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D.C. Circuit Tosses Out IRS Tax-Preparer Regulation

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Faulting the IRS for attempting to "unilaterally expand its authority," the D.C. Circuit today affirmed a district court decision tossing out the agency's tax-preparer licensing program. Under the program, all paid tax-return preparers, hitherto unregulated, were required to pass a certification exam, pay annual fees to the agency, and complete 15 hours of continuing education each year.

The program, of course, had been backed by the major national tax-return preparers, chiefly as a way of driving up compliance costs for smaller rivals and pushing home-based "kitchen table" preparers out of business. Dan Alban of the Institute for Justice, lead counsel to the tax preparers challenging the program, called the decision "a major victory for tax preparers—and taxpayers—nationwide."

The licensing program was not only a classic example of corporate cronyism, but also of agency overreach. IRS relied on an 1884 statute empowering it to "regulate the practice of representatives or persons before [it]." Prior to 2011, IRS had never claimed that the statute gave it authority to regulate preparers. Indeed, in 2005, an IRS official testified that preparers fell outside of the law's reach.

But IRS reversed course in 2011. The problem, Judge Kavanaugh's opinion for the court explains, is not that the agency changed its mind but that its action had no basis in the text of the statute. Preparers are not "representatives" because they have no authority at all to act on behalf of the taxpayer, who is still responsible for signing his or her own return. Preparers also aren't engaged in "practice…before" the IRS because they do not present any sort of case to the agency, such as in an investigation or hearing. And finally, the court observed that IRS's broad view of the statute would render superfluous other statutes that do allow the agency to impose penalties on preparers for certain conduct.

A victory for liberty in itself, the decision may have broader legal import, in two respects. First, it embraces the concept that, while Congress may delegate broad authority to agencies, "courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies." This principle, applied most forcefully in 2000 in the Supreme Court's *Brown and Williamson* decision, is one that the D.C. Circuit has lately declined to apply in big-ticket challenges to agency action, such as EPA's greenhouse gas regulatory scheme. It may well come in handy as the Obama Administration carries out an aggressive second term agenda through executive action, often at odds with its statutory authority.

The second value of the decision is illustrating the duty of courts to take statutory text seriously even while giving deference to agencies for their policy decisions. This was the issue that

confronted the Supreme Court last term in *City of Arlington v. FCC*—which I wrote about here—and Justice Scalia's majority opinion drew substantial criticism for its holding that agencies' interpretations regarding the scope of their jurisdictions are due the same deference as with anything else. But Scalia's point was not that agencies are free to do as they please, with no real judicial check, but only that courts should not place a thumb on the scale one way or the other concerning statutory authority. Courts' heavy lifting, Justice Scalia explained, is statutory interpretation (for legal geeks, *Chevron* step one), and leave the policy questions to the political branches.

Judge Kavanaugh's opinion does just that, and should be a model to courts (particularly his own) in how to balance respect for the other branches with the rule of law.