

HOW MUCH PROCESS IS DUE? I.R.C. SECTIONS 6320 AND 6330 COLLECTION DUE PROCESS HEARINGS

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“the power to tax involves the power to destroy”¹

INTRODUCTION

The historically broad powers given to the Internal Revenue Service² to enforce the tax laws and collect unpaid tax liabilities³ were significantly limited by the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998).⁴ The tone of the 1997 and 1998 Senate Finance Committee hearings preceding enactment of RRA 1998 reflected some constituencies’ extreme dissatisfaction with the functioning of the IRS.⁵

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1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

2. Throughout this article, the terms “Internal Revenue Service,” “IRS,” and “the Service” are used interchangeably.

3. Diane L. Fahey, *The Tax Court’s Jurisdiction Over Due Process Collection Appeals: Is It Constitutional?*, 55 BAYLOR L. REV. 453, 457–58 (2003); Marilyn E. Phelan, *A Summary of the Extensive Collection Powers of the Internal Revenue Service*, 9 VA. TAX REV. 405, 406–07 (1990); see also Leslie Book, *The Collection Due Process Rights: A Misstep or Step in the Right Direction?*, 41 HOUS. L. REV. (forthcoming 2004) (manuscript at 13, on file with author) [hereinafter Book, *A Misstep or Step in the Right Direction?*] (arguing that the discretion and importance placed on the government’s interest often does not adequately consider individual taxpayers’ rights and interests).

4. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (codified as amended in scattered sections of 26 U.S.C.).

5. *Practices and Procedures of the Internal Revenue Service: Hearings Before the Senate Committee on Finance*, 105th Cong., 1st Sess. 1–357 (1997). These hearings were convened on September 23, 24, and 25, 1997. Hearings on “IRS Restructuring” were held on January 28 and 29 and February 5, 11, and 25, 1998. *IRS Restructuring: Hearings Before the Senate Committee on Finance*, 105th Cong. 1 (1998). Hearings on “IRS Oversight” were held on April 28, 29, 30 and May 1, 1998. *IRS Oversight: Hearings Before the Senate Committee on Finance*, 105th Cong. 1 (1998); see also DAVID CAY JOHNSTON, *PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE* 14 (2003) (describing the “dramatic” hearings in which Congress “went after the IRS”); WILLIAM V. ROTH, JR. & WILLIAM H. NIXON, *THE POWER TO DESTROY* 225 (1999) (stating that these hearings sparked the interest not only of the Finance Committee but of “Americans everywhere”); Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 9–10 (describing the political process that gave rise to CDP); Leslie Book, *The New Collection Due Process Taxpayer Rights*, 86 TAX NOTES 1127, 1127 (2000) (stating that the hearings on IRS “abuses made great theater”); 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, 78–86 (2004) (discussing the Senate Finance Committee hearings that led to the enactment of the IRS Restructuring and Reform Act).

These hearings and the inflammatory testimony detailing the alleged abuses of the IRS in its collections activities⁶ led to reform of the IRS and its practices, including the creation of a taxpayer's right to a collection due process hearing (CDP hearing) prior to enforced collection. (Much of the testimony presented at the hearings has since been either disputed or entirely discredited.⁷)

As a result of these hearings, Congress enacted the Internal Revenue Service Restructuring and Reform Act of 1998. One observer noted that the hearings "were 'conducted in a bit of a circus atmosphere,' represented 'good political showmanship,' and made all the 'newspapers, talk shows, [and] the nightly news.'" Joe Spellman, *Conference Panel Ponders Finance Hearing Horror Stories*, 83 TAX NOTES 1854 (1999) (quoting Cono R. Namorato of Caplin & Drysdale in Washington, D.C.); see also Camp, *supra*, at 81 (describing the hearings as "high political theater").

6. The hearings included testimony from a priest, divorced mothers, a Virginia Beach restaurateur, and former IRS employees, and included detailed descriptions of numerous (alleged) abusive acts the IRS committed collecting unpaid taxes. See *Practices and Procedures of the Internal Revenue Service*, *supra* note 5 (containing the statements of these people). The inflammatory nature of the testimony led to widespread calls to limit the powers of the IRS.

IRS Commissioner Charles O. Rossotti admitted the need for some changes in the way the IRS operated. *IRS Restructuring: Hearings Before the Senate Comm. on Finance*, 105th Cong. 20 (1998) (statement of Charles O. Rossotti, IRS Commissioner). Rossotti's remarks included:

[T]he enactment of the restructuring legislation is crucial to the whole concept that I am about to outline. . . .

. . . .
 . . . [T]he IRS must shift its focus from simply its own internal operations to thinking about how it can do its job from the taxpayers' point of view.

. . . .
 . . . [A] fundamental problem remains, which is that this structure is just too complex and . . . really makes accountability quite weak and very difficult to achieve, despite the best efforts of people to achieve it.

Id. at 20–24.

7. The Webster Commission, headed by Judge William Webster, former director of both the CIA and FBI, was charged with independently investigating allegations made against the IRS's Criminal Investigation Division. The Webster Commission's report concluded that, although there were isolated abuses, there was not a pattern of misuse of authority by the Criminal Investigation Division. CRIMINAL INVESTIGATION DIV. REVIEW TASK FORCE, INTERNAL REVENUE SERV., REVIEW OF THE INTERNAL REVENUE SERVICE'S CRIMINAL INVESTIGATION DIVISION (1999).

The alleged abuses were also investigated by the General Accounting Office (GAO). See GEN. ACCOUNTING OFFICE, TAX ADMINISTRATION: INVESTIGATION OF ALLEGATIONS OF TAXPAYER ABUSE AND EMPLOYEE MISCONDUCT RAISED AT SENATE FINANCE COMMITTEE'S IRS OVERSIGHT HEARINGS, *reprinted in* 2000 TAX NOTES TODAY 80–13 (April 25, 2000) (document dated May 24, 1999, provided in redacted form to Tax Analysts pursuant to a Freedom of Information Act request) (concluding that there was no evidence to support the allegations that tax assessments were improperly handled or that criminal investigations were undertaken for retaliatory purposes).

John Colaprete, owner of the Jewish Mother restaurants, "told the Finance Committee that IRS agents and other law enforcement personnel forced children to the floor at gunpoint, leered at scantily clad teenage girls, and generally violated his Fourth Amendment rights against illegal search and seizure, all on the word of his felonious bookkeeper." Ryan J. Donmoyer, *Judge May Dismiss Jewish Mother Lawsuit*, 83 TAX NOTES 1696, 1696 (1999). Mr. Colaprete testified before the Finance Committee that, while attending his son's first Holy Communion, "[a]rmed agents, accompanied by drug-sniffing dogs, stormed my restaurants during breakfast, ordered patrons out of the restaurant, and

RRA 1998 restructured the IRS and resulted in significant reforms to the tax collection system.⁸ RRA 1998 created the third Taxpayer Bill of Rights.⁹ Among the “rights” RRA 1998 created is the right to a “collection due process hearing.”¹⁰ This is a new and potentially powerful post-assessment and pre-collection right for taxpayers. Although some conclude that these rights create unwarranted delay, others have concluded that “the Collection Due Process . . . hearing was one of RRA 98’s more significant improvements to IRS collection procedures.”¹¹

Part I of this article discusses enforced tax collection generally and then examines the statutory requirements and legislative history of the collection due process provisions.¹² This section also considers the approach that is currently used to conduct CDP hearings and explores current judicial and administrative interpretation of the CDP provisions.¹³

Part II proposes a model for the conduct of CDP hearings. The proposed model would require direct communication during the hearing, establish procedures to be used during the hearing, and establish explicit remedies for frivolous claims raised by taxpayers and inadequate CDP hearing rights afforded by the IRS.

Part III demonstrates how the proposed model will further the congressional intent of the CDP provisions. This section also explores the potential consequences of real or perceived unfairness in the methods used

began interrogating my employees.” *IRS Oversight: Hearings Before the Senate Comm. on Finance*, 105th Cong. 75–79 (1998); ROTH & NIXON, *supra* note 5, at 189. “Colaprete ‘has recanted all this—he happened to be out of the country’ when this was said to have occurred.” Spellman, *supra* note 5, at 1854.

8. There is significant data that suggests that enforcement and collections have dropped in the post-RRA 1998 era. Fewer liens are issued and fewer levies are taken. Some have suggested that the IRS, with its new mission statement and limitations, does not work. Comments of Chris Bergin at ABA Tax Section Meeting, Teaching Taxation Committee, May 2003.

9. In total, as a result of the three taxpayer bills of rights, over 130 “rights” have been created. The repeated enactments of “Bills of Rights” raise questions as to their effectiveness. Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy*, 87 TAX NOTES 1133, 1135–36 (2000); see also Leandra Lederman, *Taxpayer Rights in the Lurch: A Response to Professor Johnson*, 88 TAX NOTES 1041 (2000) (discussing the ineffectiveness of “rights” without remedies).

10. RRA 1998 § 3401 (codified at I.R.C. §§ 6320, 6330).

11. TAXPAYER ADVOCATE SERV., INTERNAL REVENUE SERV., THE NATIONAL TAXPAYER ADVOCATE’S FISCAL YEAR 2004 OBJECTIVES REPORT TO CONGRESS 12 (2003).

12. I.R.C. §§ 6320, 6330 (West 2004) [hereinafter, collectively, the CDP Provisions].

13. Other commentators have also discussed the rights and requirements of the CDP provisions. See, e.g., Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1128 (discussing the CDP provisions generally); Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 12–13 (discussing how the CDP provisions move the tax system closer to the “rule of law principles” applied in other areas of law); Camp, *supra* note 5, at 119 (discussing the CDP provisions within a broader discussion of the effect of the RRA 1998 on tax administration); Fahey, *supra* note 3 (discussing CDP provisions and the constitutionality of the Tax Court’s jurisdiction over judicial appeals from CDP determinations).

to collect taxes, which may have consequences for tax compliance generally. In addition to increasing perceived fairness, the proposed changes should reduce the need for judicial review and increase the meaningfulness of the right to a CDP hearing.

This article concludes that the CDP provisions as currently applied provide few taxpayer rights, require significant administrative and judicial resources, delay the collection of unpaid tax liabilities, and may adversely impact the public's perception of the fairness of the tax system. CDP hearing rights and procedures must be clarified by Congress.

I. ENFORCED TAX COLLECTION: PROCEDURES AND RIGHTS

Congress has the power to lay and collect taxes.¹⁴ Congress has delegated the authority to collect taxes and enforce the tax laws to the IRS. Although the judiciary's function with respect to tax is to interpret the law, it is not within the province of the judiciary to make tax law.¹⁵

This Part first considers the historic approach to tax assessment and collection, focusing on lien and levy procedures. This includes discussion of the due process considerations relating to tax collection. Next, this Part addresses the requirements of the CDP provisions and how CDP changes lien and levy procedures. Finally, this Part addresses the cases that have interpreted and, in some cases, changed the requirements of the CDP provisions.

A. *Liens and Levies Generally*

Assessment is the first step in tax collection.¹⁶ Assessment can be made either after a taxpayer files a tax return showing taxes due without payment,¹⁷ or after a determination of deficiency in income, gift, estate, or certain excise taxes becomes final.¹⁸

14. U.S. CONST. art. I, § 8, cl. 1, *amended by* U.S. CONST. amend XVI.

15. *See* Badaracco v. Comm'r, 464 U.S. 386, 398 (1983) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.").

16. *See* I.R.C. § 6201 (outlining general tax assessment authority and implying that assessment is the first step); Treas. Reg. § 301.6201-1(a) (West 2004) (implying that assessment is the first step in tax collection). Both the IRC and Treasury regulations give the IRS authority to make tax assessments.

17. I.R.C. § 6201(a).

18. I.R.C. § 6213. When the IRS determines a deficiency, the taxpayer has ninety days to petition the Tax Court for a redetermination of the deficiency. I.R.C. § 6213(a). A taxpayer has 150 days to petition the Tax Court if the notice of deficiency is addressed to a person outside the United States. *Id.* Taxes not specifically enumerated in I.R.C. section 6213 are not subject to pre-assessment and collection review. Among the taxes not subject to pre-assessment review are payroll taxes and the amount reported due by the taxpayer on a tax return. I.R.C. § 6201. The deficiency becomes final at the

After assessment, the IRS must send the taxpayer a notice informing her of the amount due and demanding payment—a “notice and demand.”¹⁹ If the assessed tax remains unpaid ten days after the notice and demand, a lien in favor of the government arises on all of the taxpayer’s assets.²⁰ Although a lien arises automatically on notice, demand, and non-payment, it does not have priority over bona fide purchasers and certain other creditors until a Notice of Federal Tax Lien (NFTL) is filed.²¹

In addition, after notice, demand, and nonpayment of assessed taxes, the IRS can levy on the taxpayer’s property and property rights.²² The taxpayer must be notified of the intent to levy at least thirty days before levy.²³ The notice must include a brief statement in “simple and nontechnical terms” explaining the proposed collection action.²⁴

A balancing test is used to determine the amount of process constitutionally required before a person is deprived of rights or property in a particular case.²⁵ When a creditor levies on a debtor’s property to collect

later of the entry of an opinion by the Tax Court or on the expiration of the period in which the taxpayer may petition the Tax Court. I.R.C. §§ 6213(a), 6215. The notice and demand must be sent within sixty days of assessment. I.R.C. § 6303(a).

19. I.R.C. § 6303. This notice must be sent within sixty days of the assessment. I.R.C. § 6303(a). The notice may take a variety of forms, including a notice of balance due. *Craig v. Comm’r*, 119 T.C. 252, 262–63 (2004). If the notice and demand applies to married persons with joint and several liability, the IRS sends a separate notice to each spouse. Typically the IRS sends a number of computer-generated billing notices before taking further collection actions. MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE*, ¶ 14.03[3] (rev. 2d ed. 2002).

20. I.R.C. §§ 6321, 6331(a). “If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.” I.R.C. § 6321.

21. I.R.C. § 6331(d)(1).

22. I.R.C. § 6331(a). The IRS can levy on almost any of the taxpayer’s property interests. I.R.C. § 6331(d)(1). IRC section 6334(a) lists thirteen narrow categories of property that are exempt from levy. If necessary, the IRS may make multiple levies on the taxpayer’s property. I.R.C. § 6331(c).

23. I.R.C. § 6331(d)(2). The Secretary may levy without the requisite notice if the Secretary makes a finding that the collection is otherwise in jeopardy. I.R.C. § 6331(a), (d)(3). The notice may be given to the taxpayer, left at the taxpayer’s dwelling or usual place of business, or sent to the taxpayer’s last known address via certified or registered mail. I.R.C. § 6331(d)(2).

24. I.R.C. § 6331(d)(4). The statement must explain the levy provisions, the applicable procedures relating to a levy and sale of property, available administrative appeals and applicable procedures, alternatives that might prevent levy, rights for redemption and lien release, and procedures for redemption of property and lien release. I.R.C. § 6331(d)(4). Notice is not required before levy when there is a jeopardy determination. I.R.C. § 6331(d)(3).

25. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (addressing specifically the required process for deprivation of Social Security Disability benefits, but commonly cited for its three-part balancing test, used to establish whether a specific procedure satisfies due process). This three-part balancing test is:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

a debt, the debtor is usually entitled to pre-deprivation notice and a meaningful opportunity to be heard.²⁶

Effective and efficient collection of taxes is necessary to finance the operations of a sovereign government. Prompt, effective, and efficient collection of taxes may be viewed as especially important in times of mounting government deficits and enormous unpaid tax liabilities.²⁷ Because of the government's need to efficiently collect taxes, the IRS has been given extraordinarily broad collection and enforcement powers.²⁸

Historically, due process has not entitled a taxpayer to pre-deprivation review of IRS decisions to collect assessed, unpaid taxes.²⁹ Summary tax

finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

26. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (recognizing "the right to a prior opportunity to be heard before chattels are taken from their possessor"); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 342 (1969) (addressing the issue of whether a post-seizure hearing is meaningful in terms of due process and deciding that a pre-deprivation notice and opportunity to be heard is necessary absent an important governmental or public interest to the contrary). A number of cases have discussed whether there was "a meaningful opportunity to be heard" under specific circumstances. *See, e.g.*, *Cinea v. Certo*, 84 F.3d 117, 121 (3d Cir. 1996) (applying the necessarily flexible standards of due process and concluding that debtors were afforded adequate process when they were informed that criminal sanctions would be imposed if they moved the levied property without permission prior to a final determination); *Huxall v. First State Bank*, 842 F.2d 249, 251 (10th Cir. 1988) (concluding that debtor was not denied due process when she received several opportunities to be heard, including before entry of judgment and prior to execution on the particular property).

27. Estimates of the tax gap—the difference between the amount of tax owed and the amount of taxes collected—ranged from \$250 billion to \$300 billion in 2001 and 2002. U.S. GEN. ACCOUNTING OFFICE, FINANCIAL AUDIT: IRS'S FISCAL YEARS 2002 AND 2001 FINANCIAL STATEMENTS GAO-03-243, at 8 (2002). These estimates are based on data collected in the 1980s and updated to account for economic changes. *Internal Revenue Service Fiscal Year 2005 Budget Request: Hearing Before the Senate Appropriations Subcomm. on Transp., Treasury, and Gen. Gov't*, 108th Cong. (2004) (statement of Mark W. Everson, Commissioner, Internal Revenue Serv.). The IRS's goals for 2005 include closing the tax gap. *Id.*

28. *See supra* note 3 and accompanying text.

29. *Phillips v. Comm'r*, 283 U.S. 589, 595 (1931) ("Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained."); *accord* *Cheatham v. United States*, 92 U.S. 85, 89 (1875).

While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed . . . a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal-revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he

collection by the Government is permitted under traditional notions of constitutional due process³⁰ because of the significant hardship the government would suffer without the ability to promptly collect taxes owed.³¹ Summary power to levy is necessary to “protect the Government against diversion or loss ‘The underlying principle’ . . . is ‘the need of government promptly to secure its revenues.’”³²

must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable.

Id.; see also Fahey, *supra* note 3, at 461–63 (discussing the historical rationale for broad tax collection powers).

30. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352 (1977).

Indeed, one may readily acknowledge that the existence of the levy power is an essential part of our self-assessment tax system and that it enhances voluntary compliance in the collection of taxes that this Court has described as “the life-blood of government, and their prompt and certain availability an imperious need.”

Id. at 350 (quoting *Bull v. United States*, 295 U.S. 247, 259 (1935)). “The constitutionality of the levy procedure, of course ‘has long been settled.’” *United States v. Nat’l Bank of Commerce*, 472 U.S. 713, 721 (1985) (quoting *Phillips v. Comm’r*, 283 U.S. 589, 595 (1931)).

If additional support were needed for this result, it is found in the Court’s decisions sustaining the right of the Government to collect taxes by summary administrative proceedings. Thus, in *Bull v. United States*, 295 U.S. 247, 260 (1935), it was stated that a tax assessment “is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor’s property to satisfy the debt.”

G.M. Leasing Corp., 429 U.S. at 352 n.18; see also *Graham v. du Pont*, 262 U.S. 234, 255 (1923) (noting the Government’s right to use stringent measures to collect internal revenue taxes where both the assessment and claim are valid); *State R.R. Tax Cases*, 92 U.S. 575, 612–15 (1876) (stating that payment of taxes must be enforced by stringent means); *Cheatham v. United States*, 92 U.S. 85, 87–90 (1876) (highlighting the fact that all governments must adopt stringent collection measures and rigid enforcement procedures). The rationale underlying these decisions is that the very existence of government depends upon the prompt collection of the revenues. In *Phillips v. Comm’r*, 283 U.S. 589, 596–97 (1931), the Court rejected a constitutional challenge to the statutory system under which taxes may be collected summarily without a pre-seizure judicial hearing. It was held that as long as there was an adequate opportunity for a post-seizure determination of the taxpayer’s rights, the statute met the requirements of due process. See *Comm’r v. Shapiro*, 424 U.S. 614, 630–33 (1976) (explaining the holding in *Phillips* that taxes may be collected summarily if the taxpayer is afforded an opportunity for a later judicial determination of their legal rights); *Fuentes v. Shevin*, 407 U.S. 67, 91–92 (1972) (recognizing summary seizure of property as an appropriate method of collecting internal revenue). These cases center upon the Due Process Clause rather than the Fourth Amendment, but the constitutional analysis is similar and yields a like result. It is to be noted that the *Phillips* Court cited *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1855), with approval as a case which sustained “[p]roceedings more summary in character . . . and involving less directly the obligation of the taxpayer.” *Phillips*, 283 U.S. at 596.

31. *Bull*, 295 U.S. at 259–60; *Phillips*, 283 U.S. at 596–97.

32. *United States v. Nat’l Bank of Commerce*, 472 U.S. at 721 (quoting *Phillips*, 283 U.S. at 596) (upholding levy of joint bank account, despite co-depositors’ claims on the money); see also,

Traditionally, a taxpayer's right to judicial review was limited to post-collection refund claims.³³ However, in some instances, including redetermination of deficiencies in income, gift, estate, and certain excise taxes, a taxpayer may seek pre-assessment review of a tax liability by petitioning the Tax Court.³⁴ Post-deprivation review is sought by making an administrative claim for a refund and, if the refund claim is denied or not answered, filing a suit for refund in the United States District Court or in the United States Court of Federal Claims.³⁵

Post-assessment, pre-collection review is generally prohibited by the Anti-Injunction Act and the Declaratory Judgment Act.³⁶ Together, these acts prohibit most legal challenges that would delay or interfere with the prompt collection of unpaid taxes.³⁷

Although there are often multiple fora with jurisdiction over the review of a tax liability, *res judicata* and collateral estoppel prevent a taxpayer from relitigating claims or issues.³⁸ Thus, a taxpayer generally cannot make multiple attempts to challenge the same tax liability.

