

E. The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship

Introduction

All TAS employees, including the National Taxpayer Advocate, were furloughed when the federal government shut down from October 1 through October 16, 2013. This IRS action was a departure from the agency's previous Shutdown Contingency Plan, which excepted 57 TAS employees from a possible furlough in 2011.¹ As a result, in 2013, taxpayers facing imminent hardships who could not reach TAS were at risk of suffering significant or irreparable harm, including risk to the safety to human life. A more detailed analysis of the law follows, including what we believe are flaws in the IRS's interpretation of the Antideficiency Act (ADA), the imminent dangers this interpretation posed for taxpayers, and the actions TAS took to ease the impact of the furlough.

Particular areas of concern include:

- IRS Chief Counsel interpreted the ADA to cover only the protection of public health and government property. This interpretation allowed the IRS to take certain enforcement actions for which taxpayers were unable to avail themselves of taxpayer protections.
- The IRS's narrow interpretation denied TAS the ability to fulfill its statutory mandate of assisting taxpayers facing a significant hardship as a result of IRS action or inaction.
- The furlough of all TAS employees led to multiple violations of the statutory requirement that TAS maintain confidential and separate communications with taxpayers, including opening mail addressed to TAS.

Chief Counsel's interpretation assumes the ADA permits the government (*i.e.*, the IRS) to take enforcement actions with impunity during a shutdown, actions that would carry with them significant taxpayer protections in the absence of a shutdown. Given Congress' consistent efforts to couple IRS enforcement actions with statutory protections such as levy releases, lien withdrawals, and access to the Taxpayer Advocate Service, it is reasonable to interpret the ADA as requiring where the IRS excepts employees who will take actions to protect government revenue, it must also except employees who ensure those actions do not create significant risk to the safety of human life or property. The recently-adopted Taxpayer Bill of Rights provides additional support for this interpretation.²

¹ *IRS FY 2011 Shutdown Contingency Plan (During Lapsed Appropriations)* 18 (Apr. 7, 2011).

² See TAS, *What the Taxpayer Bill of Rights Means for You*, available at <http://www.taxpayeradvocate.irs.gov/About-TAS/Taxpayer-Rights/What-the-Taxpayer-Bill-of-Rights-Means-for-You>.

The Antideficiency Act Has Always Allowed Excepted Employees to Work During Emergencies Involving the Safety of Human Life and Protection of Property.

The ADA prevents government officers or employees from entering into contracts or obligations prior to an appropriation, unless authorized by law.³ The ADA creates an exception to this rule “for emergencies involving the safety of human life or the protection of property.”⁴ The ADA was amended in 1990 to clarify that emergencies do not include ongoing, regular functions of government, “the suspension of which would not imminently threaten the safety of human life or the protection of property.”⁵ In January 1981 the Attorney General articulated that two factors must be present for this exception to apply:

1. A reasonable and articulable connection between the obligation (the opinion involved a contract or grant) and the safety of life or the protection of property; and
2. Some reasonable likelihood that either the safety of life or the protection of property would be compromised in some significant degree by failure to carry out the function in question – and that the threat to life or property can be reasonably said to be near at hand and demanding of immediate response.⁶

Based on guidance from the Attorney General, the Office of Management and Budget (OMB) in November 1981 issued guidance and examples of activities that could continue during a lapse of appropriations. Essential activities related to protecting life and property can include such things as “medical care of inpatients and emergency outpatient care” as well as “activities essential to ensure continued public health and safety, including safe use of food and drugs and safe use of hazardous materials.”⁷

In 1995, the Assistant Attorney General issued an opinion reiterating the two-prong analysis and interpreting the 1990 amendment. The opinion determined that the amendment clarifies that the emergencies exception only applies where the threat is “near at hand and demanding of immediate response.”⁸ The threat also has to be significant in nature:

It is conceivable that some would interpret this phrase to be satisfied even if the threat were *de minimis*, in the sense that the increased risk to life or property were insignificant, so long as it were possible to say that safety of life or protection of property bore a reasonable likelihood of being compromised at all. This would be too expansive an application of the emergency provision.⁹

3 See 31 U.S.C. § 1341.

4 See 31 U.S.C. § 1342.

5 *Id.*

6 43 U.S. Op. Atty. Gen. 293, 302 (Jan. 16, 1981).

