D.C. Circuit: 'The IRS Is Not Special'

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The D.C. Circuit's recent *en banc* decision in *Cohen* allowed a challenge to a tax refund procedure established in an IRS notice to proceed as a free-standing suit under the Administrative Procedure Act (APA), outside the traditional framework for challenging IRS actions through tax refund suits or Tax Court petitions. Because that result depended on the highly unusual circumstances presented in the case, it is unlikely that taxpayers will often be able to take advantage of the holding.

More broadly significant, however, is the fact that, in its analysis, the D.C. Circuit confirmed that the IRS is subject to the requirements of the APA. That confirmation is a welcome application in the APA context of the Supreme Court's more general holding in *Mayo* that the IRS is subject to the same general requirements of administrative law that apply to all other federal agencies.

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Introduction

The D.C. Circuit's recent *en banc* decision in *Cohen v. United States*[1] allowed a challenge to a tax refund procedure established in an IRS notice to proceed as a free-standing suit under the Administrative Procedure Act[2] (APA), outside the traditional framework for challenging IRS actions through refund suits or Tax Court petitions. Under the unusual circumstances in *Cohen*, the court rejected the IRS's arguments that the suit was barred by the Anti-Injunction Act[3] (AIA) or the tax exception to the Declaratory Judgment Act[4] (DJA).

The D.C. Circuit also held that the waiver of sovereign immunity under section 702 of the APA[5] applies because the taxpayers are seeking relief other than money damages. The relief being sought is a determination that the refund procedure itself is improper on both procedural and substantive grounds.

Finally, the *en banc* court held that the relief was not barred by the APA's requirement that the challenge involve an "agency action for which there is no other adequate remedy in a court,"[6] despite the availability of a conventional tax refund suit. The majority reasoned that the basis for the challenge is the propriety of the refund mechanism itself and that the relief sought is not a tax refund, but rather a determination that the refund mechanism is improper. For those same reasons, the ripeness requirement was also satisfied.

The "adequate remedy" and ripeness issues are the closest and most difficult questions presented by the case. Unfortunately, because they were not among the issues on which *en banc* review was granted, the court addressed them without the benefit of full briefing by the parties. The court's analysis of those questions is therefore less persuasive than its analysis of the issues that were fully briefed.

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[1]No. 08-5088 (D.C. Cir. 2011), *Doc 2011-14478, 2011 TNT 128-14*. Three judges dissented from the six-judge majority opinion.
[2]5 U.S.C. sections 701-706 (the judicial review provisions of the Administrative Procedure Act).
[3]Section 7421(a).
[4]28 U.S.C. section 2201(a).
[5]5 U.S.C. section 702.
[6]5 U.S.C. section 704.

Although the D.C. Circuit went beyond the issues on which *en banc* review was granted, it still did not address the principal question considered by the original three-judge panel: whether the notice that established the challenged refund procedure was a substantive rule under the APA or instead, as the government contended, a general statement of policy. A substantive rule is a final agency action subject not only to review under the APA, but also to the APA's notice and comment requirements for rulemaking.[7] By contrast, a general statement of policy is neither a final agency action nor the type of agency action subject to the APA notice and comment requirements.

If the *en banc* court had addressed that question and decided it in the taxpayer's favor, as the panel did, that holding — unlike the actual opinion — would have had broad significance for future challenges to IRS actions through the traditional mechanisms of refund suits and Tax Court petitions. Taxpayers could have cited it to support the contention that an IRS action in a notice, revenue ruling, or revenue procedure — even if it does not purport to be rulemaking — is potentially subject to the APA's notice and comment requirements, as long as the IRS action meets the standards for being considered a substantive rule under the APA.

Nevertheless, the initial panel's holding that the challenged notice is a substantive rule under the APA presumably remains binding precedent in the D.C. Circuit. However, because the *en banc* opinion does not contain a clear statement confirming the continued precedential status of the panel's holding on that point, taxpayers in future controversies may hesitate to cite it.

As the *en banc* majority recognized, the circumstances in *Cohen* that supported its holdings are unusual and unlikely to be duplicated often.[8] Most significantly, it was essential to the holdings on the AIA and the DJA issues that the tax had already been collected and would not be collected in the future because the IRS had agreed the tax was collected improperly.