Phillips, 283 U.S. at 595 (allowing summary proceedings to secure prompt receipt of revenue); *Cheatham*, 92 U.S. at 89 (warning that the judicial power to restrain or control tax collection could place the "existence of the government . . . in the power of a hostile judiciary").

33. See SALTZMAN, *supra* note 19, ¶ 14.01[2] ("To obtain such judicial review, the taxpayer has the burden of paying the full amount of the tax, filing a claim for refund, and commencing a suit for refund in which the taxpayer bears the burden of proof, and obtain a judgment in the taxpayer's favor."). Post-collection refund claims are heard by the United States District Courts or the United States Court of Federal Claims. *Id.*, ¶ 1.05[1].

34. Pre-assessment review is generally only available where the IRS has determined deficiencies in income, gift, estate, and certain excise taxes. I.R.C. § 6213 (West 2004).

35. I.R.C. § 7422. The taxpayer must satisfy the requirements of IRC section 7422. A claim for refund requires that the taxpayer file a claim for refund with the Secretary. I.R.C. § 7422(a). In addition, the Secretary must either deny the claim or fail to act upon the claim for at least six months. I.R.C. § 6532(a)(1). A suit for refund cannot be maintained against an officer or employee of the United States, but only against the United States. I.R.C. § 7422(c). Moreover, the types of tax for which a refund suit may be maintained are limited. I.R.C. § 7422(g)(2).

36. See *supra* note 33 and accompanying text. The Anti-Injunction Act prohibits actions to prevent the collection of taxes. I.R.C. § 7421(a). The Declaratory Judgment Act prohibits suits pertaining to Federal tax liabilities. 28 U.S.C. § 2201 (2000).

37. A narrow judicial exception exists to prevent the application of the Anti-Injunction Act: "an injunction may be obtained against the collection of any tax if (1) it is 'clear that under no circumstances could the Government ultimately prevail' and (2) 'equity jurisdiction' otherwise exists, *i.e.*, the taxpayer shows that he would otherwise suffer irreparable injury." *Comm'r v. Shapiro*, 424 U.S. 614, 627 (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)).

38. See *Finley v. Comm'r*, 612 F.2d 166, 170 (5th Cir. 1980) (applying *res judicata* to refuse a claim for an estate tax refund that was the subject of a prior Tax Court suit for deficiency redetermination); *Russell v. United States*, 592 F.2d 1069, 1071-72 (9th Cir. 1979) (applying *res judicata* in refusing to consider a refund claim after the Tax Court had made a redetermination of the deficiency); *Cooper v. United States*, 238 F.2d 40, 41 (D.C. Cir. 1956) (applying *res judicata* to refuse to consider a refund suit where the same issue, worthlessness of certain stock, was decided in a prior Tax Court proceeding, which was affirmed by the Fourth Circuit in *Cooper v. Comm'r*, 209 F.2d 154 (4th

B. CDP Rights

The CDP provisions provide taxpayers with additional procedural safeguards.³⁹ Collection actions subject to the CDP provisions include both the filing of an NFTL and levy on the taxpayer's property. Only the person liable for the unpaid tax is given a CDP notice and opportunity for a CDP hearing.⁴⁰

These previously unavailable rights have caused some controversy. Some commentators have criticized the CDP rights claiming, in part, that they divert IRS resources from more productive uses.⁴¹ CDP rights, without question, have changed the face of tax liability collection.⁴² Other commentators have supported the new rights: "CDP's administrative hearings and judicial review of those IRS collection hearings are not

Cir. 1954)); *Flora v. Comm'r*, 47 T.C. 410, 414 (1967) (refusing to consider claims of an operating loss deduction where the issue had been previously litigated on the grounds of collateral estoppel).

39. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401(b), 112 Stat. 685 (making IRC sections 6320 and 6330 effective for collection actions initiated 180 days after July 22, 1998, i.e., after January 19, 1999); *see also* Treas. Reg. §§ 301.6320-1(a), 301.6330-1(a) (West 2004). The CDP provisions do not provide procedural safeguards to collection actions initiated before the effective date but subsequently refiled.

40. I.R.C. § 6320(a); Treas. Reg. § 301.6320-1(a)(2), Q&A-A1. Applied to NFTLs, this reading of the notice requirement is reasonable, as it requires that within five days after the filing of a NFTL, a CDP notice must be provided to the "person described in section 6321." I.R.C. § 6320(a)(1). Such person is "the person liable to pay any tax," i.e., the taxpayer. I.R.C. § 6321.

This reading is strained with respect to proposed levy actions because the statute provides that "[n]o levy may be made on any property or right to property of *any person* unless the Secretary has notified such person in writing of their right to a hearing . . ." I.R.C. § 6330(a)(1) (emphasis added); *see also* Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1140 (stating that third parties may also be entitled to notice and a hearing under section 6330). This is different from the notice requirement relating to NFTL filings. While remedies are available to third parties, it is possible to interpret the meaning of the person to be provided with notice and an opportunity for a CDP hearing in different ways. For instance, a third party may seek an administrative appeal through the Collection Appeal Program, file an action for wrongful levy, or file an action to quiet title. Notice and Opportunity for Hearing Upon Filing of Notice of Lien, 67 Fed. Reg. 2558, 2559 (Jan. 18, 2002) (to be codified at 67 C.F.R. pt. 301); *see also* I.R.C. § 7426(a) (listing the circumstances where civil actions by persons other than the taxpayer are allowed). This area requires clarification. *See* Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1151 (describing the CDP process as a "maze").

41. NAT'L TAXPAYER ADVOCATE, U.S. DEP'T OF TREASURY, 2003 ANNUAL REPORT TO CONGRESS 38. These rights have also been academically criticized. *See, e.g.*, Camp, *supra* note 5, at 119-28 (discussing the failure of the CDP provisions in the context of enactment and implementation); Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1060-62 (2003) (urging that taxpayers with frivolous claims not be entitled to a CDP hearing). Other academic commentary, while criticizing the mechanism, has supported the CDP provisions. Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 3 (defending the CDP provisions).

42. Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 8; *see also* Fahey, *supra* note 3, at 464 ("I.R.C. sections 6320 and 6330 represent a dramatic departure from long-standing collection practices . . .").

necessarily unwarranted, wasteful or dangerous to the very existence of our government, but a step in the progression of the rule of law principles that came to permeate the 20th century legal culture.”⁴³

The IRS must inform a taxpayer of the availability of a CDP hearing within five days after filing a NFTL.⁴⁴ The notice must, in “simple and nontechnical terms,” inform the taxpayer of the following: the amount of unpaid tax; the right to request a CDP hearing within thirty days of the beginning of the end of the five-day post-NFTL filing period; available administrative appeals and applicable procedures; and Internal Revenue Code (IRC) provisions and procedures relating to the release of tax liens.⁴⁵

A similar CDP notice must be given, in “simple and nontechnical terms” before most federal tax levies.⁴⁶ The pre-levy CDP notice must inform the taxpayer of the following: the amount of unpaid tax; the right to request a CDP hearing within thirty days of the notice; the proposed collection action; the IRC provisions, procedures, and administrative appeals relating to levy and sale of property; and alternatives that could prevent levy.⁴⁷ Finally, the notice must explain the IRC provisions and procedures relating to redemptions of property and release of liens.⁴⁸

As will be more fully developed in this article, the CDP provisions place a significant burden on the tax collection system, yet provide taxpayers with few, if any, additional rights. The IRS is required to provide only limited process and its determinations are generally upheld by the courts.⁴⁹

During fiscal years 1999 through 2002, more than 38,000 CDP determinations were issued and, at the end of fiscal year 2002, the IRS had more than 18,600 pending CDP hearing requests.⁵⁰ Through fiscal year

43. Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 12.

44. I.R.C. § 6320(a)(2). CDP hearing rights do not exist when a lien arises under IRC section 6321, rather it is the filing of a NFTL under IRC section 6323(f) that gives rise to the hearing right. I.R.C. § 6320(a)(1). In 2004, the Treasury Inspector General for Tax Administration (TIGTA) estimated, based on a random sample of 130 CDP cases, that timely lien notices were not sent to taxpayers 4.6% of the time. TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF TREASURY, FISCAL YEAR 2004 STATUTORY REVIEW OF COMPLIANCE WITH LIEN DUE PROCESS PROCEDURES 3 (2004). Failure to timely send the lien notice may reduce the time available for a taxpayer to request a CDP hearing, adversely impacting the taxpayer's rights. *Id.* at 4.

45. I.R.C. § 6320(a)(3).

46. I.R.C. § 6330(a)(3). Prior notice of CDP hearing rights is not required before a levy made pursuant to a jeopardy determination or on a state tax refund. However, such notice must be given within a reasonable time after the levy. I.R.C. § 6330(f).

47. I.R.C. § 6330(a)(3).

48. I.R.C. § 6330(a)(3)(C)(v).

49. *See infra* notes 80–81 and accompanying text.

50. JOINT COMM. ON TAXATION, REPORT OF THE JOINT COMMITTEE ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF

2002, the courts disposed of 1,085 CDP appeals.⁵¹ The number of CDP requests and applications for judicial review continue to rise.⁵² Most CDP hearing requests and judicial appeals of the CDP determinations are made by *pro se* taxpayers.⁵³

Two types of non-meritorious claims create a significant burden on the tax collection system and have attracted the attention of critics: requests raising only frivolous arguments and requests made by taxpayers seeking solely to delay collection of their tax liabilities.⁵⁴ However, the National Taxpayer Advocate, Nina E. Olson, has expressed concern that the early cases, many of which involved only frivolous issues, would obscure later “good cases” that “are represented by ‘competent, serious professionals’ who are trying to work within the system.”⁵⁵ Although the CDP provisions may allow taxpayers an opportunity to delay collection, CDP hearings have value and allow taxpayers to present relevant issues related to the collection of assessed taxes before collection is complete.

Understandably, the courts, the IRS, the Treasury Inspector General for Tax Administration (TIGTA), and commentators have expressed concerns about the possibility that unnecessary delay may occur as a result of taxpayers’ CDP rights.⁵⁶ Potential delay may be compounded by the CDP

1998, app. 1, at 22–23 (2003) [hereinafter 2003 JOINT COMM. ON TAXATION REPORT]. In fact, 6,800 requests were filed in 1999, the first year during which collection due process hearings were available. Sheryl Stratton, *Open Issues Abound in Collection Due Process Cases*, 25 TAX PRAC. 167, 167 (2000) [hereinafter Stratton, *Open Issues Abound*]. Initially, there were concerns that there would be a flood of requests for administrative and judicial review. Sheryl Stratton, *Tax Court Prepares for Collection Due Process Actions*, 82 TAX NOTES 1554, 1554 (1999). Before the enactment of RRA 1998, more than nine million liens and levies were made each year—all of which could, after the effective date, trigger a CDP hearing request and potential judicial appeal. *Id.* However, the IRS anticipated that only a third as many notices would be issued because levies would not be used until after a determination was made that the taxpayer had property that was subject to levy. The Tax Court budgeted for 105,000 additional cases in the fiscal year following the availability of CDP hearings. *Id.*

51. 2003 JOINT COMMITTEE ON TAXATION REPORT, *supra* note 50, app. 1, at 23.

52. In FY 2001, 19,199 were filed; in FY 2002, 26,666 were filed; and through March 2003, 13,073 were filed. TAXPAYER ADVOCATE SERV., *supra* note 11, at 12.

53. NATIONAL TAXPAYER ADVOCATE, U.S. DEP’T OF TREASURY, FISCAL YEAR 2002 ANNUAL REPORT TO CONGRESS 276. Seventy percent of the requests for judicial review of CDP determinations are made by *pro se* taxpayers. *Id.*

54. Frivolous arguments most commonly raised in CDP requests are generally the type of claims associated with tax protesters and regularly rejected by the courts, e.g., that wages reported on a Form W-2 were not “income” within the meaning of the Internal Revenue Code. *See, e.g.,* Holguin v. Comm’r, 85 T.C.M. (CCH) 1245 (2003) (challenging tax system and return); Young v. Comm’r, 85 T.C.M. (CCH) 739, 741 (2003) (rejecting taxpayer’s denial of provisions obligating outright payment of taxes); Tipp v. Comm’r, 82 T.C.M. (CCH) 759 (2001) (rejecting taxpayer’s denial of the existence of the United States and the IRS).

55. Heidi Glenn, *Olson Outlines CDP Complaints as Preview to Hill Testimony*, 99 TAX NOTES 985, 985 (2003).

56. Nina E. Olson, *Taxpayer Rights, Customer Service, and Compliance: A Three-Legged*

provisions' failure to provide a time frame for the hearing process.⁵⁷ Although most CDP hearings occur within six months of the CDP request, the IRS, when asked to specify a time frame for the conduct of a CDP hearing, responded that all CDP cases are different and the time required to properly handle a CDP hearing request depends on the complexity of the issues raised by that case.⁵⁸

The CDP provisions contain ambiguities that raise a number of questions.⁵⁹ The questions include the type of hearing required, the issues that may be presented, the Appeals officer's duties, and the remedy or remedies available when a CDP hearing is deficient. These questions will be addressed in the following sections.

C. CDP Hearing

A CDP hearing request must be made in writing within thirty days of either the first notice of intent to levy⁶⁰ or the end of the five-day period following the filing of a NFTL.⁶¹ When a CDP hearing is timely requested,

Stool, 51 U. KAN. L. REV. 1239, 1249 (2003); *see also* *Lunsford v. Comm'r*, 117 T.C. 159, 164 (2001) [hereinafter *Lunsford I*] (lamenting prior delays in case resolution resulting from CDP-related jurisdictional questions); TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF TREASURY, TAXPAYER SERVICE ON LIEN AND LEVY APPEALS COULD BE FURTHER IMPROVED 3 (2001) (recommending improvements "to provide better customer service"); Johnson, *supra* note 41, at 1062 (quoting Commissioner Rossotti's testimony that "[f]rivolous claims occupy a disproportionate share of time").

57. *See* Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E9, 301.6330-1(e)(3), Q&A-E9 (West 2004) (explaining that although there is no time in which a hearing must be conducted, a hearing will be conducted "as expeditiously as possible under the circumstances").

58. TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 56, at 5, 8, 22–24. The range of time to complete the sample of sixty-six cases that were reviewed by the Treasury Inspector General for Tax Administration (TIGTA) was from less than one day to 281 days, with the average time being fifty-four days. *Id.* at 5.

59. *See* Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1137, 1152 (noting that the CDP provisions raise many questions, such as whether an Appeals officer's verification must be in writing); Fahey, *supra* note 3, at 465–68 (explaining the "confusion" caused by ambiguities in sections 6320 and 6330 and in the regulations); Stratton, *Open Issues Abound*, *supra* note 50, at 167–68 (discussing the growing list of unresolved issues raised by the CDP provisions).

60. Treas. Reg. § 301.6320-1(c)(2), Q&A-C3. The regulations require that the CDP request include the name, address, telephone number, and signature of the taxpayer. *Id.* §§ 301.6320-1(c)(2), Q&A-C1, 301.6330-1(c)(2), Q&A-C1. Although no particular form of CDP hearing request is required, a Form 12153, Request for Collection Due Process Hearing, is included with the notice of lien or intent to levy and right to a hearing. *Id.* §§ 301.6320-1(a)(2), Q&A-A9, (c)(2), Q&A-C1, 301.6330-1(a)(3), Q&A-A8, (c)(2), Q&A-C1; Internal Revenue Serv., Internal Revenue Manual, Part 5.19.8.4, available at <http://www.irs.gov/irm/index.html> (last visited December 4, 2004).

61. Treas. Reg. § 301.6330-1(c)(2), Q&A-C3. A taxpayer is not entitled to a hearing with respect to a second CDP notice. The regulations note the possibility that a taxpayer may receive more than one notice with respect to a particular tax and tax period. *Id.* §§ 301.6320-1(b)(2), Q&A-B1, 301.6330-1(b)(2), Q&A-B2 ("[O]nly the first . . . CDP Notice with respect to the unpaid tax and tax

both the proposed levy and the statute of limitations are suspended.⁶² A taxpayer is generally entitled to only one CDP hearing for each taxable period.⁶³

CDP hearings are conducted by the IRS Office of Appeals pursuant to IRC section 6330.⁶⁴ Although the statute does not specify whether CDP hearings are to be formal or informal hearings,⁶⁵ most reviewing courts have concluded that Congress intended that CDP hearing procedures be similar to the procedures used in other appeals proceedings, which have historically used informal procedures and in a variety hearing of formats.⁶⁶ The informality of Appeals Office procedures is used to justify minimal process in the CDP context.⁶⁷ In many cases, informal procedure has resulted in inadequate protection of taxpayer rights.⁶⁸

The CDP hearing must be conducted by an Appeals officer “who has had no prior involvement with respect to the unpaid tax specified.”⁶⁹ “Prior

periods entitles the taxpayer to request a CDP hearing.”)

62. I.R.C. § 6330(e)(1) (West 2004). The statute of limitations does not end until ninety days after the date of a final determination in the hearing. I.R.C. § 6330(e)(1). Collection actions taken while the suspension applies may be challenged in a proper court. *Id.* Such challenges are an exception to the prohibition against injunctions in IRC section 7421(a). The proper court for seeking an injunction may be the Tax Court. I.R.C. § 6330(e)(1); Treas. Reg. §§ 301.6320-1(i)(2), Q&A-I5, 301.6330-1(i)(2), Q&A-I5.

63. I.R.C. § 6330(b)(2). The levy can proceed if the underlying liability is not at issue and the IRS demonstrates the existence of good cause not to prevent the levy. I.R.C. § 6330(e)(2). In addition, if underlying liability is not at issue, levy may be allowed to proceed during an appeal of a CDP determination sustaining the proposed levy.

64. I.R.C. § 6330(b)(1). Throughout this article, the terms “Office of Appeals,” “Appeals Office,” and “Appeals” are used interchangeably and refer to the IRS Office of Appeals.

65. *See* Treas. Reg. § 601.106(c) (2004) (“Nature of proceedings before Appeals[.] Proceedings before Appeals are informal. Testimony under oath is not taken, although matters alleged as facts may be required to be submitted in the form of affidavits, or declared to be true under the penalties of perjury.”); SALTZMAN, *supra* note 19, ¶ 9.06 (“Appeals Office conferences are informal.”).

66. *See, e.g.,* Bourbeau v. Comm’r, 85 T.C.M. (CCH) 1205, 1207–08 (2003) (stating that the court has repeatedly held that section 6330 hearings are informal); Davis v. Comm’r, 115 T.C. 35, 41 (2000) (noting that history suggests that Congress did not intend to alter the nature of the appeal to require “attendance or examination of witnesses”); Katz v. Comm’r, 115 T.C. 329, 337 (2000) (noting that Appeals-level hearings are historically informal); Rennie v. Comm’r, 216 F. Supp. 2d 1078, 1079 (E.D. Cal. 2002) (holding that a levy must be preceded by notice and opportunity for administrative review, including judicial review of the administrative determination); Guy v. United States, 02-2 U.S. TAX CAS. (CCH) ¶ 50,633, at 85645 (E.D.N.Y. 2002) (stating that CDP hearings are informal, and face-to-face hearings are not required); Loofbourrow v. Comm’r, 208 F. Supp. 2d 698, 707 (S.D. Tex. 2002) (holding that there was notice and opportunity to be heard, even though there was no “face-to-face meeting” between taxpayer and Appeals officer).

67. *See, e.g.,* Davis, 115 T.C. at 41–42 (citing Treasury regulations indicating the informal nature of appeals proceedings to support conclusion that hearing under section 6330 does not include rights to subpoena witnesses).

68. *See infra* notes 108–156 and accompanying text.

69. I.R.C. §§ 6320(b)(3), 6330(b)(3). The taxpayer, however, has the right to waive the requirement of a previously uninvolved officer or employee. Prior involvement by another Appeals

involvement . . . includes participation or involvement in an Appeals hearing (other than a CDP hearing held under either section 6320 or section 6330) that the taxpayer may have had with respect to the unpaid tax and tax periods shown on the NFTL.”⁷⁰

Moreover, RRA 1998 confirmed and increased the independence of the Appeals Office.⁷¹ Ensuring that a previously uninvolved Appeals officer considers the matter before summary collection occurs, coupled with the increased independence of the Appeals Office, should increase both the real and perceived fairness of CDP hearings.

The Appeals officer must verify at the hearing that all applicable laws and administrative procedures have been satisfied.⁷² Because IRC section 6330 does not specifically require that the verification be provided to the taxpayer, the courts have only required that the Appeals officer perform the verification, rejecting claims that the taxpayer is entitled to receive a copy

officer in the same office does not disqualify a previously uninvolved Appeals officer. *See Harrell v. Comm’r*, 86 T.C.M. (CCH) 378 (2003) (remanding to the Commissioner on other grounds unrelated to the issue of prior involvement).

70. Treas. Reg. §§ 301.6320-1(d)(2), Q&A-D4, 301.6330-1(d)(2), Q&A-D4 (2002). *See e.g.*, *Mesa Oil, Inc. v. United States*, 86 A.F.T.R.2d (RIA) 7312, 7317 (D. Colo. 2000) (remanding for a new hearing before an impartial hearing officer upon a finding that a letter from the assigned Appeals officer indicated that the matter had been prejudged); *MRCA Info. Servs. v. United States*, 145 F. Supp. 2d 194, 201 (D. Conn. 2000) (holding that a hearing officer that heard an appeal relating to an executive’s appeal of penalties related to the case was not an impartial hearing officer and remanding for a new hearing before an impartial hearing officer); *cf. Hardy v. United States*, 03-2 U.S. TAX CAS. (CCH) ¶ 50,542, at 89,027 (N.D. Ala. 2003) (concluding that a hearing officer who had signed a notice of levy for a prior year was an impartial hearing officer for the CDP hearing because he had no prior involvement with the penalties that were at issue in this case).

