A Response to Professor Camp: The Importance of Oversight

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INTRODUCTION

Professor Camp's article[1] is a welcome addition to the growing scholarship addressing tax procedure generally,[2] and issues revolving tax collection in particular.[3] Utilizing the useful paradigm of "can't pay" versus "won't pay" as the critical focal point of the collection process, Professor Camp's article argues that Collection Due Process (CDP) is a failure. The essential insight of Professor Camp's work, both here and in prior articles,[4] is its recognition that of the millions of collection determinations that the Internal Revenue Service (IRS, or "the agency") makes, many are essentially automated and devoid of human oversight. IRS collection efforts focus on separating taxpayers who cannot pay their liabilities due to hardship (what Professor Camp calls the "can't-pays") from those who simply will not fulfill their obligations whatever the reasons (what Professor Camp calls the "won't-pays").[5] In doing so, Camp skillfully places IRS collection actions within the scope of the largely automated tax collection process.[6] He argues that CDP's notice requirements, statutorily created administrative hearing rights, and provisions of judicial review for a broad range of collection determinations are not helpful for taxpayers or tax administration, especially in light of the bulk process that characterizes much of the IRS's task in tax collection.[7]

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* The author is grateful for the tireless and enthusiastic assistance of J. Brian Hudson (J.D. Candidate, 2010, Villanova University School of Law), and the financial support of the Villanova University School of Law.

1. Bryan T. Camp, *The Problem of Adversarial Process in the Administrative State*, 84 IND. L.J. 57 (2008).

2. *See generally* Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429 (2008); Danshera Cords, *Collection Due Process: The Scope and Nature of Judicial Review*, 73 U. CIN. L. REV. 1021 (2005); Diane L. Fahey, *The Tax Court's Jurisdiction Over Due Process Collection Appeals: Is It Constitutional?*, 55 BAYLOR L. REV. 453 (2003); Leandra Lederman, *"Civil"izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS L. REV. 183 (1996).

3. *See generally* 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); Steve R. Johnson, *Why* Craft *Isn't Scary*, 37 REAL PROP. PROB. & TR. J. 439 (2002); Christopher Pietruszkiewicz, *Of Summonses, Required Records and Artificial Entities: Liberating the IRS From Itself*, 73 MISS. L.J. 921 (2004).

4. *See, e.g.*, Bryan T. Camp, *Replacing CDP*, 107 TAX NOTES 1039 (2005); Camp, *supra* note 3; Bryan T. Camp, *The Failure of Collection Due Process, Part 1: The Collection Context*, 104 TAX NOTES 969 (2004); Bryan T. Camp, *The Failure of Collection Due Process, Part 2: Why it Adds No Value*, 104 TAX NOTES 1567 (2004).

5. *See* Camp, *supra* note 1, at 73.

6. *See id.* at 73–77.

7. *See id.* at 89–111.

While much of Professor Camp's argument is persuasive, it comes up short both as a descriptive and as a prescriptive model. Unquestionably, the IRS's collection process borrows heavily from inquisitorial models of agency action,[8] and with the information asymmetry between the IRS and taxpayers themselves,[9] the agency faces heavy obstacles to consider whether delinquent taxpayers fall within the "can't-pay" or "won't-pay" category. But those insights are not sufficient to explain the dynamics of the entire collection process, which is best thought of as involving a range of interests meriting differing levels of procedural protection and personal IRS intervention.

In this brief Response, I situate IRS collection determinations within the broader landscape of administrative law, highlight the principles that administrative law scholars have emphasized in identifying fair agency practice, and apply those principles to the collection context. I conclude that Professor Camp rightfully highlights some of CDP's problems, but misses its benefits, and thus fails in prescribing the repeal of CDP. Yet, Professor Camp's article is a significant achievement for those considering tax collection. Its targeting of CDP's shortfalls highlights some of the problems of the legislative process and allows us to consider how Congress and the IRS can improve collection rights without sacrificing essential efficiency concerns associated with collecting taxes.

THE CONNECTION TO ADMINISTRATIVE LAW

Administrative agencies perform two basic functions: adjudication and rule making.[10] The Administrative Procedure Act (APA)[11] does not clearly distinguish "rule making" and "adjudication" through their respective definitions, though they are intended to have distinct procedural consequences.[12] When performing its adjudicatory role, the IRS is making determinations in "administering a program made up of general rules—statutory, judicial, or administrative"—essentially

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8. *Id.* at 83 ("In implementing [section 6330] . . . the IRS has created an inquisitorial hearing process.").

9. Implicit in Professor Camp's description of IRS efforts to separate the "can't-pays" from the "won't-pays" is recognition of an information asymmetry between the IRS and the taxpayer. *See id.* at 73–74. Professor Camp states that the IRS first places all taxpayers into the "won't-pay" category. *Id.* at 74. "This is because the IRS does not know why a taxpayer has not paid the tax. The taxpayer knows." *Id.*

10. Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 84 (2007).

