

The Community Tax Law Report™

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CDP AND COLLECTIONS: PERCEPTIONS AND MISPERCEPTIONS

by **Leslie Book**

Writing in these pages almost seven years ago, I described the then-new collection due process taxpayer rights.¹ At the time, I questioned whether collection due process (“CDP”) struck the right balance between the interests of taxpayers and the government. We now have the benefit of time to assess CDP’s merits, and look back at some of the IRS Restructuring and Reform Act of 1998’s (RRA 98) changes to the tax administration landscape. This is particularly important in light of a few recent developments. First, enforced collection activities are on the upswing, with leading indicators like collection revenue and levies on the increase following the post-RRA 98 general enforcement decline.² Yet, despite this increase, there is still a sense that the IRS can be doing more to collect assessed liabilities, which is particularly pressing during periods of deficits.³ Practical limitations on IRS budgeting has, in part, fueled the demand for (i) injecting private parties into the tax collection process⁴ and (ii) questioning whether existing procedural protections (like CDP) may create improper resource demands on IRS personnel, thus improperly draining away scarce IRS resources from the essential task of collecting taxes.⁵ Further, a respected observer of tax procedure and collection process in particular, has declared that CDP adds “no value,” is an “undesirable growth in the tax administration forest” and has called for CDP’s repeal.⁶ In light of this current situation, this essay addresses some of the common misperceptions about collection in general and CDP in particular, and considers the implications of *Robinette v. Commissioner*,⁷ a recent case about the manner of judicial review of CDP determinations.

Journalists and academics alike have commented as to how many of the stories of IRS abuse that the Senate Finance Committee uncovered leading up to RRA 98 were, at best, overblown, and at worst, not true.

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Perceptions

The discrediting of much of the testimony leading up to RRA 98 regarding IRS abuses suggested that IRS procedures were not in need of systemic changes.

Journalists and academics alike have commented as to how many of the stories of IRS abuse that the Senate Finance Committee uncovered leading up to RRA 98 were, at best, overblown, and at worst, not true.⁸ What conclusion follows from this? While I am not entirely sure, it does not support the conclusion that all of RRA 98's statutory changes and additional procedural protections (like CDP) were unnecessary. Despite RRA 98's legislative process failures, there is a fundamental soundness in the underlying rationale of CDP, i.e., adversarial processes and external checks on agency discretion contribute to better agency practice and protect taxpayer rights. Many respected observers, including the GAO and some of the country's top experts on tax procedure, testified and reported of routine IRS violations of procedures and how, in the collection process, unfettered discretion contributed to risks of agency error and taxpayer harm.⁹ While CDP might be underinclusive in some respects and overinclusive in others (and as such CDP would benefit from some legislative and administrative changes, as I discuss in a recent article published in the *Houston Law Review*¹⁰), it is fair to say there was a genuine consensus that IRS collection practices were in need of reform. However, there was, and still is, a difference of opinion as to whether those changes should be generated from internal processes, through better management and employee training, for example, or external processes like a greater and more independent role for Appeals and a new judicial check on certain collection actions. Yet, in areas where RRA 98 did not systemically alter collection processes, like general offer in compromise (OIC) review, IRS internal changes have not materially improved administration, leading respected observers to question whether the IRS is falling short in protecting taxpayer rights, delivering quality service and collecting otherwise uncollected revenues.¹¹

Tax collection is ultimately a matter of inventory management, resulting in a belief that IRS collection practice can best be improved through increased centralization.

Many tax collection decisions are really just a matter of automatic actions, undertaken at the level of computer-generated actions. In any system involving hundreds of thousands or millions of actions, like tax collection, it is unrealistic to expect individualized decisions on all collection determinations. Not only is it unrealistic, it also would be

foolish practice, for many determinations do not involve unreasonable prospects of harming individual interests or carry with them serious risk of government mistake.