Yet, despite its unusual facts, some aspects of *Cohen* have significance beyond the specific holdings. The case's broader importance is its clear confirmation that the IRS is subject to the APA's requirements no less than any other agency. The *en banc* majority opinion expressed that principle in two separate passages:

> The IRS is not special in this regard; no exception exists shielding it — unlike the rest of the Federal Government — from suit under the APA.[9]

> The practical consequence of the dissent's . . . argument is a judicially created exemption for the IRS from suit under the APA. There may be good policy reasons to exempt IRS action from judicial review. Revenue protection is one. But Congress has not made that call. And we are in no position to usurp that choice.[10]

In support of the second passage, the majority cited the Supreme Court's *Mayo* decision, emphasizing "the importance of maintaining a uniform approach to judicial review of administrative action."[11] Although the *Mayo* Court articulated the principle that the IRS is no different from any other agency for purposes of administrative law generally,[12] the case did not deal with the APA, so it is helpful to have the general principle that "the IRS is not special" applied by the *en banc* D.C. Circuit in the specific context of the APA.

Taxpayers are usually content to challenge IRS action through the traditional mechanisms of refund suits and Tax Court petitions and thus will not ordinarily need the APA to get into court. However, in those traditional types of proceedings, the general principle that the APA provisions imposing restrictions on agency action[13] apply to the IRS no less than to other agencies is much more significant than *Cohen*'s relatively narrow holdings on the AIA, the DJA, and the APA. The majority's citation of *Mayo* confirms that case's importance for the general notion that the IRS is subject to the same administrative law requirements that apply to all other federal agencies.[14]

As an *en banc* opinion from the circuit that specializes in administrative law issues, *Cohen* has particular significance in confirming the IRS is not special for purposes of the APA. Moreover, even on the relatively narrow issues actually decided by the

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[7]5 U.S.C. section 553.

[8]Slip op. at 28 ("In sum, this suit is *sui generis*. . . . In the tax context, the only APA suits subject to review would be those cases pertaining to final agency action unrelated to tax assessment and collection.").

[9]*Id.* at 10.

[10]*Id.* at 34 (citations omitted).

[11]*Id.* (quoting *Mayo Found. for Med. Educ. & Res. v. United States*, 131 S. Ct. 704, 713 (2011), *Doc 2011-609*, *2011 TNT 8-10*).

[12]"We are not inclined to carve out an approach to administrative review good for tax law only." *Id.* at 713.

[13]*See* 5 U.S.C. section 553 (notice and comment requirements for rulemaking); and 5 U.S.C. section 706(2)(A) (arbitrary and capricious standard for judicial review). For a discussion of the arbitrary and capricious standard, see Patrick J. Smith, "*Mannella*, *State Farm*, and the Arbitrary and Capricious Standard," *Tax Notes*, Apr. 25, 2011, p. 387, *Doc 2011-6811*, or *2011 TNT 80-6*.

[14]*See* Smith, "Life After *Mayo*: Silver Linings," *Tax Notes*, June 20, 2011, p. 1251, *Doc 2011-10520*, or *2011 TNT 119-2*.

D.C. Circuit, *Cohen* provides an interesting opportunity to examine the application of various APA requirements in the context of a challenge to an IRS action.

Also, *Cohen* itself is far from over. The D.C. Circuit remanded the case to the district court. Whatever the outcome, the remand proceedings will undoubtedly be subject to further appellate review, and the issues presented on appeal may well have broader application than the specific holdings of the *en banc* opinion. In particular, the subsequent proceedings will likely clarify the status of the initial panel's holding that the IRS notice is a substantive rule and therefore subject to the APA notice and comment requirements. Moreover, neither the panel nor the *en banc* court was called on to address the class certification issues that will presumably need to be considered if the taxpayers prevail in their challenge to the validity of the refund procedure established in the notice.

Background

Cohen involves refunds of the telephone excise tax. Five circuits held that the IRS was improperly applying the tax to long-distance telephone service for which the charge was based solely on time; they concluded that phone service isn't taxable under section 4252(b)(1) unless the charge is based on both the duration of the call and the distance traveled.[15] After losing on this issue in the five circuits, the IRS announced in Notice 2006-50[16] that it would no longer apply the tax to time-only service and that it would refund taxes improperly imposed during a limited period.

It is the refund mechanism provided in Notice 2006-50 that is at issue in the ongoing *Cohen* litigation. Several separate suits challenging the refund mechanism were consolidated in the U.S. District Court for the District of Columbia.[17] The grounds for challenge include the claim that Notice 2006-50 is a substantive rule under the APA and accordingly should have been issued using notice and comment procedures. Plaintiffs also assert that the refund procedure established in Notice 2006-50 is arbitrary and capricious under the APA for various reasons. They complain that the notice requires the filing of an *income tax* return to obtain a refund of *an excise tax* that has nothing to do with income taxes. Plaintiffs also argued that taxpayers were required to provide detailed documentation to obtain a refund greater than the small safe harbor refund amounts but there was no corresponding requirement for the telephone companies that had actually collected the tax to assist taxpayers in connection with that documentation, even though telephone customers were never obligated to maintain or retain that documentation in connection with their supposed liability for the excise tax.

