

TEMPLE LAW REVIEW SYMPOSIUM TAXPAYER RIGHTS: ALL THE ANGLES FOREWORD

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On Friday, October 26, 2019, nearly twenty tax scholars, practitioners, and government officials representing federal, state, and municipal authorities gathered at Temple University Beasley School of Law in Philadelphia to discuss taxpayer rights before an audience of nearly one hundred scholars, practitioners, and students. The occasion was the *Temple Law Review* Symposium, which aimed to shine a spotlight on the U.S. Taxpayer Bill of Rights (TBOR) and provoke an examination of its content and import from a variety of perspectives.

The TBOR is a compilation of ten taxpayer rights that are now part of the text of the Internal Revenue Code (the Code) itself¹ and that were adopted by the IRS even before they were made a part of the Code.² In addition to the Federal TBOR, at least forty-three states and some municipalities, including New York City, have TBORs of their own.³ The Symposium examined both the promise and the reality of TBORs at all three levels—federal, state, and municipal—and included perspectives from scholars, practitioners who represent

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1. I.R.C. § 7803(a)(3) (2018).

2. The IRS adopted the TBOR in June 2014. I.R.S. News Release, IR-2014-72 (June 10, 2014), <http://www.irs.gov/pub/irs-news/IR-14-072.pdf> [<http://perma.cc/WP42-2KQC>]. Section 7803(a)(3) was added to the code as part of the PATH Act in December 2015. Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, Div. Q, § 401, 129 Stat. 3040, 3117 (codified as amended at I.R.C. § 7803(a)(3)). The TBOR is now reproduced in Publication 1, which accompanies IRS communications with taxpayers. IRS, PUB. 1, YOUR RIGHTS AS A TAXPAYER: THE TAXPAYER BILL OF RIGHTS, <http://www.irs.gov/pub/irs-pdf/p1.pdf> [<http://perma.cc/2MDN-4ZM5>].

3. See Peter L. Faber, *Using Taxpayer Bill of Rights Laws*, 38 STATE TAX NOTES 947 (2017).

taxpayers, and government officials. Although taxpayer rights have been discussed at conferences and professional gatherings for several years now, this Symposium was the first full-day event devoted entirely to an examination of taxpayer rights in the United States.

The Symposium was structured as a series of panels bracketing the keynote address delivered by Nina Olson, the U.S. National Taxpayer Advocate and the mother of taxpayer rights in the United States. Without her, the Federal TBOR would almost certainly not exist today and “taxpayer rights” would be little more than a phrase used to adorn the title of aspirational tax legislation. Nina’s advocacy for taxpayer rights, which she sees as crucial to the legitimacy of the tax system and the resulting willingness of taxpayers to comply with its provisions,⁴ is what gave the TBOR life.

The Symposium began with an introduction in which I posed and then attempted to answer three questions. First, why are taxpayer rights important? Second, why are TBORs themselves important? And third, why is having a Symposium on taxpayer rights in the United States important?

The answers to the first and second questions are that taxpayer rights are important because taxpayer rights are human rights, and TBORs are important because they make patent and operationalize those rights.⁵ The answer to the third question is that having a Symposium on taxpayer rights in the United States is important because the United States has been comparatively slow to embrace the concept of taxpayer rights.⁶ Gathering noted U.S. scholars, practitioners, and government officials to discuss the concept and then create a written compendium of salient aspects of their discussion will advance the cause of taxpayer rights and provide a valuable resource for further development.

Study of the concept of taxpayer rights as an independent aspect of tax policy began in 1988, when the Organisation for Economic Co-operation and Development (OECD) decided to survey its member countries to find out whether and to what extent their laws protected taxpayer rights.⁷ The results of that survey were published in 1990 and eventually resulted in the adoption of taxpayer charters by many countries.⁸ Nevertheless, until 2015 the list of those countries did not include the United States.⁹ To be sure, the United States had

4. See, e.g., Nina E. Olson, *Procedural Justice for All: A Taxpayer Rights Analysis of IRS Earned Income Credit Compliance Strategy*, 22 ADVANCES TAX’N 3–7 (2015), http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/AdvancesTaxation_Vol22_Olson.pdf [<http://perma.cc/ZK9E-8JG9>].

5. Nina Olson herself has characterized taxpayer rights as human rights. Nina Olson, *A Brave New World: The Taxpayer Experience in a Post-Sequester IRS*, 139 TAX NOTES 1189, 1189–90 (2013).

