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COLLECTION DUE PROCESS AT TWENTY-FIVE: A STILL  
 IMPORTANT AND NEEDED CHECK ON IRS COLLECTION POWER

*Leslie Book*



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## COLLECTION DUE PROCESS AT TWENTY-FIVE: A STILL IMPORTANT AND NEEDED CHECK ON IRS COLLECTION POWER

*Leslie Book\**

In *Boechler v. Commissioner*, the Supreme Court held that the thirty-day filing deadline for a Tax Court collection due process (CDP) petition is not jurisdictional and is subject to equitable tolling.<sup>1</sup> The case is significant, not just for CDP, but because it may impact the way courts view other tax filing deadlines.<sup>2</sup> While the reaction was generally favorable,<sup>3</sup> some disagreed.<sup>4</sup> That disagreement with *Boechler* stems in part from a sense that the tax system “bends over backwards for people who chose not to pay their taxes.”<sup>5</sup>

The modern tax collection system has its origin in the IRS Restructuring and Reform Act of 1998 (RRA 98).<sup>6</sup> RRA 98’s CDP provisions radically changed the relationship between the IRS and taxpayers in the collection

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<sup>1</sup> *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493, 1501 (2022).

<sup>2</sup> Kristen A. Parillo, *IRS Is Studying Boechler Impact on Other Filing Deadlines*, 175 TAX NOTES 1294 (2022).

<sup>3</sup> Carlton Smith, *Winning Boechler Took a Village*, PROCEDURALLY TAXING (Apr. 21, 2022), <https://procedurallytaxing.com/winning-boechler-took-a-village/>.

<sup>4</sup> Lew Taishoff, *Ya Can’t Make This Stuff Up—Part Deux*, TAISHOFF LAW (Apr. 29, 2022, 11:51 AM), <https://taishofflaw.com/2022/04/29/ya-cant-make-this-stuff-up-part-deux-2/> (predicting that following *Boechler* the tax system can “expect a bushel basketful of cases from rounders, defiers, protesters, wits, wags, and wiseacres, all playing the *Boechler* gambit, with variations”).

<sup>5</sup> Peter Reilly, *Supreme Court Boechler Decision Cuts Some Slack in Tax Court Deadline*, FORBES (May 26, 2022, 6:38 AM), <https://www.forbes.com/sites/peterjreilly/2022/05/26/supreme-court-boechler-decision-cuts-some-slack-in-tax-court-deadline/?sh=7f9a8e555c15>.

<sup>6</sup> Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. No. 105-206, 112 Stat. 685.

process.<sup>7</sup> CDP requires the IRS to provide taxpayers additional notice following assessment and provides taxpayers with administrative and judicial opportunities to challenge the IRS post-assessment determinations.<sup>8</sup> Prior to CDP, most IRS decisions with respect to its administrative collection powers were not subject to judicial review.<sup>9</sup>

Is subjecting some previously unreviewable IRS collection decisions to the possibility of judicial review a positive development?<sup>10</sup> Any additional procedural requirements increase agency costs.<sup>11</sup> The same is true of CDP. The costs of CDP include agency resources to satisfy CDP's notice

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<sup>7</sup> Professor Steve Johnson refers to CDP as perhaps the most “consequential and controversial” changes in the RRA. Steve R. Johnson, *Reforming Federal Tax Litigation*, 41 FLA. ST. U. L. REV. 205, 264 (2013).

<sup>8</sup> For a detailed discussion of the CDP procedures, see MICHAEL SALTZMAN & LESLIE BOOK, *IRS PRACTICE AND PROCEDURES* ch. 14B.01 1-2 (2022). This article summarizes those procedures *infra* at pages 149–56.

<sup>9</sup> Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS L.J. 429, 464 (2008); Pippa Browde, *A Reflection on Tax Collecting: Opening a Can of Worms to Clean Up a Collection Due Process Jurisdictional Mess*, 65 DRAKE L. REV. 51, 56 (2017). In her article, Professor Browde discusses some of the confusion around Tax Court jurisdiction when a taxpayer raises an issue that relates to a year outside the tax year or years at issue in the CDP proceeding, when that outside year or issue has relevance to the year or years explicitly addressed in the IRS proposed levy or filing of a notice of federal tax lien. *See id.* at 69.

<sup>10</sup> CDP, and RRA 98, arose in part from stories of abuse of taxpayers at the hand of IRS collection personnel. Professors Camp and Lederman have discredited the trumped-up allegations of IRS abuse leading up to RRA 98. 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, 78, 81 (2004) (describing hearings that “were high political theater and, as with most theater, were mostly fictional”); Leandra Lederman, *IRS Reform: Politics as Usual?*, 7 COLUM. J. TAX L. 36, 39, 53–62 (2016) (discussing how the highly publicized hearings concerning IRS abuse highly publicized congressional hearings regarding alleged abuses by the IRS subsequently were largely subsequently debunked). Despite the obvious theater of the hearings, there were legitimate concerns about the inadequacy of IRS collection procedures, including that the agency failed to adequately consider taxpayer interests in the tax collection process. *See, e.g., Hearings Before the S. Fin. Comm. on H.R. 2676*, 105th Cong. 367–75 (1998) (statement of Michael Saltzman) [hereinafter Saltzman Statement, *Hearings Before the S. Fin. Comm. on H.R. 2676*]; *Hearings Before the S. Fin. Comm. on H.R. 2676*, 105th Cong. 329–36 (1998) (statement of Nina Olson) [hereinafter Olson Statement]. Michael Saltzman was a well-known expert on matters of tax procedure and tax administration. Saltzman Statement, *Hearings Before the S. Fin. Comm. on H.R. 2676*, *supra*, at 367. Nina Olson is the founder of the nation’s first freestanding low-income taxpayer clinic, went on to become the National Taxpayer Advocate from 2001 to 2019 and is now the founder and Executive Director of the Center for Taxpayer Rights. *About Us*, CTR. TAXPAYER RIGHTS, <https://taxpayer-rights.org/about-us/> (last visited Sept. 14, 2022).

<sup>11</sup> Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 360 (2019), <https://repository.law.umich.edu/mlr/vol118/iss3/2/>.

requirement, agency and judicial costs to satisfy hearing requirements, and an impact on collections when recalcitrant taxpayers use CDP to avoid or delay paying an assessed liability.

A steady drumbeat of academics has highlighted those costs.<sup>12</sup> In the years following its enactment, I offered my views as to why I felt CDP, while, not without some flaws, was a positive step for tax administration.<sup>13</sup> At the time, I argued that critics of CDP failed to appreciate the individual interest in the tax collection process, especially with respect to an individual's opportunity to enter into an alternative to enforced collection, such as an offer in compromise or an installment agreement. Moreover, I argued that the judicial review that accompanies review of collection matters, even though more deferential than the de novo traditional court review of IRS liability determinations, brought needed attention to IRS collection practices.<sup>14</sup> I argued that judicial review of some IRS collection determinations could provide benefits to all taxpayers, not just the few that actually challenge matters in court or even have a collection determination made in the context of a CDP hearing.<sup>15</sup>

I continue to believe that CDP provides a needed systemic check on the IRS's still broad collection powers. This Article builds on and expands my earlier work by exploring recent scholarship that considers how the deferential court review of agency practice and the wise use of remand power

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<sup>12</sup> See, e.g., Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 57–58 (2009); Johnson, *supra* note 7, at 241–43.

<sup>13</sup> Bryan T. Camp & Leslie Book, *Point & Counterpoint: Should Collection Due Process Be Repealed?*, 24 A.B.A. SEC. TAX'N NEWS Q. 11, 13–16 (2004). For a fuller version of that debate, see Camp, *supra* note 12, at 57, 57–128 and my response, Leslie Book, *A Response to Professor Camp: The Importance of Oversight in IRS Collection Determinations*, 84 IND. L. REV. SUPP. 63 (2009) [hereinafter *Importance of Oversight*]. See also Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145 (2004) [hereinafter *A Misstep*].

Professor Danshera Cords has been a forceful and eloquent proponent of the benefits of CDP, and in particular how abuse of discretion review improves the IRS's collection practices. Danshera Cords, *Reforming, Not Replacing, CDP*, 108 TAX NOTES 817, 818–21 (2005); Danshera Cords, *Collection Due Process: The Scope and Nature of Judicial Review*, 73 U. CIN. L. REV. 1021, 1034–36, 1041 (2005).

<sup>14</sup> *Importance of Oversight*, *supra* note 13, at 77.

<sup>15</sup> *A Misstep*, *supra* note 13, at 1154–56.

provides distinct benefits for high-volume agency adjudications.<sup>16</sup> That scholarship emphasizes how the deferential abuse of discretion review that is the default standard in administrative law allows for the judiciary to engage with an administrative agency and provide needed oversight.<sup>17</sup> The scholarship that explores the benefits of limited judicial review of agency adjudications has important implications for the IRS, and in this Article I apply that work to the IRS collection process. In this Article, I also propose changes to CDP so that it can better reflect taxpayer rights, an important benchmark following the 2015 codification of the Taxpayer Bill of Rights that the IRS had administratively adopted in 2014.<sup>18</sup>

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<sup>16</sup> See, e.g., Christopher J. Walker & James R. Saywell, *Remand and Dialogue in Administrative Law*, 89 GEO. WASH. L. REV. 1198 (2021). In earlier work, Professors Stephanie Hoffer and Walker explore how by following the APA's blueprint for court review of agency informal adjudications, the Tax Court can establish a richer dialogue with the IRS to improve agency procedures and decision-making. See Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221 (2014). For a reply to Hoffer and Walker, see Leandra Lederman, *Restructuring the U.S. Tax Court: A Reply to Stephanie Hoffer & Christopher Walker's The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. HEADNOTES 1, 8–11 (2014), for a discussion on whether the Tax Court is a "reviewing court" for purposes of the APA.

<sup>17</sup> See Walker & Saywell, *supra* note 16; Hoffer & Walker, *supra* note 16; Lederman, *supra* note 16. The IRS's Internal Revenue Manual (IRM), in Part 5 provides instructions for IRS employees to assist with the IRS's collection function. IRM provisions are directed toward agency employees, but they often provide detailed guidance that has a direct impact on taxpayer rights and responsibilities. See, e.g., IRM 5.15.1, Financial Analysis Handbook. (rules that establish a taxpayer's basis for determining the ability to pay delinquent liabilities, or reasonable collection potential). An area that awaits further and perhaps empirical study is the way that court review, or the threat of court review, can ensure that (1) the IRS actually follows internal guidance; (2) the IRS reasonably interprets the IRM as written; and (3) indefensible IRM provisions are removed. I am grateful to Professor Caleb Smith for a suggested framing of CDP through this quality control framework. As Professor Smith notes, much of what CDP may accomplish in the context of quality control is hard to measure, in part because in any instances if the IRS Collection function or Appeals has failed to properly interpret IRM guidance or neglected to follow such guidance, if a taxpayer challenges the determination in Tax Court the matter is likely resolved via a stipulated decision rather than a published opinion. This can result in a skewed perspective on the value of CDP, as published opinions may unduly focus on cases when IRS counsel has concluded that there were no quality control issues that warranted a change from a collection determination.

<sup>18</sup> I.R.S. News Release IR-2014-72 (June 10, 2014). In 2015, Congress added § 7803(a)(3), codifying those rights. Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, 129 Stat. 2242. For its potential impact, see Alice G. Abreu & Richard Greenstein, *Embracing the TBOR*, 157 TAX NOTES 1281 (2017) for a discussion on the possible transformative impact of the taxpayer rights legislation. See also Alice G. Abreu, *Taxpayer Rights: All the Angles Foreword*, 91 TEMP. L. REV. 679 (2019) (providing the history of TBOR and its likely implications for tax administration).

Part I provides background on the tax assessment and collection process prior to CDP. It also describes the CDP provisions and concludes with a discussion of how CDP changed tax collection by opening it up to limited judicial review. Part II explores some of the critical views of CDP, and in particular why some consider CDP to be an unwelcome development. Part III provides context for the expanded judicial review in CDP and explores how the limited review of agency actions, backstopped by the power to remand a case to an agency, provides a key systemic check on erroneous agency procedures and allows for the court to engage in an ongoing dialogue with the IRS to protect against agency error. Part IV highlights a few CDP cases that illustrate the value of CDP. Part V discusses two modest ways that Congress and the IRS could improve CDP, one focusing on ensuring improved communication to taxpayers and the other targeting judicial review to circumstance when there is a more defined dispute worthy of judicial consideration.

## I: WHAT IS CDP AND HOW DID IT CHANGE THE TAX COLLECTION LANDSCAPE?

### A. *Background on the Tax Collection Process*

To assess the merits of CDP, I provide a brief background on the assessment and collection process prior to CDP. After that, I summarize how CDP changed that process.

An assessment of tax marks the end of one process and the start of another, administrative tax collection.<sup>19</sup> For taxes subject to the deficiency procedures, like income, estate, and gift taxes, there are substantial pre-assessment rights that minimize the risk of agency error and provide a means to correct agency error.<sup>20</sup> Those rights include IRS notice requirements and the taxpayer's right to pre-assessment judicial review in the Tax Court, or

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<sup>19</sup> Camp, *supra* note 12, at 64 (discussing how an assessment can arise in a variety of ways including a taxpayer self-reporting a liability, an IRS determination that a return reflects a mathematical or clerical error, or the culmination of the IRS auditing a tax return are the main ways). See SALTZMAN & BOOK, *supra* note 8, at ch. 10.01[2], at 2-8.

<sup>20</sup> For a discussion of the deficiency procedures referenced in this summary, see SALTZMAN & BOOK, *supra* note 8, at ch. 10.03.

post-assessment review through refund litigation in federal district court or the Court of Federal Claims.<sup>21</sup> Employment taxes and excise taxes, and many, though not all, civil tax penalties are not subject to deficiency procedures and can be assessed without the right to pre-assessment judicial review. For those taxes and penalties not subject to deficiency procedures, the opportunity to challenge an IRS assessment in court is reserved for refund suits.<sup>22</sup> Under a detailed statutory regime backstopped by the so-called *Flora* rule, refund suit jurisdiction is predicated on a valid and timely filed refund claim and full payment of the assessed tax or penalty.<sup>23</sup>

No matter what type of pre-assessment rights a taxpayer has, the assessment marks the movement of a tax into the collection phase, and distinctions regarding taxes subject to the deficiency or non-deficiency process do not generally matter.<sup>24</sup> Following an assessment, if the taxpayer fails to pay, the IRS sends the taxpayer notice and demand for payment to their last known address.<sup>25</sup> If the taxpayer fails to, or cannot pay,<sup>26</sup> a tax lien arises automatically, retroactive to the date of assessment.<sup>27</sup>

The federal lien gives the IRS an interest in the taxpayer's property that it can enforce through the use of its administrative or judicial collection

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<sup>21</sup> *Id.* at ch. 10.03 2-4.

<sup>22</sup> *Id.* at ch. 11.01 1-4.

