by Bryan T. Camp

Replacing CDP

Bryan T. Camp is a professor of law at Texas Tech University School of Law.

This column generally explores the laws and policies of tax administration to help guide readers through the thickets of particular procedural problems while also giving them a sense of the larger tax administration forest.

Prof. Camp is seriously grateful to the following people for their time and effort in reviewing this month's column: Les Book, Danshera Cords, Michael Hatfield, Steve Johnson, Leandra Lederman, Nina Olson, and the always omniscient "anonymous." Naturally, the author remains responsible for all errors and omissions, apologizes abjectly for them, and promises to do better next time.

This month I resume my monthly column after a four-month hiatus. This column concludes my series on collection due process with some thoughts on how CDP should be reformed — out of existence. More importantly, I address what should replace it. Part I of this column summarizes my previous arguments about why CDP fails both taxpayers and the government. In doing so I intend to continue the CDP debate by responding to recent defenses of CDP by Professor Leslie Book of Villanova University School of Law, and by National Taxpayer Advocate (NTA) Nina Olson.[1] Part II suggests what should replace CDP, for I agree with much of what the thoughtful CDP proponents referenced above say is wrong about IRS collection; I just disagree on how to fix it. Part III explores the flaws in various recent proposals for reforming CDP, including those suggested by the NTA in her 2004 Annual Report, by Prof. Book, and by Prof. Danshera Cords of Capital University School of Law.

My bottom line is that I wholeheartedly agree with Olson, as I think any reasonable observer would, that "taxpayer rights and higher rates of tax compliance can coexist and do not reflect opposing values."[2] The fundamental problem with CDP is simply that the adversarial process paradigm used by courts conflicts with the inquisitorial process paradigm used to collect taxes. Court review is just the wrong process to oversee the IRS's collection of delinquent tax liabilities. CDP reflects some serious "opposing values" to tax compliance and should be replaced with a system of oversight that better allows the IRS to collect taxes from delinquent taxpayers while keeping within its mission statement of "helping them understand and meet their tax responsibilities." The traditional components of inquisitorial process oversight commonly used around the world are already in place and at work: the Taxpayer Advocate's Office, the Office of Appeals, and the Office of the Treasury Inspector General for Tax Administration. As I will keep suggesting in any available fora, CDP review is not just unneeded, but actually hurts the peaceful coexistence of taxpayer rights and increased tax compliance.

CDP: Wrong Cure for the Wrong Problem

My previous columns tried to explain how CDP was founded on four misunderstandings of tax administration in general and tax collection in particular. The first misunderstanding was that IRS employees were abusing taxpayers. All observers now appear to admit that the dog-and-pony shows of taxpayer abuse trotted out by the Senate Finance Committee were bogus.[3] So let the world right itself, and let the conclusion of the bipartisan National Commission on Restructuring the Internal Revenue Service serve as the last word on this matter: Pre-1998 there were "very few examples of IRS personnel abusing power."[4]

Those who support CDP properly point out that the sensationalist horror stories were not the only evidence before Congress of problems with tax administration.[5] That is both true and very important, and I will return to

[1]The following will give you a sense of the debate: Leslie Book, "CDP and Collections: Perceptions and Misperceptions," *Tax Notes*, Apr. 25, 2005, p. 487; the National Taxpayer Advocate's critique of CDP and proposals for reform are found in her December 2004 Annual Report to Congress (2004 Annual Report) at pp. 226-245, 451-470, and 498-510; and Danshera Cords, "Collection Due Process: The Scope and Nature of Judicial Review," *U. Cin. L. Rev.* (forthcoming 2005). For Prof. Book's and my previous debate, see "Point/Counterpoint: Should Collection Due Process be Repealed?" at 24 *Tax NewsQuarterly* 11 (Fall 2004). For my previous columns on CDP, see Bryan T. Camp, "The Failure of CDP, Part 2: Why It Adds No Value," *Tax Notes*, Sept. 27, 2004, p. 1567; "Failure of Collection Due Process, Pt. 1: The Collection Context," *Tax Notes*, Aug. 30, 2004, p. 969; and "'The Evil That Men Do Lives After Them . . . .,'" *Tax Notes*, July 26, 2004, p. 439.

[2]2004 Annual Report at 2.

[3]Or at least they were "not quite correct," to use the NTA's more delicate and understated phrasing. *See* 2004 Annual Report at 457.

[4]Report of National Commission on Restructuring the Internal Revenue Service, "A Vision for a New IRS," June 27, 1997, at 48.

[5]*Id. See also* Book, *supra* note 1 at 487.

that point in Part III. Unfortunately, as I have documented extensively elsewhere, the taxwriters were blinded by the bling bling, and in groping for an equally glitzy solution, they came up with CDP, which is long on flash-bang, but woefully short on substance.[6]

> ***CDP was founded on four misunderstandings of tax administration in general and tax collection in particular. The first misunderstanding was that IRS employees were abusing taxpayers.***

The second misunderstanding relates to the bulk-processing nature of tax administration and how the IRS sorts taxpayers into the can't-pay and won't-pay boxes. Those who inserted CDP into the tax code operated under a fundamental misconception of how the IRS operates and, indeed, must operate. They repeatedly spoke and acted on a belief that the IRS interacts with taxpayers person-to-person. So they fashioned the traditional remedy for situations in which one person abuses another: a court action. As I have demonstrated elsewhere, the rhetoric and assumption behind CDP was that an individual IRS employee made a conscious decision to levy some specific piece of taxpayer property.[7] Nothing could be further from the truth.

The IRS does not go mano a mano with taxpayers. It cannot. There are too many taxpayers, and too few IRS employees. That has been true since WWII, if not before. That seemingly obvious point has some pretty profound consequences for tax administration, and for dealing with the problems of tax administration. For our purposes here, the most important consequence is that tax collection decisions made by "the IRS" are really not decisions made by individuals about individuals, but are decisions made by processes about groups of taxpayers. Tax administration is a system of processes, and the decisions made are about how to treat groups of taxpayers, not individual ones. A proper debate about CDP must acknowledge that fundamental feature of tax administration.

