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COLLECTIVE DUE PROCESS IN TAX ADMINISTRATION

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*Bryan T. Camp**

I. INTRODUCTION

The idea of due process is a bedrock concept in the law of the United States: a government may not take a person's property or liberty without due process of law.¹ While easy to say, the concept is difficult to apply. That is because neither of the words "due" or "process" have a fixed or certain meaning, but inherently take their meaning from context. The Supreme Court has long recognized that the concept of due process is operational: due process means people should have whatever procedure is appropriate under the circumstances to contest a government action they believe will adversely affect their property or liberty interests.²

The Supreme Court has adopted various balancing tests to decide what is appropriate in various contexts.³ One important context is whether the taking at issue happens via an adjudication or via legislation (or the administrative agency analog of rulemaking).⁴ Courts analyze differently what process is due when the taking happens through adjudication and what process is due when the taking occurs through legislation or regulation. The idea of due process in adjudication is very individualized. It is about

* George H. Mahon Professor of Law, Texas Tech University. I would like to thank all who gave feedback on this Article in its various phases, including Leigh Z. Osofsky, Caleb Smith, and Richard Murphy. I am also grateful for the student editors and the leadership of Philip Hackney in bringing this Article to publication. Any errors or omissions are entirely mine; I promise to do better next time.

¹ U.S. CONST. amend. V.

² *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

³ *Id.* This is perhaps the most famous articulation of that balancing.

⁴ The classic cases here are *Londoner v. City and County of Denver*, 210 U.S. 373, 385–86 (1908) and *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). For an excellent discussion of the intellectual history of these cases, see Evan Zoldan, *The Right to an Individualized Hearing*, U.C. IRVINE L. REV. (forthcoming 2023). In this Article I use the term "regulation" interchangeably with the more general administrative law term "rulemaking."

individual rights. The idea of due process in legislation or regulation is an idea about the rights of groups of people, a collective.

Taxation is a process by which the government takes people's property to fund government operations. The money collected is spent either through direct expenditures or through what are known as tax expenditures, whereby the government basically subsidizes certain activities by not taxing what otherwise would be taxed.⁵ Either way, the process of taxation must be appropriate. There must be "due" process.⁶

The process of tax administration—of the determination and collection of tax—does not map neatly onto the traditional binary concepts of adjudication or legislation. It is a mash-up. Hence, the analysis of what process is due cannot rely exclusively on one branch of the adjudication/legislative distinction or the other. So what process are taxpayers entitled to receive? Well, as with every human endeavor, errors are inevitable and so taxpayers are not entitled to a perfect, error-free process! This Article's thesis is that taxpayers *are* entitled to a process of taxation that gives them adequate voice, an adequate opportunity to be heard in decisions that affect their property or liberty. That's the admittedly fuzzy goal.

The experience under the IRS Restructuring and Reform Act of 1998 (RRA 98)⁷ for the past twenty-five years helps clarify that goal. It shows us what does and does not achieve that goal. In RRA 98, Congress made significant modifications to tax administration.⁸ Congress believed that taxpayers did not have adequate voice, particularly in the collection phase of tax administration. It sought to give taxpayers better voice in the system and

⁵ See J. COMM. ON TAX'N, 116TH CONG., REP. NO. JCX-23-20, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024, 2 (2020).

⁶ Due process analysis applies even when the government is reducing a benefit it has conferred. Thus, if the government provides a tax subsidy, any attempt to reduce that subsidy implicates due process similarly to attempts to revoke welfare benefits. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). See also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (deprivation of property or rights created by government action may not be taken without appropriate due process).

⁷ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998).

⁸ See *id.*

to better police the relationship of taxpayers and the IRS. It partly succeeded and partly failed.

The part of RRA 98 that has failed is the magnificently misnamed “Collection Due Process” (CDP) process. There, Congress wanted to give taxpayers the ability to contest collection of their taxes through an individualized adversarial process—a very traditional concept of due process.⁹ By treating collection decisions as individualized, however, Congress misconceived those IRS-taxpayer interactions as fundamentally adjudicatory. That misconception means the CDP process fails to properly police the relationship between taxpayers and the IRS, even as measured by the “Taxpayer Bill of Rights” that Congress so proudly promulgated in § 7803. More importantly, CDP fails to give taxpayers adequate voice.

To say that CDP has failed is not to say that the relationship between the IRS and taxpayers cannot or should not be policed and regulated. I submit, however, that attempts to use traditional adjudicatory due process norms of individualized hearings to analyze the appropriate way to give taxpayers voice in the determination and collection of their tax liabilities is unhelpful. Sure, courts can fix a few individual errors, but only at high costs. Taxpayers—especially those without the ability to invoke judicial process—deserve better. I submit the better approach is to create strong bureaucratic counter-weights to police agency operations, giving taxpayers voice through proxies.

RRA 98 has succeeded in other respects in giving taxpayers voice and, hence, the process they are due. First, RRA 98 expanded traditional inquisitorial checks and balances on IRS behavior through the Treasury Inspector General for Tax Administration (TIGTA)¹⁰ and the Taxpayer Advocate Service (TAS).¹¹ These two bureaucratic counterweights offer the best hope for overall reduction in the kind of errors that CDP fails to address. Second, RRA 98 created an adversarial counterweight in the form of the Low-Income Taxpayer Clinics (LITCs).¹² The LITCs together form an institutional litigator that has the ability to use the adversarial process to

⁹ *See id.*

¹⁰ § 1103, 112 Stat. at 705.

¹¹ § 1102, 112 Stat. at 697–701.

¹² § 3601, 112 Stat. at 774.

shape the rules of tax administration on behalf of all taxpayers, not just low-income taxpayers.

Part II of this Article looks at how the traditional notion of due process conceives of citizen and government interaction as occurring through one of two modalities: adjudication or legislation. Part II concludes that common to both modalities is a concept of adequate voice. Part III explains how tax administration is basically a mash-up of both modalities. It is a set of citizen/government interactions that do not fall neatly into either the adjudication or legislation boxes. Part IV explains how CDP has failed to achieve any coherent due process goal, even as measured by the subsequently enacted “Taxpayer Bill of Rights” in § 7803. Part V offers some concluding thoughts on how tax administration might be reformed to strengthen both individual taxpayer voice and the collective voice.

II. TRADITIONAL DUE PROCESS ANALYSIS

Traditionally, due process analysis conceives of interactions between citizens and their government as occurring in one of two boxes: adjudication or legislation. The different interactions dictate difference process due: for adjudications, people are entitled to an individualized hearing; for legislation, people are entitled to a fair opportunity to participate in the creation of the legislation. Let’s take a look.

A. Distinguishing Adjudicatory Due Process from Legislative Due Process

When the government seeks to take a specific individual’s property or limit a specific individual’s liberty, the process due is typically analyzed in the adjudication box. The foundational case remains *Londoner v. Denver*.¹³ There, taxpayers in Denver, Colorado, had objected to a special property tax assessed on them for road improvements. The Denver City Council, sitting as a Board of Equalization had permitted objections to the proposed tax to be submitted in writing.¹⁴ The taxpayers did that.¹⁵ After reviewing their submissions, the City Council refused to allow an in-person meeting because

¹³ *Londoner v. City and County of Denver*, 210 U.S. 373 (1908).

¹⁴ *Id.* at 374.

¹⁵ *Id.* at 381.

the submitted objections did not complain about the fairness of how the tax was to be apportioned. Instead, the objections went to the legal question of whether the state had the power to tax.¹⁶

The Colorado Supreme Court saw nothing wrong in this procedure. The U.S. Supreme Court did. The Court wrote:

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law.¹⁷

That “something more” was this: “a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal.”¹⁸

In contrast to adjudicatory due process analysis is legislative due process analysis. Just a few years after *Londoner* came *Bi-Metallic Investment Co. v. Colorado Board of Equalization*.¹⁹ There, the taxpayers were also property owners in Denver. They sued to enjoin the State Board of Equalization and the Colorado Tax Commission from putting in force a general order that increased the valuation of all taxable property in Denver by 40%. They said they had not been afforded due process because they had received no special notice of the Board’s action and had no opportunity to be heard before the Board issued its order.

The Court unanimously said, “too bad, so sad.” The sainted Justice Holmes explained that when the government enacts general rules that may adversely affect liberty or property interests of groups, the process due is viewed differently than when the government seeks to act against a specific individual, because a government could simply not function if every person had an individual right to be heard:

¹⁶ *Id.* at 374.

¹⁷ *Id.* at 386.

¹⁸ *Id.*

¹⁹ *Bimetallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard.²⁰

Holmes then contrasts this legislative due process analysis with the adjudicative due process analysis in *Londoner*. There, “a relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing.” That is what adjudication is for: to resolve individual disputes. In contrast, when it comes to legislation: “no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against [legislation] before the body entrusted by the state constitution with the power.”²¹

There is rich scholarship that wrestles with the *Londoner/Bi-Metallic* distinction between how government interacts (and should interact) with individuals qua individuals as opposed to individuals qua groups.²² This Article does not attempt to contribute to that except to note my disagreement with those who see the distinction as based on who has access to what information.²³

The main point to emphasize here is that both *Londoner* and *Bi-Metallic* concerned what voice taxpayers were entitled to have in participating in the process of taxation.

B. Application to Administrative Agencies Generally

The *Londoner/Bi-Metallic* view of how government interacts with individuals flows into general administrative law. It is no accident that some

²⁰ *Id.* at 445.

²¹ *Id.*

²² See Zoldan, *supra* note 4, [at manuscript 17–19].

²³ See *id.*; see also Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 420 (2004) (exploring the idea that citizens have a due process right that their legislators actually have read and thought about the legislation being voted on).

of the leading due process cases arise from citizen interactions with government agencies. The case law here breaks into the same two categories as above: adjudicatory due process analysis and legislative due process analysis. It does so through the lens of the Administrative Procedure Act (APA).²⁴ While the due process analysis for adjudications is the same, the analysis for agency regulation-writing is somewhat different than the analysis for legislation.

Congress enacted the APA in 1946, some thirty years after *Bi-Metallic*.²⁵ The APA pretty much tracks the *Londoner/Bi-Metallic* distinction by dividing all agency action into two boxes: an adjudication box or a rulemaking box.²⁶ As the *Attorney General's Manual on the Administrative Procedure Act* explains: “The Administrative Procedure Act prescribes radically different procedures for rule making and adjudication. Accordingly, the proper classification of agency proceedings as rulemaking or adjudication is of fundamental importance.”²⁷

1. Adjudication Process Analysis

Administrative law nerds know that the idea of a “right to a hearing” got a huge boost from the Supreme Court in *Goldberg v. Kelly*.²⁸ That was a case involving an administrative agency. There, a welfare recipient had her benefits cut off without a hearing or opportunity to be heard. Viewing the matter through the adjudicatory lens, the Supreme Court held she was entitled to an individualized pre-deprivation hearing.²⁹

The *Goldberg* application of adjudicatory due process analysis resulted from placing the administrative agency action in the adjudicatory box: it was

²⁴ 5 U.S.C. §§ 551–59, 701 & 706.

