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## Tax Attorneys as Defenders of Taxpayer Rights

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# TAX ATTORNEYS AS DEFENDERS OF TAXPAYER RIGHTS

*Michelle Lyon Drumbł\**

## ABSTRACT

*What is the modern role of a tax practitioner, in particular a tax attorney, in the United States? In an era in which the Internal Revenue Service (IRS) is underfunded, understaffed, and struggles to address its mission, tax attorneys play an important role as advocates for taxpayer rights.*

*Tax attorneys act as advocates who represent ordinary individual taxpayers in controversies with the IRS. These controversies include post-filing disputes, such as audits, as well as issues arising with the collection of assessed taxes. Many of these cases are resolved at the administrative level; those that cannot be resolved are litigated, most commonly in the United States Tax Court.*

*Tax attorney advocates matter because for millions of low-income families, filing a tax return is not just about reporting income but also a mechanism for claiming social benefits. And for the impoverished, the collection powers bestowed upon the IRS represent a threat to their ability to meet day-to-day needs. Meanwhile, the IRS increasingly relies on automated procedures and provides a decreasing level of human service for taxpayers. Further, the sweeping tax reform that was rushed into law in December 2017 added new challenges and workload for the overburdened administrative agency, as it had to train employees on the changes, design new forms, and issue public guidance for taxpayers.*

*Looking into the future, tax attorneys will continue to play a crucial role in defending taxpayer rights and advocating on behalf of the most vulnerable population. This Essay explores that role.*

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## INTRODUCTION

When people think of tax attorneys, they may think first of transactional lawyers who represent large multinational corporations or of estate and gift planners who represent high-net-worth individuals. Lawyers who specialize in tax more often are advisors rather than advocates. But advocates play a critical role in the tax ecosystem.

Our federal tax administration agency—the Internal Revenue Service (IRS)—is underfunded and understaffed.<sup>1</sup> It is politically unpopular.<sup>2</sup> It struggles to address its basic mission as tax collector,<sup>3</sup> let alone the other roles it is asked to perform.<sup>4</sup> It increasingly relies on automation.<sup>5</sup> Tax attorneys play an important role as advocates for taxpayer rights, and these rights involve much more than just a correct computation of tax liability.

What are taxpayer rights? Many countries explicitly recognize a list of taxpayer rights in a charter.<sup>6</sup> Even among those countries that do not have a formal charter of rights, the Organisation for Economic Co-operation and Development (OECD) has identified some basic and common themes that are present in the tax systems of all OECD countries: (1) “[t]he right to be informed, assisted, and heard”; (2) “[t]he right of appeal”; (3) “[t]he right to pay no more

1. See generally Paul Kiel & Jesse Eisinger, *How the IRS Was Gutted*, PROPUBLICA (Dec. 11, 2018, 5:00 AM), <http://www.propublica.org/article/how-the-irs-was-gutted> [<http://perma.cc/32wh-yhdt>] (describing the cuts to the IRS budget between the years 2010 and 2017).

2. See generally Joseph Thorndike, *Don't Bother Fixing the Tax Code Unless You Fix the IRS Too*, FORBES (Sept. 11, 2015, 1:43 PM), <http://www.forbes.com/sites/taxanalysts/2015/09/11/dont-bother-fixing-the-tax-code-unless-you-fix-the-irs-too/#18968256552a> [<http://perma.cc/L9SD-SPM4>] (describing lack of respect for the agency and its “lousy customer service”).

3. See 1 NAT'L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS 34 (2012), <http://www.taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/Volume-1.pdf> [<http://perma.cc/273X-HMCS>].

4. See *id.* As described herein, Congress has increasingly tasked the IRS with administering social benefits.

5. Keith Fogg, *Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 TAX LAW. 3, 12 (2013); see also Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 242–43 (2009).

6. COMM. OF FISCAL AFFAIRS FORUM ON TAX ADMIN., ORG. FOR ECON. CO-OPERATION & DEV., TAXPAYERS' RIGHTS AND OBLIGATIONS—PRACTICE NOTE 3 (2003), [http://www.oecd.org/ctp/administration/Taxpayers%27\\_Rights\\_and\\_Obligations-Practice\\_Note.pdf](http://www.oecd.org/ctp/administration/Taxpayers%27_Rights_and_Obligations-Practice_Note.pdf) [<http://perma.cc/D276-D85Z>].

than the correct amount of tax”; (4) “[t]he right to certainty”; (5) “[t]he right to privacy”; and (6) “[t]he right to confidentiality and secrecy.”<sup>7</sup>

The United States followed the lead of other OECD countries, including the United Kingdom, Canada, and Australia,<sup>8</sup> when it codified its Taxpayer Bill of Rights into one list in 2015.<sup>9</sup> Section 7803(a)(3) of the Internal Revenue Code provides a list of the ten rights: “the right to be informed,” “the right to quality service,” “the right to pay no more than the correct amount of tax,” “the right to challenge the position of the Internal Revenue Service and be heard,” “the right to appeal a decision of the Internal Revenue Service in an independent forum,” “the right to finality,” “the right to privacy,” “the right to confidentiality,” “the right to retain representation,” and “the right to a fair and just tax system.”<sup>10</sup>

Many of these rights long predate the enactment of Section 7803(a)(3), and some appeared first in other sections of the Code.<sup>11</sup> The IRS adopted the list in 2014, a year prior to its codification.<sup>12</sup>

It is too soon to understand the practical effect of the list’s codification. Alice Abreu and Richard Greenstein have made the argument that having this Taxpayer Bill of Rights “generates a powerful normative force that supports enforcement”; they predict that “the adoption and enactment of the [Taxpayer Bill of Rights] will make the administration of the tax law more just.”<sup>13</sup> Time will tell, and whether codification will have practical effects is an important conversation. This Essay explores the role that advocates play as defenders of these ten codified rights and considers how agency automation runs contrary to certain of those taxpayer rights.

## I. A BRIEF HISTORY OF TAXPAYER RIGHTS LEGISLATION IN THE UNITED STATES

The incorporation of these rights into one Code section is quite recent, but these taxpayer rights have actually been thirty years in the making. Most of the rights existed in the Code prior to 2015, but not in one comprehensive list.<sup>14</sup>

Three prior legislative acts were titled Taxpayer Bill of Rights,<sup>15</sup> and these are known informally as TBOR 1, 2, and 3.<sup>16</sup> The conversation about taxpayer

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7. *Id.*

8. TAXPAYER ADVOCATE SERV., TOWARD A MORE PERFECT TAX SYSTEM: A TAXPAYER BILL OF RIGHTS AS A FRAMEWORK FOR EFFECTIVE TAX ADMINISTRATION 5–8 (2013), <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Toward-a-More-Perfect-Tax-System-A-Taxpayer-Bill-of-Rights-as-a-Framework-for-Effective-Tax-Administration.pdf> [<http://perma.cc/RED3-WT6J>].

9. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 401, 129 Stat. 2242, 3117 (2015) (codified as amended at I.R.C. § 7803(a)(3)).

10. I.R.C. § 7803(a)(3) (2018).

11. Alice G. Abreu & Richard K. Greenstein, *The U.S. Taxpayer Bill of Rights: Window Dressing or Expression of Justice?*, J. TAX ADMIN., Nov. 2018, at 25, 27–28.

12. I.R.S. News Release, IR-2014-72 (June 10, 2014), <http://www.irs.gov/pub/irs-news/IR-14-072.pdf> [<http://perma.cc/WP42-2KCO>].

