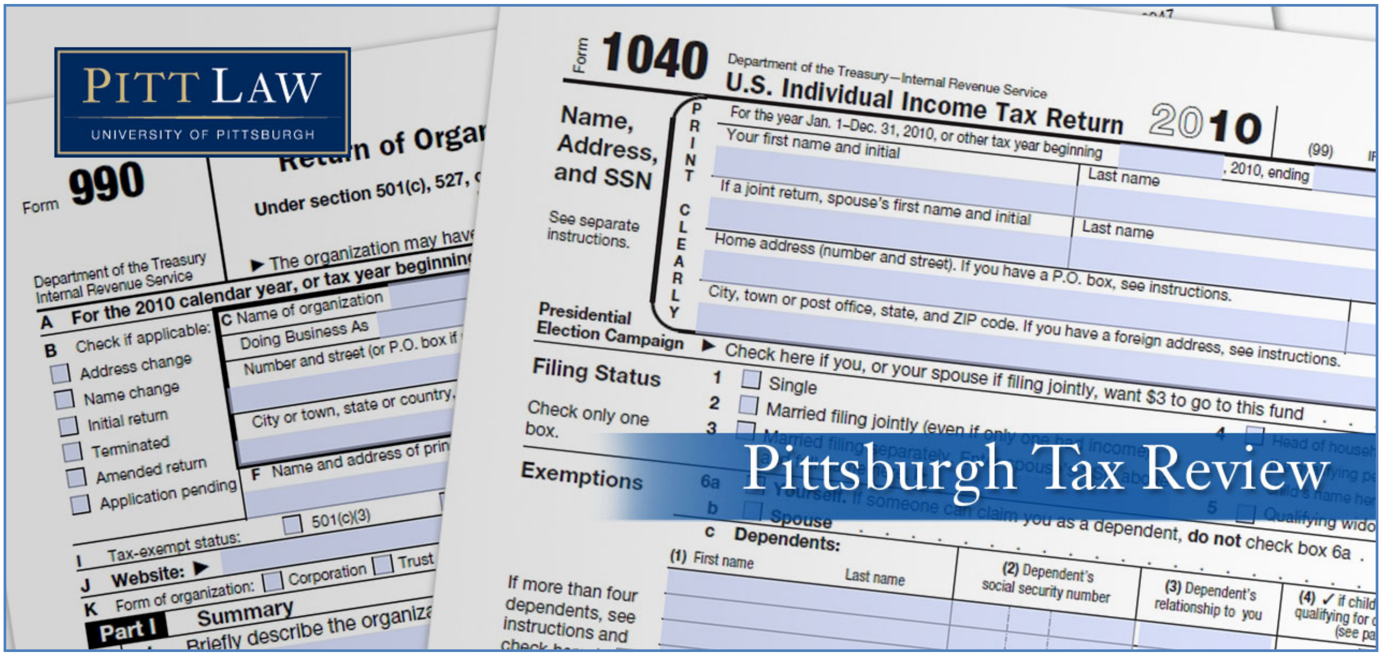

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REVISITING THE TEN DEADLY SINS CREATED IN THE IRS RESTRUCTURING AND REFORM ACT

Keith Fogg

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INTRODUCTION

Section 1203 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) provides a list of ten actions by IRS employees that result in termination from employment and has thus been referred to as the Ten Deadly sins.[1] If an IRS employee commits one of the actions listed in § 1203, the only exception to termination exists through the Commissioner of the IRS, who must personally commute the automatic termination provision. While employees of the IRS may deserve termination from employment if they commit one of these acts, targeting only IRS employees for punishment sends a chilling message to IRS employees because it creates no similar consequence for other government employees engaged in tax enforcement and regulation; many of these non-IRS employees may have much higher profile positions with a greater chance to influence public perception. The legislation also missed an opportunity to make a statement about broader compliance by federal employees generally and created a punitive consequence that is difficult to administer. Overall, § 1203 conveys that Congress sought to offer symbolic legislation rather than passing a law seeking to meaningfully influence behavior in a way that would positively influence compliance.

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[*] Keith Fogg is an Emeritus Clinical Professor of Law at Harvard Law School where he taught and directed the Tax Clinic at the Legal Services Center of Harvard Law School. He thanks his librarian, Lisa Rydin, for once again providing him with excellent assistance in pulling together materials for an article. He also thanks his research assistant, Ben Chanenson, who exhibits superior research and writing skills before even arriving at the University of Chicago Law School. Thanks also to the other authors of this edition who collaborated regarding their articles in order to make each article better.

[1] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 720.

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In calling § 1203 symbolic legislation, I do not mean to suggest that the section lacks power or that the termination of several hundred IRS employees lacks meaning.[2] Rather, in targeting only IRS employees for this treatment, the legislation missed the mark on providing true accounting for bad tax behavior by federal employees with the power to influence the tax behavior of the general populace. Having lived with the misguided symbolism of § 1203 for almost twenty-five years, the time has come to move the discussion with an eye toward seeking legislation that creates a more effective compliance atmosphere inside and outside the IRS.

This Article progresses first by providing the background leading up to RRA 98 and the passage of § 1203. This is followed by a discussion of the legislative history of § 1203. The Article then discusses the impact of § 1203 on IRS employees as detailed in the semiannual reports from the Treasury Inspector General for Tax Administration (TIGTA). Congress required these reports as part of RRA 98 and has not released TIGTA from making these reports in the twenty-five years that have elapsed since its passage. Although dated, the Government Accountability Office (GAO) took a detailed look at § 1203 twenty years ago.[3] That GAO report deserves special attention because it is the only report that examined the impact of § 1203. This Article finishes by discussing the GAO report and then reviews the data provided by TIGTA reports.[4]

Part IV of the Article address the symbolism of the § 1203 legislation, Part V the experience of the Commissioners charged with administering the law, and Part VI provides some suggestions for how to make the law more effective. Part IV on symbolism discusses how the legislation missed the mark, in several respects, to create a more effective method of both controlling behavior of federal employees and influencing behavior of the general taxpaying public. The comments of the early Commissioners charged with administering § 1203 discuss the morale crushing aspect of the legislation as well as the time-consuming administration of the legislation when compared to other duties imposed on a Commissioner. This Article suggests broadening the coverage of § 1203 to all federal employees,

[2] *See Semiannual Reports*, *infra* note 45 and table associated therewith.

[3] U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-1039R, IRS' EFFORTS TO EVALUATE THE SECTION 1203 PROCESS FOR EMPLOYEE MISCONDUCT AND MEASURE ITS IMPACTS ON TAX ADMINISTRATION (2004).

[4] *See Semiannual Reports*, *infra* note 45.

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eliminating the review of § 1203 transgressions by an agency head, and providing a greater range of possible actions an agency can take against an employee who violates one of its provisions. The inflexible nature of the legislation places a strain on a Commissioner and appears to permit practitioners to use § 1203 as a sword to impact employee behavior in order to shield their clients from scrutiny.

I. Background

Leading up to the passage of RRA 98, Senator William V. Roth Jr. of Delaware, the Chairman of the Senate Finance Committee, held sensational hearings on IRS collection practices[5] and criminal investigations,[6] seeking to demonstrate an agency run amok.[7] While bad case handling no doubt existed, and continues to exist, many of the alleged abuses brought out through the Senate Finance hearings in 1997 and 1998, were later debunked.[8]

During the period immediately after the passage of RRA 98, § 1203 received a fair amount of attention.[9] In more recent years it has received much less attention, but it continues to haunt tax administration and the implementation of certain tax procedures.

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[5] *Hearings Before the Committee on Finance*, 105th Cong. 1 (1997).

[6] *Hearings Before the Committee on Finance*, 105th Cong. 1 (1998).

[7] *See* Barbara L. Schwemle, Cong. Rsch. Serv., IRS Employees: Termination of Employment for Misconduct (2000) (detailing testimony at hearings on IRS misconduct).

[8] Leandra Lederman, *IRS Reform: Politics as Usual?*, 7 Colum. J. Tax L. 36, 59–60 (2016) (discussing how the highly publicized congressional hearings regarding alleged abuses by the IRS were largely subsequently debunked); *see also* David Cay Johnston, *U.S. Disputes Accusations of Abuses by the IRS*, N.Y. Times, Apr. 26, 1998; David Cay Johnston, *Inquiries Find Little Abuse by Tax Agents*, N.Y. Times, Aug. 15, 2000; U.S. Gov't General Accounting Off., Tax Administration: Allegations of IRS Employee Misconduct 1 (1999); David Cay Johnson, Perfectly Legal: The Covert Campaign to Rig Our Tax System to Benefit the Super Rich—and Cheat Everyone Else, 145–56 (2005); Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Fla. L. Rev. 1, 78–87 (2004) (describing hearings that "were high political theater and, as with most theater, were mostly fictional").