²⁵ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

²⁶ For a lucid explanation, see Emily Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. (forthcoming 2022) (giving history of APA’s division of agency actions into rulemaking and adjudication).

²⁷ TOM C. CLARK, U.S. DEP’T OF JUST., ATT’Y GEN.’S MANUAL ON THE ADMIN. PROC. ACT § I(c), at 12 (1947).

²⁸ *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970).

²⁹ *Id.* at 261.

seemingly an action against a particular individual, who was, to borrow from Justice Holmes, “exceptionally affected, upon individual grounds.”³⁰

This vision of how agencies interacted with individuals is somewhat narrow, as Judge Henry J. Friendly explained in his seminal article *Some Kind of Hearing*.³¹ Particularly notable is his observation that “[i]n the mass justice area the Supreme Court has yielded too readily to the notions that the adversary system is the only appropriate model” for conceptualizing the appropriate constitutional dimensions of a hearing.³² Judge Friendly’s critique recognized the difference between adversary process and administrative process: “Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client’s cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion are not only his right but may be his duty.”³³

After Judge Friendly’s article, the Supreme Court pulled back from *Goldberg*. The pullback came in *Mathews v. Eldridge*.³⁴ That case involved the quintessential mass justice administrative process: social security disability determinations. Like Ms. Goldberg, Mr. Mathews’ governmental benefits had been cut off without him getting a pre-deprivation hearing.³⁵ The Supreme Court decided that was acceptable process. In reaching that decision it adopted a balancing test that continues to be the conceptual framework for adjudicatory due process analysis:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and

³⁰ *Bimetallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 446 (1915).

³¹ Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1298–1301 (1975).

³² *Id.* at 1316.

³³ *Id.* at 1288.

³⁴ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

³⁵ *Id.* at 323–25.

administrative burdens that the additional or substitute procedural requirement would entail.³⁶

2. Rulemaking Process Analysis

The APA creates three types of processes for rulemaking: (1) notice;³⁷ (2) notice and comment;³⁸ and (3) formal hearings.³⁹

Agencies may use the simple notice process for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁴⁰ Agencies can also use the simple notice procedure “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁴¹

Agencies rarely use the formal hearing process, thanks to the Supreme Court saying that a formal hearings process was not required unless Congress wrote specific magic language in the relevant statute.⁴² Congress almost never does.

It turns out that agencies generally use the notice-and-comment process for rulemakings.⁴³ And so that is where courts have created the most robust set of process requirements tied, I submit, to the idea of giving regulated parties and the public an adequate voice in the process. That’s the process

³⁶ *Id.* at 334–35.

³⁷ 5 U.S.C. § 552(a)(1).

³⁸ 5 U.S.C. § 553.

³⁹ 5 U.S.C. § 553(c), §§ 556–57.

⁴⁰ 5 U.S.C. § 553(b)(A).

⁴¹ 5 U.S.C. § 553(b)(B).

⁴² *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973).

⁴³ Bremer, *supra* note 26, at 9. Second, agencies might choose to use the notice-and-comment process even for rules that could be issued through just the notice process. They view the notice-and-comment approach as helping insulate the regulation from judicial reversal. That was my own experience at IRS. See generally David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 *YALE L.J.* 276 (2010).

due before a regulation can operate to deprive a group of people of their property or liberty. Let's take a look.

The APA, as now codified in 5 U.S.C. § 553, creates three basic requirements for notice-and-comment rulemaking. First, the agency must publish a “[g]eneral notice of proposed rule making” in the Federal Register.⁴⁴ Second, the agency must then “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”⁴⁵ Third, the agency must then publish the final rules together with “a concise general statement of their basis and purpose.”⁴⁶

The text of § 553 is very short; some have described it as downright “skeletal.”⁴⁷ Since 1946, however, the courts have loaded those bones with deep, but not always healthy, folds of fleshy interpretations.⁴⁸ True, the Supreme Court imposed some restrictions on court-created expansion in *Vermont Yankee*.⁴⁹ But it was a short-lived diet.⁵⁰

In expanding those three basic requirements—notice, opportunity for comment, and response to comments—courts have expressed concerns that the process of rulemaking “provide fair treatment for persons affected by a rule.”⁵¹ That is, the judicial gloss on the statute text arises in substantial part from a concern that the regulated community have adequate voice in the creation of administrative regulations.⁵²

⁴⁴ 5 U.S.C. § 553(b).

⁴⁵ 5 U.S.C. § 553(c).

⁴⁶ *Id.*

⁴⁷ Bremer, *supra* note 26, at 7.

⁴⁸ See generally Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 532–45 (2018).

⁴⁹ *Vt. Yankee Nuclear Power Plant Corp. v. Nat. Res. Def. Council*, 435 U.S. 519 (1978).

⁵⁰ Explained in Bremer, *supra* note 26, at 13 (“the practice of fleshing out 5 U.S.C. § 553’s skeletal structure has continued unabated”).

⁵¹ *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

⁵² See generally *Int’l Union United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, (D.C. Cir. 2005) (stating that “[n]otice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties,

First, as to the requirement of initial notice, courts have been concerned that comments cannot be meaningfully made without a proper basis or understanding of what an agency is proposing. Thus, courts have created what is called the “critical materials doctrine,” a requirement that agencies make notices of proposed rulemaking comprehensive, not only explaining the scope and limits of the proposal but also providing background information necessary for the public to make informed comments.⁵³ But while the notice must be comprehensive, it must also be comprehensible. The notice must both not “hide” anything that might eventually become important, and also adequately flag such important material with headings.⁵⁴ Similarly, any changes in the final rule must be closely enough related to the proposed rule such that interested parties “should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”⁵⁵ Again, this is a concern about voice.

Second, as to the opportunity for a hearing, the courts have been concerned that *ex parte* access to agency personnel, stifles the voices of others. To that extent, *ex parte* contacts in rulemaking risk violating the fundamental notions of fairness implicit in due process.⁵⁶ Again, this ties to a view of the rulemaking process as dialogic event: interested persons’ opportunity to comment ought not be undercut or diminished by secret communications with the agency.

and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review”).

⁵³ See, e.g., *Conn. Light & Power Co. v. Nuclear Regul. Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982) (“in order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules”).

⁵⁴ See *MCI Telecommunications Corp. v. Fed. Comm’n Comm’n*, 57 F.3d 1136 (D.C. Cir. 1995) (FCC did not give sufficient notice because important part of proposal was explained in a footnote in the background section of the notice of proposed rulemaking).

⁵⁵ *Env’t Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

⁵⁶ *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). Of course, an agency’s organic statute will always override the general rules of the APA. See *Sierra Club v. Costle*, 657 F.2d 298, 401 (1981) (“Regardless of this court’s views on the need to restrict all post-comment contacts in the informal rulemaking context, however, it is clear to us that Congress has decided not to do so in the statute which controls this case.”).

Third, as to the concise general statement requirement, a dialogue is a two-way street. Courts have been concerned that the “opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”⁵⁷ Thus, courts require the concise general statement to respond to all “significant” comments received. We are seeing that play out in the world of tax administration with respect to the disagreement between the Sixth and Eleventh Circuits about whether Treasury properly responded to all significant comments in one of the conservation easement regulations.⁵⁸

C. Summary: Due Process as a Concept of Adequate Voice

The due process analysis for both adjudications and legislation/rulemaking focuses on the adequacy of voice. When the government operates by adjudication to deprive a person of their property, that person is entitled to an individualized hearing which means the opportunity “to support his allegations by argument, however brief; and, if need be, by proof, however informal.”⁵⁹ An individualized hearing allows individualized voice. In contrast, when the legislature enacts a statute or an agency promulgates a regulation, then even though the law or regulation might “affect the person or property of individuals, sometimes to the point of ruin,” the process due does not require an individualized hearing, for the very practical reason that to hold otherwise would bring the business of governance to a standstill. Instead, the process due is the opportunity to participate with others in the rulemaking or legislative process. It is the opportunity to have a collective voice. We call that Democracy.⁶⁰

How does all of this fit with tax administration? Let’s take a look.

⁵⁷ *Home Box Off.*, 567 F.2d at 35.

⁵⁸ *Compare* *Oakbrook Land Holdings, LLC v. Comm’r*, 28 F.4th 700 (6th Cir. 2022) (holding regulation properly promulgated), *with* *Hewitt v. Comm’r*, 21 F.4th 1336 (11th Cir. 2021) (holding same regulation not properly promulgated).

⁵⁹ *Londoner v. City and County of Denver*, 210 U.S. 376 (1908).

⁶⁰ Professor Bremer gives a nice review of the literature linking administrative rulemaking to the concept of democratic voice in Bremer, *supra* note 26, at 15–16. Professor Zoldan gives a great review of the modern use courts and scholars make of the class legislation doctrine. Zoldan, *supra* note 4, at 66.

III. TAX ADMINISTRATION AS MASHED-UP SIMULTANEOUS ADJUDICATION AND RULEMAKING

Taxation is all about taking property, the payment of tax. For all the happy talk of a voluntary tax system, it is the potential violence underpinning the statutory commands that threatens every taxpayer and forces payment.⁶¹ In fact, taxpayers are required to *pre-pay* their taxes, through either estimated tax payments or withholding.⁶² So it is definitely subject to due process analysis. But what kind? Is it the process due taxpayers for adjudications—individualized takings—or the generalized legislative/rulemaking process? What is the right fit? This Article argues that the process is a mash-up, or hybrid, and does not fit neatly into either the adjudication box or the legislation/rulemaking box. Thus, it requires out-of-the-box thinking to evaluate what process is due taxpayers.

A. *The Basics of Tax Administration*

The process of taxation has been memorably described as “plucking the goose as to obtain the largest possible amount of feathers with the smallest possible amount of hissing.”⁶³ Before one can evaluate the appropriateness of the American way of plucking, one should know at least the basic contours of tax administration to see why and how tax administration is a mash-up of adjudication and rulemaking process. For the limited purposes of this essay, I will just focus here on administration of the income tax.

The Supreme Court has explained that “[i]t is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals.”⁶⁴ Congress says the regular interval is a year: taxpayers must account for their income and pay income tax on a yearly basis, generally the calendar year.⁶⁵ Taxpayers generally have until April 15

⁶¹ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

⁶² See I.R.C. §§ 6654 (estimated taxes) & 3402 (withholding).

