PRESIDENTIAL TAX DISCRETION

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Increasingly, Congress explicitly authorizes the President to trigger tax consequences with the stroke of a pen. For example, if the President declares a major disaster under the Stafford Act, affected taxpayers are allowed a deduction for net personal casualty losses. This Article surveys instances of executive tax discretion scattered throughout the Code, with a focus on disaster declarations. In isolation, any single presidential determination may have a limited impact on a relatively narrow group of taxpayers. But in the aggregate, these deferrals represent a concerning departure from democratic norms and an alarming augmentation of executive autonomy. They erode the protections of the typical legislative process, eliminate the safeguards of judicial review, and introduce opportunities for political mischief. With those concerns in mind, this Article identifies areas where Congress might look to further enhance executive tax discretion, particularly during financial emergencies. This Article concludes that any such expansion would be unwise and suggests alternatives that would facilitate agile and consistent responses while avoiding the risks associated with unilateral executive action.

INTRODUCTION

An increasing number of provisions in the Internal Revenue Code allow the President to alter tax consequences based on a unilateral executive assessment. For example, a president's declaration of a major disaster,[1] discriminatory foreign tax treatment,[2] or the existence of a combat zone[3] has collateral tax ramifications for individuals and businesses. For example, if the President declares a disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), affected taxpayers can take deductions for personal casualty losses.[4] That declaration was not a prerequisite prior to 2018.[5] This Article argues that Congress should not attach tax consequences to presidential declarations because such delegations risk undermining the protections typically present in the tax lawmaking and

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1. *See* 42 U.S.C. § 5170 (stating that the President makes a disaster declaration in response to a request submitted by the governor of the affected state); I.R.C. § 165(h)(5)(A) (disallowing personal casualty losses deductible after December 31, 2017, and before January 1, 2026, except "to the extent it is attributable to a Federally declared disaster").

2. *See* I.R.C. §§ 891, 896(a)–(b) (authorizing the President to apply more burdensome tax rules to citizens of a foreign country that imposes discriminatory or more burdensome taxes on U.S. citizens).

3. *See id.* § 112(a)–(b).

4. *Id.* § 165(h)(5)(A).

5. *Id.*

administration processes, eliminating judicial review of arbitrary or unprincipled executive decisions[6] and opening the door for political mischief.

This Article makes three contributions to the literature. First, it surveys the scattered provisions in the United States Code that afford the President unilateral authority to vary tax consequences—a phenomenon we call "presidential tax discretion." This survey shines light on the scope of this underappreciated power. Examined individually, deferrals to presidential determinations appear to have limited consequences to a narrow subset of taxpayers. But, when viewed in the aggregate, the use and misuse of executive tax discretion comes into fuller view.

Second, this Article bridges gaps and draws insights from a diverse body of literature, including scholarship examining the President's emergency powers,[7] the nondelegation doctrine,[8] and administrative law.[9] Executive tax discretion intersects with all of these domains in ways that require special attention. For example, constitutional scholars have written extensively on congressional delegation of power to the President and availability of judicial review of any resulting presidential action.[10] This Article examines such delegations in the tax setting, focusing specifically on Congress's explicit statutory delegation to the President in the disaster relief context. It situates concerns about the reach of executive discretion within prior scholarship on the Executive's explicit and implicit tax authority,[11] scholarly examinations of the political influence on the disaster relief process,[12] and academic critiques of disaster relief legislation.[13]

Third, this Article anticipates new domains where Congress may seek to delegate executive tax discretion. In particular, in widescale financial emergencies, Congress might be inclined to provide tax relief, contingent upon

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6. *See* Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (holding that the President's actions are not subject to the APA).

7. *See, e.g.*, Stephen I. Vladeck*, The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J.F. 610, 612–13 (2020).

8. *See, e.g.*, James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 236–41 (2015).

9. *See, e.g.*, Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 64–71 (2020); Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1184–90 (2018); Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1172–78 (2009) [hereinafter Stack, *President's Statutory Powers*]; Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 542–46 (2005) [hereinafter Stack, *The Statutory President*].

10. *See* Kovacs, *supra* note 9; Stack, *President's Statutory Powers*, *supra* note 9; Stack, *The Statutory President*, *supra* note 9.

11. *See* Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633 (2017); Andre L. Smith, *The Nondelegation Doctrine and the Federal Income Tax: May Congress Grant the President the Authority to Set the Income Tax Rates?*, 31 VA. TAX REV. 763 (2012).

12. *See* John T. Gasper, *The Politics of Denying Aid: An Analysis of Disaster Declaration Turndowns*, 22 J. PUB. MGMT. & SOC. POL'Y 1 (2015); Andrew Reeves, *Political Disaster: Unilateral Powers, Electoral Incentives, and Presidential Disaster Declarations*, 73 J. POLITICS 1142 (2011).

13. *See* Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51 (2006); Christine Manolakas, *The Tax Law and Policy of Natural Disasters*, 71 BAYLOR L. REV. 1 (2019); Patrick E. Tolan, Jr., *After the Disaster: Lessons Learned About Tax Relief from Hurricanes Katrina and Sandy*, 85 MISS. L.J. 553 (2016).

a presidential declaration, to those facing losses from severely devalued securities, those holding uncollectable debts, or those surprised with tax bills resulting from cancellation of indebtedness. This relief would surely be welcomed by the affected taxpayers. But, as with other unilateral presidential decisions, a triggering declaration could be employed or withheld as a political lever in ways that are impossible to anticipate and difficult to challenge.

This study is precautionary and prescriptive. Congress's ad hoc delegation of executive tax discretion is anathema to conventional lawmaking and administrative processes. If nothing else, Congress—and the people it serves—must be clear-eyed about the political economy and normative trade-offs inherent in executive tax discretion. Congress's well-intended desire to facilitate rapid, uniform, and predictable relief in various sympathetic circumstances should not undermine the deliberative safeguards of the legislative process and upset the delicate balance of power between the branches.

I. EXECUTIVE DISCRETION IN THE INTERNAL REVENUE CODE

Congress has included many provisions in the Internal Revenue Code (the Code) that depend on objective criteria—for example, long-term capital gains treatment is available only after an asset is held for more than one year.[14] There are also discretion-based provisions—provisions whose operation depends on the decision of an outside actor.[15] Many of these provisions exist because Congress does not have a crystal ball that enables it to predict all circumstances that might affect taxpayers or all schemes that tax advisors might devise. Other such provisions are present in the Code because the federal government, out of administrative necessity, must sometimes rely on the decisions of other actors, such as state and local agencies. For example, state and local agencies have the authority to allocate low-income housing tax credits among taxpayers under § 42 of the Code,[16] and state governors had the authority to designate tracts, within certain constraints, as Qualified Opportunity Zones.[17]

When the Code grants discretion to a federal actor, usually that actor is the Treasury Secretary. For instance, the Treasury Secretary has the authority to require a change in the taxpayer's method of accounting if the method currently used "does not clearly reflect income"[18] and to reallocate income or deductions among controlled entities.[19] The Treasury Secretary then delegates this authority to the Commissioner of the IRS, who then redelegates to subordinate

14. I.R.C. § 1222(3).
15. *See, e.g.*, *id.* § 165(i).
16. *Id.* § 42(h), (m).
17. *Id.* § 1400 Z-1(b)(1).
18. *Id.* § 446(b).
19. *Id.* § 482.

administrators.[20] But sometimes the Code reaches higher on the executive ladder. In certain Code provisions, Congress has tied tax consequences directly to presidential decisions.[21] This Part reviews examples of explicit presidential discretion in the Code and identifies some justifications for Congress's deferral to certain executive decisions.

A. Where Explicit Executive Discretion Exists in the Code

1. Trade, Foreign Relations, and Armed Conflict

Several long-standing provisions tying tax results to executive determinations relate to foreign policy and fighting terrorism, areas where the President's powers have traditionally been quite broad. Some executive tax discretion is designed to give the President the ability to level the international economic playing field. Thus, the President can address trade disparities by applying the Alternative Depreciation System to property imported from countries that maintain discriminatory policies against U.S. commerce.[22] The President also has the ability to address discriminatory tax treatment of U.S. citizens by foreign countries. Two such examples are § 901(c) and § 891. Section 901(c) allows the President to deny a foreign tax credit to a resident alien whose home country denies a credit against U.S. taxes paid by a U.S. citizen who resides in the foreign country.[23] In other words, the President can prevent foreign citizens living in the United States from offsetting their U.S. tax liability with taxes paid in their home country if that country does not allow U.S. citizens to do the same. In a similar vein, § 891 gives the President the authority to double tax rates on citizens of a foreign country that subjects U.S. citizens to "discriminatory or extraterritorial taxes."[24] Perhaps not surprisingly, this extraordinary provision has never been triggered.[25] Still, it is a potentially potent tool that a president could unilaterally employ.[26]

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20. *See* Treas. Reg. § 301.7701-9(b)–(c) (1967).

21. I.R.C. § 896(a).

22. *Id.* § 168(g)(1)(D), (6); *see also id.* § 993(c)(3) (authorizing the President to curtail the definition of "export property" with respect to domestic international sales corporations if the property is in short supply and inadequate to meet the demands of the domestic economy).

23. *Id.* § 901(c).

24. *Id.* § 891; *see also id.* § 896(a)–(b) (authorizing the President to apply more burdensome tax rules to citizens of a foreign country that imposes discriminatory or more burdensome taxes on United States citizens).

25. "There is no increase in rates under Section 891 in effect with respect to any foreign country," and "[t]o date, the president has not invoked the provisions of Section 896(a) [or (b)]." JOEL D. KUNTZ & ROBERT J. PERONI, U.S. INTERNATIONAL TAXATION ¶ C1.09 (2021), Westlaw USIT WGL.

26. If the President seeks to invoke § 896(a) or (b), the President must, "at least 30 days prior to such proclamation, . . . notif[y] the Senate and the House of Representatives of his intention to issue such proclamation." I.R.C. § 896(d).

Other provisions empower the Executive Branch to deny tax benefits to those indirectly subsidizing terrorism. For example, § 501(p) prohibits an organization from qualifying as tax-exempt if it is identified in an executive order as a terrorist organization or as supporting or engaging in terrorist activities.[27] In some cases, the President has flexibility to give relief from harsh tax treatment. Section 901(j) disallows a foreign tax credit for taxes attributable to a country whose government the United States does not recognize or that the Secretary of State has designated as a foreign country that repeatedly provides support for international terrorism.[28] The President, however, can determine that a waiver "is in the national interest of the United States and will expand trade and investment opportunities for United States companies in such country."[29]

Presidential determinations related to war and peace can also have significant tax consequences for some U.S. citizens. Since World War II, the Code has excluded the income of a soldier who serves in a combat zone,[30] dies in a combat zone, or dies as a result of wounds, disease, or injury incurred while serving in a combat zone.[31] Under § 112, the President designates combat zone areas.[32] In legislation passed in the wake of the September 11, 2001, terrorist attacks, this provision was expanded to provide the same benefits to civilians (and military employees) who died as a result of a terroristic or military action.[33]

One can view these provisions as simply coordinating tax policy with foreign policy and national security, where the President has traditionally exercised wide-ranging control. But domestic determinations also have tax consequences, especially following a crisis.

2. *Domestic Emergencies and Disasters*

In recent years, the President's ability to determine tax consequences pursuant to Code-based authority has expanded, particularly in the disaster context. Several tax relief provisions, including deductions, exclusions from income, and administrative relief, are tied to federal disaster declarations that

27. *Id.* § 501(p).

28. *Id.* § 901(j)(2)(A).

29. *Id.* § 901(j)(5)(A)(i); *see also id.* § 952(a)(5) (taxing as subpart F income currently taxed to U.S. shareholders all income derived from a § 901(j) country during the sanction period). A president wishing to grant a waiver must, at least "30 days before the date on which a waiver is granted[,] . . . report to Congress—(i) the intention to grant such waiver; and (ii) the reason for the determination[—]" that it is in the interest of the United States and will expand trade and investment opportunities for U.S. companies. *Id.* § 901(j)(5)(B).

30. *Id.* § 112(a)–(b).

31. *Id.* § 692. This exclusion applies to the taxable year of death and earlier taxable years in which the soldier served in a combat zone. *Id.* § 692(c)(1).

32. *Id.* § 112(c)(2)–(3).

33. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, tit. I §§ 101(a), (c)(1), 113(b) Stat. 2428, 2429, 2435 (2002).

the President makes unilaterally under the Stafford Act.[34] Under the Stafford Act, if a state suffers harm from a disaster and the state desires federal disaster assistance, the governor must compile data and make a request to that state's Regional FEMA Administrator.[35] Based on various factors, FEMA officials then formulate a recommendation to the President as to whether to declare a disaster.[36] The President then has the sole discretion to declare, or not declare, a major disaster under the Stafford Act.[37] If the President declines to declare a major disaster, the governor has one opportunity to appeal the President's decision within thirty days after the date of denial.[38] That appeal is also directed to the President.[39]

Several tax relief provisions incorporate, and often depend on, the President's declaration that a disaster has occurred. Sometimes the President's declaration is merely one of several events or circumstances in which relief will be granted. For example, § 139 allows a taxpayer to exclude certain payments from income if the amount is paid in connection with one of several potential categories of disasters.[40] These categories include disasters resulting from

34. In 1988, the Stafford Act was established to provide an avenue for states to obtain federal assistance upon the occurrence of a major disaster that is of such "severity and magnitude that an effective response is beyond the capabilities of the state . . . and the affected local governments." 42 U.S.C. § 5170. The Stafford Act sets forth a declaration process that requires action by the governor—acting on behalf of the state—the Federal Emergency Management Agency (FEMA), and the President of the United States. *Id.*; *see also* 44 C.F.R. §§ 206.31–.49 (2021). "[T]he term 'disaster' is used in the Stafford Act to refer to either an 'emergency' or a 'major disaster' declared by the President . . . ." 42 U.S.C. § 5170. The term "federally declared disaster" under the Code includes either an "emergency" or a "major disaster" that the President declares under the Stafford Act. Treas. Reg. 1.165–11(b)(1) (2021); Rev. Rul. 2003-29, 2003-1 C.B. 587.

35. Within thirty days of the disaster, a request for a major disaster declaration must be made by the governor to the state's Regional FEMA Administrator. 44 C.F.R. § 206.36(a). A preliminary damage assessment (PDA) must be completed prior to the governor's request and incorporated as a basis to the PDA. *Id.* § 206.33. Generally, a joint FEMA–State PDA compiled by federal, state, and local officials is recommended. *Id.* The information contained in the PDA explains the "impact and magnitude of [the] damage" and acts as the basis for FEMA's recommendation to the President. *Id.* In addition to making the request, the governor must ensure that the State's emergency plan is executed. *Id.* § 206.37(c)(1). If the United States has the primary responsibility for response to an emergency, the President may issue an emergency declaration without a request from a governor. 42 U.S.C. § 5191(b).

36. 44 C.F.R. § 206.37(c). The Regional Administrator will confirm receipt of the governor's request and summarize the information in the PDA to provide a recommendation to the Assistant Administrator for the Disaster Assistance Directorate. *Id.* § 206.37(a)–(b). In formulating a recommendation to the President, FEMA will consider all the relevant information including, but not limited to, (1) "the amount and type of damages;" (2) "the impact of damages;" (3) the available resources at the State and local level; (4) the available Federal assistance programs; (5) "the extent and type of insurance;" (6) "imminent threats to [the] public;" (7) the State's disaster history; and (8) "hazard mitigation measures." *Id.* § 206.37(c)(1). More specific factors are evaluated based on whether assistance is requested under the Public Assistance Program versus the Individual Assistance Program. *See generally id.* § 206.48.

37. *Id.* § 206.38(a). Thereafter, the relevant local, state, and federal officials are notified of the President's decision and the type and extent of available assistance. *Id.* § 206.39. If the President formally declares a major disaster, FEMA and the State enter a FEMA-State Agreement setting forth the terms of further assistance and relief. *Id.* § 206.44.

38. *Id.* § 206.46(a).

39. "This one-time request for reconsideration, along with appropriate additional information, is submitted to the President through the appropriate Regional Administrator." *Id.*

40. *See* I.R.C. § 139.