The NTA's 2004 Annual Report shows a strong and sophisticated awareness of that fundamental truth about the bulk-processing nature of tax administration. It describes the "lengthy and rigid three-stage collection process" of tax collection: the notice stream, the automated collection system (ACS), and the collection field function (CFf). In fact, it critiques the IRS's failure to make human contact until, at the earliest, the ACS stage. It observes that "no person-to-person contact is even contemplated, much less attempted, during the 6 month notice stream phase of collections."[8] Likewise, Prof. Book acknowledges that "it is unrealistic to expect individualized decisions on all collection determinations."[9]

The start of the collection process is a good example of how collection decisions are generally decisions about what process to apply to a group of taxpayers. No human decides when a collection matter begins. All collections begin in the notice stream. That is because section 6303 requires the IRS to send every taxpayer a notice of unpaid tax within 60 days of assessment and section 6331(d) requires a notice of intent to levy be given to every taxpayer 30 days before any attempt to levy on that taxpayer's property. Also, the IRS has decided, internally, to provide additional notices to taxpayers. All of that is automatic. No human writes a notice, or writes the address, or licks a stamp. That is because the decision being made here — part statutory, part administrative — is to treat all delinquent taxpayers the same. It is a process decision, treating a group of taxpayers as all alike. There is no individualized determination here nor, as most would agree, should there be.

> ***The taxwriters were blinded by the bling bling, and in groping for an equally glitzy solution, they came up with CDP, which is long on flash-bang, but woefully short on substance.***

On reflection, one might think the decision to send *all* notices to *all* taxpayers makes little sense for some subgroups of taxpayers, and makes no sense at all for many individual taxpayers. For example, a taxpayer whose assessment is based solely on their return know full well that an unpaid tax liability exists. Heck, they reported it. Similarly, individual taxpayers who lose in Tax Court have ample notice of what they owe. So while the first notice perhaps serves the purpose of letting the taxpayer know that yes, the IRS is now ready and willing to receive the payment, it is difficult to think of any purpose served by additional notices not required by statute (and it is difficult to think why the statute should require multiple notices in those situations). But it does not matter: To make individualized decisions about which taxpayers should get what notices would involve the time and attention of human beings, which is very expensive. The cost of identifying and exempting those subgroups and individual taxpayers from the notice process probably outweighs the gains to the Treasury.

The process designed for the notice stream is relatively benign as to taxpayers. It is true, as the NTA gently reminds us, that "perfectly intelligent and honest people quake when they get a letter from the IRS."[10] Nonetheless, the notice process is far less intrusive on the individual interests of taxpayers than is the seizing of an asset

---

[6]*See* Bryan T. Camp, "Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998," 56 *Fla. L. Rev.* 1, 78-91, 119-128 (January 2004).

[7]*Id.*

[8]2004 Annual Report at 233.

[9]Book, *supra* note 1 at 488.

[10]2004 Annual Report at 458.

or the filing of a notice of federal tax lien (NFTL). Prof. Book is okay with the notice stream bulk-processing decisions because he does not see them as decisions that "involve unreasonable prospects of harming individual interests or carry with them serious risk of government mistake."[11] And indeed, the notice stream resolves most unpaid accounts.[12]

But the second stage of collection, ACS, involves very definite prospects of "harming individual interests" because it "ultimately seeks out levy sources or files Notices of Federal Tax Liens against taxpayers who are unresponsive to the notice sequence."[13] And yet, as the NTA acknowledges, "the IRS cannot make individualized decisions in all of these cases."[14] I explained in gory detail in an earlier column how the decision to levy or file an NFTL is not made on a case-by-case basis.[15] The ACS process is still a bulk process, a one-size-fits-all decision to prick that group of delinquent taxpayers (those who have not responded to the notice stream) harder. But despite its name, the real purpose of the levies and NFTLs at that point is not really to collect assets. The levies and NFTLs are used here more as tools to collect information. Here is why.

The most fundamental of all IRS bulk-processing decisions is the initial placement of all taxpayers into the won't-pay box. Taxpayers who have unpaid tax liabilities are, from the start, presumed able, but unwilling, to pay. There is simply never a time when any IRS employee makes an individualized decision that a particular taxpayer starts out a won't-pay. They are *all* won't-pays! Taxpayers basically have only two ways to get out of the box: Pay up or convince an IRS employee to make a decision that puts the taxpayer in the can't-pay box.[16]

The ACS process thus represents the confluence of two huge operational bulk-processing decisions: that all taxpayers are won't-pays until shown otherwise, and that the IRS needs to levy or file an NFTL before a taxpayer will come forward with the information to demonstrate an inability to pay, either because the taxpayer has not yet brought forward any information or because the taxpayer has not brought forward enough information to stop the process. Accordingly, the issuance of most *first* levies and filing of most *first* NFTLs is simply not the result of individualized decisions about particular taxpayers. It results from the bulk-processing decisions about how to gather information.[17]

It is here that CDP bares its paper teeth. But the CDP remedy is simply not designed to review bulk-processing decisions. Its adversarial format is designed to review individualized decisions, to ensure that "a relatively small number of persons . . . who were exceptionally affected, in each case upon individual grounds" have the opportunity to contest that decision as applied to them.[18] It assumes IRS employees (including Appeals) misanalyze information so what is needed is court review or, in the words of the NTA's 2004 Annual Report, "one opportunity to have an independent third party look at the *first* proposed levy action or the *first* actual Notice of Federal Tax Lien filing . . . ."[19] But the congressional misunderstanding was that these *first* collection actions result from an IRS employee deciding to levy a specific piece of property, like a car. That is not the case. The decisions are bulk-processing decisions, not individualized decisions.