The district court issued two successive opinions in the consolidated case. In the first, it denied the government's motion to dismiss.[18] In its second opinion, the district court effectively reversed its prior holding and granted the government's motion.[19] The second opinion held that the court lacked subject matter jurisdiction over the refund claims because the plaintiffs failed to file timely refund claims with the IRS before bringing suit.[20] The court also concluded that Notice 2006-50 is a general statement of the IRS's internal policy rather than a substantive rule for APA purposes; it therefore held that the plaintiffs failed to state an APA claim on which relief could be granted.[21]

The three-judge D.C. Circuit panel found that the suits were not barred by the AIA or the DJA.[22] However, the issue on which it focused[23] was whether Notice 2006-50 is a substantive rule and therefore a final agency action, as required for free-standing review under the APA,[24] or instead a general statement of policy, which is exempt from the APA notice and comment requirements[25] and not reviewable under a free-standing APA challenge.[26]

The panel majority concluded that Notice 2006-50 is a substantive rule and therefore subject to free-standing APA review.[27] In reaching that conclusion, the majority looked to precedent on what constitutes a final agency action under the APA:

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[15]For a list of the cases, see slip op. at 3-4.

[16]2006-1 C.B. 1141, *Doc 2006-10089*, *2006 TNT 102-7*.

[17]*In Re Long-Distance Telephone Service Federal Excise Tax Litigation*, 469 F. Supp.2d 1348 (J.P.M.L. 2006).

[18]*In Re Long-Distance Telephone Service*, 501 F. Supp.2d 34 (D.D.C. 2007).

[19]*In Re Long-Distance Telephone Service*, 539 F. Supp.2d 281 (D.D.C. 2008).

[20]*Id.* at 291-295. The court did not address whether the refund claim requirement in section 7422(a) is properly considered a jurisdictional requirement under the Supreme Court's recent line of cases narrowing the class of requirements for filing suit that are considered jurisdictional as opposed to mere claim-processing requirements. For a brief discussion of this line of authority, see Smith, ''Life After *Mayo*,'' *supra* note 14, at 1258-1259.

[21]*In Re Long-Distance Telephone Service*, 539 F. Supp.2d at 306-311.

[22]*Cohen v. United States*, 578 F.3d 1, 4-6, 12-15 (D.C. Cir. 2009), *Doc 2009-17950*, *2009 TNT 151-17*.

[23]*Id.* at 6-12.

[24]5 U.S.C. section 704.

[25]5 U.S.C. section 553.

[26]*Cohen*, 578 F.3d at 6.

[27]*Id.*

> To determine whether Notice 2006-50 is a binding standard, and thus a final and reviewable agency action, we consider whether it (1) marked the ''consummation'' of the IRS's decision-making process and (2) either affects legal ''rights or obligations'' or results in ''legal consequences.''[28]

The panel easily concluded that the first test was satisfied: ''Notice 2006-50 marked the culmination of the IRS's deliberations on the refund process.''[29] The panel found that the second test was also satisfied, because Notice 2006-50 produced legal consequences and affected legal rights and obligations by binding not only the IRS,[30] but also the telephone companies[31] and their customers.[32] Thus, the panel concluded that Notice 2006-50 constitutes final agency action[33] and a substantive rule.[34]

The panel opinion did not address the merits of the challenge beyond the question whether Notice 2006-50 was final agency action and a substantive rule. It instead remanded the case to the district court to consider the merits. One panel member dissented, concluding that the suits were barred by the DJA and the ripeness doctrine.[35]

Grant of *En Banc* Review

The D.C. Circuit granted the government's subsequent petition for rehearing *en banc*.[36] However, the order granting *en banc* review limited the scope of that review to four specific issues[37]:

> 1. whether the APA claims are barred by either the AIA or the DJA;
>
> 2. whether D.C. Circuit precedent interpreting the AIA and the DJA as ''coterminous'' should be overruled;
>
> 3. whether the APA claims, if barred by the AIA or the DJA, could be asserted by the plaintiffs in a refund suit challenging Notice 2006-50; and
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> 4. whether section 702 of the APA waives sovereign immunity for the APA claims.