71. RRA 1998 § 1001(a)(4); H.R. CONF. REP. NO. 105-599 (1998); *see also* SALTZMAN, *supra* note 19, ¶ 9.01 (“In the IRS Restructuring and Reform Act of 1998 . . . the Office of Appeals was not only acknowledged, but its independence was required to be protected.”). *Ex parte* communications between Appeals and other IRS employees are limited. Rev. Proc. 2000-43, 2000-2 C.B. 404. Rev. Proc. 2000-43 applies to communications after October 23, 2000.

72. I.R.C. § 6330(c)(1).

of the verification.⁷³ To increase the real and perceived fairness of the CDP hearing, the means of verification should be clarified.⁷⁴

1. Type of Hearing

The statute requires,⁷⁵ the legislative history speaks of,⁷⁶ and the regulations acknowledge that a “collection due process hearing” must occur if requested.⁷⁷ What then does “collection due process” mean? Few commentators have argued that due process in this context rises to the level of a constitutional mandate.⁷⁸ However, the little explanation Congress provided indicates that the choice of the words “due process” was both significant and intentional. In practice, the CDP hearings may not provide the “due process” Congress envisioned.

The regulations authorize Appeals to conduct CDP hearings face-to-face, telephonically, by correspondence, and by a combination of these methods.⁷⁹ The courts have also approved of these methods of conducting CDP hearings.⁸⁰ In some instances, the courts have even upheld nothing

73. See, e.g., *Yuen v. United States*, 290 F. Supp. 2d 1220, 1225 (D. Nev. 2003) (holding that “an appeals officer is not required to ‘give the taxpayer a copy of verification that the requirements of any applicable law or administrative procedure have been met’”); *Tornichio v. United States*, 263 F. Supp. 2d 1090, 1096 (N.D. Ohio 2002) (holding that IRC section 6330 only requires the Appeals officer obtain verification, not that the Appeals officer provide the verification to the taxpayer); *Craig v. Comm’r*, 119 T.C. 252, 262 (2002) (holding that the Appeals officer is not required to rely on a particular document or provide the verification to the taxpayer, although the taxpayer was given copies of the Forms 4340 used, which were valid for the verification); *Nestor v. Comm’r*, 118 T.C. 162, 166 (2002) (holding that the Appeals officer was not required to provide a copy of the verification to the taxpayer at the hearing and that there was no violation of applicable law or administrative procedure where the taxpayer was provided a copy of the Forms 4340 prior to trial and failed to show at trial that there was any irregularity in the assessment procedure).

74. See *infra* Part I.D.3.

75. I.R.C. §§ 6320, 6330.

76. See *infra* note 111.

77. Treas. Reg. §§ 301.6320-1(d)(1), 301.6330-1(d)(1) (West 2004).

78. See Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 25 (stating that “tax cases have remained outside the due process mainstream,” as illustrated by the Supreme Court’s view that tax collection is “an essential government need justifying a post-deprivation hearing”); Camp, *supra* note 5, at 119 (suggesting that Congress “massively misnamed” the CDP provisions by using the words “Due Process”). But see Pamela Kesner, Note, *Determining the Meaning of a Meaningful Collection Due Process Hearing*, 54 TAX LAW 823, 830 (2001) (arguing that “Congress intended CDP hearings to provide due process to taxpayers” and “for taxpayers to receive a meaningful collection due process hearing pursuant to the Code, taxpayers should be afforded conventional due process protections, such as the right to examine witnesses or subpoena documents”).

79. Treas. Reg. §§ 301.6320-1(d)(2), Q&A-D7, 301.6330-1(d)(2), Q&A-D7.

80. See, e.g., *Tilley v. United States*, 270 F. Supp. 2d 731, 740 (M.D.N.C. 2003), *aff’d* 2004 WL 96815 (4th Cir. 2004) (deciding that a telephonic conference in which the substance of the case is discussed satisfies due process requirements); *Cnty. Residential Servs., Inc. v. United States*, 91 A.F.T.R.2d (RIA) 2190, 2193 (M.D.N.C. 2003) (holding that a telephonic hearing was sufficient);

more than a review of the administrative record by the Appeals officer.⁸¹ Not all forms of CDP hearing afford taxpayers adequate notice and a meaningful opportunity to be heard.

The regulations acknowledge the superiority of face-to-face hearings. Face-to-face hearings are scheduled with the taxpayer and conducted in the Appeals Office nearest the taxpayer's residence.⁸² Face-to-face hearings provide the taxpayer with adequate notice and an opportunity to be heard.⁸³ Thus, face-to-face hearings satisfy the requirement that the taxpayer be afforded a CDP hearing.

Even before final regulations were promulgated, the IRS Chief Counsel concluded that a taxpayer who requested a CDP hearing was to be offered a face-to-face hearing whenever possible.⁸⁴ The right to a face-to-face CDP hearing was to be extended to a taxpayer "*even if he will raise only frivolous or constitutional arguments* because the Appeals officer must cover the statutory requirements of sections 6330(c)(1) and (3)(C) of verification and balancing."⁸⁵ This position, according to the Advisory, was agreed to by Chief Counsel, the U.S. Department of Justice, and the Appeals Office.⁸⁶ This interpretation was based on the fact that the CDP provisions did not require that the taxpayer present arguments that were likely to succeed.

Loofbourrow v. Comm'r, 208 F. Supp. 2d 698, 707 (S.D. Tex. 2002) (concluding that a CDP hearing may be a face-to-face meeting, a written communication, oral communication, "or some combination thereof"); *Konkel v. Comm'r*, 86 A.F.T.R.2d (RIA) 6939, 6943 (M.D. Fla. 2000) (stating that, although not face-to-face, taxpayer's written contact with the Appeals Office constituted sufficient opportunity to be heard); *Elek v. Comm'r*, 85 T.C.M. (CCH) 1170, 1171 (2003) (approving hearing conducted by correspondence pursuant to the taxpayer's request); *Frank v. Comm'r*, 85 T.C.M. (CCH) 1066, 1067-68 (2003) (upholding determination made following a telephonic hearing, when no other hearing was scheduled, but when the taxpayer did not object to this type of hearing); *Katz v. Comm'r*, 115 T.C. 329 (2000) (upholding determination based on telephonic hearing conducted after taxpayer refused offer of in-person hearing at Appeals Office an hour from the taxpayer's location). *But see Kesner, supra* note 78 (noting the court's rejection of a right to call witnesses, subpoena documents, or use testimony taken under oath).

81. *E.g.*, *Nichols v. Comm'r*, 84 T.C.M. (CCH) 697 (2002).

82. Treas. Reg. §§ 301.6320(d)(2), Q&A-D7, 301.6330(d)(2), Q&A-D7. If requested by the taxpayer, Appeals must offer a face-to-face hearing at the closest Appeals Office. *Id.* §§ 301.6320-1(d)(2), Q&A-D7, 301.6330-1(d)(2), Q&A-D7. An offer of a face-to-face hearing at an office less than an hour from the taxpayer's home is adequate. *Katz v. Comm'r*, 115 T.C. 329, 337 (2000).

83. *See supra* note 26 and accompanying text.

84. Chief Counsel Advisory 200123060 (June 8, 2001).

85. *Id.* (emphasis added); *cf.* *Johnson, supra* note 41, at 1062 (arguing that "[w]e should abolish the need for a CDP hearing when the taxpayer's request raises only tired, universally rejected, frivolous arguments").

86. Chief Counsel Advisory, *supra* note 84.

Although containing contradictory provisions, the regulations seem to provide a narrow right to a face-to-face hearing. The regulations first state that:

CDP hearings are much like Collection Appeal Program (CAP) hearings in that they are informal in nature and do not require the Appeals officer or employee and the taxpayer, or the taxpayer's representative, to hold a face-to-face meeting. A CDP hearing may, but is not required to, consist of a face-to-face meeting, one or more written or oral communications between an Appeals officer or employee and the taxpayer . . . or some combination thereof.⁸⁷

However, the regulations also provide that "If a taxpayer wants a face-to-face CDP hearing . . . [t]he taxpayer must be offered an opportunity for a hearing at the Appeals Office closest to taxpayer's residence or, in the case of business taxpayers, the taxpayer's principal place of business."⁸⁸

Further clouding the issue, the IRS Chief Counsel revised its position in 2003 and stated that face-to-face hearings should be granted only if the taxpayer was raising non-frivolous issues.⁸⁹ Allowing face-to-face hearings only if non-frivolous issues are raised is contrary to the regulations' requirement that if the taxpayer requests a face-to-face hearing, such a hearing must be offered. However, this position is consistent with one Tax Court judge's conclusion that the position articulated in the June 2001 Chief Counsel Advisory was "a goal, not a mandate."⁹⁰ Allowing face-to-face hearings only if non-frivolous issues are raised provides taxpayers with significantly fewer rights than if taxpayers are provided a face-to-face hearing if requested and practicable. If the taxpayer truly raises only frivolous issues, this may result in a burden on the Appeals Office and delay collection of the taxes owed. However, without conducting a hearing it is impossible to know what issues the taxpayer will raise. To deny a hearing based solely on the request may disadvantage less-educated taxpayers.⁹¹

87. Treas. Reg. §§ 301.6320-1(d)(2), Q&A-D6, 301.6330-1(d)(2), Q&A-D6.

88. *Id.* § 301.6320-1(d)(2), Q&A-D7.

89. Chief Counsel Notice CC-2003-031 (Sept. 11, 2003).

90. *Lunsford I*, 117 T.C. 159, 174 n.6 (2001) (Halpern, J., concurring).

91. *But see* Johnson, *supra* note 41, at 1061 ("There *may* be a good issue in there somewhere (but probably not). But there *will* be valuable administrative resources consumed in every case where the hearing is held. The certainty of the resources cost should outweigh the relatively small possibility of a wrong requiring redress.").

CDP hearings are also frequently conducted by telephone.⁹² The regulations and the IRS's procedures allow telephonic CDP hearings.⁹³ Telephone conversations may also constitute a component of the hearing.⁹⁴ In addition, even before the final regulations were promulgated, the Tax Court appeared to sanction the use of hearings that were not conducted face-to-face.⁹⁵

A telephonic hearing allows the taxpayer to communicate directly with the Appeals officer, albeit in a more limited fashion than in a face-to-face hearing. Because telephonic hearings are generally conducted after notice to the taxpayer, telephonic hearings satisfy Congress's intent that taxpayers be given additional rights, particularly if the call is recorded to preserve the record in case of appeal. Simultaneous discussion is available and questions can be promptly addressed. In addition, telephonic hearings also comport with the historic approach used by the IRS in Appeals Office proceedings and may be less administratively burdensome than a face-to-face hearing.

In an early case, *Meyer v. Commissioner*, the Tax Court concluded that a CDP determination was invalid because the taxpayer was not offered a face-to-face or telephonic hearing.⁹⁶ In *Meyer*, the Appeals officer issued a determination based solely on the request for a hearing because he believed the taxpayers would only raise constitutional challenges.⁹⁷ The Tax Court, despite its lack of jurisdiction over the underlying tax, concluded that the CDP determination was invalid because no hearing was held and that collection could therefore not proceed—explicitly rejecting the IRS's position that the case should be dismissed because the Tax Court would not have had jurisdiction over the underlying tax.⁹⁸

92. See *Burbridge v. Comm'r*, 87 T.C.M. (CCH) 1182, 1183 (2004) (concluding that a telephonic hearing, agreed to by the taxpayer, was proper).

93. Treas. Reg. §§ 301.6320-1(d)(2), Q&A-D7, 301.6330-1(d)(2), Q&A-D7 (2004); Chief Counsel Notice CC-2003-016: IRS Collection Due Process Handbook 11–12 (May 29, 2003) [hereinafter *IRS Collection Due Process Handbook*], available at <http://www.unclefed.com/ForTaxProfs/irs-ccdm/2003/cc-2003-016.pdf>.

94. *Katz v. Comm'r*, 115 T.C. 329, 337–38 (2000). The hearing may include all contacts between the taxpayer and the Appeals officer. *Id.*

95. See *IRS Collection Due Process Handbook*, *supra* note 93, at 11–12 (citing favorably cases involving telephone conferences).

96. *Meyer v. Comm'r*, 115 T.C. 417, 422–23 (2000), overruled by *Lunsford I*, 117 T.C. at 164 (overruling *Meyer* to the extent that it required the Tax Court to “look behind the determination to see whether a proper hearing was offered in order to have jurisdiction”) and *Johnson v. Comm'r*, 117 T.C. 204, 209–10 (2001) (overruling *Meyer* to the extent that it allowed Tax Court jurisdiction to determine whether a hearing was conducted if the Tax Court would not have had jurisdiction over the underlying liability).

97. *Meyer*, 115 T.C. at 418.

98. *Id.* at 418, 422–23.

Just over a year later, after considering the role of *stare decisis* and the results of the analysis from *Meyer*, which was issued during the “nascent stages of . . . section 6330 jurisprudence,” the Tax Court concluded that it would not look behind a facially valid notice of determination to consider whether an appropriate CDP hearing had been conducted.⁹⁹ The overruling of *Meyer* could result in much more informality in the conduct of CDP hearings, because reviewing courts will not require a CDP hearing unless the court considers it necessary or productive in the individual case, as long as a CDP determination that includes all of the required statements is issued.

Correspondence hearings are also permitted by the regulations and have been upheld by the courts.¹⁰⁰ Some taxpayers have requested correspondence hearings.¹⁰¹ In other cases, courts have found the correspondence between the taxpayer and the Appeals officer to constitute a correspondence hearing.¹⁰² The question is: what constitutes a correspondence hearing? Is a correspondence hearing simply a review of the administrative file or is more required? To provide the taxpayer with a meaningful opportunity to be heard the correspondence between the taxpayer and the Appeals officer must, at a minimum, provide the taxpayer with the opportunity to understand and respond to the Appeals officer’s questions and concerns about the taxpayer’s CDP request.

A hearing should involve a dialogue between the taxpayer and the Appeals officer, allowing development of the taxpayer’s position and to address the Appeals officer’s specific concerns. However, in some cases when a CDP hearing request appears to raise frivolous issues, the Appeals officer reviews the administrative file, conducts the verifications, and issues a CDP determination without further input from the taxpayer.¹⁰³ The assertion of CDP rights followed immediately by a determination does not

99. *Lunsford I*, 117 T.C. at 164.

100. *See, e.g.*, *Aston v. Comm’r*, 85 T.C.M. (CCH) 1260 (2003) (finding that a taxpayer may request a hearing before any of their property is levied upon); *Elek v. Comm’r*, 85 T.C.M. (CCH) 1170 (2003) (finding no abuse of discretion where taxpayer received only a correspondence hearing); *see also Lunsford I*, 117 T.C. 159, 169 (2001) (Halpern, J., concurring) (arguing that the exchange of correspondence between the IRS and the taxpayers should have constituted a correspondence hearing “since, within wide parameters, it is for [the IRS] to decide what constitutes a section 6330(b) hearing”).

101. *E.g.*, *Elek v. Comm’r*, 85 T.C.M. (CCH) 1170, 1171 (2003).

102. *See, e.g.*, *Lunsford II*, 117 T.C. at 202 (Foley, J., dissenting) (noting the majority’s refusal to determine whether the correspondence between the taxpayer and the Appeals officer constituted a correspondence hearing, as the IRS contended).

103. *Cf. Leineweber v. Comm’r*, T.C.M. (CCH) 824, 826 (2004) (upholding Appeals officer’s decision to conduct a correspondence hearing after the taxpayer repeatedly refused to confirm or schedule a face-to-face hearing and failed to appear at the time he was informed was set for the hearing; it was not the Appeals officer’s responsibility to coordinate the hearing time with either the Taxpayer Advocate or the taxpayer’s congressional liaison).

create an adequate record for review should the taxpayer seek judicial review of the CDP determination. In addition, it is impossible to know with certainty what the taxpayer might have raised at the hearing.¹⁰⁴ Thus, nothing more than a terse warning that a CDP determination would be issued unless the taxpayer supplemented the CDP request does not satisfy the statutory hearing requirement because the taxpayer is not given a meaningful opportunity to raise relevant issues and address the Appeals officer's concerns. Reviewing the CDP hearing request and the administrative file, without more, is inconsistent with the hearing envisioned by Congress.¹⁰⁵

On the other hand, when a taxpayer is offered a face-to-face or telephonic hearing and refuses to participate in the hearing, it may not be possible for the Appeals officer to do more than review the administrative record or correspondence. In these cases, the courts have upheld determinations made after a review of the administrative record.¹⁰⁶ These cases are distinguishable from cases where no opportunity to be heard is provided and should continue to be dealt with in this fashion. However, it should also be clear that these cases are the exception, rather than the rule, and that the taxpayer must be provided with a meaningful opportunity to be heard.

2. No Hearing Conducted

The CDP provisions require that, if requested, a taxpayer must receive a "fair hearing."¹⁰⁷ Specifically, IRC sections 6320(b) and 6330(b), relating to liens and levies respectively, require that "[i]f the [taxpayer] requests a hearing . . . such hearing *shall* be held"¹⁰⁸ The regulations contain a

104. See *Lunsford v. Comm'r*, 117 T.C. 183, 197–98 (2001) [hereinafter *Lunsford II*] (Laro, J., dissenting) (noting that the CDP hearing is a matter of right and disagreeing with the majority's denial of the hearing based on their assumption that it would not be productive).

105. See S. REP. NO. 105-174, at 67 (1998) (explaining the reason for change in section 3401 of the bill).

The Committee believes that taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor. Accordingly, the Committee believes that the IRS should afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property. . . . The Committee believes that following procedures designed to afford taxpayers due process in collections will increase fairness to taxpayers.

Id.

106. E.g., *Armstrong v. Comm'r*, 84 T.C.M. (CCH) 287, 292 (2002); *Hochschild v. Comm'r*, 84 T.C.M. (CCH) 161, 164 (2002); *Serv. Eng'g Trust v. Comm'r*, 82 T.C.M. (CCH) 205, 206 (2001).

107. I.R.C. §§ 6320(b), 6330(b) (West 2004).

108. I.R.C. §§ 6320(b)(1), 6330(b)(1) (emphasis added).

similar requirement.¹⁰⁹ In addition, IRC section 6330(e) provides that “if a hearing is requested . . . levy actions which are the subject of the requested hearing . . . shall be suspended for the period during which such hearing, and appeals therein, are pending.”¹¹⁰ If a CDP hearing is requested, the IRS, through the Appeals Office, must conduct a hearing and no collection by levy may occur until such hearing (along with any appeals) is concluded.

Despite the plain language of the statute requiring that a hearing occur and that certain actions be taken by the Appeals officer at the hearing,¹¹¹ the courts have not universally concluded that a CDP hearing must be conducted in all cases.¹¹² In a number of cases, the Tax Court has concluded that it would be “neither necessary or productive” to send a case back for a hearing, concluding that, on the record before the court, the Appeals officer’s CDP determination was justified even though no hearing had occurred.¹¹³ This approach began with the Tax Court’s decision in the

109. See Treas. Reg. § 301.6330-1(d)(1) (2002) (“If a taxpayer requests a CDP hearing under section 6330(a)(3)(B) . . . , the CDP hearing will be held with Appeals.”).

110. I.R.C. § 6330(e) (emphasis added). However, the levy may not be suspended if the underlying tax is not at issue and the Secretary shows good cause not to suspend the levy. *Id.* In practical terms, the levy will be suspended in most instances during appeal even if the underlying liability was not at issue.

111. I.R.C. § 6330(c).

112. *Compare Lunsford II*, 117 T.C. 183, 189 (2001) (“We do not believe that it is either necessary or productive to remand this case to IRS Appeals to consider petitioners’ arguments.”), with *MRCA Info. Servs. v. United States*, 145 F. Supp. 2d 194, 201 (D. Conn. 2000) (remanding for rehearing before an impartial hearing officer because the Appeals officer that heard the CDP hearing was not impartial and the taxpayer had not waived the impartiality requirement). See also *Brown v. Comm’r*, T.C. Summary Op. 2004-45 (remanding the case to the Appeals Office for a CDP hearing where no hearing was conducted and the taxpayer raised issues relating to an interest abatement and the allocation of payments); *Ramirez v. Comm’r*, T.C. Summary Op. 2004-48 (remanding for a proper hearing because the Appeals officer received information relating to an offer in compromise request after the Appeals officer administratively closed the file, but before the CDP determination letter and summary were mailed to the taxpayer). See generally *Fahey*, *supra* note 3, at 469–73 (discussing the effects of a CDP determination on judicial review and the Tax Court’s position on looking behind the CDP determination).