[9] Murphy & Higer, *The 10 Deadly Sins: A Law With Unintended Consequences*, 96 Tax Notes 871, 872 (2002); U.S. Gov't General Accounting Off., IRS Audit Rates: Rate for Individual Taxpayers Has Declined but Effect on Compliance Is Unknown (2001); David Cay Johnston, *A Smaller I.R.S. Gives Up on Billions in Back Taxes*, N.Y. Times, Apr. 13, 2001.

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RRA 98 did not arise in a vacuum. Congressional concerns about the IRS go back to at least the First Taxpayer Bill of Rights (TBOR I) passed in 1988.[10] That legislation marked a change in the relationship between Congress and the IRS that perhaps had been building since the election of President Reagan, who pursued smaller government,[11] or perhaps the troubles in the relationship between the IRS and Congress trace back to the night a former chairman of the House Ways and Means Committee, Representative Wilbur Mills, jumped in the Tidal Basin of West Potomac Park in Washington D.C. with Fanny Foxe.[12] When Congressman Mills chaired the Ways and Means Committee, he provided a buffer for the IRS and focused, with a deep understanding of the tax code and tax administration, on how the IRS could operate most effectively.

In addition to whatever political winds were blowing against the IRS, it was struggling to keep up with the work coming into its offices and leaning heavily on computers which did not endear it to taxpayers. One prime example of its changing operation was the shift from local revenue officers to handle taxpayer's collection accounts in person to Automated Call Sites where lower-grade employees in windowless rooms called taxpayers to collect tax debts from cubicles in faraway cities.[13] Similarly, on the examination side of the IRS, the 1980s saw the rise of correspondence exams based in Service Centers taking the place of local examiners, as the IRS tried to use efficiency to make up for its declining workforce.[14]

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

[11] Creighton R. Meland Jr., *Omnibus Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political Placebo?*, 86 MICH. L. REV. 1787, 1788 (1988).

[12] See discussion in Keith Fogg, *Congress to Consign IRS 6751(b) to the Graev?*, PROCEDURALLY TAXING (Sept. 20, 2021), https://procedurallytaxing.com/congress-to-consign-irc-6751b-to-the-graev/.

[13] MICHAEL SALTZMAN & LESLIE BOOK, *Automated Collection System (ACS)*, *in* IRS PRACTICE AND PROCEDURE § 15.02[1][a], Westlaw (2021); *see also* Treasury Inspector Gen. for Tax Admin., *Declining Resources Have Contributed to Unfavorable Trends in Several Key Automated Collection System Business Results* (Sept. 18, 2014), https://www.treasury.gov/tigta/auditreports/2014reports/201430080fr.html#_ftn3.

[14] *See generally* Nina Olson, *How Did We Get Here? Correspondence Exams and the Erosion of Fundamental Taxpayer Rights—Part 1*, PROCEDURALLY TAXING (Mar. 14, 2022), https://procedurallytaxing.com/how-did-we-get-here-correspondence-exams-and-the-erosion-of-fundamental-taxpayer-rights-part-1/.

The passage of TBOR I showed Congress that anti-IRS legislation, even mild, mostly symbolic legislation, brought good vibes from the voters. So, Congress returned to TBOR legislation in 1996 again with favorable reaction from voters in what is known now as TBOR II.[15] No longer could the IRS or Treasury easily go up to Congress and seek legislation to fix problems as it had in earlier years. It faced a much more skeptical audience.

The 1996 legislation created the National Commission on Restructuring the IRS.[16] This Commission resulted in a bi-partisan study of the IRS and produced a report that also shaped RRA 98.[17]

So, perhaps Senator Roth's sensational hearings in 1998, where the pendulum swung hard against the IRS, should have come as no surprise. Government was no longer good, and the IRS seemed to embody the worst parts of Government, at least in the eyes of influential legislators and their constituents.[18]

When the Senate considered a substitute for H.R. 2676, on May 4, 1998, Senator Roth explained his view for the need of a special termination provision to apply to IRS employees:

> As we have seen—even this past week—the Finance Committee has disclosed egregious conduct by IRS employees. We have received thousands of letters

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[15] Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996).

[16] Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, § 637(c), 109 Stat. 468. The National Commission on Restructuring the Internal Revenue Service was established by Public Law 104-52. Its purpose was to review the present practices of the IRS and to make recommendations for modernizing and improving its efficiency and taxpayer services. The seventeen-member panel was comprised of members of Congress, administration officials, representatives from various private sector firms, taxpayer organizations, and the National Treasury Employees Union, a former IRS Commissioner, and a state tax administrator. The Commission was co-chaired by Senator Robert Kerry (D–NE) and Representative Rob Portman (R–OH). Senator Charles Grassley (R–IA) and Representative William Coyne (D–PA), the Ranking Democrat on the Subcommittee on Oversight, also served on the Commission. Report of the National Commission on Restructuring The Internal Revenue Service Hearing before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, One Hundred Fifth Congress, First Session, July 15, 1997, p. 8 at http://commdocs.house.gov/committees/ways/hwmw105-30.000/hwmw105-30_0f.htm.

[17] Bobby Kerrey & Rob Portman, Nat'l Comm'r on Restructuring the Internal Rev. Serv., A Vision for a New IRS 67 (1997).

[18] David Cay Johnston, *Donald C. Alexander, 87, Who Resisted Nixon at I.R.S., Is Dead*, N.Y. Times, Feb. 8, 2009. Former IRS Commissioner, Donald C. Alexander (1973 to 1977), stated that the Senate hearings portrayed the IRS as no less than evil. *Id.*

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> relating the same. They have come from taxpayers and agency employees, alike. The stories we have heard are outrageous, as is the fact that many of those who perpetuate these abuses do so without consequence. This will not stand. Our bill requires the IRS to terminate an employee if it is proven that the employee failed to obtain required authorization to seize a taxpayer's property, committed perjury material to a taxpayer's matter or falsified or destroyed documents to conceal the employee's mistakes with respect to a taxpayer's case. This legislation allows terminations to take place if an IRS employee engages in abuses or egregious misconduct. Conditions for which an employee can be dismissed include, but are not limited to, assaulting or battering a taxpayer or other IRS employee, violating the civil rights of a taxpayer or other IRS employee, or breaking the law, regulations, or IRS policies for the purpose of retaliating or harassing a taxpayer or other IRS employee. Our legislation also allows an employee to be fired for willfully misusing section 6103 authority to conceal information from Congress. With this legislation, we show that we mean business. An environment that allows employees guilty of these kinds of behaviors to continue to work within the system is not acceptable to me, the Finance Committee, or to the American people. We have heard enough excuses.[19]

At the time of the passage of RRA 98, the executive branch suffered from the scandal created by President Clinton and his relationship with Monica Lewinski.[20] This side-show, or maybe main ring show, prevented Treasury and the executive branch from wielding the type of influence on the legislation that kept the first two TBOR bills primarily in the realm of mild legislation codifying provisions that existed administratively such as I.R.C. § 6159 enacted in TBOR I to codify installment agreements.[21]

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[19] 144 CONG. REC. H2739, S4183 (1998). When the termination provision was amended during Senate consideration of the bill, Senator Roth stated that "this amendment addresses a serious problem that came out during the hearings held by the Finance Committee last week." 144 CONG. REC. H2933, S4486 (1998).

[20] *See generally A Chronology: Key Moments In The Clinton-Lewinsky Saga*, CNN (1998), https://edition.cnn.com/ALLPOLITICS/1998/resources/lewinsky/timeline/.

[21] Section 6234(a), 102 Stat. at 3735. The IRS had administratively permitted taxpayers to enter into installment agreements for many years prior to the enactment of a statute specifically authorizing such agreements. The early TBOR legislation, in part, picked up on matters the IRS had identified as needed to make the system work.

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A. Legislative History

Senator Roth drove the train that led to RRA 98 and specifically that led to § 1203.[22] While we learn that tax legislation should originate in the House Ways and Means Committee, RRA 98 seemed driven by the Senate rather than the House.