7 OMB Memorandum for Heads of Executive Departments and Agencies 1-2 (Nov. 17, 1981).

8 OMB Memorandum M-95-18 Assistant Attorney General Walter Dellinger, *Memorandum for Alice Rivlin, Director, Office of Management and Budget* 9 (Aug. 16, 1995).

9 *Id.*

As recently as 2011, OMB reiterated this two-prong interpretation of the emergency exception.¹⁰ Based on OMB guidance, the IRS implemented the FY 2011 Shutdown Contingency Plan, under which 57 TAS employees would be excepted, all on the basis of being necessary for the safety of human life or protection of property.¹¹ These employees, including the National Taxpayer Advocate, were deemed necessary for the “protection of statute expirations, bankruptcy, liens and seizure cases (ensuring statutory deadlines are met).”¹²

The IRS Chief Counsel Interpretation of the ADA in 2013 Recognized Only Risks to Public Health and Protection of Government Property.

In October 2013, the federal government faced another shutdown scenario but this time the IRS did not except any TAS employees from furlough.¹³ In this decision, the IRS relied on the advice of the Office of Chief Counsel, General Legal Services (Counsel), which concluded that “[t]he [National Taxpayer Advocate] has not identified any activity during a shutdown that fits within one of [the emergency] exceptions.”¹⁴ Counsel’s narrow view is that the exception for protection of life and property applies only to prevent imminent loss of life or property and the protection of property exception applies only to government property.¹⁵ Furthermore, the IRS concluded that activities related to preventing significant hardship to individual taxpayers do not fit the exception. “The types of activities the [National Taxpayer Advocate] performs to prevent taxpayer hardship are not the types of activities related to protecting the public welfare that OMB has identified.”¹⁶ Upon questioning by the National Taxpayer Advocate, Chief Counsel personnel maintained that “safety of life” applied only in the context of public health, such as meat inspectors, and did not apply to a taxpayer’s need for a refund or levy release in order to have the funds to obtain a life-saving operation, for example.

OMB guidance excepts tax-related activities of the Treasury.¹⁷ The way in which the IRS interprets this exception can be seen in its shutdown plan. In 2011, some of the activities that the IRS included in the category of necessary for the safety of human life or protection of property are: processing of tax returns, taxpayer service centers and call sites, and protection of statute expiration, bankruptcy, liens, and seizure cases.¹⁸ As noted above, the IRS excepted 57 TAS employees under this category in 2011. It also excepted 1,263 ACS

10 OMB Memorandum M-11-13, *Planning for Agency Operations During a Lapse in Government Funding* 5 (Apr. 7, 2011). See also OMB Memorandum M-13-22, *Planning for Agency Operations During a Potential Lapse in Appropriations* (Sept. 17, 2013).

11 *IRS FY 2011 Shutdown Contingency Plan (During Lapsed Appropriations)* 18 (Apr. 7, 2011).

12 *Id.*

13 *IRS FY 2014 Shutdown Contingency Plan (Non-Filing Season)* 21 (Sept. 26, 2013).

14 Office of Chief Counsel, General Legal Services, *Points on Government Shutdown Issues Pertaining to National Taxpayer Advocate* 1 (Sept. 27, 2013). OMB Memorandum for Heads of Executive Departments and Agencies (Nov. 17, 1981) includes a list of the types of activities that are excepted.

15 Office of Chief Counsel, General Legal Services, *Points on Government Shutdown Issues Pertaining to National Taxpayer Advocate* (Sept. 27, 2013).