"terroristic or military action," disasters resulting "from an accident involving a common carrier, or from any other event . . . determined by the Secretary to be of a catastrophic nature," or, relevant here, a "federally declared disaster" under the Stafford Act.[41] Accordingly, an individual will not have to pay income tax on relief payments resulting from a presidentially declared disaster. In cases where a federal disaster is not declared, the nontaxability of relief payments is dependent upon a separate determination by the Treasury Secretary.[42]

Other provisions are entirely dependent upon the declaration as the exclusive threshold for relief. One example is § 165(h), which, until 2026, generally allows a taxpayer to deduct personal casualty losses "only to the extent . . . attributable to a Federally declared disaster" under the Stafford Act.[43] Another example is the extension of the rollover period for deferring gain on involuntary conversions under § 1033(h). A taxpayer can generally defer tax on certain involuntary conversions (including the destruction of a personal residence by fire, flood, or other catastrophic event) by reinvesting the proceeds within two years.[44] If, however, the property converted is the taxpayer's principal residence and the conversion occurred as a result of a federally declared disaster under the Stafford Act, the taxpayer receives an additional two years to reinvest the proceeds.[45] This relief reflects the fact that it may be more difficult for taxpayers to find suitable replacement property in an area that experienced severe and widespread damage. Finally, taxpayers may also receive administrative relief under § 7508A, such as extended filing deadlines if a federally declared disaster occurs.[46] Administrative relief is available only if the President declares a disaster under the Stafford Act and the IRS exercises its discretion to disregard a period of time up to one year in determining whether a taxpayer has timely completed certain acts.[47] The IRS can determine whether to afford relief, the time period during which the relief should apply, and which relief is appropriate (e.g., extending filing and payment deadlines).[48]

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41. *Id.* § 139(c). Triggering events also include disasters "determined by an applicable Federal, State, or local authority (as determined by the Secretary) to warrant assistance from the Federal, State, or local government." *Id.* § 139(c)(4).

42. *See id.* § 139(c)(3)–(4).

43. *Id.* § 165(h)(5)(A). A taxpayer may deduct personal casualty losses not attributable to a federally declared disaster to the extent that the taxpayer has personal casualty gains. *Id.* § 165(h)(5)(B).

44. *Id.* § 1033(a).

45. *Id.* § 1033(h)(1), (3). The statute also provides more flexible rules for reinvesting proceeds attributable to the conversion of business or investment property as a result of a federally declared disaster. *Id.* § 1033(h)(2).

46. *See id.* § 7508A.

47. *Id.*

48. Although § 7508A(d) provides a mandatory 60-day extension "'beginning on the earliest incident date specified in the [disaster] declaration' and 'ending on the date which is 60 days after the latest incident date so specified,'" Treasury and the IRS have finalized regulations interpreting this to afford certain administrative relief only if the IRS exercises its discretion to grant relief for the performance of particular acts under § 7508A. Treas. Reg. § 301.7508A-1(g) (2021).

Thus, the federal disaster designation can be critical for certain taxpayers who have suffered disaster-related losses, received relief payments, or are unable to meet administrative deadlines. The following hypothetical illustrates the stakes.

> On December 1, 2020, a strong storm system moved through the Plains States, generating several tornados and leaving behind an uneven wake of destruction. The Gale family of Holcomb, Kansas suffered substantial damage to its homestead. The structure of the house was completely destroyed, leaving the only remaining value in the land. Prior to the storm, the property was worth $350,000, and after the damage, the property (land alone) was worth $50,000. The house was uninsured. The Gales' adjusted basis in the home was $325,000. The town of Holcomb and the rest of Finney County were severely damaged, and a major federal disaster is declared for Finney County.
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> The same storm system destroyed the Joad family residence outside of Sallisaw, Oklahoma. Like the Gale property, the Joad property was worth $350,000 at the time of the storm, and after the destruction of the house, the property value was only $50,000. The Joad house was also uninsured. The damaging winds only occurred in a small portion of eastern Oklahoma, and no other structures were severely damaged in that area. Thus, no disaster declaration is sought.
>
> The issuance of a disaster declaration for Kansas and the lack of a declaration for Oklahoma will result in a much more favorable tax situation for the Gale family than the Joad family. Because a federal disaster declaration is necessary (since 2018) for the taxpayer to claim a personal casualty loss under § 165(a), the Gale family is allowed a $300,000 loss,[49] but the Joad Family is denied that same loss. The Gale family can claim the loss on the 2020 return or elect to take the loss against 2019 income (the immediately preceding year).[50] Further, the IRS would have the discretion to extend tax-related deadlines for up to one year under § 7508A.[51]

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49. This is the lesser of (1) the difference between the fair market value (FMV) of the property immediately before the casualty ($350,000) and the FMV immediately after the casualty ($50,000) or (2) the adjusted basis of the property ($325,000). This is an itemized deduction, subject to a $100 floor and only deductible to the extent aggregate losses exceed 10% of the taxpayers' adjusted gross income. I.R.C. § 165(h)(2).

50. *Id.* § 165(i)(1)–(2).

51. Professors Aprill and Schmalbeck include a similar example in which they contrast the treatment of a taxpayer in Minnesota who sustains $10,000 of damage from an unnamed storm with that of a similarly situated taxpayer who suffered identical damage as a result of Hurricane Katrina. Aprill & Schmalbeck*, supra* note 13, at 62. Under the law at the time and the relief available under the Katrina Emergency Tax Relief Act (KETRA), the Minnesotan is subject to withdrawal penalties and ordinary income taxes on funds withdrawn from a retirement account to pay for the damage while the Katrina victim is able to withdraw similar funds with no penalty and no taxable income (if recontributed within three years). The difference amounts to around $6,000 more in tax liability in the 2005 tax year used in their example. *Id.* Professors Aprill and Schmalbeck conclude that while both the KETRA relief allowing emergency access to retirement funds and the generally stringent rules on casualty losses and early retirement withdrawals can be justified independently, "it is virtually impossible to justify treating two so nearly identically situated taxpayers so differently." *Id.* Professor Christine Manolakas also provides an illustration of the stakes of the disaster declaration for personal casualty losses under current law. Manolakas, *supra* note 13, at 17. Professor Manolakas compares a taxpayer whose uninsured guesthouse is destroyed in a fire in 2018 to one who loses a vacation home to a

This hypothetical illustrates the stark differences that can confront victims of isolated disasters when compared to victims of widespread and high-profile disasters. That distinction is difficult, if not impossible, to justify under the traditional tax policy norm of horizontal equity, under which similarly situated taxpayers should receive similar tax treatment.[52]

The contrast between the hypothetical families is most significant from an equity perspective if we make the following assumptions: (1) the losses were fully uninsured, (2) each family had roughly a fair market basis in their properties, and (3) each family had significant taxable income that could be offset with deductions. If a property is adequately insured, there would be little or no loss to claim. Further, deductible losses are only useful for those with taxable income to offset. In cases when lower-income taxpayers suffer personal casualty losses, they are often unable to take advantage of deductions that would otherwise be available to them. Consequently, these provisions have been criticized for disproportionately helping higher-income taxpayers.[53]

The Code sections dependent upon the declaration were developed through the regular legislative process, but they include a trigger that is solely within the President's discretion and, in most cases, likely not subject to review or contest.[54] The provision for personal casualty losses under § 165, however, generates drastically different consequences, at least legally if not practically, depending on the President's decision. Outside the contexts of foreign policy and fighting terrorism, this is a rare feature of the Code. The remainder of this Article reviews why that discretion exists and argues that the benefits from this kind of executive authority are outweighed by the risks.

B. Why Executive Discretion Exists in the Code

When Congress attaches tax consequences to a presidential determination, it typically does so in areas that are traditionally in the executive domain, namely

flood in a federally declared disaster. *Id.* at 15. The fire victim is not allowed any deduction for the net personal casualty loss (which could only be used to offset personal casualty gains) whereas the flood victim is allowed to fully deduct the losses. After noting the relatively small projected savings ($0.2 billion from 2018–2021) from requiring a federally declared disaster for deductions of net casualty losses, Professor Manolakas concludes, "[T]he additional hardship imposed upon individuals experiencing casualty events is fiscally unjustifiable. On a human level, the personal and economic losses to the victims of casualty events are equal whether the casualty event is declared a federal disaster." *Id.* at 17.

52. *See* Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323 (2008) (arguing in favor of horizontal equity as an independent norm of tax policy); MOLLY F. SHERLOCK & JENNIFER TEEFY, CONG. RSCH. SERV., R45864, TAX POLICY AND DISASTER RECOVERY 24–26 (2021) ("As it stands, disaster tax policy is inconsistently applied across different types of disaster events . . . ."); Tolan, *supra* note 13, at 596–600 ("[T]here seems to be little reason to penalize casualty loss victims simply because their deductions are not itemized or their particular plight does not receive a presidential declaration of a disaster area.").

53. MOLLY F. SHERLOCK & JENNIFER TEEFY, CONG. RSCH. SERV., R45864, TAX POLICY AND DISASTER RECOVERY 24 (2021) (stating that existing tax provisions are "generally better suited for providing relief to taxpayers higher in the income distribution").

54. *See infra* Part II.B.2.

foreign policy, national security, and emergencies.[55] Courts also show great deference to the Executive Branch in the same areas. In most cases, the tax consequences are not the focus of the declaration. Instead, the Executive's declaration has primary significance outside of the Internal Revenue Code, and Congress has determined that certain tax results should follow the conditions that normally give rise to the executive determination. There are indeed advantages to connecting tax consequences to unilateral executive assessments. This Part reviews those advantages, and the next Part turns to the concomitant perils.

1. Responsiveness and Accountability

Perhaps the most obvious advantage of executive action is its relative speed compared to a legislative response. The President can act swiftly in response to an emerging security threat, changing economic conditions, or a natural disaster without having to navigate congressional politics and processes.[56] Although Congress responded with uncharacteristic speed to the COVID-19 crisis, that has not always been the case. Congressional actions—ideally a product of a bipartisan process—take time, as congressional leaders must navigate numerous ideological viewpoints and political motivations of members from different geographic areas.[57] There are, of course, limits to the reach of executive power, and legislative functions remain the domain of Congress even in emergencies.[58] But despite the concerns raised below, one cannot ignore the

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55. *See* Saikrishna Bangalore Prakash, *The Imbecilic Executive,* 99 VA. L. REV. 1361, 1427 (2013) (citing HAROLD C. RELYEA, CONG. RSCH. SERV., GOV 98-505, NATIONAL EMERGENCY POWERS 2, 3 (2007)) ("Dozens of statutes grant the President authority when a crisis strikes. The triggering events for these statutes greatly vary. Sometimes the delegation vests upon an invasion, war, or declaration of war. Sometimes there must be a terrorist attack or a natural disaster. Sometimes the President must make a finding before he receives crisis authority. Sometimes a third party must make a finding.") (footnote omitted).

56. *See id.* at 1362.

> The President seems tailor-made for emergencies. Unlike Congress, the executive branch does not have sessions and recesses. . . . Unlike Congress, the executive branch does not contain numerous vetogates, procedural steps that either delay or preclude final action. Rather, the President can make rapid, even hasty, decisions because they are his alone to make. Unlike the courts, the executive need not hear from interested parties before resolving some matter. . . . Unlike his sluggish and contemplative counterparts, the President is like a tightly coiled spring, full of potential energy, ready to act when an emergency erupts.

Id. (footnote omitted). Despite these advantages to executive crisis management, Professor Prakash argues that "the Founders rendered the Chief Executive almost entirely impotent in crises." *Id.* at 1365.

57. *See* Danshera Cords, *Charitable Contributions for Disaster Relief: Rationalizing Tax Consequences and Victim Benefits*, 57 CATH. U. L. REV. 427, 462 (2008) (footnote omitted) ("[T]he legislative process is not conducive to the speed with which relief needs to be provided to the victims of a disaster. Displaced or injured disaster victims generally require immediate assistance with food, housing, and medical care. Legislation takes time. With legislation following a disaster, neither donors nor victims will know what to expect in terms of relief or incentives that may be provided."); Aprill & Schmalbeck, *supra* note 13, at 52–53 ("[A]ny relief comes slowly, for the federal legislative process is not built for speed.").

58. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952) (holding that seizure of steel plants pursuant to an executive order was beyond the constitutional power of the President as such

necessity of a speedy response to crisis, especially as the potentially catastrophic challenges confronting the nation rapidly evolve to include economic interdependence, climate change, asymmetric armed conflict, and increasing dependence upon technology for basic government and commercial functions.

In the absence of action, the President is arguably more readily accountable than legislative actors for a failure to respond to a crisis. If federal legislative relief is withheld, delayed, or defeated, blame can be directed at and dispersed among hundreds of lawmakers.[59] When an executive fails to respond, the voters can point to a single individual to hold accountable.[60] Of course, this oversimplifies the political realities of presidential elections, as the Electoral College provides vastly different political incentives for action or inaction depending on the state(s) affected by the crisis. The President is also theoretically accountable to Congress through impeachment, which could be initiated following a failure to respond to a crisis or blatant abuse of the declaration discretion.[61] The two-thirds vote threshold for conviction in the Senate makes impeachment a largely hollow threat.[62] In any event, the President's handling of major disasters—wherever they fall—is a matter of national importance and scrutiny, and as a sole actor, the President's response can be relatively easily observed and attributed to him.[63]

That relative transparency and accountability is one of the reasons cited by scholars for giving the President expansive authority over administrative

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takings could only be authorized by Congress. "The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. . . . The Constitution did not subject this law-making power of Congress to Presidential or military supervision or control. . . . The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times."). To this day, the dividing line between legislative and executive functions in times of emergency remains contested. *See, e.g.,* Sierra Club v. Trump, 977 F.3d 853, 890 (9th Cir. 2020), *vacated sub nom.* Biden v. Sierra Club, No. 20-685, 2021 WL 4507558 (U.S. Oct. 4, 2021).

59. For a description of theories and the utility of blame, see David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125 (2018).

60. "The Framers were concerned with maintaining presidential responsibility for executive decisions; they wanted him to make the final decision and be accountable for it." Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1006–07 (1993). *But see* Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 196 (1995) (casting doubt on the proposition that the President is more accountable than other public officials).

61. *See* Frank O. Bowman, III & Stephen L. Sepinuck, *"High Crimes & Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1526 (1999).

62. U.S. CONST. art. I, § 3, cl. 6.

63. Although President George W. Bush did not directly suffer electoral consequences for the response to Hurricane Katrina, which occurred in his second term, his administration was beleaguered by criticism in the media and by public figures. *See, e.g.*, Douglas Brinkley, *Hurricane Katrina: The Flood that Sank George W. Bush*, VANITY FAIR (Aug. 26, 2015), https://www.vanityfair.com/news/2015/08/hurricane-katrina-george-w-bush-new-orleans; *see also* Josh Terry, *10 Years Ago Today, Kanye West Said, 'George Bush Doesn't Care About Black People'*, CHI. TRIB. (Sept. 2, 2015, 1:45 P.M.), https://www.chicagotribune.com/redeye/redeye-kanye-west-katrina-telethon-george-bush-black-people-20150902-htmlstory.html. President Obama was not immune to criticism for his handling of natural disasters. *See, e.g.*, Nick Gass, *Obama Hammered over Louisiana Flood Response*, POLITICO (Aug. 19, 2016, 4:13 P.M.), https://www.politico.com/story/2016/08/mike-huckabee-obama-louisiana-flooding-227188.

agencies. This view was perhaps most notably articulated by then-Professor Elena Kagan in her 2001 article, *Presidential Administration*,[64] in which she argued, "[I]n comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism."[65]

2. Predictability and Uniformity

Inconsistency in both the speed and character of relief has plagued past legislative responses to disasters. After Congress responded inconsistently to several disasters in the early twenty-first century, calls came from lawmakers, tax professionals, and scholars for tax reform that would provide victims more certainty. These calls commonly included requests for relief automatically triggered by an administrative determination, whether by the President or another actor. The Code now includes several such provisions, though the tax consequences of disaster declarations are still far from certain.

The lack of uniformity in disaster relief is particularly evident in legislative responses to the September 11, 2001 terrorist attacks, Hurricane Katrina and the Gulf Coast hurricanes of 2005, storms in the Midwest in 2007 and 2008, and Hurricane Sandy in 2012.[66] Some congressional responses were relatively quick, while others were delayed by months of political negotiations. Those delays left victims in limbo on the financial impact of their losses and the ultimate costs of any steps taken to remediate damage. Most storm relief measures shared several similar tax relief provisions but were not identical.[67] The relief measures also departed in significant ways from fundamental tax policy objectives.[68] Accordingly, there was a push for a more unified approach to disaster tax relief that could be deployed rapidly (or automatically) and with more fidelity to sound tax policy.[69] At the very least, an approach codified in permanent provisions would establish a floor for relief and perhaps provide a menu of (sound) options from which legislators could choose in response to a

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64. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

65. *Id.* at 2252.

66. *See generally* Tolan, *supra* note 13.

67. *See* Manolakas, *supra* note 13, at 55–56. For a handy chart showing the different relief measures available under temporary disaster relief measures prior to 2010, see MOLLY F. SHERLOCK & JENNIFER TEEFY, CONG. RSCH. SERV., R45864, TAX POLICY AND DISASTER RECOVERY 20–22 (2021).

68. *See* Aprill & Schmalbeck, *supra* note 13, at 95; Meredith M. Stead, *Implementing Disaster Relief Through Tax Expenditures: An Assessment of the Katrina Emergency Tax Relief Measures*, 81 N.Y.U. L. REV. 2158, 2169–72 (2006).