> ***The congressional misunderstanding was that the first collection actions result from an IRS employee deciding to levy a specific piece of property. That is not the case. The decisions are bulk-processing decisions, not individualized decisions.***

In administrative law, we would say that the decisions to fire out a levy or an NFTL are the product of rules and not orders. So CDP turns out not to be the opportunity to review an erroneous individualized decision, but only an opportunity for the taxpayer to bring information on which to make a decision in the first place. Olson observes that "Appeals Officers are more helpful and successful in eliciting information from and conversing with the taxpayer than ACS employees."[20] That is true but not because courts review CDP hearings; it was (and is) also true for the Collection Appeals Process (CAP), which existed before CDP. I submit it has more to do with the taxpayer bringing credible information to the table than later judicial review and would happen whether or not CDP exists. Now what Appeals does with the information presented might be affected by court review and I will further address that issue in Parts II and III.

---

[11]Book, *supra* note 1 at 488.

[12]*See* Table 16, "Delinquent Collection Activities, Fiscal Years 2000-2003," in 2003 IRS Data Book, March 2004, at http://www.irs.ustreas.gov/taxstats/article/0,,id=97168,00.html (last visited May 4, 2005).

[13]*Id.* at 456.

[14]*Id.*

[15]"Failure of Collection Due Process, Pt. 1: The Collection Context," *Tax Notes*, Aug. 30, 2004, p. 969.

[16]There are also limited opportunities for taxpayers to convince the IRS to adjust the tax liability itself so they are transformed from delinquent taxpayers to fully paid taxpayers. Those opportunities include the spousal relief provisions of section 6015 and audit reconsiderations.

[17]It is true that some delinquent accounts skip over the ACS stage and go directly into the CFf stage. Again, however, that decision is not an individualized decision; it is rather the product of a series of process decisions that, although carried out by humans, are not the result of their individualized discretion. *See* IRM 5.1.1.13, IRM 5.19.5.3.1.

[18]The quote is Justice Holmes's famous tag line in *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), which is commonly thought of as the great demarcation between what constitutes adjudicative action and what constitutes legislative action. Ironically, it was a tax case.

[19]2004 Annual Report at 459 (emphasis supplied).

[20]*Id.* at 460.

The third misunderstanding relates to the relationship between assessment and collection of tax liabilities. I will discuss the metaphysics of assessments and liabilities in a later column, but let me here emphasize the great gulf between assessments of tax and collection of tax. For that is the great divide in tax administration: assessment and collection. And even such sophisticated folks as taxpayer advocates, Tax Court judges, and yes, even Texas Tech law professors, get confused on this.

The assessment serves two functions, one legal and one practical. The legal function of an assessment is to serve as a judgment of a taxpayer's tax liability.[21] While the IRS can collect unassessed tax liabilities, it cannot do so without going to court first (except when exercising its right of setoff). But once a liability is assessed, it is the assessment that serves as the predicate for administrative collection through lien and levy. And it does not matter *how* that assessment gets on the IRS books of account. Usually it gets there because the IRS simply assesses the tax liability self-reported by the taxpayer. Sometimes it gets there because the IRS audits a return. And sometimes it gets there because there is no return filed by the taxpayer to record or examine and so an IRS employee will prepare a substitute for return.[22]

The practical function of an assessment is to create an account in the IRS records to properly account for the taxpayer's payments regarding that tax liability. Believe it or not, sometimes taxpayers decide to try to pay off a tax liability long after the limitations period has expired. Boy, are they surprised when they are told that the IRS cannot accept the money! That is because there is no account in which to "put" it. So those taxpayers are encouraged to donate the money to the Treasury's general deficit reduction fund (for which there is an account) or to do something else worthwhile with the money. Just do not send it to the IRS!

The CDP provisions were written based on a misunderstanding of that great divide in tax administration. The large majority of all collection accounts result from assessment based on a taxpayer's *self-reported* liability.[23] By permitting court review of the *assessment* itself during the collection stage, the CDP provisions (as interpreted by the Tax Court) undermine the integrity of the assessment process as well as the collection process.[24] Now the IRS must potentially get the court judgment in addition to the assessment. The assessment alone no longer serves as the predicate for collection and so CDP undermines the entire force and legal effect of an assessment. As the NTA aptly noted in her 2004 Annual Report: CDP "diminishes the meaning of the Notice of Deficiency and pre-assessment review."[25]

The fourth misunderstanding, and perhaps the most serious, relates to the dynamic nature of the collection process. CDP provides a static "picture frame" review for what is a dynamic "video" process. That is the wrong kind of review for the kind of IRS decisions being made. Even when an IRS employee "decides" to send out the first levy or file the first NFTL, that decision is necessarily percursory. There is more to be done: more levies, more NFTLs, more research into the taxpayer's potential assets. The first levy or NFTL is rarely, if ever, a final decision regarding the collection of tax from that taxpayer. And yet CDP treats it just like any other "final" decision made by any other administrative agency.

As I mentioned above, one key reason for sending out the first levy or filing the first NFTL is that the taxpayer has not yet provided enough information to justify moving the taxpayer from the won't-pay box into the can't-pay box. Logically, the result of sending out the first levy (or, more accurately, the CDP notice preceding the first levy) will be that the taxpayer either responds with sufficient information to move out of the can't-pay box, or not. Let's follow what happens in both cases to better see the misunderstanding of tax collection that CDP rests on.