6. See *infra* notes 9–13 and accompanying text.

7. TAXPAYER ADVOCATE SERV., TOWARD A MORE PERFECT TAX SYSTEM: A TAXPAYER BILL OF RIGHTS AS A FRAMEWORK FOR EFFECTIVE TAX ADMINISTRATION 6 (2013), <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Toward-a-More-Perfect-Tax-System-A-Taxpayer-Bill-of-Rights-as-a-Framework-for-Effective-Tax-Administration.pdf> [<http://perma.cc/RED3-WT6J>].

8. See *id.* at 6–8; see also ORG. FOR ECON. CO-OPERATION & DEV., TAXPAYERS’ RIGHTS AND OBLIGATIONS: A SURVEY OF THE LEGAL SITUATION IN OECD COUNTRIES (1990).

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

enacted legislation bearing the name Taxpayer Bill of Rights,¹⁰ and provisions that arguably gave taxpayers some rights were scattered throughout the Code.¹¹ But there was no systematic listing of those rights, and no identification of the provisions as securing rights, until Congress enacted Section 7803(a)(3) in 2015, implementing the suggestion that Nina first made in 2007.¹² Enactment of Section 7803(a)(3) marked the first time that the words “taxpayer rights” appeared in the Code.¹³ As Rick Greenstein and I have argued elsewhere, the enactment of Section 7803(a)(3) and its use of the words “taxpayer rights” has the potential to transform tax administration.¹⁴ As the Symposium discussion and resulting scholarship demonstrates, in some ways it already has.

The concept of taxpayer rights is now important worldwide. In November 2015, just before Congress codified the U.S. TBOR, Nina organized the first International Taxpayer Rights Conference at the National Archives in Washington, D.C.¹⁵ It was a genuinely international event, with representatives from countries as far away as Australia.¹⁶ The International Taxpayer Rights Conference has grown dramatically since 2015 and is now an annual event: the second, third, and fourth conferences took place in Vienna, Amsterdam, and

10. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6226, 102 Stat. 3342, 3730 [hereinafter TBOR 1] (current version in scattered sections of the I.R.C.) (containing the “Omnibus Taxpayer Bill of Rights,” also known as TBOR 1); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996) [hereinafter TBOR 2] (current version in scattered sections of the I.R.C.) (also known as TBOR 2); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 3000–3803, 112 Stat. 685, 726–83 [hereinafter TBOR 3] (current version in scattered sections of the I.R.C.) (containing “Taxpayer Protection and Rights,” also known as “Taxpayer Bill of Rights III” or TBOR 3); see also Abe Greenbaum, *United States Taxpayer Bills of Rights 1, 2, and 3: A Path to the Future or Old Wine in New Bottles?*, in TAXPAYERS’ RIGHTS: AN INTERNATIONAL PERSPECTIVE 347 (Duncan Bentley ed., 1998). As Greenbaum observed, although the Congress of the United States enacted three pieces of legislation that bore the name “Taxpayer Bill of Rights” in 1988, 1996, and 1998, “[t]he names of these pieces of legislation are misnomers. In all three instances the legislation was merely an omnibus law which provided a variety of procedural changes to the [Code] without any coherent scheme.” Greenbaum, *supra*, at 347.

11. See, e.g., I.R.C. §§ 6212(a), 6313, 6320(a), 6330(a), 6330(b)(1), 7431–7435 (2018).

12. 1 NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS 479 (2007), http://www.irs.gov/pub/tas/arc_2007_vol_1_legislativerec.pdf [<http://perma.cc/LHA2-U8UN>] [hereinafter 1 NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT] (making the adoption of a TBOR her first Key Legislative Recommendation).

13. See I.R.C. § 7803(a)(3).

14. Alice G. Abreu & Richard K. Greenstein, *Embracing the TBOR*, 157 TAX NOTES 1281 (2017); Alice G. Abreu & Richard K. Greenstein, *The U.S. Taxpayer Bill of Rights: Window Dressing or Expression of Justice?*, J. TAX ADMIN., Nov. 2018, at 25.

15. See TAXPAYER RIGHTS CONFERENCE, 2015 Location Information: Washington, D.C., <http://taxpayerrightsconference.com/2015-archive/location-information/> [<http://perma.cc/5J38-2P6T>] (last visited May 30, 2019); TAXPAYER RIGHTS CONFERENCE, *Archive—2015 Agenda: Washington, D.C.*, <http://taxpayerrightsconference.com/2015-archive/agenda/> [<http://perma.cc/TLT2-X9AS>] (last visited May 30, 2019).

16. See TAXPAYER RIGHTS CONFERENCE, *Archive—2015 Speakers: Washington, D.C.*, <http://taxpayerrightsconference.com/2015-archive/speakers/> [<http://perma.cc/96DK-NW66>] (last visited May 30, 2019).