At the same time, the danger of relying too much on treating all collection determinations as matters which the IRS can manage as inventory is that there are real and varying individual interests implicated in collection determinations, individual interests which IRS bulk processing and over-reliance on centralization will likely shortchange. Adversarial review proceedings work best when there is a need for individualized determinations, where there is a need for the IRS to exercise judgment and discretion concerning a taxpayer's individual circumstances. Internal IRS incentives to properly classify taxpayers in the collection stage provide a powerful tool to ensure acceptable agency practice without the need for external review in most, though not all, determinations. Fixing or improving the processing of centralized review will not necessarily lead to acceptable performance. IRS failure to give consideration to individualized factors, or improper analysis of a taxpayer's particular facts and circumstances, contributes to risk of error¹² and risk of taxpayers' unwillingness to accept agency decisions, even if those decisions are substantively proper. Characteristics of many lower-income taxpayers, including language and literacy barriers, and a lack of ready access to obtain and copy documentation, can contribute to rote rejection, with little room for individual judgment about a taxpayer's particular circumstances. Increased unfair rejections (and possibly improper acceptances) will likely accompany an over-reliance on remote centralized review.

The tough question for administrators or the legislature is to gauge which determinations require or would benefit from individualized determinations. One way to approach this issue is to borrow a utilitarian approach that balances interests, an approach inherent in procedural due process jurisprudence. That analysis considers the adequacy of existing procedures by applying a three-part inquiry considering the private interest affected by the official action; the risk of depriving that interest through procedures used, as well as probable value of additional safeguards; and the government's interest, including the administrative burden that additional requirements would impose.¹³ This approach reflects the normative view that not all government decisions are equal—some deserve more protective procedures on the adversarial model, and others fewer. The danger

with the view of tax collection that treats all collection decisions as inventory management is that it tends to treat all agency collection decisions with a broad brush, and fails to distinguish that different collection determinations should trigger different processes because there are different interests at stake and different risks of error. For example, individuals have strong interests in correct determinations regarding certain collection alter-

natives, like OICs, that lead to the possibility of a permanent solution to a possibly crippling tax debt. Further, the failure to consider matters appropriately places government interests at risk, interests that extend beyond the government's general desire for good administration. After all, insights from procedural justice scholars suggest strongly that individuals' willingness to accept decisions (and hence their likely future compliance) is not just tied to outcome.¹⁴ Procedures like opportunity to participate and voice positions—interests at greater risk with remote centralized collection determination review—contribute to satisfaction and acceptance of adjudicatory decisions. The IRS should be greatly concerned with this effect on long-term compliance, and decisions

that neglect this may turn out to be penny-wise but pound foolish.

CDP may turn Appeals into a mini-tax court and rob it of its informal traditions.

In some sense, CDP, with its requirement of judicial review (albeit limited) of IRS collection determinations is a reflection of Congress' desire to inject some adversarial process and individualized determination into the collection process. In reaching a determination regarding taxpayer CDP requests, Appeals is supposed to, for example, balance the government's need to collect taxes with the individual's interest in having the taxes collected in the least intrusive way possible.¹⁵ Moreover, Appeals, upon taxpayer request, is supposed to make an independent determination regarding the IRS's rejection of a proposed collection alternative.¹⁶ At the conclusion of the process, Appeals is supposed to issue a written determination notice setting forth its conclusions and summarizing the basis for its conclusion.

One observer has concluded that this process, and the possibility of judicial review in particular, threatens to turn Appeals into a mini-administrative law judge (ALJ) or Tax Court.¹⁷ I think this concern is overstated. For informal adjudications, practice varies considerably, with some proceedings even less formal than Appeals conferences have traditionally been, while others con-

IRS failure to give consideration to individualized factors, or improper analysis of a taxpayer's particular facts and circumstances, contributes to risk of error and risk of taxpayers' unwillingness to accept agency decisions, even if those decisions are substantively proper.

