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THE GOVERNMENT SHOULD NOT ALWAYS WIN: I.R.S. PRACTICES THAT VERGE ON UNCONSTITUTIONAL PRACTICES

Kayla Kendrick Odom[*]

INTRODUCTION

Tony and Somnuek Thangsongcharoen, an immigrant couple from Thailand, owned and operated Tony and Mii's, Inc., or Mii's Bridal Salon, a boutique bridal store in Texas, since 1983.[1] On March 4, 2015, 20 or so armed agents from the Internal Revenue Service (IRS) arrived and took over the shop.[2] The IRS was apparently under the impression that Mii's Bridal Salon (Mii's) owed $31,422.46 in relation to the tax years of 2005, 2008, and 2010.[3] The Thangsongcharoens were presented with a choice: they could come up with a $10,000 check in the next two hours, or they could watch as their entire inventory was auctioned off that very day.[4] Within four hours of the initial seizure, the IRS auctioned off over $615,000 worth of seized designer dresses and related inventory for approximately $17,000.[5] However, the complaint filed on behalf of Mii's not only indicates that the amount in question was never owed, but also that there was sufficient evidence to suggest that the revenue officer responsible for the seizure was aware of that fact at the time of the sale.[6]

Without even expounding on the facts of the case, the recounting of this tale shocks the senses, and the further one delves into the details, the more appalling the story becomes. Something about the process and the outcome just seems wrong. Chances are that someone hearing about this case immediately has one of two reactions: either he or she assumes that (a) some of the facts are missing—obviously the owners of Mii's did something they should not have done, and the IRS was surely justified in taking such drastic measures—or (b) what happened to the Thangsongcharoens was unfair, and if this is how the IRS operates, it needs to be stopped. This article admits that it is difficult to make accurate judgments without being positive that the facts upon which those judgments are based are true and complete. However, this article explores the merit in the second reaction, not necessarily because the IRS was wrong this time (the United States District Court for the Northern District of Texas has yet to decide this case), but because—as the expanded facts will illustrate—the IRS is vested with immense power and acts with nearly unbridled discretion. The power coupled with a lack of oversight provides ample opportunity

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1. Plaintiffs' Original Complaint at 5, Tony and Mii's, Inc. v. United States, No. 3:17-cv-00609-B (filed N.D. Tex. Mar. 1, 2017).
2. *Id.* at 8.
3. *Id.* at 5.
4. *Id.* at 8.
5. *Id.* at 9.
6. *Id.*

for corruption and misbehavior within the agency, and when it happens, it is likely that there is no appropriate remedy for the potential victims.

There are several parts to this paper. Part I will attempt to reconstruct *Tony and Mii's, Inc. v. United States*,[7] currently pending in the United States District Court for the Northern District of Texas, to illustrate the problem. Part II will recount some of the history of the IRS in this country in order to lay the foundation for a discussion on why the vast powers given to the IRS not only violate the spirit of the federal system, but also the purpose of several provisions of the United States Constitution. Part III will discuss the IRS's powers in comparison to: (a) the prohibition against Bills of Attainder in Article 1 § 9 of the Constitution; (b) the Eighth Amendment's Excessive Fines Clause; and (c) the Fifth Amendment's Due Process Clause. Finally, Part IV will demonstrate why, unless more protections are put in place, the creation of a civil action for damages within the Internal Revenue Code (I.R.C.) is not enough. However, this paper does not necessarily suggest that Mii's has a claim for a violation of constitutional rights. What is suggested is a look at the current system with a view toward federalism and separation of powers along with a look at the overall purpose of some of our most powerful constitutional protections. In doing so, it is easy to see that the test for whether individual protection is merited should be based on the likelihood that individuals would suffer without recourse in the event that the protection is not granted instead of focusing on government interests.

PART I. IDEAL HANDLING OF THE CASE UNDER THE I.R.C. AND INTERNAL IRS PROCEDURES

The IRS is undoubtedly authorized to seize assets for unpaid taxes.[8] So one might wonder what the subject of the federal suit is. Mii's filed suit in federal district court pursuant to 26 U.S.C. §§ 7433 and 7426.[9] Section 7433 of the I.R.C. provides that taxpayers may bring a civil action for damages against the United States if, "in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of [title 26], or any regulation promulgated under [title 26] . . . ."[10] Section 7426(a)(1) provides that when property has been wrongfully levied or sold as a result of an assessed tax, a person having an interest in or a lien on the property, other than the taxpayer against whom a tax was assessed, may bring a civil action against the United States.[11] This section of the Code also provides for recovery of economic damages in the case of reckless, intentional, or negligent disregard of Title 26 provisions or regulations pursuant to it by an employee of the IRS.[12]

7. Plaintiffs' Original Complaint, *supra* note 1, at 1.
8. I.R.C. § 6331(a)(b) (2012).
9. Plaintiffs' Original Complaint, *supra* note 1, at 1.
10. I.R.C. § 7433(a) (2012).
11. I.R.C. § 7426(a)(1) (2012).
12. *Id.* § 7426(h)(1). In the event that Tony and Somnuek Thangsongcharoen are judged not to be the "taxpayer" under I.R.C. § 7433 because the tax the IRS initially alleged was owed by Mii's Bridal and not the owners in an individual capacity, the idea is that Tony and Somnuek would be parties having "an interest" in the property that was seized and would be able to claim under the above-mentioned section. *But see* United States' Motion for

Mii's alleges, first of all, that the IRS intentionally acted in violation of several provisions of the I.R.C. and regulations set out in the Internal Revenue Manual (IRM) in what amounted to an attempt to shut down the salon.[13] While the IRS is authorized to seize property for unpaid taxes, the I.R.C. and the IRM govern the process.[14] Taken together, the rules and procedures provided in these two sources provide a picture of fair and reasonable treatment of taxpayers even in the event of a seizure or levy. Assuming the IRM is enforced and followed in good faith to ensure compliance with the I.R.C., the IRS is subject to the constraints discussed below.