With respect to § 1203 the Conference Report has a section addressing personnel issues:

> **H. IRS Personnel Flexibilities** (sec. 111 of the House bill and secs. 1201–1205 of the Senate amendment)
> Present Law
>
> The IRS is subject to the personnel rules and procedures set forth in title 5, United States Code, which regulate hiring, evaluating, promoting, and firing employees. Under these rules, IRS employees generally are classified under the General Schedule or the Senior Executive Service.[23]

The § 1203 provision came from a proposed Senate amendment.[24]

> **Mandatory employee terminations**
>
> [The Senate amendment] requires the IRS to terminate an employee for certain proven violations committed by the employee in connection with the performance of official duties. The violations include: . . .
>
> [The Senate amendment] provides non-delegable authority to the Commissioner to determine that mitigating factors exist, that, in the Commissioner's sole discretion, mitigate against terminating the employee. The Senate amendment also provides that the Commissioner, in his sole discretion, may establish a procedure which will be used to determine whether an individual should be referred for such a determination by the Commissioner. The Treasury IG is required to track employee terminations and terminations that would have occurred had the Commissioner not determined that there were mitigation factors and include such information in the IG's annual report.[25]

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[22] *Practices and Procedures of the Internal Revenue Service: Hearing Before the S. Comm. on Fin.*, 105th Cong., at 4 (1997) (Statement of Senator Roth) Leading up to and including the time of passage, Senator Roth was the Chair of the Senate Finance Committee. This is the committee on the Senate side charged with oversight of the IRS and passing with legislative changes to the Code.

[23] H.R. REP. NO. 105-599, at 227 (1998).

[24] S. REP. NO. 105-174, at 38–39 (1998).

[25] *Id.*

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The Senate proposals were largely accepted by the conference with slight modifications to the ten acts giving rise to termination. The modifications softened or clarified certain acts but did not materially change the provisions and did not change at all the consequence of an act.

Conference Agreement

> With respect to mandatory terminations of employees for certain proven violations committed by the employee in connection with the performance of official duties, the conference agreement modifies the definitions of some of the violation[s] . . . .
>
> The conference agreement also provides that the Commissioner is to implement an employee training program no later than 180 days after enactment.[26]

II. Impact

The Treasury Inspector General for Tax Administration (TIGTA) reported in 2013 on the millions of federal taxes owed by contractors working for the IRS and exhorted the IRS to address tax noncompliance for these individuals to ensure that all individuals working for the IRS are tax compliant.[27] The National Treasury Employees Union (NTEU) responded by pointing out the disparity in treatment between IRS employees and the contractors working side by side with them.[28] In response to the TIGTA

[26] H.R. Rep. No. 105-599, at 40 (1998).

[27] Treas. Inspector Gen. for Tax Admin., No. 2013-10-082, Contractor Employees Have Millions of Dollars of Federal Tax Debts (2013). See follow up reports on this issue at Treas. Inspector Gen. for Tax Admin., No. 2021-10-039, Controls Over the Internal Revenue Service Contractor Tax Check Process Need to Be Improved (2021) and Treas. Inspector Gen. for Tax Admin., No. 2020-10-35, Tax Compliance Checks for Federal Employment Suitability Have Improved, but There Are Still Some Inconsistencies (2020) (comparing the background checks for tax compliance performed on IRS hires, IRS contractors and IRS Chief Counsel with background checks on new hires in other government agencies). *See also* Treas. Inspector Gen. for Tax Admin., No. 2020-40-005, Improvements Are Needed to Ensure that Consistent Suitability Checks Are Performed for Participation in Internal Revenue Service Programs (2019) (analyzing the background checks on tax preparers participating in IRS programs, such as the ones that permit electronic filing).

[28] Nat'l Treas. Employees Union, TIGTA: IRS Contractor Employees Held to Lesser Standard (Oct. 23, 2013), https://www.nteu.org/media-center/news-releases/2016/04/13/tigta-irs-contractor-employees-held-to-l. NTEU President Colleen Kelley had written to Senators Roth and Moynihan shortly after passage of § 1203 expressing concern about the double standard created by the provision that required mandatory termination of IRS employees when no similar provision applied to members of Congress or their staff who did not file on time or pay their taxes. H.R. Rep. No. 106-189, at 76 (2000).

report and the NTEU comments, the IRS adopted a policy applicable to contractors, as well as to employees.[29] The background check policy will prevent someone from becoming an IRS employee or a contractor if they are not tax compliant at the time of hire. This policy of tax compliance at the time of hire extends to essentially all executive employees.[30]

While we impose an almost uniform policy across the executive branch requiring tax compliance by new hires as a condition of employment, and while agency ethical rules for executive branch employees require continued tax compliance for employees, § 1203 does not apply to a range of employees who work on administering the Code. Such employees not captured by § 1203 include Treasury Department employees, attorneys at IRS Chief Counsel, and Department of Justice employees including those employed in the Tax Division who represent the IRS in court.[31] Section 1203 also does not apply to Congressional or White House Staffers, or staff employees of the federal judiciary.

By statutorily limiting the impact of § 1203 to IRS employees, Congress sent a message to those employees, but failed to send a message to the broader group of federal employees, including those engaged at the highest

[29] Standard Tax Compliance Checks for Suitability and Monitoring, I.R.M. 25.29.1.

[30] Pre-Employment Clearances, I.R.M. 30.4.1.5(2) (Jan. 17, 2008) states that "Prior to entrance on duty or receipt of an official job offer, a selectee must receive favorable results for tax clearance for the last three years tax returns filed." *Id.* This policy is required for all individuals entering on duty including current IRS employees applying for jobs through an external announcement (e.g., a temporary employee applies for a permanent position via an external vacancy announcement) and current IRS employees applying for internal vacancy announcements." *Id.* In addition, Executive Order 12674 of April 12, 1989 (as modified by Executive Order 12731) established the fourteen General Principles of Ethical Conduct which apply to all executive branch employees and states, among other things, that "Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law." For the other thirteen principles, see 5 C.F.R. § 2635.101(b). TIGTA has investigated problems associated with tax compliance checks. TREAS. INSPECTOR GEN. FOR TAX ADMIN., TAX COMPLIANCE CHECKS FOR FEDERAL EMPLOYMENT SUITABILITY HAVE IMPROVED, BUT THERE ARE STILL SOME INCONSISTENCIES (2020).

[31] The sentence states a negative. Support for the statement comes from the language of § 1203 itself "This new provision was enacted in response to the widespread perception that **IRS** employees are not held fully accountable for improper conduct affecting taxpayers. The section provides that **IRS** employees must be charged with misconduct and terminated if there has been a judicial or final administrative determination that the employee committed any of the following acts or omissions." (emphasis added).

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levels of tax administration, and federal contractors.[32] The message Congress sent to IRS employees made them feel as if a target was painted on their backs and that Congress sought to punish them.[33] Not only did § 1203 create questionable Human Resources policy with respect to the covered IRS employees, but it also failed to cover the broad range of federal employees and contractors whose tax behavior could have an equal or greater influence on the tax paying public.[34]

III. THE GAO REPORT OF 2003 AND THE ANNUAL TIGTA REPORTS

In February 2003, the General Accounting Office (now called the Government Accountability Office and commonly referred to as GAO) did a study entitled *Tax Administration—IRS and TIGTA Should Evaluate Their Processing of Employee Misconduct under Section 1203*.[35] This study tracks

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[32] Senator Bob Kerrey described the legislation as an effort to "change the culture [of the IRS] by saying here are some things that, if you do it, there are going to be severe penalties." 144 CONG. REC. S44, 86-87 (daily ed. May 7, 1998) (statement of Sen. Bob Kerrey). He makes no mention of a general effort to improve tax compliance and, true to the legislation, directs his comments only at changing the behavior of IRS employees. Based on the comments of Commissioner Charles O. Rossotti below, the legislation did change the culture of IRS employees but not necessarily in the intended manner. *See infra* note 87.

[33] *See* J. COMM. ON TAX'N, 107TH CONG., REPORT OF THE JOINT COMMITTEE ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF 1998 (2002) (The report found "IRS employees frequently report that fear of a section 1203 allegation causes reluctance to take appropriate enforcement actions and that section 1203 is negatively affecting employee morale and effectiveness."). *See* U.S. GOV'T ACCOUNTING OFF., GAO-03-394, TAX ADMINISTRATION: IRS AND TIGTA SHOULD EVALUATE THEIR PROCESSING OF EMPLOYEE MISCONDUCT UNDER SECTION 1203 fig. 2 (2003) [hereinafter GAO-03-394]; *see also id.* at Appendix III.

[34] CONG. RSCH. SERV., IRS EMPLOYEES: TERMINATION OF EMPLOYMENT FOR MISCONDUCT (2000) (The report lists other provisions providing for termination of federal employees in certain positions without providing the normal civil service protections. It starts with terminations required by provisions in the Internal Revenue Code such as § 7214 which requires termination for certain criminal actions but with termination provisions which apply more broadly to federal employees. It also details special termination provisions applicable to Defense Intelligence employees, Central Intelligence Agency employees and federal law enforcement officers).