On one hand, if the taxpayer responds to the CDP notice with enough information, there is no need for CDP because, by definition, the taxpayer is being treated appropriately. So, for example, let's say that the taxpayer brings forward enough information to convince the ACS collection representative or the CFf revenue officer to hold off on the levy until the taxpayer submits an offer in compromise and the OIC is accepted. That now puts the taxpayer, by definition, in the can't-pay box.[26] But now look what happens if the taxpayer defaults the OIC: The taxpayer gets moved back into the won't-pay box. But what if the default was just a foot fault? What if the taxpayer wants to contest the OIC default decision? Too bad, so sad, no further court review. The taxpayer already *had* the one-time benefits of court review and *at that time* there was no error to complain of.[27]

On the other hand, if a taxpayer provides information in response to the CDP notice that does not convince the IRS to move the taxpayer into the can't-pay box, the taxpayer gets the very relief that CDP was designed to give: a day in court. While there is less than a 1 percent

---

[21]*Bull v. United States*, 295 U.S. 247, 259-260 (1935).

[22]Section 6020. If the taxpayer cooperates in that endeavor the return will be considered the taxpayer's return per section 6020(a) such as to trigger applicable limitation periods, including those relating to bankruptcy. But if the taxpayer lays low, the document created per section 6020(b) is not considered the taxpayer's return and so no limitation period on collection applies. *See United States v. Hindenlang*, 164 F.3d 1029, *Doc 1999-3668, 1999 TNT 16-11* (6th Cir. 1999).

[23]*See* Camp, "Tax Administration as Inquisitorial Process," *supra* note 6 at 115, n. 589. Note that taxpayers simply do *not* "self-assess" as the NTA's 2004 Annual Report suggests on p. 229. Only the IRS can assess a tax. But the IRS is authorized to do so based on the liability self-reported by the taxpayer. Section 66201(a)(1).

[24]*Montgomery v. Commissioner*, 122 T.C. 1, *Doc 2004-1409, 2004 TNT 15-9* (2004).

[25]2004 Annual Report at 462.

[26]Or at least by my definition. The IRS uses a third box, which it calls the "will pay" box. *See, e.g.*, IRM 5.19.1.1.

[27]Notice that these are similar facts to what happened in *Robinette v. Commissioner*, 123 T.C. 85, *Doc 2004-14878, 2004 TNT 140-17* (2004), except that in *Robinette* the taxpayer had received the OIC status before having had the CDP opportunity for court review. So my example serves the double duty of showing the inherent arbitrariness of CDP review.

probability that the court will disagree with the merits of the IRS determination, let's assume that the court finds that the IRS abused its discretion and sends it back to Appeals to "do it right." But even if Appeals puts the taxpayer into the can't-pay box as a result of the court decision, the IRS may still move the taxpayer out of the can't-pay box for any number of reasons later on. Notice the difference from review of a spousal relief decision under section 6105. A spousal relief decision is appropriate for courts to review (at least in this respect) because it is a determination about a particular set of facts that, once made, is unchanging. That is, a taxpayer was either an "innocent spouse" in a previous year or not. But as the NTA's 2004 Annual Report recognizes, the won't-pay versus can't-pay determination is ongoing and always subject to change.

> ***The bulk-processing feature of tax administration inherently creates two significant and interrelated problems for taxpayers and the IRS: a problem of discretion and a problem of voice.***

The upshot of this fourth misunderstanding of tax collection is that CDP makes a court review of a nonfinal agency decision as if it were a final agency decision. That raises nasty problems about the "record" for court review, because the taxpayer may well come up with more information to justify being moved into the can't-pay box after the IRS determination. Or events might occur after the IRS determination that make it more appropriate to put the taxpayer into the can't-pay box. I will not get into those issues here; Profs. Cords and Book have good discussions of that problem in their work.[28] Suffice to say that CDP leaves the taxpayer vulnerable to further error on the part of the IRS. The NTA recognizes that but is unperturbed because she believes that the "several protections available for taxpayers in the unfolding collection process" are sufficient to protect the taxpayer against any further misclassification.[29] And that even without court review. I agree with her. Moreover, my position is simple: Those same "several protections" are just as effective to prevent abuse of taxpayers (the putative problem) and provide as effective an opportunity to be heard (the real problem) before the first levy or NFTL as after.

For those reasons, CDP is simply the wrong cure for the wrong problem. I will next suggest what I believe is a true problem with the collection process that good tax administration should address. I will then comment on the various CDP reform proposals to suggest why they do not cure the fundamental put forward giving my analysis of the proper cure for the true problem.

The Right Cures for the Real Problems

The bulk-processing feature of tax administration inherently creates two significant and interrelated problems for taxpayers and the IRS: a problem of discretion and a problem of voice. I will first describe the two problems, suggest how they relate to CDP, and then explain why I believe that the right cure for those problems is actually under our collective noses.

The first problem is one of discretion, both its use and prevention of its abuse. Like other bureaucracies, the tax bureaucracy runs on rules. Tax administration in general and tax collection in particular both must process taxpayers, returns, and accounts in bulk. To do that the IRS uses systems of processes. Those systems are built on rules and, whether executed by humans or machines, rules are inherently both under- and overinclusive. That means that a rule sometimes does not apply to a situation it should (underinclusive) and it sometimes does apply to a situation it should not (overinclusive). For example, a sign near a school may say "speed limit 20 mph when flashing." The rule is to protect students walking the streets so the sign is programmed to flash every day from 7:45 to 8 a.m., which is when the students normally cross the street. But on days when the opening of school is delayed by an hour, the sign does not flash when it is most needed. Then it is an underinclusive rule. And when the sign flashes on holidays when there is no school, then it is an overinclusive rule.

Most tax administration rules are transparent. Some are imposed on the IRS by statute (such as the section 6303 requirement of a notice within 60 days of an assessment). Others are found in the regulations written by the IRS. But most of the transparent operational rules are found in the Internal Revenue Manual.