The IRS is required to provide notice to taxpayers at least 30 days prior to any seizure informing them of the amount owed and their rights with respect to any action the IRS is planning to take, including the right to request a hearing before any seizure can occur.[15] In the event of a seizure, notice must be provided to the taxpayer in writing containing the "sum demanded" and an "account of the property seized."[16] The normal procedure for any sale of seized property is found in I.R.C. § 6335.[17] It must be by public auction or by public sale under sealed bids,[18] and generally before a sale can take place, notice must be published in the county newspaper or, if no newspaper is circulated, at the nearest post office to the seizure and at least two other public places.[19] The notice must specify "the property to be sold, and the time, place, manner, and conditions of the sale thereof,"[20] and the time of the sale must be more than ten days after the issuance of public notice.[21] Furthermore, the IRS must determine a minimum price for the seized property, and the property will not be sold for less than the minimum.[22]

The IRM provides field guidance on IRS policy and how to properly conduct procedures.[23] In 2016, the IRM was revised to include some significant policy statements that would seem to protect taxpayers from IRS abuse. Obviously, these additions would not have been a part of the manual at the time the IRS agents showed up at Mii's Bridal. However, it is important to note that the IRM is a field manual intended to guide agents in following existing laws and is not itself binding law. The fact that these statements were added also begs the question whether the IRS felt pressure to make certain protections express requirements within the manual; that pressure may very well have been fueled by cases similar to the one brought by Mii's Bridal.[24]

Partial Dismissal and Brief in Support at 1–2, Tony and Mii's, Inc. v. United States, No. 3:17-cv-00609-B (N.D. Tex. May 1, 2017).

13. Plaintiffs' Original Complaint, *supra* note 1, at 4.

14. *See generally* TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2017-30-063, FISCAL YEAR 2017 REVIEW OF COMPLIANCE WITH LEGAL GUIDELINES WHEN CONDUCTING SEIZURES OF TAXPAYERS' PROPERTY 1–3 (2017), https://www.treasury.gov/tigta/auditreports/2017reports/201730063fr.pdf, *archived at* https://perma.cc/GT84-SRQ2 [hereinafter 2017 COMPLIANCE REVIEW].

15. I.R.C. § 6330(a)(2)(C), (a)(3)(B), (e)(1) (2012).

16. I.R.C. § 6335(a) (2012).

17. *Id.* § 6335.

18. *Id.* § 6335(e)(2)(A).

19. *Id.* § 6335(b).

20. *Id.*

21. *Id.* § 6335(d).

22. *Id.* § 6335(e)(1)(A).

23. I.R.M. § 5.15.1.1 (Nov. 17, 2014).

24. *See* States News Service, *Respect Act Suspects the IRS Isn't Playing Fair*, (July 18, 2017); Shaila Dewan, *Rules Change on I.R.S. Seizures, Too Late for Some*, NEW YORK TIMES, May 1, 2015, at A0.

One overarching policy the IRS now purports to uphold is, "[c]ollection enforced through seizure and sale of the assets occurs only after thorough consideration of all factors and of alternative collection methods."[25] A few of those alternatives include financial hardship deferment, an offer to compromise, or an installment agreement.[26] According to the current version of the IRM, the IRS is "required to *consider* alternative methods of collection prior to seizure."[27] Several provisions of the Manual reinforce the policy that seizure will only be conducted as a last resort[28].

For instance, the latest version of the manual provides:

> (1) Seizures will not be conducted on taxpayers who "will pay" or "can't pay." These categories include taxpayers who:
>
> • Do not agree with the assessment and are working with the Service to properly adjust their account.
>
> • Will full pay their liability within a reasonable time frame.
>
> • Require a reasonable period of time to sell an asset or secure a loan.
>
> • Are in current filing compliance and submit a processable offer. See IRM 5.8.2.4.1 for OIC processability criteria.
>
> • Have no ability to make payments and have no distrainable assets (currently not collectible).
>
> • Request and qualify for an installment agreement.[29]

Another section of the IRM claims to simply restate procedures that are already required by the I.R.C. before any seizure can take place.[30] First among these requirements is verifying the liability, followed by considering the alternatives to seizure, and determining whether the fair market value of the assets will exceed the expenses required to conduct a sale and result in net proceeds if the sale takes place.[31] That is not what happened in Mii's case.

25. I.R.M. § 5.10.1.1.2(1) (Aug. 21, 2018).
26. *See* I.R.C. § 6159 (2012).; Treas. Reg. § 301.71221 (2002); Leslie Book, *The Collection Due Process Rights: A Misstep or A Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1154 (2004).
27. I.R.M. § 5.10.1.5.2(1) (May 20, 2016).
28. *See generally* I.R.M., *supra* note 24, § 5.10.1.1.2 (seizure is only after thorough consideration of all factors and alternative collection methods).
29. I.R.M. § 5.10.1.4 (May 20, 2016). While it may be the case that this particular language was added to the IRM after the events at Mii's Bridal (likely in response to other similar complaints against the IRS), it makes little difference when the language was added because the IRS will not be accountable for failing to follow the IRM in a court of law. *See infra* Part III A.
30. I.R.M. § 5.10.1.5 (May 20, 2016).
31. *Id.*

First of all, the Thangsongcharoens claim that Mii's did not owe the IRS any money and that they were in touch with a representative trying to resolve the misunderstanding.[32] But the real source of the complaint is the allegation by Mii's that the IRS acted in bad faith.[33] The IRS agent in charge of the seizure conducted a physical inventory of the store's assets and determined that "all of the dresses and accessories for retail sale are new and in good condition."[34] At that time the agent reported that the inventory had a value in excess of $615,000 and that, in order to satisfy the purported $31,422.46 debt, the "entire inventory will not be seized at the end of the day."[35] However, instead of following the procedures for the seizure and sale of property under I.R.C. § 6335, in the days leading up to the seizure, the value and descriptions of the store's assets were drastically altered on internal IRS reports until the agency felt justified in conducting the sale under an altogether different provision of the Code.[36]