<sup>23</sup> *Flora v. United States*, 357 U.S. 63, 68–70 (1958), *aff'd on reh'g*, 362 U.S. 145, 147 (1960); see generally Keith Fogg, *Access to Judicial Review in Nondeficiency Tax Cases*, 73 TAX LAW 435 (2020) (providing an in depth analysis on *Flora* and the challenges it creates for taxpayers unable to access courts due to their inability to fully pay an assessed liability).

<sup>24</sup> Some post-assessment rights, such as innocent spouse relief, are only available for income taxes resulting from a joint return. See *Chavis v. Comm'r*, 158 T.C. No. 8, 8–9 (2022) (holding that spousal relief provisions do not apply to trust fund penalty under § 6672 as the provisions are predicated on a tax arising from a validly filed joint return). Other post assessment rights, such as the right to challenge an underlying tax liability in a CDP hearing, may turn slightly on the type of tax, and whether the IRS has issued, and the taxpayer has received a notice of deficiency. See I.R.C. § 6330(c)(2)(B) (“[Challenges to liability arise only] 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.”). However, generally speaking, in the collection phase, the type of tax does not matter or have an impact on the IRS's collection powers.

<sup>25</sup> I.R.C. § 6303.

<sup>26</sup> I.R.C. § 6331 (giving a taxpayer ten days after notice and demand for tax to pay; failure to pay allows for collection of tax by levy).

<sup>27</sup> I.R.C. § 6321 and I.R.C. § 6322.

powers.<sup>28</sup> The lien remains on the taxpayer's property, including after-acquired property,<sup>29</sup> until the liability either has been fully paid, or becomes legally unenforceable.<sup>30</sup>

The tax lien operates as a matter of law, but it does not publicize the tax debt, nor does it take priority over certain competing creditors,<sup>31</sup> which are commonly referred to as the four horsemen.<sup>32</sup> Despite the automatic existence of the lien following nonpayment, other creditors, such as purchasers and holders of security interests, may obtain priority over the IRS unless and until the IRS properly records the lien.<sup>33</sup> Once the IRS properly files a notice of federal tax lien (NFTL), the other creditors are put on notice that the IRS has a claim against all of the taxpayer's property and any rights to property, and the federal tax lien takes priority over their claims.<sup>34</sup>

While the tax lien is a prerequisite to collection of an unpaid assessment, the mechanism for the IRS's actual power to take or possess property to satisfy an unpaid assessment resides elsewhere. The IRS can enforce the lien and pursue judicial collection proceedings, such as bringing a suit in federal court to enforce the lien.<sup>35</sup> Much more common, and what makes IRS an especially powerful creditor, is that the Code allows the IRS to use

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<sup>28</sup> See SALTZMAN & BOOK, *supra* note 8, at ch. 14A.01 1.

<sup>29</sup> *Glass City Bank v. United States*, 326 U.S. 265, 267–68 (1945).

<sup>30</sup> I.R.C. § 6322. See I.R.M. 51722.2(1) (Mar. 27, 2012).

<sup>31</sup> I.R.C. § 6323(a) (providing that the federal tax lien will not operate against perfected claims of four preferred classes of competing creditors: (1) purchasers of the property for value, (2) holders of security interests in the property, (3) holders of judgment liens perfected against the property, and (4) holders of perfected mechanic's liens).

<sup>32</sup> *Camp*, *supra* note 12, at 66.

<sup>33</sup> The location of filing the notice of federal tax lien varies for personal property as compared to real property. See I.R.C. § 6323(f)(1)(A)(i) (stating real property filings are tied to the state or county of the property's location); I.R.C. § 6323(f)(1)(A)(ii) (stating personal property filing in state of taxpayer's principal residence or place of business). For a proposal to create a national online lien registry, see Keith Fogg, *National Tax Lien Registry*, 120 TAX NOTES 783 (2008).

<sup>34</sup> Subject to the ten exceptions listed in I.R.C. § 6323(b) for property, Congress wanted commerce to proceed without the need to check for lien filing.

<sup>35</sup> For judicial collection powers, see SALTZMAN & BOOK, *supra* note 8, at ch. 14A.09.



administrative collection procedures to provisionally take property to satisfy some or all of the unpaid assessment without seeking court approval.<sup>36</sup>

The IRS's power to take property is generally referred to as the power to levy. However, IRS procedures distinguish between taking tangible and intangible property. The IRS calls the taking of tangible property a seizure.<sup>37</sup> This power is found within § 6331, which gives the IRS the “power of distraint and seizure by any means” to collect an unpaid tax liability.<sup>38</sup> This administrative collection power is predicated on the assessment described above, and an additional thirty-day notice requirement that informs taxpayers of the IRS's general intention, without reference to specific property or rights to property, that the IRS intends to levy.<sup>39</sup>

After satisfying its general notice requirements, the IRS can serve a levy on a taxpayer or third party with respect to specific property or rights to property.<sup>40</sup> Unlike liens, which attach to all property, the Code provides statutory exemptions that limit or preclude the IRS from exercising its levy power to take certain types of property.<sup>41</sup> A taxpayer faced with a levy is given an opportunity to submit information to the IRS that would establish the property's exemption.<sup>42</sup> In addition, the Code requires the IRS to release

<sup>36</sup> I.R.C. § 6331.

<sup>37</sup> SALTZMAN & BOOK, *supra* note 8, at ch. 14A.13[1] (discussing the difference between the terms levy and seizure, with levy referring to intangible property and seizure referring to tangible property). With respect to seizures, the IRS not only must serve a levy, but it must take possession or control by seizing, posting, or tagging the property. *Id.* (The internal process for the IRS prior to instituting a seizure is detailed at IRM 5.10, Section 1, Pre-Seizure Considerations).

<sup>38</sup> I.R.C. § 6331(a). The IRS's considerable power to offset claimed overpayments against tax liabilities is outside the scope of this Article. I.R.C. § 6402. For more on offset, see Keith Fogg, *The Role of Offset in the Collection of Federal Taxes*, 25 FLA. TAX REV. 1 (2021). CDP provides no limitations on the IRS's offset powers.

<sup>39</sup> I.R.C. § 6331(d)(2). The notice must be given in person, left at the taxpayer's dwelling or usual place of business, or sent by certified or registered mail to the taxpayer's last known address. As discussed below, the CDP provisions add an additional notice requirement that the IRS must satisfy before it exercises its levy power. I.R.C. § 6330(a)(1)–(3). For a discussion of the relationship of the differing statutorily-required notices in the levy process, see SALTZMAN & BOOK, *supra* note 8, at ch. 14A.13.

<sup>40</sup> For notice requirements, see I.R.C. §§ 6331(d) and 6330(a)(1).

<sup>41</sup> I.R.C. § 6334(a). This list of exemptions is exclusive. I.R.C. § 6334(c).

<sup>42</sup> For a summary of that process, see I.R.S., *How Do I Get a Levy Released?*, <https://www.irs.gov/businesses/small-businesses-self-employed/how-do-i-get-a-levy-released> (last updated June 15, 2022). See also SALTZMAN & BOOK, *supra* note 8, at ch. 14A.16.

a levy in certain circumstances, including when the levy is creating financial hardship due to a taxpayer's dire economic circumstances.<sup>43</sup> A combination of regulations and internal IRS procedures establish the means and manner for the taxpayer to prove either an exemption or hardship.<sup>44</sup>

As a further means of bolstering the IRS's already considerable collection powers, a taxpayer holding property who fails to honor an IRS levy is subject to potential civil and criminal penalties, and risks the IRS forcibly seizing their property.<sup>45</sup> Similarly, following a levy issued to a third-party holding the taxpayer's property, a third-party holding property on behalf of the taxpayer becomes personally liable and also is potentially subject to hefty civil penalties if it fails to comply with an IRS levy.<sup>46</sup>

While the above summary focuses on the IRS's powers to ensure collection, the Code provides significant taxpayer rights in the collection process, especially for taxpayers who, due to financial hardship, are unable to pay an assessed liability.<sup>47</sup> To avoid the unpleasant and potentially harmful impact of a possible levy, taxpayers and the IRS are authorized to seek an alternative to enforced collection, referred to generally as "collection alternatives." The main collection alternatives are: an offer in compromise (OIC), or a settlement typically pegged to an amount that is below the assessment and reflects a taxpayer's collection potential, an installment agreement (IA), or a payment of the fully assessed liability over a period of time.<sup>48</sup>

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<sup>43</sup> See I.R.C. § 6343(a)(1)(D).

<sup>44</sup> For a discussion, see SALTZMAN & BOOK, *supra* note 8, at ch. 14A.15.

<sup>45</sup> I.R.C. § 6332(d)(1)–(2) (providing for personal liability and potential penalties for failing to honor a levy).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See I.R.C. § 7122 (offers in compromise); I.R.C. § 6159 (installment agreement). For a full discussion of the collection alternatives, see I.R.M. 822.7 (Aug. 26, 2020). For an even more extensive discussion of the differing types of offers in compromise and installment agreements, see SALTZMAN & BOOK, *supra* note 8, at ch. 15.06, at ch. 15.05.

Another collection alternative is the IRS's currently not collectible (CNC) status.<sup>49</sup> The IRS places a taxpayer in CNC status if the taxpayer can establish that an IRS levy will exacerbate or cause the taxpayer to experience financial hardship.<sup>50</sup> CNC status for a taxpayer triggers an IRS programming of the taxpayer's account that prohibits the IRS from using its levy powers and to release the levy if a taxpayer has established that they are experiencing financial hardship.<sup>51</sup>

From a taxpayer's perspective, these alternatives to enforced collection are a significant check on the IRS's broad power as a creditor. Upon establishing CNC status, or entering into an IA, or submission of a request for OIC, the IRS will not levy upon a taxpayer's property.<sup>52</sup>

Following assessment, taxpayers are entitled to request a collection alternative at any time. While the tax collection process is dynamic, the IRS evaluates a taxpayer's entitlement to a collection alternative at a fixed point in time associated with the submission of the request.<sup>53</sup> If the IRS denies the request because, for example, it believes that the taxpayer has the means to pay the assessed liability, a taxpayer may resubmit a request for an alternative.<sup>54</sup>

If the IRS and the taxpayer agree to a particular collection alternative, the effect varies depending on the type of alternative. In the absence of fraud, an OIC and IA are generally binding on both the taxpayer and the IRS, unless

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<sup>49</sup> Technically, the IRS does not view CNC status as a collection alternative, as it views a taxpayer that requests CNC status in the CDP context as a challenge to the appropriateness of the IRS's collection actions. I.R.M. 822.7(7) (Sept. 23, 2014). *See also* I.R.S. P.M.T.A. 2013-022 (Nov. 19, 2012).

<sup>50</sup> *See* I.R.M. 5161.2(9) (Apr. 13, 2021).

<sup>51</sup> *See id.* In addition to the IRS's policy with respect to CNC status, which prevents the IRS from exercising its levy powers, I.R.C. § 6343(e) requires the release of a levy on salary or wages payable to or received by a taxpayer, upon agreement with the taxpayer that the tax is currently not collectible.

<sup>52</sup> I.R.M. 5.16.1 (Apr. 13, 2021) (providing that the IRS will not use its levy powers for taxpayers in CNC status); I.R.C. § 6331(k)(1)–(2) (providing that no levy will occur while IA's or OIC's are pending, and also establishing a grace period if either alternative is rejected or terminated).

<sup>53</sup> *See* SALTZMAN & BOOK, *supra* note 8, at ch. 15.06[8], at ch. 15.05[3][a].

<sup>54</sup> *Id.*

the taxpayer fails to comply with their terms.<sup>55</sup> In contrast, the IRS will periodically review CNC status and can change that designation if it believes that the taxpayer's financial circumstances have changed or if the taxpayer fails to establish that they are still experiencing financial hardship.<sup>56</sup>

In addition to the taxpayer's right to request the above collection alternatives, the I.R.C. provides limited opportunities to minimize the effect of an NFTL, including the right to have the federal tax lien released if the assessment is fully paid or becomes unenforceable,<sup>57</sup> or, if a taxpayer posts a bond to cover the liability (plus interest).<sup>58</sup> The IRS also has discretion to discharge specific property from the reach of the federal tax lien.<sup>59</sup> The IRS will agree to the discharge of specific property, typically to facilitate a sale of the property and thus collect its share from any sale that would be applied to reduce or eliminate the taxpayer's assessed liability.<sup>60</sup>

The Code provides procedural protections if the IRS errs in the collection process. Such protections include a third-party's right to bring a claim for a wrongful levy if that third party believes that the taxpayer does not have an ownership interest that the IRS is seeking to levy or seize.<sup>61</sup> In addition, a taxpayer has a right to bring a suit for damages against the government if, in connection with the collection of a federal tax, an IRS employee negligently, recklessly, or intentionally disregards any part of the Code or Regulations.<sup>62</sup>

While third parties and taxpayers had limited rights to challenge IRS collection actions subject to a wrongful levy or reckless conduct, in 1996, the

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<sup>55</sup> SALTZMAN & BOOK, *supra* note 8, at ch. 15.05[3][c] (discussing the limited circumstances when an accepted IA may be terminated). SALTZMAN & BOOK, *supra* note 8, at ch. 15.06[10][a] (discussing the limited circumstances when an accepted OIC may be reopened).

<sup>56</sup> I.R.M. 5.16.1(6) (Apr. 13, 2021) (outlining annual review of taxpayer's income when taxpayer has been placed in CNC status).

<sup>57</sup> I.R.C. § 6325(a)(1).

<sup>58</sup> I.R.C. § 6325(a)(2).

<sup>59</sup> I.R.C. § 6325(b).

<sup>60</sup> See I.R.M. 5.12.10(3) (Sept. 30, 2015).

<sup>61</sup> See I.R.C. §§ 6343(b), 6532(c)(2).

<sup>62</sup> I.R.C. § 7433.

IRS expanded those rights. It established a process to provide taxpayers additional opportunities to get independent agency review of certain collection determinations beyond those narrow circumstances.<sup>63</sup> Known as the Collection Appeals Program (CAP), CAP allows taxpayers and third parties the right to an administrative appeal before the IRS Office of Appeals for certain instances of the collection actions described above.<sup>64</sup> The program provides for a quick review by Appeals to consider the appropriateness of the proposed collection action. The Appeals decision made within CAP, like most of the IRS's administrative collection determinations described above, was not subject to judicial review.<sup>65</sup>

### *B. How CDP Changed the Collection Landscape*

While CAP was an internal and discretionary agency measure that provided taxpayers a more defined opportunity to challenge IRS collection decisions, some felt that it did not go far enough in calibrating the balance between the IRS, and taxpayer's interests in the tax collection process.<sup>66</sup> In enacting CDP, Congress (1) added notice requirements, (2) provided a statutory right to an administrative hearing, (3) gave taxpayers a unilateral right to pause the IRS's levy powers with a timely filed request for a hearing, (4) triggered a right to force a review of its compliance with procedural rules, and (5) gave taxpayers an opportunity to request and secure judicial review of some of the IRS's administrative collection determinations.<sup>67</sup>

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<sup>63</sup> See I.R.M. 8.241.1(1) (Sept. 30, 2019).