Minneapolis, respectively, in 2017, 2018, and 2019,¹⁷ and the fifth is coming up in 2020 in Pretoria, South Africa.

Moreover, Nina's advocacy for taxpayer rights has continued unabated despite the enactment of Section 7803(a)(3). For example, every Annual Report since 2014 has included a "Taxpayer Rights Assessment" at the very beginning.¹⁸ Each Assessment lists the ten TBOR rights and then provides data that measures or indicates how the IRS has performed on that right.¹⁹ Moreover, in the Purple Book of legislative recommendations that was first a part of the 2017 Annual Report (issued in January 2018), Nina returned to the codification theme she first raised in 2013, this time recommending that Congress recodify the TBOR to remove it from the bowels of the administrative provisions of the Code (Section 7803(a)(3)) and make it Section 1 of the Code, thereby signaling its importance.²⁰ She also recommended codification of a requirement that the IRS train its employees on taxpayer rights.²¹

In the Purple Book that accompanied the 2018 Annual Report, issued in February 2019, Nina expanded her 2017 recommendations. This time she recommended a change in the language of the codified TBOR, so that instead of imposing a requirement on the Commissioner to ensure the IRS employees act consistently with taxpayer rights, the Code would impose that requirement

17. See TAXPAYER RIGHTS CONFERENCE, *Conference Archive*, <http://taxpayerrightsconference.com/conference-archive/> [<http://perma.cc/64J6-XQ3C>] (last visited May 30, 2019).

18. See, e.g., 1 NAT'L TAXPAYER ADVOCATE, 2014 ANNUAL REPORT TO CONGRESS, at xv (2014), <http://taxpayeradvocate.irs.gov/Media/Default/Documents/2014-Annual-Report/Volume-One.pdf> [<http://perma.cc/V6FT-FFFS>]. As she explained:

The *Taxpayer Rights Assessment* contains selected performance measures and data organized by the ten taxpayer rights and is another important step toward integrating taxpayer rights into tax administration.

This *Taxpayer Rights Assessment* is a work in progress. The following measures provide insights into IRS performance; but they are by no means comprehensive. In some instances, data is not readily available. In other instances, we may not yet have sufficient measures in place to evaluate adherence to specific taxpayer rights. And, despite what the numbers may show, we must pay particular attention to the needs of taxpayers who lack access to quality service even if overall performance metrics are improving. This *Taxpayer Rights Assessment* will grow and evolve over time as data becomes available and new concerns emerge.

Id.

19. See *id.* at xv–xx. For example, with respect to the first right, the right to be informed, the Assessment set forth the average number of days individual and business correspondence remains in inventory as well as the inventory overage. *Id.* at xv. Interestingly, the 2014 Assessment revealed that the total volume of individual correspondence was greater than that of business correspondence in 2014 (5,700,132 versus 3,471,571); moreover, individual correspondence spent an average of 57.6 days in inventory and was subject to an average overage of 63.6%, whereas business correspondence spent an average of 39 days in inventory and was subject to an average overage of only 17.5%. *Id.*

20. NAT'L TAXPAYER ADVOCATE, PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 5–6 (2017) [hereinafter NAT'L TAXPAYER ADVOCATE, 2018 PURPLE BOOK], http://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-ARC/ARC17_PurpleBook.pdf [<http://perma.cc/GP35-2X6C>].

21. *Id.* at 7.

directly on all IRS officers and employees.²² In addition, she recommended that a requirement that IRS employees receive training on taxpayer rights be codified as part of Section 1 itself, rather than as an amendment to another provision.²³ In short, Nina's advocacy for taxpayer rights did not stop with the enactment of Section 7803(a)(3). She has not only continued her advocacy but also has both intensified and refined it.

Nevertheless, until recently the very existence of the TBOR had gone virtually unnoticed by U.S. taxpayers and tax professionals alike. That changed dramatically in November 2017, when Facebook filed a complaint against the IRS in federal district court in San Francisco.²⁴ In that action, Facebook cited the TBOR as the basis for one of the three counts in its complaint.²⁵

Facebook claimed that the fifth TBOR right, the right to appeal a decision of the Internal Revenue Service in an independent forum, gave it a right to have its transfer pricing dispute heard by the IRS Office of Appeals rather than proceeding directly to litigation, and it asked for "mandamus-like" relief to compel the IRS to transfer the case to Appeals.²⁶ Although the court eventually found for the government,²⁷ the filing of the action was itself significant. Both Facebook's decision to ground one of the three counts in its complaint on the TBOR (the other two counts were grounded on the Administrative Procedure Act) and the court's serious engagement with that claim, which took up the bulk

22. NAT'L TAXPAYER ADVOCATE, 2019 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 3–5 (2018) [hereinafter NAT'L TAXPAYER ADVOCATE, 2019 PURPLE BOOK], http://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_PurpleBook.pdf [<http://perma.cc/4EFC-8ECH>].