13. Abreu & Greenstein, *supra* note 11, at 25.

14. *Id.* at 27–28.

rights in the United States has centered around the idea of leveling the playing field between taxpayers and a bureaucratic agency that has wide-ranging collection power.<sup>17</sup>

The first TBOR, enacted in 1988, placed important limitations on the IRS's collection practices.<sup>18</sup> For example, TBOR 1 restricted when and how the government could seize property.<sup>19</sup> It gave taxpayers the right to enter into an installment agreement to pay outstanding balances over time if they could not afford to pay all at once.<sup>20</sup> It barred the IRS from evaluating its employees based on their tax enforcement results, specifically prohibiting a quota system for levies and seizures.<sup>21</sup> It provided that the IRS must release a levy if the levy is causing a taxpayer financial hardship.<sup>22</sup> These statutory limitations on the collection practices of the IRS, foundational to recognizing different levels of ability to pay, are now so familiar that perhaps today's advocates take them for granted in their work with low-income taxpayers.

In fact, today, after three rounds of legislation bolstering taxpayer rights,<sup>23</sup> it is hard to appreciate what the IRS was like before the first TBOR. But, a look back at records of hearings and congressional testimony is enlightening. As but one example, a taxpayer named Kay Council testified before a Senate Finance Committee subcommittee about the experience she and her late husband had with the IRS in the summer of 1988.<sup>24</sup> She recalled how after the IRS had audited their 1979 return, they were not issued a thirty-day notice, a ninety-day notice, or any kind of notice of assessment; the first mailing they received was a bill for \$183,000.<sup>25</sup> After *four years* of inquiring about it, the couple finally discovered that the IRS had mailed a notice of deficiency, but to the wrong

15. 1 NAT'L TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS 5 n.5 (2013), <http://taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf> [<http://perma.cc/9UYC-VHFD>] ("These laws create specific rights in certain instances, but they do not create a thematic, principled-based list of overarching taxpayer rights.").

16. *Id.*

17. See generally Leonard Sloane, *Coping: With New Taxpayer Guidelines; Now There Is a Bill of Rights To Give You More Leverage When Dealing with the I.R.S.*, N.Y. TIMES (Nov. 12, 1988), <http://nyti.ms/2DctTYa> [<http://perma.cc/H96K-2942>] (describing ways in which the Taxpayer Bill of Rights legislation gave taxpayers more "leverage" in interacting with the IRS).

18. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, §§ 6226–6247, 102 Stat. 3342, 3730–52 (current version in scattered sections of the I.R.C.).

19. See *id.* §§ 6236–6238, 102 Stat. at 3737–43.

20. *Id.* § 6234, 102 Stat. at 3735–36.

21. *Id.* § 6231, 102 Stat. at 3734.

22. *Id.* § 6236(f), 102 Stat. at 3740.

23. See *id.* §§ 6226–6247, 102 Stat. at 3730–52 (TBOR 1); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996) (TBOR 2) (current version in scattered sections of the I.R.C.); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 3000–3804, 112 Stat. 685, 726–83 (TBOR 3) (current version in scattered sections of the I.R.C.).

24. *IRS Implementation of Taxpayers' Bill of Rights: Hearing Before the Subcomm. on Private Ret. Plans & Oversight of the Internal Revenue Serv. of the S. Comm. on Fin.*, 101st Cong. 18 (1990) [hereinafter *IRS Implementation of the Taxpayers' Bill of Rights Hearing*].

25. *Id.*

address.<sup>26</sup> Eventually, and after incurring tens of thousands of dollars in attorney's fees, the couple prevailed: a federal court determined that a valid notice of deficiency had not been issued within the statutory period for assessment, meaning the tax lien against the Councils was unenforceable and they owed nothing to the IRS.<sup>27</sup> Tragically, before the court made its ruling, Mr. Council committed suicide.<sup>28</sup> He left Ms. Council a note instructing her to use the life insurance proceeds to pay the IRS.<sup>29</sup> Adding insult to heartbreaking injury, the lien remained on Ms. Council's credit report even after the IRS released it.<sup>30</sup> Ms. Council's testimony made national headlines.<sup>31</sup> She became a public face for the lack of taxpayer rights, including the lack of collection due process rights.<sup>32</sup>

The second TBOR, enacted in 1996,<sup>33</sup> fine-tuned and extended many of the protections that were put into place in 1988. Significantly, it also created the Office of the Taxpayer Advocate.<sup>34</sup> The current National Taxpayer Advocate, Nina Olson, has done a tireless job in this role, and she was instrumental in pushing for Congress to codify the Taxpayer Bill of Rights as one list.<sup>35</sup>

The third TBOR, enacted in 1998,<sup>36</sup> brought us an IRS restructuring.<sup>37</sup> It also created a wide-ranging series of protections for taxpayers, both on the audit side and the collections side.<sup>38</sup> And most significantly—for purposes of my thesis in this Essay—it created the low-income taxpayer clinic (LITC) grant program.<sup>39</sup>

LITCs represent low-income taxpayers in their controversies before the IRS, including U.S. Tax Court cases.<sup>40</sup> These taxpayers generally cannot afford a

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26. *Id.* at 19.

27. *Id.*; see also *Council v. Burke*, 713 F. Supp 181, 185 (M.D.N.C. 1988).

28. *IRS Implementation of the Taxpayers' Bill of Rights Hearing*, *supra* note 24, at 18.

29. Shawn Pogatchnik, *IRS 'Made Me Widow,' Witness Tells Senators*, L.A. TIMES (Apr. 7, 1990), [http://articles.latimes.com/1990-04-07/news/mn-622\\_1\\_irs-abuses](http://articles.latimes.com/1990-04-07/news/mn-622_1_irs-abuses) [<http://perma.cc/BF9P-F47U>].

30. *IRS Implementation of the Taxpayers' Bill of Rights Hearing*, *supra* note 24, at 19.

31. Pogatchnik, *supra* note 29.

32. *Id.* (quoting Council as saying that she “had no rights” and that “[t]he IRS had them all”).

33. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996) (current version in scattered sections of the I.R.C.).

34. *Id.* §§ 101–102, 110 Stat. at 1453–56.

35. See, e.g., 1 NAT'L TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS 493–519 (2011), <http://taxpayeradvocate.irs.gov/userfiles/file/2011-annual-report/IRS%20TAS%20ARC%202011%20VOL%201.pdf> [<http://perma.cc/7J9T-24H6>]. Olson, who has served in this role since March 2001, has announced that she will retire, effective July 31, 2019. Nina E. Olson, *A Personal Message from the National Taxpayer Advocate*, TAXPAYER ADVOCATE SERV.: NTA BLOG (Mar. 1, 2019), <http://taxpayeradvocate.irs.gov/news/nta-personal-message> [<http://perma.cc/U9T3-RL7Q>].

36. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 3000–3804, 112 Stat. 685, 726–83 (current version in scattered sections of the I.R.C.).

37. *Id.* § 1(a), 112 Stat. at 685 (“This Act may be cited as the ‘Internal Revenue Service Restructuring and Reform Act of 1998.’”)

38. *Id.* §§ 3401–3468, 112 Stat. at 746–70.

39. *Id.* § 3601, 112 Stat. at 774–76.

