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INSTITUTIONALIZING ADVOCACY: SOME REFLECTIONS ON THE
TAXPAYER ADVOCATE SERVICE'S EVOLUTION AS AN
ADVOCATE FOR TAXPAYERS[†]

Nina E. Olson^{*}

From March 1, 2001, through July 31, 2019, I had the privilege of serving as the National Taxpayer Advocate (“NTA”), working with the dedicated employees of the unique governmental organization, the Taxpayer Advocate Service (“TAS”), to advocate on behalf of United States taxpayers, helping to resolve their problems with and protecting their rights before the Internal Revenue Service. I am often asked what drew me to the position of the NTA in the first place. At the time the NTA position became vacant, I was executive director of The Community Tax Law Project (“CTLP”), the nonprofit Low-Income Taxpayer Clinic I founded in 1992. From CTLP’s inception, my focus had been on creating an institution that would survive me and not be dependent on my presence or leadership; by the year 2000 we had finally managed to achieve some solid financial footing through federal, state, and community-based funding. Thus, when Armando Gomez, who I knew from his work with the National Commission on Restructuring the IRS, approached me in 2000 about the possibility of being considered for the NTA position, I was already thinking about transitioning from CTLP in the next two years. I did not yet know where I would find myself, but I knew wherever I landed I would continue addressing misuses of power and authority. I also knew I wanted to continue working with the diverse groups and populations I had worked with throughout my life.

However, I never aspired to be an employee of the Internal Revenue Service. I am an advocate to my core, and I never thought of that quality as being a good fit with the IRS. I wrestled with the decision to put my hat in the ring, so to speak, for the NTA position and finally decided that although

[†] To comply with confidentiality requirements of the Internal Revenue Service, sources marked with “(on file with author)” have not been reviewed by student editors and staff of the Pittsburgh Tax Review.

^{*} Executive Director, Center for Taxpayer Rights. The author wishes to thank Les Book for his thoughtful comments and our conversations about this Article.

there was little chance I would be selected, it would be interesting to go through the process. Having observed the agency from the outside for decades and being intensely curious about what makes people behave the way they do, I was intrigued by the opportunity to learn and observe from the “inside.” Once it became clear that people viewed me as a strong candidate for the position, I did some serious self-analysis about why I would make this move and just what kind of NTA I would be. At that point I concluded I could only accept the NTA position if I felt I could continue my advocacy in the same manner I had done outside the IRS.¹ I also promised myself that I would leave the position if I found myself being or feeling disconnected from the taxpayer populations I had come to know and advocated on behalf of over the decades. With those two commitments, I began a deep study of the statute and history of the Office of the Taxpayer Advocate, one that continues with my current work with international taxpayer advocates and ombudsmen today.

Unlike other federal agency ombuds and advocates,² the Office of the Taxpayer Advocate has a rich administrative and legislative history. Begun as an administrative initiative in the late 1970s, the Problem Resolution Program (“PRP”) was established in response to widespread complaints that the IRS was not addressing taxpayer complaints and concerns.³ Around the

¹ I must have made that clear in my interviews for the position. The IRS Oversight Board observed:

On the other hand, Ms. Olson is not troubled by having to take positions that are opposed by the IRS and Treasury. She will easily do so when required by law and principle, so long as she is fully informed on the issues and perfectly clear in her position and therefore prepared to explain and defend her position most effectively (or modify it when appropriate). Furthermore, she is “very tough” and not afraid to issue TAOs. She quickly adds, however, that issuing a TAO is a last resort that is most effective when seldom used. She would rather work with the operating divisions to fix problems for all taxpayers instead of issuing a TAO just for an individual case.

IRS OVERSIGHT BD., REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON PERSONNEL AND ORGANIZATION, CONSULTATION ON THE APPOINTMENT OF THE NATIONAL TAXPAYER ADVOCATE 16–17 (Dec. 2000) (on file with author).

² See Jeffrey S. Lubbers, *Independent Advocacy Agencies within Agencies: A Survey of Federal Agency External Ombudsman*, Report to the National Taxpayer Advocate (June 2002) (unpublished manuscript) (on file with author); 2 NAT’L TAXPAYER ADVOCATE, 2009 ANNUAL REPORT TO CONGRESS, at 105–27 (2009).

³ The Problem Resolution Program (PRP) was created administratively in 1977 after a 1976 pilot program in the Austin, Milwaukee, Detroit, and Dallas districts. The program was under the direction of the IRS Assistant Commissioner (Taxpayer Service and Returns Processing). Its mission was to

same time, the IRS created Problem Resolution Officers in each of the districts, who reported to the District Director and managed the work of the local PRP offices. In 1979, the Commissioner established the Taxpayer Ombudsman's Office, which had national management of PRP.⁴ The Taxpayer Ombudsman was adopted legislatively in 1988 in the Taxpayer Bill of Rights ("TBOR I"),⁵ and expanded and strengthened in 1996⁶ in the Taxpayer Bill of Rights 2 ("TBOR II"), and again in 1998.⁷ As a witness before the House and Senate in hearings leading to the IRS Restructuring and Reform Act of 1998, I had a front-row seat on Congress' dissatisfaction with the performance and structure of the Taxpayer Advocate Office.⁸ Several concerns surfaced during the hearings and debates—including the independence and authority of the office,⁹ confidentiality of communications,¹⁰ and the effectiveness and utilization of Taxpayer

"(1) provide taxpayers with an advocate within the IRS to assist when regular processes and procedures failed to resolve taxpayer concerns, (2) ensure that taxpayer problems are resolved promptly and efficiently, and (3) enable the IRS to identify organizational, procedural, and systemic problems and recommend corrective action when and where necessary." Memorandum from Kirsten Wielobob, Counsel to the Nat'l Taxpayer Advocate to Henry O. Lamar, Jr., Acting Nat'l Taxpayer Advocate, on Legal Authority of the Taxpayer Advocate—Historical Development 2–3 (Jan. 16, 2001) [hereinafter Wielobob Memorandum].

⁴ *Id.* at 3–4. At the same time, the IRS established PROs in service centers and regional offices, reporting directly to service center directors or regional commissioners. However, as discussed below, no PRO had "line authority" over PRP employees.

⁵ Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 [hereinafter TBOR I].

⁶ Taxpayer Bill of Rights 2, Pub. L. 104-168, 110 Stat. 1452 (1996) [hereinafter TBOR II].

⁷ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, § 1102(a), (c), (d), 112 Stat. 685 [hereinafter RRA 98].

⁸ See *Taxpayer Rights Proposals and Recommendations of the National Commission on Restructuring the Internal Revenue Service on Taxpayer Protections and Rights: Hearing on H.R. 2292 Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 105th Cong. 105–62, at 145–55 (1997) (statement of Nina E. Olson, Executive Director, The Community Tax Law Project); *IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Fin.*, 105th Cong. 105–529, at 329–40 (1998) (statement of Nina E. Olson, Executive Director, The Community Tax Law Project).

⁹ 144 CONG. REC. S4240 (daily ed. May 5, 1998) (statement of Sen. Breaux) ("The whole concept is to have a truly independent National Taxpayer Advocate whose one focus will be making sure that taxpayers have good representation, are fairly treated, and have someone, for a change, who is really on their side when they have a conflict with the Internal Revenue Service.").

¹⁰ *Id.* ("We are really trying to build some walls between the IRS and the Taxpayer Advocate and their work with the taxpayers, the American citizens of this country, to make sure that they, the taxpayers,

Assistance Orders.¹¹ There was bipartisan concern about the inadequacy of the current structure.¹² Congress received recommendations for restructuring

know the person they are dealing with is independent, has their interests at heart, and doesn't have to go report to the Internal Revenue Service district director about what he or she has discussed or talked about with the taxpayer who is seeking assistance.”).

¹¹ See H. COMM. ON WAYS AND MEANS SUBCOMM. ON OVERSIGHT, ADVISORY: JOHNSON ANNOUNCES REQUEST FOR WRITTEN COMMENTS ON TAXPAYER RIGHTS PROPOSALS (1997) (requesting written comments on a proposal to “[s]trengthen Taxpayer Assistance Orders by allowing the Taxpayer Advocate to consider more factors in determining whether or not a taxpayer is experiencing a ‘significant hardship.’”).

¹² The following exchange from the Senate Finance Committee hearings on H.R. 2676 is instructive on this point:

Senator Lott: How is the taxpayer advocate and how are the employees within that office selected? Who controls that?

Ms. Willis [GAO Director, Tax Policy and Administration Issues]: The advocates are selected by the Commissioner.

Senator Lott: Is that not a problem?

Ms. Willis: Well, it could be part of the problem in terms of independence.

Senator Lott: And not reflecting on the Commissioner. I mean, you are automatically beholding to and you are there because.

Ms. Willis: They do report, yes.

Senator Lott: We ought to move that somewhere else. Do we need to isolate it, wall it off, make it independent of and not dependent in any way in my opinion on IRS? If you are connected, if you are selected, if you are paid by, you are not going to be independent. It just will not happen.

Ms. Willis: Senator, the thing I would be concerned about and one of the reasons that we are undertaking this review is that the Commissioner also has need of the information and the insights and the perspective that the taxpayer advocate can provide. And there also needs to be the ability to provide oversight, etcetera, of the advocate's office. So, I think in trading off organization placement, etcetera, that there are a lot different things that need to be considered. And whether that means that the advocate has to be outside IRS, I do not know because I think you do have the issue of wanting someone in the system whose job is also to advocate for the taxpayer, as opposed to that person always being on the outside.

Senator Lott: The lines are real simple, you know. You have the Treasury Secretary up here, the President above that. But if you have the Commissioner of IRS here and then a line somewhere below him to the advocate, it is lost. The lines have got to be parallel. Now, there has got to be somebody over him. But I mean, I assume the Secretary of the Treasury and the Commissioner of IRS talk. So, I would hope that the taxpayer advocate would be talking to the Commissioner, but without being beholding to or subservient to the Commissioner. I think we really need to look at that, Mr. Chairman, and see if we could find a way to wall it off, but at the same time do make sure—I mean, they have got to be answerable to somebody, too, perhaps the Secretary of the Treasury. I do not know for sure. I mean, there is no system

the office from the National Commission on Restructuring the IRS, which in turn had heard testimony from a Problem Resolution Officer about retaliation by her supervisor for raising concerns about IRS employees' handling of cases.¹³ The Senate asked witnesses, including myself, about the current structure of the Taxpayer Advocate and Problem Resolution Office.¹⁴

In short, by the time I was approached about the possibility of putting my name forward for consideration as the NTA, there was an ample record of what Congress wanted the Office of the Taxpayer Advocate to achieve. The evolution of the statute provided a roadmap, of sorts. I was very fortunate and privileged to assume the position of NTA at a time when the first NTA, Val Oveson, had already handled most of the staffing and geographical coverage logistics. I am forever grateful to him for his herculean effort in that regard. What remained to be done was the fun stuff—fleshing out what it meant to be an independent advocate on behalf of taxpayers within the IRS, which defines itself primarily as an enforcement agency.¹⁵ In this Article I

that is perfect. All we know is we have been muddling around with this for 20 years trying to make it better. And it has gotten worse.

S. Hearing No. 105–529, at 114 (1998).

¹³ NAT'L COMM'N ON RESTRUCTURING THE INTERNAL REVENUE SERV., A VISION FOR A NEW IRS 93 (1997) (chronicling the testimony of Rena Girinakis, IRS Problem Resolution Officer).

¹⁴ Senator Roth asked the following question for the record (QFR) of various witnesses during the 1998 Senate hearings: "Are the Taxpayer Advocates and Problem Resolution Officers effective in quickly solving taxpayer problems?" See, e.g., S. Hearing No. 105–529, at 337 (1998).

¹⁵ I attempted to identify some of these challenges in my first report to Congress submitted in June 2001:

What does it mean to be a taxpayer advocate within the Internal Revenue Service?

Congress charged the National Taxpayer Advocate and her employees with assisting taxpayers to resolve their tax problems. Under what circumstances may a taxpayer advocate refuse to accept a case or say "no" to a taxpayer? Should a TAS employee advance a taxpayer's position, regardless of its merits? At what point should a taxpayer advocate accept the Internal Revenue Service's determination in a given case and cease to advocate on behalf of the taxpayer? . . .

What standards of practice should TAS employees be held to? Should we zealously advocate for a taxpayer's position or temper our representation with objectivity and independence? When should Local Taxpayer Advocates keep taxpayer contact or communications confidential from the rest of the Service? To whom do TAS employees owe a duty of care?

NAT'L TAXPAYER ADVOCATE, FISCAL YEAR 2002 OBJECTIVES REPORT TO CONGRESS, at 2–3 (2001).

will describe the steps undertaken to slowly shore up TAS’s independence and authority and make the NTA’s voice one to be reckoned with and not ignored. In all aspects of these efforts, the statutes—Internal Revenue Code §§ 7803(c) and 7811—served as my guide.