> ***Conspiracy theorists rejoice! The IRS has lots of 'secret' rules that Tax Analysts will never get its hands on!***

Some tax administration rules are hidden. Conspiracy theorists rejoice! The IRS has lots of "secret" rules that Tax Analysts will *never* get its hands on! I refer, of course,

---

[28]Both professors believe that *Robinette* was wrongly decided. *See* Cords, *supra* note 1; Book, *supra* note 1 at 491. In one sense, that is a curious position for someone to take who wants to defend CDP. That is, both professors argue that one value of court review is to keep Appeals "honest." The more searching the review, then presumably the more "honest" Appeals will be. So if one wants CDP court review to be really effective, *Robinette* was rightly decided. Court review of a closed record for abuse of discretion does not encourage the agency to do a better job as much as encourage the agency to create a better record. Further, once one recognizes the ongoing nature of the collection process, then it is entirely reasonable for a court to consider *all* information relevant to the determination of the taxpayer's status, whether or not that information was before the IRS before. To paraphrase a similar point made by the 2004 Annual Report, at p. 459, "Who really cares if the taxpayer has had several opportunities to [bring forward the information] and misses them — if the taxpayer is before us now, do we really want to collect a tax that [should not be, in fact, collected]?"

[29]2004 Annual Report at 459.

to those rules coded into the IRS's database definitions, account creation, and system updates. Now, you may think those are trivial, geeky, rules. They are not. I gave one example above: The IRS cannot receive a payment unless it has created a computer account to "receive" the payment. The rule that there must be a computer account in which to record the payment is a hidden rule. Another example may be familiar to litigators who constantly run up against the IRS use of Form 4340, which is what IRS attorneys use to "prove" an assessment. That form is usually computer-generated, and the words that print out to describe the actions taken are simply some computer geek's translation of a transaction code entered into the database. That hidden labeling rule actually hurt the IRS for a time, because the Form 4340 would label an amount as "abated" when the amount had not been abated at all under section 6402. But because "abated" was on the form, courts were reluctant to look to the underlying transaction. That killed the IRS on the issue of whether it could simply reverse a nonrebate erroneous refund without having to go through the assessment process all over (which many times was unavailable because of the limitations period).[30] That, of course, is an example of an overinclusive computer rule of tax administration that hurt the IRS and helped taxpayers.

Bureaucracies like rules because rules generate more outcomes at less cost per outcome than any alternative. Despite the Jay Leno jokes, agencies are generally under significant pressure to be efficient in that sense. Both Prof. Book and the NTA recognize that the IRS is no different.[31] So when faced with millions of work items the IRS resorts to rules to process those items. But whether a tax administration rule is created by statute, regulation, IRM provision, or computer programmer, the same problem arises: rules are inherently unfair (under- and overinclusive) and so who should have the discretion to decide when a rule is either overinclusive or underinclusive, or which of two potentially applicable rules should apply to a situation? That is, who has how much discretion to decide when the rules apply, how they apply, and when they should be broken?

To put that discretion problem in the collection context, the question is how should the IRS go about applying rules to taxpayers to decide which taxpayers go in which category: won't-pay or can't-pay? That categorization decision is the result of a process, not of an individual employee. Part of the process is rulebound, but part of the process must have the flexibility to ameliorate the errors caused by the under- and overinclusive nature of rules. Because the rules cover most situations, the historic management approach within the IRS since the 1952 reorganization has been to limit discretion at the campus sites to supervisors but to allow more discretion to line employees in the CFf. That reflects the collection systems approach of trying to weed out the easy cases through the notice stream and ACS and put the more difficult cases into flexible human hands. It also reflects a management philosophy of long-standing tradition.

Management philosophies come and go, somewhat slower than changes in women's fashions but faster than men's. Until the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), the IRS management philosophy tended toward empowerment of line employees, at least in the field. The critical tool for mediating between rules and discretion was the ambiguous status of the IRM. While it was a manual of rules (in which employees were sometimes given explicitly bounded discretion), courts refused to allow taxpayers to assert any reliance interest in it. It was not law.[32] Even when the IRM prescribed a rule, line employees faced few consequences if they exercised discretion to avoid it. Similarly, line employees would sometimes perform actions prohibited by the IRM. The downside of that for taxpayers was that there was little recourse if an employee's failure to follow the IRM worked to the taxpayer's detriment. The upside was that taxpayer representatives who had developed good relationships with local IRS personnel could accomplish much more for their clients than the IRM provisions would suggest. So, for example, if one represented a taxpayer who was not yet before the IRS on audit but who might later be, one could generally ask a local revenue agent for a transcript, despite the IRM rule that forbids employees to access accounts not directly related to one of their cases.

Like any other force, discretion has its dark side, no matter how great the Jedi Knight who wields its power. So the problem of discretion is also the problem of what checks prevent that discretion from being abused.

RRA 98, however, gave that management philosophy a swift kick in the rear, in part by elevating the IRM to the status of law, one example of that being the creation of the 10 deadly sins in RRA section 1203. As a result, for good or ill, line employees are more rulebound than before. But the discretion to break the rules is still there, in management. So if a campus line employee "decides" to reject an OIC by applying the rules of the statute, as translated into more rules by regulation, as translated into yet more rules by the IRM, that is not an individual employee making an individualized decision: It is a cog in the tax collection machine applying a rule to reach a result. The discretion to reapply the rule or break the rule is lodged in that line employee's manager or that manager's manager.

---

[30] *See, e.g., Bilzerian v. United States*, 80 F.2d 1067, *Doc 96-19549, 96 TNT 133-16* (11th Cir. 1996), *acq.* 1999-1 IRB 5 (joining Sixth and Seventh Circuits in rejecting the IRS's theory on how it could recover nonrebate erroneous refunds through administrative collection process).

[31] Thus, the 2004 Annual Report notes at 458 that the "IRS has a relentless need to demonstrate to both the executive and legislative branches that it is collecting tax in the least costly and efficient manner possible, in terms of absolute dollars and direct time on cases"; *see also* Book, *supra* note 1 at 487.

[32] *Caceres v. United States*, 440 U.S. 741 (1979).