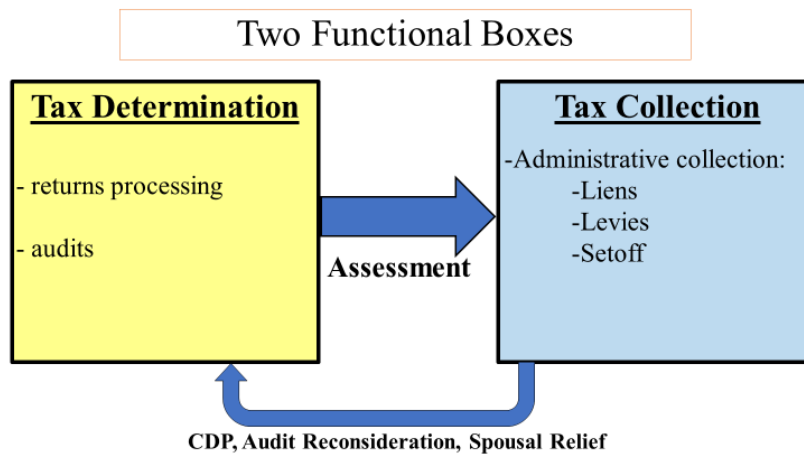
⁶³ The quote is attributed to Jean Baptiste Colbert, French Minister of Finance in the 1660s. See *Plucking the Geese*, ECONOMIST (Feb. 20, 2014).

⁶⁴ *Burnet v. Sanford & Brooks*, 282 U.S. 359, 365 (1931).

⁶⁵ I.R.C. § 441(a).

to make that accounting on a return of their income but the *liability* for income tax arises on a yearly basis, at the end of each taxpayer's tax year whether or not they actually file a return, and whether or not the IRS actually assesses the liability.⁶⁶ Thus, each year creates a new, separate, liability which must be both determined and collected. How is that done?

Tax administration can usefully be divided into two phases: tax determination and tax collection. Here's a graphic that may be helpful.



The key link in the system is the assessment. At one level, the assessment is merely a bookkeeping entry “recording the liability of the taxpayer.”⁶⁷ At a deeper level, however, assessments are a judgment—the IRS’s determination—of what taxes are owed.⁶⁸

Almost all assessments of income tax are currently made on the basis of taxpayer returns submitted each year and processed. However, § 6501 gives the IRS a general three-year period within which to examine, or audit, a

⁶⁶ Edelson v. Comm’r, 829 F.2d 828, 834 (9th Cir. 1987).

⁶⁷ I.R.C. § 6203.

⁶⁸ Cohen v. Mayer, 199 F. Supp. 331, 332 (D.N.J. 1961), *aff’d sub nom.* Cohen v. Gross, 316 F.2d 521 (3d Cir. 1963) (“assessment is a prescribed procedure for officially recording the fact and the amount of a taxpayer’s administratively determined tax liability, with consequences somewhat similar to the reduction of a claim of judgment”).

return. If the IRS determines there was a deficiency in the tax liability reported, the IRS sends the taxpayer a Notice of Deficiency (NOD) and the taxpayer has ninety days to file a petition in Tax Court to ask for a “redetermination” of the proposed deficiency.⁶⁹ If the taxpayer fails to petition the Tax Court, or if the Tax Court eventually upholds the IRS’s determination, then that deficiency will also be assessed.

Once the IRS assesses a tax, tax administration moves into the collection phase if there is an underpayment of the assessed liability. The IRS does not need to go to court to collect and assess a tax. That is the power of the assessment. As you can see from the graphic, it is the link between tax determination phase and tax collection phase. A proper assessment opens the door to the IRS being able to enforce payment through administrative collection actions of liens, levies, and setoffs.⁷⁰

To better understand how both the tax determination and the tax collection processes are mash-ups of agency adjudication and rulemaking, I will first discuss how returns processing became separated from return examination. I will then discuss how Automated Data Processing (ADP) has affected both the tax determination process and the tax collection process. Along the way, I will discuss how courts have found this congressional scheme consistent with constitutional due process, using an adjudicatory due process analysis.

B. The Separation of Returns Processing from Audits

In the Revenue Act of 1862, Congress created both the basic structure of tax administration and the agency to administer it, called then the Bureau of Internal Revenue (BIR).⁷¹ From that year up until World War I, the concept of returns processing was the same as the concept of an audit.

⁶⁹ The procedures are spelled out in I.R.C. §§ 6211–16. For further description, see *EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE IRS* ch. 3 (Christine S. Speidel & Patrick W. Thomas eds., 8th ed. 2021).

⁷⁰ For further description, see *EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE IRS* ch. 10 (Christine S. Speidel & Patrick W. Thomas eds., 8th ed. 2021).

⁷¹ Revenue Act of 1862, ch. 163, 12 Stat. 432 (1862). The following explanation is a summary of a longer description you can find in Bryan Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227 (2009) [hereinafter *Theory and Practice*].

Returns were processed by an examination. The basic procedure was for an Assistant Assessor to physically canvass his district and collect returns of tax.⁷² He would then pass them to the Assessor who would review them and make an individualized determination about their correctness.⁷³ The Assessor would send a list of proposed assessments to the Commissioner of the BIR in Washington, D.C. where it would be reviewed.⁷⁴ If approved, the Assessments would be recorded on an Assessment List which would then be transmitted to the Collector of the same district.⁷⁵ The Collector would then send a bill to the taxpayer.⁷⁶

Thus, what we now consider auditing was part and parcel of what we now call returns processing. In fact, once the BIR assessed the tax, the BIR itself was powerless to change the assessment, either to increase or decrease it.⁷⁷ Nor were taxpayers required to pay until after the return had been filed, reviewed, and the tax liability assessed. It was only *after assessment* and *after* the Collector had received the assessment list and presented the bill that payment became due.⁷⁸ If the taxpayer refused to pay, the Collector was empowered to seize the taxpayer's property, without having to secure court permission, to satisfy the amount owed.

All of this procedure—this taking—happened without the taxpayer having any ability to get before a court until after the full amount of tax had been paid. While the 1862 Act did allow taxpayers to protest to the Assessor, there was no administrative, much less judicial, appeal from the Assessor's

⁷² *Theory and Practice*, *supra* note 71, at 229.

⁷³ *Id.* at 230.

⁷⁴ *Id.* at 238.

⁷⁵ *Id.*

⁷⁶ *Id.* at 240.

⁷⁷ *In re Brown*, 4 F. Cas. 330, 332 (N.D.N.Y. 1866) (“There should be some limit of time, beyond which this inquisitorial power of the assessor to examine into all the private business transactions of every person, should not be exercised. . . . The taxpayer cannot be heard after the list has gone to the collector; why then should the assessor be permitted on his own motion to review his own action, after the list has passed from him to the proper officer to whom it belongs? It appears to me that the assessor should be regarded as to such list *functus officio*—his power is spent.”).

⁷⁸ *Theory and Practice*, *supra* note 71, at 240.

decision.⁷⁹ It was only after the tax payments had been collected that a taxpayer could then get to court by asking the Commissioner for a refund and, if denied, sue for refund.

As a result, many taxpayers started pro-actively seeking injunctions to prevent an assessment in the first place. In 1867, Congress modified the tax laws to expressly forbid this seeking of injunctions.⁸⁰ Called the Anti-Injunction Act (AIA), and currently codified in § 7421, it prohibits taxpayers from maintaining any suit “for the purpose of restraining the assessment or collection of any tax.”⁸¹

The Supreme Court blessed this procedure as consistent with due process in *Snyder v. Marks*.⁸² There, the taxpayer asserted that a tax assessed against him was illegal. He argued he had a right to a pre-deprivation hearing notwithstanding the AIA. The Court rejected the taxpayer’s claim because it found that Congress had provided adequate post-deprivation remedies to taxpayers in the form of a refund suit. Wrote the Court:

The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law.⁸³

Important here is that early courts disregarded whether the taxpayer before the court could *actually use* the judicial refund remedy Congress created. It was enough that the *system* provided remedies. A good example is *Kissinger v. Bean*.⁸⁴ There, the taxpayer was facing a \$236,000 assessment, quite a lot of money for the time. He claimed he could not use the refund remedy

⁷⁹ In 1867, one observer wrote that the Assessors were effectively “the law on the subject.” CHARLES N. EMERSON, EMERSON’S INTERNAL REVENUE GUIDE 130 (Samuel Bowles & Co. 1867).

⁸⁰ Pub. L. No. 39-169, 14 Stat. 475 (1867). For more detail on this history, see Bryan T. Camp, *Jesus and the Anti-Injunction Act*, 136 TAX NOTES 1335 (Sept. 10, 2012).

⁸¹ I.R.C. § 7421.

⁸² *Snyder v. Marks*, 109 U.S. 189 (1883).

⁸³ *Id.* at 193.

⁸⁴ *Kissinger v. Bean*, 14 F. Cas. 689 (E.D. Wisc. 1875).

because he could not pay the \$236,000.⁸⁵ The *Kissinger* court said his inability to actually pay did not render the AIA unconstitutional.⁸⁶

In 1918, the revenue demands of World War I caused Congress to expand both the tax rates and population subject to tax. To facilitate collection, Congress now required taxpayers to submit payments along with their returns, without waiting for the assessment and billing.⁸⁷ But there was still the requirement to examine (audit) each return before making an assessment. That created huge backlogs at the BIR, and stress on taxpayers since the BIR was now given five years to assess the taxes.⁸⁸ Although, after 1921, the BIR was supposed to send taxpayers a pre-assessment letter giving them thirty days to seek administrative review of any proposed assessment, it did not go well. Professors Dubroff and Hellwig explain: “As a result of the audit backlog and the operation of the statute of limitations on assessment . . . many taxpayers did not obtain the opportunity for an administrative hearing prior to assessment.”⁸⁹

In 1924, Congress changed the process due taxpayers—it created the Board of Tax Appeals and a new deficiency process.⁹⁰ This change required the BIR to now give a taxpayer notice and opportunity to petition the Board of Tax Appeals when the BIR thought there was a deficiency in the tax liability reported on the return. If the taxpayer did not like the decision of the BTA, the taxpayer could appeal to the federal courts. And all of this could happen as an exception to the AIA prohibition on suits to restrain assessment.

Despite this new right to pre-assessment judicial review for deficiencies, taxpayers still sought broader due process rights, finally getting the Supreme

⁸⁵ *Id.* at 690.

⁸⁶ *Id.*; see also *Kensett v. Stivers*, 10 F. 517 (S.D.N.Y. 1880).