It is impossible to condense eighteen years of being on the front lines of IRS/taxpayer disputes into a relatively short law review article. There are many components that make TAS strong and independent. Some are statutory, most notably the requirement that the NTA submit two annual reports to Congress directly to the tax-writing committees “without any prior review or comment from the Commissioner, the Secretary of the Treasury, the Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget.”¹⁶ Other statutory protections include the requirement that TAS be on the ground with the taxpayer by virtue of having *local* offices in each state;¹⁷ the requirement that TAS maintain separate lines of communication—phones, mail, fax, and “other electronic communication access”;¹⁸ the discretion Local Taxpayer Advocate’s (“LTAs”) have to hold confidential any information the taxpayer (or representative) has provided TAS, or the mere fact the taxpayer has contacted TAS;¹⁹ and the minimum funding level that Congress has established for TAS in appropriations bills since Fiscal Year 2006.²⁰ Some

¹⁶ I.R.C. § 7803(c)(2)(B)(iii).

¹⁷ *Id.* § 7803(e)(2)(D)(i)(I).

¹⁸ *Id.* § 7803(c)(4)(B).

¹⁹ *Id.* § 7803(e)(4)(A)(iv).

²⁰ Transportation, Treasury, Housing and Urban Development, The Judiciary, The District of Columbia, and Independent Agencies Appropriations Act of 2006, Pub. L. No. 109-115, Title II § 207, 119 Stat. 2396 (establishing a minimum funding level of \$166,249,000 for the operating expenses of the Taxpayer Advocate Service). The accompanying Senate Committee Report noted:

The bill includes a new provision designating not less than \$166,249,000 for the Taxpayer Advocate Service (TAS). The Committee directs that 85 percent or \$141,311,650 of these funds be funded out of tax enforcement and the remainder out of taxpayer service functions. This percentage split is consistent with fiscal year 2005 budget function allocations. Further, this amount does not include the normal overhead expenses that IRS provides outside of the TAS account. Accordingly, the Committee directs the IRS to continue providing overhead support from accounts outside of TAS.

S. REP. NO. 109-109, at 140 (2005). Later TAS appropriations are allocated 100% to the Taxpayer Service budget category.

independence protections are addressed administratively: (1) the requirement that each LTA conduct extensive grassroots outreach sessions a year;²¹ (2) the annual Congressional Affairs Program, during which LTAs come to Washington, DC and meet with members of Congress and their staffs to discuss the Annual Report to Congress and issues relevant to their districts and states; (3) the practice of maintaining media and congressional liaisons separate from and independent of the IRS's liaisons, and not providing Treasury or the IRS with copies of the NTA's congressional testimony before it has been delivered to the appropriate congressional committee; and, (4) the establishment of the NTA Blog. The creation of an independent research function within TAS has led to major changes in IRS tax administration practices that result in greater protection of taxpayer rights.²² The involvement of the NTA in reviewing and commenting on regulatory and sub-regulatory guidance ensures that the "voice of the taxpayer" is considered before final promulgation.²³

I will only discuss here three aspects that are key, in my opinion, to TAS being a strong, independent, and effective advocate on behalf of taxpayers and taxpayer rights: delegated authorities, Taxpayer Assistance Orders, and Taxpayer Advocate Directives. I will conclude with some thoughts about how else TAS can be strengthened as an institution.

But before I launch into this discussion, I am compelled to note that this Article is written in the first-person voice. For many of the initiatives

²¹ For example, from October 1, 2018 "TAS conducted 227 [Problem Solving Day] events through May 31, 2019, assisting almost 3,010 taxpayers, resulting in the intake of over 290 TAS cases." During the same period, TAS conducted an additional 710 external events, 125 practitioner events, and 1,250 congressional contacts. 1 NAT'L TAXPAYER ADVOCATE, YEAR 2020 OBJECTIVES REPORT TO CONGRESS, at 118–19 (2020) [hereinafter NAT'L TAXPAYER ADVOCATE 2020 OBJECTIVES REPORT].

²² The first TAS research study was published in 2005, analyzing the false positive rate of TAS cases arising from the IRS Criminal Investigation Division's Questionable Refund Program. The study's findings led to a complete restructuring of the program, including transferring it to the civil Wage & Investment Division. See generally 2 NAT'L TAXPAYER ADVOCATE, 2005 ANNUAL REPORT TO CONGRESS (2005).

²³ I have recommended that Congress require the IRS to submit all proposed and temporary regulations to the NTA for comment and address those comments in the preambles to final regulations. See NAT'L TAXPAYER ADVOCATE, 2018 PURPLE BOOK 74 (2017); see also NAT'L TAXPAYER ADVOCATE, 2019 PURPLE BOOK 79 (2018) [hereinafter 2019 PURPLE BOOK]; see Leslie Book, *Giving Taxpayer Rights a Seat at the Table*, 91 TEMP. L. REV. 759 (2019) (recommending pre-promulgation consideration of taxpayer rights in the rulemaking process, including formalizing the role of the NTA with respect to taxpayer rights impact of such guidance).

discussed below, there were teams of people—sometimes small, sometimes large—working on them. By writing about my perspective and my efforts, I by no means seek to take away their glory and accomplishments. None of what I describe here would have happened without these people. I am simply recounting my experience and my thoughts.

I. THRESHOLD CONSIDERATIONS—TAS AS AN INDEPENDENT ADVOCACY ORGANIZATION

As noted above, from the very beginning, my guide has been §§ 7803(c) and 7811. Few positions or organizations have as clear a roadmap for how to achieve their mission. Section 7803(c)(2)(A) succinctly sets forth the mission of Office of the Taxpayer Advocate, to:

- (i) Assist taxpayers in resolving problems with the Internal Revenue Service;
- (ii) Identify areas in which taxpayers have problems in dealings with the Internal Revenue Service;
- (iii) To the extent possible, propose changes in the administrative practices of the Internal Revenue Service to mitigate problems identified under clause (ii); and
- (iv) Identify potential legislative changes which may be appropriate to mitigate such problems.²⁴

It cannot be more clearly stated—TAS is supposed to *advocate* for taxpayers as they try to resolve their problems with the IRS. But its work does not stop with resolving specific cases on a one-by-one basis. Three of the four prongs of TAS’s mission address identifying systemic problems and making both administrative and legislative recommendations “to mitigate such problems.”

TAS’s predecessor organization, the Problem Resolution Office, was not always viewed as a strong advocacy organization. The National Commission on Restructuring the IRS noted:

Currently, the national Taxpayer Advocate is not viewed as independent by many in Congress. This view is based in part on the placement of the Advocate within the IRS and the fact that only career employees have been chosen to fill the position. Because a candidate for the job is likely to have additional career ambitions at the IRS after performing the Advocate position, it is difficult to perceive the Advocate as independent when the Position is regarded as just another assignment for an IRS executive, with the Commissioner viewing his or

²⁴ I.R.C. § 7803(c)(2)(A).

her performance as determining the next position. Additionally, while the Advocate has provided recommendations for improvements at the IRS, these recommendations merely tend to highlight ongoing IRS corrective efforts with little in the way of recommendations that focus attention on issues that the IRS either is doing nothing or its efforts are inadequate. Finally, what recommendations the Advocate has provided have limited value because they do not prescribe specific legislative or administrative corrections.²⁵

In House and Senate hearings, members of Congress struggled to come up with the right design, one that would balance the office's need to be inside the IRS so as to have immediate access to information and planning, with the unremitting pressure to conform to the IRS leadership's point of view.²⁶

Around the time I was appointed the National Taxpayer Advocate, the American Bar Association had adopted its Administrative Law Section's recommendations for operation of ombuds offices.²⁷ This document identified the core characteristics of ombuds as independence, impartiality,

²⁵ NAT'L COMM'N ON RESTRUCTURING THE INTERNAL REVENUE SERVICE, A VISION FOR A NEW IRS 48 (1997) [hereinafter RESTRUCTURING REPORT].

²⁶ In fact, in response to a Question for the Record from the Senate Finance Committee after my testimony in February 1998, I stated:

Many PROs are unwilling to use the tools currently at their disposal. This is particularly true with Taxpayer Assistance Orders (TAOs). It is my experience that the taxpayer has to be in extremely dire circumstances for such an order to be issued. I find myself requesting TAOs for clients most frequently when the system has failed to respond to earlier attempts at resolving an issue. Yet PROs are hesitant about using the TAO in such situations. This hesitancy is contrary to the purpose for TAOs.

The only solution to this problem is a strong Taxpayer Advocate at the National Office level and strong Taxpayer Advocates in each region and district. Only with excellent leadership will a timid workforce fulfill their true function. Strong leadership will also encourage those demoralized members of the PRO staff who are out there in the field really trying to assist taxpayers.

IRS Restructuring: Hearing on H.R. 2676 Before the S. Comm. on Finance, 105th Cong. 105-529, at 338 (1998) (statement of Nina Olson, Executive Director, The Community Tax Law Project).

Little did I know then that I would have that responsibility one day. As I have discussed above, the furthest thing from my mind was to become the National Taxpayer Advocate. In 1998, my sole focus was building The Community Tax Law Project, the low-income taxpayer clinic I founded in 1992, which led to my testimony before the House and Senate about the need for federal funding of LITCs.

²⁷ ABA, REVISED STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004), <https://www.prearesourcecenter.org/sites/default/files/library/abaadoptedbythehouseofdelegatesfeb92004.pdf>. The Standards were originally adopted in 2001.

and confidentiality. But in a significant advance, the document also recognized the role of the advocate ombuds—one who “serves as an advocate on behalf of a population that is described in the charter.”²⁸ This report—and the work of the Federal Alternative Dispute Resolution Council (“FADR”)—offered a philosophical and theoretical framework within which to create the Office of the Taxpayer Advocate. A few years later I relied heavily on the FADR Council’s recommendations in implementing the confidentiality provision, § 7803(c)(4)(A)(iv).²⁹

This confidentiality provision, which provides that each local taxpayer advocate “may, at the taxpayer advocate’s discretion, not disclose to the Internal Revenue Service contact with, or information provided by, such taxpayer,” really flummoxed me when I first read it. It has some similarities with the familiar concept of attorney-client privilege, but there are also profound differences. First, the privilege belongs to the Local Taxpayer Advocate, not the taxpayer. Second, it is a *discretionary* privilege. That is, the LTA *may* exercise it, but is not required to.

In the first few months of my tenure at TAS, a case raised the issue of confidentiality, and the Special Counsel to the National Taxpayer Advocate issued an opinion interpreting this provision.³⁰ But that opinion did not establish any standards or procedures for invoking the privilege. Moreover, the privilege belonged to the LTAs and their supervisors (including the NTA). At that time, none of the LTAs or TAS leadership were attorneys (other than me) and thus were not familiar with the application of attorney-client privilege. We needed to create an approach to the TAS privilege that could be communicated and taught to non-attorney federal employees.

The privilege also forced out into the open a fundamental but unspoken challenge. At that time, all TAS employees were hired from the pool of IRS employees. That is, they were career IRS employees. Keeping information confidential from other IRS employees, including information that might be

²⁸ *Id.* at 8.

²⁹ See Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dec. 29, 2000).

³⁰ Memorandum from Carol A. Campbell, Counsel for the Nat’l Taxpayer Advocate to Nina E. Olson, Nat’l Taxpayer Advocate, on Discretion not to Disclose Information to the IRS (Dec. 31, 2001) (on file with author).

evidence of the taxpayer's noncompliance, was antithetical to TAS employees' training and identification as IRS employees. But it was absolutely necessary for TAS employees to embrace this privilege if TAS was to become and be perceived as independent within the IRS.

To accomplish this challenging task, I invoked the IRS Restructuring and Reform Act of 1998 (RRA 98) House conference report language stating “[t]he conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate.”³¹ TAS thus procured the assistance of two experts in administrative law and alternative dispute resolution, both of whom had been deeply involved in the adoption of the ABA Ombuds standards. Professor Jeffrey Lubbers and Charles Pou prepared a report with recommendations, which we presented to all TAS employees in FY 2003.³² We worked with the Office of Chief Counsel to clarify the interaction of § 7803(c)(4)(A)(iv) and § 7214(a)(8), which requires all Federal employees who have knowledge or information of violations of Internal Revenue laws to report such violations in writing to the Secretary.³³ Our approach adopted the presumption that *all information* provided to TAS by the taxpayer or the taxpayer's representative was confidential unless we needed to share it with the IRS in order to resolve the taxpayer's problem.³⁴ We subsequently issued an Internal Revenue Manual (“IRM”) section setting forth procedures for case advocates to elevate the non-standard instances in which they believed taxpayer information should be disclosed, and for local taxpayer advocates to reach a determination about disclosure according to certain principles and analysis.³⁵

³¹ H.R. REP. NO. 105-599, at 216 (1998) (Conf. Rep.).

³² Charles Pou, Jr. & Jeffrey Lubbers, *Withholding and Disclosure of Taxpayer Advocate Service Communications*, Report to the National Taxpayer Advocate (2002) (unpublished manuscript) (on file with author).