23. *Id.* In both the 2018 and 2019 Purple Books Nina recommended codification of the IRS mission statement as Section 1 of the Code and a change to that statement that would emphasize "application" rather than "enforcement" of the tax laws; she reasoned that application includes enforcement but also includes respect for taxpayer rights. *See* NAT'L TAXPAYER ADVOCATE, 2018 PURPLE BOOK, *supra* note 20, at 5–6; NAT'L TAXPAYER ADVOCATE, 2019 PURPLE BOOK, *supra* note 22, at 3–5. Specifically, in the 2018 Annual Report she recommended that the codified mission statement—new Section 1(b)—read as follows:

The Internal Revenue Service shall aim to provide taxpayers with top-quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all and with due regard for taxpayer rights as described in subsection (a)(1) and other provisions of this title.

NAT'L TAXPAYER ADVOCATE, 2019 PURPLE BOOK, *supra* note 22, at 5.

24. *See* Complaint for Declaratory and Injunctive or Mandamus-Like Relief, Facebook, Inc. v. IRS, No. 17-cv-06490-LB, 2018 WL 2215743 (N.D. Cal. May 14, 2018) (filed Nov. 8, 2017); *see also* Amanda Athanasiou, *Facebook Files Administrative Procedure Action Lawsuit Against IRS*, 2017 WWD 217-2, Tax Analysts DOC 2017-95464, (Nov. 10, 2017), <http://www.taxnotes.com/worldwide-tax-daily/transfer-pricing/facebook-files-administrative-procedure-lawsuit-against-irs/2017/11/10/1x9tm?highlight=Facebook> [<http://perma.cc/J8VN-JGKV>]. The fact that the *Tax Notes* headline itself did not even mention the TBOR is evidence of its relative obscurity at that time.

25. Complaint for Declaratory and Injunctive or Mandamus-Like Relief at 2–3, Facebook, Inc. v. IRS, No. 17-cv-06490-LB, 2018 WL 2215743, at *18 (N.D. Cal. May 14, 2018).

26. *See id.* at 2–4.

27. Facebook, Inc. v. IRS, No. 17-cv-06490-LB, 2018 WL 2215743, at *18 (N.D. Cal. May 14, 2018).

of its opinion,²⁸ show that the TBOR has the power to transform tax administration. Three out of the five papers that appear in this Symposium issue discuss the Facebook litigation.²⁹

As the title of the Symposium suggests, our goal was to examine the concept of taxpayer rights from various perspectives.³⁰ To that end, the substantive portion of the Symposium began with an examination of the Federal TBOR, as now enshrined in the Code. In the first panel we heard from five scholars who have different views and different perspectives on the role of the Federal TBOR in tax administration.³¹ That was followed by a second panel in which we heard about the state and municipal TBORs; participants in that panel provided both taxpayer and government perspectives on the effectiveness and potential uses of TBORs.³² After a short lunch break came the highlight of the Symposium, the keynote address, delivered by the mother of taxpayer rights herself, Nina Olson. The final panel of the day focused on operationalizing taxpayer rights.³³ It began with a description of the steps the IRS has taken to make tax information accessible to individuals with limited English proficiency, which operationalizes the right to be informed. It then moved to consider the work of lawyers who are operationalizing taxpayer rights through their work with taxpayers, both pro bono and in low-income taxpayer clinics (LITCs).

The works that are a part of this Symposium issue are representative of the breadth and quality of the discussion that took place. This compendium begins with an important article by T. Keith Fogg, currently the Director of Harvard Law School's LITC.³⁴ Keith brings decades of experience as a litigator on both sides of tax controversies. For the first thirty years of his legal career Keith was

28. The TBOR discussion took up more than 90% of the court's opinion. *See id.* at *1–16. The court seemed to find it easy to deny the two Administrative Procedure Act claims but took the time to provide a thoughtful and detailed analysis of the TBOR claim. *See id.* at *1–18.

29. *See* Leslie Book, *Giving Taxpayer Rights A Seat at the Table*, 91 TEMP. L. REV. 759, 766 (2019); T. Keith Fogg, *Can the Taxpayer Bill of Rights Assist Your Clients?*, 91 TEMP. L. REV. 705, 710–14 (2019); Richard K. Greenstein, *Rights, Remedies, and Justice: The Paradox of Taxpayer Rights*, 91 TEMP. L. REV. 743, 744–48 (2019).