113. *Michael v. Comm’r*, 85 T.C.M. (CCH) 803, 807 (2003) (citing *Lunsford II*, 117 T.C. at 189); *Moore v. Comm’r*, 85 T.C.M. (CCH) 727, 728 (2003) (same); *Bartschi v. Comm’r*, 84 T.C.M. (CCH) 480, 483 (2002) (same); see also *Robinette v. Comm’r*, 123 T.C. 85, slip op. at 23 (2004) (“In some instances, we have affirmed the Appeals officer’s determination when no hearing was conducted.”) (citing *Lunsford II*, 117 T.C. at 189); *Robinson v. Comm’r*, 85 T.C.M. (CCH) 1026, 1028–30 (2003) (upholding the Appeals officer’s decision not to hold a CDP hearing based on the officer’s determination that the claims advanced did not require a hearing); *Armstrong v. Comm’r*, 84 T.C.M. (CCH) 287, 292 (2002) (upholding the Appeals officer’s decision not to hold a CDP hearing due to the taxpayer’s failure to object to telephone hearings, failure to request a face-to-face hearing, and failure to respond to Appeals Office letters and telephone messages); *Strickland v. Comm’r*, 82 T.C.M. (CCH) 961, 963 (2001) (considering the taxpayer to have abandoned his allegation of an improper hearing because he did not include this allegation in his petition to the court).

first opinion in *Lunsford v. Commissioner* (hereinafter, *Lunsford I*).¹¹⁴

In *Lunsford I*, the taxpayer questioned the validity of the determination.¹¹⁵ After receiving the CDP hearing request, the Appeals officer sent a letter to the taxpayers, which included a copy of the verification of the assessment, and informed the taxpayers that if they wanted to raise additional issues they should contact the Appeals officer by a certain date.¹¹⁶ The taxpayers did not contact the Appeals officer by that date, and the Appeals officer proceeded to issue a CDP determination.¹¹⁷ At trial, the judge asked whether the taxpayers had received a hearing.¹¹⁸ The trial judge was concerned that the court did not have jurisdiction because, without a hearing, there could be no valid notice of determination, and thus no jurisdiction.¹¹⁹ The taxpayers' representative replied that the taxpayers had not received a hearing.¹²⁰ The IRS asserted that a correspondence hearing had been conducted.¹²¹

Without addressing whether the taxpayer received the statutorily mandated CDP hearing, the majority concluded that the court had jurisdiction because the CDP determination contained all the required findings.¹²² The majority, analogizing the CDP determination to a Notice

114. In *Lunsford I*, 117 T.C. 159 (2001), Judges Wells, Cohen, Swift, Gerber, Colvin, Gale, and Thornton joined the majority, written by Judge Ruwe. *Lunsford I*, 117 T.C. at 159. Judge Halpern, joined by Judges Whalen, Beghe, and Thornton, wrote a concurring opinion. *Id.* at 165. Judge Beghe, joined by Judge Halpern, wrote a concurring opinion. *Id.* at 176. Judge Foley, joined by Judges Chiechi, Laro, Vasquez, and Marvel, wrote a dissenting opinion. *Id.* Finally, Judge Vasquez, joined by Judge Foley, wrote a dissenting opinion. *Id.* at 181. In *Lunsford II*, Judges Wells, Cohen, Swift, Gerber, Whalen, and Thornton joined the majority. *Lunsford II*, 117 T.C. at 183. Judge Halpern, joined by Judges Whalen, Beghe, and Thornton, wrote a concurring opinion. *Id.* at 191. Judge Colvin, joined by Judge Gale, wrote a dissenting opinion. *Id.* Judge Laro, joined by Judges Foley and Vasquez, wrote a dissenting opinion. *Id.* Finally, Judge Foley, joined by Judges Chiechi, Laro, Vasquez, and Marvel, wrote a dissenting opinion. *Id.* at 200.

115. *Lunsford I*, 117 T.C. at 161.

116. *Id.* at 161–62.

117. *Id.* at 162.

118. *Id.*; *Lunsford II*, 117 T.C. at 200 (Foley, J., dissenting).

119. *Id.* at 201. Under the interpretation of jurisdiction then applicable, pursuant to *Meyer v. Comm'r*, 115 T.C. 417 (2000), the court lacked jurisdiction if the taxpayer had not been given a CDP hearing.

120. *Lunsford II*, 117 T.C. at 201 (Foley, J., dissenting) (“[P]etitioners’ counsel stated: ‘I do not believe they’ve been afforded proper due process . . . and I believe they should be allowed to have a hearing.’”).

121. *Id.* at 202–03.

122. *See id.* at 189 (“It has been determined that the requirements of all applicable laws and administrative procedures have been met.”) (quoting *Goza v. Comm'r*, 114 T.C. 176, 178 (2000)). *But see id.* at 191 (Colvin, J. dissenting) (“I believe the fact that we have jurisdiction does not relieve respondent of the duty to provide an opportunity for a hearing as required by section 6330(b)"); *id.* at 201 (Foley, J., dissenting) (“[The majority] refuse[s] to follow the unambiguous statutory mandate that if a hearing is requested, ‘such hearing shall be held by the Internal Revenue Service Office of Appeals.’”) (quoting section 6330(b)(1)).

of Deficiency for jurisdiction purposes, refused to look behind what it considered to be a facially valid CDP determination.¹²³ Requiring a hearing or even considering whether a hearing had occurred, the majority reasoned, would require the court to “look behind” the CDP determination.¹²⁴ To reach this conclusion, the court overruled its prior decision in *Meyer v. Commissioner*¹²⁵ to the extent that it required the court to “look behind the determination to see whether a proper hearing was offered” before determining the jurisdictional issue.¹²⁶ The Tax Court has since acknowledged that the Lunsfords were not afforded a CDP hearing.¹²⁷ Thus, the Tax Court has jurisdiction if a CDP determination is issued and a timely petition is filed regardless of whether the taxpayer received a CDP hearing.¹²⁸

However, the reasoning of Judge Foley’s dissent was correct. Judge Foley reasoned that IRC section 6330(c) required issuance of a determination after the hearing, and that without the hearing there could be no valid determination.¹²⁹ According to Judge Foley, “[i]n order to assert jurisdiction, deny petitioners their statutorily mandated hearing, and expedite the collection process, the majority have bifurcated this case into two opinions, both of which obfuscate the issues, ignore an unambiguous statute, and avoid addressing the most critical issue:” whether a

123. *Lunsford I*, 117 T.C. 159, 164 (2001) (overruling *Meyer v. Comm’r*, 115 T.C. 417 (2000) on this issue). Note that *Lunsford I* and *Lunsford II* were bifurcated. Each opinion addresses separate issues in the case. The reasoning is somewhat circular. This is an about-face from the position that the court took in *Meyer*. In *Meyer*, the court held that the determination was invalid and overruled the determination, despite the fact that the underlying liability was a frivolous return penalty over which the Tax Court would not have had jurisdiction if there had been a valid determination. *Meyer*, 115 T.C. at 417.

124. *Id.* at 163–64. The majority also cited its prior decision in *Offiler v. Comm’r*, 114 T.C. 492, 498 (2000), which held that for jurisdictional purposes the CDP determination was the “equivalent of a [statutory] notice of deficiency.” *Lunsford I*, 117 T.C. at 163. In cases involving statutory notices of deficiency, the Tax Court generally does not “look behind” the face of the notice. *Id.* at 163–64 (citing *Pietanza v. Comm’r*, 92 T.C. 729, 735 (1989), *aff’d without published opinion* 935 F.2d 1282 (3d Cir. 1991)); *Riland v. Comm’r*, 79 T.C. 185, 201 (1982); *Estate of Brimm v. Comm’r*, 70 T.C. 15, 22 (1978); *Greenberg’s Express, Inc. v. Comm’r*, 62 T.C. 324, 327 (1974).

125. *Meyer v. Comm’r*, 115 T.C. 417 (2000).

126. *Lunsford I*, 117 T.C. at 164.

In the nascent stages of our Section 6330 jurisprudence, we made a decision limiting our jurisdiction. After almost a year of experience in dealing with lien and levy cases, we have come to the conclusion that the jurisdictional analysis in *Meyer* was incorrect and has resulted in unjustified delay in the resolution of cases.

Id.

127. See *Robinette v. Comm’r*, 123 T.C. 85, slip op. at 23 (2004) (noting that *Lunsford II* was an instance where the court has affirmed an Appeals officer’s determination when there was no hearing).

128. *Lunsford I*, 117 T.C. at 164–65.

129. *Id.* at 178–79 (Foley, J., dissenting).

correspondence hearing occurred.¹³⁰ For a determination to be valid, the determination must be issued after a CDP hearing.¹³¹ It was improper for the court to refuse to address the hearing issue.

Contrary to the Tax Court's majority holding in *Lunsford I*, without a hearing there cannot be a valid Notice of Determination. In a separate dissent in *Lunsford I*, Judge Vasquez noted that *stare decisis* should play an even greater role for cases of statutory construction.¹³² Judge Foley's dissent noted that neither the IRS nor the taxpayer questioned the rule in *Meyer*.¹³³ While concerns that the CDP hearing procedures can be used for delay are valid, the regulations allow the taxpayer to raise only issues presented at the CDP hearing on appeal.¹³⁴ Thus, if no hearing was conducted, little if anything can be raised on appeal.¹³⁵ This eviscerates the rights Congress intended to give to taxpayers.

In addition, as noted in Judge Laro's dissent in *Lunsford II*, there is little for the court to review if no hearing is conducted. Because the taxpayer was not given an opportunity to raise any relevant issues if no hearing was conducted, the Appeals officer cannot have considered the issues to have been raised at a hearing.¹³⁶ Judge Laro concluded that such a failure is a "*per se* abuse of discretion."¹³⁷ If for no other reason, Judge Laro believed that the Appeals officer abused his discretion by concluding that all applicable laws had been complied with when the Appeals officer had failed to provide the taxpayer with the statutorily mandated hearing.¹³⁸ Judge Laro noted that he wrote "separately in this important case to stress

130. *Id.* at 176 (Foley, J., dissenting).

Prior to overruling *Meyer v. Commissioner*, 115 T.C. 417 (2000), and taking jurisdiction, the majority must first answer this question. The majority did not do so. *Undaunted by the facts and the law, the majority usurp jurisdiction over this matter and simply assert that, regardless of whether there was a hearing, the purported determination is "valid" and "we have jurisdiction."*

Id. at 176–77 (Foley, J., dissenting) (emphasis added).

131. *Id.* at 178 (Foley, J., dissenting).

132. *Id.* at 182 (Vasquez, J., dissenting).

133. *Id.* at 180 (Foley, J., dissenting).

134. Treas. Reg. §301.6330-1(f)(2), Q&A-F5 (2002). "In seeking Tax Court or district court review of Appeals' Notice of Determination, the taxpayer can only ask the court to consider an issue that was raised in the taxpayer's CDP hearing." *Id.*

135. *Lunsford I*, 117 T.C. at 182 (Vasquez, J., dissenting).

136. See *Lunsford II*, 117 T.C. 183, 197 (2001) (Laro, J., dissenting) ("Absent an Appeal's officer's consideration of issues at a hearing, I do not believe that there is any determination of an Appeal's officer that this Court could sustain.").

137. *Id.* (Laro, J., dissenting) (emphasis added).

138. *Id.* (Laro, J., dissenting). Judge Laro also took issue with the manner in which the Appeals officer conducted the verifications required by IRC section 6330. *Id.* at 197–98 (Laro, J., dissenting). Proper verification is discussed *infra* in Part I.C.3.c.

the importance of an appeal to a higher court.”¹³⁹ However, no appeal was taken.

Requiring a hearing only when deemed “necessary or productive” after the fact is dangerous. Even Judges Colvin and Gale, who were in the majority that found jurisdiction in *Lunsford I*, dissented in *Lunsford II*, reasoning that “the fact that [the Tax Court has] jurisdiction does not relieve respondent of the duty to provide an opportunity for a hearing as required by section 6330(b).”¹⁴⁰ Today this standard may only be used to deny tax protesters with frivolous claims a CDP hearing, but will it end there? Could such a standard be applied to prevent a hearing to taxpayers with whom the Appeals officer or court would rather not deal because the taxpayer is difficult or unpleasant in some way?

A further problem with a CDP determination issued without a hearing relates to judicial review. The legislative history directs the courts to apply an abuse of discretion standard of review to most CDP determinations.¹⁴¹ If no hearing was conducted, the reviewing court can only look to the taxpayer’s arguments and assume that the taxpayer would not have raised anything not articulated in the CDP hearing request at the hearing. Because there is no hearing, the court cannot review the Appeals officer’s application of discretion. The court will have to “substitute [its] judgment for that of the Appeals officer.”¹⁴²

Tax statutes are ordinarily strictly construed. The Tax Court has repeatedly noted that courts “must apply the law as written; it is up to Congress to address questions of fairness and to make improvements to the law.”¹⁴³ The *Lunsford* line of cases, allowing collection activity to continue without the required CDP hearing, violates this principle by allowing the

139. *Id.* at 191 (Laro, J., dissenting). This is perhaps not surprising given that a post-trial brief, although ordered by the court, was not filed on behalf of the taxpayers. *Id.* at 187. The majority discussed the taxpayers’ representative histories in this case as well as with the court as follows:

[T]he petition in this case is essentially the same as the petition filed with this Court in *Davis v. Commissioner*, 115 T.C. 35, 39 (2000). This is not surprising since the petition was filed by Thomas W. Roberts, who also filed the petition for the taxpayer in the *Davis* case. Mr. Roberts was disbarred from practice before this Court on June 18, 2001, and was removed as petitioners’ counsel on July 18, 2001.

Id. at 187, n.8.

140. *Id.* at 191 (Colvin, J., dissenting).

141. H.R. REP. NO. 105-599, at 266 (1998).

142. *Lunsford II*, 117 T.C. at 198 (Laro, J., dissenting) (discussing the legislative history of IRC section 6330).

143. *Aaron v. Comm’r*, 87 T.C.M. (CCH) 1087, 1090 (citing *Metzger Trust v. Comm’r*, 76 T.C. 42, 59–60 (1981), *aff’d* 693 F.2d 459 (5th Cir. 1982)). “It is not the function of a Court to rewrite or amend a statute in the guise of construing it. It is the Court’s duty to construe and apply the statute as it is written . . .” *Metzger*, 76 T.C. at 59–60.

IRS to ignore the statutory mandate that, if requested, a CDP hearing shall be conducted. The CDP provisions do not have ambiguities that would permit any interpretation that does not require that the Appeals Office conduct a CDP hearing if requested.

As noted in Judge Foley's dissent:

The majority's only explicit justification for ignoring the doctrine of *stare decisis* is that *Meyer v. Commissioner* . . . "has resulted in unjustified delay in the resolution of cases." "Unjustified delay" from whose perspective? The "delay" was *created by the Appeals officer's failure* to follow the section 6330(b)(1) mandate to hold a hearing. Moreover, in a case where a taxpayer maintains a proceeding in the Court primarily for delay, we are authorized to impose a penalty¹⁴⁴

The courts are not to rewrite statutes that do not operate as Congress intended.¹⁴⁵ If Congress disliked the result in *Meyer*, Congress could change the law.

When it comes to interpreting unambiguous language, the U.S. Supreme Court stated:

In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."¹⁴⁶

Further complicating the issue, in some cases it is difficult to tell whether a CDP hearing took place, the correspondence was sufficient to constitute a correspondence hearing, or it was deemed unnecessary to consider whether a hearing had occurred. In some cases, the Tax Court has either refused to consider whether a hearing occurred or simply concluded

144. *Lunsford I*, 117 T.C. 159, 180–81 (2001) (Foley, J., dissenting) (citation omitted).

145. See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241–42 (1989) (explaining that in almost all circumstances "[t]he plain meaning of legislation should be conclusive"); see also *United States v. Goldenberg*, 168 U.S. 95, 102–03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used."); *Oneale v. Thornton*, 6 U.S. (1 Cranch) 53, 68 (1810) (explaining that if Congress intended a particular result, it "could express that intention in the language of [the] act").

146. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted).

that no hearing was held.¹⁴⁷ In *Nichols v. Commissioner*, the court noted that “[n]o hearing was held with petitioners. Instead, on the basis of petitioners’ letter and attached document, Appeals issued to petitioners . . . a Notice of Determination”¹⁴⁸ The opinion moves from the assertion in the facts that there was no hearing to an analysis of the taxpayer’s substantive arguments, without considering the consequences flowing from the absence of a hearing.¹⁴⁹

It appears that the court in *Nichols* could have found a correspondence hearing, at least if review of the CDP request is sufficient to constitute a correspondence hearing.¹⁵⁰ In addition, the Tax Court might have concluded that, pursuant to Tax Court Rule 331,¹⁵¹ the hearing issue was conceded because the taxpayer had not raised the issue. However, the opinion does not address either of these issues.

Similarly, in *Robinson v. Commissioner*, the Appeals officer “did not hold an Appeals Office hearing with [the taxpayer]. That is because the Appeals officer determined that the matters advanced in [the taxpayer’s] attachments to Form 12153 did not require [the IRS] to hold a hearing to discuss those matters.”¹⁵² The taxpayer was notified that the Appeals

147. See, e.g., *Robinson v. Comm’r*, 85 T.C.M. (CCH) 1026, 1028 (2003) (concluding that the taxpayer’s assertion of only “frivolous and/or groundless” claims “did not require [the Appeals officer] to hold a hearing”); *Nichols v. Comm’r*, 84 T.C.M. (CCH) 697, 699–700 (2002) (“[N]otwithstanding petitioner’s request to have a “meaningful hearing” . . . we consider it neither necessary or productive to remand this case to Appeals to hold a hearing.”); see also *Stewart v. Comm’r*, 2004 TNT 60-39 (W.D. Pa. 2004) (holding that the hearing requirement was satisfied where the taxpayer spoke with a settlement officer relating to one CDP request, had an informal meeting with another settlement officer at which the taxpayer was told that the meeting was not the CDP hearing, and had other contact with the second hearing officer); *Lunsford II*, 117 T.C. 183, 189 (2001) (holding an Appeals hearing not required where “the only arguments that petitioners presented to this Court were based on legal propositions which we have previously rejected”). In *Robinette v. Comm’r*, 123 T.C. 85, slip op. at 23 (2004), the Tax Court acknowledged that in some cases the court has been willing to uphold a determination even if no hearing was conducted.

148. *Nichols*, 84 T.C.M. at 699. A letter and document were attached to the Form 12153 on which the taxpayers requested a CDP hearing. The letter generally requested that the IRS abate its actions and provide copies of the record of assessment pursuant to I.R.C. section 6203, copies of notices of the assessment, and the basis for the determination that the taxpayer was in fact liable for taxes. The taxpayer stated that he was making a procedural challenge to the assessment, although the taxpayer’s letter indicates that the taxpayer in fact was attempting to raise frivolous arguments. *Id.* at 698–99.

149. See *id.* at 699.

150. See *id.* at 698–99 (describing the taxpayer’s request for a hearing, finding that Appeals did not hold a hearing, and moving forward with judicial review).

151. Rule 331 provides direction on filing a petition for redetermination of a CDP determination. In part, the rule requires that the petition include “[c]lear and concise assignments of each and every error which the petitioner alleges to have been committed in the notice of determination. Any issue not raised in the assignments of error shall be deemed to be conceded.” TAX CT. R. 331(b)(4).

152. *Robinson*, 85 TCM (CCH) at 1028.

officer would “examine any information that [the taxpayer] wished to submit [The taxpayer] did not provide any information in response”¹⁵³ The Tax Court did not address the fact that no meaningful hearing was held beyond this factual description. The taxpayer in *Robinson* was at least offered the opportunity to provide additional information and to discuss the matter with the Appeals officer in some fashion. Perhaps this is analogous to the situation where a taxpayer is offered the opportunity to schedule a CDP hearing and fails or refuses to do so. When a taxpayer fails or refuses to schedule a hearing, the Appeals officer has no choice but to issue a determination based on the available record so that collection can continue. If Mr. Robinson unreasonably failed or refused to schedule a hearing, the court could have concluded that a correspondence hearing was conducted, assuming that correspondence hearings are proper CDP hearings. Once again, the court did not address this issue.

In *Nichols* and *Robinson*, the court did not even consider whether holding such a hearing would be “necessary or productive.” Because the Tax Court acknowledges that it has upheld CDP determinations issued without a CDP hearing,¹⁵⁴ it seems unlikely that the Tax Court was concerned about whether a hearing occurred in these cases. This is even more dangerous to taxpayer rights and the perception of fairness than the approach adopted in the *Lunsford* line of cases, which at least attempts to determine the likelihood that any relevant issues would be raised at a hearing.

After a CDP determination upholding the proposed collection action is issued and any judicial appeals are exhausted, collection action may continue. Given the cases allowing issuance of a CDP determination without a CDP hearing, when is a taxpayer entitled to a CDP hearing? What arguments must be raised by the taxpayer to ensure that a CDP hearing will be offered? Requiring a CDP hearing in all cases would eliminate the uncertainty. Moreover, it is hard to understand why, given limited resources, the IRS would offer or conduct CDP hearings before a court ordered it to do so? Fortunately, some courts have not been willing to ignore the statutory mandate that a CDP hearing occur.¹⁵⁵

153. *Id.*

154. *Robinette v. Comm’r*, 123 T.C. 85, slip op. at 23 (2004).

155. *See Silver v. Smith*, 90 A.F.T.R.2d (RIA) 6575, 6577–78 (W.D.N.Y. 2002) (remanding for a CDP hearing where an Appeals officer made no findings on the merits); *Erickson v. United States*, 89 A.F.T.R.2d (RIA) 1740, 1742 (N.D. Cal. 2002) (remanding for a CDP hearing because the original CDP hearing was defective). *But see Montijo v. United States*, 02-2 U.S. TAX CAS. (CCH) ¶ 50,321, at 83,766 (D. Nev. 2002) (refusing to remand for a proper CDP hearing because the court found no authority to do so). *See also Meyer v. Comm’r*, 115 T.C. 417, 422 (2000) (concluding that a CDP

Contrary to the conclusion reached by the Tax Court, a CDP hearing must be conducted if timely requested. Without conducting a CDP hearing, the Appeals officer cannot perform the tasks assigned by the CDP provisions. Collections cannot continue until after the CDP hearing.¹⁵⁶ In addition, a proper record cannot be created without conducting a hearing. Therefore, collection actions taken without a proper CDP hearing are invalid and contrary to the statute.

Cases where no hearing was offered should be distinguished from cases where the Appeals officer offered the taxpayer a CDP hearing and the taxpayer chose not to avail him or herself of that opportunity. In many instances, the Appeals officer has worked to accommodate the taxpayer and schedule a hearing to no avail.¹⁵⁷ Unlimited delay, particularly when all evidence suggests that the taxpayer's position is frivolous, was not the intent of Congress. Ultimately the collection process must move forward. After a taxpayer requests a CDP hearing, a CDP determination must be issued for collection to continue. Congress envisioned that notice and a meaningful opportunity to be heard would be offered taxpayers.¹⁵⁸ Neither due process nor the CDP provisions require that the taxpayer take advantage of the opportunity to be heard.