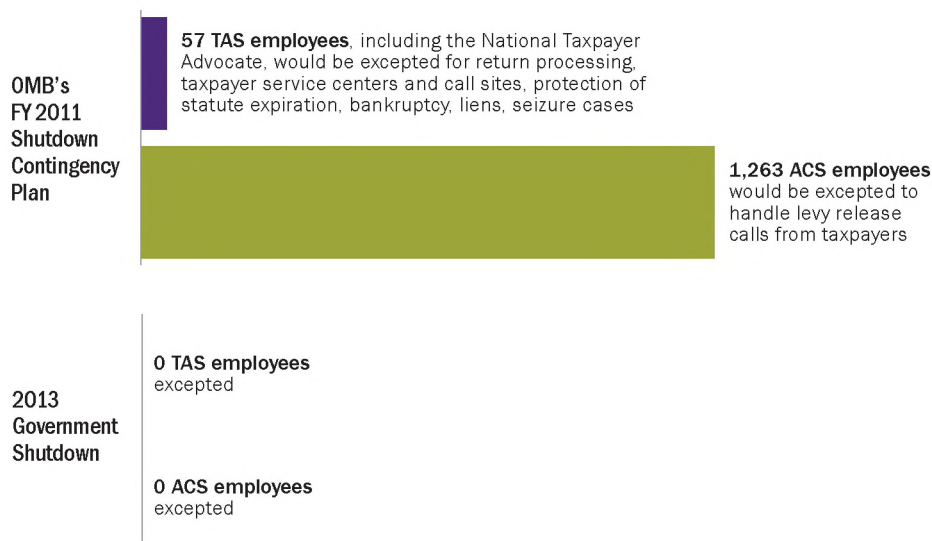
16 *Id.*

17 OMB Memorandum for Heads of Executive Departments and Agencies 2 (Nov. 17, 1981).

18 *IRS FY 2011 Shutdown Contingency Plan (During Lapsed Appropriations)* 6 (Apr. 7, 2011).

employees to handle levy release calls from taxpayers.¹⁹ In 2013, the IRS did not consider taxpayer service centers and call sites necessary for the safety of human life or protection of property exceptions nor did it except any ACS employees to handle levy release calls from taxpayers.

FIGURE II.7, EXCEPTED IRS EMPLOYEES DURING GOVERNMENT SHUTDOWNS



The IRS Chief Counsel's Recent Interpretation of the ADA is a Departure From Previous Interpretations and Overlooks TAS's Statutory Mandate.

The IRS relied on OMB guidance when it determined that the life and property exception applied only to public welfare and to government property. However, the OMB guidance makes no distinction between individual lives and public welfare. In fact, the OMB guidance allows for medical care of inpatients and emergency outpatient care.²⁰ That is a very individualized protection of human life. Moreover, OMB guidance makes no distinction between protection of government property and private property. For instance, the allowance for emergency and disaster assistance does not stipulate that it applies only for government property.²¹

Second, Counsel believes that “preventing taxpayer hardship would not protect the IRS’s ability, during a shutdown, to collect revenue that the agency otherwise would not be able

¹⁹ IRS FY 2011 Shutdown Contingency Plan (During Lapsed Appropriations) (Apr. 7, 2011).

²⁰ OMB Memorandum for Heads of Executive Departments and Agencies 1 (Nov. 17, 1981).

²¹ *Id.* at 2.

to collect.”²² This analysis overlooks the statutory requirement that the National Taxpayer Advocate must assist taxpayers who are facing significant hardships.

The Role of the National Taxpayer Advocate is to Protect Taxpayers From Significant Hardship and Government Overreaching.