The limited grant of *en banc* review is significant for two reasons. First, as discussed below, the grounds raised by the dissenting judges in the *en banc* opinion were not among the four issues on which review was granted (the review issues). As a result, the grounds on which the dissent relied were not adequately addressed in the parties' briefs, and none of the dissenting or majority judges had the benefit of a thorough briefing on those issues.

Nothing in the order granting *en banc* review suggested that any of the participating judges objected to the limited scope of review — including the judge who dissented from the initial panel decision and wrote the *en banc* dissent from the merits decision. Yet, the later dissent was based *entirely* on issues outside the review questions. And, as discussed below, presumably the *en banc* majority likewise strayed beyond the previously articulated scope of review to respond to points raised by the dissent.

The limited grant of *en banc* review is also significant because the specified issues did not include the principal question addressed by the panel majority opinion — namely, whether Notice 2006-50 is a substantive rule rather than a general statement of policy. The *en banc* majority opinion did not deal with this issue, even though, in response to the dissent, it considered other questions that were beyond the subjects specified for review.

Consistent with D.C. Circuit practice, the order granting *en banc* review vacated the panel judgment but not the panel opinion.[38] This fact, together with the *en banc* court's failure to address Notice 2006-50's status for APA purposes or to specify that topic for review, presumably means the panel's holding that Notice 2006-50 is a substantive rule remains binding D.C. Circuit precedent as though there had been no *en banc* review.

At several points in its opinion, the *en banc* majority suggested that the panel's holdings on the issues on which *en banc* review was not granted remained in effect.[39] Still, it would have been desirable for the order granting *en banc* review or the *en*

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[28] *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997)).
[29] *Cohen*, 578 F.3d at 7.
[30] *Id.* at 7-8.
[31] *Id.* at 8-9.
[32] *Id.* at 9-11.
[33] *Id.* at 12.
[34] *Id.* at 6, 8.
[35] *Id.* at 15-16.
[36] *Cohen*, 599 F.3d 652 (D.C. Cir. 2010) (*en banc*), *Doc 2010-5407*, *2010 TNT 49-19*.
[37] *Id.* (''The briefs are to be limited to the following issues.''). The description of the issues here is a paraphrase, rather than an exact quotation.
[38] *Cohen*, 599 F.3d at 652 (''It is further ordered that the portion of the court's August 7, 2009 judgment reversing in part and remanding the cases for further proceedings be vacated.''). *See* D.C. Circuit Rule 35(d) (''If rehearing en banc is granted, the panel's judgment, but ordinarily not its opinion, will be vacated.'').
[39] *See* slip op. at 10 (''We previously rejected this argument when the Service couched it in terms of a want of 'final agency action' under section 704, *see Cohen*, 578 F.3d at 7-10, and did not request briefing on the issue in our order granting en banc review. There is no need to revisit the issue now.''). Slip op. at 32 (''We rejected the Service's pre-enforcement argument at the panel stage and did not grant en banc review to reconsider it. The panel held this case was a *post*-enforcement action, and

(Footnote continued on next page.)

banc majority opinion to provide a more definitive statement confirming the continued precedential status of the panel's holding that Notice 2006-50 is a substantive rule. That statement would have been helpful not only to the parties in *Cohen* and to the district court in the remand proceedings, but also to taxpayers who might wish to cite this holding in future controversies.

Anti-Injunction Act

The AIA states that except as provided in various listed sections of the code, ''no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom the tax was assessed.''[40] The *en banc* majority easily concluded that the challenge to Notice 2006-50 was not barred by the AIA:

> This suit does not seek to restrain the assessment or collection of any tax. The IRS previously assessed and collected the excise tax at issue. The money is in the U.S. treasury; the legal right to it has been previously determined. . . . Hearing [this suit] — whatever its merit — will not obstruct the collection of revenue [or] alter Appellants' future tax liabilities. . . . This suit is strictly about the procedures under which the IRS will return taxpayers' money.[41]

The majority concluded that the challenge to Notice 2006-50 was easily distinguishable from a case like *Bob Jones University v. Simon*,[42] in which a university challenged the revocation of its tax-exempt status under section 501(c)(3). The latter challenge, the court noted, ''would have impacted the university's future tax liability because section 501(c)(3) organizations are exempt from FICA (social security) and FUTA (unemployment) taxes.''[43]

By contrast, the IRS acknowledged that the tax at issue in *Cohen* had been collected improperly and accordingly said the tax would not be collected in the future. Those facts were an essential element in the *en banc* majority's conclusion that the AIA did not apply, since there was no chance the challenge to Notice 2006-50 could affect the future collection of the tax to which the notice related. The unique nature of those facts will make it extremely difficult for taxpayers in future controversies to bring free-standing actions under the APA, rather than refund suits or Tax Court petitions, based on the authority of *Cohen*'s specific holdings regarding the inapplicability of the AIA.