When the taxpayer refuses to schedule a CDP hearing within a reasonable time, the Appeals officer is left no alternative but to review the administrative record, perform the statutorily required verification,¹⁵⁹ and issue a CDP determination so that collection is not forever delayed by the intransigence of the taxpayer. In these cases, the courts have correctly upheld the Appeals officer's decision to make a determination based on the correspondence from the taxpayer and the administrative file.¹⁶⁰

hearing was a jurisdictional requirement for judicial review of a CDP determination), *overruled by Lunsford I*, 117 T.C. 159, 164 (2001) (concluding that a CDP hearing was not required; jurisdiction simply requires a facially valid CDP determination).

156. I.R.C. § 6330(a)(1), (e)(1) (West 2004); *see also* I.R.C. § 6320(c) (applying section 6330).

157. *See, e.g.*, *Moore v. Comm'r*, 85 T.C.M. (CCH) 727, 727-28 (2003) (taxpayer did not appear at the scheduled hearing or return subsequent telephone calls); *Armstrong v. Comm'r*, 84 T.C.M. (CCH) 287, 292 (2002) (taxpayer was not available for scheduled telephonic hearing, did not object to a telephonic hearing or request a face-to-face meeting, and did not respond to attempts to reschedule); *Hochschild v. Comm'r*, 84 T.C.M. (CCH) 161, 161-64 (2002) (taxpayer turned down a face-to-face conference explaining that a disability prevented his attendance and did not respond to a subsequent offer of a telephonic hearing).

158. S. REP. NO. 105-174, at 67 (1998). I.R.C. sections 6320 and 6330 are designed to "afford taxpayers adequate notice of a collection activity and a meaningful hearing before the IRS deprives them of their property."

159. I.R.C. § 6330(c).

160. *E.g.*, *Taylor v. Comm'r*, 87 T.C.M. 848, 849 (2004); *Mann v. Comm'r*, 83 T.C.M. (CCH) 1259, 1260 (2002); *see also* Treas. Reg. §§ 301.6320-1(d)(2), Q&A-D7, 301.6330-1(d)(2), Q&A-D7 (West 2004) (explaining that a review by the Appeals Office of the correspondence from the taxpayer

The cases demonstrate that the IRS has generally attempted to comply with the CDP provisions requiring a hearing upon request.¹⁶¹ Overall, the Appeals Office is satisfying its statutory obligations. TIGTA's 2004 report concluded that the Appeals Office "substantially complied with" the CDP provisions when conducting CDP hearings in 98.5 percent of the cases reviewed.¹⁶²

The Appeals Office is the most efficient forum in which to conduct the CDP hearings: the Appeals officers are trained to conduct such hearings; the procedures may be informal; and there will be less delay in collection if the Appeals Office conducts hearings rather than the courts. However, if the Appeals Office does not conduct a CDP hearing, and the court does not send a case back for a proper hearing, courts will be required to hold a hearing, weighing the information that would have been considered at the Appeals Office. In at least some cases, if a hearing is properly conducted at the Appeals Office, judicial oversight will not be required. Given limited resources, judicial willingness to accept inadequate procedure, and the absence of an effective penalty for faulty administrative action, the number of instances in which the Appeals Office does not offer or conduct CDP hearings may increase.

3. Hearing Procedures

Failing to conduct a hearing at all is not the only way in which taxpayers may receive a less meaningful CDP hearing than Congress intended. While it is essential that a hearing be conducted to satisfy the requirements of the CDP provisions and due process, simply conducting a hearing is not enough. Congress also intended that the hearing afford the taxpayer a meaningful opportunity to be heard.¹⁶³

A number of issues have arisen relating to the conduct of the hearing. For instance, as a result of the conclusion that CDP hearings can be informal, the IRS and the courts have concluded that a taxpayer does not have a right to subpoena or cross-examine witnesses.¹⁶⁴

constitutes a CDP hearing).

161. See *Lunsford II*, 117 T.C. 183, 199 (2001) (Laro, J., dissenting) ("Section 6330 is a relatively new provision, and the Commissioner is obviously looking to the Courts for guidance as to the proper rules which he must apply to implement that provision properly.").

162. TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF TREASURY, APPEALS COMPLIED WITH THE PROVISIONS OF THE LAW FOR THE COLLECTION DUE PROCESS 3 (2004). The Appeals Office complied with the CDP provisions in 58 of 59 CDP cases reviewed (out of sixty-five randomly selected). *Id.* TIGTA is required to submit an annual report to Congress. I.R.C. § 7803(d)(1)(A)(iii) & (iv).

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

164. See, e.g., *Kelly v. United States*, 209 F. Supp. 2d 981, 988-89 (E.D. Mo. 2002) (holding

a. Taxpayers' Right to Create a Verbatim Record of a CDP Hearing

A recurring procedural issue is whether a taxpayer has a right to record or transcribe a CDP hearing.¹⁶⁵ Whether the taxpayer is entitled to record a CDP hearing remains an open question. Neither the CDP provisions nor the regulations address a taxpayer's right to record or transcribe a CDP hearing. Courts and the IRS have arrived at different conclusions.¹⁶⁶

Initially, the IRS took the position that a taxpayer's right to obtain a transcript or record an Appeals hearing, including a CDP hearing, was within the discretion of the Appeals officer assigned to that taxpayer's case.¹⁶⁷ Subsequently, the Appeals Office decided not to allow a taxpayer to record a CDP hearing or have a stenographer present.¹⁶⁸ Taxpayers

that a meaningful hearing does not include the right to subpoena witnesses and documents); *Johnson v. United States*, 91 A.F.T.R.2d (RIA) 786, 790 (N.D. Fla. 2002) (holding that a taxpayer may not subpoena or examine witnesses at the hearing); *Davis v. Comm'r*, 115 T.C. 35, 41–42 (2000) (concluding that Congress did not intend for witnesses to be subpoenaed or examined at CDP hearings).

165. See cases cited *infra* notes 171–173 and accompanying text.

166. See *Keene v. Comm'r*, 121 T.C. 8, 12 (2003) (holding that petitioner was entitled to record his hearing, despite the IRS's insistence otherwise).

167. See I.R.S. Notice 89-51, 1989-1 C.B. 691 (establishing procedures for taxpayer interviews under IRC section 7520 (now IRC section 7521), including a taxpayer's right to record an interview).

168. *Keene*, 121 T.C. at 12. *Keene* extensively quotes "an internal, apparently unpublished, Memorandum . . . from the Acting Chief of the Office of Appeals in Washington D.C.," dated May 2, 2002, which reads:

Effective immediately, audio and stenographic recordings will no longer be allowed on Appeals cases. Taxpayers and/or representatives who have already requested such recording will be informed of the change in practice immediately, and advised that the request cannot be allowed.

Prior to enactment of IRC 7521, Service Compliance functions voluntarily allowed audio recordings. Appeals decided to follow this practice at that time. IRC 7521, enacted in 1988, provided for the allowance of audio recordings of conferences relative to the determination or collection of a tax, between the taxpayer and the Internal Revenue Service, provided that the Service was given at least ten (10) days advance notice of the taxpayer's intent to record the conference.

Although Appeals makes liability and collectibility determinations, Appeals' procedures differ from Examination and Collection function contacts that are not discretionary for the taxpayer. Contact with Appeals is discretionary for the taxpayer, and as such, recording has always been discretionary for Appeals.

It should also be noted that Appeals was deliberately excluded in Notice 89-51 that dealt with the audio recording provision, as Counsel determined that IRC 7521 was not applicable to Appeals.

Recently Appeals has had several incidents of audio recordings being altered to imply Appeals employees were making inappropriate comments. In some cases, those altered recordings were broadcast on the radio. We are also aware of instances where excerpts of stenographic records were combined in inappropriate ways and published in anti-tax newsletters and other anti-government publications.

whose CDP hearings had not yet been conducted were sent notices informing them of the change in policy, which would prohibit them from recording the CDP hearing.¹⁶⁹ The primary rationale for prohibiting recording is the concern that tampering with the recording may create an appearance of improper conduct by the Appeals officer.¹⁷⁰

Even before the policy change in the Appeals Office, the courts used different approaches to a taxpayer's right to record the CDP hearing. Some courts allowed recording,¹⁷¹ some provided a limited right,¹⁷² and others have found recording to be unnecessary.¹⁷³

These actions have had the result of undermining the appearance of Appeals' competence, impeding Appeals ability to adequately function in its role as a dispute resolution function. These incidents have interfered with our customers' perception of our ability to carry our Appeals' mission to be fair and impartial in our considerations; and therefore cannot be allowed to continue.

In addition, Appeals has always been concerned that the practice of recording conferences and hearings could inappropriately interfere with the informal nature of Appeals conferences, and therefore might improperly impede settlement.

Therefore, the decision has been made to eliminate all audio as well as stenographic recordings of Appeals conferences and hearings. That decision is effective immediately upon the date of this memorandum.

This memorandum supersedes guidance issued in Internal Revenue Manual 8.7.2.3.4 and 8.6.1.2.5 on the subject of recording hearings and conferences. The IRM will be updated to reflect these changes during the next regular update of that section.

Id. at 12–13. *But cf.* Olson, *supra* note 56, at 1249 (“[P]roposals that will prevent taxpayers in Appeals conferences from recording CDP hearings are a serious abridgment of taxpayer rights. Simply because some taxpayers are putting these recordings on the Internet, and even altering them, should not stop us from allowing taxpayers to record interviews and conferences where otherwise permitted by law or practice.”).

169. *See Keene*, 121 T.C. at 12 (quoting the Appeals Office Acting Chief, who wrote that taxpayers waiting for their requested CDP hearings “will be informed of the change in practice immediately”).

170. *See supra* note 168.

171. *See, e.g., Keene*, 121 T.C. at 19 (concluding that petitioner was entitled to record his CDP hearing); *Mesa Oil, Inc. v. United States*, 86 A.F.T.R.2d (RIA) 7312, 7318 (D. Colo. 2000) (concluding that an “adequate record” of proceedings is required, and may be made through an audio recording, video recording, or stenographer).

172. *See, e.g., Brashear v. Comm’r*, 86 T.C.M. (CCH) 16, 19 (2003) (concluding that the frivolous nature of petitioners’ claims makes it unnecessary and unproductive to order a remand to allow petitioners to make an audio recording of their CDP hearing); *Kemper v. Comm’r*, 86 T.C.M. (CCH) 12 (2003) (concluding that it was neither necessary nor productive to remand for a hearing that the taxpayer could record because a CDP hearing had been conducted at which the taxpayer raised only frivolous issues).

173. *See, e.g., Hardy v. United States*, 2003-2 U.S. Tax Cas. 89,026, 80,029 (N.D. Ala. 2003) (refusing to vacate a determination because the taxpayer was not allowed to record the CDP hearing because IRC section 7521 was inapplicable to CDP hearings, and the regulations relating to the controlling IRC sections 6320 and 6330 did not entitle the taxpayer to tape-record the CDP hearing); *CompuCel Serv. Corp. v. Comm’r*, 89 A.F.T.R.2d (RIA) 1286, 1288 (D. Md. 2002) (distinguishing the facts of *Mesa Oil* because in *CompuCel* there already existed an “adequate record,” and thus there was

In *Keene v. Commissioner*, the Tax Court took an intermediate position, giving taxpayers a limited right to record the CDP hearing.¹⁷⁴ In *Keene*, the taxpayer, after being informed that no recording would be allowed, refused to continue with the hearing.¹⁷⁵ A CDP determination was then issued.¹⁷⁶ The Tax Court concluded that a taxpayer has a right to record a CDP hearing “pursuant to [IRC] section 7521(a)(1).”¹⁷⁷ The Court concluded that, although IRC section 7521(a)(1) did not define “in-person interview,” that term included CDP hearings.

Where a term is not defined in the statute, it is appropriate to accord the term its “ordinary meaning”. And when there is no indication that Congress intended a specific legal meaning for the term, courts may look to sources such as dictionaries for a definition. See also *Huntsberry v. Commissioner*, 83 T.C. 742, 747–748 (1984), in which the Court stated that “where a statute is clear on its face, . . . we would require unequivocal evidence of legislative purpose before construing the statute so as to override the plain meaning of the words used therein.”¹⁷⁸

The majority concluded there was little distinction between the term “interview” in IRC section 7521(a)(1) and the term “hearing” in the CDP provisions.¹⁷⁹ The Appeals Office allowed taxpayers to record Appeals Office proceedings at the time the CDP provisions were enacted. Congress was aware of this and chose not to address this issue when the CDP provisions were enacted, indicating an expectation of the right to record the hearing.¹⁸⁰ The majority rejected the argument that recording was allowed as a matter of right only when the process was inquisitory, as in

no need to remand to Appeals to create a fuller record, i.e., one including a recording of the hearing).

174. See *Keene*, 121 T.C. at 19 (remanding case of a CDP hearing and allowing the taxpayer to record the proceeding).

175. *Id.* at 13.

176. *Id.*

177. *Id.* at 19. IRC section 7521(a)(1) provides:

Any officer or employee of the Internal Revenue Service in connection with any in-person interview with any taxpayer relating to the determination or collection of any tax shall, upon advance request of such taxpayer, allow the taxpayer to make an audio recording of such interview at the taxpayer’s own expense and with the taxpayer’s own equipment.

I.R.C. § 7521(a)(1) (West 2004). Because it was unnecessary to the holding, the court did not address the validity of regulations saying that the recording was not mandatory. *Keene*, 121 T.C. at 18.

178. *Keene*, 121 T.C. at 14–15 (citations omitted).

179. *Id.* at 16.

180. *Id.* at 17.

proceedings before Examinations or Collections, and was not available as a matter of right when the proceedings were voluntary, as in the case of CDP hearings.¹⁸¹ Further, the CDP hearings relate to the collection of tax.¹⁸² The court also noted the inconsistency of permitting recording of examination interviews that are not subject to judicial review, but not CDP hearings.¹⁸³ In addition, the court noted that judicial review would be complicated by refusing to allow taxpayers to record CDP hearings and therefore “undermine” the intended protections of RRA 1998.¹⁸⁴

The dissent in *Keene* countered that a CDP hearing was not an “interview” under IRC section 7521 and that CDP hearings were not available at the time IRC section 7521 was enacted.¹⁸⁵ The dissent reasoned that, although under the Administrative Procedure Act (APA) a person compelled to participate in an administrative proceeding is entitled to a transcript of the proceedings,¹⁸⁶ CDP hearings are not mandatory procedures; the taxpayer voluntarily requests the hearing.¹⁸⁷ The requirement in the APA that a witness be allowed to record or receive a copy of a transcript is inapplicable in the context of CDP hearings because CDP hearings are voluntary.¹⁸⁸

While the dissent in *Keene* may be correct that a CDP hearing is not an interview under IRC section 7521, CDP hearings do relate to collection of taxes. In addition, because judicial review is available following a CDP hearing, allowing taxpayers to record the proceeding will create a better, more accurate record for review.¹⁸⁹ That the record might be used out of context is not enough to deny taxpayers the right to record their CDP hearings. In addition, denying taxpayers the opportunity to record a CDP hearing is unlikely to reduce allegations of abuse or improper conduct by

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 33 (Chiechi, J., dissenting); see also Camp, *supra* note 5, at 125–27 (concluding that the IRS’s position was better and that CDP hearings are not “interviews” as that term is used in IRC section 7521). Section 7521 was enacted as section 7520 in 1988. It was subsequently renumbered as section 7521.

186. 5 U.S.C. § 555(c) (2000).

187. *Keene*, 121 T.C. at 28–29 (Swift, J., dissenting). *But see id.* at 17 (concluding CDP hearings are “an integral part of the collection process,” in spite of the dissent’s interpretations to the contrary).

188. *Id.* at 29 (Swift, J., dissenting). For further discussion of the applicability of the APA to tax proceedings, see *infra* notes 240–44 and accompanying text.

189. *Keene*, 121 T.C. at 23. *But see* Camp, *supra* note 5, at 127 (advocating against increasing taxpayer rights to record CDP hearings as “interviews”: “So long as the CDP hearing results in ‘a’ record sufficient for judicial review, the adversarial process requirements are satisfied. A verbatim transcript is not needed, and tilting Appeals towards becoming a ‘mini-me’ Tax Court is unwise.”).

the Appeals officer.

Similarly, in *Mesa Oil v. United States*, the court remanded the case for further proceedings and the development of the record.¹⁹⁰ The court held that a more complete record was needed to facilitate judicial review of the CDP determination.¹⁹¹

In other cases, courts have denied the taxpayer the right to record the CDP hearing.¹⁹² Many of these cases are distinguishable, at least from *Keene*, because the taxpayer participated in the CDP hearing despite the Appeals officer's refusal to allow recording of the hearing.¹⁹³ However, a number of courts have concluded that IRC section 7521, the basis for allowing the recording in *Keene*, is inapplicable to CDP hearings.¹⁹⁴

The IRS suffers little, if any, harm by allowing CDP hearings to be recorded at the taxpayers' expense. In some cases, taxpayers or their representatives have made unauthorized recordings of the CDP hearing.¹⁹⁵ Unauthorized recordings increase the risk that the recordings will be altered or used improperly by depriving the IRS of the opportunity to insure that the recording accurately represents the hearing. Creating an air of secrecy makes it more difficult for the Appeals Office and the IRS to demonstrate

190. *Mesa Oil, Inc. v. United States*, 86 A.F.T.R.2d (RIA) 7312, 7317–18 (D. Colo. 2000). Cf. *CompuCel Serv. Corp. v. Comm'r*, 89 A.F.T.R.2d 1286, 1288 (D. Md. 2002) (deciding that there was no need to remand the case because the existing record was “adequate”).

191. *Mesa Oil, Inc.*, 86 A.F.T.R.2d at 7317.

192. *E.g.*, *Yuen v. United States*, 290 F. Supp. 2d 1220, 1226 (D. Nev. 2003); *Snyder v. United States*, 93 A.F.T.R.2d (RIA) 425 (N.D. Ohio 2003); see also *Bentley v. United States*, 90 A.F.T.R.2d (RIA) 6517, 6518, 6520–21 (N.D. Ohio 2002) (holding that the Appeals officer did not abuse his discretion by, among other things, refusing to allow recording of the hearing); *CompuCel Serv. Corp. v. Comm'r*, 89 A.F.T.R.2d (RIA) 1286, 1288 (D. Md. 2002) (acknowledging the possibility that some cases would require an additional record, and concluding that this was not such a case); *Henry v. Bronstein*, 90 A.F.T.R.2d (RIA) 7134, 7135 (D. Md. 2002) (concluding that taxpayer's refusal to participate in a hearing when the Appeals officer prohibited the taxpayer from recording the hearing amounted to a waiver of the taxpayer's CDP rights); *Brashear v. Comm'r*, 86 T.C.M. (CCH) 16, 19 (2003) (concluding that the frivolous nature of petitioners' claims make a remand unnecessary and unproductive); *Duncan v. Comm'r*, 85 T.C.M. (CCH) 1068, 1071 (2003) (holding that all requirements of law were met even though the taxpayer was denied the opportunity to make a recording of the hearing); *Horton v. Comm'r*, 86 T.C.M. (CCH) 19, 21–23 (2003) (concluding that the frivolous nature of petitioner's claim makes it unnecessary and unproductive to remand); *Kemper v. Comm'r*, 86 T.C.M. (CCH) 12, 16 (2003) (same); *Widner v. Comm'r*, 85 T.C.M. (CCH) 1197, 1198 (2003) (holding that “[t]he requirements of all applicable laws . . . have been met” even though petitioner was denied the opportunity to make a recording of the hearing). In addition, a taxpayer has no right to a writ of mandamus compelling recording; because a statutory right to appeal exists, mandamus is not a proper remedy. *Helvie v. Beach*, 2004 TNT 22-35 (S.D. Fla. 2003).

193. *Brashear*, 86 T.C.M. at 18; *Duncan*, 85 T.C.M. (CCH) at 1071; *Horton*, 86 T.C.M. at 21; *Kemper*, 86 T.C.M. (CCH) at 16; *Widner*, 85 T.C.M. (CCH) at 1198.

194. See, e.g., *Van Gassbeck v. United States*, 2004 TNT 69-10 (D. Nev. 2004); *Rennie v. United States*, 216 F. Supp. 2d 1078, 1079 n.1 (E.D. Cal. 2002).

195. *Struhar v. Comm'r*, 85 T.C.M. (CCH) 1350, 1352 (2003); *Widner*, 85 T.C.M. (CCH) at 1197 n.4; *Lindsay v. Comm'r*, 82 T.C.M. (CCH) 816, 821 (2001).

that they are following the Internal Revenue Code and Treasury Regulations.¹⁹⁶ The IRS can record the hearing as well to ensure that the record made is accurate, as is currently done in other collection contexts.¹⁹⁷

Preventing taxpayers from recording a CDP hearing may also have a significant cost to the taxpaying public's perceptions of the tax collection system. Such secrecy is unnecessary. Ensuring that there is a complete and adequate record of the proceedings should increase confidence that Appeals officers properly perform their duties and that taxpayers receive a fair opportunity to present their cases. Preventing the creation of a record increases the risk that these matters will be taken out of context and used improperly. The matter then truly becomes "he said, she said."¹⁹⁸ Thus, taxpayers should be permitted to record CDP hearings at their own expense, even though CDP hearings may not be "interviews" under the meaning of IRC section 7521. In addition, allowing taxpayers to record CDP hearings is consistent with the congressional intent underlying the CDP provisions.