³³ IRM 13.1.5.3(3) (Feb. 1, 2011); *see also* Memorandum from Carol A. Campbell, Special Counsel to the Nat'l Taxpayer Advocate, to Emily A. Parker, Deputy Chief Counsel (Operations), on Interaction of I.R.C. §§ 7214(a)(8) and 7803(c)(4)(A)(iv) (Sept. 30, 2002) (on file with author).

³⁴ This type of disclosure is a “standard disclosure.” *See* I.R.M. 13.1.5.8.1 (Feb. 1, 2011).

³⁵ These rare instances include emergency disclosures (IRM 13.1.5.8.2 (Feb. 1, 2011)) and nonstandard disclosures (IRM 13.1.5.8.3 (Feb. 1, 2011)).

The confidentiality discussions and training were highly controversial and upsetting to many TAS managers and analysts. Most TAS employees could not imagine *not sharing* with IRS examination personnel some admission by the taxpayer of an error. I believe the tide turned when Commissioner Charles O. Rossotti spoke to a meeting of TAS leadership, LTAs, managers, and analysts, right after I and Messrs. Lubbers and Pou had presented the proposed confidentiality framework. During a question and answer session with the Commissioner, a TAS manager approached the microphone and complained to the Commissioner that we were proposing TAS employees to violate their oaths as IRS employees. He gave the example of an Earned Income Tax Credit audit, where the taxpayer had admitted to us that the child had not lived with the taxpayer for six months of the year. The TAS manager believed it was his duty to advise exam of this admission.³⁶ The Commissioner paused for a moment, and said, “Why do you think it is your job to do exam’s job?” The hush, and then buzz, in a room of 200 TAS leaders was electric.³⁷

The confidentiality procedures marked when TAS began to emerge as a truly independent organization within the IRS; it also marked when TAS employees began to understand their roles as advocates for taxpayers. The debate over confidentiality was also important, because I wanted TAS employees to not just accept instructions as they were handed down, but to be able to understand the underlying reasons for those procedures, and to apply that reasoning in other situations. These aspects were also central to the matter of TAS authorities, as discussed in the next section.

³⁶ In fact, IRS examination and collection functions routinely and intentionally give taxpayers a pass on errors by virtue of applying “tolerances” or by selecting cases for action based on the number of employees and direct time available to work audit or collection cases, leaving lots of taxpayer noncompliance unaddressed. Under the TAS manager’s scenario, a taxpayer coming to TAS may have been treated more harshly as a result of coming to TAS than if he or she had done nothing and just let exam’s tolerances and workload planning take their course. This is a perversion of TAS’s statutory charge to assist taxpayers with resolving their problems, not create problems for them.

³⁷ TAS procedures require case advocates to discuss with the taxpayer the need to correct errors. The procedures make clear, in text and in examples, that TAS will not continue to advocate for a taxpayer where the taxpayer will not comply with the law; nor can the taxpayer use TAS to violate the law. In most instances, TAS can simply withdraw from the case. In other instances, the case advocate can elevate to the LTA, and the LTA, by reasoning through the confidentiality questionnaire, may ultimately decide the information should be disclosed to the IRS. *See* I.R.M. 13.1.5.3(3)(b) & (c) (Feb. 1, 2011).

II. TAS INDEPENDENCE AND AUTHORITIES

Section 7803(c)(4)(A)(i) requires that each local taxpayer advocate (and his or her subordinates) of the Office of the Taxpayer Advocate report to the National Taxpayer Advocate.³⁸ The National Commission on Restructuring was adamant in its recommendation of this arrangement; as noted earlier, it had received testimony about retaliation against problem resolution officers under the former structure.³⁹ The Commission noted an inherent conflict of interest in having the person charged with identifying and intervening in cases where taxpayers are experiencing harm, be subject to the manager who oversees the very employees causing that harm.⁴⁰ Accordingly, Congress established local taxpayer advocate offices, at least one in each state, and granted the NTA sole personnel authority over them—including hiring, and, by implication, promotion, termination, etc.⁴¹ With this personnel authority, the NTA could establish performance metrics based on advocacy and protection of taxpayer rights, and ensure that TAS employees would be evaluated according to those standards, rather than be retaliated against because they were doing their jobs and intervening in audits, appeals, or collection actions. Moreover, the statute required the NTA and the Commissioner work together to develop a career path for local taxpayer advocates within TAS, so it did not become a dead end for its employees and to encourage independent advocacy.⁴²

Before I even walked through the door of the IRS headquarters in Washington, DC on March 1, 2001, I had already been advised that the most controversial aspect of the transition from Problem Resolution Office to Taxpayer Advocate Service was delegated authorities. Before TAS “stood

³⁸ I.R.C. § 7803(c)(4)(a)(i).

³⁹ NAT’L COMM’N ON RESTRUCTURING THE INTERNAL REVENUE SERV., *supra* note 13.

⁴⁰ The Commission noted “the independence of the local Advocates is brought into question when their work is reviewed and graded by District and Service Center Directors. These managers have performance goals that in some cases are directly opposite to the goals of the Advocates. The Advocates seek to ensure that a case is handled properly and correctly, which often is a time-consuming process. Conversely, District and Service Center Directors have goals of production and dollars.” RESTRUCTURING REPORT, *supra* note 25, at 48.

⁴¹ I.R.C. § 7803(c)(2)(D)(i)(I) & (II).

⁴² *Id.* § 7803(e)(2)(C)(iv).

up” on March 12, 2000, the employees working PRP cases maintained their positions within their respective IRS functions.⁴³ Thus, revenue agents (auditors) who worked PRP cases had the delegated authority to make, reduce, or eliminate assessments, similar to any other revenue agent. Revenue officers (collectors) who worked PRO cases had the delegated authority to enter into installment agreements, release levies, withdraw or release or discharge liens, or accept offers in compromise, similar to any other revenue officer. But the minute TAS was officially formed and these employees reported to the National Taxpayer Advocate, they lost the authority to take those actions.⁴⁴

In response to this state of affairs, TAS developed a process by which TAS case advocates gathered all the information and documentation to resolve a case and sent that information to the appropriate function, with a request and recommendations about how to resolve the issue. This form, called the Operations Assistance Request (“OAR”), required the IRS function to acknowledge the receipt of the OAR, assign the case to an appropriate employee who would review the documentation, and respond promptly as to whether the function would or would not take TAS’s recommended action.⁴⁵

Understandably, TAS employees were frustrated. From their perspective, the OAR process took twice as long as when they were able to undertake the actions themselves. The IRS functions often ignored the OARs, or worse, just sent them back saying “no” without any explanation, which required even more follow up on the part of TAS employees. TAS leadership had negotiated with IRS senior leadership the delegation of certain *de minimis* authorities—authorities that did not involve taking substantive

⁴³ At the time of TAS “stand-up,” it had 2,300 employees, 74 local offices, 9 area directors, and a national office headquarters function. Wielobob Memorandum, *supra* note 3, at 12–13.

⁴⁴ Prior to “stand-up,” the Commissioner had issued two memoranda delegating certain authorities to the NTA. The May 1999 memorandum delegated necessary administrative authorities (*e.g.*, approval of tours of duty and travel vouchers for employees), as well as tax-related authorities (*e.g.*, abating interest on erroneous refunds, and issuing manual refunds where the appropriate IRS function had determined the refund was appropriate). The November 2, 1999 memorandum delegated to the NTA the authority to make routine account adjustments where there was no disagreement with the IRS and the NTA had determined significant hardship existed. Wielobob Memorandum, *supra* note 3, at 11–14.

⁴⁵ See generally I.R.M. 13.1.19 (Nov. 14, 2014).

actions on a case such as determining the tax due or accepting an offer in compromise. But TAS employees wanted more.

Into this environment, I waded. I could not understand why we would want the authority to make the actual decision in a case. That would just mean we would become part of the problem.⁴⁶ If we were delegated audit function authorities, we would have to follow the Field Exam or correspondence exam IRM provisions.⁴⁷ What if we thought the IRM was wrong? How would we

⁴⁶ For early examples of my thinking about delegated authorities, see Amy Hamilton, *Olson Revisits Scope of Advocate's Authority*, 34 TAX PRAC. 204 (May 31, 2002); Amy Hamilton et al., *Taxpayer Advocate Nina Olson Opens IRS Reform's Next Chapter*, 30 TAX PRAC. 97 (Apr. 23, 2001).

⁴⁷ With respect to delegated authorities, “[o]nce the taxpayer meets the hardship criteria to be included in the TAS program, a Taxpayer Advocate must follow the same procedures in the case as a Customer Service employee would.” Wielobob Memorandum, *supra* note 3, at 14.

In July 2000, the then-NTA had requested additional authorities to handle “routine” taxpayer cases. On January 17, 2001, after my appointment as NTA but before I reported to duty, the Commissioner issued a memorandum delegating additional authorities to the NTA and setting forth guidelines by which they were to be exercised:

Part A—Guidelines

1. The authorities provided in this memorandum shall be exercised in accordance with the Internal Revenue Code of 1986, applicable Treasury Regulations, and all other rules and procedures (including the Internal Revenue Manual and any applicable dollar tolerances and thresholds) that apply to other IRS functions that exercise the same authorities.
2. It is intended that the employees of the Taxpayer Advocate Service exercise the authorities with respect to cases meeting criteria 1 through 7 for acceptance into the Taxpayer Advocate Service as set forth in IRM Chapter 13.
3. The authorities are delegated to the National Taxpayer Advocate in order to provide more efficient service to taxpayers in cases where there is not a disagreement within the IRS about the appropriate action that should be taken in the case or where the case is not open in another IRS function. This delegation does not permit employees of the Taxpayer Advocate Service to overrule determinations made by employees of other IRS functions who have been delegated comparable authority. To the extent the Taxpayer Advocate Service employee disagrees with such a determination, a TAO may be issued explaining the basis for disagreement and ordering the function to reconsider its determination. . . . In addition, this delegation does not permit employees of the Taxpayer Advocate Service to take actions in cases that are open in another IRS function.

Memorandum from Comm’r of Internal Revenue, to Nat’l Taxpayer Advocate, Comm’r; Large and Mid-Size Bus. Div., Comm’r; Small Bus./Self-Employed Div., Comm’r; Tax Exempt and Gov’t Entities Div., Comm’r; Wage and Inv. Div., Nat’l Chief of Appeals; Chief Counsel, on Delegation of Auth. to the Nat’l Taxpayer Advocate and Guidelines for Issuing Taxpayer Assistance Orders 2 (Jan. 17, 2001) (on file with author) [hereinafter CIR Memorandum].

effectively advocate on that case? We would just become a second IRS, and who needed that? TAS was supposed to assist in resolving taxpayers' problems with the IRS, not be part of them.

We held trainings and programs and workshops and town halls, reminding employees that they have the greatest power there is—the power of persuasion. I reminded them that when I was in controversy practice outside the IRS, I often had little to no ability to *make* the IRS do anything—I had to advocate and persuade. By requiring IRS employees to acknowledge they were taking the wrong approach, or creating burden on taxpayers, TAS not only resolved that specific case for that specific taxpayer but also helped that employee learn to approach all his or her other cases differently. That is, the TAS case advocates could also do systemic advocacy through their casework.

In the beginning, this approach did not go over well. At TAS trainings and symposia, the “comment” box was filled with angry three-by-five cards, many saying “We know our job, you don’t, who do you think you are?” Well, first, they knew their old jobs—the old Problem Resolution Program. TAS was not that. Those jobs did not exist anymore, and for a reason. Second, I did have an idea of what their new jobs should be, and I thought my idea mattered because I was, after all, the National Taxpayer Advocate. Over time we were able to negotiate procedures that improved the OAR process, including Service Level Agreements that set time frames for IRS responses as well as TAS actions, and required the operating divisions and functions to alert us if they needed more documentation rather than just rejecting the OAR. We made changes to the delegated authorities where tasks were deemed ministerial and would not conflict with TAS’s primary advocacy function, and we eliminated certain delegated authorities where there was such a conflict. In FY 2003 I convened a team to review the delegated authorities and make recommendations for revisions, including additional authorities, that did not conflict with TAS’s statutory role. In 2007 the Acting Commissioner agreed to “undelegate” the authority to abate penalties, allow or disallow refund claims, and allow or reject non-streamlined installment agreements.⁴⁸ My reasoning about that was, (1) if that authority remained

⁴⁸ Memorandum from Kevin M. Brown, Acting Comm’r of Internal Revenue to Nat’l Taxpayer Advocate, Chief Counsel; Comm’r, Large and Mid-Size Bus. Div.; Comm’r, Small Bus./Self-Employed Div.; Comm’r, Tax Exempt and Gov’t Entities Div.; Comm’r, Wage and Inv. Div.; Chief, Appeal, Chief, Criminal Investigation, on Taxpayer Advocate Service Delegated Auths. (Aug. 20, 2007) (on file with

delegated to TAS, it would have to follow the IRS IRM on penalty abatement, which would constrain our advocacy and (2) if TAS declined to abate a penalty, where would the taxpayer turn for help?⁴⁹

I never convinced everyone, and I am sure there are many things that can be done to improve the casework process.⁵⁰ But I do know that TAS must

author). In October 2005, I had briefed the Commissioners of W&I and SB/SE on the TAS working group's delegated authorities recommendations. Commissioner Mark Everson then appointed an executive steering committee with executive members from TAS, W&I, SB/SE, Appeals and Chief Counsel to review the recommendations. The steering committee's consensus is reflected in the Acting Commissioner's memorandum modifying Delegation Order 267 effective October 1, 2007. As noted in the memorandum, TAS delegated authorities "should not undercut TAS's role as an advocate for taxpayers." The modifications were made according to the certain guiding principles including:

The authorities delegated to TAS should be limited in general to customer service issues and problems,

The authorities delegated to TAS should not establish a new process,

The authorities delegated to TAS should not establish a "mini-IRS" (i.e., TAS should not be a substitute for some other IRS Operating Division/Function),

The authorities delegated to TAS should not create situations where TAS and some other Operating Division/Function are concurrently working the case and disagree about the proper resolution of the case,

The authorities delegated to TAS must not include cases where TAS does not have access to IRS systems, such as open AIMS cases, NMF/MFT 31 cases, bankruptcy cases, cases in Appeals, OICs, or TFRP cases

Id. at 2.