The majority rejected the IRS's argument that any action affecting the amount of tax *retained* by the government comes within the AIA prohibition on actions affecting assessment and collection.[44] The majority also rejected the IRS's contention that the existence of a complex statutory scheme for refund litigation renders that litigation the only judicial mechanism available for challenging IRS actions.[45]

Declaratory Judgment Act

The principal DJA issue addressed in *Cohen* was whether the act's tax exception should be interpreted as having a larger scope than the AIA or whether the AIA and the DJA tax exception should instead be interpreted as ''coterminous'' in scope. The following text of the DJA tax exception is worded more broadly than the text of the AIA:

> In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes* other than actions brought under section 7428 of the Internal Revenue Code of 1986, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.[46]

Despite the different wording between the AIA and the DJA tax exception, the *Cohen en banc* majority concluded that prior D.C. Circuit precedent, as well as case law in other circuits, was correct to hold that the DJA tax exception should be interpreted as coterminous with the AIA. Thus, ''with respect to federal taxes'' means ''with respect to the assessment or collection of taxes''[47]:

> By design, the DJA tax exception serves a critical but limited purpose. It strips courts of jurisdiction to circumvent the AIA by providing declaratory relief in cases ''restraining the assessment or collection of any tax.''[48]

Sovereign Immunity

Because the *en banc* majority decided the first two review questions in the taxpayers' favor (the AIA and DJA issues), it was unnecessary to address the third question — namely, whether the taxpayers could pursue their challenge to Notice 2006-50 in a refund suit if either the AIA or the DJA barred the

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therefore fit for review, because Notice 2006-50 constituted final and reviewable agency action.'').

[40]Section 7421(a).

[41]Slip op. at 14.

[42]416 U.S. 725 (1974).

[43]Slip op. at 13.

[44]*Id.* at 15.

[45]*Id.* at 16-17.

[46]28 U.S.C. section 2201(a) (emphasis added).

[47]Slip op. at 18.

[48]*Id.* at 22.

action. On the fourth question — whether section 702 of the APA waived sovereign immunity for the plaintiffs' APA claims — the majority concluded the answer was yes.

Section 702 of the APA provides:

> An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency . . . acted or failed to act . . . shall not be dismissed nor relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.[49]

The majority found that the APA waiver of sovereign immunity applied because the plaintiffs were not seeking money damages, but rather a determination that the refund procedure established in Notice 2006-50 was improper:

> There is no doubt Congress lifted the bar of sovereign immunity in actions not seeking money damages. The IRS is not special in this regard; no exception exists shielding it — unlike the rest of the Federal Government — from suit under the APA.[50]

Although the foregoing statement was made in the context of a decision on the propriety of a free-standing action under the APA, it applies more broadly. Just as no exception shields the IRS from the waiver of sovereign immunity under section 702 of the APA, no exception shields it from the APA's other provisions. Most significantly, no exception shields the IRS from the APA's notice and comment requirements for rulemaking or from its arbitrary and capricious standard for judicial review of agency action.

The majority's conclusion that the plaintiffs were not seeking money damages within the meaning of section 702 of the APA clearly turned on the fact that the relief sought was a determination that the refund procedure in Notice 2006-50 was improper. Although the *en banc* opinion did not discuss this point, a suit seeking a tax refund would not necessarily be considered a suit for money damages under the APA's sovereign immunity provision merely because it is a suit to recover money. In *Bowen v. Massachusetts*,[51] the Supreme Court held that a suit seeking money as a remedy is not necessarily considered a suit for money damages for purposes of the APA's waiver of sovereign immunity: "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"[52] Instead, an order by a court that one party must pay money to another party may be "for specific relief . . . rather than for money damages."[53]

The Supreme Court later clarified its holding: "*Bowen* held that Congress employed this language ["money damages"] to distinguish between specific relief and compensatory, or substitute, relief."[54] Nevertheless, even though a suit seeking a tax refund might be considered a suit for specific relief rather than for compensatory or substitute relief and therefore might not be outside the APA's waiver of sovereign immunity as a suit seeking money damages, a suit seeking a tax refund under the APA would still need to overcome other obstacles. One of them is the separate APA requirement, discussed below, that there must not be an adequate alternative remedy. This poses a problem in light of the availability of tax refund suits as an alternative to suits under the APA. However, there is no obvious reason a litigant would want to bring a refund suit under the APA rather than the normal route.