Exercising discretion properly requires information. The flow of information is critical to the ability of any decisionmaker to accurately decide when to break the rules, or even what rule should apply. That brings us back to a point I've made repeatedly in previous articles. In the collection process, it is the taxpayer who has most of the relevant information necessary to decide whether the taxpayer is truly a can't-pay. In an inquisitorial system, the decisionmaker is also the evidence-gatherer. In the collection context that means the line employee and that employee's supervisor both make the decision and decide what evidence (that is, information) is necessary to make the decision about whether a taxpayer is a can't-pay or a won't-pay.

The other part of the discretion problem is the issue of preventing its abuse. Like any other force, discretion has its dark side, no matter how great the Jedi Knight who wields its power. So the problem of discretion is also the universal problem of what checks prevent that discretion from being abused. In American jurisprudence, the traditional check on discretion has been through the adversarial process provided by the court system or systems modeled on the adversarial process paradigm. As administrative lawyers know full well, that is a light check indeed. In tax administration particularly, it is extraordinarily rare for the courts, even for the Tax Court, to reverse an IRS decision that is the product of discretion. While part of the reason for that is the standard of review, a more critical reason why adversarial process checks on administrative discretion are so weak is the information problem. In the adversarial process paradigm it is the parties who are responsible for providing the information to make their case. Anyone who has defended a tax summons knows this. One of the few defenses to responding to an IRS summons is that the summons was issued in bad faith.[33] But to make the case for bad faith the summoned party has to come up with the evidence, and is generally denied discovery on the basis of mere allegations unless the party can articulate a connection to some facts before the court.[34] In short, to successfully invoke an adversarial process check on discretion one needs to be exceptionally adept at gathering and presenting evidence.

From the IRS perspective, the story of tax collection is the story of the IRS giving taxpayers multiple opportunities to move out of the won't-pay box, either by paying (duh) or by giving the information (through forms like the 433 series) that demonstrates an inability to fully pay and thus securing an installment agreement, an OIC, or a designation as "currently not collectible." From the taxpayer perspective, however, the story of tax collection is the story of the IRS *not* giving taxpayers *effective* opportunities to move out of the won't-pay box and that is the second problem inherent in the bulk-processing of delinquent taxpayers: the problem of voice.

Both the NTA and others testified in 1997 and 1998 to the inability of many taxpayers to secure an *effective* opportunity to be heard. That is so for a variety of reasons. One reason is what the 2004 Annual Report aptly terms "ostrich-like behavior" — taxpayers who stick their head in the virtual sand and hope the IRS goes away. By the time they pull up, they have missed their opportunity. Another reason is what Prof. Book sees time and again in his practice (as did Olson when she was in practice): Many taxpayers with collection problems lack the mental skills, language skills, organizational skills, cultural literacy, or emotional capability to articulate their position, gather the information they need to gather, and approach the IRS. Those taxpayers are what I refer to as the inarticulate can't-pays.

Those barriers of avoidance and inability that prevent many taxpayers from obtaining effective opportunities to participate in the inquisitorial tax collection process are serious barriers. The question is how best to give taxpayers voice to help IRS employees use discretion properly to mitigate the over- and underinclusive effect of rules in classifying taxpayers. Prof. Book structures that question as a choice between external checks and internal checks.[35] I believe a better dichotomy is to see it as a choice between an inquisitorial check and an adversarial check.

> ***Ironically, the adversarial process check of CDP is simply unavailable to the class of taxpayers we worry most about: the inarticulate can't-pays.***

Ironically, the adversarial process check of CDP is simply unavailable to the class of taxpayers we worry most about: the inarticulate can't-pays. First, by definition, they do not have the ability to gather the information necessary to trigger the exercise of discretion, much less to trigger a meaningful review. Second, also by definition, they do not have the money to hire someone to do it for them and few have access to low-income tax clinics. Like so many "taxpayer rights" provisions, the CDP provisions cruelly hold out a false promise. The adversarial process check, as I have explained extensively in earlier columns, adds no value to the tax collection process and imposes delay and other compliance costs.

The better approach to overseeing the use of discretion in the tax collection process in making classification decisions is to follow the inquisitorial process model used in tax collection in the first place. Some functions within the IRS should exist to help give taxpayers voice in the system, to help taxpayers who need the help gather and present the information necessary for the IRS systems to make the correct collection decision, and should do that *on an ongoing basis*. Other functions within the IRS should oversee the decisions that create the processes. Although RRA 98 shifted some process paradigms from inquisitorial to adversarial, at the same time it also strengthened two traditional inquisitorial process checks

[33] *See generally U.S. v. Michaud*, 907 F.2d 750 (7th Cir. 1990) (*en banc*).

[34] *Id.*

[35] Book, *supra* note 1 at 488 (noting the "difference of opinion as to whether . . . changes should be generated from internal processes . . . or external processes").

on the agency: the old Office of Ombudsman, renamed the National Taxpayer Advocate, and the old internal audit function, renamed the Office of Treasury Inspector General for Tax Administration, and relocated outside the IRS and in Treasury. Those offices cover the ground: They can oversee both individual decisions and systemic decisions.

But it is critically important that those two components not default into an institutionally adversarial posture to the rest of the IRS. That is, the value that they add is more than the specific checks of abuse in specific instances. They act as a cultural counterweight to the enforcement mentality that makes it so difficult for collection employees to maintain the necessary perspective to carry out the IRS mission and not succumb to the false dichotomy between taxpayer rights and taxpayer compliance. That is what troubles me about some of the reform proposals currently in play, and this final section comments on some of them.

The Impossibility of CDP 'Reform'

My position is simple: Courts should be removed from the CDP process. If you want to call that "reform," then that's fine with me. Anything short of that "reform" is subject to the same problems I outline above. I hope to demonstrate that through a critique of both Prof. Cords's proposals and then a critique of the 2004 Annual Report proposals.