11. Administrative Procedure Act, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2006)).

12. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of* Overton Park*'s Requirement of Judicial Review "On the Record"*, 10 ADMIN. L.J. AM. U. 179, 184 (1996) ("The APA's differentiation between adjudicative and legislative [rulemaking] action has proved intelligible only by means of reading common sense and constitutional tradition into the statute."). In essence, the rule-making role that administrative agencies play is similar to that played by legislative bodies: they promulgate rules, procedures, and standards applicable to both themselves and to those they regulate. *See* Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 483–87 (2000).

applying rules to individual circumstances.[13] In performing this adjudicatory role, the IRS engages in both formal adjudications—where procedural protections apply—and informal adjudications, where such protections do not.[14] The APA only provides defined procedural protections for formal adjudications.[15] Formal adjudications are those matters for which the agency is required to keep a record. "Informal adjudication" is sort of a catch-all for everything else.[16] This situates IRS collection actions, such as sending notices and the ministerial act of assessing liabilities, as adjudications in administrative law parlance. As Professor Morrison has observed, "Because every agency action, including such mundane matters as granting, or denying, a pass to enter a government building, [or] ordering a carton of toilet paper . . . culminates in an 'order' under the APA, the proceeding leading to it is an adjudication."[17]

Merely placing IRS actions within the landscape of broader administrative law, or even the APA, does not in and of itself provide policymakers with sufficient guidance regarding how much procedural protection should attach to the various stages of the IRS's collection process.[18] Administrative law scholars have expressed misgivings towards the absence of any procedural protections attaching to these informal adjudications. In fact, a recent article by Professor Michael Asimow proposes minimum procedural protections for this range of agency actions.[19]

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13. Koch, *supra* note 12, at 471–72.

14. *See* Morrison, *supra* note 10, at 98.

15. The only section of the APA that at all applies to informal adjudications is "Ancillary Matters." *See* 5 U.S.C. § 555 (2006).

16. *See* Morrison, *supra* note 10, at 98.

17. *Id*.

18. Administrative law scholars have bemoaned how informal adjudications fall within the black hole of administrative law. The APA provides little in the way of guidance as to how an agency should conduct these adjudications, and the Supreme Court, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, declined to judicially impose minimum procedural guidelines for informal agency action. *See* 435 U.S. 519, 548 (1978) ("In short, nothing in the APA, [National Environmental Policy Act of 1969], the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permit[s] the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed the statutory *minima*, a matter about which there is no doubt in this case." (emphasis in original)).

19. *See* Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1004 (2004). Asimow's piece was part of a symposium in the Administrative Law Review on what to do with informal adjudications. *See also* Cooley R. Howarth, Jr., *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043 (2004); Ronald J. Krotoszynski, Jr., *Taming the Tail that Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN L. REV. 1057 (2004). Professor Krotoszynski is skeptical of the *ex ante* effects that judicial review has on agency practice. *Id*. at 1073 ("[E]stablishing a broader, generally applicable set of procedures that would open up virtually all agency decision making to interested persons would probably create more problems than it would solve. A broader, generalized right of participation in all informal

There is significant disagreement among administrative law scholars as to the extent of procedural protections, and the type of actions that generate meaningful procedural protections.[20] The task of considering whether and to what extent agency actions generate protections is made easier by situating the agency's actions within the underlying principles of administrative law. As I have previously discussed, administrative law is defined, in part, by two often-inconsistent principles: efficiency and fidelity to rule of law principles.[21] Concern with efficiency reflects a desire to allow agencies to use their expertise[22] and is highlighted by giving the broadest possible deference to agency decisions and even their possible exclusion from judicial review.[23] On the other hand, there is a longstanding concern that agencies, with too much power and acting outside the possibility of judicial review, can improperly disregard individual interest. This latter concern has prompted deep-seated presumptions in favor of judicial review of particularized agency decisions that affect individuals' property or liberty interests.[24] The presumption of judicial review of agency action is described as:

> An integral part of the American checks and balances system—a powerful deterrent to abuses of power and an effective remedy when abuses occur. By helping maintain public confidence that government officials remain subject to the rule of law, judicial review also bolsters the legitimacy of agency action. . . .

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adjudications would be impractical, unnecessary, and unjustified on cost-benefit grounds.").

20. *See generally* Asimow, *supra* note 19; Howarth, *supra* note 19; Krotoszynski, *supra* note 19.

21. Leslie M. Book, *CDP and Collections: Perceptions and Misperceptions*, 107 TAX NOTES 487 (2005); Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1167 (2004) [hereinafter Book, *CDP Rights*] (discussing the "competing policy concerns" of efficiency and preservation of the rule of law in administrative decision making).

22. *See* Book, *CDP Rights*, *supra* note 21, at 1167; Koch, *supra* note 12, at 473 ("Restrained judicial review protects courts from the burden of actively supervising the mass of individualizing decisions and protects the agencies, which would find it difficult to administer these programs if their individual decisions were frequently subjected to close judicial scrutiny.").

23. *See* Book, *CDP Rights*, *supra* note 21, at 1173–75 (discussing tax litigation's place outside the administrative law mainstream in terms of judicial review of agency action); Koch, *supra* note 12, at 478 ("Whether a particular exercise of individualizing discretion warrants direct judicial involvement is a difficult threshold choice for a court. In deciding to review a specific individualizing decision, courts should not be criticized *as long as they are highly selective in choosing to do so*." (emphasis added)).

24. *See* Koch, *supra* note 12, at 493 ("The threshold question for the court is always whether the agency correctly applied the law. Courts are the final arbiters of questions of law, and hence their review of this threshold question demands that they agree with the legal conclusions of the agency. They can substitute their judgment for a legal conclusion with which they disagree."); Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 501 (2005) ("[W]henever government officials make decisions involving the application of legal standards, the rule of law—and hence the rule of law safeguards of due process and judicial review—attaches.").

> Finally, judicial review can enhance the quality of administrative action by exposing partiality, carelessness, and perverseness in agencies' reasoning.[25]

These principles are helpful guideposts, but calibrating the extent of procedural protections for the broad category of informal agency adjudications remains a challenge to administrative law scholars. In surveying the administrative law landscape where agency adjudications escaped review, Professor Koch urges that there should be a strong preference against unbridled agency discretion and advises that unreviewability should generally be limited to issues of expediency.[26] Professor Camp's arguments revolve around expediency and efficiency. Camp bases his arguments on both the notion that the CDP's protections are at best minimally beneficial to taxpayers and that they cause the IRS to less efficiently manage its millions of delinquent collection accounts.[27] To that end, Professor Camp skillfully describes how CDP allows for determinations in only the loosest sense of the word. These determinations involve little human interaction, and Professor Camp's article sets out nicely how the automated aspects of most of the tax collection process afford little discretion or judgment.[28] He makes a strong case for the futility of interposing judicial review for much of the collection process, especially given the sheer number of collection accounts in an annual period.