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tain many procedural protections akin to formal ALJ hearings. In other areas of administrative law, many administrative determinations are informal adjudications that require no formal ALJ, with a limited statutory mandate as to what procedures are applicable at those hearings—essentially the right to counsel and a brief statement explaining the agency's findings if it denies relief.¹⁸ Yet, courts review a significant amount of those determinations on an abuse of discretion basis, and the proceedings are often conducted informally, without many procedural rights associated with formal ALJ proceedings or trial courts. In fact, some administrative law scholars consider these informal adjudications as outside the Administrative Procedures Act (APA), because the APA provides essentially no minimal procedural requirements for those types of adjudications.¹⁹

The variety of procedures that other agencies use in their informal adjudications suggests that CDP need not change Appeals into a miniaturized Tax Court or change Appeals Officers into quasi-ALJs. Yet, in administrative law, judicial review done on an abuse of discretion basis does have as its focal point the evidence that the agency considered below in making its determination. This focus on the evidence before the administrative agency brings into question the role of the record and evidence that Appeals considers, which leads to a discussion of the controversial case of *Robinette v. Commissioner*, and considers further whether CDP's mode of judicial review alone creates the risk that Appeals will transform to an ALJ-type body.²⁰

An Application of the Abuse of Discretion Review Standard in CDP

Robinette v. Commissioner

In *Robinette*, the Tax Court held, in a divided opinion, that in reviewing a CDP determination for abuse of discretion the Tax Court may consider evidence at trial which was not included in Appeals' administrative record.²¹ In doing this, the Tax Court held that the IRS had abused its discretion in terminating an offer in compromise based upon doubt as to collectibility, because the taxpayer's subsequent breach of the offer terms was not material.²² The facts were sympathetic for reversing Appeals' determination: the taxpayer fully paid a considerable offer amount and the taxpayer was compliant with his filing and payment obligations except for one oversight.²³ The error was that within the five-year period following the OIC's acceptance, the taxpayer filed a tax return requesting a small refund one day late.²⁴ After declaring that the taxpayer's OIC was in default, the IRS sent the taxpayer an intent to levy, carrying with it the right to request a CDP hearing.²⁵ At the hearing, the Appeals Office, finding that

the taxpayer breached the offer, sustained the OIC's default and upheld the determination to proceed with enforced collection.²⁶ The Tax Court's holding that the breach was not material relied, in part, on evidence suggesting that the taxpayer had acted in good faith.²⁷

Even in cases where there has been abuse of discretion review of deficiency determinations, the Tax Court has allowed taxpayers to introduce evidence not before Appeals, and the application of the abuse of discretion standard of review closely approximates review done on a *de novo* basis.

Much of this evidence regarding the good faith of the taxpayer was not before Appeals, apparently because the Appeals Officer did not consider anything to be relevant apart from certified or registered mail receipts that would go to the timeliness of the actual return.²⁸ At trial, this evidence included the taxpayer and his wife's testimony regarding his filing patterns, other years' tax returns establishing his filing pattern and practice, his accountant's testimony regarding the Appeals Officer's unwillingness to consider issues apart from whether the taxpayer timely filed his return, and his accountant's telephone records, phone log and daily calendar.²⁹

The most controversial aspect of *Robinette* is the issue relating to the Tax Court's ability to consider evidence not before Appeals. This controversy relates to the nature of Tax Court review of IRS determinations, which have traditionally involved redeterminations of deficiencies done on a *de novo* basis, with a *de novo* scope of review. Even in cases where there has been abuse of discretion review of deficiency determinations, the Tax Court has allowed taxpayers to introduce evidence not before Appeals, and the application of the abuse of discretion standard of review closely approximates review done on a *de novo* basis.

Bringing Robinette in Line with General Administrative Law Principles

The Tax Court approach to letting in evidence is inconsistent with general administrative law principles and case law interpreting the application of the APA. As the IRS argued in *Robinette*, the APA mechanism for judicial review of informal agency adjudications turns on APA § 706(2)(A).³⁰ Under § 706(2)(A), the abuse of

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discretion standard, judicial review is deferential relative to a *de novo* standard of review, yet courts apply a “hard look” based upon the record before the agency, with the record already in existence serving as the focal point of the review.³¹ In *Robinette*, the Tax Court held that the APA was inapplicable, mainly because, in part, APA § 559 provides that requirements of the APA are not to be interpreted to limit or repeal additional requirements imposed by statute or otherwise imposed by law.³² As the *Robinette* majority points out, the Internal Revenue Code (IRC) has long provided a specific statutory framework for review of IRS’s determinations, a framework that pre-dates the APA.³³ This review framework includes an opportunity to present information to the Tax Court that was not before Appeals, including evidence in deficiency determinations that the Tax Court has reviewed on an abuse of discretion basis.