In cases where it is determined that the property seized "is liable to perish" or "become greatly reduced in price or value by keeping," or where the property "cannot be kept without great expense,"[37] the IRS must appraise the property and provide the owner with a statement of its value, providing him with an opportunity to pay the appraised amount.[38] If the owner does not pay the appraised amount under these circumstances, the IRS may conduct a public sale of the property without the ten-day waiting period required by I.R.C. § 6335.[39]

Sometime following the physical inventory, a decision was made that the "perishable goods" procedure would benefit the government the most, and, thereafter, the reported value of Mii's assets began to drop from $615,000 to $90,000; then $35,000; then $21,000; then $10,000; and finally $6,000 before it was determined that the costs of the seizure and sale, when balanced with the value of the items, justified dispensing with the normal notice and sale procedures.[40] Not only did the value of the inventory inexplicably drop repeatedly, but also, two days before the seizure took place, the description of the inventory was changed from dresses that were "new" and "in retail sell condition" to "'lower quality and cost dresses' that would not be 'marketed to individual buyers.'"[41] The final determination of $6,000 for the whole of Mii's inventory (which was paid for) places each of the over 1,600 designer wedding dresses at under $4.00 a piece, and the calculation does not factor in any of the related accessories.[42] On the day of the seizure an auction was conducted inside Mii's Bridal Salon, and within four hours every bit of inventory—along with several items not included in the Order for Entry describing the property to be seized—was sold for around $17,000.[43] Mii's never recovered from the loss.[44]

32. Plaintiffs' Original Complaint, *supra* note 1, at 9.
33. *Id.* at 1–2.
34. *Id.* at 7.
35. *Id.*
36. *Id.* at 6–8.
37. I.R.M. § 5.10.1.7(1)(A)–(C) (May 20, 2016).
38. I.R.C. § 6336 (2012).
39. I.R.C. § 6335(b); *see id.* § 6336(2).
40. Plaintiffs' Original Complaint, *supra* note 1, at 7–8.
41. *Id.* at 11.
42. *Id.* at 5, 8.
43. *Id.* at 9, 12.
44. *Id.* at 13.

Mii's claims that the perishable goods sales procedure[45] utilized by the IRS was the result of a directive from the collection agent's supervisor to "shut down this failing business venture."[46] When the initial evaluation of the inventory by the agent—in which she inspected the wares and made notes about the asking prices listed on the tags and the general condition of the items[47]—resulted in a figure of more than $615,000 for items that were new and "in retail sell condition," it was reported that the "entire inventory will not be seized at the end of the day."[48] It makes perfect sense that it would be unnecessary to seize the entire stock of paid-for gowns and accessories with a retail value of over $615,000 and a wholesale value of approximately $270,000 in order to satisfy an assessment of $31,422.[49] It was sometime after this initial evaluation that the IRS agents determined that utilization of 26 U.S.C. § 6336 to conduct a perishable goods sale was the "resolution where government will benefit the most" and set about seeking a way to invoke the rule.[50] Mii's contends that from this point, the IRS acted in bad faith to systematically and arbitrarily lower the assessed value of the store's assets in all internal IRS communications until the agency felt justified in terming the items "perishable goods."[51] In order to feel justified, drastic measures had to be taken.

The perishable goods procedure is not only appropriate in cases where goods are actually likely to perish before a sale can be conducted according to usual procedures, but also when the property may "become greatly reduced in price or value by keeping," or when the property "cannot be kept without great expense."[52] In such a case the property must be appraised and, if the owner cannot pay the appraised amount or a sufficient bond, the sale of the property may be expedited[53]—meaning that the IRS does not have to wait the standard ten days after giving public notice of the sale before the sale commences.[54] While the United States denies any wrongdoing, it acknowledges that the notes from the revenue officer's initial inspection of the inventory are accurately stated in the complaint and further admits that the final value placed on the entire stock of inventory before the seizure was a mere $10,000 with a forced-sale value further reduced to $6,000.[55] Since it is safe to say that a designer wedding gown or a tiara is not likely to spoil in the same way that milk or produce will (the only worry where gowns are concerned is that they might go out of fashion, but even then, one can probably count on varying tastes of individuals to mitigate that concern), the IRS must have determined either that the value of the gowns was rapidly going down as they continued to hang on the rack, or that the cost of storing the gowns for between 10 and 40 days (the time frame for the sale of seized

45. I.R.C. § 6336.
46. Plaintiffs' Original Complaint, *supra* note 1, at 7. The language comes from an internal IRS email. While the United States admits that the language is indeed a direct quote, it insists that the language is taken out of context and that it was not an IRS directive. *See* United States' Answer to Complaint at 6, Tony and Mii's, Inc. v. United States, No. 3:17-cv-00609-B (N.D. Tex. May 1, 2017).
47. United States' Answer to Complaint, *supra* note 45, at 5.
48. Plaintiffs' Original Complaint, *supra* note 1, at 7.
49. *Id.* at 5, 7.
50. *Id.* at 7; United States' Answer to Complaint, *supra* note 45, at 6.
51. Plaintiffs' Original Complaint, *supra* note 1, at 2.
52. I.R.M., *supra* note 36, § 5.10.1.7(1)(B)–(C).
53. I.R.C. § 6336.
54. I.R.C. § 6335(b).
55. United States' Answer to Complaint, *supra* note 45, at 5–6

goods under 26 U.S.C. § 6335) would be too high, when compared to the estimated net proceeds, to justify conducting the sale using the normal sale procedures.[56]