[35] GAO-03-394, *supra* note 33. In addition to the 2003 GAO report which contains important data breaking down the grade level of the employees terminated because of I.R.C. § 1203 violations, there were two earlier GAO reports describing the IRS disciplinary process which came out shortly after passage of I.R.C. § 1203. U.S. GOV'T ACCOUNTABILITY OFF., GAO-99-82, TAX ADMINISTRATION: ALLEGATIONS OF IRS EMPLOYEE MISCONDUCT (1999) and U.S. GOV'T ACCOUNTABILITY OFF., GAO-99-9R, TAX ADMINISTRATION: INVESTIGATION OF ALLEGATIONS OF TAXPAYER ABUSE AND EMPLOYEE MISCONDUCT RAISED AT SENATE FINANCE COMMITTEE'S IRS OVERSIGHT HEARINGS (1999).

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four years of application of § 1203 to IRS employees and does a good job of providing figures on the impact of § 1203 on IRS employees based on each of the ten provisions of the statute.[36] The study points out that the ten provisions really fall into two broad categories—employee tax return related misconduct and taxpayer rights provisions.[37] During the four-year period from the end of July 1998 when RRA 98 passed, until September, 2002, the IRS or TIGTA investigated 3,512 allegations of § 1203 misconduct and found 419 violations that resulted in the firing of seventy-one employees.[38] Specifically, GAO found that the tax compliance provisions, acts eight and nine described below, accounted for 93% of the violations and 87% of the firings.[39] While most of the ten acts apply specifically to IRS employees, these two provisions could easily apply to IRS contractors or to any federal employees or federal contractors.

The ten acts under § 1203 that will cause the firing of an IRS employee are:

> (1) Willful failure to obtain the required approval signatures on documents authorizing a seizure of a taxpayer's home, person belongings, or business assets [the chilling effect of this one has a significant impact on tax procedure and administration but almost no impact on employee termination];[40]

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[36] In the February 14, 2003, letter to the Senate Finance Committee transmitting the GAO report, the authors of the report note:

> The IRS Commissioner and others have asserted that section 1203 has had a negative impact on IRS employees' morale and effectiveness. In particular, they have indicated that section 1203 has had a "chilling effect" on IRS frontline enforcement employees who are afraid to take certain appropriate enforcement actions, contributing to recent declines in IRS's enforcement activities.

[37] *See* GAO-03-394, *supra* note 33.

[38] *Id.*

[39] *Id.* at 2.

[40] Just as Congress required TIGTA to produce an annual report on Section 1203 as a part of RRA 98, it also required TIGTA to provide annual reports on seizure activity by the IRS. 112 Stat. at 720. Immediately after RRA 98, seizure activity dropped to near zero. In the past two decades it has increased but remains well below the level of seizure activity that occurred prior to the 1998 legislation. The decline in IRS collection enforcement in general resulting from the falloff in IRS budgets starting in 2010 plays a role here but the data from 1999 to 2010 shows the marked decrease in IRS seizures. Note that for purposes of this discussion seizure is a term of art denoting the physical taking of property by the IRS and not general levy activity on wages and bank accounts.

(2) Providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative;

(3) Violating the rights protected under the Constitution or the civil rights established under six specifically identified laws with respect to a taxpayer, taxpayer representative or other employee of the IRS;[41]

(4) Falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative;

(5) Assault or battery of a taxpayer, taxpayer representative, or employee of the IRS, but only if there is a criminal conviction, or a final judgment by a court in a civil case, with respect to the assault or battery;

(6) Violating the Internal Revenue Code, Department of Treasury regulations, or policies of the IRS (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the IRS [guess which provision results in the most allegations of misconduct];[42]

(7) Willful misuse of the provisions of Section 6103[43] of the Internal Revenue Code for the purpose of concealing information from a congressional inquiry;

(8) Willful failure to file any return of tax required under the Internal Revenue Code on or before the date prescribed therefor (including any extensions), unless such failure is due to reasonable cause and not to willful neglect;

(9) Willful understatement of federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect; and

(10) Threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.

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[41] These laws are: (1) Civil Rights Act of 1964, 42 U.S.C. § 1971; (2) Education Amendments of 1972, 20 U.S.C. § 1681; (3) Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621; (4) Age Discrimination Act of 1975, 42 U.S.C. § 6101; (5) Rehabilitation Act of 1973, 29 U.S.C. 701 §§ 501, 504; or (6) Americans with Disabilities Act of 1990, 42 U.S.C. § 12101; (7) § 1203(b)(3)(B), 112 Stat. at 720.

[42] This provision causes concern among IRS leadership because it allows taxpayers or practitioners to put a revenue agent or revenue officer on their back foot defending against allegations of improper conduct instead of focusing on the examination or the collection of tax. The statistics suggest that to the extent this provision served as a tactical weapon in the early years after the passage of § 1203 when it was the provision taxpayers and representatives complained of most often as discussed in more detail below. No report has captured the data on number of complaints as thoroughly as the GAO report written in 2003; however, anecdotal observation on the use of § 1203 by taxpayers and practitioners suggests that the number of harassment complaints has diminished. *See, e.g.*, Brian D. Burton, *Nontraditional Tax Advocacy*, 16 J. TAX PRAC. & PROC. 43 (2014).

[43] Section 6103 governs the protection of tax data, which are confidential, from unauthorized disclosure and use. I.R.C. § 6103.

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Three of these acts dominate the alleged violations in the GAO report—(6) “Harassment”; (8) “Late Returns”; and (9) “Willful Understatement.” Of these three, Late Returns dominates the actual terminations with fifty-five of the total of seventy-one terminations coming from this one provision.[44]

Removals and Mitigations for Late Returns (8) and Willful Understatement (9):[45]

	Removals				Mitigations		
	8	9	Overall		8	9	Overall
2022	4	7	11		11	5	16
2021	12	16	29		54	40	94
2020	20	32	53		21	20	41
2019	20	19	40		13	17	30
2018	24	24	53		9	8	17
2017	13	11	24		13	11	24
2016	0	4	7		8	14	22
2015	3	18	21		8	10	18
2014	7	8	15		17	16	35
2013	6	8	15		22	12	34
2012	14		14		85		87
2011	6		8		42		44
2010	9		10		57		64
2009	3	9	13		47	55	102
2008	10	19	30		66	51	117
2007	30	41	75		74	68	144
2006	22	51	75		64	67	132
2005	37	18	58		88	52	140
2004	43	26	71		57	34	92
2003	7	11	19		37	14	51
2002	10	7	20		82	6	88
2001	8	0	10		26	0	26

If you look at each semiannual TIGTA report and turn to the page reporting on § 1203, you quickly see that well over ninety percent of the

[44] GAO-03-394, *supra* note 33.

[45] The data for this table comes from the semiannual TIGTA reports. TREAS. INSPECTOR GEN. FOR TAX ADMIN. SEMIANNUAL REP’S., https://www.treasury.gov/tigta/publications_semi.shtml [hereinafter *Semiannual Reports*]. The years 2001 and 2022 only have one semiannual reports worth of data, and in 2010, 2011, and 2012 the data for deadly sin number 8 and 9 were combined. *Id.* Between 2001 and 2022

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violations relate to the two provisions dealing with untimely filing of tax returns or willfully understating tax.[46] This chart does a good job of displaying how the impact of § 1203 in causing job loss falls almost entirely in subparagraphs (8) and (9) dealing with late filed returns and returns with a willful mistake. This chart does not display the number of resignations and retirements that result from investigations of § 1203 violations.[47] The impact of the provision goes beyond the terminations, the resignations, and the retirements; it also impacts IRS employee behavior.

In passing § 1203, Congress intended both to impact employee behavior and public perception. Based on the data displayed in the chart above, it is difficult to conclude that the provision has changed employee behavior in a way that has eliminated return filing problems. It is clear that it has impacted the behavior of IRS collection personnel regarding seizures.[48] Measuring the overall impact on IRS culture would be difficult.[49] Any impact on the public of the legislation has probably dissipated at this point.

It is not surprising that at the outset, most of the allegations fell in the harassment subparagraph.[50] The 2003 GAO report dug deeper into the fifty-five terminations for Late Returns and validated a predictable result.[51]

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there were also removals for violating deadly sin numbers 3, 4, 5, 6, and 10. *Id.* This data is likely slightly different than internal government records because in the data provided by TIGTA "columns containing numbers of two or less and protected by I.R.C. § 6103 are annotated with a zero and are not reflected in the column and row totals."

[46] *See Semiannual Reports*, *supra* note 45.

[47] GAO-03-394, *supra* note 33, at Appendix II, tbl. 4, p. 32. This table in the second column shows the number of resignations and retirements that resulted from the substantiated violations of I.R.C. § 1203 from July 1998 through September 2002. Note that for that period more employees resigned or retired than were fired. The later reports by TIGTA do not display this column but it is safe to assume that retirements and resignations continue to occur as a result of § 1203 investigations and that not all employees who committed a violation, or an alleged violation, were forcibly removed. Yet, § 1203 had the impact of removal beyond the number of employees terminated.