<sup>64</sup> *Id.* (providing background and history on the program). When the IRS started CAP, it was originally limited to liens, levies and seizures. The IRS added installment agreement rejections, terminations and modifications to matters that taxpayers could raise in the CAP process.

<sup>65</sup> For the relationship between CAP and CDP, see I.R.M. 824.1(2) (Sept. 28, 2021).

<sup>66</sup> See, e.g., Saltzman Statement, *Hearings Before the S. Fin. Comm. on H.R. 2676*, *supra* note 10, at 367–75; Olson Statement, *supra* note 10, at 329–36. Saltzman and Olson both advocated for additional notice and hearing rights to protect taxpayer interests in the context of the IRS's exercise of its administrative collection powers. See Leslie Book, *Taxpayer Rights: A Look Back to Congressional Testimony of Michael Saltzman and Nina Olson*, PROCEDURALLY TAXING (Feb. 24, 2015), <https://procedurallytaxing.com/taxpayer-rights-a-look-back-to-congressional-testimony-of-michael-saltzman-and-nina-olson/>, summarizing aspects of both Saltzman and Olson's testimony in the lead up to RRA 98.

<sup>67</sup> For a more in depth discussion of CDP, see SALTZMAN & BOOK, *supra* note 8, at ch. 14B.

Regarding notice, the CDP provisions require that within five days of filing an NFTL or not less than thirty days before a levy, the IRS is required to notify taxpayers of its lien filing or intention to levy.<sup>68</sup> That notice triggers and describes a taxpayer's right to file a request for an Appeals' review of the IRS's past action, (i.e., the filing of an NFTL) or its intended action (i.e., a stated intent to levy).<sup>69</sup> A taxpayer's timely request for an administrative CDP hearing will generally serve to prevent the IRS from using its levy power during the pendency of the hearing and any timely judicial appeal.<sup>70</sup>

Prior to CDP, the IRS had almost complete discretion over whether and when to levy. By adding CDP, Congress limited that discretion. While the filing of a CDP request will stop a levy, it neither prevents the IRS from filing an NFTL,<sup>71</sup> nor stops the IRS from exercising its power to offset overpayments to apply to tax liabilities.<sup>72</sup> Despite those limitations, the right to stop, or at least delay an IRS levy, is a considerable change in the balance of power between taxpayers and the IRS.

In addition to providing a statutory right to challenge the IRS's lien filing or proposed levy before Appeals,<sup>73</sup> a timely filed CDP request also generates an affirmative administrative obligation on Appeals to verify that IRS collection personnel complied with the "requirements of any applicable

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<sup>68</sup> I.R.C. § 6320.

<sup>69</sup> I.R.C. § 6330(a)(3)(B).

<sup>70</sup> To be sure, there is a cost to the taxpayer, a timely request for a CDP hearing suspends the ten-year statute of limitations under I.R.C. § 6502(a)(1) that the IRS has to collect an assessed tax for the period during which the CDP matter is pending, including the entire life of the Tax Court case if there is one. I.R.C. § 6330(e)(1). In addition, I.R.C. § 6330(f) contains exceptions to a right to a hearing before levy, with the right to a CDP hearing in those circumstances arising after the levy.

<sup>71</sup> Note that the proposed legislation would have given a taxpayer the right to a hearing before the filing of an NFTL and before each levy. The government vigorously opposed tying the rights to prior to filing an NFTL because it created the opportunity for taxpayers to transfer property before the IRS could perfect its lien by filing the notice. See Camp, *supra* note 12, at 78–80, discussing the proposed CDP provisions and contrasting the proposed provisions with the enacted provisions. Similar chances to evade collection would arise if the IRS were required to give a hearing right for any levy. The enacted legislation changed the notice provided to taxpayers in the lien setting to a post-filing notice rather than a pre-filing one and it limited the CDP rights to arising only before the first levy. Camp, *supra* note 12, at 78–80.

<sup>72</sup> To be sure, the IRS's ability to exercise its offset powers without triggering the CDP rights is significant. For more on offset. See Fogg, *supra* note 38.

<sup>73</sup> I.R.C. § 6330(b)(1).

law or administrative procedure.”<sup>74</sup> At the administrative hearing itself, taxpayers are entitled to raise spousal defenses to joint and several liability, challenges to the appropriateness of the IRS’s collection actions (i.e., either the filing of the NFTL or the proposed levy), and any taxpayer offers of alternatives to enforced collection.<sup>75</sup> The right to challenge the underlying liability is limited to circumstances where, for a tax subject to deficiency procedures, the taxpayer has not received a notice of deficiency, or has not otherwise had an opportunity to dispute the liability.<sup>76</sup>

Similar to other non-CDP hearings before Appeals, the CDP hearing itself is informal. It may be conducted via correspondence and telephone, though taxpayers generally have the right to face-to-face meetings with an Appeals Officer or delegated Appeals employee of a lesser status.<sup>77</sup> Taxpayers do not have the right to examine witnesses and cannot compel the production of documents or third parties, nor do they have an absolute right to demand a record of the proceedings.<sup>78</sup>

Following a hearing, Appeals issues a written notice of determination that addresses whether IRS complied with the law or administrative procedures and any issues the taxpayer has properly raised, and considers whether the “proposed collection action balances the need for the efficient

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<sup>74</sup> I.R.C. § 6330(c)(1).

<sup>75</sup> I.R.C. § 6330(c)(2)(A). For a discussion of the relationship between Appeals and IRS collection personnel in the context of a taxpayer requesting an offer in compromise, see Bryan Camp, *Lesson From the Tax Court: The Difference Between Rejecting an OIC and Reviewing a Rejection*, TAXPROF BLOG (July 18, 2022), [https://taxprof.typepad.com/taxprof\\_blog/2022/07/lesson-from-the-tax-court-the-difference-between-rejecting-an-oic-and-reviewing-a-rejection.html](https://taxprof.typepad.com/taxprof_blog/2022/07/lesson-from-the-tax-court-the-difference-between-rejecting-an-oic-and-reviewing-a-rejection.html) (noting that Appeals personnel in a CDP case review IRS collection function determinations rather than initially make determinations with respect to the requested offer in compromise).

<sup>76</sup> I.R.C. § 6330(c)(2)(B).

<sup>77</sup> Appeals ordinarily holds face-to-face conferences if taxpayers wish to discuss relevant, non-frivolous issues relating to proposed collection actions. See Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D6), (D7); 301.6330-1(d)(2), Q&A (D6), (D7).

<sup>78</sup> Prior to Congress giving the Tax Court exclusive jurisdiction over CDP, one district court held that the inadequacy of the record triggered the taxpayer right to record a CDP hearing remand through audiotape, videotape, or stenographic transcription. *Mesa Oil v. U.S.*, 86 A.F.T.R.2d 7312 (D. Colo. 2000). The IRS does not agree with that opinion. A.O.D. 2001-05 (Aug. 23, 2001). To be sure, taxpayers do have the right to have an audio recording of the proceedings if they are in-person. See I.R.C. § 7521(a)(1) and *Calafati v. Comm’r.*, 127 TC 219 (2006).

collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.”<sup>79</sup>

After the issuance of the determination, a taxpayer has thirty days to appeal the determination to the Tax Court.<sup>80</sup> The Tax Court has jurisdiction to consider matters that the taxpayer raised on appeal, and that were part of the notice of determination.<sup>81</sup> As part of its review of the determination, it will verify that the IRS has complied with the law in the assessment and collection process and properly balanced the taxpayer and government interests.<sup>82</sup> If a taxpayer is not challenging the amount or existence of the liability, the Tax Court, relying on legislative history, has held that the standard of review is abuse of discretion.<sup>83</sup> If a CDP case includes a liability challenge, the Tax Court’s standard of review for the liability challenge is de novo.<sup>84</sup> As to scope of review, in challenges that do not involve liability, in *Robinette v. Commissioner* the Tax Court held that it is not bound to the record that Appeals considered in the administrative hearing.<sup>85</sup> To the extent

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<sup>79</sup> I.R.C. § 6330(c)(3)(C).

<sup>80</sup> Originally the Code bifurcated court review between the Tax Court and federal district courts, with the Tax Court jurisdiction in CDP matters restricted to taxes and penalties subject to deficiency procedures. Congress provided the Tax Court with exclusive jurisdiction for all CDP matters in 2006. Pension Protection Act of 2006, P.L. 109-280 § 855(a) (amending I.R.C. § 6330(d)(1)).

<sup>81</sup> I.R.C. § 6331(d)(1) (providing for Tax Court jurisdiction for matters that are part of the administrative determination).

<sup>82</sup> I.R.C. 6331(c)(3)(A)-(C) (providing that the administrative determination includes not only issues that the taxpayer raises but also is to consider whether applicable laws or administrative procedures have been met and whether the proposed collection balances taxpayer and government interests). *See Hoyle v. Comm’r*, 131 TC 197 (2011).

<sup>83</sup> The Tax Court relied on the legislative history for its conclusions as to the appropriate standard of review. *See, e.g., Goza v. Comm’r*, 114 T.C. 176 (2000) (referring to H.R. REP. NO. 105-599, at 266. (1998)). For a discussion of the Tax Court’s approach to the standard and scope of review in CDP cases, and how it relates to the default abuse of discretion review under the APA, see Hoffer & Walker, *supra* note 16, at 262.

<sup>84</sup> *Goza v. Comm’r*, 114 T.C. 176 (2000).

<sup>85</sup> *Robinette v. Comm’r*, 123 TC 85 (2004). The Eighth Circuit reversed the Tax Court, holding that subject to limited exceptions the Tax Court was limited to the administrative record. *See Robinette v. Comm’r*, 439 F.3d 455 (8th Cir. 2006). The issue is still unsettled, with two other circuits agreeing with the IRS and the Eighth Circuit’s position. *See Keller v. Comm’r*, 568 F.3d 710, 718 (9th Cir. 2009); *Murphy v. Comm’r*, 469 F.3d 27 (1st Cir. 2006). In cases that are not appealable to the First, Eighth, or Ninth Circuits, the Tax Court continues to hold that the scope of review is not limited to the administrative



a CDP case in Tax Court involves a liability challenge, the scope of review is *de novo*.<sup>86</sup>

### C. How CDP Changed the Relationship Between the Tax Court and the IRS

With the background information in the preceding section, the Article now widens the lens and considers how CDP changed the relationship between the IRS and courts. This section describes how these changes generally brought the IRS closer to the administrative law mainstream, where there is a strong presumption that final agency action is subject to limited court review.<sup>87</sup>

To sum up the prior sections, before CDP, there were few judicial limits that checked the IRS's considerable administrative collection powers.<sup>88</sup> To be sure, taxpayers had a variety of ways to obtain judicial review relating to questions of liability, but once an assessment was on the books, IRS decisions with respect to how it would proceed with its administrative collection powers were mostly exempt from judicial review.<sup>89</sup>

The following is a snapshot of the landscape both before and after CDP:

#### Pre-CDP

1. In refund suits or Tax Court deficiency proceedings, IRS decisions regarding the amount or existence of a liability was subject to court

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record. For an excellent discussion of the issue, and its relationship to broader administrative law principles, see Cords, *supra* note 9, 464–73.

<sup>86</sup> Goza v. Comm'r, 114 TC 176 (2000).

<sup>87</sup> *A Misstep*, *supra* note 13, at 1166–69 (addressing the presumption of reviewability and the considerable scholarship in favor of that presumption on the grounds that it increases accuracy of decisions and enhances agency legitimacy). For a dissenting view questioning the legal underpinning and policy implications of the presumption of reviewability, see Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1289 (2014).

<sup>88</sup> Browde, *supra* note 9, at 56 (“Prior to the enactment of RRA 98, a taxpayer had few pre-collection remedies, and none afforded the taxpayer judicial review.”).

<sup>89</sup> Prior to CDP, taxpayers did have (and still have) the right to sue for damages due to an IRS employee's recklessness, negligence, or intentional disregard of a tax statute or regulation in connection with the collection of tax. I.R.C. § 7433. (Added in Pub. L. No. 100–647, tit. VI, § 6241(a), 102 Stat. 3747 (1988)).

review on a de novo basis both as to the scope of review and standard of review;<sup>90</sup>

2. IRS decisions with respect to its exercise of administrative collection powers generally not subject to no court review, except in limited cases involving alleged IRS negligent, reckless or intentional misconduct.<sup>91</sup>

#### Post-CDP

1. In refund suits or Tax Court deficiency proceedings, and in limited circumstances, in Tax Court as part of a CDP appeal, IRS decisions with respect to the amount or existence of liability subject to court review on a de novo basis both as to the scope of review and standard of review;
2. IRS decisions with respect to its exercise of certain administrative collection powers subject to court review if the matter is timely raised in a CDP hearing; otherwise, IRS exercise of administrative collection powers subject to no court review, except in limited cases involving alleged IRS negligent, reckless or intentional misconduct.<sup>92</sup>

Prior to CDP, while there was little opportunity to obtain judicial review of IRS collection determinations, as of 1996, under CAP, throughout the collection process, taxpayers had the opportunity to seek independent administrative review of many IRS collection determinations. In addition, throughout the collection process, taxpayers also had the opportunity to submit to the IRS requests for alternatives to enforce collection, and IRS denials of those requests similarly generated the opportunity to appeal those rejections before the IRS's administrative appeals division.<sup>93</sup>

While there were fairly robust internal procedures in place to allow for the IRS Appeals function to provide independent review of collection actions,<sup>94</sup> courts had almost no opportunity to review either initial

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<sup>90</sup> Judicial review of IRS decisions with respect to a proposed deficiency or refund claim can be thought of as an exception to ordinary remand rule discussed below. Under the APA "if the reviewing court is empowered to conduct a trial de novo, the court is not required to remand (though it retains discretion to do so) because de novo review allows the court to take the unusual step of substituting its judgment for the agency." Hoffer & Walker, *supra* note 16, at 267.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Appeals is now known as the Independent Office of Appeals following the Taxpayer First Act. Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981 (2019). As to whether the Independent Office of Appeals can provide independent review of IRS determinations, see Fogg, *supra* note 23, at 435,

determinations or determinations that Appeals employees made with respect to collection matters.

The combination of robust *de novo* court review associated with questions of liability and essentially no court review of collection determinations is one example of how the IRS occupied an odd position relative to other parts of the administrative state.<sup>95</sup> The statement that prior to CDP the absence of court review of IRS collection determinations varies from traditional review of agency action, warrants a brief detour into administrative law principles. For the most part, under the Administrative Procedure Act (APA), there is a presumption that final agency actions are subject to judicial review.<sup>96</sup> Under the APA, the default standard for court review of final agency action is a deferential abuse of discretion standard review, whereby a court typically considers challenges to final agency actions based on the record before the agency at the time of the determination.<sup>97</sup>

Upon finding that an agency has abused its discretion, rather than deciding the matter, courts will typically remand the matter back to the agency for the agency to expand on its reasoning or explain further to address the court's concerns.<sup>98</sup> If a party is not fully satisfied with the agency's action on remand, it can petition a federal court for further review of the agency determination.<sup>99</sup>

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484 (discussing the limitations on Appeals' independence, that even after the Taxpayer First Act changes, and comparing Appeals' review unfavorably to court review).