In order to make this assessment, the revenue officer, who is authorized to seize assets, and the Property Appraisal and Liquidation Specialist (PALS), who is authorized to sell assets, must agree on the fair market value (FMV) of the property to be seized and determine the estimated net sale proceeds after expenses.[57] According to the Manual, the typical formula for determining the minimum net sale proceeds of a sale starts with the fair market value—the method of determining this value should be recorded by the officer.[58] The reduced forced sale value (RFSV) can then be calculated as 60% of the FMV.[59] Encumbrances and all estimated expenses for the seizure and sale, including storage, transportation, advertising, appraisal fees, auctioneer services, etc., are subtracted from the RFSV to reflect the minimum estimated net proceeds.[60]

A perishable goods sale may be appropriate in cases where, because of the high costs associated with the seizure and sale of property, the RFSV is so low that a sale "conducted under 26 U.S.C. § 6335 would result in little or no proceeds."[61] However, the complaint in *Tony and Mii's* stems from the fact that it is unclear where the IRS came up with the numbers to justify such a valuation.[62] It seems that internal correspondence from the IRS immediately before the seizure indicated cost estimates for expenses associated with the seizure and sale from three different vendors at $6,622; $7,120; and $7,902, whereas earlier documents reflecting prices from the same vendors listed total costs of $2,461; $3,210; and $3,601, respectively.[63] It is also unclear how the final RFSV ended up at $6,000 with a starting aggregate value of over $615,000 according to the revenue officer's initial report.[64] Even if one assumes that the initial value was simply a blind addition of the ticket prices for 1,640 gowns and the PALS instructed the agent to reduce the ticket price by at least 50% if not 70–90% to get the FMV[65], that leaves an FMV of no less than $61,500. Supposedly, after this reduction of the ticket price, the IRS reported an FMV of $21,000–$35,000; it is unclear which number the agent started with.[66] Note that a FMV of $61,500 for the entire stock of roughly 1,640 gowns (not including related inventory) comes out to $37.50 for each gown. Mii's listed the wholesale value of the inventory at the time of the seizure at $270,000.[67] The reduction of 90% seems a bit excessive to begin with, but 60% of $61,500 results in an RFSV of $36,900.

Mii's also contends that the auction itself was conducted improperly in that no notice at all was given to the public, and the sale was not conducted in a public place

56. I.R.M., *supra* note 36, § 5.10.1.7(1)(A)–(C).
57. I.R.M. § 5.10.1.5.3.1(1) (May 20, 2016).
58. *Id.*
59. *Id.* at (2). The IRM specifies that the "revenue officer and the PALS should agree when the revenue officer uses a figure different than 60% of FMV in the determination of estimated net sale proceeds." Presumably, the officer should have a reasonable explanation for doing so as well.
60. I.R.M. §§ 5.10.1.4.3.2 (Aug. 29, 2017) & 5.10.1.4.3.4 (May 20, 2016).
61. I.R.M., *supra* note 36, § 5.10.1.7(1)(C).
62. Plaintiffs' Original Complaint, *supra* note 1, at 6.
63. *Id.* at 22.
64. *Id.* at 1–2.
65. *Id.* at 23.
66. *Id.*
67. *Id.* at 27.

but, rather, inside the store on the day of the seizure.[68] The general time and place of the sale are uncontested although the IRS denies any wrongdoing.[69] One can only assume that the IRS considered this action justified by the perishable goods procedure as well.

Again, something seems very wrong with this picture, but the problem is not a lack of procedures and rules in place to protect taxpayers from abuse by the IRS. The Taxpayer Bill of Rights and the Collection Due Process rules within the I.R.C., along with the IRM, were created for exactly this purpose.[70] The problem is that those procedures are not being followed, and there is no real check on the power of the IRS to do whatever it will. A study that was conducted with respect to IRS seizures from July 1, 2015, to June 30, 2016, found that in a random study of 50 cases of seizure, the IRS had failed to follow procedures in 16 cases.[71] In most of these cases there was a failure to follow adequate sale advertisement requirements, keep accurate records of sales, and/or provide taxpayers with the necessary information concerning asset recovery.[72] In 32% percent of the 50 randomly-chosen cases of seizures conducted by the IRS, the agency failed to follow procedures that were put in place to protect the public from government abuse.[73] If the same percentage applied to the total number of seizures that year (around 451), the number would rise to approximately 145 cases.[74] It must be noted that the study did not dig into cases where the IRS may have manipulated facts in order to seize much more than was necessary to satisfy the alleged debt or conduct a sale without notice using the perishable goods procedure as they are charged with doing in the *Mii's* case.[75]

In order to file this case in district court, the Thangsongcharoens had to first exhaust all administrative remedies described in the Code.[76] The couple attached copies of previously filed "Administrative Claim[s] for Relief" to the original complaint to demonstrate compliance with this requirement.[77] The subsequent filing in the district court is an obvious indication that the relief was not granted.[78] One can assume that the employees of the IRS that are charged with being the neutral decision-makers for these cases looked at all of the facts and decided that the IRS followed the appropriate procedures and Mii's was not entitled to recover damages. Apparently their copy of the facts read very differently than the one recounted above. But how likely is it that wrongs will be noticed and addressed when the entity that makes the rules, also enforces the rules, and reviews the enforcers' behavior for reasonableness and error? And unfortunately, Mii's may have to face the same decision