⁴⁹ With respect to the delegated authorities to accept or deny requests for abatement of penalties due to reasonable cause, to allow or disallow claims, or to allow or reject installment agreements, in my June 2002 report to Congress, I noted these authorities:

[tend] to undermine the independence, impartiality, and confidentiality of the Taxpayer Advocate Service. In each of these three instances, TAS may decide not to grant relief, and the taxpayer may appeal the Taxpayer Advocate's decision to the Office of Appeals. This sequence of events turns on its head the statutory authority of the Taxpayer Advocate Service, with its limited levels of review. Further, these "quasi-substantive" authorities differ significantly from the routine accounts management authorities previously delegated to the TAS.

NAT'L TAXPAYER ADVOCATE, FISCAL YEAR 2003 OBJECTIVES REPORT TO CONGRESS, at 11–12 (June 30, 2002).

⁵⁰ So much of TAS case procedures is a result of the archaic TAS case management system and the inability to maintain complete electronic case files or to communicate electronically with taxpayers or IRS employees. Beginning in 2010, TAS spent five years planning for a replacement of the Taxpayer Advocate Management Information System (TAMIS), which was really just a glorified version of the 1970s Problem Resolution Office Management System (PROMIS). As part of that project, TAS identified

be ever vigilant to not become a second IRS. The pressure to do so, to just push cases along, is profound, especially today when TAS is understaffed and is receiving more and more cases as IRS proves to be unresponsive. But any chink in the wall of advocacy and independence is a breach of taxpayer trust.

III. TAO AUTHORITY

Part of the frustration with and perceived need for additional delegated substantive authorities stemmed from a misunderstanding and underutilization of the actual authority granted to TAS by Congress. The underutilization of Taxpayer Assistance Orders (“TAO”) was a major focus of the RRA 98 hearings.⁵¹ In FY 2000, the year before I was appointed NTA, TAS issued only five TAOs.⁵² This resistance to issuing TAOs had many roots, including LTAs’ diverse technical backgrounds (*i.e.*, not being an expert in the subject matter of the TAO) as well as concern for damaging working relationships with IRS functions. I recall one plenary session at a training symposium we held early in my tenure, attended by about 1,000 TAS employees, including LTAs and case advocates. I had made the issuance of

significant improvements to its case processing that could be achieved by replacing TAMIS. Sixty percent of the programming for Release 1 of the new system, Taxpayer Advocate Service Integrated System (TASIS), was completed, and \$20 million spent, before the IRS put a hold on the project in March 2014, citing lack of funding. The IRS never agreed to reinstate TESIS, and instead chose to incorporate it into its plans for an Enterprise Case Management (ECM) System. *See* NAT’L TAXPAYER ADVOCATE, FISCAL YEAR 2015 OBJECTIVES REPORT TO CONGRESS, at 92–93 (2014) [hereinafter NAT’L TAXPAYER ADVOCATE FY 2015 OBJECTIVES REPORT]. To date, as near as I can tell, the IRS has not delivered any end product for ECM. *See generally* NAT’L TAXPAYER ADVOCATE, FISCAL YEAR 2019 OBJECTIVES REPORT TO CONGRESS, at 47–51 (2018); 1 NAT’L TAXPAYER ADVOCATE, 2016 ANNUAL REPORT TO CONGRESS, at 109–120 (2016) [hereinafter NAT’L TAXPAYER ADVOCATE 2016 ANNUAL REPORT].

⁵¹ An exchange between then-Congressman Rob Portman and Lee Monks, the Taxpayer Advocate, at a 1997 hearing is instructive:

Mr. Portman: We want to give you authority to issue more taxpayer assistance orders. As I understand it, last year we issued, what, five TAOs. Is that correct?

Mr. Monk: That is true.

Taxpayer Rights Proposals & Recommendations of the National Commission on Restructuring the Internal Revenue Service on Taxpayer Rights and Protections: Hearing on H.R. 2676 Before the Subcomm. on Oversight of the H. Comm. on Ways and Means, 105th Cong. 78 (1998).

⁵² In FY 2001, the year I joined TAS, it issued 18 TAOs, a more than 350% improvement over FY 2000. 1 NAT’L TAXPAYER ADVOCATE, 2001 ANNUAL REPORT TO CONGRESS, at 232 (2001).

TAOs a focus of my talk, reminding them that Congress gave us this tool, and it should be used where the IRS ignores our initial efforts or where we disagree with the IRS position. A member of the audience approached the microphone and said that many of them had good relationships with IRS employees and issuing a TAO would harm those relationships going forward. I was silent for a minute, and then said, “If issuing a TAO will harm that relationship, then you don’t have a ‘relationship’—you have unrequited love.” The number of times I had to remind TAS employees about that over the years, well, I have lost count. But the training and encouragement made a difference. In FY 2019, the year I retired, TAS issued 617 TAOs.⁵³

The history of the TAO authority also sheds light on TAS employee’s underutilization of the TAO and IRS resistance to its usage. The predecessor to the TAO was created in March 1988, leading up to TBOR I, when Commissioner Lawrence Gibbs authorized Problem Resolution Officers (“PROs”) to issue “Taxpayer Assistance Actions” (“TAAs”). The TAA enabled PROs to suspend enforcement actions or expedite procedures such as issuing a refund. Commissioner Gibbs stated the purpose of the TAA authority was “to elevate the status of PRP within the organization, to make all parts of the Service aware of the legitimacy of taxpayer hardship cases and to assure taxpayers and their representatives that the service is concerned and will provide relief in cases of significant hardship.”⁵⁴

Along with codifying the position of the Taxpayer Ombudsman, Congress enacted § 7811 in TBOR I, authorizing the Taxpayer Advocate to issue a Taxpayer Assistance Order where the taxpayer was experiencing or about to experience a significant hardship as a result of the IRS’s administration of the internal revenue laws. Initially the statute authorized the NTA to issue an order requiring the IRS to release levied property or cease or refrain from any action.⁵⁵ The House Conference Report discussing

⁵³ 1 NAT’L TAXPAYER ADVOCATE, 2019 ANNUAL REPORT TO CONGRESS, at 219–20 (2019).

⁵⁴ Wielobob Memorandum, *supra* note 3, at 4 (citing Remarks by Commissioner Lawrence Gibbs before the Ninth Annual Federal Tax Day sponsored by the New Jersey Institute for Continuing Legal Education and the New Jersey State Bar Association, March 10, 1988).

⁵⁵ TBOR I, *supra* note 5, § 7811(b) (providing:

The terms of a Taxpayer Assistance Order may require the Secretary—

TBOR I (“TBOR I Conference Report”) noted, in its “Present Law” section, that “[t]he Ombudsman may issue orders to affect immediate review of an IRS action. The authority of the Ombudsman, however, does not permit the Ombudsman to change a technical decision.”⁵⁶ The Treasury altered this statement by promulgating regulations (“Ombudsman Regulations”) finalized in March 1992, providing “[a] taxpayer assistance order will not be issued to contest the merits of any tax liability nor is a taxpayer assistance order intended to be a substitute for or in addition to any established administrative or judicial review procedure.”⁵⁷ Thus, the Ombudsman Regulations converted the TBOR I Conference Report language about a TAO *not changing a technical decision* into a ban on *contesting the merits of an IRS decision with respect to a tax liability*. This change created significant conflict between TAS and IRS personnel. That conflict continues to this day and I discuss this in more detail below.

By 1992, members of Congress were dissatisfied with the legal capacity of the Taxpayer Ombudsman to perform his duties. The Commissioner responded to these concerns on January 31, 1992, by issuing Delegation Order 239, which granted the Ombudsman the authority to issue TAOs in situations *not* addressed by the statute.⁵⁸ Specifically, the TAO could be used to order *affirmative actions*. Shortly thereafter, in the Revenue Bill of 1992, Congress passed Title V, the Taxpayer Bill of Rights II,⁵⁹ but the President

-
- (1) To release property of the taxpayer levied upon, or
 - (2) To cease any action, or refrain from taking any action, with respect to the taxpayer under—
 - (A) Chapter 64 (relating to collection)
 - (B) Subchapter (B) of Chapter 70 (relating to bankruptcy and receiverships),
 - (C) Chapter 78 (relating to discovery of liability and enforcement of title), or
 - (D) Any other provision of law which is specifically described by the Ombudsman in such order.).

⁵⁶ H.R. REP. NO. 100–1104 at 215 (1988) (Conf. Rep.).

⁵⁷ Treas. Reg. § 301.7811–1(c)(3) (as amended in 1992).

⁵⁸ I.R.S. Deleg. Order 239 (1992).

⁵⁹ H.R. 11, 102d Cong. tit. V (1992).

exercised his pocket veto on November 5, 1992.⁶⁰ Nevertheless, section 5002 of this failed second taxpayer bill of rights is instructive as an example of Congress' efforts to strengthen the office and revise the terms of the TAO to allow the Taxpayer Ombudsman to require the Secretary to act by a date certain, and to require the Secretary to affirmatively take certain actions. The Senate Technical Explanation of the failed bill ("Technical Explanation") described the provision as follows:

The bill provides the Taxpayer Advocate with broader authority to affirmatively take any action (as permitted by law) with respect to taxpayers who would otherwise suffer a significant hardship as a result of the manner in which the IRS is administering the tax laws. For example, the Taxpayer Advocate's scope of power will specifically include (i) the authority to abate assessments, (ii) grant or expedite refund requests, and (iii) stay collection activity. . . . *The Taxpayer Advocate is not intended to have the power to make determinations concerning the substantive tax treatment of any item.*⁶¹ (Emphasis added.)

I note the Technical Explanation language is much clearer than the regulation about the scope of the Taxpayer Advocate's authority to issue a TAO.⁶² Restricting the Taxpayer Advocate or PROs from making substantive determinations of tax items is consistent with the Commissioner's earlier delegations of authority as well as the role of an ombudsman-advocate as articulated by the American Bar Association. But *not making* the substantive determination is very different from *not contesting* the substantive determination. The latter language, found in the Ombudsman Regulations, actually restricts the Taxpayer Advocate's ability to *advocate* for a different result. That advocacy—contesting the merits—is vital to the Advocate's

⁶⁰ *Id.* (pocket vetoed by President, Nov. 5, 1992).

⁶¹ TECHNICAL EXPLANATION OF THE FINANCE COMMITTEE AMENDMENT TO H.R. 11, at 439 (Aug. 4, 1992). The version of § 5002 that originated in the House did not contain the limitation "as permitted by law," which was added by the Senate. REVENUE ACT OF 1992: STATEMENT OF MANAGERS AND CONFERENCE BILL, H.R. 11, at 449–50 (Oct. 6, 1992). Interestingly, section 5001 of H.R. 11 established within the IRS the Office of Taxpayers Advocate, headed by the Taxpayer Advocate, who would be appointed "by the President, by and with the advice and consent of the Senate" who would report directly to the Commissioner and would be compensated at a level equal to that of the IRS Chief Counsel. *Id.* at 448. "In order to ensure that the Taxpayer Ombudsman has the necessary stature within the IRS to represent fully the interests of taxpayers, it is believed that the position should be elevated to a position comparable to that of the Chief Counsel." TECHNICAL EXPLANATION OF THE FINANCE COMMITTEE AMENDMENT TO H.R. 11, at 437 (Aug. 4, 1992).

⁶² *Id.*

efficacy, precisely because the Advocate cannot overrule the substantive determination.

In 1996, as Congress was gearing up to pass TBOR II, the Commissioner amended Delegation Order 239 to clarify the TAO could be used for affirmative acts, including many examples cited in the Technical Explanation.⁶³ TBOR II, passed six months later, strengthened § 7811 by authorizing the NTA to order the IRS to “take any action as permitted by law”⁶⁴ and to specify a time frame for compliance.⁶⁵

Two short years later, in RRA 98, Congress significantly expanded the circumstances in which a TAO could be issued by identifying four broad categories that shall be considered significant hardships.⁶⁶ Further, RRA 98 authorized the NTA to issue a TAO where “the taxpayer meets such other requirements as are set forth in regulations prescribed by the Secretary.”⁶⁷ While Congress clearly wanted to expand the scope of taxpayers eligible for TAOs⁶⁸ and increase the use of TAOs, after RRA 98’s enactment there was a brewing controversy inside the IRS about whether RRA 98 authorized the

⁶³ I.R.S. Deleg. Order 239 (Rev. 1) (1996).