Again, considering the IRS as an administrative agency that is part of a broader administrative law landscape is helpful in gauging how much procedural protection should attach throughout the collection process. Professor Koch discusses individualized discretion as a concept surrounding the actions that agencies take when administering a program that is made up of statutory, regulatory, or administrative rules.[29] Professor Verkuil advises that fairness, efficiency, and satisfaction are the hallmarks of a fundamentally fair administrative process,[30] and as Professor Krotoszynski observes, these values should help shape agency practice.[31] While mundane agency decisions—like how high an agency should set its thermometer in agency office buildings[32]—constitute informal agency adjudication in the technical sense, few would worry about setting process rights revolving around this type of agency determination. Professor Camp's arguments borrow heavily from the insights of Judge Friendly, who rightly emphasized the costs associated with imparting judicial review of individualized mass justice systems.[33] Yet the types of agency decisions that warrant greater concern with

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25. Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 742 (1990) (footnotes omitted).

26. *See* Koch, *supra* note 12, at 502 ("[T]here is very little good about unbridled discretion—it is at best a necessary evil brought about by such expediencies as the need to end the process or save resources for more important decisions. Therefore, the law should incorporate a very strong preference against its proliferation. . . .").

27. *See* Camp, *supra* note 1, at 104–05.

28. *See id.* at 68–72.

29. *See* Koch, *supra* note 12, at 471–72.

30. *See* Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279–80 (1978).

31. Krotoszynski, *supra* note 19, at 1071.

32. *See id.* at 1072.

33. *See generally* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267

levels of procedural protections include cases that involve an "individual, concrete, and particularized interest."[34] As Professor Davis emphasizes, judicial review is an appropriate mechanism to keep an individual from being exposed to the "absolutely uncontrolled and arbitrary action of a public and administrative officer."[35]

It is useful to think of agency decisions in general and IRS decisions in particular as locating different places on a spectrum. Decisions that reflect a greater need for fidelity to efficiency and expediency fall on one end of the spectrum and those with a greater need for fairness and satisfaction (the types of decisions that are generally associated with heightened procedural safeguards) fall on the other end.[36] Just where agency decisions fall on this spectrum evolves over time. In addition, individuals' expectations of procedural regularity have increased over the last century.[37] For example, the substantial pre-assessment administrative and judicial review rights that taxpayers now enjoy were not originally part of the income tax system.[38] Moreover, the tax system's increasing emphasis on additional individual rights mirrors society's generalized expectations of additional procedural protections in light of government actions that could affect individuals' property rights.

Professor Camp argues that CDP gives additional procedural rights at a point in time where many individuals do not necessarily raise, or are incapable of raising, particularized individual interests.[39] Pointing to the bulk processing aspect of collection, and the millions of annual collection notices that trigger CDP review, Professor Camp questions how CDP adds value to collection decisions that largely

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(1967).

34. Krotoszynski, *supra* note 19, at 1073; *see also* Levy & Shapiro, *supra* note 24 (urging that judicial review is appropriate in cases concerning government benefits).

35. *See* 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 28:1 (2d ed. 1984) (quoting Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902) (internal quotation marks omitted)).

36. *See* Lawrence Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 264 (2004) ("The satisfaction interpretation of the participation model uses participant satisfaction as the criteria for the evaluation of process."); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 103 (1988) (citing the opportunity for error correction as an essential factor in citizen satisfaction with procedures).

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

38. In 1924, Congress created the Tax Court's predecessor, the Board of Tax Appeals ("Board"). The Board served as an independent agency within the executive branch. The creation of the Board provided an avenue through which taxpayers could seek a redetermination of IRS deficiency assessments. Before the Board was created, a taxpayer could only contest a tax deficiency by paying the deficiency assessed by the IRS and file a refund suit in the Court of Claims or a federal district court. In 1942, Congress changed the Board's name to the Tax Court, though it remained an administrative agency. In 1969, Congress changed the Tax Court's designation to a specialized legislative court under Article I of the Constitution. The Tax Court's primary function is redetermination of tax deficiencies made by the IRS, though Congress has expanded its jurisdiction over the years. For a thorough history of the Tax Court, see generally David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17.

39. *See* Camp, *supra* note 1, at 98.

revolve around the government's legitimate task of ferreting out the "can't-pays" from the "won't-pays."[40]

Yet the argument that CDP is over-inclusive misses the particularized interests that individuals have in the collection process. For example, IRS decisions with respect to collection alternatives raise individual particularized taxpayer interests. As Professor Camp describes, the three main collection alternatives are (1) installment agreements, where the taxpayer pays the liability in full plus interest over time; (2) offers-in-compromise (OICs), where the IRS absolves a taxpayer of a certain portion of the liability and the taxpayer pays back an agreed-upon amount at once or over time; and (3) currently-not-collectible status, where the tax debt remains, but the IRS agrees to hold off collection action.[41] CDP has created a hybrid world for collection alternatives. Generally, IRS determinations about collection alternatives are and have been exempt from meaningful judicial review.[42] CDP changed that in one important respect: if a taxpayer raises a collection alternative in a CDP hearing, the agency determination is subject to abuse of discretion review based upon the record created in the appeals CDP hearing.[43] So, CDP has opened the door, albeit slightly, for judicial review of these determinations—but only if the taxpayer raises the collection alternative in the CDP hearing—and judicial review is generally limited to consideration of whether the IRS abused its discretion based upon the record before it when it made its decision.[44]