<sup>95</sup> The issue of tax exceptionalism has generated significant academic attention over the past decade. See James Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067 (2015) (collecting much of the scholarship and arguing that references to the death of tax exceptionalism are both premature and misguided). In 2014, the *Duke Law Journal* dedicated a symposium issue dedicated to the topic of the relationship between tax and administrative law. Amandeep S. Grewal, *Taking Administrative Law to Tax*, 63 DUKE L.J. 1625 (2014).

<sup>96</sup> *Abbot Lab v. Gardner*, 387 US 136 (1967) at 140–41.

<sup>97</sup> Walker & Saywell, *supra* note 16, at 1203.

<sup>98</sup> *Id.* at 1204–05.

<sup>99</sup> CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (2020) (discussing the framework for agency adjudications and rulemaking and procedures for agencies and how courts may as a default review agency actions, unless review is superseded by another law).

How does CDP nudge the tax collection process toward the APA mainstream? First, it provides an opportunity for some judicial review in the administrative collection process. In the pre-RRA 98 regime there was almost no opportunity for courts to consider IRS decisions in the administrative collection process. Second, the standard of review in collection cases draws from the abuse of discretion standard under the APA. Moreover, in a manner similar to abuse of discretion court review of other informal agency adjudications, in CDP cases, the Tax Court has held that if Appeals has abused its discretion or there has been a change in circumstances, it has the power to remand proceedings back to Appeals and retain jurisdiction to review a supplemental Appeals determination.<sup>100</sup> While the Tax Court takes the position that its remand power is not grounded in the APA, Tax Court review of collection matters in CDP cases is similar to the judicial review rule that applies in most cases involving court review of other agency adjudications, which is commonly known as the ordinary remand rule.<sup>101</sup> That rule provides that when a court finds an error with an agency decision, its role is generally to remand the matter back to the agency, rather than decide the issue on its own.<sup>102</sup>

At this point, one might wonder why prior to CDP, taxpayers could not have used the APA as a basis to challenge the IRS's administrative collection determinations. While the IRS collection process contains numerous agency

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<sup>100</sup> See, e.g., *Churchill v. Commissioner*, T.C. Memo. 2011-182 (2011) (discussing how remands appropriate in CDP when Appeals has abused its discretion in some way or there has been a material change in circumstances between the CDP determination and trial).

<sup>101</sup> As Professors Hoffer and Walker note, in CDP cases the Tax Court does not base its remand power cases on the APA, but rather on the organic CDP statute, which provides that the IRS "shall retain jurisdiction with respect to any determination made under this section." Hoffer & Walker, *supra* note 16, at 261. In declining to find that it had the power to remand an innocent spouse proceeding back to the IRS, the Tax Court explained the source of its power to remand in CDP cases:

Under sections 6320(c) and 6330(d)(1), this Court may consider certain collection actions taken or proposed by the Commissioner's Appeals Office. Under paragraph 2 of section 6330(d), [Appeals] retains jurisdiction with respect to the determination under section 6330. As part of this process, a case may be remanded to the Appeals Office for further consideration.

*Friday v. Comm'r*, 124 T.C. 220, 221–22 (2005).

<sup>102</sup> Christopher J. Walker, *The Ordinary Remand Rule and The Judicial Toolbox*, 82 GEO. WASH. L. REV. 1553, 1555–56 (2014) [hereinafter *Ordinary Remand Rule*].

actions,<sup>103</sup> not every IRS decision amounts to a final action.<sup>104</sup> Though many decisions, such as the decision to file a notice of federal tax lien or to reject a taxpayer's request for a collection alternative, easily fit within the Supreme Court's two-part test for finality.<sup>105</sup> One might have expected that even prior to CDP, courts would review taxpayer alleged grievances with IRS collection actions that amounted to final agency action. However, judicial review of final agency action under the APA is unavailable: (1) when a separate statute precludes review, and (2) when the agency's action is legally committed to an agency's discretion.<sup>106</sup>

The Anti-Injunction Act (AIA), which prevents suits brought for the purpose of restraining the assessment or collection of tax, and the Declaratory Judgment Act (DJA), which waives sovereign immunity to allow suits seeking equitable relief against the United States but expressly excludes suits with respect to federal taxes, are two such statutes that preclude review.<sup>107</sup>

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<sup>103</sup> Agency "action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

<sup>104</sup> 5 U.S.C. § 704.

<sup>105</sup> See *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (holding that to constitute a final agency action, the action must not be tentative but must be the consummation of the agency's decision-making process and it must be an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"). Professor Camp argues that many aspects of the IRS's administrative collection regime, such as the filing of an NFTL, levying property or rejecting a taxpayer's request for a collection alternative, are likely not final agency actions: "Levied property may be returned and NFTLs withdrawn. Rejections of collection alternatives are not final agency actions because taxpayers can come back at anytime with more or different information." Camp, *supra* note 12, at 103. IRS determinations throughout the collection process are dependent on analysis of the taxpayer's circumstances at a particular moment in time. See, e.g., IRM 5.8.5.2(1) Ability to Pay (detailing that the IRS determines a taxpayer's ability to pay for purposes of offer in compromise evaluation as of the date of the offer's submission). Under Professor Camp's framework, a subsequent opportunity for a new determination would defeat finality, even though the initial determination has significant legal consequences (such as the right to a compromised liability) and reflects the agency's final views in light of the facts at a fixed moment in time. Surely all IRS collection decisions cannot escape finality just because there may be different determinations pertaining to the same assessment, especially when those determinations are subject to defined statutory or administrative guidance and can have a significant impact on when or even if a taxpayer pays an assessment or result in a deprivation of property or trigger public disclosure of an individual's tax return information.

<sup>106</sup> 5 U.S.C. § 701 (a)(1)-(2). For more on the two circumstances where the APA precludes judicial review, see Christopher Walker, *Constraining Bureaucracy Beyond Judicial Review*, DAEDALUS J. AM. ACAD. ARTS & SCI. 155, 159 (2021).

<sup>107</sup> The AIA provides that except as otherwise provided by the Code, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." I.R.C. § 7421. The

The case of *Wilkins v. United States*<sup>108</sup> is instructive as to why taxpayers prior to CDP, the AIA, and the DJA, were prevented from accessing federal courts with respect to IRS administrative collection powers. In *Wilkins*, the taxpayer had entered into an OIC with the IRS, as part of the terms of the agreement the taxpayer entered into a collateral agreement that called for payments to the IRS in future years. The parties disagreed about the terms of the collateral agreement, with the taxpayer claiming to have fully complied with its terms. The IRS disagreed. The taxpayer sued in district court, seeking a declaratory judgment to essentially find that the taxpayer complied with the offer's terms. Trying to avoid the reach of the AIA and DJA, the taxpayer argued that the matter did not directly pertain to taxes, and was more in the nature of a contractual dispute. The district court disagreed:

Plaintiffs are thus actually attempting to obtain an advance determination of the validity of the tax that the IRS seeks to collect. In that regard, Plaintiffs are, in effect, trying to impair the ability of the IRS to collect federal tax. Accordingly, the Court finds that Plaintiffs' suit is barred by the Anti-Injunction Act and the Declaratory Judgment Act.<sup>109</sup>

In addition to the considerable effect of the AIA and DJA, courts have held that IRS decisions with respect to a taxpayer's request for a collection alternative were committed to the agency's sole discretion and inappropriate for judicial review under the APA.<sup>110</sup>

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DJA states that any court of the United States may make a declaratory judgment "[i]n a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . ." 28 U.S.C. § 2201(a). For more on the AIA and DJA, and how courts generally apply the provisions co-terminously, see SALTZMAN & BOOK, *supra* note 8, at ch. 1.06; *see also* Kristin Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683 (2017). For a discussion of the relationship between the AIA and the APA in light of the Supreme Court decision in *CIC Services v. IRS*, 141 S. Ct. 1582, *see* Joshua D. Blank & Ari Glogower, *The Trouble With Targeting Tax Shelters*, 74 ADMIN. L. REV. 69 (2022), arguing that the Supreme Court's decision in *CIC Services* is likely to embolden taxpayers and third parties to use the APA to raise pre-enforcement challenges to IRS efforts to combat tax shelters.

<sup>108</sup> *Wilkins v. United States*, S., 93 A.F.T.R. 2153 (D.N.J. 2004).

<sup>109</sup> *Id.* A recent case involving a taxpayer who sought to compel the IRS to process an offer in compromise that the IRS refused to process because it believed it was submitted solely for delay similarly held that the U.S. had not waived sovereign immunity, and dismissed the suit for lack of subject matter jurisdiction. *Dillon v. U.S.*, No. 22-cv-00126, \*1 (D. Minn. Aug. 10, 2022) (finding, in part, that the AIA and DJA are other statutes that expressly or implicitly forbid relief under 5 U.S.C. § 702, rendering the APA's waiver of sovereign immunity inapplicable).

<sup>110</sup> *Shanahan v. Voskuil*, 1977 WL 1333, at \*1 (W.D. Mo.) (discussing IRS review of OIC are committed to agency discretion under the APA and not subject to court review). *See also* *Asemani v. U.S.*, 94 A.F.T.R.2d 6628 (M.D. Pa. 2004).

## II. CDP: A CRITICAL VIEW

CDP provides a limited way for courts to obtain jurisdiction over a small aspect of the IRS's vast administrative collection powers. By ending the almost complete exemption of this form of adjudication from court scrutiny, CDP nudges part of the IRS administrative collection process into the mainstream of court review of agency adjudications. To be sure, just because CDP brings a small subset of IRS collection determinations within the mainstream of APA review of informal agency adjudications, does not necessarily mean that CDP is a positive development.

While there is a strong presumption in favor of judicial review, some administrative law scholars have warned that additional procedural requirements do not necessarily improve agency performance or enhance their legitimacy. For example, in a 2019 article, Professor Nicholas Bagley warns that subjecting agencies to additional procedural requirements may provide needless boxes to check and overlook other ways to improve agencies:

Bad decisions may sometimes arise because the agency didn't follow the proper procedures, but they're more often the product of resource constraints, poor leadership, substantive legal rules, organizational dysfunction, ill-trained employees, political infighting, and the like. In general, the best way to build an agency's legitimacy will be to address those concerns, either by turning to Congress for resources and reform, or by enlisting someone who knows something about management.<sup>111</sup>

Writing about CDP in particular, Professor Bryan Camp makes a similar point, noting that CDP's court review provides limited benefits and imposes significant costs.<sup>112</sup> Professor Camp has argued that CDP, based on a theory of adversarial process backstopped by judicial review, reflects a misunderstanding of the nature of the collection process. Camp questions whether court review is helpful when the most important IRS collection determinations are aggregated processing decisions that effectively treat delinquent taxpayers as taxpayers who are unwilling, rather than unable, to

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<sup>111</sup> Bagley, *supra* note 11, at 379.

<sup>112</sup> Camp identifies at least three sources of cost: "First, there is a resource cost, both within the IRS and the courts. . . . Second, CDP has done doctrinal damage that has undermined the foundational role of the assessment in tax administration. Third, as it has developed, CDP threatens the symbolic legitimacy of both courts and the tax collection system." Camp, *supra* note 12, at 104.

pay.<sup>113</sup> Acknowledging that IRS automated procedures may potentially misclassify some “can’t pay” taxpayers as “won’t pay” taxpayers, Camp claims that CDP’s court review is the wrong solution:

The rhetoric that judicial review is needed to promote rule of law values thus mistakes the problem by confusing arbitrary results with incorrect results. It is undoubtedly true that some taxpayers are misclassified and, as a consequence, suffer hardship. But the mere misclassification of a taxpayer is not the same as an abuse of discretion by an employee of the IRS. The problem is not that the IRS or individual employees are abusing discretion in the moral sense of the term “abuse.” The problem is simply the error that inevitably occurs in any administrative system.<sup>114</sup>

How would Camp help ensure that the IRS makes more accurate collection determinations? Like Bagley, he looks to strengthening internal actors that can provide a check on potential agency mistakes:

By virtue of their internal position within the agency, the Taxpayer Advocate Service and the Office of Appeals add multiple layers of value-value which cannot be replicated by any type of outside agency. . . .

Strengthening the ability of both the Office of Appeals and the Taxpayer Advocate to amplify and fine tune taxpayer voices within the collections system will be far more effective than judicial review at providing taxpayers a process that is meaningful, in all senses of the word. It would, at the same time, add value to tax administration by improving the classification decisions. It would answer the clamor for adversarial process. It would, in short, be a step towards a notion of inquisitorial due process.<sup>115</sup>

Professor Steve Johnson has similarly criticized CDP for its injecting the Tax Court into the province of tax collection. In evaluating a procedure, Johnson focuses on whether it affords meaningful remedies, referring to that as the “primary value” to gauge its merit.<sup>116</sup> To measure a process in terms of the primary value Johnson focuses on “mechanisms by which taxpayers and affected third parties may challenge IRS liability determinations and

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<sup>113</sup> Camp, *supra* note 12.

<sup>114</sup> *Id.* at 121–22.

<sup>115</sup> *Id.* at 126–27.

<sup>116</sup> Johnson, *supra* note 7, at 244.



collection actions, mechanisms that are both efficacious and perceived to be fair.”<sup>117</sup>

In considering CDP costs, Johnson notes that CDP has been extremely expensive (thus violating the secondary value of efficiency), and highlights the costs associated with CDP, in terms of resources the agency and the courts spend on these cases, and in allowing taxpayers to delay collection.<sup>118</sup> Johnson unfavorably compares the costs to the limited benefits that deferential review provides to taxpayers. When considering whether the costs are justified in light of gains associated with the primary value of taxpayer protection and remedies, he argues that CDP comes up short for four reasons:

- 1) Taxpayers lose the majority of CDP cases;
- 2) In CDP, the few taxpayer wins are really not wins, with the “win” typically resulting in the matter recommitted to the IRS which sustains the collection determination;<sup>119</sup>
- 3) The abuse of discretion standard may cause taxpayers to feel as if they did not get their fair day in court; and
- 4) Placing the Tax Court in the collection process may trigger the court to overstep its role, leading to “a regrettable tendency to operate as a self-appointed superintendent of tax administration.”<sup>120</sup>

Unlike Professor Camp, who has called for the complete repeal of CDP, Professor Johnson, citing Treasury Inspector General research, acknowledges that CDP has been helpful in ensuring that the IRS follows its legal and internal guidelines in the collection process.<sup>121</sup> Focusing on how CDP could be improved in light of what he sees as its many problems, Professor Johnson proposes to retain its administrative hearing process but remove judicial review of Appeals’ consideration of a taxpayer’s proposed

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 265–66.

<sup>119</sup> This point is similar to Professor Camp, who views abuse of discretion review unfavorably to de novo review, referring to it as an “empty promise.” Camp, *supra* note 12, at 89.