30. I want to thank Professor Leandra Lederman for providing me with the title; she has a gift for titles.

31. The panelists were Professors Les Book (Villanova), Keith Fogg (Harvard LITC), Rick Greenstein (Temple), Kristin Hickman (Minnesota), and Leandra Lederman (Indiana Bloomington). The panel was moderated by my colleague, Professor Andrea (Andy) Monroe.

32. The panel was organized and moderated by Stewart Weintraub (Chamberlin, Hrdlicka and Adjunct Professor in Temple's Graduate Program in Taxation). The panelists were Peter Faber (McDermott Will & Emery), Tom Gohsler (Acting Chief Counsel to the PA Department of Revenue), Marlene Barnhart (Chief, Conference and Appeals, NJ Division of Taxation), Eunkyong Choi (NYC Taxpayer Advocate), and Catherine Martin (Community Legal Services, Philadelphia Property Tax Foreclosure Program).

33. The participants in the panel were Frank Agostino and Valerie Vlasenko (Agostino & Associates), Professor Michelle Drumbl (Washington & Lee LITC), Professor Jen Lee (Sheller Center for Social Justice, Temple), Professor Christine Speidel (Villanova LITC), and Anna Tavis (Brooklyn Legal Services LITC). The panel was moderated by Len Reiser (Program Coordinator, Sheller Center for Social Justice, Temple).

34. *See* Fogg, *supra* note 29.

an advocate for the IRS; he was a lawyer in the IRS Office of Chief Counsel, eventually becoming District Counsel in his hometown of Richmond, Virginia. After retiring from the IRS, Keith became an advocate for taxpayers when he assumed the directorship of Villanova University Charles Widger School of Law's LITC. He has continued that advocacy in his current position at the Harvard Law School.

Keith's article explores what he describes as the central question raised by the TBOR: "Now that taxpayers have these rights, . . . [w]hat good do they do?"³⁵ The article is important because of its extraordinary breadth and because of the depth of knowledge and experience that Keith brings to the examination of that central question. Keith begins by examining several recent cases in which the taxpayer has "sought relief, at least in part, based on one or more of the rights granted in TBOR."³⁶ The cases include but are not limited to *Facebook, Inc. v. Internal Revenue Service*,³⁷ and Keith's willingness to venture outside of tax to find useful analogies offers important insights.

Keith's article is also important for its identification of one precise area of tax in which the TBOR has the potential to make the greatest difference: collections. Keith thinks that the TBOR can guide the IRS in the many policy decisions it has to make in administering this area of the tax law.³⁸ Appropriately, Keith also explores the TBOR's potential application in Collection Due Process cases. He concludes by examining the possible application of the TBOR to six specific settings, ranging from IRS training to the award of attorney's fees and even to matters not involving the Code itself.³⁹ The article provides a thorough and wide-ranging analysis that will serve as a valuable referent for years to come, as advocates for taxpayers begin to work with and test the uses and limits of the TBOR.

My colleague and frequent co-author, Professor Rick Greenstein, considers a less specific aspect of the potential litigation the codified TBOR can beget. Rick first uses the *Facebook* litigation as a frame for continuing the analysis of how the codification of the ten TBOR rights can provide taxpayers with an enhanced normative basis for enforcement of those rights, despite the taxpayer's loss in that specific case.⁴⁰ He engages in an in-depth analysis of the magistrate judge's opinion and shows that what the judge does is precisely what our scholarship suggests judges should do in evaluating taxpayer claims for enforcement of the TBOR: evaluate each claim in a pragmatic, case-by-case manner, considering multiple factors, as we believe is generally appropriate in the interpretation of any standard.⁴¹

35. *Id.* at 707.

36. *Id.* at 708.

37. No. 17-cv-06490-LB, 2018 WL 2215743 (N.D. Cal. May 14, 2018).

38. Fogg, *supra* note 29, at 726–29.

39. *Id.* at 733–41.

40. Greenstein, *supra* note 29, at 744–53.

41. *Id.* at 753–55.

But then Rick extends the analysis by identifying a paradox. The paradox is that the attempt to achieve justice through deployment of a pragmatic, case-by-case analysis almost guarantees that justice will not be done in all cases.⁴² He traces that paradox to the demands of justice itself. He reasons that a just system must be administrable, but an administrable system cannot possibly ensure respect for all taxpayer rights all the time—hence the paradox. Using *Facebook* as an example, Rick illustrates and illuminates this paradox. His analysis would seem to apply to any situation in which enforcement is a matter of the application of standards and can be extended to areas beyond the tax law.