40. See IRS, PUB. NO. 5066, LOW INCOME TAXPAYER CLINICS PROGRAM REPORT 2 (2018) [hereinafter IRS, PUB. NO. 5066], <http://www.irs.gov/pub/irs-pdf/p5066.pdf> [<http://perma.cc/7SPJ-HNNE>].

lawyer, and many would face challenges handling the matter themselves, for example, because of a lack of sophistication, a lack of proficiency in English, a lack of time during business hours due to an inflexible work schedule, or a lack of internet access.<sup>41</sup>

The LITC grant program has greatly expanded the availability of pro bono legal services to low-income taxpayers. In 2017 the LITC grant program awarded a total of \$11.8 million in federal matching funds to 138 clinics.<sup>42</sup> As of 2019, these clinics are located in forty-six of fifty states, plus Washington, D.C.<sup>43</sup> Attorneys, CPAs, and law students work in the clinics.<sup>44</sup> In 2016 LITCs represented 19,479 taxpayers in controversies with the IRS.<sup>45</sup> The federal grant funding helped create a national network of clinics to represent taxpayers in their controversies.<sup>46</sup> Many of the clinics are based at law schools,<sup>47</sup> including the one I direct at Washington and Lee University School of Law. These law students and other volunteers, in various ways, are defending the rights of the taxpayers we serve. They embody the right to representation, as well as the right to a fair and just tax system.

Even if LITC clients could afford an attorney, in many cases it would not be cost efficient for them to retain one because the dollar amounts at stake can be relatively low compared to the amount of time we spend doing the work. In a law school clinic, students have the luxury of working as many hours as they need to on a case, regardless of whether \$1,000 or \$50,000 is at stake. From a cost-benefit perspective, it would not be rational for a taxpayer to retain a lawyer to resolve a low-sum dispute. The pro bono nature of this work, particularly when combined with the academic component, renders the cost-benefit analysis moot. LITC attorneys and students will devote many hours to such a representation because \$1,000 is a highly meaningful sum of money to our clients. But we also do it because it is the correct result, and the government should be held accountable for applying the law incorrectly, no matter what the sum at stake. As Section 7803(a)(3)(C) reminds us, taxpayers have “the right to pay no more than the correct amount of tax.”<sup>48</sup> If taxpayers lack the resources or ability to exercise that right or engage in a cost-benefit analysis and decide it is not worth pursuing, then that right is a hollow one. If representation depended on a favorable cost-benefit analysis, the government would never be held accountable in small-dollar matters.

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41. *Id.* at 3. As the director of the LITC at Washington and Lee University School of Law, some of these observations are based on my personal experiences with clients.

42. *Id.* at 2.

43. See IRS, PUB. NO. 4134, LOW INCOME TAXPAYER CLINIC LIST (2019), <http://www.irs.gov/pub/irs-pdf/p4134.pdf> [<http://perma.cc/GYJ3-83WE>].

44. IRS, PUB. NO. 5066, *supra* note 40, at 2.

45. *Id.* at 5.

46. Fogg, *supra* note 5, at 4.

47. See *id.*

48. I.R.C. § 7803(a)(3)(C) (2018).

## II. GREATEST AGENCY CHALLENGES: NOW AND THEN

From my perspective, the taxpayer rights legislation dating back to 1988 has been effective in improving the overall culture of the IRS. I have heard and read reports of what IRS employees and practices were like prior to 1988, and it differs from what I experience in dealing with the agency in our clinic's work. Prior to the three TBOR acts, the agency was reputed to mistreat taxpayers, and taxpayers had very few due process protections.<sup>49</sup> For example, because it was common to measure IRS employee performance according to how much money the employee collected, incentives were misaligned—enforcement was favored over customer service and fairness.<sup>50</sup> TBOR 1 provided “a basic safety net for taxpayers when the bureaucratic machine goes awry.”<sup>51</sup>

Today there is more due process afforded to taxpayers, and IRS employees are by and large courteous and professional.<sup>52</sup> That represents progress and is worth emphasizing. However, the IRS faces many of the same systemic challenges today that it did thirty years ago.

The IRS is understaffed.<sup>53</sup> As a result, the IRS is only able to answer a percentage of all taxpayer phone calls, and it has reduced the availability of in-person assistance at IRS walk-in sites.<sup>54</sup> The IRS was criticized during the 2015 tax filing season for answering only 37.5% of taxpayer calls.<sup>55</sup> With that as a low benchmark, it was praised when it answered 80% of calls during the 2018 tax filing season. However, this increase in calls answered came at the cost of delays in timely replying to correspondence because the same staff must do both.<sup>56</sup>

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49. See David Cay Johnston, *Senate Committee Is Told of a Vast Range of Abuses by I.R.S.*, N.Y. TIMES (Apr. 29, 1998), <http://nyti.ms/2De7LNa> [<http://perma.cc/VMQ4-T5XP>].

50. See David E. Rosenbaum, *Internal Audit Confirms Abusive I.R.S. Practices*, N.Y. TIMES (Jan. 14, 1998), <http://nyti.ms/2UWGqWm> [<http://perma.cc/ZQ5C-CM2M>].

51. *IRS Implementation of the Taxpayers' Bill of Rights Hearing*, *supra* note 24, at 2.

52. While I believe that the culture is better than it used to be, there will always be exceptions to such general statements. See, e.g., TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP'T OF THE TREASURY, REF. NO. 2017-10-074, *FOUR FAIR TAX COLLECTION PRACTICES VIOLATIONS RESULTED IN ADMINISTRATIVE ACTIONS IN FISCAL YEAR 2016 (2017)*, <http://www.treasury.gov/tigta/auditreports/2017reports/201710074fr.pdf> [<http://perma.cc/22GP-Q4TA>] (describing four instances of IRS collection employees violating the Fair Tax Collection Practices in fiscal year 2016).

53. See generally Kiel & Eisinger, *supra* note 1 (describing the cuts to the IRS budget between the years 2010 and 2017 and how that resulted in staffing cuts).

54. 1 NAT'L TAXPAYER ADVOCATE, 2017 ANNUAL REPORT TO CONGRESS 22 (2017) [hereinafter 1 NAT'L TAXPAYER ADVOCATE, 2017 ANNUAL REPORT], [http://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-ARC/ARC17\\_Volume1.pdf](http://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-ARC/ARC17_Volume1.pdf) [<http://perma.cc/6BHC-GK54>]; Nina E. Olson, *IRS Continues To Close Taxpayer Assistance Centers, Despite Taxpayer Advocate Service and Congressional Concerns*, TAXPAYER ADVOCATE SERV.: NTA BLOG (Aug. 9, 2018), <http://taxpayeradvocate.irs.gov/news/nta-blog-irs-continues-to-close-taxpayer-assistance-centers> [<http://perma.cc/SE8L-QGJH>] [hereinafter Olson, *IRS Continues To Close Taxpayer Assistance Centers*].

55. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-471, 2018 TAX FILING: IRS MANAGED PROCESSING CHALLENGES AND ENHANCED ITS MANAGEMENT OF TAX LAW CHANGES (2018), <http://www.gao.gov/assets/700/694403.pdf> [<http://perma.cc/4YXN-TQEY>].

56. *Id.* at 13 (“[T]hrough April 21, 2018, the overage rate of correspondence—the percentage of cases generally not processed within 45 days of receipt by IRS—was 36.8 percent compared to 26.4 percent at the same time last year.”).