Section 7803 of the tax code creates the Office of the National Taxpayer Advocate. One of the main purposes of the National Taxpayer Advocate is “to assist taxpayers in resolving problems with the Internal Revenue Service.”²³ In 1998, Senator John Breaux articulated his support for the creation of the National Taxpayer Advocate as follows:

The concept was not very complicated. It was, when people have a problem with the Internal Revenue Service, they generally are at the mercy of the system. The Government has literally thousands of attorneys and tax attorneys and prosecutors to go after individuals, but the individual citizens don’t have anyone to represent their interests in dealing with the Internal Revenue Service. The National Taxpayer Advocate concept was to have someone who was on the side of the taxpayers, to help the taxpayers put together what they need to show what they have done was entirely honest and appropriate.²⁴

When a taxpayer is facing a significant hardship “as a result of the manner in which the internal revenue laws are being administered by the Secretary,” the National Taxpayer Advocate may issue a Taxpayer Assistance Order (TAO).²⁵ The Internal Revenue Code defines “significant hardship,” in part, “as an immediate threat of adverse action” or “irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.”²⁶ The TAO could require the IRS to release levied property or “to cease any action, take any action as permitted by law, or refrain from taking any action.”²⁷

If the IRS is allowed during a shutdown to take enforcement action, then it must provide for the rights of taxpayers to ensure that significant and imminent harm to safety of life or protection of property is avoided, as Congress intended when it created the Office of the National Taxpayer Advocate.²⁸ The significant hardships that the National Taxpayer Advocate is meant to address are in line directly with the exceptions provided by the ADA, as explained in the 1995 Attorney General opinion. Likewise, the function of the National Taxpayer Advocate is essential to tax collection activities, which the OMB has identified as an excepted activity.

22 Office of Chief Counsel, General Legal Services, *Points on Government Shutdown Issues Pertaining to National Taxpayer Advocate* 3 (Sept. 27, 2013).

23 See IRC § 7803(c)(2)(A)(i).

24 Statement of Senator John Breaux, Cong. Rec., S4239 (May 5, 1998).

25 See IRC § 7811(a)(1)(A).

26 See IRC § 7811(a)(2).

27 See IRC §§ 7811(b)(1) & (2).

28 In fact, the public expected involvement by the National Taxpayer Advocate during the shutdown. See Kelly Phillips Erb, *With Shutdown, Taxes Still Due But You Can't Ask IRS For Help*, Forbes, Oct. 1, 2013, available at <http://www.forbes.com/sites/kellyphillipserb/2013/10/01/with-shutdown-taxes-still-due-but-you-cant-ask-irs-for-help/>.

Other Federal Agencies Interpret the “Safety of Human Life” and “Protection of Property” Exceptions to include Individual Rights and Personal Property.

Other agencies based the decision whether to furlough employees on more expansive interpretations of “safety of human life” and “protection of property.” For instance, the Equal Employment Opportunity Commission (EEOC) determined the following activities impacted the safety of human life or protection of property:

- Preserving the rights of aggrieved individuals under the federal employment discrimination statutes by docketing new charges and federal sector appeals;
- Continuing to litigate lawsuits where a continuance has not been granted; and
- Examining new charges to determine whether prompt judicial action is necessary to protect life or property.²⁹

None of these activities include protection of public health or government property, two distinctions drawn by IRS Chief Counsel. Instead they address the particularized interests that individuals have in protection from erroneous or harmful government actions.

Similarly, the Employee Benefits Security Administration (EBSA), part of the Department of Labor, retained 46 of its 986 employees during the furlough.³⁰ EBSA continued two activities pertinent to this discussion: it pursued “civil proceedings and remedies necessary to prevent an imminent threat to property, *particularly including plan assets*” (emphasis added), and addressed situations “imposing an imminent threat to human life due to the denial of health or disability benefits by an ERISA-covered plan.”³¹ EBSA’s mission is to “assure the security of the retirement, health and other workplace-related benefits of America’s workers and their families.”³² When EBSA employees were excepted from the furlough to protect plan assets, they were protecting the property of individuals. Similarly, EBSA employees who addressed denials of health or disability benefits were protecting individuals and not the general public.

The Furlough of All TAS Employees Violated Taxpayer Rights and May Have Resulted in Irreparable Harm to Taxpayers, Risking Safety of Human Life.

During the shutdown, the IRS continued enforcement, particularly collection, against taxpayers who could not request TAS’s assistance to protect their rights. During the shutdown, taxpayers were subject to the following IRS compliance and enforcement actions:

29 See *EEOC Shutdown Contingency Plan in the Event of Lapsed Appropriations* available at http://www.1.eeoc.gov//eeoc/shutdown_plan/cfm?renderforprint=1.