69. *See* Aprill & Schmalbeck, *supra* note 13, at 94 (noting that Congress nonetheless will want to act after a disaster and should therefore retain some formal role in the disaster relief process); *see also* Cords, *supra* note 57, at 462–68.

particular disaster. Although proposals varied, many suggested deferring to a federal disaster declaration as the trigger for relief.[70]

For example, in November 2014 testimony before the Subcommittee on Taxation and IRS Oversight of the Senate Committee on Finance, Troy K. Lewis, the chair of the Tax Executive Committee of the American Institute of Certified Public Accountants, stressed the need to amend the Code to include permanent provisions to "provide disaster victims with certainty, fairness, and the ability to promptly receive the aid they need after a natural disaster, while reducing the administrative burdens on disaster victims and the Internal Revenue Service (IRS)."[71] Mr. Lewis decried the "inconsistent tax relief" that resulted from Congress considering "each disaster as an isolated event and restrict[ing] any special tax relief to such individual event."[72] He therefore implored "Congress to enact tax legislation that permanently provides meaningful (and timely) relief, which is automatically triggered by a declaration of a federal disaster rather than providing for such relief via individual bills following a disaster."[73]

Disaster tax relief proposals have also come from several prominent legal scholars who identified the challenges presented by the political dynamics of relief and the resulting incoherent patchwork of measures. In *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, Professor Ellen Aprill and Professor Richard Schmalbeck note that sympathy plays a problematic role in post-disaster tax legislation; thus, Congress tends to overreact and provide relief that is "largely inconsistent with sound tax policy."[74] Focusing on hurricane relief passed in 2005 under the Katrina Emergency Tax Relief Act,[75] the Gulf Opportunity Zone Act of 2005 (GOZA),[76] and relief to victims of terrorist attacks under the Victims of Terrorism Tax Relief Act of 2001 (VTTRA),[77] they detail the varying and unpredictable timeframes for legislative relief and then criticize the tax relief measures ultimately adopted as poorly targeted and

70. *See* Aprill & Schmalbeck, *supra* note 13, at 95; Tolan, *supra* note 13, at 596–600.

71. *Tax Relief After A Disaster: How Individuals, Small Businesses, and Communities Recover: Hearing Before The Subcomm. on Tax'n & IRS Oversight of the Comm. on Fin.*, 113th Cong. 51 (2014) [hereinafter *Tax Hearings*] (statement of Troy K. Lewis, Chair, Tax Executive Committee, American Institute of Certified Public Accountants).

72. *Id.* at 19.

73. *Id.* at 51–52.

> In order to provide timely relief, we recommend that Congress enact legislation that provides that extraordinary relief is available (i.e., the "trigger" occurs) when a taxpayer resides, or has a principal place of business located, in a Federal Emergency Management Agency's (FEMA) "Disaster Declaration" area for which individual "disaster assistance" is available. Having a trigger mechanism that is activated through a federally-defined and controlled FEMA process will allow taxpayers the ability to promptly identify and timely receive tax relief for which they are eligible.

Id. at 53 (footnote omitted).

74. Aprill & Schmalbeck, *supra* note 13, at 54.

75. Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, 119 Stat. 2016.

76. Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, 119 Stat. 2577.

77. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002).

violative of tax policy norms.[78] Professors Aprill and Schmalbeck suggest possible approaches to mitigate the risks of an overly sympathetic Congress.[79] While conceding the expediency of expanding the administrative role in disaster responses,[80] they caution that Congress likely will still want to act in response to disasters.[81] Accordingly, they suggest preserving a role for Congress by requiring certain relief provisions to be invoked "by adoption of a joint resolution declaring a disaster."[82] As an alternative, Professors Aprill and Schmalbeck propose creating a panel of both legislative and executive tax policy staff, which would consult with federal agencies and congressional committees to develop categories of relief measures from which Congress could select in response to disasters.[83]

Similarly, in *After the Disaster: Lessons Learned About Tax Relief from Hurricanes Katrina and Sandy*,[84] Professor Patrick E. Tolan Jr. argues that "any standardization in the code" would advance "[t]he goals of reducing the legislative and administrative burdens of piecemeal tax relief."[85] Thus, allowing a longer replacement period for property damaged or destroyed as a result of a "declared national disaster" would further the goals of "increased certainty and equitable treatment of disaster victims."[86] But Professor Tolan acknowledges

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78. *See* Aprill & Schmalbeck, *supra* note 13, at 78. In particular, the hurricane relief treated victims of largescale disasters much better than similarly situated victims of smaller weather-related disasters. *Id.* at 61–66. Further, the incentives for rebuilding in the Gulf Zone provided benefits to a host of interests beyond storm victims and, even if they were justifiable, would have been equally justifiable for the victims of smaller disasters not included. *Id.* at 64–66. Also, in trying to equate victims of terrorism to those lost in active duty in combat zones, the VTTRA expanded income and estate tax exclusions initially designed to supplement the pay of lower-income military personnel "in a way that produced large benefits for wealthy victims of disaster." *Id.* at 70. They also argue that the vastly different tax treatment of victims of ordinary torts or crimes (who cannot take a deduction for losses associated with their injuries) and those lost in the September 11 attacks (who could fully exclude Victim Compensation Fund awards) fails scrutiny under tax policy norms as an arbitrary distinction driven by sympathy instead of sound analysis. *Id.* at 77–78.

79. Professors Aprill and Schmalbeck identify tax provisions that are well suited for unique deployment for disaster relief, including from KETRA: extending the replacement period for destroyed property under § 1033 from two years to five years (as replacement property may be more difficult to find in an area that suffered widespread devastation), credits for retaining employees after the disaster, and allowing penalty-free withdrawals from retirement accounts; and from VTTRA: expanded authority of the Treasury Secretary to postpone filing deadlines for filing returns, paying taxes, and other procedural actions for up to one year under § 7508A and expanded authority for the Treasury Secretary to exclude relief payments under § 139 (which has since been revised). *Id.* at 90–93.

80. *Id.* at 94.

81. *Id.* at 95.

82. *Id.*

83. *Id.* at 97–98.

84. Tolan, *supra* note 13, at 610.

85. *Id.*

86. *Id.*

> Although there is disparate treatment, in a typical isolated emergency such as a house fire . . . , there should be little difficulty in locating replacement property in the same neighborhood. On the other hand, widespread catastrophic damage, for example, from a wildfire, may cause a shortage of suitable replacement property within an entire county and hence it may take longer to find a suitable replacement nearby. Therefore, the declared emergency trigger is sensible for only allowing extended replacement time when a large area is declared a disaster area.

that a disaster declaration is only a rough proxy for needed relief, being "both over-inclusive and under-inclusive," as "[s]ome individuals suffering less severe loss may benefit just because they happen to live in a disaster area declared by the President; others, even those only a few miles outside a declared relief area, may suffer greater loss and have no access to similar relief."[87]

Whether in response to these appeals or simply as a default to an already established seemingly objective measure, the Code now includes several permanent tax relief provisions tied to federal disaster declarations. These include automatic administrative relief;[88] exclusion of disaster assistance payments[89] and insurance living expense payments;[90] a longer four-year replacement period and exclusion of gain from insurance proceeds from the involuntary conversion of a principal residence as a result of a federally declared disaster;[91] and, for 2018 through 2025, a *disallowance* of personal casualty losses absent a federal disaster declaration.[92]

However, as Professor Christine Manolakas describes in *The Tax Law and Policy of Natural Disasters*, even after the Tax Cuts and Jobs Act of 2017, the permanent measures are "slight compared to the tax relief and economic incentives allowed the victims of more severe, higher-profile Federally declared disasters, who are often the beneficiaries of special legislation and administrative relief," and special relief legislation is inconsistent even among federally declared disasters.[93] Further, "[t]he permanent provisions . . . provide surprisingly little tax relief to the victims of casualty events[,]" and "victims of non-Federally declared disasters now receive even less tax relief."[94] So although some degree of predictability has been achieved through tying tax relief to presidentially declared disasters, fairness and consistency concerns persist. Many questions remain after a declaration, and there is still need for clarification from the IRS, which takes time. For example, months after President Trump's disaster declaration regarding the COVID-19 pandemic, tax professionals are

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Id.

87. *Id.* at 602.

88. I.R.C. § 7508A(d). While the IRS has the ability under I.R.C. § 7508A to delay by up to one year certain federal tax deadlines for disaster victims, for federal disasters declared after December 20, 2019, it is required to postpone those deadlines for sixty days. *See* MOLLY F. SHERLOCK & JENNIFER TEEFY, CONG. RSCH. SERV., R45864, TAX POLICY AND DISASTER RECOVERY 6 (2021).

89. I.R.C. § 139.

90. *Id.* § 123.

91. *Id.* §§ 121, 1033; *see* MOLLY F. SHERLOCK & JENNIFER TEEFY, CONG. RSCH. SERV., R45864, TAX POLICY AND DISASTER RECOVERY 4 (2021).

92. I.R.C. § 165.

93. Manolakas, *supra* note 13, at 61.

94. *Id.* (noting the loss of a personal casualty loss deduction in the absence of a federal disaster declaration).

still seeking guidance on the impact of that declaration on the ability to take losses.[95]

II. THE TROUBLE WITH CODE-BASED EXECUTIVE DISCRETION

This Part argues that despite the President's ability to act quickly in times of crisis, and despite the sensible desire to provide certainty to those impacted by disasters, tax consequences generally should not flow from unilateral presidential determinations. As stated above, tying tax relief to disaster declarations has not brought a high degree of certainty and consistency for all victims. In light of the uncertain benefits of declaration-based provisions, Congress should be concerned about the procedural and process deviations that attend such deferrals, especially as federal declarations have now extended beyond natural disasters and executive action becomes less bounded and arguably less accountable.

A. Unilateral Executive Action Is Inconsistent with the Structure and Protections of the Tax Lawmaking Process

Typically, tax law is the result of a process largely controlled by Congress, and the application of a tax provision to a particular individual is determined by the language of the Code, interpretations from Treasury, and in the case of disputes, judgments by courts. Providing the President with the authority to vary tax consequences based on a single declaration is inconsistent with this traditional process. Rather than a measured process with multiple actors, the President alone makes the decision to declare a disaster declaration and, thus, to grant or deny, say, a deduction for personal casualty losses. This focus on a single actor's decision becomes even more problematic when that actor's decisions are generally not subject to judicial review.

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95. *See* Memorandum from Joan C. Arnold, Chair, Am. Bar Ass'n Section of Tax'n, to Hon. Charles P. Rettig, Comm'r, Internal Revenue Serv. (Sept. 4, 2020), https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2020/091420comments.pdf (commenting more than six months after the emergency and major disaster declaration on March 13, 2020, and seeking IRS guidance clarifying that taxpayers may elect to apply § 165(i) to losses from worthless stock attributable to the COVID-19 pandemic, that physical damage to property is not a prerequisite to claiming casualty loss deductions under Treas. Reg. § 1.165-7, and that taxpayers be permitted to elect to apply § 165(i) on a transaction-by-transaction basis or separately to each trade or business).

Like other federal laws, tax legislation begins in Congress.[96] Tax bills must originate in the House of Representatives[97] before moving to the Senate and then to the President's desk.[98] Upon the President's signature, the law is incorporated into the Code.[99] The IRS and the Treasury Department are then primarily responsible for interpreting and enforcing the Code.[100] Controversies between taxpayers and the IRS can be litigated in the U.S. Tax Court,[101] the federal district court of appropriate jurisdiction, or the U.S. Court of Federal Claims.[102]

The President's role in tax law thus typically consists of identifying legislative priorities for Congress to address, signing legislation once it has passed both houses of Congress (subject to a two-thirds veto override if the signature is withheld), and overseeing interpretation and directing enforcement priorities and resources by executive order or instructions to the Treasury Secretary. Code-based discretion, such as the ability to declare a disaster, gives the President an additional avenue for exercising authority over the tax law. By making, or not making, the declaration, the President can either tighten or loosen the strings on relief.

This unilateral authority that Congress has expressly given to the President is inconsistent with the typical picture of the President's involvement in tax lawmaking. Usually, actors lower on the executive ladder, such as the Treasury Secretary or the Commissioner of the IRS, directly wield administrative authority in the tax law.[103] Consequently, much of the President's influence and control over administration and enforcement derives from the appointment power. Most significantly for tax policy and enforcement priorities, the President appoints and can dismiss the Secretary of the Treasury and the IRS Commissioner.[104] Although appointment of the Treasury Secretary requires the

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96. U.S. CONST. art. I, § 8, cl. 1 (providing Congress the authority "[t]o lay and collect [t]axes"). The income tax is authorized by the Sixteenth Amendment, which provides that Congress's power to lay and collect taxes extends to "incomes, from whatever source derived." *Id.* amend. XVI; *see also* Stephen W. Mazza & Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States*, 54 AM. J. COMPAR. L. 641, 644–46 (2006).

97. U.S. CONST. art. I, § 7, cl. 1. In the House, revenue bills are addressed first by the House Ways and Means Committee. For a critical account of the Senate's rewriting of the Affordable Care Act as a violation of the Origination Clause, see Tessa L. Dysart, *The Origination Clause, the Affordable Care Act, and Indirect Constitutional Violations*, 24 CORNELL J.L. & PUB. POL'Y 451, 470–75 (2015).

98. *See* Mazza & Kaye, *supra* note 96 (describing the process of producing a uniform bill for the President's signature).

99. *Id.* at 645.

100. *See generally* CAMILLA E. WATSON & BROOKES D. BILLMAN, JR., FEDERAL TAX PRACTICE AND PROCEDURE: CASES, MATERIALS AND PROBLEMS 10–14 (2d ed. 2012).

101. For an excellent explanation of the role of the Tax Court and a critical assessment of the undue deference to Tax Court decisions, see Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835 (2014).

102. I.R.C. § 6213; 28 U.S.C. §§ 1346(a)(1), 1491(a)(1).

103. *See* Hemel, *supra* note 11, at 636.

104. *Id.* at 650.

consent of the Senate, occasionally in cases where confirmation is dubious, presidentially selected acting secretaries can occupy important cabinet positions for long periods.[105] Thus, cabinet secretaries and their deputies work under the knowledge that they may be replaced at any time if they displease the Executive.[106]

In addition to the Executive's indirect control over agencies through the appointment power, the President can directly set the agenda for agencies through pronouncements in the form of executive orders or memoranda.[107] Through these pronouncements, the President directs agency heads to promulgate regulations or to block regulations that are inconsistent with the administration's objectives.[108] Presidents also have the ability to halt (or "return") proposed regulations, which are submitted to the Office of Information and Regulatory Affairs for an analysis that usually includes projected costs and benefits.[109] While this influence is potentially expansive, historically, presidents have refrained from exercising the full extent of their tax authority. Indeed, some scholars have argued that the President could exercise far more control over both tax administration and substantive tax law.[110] For example, in his comprehensive 2017 article, *The President's Power to Tax*, Professor Daniel J. Hemel gives several examples where the President could have acted alone on tax policy initiatives (including applying ordinary income rates to carried interests, denying foreign tax credits claimed by certain oil and gas companies, and denying business expense deductions for payments of

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> Both the Secretary of the Treasury and the Commissioner of Internal Revenue serve at the President's pleasure: the President appoints them (with the advice and consent of Congress) and can remove them at will. The same is true for the Assistant Secretary of the Treasury for tax policy and the IRS Chief Counsel, the officials most directly responsible for drafting regulations that interpret the Internal Revenue Code.

Id. (footnote omitted).

105. *See* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 645–47 (2020).

106. Although this dynamic existed prior to 2016, President Trump's willingness to publicly pressure high-level officials to resign certainly highlighted the stakes for cabinet officers otherwise inclined to deviate from the President's wishes. *See, e.g.*, Kathryn Dunn Tenpas, *Tracking Turnover in the Trump Administration*, BROOKINGS (Jan. 2021), https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/.