The IRS is understaffed because it is underfunded. Despite having been tasked with burdensome new roles in recent years, funding was decreased 20% between fiscal years 2010 and 2018, measured on an inflation-adjusted basis.<sup>57</sup> Between 2010 and 2017, the IRS reduced its workforce by 18,000 full-time employees—nearly one-fifth of its total workforce.<sup>58</sup> Employee morale is sometimes low.<sup>59</sup> The agency’s technology is outdated and lags behind the private sector’s.<sup>60</sup> At the same time, it must rely heavily on automation.<sup>61</sup>

The 2017 Tax Cuts and Jobs Act exacerbated these challenges.<sup>62</sup> After all, every change to the law means a change in forms, instructions, public guidance, and of course employee training.

Looking ahead, there is no reason to believe that Congress will fund the IRS more robustly or task the agency with fewer responsibilities. In the meantime, the population is increasing, and technological advances will allow for greater automation. The next Section discusses the ways in which attorneys play a meaningful role in protecting taxpayer rights and considers the breadth of what is at stake for taxpayers.

### III. ROLES THAT ATTORNEYS PLAY AS DEFENDERS OF TAXPAYER RIGHTS

#### A. *Ensuring Due Process for Taxpayers (Including Assisting Those in Financial Hardship with Collection Alternatives)*

Tax attorneys represent clients with different types of controversies, including audits, appeals, and procedural issues arising with the collection of

57. NINA E. OLSON, WRITTEN STATEMENT OF NINA E. OLSON, NATIONAL TAXPAYER ADVOCATE: HEARING ON INTERNAL REVENUE SERVICE FY 2018 BUDGET REQUEST BEFORE THE SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT, COMMITTEE ON APPROPRIATIONS 3 (2017), [http://www.irs.gov/pub/foia/ig/tas/nta\\_written\\_testimony\\_hearing\\_irs\\_fy2018\\_budgetreq\\_7\\_26\\_2017.pdf](http://www.irs.gov/pub/foia/ig/tas/nta_written_testimony_hearing_irs_fy2018_budgetreq_7_26_2017.pdf) [<http://perma.cc/3848-JKPN>].

58. Jeff Stein, *The Shutdown Is Undercutting the IRS, Just in Time for a Particularly Difficult Tax Season*, WASH. POST (Jan. 18, 2019, 6:10 PM), [http://www.washingtonpost.com/business/economy/the-shutdown-is-undercutting-the-irs-just-in-time-for-a-particularly-difficult-tax-season/2019/01/18/6b649ed8-1b53-11e9-9ebf-c5fed1b7a081\\_story.html](http://www.washingtonpost.com/business/economy/the-shutdown-is-undercutting-the-irs-just-in-time-for-a-particularly-difficult-tax-season/2019/01/18/6b649ed8-1b53-11e9-9ebf-c5fed1b7a081_story.html) [<http://perma.cc/22E8-FT5D>].

59. See generally Stuart Gibson, *Congress to IRS: The Beatings Will Continue Until Morale Improves*, FORBES (Sept. 16, 2016, 11:55 AM), <http://www.forbes.com/sites/taxanalysts/2016/09/16/congress-to-irs-the-beatings-will-continue-until-morale-improves/#5ad4a0754f4a> [<http://perma.cc/yz6f-4wzs>] (“The best and brightest IRS employees are leaving—and they are not being replaced.”).

60. OLSON, *supra* note 57, at 19; Naomi Jagoda, *New IRS Chief To Make Updating Agency Technology a Priority*, HILL (Nov. 13, 2018, 1:38 PM), <http://thehill.com/policy/finance/416459-new-irs-chief-says-updating-technology-is-a-priority> [<http://perma.cc/86AL-2ESN>].

61. See generally 2 NAT’L TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS 1–62, [http://taxpayeradvocate.irs.gov/Media/Default/Documents/ResearchStudies/arc11\\_arc\\_vol2\\_demographic\\_history.pdf](http://taxpayeradvocate.irs.gov/Media/Default/Documents/ResearchStudies/arc11_arc_vol2_demographic_history.pdf) [<http://perma.cc/KR37-4DPW>] (describing the progression of “[f]ederal [i]ncome [t]ax [a]dministration” from 1913 to 2011 as being “[f]rom [t]ax [c]ollector to [f]iscal [a]utomaton”).

62. 1 TAXPAYER ADVOCATE SERV., OBJECTIVES REPORT TO CONGRESS: FISCAL YEAR 2019, at 36 (2019), [http://taxpayeradvocate.irs.gov/Media/Default/Documents/2019-JRC/JRC19\\_Volume1.pdf](http://taxpayeradvocate.irs.gov/Media/Default/Documents/2019-JRC/JRC19_Volume1.pdf) [<http://perma.cc/9WMD-P9EK>] (“Implementing the [Tax Cuts and Jobs Act] will be a major effort in fiscal years (FYs) 2018 and 2019. It requires the IRS to reprogram 140 systems and create or revise about 450 forms, instructions, and publications—twice the number required in a normal year.”).

assessed taxes. My experience has been that it is typically easy to work with the IRS to resolve collections issues for low-income individuals because I am familiar with the protections they have been given over the last thirty years. But many individuals need someone to assert these rights for them. For example, we often work with elderly taxpayers who have very few assets and survive on a fixed monthly income of around \$1,500. If these individuals have outstanding tax liabilities, the IRS will send collection notices and eventually may threaten to levy their Social Security benefits.<sup>63</sup> By proactively engaging the IRS, we can work with this type of taxpayer to demonstrate financial hardship and avoid a levy. Thanks in part to the various TBORs, the Code provides collection due process protections that allow taxpayers facing economic hardship a chance to consider their collection alternatives.<sup>64</sup> These include “currently not collectible” (financial hardship) status<sup>65</sup> and the offer in compromise program,<sup>66</sup> in addition to installment agreements for those who are able to make a monthly payment.<sup>67</sup>

The majority of LITC cases involve a collections matter.<sup>68</sup> But controversies are not just about tax computation and collections. There are many points of individual intersection with the IRS other than simply owing money, and these also present systemic challenges.

#### B. *Claiming Social Benefits*

In the past two decades, Congress has enacted a number of new refundable tax credits, increasing the ways in which the IRS acts as an administrator of social benefits for the public.<sup>69</sup> The IRS has struggled to administer some of these credits, and commonly these credits present enforcement issues for the agency.<sup>70</sup> As a consequence, tax attorneys become involved in defending individuals in matters that extend to health care, education, adoption, or other

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63. I.R.C. §§ 6330–6331 (2018).

64. *See, e.g., id.* § 6330.

65. IRM 5.16.1 (Sept. 18, 2018).

66. IRM 5.8 (Nov. 8, 2018).

67. IRM 5.14 (July 16, 2018).

68. IRS, PUB. NO 5066, *supra* note 40, at 6.

69. *See generally* CONG. BUDGET OFFICE, PUB. NO. 4152, REFUNDABLE TAX CREDITS (2013), <http://www.cbo.gov/publication/43767> [<http://perma.cc/V48D-9HHJ>] (describing how the number and nature of refundable tax credits has changed since 1975).

70. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-475, REFUNDABLE TAX CREDITS: COMPREHENSIVE COMPLIANCE STRATEGY AND EXPANDED USE OF DATA COULD STRENGTHEN IRS'S EFFORTS TO ADDRESS NONCOMPLIANCE (2016) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-475] <http://www.gao.gov/assets/680/677548.pdf> [<http://perma.cc/gdq9-zsfr>] (“Eligibility rules for refundable tax credits contribute to compliance burden for taxpayers and administrative costs for the Internal Revenue Service . . .”).

seemingly “nontax” matters.<sup>71</sup> Particularly for low-income individuals, access to representation can make a critical difference in prevailing in these disputes.<sup>72</sup>

Among the most common types of cases LITCs handle are IRS examinations of taxpayers claiming the Earned Income Tax Credit (EITC).<sup>73</sup> The EITC is a refundable credit for working low-income individuals and families.<sup>74</sup> Essentially, it is a social benefit that supplements income, and it lifts millions of families out of poverty.<sup>75</sup> In 2017, nearly twenty-six million households benefited from the EITC.<sup>76</sup> Most of these households included parents; taxpayers who have a qualifying child who lives with them for at least half the year may receive thousands of dollars as a tax refund because of this credit.<sup>77</sup> They rely on this credit to make ends meet.<sup>78</sup> The government has chosen to deliver this benefit through the tax return filing process because work, and earned income, are prerequisites to the credit.<sup>79</sup> However, it has also chosen this mechanism because it is inexpensive to administer and deliver the credit in this fashion—taxpayers self-declare their eligibility, and the credit is included in an annual lump sum as a tax refund.<sup>80</sup> Many recipients of the credit owe no federal income tax at all—whether they realize it or not, they are filing a tax return solely to claim their social benefit.<sup>81</sup>

In part because of this design, the EITC also has a high improper payment rate.<sup>82</sup> As a result, it is a target area of enforcement for the IRS.<sup>83</sup> Taxpayers who

71. See generally IRS, PUB. NO. 5066, *supra* note 40 (describing the types of cases LITCs handle).

72. See, e.g., 1 NAT'L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS 222 (2007) [hereinafter 1 NAT'L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT], [http://www.irs.gov/pub/tas/arc\\_2007\\_vol\\_1\\_cover\\_msps.pdf](http://www.irs.gov/pub/tas/arc_2007_vol_1_cover_msps.pdf) [<http://perma.cc/XL2L-JCH7>].

73. IRS, PUB. NO. 5066, *supra* note 40, at 6.

74. See I.R.C. § 32 (2018).

75. CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT 2–3 (2018), <http://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit> [<http://perma.cc/29UL-FW4A>].

76. *Id.*

77. See *id.*

78. See generally Jennifer Sykes et al., *Dignity and Dreams: What the Earned Income Tax Credit (EITC) Means to Low-Income Families*, 80 AM. SOC. REV. 243 (2015) (describing how EITC recipients spend their lump-sum refunds).

79. See generally Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867 (2005) (describing the EITC as a hybrid between welfare and a tax subsidy).

80. See *id.* at 1876.

81. Robertson C. Williams, *A Closer Look at Those Who Pay No Income or Payroll Taxes*, TAX POL'Y CTR. (July 11, 2016), <http://www.taxpolicycenter.org/taxvox/closer-look-those-who-pay-no-income-or-payroll-taxes> [<http://perma.cc/X8EN-BMW9>] (estimating that of those individuals who work and owe no federal income tax, two-thirds will have payroll tax liability in excess of their total refundable income tax credits).

82. Michelle Lyon Drumbl, *Beyond Polemics: Poverty, Taxes, and Noncompliance*, 14 EJOURNAL TAX RESEARCH 253, 258 (2016).

83. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-92T, FISCAL OUTLOOK: ADDRESSING IMPROPER PAYMENTS AND THE TAX GAP WOULD IMPROVE THE GOVERNMENT'S FISCAL POSITION 13–15 (2015), <http://www.gao.gov/assets/680/672884.pdf> [<http://perma.cc/62n2-gycq>].

claim this social benefit are more likely to have their returns selected for audit than those who do not claim it.<sup>84</sup> Typically the IRS freezes the refund, meaning it does not release the money to the taxpayer until the taxpayer has satisfied the IRS that they are entitled to it.<sup>85</sup> Because the IRS is understaffed, these cases take many months to resolve, even with representation.<sup>86</sup> I have worked on cases in which it took more than a year to satisfy the IRS that the taxpayer was entitled to the EITC and then weeks longer for the refund to be processed. In cases in which the refund is frozen pending the outcome, the taxpayer does not have access to funds that are meant to serve as an anti-poverty supplement.<sup>87</sup>

The National Taxpayer Advocate, Nina Olson, has well documented in her annual reports the barriers and challenges that low-income taxpayers face in EITC examinations.<sup>88</sup> One of Nina Olson's many recommendations is to increase person-to-person contacts, including opportunities to ask questions via a staffed helpline before filing the return.<sup>89</sup>

The EITC is not the only social benefit administered through the Code. The Child Tax Credit is in part refundable, and it is another important income supplement for working families at low and moderate income levels.<sup>90</sup> It too has a high improper payment rate; when a taxpayer who claims both the EITC and

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84. For example, of the nearly 148 million individual income tax returns filed in calendar year 2015, only 0.7% were audited on any basis; of the 28,060,849 returns claiming the EITC, 380,260 were selected for audit on the basis of the EITC claim (meaning that 1.36% of all EITC returns were audited on the basis of the EITC claim). IRS, PUB. NO. 55B, DATA BOOK: 2016, at 23–26 (2017), <http://www.irs.gov/pub/irs-soi/16databk.pdf> [<http://perma.cc/DUX6-GD28>].

85. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-475, *supra* note 70, at 17.

86. Paul Kiel & Jesse Eisinger, *Who's More Likely To Be Audited: A Person Making \$20,000—Or \$400,000?*, PROPUBLICA, (Dec. 12, 2018, 5:00 AM), <http://www.propublica.org/article/earned-income-tax-credit-irs-audit-working-poor> [<http://perma.cc/YW2P-TEMS>].

87. I have written elsewhere about EITC administration. See Drumbl, *supra* note 82; Michelle Lyon Drumbl, *Those Who Know, Those Who Don't, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113 (2013).

88. See, e.g., 2 NAT'L TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS 8 (2004), <http://www.irs.gov/pub/tas/nta2004arcvol2interactive.pdf> [<http://perma.cc/9MJP-3T2F>] (audit reconsideration study); 1 NAT'L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT, *supra* note 72, at 222 (2007); 2 NAT'L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS 104 (2007), [http://www.irs.gov/pub/tas/arc\\_2007\\_vol\\_2.pdf](http://www.irs.gov/pub/tas/arc_2007_vol_2.pdf) [<http://perma.cc/4YXM-9K3K>]; 1 NAT'L TAXPAYER ADVOCATE, 2008 ANNUAL REPORT TO CONGRESS 227 (2008), [http://www.irs.gov/pub/tas/08\\_tas\\_arc\\_intro\\_toc\\_msp.pdf](http://www.irs.gov/pub/tas/08_tas_arc_intro_toc_msp.pdf) [<http://perma.cc/XU67-8JNX>].

89. See 1 NAT'L TAXPAYER ADVOCATE, 2015 ANNUAL REPORT TO CONGRESS 244 (2015) [hereinafter 1 NAT'L TAXPAYER ADVOCATE, 2015 ANNUAL REPORT], [http://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15\\_Volume1.pdf](http://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1.pdf) [<http://perma.cc/P25G-2SJM>].