[48] *See* discussion *infra* pp. 256–58 (The drop off in seizures is discussed in detail in the following section).

[49] *See* GAO-03-394, *supra* note 33, at fig. 2 (showing some data on internal perceptions following the passage of § 1203). See also the discussion below based on the observations of former Commissioner Rossotti that § 1203 had an overall negative impact on IRS employee morale.

[50] *See* discussion *infra* pp. 256–58 (The high number of harassment claims, at least in the first few years after the passage of Section 1203, is discussed in the following section).

[51] GAO-03-394, *supra* note 33.

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Almost all of the employees fired for Late Returns were low-wage employees. Thirty-seven of the fifty-five employees fired for Late Returns were Grade Seven or below, and Grade Four employees had the highest number of terminated employees.[52] These numbers show that Congress has created a mechanism for firing low-level clerical employees at the IRS who have little to do with the direct enforcement of the tax laws.

There has not been a GAO report on § 1203 since the 2003 report. The semiannual reports from TIGTA provide data on the number of investigations and removals, but do not break down the grade of the employees impacted. Nothing about the legislation has changed in the following years. I strongly suspect the type of employees impacted by § 1203 remains the same as it was at the time of the GAO report; though no public data exists to support that conclusion.

The justification for § 1203's requirement that all IRS employees timely file their returns or be fired was that public perception demanded that level of tax compliance among IRS employees.[53] The impact of the law falls squarely on low-level employees not engaged in direct enforcement of the tax laws, and not in a position to provide much influence with their behavior, compared to the other types of high-profile federal employees mentioned. Late filing by any IRS employee should not be condoned, but if the congressional concern were public perception, it chose an odd group to punish as a means of promoting compliance with the tax laws. Knowing what we now know about this law, a more meaningful law could be crafted that actually promotes general tax compliance, to the extent that behavior of federal employees can do so, and is not just somewhat symbolic legislation that falls most harshly on low-level IRS employees.

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[52] *Id.*

[53] *See* 144 CONG. REC. H2739, S4183 (1998). When the termination provision was amended during Senate consideration of the bill, Senator Roth stated that "this amendment addresses a serious problem that came out during the hearings held by the Finance Committee last week." 144 CONG. REC. H2933, S4486 (1998).

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A. A Focus on Seizure and Harassment

At the time of its passage and for some years thereafter, § 1203 caused deep employee concerns at all levels of the IRS.[54] "Seizure signatures" and "Harassment," which directly impact tax administration and procedure, were the source of concern for front-line employees engaged in tax compliance. There were sixteen complaints concerning seizure signatures resulting in thirteen completed investigations, zero cases of substantiated violations, and zero firings during the first four years covered by the GAO report.[55] For the first fifteen years of § 1203, the TIGTA reports show only one reported incident of an employee willfully executing a seizure without appropriate signatures and being terminated.[56]

These numbers should be read in conjunction with the number of seizures occurring after RRA 98. Prior to RRA 98, the IRS conducted about 10,000 seizures per year.[57] After stopping seizure activity almost completely immediately after RRA 98, the number of seizures slowly grew after its enactment back to the 600-700 per-year range; however, the most recent numbers, perhaps driven by the pandemic, shows only about one-hundred seizures per year.[58]

If Congress wanted to stop the IRS from conducting seizures, it could hardly have found a more effective mechanism short of simply removing the authority from the Code. If Congress believes that seizing property as a means of collecting taxes serves a viable function, it should consider the chilling effect of § 1203 on this activity. This chilling effect runs in tandem with the impact of § 7803, which requires TIGTA to do an annual report on

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[54] GAO-03-394, *supra* note 33, at fig. 2.

[55] *Id.* at tbl.6 of Appendix II.

[56] *Semiannual Reports*, *supra* note 45.

[57] *See* I.R.S., *SOI Tax Stats—Delinquent Collection Activities—Table 25*, IRS DATA BOOK, https://www.irs.gov/statistics/soi-tax-stats-delinquent-collection-activities-irs-data-book-table-25 (last visited Oct. 4, 2022).

[58] *Id.*

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every seizure.[59] The combination of these provisions makes seizure a very rare activity.

Because seizures have become rare, revenue officers are even more uncomfortable using this collection tool, since the prospect of making a mistake on something you rarely do increases the likelihood of unfavorable scrutiny. Maybe the near extinction of seizure from the panoply of remedies available to the IRS, serves an overall beneficial purpose to the system of tax administration; but no one seems to have considered the impact of the loss of seizure as a collection tool on uncollected federal tax debt. Knowing how rare this remedy has become may embolden some delinquent taxpayers who have little to fear from administrative collection action if they do not have wages or bank accounts. This forces IRS administrative collection action on the more difficult cases into a narrower band of collection remedies.[60]

By a large margin, the § 1203 provision most frequently used by taxpayers, at least during the first four years of its life, was the harassment provision. This provision resulted in 1,729 allegations with 1,680 completed investigations, six of which were substantiated with one person fired.[61] That is a lot of smoke with very little fire.[62] One could say that all of these allegations and investigations were good for the system because they kept the enforcement employees honest. One might conclude that so few violations were found because government employees were investigating other government employees placing a very high burden on proving harassment or retaliation. Unlike the GAO report which provided significant detail, the

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[59] I.R.C. § 7803(d)(1)(A)(iv).

[60] The only effective way to take property with the administrative remedy of seizure is to bring a lawsuit which involves judicial resources and the resources of Chief Counsel, IRS and the Tax Division of the Department of Justice. A recent TIGTA report criticized the IRS for almost exclusively using foreclosure suits in those rare situations when it takes someone's residence rather than doing so administratively which might give the taxpayer more opportunities to correct. The actions of IRS employees with respect to personal residence seizures, must be seen through the lens of Section 1203 to understand the path collection employees chose to take. The report does not make that clear. *See* TREAS. INSPECTOR GEN. FOR TAX ADMIN., NO. 2022-30-026, THE IRS PRIMARILY USES LIEN FORECLOSURES WHEN PURSUING PRINCIPAL RESIDENCES, WHICH DO NOT PROVIDE THE SAME LEGAL PROTECTIONS AS THE SEIZURE PROCESS, 4–6 (2022).

[61] GAO-03-394, *supra* note 33, at 33–34.

[62] The 2003 GAO report provides an eye-opening chart and discussion of the steps that the IRS takes once the formal allegation occurs. *See id.* at 46–51.

method in which TIGTA reports on § 1203 in its semiannual report does not provide information on the number of alleged violations.[63] The GAO report indicated a sharp decline in the number of harassment violations for the years covered.[64] The TIGTA reports do make clear that instances of harassment during the last ten years that result in an actual determination of a violation are rare and almost non-existent.[65]

At least initially, the number of complaints stemming from this provision demonstrated it had more value to many taxpayers and representatives as a sword to thwart investigations, rather than a shield to protect against bad behavior. Once a complaint of this type occurs, the actual tax investigation, if it is still open, slows while the harassment investigation takes place.[66] A complaint of harassment or the threat of a complaint of harassment could alter the behavior of the IRS employee and perhaps stop or slow an investigation.[67] Other tools exist for dealing with employees who harass a taxpayer that could result in, but do not require termination. These remedies, which predate 1998, could combat bad behavior without adversely impacting compliance activities.

IV. Symbolism and Missing the Target

As mentioned in the Introduction, § 1203, and certainly RRA 98 in general, has a symbolic aspect as Congress sought to punish IRS employees for perceived abuses. The narrow scope of § 1203, covering only IRS employees, causes it to miss an opportunity to make a more influential statement. At the same time, the harshness of the remedy for committing one

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[63] *Semiannual Reports*, *supra* note 45.

[64] *See* Ken Rankin, *Mixed News on IRS Employees*, ACCOUNTING TODAY (Nov. 8, 2004), https://www.accountingtoday.com/news/mixed-news-on-irs-employees (reporting on the GAO report showing a decline in harassment allegations from 1,000 in 2000 to 143 in 2003 with only 1.5% substantiated).

[65] *See id.*

[66] RRA 98 Section 1203—Employee Responsibilities, I.R.M. 13.1.15.4.

[67] *See* Frank Agostino & Eugene Kirman, *Regulating the Conduct and Ethics of Tax Professionals*, 16 J. OF TAX PRAC. & PROC. 21, 26–27 (2014) (discussing, inter alia, the considerations a tax professional should undertake in deciding whether to make a Section 1203 referral on an IRS employee); *see also* Frank Agostino et al., *Nontraditional Tax Advocacy*, 16 J. OF TAX PRAC. & PROC. 43, 55–56 (2015) (discussing referrals to TIGTA for § 1203 violations).