107. Hemel, *supra* note 11, at 647.

108. "Often these directives instruct Cabinet Secretaries or other agency heads to promulgate particular regulations." *Id.*

109. Hemel, supra note 11, at 648–49.

110. *See* Hines & Logue, *supra* note 8, at 274 (suggesting that Congress "should consider general statutory grants to delegate greater authority to the Treasury Department to design particular tax subsidy provisions, . . . delegating some control over income tax rates, either to Treasury, the Federal Reserve[,] or . . . a newly created independent authority, . . . [and] delegating the job of tax reform to an independent commission with authority to enact tax law reforms that would take effect unless a majority of both houses of Congress vote to stop it"); Smith, *supra* note 11, at 785 (arguing that Congress could delegate setting tax rates to the President without violating the nondelegation doctrine but stopping short of endorsing the move as good policy).

punitive damages)[111] but chose not to, instead seeking congressional action through the Green Book.[112]

Given the President's apparently broad but untapped potential to influence the tax law, one might argue that extending express discretion to the President in the Internal Revenue Code is not all that different from the President's powers that flow from overseeing tax administration. Indeed, the Chief Executive thus has expansive discretionary administrative authority even absent explicit legislative references to a presidential determination. So why should we be concerned about the relatively narrow explicit grants of discretion discussed in this Article when at any time the President could impact many more taxpayers by significantly altering audit and collections priorities? The truly unilateral nature of presidential declarations distinguishes them from administrative directives. The declaration of a major disaster or designation of a combat zone has immediate and codified legal significance, whereas directions to agencies set in motion actions that will be carried out by other actors and ultimately will be subject to review and challenge in the courts in a way that a declaration is not. The key difference and the primary concern then is that an exercise of indirect presidential authority through regulation is subject to procedural and judicial restraints that are generally absent when the President acts directly. For example, Treasury and the IRS must promulgate regulations in accordance with the Administrative Procedure Act (APA), and taxpayers can bring a judicial action to challenge the regulations or an application of the regulations to the taxpayer's circumstances.[113] These constraints are often absent in the context of direct presidential action. No doubt, exercises of implicit administrative discretion have been more wide-reaching and consequential than the tax impact accompanying presidential declarations. But explicit deferrals raise the potential of rapid and unreviewable action that has thus far been largely ignored.

B. *Lack of Judicial Review*

It is typically more difficult to challenge a president than it is to sue someone lower on the executive ladder. If the Treasury Secretary disallows a deduction, imposes a change to a taxpayer's accounting method, or requires the

111. Hemel, *supra* note 11, at 658–61, 666–67, 673–75.

112. *See id.* at 639–40.

> Each year, each President since George H.W. Bush has presented a set of suggested tax law reforms to Congress—compiled in a single volume colloquially known as the "Greenbook" because of its distinctive green cover. Almost invariably, the Greenbook includes proposals that the President plausibly could carry out on his own—without any congressional action—by directing the Treasury Department to promulgate appropriate regulations.

Id. (footnote omitted). The Trump administration discontinued the practice of preparing a Green Book after fiscal year 2017. *See* Lydia O'Neal, *New Treasury Official Wants Biden to Revive Annual 'Green Book'*, BLOOMBERG TAX (Jan. 26, 2021 11:32 AM), https://news.bloombergtax.com/daily-tax-report-international/new-treasury-official-wants-biden-to-revive-annual-green-book.

113. *See* 5 U.S.C. § 702.

taxpayer to report additional income, the taxpayer generally has a method of challenging that decision. But if a presidential decision disadvantages a taxpayer, the opportunities to challenge the decision are few, if any. For example, if the President declines to declare a federal disaster, which in turn prevents a taxpayer's personal casualty loss deduction, that taxpayer appears to have no ability to challenge the President's decision. To understand how we reach that result, this Section first explores the typical methods of challenging administrative actions and then turns to special considerations in contesting a direct action by the President.

1. *Challenging Standard Administrative Action*

The APA provides for judicial review of most actions by administrative agencies.[114] Specifically, § 702 of the APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[115] The agency action must be "final" in order to obtain review under the APA.[116] Section 701 of the APA precludes judicial review only if a "statute[] preclude[s] judicial review" or the "agency action is committed to agency discretion by law."[117]

Once in court, taxpayers can lodge both procedural attacks under the APA and substantive attacks under *Chevron*.[118] Taxpayers can challenge exercises of administrative discretion on procedural grounds, alleging that the Treasury failed to adhere to the requirements of the APA.[119] And they can bring challenges on substantive grounds, alleging that Treasury and the IRS adopted an unreasonable interpretation of a statute.[120]

On the procedural side, the APA imposes certain requirements for so-called "legislative" agency rules. Mere interpretive rules clarify or explain preexisting substantive law or regulations,[121] while legislative rules "create[] rights, assign[] duties, or impose[] obligations, the basic tenor of which is not already outlined in the law itself."[122] If a regulation imposes a requirement not explicitly set forth in the statute, it is treated as a legislative rule.[123] Legislative

114. *Id.* §§ 701–706.

115. *Id.* § 702.

116. *Id.* § 704.

117. *Id.* § 701.

118. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

119. 5 U.S.C. § 706. Challenges can also be maintained under the Regulatory Flexibility Act, *id.* §§ 601–12, and the Paperwork Reduction Act, 44 U.S.C. §§ 3501–20.

120. *See Chevron*, 467 U.S. at 842–43.

121. Oakbrook Land Holdings, LLC v. Comm'r, 154 T.C. 180, 189 (2020) (citing SIH Partners LLLP v. Comm'r, 150 T.C. 28, 40 (2018)).

122. *Id.* (quoting *SIH Partners*, 150 T.C. at 40).

123. *Id.* at 189–90.

rules have "the force and effect of law,"[124] and are subject to APA notice-and-comment rulemaking procedures.[125]

Courts will set aside agency actions only if such actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[126] This is a high bar for taxpayers to clear.[127] To satisfy the APA's procedural requirements, the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[128] A satisfactory explanation must be "clear enough that its 'path may reasonably be discerned.'"[129] If the agency did so, the APA is satisfied and "[t]he court is not empowered to substitute its judgment for that of the agency."[130] "But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law."[131]

Taxpayers also face an uphill battle challenging the substance of regulations. Agency interpretations, even those that depart from prior administrations' positions, are given a high degree of deference under the *Chevron* framework. When a regulation is challenged, a court will ask first "whether Congress has directly spoken to the precise question at issue."[132] "If the intent of Congress is clear, that is the end of the matter . . . ."[133] If Congress has not spoken directly to the question at issue, the court will then consider whether the regulation "is based on a permissible construction of the statute."[134] If the statute is silent, the court will give "deference to the interpretation embodied in the agency's regulation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'"[135] Accordingly, the court will uphold the regulation "so long as it represents a 'reasonable interpretation' of

124. *Id.* at 189 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 303 (1979)).

125. 5 U.S.C. § 553(b). To promulgate legislative rules under the APA, an agency must complete a three-step process which generally consists of the following: (1) publishing a general notice of proposed rulemaking in the Federal Register; (2) providing "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and considering and responding "to significant comments received during the period for public comment;" and (3) incorporating in the final rule "a concise general statement of [its] basis and purpose." Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) (quoting 5 U.S.C. § 553(b), (c)); *see also* Altera Corp. & Subsidiaries v. Comm'r, 926 F.3d 1061, 1080 (9th Cir. 2019).

126. 5 U.S.C. § 706(2)(A); *see also Altera*, 926 F.3d at 1080.

127. Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974) ("[T]he scope of review is a narrow one.").

128. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

129. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) (quoting *Bowman Transp.*, 419 U.S. at 286).

130. Oakbrook Land Holdings, LLC v. Comm'r, 154 T.C. 180, 190 (2020).

131. *Encino Motorcars*, 136 S. Ct. at 2125 (citing *State Farm*, 463 U.S. at 42–43).

132. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

133. *Id.*

134. *Id.* at 843.

135. *Oakbrook Land Holdings*, 154 T.C. at 196 (quoting *Chevron*, 467 U.S. at 844).

the law Congress enacted."[136] Although the future of *Chevron* is uncertain,[137] in its current form, *Chevron* deference presents a formidable barrier for those challenging administrative interpretations.

Despite the low likelihood of success, these avenues provide taxpayers with a clear path to challenge actions by Treasury and the IRS. Relevant here, if the Code or regulations provide the Treasury Secretary with the authority or discretion to make a decision, courts generally review that decision for abuse of discretion. Although the APA precludes judicial review of agency action that is "committed to agency discretion by law,"[138] courts have been reluctant to apply that bar and have declined review only where "statutes are drawn in such broad terms that in a given case there is no law to apply."[139] For example, courts have reviewed for abuse of discretion the IRS's decision to require a change in method of accounting when the taxpayer's method "does not clearly reflect income,"[140] to reallocate income or deductions among controlled entities under § 482,[141] to take a particular collection action in the context of a collection due process hearing,[142] to not extend the time for shareholders to file consents to a Subchapter S election,[143] and to deny an extension to file an estate tax return.[144]

In these cases, taxpayers face a high hurdle in proving an abuse of discretion.[145] Courts usually ask, using various formulations, whether the Treasury Secretary or Commissioner exercised discretion "arbitrarily, capriciously or without sound basis in fact."[146] Typically this means the taxpayer

136. *Id.* (quoting *Chevron*, 467 U.S. at 844).

137. *See generally* Kristin E. Hickman & Aaron L. Nielson, *The Future of* Chevron *Deference*, 70 DUKE L.J. 1015 (2021) (exploring the potential for a narrowing of *Chevron*).

138. 5 U.S.C. § 701.

139. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)); Mailman v. Comm'r, 91 T.C. 1079, 1082–83 (1988) ("Only in cases in which it can be found that the existence of broad discretionary power is not appropriate for judicial review, or that the agency determination involves political, economic, military, or other managerial choices not susceptible to judicial review, or that the agency determination requires experience or expertise for which legal education or the lawyer's skills provide no particular competence for resolution and for which there are no ascertainable standards against which the expertise can be measured have the courts refrained from reviewing administrative discretion.") (citing Estate of Gardner v. Comm'r, 82 T.C. 989, 996 (1984)); *Estate of Gardner*, 82 T.C. at 999 ("This and other courts have been generally unsympathetic in the past to [the Commissioner's] arguments, express or implied, for unreviewable administrative discretion.").

140. I.R.C. § 446(b); Comm'r v. Hansen, 360 U.S. 446, 467 (1959); Thor Power Tool Co. v. Comm'r, 439 U.S. 522, 532–33 (1979); RCA Corp. v. United States, 664 F.2d 881, 886 (2d Cir. 1981); Golden Gate Litho v. Comm'r, No. 6569-95, 1998 Tax Ct. Memo LEXIS 184, at *10 (May 18, 1998).

141. Bausch & Lomb Inc. v. Comm'r, 92 T.C. 525, 582 (1989), *aff'd*, 933 F.2d 1084 (2d Cir. 1991); Veritas Software Corp. v. Comm'r, 133 T.C. 297, 318 (2009).

142. Melasky v. Comm'r, 151 T.C. 93, 105 (2018), *aff'd*, 803 F. App'x 732 (5th Cir. 2020); Fargo v. Comm'r, 447 F.3d 706, 709 (9th Cir. 2006).

143. Kean v. Comm'r, 469 F.2d 1183, 1188–89 (9th Cir. 1972); Hicks Nurseries, Inc. v. Comm'r, 62 T.C. 138, 144–45 (1974), *rev'd on other grounds*, 517 F.2d 437 (2d Cir. 1975).

144. *Estate of Gardner*, 82 T.C. at 999–1000; Estate of Proske v. United States, No. 09–CV–670, 2010 WL 2178968, at *7 (D.N.J. May 25, 2010).

145. *See, e.g.*, *Thor Power Tool Co.*, 439 U.S. at 532.

146. Mailman v. Comm'r, 91 T.C. 1079, 1084 (1988).

loses.[147] But courts have found an abuse of discretion where the IRS disregards the Code or Treasury Regulations,[148] makes a decision based on clearly erroneous factual assumptions,[149] or makes an automatic decision "without considering the facts and circumstances."[150] For example, the Tax Court again found that the IRS may have abused its discretion and denied summary judgment in *Estate of Gardner v. Commissioner*.[151] There, the taxpayer argued that the IRS had abused its discretion in denying an extension to file an estate tax return, asserting that the IRS issued an "initial automatic denial" of the extension request without considering the facts and circumstances and again denied the request on reconsideration solely because the decedent was a farmer.[152] The court denied the IRS's motion for summary judgment, stating that the taxpayer's allegations, "if proved, would constitute the very essence of arbitrary administrative action and an abuse of the discretion granted."[153] Similarly, in *Golden Gate Litho v. Commissioner*, the Tax Court held that the IRS abused its discretion when it required the taxpayer to change from the cash method of accounting to the accrual method.[154] The court reasoned that the IRS had "completely disregarded the applicable provisions of the Internal Revenue Code and regulations and made no attempt to properly value [the taxpayer's] inventory or compute [the taxpayer's] income using a proper accrual method of accounting."[155]

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147. *See, e.g.*, Columbia Gas Sys., Inc. v. United States, 473 F.2d 1244, 1251 (2d Cir. 1973) (finding no abuse of discretion in refusing to accept consents to reduce basis in order to exclude cancellation of debt income under prior version of § 108(a)); Stranahan v. Comm'r, 42 F.2d 729, 731–32 (6th Cir. 1930) (holding that decision to deny deduction for purportedly partially worthless debt was not abuse of discretion under predecessor to § 166(a)(2)); Rosefsky v. Comm'r, 70 T.C. 909, 914 (1978) (finding no abuse of discretion in denying request to extend time to replace condemned property under § 1033); Roanoke Vending Exch., Inc. v. Comm'r, 40 T.C. 735, 741–42 (1963) (finding no abuse of discretion in disallowing deduction for addition to bad debt reserve under former § 166(c)).

148. Golden Gate Litho v. Comm'r, No. 6569-95, 1998 Tax Ct. Memo LEXIS 184, at *26 (May 18, 1998); *see also* Veritas Software Corp. v. Comm'r, 133 T.C. 297, 315–16 (2009) (finding that the IRS abused its discretion when its expert ignored regulations under § 482 and relied on erroneous factual assumptions in computing the reallocation); Bausch & Lomb Inc. v. Comm'r, 92 T.C. 525, 592–93 (1989), *aff'd*, 933 F.2d 1084 (2d Cir. 1991) (finding Service abused discretion in determining that sales price for tangible property did not constitute arm's length consideration).

149. Keneipp v. United States, 184 F.2d 263, 268 (D.C. Cir. 1950) (rejecting the IRS's allocation of condemnation proceeds among tracts of property).

150. Estate of Gardner v. Comm'r, 82 T.C. 989, 1000–01 (1984); Estate of Proske v. United States, No. 09–CV–670, 2010 WL 2178968, at *7 (D.N.J. May 25, 2010).

151. *Estate of Gardner*, 82 T.C. at 1000.

152. *Id.*

153. *Id.*

154. Golden Gate Litho v. Comm'r, No. 6569-95, 1998 Tax Ct. Memo LEXIS 184, at *29 (May 18, 1998).

155. *Id.* at *15; *see also Estate of Proske*, 2010 WL 2178968, at *7 ("There has been no explanation for the Service's decision, and even discretionary decisions, if made without a rational explanation, constitute an abuse of discretion.").

2. *Challenging a Presidential Declaration*

Challenging an action taken by administrative officials is usually straightforward.[156] Suing the President is not. Taxpayers challenging the President usually encounter far more obstacles than those who sue the Treasury Secretary in large part because the President's decisions are not subject to judicial review under the APA.[157] The Supreme Court addressed this issue in *Franklin v. Massachusetts*, where the Court held that the President "is not an agency within the meaning of the [APA]."[158] The Court held that Massachusetts could not challenge the Secretary of Commerce's action under the APA because the Secretary's action of reporting the results of the 1990 census to the President was not a "final" agency action; instead, the final action occurred when the President transmitted the statement to Congress.[159] The Court then held that the President's action was not subject to review under the APA because the President is not an "agency" under the APA.[160] The Court stated that the President was neither "explicitly excluded" nor "explicitly included" under the APA but, emphasizing "separation of powers and the unique constitutional position of the President," found "that textual silence is not enough to subject the President to the provisions of the APA."[161] Indeed, the Court stated that it "would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."[162]

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156. There are, of course, some complications. For example, if a taxpayer "challenges the assessment without paying any portion of it, the suit is typically barred by the Internal Revenue Code's Anti-Injunction Act, Section 7421(a)," which "generally provides that no person may maintain an action to restrain the assessment or collection of Federal taxes." 14 MERTENS LAW OF FEDERAL INCOME TAXATION § 49E:45 (rev. vol. 2007). But several exceptions apply. *Id.*

157. Franklin v. Massachusetts, 505 U.S. 788, 796 (1992).

158. *Id.* That case involved the 1990 census and reapportionment, which caused Massachusetts to lose a seat in the House of Representatives. *Id.* at 790. Massachusetts, aggrieved, brought an action against the President and the Secretary of Commerce, among others. *Id.* The State alleged that the President and Secretary of Commerce had improperly allocated servicemembers serving overseas to their "home of record" using Defense Department files. *Id.* at 790–91. The State's challenge focused on the potential inaccuracy of home of record data. *Id.* at 795. The Census Bureau "found that military personnel were likely to designate a 'home of record' with low or no income taxes instead of their true home State—even though home of record does not determine state taxation." *Id.* at 793. Under the reapportionment statute, after the Secretary of Commerce completed the census, the Secretary was required to report the results to the President. *Id.* at 792; 13 U.S.C. § 141(b). After he received the report, the statute required the President to transmit a statement to Congress showing the number of persons in each state "as ascertained" under the census and the number of representatives to which each state would be entitled. *Franklin*, 505 U.S. at 792; 2 U.S.C. § 2a(a).