Yet, despite this historical practice, as Judges Halpern and Holmes point out in dissent, the majority’s conclusion is based upon the premise that CDP is “part and parcel” of this pre-existing statutory framework.³⁴ While it is true that the Tax Court’s procedures predate APA, and Congress did not intend to disturb existing pre-existing practice insofar as that practice relates to review of other determinations, the APA’s applicability largely turns on how analogous CDP determinations are to deficiency determinations. It is here where reasonable people can differ. In my view, review of collection determinations in CDP presents a dramatic departure from past practice, reflecting enough of a departure from a pre-existing statutory framework so that APA § 559 should not apply.³⁵ Collection decisions are different in kind from deficiency determinations, with a focus on a taxpayer’s financial circumstances and how those circumstances intersect with the IRS’s awesome powers as a creditor. Prior to CDP, the Anti-Injunction Act effectively barred consideration of IRS determinations regarding alternatives to enforced collection.³⁶ CDP changes that, and

The right to a *de novo* scope of review in CDP cases also reflects the reality that many taxpayers before the IRS are not represented and may not be able to present sufficient evidence to Appeals, due to a number of reasons, including lack of sophistication and resources.

allows taxpayers to challenge previously absolute agency discretion, and injects an element of judicial review following assessment and prior to payment—an altogether different stage in tax procedure.³⁷

Why Should We Care About the Tax Court’s Application of the Standard?

What is at stake in *Robinette*? I think the decision relates to a fundamental misperception about the means to protect taxpayer rights. *Robinette* reflects a judicial desire to correct for agency error, or at least maximize the potential to correct for agency error. In this way, *Robinette* can be seen as a taxpayer-friendly decision, yet I believe the decision for the Court to consider evidence not before Appeals carries with it risks to taxpayer rights and risks usurping collection functions best left to the IRS.

To appreciate this concern, it is again necessary to broaden the inquiry. In administrative law, the difference in the standard of review and how courts apply a particular standard reflects a contradiction between the desire to ensure deference to agency expertise and a concern that the government does not erroneously deprive an affected party of a protected right. In administrative law, this contradiction has manifested itself in varying ways, including a historical toothless application of the abuse of discretion review standard. Over time, with decisions like *Overton Park*, abuse of discretion review became much more searching, resulting in courts taking a “hard look” at agency determinations reviewed even under an abuse of discretion standard, which is more deferential than *de novo* review.³⁸ This evolution toward a less deferential application of the abuse of discretion standard reflected the courts’ greater concern for reducing the risk of government deprivations or errors.

In tax, deference was reflected not by a loose definition of abuse of discretion review; rather, through the effect of the Anti-Injunction Act³⁹ and the Declaratory Judgment Act,⁴⁰ whole classes of IRS determinations have been exempt from judicial review. Essentially, with limited exceptions, IRS decisions regarding the manner of collecting taxes, and the appropriateness of collection alternatives, were exempt from judicial review. Until CDP, deference to the agency has been absolute. (Ironically, abuse of discretion review in tax cases has traditionally been more searching and similar in effect to *de novo* review.)

The Tax Court’s approach in *Robinette* is arguably taxpayer friendly, as the consideration of evidence not before the IRS enabled the Tax Court to reach a conclusion different from the IRS’s. This in turn reflects the Tax Court’s historical concern with providing itself with an opportunity to determine a correct tax liability, notwithstanding any agency practices prior to a tax’s assessment.⁴¹ The right to a *de novo* scope of review in CDP cases also reflects the reality that many taxpayers

before the IRS are not represented and may not be able to present sufficient evidence to Appeals, due to a number of reasons, including lack of sophistication and resources. Further, it also reflects the reality that informal procedures at Appeals may result in the IRS not considering information that might be relevant.

