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The Collection Due Process Rights: A Misstep or a Step in the Right Direction?

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Leslie Book

Abstract

This article defends one of the more controversial parts of the Internal Revenue Service (IRS) Restructuring and Reform Act of 1998 (RRA 98) the collection due process (CDP) provisions. CDP gives taxpayers the right to independent administrative and judicial review of IRS decisions to use its awesome administrative collection powers, powers that have long made the IRS a feared creditor.

Prior to CDP's enactment, the IRS had the power to collect taxes from taxpayers without judicial review of administrative collection determinations. This power, atypical for creditors which often must get judicial approval for summary collection action, led many observers to criticize the IRS's powers as dangerous to individuals, even when there was no dispute that taxpayers owed back taxes. Notwithstanding this criticism, CDP's formalizing parts of the administrative collection process and interposing judicial review of certain IRS collection actions has itself been controversial for its draining of administrative resources from compliance, an issue of even greater importance in times of budget deficits. This article reveals how administrative and constitutional law principles that provide checks on arbitrary government determinations have largely been absent from tax collection adjudications. The adoption of CDP serves as a progression toward adopting broader rule of law principles in the tax system. Fidelity to rule of law has come to dominate the American legal landscape in the past century, but has been slow to make inroads in the tax system.

The article addresses this challenging topic by considering IRS collection procedures, and the changes that CDP brought to that process. Second, it examines principles from administrative and constitutional law, and reveals how tax adjudications have largely been outside the mainstream of these two important external

checks on agency behavior. In light of the tax law's isolation from these disciplines, it reveals that Congress and the Supreme Court have implicitly and explicitly overstated the government's interest in the collection process and understated the individual's interest. Third, in light of these administrative and constitutional law principles, it makes specific proposals to improve CDP, including a consideration of the proper standard of review that courts should employ in review of collection determinations. These proposals, provide the means for policymakers to appreciate the potential for CDP to provide more meaningful taxpayer protections and minimize the aspects of CDP that are imposing significant systemic costs and straining valuable tax compliance resources.

ARTICLE

THE COLLECTION DUE PROCESS RIGHTS: A MISSTEP OR A STEP IN THE RIGHT DIRECTION?

*Leslie Book**

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I. INTRODUCTION

This Article defends one of the more controversial parts of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98),[1] the so-called collection due process (CDP) provisions.[2] CDP gives taxpayers the right to independent administrative and judicial review of Internal Revenue Service (IRS) decisions to levy property or file a notice of federal tax lien. Critics of CDP have claimed that it is wasteful of precious IRS compliance resources and that it is primarily a tool for tax protestors to advance frivolous arguments about the government's taxing and collection powers.[3] These criticisms have contributed to legislative proposals to repeal some or all of its protections[4] and to pointed academic criticism[5] about the provisions' utility.[6]

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1. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

2. 26 U.S.C. §§ 6320, 6330 (2000) (setting forth lien and levy provisions respectively).

3. *See* IRS, NATIONAL TAXPAYER ADVOCATE: 2003 ANNUAL REPORT TO CONGRESS 38 (2003) [hereinafter 2003 REPORT] (summarizing criticisms of CDP), http://www.irs.gov/pub/irs-utl/nta_2003_annual_update_mcw_1-15-041.pdf.

4. Tax Administration Good Government Act, S. 882, 108th Cong. § 209 (2003) (proposing an amendment to I.R.C. § 6702 to authorize the IRS to assess a $5000 civil penalty for frivolous CDP submissions or submissions that attempt to delay or impede the administration of the tax laws and to allow the IRS to dismiss frivolous requests without following otherwise mandated CDP procedures).

5. *See, e.g.*, Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 122 (2004) (explaining that "the CDP provisions have been a boon to tax protestors and a pain to everyone else"); Danshera Cords, *How Much Process Is Due?: IRC Section 6320 and 6330 Collection Due Process Hearing*, 29 VT. L. REV. (forthcoming 2004) (manuscript at 4, on file with Author) (stating that "without significant clarification of the CDP provisions, CDP hearings should be abolished"); Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1061 (2003) [hereinafter Johnson, *1998 Act*] (noting that "many requests for CDP relief have been filed asserting only frivolous, often rejected, or protestor-type arguments").

6. There are a number of converging factors that make the general debate over CDP and tax collection especially timely. Collection cases, particularly those involving CDP, are now an important part of IRS Appeals determinations and are an increasing component of the Tax Court's overall docket. For example, in the last three years, CDP has accounted for between twenty-eight and thirty-five percent of all IRS Appeals cases. *See* 2003 REPORT, *supra* note 3, at 46 tbl. 1.4.1 (giving statistics on the percentage of IRS Appeals receipts that were CDP receipts in recent years). Prior to RRA 98, in fiscal year 1997 only fourteen percent of IRS Appeals cases involved collections. *Id.* at 50. Moreover, with the budget surplus projections of the late 1990s now looking like an unending series of deficits, we seem to be experiencing a tax reform hangover, with some observers wondering whether RRA 98's protections, including CDP, and the post-1998 drop in IRS compliance efforts may be shaking the ethos of voluntary compliance that is a foundation of our tax system. *See* Amy Hamilton, *A Look at Taxpayer Attitudes on Fifth Anniversary of IRS Reform*, TAX NOTES TODAY, July 22, 2003, LEXIS, 2003 TNT 140-4 (reporting on the general consensus that taxpayer attitudes are increasingly pessimistic about the IRS); *see also* David Cay Johnston,

Prior to CDP's enactment, the IRS had the power to collect taxes from taxpayers without judicial review of administrative collection determinations. This awesome power, atypical for creditors, who often must get judicial approval for summary collection action, led many observers to criticize the IRS's powers as dangerous,[7] even when there was no dispute that a taxpayer owed back taxes.[8] Notwithstanding this criticism, CDP's formalization of parts of the administrative collection process and imposition of judicial review over certain IRS collection actions has itself been controversial and subject to criticism for wasting and inappropriately diverting administrative resources from compliance.[9] This Article reveals how administrative and constitutional law principles that provide checks on arbitrary government determinations have largely been absent from tax collection adjudications. CDP's adoption serves as a progression

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New I.R.S. Chief Plans to Focus on Enforcement, N.Y. TIMES, Oct. 16, 2003, at C6 (reporting that IRS Commissioner Mark W. Everson is "troubled by an I.R.S. Oversight Board survey last month showing that 17 percent of Americans believe that it is acceptable to cheat on taxes, up from 11 percent in 1999").

7. The IRS's increasingly important role as deliverer of benefits exacerbates the potential danger of erroneous IRS collection action. *See* Fred T. Goldberg, Jr., *From FDR to W: The IRS as Financial Intermediary*, 29 OHIO N.U. L. REV. 1, 1–9 (2002) (discussing the growing importance of the IRS as a provider of benefits to taxpayers in addition to its more traditional role as collector of taxes from taxpayers). Compounding the potential harm is the increasing frequency with which tax collection adjudications involve determinations to collect back refundable benefits, such as the earned income tax credit, that the IRS improperly paid out to taxpayers. *See* DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE 130–36 (2003) (explaining that the IRS has recently focused its compliance efforts disproportionately on the working poor). Professor Johnston points out, for example, that in 2002 "one in 47 of the working poor had their returns audited, compared to one in 145 of the affluent and one in 400 returns filed by partnerships, which are used mostly by the wealthy." *Id.* at 134–35.

8. A prime example of this attitude can be found in a book coauthored by the late, former chair of the Senate Finance Committee. WILLIAM V. ROTH, JR. & WILLIAM H. NIXON, THE POWER TO DESTROY 91–93 (1999). The book is full of anecdotes describing how unchecked IRS collection practices have contributed to the personal ruin or even suicide of taxpayers. *See id.* at 3–8.

9. *See* Johnson, *1998 Act*, *supra* note 5, at 1060–61 (explaining that parts of RRA 98, especially the CDP provisions, are not helping "honest taxpayers harassed by the system but taxpayers who harass the system"). Professor Johnson argues that a simplification of the tax system, via rolling back some of RRA 98's recent procedural reforms (including portions of the CDP provisions), would free up IRS resources and allow the IRS the opportunity in difficult budgetary times to dedicate the resources necessary to reverse the relatively steep decline in IRS compliance. *Id.* at 1054–55.

Lack of resources has a negative impact on the IRS's ability to collect taxes. For example, starting in 1999, the IRS began to defer collection action on billions of dollars in tax deficiencies. By September 2002, the IRS had deferred collection actions on approximately one out of every three collection cases, and the "inventory of known unpaid taxes totaled $249 billion, of which $112 billion has some collection potential." GEN. ACCOUNTING OFFICE, GAO-03-732T COMPLIANCE AND COLLECTION: CHALLENGES FOR IRS IN REVERSING TRENDS AND IMPLEMENTING NEW INITIATIVES 6–8 (2003).

toward adopting broader rule of law principles in the tax system.

Although CDP embraces rule of law principles, it is far from perfect. It is both overbroad and underinclusive. CDP is overbroad because it provides protections for matters unrelated to collection, matters that cloud its essential benefits and provide tax protestors with an administrative and judicial forum for frivolous arguments that waste agency and judicial resources.[10] It is also underinclusive, however, because it fails to address the thousands of IRS collection determinations that taxpayers raise outside the CDP process. This Article argues that Congress should amend, the IRS should administer, and the courts should interpret CDP in a manner that addresses the under and overinclusive nature of CDP. This Article also provides a basis to defend CDP in light of broader administrative and constitutional law principles. At the same time, this Article provides the means to resist well-intentioned but misguided calls to eliminate CDP and provides the basis to allow CDP to develop appropriately to address both the government's interest in efficiently collecting taxes and the varied individual interests in the collection process.

This Article will proceed as follows. For those unfamiliar with tax collection, Part II briefly considers IRS collection procedures and the changes that CDP brought to that process. Part III examines principles from administrative and constitutional law and reveals how tax adjudications have largely existed outside the mainstream of these two important external checks on agency behavior. In light of the tax adjudications' isolation from these disciplines, this Article shows that Congress and the Supreme Court have implicitly and explicitly overstated the government's interest in the collection process and understated the individual's interest. In light of these administrative and constitutional law principles, Part IV makes specific proposals to improve CDP, with the related goals of providing the means for policymakers both to appreciate the potential for CDP to provide more meaningful taxpayer protections and to minimize the overinclusive aspects of CDP that are imposing significant systemic costs and straining valuable tax compliance resources.

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10. *See* STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., REPORT OF THE JOINT COMMITTEE ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF 1998, app. at 22 (Comm. Print 2003) (noting that although only five percent of CDP cases involve frivolous claims, they take a disproportionate share of time compared to claims having substantive issues).

II. THE BROAD OUTLINES OF THE TAX COLLECTION PROCESS

A. A Tax Collection Primer

1. Tax Collection Before CDP. Before revealing administrative law and constitutional law's place in the tax collection process, it is important to understand the broad contours of how the IRS collects taxes from taxpayers. When taxpayers fail to pay all or a portion of a tax due and showing on a tax return,[11] or if the IRS determines that a taxpayer has a greater tax liability than is reflected on a return,[12] the IRS has powerful administrative collection powers.[13] After the taxpayer files a balance due return, or after the IRS determines an additional tax due following deficiency procedures, if a taxpayer fails to pay the liability, a lien arises in favor of the United States with respect to all of the taxpayer's property or rights to property.[14] This lien is often called a secret or silent lien because it arises automatically following taxpayer nonpayment.[15] The IRS

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11. I.R.C. § 6201(a)(1) authorizes the IRS to assess taxes shown by taxpayers on their tax returns. I.R.C. § 6201(a)(1) (West 2004). An assessment is the IRS's recording of a taxpayer's tax liability. *See* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 10.01[1], at 10-3 to 10-4 (rev. 2d ed. 2002) (explaining that a valid assessment makes a taxpayer's outstanding tax liabilities collectible by lien or seizure upon notice and demand to the taxpayer).

12. I.R.C. §§ 6212 and 6213 limit the power of the IRS to assess additional income, estate, and gift taxes against a taxpayer who responds to deficiency procedures by challenging the existence of a proposed liability in an Article I prepayment forum, the U.S. Tax Court. I.R.C. §§ 6212(c)(1), 6213(a). A simple definition of deficiency is the difference between the correct tax liability and the tax shown on the return. *See* SALTZMAN, *supra* note 11, ¶ 10.03[1], at 10-16. Timely taxpayer challenges to IRS assertions of a proposed deficiency generally result in a stay on the IRS's assessment and collection activities. *See* I.R.C. § 6213(a).

The Tax Court's jurisdiction to redetermine the IRS's administrative determination of a deficiency only applies to those taxes that are subject to the deficiency procedures—that is, the rates that require the issuance of a statutory notice of deficiency before an assessment. I.R.C. § 6213(a). Taxes subject to the deficiency procedures include: (1) "income, estate, gift, and generation-skipping transfer taxes"; (2) "excess profits taxes"; and (3) "miscellaneous excise taxes." (((VSF))) The deficiency procedures do not apply to most excise taxes, employment taxes, the § 6672 responsible person penalty, and certain other civil penalties. GERALD A. KAFKA & RITA A. CAVANAGH, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES ¶¶ 1.04[1]-1.04[2] & n.50 (2d ed. 1997).

13. These types of assessments are commonly known as summary assessments and deficiency assessments. *See* SALTZMAN, *supra* note 11, ¶ 10.01[2][b].

14. I.R.C. § 6321 (creating a lien that extends to the amount of tax liability including interest, additions, penalties, and costs).

15. *See* WILLIAM T. PLUMB, JR., FEDERAL TAX LIENS § 2, at 10 (3d ed. 1972) (explaining that "it is quite possible that a financially troubled taxpayer, who has deferred payment of an assessed tax, will not know whether or when a tax lien has been imposed upon all his property because initially the general tax lien is usually of the *secret* variety").

may file a notice of the existence of that tax lien to ensure that the lien is valid against certain third persons who may acquire or gain an interest in a taxpayer's property.[16] Following additional IRS requests for payment, if the taxpayer refuses to pay the tax, the IRS may provisionally collect the tax by levy upon all property or interests in property.[17] The levy power is a provisional remedy, as it does not determine whether the taxpayer actually owes the underlying taxes or whether a third party's interest in levied property is superior to that of the government.[18] It does, however, allow the government to seize and dispose of property before an adjudication determining the validity of the assessment or the interests of other claimants has occurred.[19] Although state law exemptions protecting property from the reach of creditors do not limit the IRS's powers, the Internal Revenue Code does provide its own list of property exempt from a tax levy, including unemployment benefits, most welfare benefits, and a limited amount of wages or salary.[20]

Section 6321 provides that the tax lien arises automatically after assessment, notice and demand for payment, and a failure to pay, without any need for public notice. I.R.C. § 6231. Section 6323(a) provides that this "secret" lien is not valid against four broad classes of creditors until public notice is given. I.R.C. § 6323(a) (requiring notice to "any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor").

16. Once the Notice of Federal Tax Lien is filed, only a small group of creditors can assert a priority higher than the government's. *See* I.R.C. § 6323(b) (assigning priority under certain conditions to purchasers of securities, motor vehicles, or personal property; property tax liens; mechanic's liens; attorney's liens; insurance contracts; and deposit-secured loans). *See generally* DAVID A. SCHMUDDE, FEDERAL TAX LIENS ch. 4 (4th ed. 2001). Persons having actual knowledge of the tax lien's existence would lose their protected status even in the absence of a filing of a Notice of Federal Tax Lien. *See* I.R.C. § 6323(b).

17. *See* I.R.C. § 6331(a) (authorizing Secretary to collect tax plus collection expenses by levy if taxpayer does not pay tax within ten days of notice and demand). This rule generally does not extend to property or rights to property not in existence at the time of the levy; however, there is an exception to this exclusion for certain recurring payments, such as wages. *See* I.R.C. § 6331(h).

18. Alternatively, or in addition to the administrative levy provisions, the government may bring a variety of civil judicial actions to effect the collection of taxes, enforce its lien, or subject a taxpayer's property to the payment of taxes. *See* I.R.C. §§ 7401–7403 (allowing the United States, joined by all persons in interest, to bring a civil action in district court if approved by the Secretary and Attorney General); 4 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 111.6.6 (2d ed. 1992). Civil actions to enforce a lien or subject property to the payment of tax under § 7403, as contrasted with the provisional levy procedures discussed above, determine the validity of the assessment and the priority of other lienors. 4 BITTKER & LOKKEN, *supra*. If a taxpayer has no other known property on which to levy, an action under § 7403 resulting in a judgment can be enforced on subsequently acquired property. *Id.*

19. If property wrongfully becomes subject to a levy, I.R.C. § 7426 provides a remedy in federal district court for third parties. I.R.C. § 7426(a)(1). The remedy may include an injunction preventing the government from enforcing the levy or selling the property. I.R.C. § 7426(b)(1).

20. I.R.C. § 6334. State law, however, does control whether a taxpayer has property or rights to property to which a federal tax lien relates. *See* Aquilino v. United States, 363 U.S.

Unlike most other creditors, the IRS, with limited exceptions[21] and subject to applicable statutes of limitation,[22] may provisionally collect taxes without recourse to the courts; the agency alone determines when and how to collect an outstanding tax. Over time, Congress has increasingly provided taxpayers with rights to appeal informally to the IRS Appeals Office initial IRS rejections of those taxpayer-generated collection requests,[23]

509, 512–16 (1960) (remanding case to state court of appeals to determine whether state law created a property interest in taxpayer). However, recent Supreme Court decisions have emphasized the importance of federal law in determining the contours of the IRS's collection powers. *E.g.*, Drye v. United States, 528 U.S. 49, 58 (1999) (determining that a court looks to state law only for the initial inquiry into what rights a taxpayer has in particular property); United States v. Craft, 535 U.S. 274, 288 (2002) (relying on *Drye* and holding that, although Michigan law provides that property held by tenants in entirety cannot be reached by separate creditors, the IRS cannot be bound by such a state provision). For more on *Craft* and *Drye*, see Steve Johnson, *After* Craft*: Implementation Issues*, 96 TAX NOTES 553 (2002) [hereinafter Johnson, *After* Craft].

21. Before obtaining a final judgment, most other creditors, following the sending of a "dunning" letter, may seek prejudgment collection action such as prejudgment attachment or garnishment. SALTZMAN, *supra* note 11, ¶ 14.01[1]. Although these prejudgment remedies were once available to creditors through the use of summary ex parte procedures, procedural due process now generally requires that debtors be given preseizure notice and hearing. For more on the differences between the IRS and other creditors, see *id.* (discussing a series of Supreme Court cases that generally afforded debtors predeprivation notice and hearing rights before the taking of provisional collection action). *See, e.g.*, N. Geo. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605–08 (1975) (invalidating prejudgment garnishment of a bank account without a provision for early hearing); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 342 (1969) (striking down a Wisconsin statute that permitted prejudgment wage garnishment without notice or prior hearing to the wage earner). *But see* Mitchell v. W. T. Grant Co., 416 U.S. 600, 610, 618–20 (1974) (upholding a Louisiana sequestration statute).