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of the acts described by § 1203, and the high level of review required for mitigation, creates other difficulties discussed further in Part V. The fact that workers at the lowest level of the agency bear the brunt of the dismissals, shows that the provision operates more as a punishment for the economically disadvantaged, than a correcting mechanism for IRS employees generally.[68]

Because § 1203 has resulted in the termination of over 650 employees, it certainly has had more than a symbolic impact. Yet, it still seems largely a symbolic provision within a broader piece of legislation that has been criticized as symbolic despite the many substantial changes in tax procedure that it created.

Professor Steve Johnson, describing the burden of proof provision in § 7491 passed as part of RRA 98, criticized that provision as a "pernicious exercise in symbolic legislation."[69] He states that "[t]he symbol, however, does not come free of cost. To say that Section 7491 is ineffectual is not to say that it is innocuous."[70] He points out that when you consider the cumulative exceptions and conditions on the burden shifting provision, large groups of litigants are ineligible and even the eligible taxpayers must jump through hoops to qualify.[71] This causes the provision to give the illusion that it has made a major change in the system without doing so, while at the same

[68] While federal employees do not generally fall into the economically disadvantaged category, the GAO report found that the highest levels of dismissals occurred at Grade Four. GAO-03-394, *supra* note 33, at 38, tbl.5 (displaying the grade of each terminated employee). Although there are some differences based on the geographical location of the employee, a grade four federal employee in 2022 makes between $27,782 (at Step 1) and $36,116 (at Step 10). *See 2022 Pay and Leave*, OFF. OF PERS. MGMT., https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/22Tables/html/GS.aspx (last visited on Oct. 4, 2022). The federal poverty guidelines for 2022 show that most persons at grade four fall below 250% of poverty for a single person. *See* Annual Update of the HHS Poverty Guidelines, 87 Fed. Reg. 3315 (Jan. 21, 2022). The statute creating the grant for low-income taxpayer clinics, § 7526, allows these clinics to serve individuals who fall below 250% of poverty. The calculation of poverty level increases with each dependent. The chart referenced here shows that if the federal employee working at a grade four level has three dependents that individual would be right at the basic federal poverty level.

[69] Steve Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 413 (1999).

[70] *Id.* at 415.

[71] *Id.* at 443–44.

time creates a lot more friction in the system. A similar argument can be made with respect to § 1203.

Professor Johnson goes on to discuss the necessity of passing such a symbolic piece of legislation. He describes it as "the choice to enact a measure that is devoid of practical meaning, is the product of two powerful but antagonistic forces: the perceived political benefit of being viewed as doing something versus the real and disastrous consequences of actually doing something."[72]

He also describes the forces at work in 1998 and the need to pass legislation that appeared to give benefits to taxpayers and to constrict the IRS.[73] Professor Johnson is not the only person to make these observations about the RRA 98 legislation.

Professor Leslie Book, who writes an article in this special edition on Collection Due Process, another provision of RRA 98, noted in his earlier article on CDP that

> Given the limited constitutional nature of tax cases, it is generally thought that the CDP provisions have little to do with constitutional procedural due process protections. Rather, like the spate of bill of rights provisions covering matters both important and mundane, perhaps CDP reflects a means for the legislature to communicate with the public about the public's sense of dissatisfaction with government.[74]

Professor Leandra Lederman also wrote about RRA 98 and symbolism.[75] She writes in her article:

> Since 1988, three "taxpayer bills of rights" have become law. Each of these bills has amended the procedural sections of the Internal Revenue Code. Many of the new provisions and procedures have been prompted by anecdotes about taxpayers injured by the IRS. Because anecdotes are rarely representative, and sometimes are inaccurate, the resulting legislation is more symbolic than effective. Yet taxpayers harmed by inappropriate IRS activity need more than symbolism. Congress is currently considering Taxpayer Bill of Rights 2000, but more taxpayer

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[72] *Id.* at 446.

[73] *Id.* at 448–50.

[74] Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1144, 1177 (2004).

[75] Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy*, 87 TAX NOTES 1133 (2000).

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> "rights" is not the answer. The three existing bills of rights have provided few real rights to taxpayers, and even fewer remedies. The article proposes instead a civil damage remedy to compensate taxpayers that suffer material harm resulting from IRS personnel violation of applicable laws or rules.[76]

Professors Johnson and Lederman then engaged in an exchange of views on the symbolism of RRA 98 through two additional articles in *Tax Notes*.[77] In his response, Professor Johnson notes that, "TBOR3 [RRA 98] contains a number of provisions that are empty, merely symbolic, or even cynical"; however, he also notes that that many provisions "have real importance (whether for weal or for woe)" including § 1203 in his brief list of provisions having importance.[78] He goes on to say: "TBOR3 [RRA 98] does not reflect a Congress inclined to address genuine problems with only cosmetic solutions. There is no inherent reason why 'legislation by horror stories' need engender only superficial legislative fixes, and, on the recent historical experience, it hasn't."[79]

Both Professors Johnson and Book cited to the work of Murray Edelman who wrote about symbolic legislation in his book *The Symbolic Uses of Politics* (1964).[80] Mr. Edelman states that "[i]f we are to make a start toward recognizing the symbolic elements in governmental proceedings and the impact of symbolic functions upon elite and mass behavior, it is necessary to consider some general characteristics of symbols and the conditions that explain their appearance and meanings."[81] Professor Johnson also notes several other authors who have written on symbolic legislation.[82]

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[76] *Id.* at 1136.

[77] Steve Johnson, *A Residual Damages Right Against the IRS: A Cure Worse Than the Disease*, 88 TAX NOTES 395 (2000); Leandra Lederman, *Taxpayer Rights in the Lurch: A Response to Professor Johnson*, TAX NOTES (SPECIAL ISSUE) 1041 (2000).

[78] Johnson, *supra* note 77, at 399.

[79] *Id.* at 399.

[80] MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 4 (1964) (explaining the use of the symbols of rite and myth as ones which permeate our society).

[81] *Id.* at 4.

[82] CHARLES D. ELDER & ROGER W. COBB, THE POLITICAL USES OF SYMBOLS (1983); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990). These authors wrote generally on symbolic legislation. Other authors have written specifically on symbolic legislation and taxes. *See* William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth*

As each of the professors have pointed out, RRA 98 contained a significant amount of symbolic legislation. Through the names chosen and the specifics of the provisions passed, Congress signaled to the public that it was carefully watching over the IRS and protecting the public from its excesses. In his article written in response to Professor Lederman, Professor Johnson specifically lists § 1203 as one of the provisions that have real importance.[83]

I agree with Professor Johnson that § 1203 has had real consequences. It is evident in the more than 650 dismissals that have resulted from its enactment and the many more resignations and retirements that resulted because of it. Yet, because of the limited scope of § 1203 on IRS employees and because its power of dismissal lies primarily in return filing issues, it still has aspects of symbolism more than real change on the tax system. The broad provisions discussed above, controlling tax behavior of federal applicants, employees and contractors, has more power to keep filing behavior appropriately monitored.

The provisions of § 1203, beyond return filing and accuracy issues, have demonstrated themselves to be mostly symbolic with little impact in removing employees, or in shaping employee behavior in a positive manner. The harassment provision, at least initially, generated many complaints but little evidence of inappropriate behavior. It siphoned off resources to address concerns of tax protestors. The seizure provision has essentially eliminated one collection avenue. These provisions provide an example of the concern about the legislation expressed by Professor Johnson—a cure worse than the disease.[84]

To move beyond symbolism to create a cure for the disease, Congress needs to use the data it has forced TIGTA to collect over the past twenty-five years and decide if § 1203 has delivered the results it intended. If it has not, § 1203 should be amended or removed in order to create a better tax system. A provision that promotes dismissal of low-level employees, while stifling

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Tax Policy, 51 TAX L. REV. 287 (1996); Michael Livingston, *Risky Business: Economics, Culture and the Taxation of High-Risk Activities*, 48 TAX. L. REV. 163 (1993).

[83] Johnson, *supra* note 77, at 400.

[84] *Id.* at 401.

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collection practices designed to deter the most difficult collection cases, does not serve the system well.

V. SOME BROADER OBSERVATIONS

To gain a better understanding of the impact, I spoke to two former Commissioners who headed the IRS in the years immediately after the passage of the legislation.[85] Their observations provide some basis for thinking about the value of § 1203. Several former Commissioners who served before the enactment of RRA 98 gathered during the process of its creation and provided their insights on the proposed legislation and the process of creating it.[86]

Commissioner Charles O. Rossotti was appointed to the position by President Bill Clinton in 1997 in the midst of the congressional investigations leading up to RRA 98, in which § 1203 was enacted.[87] He stated that he had a good relationship with Senator Roth, the driving force behind RRA 98, and succeeded in persuading him on several topics regarding proposals in the legislation; however, on the topic of § 1203, Commissioner Rossotti could not convince Senator Roth that this was an inappropriate piece of legislation. Commissioner Rossotti found § 1203 too specific and too rigid to easily administer but was more troubled by the message it sent to IRS employees.[88]

IRS employees, and particularly employees in the IRS Collection Division, interpreted the legislation as a statement that Congress was out to get them. Commissioner Rossotti made a point to go around the country to

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[85] This Part V is based in part on personal notes and recollection of the author.