⁸⁷ Revenue Act of 1918, § 250(a), 40 Stat. 1057, 1082–84 (1918). See generally Bryan T. Camp, *Tax Return Preparer Fraud and the Assessment Statute of Limitations*, 116 TAX NOTES 697 (2007) (Congress did at least allow taxpayers to pay their tax liabilities in four installments.).

⁸⁸ Revenue Act of 1918, § 250(a), 40 Stat. 1057, 1082–84 (1918).

⁸⁹ See HAROLD DUBROFF & BRANT J. HELLWIG, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* (2d ed. 2014).

⁹⁰ Revenue Act of 1924, 43 Stat. 263.

Court's attention in *Phillips v. Commissioner*.⁹¹ There, the IRS was seeking to levy on the property of a transferee who had not had a pre-deprivation hearing. The transferee sought to enjoin collection, objecting that taking the property without a pre-deprivation hearing violated due process.⁹² The taxpayer argued that an adversarial type of in-person hearing was the *sine qua non* of due process. Justice Cardozo disagreed: the post-deprivation refund remedy was sufficient. Here, as in *Snyder*, the refund suit gave the taxpayer all the process due.⁹³ Justice Cardozo explained: "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate."⁹⁴ Thus, again, just as in *Snyder*, the Court ultimately relied upon the refund remedy as giving taxpayers all the process they were due, regardless of whether the taxpayer before then could actually make use of it.

Between World War I and World War II the BIR began to separate the idea of processing returns from the idea of auditing them. Statutory text did not make such a distinction. For example, the Revenue Act of 1926 required the BIR to examine returns and "determine the correct amount of the tax" and do so "as soon as practicable after the return is filed."⁹⁵ But you can see the distinction appearing in the relevant regulations, which provided that upon receipt, returns would be separated into those accepted as filed and those needing further perfection, or examination.⁹⁶ Modern readers will recognize it as classification of returns.

⁹¹ *Phillips*, 283 U.S. 589 (1931).

⁹² *Id.* at 594.

⁹³ *Id.* at 597–600.

⁹⁴ *Id.* at 596–97.

⁹⁵ Revenue Act of 1926, § 271, 44 Stat. 55, 55.

⁹⁶ Regulations 69, T.D. 3922, 28 TREAS. DEC. INT. REV. 558, art. 1211, 776 (1926). Treatise writers did not always pick up on this change. One long-time writer, Robert Montgomery, still described the classification process as an "office audit." See ROBERT H. MONTGOMERY, INCOME TAX PROCEDURE, 1927: VOLUME II, at 30 (1927) ("When a return is filed the first step is an office audit. . . . This audit may have one of three results: (1) the acceptance of the return as submitted; (2) the tentative determination of a deficiency on the basis of the data in the return, or (3) a decision that a field examination should be made before arriving at a tentative determination.").

After World War II, the processing of returns became increasingly distinct from audit. In 1952, the lawyer Hugh C. Bickford describes in some detail the processing of returns and explains that of the 52.8 million individual returns reporting AGI of \$8,000 or less, 51.2 million were accepted as filed while 1.6 million were “actually investigated.”⁹⁷ That is a 3% audit rate.

That seemingly low audit rate, however, belied a hugely important part of returns processing: the matching system. In 1917, Congress dramatically expanded information-gathering by authorizing the BIR to create systemic rules for third-party “returns of information.”⁹⁸ The Senate Finance Committee explained how third-party information reporting would enhance tax administration:

The proposed amendment is conducive to a more effective administration of the law in that it will enable the Government to locate more effectively all individuals subject to the income tax and to determine more accurately their tax liability. This is of prime importance from a viewpoint of collections. * * * It is the Treasury Department’s judgment . . . that information at the source is a foundation upon which the administrative structure must be built if the income-tax law is to be rendered most effective. . . .⁹⁹

Today, the audit rate is even lower than in 1952. For FY21—the latest year for which I can find data—the IRS received about 168 million individual returns.¹⁰⁰ It has, to date, actually investigated 0.2% of them.¹⁰¹ But the “information at the source” program thrives. The IRS receives billions of information returns from third parties each year, reporting amounts paid to taxpayers.¹⁰² The most well-known of these returns are the Form W-2 and the Form 1099. The IRS matches that information against the information

⁹⁷ HUGH C. BICKFORD, *SUCCESSFUL TAX PRACTICE* 207–15 (2d ed. 1952).

⁹⁸ War Revenue Act of 1917, Pub. L. No. 65-50, 40 Stat. 300, 336–37 (1917).

⁹⁹ S. REP. NO. 65-103, at 20 (Aug. 6, 1917).

¹⁰⁰ IRS DATA BOOK 2021, Pub. 55-B, tbl.2 (2021).

¹⁰¹ *Id.* at tbl.17.

¹⁰² *Id.* at tbl.22.

reported by taxpayers to try and spot discrepancies and to identify taxpayers who have not filed returns but who seem to have received income.¹⁰³

While the matching program dates back to the 1920's, it now entirely administered by computer systems, the two most important being the Automated Substitute for Return (ASFR) and the Automated Underreporter (AUR).¹⁰⁴ These Automated Data Processing (ADP) systems are, I think, key to understanding tax administration as neither and both adjudicatory and regulatory.

C. The Role of Automated Data Processing (ADP) in Tax Assessment

ADP is the most important structural change in tax administration in the past century.¹⁰⁵ It is ADP that allows the IRS to process the hundreds of millions of tax returns and the billions of information returns, increase the effectiveness of the reporting structure, and present a credible threat to taxpayers that discrepancies *will* be spotted and addressed. It is Bentham's Panopticon writ in computer code. And, as Lawrence Lessig reminds us: writing code *is* rulemaking.¹⁰⁶

It is ADP that, I submit, makes tax administration neither fully adjudicatory nor a rulemaking, through the substitution of operational presumptions for individualized decision-making. Thus, what may look like an adjudication is not really an adjudication. Nor is it rulemaking. It is instead batch processing.

After World War II, the IRS started building and relying on ADP, further separating the concept of audit from return processing.¹⁰⁷ That began in earnest in 1959 with the authorization of the National Computing Center

¹⁰³ *Theory and Practice*, *supra* note 71, at 251–52.

¹⁰⁴ See generally Liability Determination—Examination Process, I.R.M. 4.19 & Liability Determination—Collection Process, I.R.M. 5.18.

¹⁰⁵ I have written on this before and will here only recapitulate the most salient conclusions. See *Theory and Practice*, *supra* note 71. See also 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 (2004) [hereinafter *Inquisitorial Process*].

¹⁰⁶ LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE (1999).

¹⁰⁷ See *Theory and Practice*, *supra* note 71, at 243–44.

in Martinsburg, WV, which became operational in 1960.¹⁰⁸ The various Service Centers followed shortly thereafter. By 1967, the automation of returns processing was completed, and taxpayers were no longer able to even file their returns in their local IRS offices but were instead instructed to file in the nearest Service Center.¹⁰⁹

As explained above, taxpayers submit yearly returns of income. This is their first opportunity to be heard, to have voice, in the determination of what amount of their property the government may take as tax. Currently, almost all taxpayer returns are accepted as filed and the amounts self-reported as due are assessed. If insufficient payments have been received, the taxpayer's account goes into the collection phase after the assessment.

ADP mashes up rule-making with adjudication. An assessment represents the judgment of the IRS on the tax liability due. It appears to be an adjudication. But it is not an individualized judgment. The "hearing" that the taxpayer receives is not from any human. The computerization of returns processing means an assessment is not an adjudication in the traditional sense because it is not the IRS agreement with the individual tax return or judgment that the return is correct. It is instead the result of ADP operational presumptions on how to treat taxpayer returns.

You see this operational presumption most clearly with e-filing. For example, in *Fowler v. Commissioner*,¹¹⁰ a taxpayer's electronically filed return was rejected by the IRS computer system because the taxpayer had not supplied his Identity Protection Personal Identification Number (IP-PIN). That omission triggered one of many potential "business rule" rejection codes.¹¹¹ The issue in *Fowler* was whether the rejected e-filing was a "return" sufficient to trigger the three-year limitation period for assessment; there was

¹⁰⁸ *Id.*

¹⁰⁹ See generally SHELLEY L. DAVIS, IRA HISTORICAL FACT BOOK: A CHRONOLOGY 1646–1992 (Dep't of Treas., 1992). Congress changed the Code in 1966 specifically to provide for this. See Pub. L. No. 89-713, § 1(a), 80 Stat. 1107, 1107 (1966) (modifying IRC § 6091(b) to require taxpayers to file "at a service center serving the internal revenue district . . . as the Secretary may by regulations designate").

¹¹⁰ *Fowler v. Comm'r*, 155 T.C. 106 (2020).

¹¹¹ There are lots of such codes where the ADP system for returns will reject a filing. For a list of them, see *What are Modernized Electronic Filing (MEF) Reject Codes?*, TAXSLAYER, <https://support.taxslayer.com/hc/en-us/articles/360015710932-What-are-Modernized-Electronic-Filing-MEF-Reject-Codes->.

no due process issue. But the Tax Court’s opinion turns on a key concept in due process: adequate notice. So it is worth looking at.

A return is a document that contains sufficient information for the IRS to determine whether the identified taxpayer is reporting the proper tax liability. In the leading case of *Beard v. Commissioner*,¹¹² the Tax Court synthesized the Supreme Court’s jurisprudence on this subject to find that, to be a return, the document submitted to the IRS must meet four requirements: (1) it must contain “sufficient data to calculate tax liability”; (2) it must “purport to be a return”; (3) it must represent “an honest and reasonable attempt to satisfy the requirements of the tax law”; and (4) it must be appropriately signed.¹¹³

In *Fowler*, the debate was whether the e-filed return had been properly signed. The IRS argued that since it was missing the IP-PIN it was not properly signed. The Tax Court rejected that argument, pointing out that the IRS “does not refer us to any form, regulation, or other taxpayer-directed guidance that defines an IP-PIN as part of the signature.”¹¹⁴ In order to be part of the signature requirement, Judge Greaves says, a taxpayer needs to know it! “An IP-PIN does not become part of the signature requirement simply because respondent’s software will reject an efiled return without it.”¹¹⁵

Thus, *Fowler* illustrates how seemingly individualized decisions about processing returns are application of computer algorithms, application of rules. And, taxpayers are due more than hidden computer rules. At least in *Fowler*, the process due the taxpayer was reasonable notice of the signature requirement.

Audits give another example. Even more than returns-processing, audits seem to be the result of a quintessential adjudicatory process. But not so fast. Starting in the late 1960s, the IRS began crafting computer algorithms to “scientifically” identify those returns that would be pulled for audit after the

¹¹² *Beard v. Comm’r*, 82 T.C. 766 (1984), *aff’d*, 793 F.2d 139 (6th Cir. 1986).