With all four review questions resolved, one might have expected the majority opinion to end there. It did not. The court continued: "We now consider whether Appellants state a valid cause of action."[55] This issue was clearly not encompassed within the four review questions. Indeed, the majority noted at the outset of its opinion, "We have no occasion to visit the merits of Appellants' claims, as we granted rehearing en banc only to determine whether we have the authority to hear the case."[56] Whether the plaintiffs stated a valid cause of action relates to the merits of the challenge, not to the court's authority to hear the case.

Yet, some members of the majority must have concluded it was necessary to address the issues raised by the dissent. The dissent did not address any of the review questions, and it in no way acknowledged the total divergence between the issues it found dispositive and those on which the parties were instructed to limit their briefs. The majority commented on this omission:

> The dissent suggests these questions of statutory interpretation [regarding the AIA and the

[49]5 U.S.C. section 702 (emphasis added).
[50]Slip op. at 10 (citations omitted).
[51]487 U.S. 879 (1988).
[52]*Id.* at 893.
[53]*Id.* at 910.
[54]*Department of Army v. Blue Fox Inc.*, 525 U.S. 255, 261 (1999). Although there is some discussion of this aspect of *Bowen* in the Court's later decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-212 (2002), that discussion is in the context of the meaning of equitable relief in a different statute and thus does not seem to have significantly changed the meaning of *Bowen*'s holding, as clarified in *Blue Fox*.
[55]Slip op. at 25.
[56]*Id.* at 2.

DJA] are academic. But this statement is puzzling. These questions are the same ones the dissent raised at the panel stage, the same questions the court granted en banc review to consider, and the same questions the court asked the litigants to address. The court did not grant en banc review to reconsider whether this case was ripe, or whether Appellants failed to exhaust their administrative remedies.[57]

Adequate Remedy and Ripeness

The two points on which the *en banc* dissent relied were the ripeness doctrine and the adequate remedy requirement in section 704 of the APA. According to the dissent, the APA's requirement that there be ''no other adequate remedy in a court'' was not satisfied, because the propriety of the refund procedure in Notice 2006-50 could have been challenged in a conventional tax refund suit. The dissent also contended that the challenge was barred by the ripeness doctrine because the plaintiffs had not filed timely refund claims with the IRS. Again, these two grounds were not review issues.

As the majority noted, the D.C. Circuit held in an earlier case[58] that the ''final agency action'' requirement in APA section 704 was neither a limitation on the waiver of sovereign immunity in APA section 702[59] nor a jurisdictional requirement for review under the APA.[60] Thus, the dissent's reliance on the requirements of section 704 could not be viewed as encompassed within the question whether section 702 waived sovereign immunity on the plaintiffs' APA claims or as a necessary consideration of a jurisdictional issue.

Moreover, the third review issue — whether the plaintiffs could pursue refund claims if their freestanding APA challenge was barred by either the AIA or the DJA — did not by its terms pose the entirely different question whether the ''no adequate alternative judicial remedy'' requirement of section 704 could preclude a challenge brought directly under the APA that was not barred by either the AIA or the DJA. None of the four review issues referred to section 704, even though the panel opinion clearly addressed section 704 in connection with Notice 2006-50's status as a substantive rule and therefore a final agency action under section 704.

If the *en banc* review was intended to encompass the requirements of section 704, the court's order granting that review would have said so. The order clearly did not encompass the section 704 issue of whether Notice 2006-50 represented a final agency action. Consequently, it would be anomalous to interpret the third review question as covering whether there was an adequate alternative judicial remedy, since both that requirement and the final agency action requirement are part of the same phrase in section 704: ''final agency action for which there is no other adequate remedy in a court.''

On the merits of that issue, the *en banc* majority disagreed with the dissent's contention that a conventional tax refund suit would have provided an adequate alternative remedy. In refund suits, the majority noted, the relief would instead ''be individualized, not class wide as Appellants seek. Each taxpayer would have to litigate separately the Service's use of Notice 2006-50.''[61] The propriety of the refund procedure established in Notice 2006-50 was precisely what the challenge was about. The majority concluded it was unnecessary for the plaintiffs to comply with the disputed procedure as a prerequisite to challenging it.