One of Professor Camp's main criticisms of judicial review of collection determinations is that the collection process is dynamic; it is dependent upon the taxpayer's ever-changing financial circumstances.[45] But this is not true as a descriptive matter with respect to collection alternatives in general and OICs in particular. The collection process is a static rather than a dynamic event—the IRS is required to consider a taxpayer's request for a collection alternative based upon the taxpayer's facts submitted to the IRS.[46] Consider OICs based upon doubt as to collectability. In those offers, the IRS is authorized to accept an offer to settle an outstanding tax liability, and the IRS generally accepts offers if the taxpayer's offer amount equals or exceeds his reasonable collection potential (RCP).[47] RCP is based

40. "The dynamic nature of the classification decisions and the high-volume, automated nature of the collection process are perhaps the most important reasons why adversarial judicial review adds no value to this branch of tax administration." *Id.* at 101.

41. *Id.* at 65.

42. *See* Book, *CDP Rights*, *supra* note 21, at 1153.

43. When the underlying tax liability is at issue, the IRS's determination will be reviewed *de novo*. However, when the underlying tax liability is not at issue, the Tax Court will review the IRS's determination on an abuse of discretion basis. Goza v. Comm'r, 114 T.C. 176, 181–82 (2000).

44. *Id.* at 181–82.

45. *See* Camp, *supra* note 1, at 102–04.

46. *See* Internal Revenue Serv., Policy Statement P-5-100, *available at* http://www.irs.gov/businesses/small/article/0,,id=111920,00.html (stating that "taxpayers are expected to provide reasonable documentation to verify their ability to pay").

47. *See* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 5.8.1.1.3, *available at* http://www.irs.gov/irm/ [hereinafter INTERNAL REVENUE MANUAL]; 26 C.F.R. § 601.203 (2008).

upon a consideration of equity in assets and a monetized present value of the excess of the taxpayer's income over necessary expenses.[48] The IRS evaluates these offers based upon a snapshot of the taxpayer's financial condition. To take into account a possible future change in circumstances, the IRS is authorized to enter into collateral agreements that can result in future payments to the IRS.[49] Absent a collateral agreement, and assuming the taxpayer remains in compliance for a period after the offer's acceptance,[50] the taxpayer's future circumstances are irrelevant with respect to the offer.[51]

While a taxpayer may submit future requests for collection alternatives if an initial request is denied or not processed,[52] that future right does not alter the nature of the IRS's function with respect to the initial consideration. Over time, Congress has expressed a strong interest in formalizing the offer process and has effectively required the IRS to apply its detailed standards to the taxpayer's facts and circumstances.[53] To fit consideration of offers into his bulk processing model, Professor Camp minimizes the individual application of standards to taxpayers' circumstances in offers.[54] While the IRS has promulgated standards and caps to help the IRS (and taxpayers) compute collection potential—with the exception of an allowance for expenses associated with food, clothing, and some miscellaneous items—some of the expenses must be tied to actual expenditures.[55] Moreover,

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48. *See* INTERNAL REVENUE MANUAL, *supra* note 47, § 5.8.5.

49. *See id.* § 5.8.6.1. "A collateral agreement enables the government to collect funds in addition to the amount actually secured by the offer or to add additional terms not included in the standard Form 656 agreement, thereby recouping part or all of the difference between the amount of the offer or additional terms of the offer and the liability compromised." *Id.*

50. A taxpayer who has had an OIC accepted must remain in compliance with federal tax filing and payment requirements for five years or the duration of the OIC, whichever is longer. INTERNAL REVENUE MANUAL, *supra* note 47, § 5.19.7.3.26.5(1).

51. This works to the advantage of some taxpayers, who may have improved their financial circumstances following either submission or acceptance of the offer, but in other situations, works to the IRS's advantage, as in some situations the taxpayer's RCP declines.

52. Closing Agreements and Compromises, 26 C.F.R. § 301.7122-1(g)(2) (2008).

53. *See* I.R.C. § 7122 (2006) (requiring the Secretary to develop procedures for processing OICs).

54. *See* Camp, *supra* note 1, at 60–61 (characterizing evaluation criteria for OICs as "aggregate" or "bulk" as opposed to individualized).

55. "Taxpayers are allowed the total National Standards amount monthly for their family size, without questioning the amounts they actually spend. If the amount claimed is more than the total allowed by the National Standards, the taxpayer must provide documentation to substantiate those expenses are necessary living expenses. Generally, the total number of persons allowed for National Standards should be the same as those allowed as exemptions on the taxpayer's most recent year income tax return." Internal Revenue Serv., National Standards: Food, Clothing and Other Items, http://www.irs.gov/businesses/small/article/0,,id=104627,00.html. The IRS also allows taxpayers a minimum amount of health care expenses regardless of actual expenses, but allowable transportation and housing expenses are based on actual expenditures, which must be documented and are subject to limitations based on family size and location. *See* Internal Revenue Serv., Collection Financial Standards, http://www.irs.gov/individuals/article/0,,id=96543,00.html.

Congress emphasized the individualized nature of offer determinations,[56] and in the IRS Restructuring and Reform Act of 1998 (RRA), Congress formalized some of the rules with respect to offers.[57] In addition, Congress provided that the IRS is not allowed to reject an offer from a low-income taxpayer just because the offer amount is low.[58] The IRS and the Treasury later expanded upon this statutory right, providing that this no-minimum-offer rule applies to all taxpayers—not just low-income taxpayers.[59]

Of course, the IRS is free to administer programs like collection alternatives in a manner that it deems appropriate. In fact, following RRA, the IRS has taken many steps to make the offer process more efficient, including creating a centralized review process for offers and removing most offer requests from field consideration.[60] These steps are reflective of the agency's deep-seated concern for efficiency and expediency when it comes to actions, a concern with even greater pedigree when it comes to tax collection.