In her recent article, Prof. Cords proposes to retain court review but suggests that (a) the taxpayer be allowed to seek review of the entire collection decision in any court with jurisdiction over any part of the liability sought to be collected, (b) review be limited to a discrete "record" transmitted from the Office of Appeals to the court, and (c) the review should be for an abuse of discretion not a redetermination of the collection decision. The first proposed reform does nothing to solve the problems outlined above. CDP review would still be the wrong review mechanism at the wrong place at the wrong time. Accordingly, the first proposed reform, while a sensible solution to a vexatious issue for taxpayers, basically assumes continued court review.

The second proposed reform makes court review worse for taxpayers and ignores the ongoing nature of the collection process. The institutional decision represented by the Appeals notice of determination is simply not the final word of the agency because collection is an ongoing and multistage process. To limit the taxpayer to a discrete record would lead to one of two results, both unpalatable. First, in the time between the Appeals decision and the court review, the taxpayer's circumstances may have materially changed. But because that would not be in the record, it would not be before the court. To the extent that the IRS agrees that the change is relevant and puts the taxpayer into the can't-pay box, then court review is unnecessary. To the extent the IRS disagrees, then CDP court review based on a closed record is useless to the taxpayer. The second possibility is that in the time between the Appeals decision and court review, the taxpayer's circumstances will not have materially changed. The court then makes a decision on the closed record. Even if the court reverses the IRS determination, the "victory" is thus Pyrrhic because the IRS could properly demand that the taxpayer supply "updated" information and simply make the same determination but create a better record for it. Again, the taxpayer is in a no-win situation.[36]

In her 2004 Annual Report, the NTA also presents four legislative proposals for CDP: (a) retain CDP "as a necessary, essential, and statutory taxpayer right"; (b) allow taxpayers to raise issues regarding the underlying tax liability before Appeals but deny court review on that issue; (c) allow taxpayers to ask for audit reconsideration before Appeals and require Appeals to hold the case until audit reconsideration is granted or denied; (d) use the date the NFTL is mailed or otherwise submitted for filing, rather than the date the NFTL is accepted for filing, as the trigger date to send CDP notice to the affected taxpayer.

The latter three reforms are all sensible if one keeps court review of CDP hearings and the 2004 Annual Report makes a strong case for them. The 2004 report also engages in a spirited defense of retaining the court review component of CDP. But the reasoning underlying the rhetoric has some problems. In particular, I think the analysis contains three weak claims and two contradictions, which together significantly undermine the proposal to retain CDP in its current form, with court review.

The first weak claim is that "182 CDP cases were litigated in the federal courts with decisions published by the courts between June 1, 2003, and May 31, 2004, a nine percent decrease from the 199 cases litigated in the previous 12 months."[37] The problem with that statement is that it confuses "cases litigated" with "decisions published." Those are two vastly different statistics. "Cases litigated" involves the placement of a contest on the docket of a court. Most litigated cases never result in a published opinion. Published decisions are simply the tip of the iceberg of all cases being litigated. The 2004 report demonstrates no correlation between 17 fewer published opinions in her current review period than earlier and the number of CDP cases on court dockets during that same time period. For all we know the actual number of CDP cases on court dockets may have ballooned to twice as many as in the previous year but courts have put them at a lower priority because of the influx of higher priority cases. The statistic of 182 published opinions has little value to support claims about the volume of CDP litigation.

The second weak claim is that "only 1.24 percent of all taxpayers receiving [CDP] notices actually avail themselves of hearings." There are three different problems with that claim. First, it is the wrong statistic. The 2004 Report gets the 1.24 percent figure by dividing the total

---

[36]Prof. Cords's third proposed reform is similarly unhelpful to taxpayers. As I discuss earlier, court review should be *de novo* to be meaningful. Of course, as Prof. Book points out, this cuts against the usual way courts review other agency decisions. Book, *supra* note 1 at 490-491. But that is precisely the point: CDP should not be like other agency reviews because the nature of the decision being reviewed is so very different.

[37]2004 Annual Report at 460. The report evidences the same confusion again by later saying to "only 182 cases are actually litigated in a year." *Id.* at 461.

number of timely CDP hearing requests, as reflected in the statistics kept by the Office of Appeals, with the total number of NFTLs filed and levies issued. The problem is that the IRS routinely issues more than one levy per account and a single taxpayer may have more than one delinquent account. I discussed that issue in great and bloody detail in a prior column, making an educated guess that 6 percent of taxpayers managed to secure CDP hearings.[38] The second problem with the claim is that it draws the wrong conclusion from the statistic. The claim is that only 1.24 percent of taxpayers "actually avail themselves of hearings" but the statistic looks only at *CDP* hearing requests and not *all* hearing requests. Taxpayers who request a CDP hearing even one day late do not get a "CDP hearing" but rather get what the IRS calls "an equivalent hearing." So to make any claim about "hearings" in general we need to know how many equivalent hearings Appeals held. The third problem with the claim is that it assumes that taxpayers who did not "actually avail themselves" of CDP hearings must not have wanted them. That is a surprising assumption because only two pages earlier the 2004 report poignantly describes how difficult it is for taxpayers to respond to the supposed "opportunities" given to them by the IRS and criticizes (rightly so, in my humble opinion) the IRS for designing systems and procedures to limit the ability of IRS employees to "pick up the phone and call taxpayers to discuss their cases." The 2004 report gives us no reason to believe that a CDP notice is an opportunity in any way that is qualitatively different than from other "opportunity" that taxpayers avoid with their "ostrich-like" behavior. Indeed, this second mistaken assumption seems to be the very same assumption that is criticized elsewhere in the 2004 Annual Report.

What troubles me most about the 1.24 percent statistic is that it suggests so few taxpayers use CDP. What the heck good is CDP if only 1.24 percent of taxpayers use it? But whether it is 1.24 percent or 6 percent or 10 percent really does not matter. The 2004 report concludes, in effect, that "those are the only taxpayers who really want to use CDP." I draw a different conclusion. Those numbers tell me that CDP is simply useless for those taxpayers who need it the most: the inarticulate can't-pays. Of course, knowing how many taxpayers who *think* they are getting a CDP hearing end up with the equivalent hearing instead would help us greatly in this analysis, and it is too bad that the 2004 report did not address that question.