159. *Franklin*, 505 U.S. at 799.

160. *Id.* at 796.

161. *Id.* at 800–01 (footnote omitted).

162. *Id.* at 801. The Court did, however, reach the State's claim that the Secretary's allocation violated the Constitution. *Id.* The Court rejected that claim on the merits. *Id.* at 806. *But see* Dalton v. Specter, 511 U.S. 462, 472 (1994) ("Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution.").

However, the fact that the President's decisions are not reviewable under the APA does not mean that they are never reviewable.[163] Courts may grant mandamus relief under 28 U.S.C. § 1361 against a federal official, including the President, if he "has a clear obligation to perform a duty . . . and there is no other adequate remedy available to the plaintiff."[164] But mandamus relief is limited solely to situations in which "a public official has violated a 'ministerial' duty."[165] To be ministerial, the duty must not be discretionary, meaning the official must have "no authority to determine whether to perform the duty."[166] Courts have also intimated that they may, in extraordinary cases, grant an injunction against the President.[167] And a court has issued a declaratory judgment stating that the President is required by law to take a particular action.[168]

While these alternate avenues for judicial review of presidential decisions exist, as a practical matter, the President's discretionary decisions will rarely be subject to meaningful judicial review.[169] Even when the courts agree to review a presidential decision, they "will not engage in APA-style arbitrary or capricious review."[170] And some courts have flatly refused to review discretionary presidential decisions. For example, in *Michael Simon Design, Inc. v. United States*, the Federal Circuit refused to review the President's decision to adopt a modification to the Harmonized Tariff Schedule of the United States recommended by the International Trade Commission.[171] The court reasoned that "the decision whether to accept or reject the Commission's recommended . . . modifications is committed to the discretion of the President" under the relevant statute and that the statute's language did "not implicitly or explicitly limit the President's discretion in a way that would render

163. Nat'l Treasury Emps. Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974) ("[N]o immunity established under any case known to this Court bars every suit against the President for injunctive, declaratory or mandamus relief."); Kovacs, *supra* note 9, at 66 (stating that judicial review of a President's actions taken in accordance with statutory discretion "is available but is constrained significantly").

164. Freedom Watch, Inc. v. Obama, 807 F. Supp. 2d 28, 34 (D.D.C. 2011). *See generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997) (arguing that exemption from review under APA does not exempt the President from judicial review under other avenues).

165. Consol. Edison Co. of N.Y. v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002).

166. Swan v. Clinton, 100 F.3d 973, 977 (D.C. Cir. 1996) (citing Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 498 (1866)); *see also, e.g.*, Citizens for Resp. & Ethics in Wash. v. Trump, 302 F. Supp. 3d 127, 136–37 (D.D.C. 2018) (refusing to grant mandamus relief in an action alleging violation of the Presidential Records Act), *aff'd*, 924 F.3d 602 (D.C. Cir. 2019).

167. *See Johnson*, 71 U.S. (4 Wall.) at 501 (1866); *Franklin*, 505 U.S. at 802–03 (summarizing the Supreme Court's hesitance to grant injunctive relief against the President).

168. *Nat'l Treasury Emps. Union*, 492 F.2d at 616.

169. Dalton v. Specter, 511 U.S. 462, 476–77 (1994) ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review. . . . Where a statute . . . commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available.").

170. Kovacs, *supra* note 9, at 79; *see also* Chamber of Com. v. Reich, 74 F.3d 1322, 1326 (D.C. Cir. 1996).

171. Michael Simon Design, Inc. v. United States, 609 F.3d 1335, 1340 (Fed. Cir. 2010).

the President's actions . . . judicially reviewable for exceeding his authority."[172] The Federal Circuit reached a similar conclusion in *Motions Systems Corp. v. Bush* even though the statute in that case "place[d] some restriction on the President's discretion."[173] There, a manufacturer filed a petition with the U.S. International Trade Commission seeking import restrictions against certain products from China.[174] Pursuant to the Trade Act of 1974, the Commission and the Trade Representative recommended that the President impose import restrictions on the goods from China.[175] The President, however, denied the import relief under statutory authority tied to a determination that such relief "would have an adverse impact on the United States economy clearly greater than the benefits of such action."[176] The court refused to review the manufacturer's challenge to the President's action even though the statute limited the President's discretion to a degree.[177]

Based on this background, it comes as no surprise that the President's decision to make or withhold a disaster declaration under the Stafford Act is evidently not subject to judicial review.[178] The Stafford Act merely states that the President "may declare . . . that a major disaster or emergency exists."[179] This is far from a purely ministerial act, as required for mandamus relief. Indeed, the only condition is that a state governor make a request.[180] Although FEMA officials consider various factors in formulating a recommendation to the President, the statute does not require the President to consider these factors.

This same analysis would presumably apply to many other circumstances in which presidential determinations impact tax consequences. For example, it is unlikely that an aggrieved taxpayer could challenge the President's decision not to issue a waiver authorizing a foreign tax credit for taxes paid to a country whose government the United States does not recognize.[181] Likewise, it seems doubtful that a court would review the President's decision to apply the alternative depreciation system to property imported from a country that maintains discriminatory policies against the United States.[182] As in *Michael Simon Design, Inc.* and *Motions Systems Corp.*, these are clearly discretionary decisions by the President in the foreign policy arena, an area in which he has

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172. *Id.*

173. Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1361 (Fed. Cir. 2006).

174. *Id.* at 1357.

175. *Id.* at 1357–58.

176. *Id.* at 1359.

177. *Id.*

178. 18 BARBARA J. VAN ARSDALE ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 44:575 (2020); *see also* Grace v. Fed. Emergency Mgmt., 889 F. Supp. 394, 396 (C.D. Cal. 1995) (holding that an individual that FEMA declared ineligible for disaster housing assistance had no right for judicial review of the agency's decision).

179. 42 U.S.C. § 5170(a).

180. *Id.*

181. *See* I.R.C. § 901(j).

182. *Id.* § 168(g)(1)(D).

traditionally enjoyed robust authority. Even if a court reached these issues, it may decline to examine whether the President's decision constituted an abuse of discretion; instead, to use § 168(g)(6) as an example, the court might ask only whether the President made the predicate finding that a country "engages in discriminatory or other acts . . . or policies unjustifiably restricting United States commerce."[183] In other words, the court may refuse to examine the reasonableness of that finding, "as it would have if the order had come from an agency."[184] In this way, presidential actions appear to be far more insulated from judicial review than discretionary decisions by the Treasury Secretary or the Commissioner.

Of course, judicial review is not without its flaws. Federal judges are not accountable through elections, and their decisions are often far less visible than executive actions. And redress through the courts can be costly and time-consuming. These drawbacks should be kept in mind when determining the level and kinds of discretion to bestow upon the Executive Branch, as, arguably, if less discretion is vested in the President, the courts or Congress will inherit more discretion.[185] But judicial discretion is subject to safeguards, including appellate review. And although district court judges may make decisions alone, most appellate bodies will include multiple decision-makers with diverse perspectives.

a. Much Ado About Little?

Why should we care about the President's ability to change the tax outcomes in a handful of instances often involving foreign policy or emergencies when the President has authority to make life and death decisions in those same realms? If the President can order soldiers into combat, it seems relatively unimportant that certain tax consequences accompany the combat zone designations. Certainly, the potential for physical harm and loss of life is far weightier than anything else a decision-maker faces. And the President's authority over life and death is vast.

Although far less consequential from a humanitarian standpoint than armed conflict, the potential for political misadventures in tax are concerning. Tax is distinctly within the domain of Congress—the Constitution designated

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183. *Id.* § 168(g)(6)(A); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (stating that the plaintiffs' argument that President Trump's restrictions on the entry of certain aliens were invalid was "grounded on the premise that [the Immigration and Nationality Act] not only requires the President to *make* a finding that entry 'would be detrimental to the interests of the United States,' but also to explain that finding with sufficient detail to enable judicial review" and that "[t]hat premise is questionable").

184. Kovacs, *supra* note 9, at 66.

185. *See* William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1224 (1983) (citing Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 759 (1980)) ("There is a law of conservation of discretion: one limits the discretion of one set of actors only by increasing that of others.").

a progression tax laws should follow, beginning with the House of Representatives. Deviations from that approach raise structural and balance-of-power concerns. Further, in almost all cases involving a presidential declaration, the focus of the declaration is not on tax, and thus, seldom should tax consequences automatically flow from the decision. And while there is extensive public scrutiny over the President's orders involving military actions and emergency responses, the tax consequences are largely unknown and unnoted. There cannot be political accountability without visibility and awareness.

As the Code currently stands, the inability to challenge presidential decisions that affect tax consequences is probably of limited significance. Recall that the Code provides the President with discretionary authority to make certain determinations related to trade, foreign relations, and armed conflict. These are all categories where the President has enjoyed uniquely robust authority. And these provisions probably affect very few taxpayers, especially because the President has traditionally exercised restraint in using authority under those provisions. For instance, the President has never invoked the authority under the Code to apply more burdensome tax rules to citizens of a foreign country that imposes discriminatory taxes on U.S. citizens.[186]

Action by the executive is also well-established in disaster relief, though perhaps less so than in the foreign policy and armed conflict contexts. Traditionally, states and localities have driven responses to physical disasters.[187] The federal government plays a supplementary role if the disaster overwhelms the available resources at the state and local level.[188] But when the federal government steps in, the President plays an essential role. Since 1988, the Stafford Act has defined the President's role by incorporating the process for disaster declarations that we have previously explored. Although the breadth of the President's authority in the disaster context is perhaps less established, or at least less familiar, than in the foreign policy context, it is still significant. In this sense, as with foreign policy and fighting terror, perhaps the Code's reliance on presidential disaster declarations is simply aligning tax relief with nontax relief.

In addition, tying disaster declarations to tax benefits like exclusions for qualified relief payments and deductions for personal casualty losses probably has limited practical effects for many taxpayers. While a disaster declaration in one area but not another would generate facially different treatment for the hypothetical Gale and Joad families,[189] the practical, after-tax difference is likely to be less significant, especially if the families have insurance or do not have significant taxable income. As currently structured, disaster relief in the Code is

186. KUNTZ & PERONI, *supra* note 25.

187. BRUCE R. LINDSAY & ELIZABETH M. WEBSTER, CONG. RSCH. SERV., R41981, CONGRESSIONAL PRIMER ON RESPONDING TO AND RECOVERING FROM MAJOR DISASTERS AND EMERGENCIES 1–2 (2020).

188. *Id.*

189. *See supra* Part I.A.2.

more important to high-income earners. It is even more important to these earners when they are significantly underinsured.

Because most of the substantive tax relief measures are structured as either deductions or exclusions, they generate greater benefits for those with higher incomes. If we assume, for example, that the Gale and Joad families make roughly $50,000 per year, a casualty loss deduction would offset income taxed at a ten or twelve percent rate. But if they make $625,000 or more, that loss can offset income taxed at rates of up to thirty-seven percent, with a concomitant increase in tax savings. The same analysis applies for exclusions from income such as the exclusion for qualified disaster relief payments under § 139.[190] If a high-income earner can exclude a payment from income, the taxpayer saves a higher rate of tax.

The importance of a disaster declaration also increases if one of the families lacks insurance because the personal casualty loss deduction is available only for losses "not compensated for by insurance or otherwise."[191] The taxpayer has no loss if the insurance company provides full compensation, though the taxpayer may be able to take advantage of other disaster relief provisions in the Code, such as the increased four-year period under § 1033 to defer gain by reinvesting proceeds from an involuntary conversion.[192] Thus, while horizontal-equity concerns can arise where two taxpayers suffer similar damage, with one inside an area that the President has designated for relief in a disaster declaration and one outside that area, these concerns are likely to be most acute where both taxpayers are wealthy and without insurance. This is not to say that the disparate effects are unimportant, or that low-income taxpayers can never suffer deleterious effects from the disaster declaration process. But it does lower the stakes of presidential discretion in this area and perhaps dilutes the importance of judicial review.

Taxpayers' usual lack of success in challenging actions by decision-makers lower on the executive ladder could also counsel against becoming overly concerned with the rise of presidential discretion in the Code. As noted, taxpayers typically lose abuse-of-discretion cases. It is difficult to prove that a government actor acted arbitrarily, even when it seems like the government reached the wrong decision. This is especially true when the area is one where the law affords the actor robust discretion, as in the Stafford Act. But taxpayers do not always lose. In this way, the ability to challenge a government action for abuse of discretion provides an important check on arbitrary, uninformed executive actions. Expanding the circumstances in which a Code provision depends on presidential action could also increase the prevalence of a strange

190. The stakes for a presidential disaster declaration are slightly lower in the context of § 139, where a federally declared disaster is but one of four possibilities that can trigger the exclusion's applicability. I.R.C. § 139(c).

191. *Id.* § 165(a).

192. *Id.* § 1033(e)(2)(A).

dichotomy in the Code, where the decisions of the Treasury Secretary are subject to challenge but the President's are not. And the concerns over unavailability of judicial review extend not only to actions that harm taxpayers but also to actions that unduly benefit them. This could occur, for example, where the President uses the disaster declaration as a mechanism to reward political supporters or sway swing states. These concerns would become all the more pressing if Congress were to extend Code-based presidential discretion to additional areas.

C. Given the Lack of Review, the Risks of Partisan Games and Overzealous Use Are Real

1. Political Games

Even when opposing political parties agree that federal intervention may be warranted in the aftermath of a disaster, the disaster declaration process is still subject to, and often criticized for, partisanship.[193] The decision to seek a disaster declaration and its ultimate affirmation or denial each fall into the hands of one government official. First, the governor or tribal leader has the sole discretion to begin the disaster declaration process and request federal aid.[194] Second, the President holds the ultimate authority to formally declare or deny a disaster.[195] The lack of checks and balances on these two government officials is exacerbated by the absence of clear standards and guidelines as to what may or may not be considered a disaster.[196] While the process may be more efficient with fewer interagency hurdles, this consolidation of power creates the opportunity for individual political motivations to invade the process.[197]

There is evidence that an executive's election strategy influences disaster declaration determinations.[198] During the President's term of office, critical states in a reelection bid will often have more disaster declarations.[199] Further,

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193. Gasper, *supra* note 12, at 1 ("[P]olitics and disaster declarations are intertwined.").

194. *Id.*; FRANCIS X. MCCARTHY, CONG. RSCH. SERV., R43784, FEMA'S DISASTER DECLARATION PROCESS: A PRIMER 12 (2014).

195. FRANCIS X. MCCARTHY, CONG. RSCH. SERV., R43784, FEMA'S DISASTER DECLARATION PROCESS: A PRIMER 12 (2014); *see also* Gasper, *supra* note 12, at 1.

196. *See* Gasper, *supra* note 12, at 3 ("The Stafford Act nonetheless does not name any threshold for damage sustained in the affected area or any specific mathematical formula in determining suitability for disaster declarations. So while there may be recommendations from FEMA officials, there is no required threshold for a declaration and the president has unilateral authority in granting or denying the gubernatorial request. Given this discretion granted to the president and the vague criterion spelled out in the Stafford Act, the disaster declaration process could be influenced by political factors.").

197. *See* Manolakas, *supra* note 13, at 34 (explaining that unilateral authority "allows politics to be a factor in the President's decision to declare a federal disaster").

198. *See* Gasper, *supra* note 12, at 3 ("[H]alf of all disaster aid is politically motivated.").

199. Reeves, *supra* note 12, at 1148 ("[A] competitive state is expected to receive over twice the number of disaster declarations as a noncompetitive state . . . ."). Since the passage of the Stafford Act, there has been a positive correlation between a state's political competitiveness and the number of presidential disaster

disaster declarations increase during election years.[200] Governors of these critical states can take advantage of this reality and may ask for more aid more often.[201] The governor and President have their reelection prospects at stake—the voter will look to their leadership in the aftermath of the disaster.[202] Admittedly, members of Congress are susceptible to similar political temptations,[203] but they must act together as a body that represents vastly different constituencies. The slower process and diverse perspectives represented in Congress reduce the risk of the Legislative Branch acting to promote idiosyncratic interests.