In his contribution to the Symposium, Professor Les Book steps back from the litigation and controversy fray to consider the role the TBOR might play in the formulation of administrative guidance.⁴³ He moves beyond the taxpayer-IRS dyad to consider the systemic effects the TBOR might have and identifies an additional way in which the Taxpayer Advocate Service can play an important part in operationalizing taxpayer rights.⁴⁴ Specifically, Les makes a compelling argument in support of the proposition that

Congress should explicitly require the IRS to consider the impact of guidance on taxpayer rights prior to promulgating regulations and other guidance. In so doing, Congress should rely on and expand the role of the IRS office that is deeply associated with the increased importance of taxpayer rights, the Taxpayer Advocate Service (TAS).⁴⁵

Les's experience representing taxpayers as well as his longstanding scholarly interest in taxpayer rights have combined to produce an innovative and apt proposal—the sort of proposal which, once articulated, prompts the thought: “Of course; why didn’t I think of that?”

Les's proposal is even more compelling now that Nina has announced that she will retire from the IRS, and her position as National Taxpayer Advocate, as of July 31, 2019.⁴⁶ As Les observed before Nina announced her retirement:

Formalizing the role of TAS will help ensure a systemic approach to taxpayer rights and ensure that the agency at large considers the interest of taxpayers that may not have the resources, skills, or access to engage in the rulemaking process. In addition, an ancillary benefit of my proposal is that it strengthens TAS at a time when it has had a charismatic and powerful National Taxpayer Advocate (NTA), Nina Olson, whose departure may leave TAS with a shortfall in the soft powers of persuasion that are associated with the office today.⁴⁷

His observation is spot on.

42. *Id.* at 755–58.

43. *See generally* Book, *supra* note 29.

44. *See id.* at 783–87.

45. *Id.* at 761.

46. Nina E. Olson, *A Personal Message from the National Taxpayer Advocate*, TAXPAYER ADVOC. SERV.: NTA BLOG (Mar. 1, 2019), <http://taxpayeradvocate.irs.gov/news/nta-personal-message> [<http://perma.cc/U9T3-RL7Q>].

47. *See* Book, *supra* note 29, at 761–62.

The second panel of the Symposium addressed state and local TBORs, and was conducted in an innovative way. The panel chair, Stewart Weintraub, developed a set of questions to structure a discussion among the panelists, who were able to provide their differing perspectives as representatives of taxpayers or the government, and their experience with state TBORs, local TBORs, or no TBOR at all. This structure, combined with the wide array of perspectives of the panel members, highlighted how the enactment of a TBOR might change practice. Unfortunately, although the format produced a captivating discussion, it did not lend itself to the production of specific papers, so none forms a part of the issue. Nevertheless, an audio recording of the session is available free of charge at <http://bit.ly/2ZgT9VT>. In addition, the slide deck that Stewart used to guide the panelists through a discussion of the key issues is reproduced as Appendix A hereto; it should prove useful in helping others identify and work through the issues and opportunities presented by state and local TBORs.⁴⁸

In her keynote address—the highlight of the Symposium—the National Taxpayer Advocate, Nina Olson, traced the path that led to the adoption of the TBOR by the IRS and, subsequently, to its enactment by Congress.⁴⁹ It is a captivating story that explains the evolution of taxpayer rights in the United States in ways many of us had not theretofore known. Although it is unfortunate that the address is not available in print, we are nevertheless fortunate to have captured it on video. The video can be accessed free of charge at http://www.youtube.com/watch?v=Nz4lR_ucgHU. I recommend it to anyone interested in understanding how taxpayer rights came to be operationalized in the United States as well as to anyone who wants to experience the force of nature that is Nina Olson.

The final panel of the day provided various perspectives on how taxpayer rights have been operationalized in ways that directly affect taxpayers' lives, both through the actions of the IRS and through the work of tax lawyers who serve the population of low-income taxpayers. The panel began with a presentation by my colleague Jen Lee. Jen described and analyzed the ways in which the IRS has operationalized the first TBOR right—the right to be informed—by producing tax forms and information in a number of languages, but most extensively in Spanish. Her essay, *Operationalizing Language Access Rights for Limited English Proficient Taxpayers*, provides a detailed and important assessment of just what the IRS has been able to achieve—the good news—but is balanced by an equally detailed and important assessment of the work that remains to be done—the bad news.⁵⁰ Because the essay begins by explaining the legal framework that provides the IRS's language access obligations, which predates and exists outside of the TBOR,⁵¹ the essay will

48. See *infra* Appendix A.

49. Nina E. Olson, Nat'l Taxpayer Advocate, Keynote Address at the 2018 *Temple Law Review* Symposium: Taxpayer Rights in the United States: All the Angles (Oct. 26, 2018), http://youtu.be/Nz4lR_ucgHU.