90. See I.R.C. § 24(d) (2018). The Tax Cuts and Jobs Act of 2017 greatly increased the income phase-out for the Child Tax Credit; for tax years 2018–2025, the credit begins to phase out at \$200,000 (\$400,000 for married taxpayers filing jointly). See *id.* § 24(h)(3). Prior to 2018, the Child Tax Credit began to phase out at \$75,000 (\$110,000 for married taxpayers filing jointly). See *id.* § 24(b)(2). In contrast, in 2018, the income limit for the EITC is \$49,194 (\$54,884 for married taxpayers filing jointly) and the amount begins phasing out well before that maximum is reached. See *2018 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, IRS (Jan. 24, 2019), <http://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/eitc-income-limits-maximum-credit-amounts> [<http://perma.cc/HR9V-8XNS>].

Child Tax Credit is selected for return examination, he or she must prove eligibility for both credits.<sup>91</sup>

Congress also has enacted tax credits to help offset the costs of higher education, such as the American Opportunity Tax Credit (AOTC), which is partially refundable.<sup>92</sup> The AOTC also presents administrability challenges: the Treasury Inspector General for Tax Administration estimated that the 2017 AOTC improper payment rate was 28.3%, which represents \$1.3 billion in improper payments.<sup>93</sup> Taxpayers claiming the AOTC also may find themselves the subject of an examination, with the IRS asking for supporting documents such as copies of the taxpayer's tuition statement or proof of payment of qualified education expenses.<sup>94</sup> This is another type of case an LITC can handle.

The Premium Tax Credit is another example of a social benefit with its home in the Code. This credit is designed to help eligible taxpayers afford the premiums for health insurance purchased through the Health Insurance Marketplace.<sup>95</sup> By design, the credit is refundable; it may be claimed (in whole or in part) in advance and paid directly to the insurance provider.<sup>96</sup> The Premium Tax Credit is calculated based on household income, and taxpayers who receive the advance credit are required to file a tax return in order to reconcile the advance payments.<sup>97</sup> If a recipient fails to file a tax return or to reconcile the credit on the appropriate IRS form as part of the return, he or she will not be able to receive the advance credit in future years until the reconciliation is made.<sup>98</sup>

Like other refundable credits, Premium Tax Credit claims can end up the subject of Tax Court litigation, either because of a dispute over the interpretation of the substantive code provision or because a miscalculation in estimated income resulted in a change to the advance Premium Tax Credit computation.<sup>99</sup> Thus, because Congress has chosen to link affordable health care

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91. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-475, *supra* note 70, at 17.

92. I.R.C. § 25A(i).

93. TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP'T OF THE TREASURY, REF. NO. 2018-40-032, THE INTERNAL REVENUE SERVICE IS NOT IN COMPLIANCE WITH IMPROPER PAYMENT REQUIREMENTS 6 (2018), <http://www.treasury.gov/tigta/auditreports/2018reports/201840032fr.pdf> [<http://perma.cc/ESM4-J27F>].

94. See IRS, FORM 886-H-AOC (2017), <http://www.irs.gov/pub/irs-pdf/f886haoc.pdf> [<http://perma.cc/YZ7Q-G8XQ>].

95. IRS, PUB. NO. 974, PREMIUM TAX CREDIT 3 (2018), <http://www.irs.gov/pub/irs-pdf/p974.pdf> [<http://perma.cc/W5JK-SPS9>].

96. *Id.*

97. *Id.*

98. I.R.C. § 1.36B-4 (2018); 45 C.F.R. § 155.305(f)(4) (2018); Robert Pear, *Thousands Who Didn't File Tax Returns May Lose Health Care Subsidies*, N.Y. TIMES (Oct. 25, 2015), <http://nyti.ms/1OPX2cB> [<http://perma.cc/X5VT-T7ZC>].

99. Christine Speidel, *Recent Tax Court Decisions Point Out ACA Pitfalls for Taxpayers*, PROCEDURALLY TAXING (July 21, 2017), <http://procedurallytaxing.com/recent-tax-court-decisions-point-out-aca-pitfalls-for-taxpayers/> [<http://perma.cc/3GPK-69JD>].

administration with the tax filing process,<sup>100</sup> this serves as another example of how tax attorneys may find themselves playing a role protecting the social benefits of their clients.

LITCs routinely assist taxpayers with examinations or other controversies stemming from each of these social benefits. In doing so, tax attorneys defend the taxpayer's right to quality service, the right to challenge the IRS's position and be heard, the right to appeal an IRS decision in an independent forum, the right to finality, and the right to a fair and just tax system. While important, these statutory taxpayer rights do not on their face capture the true nature of the protections LITCs are providing because, as this Part highlights, the United States tax system means so much more than revenue collection. LITCs are defending the taxpayer's right to pursue or receive many unrelated social benefits, such as the anti-poverty safety net and access to health care and education.<sup>101</sup>

It is doubtful that the Taxpayer Bill of Rights will ever be expanded to add an eleventh right. It would be appropriate, however, if there were an enumerated taxpayer right that explicitly touched upon the role the IRS plays as an administrator of social benefits and invoked a specific right to correctly determine those benefits.<sup>102</sup>

### C. *Assisting with Collateral Consequences of Tax Debt*

Many LITC clients are somewhat indifferent to the amount they owe because they have no ability to pay anything to the IRS. In their eyes, if they owe \$1,000 or \$5,000, it has the same practical effect as if they owed \$100,000 because all of those sums are out of reach to them. Tax advocates, on the other hand, are keenly aware of the collateral consequences of tax debt. As a result, in cases in which it might be possible to reduce a taxpayer's proposed assessment or outstanding liability, the advocate should advise the client as to how to reduce the liability to the extent possible.

This Part raises the passport revocation certification program as an example of such a collateral consequence and considers how in these cases the tax attorney is defending the taxpayer's right to be informed, the right to a fair and just tax system, and the right to challenge the IRS's position and be heard.

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100. Though the Internal Revenue Code has long included tax credits for health care, the Affordable Care Act added dozens of new provisions to the Internal Revenue Code. For an excellent overview, see Christine Speidel & Samantha Galvin, *Understanding the Affordable Care Act and Its Impacts on Low-Income Taxpayers*, in *EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE IRS*, at ch. 29 (Keith Fogg ed., ABA 7th ed. 2018).

101. See IRS, PUB. NO. 5066, *supra* note 40, at 2.

102. Nina Olson has recommended that the IRS mission statement be changed to clarify this role as well. See 1 NAT'L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS 17 (2010), [http://taxpayeradvocate.irs.gov/userfiles/file/MSP2\\_IRS%20Mission%20Statement.pdf](http://taxpayeradvocate.irs.gov/userfiles/file/MSP2_IRS%20Mission%20Statement.pdf) [<http://perma.cc/sv9g-kc7h>] (arguing that "the IRS should revise its mission statement to explicitly acknowledge its dual roles of tax collector and benefits administrator").

In 2015 Congress enacted Code Section 7345,<sup>103</sup> which provides that if the IRS certifies to the Secretary of the Treasury that an individual has “seriously delinquent tax debt,” the Secretary of the Treasury will transmit the certification to the Secretary of State, and the taxpayer will face consequences related to the status of their passport.<sup>104</sup> The IRS and State Department began implementation of this provision in January 2018.<sup>105</sup>

Seriously delinquent tax debt is defined as an individual’s unpaid, legally enforceable federal tax debt totaling more than \$50,000 (including interest and penalties) that has been assessed and for which (1) a notice of federal tax lien has been filed and all administrative remedies under Section 6320 have lapsed or been exhausted or (2) a levy has been issued pursuant to Section 6331.<sup>106</sup> Once such a debt is certified by the Commissioner to the Department of Treasury, the State Department generally will reject a new passport application or renewal and has the ability to revoke or limit a taxpayer’s current passport.<sup>107</sup> A taxpayer can have this certification reversed, or decertified, if the taxpayer takes certain measures to address the debt,<sup>108</sup> which I discuss further below.