This statutory requirement that the IRS not reject offers solely based on the amount of the offer reflects congressional concern that prior to RRA, the IRS was not considering the individual merits of particular offers.[61] This is an explicit rejection of the broad nondiscretionary approach to tax collection that Professor Camp describes. It is not that Professor Camp's description is wrong; it is just incomplete. While much of the collection process does not rely in any way on individualized determinations, by their definition, collection alternatives—OICs in particular—require that the IRS consider the circumstances of the taxpayer submitting the requests for alternatives to enforced collection and apply standards to those individualized circumstances.[62] It is, of course, possible for either

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56. S. REP. NO. 105-174, at 89 (1998) ("The IRS will also be required to consider the facts and circumstances of a particular taxpayer's case in determining whether the national and local schedules are adequate for that particular taxpayer. If the facts indicate that use of scheduled allowances would be inadequate under the circumstances, the taxpayer would not be limited by the national or local allowances.").

57. *See* Internal Revenue Service Restructuring and Reform Act of 1998, § 3462, Pub. L. No. 105-206, 112 Stat. 685, 764–67 (1998).

58. *See* S. REP. NO. 105-174, at 358–59. This latter change reflects congressional desire to consider the individualized circumstances of offers. This change also highlights the need for individualized determinations that reflect agency creation of applicable standards and agency application of those standards to individuals in a manner inconsistent with the bulk processing nature of the collection stream that Professor Camp describes.

59. Treas. Reg. § 301.7122-1(f)(3) (2002).

60. *See* GOV'T ACCOUNTABILITY OFFICE, IRS OFFERS IN COMPROMISE: PERFORMANCE HAS BEEN MIXED; BETTER MANAGEMENT INFORMATION AND SIMPLIFICATION COULD IMPROVE THE PROGRAM 7 (2006) (describing the centralization of OIC review). *But see* 1 NAT'L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS § 1, 374–81 (2007) (arguing that the new OIC rules may actually be making it harder for taxpayers to submit OICs), *available at* http://www.irs.gov/advocate/article/0,,id=177301,00.html.

61. *See* S. REP. NO. 105-174, at 358–59 (discussing the desire for the IRS to be flexible in dealing with taxpayers who are trying to meet their obligations and requiring the IRS to take into account the taxpayer's facts and circumstances when deciding whether to accept an OIC).

62. Closing Agreements and Compromises, 26 C.F.R. § 301.7122-1(c)(1) ("The

Congress to legislate or the IRS to administer the law to remove discretion from the consideration—in fact, both have done so when it comes to certain installment agreement requests, where taxpayers in effect have an automatic right to agree to pay those agreements in certain defined circumstances.[63]

Now, as might be expected in a program that may cost the agency significant resources, and where future benefits of agreeing not to take enforced collection may be difficult to gauge, the IRS has done its best to follow RRA and to centralize offer submissions and considerations in an effort to limit the costs associated with agency discretion. At the same time, the IRS has promulgated extensive guidance to assist both itself and taxpayers with respect to the process of submitting offers and the fairly complex task of determining a taxpayer's collection potential.[64]

Professor Camp implicitly acknowledges the difference between the IRS's considerations of alternatives to enforced collection from the rest of the collection process. He notes that even where the IRS does have to make individualized determinations, its incentives are toward reaching correct decisions. Professor Camp describes how incentives, absent CDP, provide more than sufficient means of checking potential IRS abuses and errors:

> On the one hand, if the definition of can't-pay is too narrow, then the IRS pursues taxpayers who truly cannot pay. Not only does that waste resources but it also makes the IRS look hard and mean, thereby undermining confidence in government and leaving the citizenry—and ultimately democracy—vulnerable to charlatans and demagogues. On the other hand, if the definition is too broad, the IRS looks like a chump, and those who have paid their taxes wonder why the hammer never falls on similarly situated taxpayers who shirked their responsibility. Error in either direction weakens voluntary compliance, which depends in no small measure on perception.[65]

Yet individualized IRS determinations about these collection alternatives constitute confidential tax return information.[66] These determinations are not subject to disclosure and are therefore generally not made available to other taxpayers. It is difficult to see how the public genuinely becomes aware of IRS decisions, aside from generalized perception of the IRS's performance.

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determination whether to accept or reject an offer to compromise will be based upon consideration of all the facts and circumstances . . . .").

63. For tax liabilities under $10,000, the IRS will automatically accept an installment agreement. *See* INTERNAL REVENUE MANUAL, *supra* note 47, § 5.14.1.2(4). The IRS is also required to accept installment agreements from taxpayers if they are unable to pay their tax liabilities in full, their agreements will result in full payment within three years, and they have not entered into another installment agreement or failed to file tax returns or pay taxes on those returns in the last five years. *See* I.R.C. § 6159(c) (2000 & Supp. V 2005).

64. In addition to OICs based on doubt as to collectability, the IRS is authorized to accept OICs based on effective tax administration and doubt as to liability. *See* I.R.C. § 7122 (2000) (granting authority to set procedures to accept OICs); Treas. Reg. § 301.7122-1 (2002) (outlining procedures).