Yet, a failure to abide by the APA's general approach toward reviewing only material before an agency (called the "On the Record" rule in administrative law) creates some risk that the IRS will take less care with its procedures at the hearing-level. For example, the On the Record rule creates incentives for the agency to conduct adequate procedures and provide sufficient explanations, so that a reviewing court will be able to perform its task of considering what an agency has decided, and the decision's rationale. Courts following the On the Record rule may conclude that the agency has acted improperly, through a failure to consider relevant material or explain actions rationally, which should result in a remand and hopefully corrective agency practices. Often, better agency practice initially, compelled by the searching light of judicial review into what the agency did, provides more meaningful taxpayer protections than the possibility of more searching review.⁴²

CDP creates challenges for the IRS and courts applying its provisions. At a time when many administrative law scholars are wrestling with injecting a floor of procedural protections in informal adjudications⁴³ and lamenting their all but exclusion from the APA, cases like *Robinette* reflect an aversion to injecting principles inherent in administrative law to tax determinations. While *Robinette* is ostensibly a taxpayer-friendly decision, its pedigree is one of isolation from broader administrative law principles. The Tax Court's casting its lot with the administrative law mainstream would ultimately provide a more systemic basis for taxpayer protection. The danger with the majority approach in *Robinette* is that it provides the cover for a judicial usurping of administrative function, which will not likely produce long-term systemic taxpayer benefits, though it may result in individualized correct decisions. Moreover, while arguably consistent with past Tax Court practice, it reflects a more radical approach to review of agency actions, departing from a pre-1998 universe of no judicial review to a more aggressive outcome-determinative review more akin to review of deficiency determinations. If the IRS knows that the court will consider new evidence on appeal and effec-

tively substitute its judgment for that of the IRS, it creates little incentives to improve agency practice in the first instance.

Conclusion

Dread over injecting adversarial process in collection determinations is overstated, and minimizes the challenges that the IRS has experienced with some of its collection determinations. IRS performance in the collection function has been spotty at best, especially in

connection with its administration of offers in compromise, where it has had almost absolute discretion and performed as both an evidence-gatherer and decision-maker. CDP, while born out of a far-from-perfect legislative process, reflects a legislative shift away from absolute discretion and toward judicial review, albeit limited, of IRS collection action. This shift away from absolute decision-making agency power and toward a limited review, while radical for tax administration in

the collection context, is consistent with administrative law's mainstream. While far from perfect, CDP deserves to continue, mature, and hopefully evolve. ■

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1 Leslie M. Book, *Due Process and New Process*, 3 COMMUN. TAX L. REP. 1 (Summer 1998).

2 Bryan T. Camp, *The Costs of CDP*, 105 TAX NOTES 1445, 1447 (2004); Allen Kenney, *Everson Evaluates State of IRS, Pledges Strong Agenda for 2005*, TAX NOTES TODAY, 2005 TNT 3-5 (January 5, 2005) ("Enforcement revenue grew 15 percent between 2003 and 2004, reaching a record high of \$43 billion for the year. The numbers also revealed an 18 percent upswing in the overall individual audit rate from fiscal 2003, as total individual audits climbed to slightly more than one million in 2004.").

3 For a discussion of the importance lawmakers place on enforcement during budget deficits, see Leslie M. Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. KAN. L. REV. 1145, 1153 n.26 (2003).

4 American Jobs Creation Act of 2004, Pub. L. No. 108-357 § 881, 118 Stat. 1418 (2004).

5 See Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1061 (2003).

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Collection Due Process: *continued from page 13*

6 Camp, *supra* note 3, at 1445; *see also* Bryan T Camp, *Point & Counterpoint: Should Collection Due Process Be Repealed?*, 24 A.B.A. NEWS Q. SEC. TAX'N. 11 (Fall 2004).

7 *Robinette v. Commissioner*, 123 T.C. 85 (2004).

8 *See, e.g.*, 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, 81 (2004); Leslie M. Book, *The New Collection Due Process Taxpayer Rights*, 86 Tax Notes 1127, 1127 n.1 (2000).

9 Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1147 n. 3, 1157 n.44 (concerning the need to introduce a third party to protect both the government's and the taxpayers' rights in the tax collection process).