68. *Id.* at 9; *See* Treas. Reg. § 301.6336-1(c) (1967).
69. United States' Answer to Complaint, *supra* note 45, at 6.
70. *See* IRS, TAX PAYER BILL OF RIGHTS (2014), https://www.irs.gov/pub/irs-pdf/p5170.pdf , *archived at* https://perma.cc/Y6LG-TKKW; *Collection Due Process (CDP)*, IRS, (Apr. 13, 2018), https://www.irs.gov/compliance/appeals/collection-due-process-cdp, archived at https://perma.cc/9K5H-MGDG; *See* Internal Revenue Manual.
71. 2017 COMPLIANCE REVIEW, *supra* note 14, at 3. Bear in mind that this is after a major call for change in 2016 in which the RESPECT Act was introduced into the House and the I.R.M. was substantially amended.
72. *Id.* at 3–9.
73. *Id.* at 3.
74. *Id.*
75. *See* Plaintiffs' Original Complaint, *supra* note 1, at 1–2.
76. I.R.C. §§ 7433(d)(1) & 7426(h)(2).
77. Plaintiffs' Original Complaint, *supra* note 1, at 18, 29.
78. *Id*. at 1.

in the district court because in their complaint they state that the IRS violated procedures contained within the I.R.C. and the IRM. However, the brutal irony is that the IRS is not required by law to follow its own procedures.[79]

One would think that the "regulations promulgated under" the I.R.C. would include the rules recorded in the IRM; the cause of action created by the Code references not only the disregard for codified provisions, but also disregard for other governing regulations. In theory, such incorporation should grant IRS internal procedures the force of law.[80] But courts have refused to find liability under 26 U.S.C. §§ 7433 and 7426 for failure to follow the IRM.[81]

PART II. HISTORY OF THE AGENCY AND VARIOUS REFORM EFFORTS

Since its creation, the bureaucratic agency charged with collection and enforcement of income taxes has been met with distrust and hostility from the American people. While some of the ill will can be traced back to founding-era ideals of what government should look like, there is evidence that the behavior of the agency's employees also contributed to these feelings.[82] Charges of "corruption, favoritism, secrecy, and taxpayer mistreatment"[83] are by no means new complaints, and the fact that they continue to persist over 100 years after the creation of the agency and multiple efforts to reform its structure and processes begs the question whether anything can be done to redeem the IRS in the eyes of the American citizens. Acknowledging that where people are involved there is always the potential for corruption, and also acknowledging that, in this day and age, dismantling the bureaucratic system would be nigh impossible, this article agrees that the short answer is: probably no. However, bureaucracy raises valid concerns about separation of powers and the function of the Federal Government that deserve to be addressed. The New Deal era, which resulted in the strengthening of the agency state through new and frightening interpretations of the Constitution and government power, altered the protections available to individuals in the event that the government overstepped.[84] Some of these protections need to be restored and indeed some of them may need to be expanded in order to balance the scales again.

The first income tax was imposed as a result of the Civil War in 1861.[85] After significant debate and skepticism on how to best collect the new tax, the Bureau of Internal Revenue (BIR), the precursor to the IRS, was established in 1862.[86] The

79. Thomas v. United States, No. 4:08-CV-14(CDL), 2009 U.S. Dist. LEXIS 8988 at *11 (M.D. Ga. Feb. 9, 2009).

80. The fact that the "rules" in the IRM were created by the IRS and intended to reinforce the law does not elevate them to the level of regulations promulgated under the I.R.C. *See* Fargo v. Commissioner, 447 F.3d 706, 713 (9th Cir. 2006) ("The Internal Revenue Manual does not have the force of law and does not confer rights on taxpayers.").

81. *Id.*

82. *See, e. g.,* Milo B. Williams, *The Fifth Article of Amendment*, 4 LOY. L.J. (NEW ORLEANS) 159, 160-61 (1923).

83. Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History,* 53 ADMIN. L. REV. 717, 718 (2001).

84. *See infra* discussion of Bill of Attainder, Part III A.

85. Thorndike, *supra* note 82 at 720.

86. *Id.* at 723 (citing OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE, HISTORY OF THE INTERNAL REVENUE SERVICE, 1791-1929, *reprinted in* ROBERT M. WILLAN, INCOME TAXES: CONCISE HISTORY AND PRIMER IV-22 (1994)).

congressional act that created the BIR authorized the President to divide the country into 185 collection districts and appoint a collector and an assessor for each district, who would then need to hire additional staff to carry out the necessary tasks.[87] Within six months of its formation, the Bureau had over 3,000 employees with only one Commissioner to guide and instruct them all.[88] In large part due to the broad powers given to its agents in assessing and enforcing tax liability, the BIR quickly gained a reputation for corruption.[89] "Assessors were given considerable freedom in determining a taxpayer's liability, with ample discretion to enforce the law strictly or to offer compromise easily. The decision was theirs, and they had relatively little oversight."[90]

Civil War America, more closely related to the foundation ideals and principles, distrusted government bureaucracy.[91] A criticism of the income tax and the BIR in the New York Times from January 1864 noted:

> [W]ith our system of government, it is a consideration of prime importance that the number of Government functionaries should be kept as small as possible. A vast and complicated system of raising revenue, overspreading the country like a minute network, would not only affect the popular vote prejudicially, but would, if the places of officials were permanent, speedily lay the foundation for a bureaucracy like that of France or Austria, that would eat out the vitals of the country and destroy free institutions.[92]

Without the appropriate oversight, "The only counter-check . . . for government to rely upon is the integrity, faithfulness, capacity, and experience of its agents."[93] Despite the installment of an administrative staff in 1866[94] and various other reform efforts since then,[95] we seem to be in virtually the same place today.