⁶⁴ TBOR II, *supra* note 6, § 102(a)(2). Section 101 of TBOR II added I.R.C. § 7802(d) establishing the Office of the Taxpayer Advocate, setting forth the four-pronged mission governing the Office today, and mandating two reports delivered directly to the House Ways and Means and Senate Finance Committees “without any prior review or comment from the Commissioner, the Secretary of the Treasury, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget.” RRA 98, *supra* note 7, at § 1102(a) (quoting I.R.C. § 7802(d)(2)(B)(iii), later renumbered I.R.C. § 7803(c)(2)(B)(iii)).

⁶⁵ TBOR II, *supra* note 6, at § 102(a)(1).

⁶⁶ I.R.C. § 7811(a)(2) (“[A] significant hardship shall include—(A) an immediate threat of adverse action, (B) a delay of more than 30 days in resolving taxpayer account problems, (C) the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or (D) irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.”). In making the determination to issue a TAO, where the IRS “employee is not following applicable published guidance (including the *Internal Revenue Manual*),” the NTA is instructed to view these factors “in the manner most favorable to the taxpayer.” *Id.* § 7811(a)(3).

⁶⁷ *Id.* § 7811(a)(1)(B). The Conference Report states “[i]t is intended that the circumstances set forth in regulations be based on considerations of equity.” H.R. REP. NO. 105-599, at 28 (1998) (Conf. Rep.).

⁶⁸ The National Commission on Restructuring the IRS noted that “[b]ecause the agency has interpreted the statutory term [‘significant hardship’] so narrowly, very few cases are eligible for relief.” RESTRUCTURING REPORT, *supra* note 25, at 45.

NTA to override a substantive decision in a taxpayer's case.⁶⁹ This controversy was likely fueled by TAS employees' deep frustration with their limited delegated authorities and the loss of their ability to make substantive determinations as PRP caseworkers.

After I accepted my appointment as NTA on January 11, 2001, but before commencement of my duties on March 1, 2001, the Office of Chief Counsel issued a memorandum interpreting § 7811; this opinion formed the basis for a memorandum of understanding signed by the Acting NTA and IRS senior leadership and a memorandum from the Commissioner "clarifying" the guidelines for TAO issuance and delegating additional authorities to the NTA.⁷⁰ I clearly recall my feelings as I sat among packing boxes in my Richmond, Virginia, home and opened a FedEx envelope from the Commissioner's assistant, containing those documents. The first thoughts that came to mind were, "my hands have been tied" and "TAS has been sold down the river." While I believe the Commissioner wanted to put the controversy to rest so the new NTA would not have to deal with the question of TAO scope, the fact that the new NTA (me) was not part of any of the negotiations, made me question why the IRS did not wait another few weeks to get my thoughts on the matter.

In fact, I did not—and do not—disagree with most of the legal analysis in the Chief Counsel memorandum. The memorandum provides a comprehensive history of the administrative and legislative history of the Office of the National Taxpayer Advocate. It correctly distinguishes and explains the two sources of TAS authority—delegated and statutory. For me, the problem arose with the language the memorandum used to describe the statutory authority. After a lengthy discussion of statutory interpretation and the principle of "*ejusdem generis*," the Chief Counsel memorandum concludes that § 7811 does not authorize the NTA to issue a TAO either

⁶⁹ Wielobob Memorandum, *supra* note 3, at 15 ("Particularly since the enactment of RRA 98, there has been some question about the interpretation of section 7811(b) and whether a TAO may direct a different result regarding a liability in a taxpayer's case.").

⁷⁰ CIR Memorandum, *supra* note 47, at 1.

directing the IRS to reach a particular result regarding a taxpayer’s liability or *making* a substantive determination of a taxpayer’s liability.⁷¹

The Chief Counsel memo provided the legal reasoning for the Commissioner’s memorandum to artificially categorize TAOs into two types—“Direct” and “Review.”⁷² According to the Commissioner’s memo, a “Direct TAO” may be issued “to direct that the primarily responsible IRS organizational unit take a specific action in the case.”⁷³ An example of a Direct TAO is an order to an IRS unit to release a taxpayer’s property from a levy.⁷⁴

A “Review TAO,” on the other hand, may be issued “to direct that the unit review, expedite consideration of or reconsider a taxpayer’s case.”⁷⁵ According to the memorandum, a Review TAO could be issued to any IRS organizational unit (including the Office of Appeals and the Office of Chief Counsel but excluding Criminal Investigation) and “may cover any aspect of the case (including a determination of the merits of a taxpayer’s liability).”⁷⁶

Herein lies the problem: if under the regulation a TAO “will not be issued to contest the merits of any tax liability,”⁷⁷ then what, exactly, can the NTA do with a Review TAO? Although it can “cover . . . a determination of

⁷¹ Wielobob Memorandum, *supra* note 3, at 20–21. It opined that under the principle of *ejusdem generis*, a general catchall phrase following a specific list of items is “construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” (citations omitted). *Id.* at 16. Thus, the phrase “any other provision of law” was limited in scope to provisions pertaining to Subtitle (F) of the Internal Revenue Code, entitled “Procedure and Administration,” pertaining to the collection of tax and the conduct of examinations. The memorandum concludes that TAOs “can be issued on procedural matters, but not on substantive matters, . . . such as the character of income or whether a taxpayer qualifies as an innocent spouse.” *Id.* at 17.

⁷² In the 2007 revision of the I.R.M. section about TAOs, the artificial distinction between “review” and “direct” TAOs was finally eliminated. “TAS no longer uses the terms ‘direct’ TAO and ‘review’ TAO. These terms should not be used on Form 9102 [Taxpayer Assistance Order].” I.R.M. 13.1.20.3(3) (as revised Dec. 15, 2007).

⁷³ CIR Memorandum, *supra* note 47, at 5.

⁷⁴ *Id.*

⁷⁵ *Id.* at 6.

⁷⁶ *Id.*

⁷⁷ Treas. Reg. § 301.7811–1(c)(3) (as amended in 1992).

the merits of a taxpayer's liability,"⁷⁸ is the NTA able to stake out a position about what she thinks is the correct determination in the case? As a lawyer, is she able to set forth her own legal analysis, especially where it differs from that of a Chief Counsel attorney's? Or is she limited to issuing a Review TAO merely ordering the IRS to look at the case again, or at a higher level, and just hoping that someone, somewhere higher up will hit upon the correct result?

The Ombudsman Regulations and the Commissioner memorandum's language regarding the issue of TAS's authority to make recommendations about the correct interpretation of law or the application of facts to law continues to be raised by IRS employees as they challenge TAS's intervention in cases. This language enabled IRS employees to challenge LTAs and case advocates' authority when they questioned the IRS's determination of a tax liability, or a determination not to release a levy or withdraw or release a lien, or with respect to the application of a penalty.

It took ten years, during which I worked closely with attorneys in TAS and in the Office of the Special Counsel to the National Taxpayer Advocate, to revise the regulation governing TAOs and six years to exorcise the Direct/Review language from TAS and IRS vernacular (and the IRM).⁷⁹ The current Treasury regulation does not contain the "not contesting" language but instead states the "NTA may not make a substantive determination of any tax liability."⁸⁰ This statement makes clear the NTA does not have the statutory or delegated authority to *determine* the amount of tax a taxpayer may owe.

However, the Treasury regulation later provides that "[a]lthough the NTA may not make the substantive determination, a TAO may be issued to require the IRS to expedite, reconsider, or review at a higher level an action

⁷⁸ CIR Memorandum, *supra* note 47.

⁷⁹ I am deeply grateful to Judy Wall, Janice Feldman, and Susan Hartford in the Office of the Special Counsel to the National Taxpayer Advocate, and to Eric LoPresti and Ken Drexler in TAS for their unflagging efforts in updating the regulation. Their talents, determination, and advocacy included revisions and language that were essential to protecting the independence of TAS and ensuring it can effectively advocate on behalf of taxpayers.

⁸⁰ Treas. Reg. § 301.7811-1(b) (as amended in 2011).

taken with respect to a determination or collection of a tax liability.”⁸¹ This statement is illustrated by several examples, all of which were based on the actual recurring experiences of LTAs. We deliberately chose examples involving the IRS Collection function⁸² and the IRS Office of Appeals.⁸³ We used the examples to show the NTA may independently review the taxpayer’s case, arrive at an independent conclusion that the IRS has reached the wrong determination, and include that independent analysis and (substantive) recommendation in a TAO requiring the IRS to review or reconsider its determination at a higher level.

Yet even after promulgation of the new Treasury regulation, IRS employees continue to challenge TAS’s authority to issue TAOs. Revenue agents balk at sharing the taxpayers’ administrative files with TAS, which hampers TAS’s ability to arrive at an independent assessment of the case. Revenue officers challenge TAS’s authority to question their calculations of a taxpayer’s ability to pay. Appeals Officers continue to challenge TAS’s authority to make independent recommendations and order a review.⁸⁴ Even

⁸¹ *Id.* § 301.7811–1(c)(3).

⁸² *Id.* § 301.7811–1(c)(4), ex. (2) (as amended in 2011) (“The IRS rejects K’s offer in compromise. K files a Form 911, ‘Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance Order).’ The NTA discovers facts that support acceptance of the offer in compromise. The NTA may issue a TAO ordering the IRS to reconsider its rejection of the offer or to review the rejection of the offer at a higher level. The TAO may include the NTA’s analysis of and recommendation for resolving the case.”).

⁸³ *Id.* § 301.7811–1(c)(4) ex. (3) (as amended in 2011) (“L files a protest requesting Appeals consideration of IRS’s proposed denial of L’s request for innocent spouse relief. Appeals advises L that it is going to issue a Final Determination denying the request for innocent spouse relief. L Files a Form 911, ‘Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance Order).’ The NTA reviews the administrative record and concludes that the facts support granting innocent spouse relief. The NTA may issue a TAO ordering Appeals to refrain from issuing a Final Determination and reconsider or review at a higher level its decision to deny innocent spouse relief. The TAO may include the NTA’s analysis of and recommendation for resolving the case.”).

⁸⁴ The question of TAS’s role in advocating before Appeals had been an issue from TAS’s inception. Appeals officers objected that TAS communications with Appeals with respect to an open case would violate the prohibition on *ex parte* communications under RRA 98 § 1001(a)(4). In Q & A—18 of Rev. Proc. 2000–43, 2000–2 C.B. 404, the IRS clarified that there was, in fact, no such violation: Question: “Does the prohibition on *ex parte* communications have any impact on Appeals communications with the Taxpayer Advocate Service (TAS) on an open case?” Answer: “No. Communications by Appeals with the TAS that are initiated by the TAS are not subject to the prohibition because the Appeals Officer may assume that the TAS is acting at the request, and with the consent, of the taxpayer.” Rev. Proc. 2000–43, 2000–2 C.B. 404. See also Memorandum from Carol A. Campbell,

more disturbing, on several occasions IRS employees actually reported Local Taxpayer Advocates to the Treasury Inspector General for Tax Administration, alleging that by issuing a TAO the LTA was either harassing the IRS employee or aiding and abetting a taxpayer's noncompliance. These "complaints" were dropped after I brought them to the attention of the appropriate Operating Division Commissioner and informed the Inspector General that these complaints interfered with TAS's statutory duty, but the fact they occurred at all is troubling, indeed.⁸⁵

While I fully understand how annoying it can be to have someone come to you and say, "I need you to look at this again, in light of what I've found," this is TAS's job. I believe these challenges persist because the IRS has not yet accepted, much less embraced, the important role TAS plays in promoting trust in the IRS. As Senator Breaux said about the provisions in RRA 98 pertaining to the Office of the Taxpayer Advocate:

I think in the end [the provisions] will go a very long way to assuring the American taxpayers that they have a system that is not out to get them, that is not out to intimidate them, that is not out to embarrass them; that if they are honest taxpayers, they will be treated honestly and will be treated fairly and, if they have a problem, there will be someplace they can go to get honest information and help and assistance that is not directed by the Internal Revenue Service but is being directed by the Office of the Taxpayer Advocate.⁸⁶

Counsel to the Nat'l Taxpayer Advocate, to Cheryl Harskowitch, Dir., Taxpayer Account Operations (TAS), on Ex Parte Communications with Appeals (Apr. 23, 2002).

Appeals' sensitivity continues to the present day. In response to a proposed 2019 IRM revision covering TAOs, which was circulated internally for IRS comment, Appeals' representative commented on an example that was copied verbatim from the regulation: "It should not be suggested Appeals is 'ordered' as this suggests a usurpation of Appeals' independence. Therefor [sic], revise the sentence . . . requesting]." Appeals Comments on Proposed IRM 13.1.20 (July 2019) (on file with author). The proposed IRM revisions are discussed below.