Although it should not be necessary to amend the statute to allow recording, the conflicting administrative and judicial approaches to recording make statutory changes important to provide a consistent rule. Allowing taxpayers to record their CDP hearings will also increase the perception of fairness, furthering one of Congress' concerns in adopting the CDP provisions.

b. Issues that May Be Raised at a CDP Hearing

Another recurring issue relates to which issues can be raised at the CDP hearing. Under IRC section 6330, a taxpayer is allowed to raise "any relevant issue relating to the unpaid tax or the proposed levy."¹⁹⁹ The CDP provisions provide two important limitations to the right to raise any relevant issue.²⁰⁰ First, challenges to the amount or existence of the underlying liability may be raised only if the taxpayer did not receive a statutory notice of deficiency or otherwise have a prior opportunity to challenge the underlying liability.²⁰¹ Second, the taxpayer may not raise

196. But note that it may still be difficult for Appeals to defend itself within the bounds of nondisclosure required by IRC section 6103, which requires government officers and employees to maintain the confidentiality of tax return information. I.R.C. § 6103 (West 2004).

197. IRS Notice 89-51, 1989-1 C.B. 691.

198. *Keene v. Comm'r*, 121 T.C. 8, 23 (2003) (Vasquez, J., concurring).

199. I.R.C. § 6330(c)(2)(A); *see also* H.R. CONF. REP. NO. 105-599, at 265 (1998) ("In general, any issue relevant to the appropriateness of the proposed collection against the taxpayer can be raised at this hearing.").

200. I.R.C. § 6330(c).

201. I.R.C. § 6330(c)(2)(B). Taxpayers are entitled to raise the issue of the underlying liability with respect to tax liabilities self-reported on a return but not paid. *Montgomery v. Comm'r*, 122 T.C. 1,

any other issue that was considered in any prior CDP hearing, administrative proceeding, or judicial proceeding in which the taxpayer meaningfully participated.²⁰² The statute and regulations identify “relevant” issues to “includ[e] appropriate spousal defenses, challenges to the appropriateness of the proposed collection action, and offers of collection alternatives.”²⁰³

Among the collection alternatives that a taxpayer may raise are proposals for offers in compromise and installment payment agreements.²⁰⁴ Both offers in compromise and installment payment agreements have significant restrictions on when they will be accepted by the IRS. Among the restrictions are current compliance with the tax laws and compliance with the terms of the agreement. The courts have generally upheld an Appeals officer’s determination not to accept proposed collection alternatives.²⁰⁵

9 (2004). The underlying liability may be challenged in such circumstances because no notice of deficiency was issued and the taxpayer did not have an opportunity to challenge the amount or existence of the liability in a prior proceeding. *Id.* at 7.

202. I.R.C. § 6330(c)(4). *Wooten v. Comm’r*, 85 T.C.M. (CCH) 1193, 1196 (2003) (“Section 6330(c)(4) in effect codifies the legal doctrines of res judicata and collateral estoppel in their application to collection proceedings.”); *see also McIntosh v. Comm’r*, 86 T.C.M. (CCH) 406, 411 n.8 (2003) (barring petitioner from raising the issue because the same issue had been raised in a previous proceeding in which the petitioner was a participant).

203. Treas. Reg. §§ 301.6330-1(e)(1), 301.6320-1(e)(1) (2004); I.R.C. § 6330(c)(2). Judicial review of Appeals’ rejection of a proffered collection alternative is made for abuse of discretion. A number of cases have upheld an Appeals officer’s decision to reject a collection alternative. *See, e.g., Dudley’s Commercial & Indust. Coating, Inc. v. United States*, 292 F. Supp. 2d 976, 990 (M.D. Tenn. 2003) (holding that the Appeals officer’s rejection of petitioner’s proposed collection alternative was justifiable); *Estate of Doster v. Comm’r*, 83 T.C.M. (CCH) 1044, 1047 (2002) (concluding that the rejection of petitioner’s request for a collection alternative was not an abuse of discretion).

204. I.R.C. § 6330(c)(2)(A)(iii). Offers in compromise may be made where there is doubt as to the liability, doubt as to the collectability, and for the promotion of effective tax administration. Treas. Reg. § 301.7122-1(b)(1)–(3). Claims that payments were not allocated in an optimal manner do not constitute a proposed collection alternative. *Mendez v. United States*, 2004 TAX NOTES TODAY 58-16 (Mar. 25, 2004) (S.D. Fla., Dec. 15 2003).

205. *See, e.g., Nicol v. Comm’r*, T.C. Summary Op. 2004-47, slip op. at 10–11 (Apr. 12, 2004) (finding no abuse of discretion in the denial of an offer in compromise and an installment agreement when the taxpayer failed to file the required forms that allow the IRS to determine whether the proposed collection alternatives were reasonable); *Razo v. Commissioner*, 113 T.C.M. (CCH) 1234, 1235 (2004) (finding no abuse of discretion in a CDP determination rejecting an offer in compromise on the basis of the taxpayer’s assets where the Appeals officer treated the liability as “temporarily not collectible”); *STA Painting v. United States*, 04-1 U.S. Tax Cas. (CCH) ¶ 50,174, at 83,268 (E.D. Pa. 2004) (finding no abuse of discretion in denial of an installment agreement on the basis that the taxpayer had a history of noncompliance with a previous installment agreement). *But see Borges v. United States*, 317 F. Supp. 2d 1276, 1283 (D. N.M. 2004) (remanding the case for a new CDP hearing and determination because the Appeals officer improperly balanced the proposed collection alternative without considering possible errors as to the amount of the liability and incorrectly identifying the proposed amount of the installment payments); *Ramirez v. Comm’r*, T.C. Summary Op. 2004-48, slip op. at 9 (April 12, 2004) (concluding that the Appeals officer abused his discretion by not considering a proposed offer in

The existence or amount of the underlying deficiency cannot be challenged unless “the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.”²⁰⁶ The legislative history helps to clarify when Congress intended to allow taxpayers to challenge the underlying deficiency, stating that “the validity of the tax liability can be challenged only if the taxpayer did not *actually* receive the statutory notice of deficiency or has not otherwise had an opportunity to dispute the liability.”²⁰⁷ Thus, the standard for when the underlying liability may be challenged is actual receipt of the notice of deficiency.²⁰⁸ If a notice of deficiency was issued, the taxpayer must demonstrate non-receipt of the notice of deficiency to challenge the underlying liability.²⁰⁹ A taxpayer may not challenge the underlying liability if the taxpayer purposefully avoided receipt of the notice of deficiency.²¹⁰ However, taxpayers may challenge the amount or existence of a self-assessed liability. That is, a taxpayer may challenge the accuracy of the amount due shown on a self-filed return if reported but not paid and a notice of deficiency was not issued.²¹¹ In many, if not most cases, issues relating to the existence or

compromise that was received after the Appeals officer administratively closed the file, but before the CDP determination was mailed to the taxpayer).

206. I.R.C. § 6330(c)(2)(B); *see also* Fahey, *supra* note 3, at 467 (noting that the statute does not clearly articulate the meaning of the phrase “or did not otherwise have an opportunity to dispute such tax liability”); Book, *The New Collection Due Process Rights*, *supra* note 5, at 1147 (same).

207. H.R. CONF. REP. NO. 105-599 (emphasis added). The right to challenge the underlying liability should be limited to cases where the taxpayer’s non-receipt of the notice of deficiency or lack of opportunity to dispute the liability is not a result of the taxpayer’s actions.

208. This differs from the standard used with respect to petitioners for redetermination, which hinges on whether a notice was sent to the last known address, regardless of whether it was actually received by the taxpayer. *See* St. Joseph Lease Capital Corp. v. Comm’r, 235 F.3d 886, 891–92 (4th Cir. 2000) (noting that when a mailing itself does not provide the deficiency notice, but the taxpayer otherwise receives such notice, the technical flaw in the mailing is harmless); Miller v. Comm’r, 95-2 U.S. TAX CAS. (CCH) ¶ 50,451, at 89,432 (10th Cir. 1995) (finding taxpayers’ petition to be “untimely filed” despite taxpayers’ contention that they did not receive two notices of deficiency that were sent to their last known address).

209. *See, e.g.*, Tatum v. Comm’r, 85 T.C.M. (CCH) 1200, 1203 (2003) (concluding that the taxpayer’s failure to receive the notice of deficiency was not the taxpayer’s fault where the taxpayer did not receive the postal service’s notice of attempted delivery of a certified letter and remanding to Appeals for a hearing with an opportunity to dispute the tax liability).

210. Sego v. Comm’r, 114 T.C. 604, 611 (2000) (“So long as the notice is mailed to the taxpayer’s last known address, it is valid, even if the taxpayer does not receive it.”).

211. Montgomery v. Comm’r, 122 T.C. 1, 9 (2004); *see also* Poindexter v. Comm’r, 122 T.C. 280, 284 (2004) (concluding that the taxpayer must demonstrate the correct liability and that when the issue is properly raised, summary judgment may be granted where the taxpayer asserts that the liability is not accurate, but fails to present evidence proving the alleged inaccuracy); Robertson v. Comm’r, 87 T.C.M. (CCH) 1112, 1114 (2004) (holding that petitioner was not precluded from challenging his underlying tax liability where no notice of deficiency was received after filing his self-prepared return). However, events preceding the issuance of a notice of deficiency are not relevant issues and may not be

amount of the underlying liability will not be permitted, particularly if a notice of deficiency was issued.²¹²

The list of issues that can be raised during a CDP hearing contained in CDP provisions is not exhaustive.²¹³ Although the courts have interpreted the list narrowly, this interpretation is contrary to the use of “including” in the Internal Revenue Code. For purposes of the Internal Revenue Code, “including” “shall not be deemed to exclude other things otherwise within the meaning of the term defined.”²¹⁴ In addition, the legislative history of the CDP provisions makes clear that this is not a limited list of issues.²¹⁵

In addition, an issue that was raised in a prior proceeding in which the taxpayer meaningfully participated cannot be considered at the CDP hearing.²¹⁶ This is the correct result where a taxpayer had a prior opportunity to challenge, or in fact did challenge, the existence of the underlying liability, the taxpayer should not be given another bite at the proverbial apple. Moreover, once the liability is paid, the taxpayer may be able to seek a refund, which, if denied, allows the taxpayer the opportunity to challenge that denial in the U.S. District Court or the U.S. Court of Claims.²¹⁷ However, repeated litigation of the same issue is generally barred by the doctrines of *res judicata* and *collateral estoppel*. When the IRS seeks to collect a tax liability, allowing the taxpayer to challenge the existence of the liability after having sought a redetermination would be unreasonably costly to the system and would undermine the finality of tax liability determinations.

c. Appeals Officer’s Verification

The CDP provisions require the Appeals officer to verify at the hearing that all of the requirements of applicable law and administrative procedure

challenged by the taxpayer. *Heaphy v. Comm’r*, 87 T.C.M. (CCH) 1022, 1024 (2004).

212. Seldom, if ever, should a taxpayer be allowed to challenge the existence or amount of the underlying liability in the case of unpaid taxes that are subject to deficiency procedures. In those cases, the taxpayer should generally have received a notice of deficiency, which provides the taxpayer with the opportunity to seek redetermination in the Tax Court. Instances where the taxpayer will generally be allowed to raise the existence or amount of the underlying liability in the context of a CDP hearing will include actions to collect unpaid taxes that were reported on, but not paid with, the taxpayer’s tax return and actions to collect liabilities for taxes that are not subject to the deficiency procedures such as employment taxes and frivolous return penalties.

213. I.R.C. § 6330(c)(2) (West 2004).

214. I.R.C. § 7701(c).

215. S. REP. NO. 105-174, at 68 (1998) (clarifying that the list identifies some, but not all issues that may be relevant).

216. I.R.C. § 6330(c)(4); Treas. Reg. §§ 301.6320-1(e)(1), 301.6330-1(e)(1) (West 2004).

217. I.R.C. § 7422(a) (stating that an administrative claim for refund must be made before a suit for refund is permitted).

have been satisfied.²¹⁸ The form of this verification is not specified.²¹⁹ In addition, the legislative history and regulations are silent on this issue.²²⁰ Although many taxpayers have challenged the Appeals officer's method of verification,²²¹ the courts have minimized the importance of the verification.²²² However, in one instance the Tax Court remanded a case to the Appeals Office to conduct further investigation because the Appeals officer failed to properly verify that all the requirements of applicable law and administrative procedure had been satisfied.²²³

Whether proper verification occurred is frequently questioned in connection with the taxpayer's receipt of verification of a valid assessment.²²⁴ The Appeals officer is generally not required to provide the verification to the taxpayer,²²⁵ and most courts have allowed the Appeals officer to use a variety of forms to verify proper assessment, even when questioned by the taxpayer.²²⁶

However, the regulations under IRC section 6203 require that, upon request, the IRS provide the taxpayer with a summary of the assessment record.²²⁷ In the CDP context, the Tax Court has held that the requirement that assessment records be provided is satisfied if the taxpayer receives a copy of the assessment record at or before trial, even if after the hearing, as

218. I.R.C. § 6330(c)(1).

219. See Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1137 (lamenting that the statute does not specify whether the verification must be in writing).

220. *Id.*

221. See, e.g., *Keown v. Comm'r*, 85 T.C.M (CCH) 1003, 1004-05 (2003) (concluding that reliance on a computer transcript of the taxpayers account was proper for verification of the assessment); *Gunselman v. Comm'r*, 85 T.C.M. (CCH) 756, 759 (2003) (concluding that reliance on a Form 4340 for verification of the taxpayer's account was proper); *Roberts v. Comm'r*, 118 T.C. 365, 371 (2002) (concluding that the Appeals officer's reliance on the RACS 006 form was proper verification of the taxpayer's account and that Form 23C was not required).

222. *Lunsford II*, 117 T.C. 183, 188 (2001) (holding that the Appeals Officer could rely on a Form 4340 for verification of a valid assessment); *Davis v. Comm'r*, 115 T.C. 35, 41 (2000) (holding that the Appeals officer could properly rely on Form 4340 for verification of a valid assessment).

223. *Haws v. Comm'r*, T.C. Summary Op. 2004-44, slip op. at 15 (Apr. 6, 2004) (remanding because it appeared from the record that collection action was precluded under IRC section 6331(k)(2)(C) because an installment agreement remained in effect).

224. *Roberts v. Comm'r*, 118 T.C. 365, 372 (2002) (approving of both the Appeals officer's assessment and the officer's method of verifying that assessment).

225. See *Nestor v. Comm'r*, 118 T.C. 162, 166 (2002) (providing verification to the taxpayer at or before the hearing is not required); *Kuglin v. Comm'r*, 83 T.C.M. (CCH) 1265, 1266 (2003) (concluding that petitioner need not be provided with a form of verification);

226. See, e.g., *Keown*, 85 T.C.M at 1004-05 (concluding that reliance on a computer transcript of the taxpayers' account was proper); *Gunselman*, 85 T.C.M. at 759 (concluding that reliance on a Form 4340 for verification of the taxpayer's account was proper); *Roberts*, 118 T.C. at 371 (concluding that the Appeals officer's reliance on RACS 006 was proper verification of the taxpayer's account and that Form 23C was not required).

227. Treas. Reg. § 301.6203-1 (West 2004).

long as the taxpayer has not demonstrated irregularities in the assessment procedures.²²⁸ Because the regulations require that the taxpayer be provided with proof of the assessment, it is difficult to understand how the Appeals officer, without providing a copy of the verification or document used to verify the assessment, can certify that he or she has verified that the requirements of all applicable laws and administrative procedures have been satisfied if the challenge raised by the taxpayer is, in effect, a challenge to the assessment.²²⁹

Even though the CDP provisions do not specifically require that the taxpayer receive a copy of the verification, it would be helpful for the verification to be communicated to the taxpayer before the hearing.²³⁰ That is, the verification should help narrow the issues the taxpayer raises at the hearing.²³¹ Moreover, the verification could also help the taxpayer prepare for and participate in the hearing because the taxpayer would know whether to challenge the assessment procedure or whether the amount the IRS asserted was due had been paid. Providing this information at the hearing is consistent with the rights that Congress intended to give taxpayers. In fact, the language of IRC section 6330 requires that “[t]he appeals officer shall *at the hearing* obtain verification . . . that the requirements of any applicable law or administrative procedure have been met.”²³² As Judge Laro noted in his dissent in *Lunsford II*, “The mere fact that the verification may have come at a time other than ‘at the hearing’ is of no concern. Congress obviously believed it important to require explicitly and unambiguously that this verification occur ‘at’, rather than before or after, the hearing.”²³³ If no hearing is conducted the verification cannot occur at the hearing.

The statute requires that the CDP notice include information about the procedures of the CDP hearing, however, taxpayers are simply informed that Appeals Office hearings are informal. The taxpayer is provided with little further guidance. Given the difficulty that even seasoned tax professionals sometimes have navigating the tax system, taxpayers should be provided with clear information about the hearing process. The number

228. *Holliday v. Comm’r*, 83 T.C.M. (CCH) 1360, 1362 (2002).

229. See *Lunsford II*, 117 T.C. 183, 198 (2001) (Laro, J., dissenting) (“How could those requirements have been met when respondent never held the statutorily required CDP hearing or performed at the appropriate time the required verification?”); *id.* at 202 (Foley, J., dissenting) (“Respondent recognizes that if no hearing was conducted, an Appeals officer obviously could not have obtained *at the hearing* ‘verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.’”).

230. Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1137.

231. *Id.*

232. I.R.C. §6330(c)(1) (West 2004) (emphasis added).

233. *Lunsford II*, 117 T.C. at 196 (Laro, J., dissenting).

of cases challenging the procedures and arriving at different conclusions demonstrates the need for clearly articulated procedures. If no further procedural information is given to the taxpayer, it is difficult for the Appeals officer to properly make a determination of compliance with all applicable laws and administrative procedures.

4. Addressing CDP Hearing Failures

The CDP provisions do not provide taxpayers a remedy for violations of the CDP provisions, other applicable law, or administrative procedure. In fact, the only remedial provision in the CDP provisions is the bar on collection activity after the CDP-hearing request is made.²³⁴ However, the effect of a failure to give notice of CDP rights is unclear.²³⁵ It is also unclear what remedy a taxpayer may seek when an invalid CDP determination is issued. The only remedy available under the CDP provisions is judicial review of the CDP determination,²³⁶ which is limited to abuse of discretion in most cases.²³⁷ In many instances, the courts have placed little importance on the verification.²³⁸ However, in a few cases, the matter has been remanded for further proceedings where it appears that the verification was incomplete.²³⁹ Given that the importance of verification has been minimized, judicial review may not be meaningful in cases where the primary claim involves the propriety of the Appeals officer's verification.

The Administrative Procedure Act (APA) might be used to guide the application of remedies in this area.²⁴⁰ Under the APA:

234. I.R.C. § 6330(e)(1); *see also* Fahey, *supra* note 3, at 478 (“Nowhere in the enabling statute or the legislative history is the Tax Court empowered to affirm, reverse, remand, or modify the Internal Revenue Service’s determination.”); Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1149 (raising, among other remedial questions that may arise during judicial review of the CDP determination, the issue of “whether a reviewing court’s subject matter jurisdiction includes the power to order its own collection alternative”).

235. *See* Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1136 (noting that there are no statutory penalties for failing to provide taxpayers with notice of their CDP rights, but that this failure could have severe consequences).

236. I.R.C. § 6330(d)(1).

237. *See infra* Part I.E.

238. *Cf.* Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1137 (“The temporary regulations . . . minimize the verification’s importance.”).

239. *See, e.g.,* Haws v. Comm’r, T.C. Summary Op. 2004-44 (Apr. 6, 2004) (remanding because the record indicated the possibility that an installment agreement remained in effect, preventing further collection action).

240. Other areas of law, including the APA, have generally not been applied to tax law. *See* Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 11 (“[A]cademics and policymakers have often viewed tax law as an island, apart from procedural and substantive legal mainstream.”); Leandra Lederman, “Civil”izing Tax Procedure: Applying General Federal Learning to Statutory

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

....

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights;

(D) without observance of procedure required by law;

....

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.²⁴¹

Adopting the APA standards would provide a consistent approach, the same approach used to review most agency actions.²⁴² Although the APA is not generally applied in tax matters, a case for applying the APA in CDP cases can be made, in part, because CDP determinations are made by the agency, i.e., the IRS, and judicial review is deferential, unlike many other cases

Notices of Deficiency, 30 U.C. DAVIS L. REV. 183, 183 (1996) (“Tax law tends to be uninformed by other areas of law. This insularity has the unfortunate consequence of depriving tax and other fields of cross-fertilization.”). See generally Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994) (addressing the concern “that tax law too often is mistakenly viewed by lawyers, judges, and law professors as a self-contained body of law” and that “this misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate”).

It is unclear how and whether the APA applies to tax proceedings. See Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 15 & n.62 (considering both the Tax Court’s history, before it became an Article I court and as an executive agency, and the number of instances in which review of IRS determinations was de novo, making the APA of limited importance at most, and citing *Ewing v. Comm’r*, 122 T.C. 32 (2004) and *Pierson v. United States*, 428 F. Supp. 384, 389 (D. Del. 1977)).

241. 5 U.S.C. § 706 (2000). This is a more limited review than the de novo review currently used by courts to review a CDP determination relating to the amount or existence of the underlying liability. To the extent that it would require that the court compel agency action or set aside the determination where the IRS has failed to provide a hearing, review under the APA standard would afford a taxpayer a greater right than is currently being afforded. See Fahey, *supra* note 3, at 477 (arguing that standards of review and remedies must be clearly set out in the authorizing statute).

242. Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 41 (advocating the application of the APA standards to provide consistency in the standard of review); see also *Lunsford I*, 117 T.C. 159, 167–68 (2001) (Halpern, J., concurring) (advocating applying the APA standards to judicial review of CDP determinations).

where review of IRS determinations is made de novo by the Tax Court.²⁴³ This would provide a certainty of result, because a large body of law relating to the remedies for administrative failure already exists under the APA. Adopting specific remedies is necessary as the courts have generally refused to apply the APA to CDP cases.