PART III. DISCUSSION OF CONSTITUTIONAL PROVISIONS

The following statements will undoubtedly seem radical and/or naïve to constitutional law scholars, but the next section is more of a philosophical approach than a legal one. The United States Constitution in its entirety was drafted with the distinct purpose of protecting individual rights and freedoms against the arbitrary exercise of government power.[96] The overall structure of the document, as well as several

87. *Id.* at 723–24.
88. *Id.* at 724.
89. *Id.* at 729.
90. *Id.*
91. *See Id*. at 730.
92. *Taxation in America--Its Principles and Practice*, N.Y. TIMES, Jan. 18, 1864, at 4.
93. Thorndike, *supra* note 82, at 732 (quoting UNITED STATES REVENUE COMMISSION, REPORTS OF A COMMISSION APPOINTED FOR A REVISION OF THE REVENUE SYSTEM OF THE UNITED STATES 1865-66 1-2 (Washington, Government Printing Office 1866)).
94. *Id.* at 733.
95. *Id.* at 734.
96. *See* Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 128-29 (1983).

individual provisions in the Constitution, are particularly tied to this purpose, including the prohibition against Bills of Attainder, the Fifth Amendment Due Process Clause, and the Eighth Amendment Excessive Fines Clause. *Any* exercise of power that is not in some way reviewable and remediable when there are abuses is fundamentally opposed to these principles and should either be rectified through legislative efforts or reviewable by the judiciary. This may mean limiting or disposing of forms of sovereign immunity where it is applicable, downsizing an agency, or overturning legislation.

The Founding Fathers were influenced by notions of absolute rights set down in the Magna Carta.[97] Two major concepts arose from the adoption of the Magna Carta into British Constitutional law: (1) that the government—first the King and later parliament—was not above the law, but subject to it; and (2) that there was a set of certain fundamental rights of Englishmen that the King could not deprive his subjects of without the rule of law or due process (the words were interchangeable).[98] Among the chief grievances meant to be addressed by the Magna Carta was the King depriving his subjects of life, liberty, and *property* arbitrarily and without proof in a court that they had committed a grievance recognized by the law.[99]

A. Bill of Attainder

Today, Bill of Attainder jurisprudence is complex and carries an extremely high burden of proof.[100] Courts are instructed to look only to the text of the statute being challenged and the intent expressed by the Congress in passing it rather than how the law works against a particular person in a particular situation.[101] But the "inclusion of the Federal Bills of Attainder Clause was intended not as a narrow, technical prohibition, but rather as a general safeguard against legislative exercise of the judicial function, or more simply, trial by legislature."[102] At its inception, it was very simply a protection against the arbitrary exercise or application of laws by the federal government against individuals.[103]

Going all the way back to the Magna Carta and Blackstone's Commentaries, the purpose of Bill of Attainder laws was essentially separation of powers.[104] The Court in *United States v. Brown* recognized both the principle and the influence of this concept on James Madison when it quoted, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the

97. *See* Guy I. Seidman, *The Origins of Accountability: Everything I Know about the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS L.J. 393, 450 (2005).
98. *Id.* at 451.
99. *Id.* at 477.
100. *See, e.g.*, SeaRiver Mar. Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 668–69 (9th Cir. 2002).
101. *See id.*
102. *See* Ann K. Wooster, Annotation, *Construction and Application of U.S. Const. Art. I, § 9, cl. 3, Proscribing Federal Bills of Attainder*, 62 A.L.R. 6th 517 (2011).
103. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 316 (1867) ("Among the constitutional guarantees against the abuse of Federal power thrown around the American citizen, are these three: First, he cannot be punished till judicially tried. . . .").
104. *See SeaRiver Mar. Fin. Holdings, Inc.*, 309 F.3d at 668.

very definition of tyranny."[105] The administrative agency destroys the concept of separation of powers and in some ways deprives citizens of the opportunity for protection. The IRS is created by Congress and functions in a legislative capacity, but its execution of the laws is a function of the executive branch, and lastly, the presence of administrative review and the tax courts prevent access to the judiciary branch outside of the IRS umbrella.[106]

Today, the Bill of Attainder Clause should stand for the commonly quoted notion that "all men are innocent until proven guilty,"[107] and this protection should be inherent and assumed any time a punishment is to be inflicted upon a person for some action or inaction. The declaration against Bills of Attainder should not be assumed to apply only to cases that are brought before the court relating to acts described in the Penal Code. Nothing in the Magna Carta or the Constitution insinuates that there should be a difference between government's ability to act against citizens arbitrarily, without proof of wrongdoing, either in criminal or civil proceedings. It is the penalty that matters. When a person is to be punished for an act, or for failing to act in some prescribed manner, a tribunal should first determine that the accused actually deserves the punishment being inflicted. Punishment, furthermore, is not limited to incarceration or the death penalty.[108]

Forfeiture of property (seizure) has been historically considered a criminal punishment.[109]

Furthermore, failure to pay taxes eventually is labeled a crime of which one of the punishments is seizure and sale of assets to pay liability.[110] In fact, another way that the IRS can easily avoid being held to have violated a citizen's constitutional rights is to avoid labeling any action it takes against an individual as pursuant to a criminal investigation. If the IRS had decided to conduct an investigation into Mii's Bridal that could result in criminal liability (say, for suspected tax fraud), the agency could potentially face constitutional claims for failing to follow certain procedures.[111] But thanks to our justice system, "Courts usually defer to the judgment of a revenue agent in determining whether the investigation should be turned over to CI [criminal investigation], creating difficulties for taxpayers seeking to establish a constitutional violation."[112]

105. United States v. Brown, 381 U.S. 437, 443 (1965) (quoting THE FEDERALIST NO. 47, at 373-374 (James Madison) (Hamilton ed., 1880)).

106. *See* Thorndike, *supra* note 82, at 772–73.

107. *See, e.g.*, United States v. Bentvena, 288 F.2d 442, 444 (2d Cir. 1961) (the right to bail is an important part of maintaining a presumption of innocence and has been justified throughout history by the desire to ensure that punishment is not issued prior to conviction). *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468-69 (1977) (the prohibition against Bills of Attainder is initially described as simply barring any law that legislatively decides guilt and inflicts punishment without the benefit of a trial; however, *Nixon* is a perfect example of the substantial burden required to prove that a law or regulation violates the Bill of Attainder Clause).

108. *See generally Cummings*, 71 U.S. (4 Wall.), at 286–90.