The most significant limitation on the Service's broad collection powers pertains to limitations on the IRS's ability to enter private residences to seize assets. *See* G.M. Leasing Corp. v. United States, 429 U.S. 338, 358–59 (1977) (requiring the Service to get a warrant before entering a private office to seize assets). For a discussion of *G.M. Leasing* and its implications in the collection process, see Camp, *supra* note 5, at 28–31.

Moreover, as of RRA 98's passage, the IRS is limited when exercising its administrative collection powers on a taxpayer's principal residence. Prior to RRA 98, the IRS could seize a principal residence with internal management approval. Under § 6334(e), as amended by RRA § 3445(b), the IRS must get approval in writing from a federal district court judge or magistrate prior to levy of a taxpayer's principal residence. I.R.C. § 6334(e). For more relating to collection with respect to a residence, see *United States v. Rodgers*, 461 U.S. 677, 690–99 (1983) (holding that the IRS may use administrative collection procedures to order the sale of a family home in which a delinquent taxpayer had an interest at the time the tax liability was incurred but in which the taxpayer's spouse, who did not owe any of the indebtedness, had a separate state homestead right).

22. I.R.C. § 6502(a) (providing that the IRS may collect by levy or by judicial proceeding within ten years after the assessment of tax).

23. I.R.C. §§ 6159(d) and 7122(d), which were added by RRA 98, provide for administrative review of IRS termination of installment agreements and of OICs. I.R.C. § 6326, added by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6238(a), 102 Stat. 3342, 3743 (1988), allows administrative appeal of the filing of a notice of federal tax lien. These statutory rights essentially codified prior administrative practice.

but this review is itself not subject to judicial review.[24] Congress has exempted most IRS decisions regarding the manner in which the sovereign collects taxes; statutes like the Anti-Injunction Act[25] and the Declaratory Judgment Act,[26] for example, prevent taxpayers from seeking prepayment judicial recourse to review IRS collection decisions.[27]

Notwithstanding these broad powers, the Internal Revenue Code and internal IRS guidelines allow taxpayers to request specific types of relief from the IRS when faced with threats of enforced collection, such as a levy or the filing of a notice of federal tax lien. These relief options, or alternatives to enforced collection—"collection alternatives" in tax parlance—have grown increasingly popular, and the IRS is subject to statutory and

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24. *See, e.g.*, Olsen v. United States, 326 F. Supp. 2d 184, 188 & n.2 (D. Mass. 2004) (noting that challenges to rejections of taxpayers' offers of compromise are entitled only to "administrative . . . not judicial review").

25. The Anti-Injunction Act is found at I.R.C. § 7421, which provides,

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, 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 such tax was assessed.

I.R.C. § 7421. For more on the limited statutory exemptions to the Anti-Injunction Act, including those that arise if the IRS fails to send a notice of deficiency or if the IRS begins collection proceedings before the ninety-day period for responding to a notice of deficiency under § 6213(a) has passed, see Arthur W. Andrews, *The Use of the Injunction as a Remedy for an Invalid Federal Tax Assessment*, 40 TAX L. REV. 653, 653–55 & n.9 (1985). The Supreme Court has held that a district court may grant an injunction restraining the assessment or collection of tax if (1) at the time of the suit and taking into consideration the most liberal view of the law and facts, the government under no circumstances could prevail, and (2) equity jurisdiction otherwise exists. *See* Bob Jones Univ. v. Simon, 416 U.S. 725, 737, 748–49 (1974) (denying injunctive relief to university because it could not show that the government could not prevail); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962) (setting forth the rule that tax collection may be enjoined if "it is clear that under no circumstances could the Government ultimately prevail" and "if equity jurisdiction otherwise exists"); Miller v. Standard Nut Margarine Co., 284 U.S. 498, 510–11 (1932) (enjoining collection of a tax on oleomargarine because the item in question did not fall within the statutory definition of oleomargarine and collection of the tax would destroy the taxpayer financially). This exception "leaves the granting of an injunction to the rare case." SALTZMAN, *supra* note 11, ¶ 106[4][a], at 1-62.

26. 28 U.S.C. § 2201(a) (2000) (exempting federal tax controversies from the types of actions allowed to be brought in a declaratory judgment action in federal district court). For a general explanation of declaratory judgments in the federal tax context, see SALTZMAN, *supra* note 11, ¶ 15.05[1].

27. The Anti-Injunction Act has generally prevented courts from reviewing IRS decisions to accept or reject alternatives to enforced collection or IRS considerations involving the manner in which the IRS collects taxes. *See, e.g.*, Carroll v. IRS, 14 A.F.T.R.2d. 5564, 5564 (E.D.N.Y. 1964) (concluding that the Anti-Injunction Act prevented the Tax Court from compelling the Government to accept an offer in compromise). For a discussion of the interplay of sovereign immunity, the Anti-Injunction Act, and the Declaratory Judgment Act, see Litig. Guideline Mem. GL-52 (June 28, 1991), 1991 IRS LGM LEXIS 24.

regulatory standards that it must apply when evaluating them.[28] These collection alternatives present a number of different options with varying consequences, including requests that the IRS defer collection activities due to the taxpayer's poor financial circumstances;[29] that the IRS accept a compromise of a tax liability, also known as an offer in compromise;[30] or that the taxpayer pay the agreed upon liability over a period of time, also known as an installment agreement.[31]

2. CDP's Changes to the Administration of Tax Collection. By allowing taxpayers the right to administrative and judicial review of collection actions, and concomitantly requiring the IRS to explain and justify its collection actions, CDP fundamentally changes the above landscape.[32] Following an IRS filing of a notice of federal tax lien or a levy upon certain assets, CDP requires the IRS to notify taxpayers of their right to a hearing before the IRS

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28. For a summary of these rules, see 5 INTERNAL REVENUE MANUAL PART V COLLECTION PROCESS (((DATE))) [hereinafter IRS MANUAL PART V], http://www.irs.gov/irm/part5/index.html.

29. *See id.* § 5.16.1.1 (Currently Not Collectible: Overview). For example, the taxpayer can request to be placed in uncollectible status if the taxpayer can establish that payment of any amount due would constitute an economic hardship. *Id.* §§ 5.16.1.1, 5.16.1.2.9. Establishing hardship can also result in the IRS releasing a levy. *See* I.R.C. § 6343(a)(1)(D). Economic hardship is established by considering the taxpayer's income and expenses, with the IRS providing that only certain expenses will be relevant, such as food, clothing, medical costs, transportation, and housing. *See* Treas. Reg. § 301.6343-1(b)(4) (2004). The IRS also publishes national and local expense allowance guidelines to help it evaluate the taxpayer's ability to pay a delinquent tax liability. *See* IRS, *Collection Financial Standards*, IRS.gov, *at* http://www.irs.gov/individuals/article/0,,id=96543,00.html (last visited Nov. 13, 2004).

30. *See* I.R.C. § 7122; Treas. Reg. § 301.7122-1(b)(2). The IRS considers acceptance primarily because there is doubt as to collectibility of the full amount of tax, interest, and penalties. The IRS evaluates the offer based upon the taxpayer's expected ability to pay the tax out of net equity in assets and the excess of income over otherwise allowable expenses (determined largely on the basis of the guidelines referred to in note 28 *supra*). If the taxpayer's offer exceeds what the IRS believes to be the taxpayer's reasonable collection potential (RCP), it is authorized to accept the offer. The IRS may also accept an offer that is less than a taxpayer's RCP in situations in which collection would create economic hardship or in which compelling public policy or equity considerations justify acceptance. *See* Treas. Reg. § 301.7122-1(b)(2), (b)(3), (c)(1). If there is a question about the existence or amount of the liability itself, the IRS may also compromise the liability. *See* Treas. Reg. § 301.7122-1(b)(1); *see also* INTERNAL REVENUE MANUAL PART V, *supra* note 28, § 5.8.1 (Offers in Compromise: Overview).

31. *See* I.R.C. § 6159; INTERNAL REVENUE MANUAL, *supra* note 28, § 5.14.1.1 (Securing Installment Agreements: Overview).

Other collection alternatives include a taxpayer request that the IRS withdraw the filing of its notice of federal tax lien to facilitate future payment, the posting of a bond, and a substitution of other assets for payment of the liability. *See* Treas. Reg. § 301.6330-1(e)(3) Q&A-E6.

32. *See* Diane L. Fahey, *The Tax Court's Jurisdiction Over Due Process Collection Appeals: Is It Constitutional?*, 55 BAYLOR L. REV. 453, 464 (2003) (calling CDP's judicial review of tax collection a "dramatic departure" from past practice).

Appeals Office.[33] At this hearing, a taxpayer may request that the Appeals Officer (AO) consider whether the IRS's collection decision (i.e., the levy or filed notice of federal tax lien) was inappropriate.[34] Specifically, CDP requires the AO to verify that the IRS followed administrative and procedural requirements (the "verification requirement")[35] and to consider whether the "collection action balances the need for the efficient collection of taxes with the legitimate concern of the [taxpayer] that [the] collection action be no more intrusive than necessary" (the "balancing requirement").[36] In addition, at the CDP conference, if a taxpayer requests a collection alternative (such as an offer in compromise) that the IRS rejects, the AO, independently of IRS collection personnel, must consider the merits of the taxpayer's request for a collection alternative (the "collection alternative requirement").[37]

Following the hearing, the AO is supposed to issue a written notice of determination summarizing her conclusions regarding the verification and balancing requirements.[38] In addition, if the taxpayer has requested a collection alternative, the notice of

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33. I.R.C. § 6320.

34. *See* I.R.C. §§ 6320(c), 6330(c)(2)(A)(ii). The collection action might not be appropriate because collection might relate to taxes that were discharged in a prior bankruptcy proceeding or because the taxpayer might be able to establish that the IRS should declare him administratively not collectible. *See* IRS, CHIEF COUNSEL NOTICE, CC-2003-016, at 15 (May 29, 2003) [hereinafter CDP NOTICE].

Collection action might also be inappropriate if the taxpayer does not owe the underlying liability, but challenges to the underlying liability are only allowed in a CDP hearing if the taxpayer "did not receive any statutory notice of deficiency . . . or did not otherwise have an opportunity to dispute [the] liability." I.R.C. § 6330(c)(2)(B); *see also* CDP NOTICE, *supra*, at 15–16. At CDP hearings, taxpayers may also raise spousal defenses to seek relief from the underlying liability under I.R.C. §§ 66 and 6015, barring a previous IRS final determination on the merits of such a request or a prior final judicial proceeding. I.R.C. § 6330(c)(2)(A)(i); Treas. Reg. §§ 301.6330-1(e)(2), 301.6330-1(3)(3) Q&A-E3, E8. Although taxpayers have raised these noncollection issues in CDP hearings, collection activities comprise the major part of CDP cases, and this Article focuses largely on CDP's provisions concerning the propriety of IRS collection actions and consideration of alternatives to immediate payment of a tax liability. *See* DEP'T OF TREASURY, GENERAL EXPLANATION OF ADMINISTRATION'S FISCAL YEAR 2004 REVENUE PROPOSALS 91 (2003) (acknowledging that most CDP cases involve collection issues rather than questions pertaining to the underlying liability or spousal defenses). As discussed below in Part IV.A, I believe these rights to raise noncollection matters in CDP hearings actually weaken the protections most essential in CDP cases and allow a mechanism for inappropriate cases to work their way through IRS Appeals and the courts. For a discussion of the potential constitutional problems associated with giving the Tax Court the power to consider the underlying liability in CDP cases, see Fahey, *supra* note 32, at 486–88.

35. I.R.C. § 6330(c)(1).

36. I.R.C. § 6330(c)(3)(c).

37. Treas. Reg. § 301.7122-1(f)(5).

38. Treas. Reg. § 301.6330-1(e)(3) Q&A-E8.

determination will contain the AO's view on that request.[39] The taxpayer may contest the AO's determination by filing an appeal to either the Tax Court or a federal district court within thirty days, depending upon the tax in question.[40] During the pendency of the hearing, and often throughout appeal, the IRS collection action is stayed.[41]

In sum, CDP departs from past practice in two principal ways: (1) it provides the taxpayer with statutorily significant administrative and judicial review of certain IRS collection determinations, and (2) it provides taxpayers with an effective unilateral right to enjoin collection during the pendency of those hearings.

B. CDP's Background

CDP arose out of the broader tax reform of 1998 and is consistent with Congress's desire at that time to interpose external checks on the agency's nearly unlimited collection discretion.[42] Although the IRS still enjoys broad collection powers, in RRA 98 Congress sought to bring IRS powers more in line with other creditors':

> The Committee believes that taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor. Accordingly, the Committee believes that the IRS should afford taxpayers adequate notice of collection activity and a

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39. If a taxpayer has raised questions concerning the underlying liability or the availability of spousal defenses, the written determination is supposed to address those as well. *See id.*

40. The appeal of a determination is filed with the Tax Court only if the Tax Court has jurisdiction over the type of tax specified in the CDP Notice. *See* Moore v. Comm'r, 114 T.C. 171, 175 (2000) (interpreting "section 6330(d)(1)(A) and (B) together to mean that Congress did not intend to expand the Court's jurisdiction beyond the types of taxes that the Court may normally consider"). If the Tax Court does not have jurisdiction, the appeal must be filed with the appropriate U.S. district court. *See* Treas. Reg. § 301.6330-1(f)(2) Q&A-F3.

41. I.R.C. § 6330(e). A court may permit levy actions if the underlying liability is not at issue and the IRS shows good cause. I.R.C. § 6330(e)(2).

42. *See* Camp, *supra* note 5, at 87–91 (describing RRA 98 in detail and noting the difference between recent reform and IRS reform in the 1950s). Professor Camp notes that in the recent IRS reform, anecdotal evidence led to outrage over Service employees' actions, prompting the enactment of external checks on the Service, whereas in the 1950s the resulting legislation focused on the addition of internal checks and balances within the IRS. *Id.* at 87–88. For an excellent review of other periods of IRS reform and the contrast in emphasis on internal checks in IRS discretion during many of those reform movements, see Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717 (2001) (discussing in great detail the four main overhauls of the IRS (and its predecessor the Bureau of Internal Revenue), in 1866–1870, 1920–1926, 1952–1954, and 1997–1998).

> meaningful hearing before the IRS deprives them of their property.[43]

The CDP proposals grew, in part, out of testimony at Senate Finance Committee hearings from four respected members of the tax community, including current National Taxpayer Advocate Nina Olson and tax procedure expert Michael Saltzman, who testified about the need to introduce a third party to protect both the government's and the taxpayers' rights in the tax collection process.[44] Initial CDP proposals were broader than those eventually enacted—for example, the original CDP proposal would have given all taxpayers the right to challenge the amount or existence of a liability in CDP hearings and would have granted taxpayers the right to a CDP hearing before the filing of a notice of federal tax lien, rather than a postfiling right.[45] Government officials in the Clinton Administration objected to CDP on policy grounds and were wary of CDP's impact on the IRS's ability to collect taxes:

> This [CDP] provision represents an overreaction to allegations of IRS overreaching in connection with the collection of taxes. The proposed process would permit the noncompliant taxpayer to benefit at the expense of the vast majority of taxpayers who report and pay their taxes timely. In essence, this legislation would give any taxpayer a unilateral right to enjoin collection of taxes simply by taking an appeal to the Office of Appeals and then seeking Tax Court review.
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> . . . Our experience is that if the IRS is unable to freeze assets of a taxpayer such as bank accounts, accounts receivable, stocks or securities, and motor vehicles, the assets will often quickly disappear and the IRS will be relegated at best to its remedies under fraudulent transfer law. For that reason, the proposed due process protections may dramatically affect the ability of the IRS to collect taxes, unless the rights of the IRS in the taxpayer's property are frozen prior to any availability of administrative and judicial review.[46]

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43. S. REP. NO. 105-174, at 67 (1998).

44. *IRS Restructuring: Hearings on H.R. 2676 Before the Senate Comm. on Finance*, 105th Cong. 124–28 (1998) (statements of Nina Olson and Michael Saltzman). The legislative history is summarized in 2003 REPORT, *supra* note 3, at 38–39.

45. S. REP. NO. 105-174, at 67–68.

46. Letter from L. Anthony Sutin, Acting Assistant Attorney General, Justice Department, to The Honorable William V. Roth, Jr., Chairman, Committee on Finance, U.S.

Thus, when Congress was considering CDP, there was a tension between efficiency and fidelity to rule of law. Critics of CDP believed that it would hamper IRS efforts to collect taxes, but its supporters believed that interposing additional notice and hearing requirements would place needed external controls on agency power. Although there is a lack of compelling evidence that CDP is materially affecting the IRS's ability to collect taxes,[47] CDP has dramatically reshuffled administrative and judicial resource allocations towards collection cases.[48] This major tilt in administrative and judicial focus clarifies whether Congress calibrated taxpayer protections appropriately. The following Part of the Article considers CDP in light of administrative and constitutional law principles and provides insight into an appropriate view of CDP's merits.

III. TAX ADJUDICATIONS: THE CONTEXT OF ADMINISTRATIVE AND CONSTITUTIONAL LAW

A. *Introduction: The Rule of Law and Its Absence in Tax Collection*

The last decades of the twentieth century coincided with an intense judicial focus on the role of law in the modern administrative state, largely through the lenses of constitutional procedural due process[49] and administrative law.[50] Notwithstanding the tax system's ubiquity as a government area that touches almost all Americans' lives,[51] academics and

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Senate, and The Honorable Bill Archer, Chairman, Committee on Ways and Means, House of Representatives, paras. 20–21 (June 8, 1998*), reprinted in* L. Anthony Sutin, *Justice Letter Raising Constitutional Concerns in IRS Reform*, TAX NEWS TODAY, June 11, 1998, LEXIS, 98 TNT 112–41.

47. *Cf. Johnson*, *After* Craft, *supra* note 20, at 1022–23 (noting a drastic decline in enforced collection revenue following enactment of RRA 98 and observing that collection actions, like the filing of notices of federal tax liens and levy or seizure actions, have been recently increasing following sharp post-RRA 98 declines).

48. *Id.* at 1043 (commenting that CDP consumes "large amounts" of judicial and administrative resources); *see also* 2003 REPORT, *supra* note 3, at 50 (reviewing the "dramatic" rise in collection cases from fourteen percent of case receipts in FY 1997 to over fifty percent in FY 2003 and noting that CDP comprises a majority of current collection cases). For more on the significant administrative and judicial resources CDP implicates, see Cords, *supra* note 5 (manuscript at 9–10 & n.50) (discussing the growing number of CDP requests).

49. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 10–12 (1985) (discussing the pervasiveness of constitutional law due process challenges to myriad forms of agency adjudications in the late twentieth century).

50. *See, e.g.*, Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 346–47 (1991) (discussing the relationship of constitutional law to agency practice).

51. In addition to raising revenues through exclusions, deductions, and credits, tax

policymakers have often viewed tax law as an island, apart from the procedural and substantive legal mainstream.[52] Perhaps because taxing powers, unlike other agency practices,[53] are so essential to our government, administrative and constitutional law scholarship has had little impact on IRS adjudication[54] practices.[55]

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provisions provide numerous indirect benefits that affect and influence many facets of taxpayer behavior. Professor Stanley Surrey popularized the term "tax expenditure," which encompasses those items that seem like government payments to certain groups of taxpayers. *See* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES, at vii (1973) (providing an introduction to the concept of tax expenditures). Tax expenditures serve to make an already complex body of tax laws even more complex. *See* Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 656 (2003) (explaining that tax expenditure provisions contradict fundamental tax policy and make the Code much more difficult for taxpayers to understand and for the IRS to enforce).