Opportunistic exercise of discretion in areas related to the tax law is not limited to the disaster context. The qualified opportunity zone program is perhaps the most prominent example of a tax benefit that depends on the discretion of a small group of actors subject to little, if any, review. Adopted in 2017 as part of the Tax Cuts and Jobs Act, the opportunity zone program offers a bevy of benefits to investors, including both tax deferral and exemption.[204] Under the program, if an investor realizes capital gain—say, by selling stock in a publicly traded company—and reinvests the proceeds into a qualified opportunity zone, the investor can avoid paying tax on that gain until 2026.[205] The investor can also avoid paying up to fifteen percent of the deferred tax if he or she holds the investment for at least seven years.[206] Finally, the investor can avoid paying tax on any appreciation in the qualified opportunity zone investment if he or she holds the investment for at least ten years.[207]

To identify qualified opportunity zones, Congress provided some objective criteria and then left it to state governors and the Treasury Secretary to select tracts that fell within those guardrails. Governors could nominate up to twenty-five percent of the "[l]ow-income communities" in their state.[208] After receiving

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declarations. *Id.*; *see also* Gasper, *supra* note 12, at 6 ("[C]ounties in competitive states are substantially less likely to be denied aid during an election year.").

200. *See* Manolakas, *supra* note 13, at 35.

201. *See* Gasper, *supra* note 12, at 4.

202. *See* Reeves, *supra* note 12, at 1148 ("Voters reward presidents for disaster declarations to the tune of over 1% at the ballot box."); Alexander J. Oliver & Andrew Reeves, *The Politics of Disaster Relief*, *in* EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES 1, 2–4 (Robert Scott & Stephen Kosslyn eds., 2015), https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118900772.etrds0258 (finding that voters hold elected officials responsible for both natural disasters and for the response to those events); Manolakas, *supra* note 13, at 43 ("After disasters, people rise to the occasion, and so do voters.").

203. *See, e.g.*, Tolan, *supra* note 13, at 560–61 (arguing that the reactions of members of Congress during a disaster may be, in part, attributed to "their own internal ambitions for potential political gain").

204. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13823, 131 Stat. 2183 (2017).

205. I.R.C. § 1400Z-2(a)–(b).

206. *Id.* § 1400Z-2(b)(2)(B)(iii)–(iv).

207. *Id.* § 1400Z-2(c).

208. *Id.* § 1400Z-1(a)–(d). To qualify as a "low-income community," a census tract generally had to have a poverty rate of at least twenty percent or have a median family income of no more than eighty percent of the statewide median family income (or eighty percent of the metropolitan area median family income if the tract was in a metropolitan area with a median family income higher than the statewide median family income). *Id.* §§ 45D(e)(1), 1400Z-1(c)(1).

the nominations from each governor, the Treasury Secretary was responsible for certifying the nominations and designating the tracts as qualified opportunity zones.[209]

This discretion afforded to political actors has, unsurprisingly, spawned anecdotes and empirical studies showing possible favoritism in tract designations.[210] For example, one empirical study found "robust evidence that governors exercised their discretion to reward political supporters and investors that contributed to their campaigns."[211] These findings came after multiple news reports exposed at least the appearance of favoritism in the designation process.[212]

Clearly, these determinations are not entirely detached from politics. Returning briefly to the hypothetical Gale and Joad families,[213] it is at least worth considering the potential that politics could play a role in the decision to grant or withhold relief if instead the storm's impact was more comparable in the different areas. Even though both Oklahoma and Kansas are reliably conservative states in presidential elections,[214] the request for federal relief for Oklahoma would be coming from a Republican Governor (Kevin Stitt) and the request for Kansas would be coming from a Democratic Governor (Laura

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209. *Id.* § 1400Z-1(b)(1).

210. Ofer Eldar & Chelsea Garber, *Does Government Play Favorites? Evidence from Opportunity Zones* (Duke L. Sch. Pub. L. & Legal Theory Series No. 2020-28, 2020); Megan Duffy, *The U.S. Qualified Opportunity Zone Program Is Vulnerable to Corrupt Manipulation by Politically-Connected Investors. Here's How to Fix It.*, THE GLOB. ANTICORRUPTION BLOG (July 31, 2020), https://globalanticorruptionblog.com/2020/07/31/the-u-s-qualified-opportunity-zone-program-is-vulnerable-to-corrupt-manipulation-by-politically-connected-investors-heres-how-to-fix-it/ (collecting examples of possible favoritism by state governors and the Treasury Secretary).

211. Eldar & Garber, *supra* note 210, at 26.

212. ProPublica reported that Maryland Governor Larry Hogan designated a tract in a Baltimore neighborhood as a qualified opportunity zone after a meeting with developers (whose investors included Kevin Plank, the founder of Under Armour) who had contributed to his campaigns in recent years. Jeff Ernsthausen & Justin Elliott, *One Trump Tax Cut Was Meant to Help The Poor. A Billionaire Ended Up Winning Big.*, PROPUBLICA (June 19, 2019, 4:00 AM), https://www.propublica.org/article/trump-inc-podcast-one-trump-tax-cut-meant-to-help-the-poor-a-billionaire-ended-up-winning-big. ProPublica also reported that Dan Gilbert (the billionaire owner of Quicken Loans, a donor to former President Trump) successfully lobbied federal, state, and local officials to designate "islands of wealth" in Detroit as qualified opportunity zones. Jeff Ernsthausen & Justin Elliott, *How a Tax Break to Help the Poor Went to NBA Owner Dan Gilbert*, PROPUBLICA (Oct. 24, 2019, 2:10 PM), https://www.propublica.org/article/how-a-tax-break-to-help-the-poor-went-to-nba-owner-dan-gilbert. Even former "junk bond king" Michael Milken got in on the action, with the New York Times reporting that Steven Mnuchin "directly intervened" to "bend rules" and designate a tract in which Milken was a "major investor." Eric Lipton & Jesse Drucker, *Symbol of '80s Greed Stands to Profit from Trump Tax Break for Poor Areas*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/2019/10/26/business/michael-milken-trump-opportunity-zones.html.

213. *See supra* part I.A.2.

214. In 2020, 65% of Oklahoma voters (and every county in that state) voted for Trump, and 56% of Kansas voters voted for Trump. *Election 2020 Results and Live Updates*, ABC NEWS (Dec. 18, 2020, 4:15 PM), https://abcnews.go.com/Elections/2020-us-presidential-election-results-live-map/. Both Senators in both Oklahoma (Inhofe and Lankford) and Kansas (Moran and Roberts) are Republicans. *Id.*

Kelly).[215] Speculation aside, the evidence indicates that partisan considerations can influence the decisions of a single or small group of actors tasked with making a decision under the tax law. If a taxpayer takes issue with the decision, one response is simply to go to the voting box in the next election. Beyond that, there are few, if any, avenues for challenging the President's decision, especially if it does not directly harm the individual seeking to challenge the action.

2. *Overzealous Use*

Taxpayers likely cannot challenge the President's decision not to declare a disaster, even if that decision harms them. Unavailability of judicial review is even more clear, however, where the President, perhaps unjustifiably, does declare a disaster declaration. Taxpayers generally cannot challenge pro-taxpayer actions.[216] For example, if Treasury and the IRS issue regulations expansively interpreting a Code provision arguably beyond the scope of the statutory text, a taxpayer generally cannot challenge the regulation as overbroad.[217] The taxpayer lacks standing.[218]

The ability to declare a disaster declaration, conferring tax and nontax benefits on a particular geographic area, is a tempting mechanism for securing political support. In addition to providing a direct association between the President and tangible benefits that taxpayers receive, the President can appear competent and responsive, qualities that will serve him well in a reelection

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215. The following statement of Senator Pat Roberts (Republican, Kansas) in a 2014 subcommittee hearing on disaster tax relief illustrates the importance of personal relationships in accessing quick relief and also hints at the role of partisanship and maneuvering for credit (or blame) in the immediate aftermath of a disaster.

> In the immediate aftermath [of the May 4, 2007 Greensburg, KS tornado], I called President Bush. He was at Camp David. I told him he needed to get FEMA out to Greensburg right away. He informed me that that request had to come from [Governor Kathleen Sebelius]. I told him the Governor was at a jazz concert in Louisiana. He said, "Raise your right hand"—by phone, which I did—and he said, "Please take the following oath as Governor of Kansas for only 5 minutes," which I did. And he said, "You have FEMA coming."

Tax Hearings, *supra* note 71, at 7 (statement of Hon. Pat Roberts, U.S. Sen., Kansas).

216. *See, e.g.*, Freedom from Religion Found., Inc. v. Lew, 773 F.3d 815, 820, 823 (7th Cir. 2014) (holding that a foundation and its two atheist copresidents lacked standing to challenge the constitutionality of § 107, which provides tax exemptions for any "minister of the gospel").

217. Michael L. Schler, Letter to the Editor, *More on Tax Regulations and the Rule of Law*, TAX NOTES INT'L (Aug. 3, 2020), https://www.taxnotes.com/tax-notes-international/code-and-regulations/more-tax-regulations-and-rule-law/2020/08/03/2csbf (arguing that the pro-taxpayer regulatory high-tax income exemption from global intangible low-taxed income is inconsistent with the Code and would likely be struck down if challenged in court). A state also lacks standing to sue either on its own behalf or *parens patriae* on behalf of its citizens. *See* Pennsylvania v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976); Iowa *ex rel.* Miller v. Block, 771 F.2d 347 (8th Cir. 1985).

218. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 134 (2011) ("Absent special circumstances, . . . standing cannot be based on a plaintiff's mere status as a taxpayer."); *Lew*, 773 F.3d at 820 (stating that challenges to "the legality of a government expenditure . . . are typically foreclosed because the harm is too widely shared, the financial injury to any given taxpayer is too slight, and the possibility of redress is too speculative to support standing under traditional principles").

campaign. Elections, the traditional check on the President's actions, work perverse incentives in this context. Rather than promoting measured executive action based on whether an area has suffered a qualifying disaster, an upcoming election encourages the President to err on the side of over-declaring disasters, avoiding the risk of alienating voters in the impacted states. This could result in unnecessary windfalls to taxpayers and needless drains on an already strained federal budget. And taxpayers in other areas generally could not challenge the President's decision, even though they might see their tax bill rise in later years when Congress sees a need to cover a budget shortfall.

Limited to the disaster context, the stakes for politically motivated disaster declarations are probably fairly low. The benefits of increased personal casualty loss deductions or a delayed filing deadline will be muted for many taxpayers. But an extension of the principle of Code-based presidential authority beyond the disaster context into areas such as worthless stock or bad debt deductions could quickly become problematic, as the stakes to taxpayers and the budget dollars involved increase. And we should not discount the President's potential willingness to broadly interpret authority under the Code for political means. The possibility of an unmoored Executive, bound only by considerations of what is the most politically beneficial, could adopt expansive interpretations of the types of events that trigger presidential authority under the Code.

Consider, for example, former President Trump's declaration that the COVID-19 pandemic constituted a major disaster under the Stafford Act. To be clear, few would argue with the result that the declaration brought about. People were in need of assistance, and the federal government needed to respond. Yet one could question whether a pandemic is within the definition of a disaster under the Stafford Act, which focuses on physical events. The Stafford Act defines a "major disaster" as follows:

> [A]ny natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.[219]

Indeed, prior to President Trump's declaration, the Congressional Research Service questioned the validity of a major disaster declaration for a public health emergency: "The list of events that explicitly qualify for a major disaster declaration does not include outbreaks of infectious diseases."[220] Decision-

219. 42 U.S.C. § 5122(2).

220. ERICA A. LEE & BRUCE R. LINDSAY, CONG. RSCH. SERV., IN11229, STAFFORD ACT ASSISTANCE FOR PUBLIC HEALTH INCIDENTS 2 (2021).

makers who interpret the definition literally may be disinclined to issue a major disaster declaration for outbreaks.[221] Under current law, a major disaster declaration has not been authorized in response to a public health incident of any type.[222] Additionally, infectious disease outbreaks are unlikely to cause physical damage to public infrastructure—a key threshold used to determine eligibility for a major disaster declaration.[223]

Again, few would question the need for action in response to a public health emergency of this scope. But it does raise the question of how far an Executive motivated to respond to a crisis, or to marshal support for an upcoming election, could go in interpreting the Stafford Act—or, indeed, any statute that gives the President authority to confer benefits (whether tax or nontax) on segments of the population. Could anything that threatens financial ruin be a disaster? Or, perhaps more importantly, is there any point on the spectrum of events that the President could potentially view as a disaster where a court would step in and reject the President's interpretation? Theoretically, the answer could be yes. At some point, if it reaches the issue, a court might say that the event is too attenuated from the circumstances that the Stafford Act is meant to cover.[224] But practically the answer is almost always no, since no taxpayer will have standing to challenge the President's decision.

These concerns over unreviewable executive giveaways extend beyond the Stafford Act. Recall that the Code excludes certain amounts paid to a soldier or civilian who died in, or as a result of injuries suffered in, a "combat zone."[225] The President makes the call on what constitutes a combat zone.[226] How broad is the President's discretion in determining whether a combat zone exists? Could a President designate all or a substantial portion of the United States a combat zone for purposes of the war on drugs, COVID-19, systemic racism, or any number of other perils facing the United States so that any soldiers or civilians who die in the United States in some way related to one of those issues could avoid paying taxes for the year of their death? Certainly, some of those issues have components of physical violence. The war on drugs is famous for "Cocaine Cowboys" and high-stakes confrontations between drug lords and government authorities. COVID-19 is less associated with physical violence, but there has been no shortage of statements that the United States is on a "war

221. *Id.*

222. *Id.*

223. *Id.*

224. *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (stating that the plaintiffs' argument that President Trump's restrictions on the entry of certain aliens were invalid was "grounded on the premise that [the Immigration and Nationality Act] not only requires the President to *make* a finding that entry 'would be detrimental to the interests of the United States,' but also to explain that finding with sufficient detail to enable judicial review" and that "[t]hat premise is questionable").

225. I.R.C. §§ 112(a), 692.

226. *Id.* § 112(a)–(b), (c)(2).

footing" in its response to the pandemic.[227] One could make a colorable argument for including areas where these types of issues are present within the ambit of a combat zone, especially if they grow serious enough to require involvement of the U.S. military. But, again, does it even matter if the argument is colorable? Who would have standing to challenge the President's decision anyway?

To be clear, this would not necessarily be a bad result from a policy perspective. If a member of the military or a civilian dies in connection with government service for the good of the country, there are persuasive arguments in favor of forgiving tax liability for the year of (and years before) the person's death. The problem is that this seems, at least traditionally, like a policy decision that Congress should make. Congress writes the tax law. Allowing the President to do so for all practical purposes through essentially unchecked discretion is problematic. Certainly it seems inconsistent with the traditional conception of the tax lawmaking process. Perhaps more concerning, it is hard to know how far an occupant of the Oval Office might try to take Code-based discretion in the future. Presidents pushed the envelope even before the Trump era, and the norms of the White House are not the same as they were only a few years ago. But historically, the country has taken for granted a rational Executive with conventional political aims in a stable political environment. In a situation where the Executive is unmoored by conventional political pressures and allegiances, the question might well become not what the President has clear or arguable legal authority to do but rather what he can get away with.[228]

To date, only a few attempts have been made to circumvent the regular channels of authority and procedure in the tax context. These include the Trump Administration's payroll tax extension[229]—and then attempt at

227. Robert E. Litan, *Putting COVID Emergency Response on War Footing*, BROOKINGS (Mar. 19, 2020), https://www.brookings.edu/opinions/putting-covid-emergency-response-on-war-footing/; William A. Galston, Opinion, *Test Every American for Covid-19*, WALL ST. J. (Aug. 4, 2020, 7:05 PM), https://www.wsj.com/articles/test-every-american-for-covid-19-11596582339 ("In March, President Trump rightly labeled the fight against the pandemic a 'war.' But we are losing this war."); Sheryl Gay Stolberg, *Biden Rolls Out 'Full-Scale, Wartime' Coronavirus Strategy, Including Requiring Masks on Some Planes, Trains and Buses.*, N.Y. TIMES (Apr. 22, 2021), https://www.nytimes.com/2021/01/21/us/politics/biden-rolls-out-full-scale-wartime-coronavirus-strategy-including-requiring-masks-on-some-planes-trains-and-buses.html.

228. Vladeck*, supra* note 7, at 610, 612 (describing "Congress's systematic over-delegation of authority to the President to respond to a surprisingly broad array of real or invented (or, at least, overblown) crises" and stating that while "the principal checks on abuses of these emergency authorities over time have been political, as successive Presidents have been reluctant to stretch these statutes to their limits lest they suffer adverse political consequences[,] . . . [t]hese political checks . . . have proven ineffective on the Trump Administration, which has been willing to push those authorizing statutes to, if not beyond, their limits.").

229. Deferring Payroll Tax Obligations in Light of the Ongoing Covid-19 Disaster, 85 Fed. Reg. 49,587 (Aug. 8, 2020); I.R.S. Notice 2020-65, IR-2020-195 (Aug. 28, 2020).

forgiveness[230]—and exploration of indexing cap gains.[231] But those instances provide a glimpse of what a determined and persistent Executive could accomplish through unilateral action, especially if the President's discretion is anchored in the Code itself.