⁸⁵ Fairly early in my service as NTA, a high-ranking IRS official reported me to TIGTA, alleging that my intervention and issuance of a TAO in a case involving a high-profile individual was the result of my friendship with the taxpayer's representative. TIGTA conducted a full investigation, including interviewing the parties, and concluded there was no basis for the allegation. That investigation took over six months, during which time I continued to advocate on behalf of that taxpayer. I believe the complaint was made to chill my advocacy efforts in that regard. Ironically, the representative involved, Karen Hawkins, went on to become the IRS Director of the Office of Professional Responsibility, and she is widely regarded by the tax bar as an expert on ethical professional conduct. Karen has given me permission to publicly recount this episode.

⁸⁶ 144 CONG. REC. S4240 (daily ed. May 5, 1998) (statement of Sen. Breaux).

IV. TAS INTERNAL TAO PROCEDURES: SHOOTING ONE’S SELF IN THE FOOT

In addition to IRS efforts to contain the scope and application of TAOs, I learned early on that TAS itself had erected unnatural barriers to its employees issuing TAOs. The TAO authority had been delegated by the first NTA to Local Taxpayer Advocates, and an appeal process was outlined in the IRM. Case advocates had to fill out requests, the LTA had to review the request, the LTA then had to reach out to the manager of the IRS employee handling the case, attempt a resolution, and if no resolution, prepare a Form 9102, *Taxpayer Assistance Order*, issued to that manager. The manager had a certain period of time to respond and appeal the TAO. At that point, the TAO appeal would be reviewed by a TAS Area Director who could sustain or modify or rescind. The sustained or modified TAO would then be sent to the second-level supervisor in the IRS function, who could also appeal the TAO. Next, the TAO would go to a TAS headquarter official who would review and determine whether the TAO should be sustained; that official would have conversations with IRS officials; if appealed from that level, it would then go to the Deputy NTA and only after that appeal would the NTA get wind of the TAO and its subject matter.

Early in my tenure, the IRM was altered to provide that after the LTA’s TAO was appealed, it went to the Area Director. If the Area Director’s TAO was appealed, it landed on the NTA’s desk.⁸⁷ As simple as that. Taxpayers should not have to wait for multiple levels of review—remember that a TAO, per statute, cannot be issued unless the taxpayer is experiencing *significant* hardship. Give the IRS two chances to get it right, but then it has to deal with the NTA. Actually, the IRS had several other chances to address the problem before TAO issuance, because TAOs generally are preceded by OARs—the “pretty please” request that IRS cease, take, or refrain from an action.

⁸⁷ The current IRM 13.1.20.5 (Dec. 9, 2015) outlines the TAO appeal process. Before my retirement, as discussed below, I circulated to IRS leadership an extensive revision of this IRM, which included eliminating many of the inflexible timeframes that did not allow the NTA to conduct any meaningful review or research into the law or facts or procedures raised in the TAO. The proposed IRM replaced them with prompt timeframes for the NTA notifying the Operating Division Commissioners about the existence of, and subject matter and issues under dispute in, the appealed TAO, and then specific briefing schedules within TAS to ensure the case moved along without unnecessary delay. To date, the revised IRM has not been published.

One of the benefits of these procedural changes was that I got to have direct contact with the LTAs in their most difficult cases. I could assess the strengths and weaknesses of each LTA in terms of advocacy, which in turn informed my directives about the types of training we needed to provide the case advocates and LTAs. It also strengthened my resolve to recruit attorneys and accountants from outside the IRS, especially attorneys who worked in Low Income Taxpayer Clinics, to serve as LTAs. I had a rough goal in mind—one-third of the LTAs should come from IRS Campus operations (Accounts Management, Submission Processing, Correspondence Exam or Campus Collection); one-third should come from Revenue Agent/Revenue Officer/Appeals background; and one-third should be external hires, with emphasis on experience representing taxpayers before the IRS. With this mix, each type of LTA would share their expertise with the others; there is no replacement for deep internal knowledge, but that knowledge needs to be leavened with the expertise of those who had actually sat across the table from the IRS, representing taxpayers in tax controversies.

Integrating externally-hired LTAs proved to be a challenge for TAS and for the LTAs themselves. Despite having years, even decades, of experience representing taxpayers before the IRS, there is really no preparation for the challenges an IRS manager faces. As with any large organization, especially a government one, the sheer amount of paperwork (electronic and hard copy) covering every imaginable aspect of one's duties can be overwhelming even for those who grow up in that bureaucracy. And then there is the culture-shock of seeing firsthand how the sheer volume of work drives IRS employees to view taxpayers as widgets, or of experiencing the profoundly archaic IRS information technology infrastructure, which wastes so much of its employees' time and harms taxpayers. TAS got better over the years at preparing specific training and creating a mentor program for these hires, but it was never easy. Initially, internally-hired LTAs eyed these external hires suspiciously because they brought different skill sets; there were worries that internal LTA hiring would stop. As time went on, I think most LTAs recognized one another's value and appreciated the different skills and perspectives.

Internally-hired LTAs presented challenges, too. If someone served under an "old-style" LTA who never issued a TAO, and then was promoted to the LTA position, it took a while to change those habits. (This was not always the case—sometimes the subordinate manager was eager to do more advocacy and frustrated by the former LTA's style.) And some IRS employees who were hired into the LTA position from another function had

a hard time abandoning the mindset of the IRS function they came from. Then again, many of these managers actively sought out the LTA position at the end of their career; they had spent a lifetime seeing how procedures and attitudes in their functions created taxpayer problems, and they saw the LTA position as a way for them to use their skills and knowledge to address these problems. They became some of our strongest LTAs.

Because the Local Taxpayer Advocate is *the* face of TAS in the field, over the last few years, I and the Deputy National Taxpayer Advocate personally had a conversation with them before any LTA was hired. We talked about their backgrounds, why they wanted the job, how would they lead and inspire TAS employees, how would they persuade IRS functions to address a taxpayer problem, and how would they deal with disagreements and even conflict. Almost all of the internally-hired LTAs we talked with had gone their entire careers in the IRS and never had a conversation with a head of office (unless they had come from TAS). I believe all these efforts sent the message to TAS managers that we expected advocacy, empathy, and expertise from them and demonstrated that the NTA and DNTA wanted to know what TAS employees were doing with respect to their cases or other work.

Similarly, the fast-track TAO elevation procedures we established were important in ensuring that the heads of IRS Operating Divisions and functions also knew what their employees were doing. I recall Bob Wenzel, the IRS Deputy Commissioner when I first arrived at the IRS in 2001, telling me that when he would visit a local office as a regional commissioner, his first stop was the Problem Resolution Office. He would open up a file cabinet and pull out some random PRP cases; those cases would show him where the problems were in that locale, and he would use what he saw in those cases as a roadmap for his discussions with personnel there (protecting the identity of taxpayers, of course).

Accordingly, once a case arrived on my desk, if I sustained the TAO, it was directly issued to the Operating Division (“OD”) Commissioner or Chief, Appeals. This caused no end of consternation on the OD’s part. The IRS is a hierarchical organization and the compliance functions in particular have many managerial levels. The fact that TAS had a shallow management structure—only three steps to the top of the organization—meant the TAO

appeals process skipped over many managers in the OD.⁸⁸ One OD advisor, writing on behalf of the OD Commissioner objecting to my issuance of a TAO to the OD Commissioner directly instead of lower level supervisors, suggested I “look at it from [the OD’s] perspective.”⁸⁹ But that is precisely what the NTA is *not* supposed to do—at least until she has thoroughly looked at it from the *taxpayer’s* perspective. There are almost 80,000 employees in the IRS looking at matters from the IRS perspective. There is just one NTA, and her approximately 1,600 employees, who are *required by law* to look at it from the taxpayer’s perspective. Part of TAS’s job is to make sure the IRS considers and understands the taxpayer’s perspective.

The case in which I was asked to look at it from the OD perspective was one we reported in an Annual Report, with the taxpayer’s permission.⁹⁰ The taxpayer lived solely off of Social Security benefits; for some reason, a Revenue Officer (RO) decided to issue a manual levy against those benefits, rendering the taxpayer unable to pay for basic living expenses, including medication.⁹¹ TAS intervened and was able to obtain a release of levy on the grounds of economic hardship.⁹² The RO also agreed to return the proceeds of one of the monthly garnishments, but refused to return an earlier one (approximately \$250), because at the time of that levy, he did not know the taxpayer was experiencing economic hardship, even though he later agreed that she was.⁹³ TAS issued a TAO to the RO’s manager, who appealed; the TAS Area Director then sustained the TAO to the second-level manager, who also appealed.⁹⁴ I believed it was very important for the Commissioner of SBSE to know that her employees had refused on two occasions to return the levy proceeds of an elderly low-income person who met the definition of

⁸⁸ One commenter on the 2019 proposed TAO I.R.M. revisions circulated internally wrote: “In this example, nothing official was sent to either the Area Director; Director, Field Collection; or Director, Collection. . . . TAS should work through the BOD leadership levels.” SBSE Comments on Proposed IRM 13.1.20 (July 2019) (on file with author).

⁸⁹ I recall this statement being made in reference to a case involving a social security levy on an elderly taxpayer; see *infra* note 90 and accompanying text.

⁹⁰ See 1 NAT’L TAXPAYER ADVOCATE, 2017 ANNUAL REPORT TO CONGRESS, at 506 (2017).

⁹¹ *Id.*

⁹² *Id.* (citing to I.R.C. § 6343(a)(1)(D), which requires the Secretary to release a levy where he determines that “the levy is creating an economic hardship due to the financial condition of the taxpayer.”).

⁹³ *Id.*

⁹⁴ *Id.*

economic hardship. This case indicated serious flaws in the protection of fundamental taxpayer rights, and it should not have to go through some elaborate elevation process. It required top-down attention.

Cases like this showed how the TAO in a specific case can highlight areas in need of systemic change. In the next section I will describe how LTAs came to understand how the TAO, used in conjunction with the Taxpayer Advocate Directive, furthers systemic advocacy.

V. TAXPAYER ADVOCATE DIRECTIVE

The Taxpayer Advocate Directive, or TAD, was delegated to the Taxpayer Advocate by the Commissioner in March 1998, during the period of hearings leading to RRA 98. The TAD is a means for the NTA “to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment, or provide an essential service to taxpayers.”⁹⁵ The TAD authority is nondelegable: only the NTA can issue a TAD. Initially, it was recognized that only the Commissioner, Deputy Commissioner and NTA could modify or rescind a TAD,⁹⁶ but on January 17, 2001, DO-250 was replaced by Delegation Order 13-3, which provided that the only appeal route was to the Deputy Commissioner and made no mention of the role of the Commissioner.⁹⁷

On July 1, 2019, Congress enacted the Taxpayer First Act (“TFA”) amending § 7803(c) to provide an appeals and public reporting process for TADs, based on legislative recommendations made in past NTA Annual Reports to Congress.⁹⁸ Prior to TFA, TADs suffered the same fate as TAOs

⁹⁵ I.R.S. Deleg. Order 13-3 (formerly DO-250, Rev. 1), IRM 1.2.2.151 (Jan. 17, 2001). *See also* IRM 13.2.1.6 (July 16, 2009).

⁹⁶ Wielobob Memorandum, *supra* note 3, at 10 (describing terms of original Del. Order 250 (Mar. 17, 1998) (“Further, a recipient may appeal a TAD to the Deputy Commissioner, who, along with the Commissioner and National Taxpayer Advocate, are the only persons authorized to modify or rescind a TAD.”)).

⁹⁷ *See* IRM 13.2.1.6.2 (July 16, 2009) (“The only avenue of appeal, should a functional area disagree with the TAD, is to the Deputy Commissioner for Services and Enforcement.”).

⁹⁸ Taxpayer First Act, Pub. L. No. 116-25, § 1301(a), 133 Stat. 981 (2019) [hereinafter TFA]. 2019 PURPLE BOOK, *supra* note 23, at 75-76; *see also* NAT’L TAXPAYER ADVOCATE 2016 ANNUAL REPORT, *supra* note 50, at 39-40.

issued by the NTA—they got stopped at the Deputy Commissioner level, although as a direct report to the Commissioner, the NTA could copy the Commissioner on TADs and raise the issues in meetings with the Commissioner. Still, there was no audit trail or formal appeal mechanism for getting systemic issues before the Commissioner. Under TFA, there is a mandated procedure: where a Deputy Commissioner modifies or rescinds a TAD, the NTA *may*, within ninety days, appeal to the Commissioner, and the Commissioner *shall*, within ninety days of such appeal, “ensure compliance with such directive . . . or provide the National Taxpayer Advocate with the reasons for any modification or rescission.”⁹⁹ Moreover, the NTA is now required to identify in her Annual Reports to Congress any TAD that is not honored in a timely manner.¹⁰⁰

Strategically, TAOs and TADs complement each other. Individual cases requiring TAOs can flesh out the exact circumstances in which IRS processes, training, or actions obstruct or impair taxpayer rights. The problems identified in the TAOs may not just be one-off problems but are indicative of a larger systemic problem that affects many more taxpayers (or all taxpayers) than those who have cases in TAS. Thus, TAOs can clearly lead to issuance of a TAD, with its broader scope and systemic recommendations.