¹¹³ *Id.*

¹¹⁴ *Fowler*, 155 T.C. 106, 114 (2020).

¹¹⁵ *Id.*

initial processing.¹¹⁶ Critically, this shift to centralized processing took the examination decisions away from experienced field agents who had local knowledge and put the examination decision in the hands of programmers. The audit selection function had become centralized and computerized. It is true that humans still made the final audit decision. But they select from batches of returns initially flagged by the computer system using operational presumptions about returns. Hidden rules.

Another example is the treatment of unfiled returns. It used to be that IRS field employees called Revenue Officers (RO's) would conduct "Taxpayer Delinquency Investigations" (TDI) to identify taxpayers who were required to file returns but had not. If the RO discovered such a taxpayer, the RO would attempt to secure the return from the taxpayer or, if the taxpayer did not cooperate, the RO was authorized to make up a Substitute for Return (SFR) and such became the basis for a tax assessment.¹¹⁷ While ROs still perform some TDI's, the process is now almost entirely centralized in the Automated Substitute For Return (ASFR) program.¹¹⁸ ASFR automatically sends out computer-generated notices to taxpayers, proposing an assessment based solely on the information received from third parties unless and until the taxpayer sends the proper response to the proper office within the time allowed.¹¹⁹

Another example is the Automated Correspondence Exam (ACE) program. In the old days, if an IRS employee saw that a taxpayer's return did not match an information return or if an experienced reviewer in the local office saw a deduction that was out of line and needed explanation, then the employees would write the taxpayer a letter to explain the questionable

¹¹⁶ See generally Kimberly Houser & Debra Sanders, *The Use of Big Data Analytics by the IRS: Efficient Solution or the End of Privacy as We Know It?*, 19 VAND. J. ENT. & TECH. L. 817 (2017).

¹¹⁷ I.R.C. § 6020. For a description of the history and operation of I.R.C. § 6020, see Bryan T. Camp, *The Function of Forms*, 110 TAX NOTES 531 (2006) (critiquing 7th Cir. opinion on the non-dischargability of taxes for "unfiled" returns in bankruptcy); Bryan T. Camp, *The Function of Forms in the Substitute-For-Return Process*, 111 TAX NOTES 1511 (2006) (explaining the SFR process, exploring its implications for the legal definition of "return" and critiquing an IRS reversal of position).

¹¹⁸ See Automated Substitute for Return (ASFR) Program, I.R.M. 5.18.1 (Mar. 11, 2020).

¹¹⁹ *Id.*

income or deduction item.¹²⁰ Sometimes that occurred during returns processing and sometimes it occurred afterwards.¹²¹ Now, however, that function has been almost entirely automated. The following official description of this program could apply equally well to all these computerized interactions with taxpayers:

Automated Correspondence Exam (ACE), formerly Batch Processing (BP) is an IRS-developed, multifunctional software application that fully automates the initiation, Aging and Closing of certain EITC and non-EITC cases. Using the Batch System, Correspondence Exam can process specified cases with minimal to no tax examiner involvement until a taxpayer reply is received. **Because the batch system will automatically process the case through creation, statutory notice and closing, tax examiner involvement is eliminated entirely on no-reply cases.** Once a taxpayer reply has been considered, the case can be reintroduced into Batch for automated Aging and Closing in most instances.¹²²

Note that taxpayers flagged by the ASFR and ACE programs are presumed non-compliant until they affirmatively respond. That is the significance of the bolded language in the quote above. This is the opposite operational presumption in returns processing: taxpayers whose returns are NOT flagged for potential examination by the computers are presumed compliant, unless and until some individualized event occurs to prove otherwise. Similarly, taxpayers who have made errors in claiming refundable credits such as EITC in a prior year are all batched together and presumed to be ineligible for the EITC unless and until they prove their eligibility through the recertification program.¹²³

In all of these ADP batch processing operations, taxpayers must respond to automated notices in order to trigger an actual human-to-human interaction; taxpayers must respond with the right information to the right place within the right time frame. If they fail to do that, they become a “no-

¹²⁰ A good description of the pre-automation returns processing and correspondence exam procedures can be found in any edition of Hugh Bickford’s practice manuals. *See, e.g.*, HUGH C. BICKFORD, *SUCCESSFUL TAX PRACTICE* 182–206 (2d ed. 1952).

¹²¹ *See id.*

¹²² Automated Correspondence Exam Overview (ACE), I.R.M. 4.19.20.2 (Jan. 1, 2021) (emphasis supplied).

¹²³ *See* Recertification, I.R.M. 4.19.14.7 (Mar. 12, 2021).

reply” case which, based on the operational presumption of non-compliance, results in an automatic Notice of Deficiency.¹²⁴

There is nothing inherently problematic about any of this. ADP bring economies of scale to tax administration. It is ADP that allows the Service to process billions of information returns, thus increasing the effectiveness of the reporting structure, and so presenting a credible threat to taxpayers that discrepancies *will* be spotted and addressed. That is why those who scoff at the low rate of “audits” need to be more attentive to ADP. Between the various ADP programs (ASFR, AUR, ACE), the IRS effectively and efficiently “audits” the *income* items of almost every single return subject to third-party withholding.¹²⁵ This is one aspect of tax administration that tends to be overlooked.

Common to all batch processing, however, is the substitution of rules (through computer coding) for individual decision-making. Thus, decisions that on their face look like individualized decisions are really batch processing decisions. And taxpayers may or may not receive the automatically generated notices in the ASFR, AUR, and ACE, or may not have the ability to even understand the notices. As anyone working in a LITC quickly learns, a substantial number of taxpayers get caught up in the gears because they missed the window to properly respond to whatever computerized notice was sent out. Now they end up in collection-land with multiples of liability accruing interest and penalties, and no way to stop the machine because they are unable to establish human-human contact.

So: is assessment of tax—the culmination of the tax determination process—an adjudicatory or legislative act? On the one hand, it looks like an adjudication because each return is subject to various screens that seemingly result in an individualized determination of liability. On the other hand, batch processing does not look like an adjudication because the automated nature of processing necessarily means that most assessments result from

¹²⁴ Automated Correspondence Exam Overview (ACE), I.R.M. 4.19.20.2 (Jan. 1, 2021) (emphasis added).

¹²⁵ One must be careful with the word “audit.” The AUR IRM emphasizes to IRS employees that the Automated Underreporter process is different than an audit. *See* Overview of IMF Automated Underreporter, I.R.M. 4.19.3.2 (Sept. 21, 2020) (“AVOID ‘AUDITING’ RETURNS. All returns in the AUR inventory were previously screened for unallowable items and audit potential. They were not selected for action in either event.”) (emphasis in original).

application of rules to groups of similar returns, using generalized computer algorithms. That is, the IRS applies bulk processing rules to populations of taxpayers, producing results that are not adjudications in the traditional sense. The adjudication only comes about if and when taxpayers are able to push through the computers to contact actual human beings.

D. The Role of ADP in Tax Collection

Just as ADP has made the tax assessment process a mash-up of adjudication and rulemaking, so it does with the tax collection process.¹²⁶ If the IRS assesses a tax liability—whether, on the basis of a taxpayer’s return, a matching program adjustment, a substitute-for-return, or an examination—and the taxpayer does not voluntarily pay it, the account goes into the collection process, which basically consists of the following four stages: (1) the notice stream; (2) Automated Collection System (ACS); (3) the Queue; and (4) Field Collection.

The notice stream consists of a series of computer-generated notices, spaced several weeks apart, that tell the taxpayer the amount due, give instructions on how to make payments (including the potential options of installment agreements), and warn taxpayers of how the IRS can enforce collection.¹²⁷ TIGA reports that about 55% of what the IRS collects in a given year from unpaid liabilities comes from the notice stream.¹²⁸

If a taxpayer’s account remains in a balance due status after the last notice, the account is assigned to the ACS which ratchets up the pressure by filing a Notice of Federal Tax Lien (NFTL) and/or threatening to levy.¹²⁹ Before the ACS can actually do any of that, it must send taxpayers a notice of their right to a CDP hearing. If the taxpayer fails to respond, or once the

¹²⁶ See *Inquisitorial Process*, *supra* note 105. Again, this section summarizes the more detailed explanations I have given in the prior articles.

¹²⁷ See CHRISTINE S. SPEIDEL & PATRICK W. THOMAS, *EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE IRS*, ch. 10 (8th ed. 2021).

¹²⁸ U.S. TREAS. INSPECTOR GEN. FOR TAX ADMIN., REP. NO. 2022-30-03, *TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2020*, at 7 (May 6, 2022) [hereinafter *TRENDS IN COMPLIANCE*].

¹²⁹ See generally Notice of Levy, I.R.M. 5.11 & Federal Tax Liens, I.R.M. 5.12.

CDP process is over, the ACS can get to work.¹³⁰ As its name implies, the ACS largely operates without human involvement. Similar to the ADP systems in the tax determination process, ACS relies on taxpayers responding timely to automatically generated actions. This brings great efficiency. As TIGTA reports:

[T]he IRS believes that, over the past several years, increases in enforcement revenue have generally been due to . . . notices or other substantially automated programs. Because notices are computer generated and mailed to taxpayers, there is initially little direct involvement by IRS employees. To the extent that taxpayers then take action to pay or otherwise resolve their balance due accounts, collections can occur with relatively little additional IRS investment.¹³¹

If ACS activity does not resolve the account after a period of time, the account goes into what is called “the queue” where it waits to be assigned to a field employee called a Revenue Officer (RO). The last stage of collection is the field stage. As TIGTA explains:

[T]he IRS’s Field Collection receives the highest risk and most complex cases because those employees (revenue officers) have unique skills that enable them to work such cases. Revenue officers work with taxpayers to bring them into compliance by obtaining delinquent returns and payments on past due tax delinquencies or establishing payment plans.¹³²

Are these collection actions adjudication actions or rulemaking actions? They do not seem to fit neatly into either box. It bears emphasizing here again that the *assessment* is what operates as a determination of tax liability. It is like a court judgment.¹³³ Thus, on the one hand, collection actions do not impose any new obligations or burdens on the taxpayer, they are actions to enforce an existing obligation: pay your taxes. So, it is hard to see them as adjudications. On the other hand, Congress has created various statutes that permit taxpayers to escape collection if they meet certain criteria. Determining whether taxpayers meet such criteria seems like a basic adjudicatory function.

¹³⁰ *Id.*

¹³¹ TRENDS IN COMPLIANCE, *supra* note 128, at 7.

¹³² *Id.* at 8.

¹³³ *See, e.g.,* Bull v. United States, 295 U.S. 247, 260 (1935) (“The assessment is given the force of a judgment.”).