The third weak claim is that "CDP appears to be, for the most part, elected by taxpayers that are genuinely trying to resolve their collection problems." So now the 1.24 percent of delinquent taxpayers who have collection issues are all (or "for the most part") saints! It is difficult to tell where that conclusion comes from. Perhaps it refers to the italicized observation on the previous page that "only" 23 percent of those 182 opinions issued by the courts contained frivolous issues raised by the taxpayer. The 2004 report contrasts that percentage to the 2003 report in which 52 percent of the published opinions contained frivolous issues. The claim that a decrease in frivolous arguments found in published cases demonstrates less taxpayer abuse of CDP is extremely weak. The concern is that taxpayers abuse CDP by using it only for delay purposes. The 2004 report shows no correlation between frivolous arguments and the abuse of delay. Taxpayers may well use CDP for delay without raising frivolous tax protestor type arguments.

If we are going to analyze court cases, it would be far more useful to analyze the litigated cases rather than the published opinions. First, how many court petitions contesting CDP hearings did taxpayers *file* in Tax Court or district court during the review period? Second, of cases filed, how many were dismissed with prejudice by the court *without a published opinion* for a failure to state a claim on which relief could be granted or for other reasons? Third, of cases filed, how many were *settled* by counsel? Fourth, of cases filed, how many *went to trial*? Fifth, how do all of those statistics compare to *non-CDP* cases during the same covered period? Sixth, how many IRS employee hours (as measured in full-time equivalents) are spent on these filed cases? That information would better help us answer questions about how much taxpayers use the court review feature of CDP for delay purposes and how costly, at least in employee time, court review is. For example, a taxpayer who seeks to use CDP for delay purposes will be far less likely to settle the matter. So statistics that show a significantly lower settlement rate for CDP cases than for non-CDP cases would be suggestive (but certainly not conclusive) that taxpayers are turning collection due process into collection delay process.

The 2004 report's defense of CDP also contains analysis that seems to conflict with analysis elsewhere in the report. Three examples struck me with particular force, although I could be reading too much between the lines. I'll give the references and invite the reader to judge. First, on page 451 the 2004 report says that CDP is "necessary" and "essential" to protect taxpayer "rights," but then on page 459 it dismisses the lack of CDP at later stages in the collection process, listing the "several protections available for taxpayers in the unfolding collection process" and suggesting that those protections (all of which are traditional inquisitorial process protections) suffice. Nowhere, however, does the 2004 report explain why CDP is so vital for the *first* levy but not for the second or fifth. It instead merely asserts that "in light of these downstream protections, providing a CDP hearing at the beginning of the collection process makes sense. It provides the taxpayer with a formal opportunity to protest the . . . classification and to achieve some type of resolution very early in the tax dispute." But classification is fluid, as the 2004 report recognizes some 200 pages earlier: "[current IRS policy] recognizes that taxpayers move from one category to the next during the life of a tax delinquency, i.e. from a 'will pay' to a 'won't pay'"[39] So if classification is fluid, then one wonders how much real "resolution" this "formal opportunity" provides.

[38]Camp, "The Failure of CDP, Part 2: Why It Adds No Value," *Tax Notes*, Sept. 27, 2004, at 1569 n.10.

[39]2004 Annual Report at 239.

Remember that the limitation of CDP hearings to the "first" levy and NFTL was the compromise reached in the conference committee. The original proposal in the Senate was for taxpayers to have CDP hearings for *each* levy and NFTL. If you are serious about taxpayer rights, that would definitely be the way to do it. But then you might as well just stick to setoff and dunning letters to collect.

The second seeming contradiction regards whether reducing the collection cycle time on a case (that is, how long it takes a delinquent account to move through the three stages of the system) is good or bad. On page 233, the 2004 report critiques the current IRS collection strategy for taking too long before establishing person-to-person contacts. That is, it takes too long to get the delinquent account through the notice stream and ACS over to the CFf where a human starts working the case. But then on page 459 it critiques the IRS for putting too much pressure on ACS to reduce cycle time, which, it says, will tend to cause more classification errors. I like the earlier critique better. Because it is up to the taxpayer to show why the account should move from the default classification of won't-pay over to can't-pay, the sooner the taxpayer can discuss the matter with an IRS employee who has more discretion, the better.

Finally, I am not sure what the 2004 report means on page 460 where it explains how Appeals officers are so much "more helpful and successful in eliciting information from and conversing with the taxpayer than ACS employees." The point here seems to be that the Appeals hearing is a more *effective* opportunity to be heard than is interaction with lower-level employees in ACS or CFf. But the 2004 report does not explain how that effectiveness derives from the availability of court review. It could as well derive from the fact that Appeals officers are more experienced, better trained, and have more discretion than do lower-level employees. That is, the 2004 report's claim is just about Appeals officers in general and not about Appeals officers conducting CDP hearings. So it is not clear why the court review adds any value.

Conclusion

The essential problem with CDP is the snapshot judicial review of the IRS's bulk-processing rules at a relatively early stage in a dynamic collection process. And with that conclusion, dear reader, I shall take a breather from the CDP debate. Instead, I hope to spend my next few columns on such dull and boring topics as the distinction between tax liabilities and tax assessments, what the term "practice before the IRS" means for the ability of the IRS to regulate both the tax bar and return preparers, the power of bankruptcy courts to require the IRS to either consider or even accept OICs in bankruptcy cases, and the proper interplay of the common law mailbox rule and section 7502. In short, I would like to explore some of the particular flora and fauna that inhabit the forest of tax procedure and administration before stepping back to revisit the bigger picture.