109. *Id.* at 286 ("What is punishment? The infliction of pain or privation. To inflict the penalty of death, is to inflict pain and deprive of life. To inflict the penalty of imprisonment, is to deprive of liberty. To impose a fine, is to deprive of property. To deprive of any natural right, is also to punish. And so is it punishment to deprive of a privilege."); 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.").

110. Alexandra Garcia et. al., *Tax Violations*, 53 AM. CRIM. L. REV. 1825, 1859–60 (2016).

111. *Id.* at 1828.

112. *Id.* at 1829.

The creation of the Agency State is not surprising considering the expansion of our country since the time of its founding. The amount of involvement the Federal Government has in the everyday lives of its citizens is hardly conducive to as small a government as some would prefer. However, Alexander Hamilton said it best:

> Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.[113]

B. Excessive Fines Clause of the Eighth Amendment

The Excessive Fines Clause also has its origins tied to the Magna Carta.[114] Nicholas M. McLean notes, "protecting and preserving offenders' ability to contribute usefully to their communities, notwithstanding the imposition of a monetary penalty, was a core purpose of this constitutional provision."[115] A forfeiture has been recognized by the Supreme Court as a fine for purposes of Eighth Amendment analysis.[116] Drawing parallels to Civil Asset Forfeiture jurisprudence, one can understand how a seizure can be considered a fine.[117] The difference is said to be a suspicion of criminal activity, but going back to the discussion about Bill of Attainder, when the entity

113. "A Letter from Phocion to the Considerate Citizens of New York" (1–27 Jan. 1784), *in* 3 THE PAPERS OF ALEXANDER HAMILTON 483–87 (Harold C. Syrett ed., Columbia University Press, 1962), http://founders.archives.gov/documents/Hamilton/01-03-02-0314. *See also Brown*, 381 U.S. at 444 (quoting Hamilton to explain the Bill of Attainder Clause).

114. Nicholas M. McLean, Article, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 835 (2013).

115. *Id.* at 896.

116. United States v. Bajakajian, 524 U.S. 321, 334 (1998).

117. *See* Richard E. Finneran & Steven K. Luther, *Criminal Forfeiture and the Sixth Amendment: The Role of the Jury at Common Law*, 35 CARDOZO L. REV. 1, 47-49, 48 n.290 (2013) (in criminal forfeiture cases, seizure is only appropriate after the elements of the offense have been proven in court beyond a reasonable doubt, but in civil forfeiture cases, the burden is either preponderance of the evidence or simply probable cause. Readers of Fourth Amendment jurisprudence will recognize that probable cause is an extremely flexible standard and not difficult to meet. The relaxed standards allow for forfeiture of property when officers believe that property is somehow connected to a crime but have a harder time proving the connection); 18 U.S.C. §§ 981(a)(1)(C) & 981(a)(2)(A) (2012); Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems it Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 315 (2017) ("Civil asset forfeiture enables law enforcement to seize property . . . without arresting anyone, much less charging or convicting anyone of a crime."); *Bajakajian*, 524 U.S. at 328-31 (noting that the standard for probable cause does little to distinguish it from mere suspicion. In other words, law enforcement officers utilizing civil asset forfeiture have to prove nothing and do not need a warrant to seize). *See also* Rachel Jones, Note, *Excessively Unconstitutional: Civil Asset Forfeiture and the Excessive Fines Clause in Virginia*, 25

seizing the property does not have to prove that the suspicion of criminal activity is founded on fact,[118] it might as well be assigning blame on individuals for the color of their shirt or the type of music they like.

If the courts are not willing to recognize that the forfeiture of property is inherently a punishment, then the amount of the forfeiture or seizure should be relevant to determining when the deprivation is a punishment as well as when the punishment is excessive. In *Commonwealth v. Morrison*, "the court concluded 'the fine imposed should bear a just proportion to the offense committed' as well as to 'the situation, circumstances, and character of the offender.'"[119]

It goes without saying that the seizure and sale of a couple's livelihood and entire life savings, which was valued at well over an amount adequate to satisfy the debt of $31,422.46,[120] was excessive; especially when one considers that the IRS placed the forced-sale value of the goods at $6,000, which means that the agency was apparently willing to gain back only $6,000 toward satisfaction of a debt nearly five times that amount.[121] The IRS, in fact, only received a total of $17,000 toward the liability. According to the IRM, the agency is more concerned with giving taxpayers the opportunity to settle the debt in full, even if it means establishing an installment plan to allow for payment of the debt over a more extended period of time.[122] If that is the case, one fails to see the logic and reasoning in the seizure and sale of Mii's property. Even if the IRM did not expressly advocate for using seizure as a last resort when the agents entered Mii's Bridal in 2015, it seems that the United States government would have been better off (assuming the debt was legitimately owed) if it had worked with the couple and allowed them to eventually pay back everything that was owed, or seized only a portion of the inventory to be auctioned off to satisfy the amount at a properly advertised and public sale. A computer-savvy individual could probably have taken a portion of the inventory and recovered at least twice as much as the IRS received from the "auction" in a few weeks or months on eBay.

C. Due Process Clause of the Fifth Amendment

Yet another constitutional provision can be linked to the important ideals that led to the signing of the Magna Carta. Property is one of the most important fundamental rights acknowledged by the Magna Carta and the American Bill of Rights.[123] The purpose of the provision in both the Magna Carta and the U.S. Constitution was to prevent the arbitrary deprivation of property (without proof of an offense).[124] Two of the most popular arguments against this thinking are probably: (1) that the property referred to in the Magna Carta and the Constitution was specifically real estate

WM. & MARY BILL OF RTS. J. 1393, 1394 (2017) (stating that the law allows police to seize property allegedly connected to a crime without having to first prove that the crime was actually committed).