[86] *See Panel on IRS Restructuring*, 51 NAT'L TAX J. 415, 415–35 (1998).

[87] Charles O. Rossotti, https://en.wikipedia.org/wiki/Charles_O._Rossotti (last visited Sept. 17, 2022).

[88] *See, e.g.*, Boyd Harlan, *IRS Reform and Restructuring Act of 1998 Rossotti Provides Update at Hearing*, 44 THE NAT'L PUB. ACCT. 1, 6–7 (1999) (In his testimony to the House Ways and Means Subcommittee on Oversight regarding the impact of RRA 98 one year later, the author paraphrased his testimony regarding § 1203 by stating: "[i]n terms of the RRA itself, the costs of implementation have drained resources away from compliance activities. IRS employee trepidation has been caused by RRA 1203, Termination of Employment for Misconduct. The availability of 1203 for use against IRS personnel has had its own chilling effect on IRS compliance activities. Rossotti testified that he is engaged in a concerted effort to educate and reassure his work force 1203 will not be applied to good faith mistakes, but is instead applicable only to willful misconduct.").

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attempt to reassure employees this was not his agenda. He recalled an encounter with one Revenue Officer who said basically that if I do nothing, it would take years to be terminated under the rules applicable to federal civil servants, but if I make one misstep covered by § 1203, you can fire me immediately.

This attitude toward the legislation pervaded the enforcement divisions of the IRS and took years to overcome. Commissioner Rossotti and then IRS Deputy Commissioner Bob Wenzel not only reached out to employees through their travels around the country, but decided that they would personally review every case in order to make a judgment. The two IRS leaders reviewed cases once a month after the cases went through the investigator stage. Commissioner Rossotti described it as a cumbersome process and one that lasted for his entire tenure.[89]

Commissioner Rossotti felt that no business would enact such a rigid policy and one that did, would alienate employees to the degree that § 1203 did. He had no problem identifying the actions listed in § 1203 as serious problems that should give rise to serious consequences but did not find the automatic termination provision of the statute helpful in managing a workforce.

Commissioner Mark Everson succeeded Commissioner Rossotti.[90] Commissioner Everson served from 2003 to 2007. He inherited the structure created by Commissioner Rossotti to deal with § 1203 issues. Commissioner Everson found that the time he spent to review proposed § 1203 actions far outweighed the benefit to the system. Commissioner Everson felt that reviewing in detail the proposed outcomes for the § 1203 cases brought to his attention took him about an hour each month. Considering all of the actions on his plate in running the agency, Commissioner Everson found it difficult to justify this expenditure of time. Because of the mandate in the statute, however, he could not find a path to performing his statutory duty without expending this time. He felt that a statute could accomplish the goal of removing employees engaged in inappropriate behavior without tying the

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[89] SCHWEMLE, *supra* note 7, at 18 *et seq.* (The report describes the implementation of the 1203 procedures put in place by Commissioner Rossotti including the training for employees to assist them in avoiding a problem with the provision.).

[90] I.R.S., Previous IRS Commissioners, https://www.irs.gov/about-irs/previous-irs-commissioners.

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hands of the Commissioner by requiring personal action of the agency head to prevent termination once a violation was identified.

VI. Creating a More Meaningful Provision

Based on the observations of the Commissioners, and the data provided in the GAO report as well as the ongoing TIGTA reports, it appears that § 1203 brings more harm to the system than good by creating a burdensome drag on tax administration without sufficient benefits. Section 1203 has allowed the collection of data for almost twenty-five years on identified employee behaviors within one agency of the federal government. Rather than have TIGTA simply report on the number of terminations or other employee discipline each year, some real research should take place, examining the value of the section against the costs.

IRS employees who behave badly on certain core conduct functions certainly exist.[91] The mechanism for firing federal employees for performance, and even non-§ 1203 conduct violations, may need strengthening in order to eliminate employees whose conduct deserves dismissal. Current federal rules protecting employees may not strike the appropriate balance between protections of the individual rights versus protection of the public. Still, the targeted nature of § 1203 on the IRS ignores the problems that can exist in any federal agency regarding compliance with a core duty such as timely filing an accurate return. The passage of § 1203 appears to have been aimed at currying votes, rather than promoting appropriate behavior of the federal workforce, using remedies and review processes better designed to achieve the goal of insuring the public that the individuals it employs behave appropriately on a core duty.

Instead of keeping § 1203 on the books in its current form as a monument to political symbolism, Congress should conduct a careful study of factors that would protect the public while allowing IRS compliance officers to do their job unimpeded by poorly designed laws. The impact of

[91] *See, e.g.*, Treas. Inspector Gen. for Tax Admin., No. 2014-10-007, The Awards Program Complied with Federal Regulations, but Some Employees with Tax and Conduct Issues Received Awards (2014). This report details awards handed out to employees who had issues with the payment of taxes something not covered by § 1203 but something that clearly impacts the public perception of the IRS and tax administration in general.

that targeting deserves attention. Congress could consider if this was just a bad law passed at a time when Congress was flexing its muscle at an unloved agency, or if it is an effective tool for controlling the behavior of federal employees that should be extended to other parts of the federal government and to federal contractors.

The data clearly shows that the return compliance provisions of § 1203 represent the part of the legislation with teeth.[92] These two provisions can easily be important to the entire federal workforce and its contractors if necessary. Guidelines already exist that check compliance prior to hiring and that could cause some discipline for noncompliance. It is not clear that extending the § 1203 remedy of dismissal to all federal employees for late filed or willfully inaccurate returns would create a benefit to tax compliance or to agency function. Adjusting current § 1203 to remove its focus from low-level employees would benefit the system, as would removing the commissioner as the only person who can commute the remedy of dismissal if a violation occurs.

From the TIGTA data, it appears that many employees who file late or present some filing disparities still receive clemency.[93] This pattern to provide clemency in such situations should continue and perhaps be formalized to the extent that the data shows clear patterns where certain behaviors that violate the language of the statute nonetheless regularly draw a response other than termination.

The compliance review could be centered in a part of the Office of Personnel Management (OPM) or some other central federal compliance agency so that each agency need not engage in the review. The decision to terminate or issue some lesser punishment, or no punishment at all, should rest with an official below the level of IRS Commissioner, but someone at the executive level of federal service. By extending these provisions across the board to federal employees and federal contractors, public perception for bad tax compliance behavior in other parts of the federal government than the IRS will no longer be an issue.

The provisions designed to protect taxpayer rights obviously do not need to apply to agencies other than those who deal with taxpayers. Applying these

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[92] *See Semiannual Reports*, *supra* note 45.

[93] *Id.*

provisions to only IRS employees makes the most sense. Rather than having the Commissioner as the only person who can commute termination of an identified violation, the system should allow commutation at a lower level. It should save for the Commissioner's review those cases in which termination is recommended. This would restore a better balance to the Commissioner's workload.

Almost twenty-five years of history suggest that these provisions rarely result in dismissal. I do not condone the other targeted behaviors but believe that IRS employees deserve no different treatment than other federal employees. Most of the other behaviors involve actions not unique to IRS employees. Singling out IRS employees serves no benefit and may result in making them less effective in appropriate compliance activities. To the extent that IRS employees engage in inappropriate behavior in matters not unique to tax enforcement, the same tools should exist for all federal employees.

Section 1203 works reasonably well with respect to the two provisions related to return filing and willful understatement of tax. Though, automatic termination need not be the default remedy. Even though the 2003 GAO report demonstrated that the impact of these two provisions falls hardest on low-level employees,[94] the provisions still provides a base level of appropriate conduct. The requirement to timely file does not adversely impact IRS employee performance on compliance functions.[95] The same is true of requiring dismissal for a willful understatement of tax.[96] These two

[94] GAO-03-394, *supra* note 33, at app. II.

[95] The important function in reviewing cases of failure to timely file is capturing the reason for the failure. Sometimes the failure comes with a very reasonable excuse. One of the Commissioners described to me an employee who had the return sitting on her outgoing mail table but forgot to put it in the mail in the excitement of preparation for and departure on her first cruise. The failure in that instance did not result in termination as a result of the investigation. The IRS proposed legislation shortly after the passage of I.R.C. § 1203 to eliminate the automatic termination provision for late filed returns of employees where the return seeks a refund. *See* J. COMM. ON TAX'N, *supra* note 33. Without seeing all of the recommendations to the commissioner regarding this issue, one suspects that most of the late filers with refund returns receive commutation of the penalty of termination.