52. *See, e.g.*, Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 519, 524–27, 531 (1994) (asserting that tax lawyers' isolation from other lawyers perpetuates the myth that tax law is different from other areas of law); Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 384–85, 387 (1998) (noting that tax law is an isolated discipline and positing that tax scholarship would benefit by reaching into nontax law as well as nonlegal fields). *See also generally* Leandra Lederman, *"Civil"izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS L. REV. 183 (1996) [hereinafter Lederman, *"Civil"izing*] (stating that both substantive tax law and tax procedure tend to be uninformed by other areas of law).

53. For example, there is an extensive literature concerning the review of Social Security Administration disability determinations. *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 733, 773–76 (2003) (reviewing a number of proposals to change the current district court review of Social Security cases to achieve fairer and more uniform decisionmaking). Likewise, there is significant scholarship concerning the review of Veterans' Administration disability determinations. *Id.* at 762–71 (discussing the current veterans' benefits appeals process). For competing views of the appeals process in Veterans Administration hearings, compare James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 227 (2001) (deploring the slowness of the current system), with Gary E. O'Conner, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN. L. REV. 343, 345 (arguing that the ponderousness of the system may, in fact, be justified). Prior to 1988, these determinations were not subject to judicial review. *See* WILLIAM F. FOX, JR., THE UNITED STATES COURT OF APPEALS FOR VETERANS' CLAIMS 5 (2d ed. 1998).

54. For the purposes of this Article, adjudication is defined as an IRS determination with respect to a tax liability or credit eligibility of a specific taxpayer, including decisions regarding enforced collection and taxpayer requests for collection alternatives. In administrative law parlance, agency action is generally divided between adjudication and rulemaking, with the latter detailing agency action pertaining to "the whole or a part of an agency statement of general or particular applicability and future effect," and the former referring to the "agency process for the formulation of an order." 5 U.S.C. § 551(4), (7) (2000 & Supp. 2003). The APA defines an order as "the whole or a part of [an agency's] final disposition." § 551(6).

55. To be sure, constitutional law, and procedural due process in particular, provides only a limited check on minimally acceptable agency procedures. *See, e.g.*, Bruff, *supra* note 50, at 347 (discussing the relationship between administrative law and constitutional law due process jurisprudence in administrative adjudicative procedures). As Professor Bruff explains, "most administrative adjudication is not very vulnerable to constitutional invalidation under

The justification for this lack of scrutiny has largely centered around the conclusory importance rather bluntly attached to the government's receipt of tax dollars and how a potentially hostile judiciary or the imposition of additional procedures could put sand in the gears of government machinery.[56] The government interest in tax collection, although vital, involves subtle considerations, including the potential of alternatives to full payment to increase the amount of tax the government actually collects[57] and the possibility that increasing postassessment procedural protections may embolden noncompliance or, alternatively, increase compliance through a greater sense of public confidence in the fairness of procedures.[58] An understanding of these subtleties, as well as an appreciation of individuals' interests in the tax collection process, assists the progression of this Article's normative argument: CDP's administrative hearings and judicial review of those IRS collection hearings are not necessarily unwarranted, wasteful, or dangerous to the very existence of our government; rather, they comprise a step in the progression of the rule of law principles that came to permeate twentieth century legal culture.[59]

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the due process clause." *Id.*; refer also to note 80 *infra* and accompanying text (commenting that constitutional law has even less impact on IRS adjudication because of the longstanding belief that it is unwise to interpose additional procedures that might delay the receipt of tax revenues). Nonetheless, the modern due process balancing analysis provides insight into how agencies should set procedural safeguards.

56. *See* Bull v. United States, 295 U.S. 247, 259 (1935) (explaining that "taxes are the life-blood of government, and their prompt and certain availability an imperious need"). In an oft-quoted passage, Justice Roberts explains the historical imperative for the sovereign's use of summary collection procedures: "Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt." *Id.* at 259–60.

57. *See* INTERNAL REVENUE MANUAL (CCH) § 5.8.1.1.4, at 16,254 (((DATE))) (acknowledging that offers "effect collection of what can reasonably be collected at the earliest possible time and at the least cost to the government").

58. *See* Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1487 n.190 (2003) [hereinafter Lederman, *Tax Compliance*] (positing, for example, that "the offer-in-compromise program may undermine taxpayer assurance that others are paying their tax obligations by letting taxpayers who legally owe taxes compromise those obligations for a small fraction of the liability"). For more on the importance of process in ensuring the legitimacy of government actions, see Lawrence B. Solum, *Procedural Justice*, Public Law and Legal Theory Research Paper Series, Research Paper No. 04-02, at 6–8, *at* http://ssrn.com/abstract=508282 (Spring 2004) (explaining that "the action-guiding role of procedure is important because it undermines [the assumption of a split between procedural law and substantive law] implicit in the *ex post* view of procedural fairness").

59. *See* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 80–91 (1985) (arguing that Americans increasingly expect all government actions that affect individuals to conform to notions of fair procedure).

Although the extent of external constraints on agency discretion generally varies with the nature of the decision and the type of interest involved, external constraints—such as the APA's general scheme of judicial review of agency adjudication and procedural due process's general requirements for notice and hearing prior to the deprivation of a property, liberty, or privacy interest—help ensure that government actors comply with the law.[60] The concept of rule of law relates to a model of regularity and incorporates, through the requirement of fair procedures, a means to achieve that regularity.[61] Although the exact definition of the rule of law varies somewhat among scholars, there are fundamental procedural principles underlying many scholars' approaches to the subject, including the notion that it is important to minimize governmental arbitrariness and unfettered discretion and the notion that there should be equal treatment for all those who come before the law.[62]

In the tax collection process, Congress and the Supreme Court have exempted the IRS from procedural regularity and external checks on agency discretion, both of which are associated with rule of law principles.[63] Faced with the possibility that third parties would interfere with tax collection, Congress, when crafting administrative law-type checks on IRS practice, and the Supreme Court, when considering the role that constitutional law should have in the tax adjudication process, have given the IRS almost absolute discretion in collecting taxes

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60. Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 ADMIN. L. REV. (forthcoming 2005) (manuscript at 4, 30–31) (explaining that due process and separation of powers rule of law principles require standards for administrative discretion), *available at* http://ssrn.com/abstract59283.

61. *Id.* at 11.

62. *See, e.g.*, Jennifer C. Root, *The Commissioner's Clear Reflection of Income Power Under § 446(B) and the Abuse of Discretion Standard of Review: Where Has the Rule of Law Gone, and Can We Get It Back?*, 15 AKRON TAX J. 69, 71–72 (2000) (citing A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (7th ed. 1908)) (describing the fundamental characteristics of the rule of law). The importance of this fundamental rule of law principles has likely contributed to popular dissatisfaction with IRS collection procedures, which largely operate within IRS revenue officers' broad discretion. For example, Professor Lawrence Friedman notes that Americans increasingly have a general expectation of justice that includes a strong sense of procedural regularity in public and private affairs. *See* FRIEDMAN, *supra* note 59, at 5. IRS practices are therefore in sharp contrast with many Americans' interactions with other public and private actors.

63. Professor Bryan Camp refers to tax administration's lack of external oversight as consistent with tax administration's pedigree as part of an inquisitorial, rather than an adversarial, process. Camp, *supra* note 5, at 16 (citing Bolich v. Rubel, 67 F.2d 894, 895 (2d Cir. 1933)).

and considering the merits of taxpayer requests for collection alternatives.[64]

B. IRS Adjudicatory Determinations: The IRS as an Administrative Agency

1. Tax Adjudications' Place Outside the Administrative Law Mainstream. Modern administrative law takes its shape from the 1946 passage of the Administrative Procedure Act (APA).[65] The APA provides for strict trial-like procedures for so-called formal adjudications and limited procedural requirements for so-called informal adjudications.[66] For formal

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64. Although Congress and the Court have based this absolute discretion on too generous a perception of the government's interest in the tax process and too little consideration of the individual's interest or rights, the discretion is even harder to justify in the face of agency actions relating to the dispensation of benefits wherein IRS decisions can make the difference between a taxpayer's living below or above poverty levels. This point is more direct when considering IRS collection actions to recover refundable credits, like the earned income tax credit (EITC), which are meant to supplement low wage work and constitute a fundamental part of the nation's antipoverty policy. *See, e.g.*, Francine J. Lipman, *The Working Poor Are Paying For Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 WIS. L. REV. 461, 462 (noting that the EITC lifts 4.3 million households out of poverty); Diane Lim Rogers & Alan Weil, *Welfare Reform and the Role of Tax Policy*, 53 NAT'L TAX J. 385, 391 (2000) (noting that the importance of targeted tax credits in terms of overall federal policy to help lower-income Americans is often overlooked). "A common perception is that tax policy primarily affects high-income families, while transfer policy is used to redistribute resources to the lower-income population. That is too simplistic a view," as the tax system is increasingly the vehicle for federal transfers to low-income populations. *Id*. at 391.

It is also appropriate to consider that IRS decisions regarding collection alternatives provide important taxpayer benefits. Administrative law scholars often define government benefits as a relief from costs or burdens:

> We use the term "government benefits" to describe a broad spectrum of benefits, including welfare and social security, public employment and government contracts, and occupational licenses or building permits. Their common feature is that they are benefits (including in principle relief from costs or burdens) that private persons receive from the government.

Shapiro & Levy, *supra* note 60, at 2 n.1. As such, IRS decisions with respect to collection alternatives, which provide certain taxpayers with relief from the burden of full payment of a liability or enforced collection, though perhaps not implicating as important an interest as direct tax expenditures such as the EITC, nonetheless often have great financial impact on taxpayers.

65. 5 U.S.C. §§ 551 et seq. (2000 & Supp. 2003).

66. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 108 (2003) (noting that the APA "imposes few, if any, requirements on informal adjudication"). The APA also divides agency action into two general administrative categories, rulemaking and adjudication. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1265 (1986). Like adjudication, rulemaking is further bifurcated into formal and informal proceedings. Formal rulemaking calls for "trial-type" hearings, and informal rulemaking provides for "a system of antecedent publicity" through notice and comment periods. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW §§ 4.9–.10 (2d ed. 1984).

adjudications, the APA provides detailed procedural safeguards, including the right to be heard before an administrative law judge and formal trial-like protections, such as requirements that an agency only consider evidence properly admitted and subject to rebuttal and that an agency explain its decisions in a manner similar to the way trial courts explain themselves.[67]

Over time, due to the costs associated with the strict trial-like procedures associated with formal adjudications, courts have limited the types of agency actions subject to formal adjudications.[68] At the time of the APA's passage, Congress exempted IRS deficiency adjudications from the APA's onerous formal adjudication requirements because the agency determinations regarding tax deficiencies were already subject to subsequent trial de novo issues of both fact and law in Tax Court, thus providing taxpayers with the type of judicially guaranteed protections that were attendant in the APA's extensive formal adjudication procedures.[69]

A significant amount of scholarship has considered both the APA's application to the IRS's rulemaking function and the deference that courts should give to various forms of IRS and Treasury rulemaking guidance. *See, e.g.*, John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 72–74 (2003) (discussing the APA's application to various forms of Treasury and IRS guidance and addressing the degree of deference courts should afford to tax law interpretations); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35 (1995) (same); Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 844 (1992) (arguing that heightened deference should not apply to statutory interpretations in certain IRS administrative pronouncements).

67. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of* Overton Park*'s Requirement of Judicial Review "On the Record"*, 10 ADMIN. L.J. AM. U. 179, 194–95 (1996).

68. *See* 5 U.S.C. §§ 554, 556–557; Young, *supra* note 67, at 194 & n.58 (describing formal adjudication as a "relatively rare, procedurally onerous method of agency decisionmaking" that only applies if an enabling statute specifically "requires the agency action to be made 'on the record'").

In reviewing agency decisions through formal adjudication processes, courts must examine an agency's entire record and, to uphold the agency's decision, must find that "substantial evidence" taking that record as a whole supports an agency's action. *See* § 706(2)(E); *see also* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 56 (1991).

69. STAFF OF SENATE JUDICIARY COMM., 79TH CONG., ADMINISTRATIVE PROCEDURE ACT 23 (Comm. Print 1945) (providing explanations of the provisions of the Administrative Procedure Act) ("The exception of matters subject to a subsequent trial of the law and the facts *de novo* in any court exempts such matters as the tax functions of the Bureau of Internal Revenue (which are triable *de novo* in The Tax Court) . . . ."); *see also* SALTZMAN, *supra* note 11, ¶ 1.06[2], at 1-54 (explaining that APA adjudication rules do not apply to IRS administrative hearings); Mary Ferrari, *"Was Blind, but Now I See" (Or What's Behind the Notice of Deficiency and Why Won't the Tax Court Look?)*, 55 ALB. L. REV. 407, 423–24 (1991) (noting that the APA is not applicable to the return examination process).

Although some cases acknowledge the APA's exemption of tax proceedings from the APA's formal adjudication rules,[70] until recently there was little authority discussing whether IRS adjudications not subject to de novo review should thus be treated as informal adjudications under the APA. Because the APA provides essentially no guidance on what procedures agencies are required to provide to parties in informal adjudications, the absence of clear guidance on the treatment of IRS adjudications not subject to de novo review is not directly relevant with respect to what procedures the agency applies in making those decisions; rather, the import of the analysis is whether the extensive administrative law jurisprudence surrounding abuse of discretion review (which applies to most court review of agency informal adjudications) should control how courts review IRS determinations (like CDP collection determinations).[71]

2. A Closer Look at Unreviewability and Discretion. As mentioned in Part II, prior to CDP, the Anti-Injunction Act and the Declaratory Judgment Act exempted most IRS collection determinations from judicial review. These informal agency decisions covered a broad swath of territory and included agency determinations to take certain collection actions, like

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70. *See, e.g.*, Ewing v. Comm'r, 122 T.C. 32, 52 (2004) (Thornton, J., concurring) (citing Phillips v. Comm'r, 289 U.S. 589, 598, 600 (1931)) ("[T]his Court's de novo procedures for reviewing IRS functions [are] well established and 'recognized by law' within the meaning of APA section 559."); Greenberg's Express, Inc. v. Comm'r, 62 T.C. 324, 328 (1974) ("[A] trial before the Tax Court is a proceeding de novo; our determination as to a petitioner's tax liability must be based on the merits of the case and not any previous record developed at the administrative level.").

71. Two factors have blurred the relationship between tax adjudications and the APA: (1) the history of the Tax Court, until its 1969 change to an Article I court, as an independent agency within the executive branch and (2) the predominance of IRS determinations that were subject to de novo review and hence excluded, as a practical matter, from the APA. *See Ewing*, 122 T.C. at 52; Fahey, *supra* note 32, at 481. With the increased importance of IRS adjudications that are not subject to de novo review but instead reviewed on an abuse of discretion basis (like collection determinations in CDP cases), there has been some question about the relationship between IRS adjudications and traditional administrative law principles. *See*, *e.g.*, *Ewing*, 122 T.C. at 53 (concluding that the APA's standards applicable to reviews of informal adjudication do not apply to IRS determinations for equitable relief from joint and several liability, notwithstanding that court review of those determinations is to be done under an abuse of discretion standard).

> On its face, the APA would arguably appear to apply [to the IRS decision to revoke a taxpayer ruling]. . . . [D]espite thorough review of numerous decisions involving retroactive revocation, the Court and the parties have been unable to find any decision holding that the APA does regulate the scope of review; apparently no one heretofore has thought to raise the issue.

Pierson v. U.S., 428 F. Supp. 384, 389 (D. Del. 1977) (citation and footnotes omitted).

deciding to levy or seize assets or to file a notice of federal tax lien to protect the government's interest. The IRS decisions exempted from meaningful judicial review also included taxpayer requests for collection alternatives—or agency collection determinations made pursuant to a taxpayer request—including requests (1) to compromise a tax liability, (2) to pay a liability in installments, (3) to find that the taxpayer's financial circumstances are so dire that the agency should place the taxpayer in noncollectible status, or (4) to withdraw a notice of federal tax lien to allow a taxpayer to secure needed financing.[72]

In administrative law, judicial unreviewability of final agency decisions is the exception, rather than the rule. Professor Koch, in reviewing the limited situations in which unreviewability is the norm, argues that there should be a "very strong preference" against unbridled agency discretion and that "it is at best a necessary evil brought about by such expediencies as the need to end the process or save resources for more important decisions."[73] Although the APA provides that judicial review of agency action does not arise "to the extent that—(1) [other] statutes [like the Anti-Injunction Act] preclude judicial review; or (2) agency action is committed to agency discretion by law," courts apply both exceptions to judicial review narrowly.[74] For example, courts interpreting the "committed-to-agency-discretion exception" focus on whether the statute is drawn so broadly that in any given case there is no law to apply.[75] Moreover, the committed-to-agency-discretion limitation on the reviewability of agency decisions has been subject to significant academic criticism. For example, Professor Ronald Levin has referred to a number of policy reasons to

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72. See I.R.C. § 6330(b)-(d) (West 2004) (authorizing tax court to hear appeals relating to unpaid taxes or impending levies).

73. Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 502 (1986) [hereinafter Koch, *Judicial Review*].

74. 5 U.S.C. § 701(a)(1), (2) (2000).

75. Examples of areas in which courts have found no law to apply include military and foreign affairs, subjects in which unreviewability relates to the political branch's significant latitude. For a discussion of those exceptions, see Koch, *Judicial Review*, *supra* note 73, at 499.

In addition, courts have found that certain agency actions to not engage in enforcement activity are unreviewable. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985). The "no-law-to-apply test" has generated a substantial amount of scholarship, much of it emphasizing the importance of a narrow application of the principle. *See, e.g.*, Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 741 (1990) (suggesting a more pragmatic approach to the issue of unreviewability, including historical, utilitarian, and prudential considerations).

encourage judicial review of agency action and narrowly interpret the no-law-to-apply test:

> Scrutiny of administrative action by an independent judiciary is an integral part of the American checks and balances system—a powerful deterrent to abuses of power and an effective remedy when abuses occur. By helping maintain public confidence that government officials remain subject to the rule of law, judicial review also bolsters the legitimacy of agency action. . . . Finally, judicial review can enhance the quality of administrative action by exposing partiality, carelessness, and perverseness in agencies' reasoning.[76]

Although the IRS has, at times, invoked the committed-to-agency-discretion exception in an attempt to limit judicial review, courts have applied that exception narrowly to IRS activities,[77] and by itself the exception would likely not bar judicial consideration of collection alternatives.[78] Despite the exception's narrow reach, because the Anti-Injunction Act and the Declaratory Judgment Act are, in APA parlance, "other statutes [that] preclude review," with limited exceptions,[79] IRS decisions

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76. *See* Levin, *supra* note 75, at 742 (footnote omitted). Writing about the public rights doctrine, and in particular criticizing its effect on insulating some agency actions from judicial scrutiny, Professors Shapiro and Levy also point to the importance of judicial review in ensuring that agency actions do not unfairly impinge upon individuals' rights. *See* Shapiro & Levy, *supra* note 60, at 12–13.