In reaching that conclusion, the majority relied primarily on *McCarthy v. Madigan*.[62] *McCarthy* described one type of situation in which litigants have not been required to exhaust administrative remedies as a prerequisite to bringing suit:

> Exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that ''the question of the adequacy of the administrative remedy [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.''[63]

However, as the dissent correctly responded:

> There is a difference between (i) the doctrine requiring exhaustion of *administrative* remedies and (ii) the . . . principle that applies when, as here, Congress has provided alternative *judicial* procedures. . . . The majority opinion here melds them into an undifferentiated stew and then uses administrative exhaustion case law to try to respond to our [alternative remedy] argument.[64]

Because filing a refund suit is not an administrative remedy, as the dissent noted, case law on when exhaustion of administrative remedies may be excused does not directly address whether there is an adequate alternative *judicial* remedy to a freestanding challenge under the APA. Nevertheless,

[57] *Id.* at 11-12 (citation omitted).
[58] *Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2006).
[59] Slip op. at 10-11 (citing 456 F.3d at 187).
[60] Slip op. at 7 (citing 456 F.3d at 185).
[61] Slip op. at 26.
[62] 503 U.S. 140 (1992).
[63] *Id.* at 28 (quoting 503 U.S. at 148) (alterations in original).
[64] Dissenting op. at 9 (emphasis in original).

the dissent failed to answer the majority's point that when the substance of the plaintiffs' complaint is the very nature of the refund claim procedure, it would be anomalous to require compliance with that procedure as a prerequisite to challenging it.

In an attempt to respond to that point, the dissent argued that the plaintiffs could have filed refund suits without filing refund claims.[65] However, as the majority observed, that argument conflicts with section 7422(a), which provides that a refund suit cannot be maintained until after a refund claim has been filed.[66] In fact, the dissent recognized that ''the courts may well reject such attempts to evade the exhaustion requirement'' in section 7422(a).[67]

The dissent then seemed to abandon this entire line of argument: ''Even so, the burden of participating in a statutorily imposed exhaustion requirement does not make an alternative judicial forum inadequate.''[68] In light of this statement relying on an entirely different argument, it is unclear why the dissent bothered to argue the plaintiffs could file refund suits without filing refund claims.

In response, the majority emphasized the inadequacy of a series of individual suits, as demonstrated by the IRS's unwillingness to accept the binding effect of judicial opinions from one circuit to another.[69] Moreover, the majority noted, the purpose of the procedure established in Notice 2006-50 was to spare claimants the need to pursue separate refund suits: ''By promulgating the 2006 rule, the IRS effectively conceded a case-by-case resolution would be both inefficient and unfair.''[70] The majority found there was a clear conflict between the rationale underlying Notice 2006-50 and the dissent's argument that case-by-case resolution provided an adequate alternative remedy.

The majority's ultimate answer to the dissent's objection that precedent excusing exhaustion of *administrative* remedies does not directly respond to whether there is an adequate alternative *judicial* remedy was that in the tax refund context, a refund claim is a statutory prerequisite to filing a refund suit: ''It is far from clear Appellants could challenge Notice 2006-50 in a refund suit without first having to proceed through it.''[71]

Regarding the dissent's contention that the ripeness doctrine barred the suit, the majority noted that the IRS argued the suit was not ripe because it was a ''pre-enforcement action''[72]:

> We rejected the Service's pre-enforcement argument at the panel stage and did not grant en banc review to reconsider it. The panel held this case was a *post*-enforcement action, and therefore fit for review, because Notice 2006-50 constituted final and reviewable agency action barring Appellants ''from pursuing their refunds in court by virtue of the fact that they did not exhaust their administrative remedies under the only available avenue — Notice 2006-50.''[73]

Despite pointing out that *en banc* review was not granted on the ripeness question or on whether Notice 2006-50 represented final agency action, the majority addressed the ripeness issue on the merits. The majority and the dissent principally disagreed on the relevance of the possible hardship to the parties posed by a delay in judicial review that would result from requiring the filing of a refund suit to challenge the propriety of the refund mechanism.

The dissent contended that the refund suit prerequisite is not a hardship for purposes of the ripeness doctrine. The majority responded: ''When the hardship Appellants suffer is compliance with allegedly unlawful administrative procedures, we have consistently held claims are ripe for review.''[74] The dissent acknowledged that prior D.C. Circuit authority permits review under the ripeness doctrine when there is no hardship to plaintiffs from a delay in judicial review, provided there are ''no significant agency or judicial interests militating in favor of delay.''[75] The dissent unpersuasively argued that there were interests militating in favor of delay in this case:

> Those interests are some of the very interests that are protected by the ripeness doctrine: the courts' interest in not ''entangling themselves in abstract disagreements over administrative policies,'' and the IRS's interest in being protected from ''judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'' For example, plaintiffs claim that it was too difficult for taxpayers to gather the paperwork needed to justify a claim for more than the standard refund amount. That is precisely the kind of claim where court review

[65] *Id.* at 10-11.
[66] Slip op. at 30 (''The dissent concocts an extravagant scenario in an effort to show that a refund suit would be an adequate alternative remedy.'').
[67] Dissenting op. at 11.
[68] *Id.*
[69] Slip op. at 29.
[70] *Id.* at 31.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 32.
[74] *Id.* at 33.
[75] Dissenting op. at 16.