One such example concerns return preparer fraud. I clearly recall the day an LTA spoke up at a leadership meeting we held in 2010 with all LTAs, telling us about four cases in her inventory where taxpayers had been victims of return preparer fraud.¹⁰¹ The taxpayers, who were referred to TAS by the IRS Criminal Investigation (CI) function, never received their tax refunds; it turns out that after the taxpayers had approved their returns for filing, the preparer altered the returns to increase the refund and also changed the

⁹⁹ TFA, *supra* note 98, § 1301(a)(1); *see also* I.R.C. § 7803(c)(5). Note that TFA established a TAD appeal process; it did not statutorily authorize the TAD itself. Thus, we have the rather bizarre arrangement of a statutorily mandated appeal process for an administratively delegated authority.

¹⁰⁰ *Id.* § 1301(a)(2); *see also* I.R.C. § 7803(c)(2)(B)(ii)(VIII).

¹⁰¹ The late Betty Martin, the LTA in the Nashville, Tennessee TAS office, was the LTA who spoke up. Betty was an extraordinary LTA, a compassionate but strong voice on behalf of “her” taxpayers, and all TAS grieved at her passing.

account for the direct deposit to an account he controlled. At this point, the preparer was nowhere to be found.

The IRS's response to the TAOs was that it had no procedures by which to issue second refunds to these taxpayers, although the IRS did that every single day in cases involving identity theft. It turned out that CI had been more concerned about these taxpayers than the IRS civil functions. Since 2000, CI had sought Chief Counsel advice as to whether these false returns were returns of the taxpayer and whether refunds could be issued.¹⁰² Over the six years in which TAS advocated forcefully on this issue, we heard every excuse under the sun—the IRS was not the insurer of taxpayer's choice of return preparers, the taxpayers could collude with the preparers to get second refunds, the IRS had no accounting procedures to record the second payments.¹⁰³ Never mind that many of the TAS taxpayers had reported the preparers to the police and some had actually testified against their return preparers, which resulted in convictions and even jail time for the preparers.

In May 2012, after a frustrating year of trying to work with the IRS to get guidance, I issued an Interim Guidance Memorandum instructing TAS employees to challenge the IRS's "no procedures" stance and move cases

¹⁰² See I.R.S. Field Service Advice 200038005 (June 6, 2000) (noting that there is "no legal impediment to reissuing a direct deposit refund" and that situations in which direct deposits are stolen are closely analogous to the stolen refund check situation, where there is a process for issuing a replacement); I.R.S. Gen. Couns. Mem. PMTA 2011–13 (May 12, 2003) (stating that a return altered by preparer fails *Beard* test and is a nullity; return should be backed out and taxpayer allowed to file original return); I.R.S. Gen. Couns. Mem. POSTN–145098–08 (Dec. 17, 2008) (stating that the IRS "can and should" adjust taxpayer's account for refund illegally obtained by preparer and IRS should consider bringing an erroneous refund suit against preparer) (on file with author). Chief Counsel also issued a memorandum in response to a TAS request. See I.R.S. Gen. Couns. Mem. PMTA 2011–20 (June 27, 2011) (using the *Beard* analysis, "[a] tax return signed by a taxpayer that is altered by a tax return preparer without the taxpayer's knowledge and submitted to the IRS by the preparer is not a valid tax return"). In 2014, the IRS Chief Counsel reaffirmed to the NTA and the IRS Commissioner that the IRS is not prohibited from issuing refunds to victims of preparer fraud.

¹⁰³ In his December 20, 2013 memorandum rescinding *en masse* 24 of the 25 TAOs that I had elevated to the Acting Commissioner in 2012, the Deputy Commissioner for Services and Enforcement stated, "It would be extremely difficult to ensure that the taxpayer and the return preparer are not in collusion in order to obtain an additional refund. If collusion is not present in the current cases, establishing a process whereby IRS issues a second refund could certainly create an incentive for taxpayers and preparers to abuse in order to obtain additional Federal monies." See 1 NAT'L TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS, at 96 (2013) (quoting the Deputy Commissioner for Services and Enforcement in note 97). In at least 14 of these TAOs, the taxpayers had reported the refund theft and preparer fraud to the police, so it was highly unlikely they were colluding.

forward with TAOs.¹⁰⁴ We developed TAO memoranda with legal analysis for the cases elevated to me, and I issued two proposed TADs and two TADs on the subject.¹⁰⁵ I identified return preparer fraud as a most serious problem in three Annual Reports to Congress,¹⁰⁶ two Objectives Reports to Congress,¹⁰⁷ and testified about it before Congress on several occasions.¹⁰⁸ We created spreadsheets containing every case with a brief summary of the facts of the case, which later proved invaluable in debunking IRS objections and in developing procedures for handling the claims. By the time the IRS finally produced actual procedures in 2015, *more than a year after the Commissioner decided to issue these refunds*, TAS had issued 247 TAOs, of which twenty-five were elevated to the Commissioner and Acting Commissioner.¹⁰⁹ I had raised the matter with two Commissioners and two Acting Commissioners. TAS's coordinated strategy of using TAOs and TADs to advocate for these taxpayers finally paid off.

The toll this took on taxpayers and on TAS personnel was enormous. Over the six years we worked this issue, TAS case advocates regularly checked in with their taxpayers. *For years*, they had to keep encouraging taxpayers to continue working with TAS, reassuring them we would not give up. *Of the twenty-five TAOs I elevated to the Commissioner and Acting Commissioner, the median Adjusted Gross Income was \$17,548 and the*

¹⁰⁴ NAT'L TAXPAYER ADVOCATE, INTERIM GUIDANCE FOR PREPARING TAXPAYER ASSISTANCE ORDERS (TAOS) TO ACCOUNTS MANAGEMENT INVOLVING RETURN PREPARER FRAUD, TAS-13-0512-017 (May 23, 2012) (on file with author).

¹⁰⁵ See NAT'L TAXPAYER ADVOCATE FY 2015 OBJECTIVES REPORT, *supra* note 50, at 27–28 (reciting a timeline of events in Fig. 11.4).

¹⁰⁶ See 1 NAT'L TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS, at 59–60 (2011) [hereinafter NAT'L TAXPAYER ADVOCATE 2011 ANNUAL REPORT]; see also *supra* note 103, at 94–102; 1 NAT'L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS, at 68–83 (2012).

¹⁰⁷ See NAT'L TAXPAYER ADVOCATE FY 2015 OBJECTIVES REPORT, *supra* note 50, at 22–34; see also 1 NAT'L TAXPAYER ADVOCATE, FISCAL YEAR FY 2016 OBJECTIVES REPORT TO CONGRESS, at 34–37 (2015) [hereinafter NAT'L TAXPAYER ADVOCATE FY 2016 OBJECTIVES REPORT].

¹⁰⁸ See, e.g., *Hearing on National Taxpayer Advocate's 2014 Annual Report to Congress: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight and Gov't Reform*, 116th Cong. (Apr. 15, 2015) (Statement of Nina E. Olson, National Taxpayer Advocate).

¹⁰⁹ TAS issued 5 Return Preparer Fraud TAOs in FY 2011; 58 TAOs in FY 2012; 100 TAOs in FY 2013; 51 TAOs in FY 2014; and 23 TAOs in FY 2015 (through April 2015). NAT'L TAXPAYER ADVOCATE FY 2016 OBJECTIVES, *supra* note 107, at 35.

*median refund was \$2,511.*¹¹⁰ The issue is still not fully resolved for some taxpayers; unless they are willing and able to obtain a police report, IRS will not process their refunds. Never mind that some police stations will not issue reports for refund fraud, even when the LTA calls to ask. And never mind that some victims, who are undocumented, cannot go to a police station without risking deportation.

The only upside of this dismal tale is that TAS employees in case advocacy, systemic advocacy, research, and the attorney advisor group experienced what it was like to work together on an advocacy strategy. It was coordinated and effective, and it required perseverance. The most disturbing aspect of this period was that so few IRS employees showed empathy or exhibited any sense of urgency for these taxpayers; the IRS response demonstrated clearly the law enforcement—as opposed to tax administration and taxpayer service—mindset engrained in the agency. The fact that these events were occurring as the IRS tried to envision its “Future State” did not bode well for that plan.¹¹¹

VI. THE “LOST” IRMS ON TAOs AND TADs

In the last year of my service as NTA, I and a small group of TAS attorneys and senior advisors worked to issue revised IRMs on TAOs and TADs, reflecting what we had learned about the processes over almost two decades. With respect to TAOs, we had definitely heard the legitimate frustration of BOD Commissioners about how long it took to resolve cases once they arrived at the NTA level; but we also knew, from experience, that many cases elevated to the NTA required more handling time because they presented complex or new issues that needed thoughtful and thorough case development and research. Although only a few handfuls of TAOs actually landed on the NTA’s desk over eighteen years, of those that did, many cases

¹¹⁰ *Supra* note 103, at 94.

¹¹¹ *See* 1 NAT’L TAXPAYER ADVOCATE, 2015 ANNUAL REPORT TO CONGRESS, at 3–13 (2016) [hereinafter NAT’L TAXPAYER ADVOCATE 2015 ANNUAL REPORT] (discussing my concerns about the IRS Future State Vision). Based on these concerns, I held twelve Public Forums on Taxpayer Needs and Preferences throughout 2016, hearing from taxpayers in locations throughout the United States, and often in the company of members of Congress. In many ways, my experience seeing the IRS be so callous with respect to the Return Preparer Fraud cases was the catalyst for the Public Forums. I reported on the Public Forums and set forth my own vision for a 21st century IRS. *See* 1 NAT’L TAXPAYER ADVOCATE, FISCAL YEAR 2017 OBJECTIVES REPORT TO CONGRESS, at 1 (2016); NAT’L TAXPAYER ADVOCATE 2016 ANNUAL REPORT, *supra* note 50, at 1.

presented issues of first impression that required legal opinions from the Office of Chief Counsel. Other cases rose to the NTA level simply because IRS artificial “cycle-time” measures drove the case to the next stage (such as levy or proposed assessment) regardless of whether issues were actually resolved. The new TAO IRM tried to address all of these concerns as well as lay out an appeals process that reflected the statutory language.

In the spring of 2019, we circulated the IRMs to IRS leadership. We first shared them with the Commissioner and his senior advisor. They raised concerns about the Commissioner being involved in specific taxpayer cases, which we then tried to address. I was particularly sensitive to the fact that the Commissioner is the head of the agency, and I agreed with the statutory structure that his decision is final. I also agreed that there is great risk in the Commissioner, nominated by the President and hence a political appointee, intervening in specific taxpayer cases. But I believe the statute and Congress envisioned the Commissioner has a role to play in the TAO process—Congress wanted the Commissioner to know what was actually happening to taxpayers in disputes with the IRS—not just statistics, but specific instances. In fact, on January 10, 1996, before the enactment of TBOR II, the *Commissioner* amended Delegation Order 232 to limit the authority to modify or rescind the TAO to only the *Commissioner*, Deputy Commissioner or the Taxpayer Ombudsman.¹¹² This approach was adopted by Congress in 1996 and retained in 1998.¹¹³ Moreover, the Internal Revenue Code mandates the NTA be a direct report to the Commissioner.¹¹⁴ By granting the Deputy

¹¹² The stated reason for this amendment was to “reassure taxpayers that TAOs will be accorded the greatest respect and consideration by the IRS.” Wielobob Memorandum, *supra* note 3, at 8 (quoting Delegation Order 232 (Rev. 2) as published at 61 FR 764 (Jan. 10, 1996)). Under the original Delegation Order 232, adopted on January 1, 1989 (the effective date of TBOR I), the Ombudsman delegated the TAO authority to PROs. Prior to 1996, I.R.C. § 7811(c) read as follows: “Any Taxpayer Assistance Order issued by the Ombudsman under this section may be modified or rescinded only by the Ombudsman, a district director, or a service center director, a compliance center director, a regional director of appeals, or any superior of any such person.”

¹¹³ TBOR II, *supra* note 6, at § 102(b) (amending I.R.C. § 7811(c) to limit modification or rescission authority to the Taxpayer Advocate, the Commissioner, or the Deputy Commissioner, in that order). In 1998, Congress replaced the title Taxpayer Advocate with the “National Taxpayer Advocate” but otherwise left the provision untouched. RRA 98, *supra* note 7, at § 1102(d)(1)(D).

¹¹⁴ I.R.C. § 7803(c)(1)(B)(i).

Commissioner the final say on a TAO or TAD, the IRS was overturning a key protection of the NTA's independence and authority.