77. *See, e.g.*, Butler v. Comm'r, 114 T.C. 276, 288–89 (2000) (rejecting the IRS's argument that review of the equitable relief innocent spouse provision was committed to agency discretion and not subject to judicial review and referring to the strong presumption that agency action is subject to review). *But see* Shanahan v. Voskuil, No. 76 CV 210-W-1, 1977 WL 1333, at *1 (W.D. Mo. Jan. 26, 1977) (concluding that actions to bar payment of taxes in excess of the amount of taxpayer's proposed offer in compromise are prohibited under the Anti-Injunction Act and that IRS decisions with respect to offers in compromise are committed to agency discretion under APA § 701(a)(2)).

78. For example, in the context of CDP determinations, the Tax Court has now considered on numerous occasions whether IRS rejections of installment agreements or offers in compromise constitute an abuse of discretion, and the CDP statute itself contemplates judicial review of IRS determinations with respect to collection determinations. *See, e.g.*, Roman v. Comm'r, 87 T.C.M. (CCH) 835, 2004 WL 157817, at *4 (2004) (reviewing a CDP determination that rejected an offer in compromise as a collection alternative under 26 U.S.C. § 6330(c)(2)(iii) (2000) and finding no abuse of discretion in the IRS's decision to reject the offer). Courts have concluded, however, that they may not have the power to compel acceptance of an offer in compromise. *See, e.g.*, Chavez v. United States, No. Civ. EP-03-CA-303(KC), 2004 WL 1124914 (W.D. Tex. May 18, 2004) (holding that the IRS nonprocessable determination regarding the offer in compromise was an abuse of discretion yet also holding that it did not have the power to compel acceptance of the offer).

79. There is some limited recourse for improper IRS conduct in collection cases, as taxpayers can seek money damages for improper collection actions, I.R.C. § 7430 (West 2004); and IRS employees can be discharged for improper conduct in connection with the collection of taxes, I.R.C. § 7804; RRA 98 § 1203.

regarding the manner in which the sovereign collects taxes have been largely exempt from judicial review.[80] Thus, taxpayers disgruntled with those decisions have not even benefited from the possibility of some redemption through judicial review of improper agency action.

Little academic writing has focused on the possible adverse effects of the Anti-Injunction Act or the Declaratory Judgment Act on IRS practice, especially with respect to collection determinations, but the benefits that administrative law scholars have identified as being associated with limiting the reach of the APA's nonreviewability provisions apply to tax collection cases. As Professor Levin notes in other contexts, judicial review of collection action is likely to deter IRS abuses, provide a taxpayer remedy when the IRS abuses its formidable collection powers, provide legitimacy to IRS action through increased public confidence, enhance the quality of agency practice, and provide additional guarantees that the IRS will protect individual rights in the collection process.[81]

3. The Recurring Tension Between Efficiency and the Rule of Law. The above tour through the outlines of administrative law reveals competing and often contradictory concerns within administrative law. Competing policy concerns underlie the review of agency adjudication: on the one hand, there is a desire for broad agency discretion, largely based on efficiency[82] and expertise concerns, and on the other hand, there is a call for vigorous judicial review to ensure that individuals are given due process and to preserve the rule of law.[83]

These competing concerns inherent in administrative law are also present in tax law, where the trade-off between efficiency and fidelity to rule of law principles has been rather extreme. Although there is de novo review of IRS deficiency and refund determinations,[84] with no (or very little) discretion given

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80. *See*, *e.g.*, Bob Jones Univ. v. Simon, 416 U.S. 725, 736–37 (1974) (identifying one of the objectives of the Anti-Injunction Act as protecting the need of the government to collect taxes in an expeditious and unimpeded manner); Inv. Annuity, Inc. v. Blumenthal, 609 F.2d 1, 5 (D.C. Cir. 1979) (reiterating that government tax collection should be "free from pre-enforcement judicial interference" (citing *Bob Jones Univ.*, 416 U.S. at 736–37)).

81. *See* Levin, *supra* note 75, at 742.

82. For these purposes, efficiency relates to the IRS collection of the greatest portion of unpaid taxes expeditiously at the least cost possible.

83. *See* Young, *supra* note 67, at 181 (calling the desire for agency discretion and the yearning for vigorous judicial review the "center" of "deep-seated and contradictory impulses" within administrative law).

84. The de novo nature of proceedings in the Tax Court has been a longstanding feature of tax proceedings. *E.g.*, Barry v. Comm'r, 1 B.T.A. 156, 157 (1924) (explaining

to IRS determinations regarding the amount or existence of a taxpayer's proper liability or refund claims, the IRS has had almost unlimited discretion in determining how it would collect an agreed upon liability.[85] Despite the de novo review afforded to IRS determinations regarding the amount or existence of a liability or refund, the pre-CDP judicial scheme applied to tax collections is extremely deferential to agency expertise.[86] CDP,

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that "when a taxpayer brings his case before the Board [of Tax Appeals, the predecessor of the Tax Court,] he proceeds by trial *de novo*"). De novo review ensures that a court will take a fresh look at the facts and the law, irrespective of agency determinations. *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 688 (2002) (noting how Congress created different levels of review to calibrate the degree of judicial oversight of agency action, with de novo review providing for "no deference at all"). De novo review has traditionally been thought of as preserving individual rights from the possibility of inappropriate agency conduct. *See, e.g.*, Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 49 (2002) (explaining that "in some situations, de novo review is explicitly intended to protect individual rights").

85. *See* David Laro, Panel Discussion, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 22–23 (noting that while the Tax Court hears a variety of matters, its "primary function" remains the redetermination of deficiencies). For a discussion of the differences between tax litigation in proceedings before Article III federal district courts and the Article I U.S. Tax Court, see Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357, 396–98 (2001) [hereinafter Lederman, *Equity*] (discussing differences between the two fora, including different rules pertaining to statutes of limitation and burden of proof).

86. One commentator has found the de novo review afforded to tax assessments "ironic" because practical arguments such as efficiency and doctrinal tradition support administrative finality. *See* Chin, *supra* note 84, at 48. Yet this view conflates the IRS's collection function with its liability and refund determination functions. Practicality and efficiency concerns have dominated with respect to collection determinations, but not with respect to liability or refund determinations.

One effect of the de novo review courts give to IRS adjudications with respect to the amount or existence of the liability or refund is that the limited deference given to agency findings actually may undercut some of the important benefits that flow from agency fidelity to rule of law principles. *See* KENNETH CULP DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 12:13 (2d ed. 1979) (indicating that de novo review provides little opportunity for judicial pressure on the IRS to conform to procedural requirements); *see also* Ferrari, *supra* note 69, at 453 (criticizing de novo review for contributing to well-defined judicial protections that result in "no audience to hear or redress any of [the taxpayer's] complaints concerning his treatment at the hand of the administrator"). The Tax Court has long taken the view that it generally will not "look behind" the notice of deficiency to examine the IRS's conduct or the administrative record backstopping the IRS's proposed deficiency. Greenberg's Express, Inc. v. Comm'r, 62 T.C. 324, 327 (1974). Although *Greenberg's Express* arose in the context of considering whether the Tax Court should consider the reasons behind audit selection, its reach is much broader and has been cited many times for the proposition that the courts generally do not look behind the IRS's proposed assessments of liability. For a discussion of the reach of *Greenberg's Express*, see Leandra Lederman, *Are There Procedural Deficiencies in Tax Fraud Cases?: A Reply to Professor Schoenfeld*, 35 IND. L. REV. 143, 151–52 (2001).

As Professor Ferrari has observed, the *Greenberg's Express* line of cases has contributed to administrative insulation, resulting in the Tax Court "turn[ing] a blind eye to taxpayer complaints about administrative failures by the Service." Ferrari, *supra* note

through its general scheme of abuse of discretion review of IRS decisions regarding collection determinations, expands rule of law principles to a previously unchecked area of agency action. The pre-CDP lack of review for collection determinations reflected practical concerns about the need to collect taxes without unwanted delay, and CDP reflects Congress's newfound willingness to sacrifice somewhat efficiency in collections to promote rule of law principles.[87]

CDP thus represents Congress's commitment to expand, in a limited way, rule of law principles to IRS collection adjudications.

69, at 428. "Instead, the Tax Court has chosen to focus upon the substantive merits . . . rather than the procedural adequacy of the administrative determination process, which the [Tax Court], with the sanction of the Supreme Court, considers irrelevant." *Id.* Although "*Greenberg's Express* is an easy decision to dislike," the Tax Court's policy of not looking behind the notice of deficiency to examine agency conduct makes sense in light of the Tax Court's statutory and common law restrictions on its jurisdiction and its traditional role in redetermining deficiencies, not in regulating agency conduct. Leandra Lederman, *Deficient Statutory Notices and the Burdens of Proof: A Reply to Mr. Newton*, 92 TAX NOTES 117, 120–21 (July 2, 2001) [hereinafter Lederman, *Deficient Statutory Notices*].

The effect of the *Greenberg's Express* line of cases, and similar cases holding that the IRS is not required to follow its internal procedures nor offer taxpayers settlement conferences with the IRS Appeals Office even when its published procedural rules state otherwise, is that the IRS's fidelity to its standard adjudicatory practice is free from judicial scrutiny. *See* United States v. Caceres, 440 U.S. 741, 749–51 (1979) (holding that evidence obtained in violation of internal IRS rules was admissible because the taxpayer's constitutional rights were not violated). The Court went on to explain that "as a matter of administrative law . . . it seems clear that agencies are not required, at the risk of invalidation of their action, to follow all of their rules, even those properly classified as 'internal.'" *Id.* at 754 n.18; *see also* Luhring v. Glotzbach, 304 F.2d 560, 563 (4th Cir. 1962) ("In our view the procedural rules do not have [the force and effect of law, nor are they mandatory]; and compliance with them is not essential to the validity of a notice of deficiency."); Crowther v. Comm'r, 269 F.2d 292, 293 (9th Cir. 1959) (finding no error on the part of the Tax Court for refusing to consider the taxpayers' claims that the Commissioner acted in an arbitrary manner in finding deficiencies in their returns by failing to furnish them with a thirty-day letter and by failing to make a proper investigation before sending out the ninety-day deficiency notices). *Caceres* has been heavily criticized. *See* Rodney A. Smolla, *The Erosion of the Principle that the Government Must Follow Self-Imposed Rules*, 52 FORDHAM L. REV. 472, 485–86 (1984) (arguing that *Caceres* results in occasional abuses and "delegitimizes and undermines the idea that agency rules are a part of the essential fabric of a society governed by the rule of law rather than official whim and caprice"); *see also* SALTZMAN, *supra* note 11, ¶ 1.07[3] (suggesting that the effect of *Caceres* is that it is possible that similarly situated taxpayers will get different agency treatment, raising "equal protection and due process questions").

87. Although an abuse of discretion standard is highly deferential and results in relatively few cases in which IRS collection determinations are reversed, *see* Verkuil, *supra* note 84, at 689 (positing that abuse of discretion review should lead to eighty-five to ninety percent agency affirmance rates), it is nonetheless a significant check on agency practice in that a third party—a reviewing court—will have occasion to examine the previously unchecked IRS discretion. *See* Koch, *Judicial Review*, *supra* note 73, at 476 (noting that abuse of discretion review allows the agency to "fine tune" rules and allows courts to "control[] only for extreme risk of error").

The expansion is limited because judicial review of collection actions is on a highly deferential abuse of discretion basis and does not extend to consideration of collection alternatives or IRS collection actions outside of CDP. Yet even this limited application of judicial review to collection actions is significant and is a "dramatic departure" from past practice[88] because even deferential review exposes agency action to the broad daylight of judicial scrutiny. The following subpart explores in more detail administrative law concepts of abuse of discretion review and examines how those concepts provide an indirect means of ensuring that agencies use adequate procedures to better protect taxpayer rights.

4. Overton Park*, the Meaning of the Term Record, and the Importance of Agency Explanation*. The novelty of CDP relates to both the standard of review and the subject matter of court proceedings. Judicial review of the IRS determination regarding a collection action is reviewed under an abuse of discretion standard analogous to the standard found in APA section 706(2)(A).[89] Judicial review of informal adjudications is

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88. Fahey, *supra* note 32, at 464. CDP's "dramatic departure" from prior practices was foreshadowed by the increasing trend in the tax law to allow preassessment judicial review of the amount or existence of a liability. The creation of a prepayment judicial forum to review income, gift, and estate taxes and an increase in modernized opportunities to challenge employment taxes before assessment typify this departure. *See id*. at 457–58 (stating that the federal government historically enjoyed "virtually unchecked collection powers" and describing the modern preassessment procedures relative to income, gift, and estate taxes). These preassessment opportunities for judicial review likewise create impediments to the collection of tax revenues, *see id.* at 458 (describing the assessment and collection prohibitions during the notice period and during proceedings before the Tax Court), and run counter to the historical practice of only allowing taxpayers postdeprivation opportunities to challenge the sovereign's tax determinations, *id.* at 454, yet they are essential ingredients of our modern tax system.

89. APA § 706(2)(A) provides that a reviewing court can set aside an agency's "action[s], findings, and conclusions" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000). In addition to setting aside agency actions found to be an abuse of discretion, the APA also allows courts, in informal adjudications, to set aside findings that are unconstitutional, outside the authority of an agency to make a challenged decision, or made "without observance of procedure required by law." § 706(2)(B)–(D). However, these three additional categories are generally not relevant for CDP determinations. *See CDP Notice*, *supra* note 34, at 30 (noting that the tax lien and levy scheme has already passed constitutional muster).

Although the CDP statute is silent on the standard courts must employ in reviewing collection action, the legislative history to the CDP provisions clarifies that reviewing courts should consider an AO's determination under an abuse of discretion standard. H.R. CONF. REP. NO. 105-599, at 266 (1998); *see also* Goza v. Comm'r, 114 T.C. 176, 181–82 (2000) (explaining that the de novo standard is used when "the validity of the underlying tax liability is properly at issue" and that the abuse of discretion standard is used when "the validity of the underlying tax liability is not properly at issue").

generally based on an abuse of discretion standard.[90] There is a significant amount of scholarship and case law concerning the "abuse of discretion" standard.[91] The method by which a court reviews most agency actions for an abuse of discretion was first set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*,[92] the seminal 1970 Supreme Court case that helped define the reach of the APA's abuse of discretion review. In *Overton Park*, the Court brought into sharper focus the need for formal agency procedures and more searching review, even in the relatively uncharted world of informal adjudications, partially by reassessing the merits of giving agencies the final say in important policy matters.[93] The Court explained that the abuse of discretion standard, although more deferential than a de novo review of agency actions, requires courts to engage in a "substantial inquiry . . . [that does not] shield [the Agency's actions] from a thorough, probing, in-depth review" that explores "whether the decision was based on a consideration of the relevant factors."[94] As Professor Young has indicated, the juxtaposition of a requirement that a reviewing court engage in a thorough, probing, in-depth review with a supposedly deferential standard of review is generated by the same tension between rule of law and agency deference principles that underlies the whole of administrative law.[95]

The application of this somewhat contradictory standard highlights the importance of agency action and conduct to a court review of agency determinations in informal adjudications. In matters involving the review of agency actions on an abuse of discretion basis, the administrative record is crucial to a court's ability to determine whether the agency's decision will survive judicial scrutiny.[96] *Overton Park* states that although informal proceedings are not "on the record" in the

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90. David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 55 (1975) (explaining that judicial review of informal agency adjudications proceeds "under the general review provisions of the APA"); *see also* 5 U.S.C. § 706(2)(A).

91. *See*, *generally, e.g.*, Verkuil, *supra* note 84 (providing an outcomes analysis of the various standards of review in the context of congressional intent and Supreme Court interpretation); Young, *supra* note 67 (discussing the "abuse of discretion" and "arbitrary and capricious" standards of review in the context of the *Overton Park* holding).

92. 401 U.S. 402 (1971).

93. Prior to *Overton Park*, the type of analysis courts employed in reviewing informal action resembled the "toothless rational basis test" associated with substantive due process challenges to legislation. *See* Young, *supra* note 67, at 203–04 & n.84.

94. *Overton Park*, 401 U.S. at 415–16.

95. *See* Young, *supra* note 67, at 190.

96. *See id*. at 209.

technical sense of the term under the APA, the presence of a record is key to a court's ability to implement *Overton Park*'s mandate.[97] Notwithstanding the importance of a record to a review of informal adjudications, one of the further contradictions of *Overton Park* and administrative law generally is that they do not provide any definition of what a record is. The term "record" is amorphous, essentially including "all the material that the agency considered in reaching its decision."[98] The effect of the *Overton Park* approach is that once the record is identified, its status is largely that of formal records produced in formal administrative decisions:

> Any specific factfinding, crucial to an agency's decision, must be adequately supported by the evidentiary record which was before the agency when it acted. If the purely legal reasoning is adequate ("the statute permits us to ban dangerous products"), then the decision stands or falls depending on whether the factual record adequately supports the factual portion ("this is a dangerous product") of the agency's actual reasoning to its conclusion ("therefore it is banned").[99]

Closely related to the importance of the record is the *Overton Park* rule that an agency adequately explain its decision.[100] The emphasis on the adequacy of an agency explanation points to the importance of the agency's legal analysis at the time of the administrative determination and prevents the agency from offering post hoc justifications at the time of judicial review.[101]

Although academics have criticized the *Overton Park* "on-the record requirement" because of its imprecise nature and the difficulty it creates for courts and litigators in determining what in fact the record is,[102] it reflects both rule of law and agency deference concerns. By limiting courts from considering new evidence or agency arguments on appeal, the on-the record requirement promotes efficient resolution of disputes. At the

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97. *See Overton Park*, 401 U.S. at 419–21 (stating that the "whole record" is the basis for review).

98. Young, *supra* note 67, at 208.

99. *Id.* at 209 (footnotes omitted).

100. *See Overton Park*, 401 U.S. at 420–21 (stating that an agency could prepare formal findings to explain its action and that a court might even require additional explanation).

101. Young, *supra* note 67, at 210. Moreover, to guard against erroneous agency action, abuse of discretion review subjects an agency to court consideration of whether the agency has given proper consideration to all relevant factors in its legal analysis. *Id.* at 209–10 & n.18.

102. *See*, *e.g.*, William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 61 (1975).

same time, by requiring that agency decisions stand or fall based upon previously submitted and considered facts and adequate agency legal analysis and explanation, the on-the-record requirement helps ensure that agency practices when initially considering a matter are sufficient so that courts can adequately review their determinations.