65. Camp, *supra* note 1, at 76–77 (footnote omitted).

66. INTERNAL REVENUE MANUAL, *supra* note 47, § 5.8.8.6. Accepted OICs are subject to public inspection under sections 7122(b) and 6103(k)(1). While they are open to public inspection, they are not subject to public comment like rules and regulations are. They are available only in redacted form, for a limited time period, and in a single location. *See id.*

Professor Camp also states that limited review tied to the record "undermines the promise of CDP."[67] Yet a consideration of some of the recent cases the court has remanded to the IRS—determinations with respect to collection alternatives—highlights the important safety valve that CDP's judicial review can play.[68] In addition, it demonstrates how CDP's limited review has served its intended oversight function of limited aspects of the collection process, and corrected for egregious agency error. It also allowed the court to highlight errors in the IRS's consideration of collection alternatives that might have a broader impact than the taxpayer whose case is on appeal. While Professor Camp discounts record review as being second best to *de novo* review,[69] administrative law scholars have long pointed to the benefits of this limited review when it is important to give the agency broad deference, but not afford the agency unbridled and absolute discretion.[70] That taxpayers themselves control most of the information relating to their ability to pay an assessed liability tempers Professor Camp's criticism that record review is inadequate. It also belies the potential for facilitating confidence in the tax system by ensuring that government agents "remain subject to the rule of law."[71]

Professor Camp highlights the overwhelming percentage of cases which the courts have sustained IRS collection determinations. Apart from the fact that most agency determinations under an abuse of discretion review are likely to be sustained,[72] there is a growing number of important CDP cases in which courts

67. Camp, *supra* note 1, at 92.

68. *See* Dailey v. Comm'r, 95 T.C.M. (CCH) 1582 (2008) (incomplete consideration of an OIC); Perkins v. Comm'r, 95 T.C.M. (CCH) 1396 (2008) (erroneous interpretation of applicable law); Samuel v. Comm'r, 94 T.C.M. (CCH) 392 (2007) (incorrect guidance given to taxpayer for amended OIC); Sampson v. Comm'r, T.C. Summ. Op. 2006-75 (2006) (incorrect standard when calculating a taxpayer's earning potential). Each of these cases highlights the importance of CDP in a different way. *Sampson*'s application of an incorrect standard helps illustrate the point that unchecked internal review can fail to properly identify diversions from the IRS's own guidelines—in this case the IRM. *Dailey* shows how external review protects taxpayers from incomplete consideration of their situation, and requires IRS officers to conduct a complete and thorough review of the appropriate factors. Similarly, *Samuel* identifies factors that must be taken into account when advising a taxpayer on their course of action. *Perkins*, though, is probably the best illustration of CDP's effectiveness. In this case, the court was able to tackle the issue of mistaken interpretation of law—an issue typically reviewed *de novo*. *Perkins* is also a terrific example of how external review should be conducted. The court took over the legal question involved (statutory interpretation), but left to the IRS the responsibility of applying that legal determination to a particular set of facts, actually going out of its way not to step on the toes of the IRS by making its own factual determination.

69. *See* Camp, *supra* note 1, at 89–97.

70. *See* DAVIS, *supra* note 35, at § 12:13 (indicating that *de novo* review provides little opportunity for judicial pressure on the IRS to conform to procedural requirements); Koch, *supra* note 12, at 491–95 (explaining the benefits of limited review for different types of discretion that the agency practices).

71. Levin, *supra* note 25, at 742.

72. *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 689 (2002) (hypothesizing an eighty-five to ninety percent affirmation rate for cases reviewed under an "arbitrary and capricious" standard).

have found problems with the collection process.[73] Prior to CDP, these cases would never have been before the courts. Consider the case of *Oman v. Commissioner*.[74] *Oman* involved a one-time business executive who, for a number of years, filed tax returns with significant unpaid balances.[75] By 2004, his outstanding tax liabilities approached $170,000.[76] After completing rehabilitation to overcome substance abuse addiction, Oman, while unemployed, living with friends, and relying on gifts from family, submitted a $1000 offer based upon doubt as to collectibility.[77] The collection information sheet that accompanied his offer indicated that he had no assets and a negative monthly cash flow; thus the $1000 offer exceeded his RCP.[78]

The IRS acknowledged that Oman's RCP was zero, but rejected Oman's offer because of his "egregious history of past non-compliance" and a belief that, due to "current finances," it did not think he would remain in compliance during the offer's terms.[79] Prior to its initial rejection of the offer, the IRS filed a Notice of Federal Tax Lien and issued a corresponding right to a CDP hearing.[80] Oman submitted a request for a due process hearing and was able to use the hearing as a forum to challenge the IRS's initial rejection of the offer.[81] At the hearing, the Appeals Office sustained the offer's rejection. In its determination, the Office cited section 5.8.7.6(5) of the *Internal Revenue Manual* (IRM) and held that due to Oman's "egregious history of noncompliance it is in the best interest of the government not to accept [his] offer to compromise."[82]

The Tax Court appropriately reviewed the Appeals Office's rejection on a deferential basis, noting that it does not conduct an independent review of what would be an acceptable offer, but gives deference to the Commissioner's discretion and decides whether the rejection was arbitrary, capricious, or without sound basis in law.[83] Thus, *Oman* presented the issue as to whether and on what basis the IRS can reject offers that exceed the taxpayer's RCP.

The *Oman* court examined the IRM to clarify when it might be in the government's interest to reject an offer that exceeded what the government could reasonably expect to collect.[84] It looked to the IRS's own policy statement on offers, IRS policy statement P-5-100 ("Policy Statement"), which provides that the goals of the offer program are (1) collecting what can fairly and reasonably be collected from taxpayers who cannot fully pay a delinquent liability, (2) collecting tax in a timely and cost-effective manner, and (3) providing an opportunity for

73. *See supra* note 68.

74. 92 T.C.M. (CCH) 372 (2006).

75. There were eight years that gave rise to the liability. For the earliest year, Oman failed to file an original tax return; in four years, he did not timely file and also did not submit sufficient payment; in the final three years, Oman filed timely but did not remit payment of the balances due. *Id*. at 373.