<sup>120</sup> See, e.g., Johnson, *supra* note 7, at 266.

<sup>121</sup> *Id.* at 267.

collection alternatives and IRS compliance with guidance, apart from statutes or regulations.<sup>122</sup>

### III. HOW ABUSE OF DISCRETION REVIEW CAN ENCOURAGE AGENCIES TO IMPROVE THEIR PROCESSES

On the other side of Bagley’s general criticism of additional agency procedures and Camp and Johnson’s specific criticism of the additional procedural protections of CDP, is scholarship discussed below that has focused on the relative merits of the ostensibly more deferential abuse of standard of review. Recall that under abuse of discretion review, when a court finds that the agency has acted erroneously, it generally remands the matter back to the agency rather than deciding the issue on its own. This is referred to as the “ordinary remand rule.”<sup>123</sup>

Professor Christopher Walker and James Saywell discuss the merits of the ordinary remand rule, especially for matters of high-volume agency adjudication when many parties with matters before an agency may not actually challenge an adverse agency action in court.<sup>124</sup> Despite

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<sup>122</sup> Here is Johnson’s complete discussion of his proposal to pare down judicial review in CDP:

First, the current rule—§ 6330(c)(2)(A)(iii)—authorizes consideration of collection alternatives offered by the taxpayer should be amended. Taxpayers should still be able to present such alternatives to the Appeals Office. However, the Appeals Office’s decision with respect to such alternatives should no longer be judiciary reviewable. Second, the current rules—§ 6330(c)(1) and § 6330(c)(2)(A)(ii)—require verification of and permit challenges to collection procedures should be amended. Only failures to follow procedures required by a statute or regulation should be judicially reviewable. Failures to follow lesser requirements—such as those set out in the Internal Revenue Manual—should be fodder for administrative review (to serve the tripwire function) but not for judicial review.

Johnson, *supra* note 7, at 267.

<sup>123</sup> Walker & Saywell, *supra* note 16, at 1205 (discussing the ordinary remand rule and “its central importance in the modern administrative state” though noting that little scholarly attention has been paid to the rule).

<sup>124</sup> Walker & Saywell, *supra* note 16, at 1205. See also Emily H. Hammond, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1739–71 (2011) (focusing on remand in the rulemaking context). Walker has explored the remand rule in other articles as well, including with coauthor Stephanie Hoffer in a piece that focuses on the Tax Court’s exceptionalist approach to administrative law. Hoffer & Walker, *supra* note 16. See also Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84, 86 (2016); *Ordinary Remand Rule*, *supra* note 102.

acknowledging claims that the ordinary remand rule is too deferential to agency action, Walker disagrees, noting that rather than substantively deciding the issue, by issuing an opinion and remanding the matter back to the agency, courts can have a broader impact on agencies than de novo review. “The issuance of written, public judicial opinions allows this dialogue to extend beyond the hearing-level or appellate agency adjudicators dealing with the particular case. . . . Indeed, such a public dialogue can even reach the agency’s principals in Congress and in the executive branch.”<sup>125</sup> In his articles, Walker has identified numerous tools that the courts use to facilitate that dialogue, including retention of jurisdiction, identifying hypothetical solutions for the agency to consider, and obtaining government concessions to limit the open issues on remand.<sup>126</sup>

Professors Stephanie Hoffer and Christopher Walker have explored this theme in an article that critiqued the Tax Court’s exceptional approach to the APA.<sup>127</sup> Their article focuses on IRS adjudications broadly, including collection matters but also other actions such as deficiency determinations and requests for relief from joint and several liability.<sup>128</sup> As they note, the default standard of review under the APA is that a court must set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>129</sup> The default scope of review is one that is based on the record that existed at the time the agency made a determination.<sup>130</sup>

Hoffer and Walker elaborate on how in areas apart from tax, the default APA standard and scope of review focuses on agency process rather than the substantive correct result typically associated with Tax Court deficiency cases:

The focus [under the APA default standard] is thus on whether the agency considered the factors set forth by Congress in the agency’s organic statute; whether it considered important aspects of the problem it was seeking to address;

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<sup>125</sup> *Ordinary Remand Rule*, *supra* note 102, at 1221.

<sup>126</sup> Walker’s exploration of the concept of the judicial toolbox to engage with agencies on remand was first discussed deeply in *id.* at 1553.

<sup>127</sup> Hoffer & Walker, *supra* note 16.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 245.

<sup>130</sup> *Id.* at 247.

whether its proposed action is consistent with the evidence; and whether the action otherwise demonstrates reasoned decision-making as evidenced by “the quality and coherence of the agency’s reasoning.”<sup>131</sup>

While Hoffer and Walker do not exhaustively explore the application of the ordinary remand tools in the tax context, they do offer some observations on how the remand rule promotes systemic benefits, rather than one-off victories for a particular taxpayer who brings their case to court and may prevail if a court decides the issue on its own rather than remanding the matter back to the agency:

These tools not only help focus the dialogue on remand, but they also communicate to the IRS specific, or even systemic, problems (and accompanying solutions) identified by the Tax Court. And they allow the Tax Court to suggest potential solutions for the IRS to implement beyond the particular case under review. Because these tools consist of words and not commands, they comport with a proper separation of powers and leave discretion for the agency to exercise its expertise to address the issues.<sup>132</sup>

In an article in *Tax Notes*<sup>133</sup> and in a blog post for *Procedurally Taxing*,<sup>134</sup> Carl Smith has also discussed how judicial review within CDP, and the Tax Court’s ability to remand proceedings, has been significant and beneficial for taxpayers. In his *Tax Notes* article, Smith, referring to research that he and Professor Keith Fogg had done, found about eight percent of CDP cases in Tax Court produced a remand without a published opinion during a sample period. As Smith noted, the remand typically arose in the context of an IRS error. Looking at a later six-month period when the Tax Court issued about one hundred orders involving a remand Smith notes

“that alone should give heart to many of those who merely read published opinions and conclude that CDP is a waste of time for taxpayers. Practitioners like me know it is not. Remands often achieve either the original goal or something more acceptable than what was determined in the original notice of determination.”

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<sup>131</sup> *Id.* at 246.

<sup>132</sup> *Id.* at 293.

<sup>133</sup> Carlton Smith, *The Tax Court Keeps Growing Its Collection Due Process Powers*, 133 TAX NOTES 859 (2011) [hereinafter *Keeps Growing Its Collection*].

<sup>134</sup> Carlton Smith, *Quality Software Case Highlights that There is Still No Written Guidance for Reinstating OICs during CDP*, PROCEDURALLY TAXING (June 15, 2015), <https://procedurallytaxing.com/quality-software-case-highlights-that-there-is-still-no-written-guidance-for-reinstating-oics-during-cdp/>.

In his blog post, Smith refers to my claim that CDP's value lay in providing systemic benefits.<sup>135</sup> While noting that most CDP opinions have not produced structural changes, Smith identifies at least four instances where a judicial opinion in a CDP case led to broader changes in IRS collection policies:

1. When the Tax Court held in *Keene v. Commissioner*, 121 T.C. 8 (2003), that section 7521 authorized the taxpayer to audio record a CDP hearing, the IRS added a section to the Manual providing procedures for audio recording, currently at § 8.22.5.6.2 (11-8-13).
2. When the Tax Court held in *Montgomery v. Commissioner*, 122 T.C. 1 (2004), that a taxpayer could, at a CDP hearing, challenge the correctness of the taxes the taxpayer had reported on his or her return, the IRS amended its regulations to embrace this holding at Reg. §§ 301.6320-1(e)(1) and 301.6330-1(e)(1).
3. In light of Tax Court opinions such as *Drake v. Commissioner*, 125 T.C. 201 (2005), where the Tax Court held that there were ex parte contacts that appeared to have compromised the independence of the [Appeals Settlement Officer], the IRS strengthened Rev. Proc. 2000-43, 2000-2 C.B. 404, regarding such contacts, by replacing it, after public notice and comment, with Rev. Proc. 2012-18, 2012-1 C.B. 455.
4. When the Tax Court held in *Vinatieri v. Commissioner*, 133 T.C. 392 (2009), that a taxpayer could not be denied currently not collectible status merely because he or she had not filed all prior returns, the IRS modified the Manual to accept such holding. See current Manual § 8.22.7.7(3).

#### IV. A SELECTIVE VIEW OF A FEW CDP CASES

The above sections discuss the main ways that CDP changed the collection process, as well as some of the reasons why some scholars opposed the changes and why some, including myself, welcome its change.

To what extent is CDP undermining the IRS's traditional role in tax collection? And what value, if any, does CDP's right to limited court review provide to the tax system? A high percentage of CDP cases are decided on

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<sup>135</sup> *Id.* The post considers the case of *Quality Software v. Comm'r*, and identifies an area where the IRS failed to respond to repeated judicial opinions that had raised questions concerning procedures associated with defaulting an OIC for a taxpayer's failure to comply during the five-year compliance period. Following *Quality Software*, the IRS has modified its default procedures. See I.R.M. 589.4(3) (07-07-2020) Potential Default Cases (providing some examples as to when a breach should trigger an effort to cure, though just referring to the power as part of IRS discretion).

motions for summary judgement where the taxpayer loses with little fanfare as the Tax Court simply holds that the IRS proposed levy or filed lien is appropriate. As Carl Smith has observed, a counting of the reported decisions alone fails to capture the impact on individual cases and on the IRS's broader institutional practices, let alone perception of the agency's legitimacy.<sup>136</sup> The following discusses a few CDP cases, using the cases as examples showing that court review can meaningfully protect individual taxpayers while also providing needed oversight to address systemic issues.

Before discussing these cases, I acknowledge that cherry picking some cases out of the thousands that have been decided over the past twenty-five years may reflect my confirmation bias in favor of CDP. Those who disagree with CDP can point to and discuss the far greater number of cases where the courts have decided for the IRS, with taxpayers using CDP in an attempt to delay or defeat collection.

While I do not dismiss those concerns, following this section I identify potential ways to improve CDP, with a focus on minimizing CDP's costs or highlighting its potential to more closely align tax administration with fundamental taxpayer rights.

*A. Vinatieri v. Commissioner: Appeals Imposes Unwarranted Condition on Taxpayer Experiencing Economic Hardship Who Asked IRS Not to Levy Wages*

One of the cases Carl Smith describes as generating a systemic change is *Vinatieri v. Commissioner*. *Vinatieri* is a prime example why court review of IRS collection decisions can ensure that the IRS is properly considering the interests of taxpayers during the collection process.<sup>137</sup> It also illustrates how abuse of discretion review can provide a means to correct a patently incorrect IRS's legal position embedded in its internal collection policy that had likely harmed countless taxpayers and, but for CDP, likely would have continued unabated.

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<sup>136</sup> *Keeps Growing Its Collection*, *supra* note 133.

<sup>137</sup> 133 T.C. 392 (2009).

To understand the impact, I will describe the case in some detail. The taxpayer, Kathleen Vinatieri, reported a tax liability on her 2002 tax return.<sup>138</sup> Following non-payment, IRS began the stream of collection correspondence that eventually included a notice of intent to levy that entitled her to a CDP hearing.<sup>139</sup> She filed a request for a CDP hearing, which Appeals conducted via correspondence and by telephone.<sup>140</sup>

During the hearing, Vinatieri told the settlement officer that she had pulmonary fibrosis and was dying.<sup>141</sup> She submitted a financial statement indicating she had monthly income of \$800 from part-time work and expenses of \$800, had no savings, and owned a 1996 Toyota Corolla with 243,000 miles and a value of \$300.<sup>142</sup> According to the Appeals Settlement Officer logs, she established that the IRS should place her account in uncollectable status because she was experiencing hardship under § 6343 and applicable regulations.<sup>143</sup>

Despite her proving hardship, Appeals sustained the levy on the grounds that she had not met her tax return filing obligations.<sup>144</sup> To justify its decision, Appeals relied on then-applicable Internal Revenue Manual provisions that required a taxpayer who had unfiled returns to submit those returns as a condition for the IRS to consider any alternative to enforced collection, including being placed in CNC status.<sup>145</sup> Vinatieri did not file her 2005 return at the time of the CDP hearing because the payroll processing provider had

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<sup>138</sup> *Vinatieri v. Comm’r*, 133 T.C. No. 16, 393–94 (2009).

<sup>139</sup> *Id.* at 393.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 394.

<sup>143</sup> *Id.* at 394; *see also* I.R.C. § 6343(a)(1)(D) states that a levy shall be released if “the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer.” Economic hardship “exists when a levy will cause an individual to be unable to pay his or her reasonable living expenses.” Treas. Reg. § 301.6343-1(b)(4).

<sup>144</sup> *Vinatieri*, at 395.

<sup>145</sup> *Id.*

gone out of business and she was unable to obtain records reflecting her income; IRS records on her income also were lacking.<sup>146</sup>

Due to her failure to file a prior return, the notice of determination that Appeals issued sustained the proposed levy and stated the following:

Collection alternatives include full payment, installment agreement, offer in compromise and currently-not-collectible. However, since unfiled tax returns exist, the only alternative at present is to take enforced action by levying your assets. It is Appeals decision that the proposed levy action is appropriate. The proposed levy action balances the need for the efficient collection of the taxes with the legitimate concern that any collection action be no more intrusive than necessary.<sup>147</sup>

Vinatieri timely challenged the determination by filing a petition with the Tax Court.<sup>148</sup> The IRS filed a motion for summary judgment on the grounds that Appeals did not abuse its discretion in rejecting her request.<sup>149</sup> The government's motion relied on the internal agency procedures requiring a taxpayer to file back due returns as a condition to the IRS classifying a taxpayer as not collectible even if the taxpayer established that a levy would create or exacerbate a financial hardship.<sup>150</sup>

Vinatieri, who was unrepresented, submitted a letter, where she told the court (and the IRS) the following:

I work in a job so I can be home with my daughter. I left my husband in July after he threatened to beat my daughter with a baseball bat. Beating me is one thing but I could not have him beating my girl. So I am a single parent again. Right now we have not had much work in nearly a year. I have rent of 600 a mo. Utilities of 150 and get food stamps or I wouldn't eat. I make about 700-800 [per] month. There are no better jobs in our town. My daughter is only 11 so its not like I can leave her alone at night or on weekends. D.H.S. says it's not even legal. She is too young. There is no child care and I have no family here. I have pulmonary fibrosis that makes me sick all the time and the diagnosis says I have about 10 yrs to live. Right now I can work thank God.

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<sup>146</sup> *Id.* at 393.

<sup>147</sup> *Id.* at 394.

<sup>148</sup> *Id.* at 395.

<sup>149</sup> *Id.* at 395–96.

<sup>150</sup> *Id.* at 397.