5. Abuse of Discretion Review in Tax Adjudications Differs from the Overton Park *Standard*. Although abuse of discretion review is the exception in tax determinations, a number of provisions in the context of deficiency determinations are reviewed on that basis.[103] Moreover, other IRS determinations subject to abuse of discretion review are not generally reviewed in the context of deficiency determinations, but special jurisdictional provisions allow for judicial review of those determinations, notwithstanding the Anti-Injunction Act's prohibition of most IRS determinations outside of deficiency or refund procedures.[104] Generally, as the Tax Court held in the recent case of *Ewing v. Commissioner*, these tax determinations are generally not subject to the on-the record rule, and the Tax Court holds de novo trials.[105] The Tax Court approach results in

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103. *See* Ewing v. Comm'r, 122 T.C. 32, 40 (2004) (noting that de novo review by the Tax Court for an abuse of discretion by the IRS applies to (1) "determin[ations] that a taxpayer's method of accounting did not clearly reflect income"; (2) "reallocat[ions of] income or deductions" among related parties; (3) "fail[ures] to waive penalties and additions to tax"; and (4) bad debt deductions). The Tax Court has applied the abuse of discretion standard on a number of different occasions. *See*, *e.g.*, Mailman v. Comm'r, 91 T.C. 1079, 1084 (1988) (considering the IRS's discretion to waive a civil understatement penalty and stating that abuse of discretion is based on the Code and regulations' ascertainable standards to which the IRS is subject and entails a judicial determination of whether the IRS acted "arbitrarily, capriciously, or without sound basis in fact"); Estate of Gardner v. Comm'r, 82 T.C. 989, 1000 (1984) (considering the IRS's denial of an extension to file an estate tax return and stating that agency abuse of discretion would arise "if [this decision] were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis").

104. For example, under I.R.C. § 6404(i) the Tax Court has jurisdiction to review IRS failures to abate interest on an abuse of discretion basis. I.R.C. § 6404(i)(1) (West 2004); *e.g.*, Goettee v. Comm'r, 85 T.C.M. (CCH) 867, 877 (2003).

The Tax Court may also consider on an abuse of discretion basis IRS determinations concerning the IRS's decision to grant equitable relief from joint and several liability; these may arise as a stand-alone matter or within the context of deficiency procedures. *Ewing*, 122 T.C. at 36–37.

105. *Ewing*, 122 T.C. at 37–39. Although *Ewing* involves the application of the on-the-record rule to a review of IRS equitable relief innocent spouse proceedings, its reach is likely much further because its rationale is equally applicable to all proceedings, including CDP, subject to abuse of discretion review. *See* Pless v. Comm'r, 87 T.C.M. (CCH) 845, 847 (2004) (citing *Ewing* and allowing consideration of testimony at trial or evidence as to whether Ms. Pless qualified for relief under section 6015(f) that was not presented during the telephonic hearing). Relying on *Ewing*, the Tax Court in *Robinette v. Commissioner*, 123 T.C. 4489 (2004) held that when reviewing for abuse of discretion

deference to agency determinations, but the proceedings closely resemble other Tax Court proceedings that are completed on a de novo basis. The Tax Court's approach to the matter—that it will hold trials de novo in situations where an abuse of discretion standard applies—is arguably taxpayer friendly and sensitive to rule of law concerns. It ensures that taxpayers get a proper opportunity to present evidence that, because of the IRS's administrative-level informality, may not have been before the IRS.[106]

6. Summing up the IRS's Isolation from Administrative Law Principles. The importance of the preceding discussion is its revelation that tax adjudications are not part of the administrative law landscape. Tax adjudications stand alone. This isolation is explained largely by historical practice,[107] a

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under § 6330(d), the APA does not control review of CDP determinations, and the court's review is not limited to the administrative record. *Id.* at 4493. The court cited Judge Thornton's concurrence in *Ewing* stating that the APA has never governed proceedings in the Tax Court and that the Tax Court's de novo procedures actually provide a stricter scope of review than APA judicial review procedures. *Id.* In a dissenting opinion, Judges Halpern and Holmes disagreed with the application of *Ewing*, asserting that *Ewing* was based on unique aspects of § 6015 that should not be extended to § 6330. *Id.* at 4504 (Halpern and Holmes, J.J., dissenting). They also emphasized that the application of an abuse of discretion review does not necessarily mean that the Tax Court is free to substitute its judgment for the Commissioner's judgment. *Id.* at 4505 n.6 (Halpern and Holmes, J.J., dissenting).

106. The IRS Appeals Office conducts traditionally informal hearings, and taxpayers do not have the right to subpoena and examine witnesses or to subpoena documents. *E.g.*, Barnhill v. Comm'r, 83 T.C.M. (CCH) 1624, 1626 (2002); Treas. Reg. § 301.6330-1(d)(2) Q&A-D6 (2004).

Concerns about limited information before a reviewing agency have led Professors Currie and Goodman to conclude that the on-the-record rule of *Overton Park* is "hard to take . . . at face value [because] . . . the party tendering new evidence may have had no opportunity to be heard at the administrative level." Currie & Goodman, *supra* note 90, at 59. Professors Currie and Goodman continued, "[A strict application of the on-the-record rule] would often reduce judicial review to a rubber stamp, especially where the proffered evidence tended to expose the administrative record as a product of superficial and inadequate investigation." *Id.* This concern seems less applicable in collection determinations, in which IRS determinations often relate to decisions regarding a taxpayer's financial circumstances, circumstances that the taxpayer should be able to describe and provide evidence of to the IRS. To the extent that a taxpayer is unable to provide that information, or a type of information outside the control of the taxpayer, it may make sense for a reviewing court to provide some limited exceptions to the on the record rule.

107. *Ewing*, 122 T.C. at 35–36. The relatively toothless abuse of discretion review prior to *Overton Park* may likely have inspired the Tax Court to chart its own more searching inquiry to help ensure agency fidelity to rule of law principles. As discussed above, with *Overton Park* and the general trend in administrative law providing for a more searching review of informal agency adjudications, the Tax Court's different approach is less justifiable. With its lack of scrutiny of agency practice and decisionmaking, the Tax Court's approach may in fact create fewer opportunities to sanction improper agency practices. Interestingly, district court review of collection

practice that, with respect to the exemption of collection determinations from judicial review, stems from a belief that the government interest in tax adjudication is so vital that it warrants special treatment and unbridled discretion. Tax adjudications also stand alone with respect to abuse of discretion review, an approach also largely justified by historical practice giving the court a more meaningful opportunity to review IRS determinations and to consider evidence that may not have been before the IRS at the time of its determination. Part III.C below examines how tax adjudications fit in with broader themes of constitutional law and reveals how constitutional law similarly isolates tax law from the mainstream.

C. The IRS Adjudicatory Role in Constitutional Context

Constitutional law principles as applied to tax adjudications have affected the courts' deference to the IRS's role as tax collector. As such, in adjudications, constitutional law, like administrative law, has done little in the way of offering procedural protections to taxpayers.

1. What Does "Due Process" Have to Do with "Collection Due Process"? The Due Process Clause of the Fifth Amendment provides that "no person . . . shall be . . . deprived of life, liberty, or property, without due process of law." Procedural due process generally requires two elements prior to the deprivation of a protected interest: notice and the opportunity for a hearing.[108] Although the last few decades of the twentieth century saw an explosion of procedural developments designed to ensure that government actions did not deprive an individual of property rights or privacy rights before adequate notice and hearing, tax cases have remained outside the due process mainstream.[109] The

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determinations in CDP cases generally does not reflect the Tax Court's approach to abuse of discretion review. *See* Robinette v. Comm'r, 123 T.C. 4489, 4505 (2004) (Halpern & Holmes, J.J., dissenting).

108. *Cf.* United States v. James Daniel Good Real Prop., 510 U.S. 43, 47 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process."); Lederman, *"Civil"izing*, *supra* note 52, at 216–21 (questioning whether the notice of deficiency required by I.R.C. § 6212 satisfies the constitutional requirement of notice); *see also* RODNEY L. MOTT, DUE PROCESS OF LAW 208 (1926) (noting that "notice and hearing as a part of due process of law was a natural corollary of the idea that that phrase embodied the essential principles of the common law of England"). The substantive due process inquiry is whether the government has sufficient justification to deprive a person of life, liberty, or property. For a general discussion of substantive due process, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.1 (1997).

109. This flurry of procedural development, referred to as the procedural due process revolution, commenced after the landmark decision of *Goldberg v. Kelly*, 397 U.S. 254, 261

Supreme Court has long held that a delay in the determination of property rights, a postdeprivation hearing, may be sufficient process in situations where it is "essential that governmental needs be immediately satisfied."[110] As a result, the Supreme Court has allowed the government, without a preseizure hearing, to destroy food thought to be unsafe[111] and to seize drugs thought to mislabeled.[112] The Supreme Court has held that collection of revenue, like the destruction of property for public health reasons, is an essential government need justifying a postdeprivation hearing, that is, a hearing after tax payment or enforced collection through administrative collection tools.[113] Summary proceedings by distraint appeared in our earliest revenue laws,[114] and courts have held constitutionally sufficient taxpayers' ability to recover erroneously assessed and collected taxes after those taxes had been paid voluntarily or collected

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(1970) (finding a procedural due process violation where public assistance payments were terminated without a prior opportunity for an evidentiary hearing); *see also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975) (noting that after *Goldberg*, "we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another"); Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 639 (2000) [hereinafter Koch, *Due Process Calculus*] (noting that there was "an explosion in procedural innovation" following *Goldberg v. Kelly*); *cf.* Paul R. Verkuil, *A Study of Informal Adjudicative Procedures*, 43 U. CHI. L. REV. 739, 739 n.2 (1976) (suggesting that the due process revolution had "noteworthy antecedents" to *Goldberg*). For a good, brief historical discussion of the growth of procedural due process protections and recent limitations on the reach of procedural due process, see Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL'Y 89, 105–07 (2002); *see also* Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1988–89 (1996) (suggesting a reduction in due process rights in areas such as welfare benefits and prisoner rights in which the legislature has clarified that individuals do not have statutorily created entitlements). For a different view, see generally Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591 (1998) (responding to Professor Pierce, giving a more complex and ambiguous history of contemporary procedural due process, and adopting a different view of the current status of "new welfare" benefits).

110. Phillips v. Comm'r, 283 U.S. 589, 596–97 (1931).

111. *See* N. Am. Cold Storage Co. v. Chicago, 211 U.S. 306, 315 (1908) (holding that "a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use, is not necessary").

112. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598 (1950) (reaffirming earlier holdings that "no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective").

113. *See Phillips*, 283 U.S. at 595–97; *see also* Fahey, *supra* note 32, at 486–88 (providing a description of and justification for taxpayers' postdeprivation rights).

114. *E.g.*, Act of Mar. 3, 1791, ch. 15, § 23, 1 Stat. 199, 204 (1791) ("[T]he amount of the duties [on spirits] so refused or neglected to be paid, may either be recovered with costs of suit in an action of debt . . . or may be levied by distress and sale of goods of the person or persons refusing or neglecting to pay . . . .").

through seizure or levy.[115] Taxpayers have long had the right to bring a refund claim and suit after assessment and payment or collection to ensure redress for improper government action.[116]

Given the limited constitutional nature of tax cases, it is generally thought that the CDP provisions have little to do with constitutional procedural due process protections.[117] Rather, like the spate of bill of rights[118] provisions covering matters both important and mundane, perhaps CDP reflects a means for the legislature to communicate with the public about the public's sense of dissatisfaction with government.[119] CDP does not reflect

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115. *See, e.g.*, Stonecipher v. Bray, 653 F.2d 398, 403 (9th Cir. 1981) (reiterating that prompt tax collection is an important national interest, thereby justifying a postponement of notice and opportunity for a hearing).

116. Refund suits directly against the United States became possible in 1855 with the creation of the Court of Claims. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855). In 1870, taxpayers were permitted to bring refund actions against the United States in federal district court. Act of Mar. 3, 1887, ch. 359, § 2, 24 Stat. 505 (1887). Prior to 1855, the sole recourse was to bring a refund suit against the collector of the internal revenue; this right was discontinued in 1966. Pub. L. No. 89-713, § 3, 80 Stat. 1107, 1108 (1966); *see* Flora v. United States, 362 U.S. 145, 177 (1960), *aff'g on reh'g*, 357 U.S. 63 (1958) (establishing that a taxpayer must fully pay the tax prior to filing a refund suit with respect to income, estate, and gift taxes). District court refund jurisdiction is now found at 28 U.S.C. § 1346(a)(1) (2000). For a discussion of the historical lineage of refund suits, see Leandra Lederman, *Equity*, *supra* note 85, 401–11 (discussing the refund suit as the lineal successor of the common count in *indebitatus assumpsit* for money had and received).

117. *See* Camp, *supra* note 5, at 119 (implying that collection due process has little relation to traditional due process concerns by referring to the CDP provisions as the "massively misnamed 'Due Process' provisions").

118. William Safire, *On Language*, N.Y. TIMES MAG., Aug. 1, 1999, at 22, 22–24 (discussing the growth of the catch phrase "bill of rights" in a host of substantive areas: G.I. benefits, crime victims' rights, voters rights, hospital patients' rights, and taxi passengers' rights). *See generally* Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy*, 87 TAX NOTES 1133 (2000) (arguing that the proposed taxpayer bills of rights are symbolic rather than effective and proposing a civil damages remedy instead); Steve Johnson, *A Residual Damages Right Against the IRS: A Cure Worse than the Disease*, 88 TAX NOTES 395 (2000) (finding Professor Lederman's proposal deficient and suggesting a commitment to the current direction of taxpayer protection); Leandra Lederman, *Taxpayer Rights In the Lurch: A Response to Professor Johnson*, 88 TAX NOTES 1041 (2000) (responding to Professor Johnson's critique and remaking her own case for a civil damages remedy).

119. An example of Congress speaking to taxpayers' concerns is found in § 7491, enacted as a part of RRA 98. I.R.C. § 7491 (West 2004). Historically, the burden of proof in tax adjudications had been on the taxpayer; the enactment of I.R.C. § 7491 changed that by providing for a shift in the burden of proof to the IRS if the taxpayer presents "credible evidence." *See id.*; *see also* Leslie Book, *The New Collection Due Process Taxpayer Rights*, 86 TAX NOTES 1127, 1132 (2000) (noting the emphasis RRA 98's lawmakers placed on connecting RRA 98 to general antigovernment sentiment); Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 446–48 (1999) (explaining that § 7491 was passed because Congress needed to politically respond to the public's dissatisfaction with the tax system). For a fascinating discussion of the importance of symbolism in tax legislation, see MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 26–28 (1964) (suggesting the divergence

a legislative intervention into or overturning of the settled state of procedural due process tax jurisprudence. The cases compromising that jurisprudence essentially state that the hearing process that is due before the government can commence summary collection procedures need not be judicial; rather, discretionary administrative preassessment procedures, largely through the examination and IRS Appeals Office procedures, backstopped by a postdeprivation right to a refund action in federal district court or the Court of Federal Claims, are all the constitutionally required process due to taxpayers.[120]

In some ways, the tax system's absence from the due process developments of the late twentieth century may be surprising given that until 1933 and the advent of the New Deal, tax cases constituted the majority of the Supreme Court's procedural due process caseload.[121] Yet by the early twentieth century and the introduction of the modern tax system in 1913,[122] it was essentially black letter law that predeprivation taxpayer administrative or judicial hearing rights were not constitutionally required. This was because of two related concepts: (1) the government's revenue needs were too important to warrant the delays inherent in predeprivation hearings, and (2) derivatively, the interposition of a potentially hostile judiciary between the taxpayer and the treasury was thought to give rise to a risk creating a chokehold on the flow of revenues.[123]

With the exception of cases in which taxpayers do not receive actual notice of the IRS's intent to assess additional tax[124] and

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between the symbolism of federal tax legislation and its effects).

120. *See* Fahey, *supra* note 32, at 454, 460–61; Lederman, *Equity*, *supra* note 85, at 398, 412.

121. *See* MASHAW, *supra* note 49, at 61 (explaining that during the nineteenth century most government regulation was related to taxation and that over sixty percent of all due process cases reaching the Supreme Court before 1933 were tax cases).

122. For a brief history of the events leading up to the passage of the Sixteenth Amendment and the adoption of the modern income tax in 1913, see DANIEL Q. POSIN & DONALD B. TOBIN, PRINCIPLES OF FEDERAL INCOME TAXATION § 1.01 (6th ed. 2003).

123. *See* MOTT, *supra* note 108, at 220 (discussing how the exigencies of efficiency in the collection of taxes required that both notice and hearing rights in taxation were historically less than in most other areas of law); *see also* Fahey, *supra* note 32, at 461–62.

124. *See* I.R.C. § 6330(c)(2)(B) (providing that a person may raise at the hearing challenges to the existence or amount of the liability "if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability"). Although adequate notice and hearing rights are the mainstays of procedural due process jurisprudence, actual notice is not a procedural due process requirement. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950); *see also* Lederman, *"Civil"izing*, *supra* note 52, at 215–16 (describing how the state has to use procedures only "reasonably calculated" to reach the intended party). In fact, CDP grants additional administrative and judicial hearing rights to taxpayers who may not have received actual notice but to whom the government would

cases in which taxpayers are requesting so-called innocent spouse protections,[125] in CDP proceedings, taxpayers do not have additional administrative or judicial hearing rights concerning the amount or existence of a liability. Instead, CDP involves additional procedures respecting the government's power to collect an agreed-upon liability. Although the CDP procedures relate to the IRS's provisional collection powers, those collection powers arise only after an assessment, and for the most part, taxpayers have significant procedural and statutory rights to administrative review and statutory rights to judicial review of the IRS's proposed actions giving rise to an assessment.[126] These procedural and statutory preassessment rights, which have grown over time, serve to reduce the risk that the government will erroneously propose that a taxpayer owes additional money to the government. They soften the effect of the constitutional law principles that would otherwise suggest that the risk of error in IRS assessment determinations is far outweighed by the government's need to dispense with trial-like procedures and ensure the prompt flow of tax revenue.

Yet, CDP does seem somehow connected by more than just name to traditional procedural due process concerns. Although judges and academics alike have spilled much ink in the area of procedural due process,[127] little of it has addressed the tax system.[128] The due process revolution of the 1970s and 1980s,

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have satisfied its notice requirements under traditional procedural due process jurisprudence. *See* Book, *supra* note 119, at 1147 (contrasting the notice requirements under I.R.C. § 6212 with those in the CDP proceedings).

125. *See* I.R.C. § 6330(c)(2)(A)(i) (allowing taxpayers to raise "appropriate spousal defenses" in CDP proceedings). *See also generally* Raymond v. Comm'r, 119 T.C. 191 (2002) (considering an innocent spouse claim during a CDP hearing).

126. For a discussion of the significant preassessment taxpayer procedural rights, see SALTZMAN, *supra* note 11, chs. 8–9.

127. *See* Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 748 (1990) (noting that although, in his view, *Goldberg v. Kelly*, 397 U.S. 254 (1970) was wrongly decided, and although it has been the subject of "extensive commentary" and "endless elaboration, qualification and even contraction over the years, its importance, if not its influence, continues to grow with time" (footnote omitted)).