Of course, linking passports to tax liabilities implicates a taxpayer’s right to enter and exit the country. The United States has an interest in collecting outstanding tax debt and preventing tax evasion, but this interest must be balanced with taxpayer rights. With the IRS serving this role in certifying debt to the State Department, it is critical that taxpayers not ignore their rights and that attorneys and others serve as a check on the IRS’s automated and depersonalized methods of assessment and collection.

What if the amount assessed is erroneous, say based on a fraudulently issued 1099? Or inflated, as when an assessment is made through the automated substitute for return procedure without regard to deductions? I have seen cases involving both these factors. For example, imagine a taxpayer who is an independent contractor and received a 1099 for a project on which he paid many subcontractors or laborers, or purchased many materials. I have worked with clients who were in that situation but did not file a tax return for the year in question. The reasons for not filing include neglect, fear of owing taxes, erroneously thinking they did not need to file because their net income on the job was so low, and failure to keep proper records. No matter the reason, if the taxpayer does not file a return to establish his business deductions, the gross income on the 1099 becomes his taxable base, even if his net profit was slim.<sup>109</sup>

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103. Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, § 32101(a), 129 Stat. 1312, 1729–33 (2015) (codified as amended at I.R.C. § 7345).

104. I.R.C. § 7345 (2018).

105. I.R.S. Notice 2018-01, I.R.B. 2018-3 (Jan. 16, 2018).

106. I.R.C. § 7345(b).

107. I.R.S. Notice 2018-01, *supra* note 105.

108. *Id.*

109. Tax deductions are a matter of legislative grace, and the taxpayer bears the burden of proving entitlement to any deduction claimed. *INDOPCO, Inc. v. Comm’r*, 503 U.S. 79, 84 (1992); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934).

To many of our clients, large tax liabilities are no different than small tax liabilities. They shrug their shoulders at the penalties and interest because they cannot pay any amount anyway. Collateral consequences such as the passport revocation rules, unfortunately, make the amounts relevant no matter how unattainable full payment is.

If the taxpayer cannot afford to pay, there are procedures in place for the taxpayer to avoid or reverse the IRS certification of the debt. Section 7345 provides a statutory exception in cases in which taxpayers are making timely payments on their tax debt through an installment agreement or offer in compromise, have a collection due process hearing pending, or have an innocent spouse relief request pending.<sup>110</sup> The IRS has created additional administrative exclusions for debts that are determined to be in financial hardship (currently not collectible) status, debts that result from identity theft, debts that belong to a taxpayer in a disaster zone, debts of a taxpayer in bankruptcy, debts included in a pending offer in compromise or installment agreement, debts of deceased taxpayers, and debts for which there is a pending claim and the resulting adjustment is expected to result in no balance due.<sup>111</sup>

Importantly, taxpayers also have the right to judicial review (in Tax Court or in federal district court) of whether the certification was erroneous or whether the IRS failed to reverse the certification.<sup>112</sup> Attorneys will play a role in shaping how procedures and precedent develop as these cases make their way through the judicial branch.<sup>113</sup>

In her reports to Congress and blog posts, Nina Olson has expressed concern about the notice requirements the IRS follows for passport certification<sup>114</sup>: the statute requires contemporaneous notice to the individual at the time of the certification to the State Department,<sup>115</sup> meaning the passport denial may occur before the taxpayer has time to comprehend and exercise the collection alternatives that can provide an exception to certification, especially if the taxpayer needs representation. Citing the U.S. Constitution and the U.N.

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110. I.R.C. § 7345(b).

111. IRM 5.19.1.5.19.4 (Dec. 26, 2017). The manual notes that “[t]hese discretionary exclusion categories are subject to change in the future.” *Id.*

112. I.R.C. § 7345(e).

113. See, e.g., Carlton Smith, *The Tax Court Should Modify Its Form 2 Petition To Add a Checkbox for Passport Actions*, PROCEDURALLY TAXING (Sept. 24, 2018), <http://procedurallytaxing.com/the-tax-court-should-modify-its-form-2-petition-to-add-a-checkbox-for-passport-actions/> [http://perma.cc/D6BF-M2LY].

114. See e.g., 1 NAT’L TAXPAYER ADVOCATE, 2017 ANNUAL REPORT, *supra* note 54, at 77. Olson has acknowledged that the IRS provides notice of debt certification in its collection due process hearing notices, but she has expressed concern that the information is ineffective because it is buried within a several page notice focusing on a broader procedure. *Id.*; Nina E. Olson, *The IRS’s New Passport Program: Why Notice to Taxpayers Matters (Part 1 of 2)*, TAXPAYER ADVOCATE SERV.: NTA BLOG (June 7, 2017), <http://taxpayeradvocate.irs.gov/news/the-irs-s-new-passport-program-why-notice-to-taxpayers-matters-part-1-of-2> [http://perma.cc/Y6D8-L6DB] [hereinafter Olson, *The IRS’s New Passport Program*].

115. I.R.C. § 7345(d).



Universal Declaration of Human Rights, Olson has questioned whether this lack of notice violates due process protections of the right to travel internationally.<sup>116</sup>

As described, LITC and pro bono attorneys routinely help low-income individuals pursue hardship status, installment agreements, and offers in compromise. In my experience, most (but certainly not all) of the clients we work with need assistance navigating these collection alternatives and asserting their rights. Pursuing these collection alternatives can be time consuming, and many clients we work with have ignored multiple IRS notices before they ultimately seek our help: these clients do not have the time or energy to address their tax issues unless they face an immediate threat, such as a paycheck levy. Individuals may not foresee the negative collateral consequences that can arise from ignoring notices. Some are perfectly content to simply remain in currently-not-collectible hardship status once we remove the immediate harm or threat of a levy. These collateral consequences underscore why pursuing an offer in compromise may be a better resolution even if the taxpayer is psychologically content with hardship status.

Passport revocation is but one example of the collateral consequences of tax debt and the importance of access to legal representation. Tax debt can cause other complications that need to be addressed. Some states, including New York, Maryland, South Dakota, Louisiana, and Kentucky, have passed statutes allowing their state revenue agencies to suspend, revoke, or decline to renew an individual's driver's license or car registration if the individual owes unpaid individual state income taxes and is not in a payment plan.<sup>117</sup> This strategy seems intuitively counterproductive because many individuals depend on their cars for transportation to employment. Though these are state rather than federal issues, LITCs in these states can assist these individuals with their collection options if they are also representing a taxpayer in a controversy with the IRS involving the

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116. 1 NAT'L TAXPAYER ADVOCATE, 2017 ANNUAL REPORT, *supra* note 54, at 77 (first citing *Dulles*, 357 U.S. 116; and then citing GA Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)); Olson, *The IRS's New Passport Program*, *supra* note 114.