Even before President Trump, examples abound of unilateral presidential actions pursuant to statutory authority. For example, President Obama took executive action on a variety of subjects. He used his statutory power under the Migration and Refugee Assistance Act to furnish up to $70 million "for the purpose of meeting unexpected urgent refugee and migration needs related to the U.S. Refugee Admissions Program."[232] He also used presidential authority under the Immigration and Nationality Act to authorize the admission of up to 110,000 refugees to the United States for fiscal year 2017.[233] Unilateral executive action simply continued with far different aims in the Trump Administration. To cite one of several examples, then-President Trump declared a national emergency on the southern border and diverted billions of dollars in funds originally appropriated for military construction projects.[234]

Tax administration is no stranger to politically motivated actions. The use of presidential power and administrative bodies, including Treasury and the

230. *See* Richard Rubin, *Trump's Payroll-Tax Deferral Creates Predicament for Congress*, WALL ST. J. (Nov. 27, 2020, 11:00 AM), https://www.wsj.com/articles/trumps-payroll-tax-deferral-creates-predicament-for-congress-11606492800 ("Mr. Trump couldn't get Congress to cut payroll taxes, so he used the administration's ability to defer tax deadlines after a disaster to delay payments of the employees' portion of Social Security taxes. He promised that if he won re-election, he would push to turn that delay into a real tax cut.").

231. Indexing capital gains was also considered by the George H. W. Bush Administration. *See* Laura Davison & Mario Parker, *Trump Says He's 'Seriously' Mulling a Capital Gains Tax Cut*, BLOOMBERG TAX (Aug. 11, 2020, 11:00 AM), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/tax-insights-and-commentary/X6D3ERKO000000?bna_news_filter=tax-insights-and-commentary#jcite.

232. Unexpected Urgent Refugee and Migration Needs, 81 Fed. Reg. 68,925 (Oct. 4, 2016). The Migration and Refugee Assistance Act provides: "Whenever the President determines it to be important to the national interest he is authorized to furnish on such terms and conditions as he may determine assistance under this chapter for the purpose of meeting unexpected urgent refugee and migration needs." 22 U.S.C. § 2601(c)(1).

233. Presidential Determination on Refugee Admissions for Fiscal Year 2017, 81 Fed. Reg. 70,315 (Sept. 28, 2016). The Immigration and Nationality Act states: "[T]he number of refugees who may be admitted . . . shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation [with certain congressional committees], is justified by humanitarian concerns or is otherwise in the national interest." 8 U.S.C. § 1157(a)(2). For additional examples of executive action by the Obama Administration, see Kovacs, *supra* note 9, at 67.

234. Declaring a National Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 20, 2019); El Paso Cnty. v. Trump, 982 F.3d 332, 335–36 (5th Cir. 2020) (holding that county and community organization lacked standing to challenge the diversion of funds). *But see* Sierra Club v. Trump, 977 F.3d 853, 890 (9th Cir. 2020), *vacated sub nom.* Biden v. Sierra Club, No. 20-685, 2021 WL 4507558 (Oct. 4, 2021) (finding that states and organizations had standing to challenge the same action and that National Emergencies Act did not authorize the diversion of funds). The propriety of these actions remains in question. Immediately upon assuming office, President Biden reversed course, terminated the emergency declaration, and redirected the appropriated funds. Accordingly, the Court, at the request of the Biden Administration, vacated and remanded decisions providing declaratory and injunctive relief while the authority to redirect the funds was to be litigated. *Id. See* Reply Brief for the Petitioners, Biden v. Sierra Club, No. 20-685, 2021 WL 4507558 (Oct. 4, 2021).

IRS, for political purposes stretches back at least to the 1950s. During that decade, the IRS "was used to investigate individuals and groups associated with the Communist Party of the United States."[235] Later, and perhaps most notoriously, the Nixon Administration "exert[ed] pressure over the Service to audit" members of President Nixon's "Enemies List."[236] Some of these threats are no longer available after the adoption of § 6103, which requires that tax return information be kept confidential.[237] But the cautionary tale remains: a vengeful Executive might well look to the tax system as a tool for disrupting and injuring opponents.

Ultimately, the problem with the proliferation of presidential discretion in the Internal Revenue Code is that it places an increasing number of important decisions outside of the normal administrative process and insulates them, sometimes completely, from judicial review. Even the existing provisions, which largely address areas where the President has enjoyed broad authority, create potential concerns depending on the executive's determination to exercise the authority to the fullest extent, possibly for political purposes. These concerns only become more acute when we consider other areas in the Internal Revenue Code to which Congress could extend presidential discretion. While there have not been widespread calls to use presidential discretion in more areas of the Internal Revenue Code, the theoretical case for stopping at disaster relief provisions is not at all obvious. And once Congress has given the authority to the President it is hard to take it back.[238]

III. BEYOND FOREIGN POLICY AND NATURAL DISASTERS: WHERE PRESIDENTIAL TAX DISCRETION COULD (BUT SHOULD NOT) EXPAND

Statutory authority of the President to vary tax consequences is currently confined to a few Code provisions, most of which address traditionally executive-driven areas such as disasters, foreign policy, and homeland security. But the notion of a tax deduction, exclusion, or credit, the existence of which depends on a presidential declaration, could be expanded to many different contexts in the Code. This Section explores several different provisions, many

235. David J. Herzig, *Justice for All: Reimagining the Internal Revenue Service*, 33 VA. TAX REV. 1, 22–26 (2013) (citing JOHN A. ANDREW, III, POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON (2002)).

236. *Id.*

237. 26 U.S.C. § 6103(a).

> (1) [N]o officer or employee of the United States . . . and (3) no other person . . . who has or had access to returns or return information . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

Id.

238. Vladeck, *supra* note 7, at 611 ("Thanks to the Supreme Court's 1983 decision in *INS v. Chadha*, it has become practically impossible for Congress to claw back these [national security] authorities once they have been delegated.") (footnote omitted).

centering on financial emergencies, that could incorporate a requirement of a presidential declaration. While there are practical arguments against expanding executive discretion to additional parts of the Code, the theoretical basis for drawing the line at disasters is not entirely convincing.

A. Worthless Securities Deductions

A taxpayer can take a deduction for securities that become worthless during the taxable year.[239] To establish that a security became worthless, a taxpayer must show more than a severe decline in the value of the stock.[240] A decline in value of the stock, "even though extensive, does not give rise to a deduction . . . if the stock has any recognizable value."[241] The taxpayer must show both that the liabilities of the company exceed its assets and that the security has no reasonable chance of having value in the future.[242] Generally the taxpayer must point to an "identifiable event," such as bankruptcy, cessation of business, or liquidation of the corporation, which "clearly evidences destruction of both the potential and liquidating values" of the security.[243] The taxpayer must also prove that the worthlessness of the security came about during the year in which the deduction is taken.[244]

Whether a security lacks a reasonable chance of having value in the future is a factual issue often disputed between taxpayers and the IRS. For example, in *Figgie International, Inc. v. Commissioner*, the Sixth Circuit upheld the IRS's denial of a worthless stock deduction even though the corporation had a "history of operating losses," the stock had a "negative liquidating value," the shareholder had repeatedly made unsuccessful attempts to sell the stock, and the eventual buyer had refused to pay any cash for the stock.[245] Although the corporation had suffered losses or only made a small profit in prior years, its situation had significantly improved as of the year in which the taxpayer attempted to claim

239. I.R.C. § 165(g); Treas. Reg. § 1.165-5 (2008). If the security was a capital asset, the loss is a capital loss. I.R.C. § 165(g)(1). The loss is ordinary if the security was not a capital asset. Treas. Reg. § 1.165-5(b) (2008). "Worthlessness of a partnership interest is an ordinary loss, if the partner receives nothing in exchange." I.R.S. Chief Couns. Adv. 200851054 (Dec. 19, 2008). The amount of the loss is limited to the taxpayer's adjusted basis in the security. I.R.C. § 165(b).

240. "The burden of establishing worthlessness is on the taxpayer." Delk v. Comm'r, 113 F.3d 984, 986 (9th Cir. 1997).

241. Treas. Reg. § 1.165-4(a) (1960). Note, however, that under the mark-to-market rules of § 475, a dealer or trader in securities may recognize a decline in value of a stock as an ordinary loss, even without selling the stock. I.R.C. § 475. This treatment is mandatory for a dealer in securities but elective for a trader. *Id.* § 475(a), (f).

242. Morton v. Comm'r, 38 B.T.A. 1270, 1278–79 (1938), *aff'd*, 112 F.2d 320 (7th Cir. 1940); Austin Co. v. Comm'r, 71 T.C. 955, 969–70 (1979); John C. McCoy, Loss Deductions, 527-4th Tax Mgmt. Port. (BNA), at III.E (2021).

243. *Austin Co.*, 71 T.C. at 970.

244. G.E. Emps. Sec. Corp. v. Manning, 137 F.2d 637, 638–39 (3d Cir. 1943).

245. Figgie Int'l, Inc. v. Comm'r, 807 F.2d 59, 63 (6th Cir. 1986).

a worthless stock deduction.[246] Similarly, in *Osborne v. Commissioner*, the Tax Court held that a corporation's stock had value even though the circumstances suggested that the corporation's liabilities exceeded its assets by millions of dollars and the corporation filed for bankruptcy months after the end of the taxable year.[247] The court emphasized that the closing price of the corporation's stock on NASDAQ as of December 30 of that year was $0.75 per share and that the taxpayer failed to show "that the price of the security listed on NASDAQ did not reflect the price at which a willing buyer would be able to buy the stock and a willing seller would be able to sell the stock."[248]

The Tax Court reached the opposite conclusion in *Austin Co. v. Commissioner*.[249] There, the court found that stock was worthless where the taxpayer resolved to sell the corporation, obtained an independent appraisal, signed binding contracts for the sale of the corporation fixing the liquidation value of the assets of the corporation, the corporation's balance sheet showed a negative net worth of roughly $258,000, and the corporation stopped operating.[250] Likewise, in *Delk v. Commissioner*, the Ninth Circuit upheld a taxpayer's worthless stock deduction where, in a Chapter 11 bankruptcy of the corporation, the taxpayer's old shares were cancelled and the taxpayer contributed capital to the corporation in exchange for new shares in the corporation.[251] The court reasoned that the old shares ceased to have value, and that the taxpayer received the new shares solely as consideration for the new cash contribution.[252] The court reached this conclusion even though the corporation continued to operate during and after the bankruptcy proceedings.[253]

These are but a few of many worthless securities cases that depend on narrow factual differences. Arguably, introducing an exclusive test or a safe harbor for allowing worthless securities deductions based on a determination by the President could bring certainty to the law, especially in times of severe economic downturn. This discretionary standard could take various forms. For example, Congress could allow any taxpayer to elect to mark losses to market for any taxable year in which the President determines that the U.S. economy (or either a sector of the economy or the economy of a particular region or state in the United States) entered into a recession or suffered another detrimental

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246. *Id.*

247. Osborne v. Comm'r, No. 12057-93, 1995 Tax Ct. Memo LEXIS 353, at *11–12, *15 (Aug. 1, 1995).

248. *Id.* at *10–11; *see also G.E. Emps.*, 137 F.2d at 640–41.

249. Austin Co. v. Comm'r, 71 T.C. 955, 970–71 (1979).

250. *Id.*

251. Delk v. Comm'r, 113 F.3d 984, 986–88 (9th Cir. 1997).

252. *Compare Delk*, 113 F.3d at 986–88, *and* DeFord v. Comm'r, 19 B.T.A. 339, 344–45 (1930) (reaching same conclusion as *Delk* on similar facts), *with* Coleman v. Comm'r, 81 F.2d 455, 455–56 (10th Cir. 1936) (finding that no loss occurred where old stockholders received warrants in exchange for their shares).

253. *Delk*, 113 F.3d at 985.

economic event.[254] This would resemble a deduction for partially worthless stock and would avoid some of the troublesome questions about whether the corporation is balance-sheet insolvent and lacks a reasonable expectation of generating future value. Congress could also take a narrower approach, such as allowing the President to dispense with one part of the test for worthless stock deductions if the President determines that the economy entered a recession (or some other triggering event occurred). Under that approach, the President might be authorized to enable taxpayers to take worthless stock deductions if the corporation's liabilities exceeded its assets, without the requirement to determine whether the corporation had any chance of generating value in the future.[255]

An alternative (or additional) approach would be to make it easier for taxpayers to show that a loss occurred during a particular year if the President made a determination that a recession or some other event happened during that year. In many cases, the IRS and taxpayers argue not over whether the securities became worthless in *some* year but instead dispute whether the securities became worthless in *that* year. Say, for example, that a real estate business suffered badly in the subprime mortgage crisis in the late 2000s. An owner might have been fairly certain that the business would not recover but may have held out some hope for a change in circumstances before the business ultimately failed in a later year. In that case, Congress could have provided some type of safe harbor in § 165 to enable the owner to take the worthless security loss in 2007, when the recession started.[256]

Aside from providing some certainty, a safe harbor approach, such as allowing investors to mark losses to market, could provide relief to inexperienced investors. In the era of Robinhood and Reddit day traders, many market participants have piled into stocks that the broader market viewed as inevitably doomed. Sometimes these investors took home impressive returns. Other times the results were less spectacular with many investors, some of whom may have bought the stock based on advice from a social media thread, sustaining painful losses. Indeed, someone somewhere bought GameStop stock at $483 per share.[257] These investors could be partially redeemed by a safe harbor allowing them to claim losses based on the President's declaration that

254. Congress could select any one of a number of economic indicators.

255. In each of these cases, the tax law would need to address the result if a security later recovered its value and the taxpayer sold it for a profit. One way to address this would be to decrease the security's value by the amount of the deduction that the taxpayer took.

256. For an example of administrative relief providing certainty and beneficial rules to taxpayers who suffered losses in connection with Ponzi schemes, see Rev. Rul. 2009-9, 2009-14 I.R.B. 735 (stating, among other things, that the loss is a theft loss rather than a capital loss), Rev. Proc. 2009-20, 2009-14 I.R.B. 749 (providing safe harbor methods for calculating the loss and determining the year in which it occurred), and Rev. Proc. 2011-58, 2011-50 I.R.B. 849 (modifying Rev. Proc. 2009-20).

257. Yun Li, *GameStop Breaks Below $50 a Share as Short Squeeze Comes to an End*, CNBC (Feb. 9, 2021, 4:15 PM), https://www.cnbc.com/2021/02/09/gamestop-breaks-below-50-a-share-as-short-squeeze-comes-to-an-end.html.

a particular event, such as a measure of market volatility or unfair manipulation, had occurred. Perhaps most obviously, it could reduce the complexity for investors (and possibly IRS auditors) attempting to determine when a stock becomes worthless. The shocking transformation of companies like GameStop and Hertz from mere targets of short sellers to market darlings serves as a reminder that the stock market is not always a reliable gauge of underlying value. In addition, a safe harbor approach could provide relief for those who bought at the top and may have lost a down payment on a home or funds formerly in a retirement account. That said, any relief would have to be weighed against the incentives created for investors to engage in irresponsible or market-destabilizing behavior.

Despite the potential benefits of such an approach (aside from the numerous details that a true proposal would need to sort out), giving the President the ability to unilaterally loosen the rules on worthless stock deductions would create several serious concerns. The potential revenue loss would likely be far larger than in the disaster context.[258] Aside from the prevalence of stock ownership among the U.S. population, the role of insurance in stock investments is far smaller than in the context of personal residences. If a person's home burns in a fire or is destroyed in a tornado, insurance often steps in to provide compensation to the owner. But if a stock's value falls, the investor is generally left holding the bag. Allowing taxpayers to claim losses for these often cyclical declines in value would pose risks for the fisc.

In addition, as in the disaster context, political considerations could taint the President's decisions. If the discretionary standard applies on a state-by-state, region-by-region, or even sector-by-sector basis, the President might be tempted to grant relief primarily to needed supporters. Even if the relief was nationwide, the President might be tempted to grant unnecessary relief as election years approached. While this would not sadden many taxpayers, the integrity of the tax law and the flow of government revenue could suffer.

Triggering a tax deduction based on a presidential declaration could also reduce the likelihood that a taxpayer could obtain judicial review of the President's decision for abuse of discretion. It is generally harder to challenge the President's decision than it is to sue the Treasury Secretary or the Commissioner. Thus, if the President acted in an arbitrary manner in refusing to declare that a recession or other triggering event had occurred, it appears unlikely that taxpayers would be able to obtain review of the President's decision. Perhaps more concerning, if the President declared a recession based not on objective economic circumstances but instead on political considerations related to an upcoming election, it would be difficult to find someone who has standing to challenge that decision. And voters receiving

258. *See* Manolakas, *supra* note 13, at 17 (noting relatively small projected savings ($0.2 billion per year from 2018–2021) from requiring a federally declared disaster for deductions of net casualty losses).

windfall worthless stock deductions would have little incentive to hold the President accountable for this politically motivated decision.