I did my taxes this year (for 2008) and you are getting a little over \$4,700. I'm not asking for much just a break. You can have my tax returns [refunds ?] I don't care. Well I do that is a tremendous loss but oh well. I don't have any money to send you on a monthly basis., Can we stop all the penalties. They are killing me. I will never be able to pay it off. \* \* \* I let a relationship screw. me up. I am truly sorry for that and am begging for a lifeline here. You can come to my home and see for yourself. I don't have fancy t.v.'s or even cable except for internet. I can't afford a phone. My clothes have-holes in them. I even cut my own hair. If I could pay this off faster I would just to stop the nightmares it gives me.<sup>151</sup>

In denying the IRS's motion for summary judgment, the Tax Court reviewed the Code and Treasury Regulations relating to hardship relief from levy.<sup>152</sup> Section 6343(a)(1)(D) provides that under regulations proscribed by the Secretary, if the taxpayer establishes that a levy is creating an economic hardship due to the financial condition of the taxpayer, the IRS must release a levy to the taxpayer's property or rights to property contains rules.<sup>153</sup> The regulations provide that a levy must be released "if satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses."<sup>154</sup>

The Tax Court order, issued as a precedential opinion, held that not only is the IRS required to release levies on taxpayers who have shown they are in economic hardship, the IRS abuses its discretion when a CDP determination sustains a proposed levy on the taxpayer who has established financial hardship.<sup>155</sup>

Noting the broader issues implicated, the opinion emphasized the harm of the IRS's position to taxpayers generally:

A determination in a hardship case to proceed with a levy that must immediately be released is unreasonable and undermines public confidence that tax laws are being administered fairly.<sup>156</sup>

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<sup>151</sup> *Id.* at 396–97.

<sup>152</sup> *Id.*

<sup>153</sup> I.R.C. § 6343(a)(1)(D).

<sup>154</sup> I.R.C. § 301.6343-1(b)(4).

<sup>155</sup> *Vinatieri*, at 398.

<sup>156</sup> *Id.* at 401.

The Tax Court remanded to Appeals to allow it to consider possible collection alternatives, including a potential offer in compromise.<sup>157</sup> The Tax Court retained jurisdiction, with the parties filing status reports, and pro bono counsel eventually agreed to represent the previously unrepresented Mrs. Vinatieri.<sup>158</sup> Appeals and *Vinatieri* resolved the matter after the remand, and the Tax Court eventually dismissed the case for mootness following the issue of a supplemental notice of determination.<sup>159</sup>

The impact of the case was immediate and far-reaching. The IRS issued a Chief Counsel Notice<sup>160</sup> stating that in *Vinatieri* the Tax Court correctly held that Appeals abused its discretion. The IRS changed numerous provisions in its Internal Revenue Manual for employees to effectuate the decision and provide relief for taxpayers who established hardship even if they had not complied with all filing obligations.<sup>161</sup>

What lesson does *Vinatieri* offer? It is significant because it directly shows how judicial engagement with the collection process can produce systemic changes. By allowing the opportunity to expose the IRS's administrative collection process to judicial review, CDP exposed an erroneous IRS policy that would likely have continued unabated.

It is hard to quantify the impact of *Vinatieri* on the most financially vulnerable taxpayers, both in actual direct economic harm of a potential levy and the psychological harm of not being able to prove one is entitled to relief as a result of a blanket policy that had the potential for harming the most vulnerable. The precedential *Vinatieri* Tax Court opinion generated

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<sup>157</sup> *Id.* at 400–02.

<sup>158</sup> E-mail from Mary Gillum, Attorney, Legal Aid Center, to author confirming this representation (Nov. 14, 2022, 09:23 CST) (on file with author).

<sup>159</sup> Order Dated Dec. 29, 2009, Docket #15895-08L. During the pre-levy hearing, the settlement officer would not discuss an offer-in-compromise or report petitioner's account as currently not collectible because petitioner had not filed her 2005 and 2007 returns.

<sup>160</sup> I.R.S. CC Notice 2011-005 (Nov. 11, 2011).

<sup>161</sup> For a review of some of the changes, including IRM provisions that the IRS modified, see Debra Holland & Karen Schiller, *Hardship Levies: Four Years After the Tax Court's Holding in Vinatieri v. Commissioner, the IRS Continues to Levy on Taxpayers it Acknowledges are in Economic Hardship and then Fails to Release its Levies*, at 86, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC\\_VOL-1\\_S1-MSP-7.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-1_S1-MSP-7.pdf) (last visited Aug. 2, 2022).

systemic changes in IRS policy. Those changes had a far-reaching impact on many taxpayers, including taxpayers who never would have or never likely would have had the opportunity to themselves petition a matter in court or even availed themselves of an administrative CDP hearing.

Another byproduct of *Vinatieri* is that it alerted the Taxpayer Advocate Service (TAS) to prod the IRS to conform its policies with the opinion, further ensuring that the IRS implemented changes beyond that associated with any one particular case.<sup>162</sup> As *Vinatieri* reflects, and as Chris Walker and others have described in their scholarship, there is a symbiotic relationship between judicial review and other internal sources of checks on agency error. For example, in a report it issued in 2013, over three years from the time of the opinion, the TAS noted that the IRS, with assistance from TAS, had made great progress in implementing the post-*Vinatieri* changes.

*B. Budish v. Commissioner: Appeals Misreads the IRM and Tax Court Suggests How Appeals Should Balance IRS and Taxpayer's Interest on Remand*

In addition to generating potential review following IRS denial of a collection alternative, CDP itself requires a balancing that evaluates the government's interest in efficiently collecting an assessed tax with the taxpayer's interest that the collection be no more intrusive than necessary.<sup>163</sup> That balancing test is most implicated following an IRS determination to file a notice of federal tax lien, given that the notice itself is an explicit exception to the rule that the IRS must keep confidential a taxpayer's tax return information, can have a crippling impact on a taxpayer's credit rating and may in fact even jeopardize a taxpayer's entitlement to employment.

One of the more interesting cases showing how CDP provides the Tax Court with the chance to engage in a meaningful dialogue with respect to this balancing requirement and the review of collection determinations is *Budish v. Commissioner*.<sup>164</sup> In *Budish*, the taxpayer was a sculptor who self-reported a sizeable tax liability that with interest and delinquency penalties exceeded

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<sup>162</sup> *Id.* at 91. (noting that for years following the *Vinatieri* decision, the TAS still encounters IRS collection employees still mistakenly believed that a taxpayer's unfiled returns were a barrier to releasing a levy or placing an account in non-collectible status).

<sup>163</sup> I.R.C. § 6330(c)(3)(C).

<sup>164</sup> *Budish v. Comm'r*, TC Memo 2014-239.

\$200,000. After receiving a notice of intent to levy, Budish requested and received a CDP hearing, where he sought an installment agreement to pay the debt over time.

Budish had significant income from his sculpting, but he also had significant costs, including child support and care for his elderly parent. At the CDP hearing, Budish and Appeals were able to agree on the terms of an installment agreement for full payment of his assessed liability. But, the Appeals Officer insisted that the IRS file public notice of its lien as a condition of entering into the installment agreement.<sup>165</sup>

Budish disagreed with the IRS's proposal to file a notice of the lien because he argued that its impact on his business would render him unable to make the monthly installment agreement payments. To support his claim, he furnished a statement from an owner of a foundry indicating that if the IRS did file a notice of federal tax lien, it would require him to "immediately pay for all work previously produced and make up-front payments for all future work." In addition, Budish's counsel "represented that the notice of lien would cause the buyers of petitioner's sculptures to cease financing petitioner by paying on a commission basis (i.e., up front) for artwork they might never receive because of petitioner's financial difficulties or because the artwork "may be encumbered by either the tax lien or other debtors [sic]."

The impasse resulted in Appeals issuing a notice of determination sustaining the proposed levy and rejecting the installment agreement. The determination included an attachment prepared by the Appeals Officer who conducted the hearing that indicated that Appeals felt that under the IRS's internal guidelines in the Internal Revenue Manual it was obligated to file the notice of federal tax lien given the size of the liability:

The Taxpayer requested an installment agreement instead of levy action and also requested no NFTL be filed. IRM 5.14.1.4.2 requires a lien filing determination be made prior to granting an installment agreement. IRM 5.12.2.4 requires a[n] NFTL be filed if an installment agreement does not meet streamlined, guaranteed, or in-business trust fund express criteria. The Taxpayer's installment agreement

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<sup>165</sup> While a lien in favor of the government arises by operation of law, the Notice of Federal Tax Lien (NFTL) perfects this lien and alerts third parties to the government's claim on the taxpayer's property. The unperfected "secret" lien can be defeated by creditors who would have to fall in line behind a perfected lien. For more on the impact of the filing notice of a federal tax lien, see SALTZMAN & BOOK, IRS PRACTICE & PROCEDURE ¶ 14A.04, Effect of the General Tax Lien.

request does not meet these criteria; therefore the filing of the NFTL would be required as a condition of the installment agreement.

You have failed to show how withholding the lien filing would be in the best interest of the government and facilitate collection.

I advised the POA I could accept the installment agreement but that the NFTL would be filed as a condition of the installment agreement. The POA refused to enter into the installment agreement and said he would take the matter to tax court.

The Appeals officer's explanation of her determination to enforce the levy concludes as follows:

The Notice of Intent to Levy was issued properly. You requested an installment agreement instead of levy action but refused to agree to the filing of the NFTL. As such levy action, although intrusive, balances the need for efficient collection of the tax with your legitimate concern that collection action be no more intrusive than [sic] necessary. Compliance may levy as they see fit.

Following the adverse determination, Budish timely appealed to the Tax Court, challenging Appeals' rejection of the installment agreement and its sustaining of the proposed levy. The issue before the Tax Court was whether by requiring that a notice of lien be filed as a condition of entering into the installment agreement, whether Appeals acted arbitrarily and capriciously. At Tax Court, Budish argued that the determination reflected Appeals misread of the applicable IRM provisions and failed to adequately balance the government's legitimate interest in collecting the tax with the statutory mandate that the collection be no more intrusive than necessary.

In response, IRS argued that the discretionary nature of installment agreements under § 6159 and the applicable regulations gave IRS authority to condition the installment agreement as it saw fit. The government also echoed the concerns of Professors Johnson and Camp, noting that it was not the Tax Court's role to substitute its judgment for the tax administrator and it should not "conduct an independent review of what would be an acceptable collection alternative" and "substitute its judgment" for Appeals when reviewing a collection alternative for an abuse of discretion.

The Tax Court agreed with Budish that Appeals' actions were arbitrary and capricious. It did so because it noted that Appeals misread the IRM and

failed to refer to another IRM provision that provided IRS discretion to not require a notice of lien filing.<sup>166</sup>

Besides the misreading and omission of IRM provisions, the opinion held that Appeals' attempt to balance the government and taxpayer's interests was inadequate.<sup>167</sup> As to the government's interest, the opinion criticized Appeals' conclusory statement that the taxpayer "failed to show how withholding the lien filing would be in the best interest of the government and facilitate collection":

The Appeals officer does not explain her basis for the first statement. Did she not believe petitioner's representation that, absent the income from his sculpting business, he had few assets to which a Federal lien would attach; i.e., did she believe that petitioner filed an erroneous Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals? Alternatively, did she disbelieve petitioner's representation that a notice of lien would make it impossible for him to continue to generate sufficient income from his sculpting business to satisfy his obligations under the proposed installment agreement? Whether or not, as respondent argues, petitioner failed to prove the truth of that representation, there is no indication that the Appeals officer actually weighed and, after consideration, rejected it as a basis for not filing a notice of lien, as she was required to do by section 6330(c)(3)(C). Rather, it appears that she felt constrained to require a notice of lien filing by virtue of what she erroneously considered the mandate of the IRM and that the inclusion of her statement that petitioner "failed to show" that not filing of a notice of lien would be in the Government's best interest and facilitate collection was, in effect, surplusage or boilerplate, included merely for the sake of completeness.<sup>168</sup>

The opinion also included language from the determination that purportedly considered the individual's interest:

The Notice of Intent to Levy was issued properly. You requested an installment agreement instead of levy action but refused to agree to the filing of the NFTL. As such levy action, although intrusive, balances the need for efficient collection

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<sup>166</sup> *Budish*, at 1737–38 ("It is also clear that IRM pt. 5.12.2.4 (Oct. 30, 2009) lists circumstances under which an 'NFTL filing determination must be made,' not circumstances under which a notice of lien must be filed. Thus, pursuant to IRM pt. 5.12.2.4, the Appeals officer was required to make a lien filing "determination," which petitioner does not dispute; but she was not required, by that provision, to determine that a notice of lien be filed.").

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

of the tax with your legitimate concern that collection action be no more intrusive than [sic] necessary. Compliance may levy as they see fit.<sup>169</sup>

The opinion took issue with this language, finding that it failed to address the taxpayer’s substantive concerns:

We assume the Appeals officer meant to conclude the sentence by stating that levy action is warranted. But, again, there is no analysis of what might have led her to conclude that levy action will balance the need for efficient collection of tax with petitioner’s concern that it would be unnecessarily intrusive.<sup>170</sup>

Moreover, it distinguished a number of cases where the Tax Court had previously found that it was not an abuse of discretion to not withdraw a filed notice of federal tax lien.<sup>171</sup> As such, it found that Appeals abused its discretion in sustaining the proposed levy.<sup>172</sup>

After finding that Appeals’ determination was inadequate due to its failure to consider the pertinent issues or explore the facts needed to do its proper balancing test under the statute, the opinion notes that the typical recourse in CDP cases is for the Tax Court to remand the case back to Appeals for further consideration.<sup>173</sup> That is precisely what the Tax Court did in *Budish*, but it went one step further.

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> The issue as to whether the IRS was justified in proposing to file a notice of federal tax lien arose in *Budish* in a somewhat unusual way. *Budish*, 108 T.C.M. (CCH) 564, 2014 T.C.M. (RIA) ¶ 2014-239 (2014). Typically, in a CDP case where a taxpayer is claiming harm from a lien filing the CDP challenge arises after the IRS has already filed its NFTL rather than in *Budish* where the IRS had not yet done so. *Id.* at ¶ 14. It is generally difficult, although not impossible, to use CDP as a vehicle to have IRS withdraw a lien filing. See Christine Speidel, *Taxpayer Wins Rare Reversal in CDP Lien Appeal*, PROCEDURALLY TAXING (Feb. 27, 2020), <https://procedurallytaxing.com/taxpayer-wins-rare-reversal-in-cdp-lien-appeal/> (discussing “hurdle taxpayer faces in fighting a NFTL determination is proving that there is a specific harm caused by the public lien filing, and this should be a harm which impedes collectability of the tax debt.”).

<sup>172</sup> *Budish*, at 108 T.C.M. (CCH) at 24 (“[W]e find that the Appeals officer gave little, if any, consideration to petitioner’s arguments and, instead, decided a notice of lien should be filed because of her mistaken belief that she lacked discretion to do otherwise under the IRM. Therefore, we find that the Appeals officer did not balance the need for the efficient collection of taxes with petitioner’s legitimate concern that the collection action (i.e., the notice of lien) be no more intrusive than necessary, as required by section 6330(c)(3)(C). By failing to perform that function, she abused her discretion in sustaining the levy against petitioner’s assets.”).

<sup>173</sup> *Id.* at 25.