For example, certain taxpayers are entitled to an installment agreement if they meet certain requirements.¹³⁴ If a taxpayer asks for that, someone has to apply rules to facts to reach a decision on whether a taxpayer qualifies. Similarly, while the IRS is generally given the discretion to compromise a tax liability,¹³⁵ that discretion is cabined for some taxpayers under certain conditions.¹³⁶ If a taxpayer brings it up, someone has to make that decision. Finally, some taxpayers may be relieved of their obligation to pay a liability created by their filing of a joint tax return.¹³⁷ Should a taxpayer so request, the IRS has created a Revenue Procedure to help its employees make that evaluation.¹³⁸

All of these actions look like adjudications, but only once a taxpayer triggers the obligation to make the relevant evaluation.

IV. CDP: MISAPPLICATION OF DUE PROCESS IDEAS TO TAX ADMINISTRATION

It is my contention that judicial review of collection decisions is a misapplication of due process ideas. It is not my contention that a review by Appeals of collection actions is useless. Far from it. I think that the benefits of CDP happen in Appeals, not in Tax Court and those benefits would occur, by and large, with or without judicial review.¹³⁹ But the Appeals review is

¹³⁴ I.R.C. § 6159(c) (requiring installment agreements be granted under certain conditions).

¹³⁵ I.R.C. § 7122(a).

¹³⁶ I.R.C. § 7122(d)(2) (IRS must create basic living standards to use to evaluate offers in compromise); § 7122(d)(3) (IRS may not reject an offer solely because the taxpayer is low income). Similarly, the regulations allow the IRS to accept compromises when doing so “promote[s] effective tax administration.” Treas. Reg. § 301.7122-1(b) (2002). These provisions require individualized determinations, very much like an adjudication. *Id.*

¹³⁷ I.R.C. § 6015.

¹³⁸ Rev. Proc. 2013-34, 2013-43 I.R.B. 397.

¹³⁹ I understand that attorneys who represent taxpayers may feel differently. They see the benefit they provide and they may have an intuition that Appeals is only responsive to their arguments because of the potential hazards of litigation. I am skeptical of that intuition in part because I have greater faith in their advocacy than that, and in part because the primary decisions on collection alternatives are made primarily by the IRS functions and only reviewed by Appeals. It would be useful to see a well-designed study comparing Equivalent Hearing outcomes with CDP hearing outcomes. I am not aware of any such study. While TIGTA conducts regular reviews of CDP, it studies only processes and not outcomes. *See, e.g.,* U.S. TREAS. INSPECTOR GEN. FOR TAX ADMIN., REP. NO. 2021-10-049, REVIEW OF THE

not traditional adversarial process, either. It is inquisitorial: Appeals does not work the case but rather inquires into the appropriateness of collection decisions.¹⁴⁰

I will first outline the benefits of the CDP process and then examine the fit of CDP with the taxpayers rights listed in § 7803(a)(3).

A. CDP Benefits

In the RRA 98, Congress was concerned that taxpayers lacked sufficient ability to be heard during the tax collection phase. It created the CDP procedure as a way to give taxpayers a traditional adjudicatory hearing in a court of law without overly interfering the IRS's ability to collect an assessed tax liability.

You see the balancing when you compare the enacted statutory provisions with the original proposal. The initial proposal was to require the IRS to give taxpayers an opportunity for a CDP hearing each and every time it sought to levy and before each and every time it wanted to file an NFTL.¹⁴¹ As enacted, however, the IRS need only give taxpayers notice and an opportunity for a CDP hearing twice for each tax period sought to be collected: once before any levies are made and once within five business days after the first NFTL is filed.¹⁴² And, the window to seize that opportunity is very, very short: less than thirty days. That is why I call it the "CDP Butterfly."¹⁴³

INDEPENDENT OFFICE OF APPEALS COLLECTION DUE PROCESS PROGRAM (Aug. 4, 2021) (studying the approximately 21,000 CDP hearings and 4,000 Equivalent Hearings closed in FY20).

¹⁴⁰ See, e.g., *Brown v. Comm'r*, 158 T.C. 9 (2022), which I discuss in 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.

¹⁴¹ I describe this history in *Inquisitorial Process*, *supra* note 105, at 119–21.

¹⁴² See I.R.C. §§ 6320, 6330. The regulations say that the IRS will attempt to combine the two hearings into one whenever feasible. *E.g.*, Treas. Reg. § 301.6330-1(d), Q&A D-2 (as amended in 2006).

¹⁴³ See Bryan Camp, *Lesson from the Tax Court: The CDP Butterfly*, TAXPROF BLOG (July 6, 2021), https://taxprof.typepad.com/taxprof_blog/2021/07/lesson-from-the-tax-court-the-cdp-butterfly.html.

For taxpayers who catch the CDP butterfly, a CDP hearing provides at least four potential benefits, some formal and some informal. Here I will list each of the main benefits along with an observation of how much of the benefit exists without judicial review.

Benefit 1: Delay! This is often the biggest benefit to individual taxpayers, but also the biggest harm, both to individual taxpayers and to the system. If a taxpayer successfully invokes their CDP rights, the IRS must suspend levies and may not file any additional NFTLs during the pendency of the CDP case, both in the IRS and before Tax Court.¹⁴⁴ That is a benefit. The biggest part of the delay comes from the opportunity for judicial review, which adds at least two years to the process.¹⁴⁵ However, that delay allows taxpayers to engage in “asset protection” moves.¹⁴⁶ This harms the system because it allows some taxpayers to escape collection at the expense of other taxpayers who do their best to comply, or who do not have the wherewithal to move assets out of IRS reach. In addition, delay can hurt individual taxpayers and not just because the collection period is suspended during the CDP process, extending the window for collection. The CDP delay results in continuing accrual of interest and penalties which can substantially increase the liability to be collected. So taxpayers come out of CDP with the IRS having a longer time to collect a larger liability. If a taxpayer is successful in their CDP hearings, then that would not matter so much, but as I explained in my empirical study of CDP cases, only about one in a million IRS collection decisions get reversed by the Tax Court.¹⁴⁷

Without judicial review, delay would decrease and thus both the benefit and harm of delay would diminish.

¹⁴⁴ *Id.*

¹⁴⁵ See Bryan Camp, *Lesson from the Tax Court: The Long and Short of CDP*, TAXPROF BLOG (Apr. 6, 2020), https://taxprof.typepad.com/taxprof_blog/2020/04/lesson-from-the-tax-court-the-long-and-short-of-cdp.html.

¹⁴⁶ See Bryan Camp, *Lesson from the Tax Court: The Proper Role of Delay in CDP*, TAXPROF BLOG (Sept. 30, 2019), https://taxprof.typepad.com/taxprof_blog/2019/09/lesson-from-the-tax-court-the-proper-role-of-delay-in-cdp.html.

¹⁴⁷ Bryan Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 57 (2009).

Benefit 2: Double-Check. At a CDP hearing, Appeals reviews the actions of the IRS collection function to ensure those employees properly dotted the i's and crossed the t's. More formally, § 6330(c)(1) requires Appeals to “obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.”¹⁴⁸

Without judicial review, I do not see this benefit changing: it is still a high-level IRS employee making an inquiry on the actions of other IRS employees. Any argument that judicial review adds value here must depend on a trickle-down theory whereby the occasional Tax Court reversal or remand to Appeals will not only change the scrutiny Appeals gives the collection decisions, but will also trickle down to the collection function employees. I am skeptical. Judicial review does not cure indolence. Nor have I seen any empirical evidence supporting a trickle-down theory. Nor can I think of another reason why Appeals review would lessen in the absence of a potential judicial appeal. To the contrary, in a bureaucracy, the motivation to show up other offices and prove one superiority is at least as common as the motivation to CYA. My own experience in Chief Counsel was that Appeals Officers rather enjoyed finding errors in what they reviewed. Certainly, many long-time practitioners would agree with Judge Swift that before the *ex parte* prohibitions changed the practice, Appeals communicated with the exam and collection functions “with a great deal of effectiveness and propriety.”¹⁴⁹

Benefit 3: Pre-Payment Liability Review. Some taxpayers may be able to get review of their underlying tax liability at a CDP hearing. I.R.C. § 6330(c)(2)(B) allows such review to those taxpayers who “did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.” I call this the “Eye of the

¹⁴⁸ See also CDP Non-Statute Verification and Documentation, I.R.M. 8.22.5.4 which instructs Appeals employees how to do that. If the IRS has messed something up, that helps taxpayers because Appeals will tell the collection function to go do their job right, which gets the taxpayer more delay. See Benefit 1.

¹⁴⁹ Moore v. Comm’r, 92 T.C.M. (CCH) 7, 2006 T.C.M. (RIA) § 2006-171 (2006) (“In prior years, and with a great deal of effectiveness and propriety, respondent’s Appeals officers generally were allowed to communicate with respondent’s revenue agents and officers concerning a taxpayer’s outstanding taxes.”).

CDP Needle.”¹⁵⁰ Not only must taxpayers catch the CDP butterfly, but then they must thread this needle-like language. The Tax Court has read this language narrowly in the sense that an “opportunity to dispute” means opportunities to dispute administratively and not just opportunities to dispute in a court.¹⁵¹ Thus, taxpayers who had any prior administrative opportunity to contest the liability sought to be collected are precluded from liability review in the CDP proceeding. However, the Tax Court has also read this language literally to allow taxpayers to later dispute the liability they self-reported on their return, reasoning they would not have, by definition, received an NOD.¹⁵²

Without judicial review, this benefit would not be available to taxpayers who self-report their liability but later want to contest that. Nor would it be available to taxpayers who were properly sent an NOD but can prove they did not actually receive it, or received it in time to contest their liability in a deficiency proceeding.¹⁵³

Benefit 4: Collection Alternatives. A CDP hearing allows taxpayers the opportunity to explain to a high-level IRS employee why the taxpayer cannot fully and immediately pay the assessed tax.¹⁵⁴ Taxpayers can apply and argue for a payment alternative such as an Offer in Compromise (OIC), an Installment Agreement (IA), a Partial Pay Installment Agreement (PPIA), or relegation to Currently Not Collectible (CNC) status. As with Benefit 3, § 6330(c) limits this benefit, using an issue preclusion rule. A taxpayer may not ask for a collection alternative if the taxpayer tried for that same collection alternative in either a previous CDP hearing or “any other previous administrative or judicial proceeding.”¹⁵⁵ Further, although a taxpayer may

¹⁵⁰ I review the case law in Bryan Camp, *Lesson from the Tax Court: The Eye of the CDP Needle*, TAXPROF BLOG (May 4, 2020), https://taxprof.typepad.com/taxprof_blog/2020/05/lesson-from-the-tax-court-the-eye-of-the-cdp-needle.html.