76. *Id*.

77. *Id*.

78. *Id*.

79. *Id*.

80. *Id*. at 372.

81. *Id*.

82. *Id*.

83. *Id*. at 374.

84. *Id*.

taxpayers to earn a fresh start toward future payment and filing obligations.[85] The Policy Statement also states that the "ultimate goal is a compromise which is in the best interest of both the taxpayer and the Service."[86]

Section 5.8.7.6(6) of the IRM provides that there may be instances where an offer rejection may also be based on a determination that accepting the offer at hand is not in the "best interest of the government" per policy statement P-5-100.[87] The IRM provides that these rejections "should not be routine," should be "fully supported by the facts outlined in the rejection narrative," and should be subject to additional managerial review.[88] The IRM provides examples of situations that may warrant rejection as not being in the "best interest of the government," such as when "[r]ecent compliance satisfies offer processability criteria; however, the taxpayer has an egregious history of past noncompliance and our analysis of his current finances reveals that it will be highly unlikely the taxpayer will be able to remain in compliance during the offer period."[89] Thus, while the IRS's Policy Statement focuses on collecting efficiently what a taxpayer can reasonably be expected to pay and the benefits of providing a fresh start, the IRM suggests that past egregious noncompliance and the likelihood of future noncompliance can create a situation where the IRS may reject an offer in excess of RCP.

Oman concluded that these two provisions were inconsistent, noting that the Policy Statement offered nothing that suggested past compliance or the likelihood of future compliance should affect the agency's evaluation of an offer:

> IRM sec. 5.8.7.6[(6)] and policy statement P-5-100, as applied in this case, appear to be inconsistent regarding the "best interest of the government." IRM sec. 5.8.7.6[(6)] pertains to rejecting offers if they are "not in the 'best interest of the government,' per policy statement P-5-100," while policy statement P-5-100 describes the dollar amount of offers which are in the "best interest" of the government and encourages such compromises. The "goal" of the offer-in-compromise program, according to policy statement P-5-100, is to collect what is potentially collectible as early as possible, and the "ultimate goal" is to find a compromise that is in the "best interest of both the taxpayer and the Service." Policy statement P-5-100 does not mention "egregious past non-compliance". It instead mentions "creating for the taxpayer an expectation of a fresh start toward future compliance." According to policy statement P-5-100, it appears

85. *Id*. at 374–75.

86. Internal Revenue Serv., Policy Statement P-5-100, *available at* http://www.irs.gov/businesses/small/article/0,,id=111920,00.html. The Policy Statement also provides guidance on the process of offer, noting that "in cases where an offer in compromise appears to be a viable solution to a tax delinquency, the Service employee assigned the case will discuss the compromise alternative with the taxpayer and, when necessary, assist in preparing the required forms. The taxpayer will be responsible for initiating the first specific proposal for compromise. . . . Taxpayers are expected to provide reasonable documentation to verify their ability to pay." *Id*. This guidance reflects a sense that the IRS should both facilitate and assist in the offer process, while recognizing the taxpayer's responsibility for making an initial offer and providing to the IRS information sufficient to make a determination. *Oman*, 92 T.C.M. (CCH) at 374.

87. INTERNAL REVENUE MANUAL, *supra* note 47, § 5.8.7.6(6).

88. *Oman*, 92 T.C.M. (CCH) at 374.

89. *Id*.

> the "best interest of the government" is a compromise that is also in the best interest of the taxpayer and which collects the potentially collectible amount, or more, at the earliest possible time.[90]

In light of the above, the *Oman* court found it difficult to justify the IRS's rejection of the offer, noting (1) that the IRS "determined that petitioner's reasonable collection potential was zero"; (2) that acceptance of the $1000 offer was in the IRS's and the taxpayer's "best interest" under the Policy Statement; and (3) that acceptance permitted the IRS to collect more than it could otherwise collect and allow "a fresh start toward future compliance."[91]

Oman illustrates the possible problems with the IRS's collection system and, how absent CDP, those problems can lead to arbitrary determinations for taxpayers. There is something deeply dissatisfying about the IRS's approach in *Oman* specifically, and in the guidelines that allowed the IRS to reject the offer generally. On the one hand, there are a number of reasons why the IRS might have found it difficult to accept Oman's offer. First, the offer itself was low relative to the amount of tax that was unpaid. The $1000 offer reflected a small percentage of the unpaid tax. That, however, as described above, is an insufficient basis to reject an offer.[92]

The IRS, in the IRM and in *Oman*, explicitly considers the circumstances of that past conduct and evaluates whether those circumstances warrant an exception to the general rule that the IRS should accept doubt as to collectability offers when the offer equals or exceeds RCP. Yet, there is little guidance for the IRS on this very point. The regulations are silent, and while IRM provides a few examples, it does not discuss the underlying principles that should guide the IRS. In *Oman*, it is not clear exactly what the IRS found egregious about the taxpayer's history. Perhaps it was the combination of his relatively high income with many years of making barely any tax payments. It could also have been what he apparently was doing with Uncle Sam's money, as the opinion notes that during the years where he failed to pay taxes he had substance abuse problems. In addition, it could have been that

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90. *Id.* The interplay between P-5-100 and IRM § 5.8.7.6(5) is also illustrated by *Bennett v. Commissioner*, T.C. Memo 2008-251. In *Bennett*, based on doubt as to collectability, the taxpayer submitted an offer of approximately $15,000 to settle a $100,000 tax debt, an amount that exceeded her collection potential. *Id.* The IRS rejected the offer and attempted to classify her as currently not collectible. *Id.* While finding that the offer exceeded the collection potential, the Tax Court sustained the rejection, noting that *Oman* did not resolve the possible conflict between the manual provisions. *Id. Bennett* emphasized that at a minimum, the IRS had to express its reasoning for rejecting an offer based on a best interests of the government rationale if an offer exceeds reasonable collection potential. *Id.* In *Bennett*, in connection with the consideration of the offer, there was evidence that the taxpayer's evidence for her expenses were "unverifiable or somehow improper," and there was an open question as to whether her future income was likely to increase. *Id.* The minimal requirement that the IRS explain the basis and reasoning underpinning of a rejection where an offer exceeds collection potential is consistent with the rule of law principles, which I argue should be part of the IRS administration of its offer in compromise program. *Id.*

91. *Oman*, 92 T.C.M. (CCH) at 375.