Adopting the APA or similar remedies would also address concerns about whether the courts should remand cases to the Appeals Office for further proceedings.²⁴⁴ The District Court for the District of Connecticut concluded that, where the Appeals officer had been previously involved in the case, it was necessary to remand a case back to the Appeals Office “for a new CDP hearing conducted by an ‘impartial officer’ within the meaning of IRS Treasury Regulation § 301.6330-1T.”²⁴⁵ In another case, although the District Court for the District of Nevada agreed that an unscheduled telephone conversation was not a hearing, the court concluded that it was not empowered to remand the case for further proceedings before the Appeals Office.²⁴⁶ The court declared the CDP determination invalid, granted the taxpayer his costs, and allowed the IRS to “proceed as authorized by the law.”²⁴⁷ It is not clear what the IRS could then do. Under the circumstances, specific remedies for administrative failings are needed to ensure that CDP hearings are meaningful.

D. CDP Determination

After the CDP hearing, the Appeals officer makes a written determination.²⁴⁸ The determination must be based on the Appeals officer’s

243. Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 15 & n.63; *see also* *Robinette v. Comm’r*, 123 T.C. 85, slip op. at 70–71 (2004) (Halpern & Holmes, JJ., dissenting) (asserting that the standard of review should be based upon the APA, i.e., review of the administrative record); *Lunsford I*, 117 T.C. at 170–75 (Halpern, J., concurring) (discussing the applicability of the APA and stating that it is “at the center of the relevant jurisprudence”). *But see Robinette*, 123 T.C. 85, slip op. at 26 (concluding that the APA is not applicable to Tax Court review of CDP cases).

244. *See, e.g., MRCA Info. Servs. v. United States*, 145 F. Supp. 2d 194, 201 (D. Conn. 2000) (remanding because the Appeals officer was found not to be an impartial officer); *Herycyk v. United States*, 89 A.F.T.R.2d (RIA) 1584, 1585 (D. Ohio 2002) (raising the question whether the court would retain jurisdiction after remand, and remanding); *Silver v. Smith*, 90 A.F.T.R.2d (RIA) 6575, 6578 (W.D.N.Y. 2002) (remanding “for a proper due process hearing”). *But see Montijo v. United States*, 02-1 U.S. TAX CAS. (CCH) ¶ 50,321, at 83,766 (finding no authority to remand the case); *Lunsford II*, 117 T.C. 183, 189 (2001) (finding remand “neither necessary or productive”).

245. *MRCA Info. Servs.*, 145 F. Supp. 2d at 200–201.

246. *Montijo*, 02-1 U.S. TAX CAS. at 83,766.

247. *Id.* at 83,767.

248. I.R.C. § 6330(c)(3) (West 2004); Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E8, 301.6330-1(e)(3), Q&A-E8 (West 2004). Under the regulations, the CDP determination must document the issues the taxpayer raised and that were considered at the hearing. *Id.* § 301.6330-1(e)(3), Q&A-E8. In seven of the fifty-nine cases TIGTA reviewed in its 2004 report to Congress, the CDP determination did not

conclusions about the following:

- (A) the verification presented under [section 6330(c)(1)];
- (B) the issues raised under [section 6330(c)(2)]; and
- (C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.²⁴⁹

The statute provides no guidance on how the balancing is to be performed or even the factors that should be considered.²⁵⁰ In addition, the regulations and judicial opinions have given little attention to balancing, nor was it addressed in the legislative history. Since the basis for determination requires the Appeals officer to take into consideration several factors, it is likely that Congress intended that the Appeals officer do something more than was required by other parts of the statute when the Appeals officer balances the need for efficient collection of taxes and the individual interest of the taxpayer.²⁵¹ Given the regulatory and judicial failure to address the question, further guidance is necessary to make this balancing meaningful.

The CDP provisions do not address what should happen when a CDP hearing is not conducted but a determination is issued.²⁵² Nor does the statute create a remedy for such an invalid determination. The statute needs to address whether cases should be sent back for hearing or rehearing. In addition, the statute should also address what the Appeals officer may consider at a subsequent hearing. To the extent that remand is available, provision must be made to ensure that the subsequent hearing is fair. This may require the appointment of a new Appeals officer to the case.

Perhaps an analogy can be drawn between the failure to conduct a CDP hearing and the instances where an IRC section 6303 notice and demand is not provided.²⁵³ When a section 6303 notice is not provided administrative collection is barred, but judicial collection is still available.²⁵⁴ Perhaps in

address all of the issues that were considered at the hearing; this is a 10.8% error rate. TREASURY INSPECTOR GEN., *supra* note 162, at 5. Court review of CDP determinations may be impaired if issues raised and considered at the CDP are not addressed in the CDP determination. *Id.* at 5–6.

249. I.R.C. § 6330(c)(3).

250. Book, *The New Collection Due Process Taxpayer Rights*, *supra* note 5, at 1139.

251. Whether the IRS provided sufficient notice, is attempting to levy on exempt property, or is making an arbitrary denial of collection alternatives, are all determinations that the Appeals officer must make under other parts of the CDP provisions.

252. Stratton, *Open Issues Abound*, *supra* note 50, at 168.

253. I.R.C. section 6303(a) requires the IRS to provide notice and demand for payment of tax within sixty days after an assessment is made.

254. *See, e.g., United States v. Berman*, 825 F.2d 1053, 1060 (6th Cir. 1987) (holding that

cases where a CDP hearing has not been offered or conducted the courts could similarly oversee the use of enforced collection techniques. However, this is an inefficient result. Requiring judicial oversight would make the collection process become much longer and more expensive both for the taxpayers and for the IRS. Therefore, the CDP provisions should provide adequate incentives to ensure that the CDP hearings will be properly conducted and that taxpayer rights will be protected by providing a significant remedy for the taxpayer in the event that a cure of any procedural deficiency is not possible.

At a minimum, the CDP provisions require that a hearing be conducted and that the taxpayer be provided with an opportunity to raise any relevant issues. These requirements exceed what the Tax Court requires for a valid CDP determination. However, Congress intended that taxpayers receive due process, not just a determination. In addition, the statute should provide a remedy to taxpayers when the IRS fails or refuses to hold a hearing, or a fair hearing is not possible.

E. Judicial Review

A taxpayer has thirty days from the date of issuance to appeal a CDP determination with which the taxpayer disagrees.²⁵⁵ The thirty-day period in which the taxpayer may file an appeal is not extended if the taxpayer does not receive a CDP determination that was mailed to the taxpayer's last known address.²⁵⁶

The Tax Court has jurisdiction over the appeal if it would have had jurisdiction over the underlying liability.²⁵⁷ The district courts have

failure to give section 6303 notice does not bar the government from instituting a civil suit); *United States v. Jersey Shore State Bank*, 781 F.2d 974, 981 (3d Cir. 1986), *aff'd*, 479 U.S. 442 (1987) (holding that the failure to give notice does not bar the government from collecting through a civil suit).

255. I.R.C. § 6330(d). Judicial review is not available following an equivalent hearing. Issuance of a document entitled Notice of Determination after an equivalent hearing does not permit judicial review of the equivalent hearing. *See infra* Part I.F.

256. *See Weber v. Comm'r*, 122 T.C. 258, 262 (2004) (concluding that the time to file an appeal was not extended where the taxpayer did not receive the CDP determination until more than eight months after the CDP determination was sent, when the CDP determination was properly mailed to the taxpayer's last known address and returned "unclaimed").

257. I.R.C. § 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(2), Q&A-F3, 301.6330-1(f)(2), Q&A-F3 (West 2004); *see also Steidel v. Evans*, 03-1 U.S. TAX CAS. (CCH) ¶ 50,295, at 87,730 (9th Cir. 2003) (finding that "if the Tax Court has jurisdiction with respect to the underlying subject matter, [it] has exclusive jurisdiction over an action seeking judicial review of a tax levy determination following a hearing"); *Glass v. Internal Revenue Serv.*, 01-2 U.S. TAX CAS. (CCH) ¶ 50,747, at 90,080 (10th Cir. 2001) (agreeing with a district court's dismissal for lack of jurisdiction because the Tax Court had exclusive jurisdiction over income tax liability); *Diefenbaugh v. Weiss*, 00-2 U.S. TAX CAS. (CCH) ¶ 50,839, at 86,055-56 (6th Cir. 2000) (dismissing for lack of jurisdiction); *True v. Comm'r*, 108 F.

jurisdiction over the appeal if the Tax Court would not have had jurisdiction over the underlying liability, such as in the case of transferee liability, trust fund recovery penalty liability, or frivolous return penalty liability.²⁵⁸ This jurisdictional grant may bifurcate some appeals.²⁵⁹

Supp. 2d 1361, 1364 (M.D. Fla. 2000) (dismissing claimant's appeal for lack of jurisdiction over the underlying tax liability); *Downing v. Comm'r*, 118 T.C. 22, 27–28 (2002) (holding the court had jurisdiction over the underlying tax liability); *Goza v. Comm'r*, 114 T.C. 176, 182 (2000) (affirming that the court has jurisdiction over the appeal if it also has jurisdiction over the underlying tax liability). This has generally been interpreted to place jurisdiction with the Tax Court if the underlying tax is an income, estate, or gift tax, regardless of whether a notice of deficiency has been issued. *Palmer v. Comm'r*, 03-1 U.S. TAX CAS. (CCH) ¶ 50,382, at 88,066 (7th Cir. 2003). *See generally* Fahey, *supra* note 3 (providing an in-depth analysis of the constitutionality of the grant of jurisdiction of appeals from CDP determinations to the Tax Court).

258. I.R.C. § 6330(d)(1)(B). Review of CDP determinations relating to collection of less than \$50,000 may be tried as a small tax case. *See* I.R.C. § 7443A(b) (authorizing the Chief Judge of the Tax Court to assign proceedings under IRC sections 6320 or 6330 to special trial judges); *see also* I.R.C. § 7463(f) (providing taxpayer the option of having a 6330(d)(1)(A) appeal involving less than \$50,000 conducted under § 7463). The procedures in small tax cases are more informal. However, no appeal may be taken from a small tax case decision. I.R.C. § 7463(b).

259. *See* I.R.C. § 6330(d)(1) (giving jurisdiction to the Tax Court only over matters in which the Tax Court would have jurisdiction over the underlying tax liability and to the district court in all other matters); Treas. Reg. §§ 301.6320-1(f)(2) A-F3, 301.6330-1(f)(2), Q&A-F3 (stating that a taxpayer must seek judicial redress in the district court for all matters where the Tax Court would not have jurisdiction over the underlying tax liability). An example is a determination pertaining to collection actions with respect to deficiencies and frivolous return penalties. The Tax Court would have original jurisdiction over the deficiency matter, but does not have jurisdiction over frivolous return penalties. *Johnson v. Comm'r*, 117 T.C. 204, 208 (2001); *see also* *Van Es v. Comm'r*, 115 T.C. 324, 328–29 (2000) (“[W]e hold that we do not, in the instant case, have jurisdiction to redetermine the frivolous return penalties assessed pursuant to section 6702.”). As a result, the division of jurisdiction may require judicial review of a single CDP determination in two courts. *See, e.g.,* *Dogwood Forest Rest Home, Inc. v. United States*, 181 F. Supp. 2d 554, 558, 561 (M.D.N.C. 2001) (holding that review of determination not to abate penalties was not within this court's jurisdiction, dismissing that claim for lack of subject matter jurisdiction, but granting summary judgment with respect to determination relating to failure to timely file and failure to make timely deposit penalties); *Pinsonneault v. United States*, 89 A.F.T.R.2d (RIA) 1334, 1336–37 (D. Nev. 2002) (granting summary judgment to the IRS with respect to the Appeals officer's CDP determination relating to assessed frivolous return penalties, but dismissing for lack of subject matter jurisdiction claims with respect to CDP determination relating to the underlying liability); *Standifird v. Comm'r*, 84 T.C.M. (CCH) 371 (2002) (upholding CDP determination with respect to deficiency and dismissing for lack of jurisdiction with respect to determination relating to frivolous return penalties and related interest; the Tax Court also imposed a section 6673 penalty because the taxpayer who instituted and maintained this proceeding primarily for delay was “a frequent litigator of groundless challenges to the validity of the Internal Revenue Code”); *Stoewer v. Comm'r*, 84 T.C.M. (CCH) 13, 16 (2002) (concluding that the Tax Court had jurisdiction over CDP determination relating to unpaid taxes, but dismissing for lack of subject matter jurisdiction with respect to assessed frivolous return penalties).

Proposals have been made to give exclusive jurisdiction over CDP appeals to the Tax Court because of the potential necessity of multiple judicial review, inefficient use of scarce judicial resources, and inconsistent results in the same case. Taxpayer Protection and IRS Accountability Act of 2003, H.R. 1528, 108th Cong. § 303 (2003); Tax Court Modernization Act, S. 753, 108th Cong. § 101 (2003); Taxpayer Protection and IRS Accountability Act of 2002, H.R. 3991, 107th Cong. § 303 (2002); Tax Relief Guarantee Act of 2002, H.R. 586, 107th Cong. § 233 (2002). Problems related to this

Generally, the CDP determination informs the taxpayer of which court has jurisdiction of an appeal.²⁶⁰ A taxpayer is given thirty days to refile after dismissal if the appeal is initially filed with the wrong court.²⁶¹

Although the statute does not address the standard of review, the legislative history provides that de novo review will be conducted where the tax liability is part of the appeal, and abuse of discretion review will be conducted where the validity of the liability is not at issue.²⁶² Both the district courts and the Tax Court have adopted these standards of review when considering CDP determinations.²⁶³ The regulations prohibit a taxpayer from raising any issue in court that was not raised at the hearing.²⁶⁴ To the extent that an abuse of discretion standard of review is applied, this is the correct approach, as only the CDP determination is being reviewed. However, if de novo review occurs there is no reason to limit the issues available for review.

F. Equivalent Hearings

While a CDP hearing is not available when the taxpayer does not file a timely written request for a CDP hearing, in keeping with the expectation expressed in the legislative history, a taxpayer is given an “equivalent hearing.”²⁶⁵ An equivalent hearing addresses the same issues as a CDP hearing.²⁶⁶

There are several important differences between a CDP hearing and an

jurisdictional grant and bifurcated review of CDP determinations are beyond the scope of this article.

260. Moreover, the Internal Revenue Manual includes this information as one of the items that is to be included in the Notice of Determination. Internal Revenue Serv., Internal Revenue Manual, *supra* note 60, at Part 5.1.9.3.8.

261. I.R.C. § 6330(d).

262. H.R. CONF. REP. NO. 105-599, at 266 (1998); *see also* Fahey, *supra* note 3, at 478, 494, 500–01 (noting that the statute also does not identify the remedy if the reviewing court concludes that the IRS abused its discretion and advocating that “Congress must give the Tax Court the necessary tools: the authority to reverse, remand with instructions, or modify”).

263. *See, e.g.*, Pelliccio v. United States, 253 F. Supp. 2d 258, 262 (D. Conn. 2003) (holding that when the underlying tax liability is not at issue, the court reviews the decision of the IRS for abuse of discretion); Tornichio v. United States, 263 F. Supp. 2d 1090, 1095 (N.D. Ohio 2002) (noting that the legislative history indicates that the court should conduct a de novo review only where the validity of tax liability is at issue, otherwise, the court should review for abuse of discretion); Sego v. Comm’r, 114 T.C. 604, 610 (2000) (concluding that the court should conduct a de novo review only where the validity of tax liability is at issue, otherwise, the court should review for abuse of discretion).

264. Treas. Reg. §§ 301.6320-1(f)(2), Q&A-F5, 301.6330-1(f)(2), Q&A-F5 (West 2004).

265. *Id.* §§ 301.6320-1(i)(1), 301.6330-1(i)(1). “The Secretary must provide a hearing equivalent to the pre-levy hearing if later requested by the taxpayer. However, the Secretary is not required to suspend the levy process pending the completion of a hearing that is not requested within 30 days of the mailing of the Notice.” H.R. CONF. REP. NO. 105-599, at 266.

266. Treas. Reg. §§ 301.6320-1(i)(2), Q&A-II, 301.6330-1(i)(2), Q&A-II.

equivalent hearing. First, during the pendency of an equivalent hearing, the statute of limitations is not suspended and collection activity may continue.²⁶⁷ Whether collection activity in fact continues is “determined on a case-by-case basis.”²⁶⁸

Although the procedure for an equivalent hearing is similar to the procedure for a CDP hearing, at the conclusion of an equivalent hearing, the Appeals officer issues a decision letter, which contains the same general information as a Notice of Determination.²⁶⁹

II. CDP HEARINGS: A PROPOSED MODEL

As the prior section demonstrated, a number of significant issues relating to the conduct of CDP hearings must be addressed to make CDP rights meaningful. Providing certainty with respect to CDP hearing procedures should also reduce the number of instances in which taxpayers seek judicial review of CDP determinations.

If the issues that may be raised during a CDP hearing are to be limited, those limitations must be clearly identified. Similarly, if the circumstances under which a CDP hearing is available are to be limited, such limiting circumstances must also be clearly identified. Currently the CDP provisions entitle all taxpayers subject to collection activity to a CDP hearing at which they may raise *any* relevant issue that is not prohibited.²⁷⁰ Because the CDP provisions require a hearing if a taxpayer is subject to collection action and requests one, any limitation on the right to a hearing must be created by amending the CDP provisions.

Further, a single approach to the conduct of CDP hearings should be adopted. Clearly defined CDP procedures will help taxpayers to understand

267. *See id.* §§ 301.6320-1(i)(2), Q&A-I2, 301.6330-1(i)(2), Q&A-I2 (noting that the suspension of the periods of limitation under sections 6502, 6531, and 6532 are available only for hearings requested within the thirty-day period for timely filing of a request for a CDP hearing under Sec. 6330); *see also* H.R. CONF. REP. NO. 105-599 at 266 (“[T]he Secretary is not required to suspend the levy process pending the completion of a hearing that is not requested within 30 days of the mailing of the Notice.”).

268. Treas. Reg. §§ 301.6320-1(i)(2), Q&A-I3, 301.6330-1(i)(2), Q&A-I3. Unless collection is found to be in jeopardy, levy actions will generally be suspended until the conclusion of the equivalent hearing. Internal Revenue Serv., Internal Revenue Manual, *supra* note 60, at Part 5.1.9.3.4.

269. Treas. Reg. §§ 301.6320-1(i)(2), Q&A-I4, 301.6330-1(i)(2), Q&A-I4.

270. *See* I.R.C. § 6330(a)(1) (West 2004) (providing that “[n]o levy may be made on any property or right to property of *any* person unless” the person is notified of their CDP rights) (emphasis added); § 6330(b)(1) (“If the person requests a hearing . . . , such hearing *shall* be held . . .”) (emphasis added); § 6320(a)(1) (“The Secretary shall notify in writing the person described in section 6321 of the filing of a notice of lien”); § 6320(a)(3)(B) (requiring that the notice inform the person of the right to request a CDP hearing); § 6320(b)(1) (“If the person requests a hearing . . . , such hearing *shall* be held . . .”) (emphasis added).

their rights and obligations. In addition, consistent procedures for CDP hearings will help ensure that all taxpayers are afforded similar rights. The CDP hearing procedures should have, at a minimum, the following five elements.

First, there must be an opportunity for direct communication between the taxpayer and the Appeals officer, unless otherwise requested by the taxpayer. This could easily be accomplished through a face-to-face hearing, but might also be accomplished by a telephonic hearing. Use of a correspondence hearing should only be permitted when requested by the taxpayer, or when such a hearing is otherwise unavoidable.

Second, there must be an opportunity for a recording or transcript of the CDP hearing to be made at the taxpayer's request and expense. If deemed necessary, the IRS could also make its own recording or transcript of the hearing.

Third, in addition to the verification that the IRS has complied with all applicable laws and regulations, there must be a meaningful verification of the amount and existence of the liability. To make the verification meaningful, the contours of what constitutes the verification must be more fully defined. In addition, the verification must be communicated to the taxpayer in a manner and at a time that will allow the taxpayer to raise any relevant challenges to the verification.

Fourth, there must be a real opportunity for the taxpayer to challenge the proposed collection action. In addition, the nature of the hearing must be such that the taxpayer will have a meaningful opportunity to respond to the Appeals officer's concerns and questions. The taxpayer must be given an opportunity to explain his or her position to the Appeals officer.

Finally, there must be an explicit remedy for both frivolous claims raised by taxpayers seeking to delay the collection process, as well as for taxpayers who are afforded insufficient rights in the CDP hearing process.

The following section discusses each of these elements and how, together, they further the purposes of the CDP provisions and create a fairer and more effective tax collection system.

III. EFFECT OF PROPOSED MODEL ON TAX SYSTEM

Only about five percent of the CDP requests raise frivolous arguments.²⁷¹ However, these cases use a disproportionate amount of time and resources. Frivolous claims are disproportionately represented in the

271. 2003 JOINT COMM. ON TAXATION REPORT, *supra* note 50, app. 1, at 22. Five percent of the claims total only 906 CDP requests that were brought raising only frivolous arguments. *Id.*

requests for judicial review.²⁷² Moreover, the courts generally uphold the Appeals officer's CDP determination.²⁷³

Congress intended to "afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property."²⁷⁴ That is, Congress intended to provide taxpayers with a new right, the right to a hearing that will be subject to judicial review prior to enforced collection.²⁷⁵ In providing these rights, Congress chose to use the emotionally charged words "due process." Calling these hearings collection "due process" hearings may raise the level of importance taxpayers will attribute to the right.²⁷⁶ In addition, the legislative history suggests that the common notion of "due process" was intended.²⁷⁷ The hearings should afford a process that is consistent with our notions of due process: the hearing should provide the taxpayer with notice and a meaningful opportunity to be heard.²⁷⁸ In fact, the legislative history indicates Congress intended that taxpayers be given "adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property."²⁷⁹ Thus, a taxpayer requesting a CDP hearing must be afforded some type of hearing.²⁸⁰ The grants of a pre-deprivation hearing and judicial review, rights which were not previously available, demonstrate that Congress viewed the private interest being protected as outweighing the government's burden of providing the hearing.