¹⁵¹ *Lewis v. Comm’r*, 128 T.C. 6, 22–23 (2007).

¹⁵² *Montgomery v. Comm’r*, 122 T.C. 1, 12 (2004).

¹⁵³ *See, e.g., Kuykendall v. Comm’r*, 129 T.C. 9 (2007) (holding that taxpayer who showed actual receipt was only twelve days before the end of the ninety day period did not “receive” an NOD within the meaning of § 6330(c)(2)(B)).

¹⁵⁴ I.R.C. § 6330(c)(2)(A).

¹⁵⁵ I.R.C. § 6330(c)(4)(A). *See, e.g., Galloway v. Comm’r*, 24 T.C.M. (CCH) 11, 2021 T.C.M. (RIA) ¶¶ 2021–24 (2021), which I explain in Bryan Camp, *Lesson from the Tax Court: No Second Bite in*

be precluded from getting two bites at the same proposed collection alternative, there is nothing to prevent taxpayers from seeking any one of these collection alternatives outside the CDP context.

Without judicial review, taxpayers would receive the same benefit. That is because none of the collection alternatives require a CDP hearing to obtain or request. And each collection alternative procedure comes with an opportunity for administrative review in Appeals.

B. The Poor Fit of CDP to Taxpayer Rights

I maintain that the CDP process gets the balance wrong. It fails to give taxpayers what it promises and, in that failure, it diminishes the ability of the IRS to ensure that all taxpayers are treated fairly.

First, I have seen no data to contest my central finding or arguments in my prior study of 976 CDP decisions between 2000 and 2006: over the sixteen million IRS collection decisions made during that time period, only about 3,000 received Tax Court review, and only sixteen collection decisions were reversed.¹⁵⁶ Tax Court review of IRS collection decisions simply, and empirically, is an epic fail. Or, as I more somberly concluded: “[a]dversary process is not an effective regulatory mechanism to check government abuses in the modern administrative state.”¹⁵⁷

Second, to the extent that CDP judicial review actually provides benefits, only a select few taxpayers receive them. The short thirty-day window to invoke CDP means that only the most alert and sophisticated (or well-represented) taxpayers can actually seek its supposed benefits.¹⁵⁸ The vast, vast majority of taxpayers miss out. But let us imagine that as many as one in one hundred taxpayers not only successfully invoke their CDP rights but also derive some individual benefit from a CDP appeal to Tax Court, such as a remand for Appeals to reconsider a denied collection alternative. I cannot

CDP for Rejected OIC, TAXPROF BLOG (Mar. 1, 2021), https://taxprof.typepad.com/taxprof_blog/2021/03/lesson-from-the-tax-court-no-second-bite-in-cdp-for-rejected-oic-.html.

¹⁵⁶ *Inquisitorial Process*, *supra* note 105.

¹⁵⁷ *Id.* at 57–58.

¹⁵⁸ The IRS itself has administratively expanded the thirty-day window to a one-year window by allowing taxpayers what it calls an “equivalent hearing.” Treas. Reg. § 301.6330-1(i) (as amended in 2006). The administrative details are found in Equivalent Hearing (EH) L.R.M. 8.22.4.3.

see how that is a successful result. To tout that as a success is like saying that a casino benefits all the players who walk out empty-handed just because one in a hundred walks out a winner. It is like saying that a test car that crashes ninety-nine times out of one hundred test drives is a success because: look! it worked once!

The difficulty with CDP is that it is based on a limited vision of what process taxpayers are due. Even given that vision, however, CDP fails more than it succeeds. You can see that by looking at how CDP fits the list of taxpayer rights in § 7803(a)(3). That provision requires the IRS Commissioner to “ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title.” It then goes on to list ten aspirations. Let us look at the fit. I will first quote the statutory right and then comment on CDP’s fit.

“(A) the right to be informed.” CDP adds nothing to a taxpayer’s information set. It is the taxpayer, not the IRS, that has knowledge of the taxpayer’s financial conditions that might affect the ability of the IRS to properly collect from the taxpayer. Further, taxpayers already have a right to access to their account information without the need for a CDP hearing,¹⁵⁹ either directly through the IRS or else indirectly through FOIA.

“(B) the right to quality service.” The judicial review of CDP hearings adds value here by adding a different IRS decisionmaker (Chief Counsel attorney) to the case review if and when the taxpayer petitions the Tax Court. Otherwise, the Equivalent hearing process adds the same new decisionmaker (the SO) as does the CDP hearing. Empirically, very few taxpayers get to Tax Court.

“(C) the right to pay no more than the correct amount of tax.” Unless this right really means taxpayers have a right to pay less than what they owe, CDP actually works against this right because it is designed to give taxpayers an opportunity to *avoid* paying the correct amount of tax!

“(D) the right to challenge the position of the Internal Revenue Service and be heard.” This is a right dressed up in traditional adjudicatory due process language. It is not clear what this right encompasses. It might be saying that a taxpayer should be able to challenge all decisions made by Exam or Collection employees. If so, CDP adds minimal value here because

¹⁵⁹ I.R.C. § 6103(c).

equivalent hearings add the same value by giving taxpayers the right challenge Exam or Collection in Appeals. However, this language might also be saying that a taxpayer should be able to challenge the decision of *any* IRS employee—including those who work in Appeals. If so, CDP still adds minimal value because of the butterfly effect. Taxpayers faced with enforced collection of income, estate, and gift taxes have already had an opportunity to contest the liability via the deficiency procedures. So CDP adds no value. Moreover, if what the taxpayer wants to contest in CDP is self-reported but unpaid taxes, it's difficult to see why a process to "challenge the position of the IRS" is due a taxpayer when the IRS position is based entirely on the taxpayer's self-reported liability.

"(E) the right to appeal a decision of the Internal Revenue Service in an independent forum." As with the right to quality service, CDP judicial review can in theory add value because it brings in a different decisionmaker, the Tax Court judge. In practice, however, judicial review adds no such value and, I submit, actually misleads taxpayers into thinking they will get a very different kind of review than what they actually get.

"(F) the right to finality." CDP judicial review actually undermines this right because of the delay inherent in the judicial review process. Not only do taxpayers almost always lose on the merits when there is, eventually, a final decision, but they then get hit with increased interest and penalties. It's lose-lose.

"(G) the right to privacy." CDP judicial review actually undermines this right because court cases are public. While the Tax Court takes some measures to protect privacy, it has both operational difficulties in doing so as well as an inherent tension in its role and function as a public forum. Keith Fogg has written extensively and well on this issue.¹⁶⁰ The taxpayer must be willing to make their personal lives public in order to challenge the Service. That disclosure is necessary to a proper rule of law so that others see whether the system is or is not favoring one class of taxpayers over another. But it still invades any so-called "right to privacy."

"(H) the right to confidentiality." It's not entirely clear how this differs from the above right to privacy. Thus, CDP judicial review undermines confidentiality for same reason as it undermines privacy. That is because the

¹⁶⁰ See, e.g., Keith Fogg, *When Will the Tax Court Redact?*, PROCEDURALLY TAXING (Aug. 5, 2022), <https://procedurallytaxing.com/when-will-the-tax-court-redact/>.

IRS must disclose the taxpayer's personal information to the Tax Court in order to explain why its decision to collect is not abusive. That then is disclosed in public opinions. The disclosure is necessary to a proper rule of law so that others see whether the system is or is not favoring one class of taxpayers over another.

“(I) the right to retain representation.” CDP judicial review adds no value to this and likely undermines it because most CDP petitions are pro-se. It's not entirely clear what this right is supposed to mean. There are no prohibitions in the I.R.C. on taxpayers hiring representatives. And as far as judicial review goes, any licensed attorney can file an appearance for taxpayers. Moreover, to help pro-se taxpayers, the ABA Tax Section has partnered with the Tax Court to staff pro-bono attorneys at Tax Court calendar calls.¹⁶¹

“(J) the right to a fair and just tax system.” CDP judicial review actually undermines this right because of the delay feature inherent in judicial review. Thus, well-heeled and sophisticated taxpayers can utilize this delay to move assets out of the IRS's reach, but most other taxpayers cannot make that use of the delay.

This review of how CDP fits with the list of taxpayer rights enumerated in I.R.C. § 7803(a)(3) shows that, even as so measured, the judicial review aspect of CDP adds little to the process taxpayers are due in tax administration.

I submit, however, that § 7803(a)(3) is too focused on concepts of individual rights that we are used to seeing in adjudicatory due process analysis. Because tax administration is a mash-up of adjudication and rulemaking, I would argue for a broader concept of taxpayer rights. And just as RRA 98 moves in the wrong direction with CDP, I submit that it moves in the right direction with some of its other reforms, reforms which enhance this broader concept of rights.

¹⁶¹ The program is described on the Tax Court's website here: *Clinics & Pro Bono Programs: Bar Sponsored Calendar Call Programs*, U.S. TAX COURT, https://www.ustaxcourt.gov/clinics_calendar_call.html (last visited Aug. 14, 2022).

V. REIMAGINING TAXPAYER RIGHTS AS COLLECTIVE RIGHTS

Errors happen. That is as fundamental a truth of human existence as any. And errors happen in tax administration. Most of those errors do not happen because of bad IRS employees. They happen because operational presumptions built into the ADP systems trip taxpayers who have no practical way of fixing to those errors. There is no good process for them. The CDP process created by RRA 98 does not work well to fix those errors. However, other parts of RRA 98 show more promise and help us analyze the process due taxpayers in tax administration not just through the adjudicative lens, but also through the legislative lens. It helps us reimagine taxpayer rights as collective rights.

The CDP “protections” created by RRA 98 catch very, very few individual errors. And for every taxpayer helped by the CDP process, there are thousands left out. The pounds of resources currently devoted to curing errors (via CDP judicial review) could be much more effectively used to prevent or ameliorate errors before they happen. RRA 98 created three mechanisms that could be more effectively used to do this: TAS, TIGTA, and the LITCs.¹⁶²

I will first set out some re-imagined collective rights. Then I will look to see how these three bureaucratic counterweights help give taxpayers appropriate voice in the determination and collection of taxes.

A. A Different Way of Thinking About “Rights”

I do not have a magic number of “rights,” but the overall idea is that taxpayers are due a tax administration process that determines and collects tax liabilities as accurately and humanely as possible. Here is one way to put it.

First, taxpayers have a right to adequately trained IRS personnel. When ADP creates errors it takes humans to fix them. That means IRS people. When the agency is understaffed and underfunded, agency personnel start focusing on speed over accuracy. There is simply no time to do it right. Training is not only vital for accuracy, but also for humaneness. Just as with

¹⁶² See *Inquisitorial Process*, *supra* note 105, at 91–103; Keith Fogg, *Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 TAX LAW. 3 (2013).

any law enforcement agency, IRS personnel run the risk of developing an enforcement mentality whereby all taxpayers are presumed to be bad actors on first contact. One way to ameliorate that mindset is repeated training and cross-functional assignments.