92. *See supra* note 57 and accompanying text.

the liabilities related to underpayments or nonpayments, and were not liabilities that arose on examination.[93]

Concepts of “best interests of the government” or “contrary to public policy” are too vague to allow a reviewing court the opportunity to determine if the IRS abused its discretion. In *Oman*, the IRS in effect operated as if its discretion were absolute, and that its decision need not be rationally explained or tied to the principles that provide meaningful guidance to its employees. *Oman* can thus be thought of as the Tax Court’s proper entry into this issue, with a firm reminder that OICs, at least when challenged in the context of CDP, are subject to basic rule of law principles. The IRS cannot reject offers because they flunk a smell test or because the taxpayer has red hair or because of some secret IRS policy that encourages rejection of low offers. *Oman* lays down the marker that the IRS must clarify, in either its manual or in its regulations, what principles underlie rejecting offers that exceed RCP, and in particular determinations, the Appeals Office must explain specifically how the taxpayers’ circumstances warrant that determination.[94] It illustrates precisely why Congress thought collection determinations may need the benefit of judicial oversight, and fits squarely within the concerns that a number of administrative law scholars have suggested as providing a strong presumption against unbridled agency discretion.[95]

While Professor Camp rightly points out that the overwhelming number of CDP cases result in affirmations of IRS collection actions, there are a number of recent cases, in addition to *Oman*, involving remands where the IRS failed to apply proper legal standards.[96] Administrative law scholars have emphasized that limited record review results in comparatively few cases of court reversal of agency action.[97] Yet, absent CDP, there is no realistic opportunity for taxpayers to ensure scrutiny of IRS collection actions.

Professor Camp states that this limited judicial review is “horrid” and points to some examples where courts have been hamstrung by inadequate records. He also notes the relatively few times where courts have meaningfully disagreed with agency determinations.[98] To the contrary, record review is precisely the appropriate level of review when one wants to give broad deference to agency expertise. There is a strong government interest in executive agency discretion, but there is also a strong need for a means to check the agency’s absolute discretion to temper for systemic failures or egregious errors.[99] The promise of oversight from parties other than courts provides only limited means for ensuring that IRS collection actions involve correct applications or expressions of legal principles.

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93. There is less generous opportunity for relief from joint and several liability when the liability is self-reported. *See* I.R.C. § 6015 (2000).

94. *See generally Oman*, 92 T.C.M. (CCH) 372; *Bennett*, T.C. Memo 2008-251.

95. *See supra* note 19 and accompanying text.

96. *See supra* note 68 (listing recent cases).

97. *See* Verkuil, *supra* note 72, at 689 (hypothesizing an eighty-five to ninety percent affirmation rate for cases reviewed under an “arbitrary and capricious” standard).

98. *See* Camp, *supra* note 1 at 94–97.

99. *See supra* notes 21–23 and accompanying text.

The fact that other mechanisms exist to provide oversight[100] does not suggest that judicial review is inappropriate. Government bodies such as the Treasury Inspector General for Tax Administration, the Government Accountability Office, and the Taxpayer Advocate Service are helpful mechanisms to facilitate proper agency conduct. Those executive agency checks, however, are not a substitute for independent judicial review, as judicial expertise plays a different and invaluable role.[101]

Professor Camp notes that Congress might provide for individualized causes of action with respect to IRS rejections of collection alternatives.[102] The number of collection alternative requests that the IRS rejects is likely considerably lower than the number of collection actions that currently gives rise to CDP rights. Providing that these individualized causes of action warrant further consideration, in the past, Congress has provided circumstances where the IRS is required to accept certain collection alternatives. In fact, the IRS has broadened the circumstances where it will grant that relief.[103] The IRS's broadened circumstances approach also could limit the potential agency and court resources and correct for the oddity that only adverse collection determinations within current CDP generate possible judicial review.

CONCLUSION

Professor Camp is one of a handful of scholars meaningfully considering the appropriate role that the IRS, courts, and Congress should play in the collection process. His article highlights a number of CDP's problems. This Response is not intended to belittle these problems, nor offer the view that CDP is perfect. Professor Camp's descriptive and prescriptive approaches, however, are incomplete. They miss the essential backstops that interjecting additional procedural protections in the collection process provide. Despite its shortfalls, Professor Camp's article is a significant achievement that helps situate the discussion regarding the appropriate roles that the branches of the United States government should play in the crucial task of collecting the revenues that are our nation's lifeblood.

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100. Camp, *supra* note 1, at 126–27.

101. *See* Koch, *supra* note 12, at 473.

102. Professor Camp states that a narrowly tailored cause of action where a taxpayer can challenge the rejection of a collection alternative would "at least put an individualized decision in front of a court . . . ." Camp, *supra* note 1, at 102 n.225.

103. In 1998, Congress provided that if taxpayers meet certain conditions, they are entitled to guaranteed installment agreements. *See* I.R.C. § 6159(c) (2006); INTERNAL REVENUE MANUAL, *supra* note 47, § 4.20.4.4.