10 *Id.*

11 Letter from Sen. Chuck Grassley, chairman of the Committee on Finance and Sen. Max Baucus, ranking member, to The Hon. John Snow, Secretary, Department of the Treasury (September 2, 2004), *reprinted in* Grassley, Baucus 'Concerned' With OIC Program, TAX NOTES TODAY, 2004 TNT 173-54 (September 2, 2004); Allen Kenney, *Taxpayer Advocate Olson Finds Fault with Offer-In-Compromise Program*, TAX NOTES TODAY, 2004 TNT 192-3 (October 4, 2004).

12 For example, in her recent report, the National Taxpayer Advocate raises serious questions regarding the IRS's ability to determine the correct offer amount for taxpayers submitting offers based upon doubt as to collectability. National Taxpayer Advocate, 2004 Annual Report to Congress, Vol. I at 334 n.73 (2004), *available at* <http://www.irs.gov/pub/irs-utl/ntafy2004annualreport.pdf> (data indicates that in FY 03 IRS ability to determine correct ability to pay declined by 9 percent compared to FY 01); *see also Fowler v. Commissioner*, 88 T.C.M. (CCH) 17 (2004) (in the context of review of a CDP determination, holding that IRS's Appeals Officer's use of national standards rather than actual expenses in determining a taxpayer's ability to fund an OIC was an abuse of discretion).

13 *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

14 *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 263 (2004).

15 I.R.C. § 6330 (c)(3)(C) (2004).

16 Camp, *supra* note 3, at 1451.

17 *See id.*

18 5 U.S.C. § 555 (2004) (concerning ancillary matters). For more on the limited procedural constraints applicable to informal adjudications, *see* Cooley R. Howarth, Jr., *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043, 1044 (2004).

19 *See* Ronald J. Krotoszynski, Jr., *Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057, 1058 (2004); *see also* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 108 (2003) ("the APA does not actually use the term informal adjudication at all, and barely acknowledges the concept").

20 *Robinette*, 123 T.C. at 85. For a good discussion of *Robinette*, *see* Dansheera Cords, *Collection Due Process: The Scope and Nature of Judicial Review*, U. CIN. L. REV. (forthcoming 2005).

21 *Robinette*, 123 T.C. at 95.

22 *Id.* at 112.

23 *Id.* at 86-90.

24 *Id.*

25 *Id.*

26 *Id.* at 90-92. The IRS had no record of the taxpayer filing the return one day late, and the taxpayer's accountant told the Appeals Officer that he filed the return on behalf of the taxpayer on October 15, on extension. The Appeals Officer requested that the accountant provide a copy of a certified or registered mail receipt, which the accountant could not do, because in filing the return, he used a private postage meter and testified at trial that he had deposited the return in a US postage box at 11:00 PM.

27 *Id.* at 104.

28 *Id.* at 91.

29 *Id.* at 94-95.

30 Administrative Procedures Act, 5 U.S.C. § 500 et seq. (2000).

31 *See, e.g.*, *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *see also* Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record"*, 10 ADMIN. L.J. AM. U. 179, 194-95 (1996).

32 *Id.* at 97.

33 *Id.*

34 *See Robinette*, 123 T.C. at 126.

35 As support for this conclusion note that the Supreme Court has held that courts should narrowly construe exceptions to the APA's rules of general applicability. *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) (in considering review of a decision from the Patent and Trademark Office, Court held that the correct standard of review is that set forth in the APA rather than the "clearly erroneous" standard unrecognized by the APA unless there are policy reasons justifying such an exception).

36 For a discussion of the interplay of the Anti-Injunction Act and non-review of collection decisions, *see* Book, *supra* note 9, at 1155 nn.23-25

37 *See* *Flora v. United States*, 362 U.S. 145 (1960) (holding that courts lack jurisdiction to hear refund suits unless the outstanding assessment is paid in full and the taxpayer has filed a timely refund claim with the IRS).

38 *Overton Park*, 401 U.S. at 402; *see also* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 688-89 (2002).

39 *See supra* notes 9 and 36

40 *Id.*

41 Cords, *supra* note 20.

42 Krotoszynski, *supra* note 19, at 1058 (criticizing ex post models of accountability)

43 *See generally* Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004).