50. See generally Jennifer J. Lee, *Operationalizing Language Access Rights for Limited English Proficient Taxpayers*, 91 TEMP. L. REV. 791 (2019).

51. *Id.* at 793–96.

serve as a comprehensive resource for advocates who want to know what tools exist for limited English proficient (LEP) individuals generally, as well as taxpayers in particular. I learned a lot from it.

But the essay does much more than describe the IRS's obligations and accomplishments. It also precisely illustrates the limits of the IRS's current efforts. For example, while it notes that the IRS's Spanish language website is not a mere translation of the English—it appropriately emphasizes different items that reflect the likely interests of Spanish speaking LEP taxpayers (such as the Individual Taxpayer Identification Number (ITIN))—it also points out that the Spanish website stops short of providing comprehensive information in Spanish.⁵² For example, on topics “such as the ‘Free File’ software or ‘ordering a tax return transcript,’ after a brief explanation in Spanish, the links to further forms and information are in English.”⁵³ And Form 1040 is not translated into Spanish.⁵⁴

Next, Professor Michelle Drumbl, who serves as the Director of the Tax Clinic at Washington and Lee University School of Law, provided both history and context for the development and importance of taxpayer rights. Her essay, *Tax Attorneys as Defenders of Taxpayer Rights*, begins by noting that while most tax lawyers function principally as advisors, the tax lawyers who represent clients in LITCs work principally as advocates.⁵⁵ She then illustrates both the need for advocates and the importance of taxpayer rights by describing the situation that existed before the first legislation bearing the name Taxpayer Bill of Rights was enacted in 1988.⁵⁶ This includes a heartbreaking story of a widow whose husband was driven to suicide by the IRS's claim that the couple owed additional taxes: the husband killed himself so that his wife could use his life insurance proceeds to satisfy an IRS debt that it later turned out they did not owe.⁵⁷

Michelle's essay makes an important contribution by detailing the work of an LTC lawyer, proving the observation that “tax lawyers are today's poverty lawyers.”⁵⁸ This portrait of a tax lawyer as an advocate is one that is important for policymakers interested in issues of inequality and access to justice to understand, but it is also important for law students and others contemplating a career in tax. Michelle illustrates and explains the many ways in which LITCs and the lawyers and students who work in them are operationalizing the right of taxpayers to “pay no more than the correct amount of tax,” the “right to

52. *Id.* at 800.

53. *Id.*

54. *Id.* at 805.

55. Michelle Lyon Drumbl, *Tax Attorneys as Defenders of Taxpayer Rights*, 91 TEMP. L. REV. 813, 814 (2019).

56. *Id.* at 816–17. See also *supra* note 10 and accompanying text for a brief discussion of TBOR 1.

57. Drumbl, *supra* note 55, at 816–17.

58. Professor Francine Lipman has made this remark in public at ABA meetings when I have participated in panel discussions with her and I want to credit her with the observation. Her published work exemplifies the accuracy of the observation. See, e.g. Francine J. Lipman, *(Anti)Poverty Measures Exposed*, 21 FLA. TAX REV. 389 (2017).

challenge the IRS's position and be heard," the "right to appeal an IRS decision in an independent forum," the right "to representation," and the right to "a fair and just tax system" (the third, fourth, fifth, ninth and tenth taxpayer rights).⁵⁹ Her account confirms not only the importance of the statutorily mandated IRS funding of LITCs but also the particular contributions that academic LITCs can make to operationalizing taxpayer rights. Academic LITCs are training grounds for students who will be equipped to represent low-income taxpayers pro bono even if they do not choose to practice in an LTC or otherwise enter public service.

In sum, the articles and essays in this issue accomplish precisely what I hoped the Symposium would accomplish. They provide a view of taxpayer rights from a number of different perspectives and will serve as a useful primer for anyone wanting or needing to educate themselves on the subject. They also offer suggestions and data points that can inform the formulation of future tax policy. I am exceedingly proud of this compendium and thankful to the Volume 90 and Volume 91 *Temple Law Review* editorial boards for asking me to serve as their faculty advisor for the Symposium that produced this issue, and for their work on putting on the Symposium and bringing this issue to press. Congratulations on a job very well done.