128. For an exception, see Larry J. Roberts, Laing *Down a Challenge: The Future of Due Process and Tax Collections*, 11 GONZ. L. REV. 369 (1976) (discussing how due process developments brought into question the constitutionality of prior law jeopardy collection provisions of the Internal Revenue Code). A jeopardy or termination assessment begins when the IRS believes "prior to assessment, . . . that collection will be endangered if regular assessment and collection procedures are followed." *See* INTERNAL REVENUE MANUAL (CCH) § 4.15.1.2 (June 30, 1999). Congress amended the jeopardy assessment provisions to allow taxpayers the right to obtain administrative and judicial review of IRS jeopardy assessment actions. I.R.C. § 7429; *see also* SALTZMAN, *supra* note 11, ¶ 10.05[7][a] (providing a description of the changes made to jeopardy and termination assessments in the mid-1970s). Before 1976, the Service, relying on the Anti-Injunction Act, did not submit to judicial review of jeopardy or termination assessments. SALTZMAN,

covering landmark cases like *Goldberg v. Kelly*,[129] *Mathews v. Eldridge*,[130] and *Board of Regents v. Roth*,[131] placed the Supreme Court in the position of determining whether there was in fact a protected privacy, property, or liberty interest and, if there was, how much process was due after the Court applied a utilitarian-based balancing test that resulted in a general expansion of situations in which a predeprivation hearing right was constitutionally required.[132]

Following the due process revolution, courts have continued to place tax cases outside the mainstream of due process jurisprudence. For example, in *Fuentes v. Shevin*,[133] the Supreme Court stated that "extraordinary situations," including taxation, justify postponing notice and hearing until after a deprivation, but that those situations are "unusual."[134] In addition, *Fuentes* set forth three factors common to cases in which the Court has held that preseizure hearing was not necessary: the seizure must be "necessary to secure an important governmental or general public interest," there must be "a special need for very prompt action," and the state must have "kept strict control over its monopoly of legitimate force."[135] Without analysis, *Fuentes* stated that the above factors therefore "allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food."[136] The lumping

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supra note 11, ¶ 10.05[7][a].

129. 397 U.S. 254, 261 (1970) (holding that due process requires a hearing prior to termination of benefits received under a federal program).

130. 424 U.S. 319, 323 (1976) (considering the adequacy of Social Security Administration procedures to determine that an individual was no longer entitled to disability payments). In *Mathews*, the Court analyzed the adequacy of existing procedures by applying a three-part inquiry considering the private interest affected by the official action; the risk of an erroneous deprivation of that interest through procedures used and the probable value of additional safeguards; and the government's interest, including the administrative burden that additional requirements would impose. *Id.* at 334–35.

131. 408 U.S. 564, 569, 573–75 (1972) (holding that a nontenured professor whose contract was not renewed did not have a Fourteenth Amendment liberty interest and therefore was not entitled to procedural due process protection).

132. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46–49 (1976) (arguing that the *Mathews* test is a utilitarian analysis creating a social welfare function). Professor Aleinikoff calls this test the foundation of modern due process analysis. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 994 (1987).

133. 407 U.S. 67 (1972).

134. *Id.* at 90.

135. *Id.* at 91.

136. *Id.* at 91–92 (footnotes omitted).

of taxation together with other extraordinary situations, however, is not persuasive: although collecting taxes is crucial to the nation's well-being, the need for speed that might justify the absence of a predeprivation hearing seems much more pronounced when considering government actions to destroy contaminated food or mislabeled drugs.[137]

Although these cases isolating tax from mainstream procedural due process jurisprudence are entrenched,[138] when one scratches the surface of the tax system's place within procedural due process jurisprudence, the CDP provisions, at a minimum, reflect some analytical dissatisfaction with the deep structure of the tax cases.[139] Case law considering what process is due to taxpayers does not reflect the importance that society (through the legislature) now attaches to individuals' rights in the collection process and overstates the government's interest in prompt payment of taxes.

The following subpart reveals the deep roots of the tax system's exemption from most modern procedural due process jurisprudence, which provides a perspective for considering the merits of the CDP provisions.

2. Murray's Lessee *and the Nineteenth Century Approach to Due Process*. Considering the due process jurisprudence of tax cases requires a return to the underpinning of all these cases:

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137. *See* Roberts, *supra* note 128, at 396 (stating that the vitality of procedural due process jurisprudence as applied to tax law is questionable, as the cases do not rest on "careful analysis" and "merely observe that taxes are the nation's lifeblood and that the nation's continued existence depends upon their swift and unhindered collection"); *cf.* United States v. James Daniel Good Real Prop., 510 U.S. 43, 60 (1993) (stating in dicta that earlier cases upholding the constitutionality of the modern tax assessment process "relied upon the availability, and adequacy, of these [BTA, the predecessor to the Tax Court,] preseizure administrative procedures in holding that no judicial hearing was required prior to the seizure of property"). Moreover, the IRS, through its jeopardy and termination assessment procedures, has the power to quickly assess and collect when there are critical reasons to dispense with procedural protections. Refer to note 128 *supra* (discussing the *Internal Revenue Manual* rule allowing collection to begin when the IRS believes collection will be hindered if normal procedures are followed).

138. *See, e.g.*, Martinez v. IRS, 744 F.2d 71, 72–73 (10th Cir. 1984) (holding that due process is satisfied by postcollection judicial review and imposing sanctions on taxpayer who filed a frivolous return); Kalb v. United States, 505 F.2d 506, 510 (2d Cir. 1974) (stating that "collection of taxes by summary proceedings, with judicial review afforded after assessment, does not violate due process"); Tavares v. United States, 491 F.2d 725, 726 (9th Cir. 1974) (considering the administrative levy powers under § 6331 and stating that modern procedural due process developments do not require a judicial hearing prior to seizure).

139. *Cf.* Roberts, *supra* note 128, at 397 (critiquing cases that rely on the truism that taxes are the "nation's lifeblood" for not adequately analyzing the government's interest in collecting taxes through less drastic means).

Murray's Lessee v. Hoboken Land & Improvement Co.[140] The Supreme Court's consideration of tax cases in the nineteenth and early twentieth centuries reflected a mode of analysis that centered on tradition and analogy and considered whether the process in question conformed to an historical notion of the usual processes at law.[141] In contrast, as mentioned above, the current state of procedural due process jurisprudence reflects an interest balancing that considers whether the procedures in effect approximate a tolerable amount of accuracy in light of the potentially competing government and individual interests.[142] More than a century and a half has passed since *Murray's Lessee* was decided, and its vitality as a due process case other than in the tax area is limited. Yet in cases in which taxpayers have challenged aspects of the tax system on procedural due process grounds, the courts have largely adopted the *Murray's Lessee* approach as the underlying basis for sustaining the constitutionality of the tax structure and justifying the notion that postdeprivation judicial remedies are constitutionally adequate.[143]

Although *Murray's Lessee* and its progeny are well established, analyzing its reasoning helps explain how CDP reveals a sharpening of the interests at stake in the tax collection process. In *Murray's Lessee*, the Court held that an act of Congress authorizing a summary warrant to issue against a delinquent tax collector without oath for the seizure of his

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140. 59 U.S. 272 (1855); *see* MASHAW, *supra* note 49, at 61–62 (calling *Murray's Lessee* "the earliest attack on administrative procedure on due process grounds").

141. *See* MASHAW, *supra* note 49, at 44. The concept of due process of law was born of two provisions in the Magna Carta: Due process expects justice through the "judgment of [one's] peers" and "the law of the land." *See* MOTT, *supra* note 108, at 32–37, 45 (discussing the evolution of the English concept of due process of law and its effect on the U.S. legal system). Both clauses have been much debated; however, three things are certain: 1) due process protected people against arbitrary actions by the English monarchy, 2) the two clauses are complementary, suggesting that justice is done if one of the two is satisfied, and 3) "the law of the land" is synonymous with legality and justice according to reigning legal principles. *Id*. at 32–36. The Magna Carta supplied "the conception of a fundamental statute by which other statutes might be tested as regards their validity." *Id.* at 42–44.

142. Farina, *supra* note 109, at 614–15 (stating that government discretion is "constrained by only whatever limits the majoritarian political process decides to impose on the particular regulatory enterprise").

143. *Murray's Lessee* recognized, however, that the general vision of due process constituted trial-like procedural protections, but not every area of law required that approach. *See* MASHAW, *supra* note 49 , at 67 (explaining that although trial was the most common way of deciding contested facts, this method was not always followed in the due process area); *see also* Fahey, *supra* note 32, at 467–68 & n.94 (explaining that the concept of procedural due process in the tax system can be traced to cases such as *Murray's Lessee* and *Phillips v. Comm'r*, 289 U.S. 589 (1931)).

property reflected due process of law.[144] The plaintiff was an individual creditor, as was the government, of the delinquent tax collector and the plaintiff sought to invalidate the government's summary seizure of the delinquent tax collector's land.[145] The Court applied a two-tier test for determining whether the government's summary distress procedure was consistent with the law of the land, and thus not subject to judicial proceedings. First, the Court looked to the Constitution itself "to see whether this process [was] in conflict with any of its provisions."[146] Second, the Court examined whether the procedure conformed to "settled usages and modes of proceeding existing in the common and statu[t]e law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[147]

Murray's Lessee is technically not a case involving taxpayer challenges to the sovereign's assertion or collection of a tax liability. Nonetheless, it involved what types of protections are due when the government seeks to collect upon a debt owed to it. As such, it can be said that the sovereign's long tradition of using summary nontrial proceedings to collect on tax debts underlies *Murray's Lessee*'s holding that due process does not entail judicial proceedings in that context. To justify its conclusion, *Murray's Lessee* examined tax history, including practices in England, the colonies, and the states between the signing of the Declaration of Independence and the ratification of the Constitution; the then-current practices of the states; and the functional necessities of tax administration.[148] In its consideration of historical practices,

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144. *Murray's Lessee*, 59 U.S. at 284–85.

145. The government sold the land to the *Murray's Lessee* defendant, and the plaintiff brought an ejection action against the defendant based in part on the government's original seizure of the tax collector's land was invalid due to the lack of trial-like judicial protections the government used in its seizure. *Id.* at 274.

146. *Id.* at 277.

147. *Id.*

148. *Id.* at 277–79. Later cases followed this approach as well. *See* Cheatham v. United States, 92 U.S. 85, 88–89 (1875).

> All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them.
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> . . . [A]ppeals are allowed to specified tribunals as the law-makers deem expedient. . . .
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> . . . .
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> . . . [T]he general government has wisely made the payment of the tax claimed . . . a condition precedent to a resort to the courts . . . .

Id. Cheatham also warned that any judicial power to delay or control tax collection might place "the very existence of the government . . . in the power of a hostile judiciary." *Id.* at 89; *see also* McMillen v. Anderson, 95 U.S. 37, 41 (1877) (upholding Louisiana's method of

Murray's Lessee noted that since the time of King Henry VIII, English law had recognized nonjudicial procedures for collecting debts due the sovereign and that no colonial repudiation of such practices had occurred.[149] Underlying this historical viewpoint was an implication, without analysis, that a parade of horribles might befall the system if the Court were to mandate additional procedural protections and invalidate longstanding practices. Further, when considering the adequacy of the provisions, the Court did not balance the general interests of the sovereign and the taxpayers in the nature of a judicial proceeding against the government's interests in avoiding delay tactics and in securing immediate payment of taxes.[150] *Murray's Lessee* also did not consider whether the sovereign could collect taxes "by less drastic means";[151] rather, it stated, without analysis, that few governments "can permit their claims for public taxes . . . to become subjects of judicial controversy.[152]

3. Bringing It Back to CDP. In procedural due process cases, the Supreme Court has rejected the *Murray's Lessee* mode of analysis inherent in the nineteenth century tax cases—that is, an analysis based on custom and analogy—and replaced it with interest-balancing.[153] As indicated above, the Court has continued to classify tax cases as exceptional and it is reluctant to impose interest-balancing on the evaluation of the levels of procedural

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assessing and collecting liquor taxes from delinquent taxpayers against a taxpayer's claim that the assessment of the tax without notice to the taxpayer and the collection of taxes by administrative seizure violated the due process clause of the Fourteenth Amendment).

> The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. . . . The tax collector may, without judicial formality, proceed to seize and sell . . . the property . . . to pay the tax and costs.

Id.

> It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that "due process of law," as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals.

Ky. R.R. Tax Cases, 115 U.S. 321, 331 (1885).

149. *Murray's Lessee*, 59 U.S. at 277–78.

150. MASHAW, *supra* note 49, at 64.

151. *Id.*

152. *Murray's Lessee*, 59 U.S. at 282.

153. MASHAW, *supra* note 49, at 46–47, 69–71 (discussing the drawbacks of analysis based on custom and analogy and noting the recent change to an interest-balancing methodology).

protections due to taxpayers.[154] What, if anything, does the structure of tax cases' place in the procedural due process pantheon tell us about CDP?

Although CDP may appear to have little to do with procedural due process jurisprudence, there are certain aspects of CDP that suggest a similarity between the two. First, CDP requires an administrative, and possibly judicial, determination of "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."[155] There is little authority discussing how the IRS or courts should balance these competing interests, but the statute reflects Congress's explicit acknowledgment that the individual does have important interests in the collection process—interests that the due process jurisprudence minimizes. CDP legitimizes the competing interests at play in the tax collection process, an analysis essentially absent from *Murray's Lessee* and its progeny.[156] Notwithstanding the truism that taxes are the lifeblood of government, CDP suggests a heightened awareness that there are important individual interests in the tax collection process beyond the indirect benefits that flow from a greater likelihood that the IRS will follow the rule of law in collection procedures.[157]

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154. Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972) (explaining that the procedural due process standards protect against arbitrary takings). An exception to this is *Kahn v. United States*, 753 F.2d 1208, 1220 & n.6 (3d Cir. 1985) (considering the adequacy of the procedures for imposing a penalty for filing a frivolous income tax return and noting that cases that merely refer to this mode of analysis provide "little guidance" and are "deficient in terms of offering a cogent analytical framework"). *Kahn* applied the three-factor *Mathews v. Eldridge* balancing test in upholding the § 6703 procedures for postassessment judicial review of the frivolous return penalty. *Id.* at 1219–20, 1222. For a similar analysis and result, see *Lil jenfeldt v. United States*, 588 F. Supp. 966, 971–73 (E.D. Wis. 1984) (applying the *Mathews v. Eldridge* balancing test and affirming the constitutional validity of § 6702 civil penalties for frivolous income tax returns).

155. I.R.C. § 6330(c)(3)(C) (West 2004).

156. MASHAW, *supra* note 49, at 62–64.

157. These indirect societal benefits may be difficult to conceptualize as individual rights, but they may have value because of their educative, character-forming, or symbolic roles. Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 LAW & PHIL. 19, 32 n.21 (1998). Professor Alexander cautions, however, that because of the ubiquity of determinations, the government should be wary of the additional costs related to additional procedural protections. *Id.* In addition to these indirect benefits of which Professor Alexander is wary, increased legislative attention to alternatives to full payment of agreed-upon liabilities, including installment agreements and offers in compromise, typify Congress's more direct statement that individuals have statutorily protected interests in the tax collection process. RRA 98 added provisions for establishing uniform procedures and guidelines for evaluating offers in compromise. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685; H.R. CONF. REP. NO. 105-599, at 287–289 (1998). RRA 98 also provided changes that

In addition to placing the CDP-required balancing into some constitutional context, an understanding of procedural due process in general, and the outmoded analysis inherent in *Murray's Lessee* in particular, focuses attention on just what the government interest is in the collection process. This understanding is important even if one accepts the notion that constitutional law should not be the engine that drives the procedural calibration, but rather the legislature or the agency itself should set procedural protections.[158] Consider, for example, how the legislature should think about the government's interest when evaluating the merits of proposing additional collection rights. How much money that would otherwise be collected does not get collected due to CDP's grant of an essentially unfettered right to taxpayers to stay collection pending administrative consideration of the matter? What government costs accrue because of the possibility of delay, even if the taxes are ultimately collected? What is the net effect on collections of CDP's implicit encouragement the IRS and the taxpayer to consider alternatives to full collection as a distinct resolution to the IRS's proposed collection action? Will this encouragement to consider collection alternatives perhaps contribute to greater noncompliance as taxpayers increasingly view alternatives to enforced collection as part of their rational calculus in deciding whether to comply with their tax obligations in the first place?[159] Finally, what are the costs to the system of administering the CDP provisions, including an appreciation that the IRS as an agency has limited resources and that CDP may divert agency resources?

4. Summarizing Tax Cases' Isolation from Constitutional Principles. In sum, CDP forces the IRS and courts to consider in sharper focus the government's and individuals' interests in the tax collection process. This type of focused analysis was absent

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increased the availability and consideration of installment agreements. For example, see I.R.C. § 6159(c), which now requires the Service to enter into installment agreements in certain circumstances.

158. For the view that it is inappropriate for the courts, through an expansive procedural due process jurisprudence, to place themselves in the position of micromanaging the appropriate levels of agency procedures, see Epstein, *supra* note 127, at 769–71 (suggesting that the legislative and administrative branches are better equipped to perform the risk-based analysis inherent in setting appropriate procedural safeguards).

159. For more on the latter point, see Lederman, *Tax Compliance*, *supra* note 58, at 1488 n.190 (positing, for example, that "the offer-in-compromise program may undermine taxpayer assurance that others are paying their tax obligations by letting taxpayers who legally owe taxes compromise those obligations for a small fraction of the liability").

from the debate leading up to CDP's enactment and from the venerable cases considering the constitutionality of tax adjudications. The import of this subpart, however, is not that the tax system rests on unsound constitutional footing. Rather, CDP suggests that the constitutionally sanctioned absolute discretion the IRS has had in the collection of taxes is not as vital as those cases imply. The tension between due process and CDP stems, in part, from CDP's requirement that, prior to levy or following the filing of a notice of federal tax lien, a taxpayer can require the IRS and the appropriate reviewing court to consider individuals' rights to collection alternatives and less intrusive ways of having a liability satisfied.[160] Additionally, due process cases that default to the truism that the government has vital interests in collecting taxes blur the analysis concerning what protections taxpayers should have in the collection process, especially given the IRS's increasingly important role as a deliverer of benefits, if one assumes that balancing competing interests is an appropriate way to calibrate procedural protections.[161]

Despite this realization, however, it is not enough to state that individuals have rights in the tax collection process that should automatically lead to new hearing and notice rights such as CDP. Rather than examine procedural protections under the specter of anecdotal stories of abuse[162] or via cloaked informants railing on IRS mistreatment of taxpayers, the legislature should carefully weigh the interests at stake when evaluating substantial shifts in agency resources inherent in a provision like

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160. I.R.C. § 6330(a)–(c).

161. Many have pointed out practical and normative critiques of the modern due process balancing test. For example, Professor Mashaw, while noting the adaptability of balancing and its recognition that process always involves trade-offs between collective and individual ends, states that "this brand of utilitarianism has the defects of its virtues, [and] that, given a good enough reason, the government can use any process it pleases." MASHAW, *supra* note 49, at 47. Professor Mashaw also points out the test's appetite for data that is both unknown and perhaps not capable of being known and the difficulty of comparing an individual's dignitary costs to administrative costs. *Id.* For a similar critique, see Koch, *Due Process Calculus*, *supra* note 102, at 643 (noting that the implementation of the cost-benefit analysis is unsatisfactory because of limited information, rendering the analysis little more than "judicial guesswork"). Despite its inherent limitations, balancing benefits in this context from its acknowledgment that there are competing interests in the tax collection process and that over time society ascribes increasing importance to rule of law principles in all dealings with the government, including tax collection.

162. As Professor Camp thoroughly explains, almost all of the allegations of abuse were subsequently discredited. Camp, *supra* note 5, at 81 & n.428; *see also* David Cay Johnston, *Inquiries Find Little Abuse by Tax Agents*, N.Y. TIMES, Aug. 15, 2000, at C1. *See generally* David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797 (1998) (addressing the risks of anecdote-based legislation).