30 See Memorandum from the Solicitor of Labor, to the Deputy Secretary 2 (Sept. 25, 2013) available at http://www.dol.gov/opa/media/press/opa/shutdown_plan2013.pdf. It appears that EBSA initially proposed that 85 employees be excepted from the furlough. See Memorandum from the Deputy Assistant Secretary for Program Operations, to the Solicitor of Labor 1 (Sept. 12, 2013) available at http://www.dol.gov/opa/media/press/opa/shutdown_plan-2013.pdf.

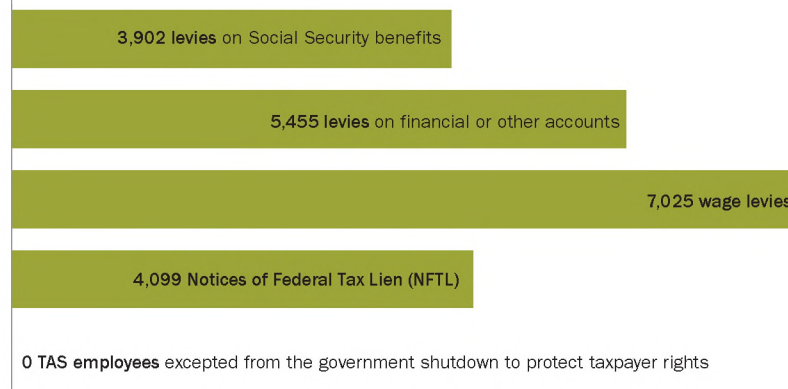
31 See Memorandum from the Deputy Assistant Secretary for Program Operations, to the Solicitor of Labor 2 (Sept. 12, 2013) available at http://www.dol.gov/opa/media/press/opa/shutdown_plan-2013.pdf.

32 See EBSA, Mission Statement available at http://www.dol.gov/ebsa/aboutebsa/org_chart.html#mission.

- 3,902 levies on Social Security benefits;³³
- 5,455 levies on financial or other accounts;
- 7,025 wage levies; and
- 4,099 Notices of Federal Tax Lien (NFTL).³⁴

FIGURE II.8. CONTINUED ENFORCEMENT ACTIVITIES DURING THE GOVERNMENT SHUTDOWN

During the government shutdown, Oct. 1-16, 2013, the IRS made the following enforcement activities, though taxpayers could not request TAS's assistance to protect their rights.



The 2014 Shutdown Plan provided for excepted IRS field collection personnel to “protect statute expiration/assessment activities, bankruptcy or other revenue generating issues.”³⁵ The IRS protects tax collection by reducing IRS liens to judgments or enforcing liens with respect to property,³⁶ by filing public NFTLs,³⁷ levying upon financial accounts (including Social Security benefits) and other property belonging to the taxpayer,³⁸ or garnishing wages.³⁹ In addition, the IRS can impose a 15 percent continuous levy on Social Security benefits.⁴⁰ All of these activities must be initiated within the statutory period for collecting tax (the Collection Statute Expiration Date or CSED).

33 These levies on Social Security benefits were likely part of the Federal Payment Levy Program (FPLP). An FPLP levy is a continuous levy that can take up to 15 percent of the Social Security benefit. Because an FPLP levy is continuous, it will continue until it is released. See IRC § 6331(h).

34 Preliminary information from IRS Office of Taxpayer Correspondence, Individual Master File (IMF), and Automated Lien System.

35 *IRS FY 2014 Shutdown Contingency Plan (Non-Filing Season) 34* (Sept. 26, 2013).