My proposed solution was, once a TAO was appealed to the NTA, the NTA would first modify or sustain a TAO to the head of the OD or function; the OD/function head could then appeal to the Deputy Commissioner. If the Deputy Commissioner rescinded or modified the TAO, and the NTA did not agree with the rescission or modification, the actions would be paused for a brief period of time so the NTA could prepare a memorandum for the Commissioner's review regarding the *systemic issue or concern* raised by the specific case. The taxpayer's identity would not be exposed and only those facts relevant to the decision on the systemic issue would be shared. In this way, the Commissioner would learn how the internal revenue laws, as administered in this case, were creating significant hardship, and be able to decide on the procedural issue without intervening in a specific case. At the time of my retirement, we had not yet heard whether the Commissioner agreed with this proposal.¹¹⁵

VII. CONCLUSION AND SOME FINAL PERSONAL REFLECTIONS

Even after eighteen years, there is still much work to be done to ensure TAS's independence and effectiveness.¹¹⁶ In the last few years of my tenure

¹¹⁵ We proposed a similar appeal process in the TAD IRM revisions, which at that point allowed only an appeal to the Deputy Commissioner. The Deputy Commissioner's office objected to these proposed revisions: "This section should be deleted in its entirety. There is no authority for creating a second appeal, this time to the CIR Del. Order 13-3 does not provide for a post-appeal process." Deputy Commissioner for Services and Enforcement ("DCSE") Comments on Proposed I.R.M. § 13.9.1 (Procedures for Taxpayer Advocate Directives) (on file with author). As discussed above, TFA resolved that matter legislatively by creating an Appeal process for TADs. See TFA, *supra* note 98. The Deputy Commissioner's office also objected to the proposed appeal revisions for TAOs: "Delete the reference to the Commissioner. TAOs are taxpayer-specific, and CIR is not involved in individual taxpayer cases." DCSE Comments on Proposed I.R.M. § 13.9.1 (Procedures for Taxpayer Advocate Directives) (on file with author). "The DCIR has the authority to respond to the appeal, meaning there is no further standing for NTA to dispute it." *Id.* Chief Counsel had advised me that once a TAO is rescinded by the DCIR, I would have to issue a new TAO to the Commissioner to get his review. Understanding I had that legal authority, I proposed the method described above—staying the DCIR's rescission or modification until I could brief the Commissioner on the issues involved in the case. At this time, the I.R.M. relating to TAO appeals has not been revised to reflect this proposal.

¹¹⁶ See Nina E. Olson, *NTA Farewell*, NTA BLOG (July 31, 2019), https://taxpayeradvocate.irs.gov/news/NTA_Farewell; see also NAT'L TAXPAYER ADVOCATE 2020 OBJECTIVES REPORT, *supra* note 21, at 13-14.

as NTA, I submitted legislative recommendations to Congress to strengthen the independence of the Office of Taxpayer Advocate and to address gaps in its existing authority. These included:

- clarifying the NTA’s authority to hire legal counsel;¹¹⁷
- clarifying the NTA’s authority to make personnel decisions for all TAS employees, not just those in local taxpayer advocate offices;¹¹⁸
- clarifying TAS access to IRS files, IRS meetings with taxpayers whose cases are open in TAS, and other information;¹¹⁹
- authorizing the NTA to file *amicus* briefs in cases raising significant taxpayer rights concerns;¹²⁰
- requiring Treasury and the IRS to address the NTA’s comments in final rules;¹²¹
- authorizing TAS to assist taxpayers experiencing significant loss of property or harm during a lapse in appropriations;¹²² and

¹¹⁷ 2019 PURPLE BOOK, *supra* note 23, at 70. *See also* NAT’L TAXPAYER ADVOCATE 2016 ANNUAL REPORT, *supra* note 50, at 37–39; NAT’L TAXPAYER ADVOCATE 2011 ANNUAL REPORT, *supra* note 106, at 573–81; 1 NAT’L TAXPAYER ADVOCATE, 2002 ANNUAL REPORT TO CONGRESS, at 198–215 (2002) [hereinafter NAT’L TAXPAYER ADVOCATE 2002 ANNUAL REPORT].

¹¹⁸ 2019 PURPLE BOOK, *supra* note 23, at 73.

¹¹⁹ *Id.* at 77. *See also* NAT’L TAXPAYER ADVOCATE 2016 ANNUAL REPORT, *supra* note 50, at 34–36 (2016).

¹²⁰ 2019 PURPLE BOOK, *supra* note 23, at 78. *See also* NAT’L TAXPAYER ADVOCATE 2016 ANNUAL REPORT, *supra* note 50, at 37–39; NAT’L TAXPAYER ADVOCATE 2011 ANNUAL REPORT, *supra* note 106, at 573–81; NAT’L TAXPAYER ADVOCATE 2002 ANNUAL REPORT, *supra* note 117, at 198–215. In 2002, Chief Counsel opined that the NTA could not submit an *amicus* brief to U.S. courts absent a specific legislative grant of authority. *See* Memorandum from Carol A. Campbell, Counsel to the Nat’l Taxpayer Advocate, to Nina E. Olson, Nat’l Taxpayer Advocate, on Authority for the Nat’l Taxpayer Advocate to File *Amicus* Briefs with the Courts of the United States (Oct. 2, 2002).

¹²¹ 2019 PURPLE BOOK, *supra* note 23, at 79. *See also* NAT’L TAXPAYER ADVOCATE 2016 ANNUAL REPORT, *supra* note 50, at 37–39; NAT’L TAXPAYER ADVOCATE 2011 ANNUAL REPORT, *supra* note 106, at 573–81; NAT’L TAXPAYER ADVOCATE 2002 ANNUAL REPORT, *supra* note 117, at 198–215.

¹²² 2019 PURPLE BOOK, *supra* note 23, at 80. *See also* NAT’L TAXPAYER ADVOCATE 2020 OBJECTIVES REPORT, *supra* note 21, at 40–44; NAT’L TAXPAYER ADVOCATE FY 2015 OBJECTIVES REPORT, *supra* note 50, at 79–91.

- repealing the suspension of statutory periods of limitation while taxpayers seek TAS assistance.¹²³

That is the work of future NTAs. Each NTA has a honeymoon period with the IRS, in which the IRS and the NTA believe they will be able to resolve matters internally and without conflict. For myself, that honeymoon was short. By early April 2001, after only a few weeks on the job, I had already issued a memorandum to the Commissioner about the IRS's plans for rolling out the federal payment levy program (FPLP), taking 15% of the monthly social security payments of persons with tax debts, my concerns about which fell on deaf ears of IRS leadership.¹²⁴ By May 2002, I was ready to resign as a result of my frustration with the IRS's lack of engagement with TAS casework and with TAS leadership.¹²⁵ After I raised my concerns, the

¹²³ 2019 PURPLE BOOK, *supra* note 23, at 82. See also NAT'L TAXPAYER ADVOCATE 2015 ANNUAL REPORT, *supra* note 111, at 316–28.

¹²⁴ See Memorandum from Nina E. Olson, Nat'l Taxpayer Advocate to Comm'r, Large and Mid-Sized Bus. Div.; Comm'r, Small Bus./Self-Employed Div.; Comm'r Tax Exempt and Gov't Entities Div.; Comm'r, Wage and Inv. Div.; Chief Appeals, Chief Counsel, on I.R.C. § 6331(h) Levies on Social Security Payments (Apr. 16, 2001) (on file with author). I.R.C. §§ 6331(h) and 6343(a)(1)(D) authorize the Secretary to continuously levy up to 15% of any non-means-tested federal payment where there is an outstanding tax debt of the recipient. In response to my memorandum, the Commissioner issued a moratorium on implementing the FPLP on Social Security benefits until the IRS developed a low-income filter and conducted an outreach campaign to alert the affected population and their representatives (*e.g.*, guardian and conservators). For a more detailed discussion of FPLP levies on social security benefits, see 2 NAT'L TAXPAYER ADVOCATE, 2008 ANNUAL REPORT TO CONGRESS, at 45–72 (2008).

¹²⁵ In a May 29, 2002 letter to the Commissioner and Deputy Commissioner, I wrote:

The lack of engagement of the Senior Leadership Team with TAS casework is duplicated in the relationships with the National Taxpayer Advocate. I can count on my right hand the one-on-one meetings I have had with the leaders of the operating divisions since coming on board. I have made luncheon dates, only to have them cancelled. When I raise issues to my "peers" and grab their attention at close of meetings, I am told to work with whatever executive or analyst is in charge of a particular program. And yet, when I do negotiate with that executive, I find that they do not have the authority to make decisions. In fact, I am often not told that decisions that I thought were actually made are later reversed or altered.

Whether this approach is a deliberate attempt to appease and marginalize the NTA office, or whether it is an inadvertent result of the bureaucratic structure of the IRS, is relevant only to a certain point. Regardless of the motivation, the NTA office does not receive access to the senior leadership team. NTA involvement is viewed as something that can be shunted off to lower executives and as long as they manage it, the heads of office do not need to be concerned about the issues and problems identified by the NTA.

Memorandum from Nina E. Olson, Nat'l Taxpayer Advocate to Charles Rossotti, Comm'r and Bob Wenzel, Deputy Comm'r of Internal Revenue (May 29, 2002) (on file with author).

Commissioner and Deputy Commissioner shepherded through TAS Service Level Agreements with the Operating Divisions, but the issue of working with the IRS at all levels continues to bedevil TAS.¹²⁶ In fact, in the recently-appointed NTA's first Objectives Report to Congress, she recounts how she has already encountered a roadblock. Under § 7803(c)(3), when the NTA submits recommendations to the Commissioner, “[t]he Commissioner shall establish procedures requiring a formal response . . . within 3 months.” Early in 2020 (pre-pandemic shutdown) TAS submitted to the Commissioner *all* administrative recommendations from the 2019 Annual Report to Congress: not just those in the Most Serious Problem section (the previous practice), but also those made in Status Updates, in the Most Litigated Issues, and in research studies. The NTA reports that the IRS's position is it is only required to respond to the recommendations raised in the Most Serious Problems. The NTA states:

We believe the IRS's position misinterprets the statute and deprives Congress and the public of answers they deserve. As noted, we have submitted our administrative recommendations to the IRS pursuant to § 7803(c)(3), which requires a formal response to each administrative recommendation the National Taxpayer Advocate makes. There is nothing in this subsection that limits the National Taxpayer Advocate to recommending actions that are proposed in the MSP section of the annual report. In fact, there is nothing in this subsection that limits the National Taxpayer Advocate to recommending actions that are proposed in the report at all. The intent of the statute is clear: If the National Taxpayer Advocate makes an administrative recommendation to mitigate a taxpayer problem—regardless of whether or where it has appeared in a report—the IRS should evaluate it and respond in writing so that TAS, Congress, and the taxpaying public know whether the IRS plans to implement the recommendation and, if not, why not. General narrative discussions that do not address recommendations

¹²⁶ For example, in September 2002, the IRS Oversight Board's decided that “when the Board and its committees measure the performance of the OTA [Office of Taxpayer Advocate], ODs, and senior executives, the measures shall include progress in reducing the occurrence of systemic problems that taxpayers encounter in dealing with ODs and progress of the OTA and ODs in promptly resolving such problems and providing prompt relief in other cases referred or returned by TA to ODs for resolution.” IRS OVERSIGHT BD., OVERSIGHT OF THE OFF. OF TAXPAYER ADVOC.: PRINCIPAL FINDINGS AND ACTIONS, at 13 (2002). A year later, the Deputy Commissioner for Services and Enforcement issued a memorandum instructing the Operating Division Commissioners “to incorporate an ongoing item on TAS case inventory in your Business Performance Review (BPR) starting in Fiscal Year '04. This item should include any conclusions you draw from the reports as well as initiatives you are pursuing to correct identified systemic problems.” Memorandum from Mark E. Matthews, Deputy Comm'r for Servs. and Enf't to Div. Comm'rs on Addressing Systemic Problems in TAS Cases 1 (Oct. 10, 2003) (on file with author). That practice lasted about a year.

directly fail to satisfy this objective. We note in this appendix where IRS narratives are not responsive.¹²⁷

I close by noting the pressure on the NTA and TAS to conform to the IRS's perspective is unrelenting, even as it is often unspoken and below the surface. Every single day of those eighteen years, I was in some meeting at which I would feel the need to speak up, knowing (and feeling) that everyone in that room did not want me to speak up, wanted to move on, and just go about their job in the way that suited them best. Every single day, TAS employees pick up the phone and ask IRS employees to do something or consider something that they do not want to do or consider. The temptation to just "pick your battles" is profound. And yet, every single time I temporarily gave in to the weariness, I almost immediately regretted it, and the situation became harder to resolve and correct down the road. I learned, over the eighteen years, that you cannot pick five or so things to focus on. All you can do is focus on one problem at one particular moment with every fiber of your being and every ounce of your intelligence; and then in the next moment go on to the next problem; and on and on to next moments and next problems. It is never over; there is always some new problem around the corner. But there is no more important work in tax administration. TAS is the safety net for all taxpayers, and the knowledge of that compelled me on whenever I flagged, as it does every TAS employee.

¹²⁷ 1 NAT'L TAXPAYER ADVOCATE, FISCAL YEAR 2021 OBJECTIVES REPORT TO CONGRESS, app. I, at 118–19 (2020).