117. Comptroller of Md., *Unpaid Taxes?*, SPOTLIGHT ON MARYLAND TAXES, [http://taxes.marylandtaxes.gov/Individual\\_Taxes/Individual\\_Tax\\_Compliance/What\\_Happens\\_if\\_I\\_Do\\_not\\_Pay/Motor\\_Vehicle\\_License\\_and\\_Registration\\_Nonrenewal/](http://taxes.marylandtaxes.gov/Individual_Taxes/Individual_Tax_Compliance/What_Happens_if_I_Do_not_Pay/Motor_Vehicle_License_and_Registration_Nonrenewal/) [<http://perma.cc/F7AJ-8WWN>] (explaining that a driver's license can be suspended in Maryland if the driver has unpaid individual income taxes and is not in a payment plan) (last visited May 30, 2019); *Driver License Suspension*, N.Y. STATE DEP'T OF TAXATION & FIN., <http://www.tax.ny.gov/enforcement/collections/driver-license-susp.htm> [<http://perma.cc/8J68-D8EB>] (explaining that a driver's license can be suspended in New York for state tax debt of at least \$10,000) (last visited May 30, 2019); *Frequently Asked Questions: Suspension of Licenses*, LA. DEP'T OF REVENUE, <http://www.revenue.louisiana.gov/FAQ/QuestionsAndAnswers/51> [<http://perma.cc/A72E-B2GU>] (last visited May 30, 2019) (explaining that a driver's license can be suspended in Louisiana for state tax debt in excess of \$1,000); *Licenses*, KY. DEP'T OF REVENUE, <http://revenue.ky.gov/Collections/Collection-Actions/Pages/Licenses.aspx> [<http://perma.cc/XXE2-J5JG>] (last visited May 30, 2019) (explaining that the driver's license of a delinquent taxpayer in Kentucky can be suspended or revoked); *Revoked or Suspended Licenses*, S.D. DEP'T OF PUB. SAFETY, <http://dps.sd.gov/driver-licensing/south-dakota-licensing-information/revoked-or-suspended> [<http://perma.cc/9S89-ZKX2>] (last visited May 30, 2019) (explaining that a driver's license can be suspended for unpaid debt owed to South Dakota).

same or related tax matter.<sup>118</sup> In some cases, the state income tax debt relates back to a federal income tax controversy, the resolution of which can also resolve the underlying state problem.<sup>119</sup>

#### IV. THE TENSION BETWEEN AUTOMATION AND TAXPAYER RIGHTS

Increased automation is fundamentally at odds with taxpayer rights. It relies on assumptions, imperfect information, and algorithms that cannot factor in the nuance of the human condition.

Nina Olson has identified specific ways in which automation harms taxpayers. For example, she has raised concerns about how the Notice of Federal Tax Lien (NFTL) process unnecessarily harms taxpayers.<sup>120</sup> She noted that an NFTL, while protecting the government's interest, can negatively impact an individual's credit rating,<sup>121</sup> which can in turn create difficulty in seeking employment or housing.<sup>122</sup> Olson's concern illustrates the dangers of a one-size-fits-all automated collections approach: specifically, the IRS's use of an arbitrary dollar threshold to determine when to file a lien and the fact that a percentage of NFTLs are filed by automated processes with no human involvement.<sup>123</sup> Olson has argued that due to these policies, taxpayers with no tangible assets who are experiencing financial hardship are further damaged while there is no meaningful benefit to the government.<sup>124</sup> She advocated for the IRS to base its NFTL policy on meaningful contact with the taxpayer, rather than on a dollar threshold.<sup>125</sup>

As the IRS relies increasingly on automation and tries to serve more taxpayers (and as it is increasingly tasked with new missions), it will become

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118. IRS, PUB. NO. 3319, LOW INCOME TAXPAYER CLINICS 2019 GRANT APPLICATION PACKAGE AND GUIDELINES 6 (2018).

119. This is because most state income tax codes incorporate the federal rules for determining taxable income into their state calculations. *See generally* Anne Stauffer & Mark Robyn, *How States Piggyback on Federal Personal Income Tax Calculations*, PEW (Apr. 1, 2016), <http://www.pewtrusts.org/en/research-and-analysis/articles/2016/04/01/how-states-piggyback-on-federal-personal-income-tax-calculations> [<http://perma.cc/B2HX-GSFU>] (“Of the 41 states plus the District of Columbia with broad-based personal income taxes, 40 and the District link to the federal tax system by incorporating a range of federal tax expenditures—exclusions, deductions, and credits—into their tax codes”).

120. *See* 1 NAT'L TAXPAYER ADVOCATE, 2015 ANNUAL REPORT, *supra* note 89, at 112–22.

121. *Id.* at 113. In 2016, following a class action suit against them, the three major credit bureaus revisited their policies about listing tax lien and civil judgment information in credit reports. *See, e.g.*, Louis DeNicola, *Has Your Credit Score Increased Lately? This May Be Why*, CREDIT KARMA (Dec. 4, 2018), <http://www.creditkarma.com/advice/i/credit-score-increase-removal-tax-liens/> [<http://perma.cc/zn5c-rgge>]; Keith Fogg, *Credit Scores and the Federal Tax Lien*, PROCEDURALLY TAXING (Aug. 12, 2016), <http://procedurallytaxing.com/credit-scores-and-the-federal-tax-lien/> [<http://perma.cc/WT5Q-FYDU>]; Jeanine Skowronski, *Is This the Biggest Change to Credit Reports in Years?*, CREDIT.COM (July 12, 2016), <http://blog.credit.com/2016/07/would-eliminating-tax-liens-public-records-from-credit-reports-help-your-score-150300/> [<http://perma.cc/5VLS-WGAX>].

122. *See* 1 NAT'L TAXPAYER ADVOCATE, 2015 ANNUAL REPORT, *supra* note 89, at 113.

123. *Id.* at 112.

124. *Id.*

125. *Id.* at 112–22.

harder and harder for taxpayers to have meaningful contact with the agency. As it is, phone calls go unanswered, and local offices have been closed.<sup>126</sup> Even in cases that require human interaction, such as identity theft resolution and correspondence audits,<sup>127</sup> Olson has noted that these cases are not assigned to a specific IRS employee.<sup>128</sup> Taxpayers must tell their story again and again to different individuals; Olson believes this hampers case resolution.<sup>129</sup>

LITC and pro bono attorneys provide an important check and balance against the increased automation, in part because they are repeat players who have learned what to expect and how to navigate examinations and collections cases.

#### CONCLUSION

Having a clearly stated list of taxpayer rights is an important step in ensuring due process for taxpayers. Certainly, tax attorneys are playing a critical role in the tax ecosystem. Every time one of my students spends hours puzzling over how best to contest or address a relatively modest liability, I am reminded what an important role LITCs and pro bono attorneys play in meaningfully implementing the taxpayer bill of rights.

Tax law is complicated enough when it is just about numbers. It becomes even more difficult when Congress burdens its administration with social programs, affordable health care and education, and the right to travel. The fundamental mission of the IRS has been greatly expanded since the 1980s when Congress began to focus on expanding taxpayer rights. At the same time, the agency remains understaffed and relies heavily on correspondence and automation rather than face-to-face interactions.

For these reasons, tax attorneys will continue to play an important role as defenders of taxpayer rights, with that phrase serving as a proxy for something much larger than correctly computing tax owed.

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126. 1 NAT'L TAXPAYER ADVOCATE, 2017 ANNUAL REPORT, *supra* note 54, at 22; Olson, *IRS Continues To Close Taxpayer Assistance Centers*, *supra* note 54.

127. OLSON, *supra* note 57, at 16.

128. *Id.*

129. *Id.*