36 See IRC § 7403.

37 See IRC § 6323(a).

38 See IRC § 6331(a).

39 See IRC § 6331(e).

40 See IRC § 6331(h).

The IRS protects the integrity of tax collection by issuing Notices of Deficiency⁴¹ or making summary assessments of tax for mathematical or clerical errors.⁴² All of these activities must be initiated within the statutory period for assessing tax (the Assessment Statute Expiration Date or ASED). Thus, when the IRS says it will protect “statute expiration, bankruptcy, or other revenue generating issues,” it is stating that it could conduct significant enforcement actions against taxpayers during the shutdown to protect government tax collections. However, as noted above, Congress intended that TAS be available to assist taxpayers in challenging these actions. If these actions occur, then TAS employees must be able to protect taxpayers from any imminent hardships arising from these actions.

Although the IRS publicly stated that it was not undertaking certain enforcement actions during the shutdown, the data presented above demonstrate that the IRS already had significant enforcement activity programmed to take place automatically while employees were furloughed.⁴³ During the shutdown, the IRS reported to the public that it would cease issuing liens and levies.⁴⁴ However, the IRS admitted that some levy and lien letters would be mailed because they were prepared prior to the shutdown. It also did not exclude automatic levies – *i.e.*, levies already scheduled to occur during the shutdown would take place.

In at least one instance, an attorney filed suit to prevent the IRS from issuing and enforcing automatic levies during the shutdown because she had no other avenue for relief.⁴⁵ In that case, the intent to levy notice was sent prior to the shutdown but before the period to appeal had expired.⁴⁶ If some select TAS employees had been excepted, this problem could have been avoided. It should be noted that the hardship situation faced by the taxpayers in this case was not unique.

The IRS received payments from many banks in response to account levies within 21 days of the beginning or end of the shutdown. Financial institutions are required to pay over account proceeds up to the amount of the levy by the 21st day following levy issuance or else become liable for that amount.⁴⁷ This 21-day period gives taxpayers the opportunity to contact the IRS, make payment arrangements, and obtain a release of levy before the funds are actually remitted.

41 See IRC § 6212.

42 See IRC § 6213(b)(1).

43 See Ward Affidavit, ¶ 5, *Johnson and Johnson v. Werfel and IRS*, No. 4:13-cv-134 (E.D. Va. Oct. 16, 2013). In this case, an IRS employee submitted an affidavit explaining that the FPLP matching program was suspended until operations were restored. This statement is not accurate, as we know that 3,902 levies on Social Security benefits occurred during this time. See also Kelly Phillips Erb, *With Shutdown, Taxes Still Due But You Can't Ask IRS For Help*, Forbes, Oct. 1, 2013, available at <http://www.forbes.com/sites/kellyphillipserb/2013/10/01/with-shutdown-taxes-still-due-but-you-cant-ask-irs-for-help/>.

44 American Institute of CPAs, *Questions and Answers on the Impact of the Government Shutdown on IRS and Tax Administration*, available at http://www.aicpa.org/interestareas/tax/resources/irspracticeprocedure/pages/shutdown-2013_irs-impact.aspx (Oct. 1, 2013).

45 See Complaint, *Johnson and Johnson v. Werfel and IRS*, No. 4:13-cv-134 (E.D. Va. Oct. 10, 2013). See also Matthew R. Madara, *Shutdown Blocks Taxpayers' Right to Levy Hearing, Complaint Says*, Tax Analysts 199-4 (Oct. 15, 2013).

46 IRC § 6330 provides taxpayers with the right to request a hearing within 30 days of the issuance of a levy notice. Among other things, the taxpayer may raise issues related to the appropriateness of the collection activity at the hearing and may propose collection alternatives. This protection is important particularly for low-income taxpayers who often face significant hardships when their source of income is levied.

47 See IRC § 6332(c); see also Treas. Reg. § 6332-3.

Between September 10 and October 30, 2013, the IRS issued 37,385 Forms 8519, *Taxpayer's Copy of Notice Levy*, and 35,699 Forms 668-A, *Notice of Levy*.⁴⁸ Because the National Taxpayer Advocate and her employees were furloughed, taxpayers facing imminent economic hardship as a result of a levy were unable to reach anyone in the IRS, and were **unable to request** and receive levy releases as mandated by IRC § 6343.⁴⁹ Thus, **these taxpayers** may have experienced *significant and imminent harm*, including the inability to pay for reasonable *basic* living expenses, *risking safety of human life*.