In a manner that reflects the work of Professor Walker and his description of how courts can successfully use tools to engage an agency, the opinion discussed in detail what facts it expected Appeals to explore on remand, so it could better assess the taxpayer's claim that the filing of the lien will result in lower income and likely default on the proposed installment agreement:

On remand we anticipate that the Appeals officer assigned the case will want to investigate, facilitated by petitioner's furnishing supporting documentation or affidavits where necessary, petitioner's representations that the mere filing of a notice of lien will cause the foundry to drastically and unfavorably alter its working relationship with him and cause his customers to do the same, both resulting in a sharp decrease or stoppage of his income from the production and sale of sculptures, thereby causing him to default on the proposed installment agreement. In that connection we agree with respondent that counsel, in a letter to the Appeals officer, overstated the foundry's reaction to the possibility of a Federal tax lien against petitioner's assets. The foundry did not cite that possibility as "the impetus" for its proposed changes in its business relationship with petitioner. Rather, it cited the actual suspension or delay of payments due it as the linchpin of those changes.<sup>174</sup>

One aspect of *Budish* is that the opinion did not take at face value the taxpayer's claim that the lien filing would in fact have an adverse impact on the taxpayer. In fact, it used its opinion to provide the tools for the IRS to dig deeper into the taxpayer's argument about the impact of the lien. Despite the taxpayer's assertion that the lien might prevent his selling goods to customers who might be reluctant to purchase if the lien were made public, the Tax Court noted that the Code provides generally that the filing of a notice of a federal tax lien is not generally valid against a purchaser of tangible personal property purchased at retail in the ordinary course of the seller's trade or business.<sup>175</sup> By identifying this rule, the opinion prompts IRS Appeals, on remand, to meaningfully explore the impact of the IRS's lien filing, rather

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<sup>174</sup> *Id.*

<sup>175</sup> The opinion drilled down fairly deeply into the impact of § 6323(b)(3): "On the one hand, the Government's lien would not be valid as against a purchaser's interest in petitioner's sculptures, which would mean, assuming petitioner's representations with respect to his lack of other valuable assets are true, that a lien would do little to protect the Government's interests and, therefore, might not be necessary. On the other hand, the failure of the lien to have priority over a purchaser's interest in the sculptures would negate petitioner's argument that it would effectively put him out of business. In any event, it would be up to the Appeals officer, on remand, to weigh the impact of section 6323(b)(3) on the need to file a notice of lien in conjunction with the installment agreement." *Id.* at 27.



than take as a given the taxpayer's assertion that the IRS's collection action would deter taxpayers from purchasing his sculptures.

*C. Moore v. Commissioner: IRS Decision to Revoke OIC Without Offering Taxpayer an Opportunity to Cure a Default Was an Abuse of Discretion*

Though less significant than the prior two cases, *Moore v. Commissioner* is instructive. The facts, somewhat simplified, involve a taxpayer who entered into an offer in compromise.<sup>176</sup> One of the conditions for an OIC is that a taxpayer agrees to comply with all filing and taxpaying obligations for a five-year period following acceptance of the offer.<sup>177</sup> The taxpayer filed late tax returns for two of the years during the five-year period; he also failed to pay timely for one of the years.<sup>178</sup> The IRS Collection function terminated the offer.<sup>179</sup> The IRS eventually sent a letter proposing to levy for the tax that was previously subject to the offer in compromise.<sup>180</sup> The taxpayer filed a timely CDP request, and after curing the nonpayment and non-filing, asked the assigned Appeals Settlement Officer to reinstate the terminated offer.<sup>181</sup> After declining to do so, Appeals issued a determination, and the taxpayer petitioned to Tax Court seeking the offer's reinstatement.<sup>182</sup>

After reviewing the IRS's internal procedures and the form that taxpayers and the IRS use to enter into an offer, the Tax Court noted that IRS procedures and case law provide that the IRS has discretion to terminate the offer, with any breach, even if immaterial, providing sufficient basis to do so.<sup>183</sup> The opinion also noted that IRS internal procedures require that IRS give defaulting taxpayers an option to cure the default, but the record did not

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<sup>176</sup> *Moore v. Comm'r*, T.C. Memo. 2019-129, 2 (2019).

<sup>177</sup> *Id.* at 3.

<sup>178</sup> *Id.* at 2–3.

<sup>179</sup> *Id.* at 7–8.

<sup>180</sup> *Id.* at 8–9.

<sup>181</sup> *Id.* at 10.

<sup>182</sup> *Id.* at 11–12.

<sup>183</sup> *Id.* at 17–18.

reflect that the IRS had given Moore that opportunity.<sup>184</sup> Despite that absence of evidence showing that it had given Moore the chance to cure the default, in Tax Court, the IRS argued that should not have any impact on the CDP case because it viewed the offer termination process as not part of the CDP hearing and thus effectively insulated from court review.<sup>185</sup>

The Tax Court disagreed:

The purpose of the CDP hearing is to give the taxpayer an opportunity for an independent review to ensure that the levy action is warranted and appropriate. The settlement officer determined that petitioner breached the OIC's terms and the OIC was subject to termination; however, that was not the end of his required inquiry. The settlement officer was required to verify that all administrative procedures with respect to the levy action had been satisfied. Termination of the OIC was a necessary step before the levy action could be initiated.<sup>186</sup>

As such, the Tax Court distinguished other CDP cases where it had found no abuse of discretion when the taxpayer sought to reinstate a defaulted offer, but the record reflected that the taxpayer had been given the opportunity to cure the default.<sup>187</sup> While the opinion notes that the taxpayer was far from faultless in his dealings with the IRS, it emphasized that CDP requires that Appeals verify that IRS complied with its own administrative procedures and that Appeals' failure to consider that IRS's failure to follow its procedures to allow for a cure for the default was an abuse of discretion:

It is clear that the OIC was not terminated because of circumstances beyond petitioner's control. His default was his own doing. He failed to carefully manage his income tax liabilities and filing obligations for five years after being granted a favorable OIC that was conditioned on his tax compliance. He also failed to notify respondent of a change to his mailing address. However, these failures on petitioner's part do not excuse respondent's failure to follow his own administrative procedures for terminating an OIC.<sup>188</sup>

Declining to accept the taxpayer's request that the IRS be ordered to reinstate the offer, the Tax Court remanded the matter to Appeals and

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<sup>184</sup> *Id.* at 22–25.

<sup>185</sup> *Id.* at 24–25.

<sup>186</sup> *Id.* at 23.

<sup>187</sup> *Id.* at 25.

<sup>188</sup> *Id.* at 28.

suggested, though did not mandate, that the assignment of a new Appeals Settlement Officer.<sup>189</sup>

#### V. IMPROVE THE QUALITY OF INFORMATION THAT TAXPAYERS RECEIVE IN THE CDP PROCESS

While I have argued that CDP provides a needed check on IRS collection procedures, I also believe that Congress and the IRS can improve CDP to better balance the government and taxpayer's interest in the tax collection process.<sup>190</sup> In this section, I offer two modest proposals, one to

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<sup>189</sup> *Id.* at 29–30.

<sup>190</sup> As I focus in this essay on CDP's direct relation to the tax collection process, I do not in detail address ways that Congress could modify CDP that relate to questions of liability or a taxpayer's entitlement to a refund. For more on that issue, see Fogg, *supra* note, 23 at 435, 490, recommending that Congress "amend section 6330 to make it clear that a taxpayer who has not had a prior opportunity for a judicial hearing on the merits of a liability will have that opportunity as a part of CDP." Professor Fogg discusses in detail the so-called *Flora* rule that requires the taxpayer to fully pay any asserted tax deficiency prior to bringing refund suit in federal district court or the Court of Federal Claims. *Flora v. United States*, 357 U.S. 63, 74–75 (1958), *aff'd on reh'g*, 362 U.S. 145 (1962). With respect to questions of liability, as discussed above at 74–75 a taxpayer may only dispute the underlying liability if they did not actually receive a notice of deficiency or did not otherwise have an opportunity to dispute such liability. I.R.C. §§ 6320(c), 6330(c)(2)(B). The opportunity to dispute a tax liability includes the opportunity to challenge the liability in an administrative hearing before the IRS Independent Office of Appeals or in a judicial proceeding. Treas. Reg. § 301.6320-1(e)(3), Q&A (e)(2) (2022); Treas. Reg. § 301.6330-1(e)(3), Q&A (e)(2) (2022). In addition to Professor Fogg, TAS has recommended that Congress amend the statute to provide that an "opportunity to dispute an underlying liability" means that a taxpayer had an opportunity to dispute the liability in a prepayment judicial forum. See NAT'L TAXPAYER ADVOC., *2022 Purple Book Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration*, 37 (2022).

To be sure, using CDP as a means to address the problem with the *Flora* rule is an indirect way to address the problem of limited access to court review, as Congress could expand the jurisdiction of the Tax Court to include matters that are at present not subject to deficiency procedures or legislatively overrule *Flora*. See Fogg, *supra* note 38, at 485–88 (suggesting as an alternative to changes to CDP that Congress clarify that *Flora* only applies to taxes subject to deficiency procedures or expand the notion of divisibility to address all civil tax penalties).

A separate issue concerns the Tax Court's view that it does not have jurisdiction to order a refund in a CDP case, even if it has jurisdiction to consider the amount or existence of a liability. For a discussion of that issue, see Keith Fogg, *Tax Court Reiterates That It Lacks Refund Jurisdiction in Collection Due Process Cases*, PROCEDURALLY TAXING (Oct. 4, 2018), <https://procedurallytaxing.com/tax-court-reiterates-that-it-lacks-refund-jurisdiction-in-collection-due-process-cases/>; Carlton Smith, *Does the Tax Court Sometimes Have Refund Jurisdiction in CDP Cases?*, PROCEDURALLY TAXING (June 11, 2018), <https://procedurallytaxing.com/does-the-tax-court-sometimes-have-refund-jurisdiction-in-cdp-cases/>. While I do not address this in detail, from a standpoint of judicial efficiency and fairness, Congress should

enhance the possibility that taxpayers understand and exercise their rights in CDP, and one to minimize costs that might arise from taxpayers improperly exercising those rights.

A. *Improve Communication to Taxpayers Throughout CDP*

One way to evaluate possible changes and whether CDP strikes the right balance is to consider measures that might enhance its ability to promote a tax administration that is tethered to taxpayer rights. A taxpayer-rights perspective is appropriate given the 2015 codification of the taxpayer bill of rights (TBOR) and Congress' explicit recognition that the IRS should ensure that its employees are familiar with, and act in accord with, a defined list of fundamental taxpayer rights.<sup>191</sup>

Four of the ten rights have particular applicability when considering CDP.<sup>192</sup> Those rights are the right to be informed, the right to challenge the IRS's position and be heard, the right to appeal an IRS decision in an independent forum, and the right to a fair and just tax system.<sup>193</sup>

One way that the IRS could assist taxpayers in the CDP process is to ensure that taxpayers understand their rights and responsibilities when they communicate at the various stages of the CDP process.<sup>194</sup> In particular, there

clarify that the Tax Court does have jurisdiction to hold that a taxpayer has overpaid their tax liability in the context of a CDP proceeding.

<sup>191</sup> The IRS adopted a taxpayer bill of rights in 2014. I.R.S News Release IR-2014-72 (June 10, 2014). In 2015, Congress added Section 7803(a)(3), codifying those rights. I.R.C. § 7803(a)(3). For its potential impact, see Alice Abreu & Richard Greenstein, *Embracing the TBOR*, 157 TAX NOTES 1281, 1291 (2017) (discussing the possible transformative impact of the taxpayer rights legislation). To be sure, any change to CDP should also consider whether the measure likely will impede IRS efforts to collect, especially from taxpayers who may seek to use CDP merely to delay or possibly even defeat collection. As I discuss below, the IRS has the authority to disregard frivolous CDP requests and sanction taxpayers if they are submitted for solely for delay or which advance frivolous positions.

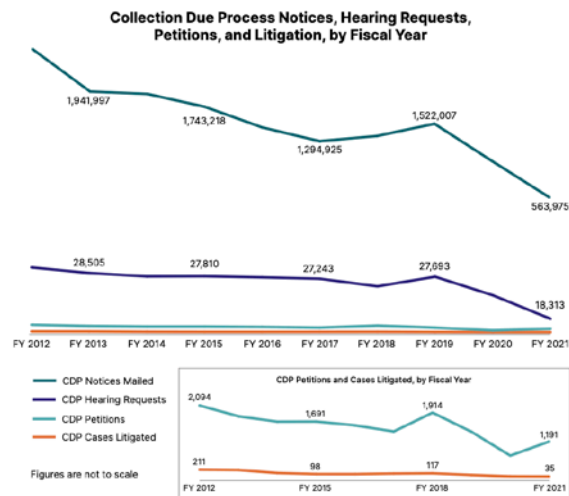
<sup>192</sup> I.R.S News Release IR-2014-72 (June 10, 2014).

<sup>193</sup> *Id.*

<sup>194</sup> This is not intended to be an exhaustive account of how to improve CDP. For other suggestions that are premised on the belief that CDP provides a needed check on IRS collection powers, see two sound proposals by Carlton Smith and Keith Fogg to accelerate the time frame for Appeals and the Tax Court to resolve CDP matters. Carlton Smith & Keith Fogg, *Collection Due Process Hearings Should Be Expedited*, 125 TAX NOTES 919, 923 (2009); Carlton Smith & Keith Fogg, *Tax Court Collection Due Process Cases Take Too Long*, 130 TAX NOTES 403, 415–16 (2011).

are two key communication opportunities tethered to the statute: the triggering of a right to a CDP hearing through the issuance of a final notice of intent to levy or notice of federal tax lien, and the notice of determination concerning collection action under the CDP proceeding.<sup>195</sup>

As reflected in the following figure from a recent TAS annual report there is a low rate of take up on letters conferring the right to a CDP hearing before Appeals, and on notices of determination conferring the right to Tax Court review of the Appeals' CDP determination:

FIGURE 3.3<sup>25</sup>

As to the notices triggering the right to a CDP hearing, the Code identifies a number of specific items that the notices must contain.<sup>196</sup> The notices and the statutory requirements vary depending on whether the notice

<sup>195</sup> A separate but related issue is the information that taxpayers receive from either the IRS or the Tax Court if they do file a petition to Tax Court in response to a notice of determination. As the TAS research reflects, very few filed petitions in response to a notice of determination culminate in a decided opinion, with the vast majority relating to pro se taxpayers whose matters are resolved on summary judgment. One way to assist taxpayers, especially unrepresented taxpayers, would be for the Tax Court to require the IRS to advise taxpayers on how to respond to a dispositive motion. See Keith Fogg, *Power of Federal Tax Lien*, PROCEDURALLY TAXING (July 6, 2022), <https://procedurallytaxing.com/power-of-federal-tax-lien/> (suggesting that the local rules in the Northern District of Illinois are a model for providing clear instructions on how to respond to dispositive motions, with such an approach likely “to give pro se litigants a better chance to provide the court with appropriate information.”).