> would benefit from prior agency application and analysis. Indeed, if the agency agreed with a taxpayer's argument on that issue, there would be no need for judicial involvement at all. Also, plaintiffs claim that the IRS did not provide adequate notice of the refund procedure. That too is the kind of claim where judicial resolution would benefit from a considered agency analysis of the design and limitations of the notification process.[76]

This passage ignores that the terms of Notice 2006-50 don't allow taxpayers to make the type of arguments the dissent contemplates — which is exactly what the *Cohen* plaintiffs are complaining about. The refund procedures, which were finalized with no public input whatsoever, leave no room for the type of dialogue between the IRS and refund claimants that the foregoing passage assumes.

The majority's final response on the ripeness issue returned to the principle that the IRS is not given special treatment under the APA:

> The practical consequence of the dissent's ripeness argument is a judicially created exemption for the IRS from suit under the APA. There may be good policy reasons to exempt IRS action from judicial review. Revenue protection is one. But Congress has not made that call. And we are in no position to usurp that choice on the basis of ripeness. *Cf. Mayo Found. for Med. Educ. & Res. v. United States*, 131 S. Ct. 704, 713 (2011) (noting in the context of tax regulations "the importance of maintaining a uniform approach to judicial review of administrative action").[77]

As with the majority's earlier statement that the IRS is not special under the APA, the above observation — that Congress has not made the call to exempt IRS action from judicial review — is not limited by virtue of having been made in the context of a particular issue (ripeness). That fact does not narrow the scope or applicability of the D.C. Circuit's conclusion that the IRS is subject to the requirements of the APA no less than any other agency.

As noted above, whether the challenge to Notice 2006-50 was ripe for judicial review and whether a conventional tax refund suit would have provided an adequate alternative remedy are the closest and most difficult questions addressed in the *en banc* opinions. That these issues were not among those on which review was granted and that they accordingly were not fully briefed by the parties undoubtedly affected the quality of both the majority and dissenting opinions, as the foregoing discussion suggests.

In light of that adverse effect, it is difficult to evaluate whether the majority or the dissent reached the better answer on those issues. Nevertheless, the weaknesses in the dissent seem more serious than those in the majority opinion.

Refund Suits and Tax Court Petitions

It is important to emphasize that all the issues addressed in the *Cohen en banc* opinions disappear if taxpayers follow the traditional routes of challenging IRS actions through refund suits or Tax Court petitions rather than a free-standing suit under the APA. The AIA and DJA should not apply in those traditional proceedings. In a refund suit, sovereign immunity is waived by 28 U.S.C. section 1346(a)(1), the provision in the judicial code granting the district courts and the Court of Federal Claims concurrent jurisdiction over tax refund suits.[78]

In a refund suit or a Tax Court petition, it is unnecessary for the taxpayer to satisfy the "no other adequate remedy in a court" requirement of APA section 704 to challenge an IRS action on the basis of other provisions of the APA, such as the notice and comment requirements or the arbitrary and capricious standard. Likewise, in a refund suit or a Tax Court petition, the ripeness requirement should be satisfied because the IRS will already have acted, or failed to act, regarding the particular taxpayer who is in court.

The principal issue addressed by the appellate panel opinion — whether an IRS notice such as Notice 2006-50 is a substantive rule and therefore subject to the notice and comment requirements of APA section 553 — would apply far more broadly in refund suits and Tax Court proceedings than the issues decided by the *en banc* court. As discussed above, the panel's holding on this issue presumably remains binding D.C. Circuit precedent, although more clarity on this point would have been desirable.

Conclusion

The specific holdings in *Cohen* will be difficult for taxpayers to take advantage of, because the unusual circumstances of this case are unlikely to be duplicated often. Nevertheless, the broader principle in *Cohen* that the requirements of the APA apply to the IRS no less than to other federal agencies is an

[76] *Id.* at 16-17.

[77] Slip op. at 34 (citations omitted).

[78] *United States v. Williams*, 514 U.S. 527, 530 (1995), *Doc 95-4274*, *95 TNT 81-13* ("28 U.S.C. section 1346(a)(1) . . . waives the Government's sovereign immunity from suit").

important application of the Supreme Court's holding in *Mayo* that administrative law principles in general apply to the IRS the same as to other agencies.