272. *Id.*

273. See Camp, *supra* note 5, at 122 (graphically illustrating the number of reported cases, taxpayer victories, cases involving tax protestors, and sanctions).

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

275. CDP hearings were to "establish[] formal procedures designed to insure *due process* where the IRS seeks to collect taxes by levy." H.R. CONF. REP. NO. 105-599, at 263 (1998) (emphasis added). The reasons for the change in law included the "belie[f] that taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor." S. REP. NO. 105-174, at 67 (1998).

276. Commentators have suggested that the new CDP rights have little connection to constitutional procedural due process. See Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at 24-29 (discussing the history of procedural due process as it relates to tax proceedings); Camp, *supra* note 5, at 119 (referring to the CDP provisions as "massively misnamed").

277. H.R. CONF. REP. NO. 105-599, at 263 (1998); see Fahey, *supra* note 3, at 487 ("It is important to note that a collection hearing conducted in accordance with the I.R.C. section 6330 as presently constituted would not satisfy due process. . . . The taxpayer is afforded such a limited opportunity to protest the tax collection . . . that it could not possibly be deemed a meaningful opportunity to present his case."). See generally Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413 (1998) (discussing the dangers to the tax system arising from symbolic legislation in the context of IRC section 7491's new burden-of-proof rules).

278. See *supra* notes 25-26 and accompanying text.

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

280. *Id.* at 68.

Presumably, Congress considered providing a pre-collection hearing to be of greater importance than maintaining or increasing the speed with which unpaid taxes are collected. “Where Congress has created an administrative avenue for hearing and relief, the IRS cannot justify abridgment of the right to that hearing on formalistic or workload grounds.”²⁸¹

The circumstances surrounding enforced collection of unpaid taxes have changed; taxpayers are to be afforded a meaningful post-lien or pre-levy hearing, conducted by an impartial Appeals officer, with a right of judicial review. Upon request, a taxpayer must receive an actual CDP hearing.

Without a consistent process that comports with our notions of “due process,” public confidence in the fairness, equality, and effectiveness of the tax collection system may be reduced. This risk may pose a significant threat to our system of tax collection. Taxpayers are far less likely to comply with the tax law if they believe that the tax law is unfair or that they are not afforded the same rights as others.²⁸²

Despite the concern that CDP hearings and judicial review may open the floodgates to frivolous suits and allow significant delay in tax collection, the CDP provisions do not specify which taxpayers may request CDP hearings and seek judicial review. As enacted, all taxpayers against whom the IRS has filed a NFTL or intends to levy are entitled to a CDP hearing.

Cases raising only frivolous arguments pose serious concerns for the tax collection system; creating delay and using disproportionate resources.²⁸³ However, unrepresented taxpayers, who make up the majority of taxpayers asserting CDP rights, are far less likely to fully understand the complex workings of the tax code and the tax system. These taxpayers should be afforded an adequate opportunity to present their case. If the taxpayers’ rights to raise relevant issues are to be limited, the limitations must be clearly spelled out. Once commonly used frivolous positions are raised with no legitimate issues, summary disposition should be possible.

The cost to the tax collection system should be minimized. Thus, informal hearing procedures should be used. However, a preference should

281. Olson, *supra* note 56, at 1250.

282. See John S. Carroll, *How Taxpayers Think about Their Taxes: Frames and Values*, in *WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT* 47 (Joel Slemrod ed., 1992) (concluding that people are motivated to report accurately if they perceive the laws to be fair); Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 998–1004 (2003) (observing that “the perceived fairness of IRS procedures may affect taxpayer attitudes to the IRS and perhaps thereby affect tax compliance. . . . In fact, it is unlikely that the government would succeed in dispensing with due process and fairness for very long.”).

283. See *supra* notes 271–72 and accompanying text.

be given to face-to-face hearings to address concerns relating to the perceived fairness of these proceedings. Because of the number of cases challenging the hearing format, statutory clarification is desirable to reduce the number of judicial appeals made to challenge just this issue.

Currently, taxpayers are afforded different types of process depending on nothing more than the area in which the taxpayer lives, the type of tax that is subject to collection action, and the perceived positions of the taxpayer. This is contrary to the goal of uniformity in the administration of the tax laws.²⁸⁴ Standardizing the CDP hearing process should increase the public perception of fairness in the tax collection system and address concerns that taxpayers may receive different treatment in similar situations.²⁸⁵

A taxpayer should be permitted to record a CDP hearing, if the taxpayer is willing to bear the expense. To increase the accuracy of the record created and reduce the likelihood of tampering, the IRS could limit the taxpayer to selecting from among authorized court reporters, as it currently does with taxpayer representatives and stenographers.²⁸⁶ This would minimize concerns about accuracy. In addition, the cost to the IRS of making its own recording should be minimal, as the IRS already records

284. See e.g., *Keasler v. United States*, 766 F.2d 1227, 1233 (8th Cir. 1985) (“[U]niformity of decision among the circuits is vitally important on issues concerning the administration of the tax laws.”) (quoting *N. Am. Life & Cas. Co. v. Comm’r*, 533 F.2d 1046, 1051 (8th Cir. 1976)); *accord* *Popov v. Comm’r*, 246 F.3d 1190, 1195 (9th Cir. 2001); *Unger v. Comm’r*, 936 F.2d 1316, 1320 (D.C. Cir. 1991). Consolidating jurisdiction over all CDP hearing appeals in one court would reduce this problem, but could have other, less positive effects.

285. Other commentators have suggested that face-to-face hearings are not necessary and that the IRS and the courts should simply make it clear that the CDP hearings are informal and may take any form chosen by the IRS, taking into account the taxpayer’s and government’s interests in the proceeding. See, e.g., Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at Part IV.B.

286. See I.R.S. Litigation Guideline Mem., 1991 LGM GL-17, 1991 WL 1167959, at *5 (Feb. 12, 1991) (recommending “minimum standards” for CDP-hearing stenographers).

We believe that the Service should insist that the stenographer meet minimum standards, as follows:

- (a) be qualified as a court reporter of the United States District Court,
- (b) be licensed or certified by any state to be a court reporter or to take depositions or,
- (c) be an independent reporter qualified to take depositions for use in a United States District Court.

The court in *Mott v. MacMahon*, 214 F. Supp. 20 (N.D. Cal. 1963), discussed the qualifications of stenographic reporters and suggested that a transcript by a qualified court reporter who certifies it under penalty of law is most likely to show the truth.

If the witness chooses to make a tape recording, the Service should protect itself by making a simultaneous recording.

Id.

other collection proceedings.²⁸⁷ Moreover, allowing the creation of an audio or stenographic record of the hearing is consistent with the intent to allow the creation of a record in collection proceedings and would create a better record for the court if the taxpayer seeks judicial review of the Appeals officer's determination. Transcripts of the CDP hearings could make the process of judicial review easier.²⁸⁸

The CDP provisions also need to provide a penalty for a failure by the Appeals Office to conduct a hearing. A CDP hearing is required by statute, which means that the failure to conduct a hearing should not be harmless error. At a minimum, the matter should be sent back for a proper hearing before an impartial hearing officer.

The regulations take the position that administrative collection actions are not barred by the IRS's failure to comply with the CDP provisions relating to notice.²⁸⁹ Instead, upon discovery of the failure to provide notice, a substitute notice is to be provided and if a CDP hearing is requested by the taxpayer within thirty days of the notice, collection must cease and a regular CDP hearing provided.²⁹⁰ This is not authorized by the CDP provisions and the legislative history does not indicate that Congress considered this problem, much less this result.

Remedies for the IRS's failure to provide notice or otherwise comply with the CDP provisions need to be clearly addressed. Options for remedies include: delaying or barring collection, providing additional process, or requiring the IRS to start at the beginning—complying with the CDP provisions at each step of its efforts to collect the unpaid tax liability. Providing a remedy will avoid the possibility that procedural errors are without remedy, as is the case when the IRS fails to provide the last day to file a petition for redetermination on a notice of deficiency.²⁹¹ Providing no remedy for serious administrative failings is contrary to the congressional intent of the RRA 1998. Congress intended to give taxpayers rights similar to those they have with other creditors. This cannot be accomplished

287. See, e.g., IRS Notice 89-51, 1989-1 C.B. 691 (providing that if the IRS intends to record a section 7520 "interview," it must notify the taxpayer beforehand and provide the taxpayer with a transcript or copy, the cost of which the taxpayer must reimburse the IRS).

288. *Keene v. Comm'r*, 121 T.C. 8, 23 (2003) (Vasquez, J., concurring); see also Christine Harris, *Low-Income-Taxpayer Forum Uncovers Kinks in Collection Due Process Hearings*, 95 TAX NOTES 1150, 1150-51 (2002) (discussing concerns raised by Special Trial Judge Peter Panuthos and IRS National Taxpayer Advocate Nina Olson relating to the record being created in CDP hearings); Book, *A Misstep or Step in the Right Direction?*, *supra* note 3, at Part IV.C.2 (advocating allowing face-to-face CDP hearings to be recorded).

289. Treas. Reg. §§ 301.6320-1(a)(2), Q&A-A12 (2004).

290. *Id.* §§ 301.6320-1(a)(2), Q&A-A12, 301.6330-1(a)(3), Q&A-A10.

291. See, e.g., *Elings v. Comm'r*, 324 F.3d 1110, 1111 (9th Cir. 2003) (holding that if a taxpayer can show prejudice, notice may be found insufficient when the last day to file is not included).

without a remedy for administrative failings. Further, it is within the IRS's and Appeals Office's power to ensure compliance with the law and administrative procedures. Holding the IRS to a strict standard is not unreasonable and should increase confidence in the fairness of the system.

"If . . . the taxpayer demands a hearing, the proposed collection action may not proceed until the hearing has concluded and the Appeals officer has issued his or her determination."²⁹² Inherent in this requirement is a delay of the collection process. This is contrary to the notion that collection of tax revenues is to proceed without interference.²⁹³ This also counters the effects of the common law and the anti-injunction and declaratory judgment acts.²⁹⁴ Some delay will occur in all CDP cases, however, unnecessary delay should be minimized or avoided.

Intentional delay of the collection process burdens the tax collection system. Taxpayers may delay collection by responding slowly to the Appeals Office's attempts at resolution. Additional delay may result from requests to reschedule the CDP hearing.²⁹⁵ Frivolous cases and cases pursued solely for delay have been summarily dealt with by the IRS and the courts.²⁹⁶ Clarifying the nature, type, and procedures of CDP hearings will

292. H.R. CONF. REP. NO. 105-599, at 263 (1998).

293. *See supra* notes 29–38 and accompanying text.

294. This is not the only circumstance in which administrative remedies or delay in application of administrative remedies may occur. *See, e.g.,* *United States v. Berman*, 825 F.2d 1053, 1060 (6th Cir. 1987) (allowing a civil suit against the taxpayer to proceed regardless of the administrative failings); *United States v. Jersey Shore State Bank*, 781 F.2d 974, 981 (3d Cir. 1986), *aff'd*, 479 U.S. 442 (1987) (finding that failure to provide notice does not bar the government from bringing a civil suit to collect a liability).

295. *See* 2003 JOINT COMM. ON TAXATION REPORT, *supra* note 50, at 87–88, app. 1 at 22. (providing various reasons for CDP-hearing delay and inefficiency). Taxpayers seeking nothing more than delay may request indefinite postponements of the CDP hearing for little, no, or frivolous reasons. *Id.* Taxpayers can also delay collection by intentionally filing an appeal of a CDP determination in the wrong court. *Id.* Requests and appeals filed solely for the purpose of delaying collection arguably are also frivolous, because they are made for no other purpose. Although levy is not always suspended during a judicial appeal, for the IRS to continue with levy, the underlying liability must not be at issue, and the IRS must show good cause to continue the levy. I.R.C. § 6330(e)(2) (West 2004). The CDP determination generally specifies in which court an appeal will lie. *See* IRS Collection Due Process Handbook, *supra* note 93, at 22–25 (explaining over which issues either the Tax Court or the district courts have jurisdiction).

296. *See, e.g.,* *Holguin v. Comm'r*, 85 T.C.M. (CCH) 1245, 1249 (2003) (granting IRS motion for summary judgment and imposition of section 6673 penalties because the issues raised by the taxpayer as to why he had no tax liability, despite the receipt of wages, were frivolous, as were the attachments taxpayer included with his Form 12153, and his response to the IRS's motion for summary judgment); *Young v. Comm'r*, 85 T.C.M. (CCH) 739, 742 (2003) (granting IRS motion for summary judgment and imposition of section 6673 penalty because taxpayer raised only frivolous arguments previously rejected by numerous courts, relating to receipt of proper notice and administrative delegations); *Tipp v. Comm'r*, 82 T.C.M. (CCH) 759, 760–61 (2001) (dismissing for failure to state a claim on which relief can be granted, although almost one year elapsed between the request for CDP hearing and the Tax Court hearing, as the taxpayer "filed an amended petition which included nothing

increase their efficiency and reduce the likelihood that frivolous requests and appeals will result in significant delay.

Although the courts often impose sanctions on taxpayers who have raised only frivolous issues, made only frivolous arguments, or acted solely to create delay,²⁹⁷ imposing more substantial or automatic penalties could reduce the incidence of these delay tactics. One proposal would allow the IRS to impose a \$5,000 penalty on a taxpayer that files a frivolous request for a CDP hearing under section 6320 or 6330.²⁹⁸ This proposal may

but frivolous and groundless allegations that [the taxpayer] is not liable for taxes under the Uniform Commercial Code”).

297. See, e.g., *Marino v. Brown* 357 F.3d 143, 147 (1st Cir. 2004) (imposing a \$2,000 sanction on a taxpayer pursuant to FED. R. APP. P. 38, but declining to impose the entire \$4,000 sanction requested because it was the first instance in which the sanction was imposed on a pro se taxpayer); *Kahre v. United States*, 03-1 U.S. TAX. CAS. (CCH) ¶ 50,409, at 88,152 (D. Nev. 2003) (imposing a \$1,500 Rule 11 sanction); *Craig v. Comm’r*, 119 T.C. 252, 264–65 (2002) (imposing a \$2,500 penalty under section 6673 because the proceeding was instituted and maintained primarily for delay); *Roberts v. Comm’r*, 118 T.C. 365, 372–73 (2002) (citing *Pierson* and imposing a \$10,000 penalty under IRC section 6673 because the petition was filed “primarily for delay” and presented positions and arguments that had been previously rejected); *Pierson v. Comm’r*, 115 T.C. 576, 581 (2000) (warning taxpayers raising frivolous issues that although the court declined to impose penalties in this case, where it would have been proper to assess IRC section 6673 penalties, that the court “regard[ed] this case as fair warning to those taxpayers who, in the future, institute or maintain a lien or levy action primarily for delay or whose position . . . is frivolous or groundless”). *But cf.* *Myrick v. United States*, 217 F. Supp. 2d 979, 985 (D. Ariz. 2002) (declining to impose Rule 11 sanctions only “to prevent further waste of this Court’s time with this frivolous matter”). IRC section 6673 allows the Tax Court to impose up to a \$25,000 penalty where the taxpayer has primarily instituted or maintained a proceeding for delay or has taken a frivolous or groundless position. I.R.C. § 6673(a)(1) (West 2004). The Tax Court has even been willing to impose these penalties sua sponte. See, e.g., *Frank v. Comm’r*, 85 T.C.M. (CCH) 1066, 1068 (2003) (imposing a \$3,500 penalty, sua sponte, on taxpayers); *Israel v. Comm’r*, 86 T.C.M. (CCH) 23, 27–28 (2003) (finding the taxpayer’s argument to be frivolous and groundless and imposing a \$1,500 penalty sua sponte); *Robinson v. Comm’r*, 85 T.C.M. (CCH) 1026, 1030 (2003) (imposing an \$11,000 penalty, sua sponte, on petitioners); *Williams v. Comm’r*, 85 T.C.M. (CCH) 1048, 1050–1051 (2003) (imposing a \$1,600 penalty, sua sponte, on petitioners). The district courts, while not imposing penalties sua sponte, in many cases have acknowledged that had Rule 11 sanctions been requested, the request would have been granted. See, e.g., *Carrillo v. United States*, 91 A.F.T.R.2d (RIA) 1608, 1611–12 (D. Nev. 2003), *aff’d*, 72 Fed. Appx. 732 (2003) (stating the court would have granted a motion for Rule 11 sanctions if the Government had made the case); *Lindsey v. United States*, 03-1 U.S. TAX CAS. (CCH) ¶ 50,480, at 88,400–01 (D. Nev. 2003) (upholding determination to proceed with collection of frivolous return penalties and granting the requested \$1,242 in attorneys fees as a sanction under the court’s inherent power, but noting that a \$2,500 sanction would have been appropriate); *Blanchard v. United States*, 90 A.F.T.R.2d (RIA) 6640, 6643 (D. Nev. 2002) (stating the court would have granted Rule 11 sanctions if the government had made such a motion); *Waller v. United States*, 03-1 U.S. TAX CAS. (CCH) ¶ 50,123, at 87,090 (D. Nev. 2002) (“[H]ad the Defendant moved for Rule 11 sanctions, this Court would have freely granted such a motion.”). In many cases before the district courts, the IRS has not asked the court to impose sanctions on a taxpayer who has only sought delay or raised frivolous arguments.

298. Taxpayer Protection and IRS Accountability Act of 2003, H.R. 1528, 108th Cong. §§ 107, 303 (2003). This proposal would change IRC section 6702. In addition to imposing a \$5,000 penalty on frivolous CDP filings, the bill would also increase the frivolous return penalty to \$5,000. *Id.* § 107. Moreover, this bill would allow the Secretary discretion to “reduce the amount of any penalty imposed

alleviate some of the problems associated with frivolous CDP hearing requests and appeals, but will not address all of the problems. Further action is required.

With respect to those taxpayers that raise frivolous arguments and have the means to pay, substantial or escalating penalties could be applied. For those taxpayers who do not have the means to pay, the limited resources of the IRS and the courts should not be expended on accounts that are unlikely to be collected.

Where different taxpayers are afforded different rights based on arbitrary factors, such as the area in which they live or whether they have been assessed income tax deficiencies or penalties that require consideration by the district court, the notion of due process is lessened. The perception of unfairness of the tax law may be exacerbated. Compliance may be lessened where there is a perception that the system is unfair.²⁹⁹ Compliance is essential to the operation of a system such as ours, which relies on “voluntary” reporting and payment for the majority of its revenues.

CONCLUSION

Without a hearing and a record of the issues raised, information provided, and factors considered by the Appeals officer, the CDP hearing is rendered meaningless. The statistics reported by the IRS indicate that only a small percentage of CDP requests are frivolous.³⁰⁰ Unfortunately, but perhaps predictably, appeals of CDP determinations issues on frivolous requests make up a disproportionate number of the requests for judicial review.³⁰¹ The fact that taxpayers who raise frivolous arguments may be more likely to seek judicial review of their determination does not mean that all cases are frivolous. However, frivolous cases may make courts less willing to consider whether taxpayers in other cases are raising meritorious arguments, as is demonstrated by their willingness to determine that simply requiring appeals to conduct the hearing required by sections 6320 and 6330 is “neither necessary or productive.” To cure the procedural inadequacies being allowed by the courts, statutory change is required.

The fact that in some instances taxpayers have not been afforded a

under [section 6702] if the Secretary determines that such reduction would promote compliance with and administration of the Federal tax laws.” *Id.* § 107(d).

299. *See* Carroll, *supra* note 282, at 47 (commenting on the manner in which the sense of the fairness of the law impacts the likelihood that individuals will comply with the law).

300. *See* 2003 JOINT COMMITTEE ON TAXATION REPORT, app. 1, at 22 (2003) (reporting that only 5% of the CDP-appeal requests are frivolous).

301. *Id.*; *see supra* notes 271–72 and accompanying text.

hearing, as prescribed by Congress, particularly in the Tax Court, creates a disparity between taxpayers. Some taxpayers are afforded the hearing and others are not. While this may not be unreasonable from a theoretical standpoint, it is contrary to the statutory language and the intent of Congress. This statute was not intended to improve the efficiency of the tax collection system; it was designed to create additional taxpayer rights, which inherently cause collection delays.

The courts' interpretation of the CDP hearing requirement has left the taxpayer, in many cases, with little more recourse or process than he or she had prior to enactment of RRA 1998. As a result, the CDP hearing requirement must be reconsidered and reinterpreted to reflect the statutory language, the legislative history, and the purpose of the CDP provisions.

Statutory or regulatory change must occur to ensure that the approach taken by the courts is consistent. As previously discussed, five elements need to be included in revised CDP hearing procedural requirements:

1. An opportunity for direct communication between the taxpayer and the Appeals officer;
2. An opportunity to record or transcribe a CDP hearing at the taxpayer's expense;
3. A meaningful verification of the amount and existence of the liability and compliance with all applicable laws and regulations;
4. A real opportunity for the taxpayer to challenge the proposed collection action; and
5. An explicit remedy for both frivolous claims made by taxpayers solely for delay and for IRS failure to provide sufficient rights to the taxpayer during the CDP hearing process.

A process containing these elements will allow taxpayers to clearly understand their rights and obligations with respect to CDP hearings. This will further congressional intent by ensuring that taxpayers receive additional pre-deprivation process before enforced collection of tax liabilities. Proper CDP procedures should increase the perceived fairness of the tax collection system. Proper CDP procedures will also make a taxpayer's right to a CDP hearing more meaningful.