The 1995 assistant attorney general's opinion stated that exceptions under the ADA require "a threat to human life or property of such a nature that immediate action is a necessary response to the situation."⁵⁰ TAS cases that meet the significant hardship criteria of IRC §§ 7811(a)(2)(A) and (D) (*i.e.*, immediate threat or irreparable harm) satisfy this

exception. Particularly where the case impacts the taxpayer's ability to provide for medical expenditures, food, and shelter, IRS levy action can cause irreparable and imminent harm - that is, *harm that cannot be undone*.

Thus, the IRS's decision to furlough all TAS employees, including the National Taxpayer Advocate, violated taxpayer rights and, in some cases, resulted in irreparable harm to taxpayers, risking safety of human life.

Significant harm as a result of IRS action is not a mere theoretical possibility. Nearly every day, TAS receives cases in which taxpayers will have their utilities disconnected or their homes

foreclosed upon as a result of the IRS's failure to pay a refund or release a levy. TAS has cases in which taxpayers make suicide threats, or in which they need emergency surgery and need levies released or refunds released. During a shutdown, how do you restore to the taxpayer the harm that occurred during that period when she had no utilities? How do you restore the sixteen days of no heat, no warmth, no electricity? Because TAS wasn't there to answer the phone or open the mail, how do we know, during the shutdown, that someone didn't lose his or her job, threaten (or even commit) suicide, or not get emergency surgery in a timely manner? We don't know. We won't ever know. That's the problem. We weren't there. Such significant harm could have been avoided if the National Taxpayer Advocate and select personnel, such as campus LTAs, analysts, and a limited number of case advocates and support staff, were excepted to address cases where immediate threat or irreparable harm was present due to IRS actions (or failure to act) during the shutdown.

The IRS's decision to furlough all TAS employees, including the National Taxpayer Advocate, violated taxpayer rights and, in some cases, resulted in irreparable harm to taxpayers, risking safety of human life.

48 Information from IRS Office of Taxpayer Correspondence (April 11, 2014).

49 The shutdown affected all of the IRS. For instance, Small Business/Self-Employed (SB/SE) only excepted 90 employees in field collection, which includes 68 territory managers and eight area directors who had "oversight of the collection of taxes and processing of returns." See IRS FY 2014 Shutdown Contingency Plan (Non-Filing Season) 33-34 (Sept. 26, 2013).

50 OMB Memorandum M-95-18, Assistant Attorney General Walter Dellinger, *Memorandum for Alice Rivlin, Director, Office of Management and Budget* 9 (Aug. 16, 1995).

TAS Issued Guidance to Mitigate the Negative Impact of the Furlough on Taxpayers.

TAS anticipated that some taxpayers would appear in imminent danger of significant hardship and irreparable harm from IRS enforcement actions during the shutdown. To minimize the potential harm from the IRS's decision to furlough all TAS employees, the National Taxpayer Advocate issued internal guidance that directed all TAS case advocates to bypass the typical process in certain cases, and instead directed them to issue Taxpayer Assistance Orders (TAOs) to protect taxpayer rights.⁵¹ This action prioritized cases affected by the furlough and ensured that any hardships were alleviated as soon as possible.

TAS has issued 96 TAOs related to the shutdown,⁵² of which the vast majority (82) were issued because of an economic burden.⁵³ Further, the IRS has complied with 91.4 percent of all TAOs issued due to the shutdown.⁵⁴ This means not only that the government shutdown created a situation where taxpayers faced economic harm, but the harm could have been alleviated if some TAS employees were excepted from furlough and performing their duties in cases involving significant and imminent harm. Figure II.9 shows the breakdown of TAOs issued related to the shutdown.