Second, taxpayers have a right to better use of ADP. ADP's operating assumptions should be transparent and open to critique. For example, the collection ADP systems are built to assume all taxpayers can pay but just will not pay.¹⁶³ Taxpayers must affirmatively find a human being to prove they are turnips. One fix might be to switch that operating presumption for certain classes of taxpayers. Typing as can't-pays those taxpayers whose information returns and tax returns show a very small level of income may be a better and more humane operating assumption.

Third, taxpayers have a right to better and more accurate third-party information reporting rules. Currently, the fit between third-party information returns and income tax obligations is quite imperfect. One sees that most obviously in COD reporting. But one also sees it in the payment processing economy where the information returns filed by payment processors such as Square or eBay may contain inaccurate taxpayer TINS or names or, worse, when payors such as Grub Hub or Uber Eats vastly overstate payments made to delivery workers because they include payments for deliveries for which the workers were just conduits.¹⁶⁴

Fourth, taxpayers have a right to proper allocation of government resources. The government should focus and devote resources to the most

¹⁶³ *Inquisitorial Process*, *supra* note 105, at 73–77.

¹⁶⁴ This has been a long-standing problems. *See, e.g.*, Ina Steiner, *When IRS Form 1099Ks Don't Match Online Sellers' Records*, ECOMMERCEBYTES (Feb. 4, 2014), <https://www.ecommercebytes.com/2014/02/04/irs-form-1099ks-dont-match-online-sellers-records/>. *See also* Candace J. Dixon, *Clarifications and Complexities of the New 1099-K Reporting Requirements*, CPA PRACTICE ADVISOR (Jan. 7, 2022), <https://www.cpapracticeadvisor.com/2022/01/07/clarifications-and-complexities-of-the-new-1099-k-reporting-requirements/46984/>. The problem is common such that vendors offer educational programs about it. *See Get Ahead of 1099-K Reporting*, TRANSACTION TRENDS (Oct. 7, 2021), <https://www.electran.org/publication/transactiontrends/get-ahead-of-1099-k-reporting/>. The danger in the current operational presumption is well illustrated by TIGTA's 2021 report on eCommerce 1099's. There, TIGTA assumes the correctness of the 1099-Ks and urges the IRS to create a special enforcement program to address this "tax gap." *See generally* TREAS. INSPECTOR GEN. FOR TAX ADMIN., 2021-30-022, THE INTERNAL REVENUE SERVICE FACES CHALLENGES IN ADDRESSING THE GROWTH OF PEER-TO-PEER PAYMENT APPLICATION USE (2021).

important parts of the tax gaps. For example, resources currently used for policing low-income taxpayer compliance are generally much less effective in protecting the tax base than if those resources were used to police high-income taxpayer compliance.¹⁶⁵

For example, consider a low-income taxpayer receiving various forms of government support during the tax year—such as Advance ACA premiums or Advance Child Tax Credit—that require them to “true up” on their tax returns filed up to 3.5 months after the end of their tax year.¹⁶⁶ Those taxpayers are due a better process for truing up and for collecting or forgiving the difference. The process might better trained IRS personnel, better choice of ADP operating assumptions, better third-party information reporting to improve the timing and accuracy of the true-up, and better operational presumptions for forgiving of inexactitude.

B. Bureaucratic Enforcement of Rights

None of these are rights easily enforceable through judicial process such as CDP. Changing the process due is better achieved through the bureaucracy itself. Taxpayers should have voice through proxies, institutions that are charged with being a counterweight to the enforcement mindset that inheres in tax administration.

RRA 98 has created such mechanisms. Two are classic mechanisms to police agency behavior: an inspector general and an ombudsman. Here, those roles are played by TIGTA and by TAS. The third mechanism are the LITCs. To give taxpayers the process they are due, all three of these legal actors need more juice to make a difference. Let’s take a quick look at each.

First, as to TIGTA, it currently has broad powers to investigate IRS processes and regularly publishes reports of various reliability about those processes. TIGTA’s oversight function could be strengthened. For example,

¹⁶⁵ See I.R.S. Pub. No. 1415, Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2011–2013 (2019).

¹⁶⁶ For the harshness of the current law, see Bryan Camp, *Lesson from the Tax Court: No Relief for Miscalculating ACA Premiums*, TAXPROF BLOG (Aug. 20, 2018), https://taxprof.typepad.com/taxprof_blog/2018/08/lesson-from-the-tax-court-no-relief-for-miscalculating-aca-premiums.html.

TIGTA currently can only make recommendations about processes.¹⁶⁷ But a traditional tool of IG offices is to audit the work product of employees to detect mis-, mal- or non-feasance with the law. Thus, for example, TIGTA could be charged with auditing samples of each SO's case-loads in Equivalent Hearings to ensure that the taxpayers received proper process and that the SO conducted a proper review. It could have the ability to fix any errors it found. Again, errors are inevitable.

Second, as to TAS, it currently can help individual taxpayers get to the right IRS office or get priority treatment. In addition, however, TAS has the ability to look at systemic issues of tax administration and make recommendations on improving processes.¹⁶⁸ TAS is able to identify systemic issues that need fixing. I have before written in praise of this ability and given examples.¹⁶⁹ Two quick examples here illustrate the point. First is the creation of the Uniform Definition of Child. TAS started pushing for that in 2001.¹⁷⁰ Treasury adopted the idea for its legislative recommendations starting in 2002.¹⁷¹ The idea was enacted by Congress in the Working Families Relief Act of 2004.¹⁷² The goal of the effort was to simplify the requirements for the various tax benefits that depended on a taxpayer having a qualifying child, such as the dependency deduction, the Child Tax Credit, the Earned Income Tax Credit, as well as head of household filing status, and child care credit, by generally eliminating the need to document expenses for supporting a child of a prescribed age, relationship, and residence. That is,

¹⁶⁷ See *Inquisitorial Process*, *supra* note 105, at 93–103; see also Bryan Camp, *What Good Is the National Taxpayer Advocate?*, 126 TAX NOTES 1243, 1249–55 (Mar. 8, 2010), <https://www.taxnotes.com/tax-notes-federal/tax-system-administration-issues/what-good-national-taxpayer-advocate/2010/03/08/qk63> [hereinafter *What Good Is the National Taxpayer Advocate?*].

¹⁶⁸ TAS cannot, however, make substantive decisions or overrule IRS tax determination decisions or tax collection decisions. This is as it should be. For example, TAS cannot order the IRS to assess a certain amount or restrain the IRS from assessing a certain amount. TAS cannot order the IRS to accept an OIC or IA. You do not want TAS to be able to do that because that will turn TAS—with only about 1,600 employees—into a shadow IRS.

¹⁶⁹ See *What Good Is the National Taxpayer Advocate?*, *supra* note 167, at 1244–46, 1249.

¹⁷⁰ NAT'L TAXPAYER ADVOC., FY 2001 ANNUAL REPORT TO CONGRESS 76 (2001), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2001_tas.pdf.

¹⁷¹ DEP'T OF THE TREAS., PROPOSAL FOR UNIFORM DEFINITION OF A QUALIFYING CHILD (2002).

¹⁷² Working Families Relief Act of 2004, Pub. L. No. 108-311, § 201(f), 118 Stat. 1166.

the legislation reversed the old operating presumption that parents did not provide more than half of the support for their children.

The second example involves fixing internal computer operational presumptions. In 2005, TAS suggested that the IRS kick certain groups of taxpayers into an automatic audit reconsideration processes.¹⁷³ Automatic audit reconsideration would occur in cases where there may be reason to distrust the assessment process (i.e. the liability determination), such as cases where the IRS has prepared a substitute for return and has had no contact from the taxpayer regarding the liability proposed on the substitute for return. This proposal would not only improve the taxpayer's voice in the tax determination process but would also improve the accuracy of the collection process as well and reduce the number of errors where the IRS tries to collect taxes not actually owed. I do not know what ever happened to the proposal, but it remains a good idea and it leads to consideration of how TAS's role could be enhanced.

TAS oversight function could be strengthened. One way might be to give TAS sign-off authority on Treasury regulations. Additionally, TAS could be given authority to require the IRS to alter a particular process, including an ADP process, subject only to veto by the Commissioner. Thus, rather than having to merely recommend legislation giving certain groups of taxpayers automatic audit reconsideration, TAS could just . . . do it. A third way to improve TAS operation would be to require TAS personnel to rotate through different IRS Exam and Collection functions, to better understand those operations. And, similarly, as part of training and inculcating a taxpayer point of view among IRS employees, IRS personnel could be required to rotate through TAS, to see life on the other side. As with TIGTA, however, all of these changes would require increasing the TAS footprint, resources, and training.

Third, as to the LITCs, Keith Fogg has written a great article on their history.¹⁷⁴ My own takeaway from that history is that Congress has created

¹⁷³ See NAT'L TAXPAYER ADVOC., 2005 ANNUAL REPORT TO CONGRESS 462 (2005). That report actually suggested a statutory change. That would be a sub-optimal result since statutory provisions prevent an agency from reforming its practices as time and technology bring about new opportunities to improve administration.

¹⁷⁴ See Keith Fogg, *Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 TAX LAW. 3, 5 (2013).

an institutional litigator for low-income taxpayers. The clinics communicate and cooperate in finding litigation vehicles. The most recent and resounding success in this area was the successful litigation on *Boechler v. Commissioner*, where the cooperative efforts of the LITCs led to a Supreme Court opinion highly favorable to taxpayers.¹⁷⁵ The *Boechler* decision culminated almost a decade of coordinated litigation efforts, efforts made possible by RRA 98. I am sure someone will write an article on this history.

C. Conclusion

Circling back to the *Londoner/Bi-Metallic* distinction, what is the process due taxpayers in a tax administration that is both and neither adjudicatory and legislative in its operation? I submit they are best conceived of as collective rights, the right to have a tax administrative system that treats taxpayers fairly and humanely. That requires adequate voice. This differs from the concept of individualized rights that you see in most of § 7803(c). The process by which rights are monitored and enforced are not through individualized hearings, not through a taxpayer v. agency process. That kind of process—the kind envisioned by the creation of CDP—is ineffective to give taxpayers the voice they deserve. Taxpayers deserve a better voice through the creation of proxy voices, voices that can participate in a wider array of both rule-creation and specific adjudication. That is process taxpayers are due.

¹⁷⁵ *Boechler v. Comm’r*, 142 S. Ct. 1493 (2022).