CDP. The reality is that CDP is imposing significant costs on the tax system, and it can be improved, in part by an understanding of the tax system's place in the broader context of administrative and constitutional law. The following Part offers specific proposals to improve CDP so that it can better serve the government and individual interests in the collection process.

IV. PROPOSED SOLUTIONS WILL MINIMIZE SYSTEMIC COSTS AND SHARPEN CDP'S FOCUS ON REGULATING IRS CONDUCT AND PROTECTING LEGITIMATE INDIVIDUAL INTERESTS

A. Limiting the Opportunities to Challenge the Amount or Existence of the Liability in CDP Hearings

One important way to limit CDP costs, and to address the overinclusive nature of CDP as it is currently written, is to eliminate or reduce the opportunities a taxpayer has to challenge his underlying liability in CDP hearings. Congress should pass legislation that eliminates or reduces the avenue for liability redeterminations in CDP hearings. Under current law, the taxpayer is entitled to challenge the amount or existence of a liability if the taxpayer did not receive adequate notice of the IRS's proposed deficiency or if the taxpayer otherwise did not have an opportunity to dispute the underlying liability.[163] The AO, at her discretion, may consider the underlying liability even if the taxpayer has received adequate notice or otherwise had an opportunity to dispute the liability, but the AO's consideration does not become part of the formal CDP determination and is not subject to judicial review.[164] A recent case also concluded that a taxpayer who self-reports a liability (by filing a balance due tax return) can also challenge that liability (and maybe even demand a refund) in a CDP hearing.[165] Although collection issues have been the most prevalent in CDP cases, challenges to the amount or existence of the liability, or disputes concerning whether the taxpayer received adequate notice, are not uncommon.[166]

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163. I.R.C. § 6330(c)(2)(B).

164. Treas. Reg. § 301.6330-1(e)(3) Q&A-E11 (2004).

165. *See* Montgomery v. Comm'r, 122 T.C. 1, 7–8, 10 (2004) (concluding that the underlying tax liability in I.R.C. § 6330(c)(2)(B) includes an amount self-assessed and that the plain language of the statute supports such taxpayer challenges because a taxpayer filing a balance due return has not received a statutory notice of deficiency with respect to that liability or otherwise had a judicial or administrative opportunity to dispute it).

166. Department of Treasury General Explanations of the Administration's Fiscal Year 2004 Revenue Proposals 91 (2003), *reprinted in* 2003 TAX NOTES TODAY 23, Feb. 4, 2003, LEXIS, 2003 TNT 23-11.

The policy behind letting taxpayers raise the issue of underlying liability in the context of CDP determinations is twofold: (1) it is foolish to consider collection alternatives if the taxpayer does not in fact owe the underlying liability, and (2) pre-CDP procedures may not provide sufficient opportunities to challenge tax liabilities. Yet taxpayers have important preassessment rights to challenge the amount or existence of a liability. For example, the IRS is required to provide a taxpayer with a notification of its belief that thetaxpayer owes taxes in addition to those the taxpayer reflected on his tax return, and the notification must be reasonably designed to reach the taxpayer.[167] Pegging the right to dispute income tax liability to actual notice when the liability relates to an IRS-determined additional tax liability makes some sense. After all, it is possible that the IRS might satisfy its last-known-address notice requirements, but that the taxpayer might not get actual receipt in time to petition the Tax Court for relief.[168] Therefore, the taxpayer would not be able to challenge the IRS's adjustments unless he was to pay the tax and file a refund claim. For a taxpayer unable to afford the tax payment, the refund remedy might be theoretical only,[169] and the taxpayer might face the threat of enforced collection on an erroneous liability.

The problem with allowing judicial review of liability determinations in CDP proceedings, however, is that it is difficult and wasteful for the IRS to prove that a taxpayer did in fact receive the notice. Opening the door to liability considerations in CDP cases dilutes the provisions' focus on regulating and overseeing IRS collection conduct and it substantially increases CDP's costs to agency and court

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167. For a discussion of the relationship between the IRS's obligation to notify taxpayers of a proposed deficiency and traditional due process notice considerations, see Lederman, *"Civil"izing*, *supra* note 52, at 214–23. Section 6212(a) authorizes the IRS to send a statutory notice of deficiency to a taxpayer by certified or registered mail. I.R.C. § 6212(a). If the taxpayer receives the notice in a timely manner, the IRS has satisfied its notice requirements and may assess tax if the taxpayer fails to file a timely petition to the Tax Court. I.R.C. § 6212(c). In addition, § 6212(b) provides for constructive notice if the IRS sends a notice of deficiency to the taxpayer's "last known address." I.R.C. § 6212(b)(1); *e.g.*, Abeles v. Comm'r, 91 T.C. 1019, 1029–31 (1988) (noting that the last known address is that which appears on the taxpayer's most recently filed return, absent a clear and concise notification of a different address).

168. *See* Sego v. Comm'r, 114 T.C. 604, 610–11 (2000) (considering a taxpayer's claim that she did not receive notice of deficiency despite IRS and postal service records indicating attempted delivery and ultimately finding that the notices were left at her residence).

169. *See* Flora v. United States, 362 U.S. 145, 195–96 (1960) (Whittaker, J., dissenting) (pointing out that the refund remedy may be of little practical consequence if the taxpayer is unable to pay the assessed liability).

resources. Moreover, many of the cases involving disputes concerning the underlying liability involve protestor-type issues, and the Tax Court has recently begun sanctioning taxpayers for raising frivolous matters in CDP hearings. These frivolous claims take up a disproportionate amount of judicial and administrative resources.[170]

Even if Congress is unwilling to eliminate the liability category completely, it should legislatively overrule *Montgomery v. Commissioner*,[171] which held that taxpayers can challenge the amount or existence of a liability in a CDP hearing even if the liability arises from filing a tax return with an unpaid tax liability.[172] Allowing taxpayers in CDP hearings to challenge the underlying liability resulting from self-assessed tax liabilities is an inappropriate use of IRS and court resources.[173] Taxpayers are always free to request that the IRS administratively abate the liability by filing an amended tax return, and if the taxpayer still disagrees with the IRS, the taxpayer can pursue a refund action in federal court. The policy of allowing challenges to the liability stems, in part, from discomfort with erroneous governmental determinations in which taxpayers have not had opportunity to make their case. When liabilities and IRS-proposed collection actions stem from taxpayers' own errors or a change in views, it is not worth the additional costs to the system of allowing those taxpayers to use CDP as a mechanism to challenge the underlying liability. CDP is not meant to create a forum for correcting taxpayer errors; rather, it is meant to provide oversight to IRS collection activities.

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170. *See* Cords, *supra* note 5 (manuscript at 47–48); *e.g.*, Hauck v. Comm'r, T.C.M. (RIA) 2002-184 (2002), *aff'd*, No. 02-2301, 2003 WL 21005238 (6th Cir. May 2, 2003) (upholding sanction). For a discussion of the disproportionate amount of resources that frivolous requests consume, see STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., REPORT OF THE JOINT COMM. ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF 1998, at 81 (Comm. Print 2003). However, allowing the AO to exercise his discretion in considering the underlying liability makes sense as well, but subjecting that determination and the determination regarding the ability to challenge the underlying liability to judicial oversight provides little benefit and great opportunity for mischief in the hands of certain taxpayers. To ensure the proper balance between taxpayer and IRS rights, regulations should provide factors for when the AO should exercise that discretion favorably. Nonexclusive factors could include actual notice of the IRS's proposed assessment, economic hardship, and the taxpayer's cooperation with IRS Appeals to provide all information necessary to make that determination.

171. 122 T.C. 1 (2004).

172. *Id.* at 10.

173. For a similar policy critique, see *id.* at 20–22 (Gerber, J., dissenting).

B. The Form of CDP Hearings

Insights from constitutional and administrative law dictate that the IRS should have great flexibility in setting appropriate procedures for CDP hearings. Taking a cue from the utilitarian approach to gauging the amount of process necessary for procedural due process purposes, the procedures the IRS offers in a particular CDP hearing should reflect the nature of the interest at stake in the hearing and the likelihood that the procedure offered will contribute to the IRS reaching a correct result. This understanding requires the IRS to consider what it is the taxpayer is requesting that the IRS consider at the CDP hearing.

In CDP cases, the IRS and courts have been taking a schizophrenic approach to what a CDP hearing is, whether taxpayers are entitled to face-to-face hearings,[174] and whether correspondence or telephonic conferences are adequate as a matter of law.[175] The extent of a hearing may directly affect IRS resources expended on CDP and the length of time the IRS has to resolve a matter. Moreover, the extent of the hearing may have a direct impact on a court's ability to undertake meaningful review, if that review is truly based upon the "abuse of discretion" standard found in administrative law.

Some observers have criticized the lack of uniformity in CDP hearings.[176] Yet administrative law reveals that with informal adjudications, the agency has few constraints on what constitutes a hearing.[177] The extent of the hearing should vary with respect to the particular relief or task the taxpayer is requesting that the AO consider. There is a great variety in terms of what is at stake within CDP hearings, and not every CDP hearing will have benefits associated with additional procedures. This insight is crucial to an understanding that the IRS may reduce its costs significantly by minimizing the extent of the procedures automatically offered to taxpayers in the CDP context. Regulations should clarify this potential for procedural reduction,

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174. *See* Treas. Reg. § 301.6330-1(d)(2) Q&A-D7 (2004) (stating that if a taxpayer wants a face-to-face hearing, a taxpayer "must be offered an opportunity for a hearing at the Appeals office closest to taxpayer's residence or, in the case of a business taxpayer, the taxpayer's principal place of business"). The regulations also provide, somewhat inconsistently, that the hearings are not formal under the APA and do not require a face-to-face meeting but that the CDP hearing might constitute a meeting or one or more oral or written communications between IRS Appeals and the taxpayer. Treas. Reg. § 301.6330-1(d)(2) Q&A-D6.

175. *See* Cords, *supra* note 5 (manuscript at 14–25).

176. *See id.* (manuscript at 42) (proposing a single approach to CDP hearings).

177. Refer to notes 66–67 *supra* and accompanying text (reviewing separation of agency adjudications and rulemaking into formal and informal categories).

and courts should embrace it when considering taxpayer challenges to IRS CDP determinations.

This point is illustrated by recalling the very tasks the IRS is supposed to, or authorized to, perform at a CDP hearing. For example, in the CDP determination process, the AO is supposed to satisfy its verification requirement—that the IRS has followed its administrative and procedural rules in the assessment of the tax that is subject to the IRS collection action.[178] If the taxpayer in a CDP request is only challenging whether the IRS has verified that applicable laws or procedures have been followed and is not requesting any other relief, then there is little need for extensive telephonic or face-to-face contact. The verification requirement is easily satisfied without much delay or many administrative resources, yet existing regulations suggest that a taxpayer should be given a face-to-face meeting even if he is only requesting evidence that the verification requirement has been satisfied.[179] This makes little sense.

Moreover, the balancing requirement in the context of individual determinations—that the AO is supposed to balance the need for efficient collection of taxes with the legitimate concern that the collection action be no more intrusive than necessary—seems best satisfied without direct taxpayer contact. The regulations and case law, however, have provided little guidance on what an AO is supposed to do to satisfy the balancing obligation,[180] and this provision is better understood as

178. There is no particular documentation on which the IRS is required to rely in order to satisfy this requirement. *See* Craig v. Comm'r, 119 T.C. 252, 261–62 (2002) (dismissing petitioner's allegations that the AO failed to obtain verification from the Secretary that the requirements of all applicable laws and administrative procedures were met as required by section 6330(c)(1) because section 6330(c)(1) does not require the officer to rely upon a particular document in order to satisfy this requirement).

179. The AO should supply written evidence of its verification to the taxpayer to minimize disputes and to allow the taxpayer to submit information showing that the IRS verification may be erroneous. Courts do not require that this verification be provided to the taxpayer, and a legislative change may be needed to require the IRS to provide this to taxpayers—a task that would not consume much in the way of agency resources. *See* Book, *supra* note 119, at 1137 (arguing that the reduction of the AO's verification to writing would aid in disputes); Cords, *supra* note 5 (manuscript at 35 & n.226) (citing Nester v. Comm'r, 118 T.C. 162, 166 (2002)); *see* Fahey, *supra* note 32, at 465–66 (questioning whether the failure of an AO "to obtain a timely verification can be rectified at the time of judicial review").

180. *See* Cords, *supra* note 5 (manuscript at 39) ("The statute provides no guidance on how the balancing is to be performed or even what factors should be considered."). The "no more intrusive than necessary" standard seems to be best applied with respect to determining which assets the IRS might seize to satisfy an outstanding debt; it is possible that taxpayers would wish to preserve some assets, such as income-producing assets, assets set aside for retirement, or assets with particular sentimental value, yet the CDP hearing occurs before the IRS has necessarily chosen which asset or assets it will seize.

a broader legislative directive for the IRS to acknowledge that, notwithstanding the long history of administrative and constitutional law jurisprudence minimizing taxpayer rights in the collection process, individuals do have important rights in tax collection adjudications.

Under CDP, the IRS is not independently required to consider collection alternatives on behalf of the taxpayer, and implicit in CDP is the ability of taxpayers to request that the AO consider the propriety of collection alternatives that the taxpayer believes are appropriate.[181] If a taxpayer does request collection alternatives, the individual's interest is more directly identified, thus justifying greater use of IRS resources and possibly even a face-to-face meeting. Moreover, because there is an increased risk of error in reaching its CDP determination without direct taxpayer contact when the hearing involves a collection alternative,[182] there is an additional justification for greater IRS resources in the CDP hearing. The increased risk of error arises because in all considerations of collection alternatives, the IRS is required to consider a taxpayer's financial circumstances. These circumstances, while summarized on IRS forms and checked for reasonableness with published IRS standards, often require additional information from the taxpayer in order for the IRS to perform its review function adequately. For example, if a taxpayer was to argue that special circumstances warranted a deviation from IRS standards when determining the taxpayer's reasonable collection potential, that explanation might be difficult to make via correspondence only and might justify the additional time expended for a face-to-face meeting.

To be sure, the approach described above has some difficulties. The relatively high percentage of pro se taxpayers in the CDP process and the open-ended nature of Form 12153, which taxpayers use to request CDP hearings,[183] make the IRS's

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The standard also seems to be appropriate in considering whether the IRS should file a notice of federal tax lien to protect its interest, but a taxpayer has independent grounds apart from this balancing requirement to request that the IRS withdraw its notice of federal tax lien; it is not clear that this balancing requirement would supersede this standard or impose additional obligations on the IRS. *See* I.R.C. § 6323(j)(1) (West 2004) (providing that the IRS may withdraw a notice of federal tax lien in certain circumstances, including if the withdrawal will "facilitate the collection of the tax liability").

181. Refer to Part II.A.2 *supra* (listing the new rights CDP provides the taxpayer).

182. Such an increased risk of error tends to implicate the desirability of a predeprivation hearing. Refer to note 130 *supra* (discussing the three-part inquiry under *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976)).

183. Pro se litigants constituted seventy percent of the cases of judicial review of CDP determinations in 2002. IRS, NATIONAL TAXPAYER ADVOCATE; FISCAL YEAR 2002

task of determining the adequacy of CDP procedures more difficult. If the taxpayer is inarticulate or unsophisticated so that the request for a CDP hearing is vague or ill-defined, it is difficult for the IRS to determine what procedures are adequate. Yet, as suggested by other observers, the IRS could assist taxpayers by better informing them of their specific individual rights in the CDP process.[184] If a taxpayer was better able to request specific relief at an early stage in the process, the IRS would be able to identify whether the taxpayer was requesting a legitimate consideration of collection alternatives—which would require a mere verification that the IRS followed its procedures—or was in fact raising a request based upon frivolous arguments or merely to delay collection. Each warrants a different IRS response and a different type of hearing.

C. True Abuse of Discretion Review

General administrative law principles limit litigants from introducing new evidence when courts are hearing appeals from informal agency adjudications that are subject to abuse of discretion review.[185] This on-the-record rule has no counterpart in tax law, in which the Tax Court, even in reviews of IRS determinations completed on an abuse of discretion basis, generally lets taxpayers introduce evidence that was not before the IRS when it reached its determination.[186] Beyond fidelity to historical practice, the underlying rationale for treating tax adjudications differently than other agency adjudications is that the new information might enable the court to reach a correct result—a result that might be different from the agency's because of the court's consideration of new matters.

The Tax Court's approach to abuse of discretion review is implicitly based on a belief that it is worth sacrificing efficiency

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ANNUAL REPORT TO CONGRESS 276, *available at* http://www.irs.gov/pub/irs-utl/nta_2002_annual_rpt.pdf.

> Form 12153 is incomplete in that it does not provide a checklist for the types of issues that Appeals could consider; rather, it provides a blank space for a taxpayer to explain why she does not agree with the proposed collection action. For a taxpayer who is unaware of what issues the AO could consider at the CDP hearing, this could prevent the taxpayer from fully exercising her rights. The IRS should modify the form to allow a taxpayer to easily identify issues she wishes for Appeals to consider.

Book, *supra* note 119, at 1146 n.155.

184. 2003 REPORT, *supra* note 3, at 43–45 (suggesting that IRS Appeals should better inform taxpayers about their rights to seek collection alternatives in the CDP process).

185. Refer to Part III.B.4 *supra* (discussing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).

186. *See* Ewing v. Comm'r, 122 T.C. 32 (2004).

for more complete judicial hearings because the additional procedures may lead the court to conclude, in certain circumstances, that the taxpayer would be entitled to full or partial relief. In addition to the tangible costs to both the parties and the judiciary associated with a hearing in which the parties introduce facts on a de novo basis, the introduction of new evidence takes away the court's emphasis on agency practice, and review tends to become more of a judicial substitution of judgment, rather than a mechanism for external control of agency practice—the very rationale for CDP in the first place.[187]

Allowing the IRS to supplement its agency factfinding at trial, or to justify its reasoning in a de novo proceeding, might create incentives for the IRS to minimize protections across the board that would promote fidelity to rule of law principles. In a perceptive dissenting opinion in *Ewing v. Commissioner*, Judge Halpern suggests that the Tax Court's decision to hold de novo proceedings in matters subject to abuse of discretion review should not be extended to review of IRS determinations that are not "relevant to . . . the existence or amount of a deficiency in tax or an addition to tax that is subject to our deficiency jurisdiction."[188] As Judge Halpern implies, the reach of the Tax Court rule should not extend to proceedings in which the provisions at issue, like CDP, were meant to provide oversight with respect to IRS activity and in which the provisions are not related to the Tax Court's traditional role of redetermining the proper amount of a taxpayer's tax liability. Provisions like CDP, although a radical departure for a court like the Tax Court, are much more consistent with traditional notions of judicial review of agency conduct, and CDP's adoption is evidence that there is little special justification warranting a radically different approach to review of IRS conduct.

This notion that limiting courts' ability to substitute their judgment or to consider new evidence may promote agency fidelity to rule of law seems counter-intuitive. Yet requiring agency action to stand or fall based on the information and explanation the agency presents to a reviewing court will expose

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187. *See, e.g.*, *id.* at 67–68 (Halpern and Holmes, J.J., dissenting).

> [W]e fail to see how the majority has done anything other than ignore its description of the abuse of discretion standard and, instead, substitute its judgment for respondent's, both as to the procedures prescribed by the Secretary pursuant to section 6015(f) and respondent's determination of various factual issues in this case.