[96] These cases provide more challenges to the IRS since willfulness is much more difficult to prove than late filing. IRS employees are not immune from making mistakes on their returns and punishment should not result from understandable mistakes. On the other hand, there have been very public cases of IRS employee misconduct which has resulted in criminal prosecution showing that IRS employees are also not immune from willfully filing false returns. *See Former IRS employee sentenced to over one year in prison for tax evasion*, INTERNAL REVENUE SERVICE (July 12, 2022), https://www.irs.gov/compliance/criminal-investigation/former-irs-employee-sentenced-to-over-one-year-in-prison-for-tax-

provisions result in well over 90% of the dismissals under § 1203. Untimely filing and willful understatement provide measurable, generally inexcusable behaviors deserving of discipline. Enforcing discipline resulting from these behaviors should not have a negative impact on IRS employees trying to properly enforce the tax laws.

These two provisions of § 1203 act to promote compliance in the same way the use of licenses can serve as a cost-effective method for promoting compliance among taxpayers generally.[97] At the time of passage of RRA 98, states were just beginning to use licenses as a way to promote tax compliance while today the use of licenses to promote tax compliance for state tax obligations is widespread.[98] Congress and the IRS have not ignored the trend to use licenses. While the federal government does not control as many licenses as the states, Congress passed legislation controlling behavior by restricting the passports of seriously delinquent taxpayers.[99] The IRS uses the license of the Preparer Tax Identification Number (PTIN) to require tax-return preparers who want to file electronically to file and pay their taxes.[100] The IRS places the same requirements on the Low-Income Taxpayer Clinics (LITCs) and Volunteer Income Tax Assistance (VITA) sites to whom it issues grants.[101] While slightly different, the IRS also withholds the benefits

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evasion#:~:text=Goldberg%20of%20the%20Justice%20Department's,and%20providing%20fabricated%20records%20to.

[97] Keith Fogg, *Withholding or Withdrawing Licenses for Nonpayment of Tax*, PROCEDURALLY TAXING (Oct. 10, 2013), https://procedurallytaxing.com/withholding-or-withdrawing-licenses-for-nonpayment-of-tax/; *see also* Joshua D. Blank, *Collateral Compliance*, 162 U. PA. L. REV. 719, 779 (2014).

[98] Blank, *supra* note 97, at 740–42.

[99] Leaving and re-entering the United States was made a bit more difficult for Americans by the Fixing America's Surface Transportation (FAST) Act, signed into law December 4, 2015, and creating § 7345. For a discussion of how it is working see TREAS. INSPECTOR GEN. FOR TAX ADMIN., NO. 2019-30-068, IMPLEMENTATION OF THE PASSPORT PROVISIONS OF FAST ACT WAS GENERALLY SUCCESSFUL, AND THE INTERNAL REVENUE SERVICE IS WORKING ON OBJECTIVE CRITERIA FOR PASSPORT REVOCATIONS (2019).

[100] All PTIN applicants must attest they are compliant with their personal and business tax obligations, or provide an explanation if they are not. For purposes of obtaining a PTIN, an individual is in tax compliance if (1) all individual and business returns that are due have been filed (or an extension requested) and (2) all taxes that are due have been paid (or acceptable payment arrangements have been established).

[101] NAT'L TAXPAYER ADVOC., LOW INCOME TAXPAYER CLINICS: 2023 GRANT APPLICATION AND GUIDELINES 104 (Apr. 2022).

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of collection alternatives to taxpayers who fail to come into tax filing compliance.[102] If Congress wants to promote tax compliance more broadly through the use of licenses, it should work with states to establish a framework for cooperative compliance, similar to the provisions it has enacted to allow the payment of state taxes and other state obligations through the offset of federal refunds.[103]

The IRS has payment compliance provisions that apply to its employees, but these provisions do not have the force of immediate termination of § 1203.[104] Any new federal legislation should include filing compliance for both timeliness and accuracy and should cover not only all federal employees, but also federal contractors. Congress should seek to extend these requirements to state employees and local employees based on the benefits provided to those governments by the federal government through the offset provisions of § 6402.[105] This is a cost-effective mechanism for increasing compliance from a group of individuals who should model compliance with the tax laws. Government employees, at any level, should lose the privilege of government employment if they cannot comply with this most basic function of citizenship which funds their positions. This fruit is low hanging and the failure of any government employee or contractor to timely file and pay the proper amount of taxes reflects poorly on the government as a whole. Any provisions of the type described here should provide for mitigation of sanctions in appropriate circumstances.

We have been learning since RRA 98 how to legislate to withhold benefits. We do not need to punish IRS employees with the threat of termination of employment in order to promote appropriate behavior. The lessons learned from other forms of promoting taxpayer, practitioner, and IRS employee behavior, can be used to improve tax compliance without only using a stick to severely punish IRS employees and harm the system of tax compliance.

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[102] Withholding Compliance Program, I.R.M. 5.19.11; *but see* Vinatieri v. Comm'r, 133 T.C. 392 (2009) (requiring that the IRS not continue with levy in the face of noncompliance because hardship provision of I.R.C. § 6343 still applies even if taxpayer is noncompliant).

[103] *See* I.R.C. § 6402(e). For a broader discussion of the scheme of the offset of federal refunds see Keith Fogg, *The Role of Offset in the Collection of Federal Taxes*, 25 FLA. TAX REV. 1 (2021).

[104] Standard Tax Compliance Checks for Suitability and Monitoring, I.R.M. § 25.29.1.

[105] Fogg, *supra* note 103.

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VII. SECTION 1203 AND TAXPAYER RIGHTS

Subsequent to the passage of RRA 98 Congress amended § 7803 to add a list of ten taxpayer rights. The list of ten deadly sins and ten taxpayer rights do not overlap. Each addresses a different matter. Yet, we should hope that the items deemed so inappropriate in nature as to require the removal of IRS employees from their job would in some ways foster taxpayer rights. This section seeks to look at the intersection of the two provisions.

The two § 1203 provisions that have had the most impact, (8) failure to timely file a return and (9) filing a return with a willful understatement, have little, if anything, to do with taxpayer rights. The prohibition of these two acts provide no direct protection to taxpayers unless you view the removal of non-tax compliant employees as a form of taxpayer protection.

Other provisions of § 1203 directly implicate taxpayer rights. For instance, protecting taxpayers from harassment, from wrongful seizure, from civil rights violations, from misstatements, from assault, etc. all provide important protections to taxpayers.

Because TIGTA does not capture the number of allegations of these types of behavior and because the number of terminations resulting from these provisions remains low, the benefits to taxpayer from these § 1203 provisions is difficult to quantify. Nonetheless, the sentiment of the legislation does indicate a significant effort to protect taxpayer rights. Section 1203 puts a premium on taxpayer rights by imposing such a high penalty for cases in which taxpayer rights have demonstrably been violated in one of the ways described in the statute.

If Congress revises § 1203, it should examine the provisions it added to the Internal Revenue Code in 1988, 1996, and 1998 specifically seeking to protect taxpayer rights and tie the protection of those rights into the behavior of IRS employees. Congress should review the legislation it passed in the name of taxpayer rights prior to 2015 when it added § 7803 and link the protection of the rights identified in § 7803 with protection from the behavior of IRS employees that undermines those rights. Now that Congress has identified ten taxpayer rights in need of protection it has an opportunity to protect those taxpayer rights based on the specific roadmap for those rights created by § 7803.

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VIII. CONCLUSION

When Congress passed § 1203, it sought to curb perceived IRS abuses and to restore the public's faith in the IRS. It focused only on the behavior of IRS employees to the exclusion of many more important players in the tax system and created a stick to change their behavior with no carrots. Rather than making employees feel they were part of an important team of the federal government, helping the process of funding government operations, the legislation changed IRS culture, to make IRS employees feel they were under attack. IRS employees became defensive, and it reflected in their productivity.

We learned lessons of treating important federal workers poorly in the way members of the armed forces were treated during the Vietnam War. The lessons we learned from the mistreatment of active military and veterans during the Vietnam War have helped us to shape a national consciousness of support for these groups. While we may never love and honor the people who collect taxes the same way we do those who protect us in military conflicts, we might find that treating IRS employees with respect and acknowledging the important work they do goes further than beating them with a stick, like § 1203.

We deserve high levels of tax compliance by IRS employees and appropriate behavior. We should remove employees who cannot meet those standards; however, better ways of achieving those goals exist than the system created by § 1203. It's time to find those better ways so we can improve tax administration.

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