59. See Drumbl, *supra* note 55, at 818–29 (quoting I.R.C. § 7803(a)(3) (2018)).

APPENDIX A**TEMPLE TBOR SYMPOSIUM**

James Beasley School of Law
Temple University
October 26, 2018

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Agenda

- Privacy/Confidentiality
- Equitable Powers
- Right to Meet with Department Representative
- What Must a Department Provide to a Taxpayer
- Power and Independence of the Taxpayer Advocate

Agenda (continued)

- Precedential Value of Administrative Decisions
- Advisory Opinions
- Department Violations and Taxpayer Remedies
- Created by Statute or Administrative Action
- What is Not in the TBOR and Should Be
- What is in the TBOR and Should Not Be

Agenda (continued)

- Application of Payments
- Power to Abate Interest and Penalty
- Use to Leverage Assistance When Resolving Disputes
- TBOR Benefits, past and future

Citations

- New Jersey

Taxpayer Bill of Rights, P.L. 1992,c. 175,
sect. 8

Statement of Taxpayer's Rights Procedures
and Time Limits, N.J. Rev. Stat., Sect. 54:48-6

State Tax Uniform Procedure Law, R.S.
54:48-1, et. seq.

Citations

- New York State

Taxpayer Bill of Rights, Tax Law sects. 3000-
3013

- New York City

Taxpayer Bill of Rights,
https://www1.nyc.gov/site/finance/about/nyc_taxpayer_bill_of_rights.page

Citations

- Pennsylvania

Sunshine Act 65 Pa.C.S.A. sect 701, et. seq

Taxpayer Bill of Rights, Act of December
20, 1996 (P.L. 1504, No. 195)

Local Taxpayer Bill of Rights, 53 Pa.C.S.A.
sect. 8421, et. seq.

Privacy/Confidentiality

- Are taxpayer records confidential?
- Are there any circumstances when taxpayer records become public record?
- Are administrative hearings open to the public?
- Are administrative hearings recorded and available to the public?
- If taxpayer records are confidential, what is the basis for interstate information exchanges?

Equitable Powers

- Does an administrative board have equitable powers?
- If yes, what is the nature and extent of those equitable powers?
- How often will an administrative board exercise its equitable powers?
- If an amended return is filed, must it be processed?
- Does an amended return seeking a refund substitute for a refund petition

Right to Meet with the Department

- What types of audits does the Department do, field/office/both?
- For an office audit, does the taxpayer have a right to be present?
- What rights does a taxpayer have to meet with the auditor and/or supervisor?
- What rights does a taxpayer have when encountering a “rogue” auditor?

Access to Department Documents

- During the audit, to what documents is a taxpayer entitled?
- At the conclusion of the audit, to what documents is a taxpayer entitled?
- Is the taxpayer ever entitled to a copy of a department audit manual? When?
- If there are any private rulings issued by the Department applicable to issues involved with the audit, will the Department provide a copy

Access to Department Documents

- Taxpayer undergoing a sales tax audit is being assessed for not collecting sales tax from certain customers, can the taxpayer ever find out whether the purchaser was assessed and paid use tax for the same transaction
- Taxpayer believes it is being treated differently from other similarly situated taxpayers, how can taxpayer find out whether that is correct?

Taxpayer Advocate

- Does the state have a taxpayer advocate?
- What is the role of the taxpayer advocate?
- What are the procedures by which a taxpayer can obtain the services of the taxpayer advocate?
- Should the taxpayer advocate be independent of the Department?

Taxpayer Advocate

- Is the taxpayer advocate independent of the Department?
- How is that independence assured?

Administrative Decision Precedential

- Are administrative decisions precedential?
- Are administrative decisions public record?
- Do any of the tax services publish the administrative decisions?
- If not, how does a taxpayer know about administrative decisions of other cases?

Advisory Opinions

- Does your department issue advisory opinions?
- What criteria, if any, govern whether an advisory opinion is issued?
- Is an advisory opinion binding upon the Department?
- Are there any time limits limiting advisory opinions?

Violations and Remedies

- What are the most common violations of the various TBORs committed by the Department?
- What are the taxpayer's rights and remedies for such violations?

Statute or Administrative Action

- What is the source of the various TBORs?
- Does it make any difference?
- Is there any difference in the enforceability if it is based upon statute or administrative action?

Application of Payments

- When payments of delinquent taxes are made, what is the priority for application of the payments?
- What is the authority for this application, statute/regulation/policy?

Interest and Penalty

- Is there any discretion for the assessment of interest?
- Is there any authority for the abatement of interest?
- What is the burden of proof to obtain abatement of interest?
- What is the procedure?

Interest and Penalty

- Is there any discretion for the assessment of penalty?
- Is there any authority for the abatement of penalty?
- What is the burden of proof to obtain abatement of penalty?
- What is the procedure?

Interest and Penalty

- Does the state pay interest on a refund?
- If yes, what is the authority, statute/regulation/policy?
- Must it be requested or is it automatically added?

- What is not in the TBOR which should be?
- What is in the TBOR which should not be?
- What benefits do you see for TBORs past and future?

QUESTIONS?????