<sup>196</sup> I.R.C. § 6330(a)(3).

relates to a lien filing or intent to levy, but they must include a brief statement including the amount of unpaid taxes, the tax period or periods, and the action or proposed action. With respect to notices of determination, the statute ties the determination to Appeals' consideration of the particular circumstances, including whether the proposed collection action balances the need for the efficient collection of taxes with the taxpayer's concern that the collection be no more intrusive than necessary and any conclusions with respect to issues (like collection alternatives) that the taxpayer raised in the hearing itself.

While the absolute numbers of taxpayers availing themselves of the opportunity for administrative or judicial CDP rights have declined in part due to a decline in enforced collection associated with COVID-19, the take-up has been consistently low. TAS has criticized the IRS for designing CDP notices in a way that fails to inform taxpayers about the basics of their statutory rights, including why appeal rights are important, and the differences between CDP hearings and equivalent hearings requested outside the thirty-day window.<sup>197</sup> With respect to the notices conferring the right to an administrative CDP hearing, TAS has emphasized that the notice itself reads more like a typical collection notice and not nearly enough like one that highlights the important taxpayer rights that are implicated by timely filing a request for a CDP hearing. With respect to notices of determination, TAS notes that the notices fail to explain the significance of court review, which as TAS correctly emphasizes is the "heart of the taxpayers' right to appeal an IRS decision in an independent forum . . . and provides important oversight to the IRS's collection powers."<sup>198</sup>

Professor Keith Fogg has similarly criticized the IRS for failing to make it easy for taxpayers to request a hearing, even if they understood the appeal

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<sup>197</sup> 1 NAT'L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 2018, at 214–19 (2018).

<sup>198</sup> Practitioner Marty Davidoff has also criticized IRS collection notices that confer CDP rights, echoing concerns that TAS has made as perhaps being technically legal but "immoral" in how the forms fail to highlight the taxpayer opportunity to protect their appeal rights. E. Martin Davidoff, *New Format of Notice of Intent to Levy Fails to Provide Sufficient Notice*, PROCEDURALLY TAXING (Jan. 22, 2016), <https://procedurallytaxing.com/new-format-of-notice-of-intent-to-levy-fails-to-provide-sufficient-notice/>.

opportunities the letter affords. Fogg has suggested that the IRS create a centralized portal or common address for all CDP requests.<sup>199</sup>

To help ensure that taxpayers understand the important rights embedded in CDP notices, TAS has recommended that the IRS more directly consider and study collection notice design, and in the letters, highlight filing deadlines and clearly explain the importance of CDP in relation to taxpayer rights and protections.<sup>200</sup>

The assumption I am making by promoting the IRS drafting different notices and suggesting that the IRS facilitating proper taxpayer responses is that these changes would encourage more taxpayers to take advantage of their CDP rights. Of course, a more nuanced take would consider not only whether the changes would increase take-up but would analyze what kinds of taxpayers would be more likely to respond following these changes. If taxpayers perhaps knew more about the rights that CDP confers, it is possible that taxpayers who are merely looking for opportunities to delay or defeat collection might respond in greater numbers.

The concern about the potential take-up by taxpayers who have the means to pay an assessment and who are likely to use CDP as a way to delay or defeat collection is a serious one. I note that current law provides the means to preserve the integrity of the CDP process. Appeals has the right to disregard CDP requests that are made to delay collection,<sup>201</sup> and taxpayers in a CDP hearing may not raise frivolous matters.<sup>202</sup> The IRS also has the right to impose a \$5,000 penalty when a request for a CDP hearing is based on a position the IRS has identified as frivolous or reflects a desire to delay or impede tax administration.<sup>203</sup>

One way to evaluate the impact of changes in the form of communication would be for the IRS to study the effect of changes in

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<sup>199</sup> See Keith Fogg, *Sending Your Collection Due Process Hearing Request to the Correct Address*, PROCEDURALLY TAXING (Apr. 26, 2016), <https://procedurallytaxing.com/sending-your-collection-due-process-hearing-request-to-the-correct-address/>.

<sup>200</sup> NAT'L TAXPAYER ADVOC., *supra* note 197, at 221–22.

<sup>201</sup> I.R.C. § 6330(g).

<sup>202</sup> I.R.C. § 6330(c)(4)(B).

<sup>203</sup> I.R.C. § 6702(b)(2).

correspondence, using differing types of letters in a randomized controlled trial to evaluate what impact changes have on take-up, types of issues raised by differing forms of letter, and whether letter changes contributed to requests that appeared to be mostly for delay.<sup>204</sup>

*B. Limit Taxpayer Access to Judicial Review in the Absence of a Liability Challenge or Collection Alternative Following a Determination Relating to a Proposed Levy*

While the statistics do not reflect that there has been a major adverse impact on the Tax Court,<sup>205</sup> CDP has become one of the most tax system's most litigated issues. In this section, I consider whether critics like Professors Johnson and Camp have a point when it comes to whether CDP may have tipped the scales too far when it comes to the opportunity to obtain court review of all aspects of a possible Appeals determination.

Professor Johnson has suggested that one way to reduce CDP costs would be to scale down court review by removing judicial review of Appeals' consideration of a taxpayer's proposed collection alternatives, and IRS compliance with guidance, apart from statutes or regulations.<sup>206</sup> While the relatively low number of Tax Court cases involving CDP matters does not suggest that CDP is imposing significant burdens on the court, his criticism warrants deeper consideration of the costs and benefits of judicial review.

As I have discussed above, I disagree with Camp who proposes to eliminate all of judicial review in CDP, and Johnson who proposes to eliminate all court review, unless the taxpayer alleges that the IRS has violated a statutory or regulatory rule. As I have discussed previously, my disagreement stems from what I believe is the significant taxpayer interest in

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<sup>204</sup> During my time in 2019 as Professor in Residence at the IRS, TAS had proposed that IRS conduct such a study with respect to notices conferring administrative CDP rights. To the best of my knowledge the study was not undertaken.

<sup>205</sup> See U.S. TAX CT., CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2023, at 19 (2022), [https://www.ustaxcourt.gov/resources/budget\\_justification/FY\\_2023\\_Congressional\\_Budget\\_Justification.pdf](https://www.ustaxcourt.gov/resources/budget_justification/FY_2023_Congressional_Budget_Justification.pdf) (reporting that CDP cases filed in the fiscal year ended 9/30/21 made up 3.29% of its total caseload and deficiency cases made up 96.46% of its total caseload).

<sup>206</sup> Johnson, *supra* note 7, at 267.



the opportunity for a collection alternative and the benefits of oversight that accompany court review of IRS collection action.<sup>207</sup>

On the other hand, as Professor Camp has argued, CDP at times allows taxpayers to raise issues that may not be ripe for court review.<sup>208</sup> This critique seems especially apt in the context of a proposed levy if a taxpayer has not raised a request for a collection alternative, there is not a good faith or reasonable challenge to the IRS's compliance with its procedures, and the taxpayer has raised no other appropriate issue, such as a challenge to the amount or existence of a liability. In that situation, if a taxpayer has petitioned the Tax Court for a review of the determination, the Tax Court is required to balance the IRS's interest in efficiently collecting tax with the taxpayer's interest that the collection be no more intrusive than necessary. While the IRS can dispose of such matters on summary judgment and could file a motion to proceed with levy during the pendency of the Tax Court case, there is little taxpayer benefit associated with court review in those circumstances.

The same considerations differ for a taxpayer who files a request for CDP following an NFTL, with the taxpayer's interest in IRS action being less intrusive due to the impact that the lien filing has on the taxpayer. If a CDP matter involves a proposed levy and there is the absence of a specific request for a collection alternative, there is little meaningful work for a court to engage when it performs its required balancing test. The IRS's proposed collection action prior to a levy is inchoate; there are no specific assets

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<sup>207</sup> I most extensively discuss this in *A Misstep*, *supra* note 13, at 1147.

<sup>208</sup> Camp does not consider any IRS determination in the collection process as final until the last dollar of an assessment is collected. Camp, *supra* note 12, at 89. That perspective minimizes the considerable rights that taxpayer's have in ensuring that the IRS evaluate their collection potential at a given point in time. *See, e.g.*, I.R.C. § 7122(d)(1) (providing that IRS "shall" prescribe standards to determine whether an offer in compromise is adequate and should be accepted); I.R.C. § 7122(e) (providing for IRS to allow taxpayers access to the Independent Office of Appeals prior to the rejection of either an offer in compromise or installment agreement); I.R.C. § 6159(c) (providing in certain circumstances, that the IRS must enter into an installment agreement with a taxpayer who has requested such an agreement). That Congress has afforded statutory rights that attach to offers in compromise and installment agreements suggests that a perspective that focuses only on the truism that a taxpayer's financial circumstances may change, so that a determination is ever evolving, misses the considerable interest that taxpayers possess. The taxpayer interests are especially acute when taxpayers are delinquent not because they are recalcitrant or evasive but because their financial circumstances are so dire that IRS enforced collection may jeopardize their basic survival.

identified when the IRS issues a notice of intent to levy.<sup>209</sup> In contrast, if a taxpayer has sought court review following an NFTL, there are defined taxpayer interests at play, especially given the impact that a publicly filed NFTL may have on a taxpayer's credit rating and possibly even livelihood.<sup>210</sup> While the lien filing may be important to protect the government's interest, Congress, through CDP, has recognized that the intrusiveness of the NFTL may at times be outweighed, if there is little to suggest that the particular NFTL will have a material impact on the IRS's ability to collect and there is a demonstrated effect that the NFTL may jeopardize the taxpayer's ability to earn money or impose significant costs.

In this situation, while CDP allows for at times a needed pause and a fresh look from a different IRS employee outside of Collection, by extending the possibility of judicial review when the review may not meaningfully advance a defined individual interest, CDP may have tipped the scales too far in the taxpayer's favor.

#### CONCLUSION

CDP, and RRA 98 more generally, arose in part from stories of abuse of taxpayers at the hand of IRS collection personnel, though much of the allegations of IRS abuse leading up to RRA 98 have been discredited.<sup>211</sup> Despite the obvious theater of the hearings, leading up to RRA 98 there were legitimate concerns about the inadequacy of IRS collection procedures,

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<sup>209</sup> See, e.g., Camp, *supra* note 10, at 87 (contrasting CAP from CDP, with CAP often arising after IRS has decided to collect on a specific asset, as contrasted with CDP, when there is "an abstract threat to levy.").

<sup>210</sup> See Christine Speidel, *Taxpayer Wins Rare Reversal in CDP Lien Appeal*, PROCEDURALLY TAXING (Feb. 27, 2020), <https://procedurallytaxing.com/taxpayer-wins-rare-reversal-in-cdp-lien-appeal/> (discussing and linking *Cue v. Commissioner*, No. 214-18SL (U.S.T.C. Dec. 3, 2019) (unpublished), where the Tax Court reversed a determination that sustained an NFTL and found that the government's interest was outweighed by the taxpayer's interest due to the NFTL, causing the employee to lose their license to continue working in the financial sector).

<sup>211</sup> Camp, *supra* note at 10, at 1, 78, 81 (describing hearings that "were high political theater and, as with most theater, were mostly fictional."); Leandra Lederman, *IRS Reform: Politics as Usual*, 7 COLUM. J. TAX L. 36, 38 (2016) (discussing how the highly publicized Congressional hearings regarding alleged abuses by the IRS subsequently were largely subsequently debunked).

including that the agency failed to adequately consider taxpayer interests in the tax collection process.

CDP reflects Congress' explicit way to ensure that parties other than IRS Collection personnel consider the taxpayer's interest in the tax collection process. Congress most explicitly recognized that interest by injecting what at the time was an unprecedented judicial review of IRS collection actions, even if that review is done in a more deferential manner than review of IRS determinations concerning the amount or existence of a liability or refund. It also requires Appeals and the Tax Court to evaluate whether the IRS balanced its interest in efficient collection of taxes with the legitimate concern that any administrative tax collection is no more intrusive than necessary.<sup>212</sup>

Over time, Congress has more explicitly recognized the taxpayer's right to an alternative to enforced collection. In addition, Congress has more explicitly recognized the foundational importance of taxpayer rights, including the right to a fair tax system, the right to challenge the IRS's position and be heard, and the right to be informed. CDP allows taxpayers to better understand and exercise their rights, rights that exist even if it is unquestioned that taxpayers owe an assessed liability. The importance of those rights exists even if there was or is little evidence that IRS Collection employees were reckless or intentional in disregarding taxpayer interests and rights in tax collection. By allowing for limited judicial review, CDP provides the means to ensure that the IRS is following the rules and properly applying standards to determine a taxpayer's collection potential. While any procedure entails additional costs, and CDP is far from perfect, it still represents a positive step in tax administration and provides needed oversight of an agency that is still entrusted with considerable power.

I started this article by highlighting some adverse reaction to the Supreme Court's decision in *Boechler v. Commissioner*, where the Supreme Court held that the thirty-day filing deadline for a Tax Court CDP petition is not jurisdictional and is subject to equitable tolling. I believe some of the adverse reaction to *Boechler* is overstated<sup>213</sup> and also stems from a continued

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<sup>212</sup> I.R.C. § 6330(c)(3)(C).

<sup>213</sup> See, e.g., Carlton M. Smith, *Pro-Taxpayer Holding in Boechler Would Impose Little Burden on Tax Court*, TAX NOTES (Feb. 7, 2022), <https://www.taxnotes.com/tax-notes-federal/litigation-and-appeals/pro-taxpayer-holding-boechler-would-impose-little-burden-tax-court/2022/02/07/7d5bc>

undervaluing of the systemic benefits associated with how CDP opened the window ever so slightly to court review of IRS collection determinations.<sup>214</sup> I hope that this article contributes to a better appreciation of how CDP is a tool, albeit imperfect, that allows for a more balanced approach to tax collection.

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(arguing that the government in *Boechler* provided misleading statistics on the impact of a taxpayer favorable decision in the case).

<sup>214</sup> For example, focusing on the supposed “chaos” that may accompany equitable tolling in CDP cases, blogger Lew Taishoff frames this as helping “rounders, defiers, protesters, wits, wags, and wiseacres.” Lew Taishoff, *Ya Can’t Make This Stuff Up*, TAISHOFF LAW. (Apr. 29, 2022), <https://taishofflaw.com/2022/04/29/ya-cant-make-this-stuff-up-part-deux-2/>.

While any procedural protection may engender recalcitrant taxpayers seeking to avail any means necessary to delay tax payment, as Professor Keith Fogg has noted, *Boechler* will likely cause the Tax Court to develop a body of law around establishing the bases for equitable tolling, including considering circumstances when the IRS has actively misled taxpayers about filing deadlines and extraordinary circumstances that may have prevented filing. Keith Fogg, *What Happens After Boechler—Part 4: The IRS Argues That Equitable Tolling Would Not Apply in Deficiency Cases*, PROCEDURALLY TAXING (Apr. 29, 2022), <https://procedurallytaxing.com/what-happens-after-boechler-part-4-the-irs-argues-that-equitable-tolling-would-not-apply-in-deficiency-cases-%EF%BF%BC/>.