Ultimately, then, the downsides of a discretionary approach to worthless securities deductions counsel against extending presidential discretion to that area. But it is less clear, as a theoretical matter, what distinguishes disasters from worthless securities deductions. COVID-19 has brought us many things, one of which is a disaster declaration predicated on destruction other than physical harm. If the President can declare a disaster under the Stafford Act, and thus determine tax consequences for taxpayers, even without physical harm, the theoretical arguments against extending this type of approach to areas focused on economic disaster are less persuasive. Likely, the gut reaction of many academics, lawyers, and lawmakers will be that this is a bridge too far, with too many potential revenue effects and too much discretion. We agree. But now that declarations have extended beyond cases involving physical destruction, there is arguably not a meaningful distinction between relying on a disaster declaration as a trigger of tax consequences versus some other presidentially determined event.

B. Bad Debt Deductions

Presidential discretion could also play a role in determining deductions for bad debts under § 166. As with worthless securities deductions, a test for deducting bad debts based on a presidential determination could provide certainty and relief to taxpayers. Ultimately, however, Congress should decline to extend presidential discretion into this area for the same reasons previously discussed.

Section 166 provides a deduction for any debt that becomes wholly or, at the Treasury Secretary's discretion, partially worthless during the taxable year.[259] Whether a debt has become wholly or partially worthless is a question of fact. "Proof of worthlessness generally requires a showing of identifiable events demonstrating the valuelessness of the debt and justifying abandonment of hope of recovery."[260] Factors that might show a debt has become worthless include "the value of [the] collateral" that "secur[es] the debt,"[261] "the debtor's serious financial reverses, insolvency, lack of assets, persistent refusals to pay on demand, ill health, death, disappearance, abandonment of business, bankruptcy, and receivership, as well as the debt's unsecured or subordinated

259. Cole v. Comm'r, 871 F.2d 64, 66 (7th Cir. 1989). For noncorporate taxpayers, if a nonbusiness debt becomes worthless, the loss is considered a short-term capital loss. I.R.C. § 166(d). Noncorporate taxpayers may not take a deduction for partially worthless nonbusiness debts; instead, the taxpayer must wait until the debt becomes wholly worthless. *Id.* Section 166 does not apply to debts evidenced by securities described under § 165(g)(2)(C). *Id.* § 165(e); Treas. Reg. § 1.166-1(g) (1986).

260. *Cole*, 871 F.2d at 67.

261. Treas. Reg. § 1.166-2(a) (1993).

status and expiration of the statute of limitations."[262] Factors that weigh against worthlessness, on the other hand, include "the creditor's failure to press for payment (especially if the debtor is a relative or friend), willingness to make further advances, availability of collateral or guarantees by third parties, the debtor's earning capacity, minor defaults, payment of interest, and sluggish business conditions."[263]

As with worthless stock deductions, the fact-intensive nature of whether a debt is worthless has generated reams of case law that often turns on narrow factual distinctions. For example, in Rev. Rul. 71-577, the IRS allowed a taxpayer with personal savings in a deposit account with a savings and loan association to take a bad debt deduction when the association went bankrupt and was placed in receivership.[264] There, the receiver had notified the taxpayer that the association "had few assets remaining and after liquidation it was doubtful that anything would remain for distribution except for possibly one or two cents on the dollar."[265] Conversely, the Tax Court held in *Fincher v. Commissioner* that a taxpayer's deposits in a savings and loan association were not worthless even though the association had closed for liquidation.[266] The taxpayer presented no evidence of the value of the assets of the association at the time of liquidation or the likelihood that he would recover any part of the deposits.[267] In addition, the taxpayer did not take action to recover the deposits and provided no evidence that collection attempts would have been futile.[268]

Further, in *Carroll v. Commissioner*, the Tax Court allowed a taxpayer to take a bad debt deduction when the borrower missed multiple payments, made no promises of future payment, had heavily mortgaged his assets to secure other

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262. *Cole*, 871 F.2d at 67 (quoting 2 BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 33.3, at 33–11 (1981)); *see also* Shaw v. Comm'r, No. 8172-12, 2013 Tax Ct. Memo LEXIS 182, at *15–16 (July 24, 2013) ("Objective indicia may include a decline in the debtor's business; a decline in the value of the debtor's assets; the overall business climate; serious financial reverses suffered by the debtor; the debtor's earning capacity; events of default; insolvency of the debtor; the debtor's refusal to pay; actions taken by the creditor to pursue collection; and subsequent dealings between the creditor and debtor. No single factor is conclusive. The mere fact that a business is in decline, that it has failed to turn a profit, or that the debt obligation is difficult to collect is insufficient to prove that the debt has become worthless. This is especially true where the debtor continues as a going concern with the potential to earn a future profit.") (citations omitted). If the debt is unsecured, bankruptcy generally indicates that the debt is worthless at least in part. Treas. Reg. § 1.166-2(c)(1). "The debt may become worthless before settlement [of the bankruptcy] in some cases; at settlement in others. In either case, the mere fact that proceedings terminate in a later year does not authorize the shifting of the deduction to that year." Rev. Rul. 71-577, 1971-2 C.B. 129.

263. *Cole*, 871 F.2d at 67. (quoting BITTKER, *supra* note 262). A creditor need not take legal action in an attempt to enforce payment; if the "circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt." Treas. Reg. § 1.166-2(b).

264. Rev. Rul. 71-577, 1971-2 C.B. 129.

265. *Id.*

266. Fincher v. Comm'r, 105 T.C. 126, 138 (1995).

267. *Id.*

268. *Id.*

loans, and was unable to sell the debt.[269] The Seventh Circuit reached the opposite conclusion in *Cole v. Commissioner*, when a lawyer lent money to a professional corporation in which he was a shareholder.[270] The court concluded that the debt was worth something even though the taxpayer argued that the debtor's major assets had minimal value and were subject to another lender's priority lien.[271] Similarly, in *Randall v. Commissioner*, the Tax Court held that a debt did not become worthless when the debtor continued operating for four more years.[272] Although the debtor was "financially troubled," the lender's actions in postponing required loan payments and subordinating the loan to loans from other lenders showed that the lender had not given up hope of receiving payment on the loan in the year at issue.[273]

The narrow distinctions between these types of cases create problems both for taxpayers and the IRS. As the author of a prominent secondary source noted, "In the absence of legislation or regulations setting forth objective criteria, the determination of worthlessness continues to be a highly subjective determination, dependent on the facts of the particular case."[274] Indeed, the IRS has previously issued administrative relief to certain types of taxpayers by directing examiners not to challenge bad debt deductions by certain banks and insurance companies.[275]

One option for increasing certainty would be to include objective criteria in the statute, such as whether the debtor's assets exceed its liabilities. Another option would be to include a measure based on presidential discretion. For example, the statute might say that if the President declares that a recession or other event has occurred in the United States, lenders can take deductions for bad debts in accordance with write-downs of their debts for accounting purposes. Or it might provide a safe harbor method for partially writing down even nonbusiness debts if the President made a declaration that a recession or other event has occurred. Similar to worthless securities deductions, Congress

269. Carroll v. Comm'r, No. 10409-80, 1981 Tax Ct. Memo LEXIS 193 (Sept. 28, 1981).

270. Cole v. Comm'r, 871 F.2d 64, 65, 68 (7th Cir. 1989).

271. The court found that the lender's calculation of the value of the debtor's property was unreliable because it was based solely on figures provided in the debtor's tax returns and did not reflect assets such as good will. *Id.* at 68. In addition, the court noted that the law firm had continued to service the priority loan without default. *Id.*

272. Randall v. Comm'r, No. 8251-75, 1980 Tax Ct. Memo LEXIS 124, at *8, *14 (Oct. 14, 1980).

273. *Id.* at *8.

274. John C. McCoy, Bad Debts, 538-3rd Tax Mgmt. Port. (BNA), at VI.A (2021).

275. I.R.S. Treas. Dir. LB&I-04-1014-008 (Oct. 24, 2014) (directing Large Business & International examiners to accept charge-off amounts reported by banks and their subsidiaries for Generally Accepted Accounting Principles and regulatory purposes as sufficient evidence of worthlessness of certain bank assets, and noting that "[i]ndependently determining worthlessness amounts under § 166 imposes a significant burden on Banks, Bank Subsidiaries, and LB&I examiners"); I.R.S. Treas. Dir. LB&I-4-0712-009 (July 30, 2012) (directing examiners not to challenge an insurance company's partial worthlessness deduction under § 166(a)(2) for certain loan-backed securities if consistent with reports filed with state regulators for accounting purposes and noting that "[i]ndependently determining partial worthlessness amounts under section 166 imposes a significant burden on both insurance companies and LB&I").

could also use a presidential declaration to fix the year in which the debt became worthless. This could potentially provide increased certainty to taxpayers and the tax authorities and would not be without precedent.[276]

In addition, extending presidential discretion to bad debt deductions would provide relief for taxpayers who have often suffered harm from an event that they did not cause. For example, taxpayers who lent money might have seen their likelihood of repayment suffer as a result of the COVID-19 pandemic. Clearly COVID-19 was not the lenders' fault. In this way, bad debt deductions can be analogous to losses in disasters and could be theoretically subject to similar rules.

But introducing a presidential declaration to bad debt deductions would raise many of the same concerns as presidential discretion in the context of worthless securities deductions. The revenue loss could be far greater than that associated with deductions for personal casualty losses, especially if Congress introduced presidential discretion to both worthless securities and bad debt deductions. Political considerations could still taint the President's decision. And it is unclear when, if ever, a taxpayer could obtain review of the President's decision.[277] Again, although a theoretical basis for making the extension exists, the practical consequences counsel against it.

C. Possible Additional Areas for Presidential Tax Discretion

The areas outlined above are not exclusive. Presidential discretion could be extended to many different areas in the tax law. For example, a President's declaration of an adverse economic event might be tied to provisions such as granting tax-free or penalty-free access to retirement accounts, activating the employee retention credit or programs like the Paycheck Protection Program, suspending limitations on carrying back net operating losses, relaxing loss limitations for noncorporate taxpayers under § 461(l), or loosening the rules for deduction business interest expense under § 163(j), among others. A presidential declaration could even allow for exclusion of cancellation of indebtedness income in connection with measures taken to address a student loan crisis, high nationwide unemployment, or similar widescale economic setbacks.

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276. *See* I.R.S. Treas. Dir. LB&I-04-1014-008; I.R.S. Treas. Dir. LB&I-4-0712-009.

277. Compare a potential absence of judicial review of the President's decision to the taxpayer's present ability to challenge the Treasury Secretary's decision to deny a deduction for a partially worthless debt. The Treasury Secretary has discretion in determining whether a taxpayer may take a deduction for partially worthless debt, but this exercise of discretion cannot be "arbitrary and unreasonable." Austin Co. v. Comm'r, 71 T.C. 955, 971 (1979). The Treasury Secretary cannot "ignore the soundly exercised business judgment of a taxpayer's officers in determining partial worthlessness. . . . [I]f management's business judgment is supported by facts establishing partial worthlessness," courts will overturn the Secretary's exercise of discretion. *Id.* at 971–72.

The arguments against doing this are clear: at a certain point, the President's control over the Internal Revenue Code would become so pervasive as to significantly shift the separation of powers between the Legislative and Executive Branches. That shift could be even larger if the President makes an effort to expansively interpret his authority to declare that an adverse economic event (whether that is a national or regional recession or something else) has occurred. Because this would be a taxpayer-favorable action, very few, if any, parties would have standing to challenge it, making it virtually unreviewable by the judiciary. The answer in that scenario might be for Congress to step in and take back the authority. The President's veto power makes this very hard though, as each chamber of Congress must pass the bill by a two-thirds vote.

But despite these obvious arguments against a tax code riddled with express presidential discretion, it is less clear why we should stop at disasters. The reasoning, presumably, is that Congress must stop somewhere in granting presidential discretion in the Code lest the Executive end up with the power to run rampant in all areas. But, as an analytical matter, what makes these provisions—from accessing retirement accounts to activating net operating losses—so different from disaster losses? Although differences exist, such as the likely availability of insurance for physical destruction, it is difficult to draw a substantial distinction between disaster losses and many of these other provisions.

So, where does this leave us? Our view is that presidential discretion tied to foreign policy and fighting terrorism is fine. Those are areas over which the Executive clearly exercises robust authority, and the President has exercised restraint in using the full extent of existing powers over those matters. Perhaps the Internal Revenue Code should incorporate an avenue for judicial review for certain taxpayers or require that another actor, such as the Treasury Secretary, make the determination in order to preserve review under the APA, but ultimately these areas seem naturally bounded.

Presidential discretion tied to disaster declarations is more questionable. The arguments for it are clear—it can increase certainty and responsiveness in times of crisis. But the arguments against it, particularly the lack of a logical distinction between provisions like disaster losses and exclusions for qualified relief payments, on the one hand, and access to retirement accounts and the employee retention credit, on the other, call into question whether tax presidential discretion should even exist in the disaster context. And the benefits of certainty are overstated; indeed, with the changing nature of catastrophic events, the definition of disaster in the Stafford Act seems to be a moving target.

Rather than tying disaster-related provisions to a presidential declaration, Congress could adopt an approach that preserves the benefits of executive discretion with the protections of administrative law. This approach should at least require an actor lower on the executive ladder—e.g., the Treasury

Secretary—to make the final decision on whether a disaster exists.[278] To go a step further, Congress could establish an independent commission tasked with determining whether a disaster has occurred, making the declaration, and tailoring relief in consultation with other agencies such as Treasury. Indeed, in a broader context, Professors James R. Hines Jr. and Kyle D. Logue have previously advocated for "an independent commission with authority to enact tax law reforms that would take effect unless a majority of both houses of Congress vote to stop it."[279] We stop short of advocating an independent commission for enacting broader tax laws but would support an independent commission with a more limited mandate in the disaster context.

Importantly, regardless of whether the decision-maker is an existing agency or an independent commission, the law should provide for judicial review of discretionary determinations. The standard of review would be abuse of discretion. To be sure, this would mean that decisions would rarely be overturned. But it would provide an important safeguard for arbitrary and uninformed decision-making.

It would also be important to provide safeguards for actions that are unduly favorable to taxpayers. It is generally impossible to challenge actions, even by administrative agencies, that grant undue benefits to a particular group or society at large. In her testimony to the House Ways and Means Committee on regulatory giveaways connected to the Tax Cuts and Jobs Act, Professor Rebecca M. Kysar suggested several approaches for limiting agency overreach.[280] One solution that she suggested to solve "the lack of standing to challenge Treasury and the IRS actions benefitting certain taxpayers would be a Congressional grant of power to an ombudsman, inspector general or other federal official to bring suit against Treasury and the IRS for regulatory decisions that contravene statutory authority."[281] Professor Kysar noted, though, that "the constitutionality of this approach is unclear."[282] Clearly, we do not want to create unnecessary hurdles for relief for individuals and businesses suffering in the wake of disasters, whether physical or economic. But some safeguard should be considered to curtail the risks of triggering tax relief upon a unilateral and unreviewable executive determination.

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278. Professors Aprill and Schmalbeck have previously suggested preserving a role for congressional action by requiring a joint resolution from Congress or by empaneling a group of executive and legislative staff to coordinate on a menu of disaster tax relief options. Aprill & Schmalbeck*, supra* note 13, at 95.

279. *See, e.g.*, Hines & Logue, *supra* note 8, at 274.

280. *TCJA's Business Tax Provisions: Design Flaws and Undemocratic Implementation: Before the H. Ways and Means Comm.*, 115th Cong. 9–10 (2017) (statement of Rebecca M. Kysar, Professor of Law, Fordham University School of Law).

281. *Id.* at 9 (first citing MICHAEL J. GRAETZ ET AL., FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 81 (2018); then citing Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617, 667 (2016) as commentators who have previously suggested such an approach as a possibility).

282. *Id.* at 10.

CONCLUSION

The President is uniquely positioned to quickly respond to a wide range of crises and to be held accountable for the effectiveness of the response. It therefore makes sense for the Executive Branch to make determinations like emergency and disaster declarations that instantly make resources available and facilitate a coordinated federal response. And indeed, Congress has delegated that authority to the President and other Executive Branch officials in areas of trade, foreign relations, national security, and natural disasters. These decisions are largely unbounded by objective standards or outside review. Nonetheless, in several cases, Congress has attached tax consequences to the determination, most notably in recently denying personal casualty loss deductions in the absence of a federally declared disaster. Indeed, Congress may be tempted to look to other areas, particularly during financial emergencies, to provide a reprieve for sympathetic taxpayers who would otherwise face complicated and unpredictable factual determinations as a threshold for tax relief. In highlighting the lack of reviewability and the unpredictability of unilateral presidential determinations, this Article has shown that despite the appeal of coordinated relief, Congress should not continue to assign automatic tax consequences to declarations statutorily delegated solely to the President.