118. See Finneran & Luther*, supra* note 116, at n.290.

119. Mclean, *supra* note 116 at 871.

120. Plaintiffs' Original Complaint, *supra* note 1, at 1.

121. United States' Answer to Complaint, *supra* note 45, at 5–6.

122. Book, *supra* note 25, at 1154.

123. *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment,* 58 EMORY L.J. 585, 596 (2009).

124. *Id.*

and (2) that the due process test is a balancing test which includes the government interest and burden of providing more protections.[125]

To address the first argument, real estate was the property referred to when the Constitution was drafted.[126] However, most sensible people can see the logic in extending the protection of the clause beyond land because in today's society a great many people have mostly, or maybe even only, intangible assets. The deprivation of these assets is no less devastating than the deprivation of land at the time the Constitution was drafted.

Second, the premise of this article is that the government should begin to see things from a new perspective. When one considers the protections that were intended to be conveyed by the provisions discussed and the relative ease with which certain agencies can wrong individuals and circumvent any kind of attempt at providing redress, it becomes paramount to either restructure the system or grant extra protections.

Not only can the government not deprive an individual of property without proof of a wrong, but the government also cannot hand over its power to private parties simply to avoid the Due Process Clause of the Constitution.[127] An administrative agency as powerful as the IRS should raise questions about whether the anti-delegation doctrine (meant to uphold separation of powers) is being violated.[128] The IRS is not a centralized or small committee of decision-makers but rather is composed of many civilian employees in many different districts with very remote, if any real, supervision.[129] Each of these individuals make decisions on how to interpret and implement the IRM and other IRS regulations when in the field. Assuming it is not the policy of the IRS to take it upon itself to decide when to "shut down [a] failing business" and assuming that it is the IRS's policy to treat taxpayers fairly and according to procedures of the I.R.C. and the IRM,[130] certain steps need to be taken to ensure that the actions of one person or several people in a tiny sector of the country do not step all over individual rights with the protection of the federal government.

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125. *See* Matthews v. Eldrige, 424 U.S. 319, 348 (1976).

126. *See generally* RICHARD L. PERRY, SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS (Richard L. Perry, ed. 1959) (explaining the early common law understanding of the Bill of Attainder provision in the Magna Carta).

127. David H. Rosenbloom & Suzanne J. Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 35 AM. REV. OF PUB. ADMIN. 103, 111 (2005) (the state action doctrine "prevents government from evading 'the most solemn obligations imposed by the Constitution' by privatizing and outsourcing") (quoting Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 397 (1995)) .

128. Within the state agency, one sees the potential for combining the legislative power and the executive power into a single entity. The anti-delegation doctrine stands for the proposition that it is unconstitutional for one branch of government (particularly the legislature) to hand over its delegated powers to another branch (particularly the executive branch). *See* David A. Super, *ARTICLE: A Hiatus in Soft-Power Administrative Law: The Case of Medicaid Eligibility Waivers*, 65 UCLA L. REV. 1590, 1603 (2018).

129. *See generally* Eric A. Lustig, *ARTICLE: IRS, Inc.—The IRS Oversight Board—Effective Reform or Just Politics? Some Early Thoughts from a Corporate Law Perspective*, 42 Duq. L. Rev. 725 (2004) (although Congress created an IRS Oversight Board as part of the IRS Restructuring and Reform Act of 1988, the board was given no actual authority over tax policy, enforcement, or compliance and thus provides very little actual oversight).

130. Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System,* 14 FLA. TAX REV. 223, 226 (2013).

PART IV. INADEQUATE REMEDIES

Even if the court were to rule in favor of Mii's, the remedy would be insufficient because under the statute, the damages are capped at $1,000,000 and if the actual economic damages plus the costs of the litigation add up to less than $1,000,000, the plaintiff will only be awarded the lesser amount.[131] In the case that only negligence is proven, the damage cap is even less: $100,000.[132] Since the economic damages must be the direct and proximate result of the either intentional, reckless, or negligent behavior, the owners of Mii's would not be able to recover for losses that flowed from the close of their business such as the owners' personal economic losses.[133] While the complaint alleges direct economic damages in excess of $1,000,000, it is unlikely that the court would agree with the Plaintiffs' designation of the damages as direct and proximately resulting from the behavior of the IRS.[134] The store claims a loss of $615,000 for the loss of inventory and $500,000 for losses associated with an ongoing business.[135] The store claims that $7,834—the value of seized items outside the scope of the written order (including office equipment and personal gaming systems)—should be included in the damages.[136] Mii's also seeks $500,000 for loss of reputation as a direct result of the improper seizure.[137] Furthermore, the original complaint claims economic damages of $300,000 for Tony Thangsongcharoen's medical bills.[138] The owner of Mii's underwent a quadruple bypass surgery (allegedly as a result of the stress of the situation), and the costs of the operation contributed to the inability of Mii's Bridal to recover after the seizure.[139]

CONCLUSION

The beauty of the federal system is the notion of checks and balances. The balance between the federal government and the state governments; the balance between the three branches of government: the executive, the judiciary, and the legislature; and the balance between the government interests and the freedoms of the individual. The founders and drafters of our Constitution decided that the best way to protect the individual was by limiting and enumerating the powers of the federal government. Somewhere along the way, the government became too large. Bureaucracy threatens the freedom of the individual because it is often largely unchecked. The creation of the independent agency creates a source of both legislative and police power that is free from judicial review and executive authority. This power is not unconstitutional according to our modern jurisprudence, but it does violate the purpose of creating a government with separate and enumerated powers to protect the people from tyranny and arbitrariness. At the very least, more procedural protections should be put in place to protect individuals from potential wrongdoing by the IRS, and oversight has to be increased.

131. I.R.C. §§ 7433(b) & 7426(h)(1).
132. *Id.*
133. *Id.*
134. Plaintiffs' Original Complaint, *supra* note 1, at 13.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*