Bureaucratic Oppression and the Tax System
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International Taxpayer Rights Conference
Panel: Taxpayer Rights, Due Process and Procedural Justice
November 19, 2015
The Safety Net and Tax
Poverty and Tax

Major Tax Credits and Means-Tested Programs Lifted Millions Out of Poverty in 2012

Millions of people lifted above the poverty line

<table>
<thead>
<tr>
<th>Program</th>
<th>All ages</th>
<th>Children</th>
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<tbody>
<tr>
<td>Earned Income Tax Credit &amp; Child Tax Credit</td>
<td>10.3</td>
<td>5.3</td>
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<tr>
<td>SNAP (food stamps)</td>
<td>10.3</td>
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<tr>
<td>Housing assistance</td>
<td>4.0</td>
<td>1.5</td>
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<tr>
<td>Supplemental Security Income</td>
<td>5.1</td>
<td>1.5</td>
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<tr>
<td>Temporary Assistance for Needy Families</td>
<td>1.3</td>
<td>0.7</td>
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Note: Figures show the number of people lifted above the poverty line using the federal government's Supplemental Poverty Measure (SPM) with corrections for underreporting.

Poverty and Tax

Major Tax Credits and Means-Tested Programs Lifted Millions Out of ‘Deep Poverty’ in 2012

- Millions of people lifted above half the poverty line
- **All ages**
- **Children**

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<td>Earned Income Tax Credit &amp; Child Tax Credit</td>
<td>1.6</td>
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<tr>
<td>SNAP (food stamps)</td>
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Far Reaching Effect of Credits

- Austin Nichols and Jesse Rothstein, “The Earned Income Tax Credit (EITC),” Economics of Means-Tested Transfer Programs in the United States, volume 1, Moffitt. 2015

- Families receiving the tax credits do better in school, are likelier to attend college, and can be expected to earn more as adults.
  — CBPP Summary (Oct 2015)
What is bureaucratic oppression?

What agencies do? The Administrative Law Framework: Rulemaking and Adjudication
Traditional view of control of agencies: the legalistic approach

• Constitutional law, such as procedural due process and separation of powers
• Administrative law, such as the Administrative Procedure Act
• Organic agency statutes
Legalistic emphasis tends to omit some basic questions:

• How should agencies be designed?
• How should agencies implement their statutory mandates?
Bringing it Back to the IRS

• An even more basic question for IRS is what is its statutory mandate?

• How should IRS balance its interest in revenue collection with other functions associated with specific statutory provisions that require IRS to perform roles that ensure delivery of benefits?
What is oppressive behavior?

Applications for benefits or relief from liabilities that often relate to lower-income or otherwise disadvantaged taxpayers


• Math Error
• Spousal Relief
• Financial Disability Determination
• Collection Alternative Considerations
Causes of Bureaucratic Oppression—tip of the hat to Professor Rubin

• Status Differences
• Stranger Relations
• Institutional Pathologies
• Divergent Incentives
Status Differences

- Scorn
- Unwillingness to perform tasks, e.g., benefit distribution
- Attitudes toward benefits that are viewed as reward for merit differ from those that are means based
Causes-Continued

Stranger Relations

Varies greatly by agency and function within agencies

Contrast between agency officials who interact with regulated industries with benefits workers
Causes of Bureaucratic Oppression

• Institutional Pathologies - organization theory

• Red Tape: Definition?

• Distinguish between red tape and bureaucracy
Solutions?

• Constitutional Law: Due Process and Equal Protection
• Taxpayer rights: international and domestic
• Statutory rights with remedies or at least consequences for failure to follow direction
• Ombudspersons
• Public Interest Law Firms
• Private Market
Procedural Due Process: Risk of erroneous deprivation of property

- Tax law has long been carved out of expanded procedural due process protections
Constitutional Law: erroneous deprivations of property and arbitrary government actions

- *Times Changing? Two Potentially Important Cases*
  - Paeste v. Guam, 798 F.3d 1228 (9th Cir. 2015)
  - Barrows v. Burrell, 777 F.3d 106, 113-14 (2nd Cir. 2015)
Constitutional Law: erroneous deprivations of property and arbitrary government actions

• Implications for other cases: delays in releasing refunds stemming from abusive preparers, expanded math error powers, and the lack of established guidelines relating to challenging EITC freezes
Limitations of Judicial Solutions

• Requires an agency final determination; most interactions not itself subject to review
• Some IRS final determinations not subject to clear review rights: the ban on claiming EITC
• Limitations of those who could assert rights
  – Right to a Fair and Just Tax System
Limitations of Judicial Solutions

• The special case of IRS adjudications: de novo review and the perverse effect that de novo review actually largely ignores interactions between government and taxpayers
Two Successes of 1990’s Tax Reform: Tax Clinics and The Taxpayer Advocate Service
TAS and Preventing Problems

• Ruelmaking: Move to a “before the event” approach. See Book A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation 12 Florida Tax Review 518 (2012)
• What about adjudication?
• TAS: Does TAS have to be adversarial? Cooperative monitoring; TAS amicus powers
• Improving Clinics

Systemic approach to issues:

e.g., coordination of clinic litigation through resource center
Market Mechanisms

Generally two approaches:
1) Diminish scope of regulation government provides;
2) Incorporate market mechanisms into what the government does

What about partnerships between government and the private sector? Is it a problem or is this a solution?

Keys: clarify role, identify objectives, set rules, manage data (Dave Williams, CTO Intuit)