Id.

188. *Id.* at 65 (Halpern and Holmes, J.J., dissenting).

agency practices to judicial scrutiny.[189] In essence, the Tax Court approach fails to appreciate that review of collection determinations is intended as a means to provide oversight to IRS activities and is not about identifying agency error on an individualized basis.[190] This approach is radically different from de novo review, under which the court is concerned with the right answer, regardless of the agency action preceding the court review.[191]

A possible means to ensure that courts neither substitute their own judgment for that of the agency nor consider new evidence at trial would be legislation clarifying that CDP determinations are informal adjudications under the APA and, as such, should be governed by the APA's standards of review of agency determinations. Greater fidelity to administrative law-based notions of abuse of discretion review would place a premium on the IRS's determination of what procedures it will need to ensure that courts sustain its CDP determinations. For example, limiting the ability of the IRS to develop an after-the-fact rationale for its determination or supplement its evidence before the court would create incentives for the IRS to provide appropriate procedures at the administrative hearing.

Some of the courts' problems with review of collection determinations stem from the uncertainty associated with abuse of discretion review in tax cases. The contrast with other case types is stark when considering the relevance of agency actions in traditional tax cases, where taxpayers are not entitled to detailed information concerning the IRS's thought process or rationale in deficiency cases.[192] At the other end of the spectrum,

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189. *See generally* 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 12:13, at 459–60 (2d ed. 1979) (discussing "the Nickey principle," which states that a collection suit must be "'open to a defendant . . . to assail the correctness and legal sufficiency of the assessment'" (alteration in original) (quoting Nickey v. Mississippi, 292 U.S. 393, 396 (1934))).

190. *See* Koch, *Judicial Review*, *supra* note 73, at 476.

> Review for potential error, however, must recognize the benefits of leaving to the decisionmaker freedom to make some mistakes as to the individuals. . . .
>
> The purpose of individualizing discretion is to allow the agency to fine tune the rules—administrative, judicial, or statutory—to do individual justice; the court controls only for extreme risk of error in such judgments.

Id.

191. "That the court disagrees with the core discretionary decision is irrelevant as long as there is an adequate probability that the official might be right." *Id.* Professor Koch notes that the challenge with court review is that courts need to be selective in choosing to review individualized decisions—for example, properly examining the core decision when there appears to be a pattern of agency conduct contributing to the risk of agency error. *Id.* at 478.

192. Refer to note 86 *supra* for a discussion of *Greenberg's Express, Inc. v.*

abuse of discretion review has at its "focal point . . . the administrative record already in existence, not some new record made initially in the reviewing court."[193] The following discussion considers some courts' struggles with the type of review in CDP, and offers courts and the IRS suggestions for facilitating its abuse of discretion review of CDP collection determinations.

1. Confusion in Some CDP Cases Stems from the Amorphous Nature of the Administrative Record. The relative isolation of tax cases from administrative law principles explains some of the tension within recent CDP cases and the information a reviewing court can expect to have before it when it determines whether IRS collection alternative decisions withstand abuse of discretion analysis. The case of *Mesa Oil v. United States*[194] is a prime example of courts trying to come to terms with concepts that have no predicate in the tax law. In *Mesa Oil*, the taxpayer fell behind by over $425,000 in payroll tax deposits over a one-year period.[195] The IRS issued a notice of intent to levy and filed a notice of federal tax lien, both of which triggered rights to a CDP hearing for the relevant tax period.[196] In writing, the taxpayer requested that the IRS release its Notice of Federal Tax Lien and permit it to make installment payments of approximately $40,000 per month.[197] The AO responded to the taxpayer and stated that it was scheduling a CDP hearing. Following the hearing, the AO issued the following unsupported determination: "the proposed collection action balances the need for the efficient collection of taxes with the taxpayer's legitimate concern that any collection action be no more intrusive than necessary."[198]

The letters to and from the AO and the above determination were the extent of the information before the district court in

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Commissioner in this paper. Because the notice of determination, like a notice of deficiency, also serves a jurisdictional function, it is appropriate for a court not to look behind the notice when considering jurisdictional questions arising from an agency determination. This is very different, however, from a court's role in performing its review of agency actions. It is important to understand that a CDP notice of determination serves different functions, and a court's willingness to look behind that notice should depend upon which function is relevant to the particular review in question. For a discussion of the differing roles of notice of deficiency, see Lederman, *Deficient Statutory Notices*, *supra* note 86, at 117–18 (discussing how one role of the notice of deficiency is that of a jurisdictional "ticket to the Tax Court" and arguing that vague notices should not deprive the Tax Court of jurisdiction).

193. Camp v. Pitts, 411 U.S. 138, 142 (1973).

194. No. Civ.A 00-B-851, 2000 WL 1745280 (D. Colo. Nov. 21, 2000).

195. *Id.* at *1.

196. *Id.*

197. *Id.*

198. *Id.*

conducting its review. *Mesa Oil* acknowledged that IRS Appeals hearings have traditionally been informal, but it offered the insight that "informality does not completely obviate the need for a record of some sort."[199] The opinion went on to point out that a full stenographic record was not required, yet it inconsistently remanded the matter back to IRS Appeals to produce a record of the proceedings at the administrative level "sufficient to record the evidence or arguments presented at the hearing, as well as the analysis used by the Appeals Officer in making a Determination" and it mandated that this record "may be made either through audio tape recording, video tape recording, or stenographer; along with all paper documents presented by the parties."[200]

Mesa Oil suggests that courts do not, under administrative law principles, have the power to compel agencies to adopt specific procedures in informal adjudications. The court in *Mesa Oil*, however, ordered the AO to produce a verbatim transcript of the proceedings. This inconsistency is unfortunate but not surprising when one understands that inconsistency surrounds informal adjudications under general administrative law. What separates informal adjudications from formal adjudications under the APA is the requirement that the review of formal adjudications complete on the record.[201] This suggests that in informal proceedings, the record below is somehow less important. Yet that suggestion is not correct. If a reviewing court is to stay true to its task of genuinely reviewing informal abuse of discretion matters according to *Overton Park*'s standards, it will essentially need an understanding of all the facts that the IRS considered below. To facilitate review, an agency may wish to adopt procedures that will preserve the facts and law considered by the adjudicator. Certainly the transcript or recording the *Mesa Oil* court wanted to see would have facilitated judicial review and avoided messy factual disputes about what exactly was before the AO when she reached a determination. However, administrative law principles generally state that courts cannot impose additional procedural requirements on administrative agencies,[202] and *Mesa Oil*, to the extent that the district court suggested it could do so, is wrongly decided.

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199. *Id.* at *7.

200. *Id.*

201. *See* Young, *supra* note 67, at 185 n.20 (explaining that "the APA's provisions for rulemaking and adjudication state that proceedings are formal if the agency's organic act 'require[s] [them] to be made on the record after opportunity for agency hearing'" (alterations in original) (quoting 5 U.S.C. §§ 553(c), 554(a), 554(c)(2) (1994))).

202. Refer to note 68 *supra*.

Where does this leave the IRS in fashioning its CDP procedures? A better reading of *Mesa Oil* is that it puts the IRS on notice of its obligation when issuing a notice of determination to explain both its conclusion, and the factual and legal information justifying its conclusion either in the determination itself or in contemporaneously created administrative files. If a taxpayer appeals the determination, the IRS must provide the reviewing court with all such information in conjunction with the filing of a dispositive motion or at trial.[203] Absent adequate documentation, courts are placed in the unenviable role of recreating what exactly was before the AO, leading to all sorts of "he said, she said" possibilities and increasing the likelihood that a matter cannot be decided without remand or the admission of additional evidence from hearing participants.

2. The IRS Should Allow Taxpayers to Record a CDP Hearing when It Offers Taxpayers a Face-to-Face Hearing. The confusion over the exact nature of a record and the need for a transcript are also highlighted by two Tax Court opinions, Keene v. Commissioner[204] and Kemper v. Commissioner,[205] decided on the same day. Both cases consider whether a taxpayer is entitled to an audiotape of a CDP hearing.[206] Keene was ostensibly decided on the basis of statutory interpretation principles, namely, whether I.R.C. section 7512(a)(1), which permits taxpayers to make audio recordings of "any in-person interview with any taxpayer relating to the determination or collection of any tax," extends to CDP hearings.[207] In Keene, the taxpayer refused to participate in a face-to-face hearing with IRS Appeals

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203. *See, e.g.*, Muhammad v. United States, No. 0:02-2677-17BD, 2003 WL 22753568, at *1 (D.S.C. Apr. 9, 2003) (denying government motion to dismiss taxpayer's challenge to CDP determination sustaining a frivolous tax return penalty because the IRS failed to provide documents or other evidence supporting the AO's justification for his determination).

204. 121 T.C. 4129 (2003).

205. 86 T.C.M. (CCH) 12 (2003).

206. *See Keene*, 121 T.C. at 4129; *Kemper*, 86 T.C.M. (CCH) at 15.

207. *See Keene*, 121 T.C. at 4129. I.R.C. § 7521(a)(1) in its entirety reads:

> (a) Recording of interviews—
>
> (1) Recording by taxpayer—Any officer or employee of the Internal Revenue Service in connection with any in-person interview with any taxpayer relating to the determination or collection of any tax shall, upon advance request of such taxpayer, allow the taxpayer to make an audio recording of such interview at the taxpayer's own expense and with the taxpayer's own equipment.

I.R.C. § 7521(a)(1) (West 2004). *Mesa Oil* did not consider the application of § 7521(a) to CDP hearings. *See* Mesa Oil v. United States, No. Civ.A 00-B-851, 2000 WL 1745280 (D. Colo. Nov. 21, 2000).

after he was told that he could not audio record it.[208] The taxpayer exchanged no meaningful correspondence with the IRS in light of the AO's refusal to permit the recording. The IRS stipulated in Keene that if the Tax Court found that I.R.C. section 7521(a) applied to CDP hearings, then the matter should be remanded to IRS Appeals.[209] Using a plain language analysis, the Keene majority held that CDP hearings relate to the collection of tax under I.R.C. section 7521(a) and that a CDP hearing was an interview for these purposes.[210]

Keene is more than a case about statutory interpretation because the majority relied on its opinion of the nature of CDP hearings to bolster its rationale, including its opinion respecting the need to look behind determination notices when performing review functions:

> [R]espondent's interpretation of section 7521(a)(1) would lead to the anomalous result of allowing the audio recording of Examination Division interviews, which are proceedings that we typically do not review, but not allowing the recording of section 6330 hearings, which are proceedings that we are statutorily charged with reviewing . . . .
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> . . . [R]espondent's interpretation of section 7521(a)(1) would complicate judicial review of the [Appeals office] determination . . . . Having a transcript of the administrative hearing would certainly facilitate that review . . . .
>
> In addition, when reviewing for abuse of discretion, . . . [h]aving a transcript would eliminate a possible dispute between the parties concerning the scope of the issues that were raised by the taxpayer in the administrative hearing.[211]

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208. *Keene*, 121 T.C. at 4131.

209. *Id.* at 4134.

210. *See Keene*, 121 T.C. at 4132–33. The court explained that a

> [CDP] hearing is an integral part of the tax collection process and therefore relates to the "collection of any tax" within the meaning of section 7521(a)(1) . . . [because] the Commissioner generally may not collect a tax by levy or permit a notice of Federal tax lien to remain on the public record without first offering the taxpayer [a CDP] hearing.

Id. at 4133. The court also explained that "the general and ordinary definitions of 'interview' suggest [that] the exchange of information that occurs between a taxpayer and an Appeals officer during [a CDP] hearing . . . constitutes an 'in-person interview' within the meaning of that term as used in section 7521(a)(1)." *Id*. The case was then remanded back to IRS Appeals to allow for the taxpayer to audio record the hearing. *Id.* at 4134.

211. *Keene*, 121 T.C. at 4133–34 (citations omitted).

Except for some overreaching comments that suggested it would be contrary to Congress's intent to have fair and impartial CDP hearings without transcripts,[212] the majority's opinion that audio recordings would facilitate judicial review is accurate in light of both *Overton Park* and general administrative law principles. Yet the novelty of looking at IRS conduct in tax cases is illustrated by a dissent in *Keene*, which argues that a transcript or audio recording would not be helpful in reviewing CDP determinations. Noting that some deficiency cases are reviewed under an abuse of discretion standard and that "we typically do not go behind the notice of deficiency,"[213] the dissent stated that there was nothing anomalous in allowing recording of exam interviews but not CDP hearings because "we are no more charged with reviewing 'section 6330 hearings' than we are charged with reviewing 'Examination Division interviews.'"[214] Although this view is hard to reconcile with *Overton Park*, it is true that in deficiency cases based on an abuse of discretion standard, the Tax Court typically appears less like a court reviewing agency conduct and more like a body seeking to get to the right answer without regard to administrative law principles.[215] Yet the rationale for CDP is that there needs to be external oversight of IRS collection action and that true abuse of discretion review provides the means to examine that conduct. The implication in the dissent's view is that tax cases are so different from other cases that they justify a unique approach to agency conduct review, an approach that emphasizes efficiency over oversight but is hard to reconcile with the rule of law principles underlying CDP.

On the same day that the Tax Court decided *Keene*, the Tax Court in *Kemper* granted summary judgment to the IRS in another CDP case involving a taxpayer who had demanded unsuccessfully that the IRS AO record his CDP hearing.[216] Like *Keene*, *Kemper* involved a taxpayer raising frivolous challenges to the tax collection system, but unlike *Keene*, the AO held an in-

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212. *Id.* at 4134 ("[N]ot having a transcript may contravene the intent of Congress in providing for a fair and impartial administrative hearing and may have a negative impact on this Court's review of the Appeals Office determination.") Although the latter is likely true, it is a stretch, under both general administrative law principles and CDP's legislative history, to equate the lack of a transcript with an unfair or partial IRS Appeals hearing.

213. *Id.* at 4143 n.6 (Chiechi, J., dissenting) (citing Greenberg's Express, Inc. v. Comm'r, 62 T.C. 324, 327 (1974)).

214. *Keene*, 121 T.C. at 4143 (Chiechi, J., dissenting).

215. *See* Ewing v. Comm'r, 122 T.C. 32, 49 (2004) (finding that the IRS abused its discretion in rejecting taxpayer's request for equitable innocent spouse relief).

216. Kemper v. Comm'r, 86 T.C.M. (CCH) 12, 12, 15 (2003).

person meeting even though the AO refused to record the meeting.[217] Finding that the AO's refusal to record the conference was contrary to I.R.C. section 7521(a)(1), the Tax Court nonetheless granted summary judgment in favor of the IRS and, for good measure, imposed an $8500 penalty on the plaintiff for raising frivolous contentions.[218] To reach its decision, the Tax Court relied on language from an earlier case suggesting that holding a hearing might not be necessary if the hearing would only involve frivolous matters,[219] and the Tax Court concluded that the frivolous positions made it "not necessary" and "not . . . productive" to remand the case to IRS Appeals.[220]

It is hard to fault the result in *Kemper* because the taxpayer relied on tired tax protestor arguments in his CDP challenge.[221] If the IRS were to grant an in-person meeting (and I have suggested that it need not always offer this to taxpayers), it makes sense to allow taxpayers to record the in-person hearing, especially given the importance of agency conduct to a court's performance of abuse of discretion review. Although there are some procedural differences between the cases—in *Kemper*, there was no AO meeting with the taxpayer and the IRS stipulated that if the Tax Court found in favor of the taxpayer on the issue, the matter should be remanded—on the surface, the cases seem difficult to reconcile. Nonetheless, the rationale for the result in *Kemper* is far from precise, partially because of the uncertain reach of one case the Court relied on for its summary dismissal, a case in which the Tax Court suggested that the IRS need not hold CDP hearings when the only matters involved are frivolous.[222]

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217. *Id.* at 14.

218. *Id.* at 16.

219. *Id.* (citing Lunsford v. Comm'r, 117 T.C. 183, 189 (2001)).

220. *Id.*

221. *Id.* at 15 n.7 (citing Keown v. Comm'r, T.C.M. (RIA) 2003-069 (2003)).

222. *Lunsford*, 117 T.C. at 189. As mentioned above, I believe courts would be better served by adopting a flexible understanding of what a hearing is, rather than suggesting that the IRS may choose not to offer a hearing when it determines that to be expedient. The state of law in this area is far from settled. One way to reconcile *Kemper* and *Keene* is suggested by a concurring opinion in *Keene* that points to APA section 706, which provides that courts "shall . . . hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law," but also directs that, in making its determinations, courts should also give "due account" to the "rule of prejudicial error." *Keene*, 121 T.C. at 4135 (Halpern, J., concurring). In administrative law, reviewing courts disregard procedural errors unless the complaining party was prejudiced by the error. For more on the harmless error doctrine, see Nestor v. Comm'r, 118 T.C. 162, 173 (2002) (Halpern, J., concurring).

D. The Current Distinction Between Judicial Review of Collection Determinations in CDP Cases and Other Collection Determinations

Understanding the administrative law context for CDP brings into question whether IRS considerations of collection alternatives outside the CDP process should likewise be subject to judicial review on an abuse of discretion basis. After all, if, as administrative law scholars emphasize, even highly deferential judicial review of agency action provides incentives for better agency practice, increases public confidence in agency practice, and is an integral part of our system of checks and balances,[223] then why should the availability of judicial review of IRS decisions on collection alternatives be dependent upon whether the IRS itself is taking collection action? Although there has been greater attention to the overinclusive aspects of CDP (and the previous discussion in this Part reveals a mechanism for reducing systemic costs associated with those aspects), it is possible that CDP does not go far enough, in that IRS consideration of collection alternatives is generally not subject to judicial review unless the IRS action is the subject of a CDP hearing.

There are systemic costs associated with a proposal to expand CDP hearings, including the limited precedential value of the cases, the sheer number of cases that might flood the system, and the tangible costs associated with formality that review of factual issues might impose (when agency discretion is subject to review, the agency must write an opinion explaining its actions and factual premises to develop a record).[224] It is likely that the IRS would vigorously oppose any such expansion, especially in light of its likely view that the relatively small number of cases in which courts have reversed or modified its CDP determinations is evidence of sound agency conduct.[225] Yet correcting CDP's excesses should free IRS resources. CDP's focus on regulating agency conduct, and not necessarily on correcting individual taxpayer error, suggests that the success of the provision should not be based on the number of reversals or modifications, but rather on the broader effects that the provisions would create, thereby improving IRS collection procedures.

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223. *See* Levin, *supra* note 75, at 742.

224. *Id.* at 747–49.

225. 2003 REPORT, *supra* note 3, at 50 (noting that only one-tenth of one percent of CDP cases have been overturned or conceded on appeal).

V. CONCLUSION

CDP is a dramatic change in terms of providing external oversight to IRS conduct, but it is not so dramatic when placed in the broader context of agency action, administrative law, and constitutional law developments. CDP forces the judiciary to consider the IRS's conduct in a much more direct way than ever before. Focusing solely on CDP's costs and the government's interests in reducing costs and collecting taxes ignores the legitimate individual interest in the collection process. Forcing the IRS in its collection practices to pay more attention to rule of law principles is consistent with the broader administrative and constitutional law contexts and may promote better, more uniform agency practice and increased respect for, and confidence in, the tax system.