FIGURE II.9, TAS CASES BY ISSUE AND TAOS ISSUED RELATED TO GOVERNMENT SHUTDOWN⁵⁵

Issue Description	TAOs Issued	% of TAO Case Type to All TAO Types
Stolen identity	1	1%
Levy (including Federal Payment Levy Program)	34	35%
Processing amended re turn	8	8%
Pre-refund wage verification hold	9	9%
Other	44	46%
Total	96	99%*

*Total does not add to 100% due to rounding.

51 National Taxpayer Advocate, *Interim Guidance on Advocating for Taxpayers Adversely Affected by Government Shutdown* (Oct. 21, 2013). The guidance required that all case advocates review open cases and post-shutdown cases to determine if “significant economic or irreparable harm occurred during the [s]hutdown.” Four things to consider in making the determination included: if the IRS or TAS was unavailable during the Shutdown, and the harm could have been avoided if the taxpayer had been able to make contact with the IRS or TAS; the timeframes for the exercise of important taxpayer rights (such as exercising appeal rights, responding to a proposed adjustment or to a penalty notice) lapsed during the Shutdown or timeframes lapsed immediately after the Shutdown; there are now short timeframes for obtaining relief because of the Shutdown; and other situations which are substantially similar to the examples provided below. *Id.*

52 Business Performance Report FY 2014 Quarter 2, at 16 (Apr. 16, 2014).

53 *Id.*

54 *Id.*

55 Data obtained from TAMIS (April 29, 2014). This list includes three rescinded TAOs.

FIGURE II.10, TOP 10 GOVERNMENT SHUTDOWN CODED CASES BY PRIMARY CASE ISSUE CODE (PCIC)

Rank	Primary Issue Code	Description	TAS Case Receipts	% of All Government Shutdown Receipts
1	425	Identity theft	162	19.2%
2	710	Levy	102	12.1%
3	610	Open audit	82	9.7%
4	330	Processing amended returns	57	6.8%
5	045	Pre-refund wage verification	55	6.5%
6	630	Earned Income Tax Credit claim	44	5.2%
7	310	Processing original return	27	3.2%
8	340	Injured spouse claim	24	2.8%
9	712	FPLP Levy - SSA benefits	22	2.6%
10	620	Reconsideration of audits and substitute for return under IRC 6020(b)	19	2.3%

IRS Enforcement Personnel Opened TAS Mail during the Furlough in Violation of TAS’s Statutory Confidentiality Rules.

The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) contained a number of changes to IRC § 7803(c) to ensure that TAS would be viewed, both in perception and reality, as an independent and impartial voice for the taxpayer within the IRS.⁵⁶

Confidentiality plays an important role in promoting this independence. In this regard, Congress added IRC § 7803(c)(4)(A)(iv), which provides that each Local Taxpayer Advocate “may, at the taxpayer advocate’s discretion, not disclose to the Internal Revenue Service contact with, or information provided by, such taxpayer.”

To ensure that the TAS is truly independent from the rest of the IRS, Congress also added the following requirement to the Code in 1998:

“MAINTENANCE OF INDEPENDENT COMMUNICATIONS Each local office of the taxpayer advocate shall maintain a separate phone, facsimile, and other electronic communication access, and a separate post office address.”⁵⁷

Congress envisioned that each Local Taxpayer Advocate (LTA) office “would operate separately from the local IRS office (including having its own telephone and fax lines and a separate listing in the telephone book).”⁵⁸

⁵⁶ See Pub. L. No. 105-206, 112 Stat. 685 (1998).

⁵⁷ See IRC § 7803(c)(4)(B).

⁵⁸ See Description of Senate Finance Committee Chairman’s Mark Relating to Reform and Restructuring of the Internal Revenue Service, Joint Committee on Taxation, JCX-17-98.

On October 9, 2013, during the shutdown, the Small Business/Self-Employed (SB/SE) Director, Field Collection, issued a memorandum to all SB/SE Field Collection and Examination Area Directors, Territory Managers, Group Managers, and Technical Analysts, setting forth the “Revised Shutdown Procedures for Processing Mail, Posting Payments.” This memo directed enforcement personnel in designated locations to open and sort mail for *all* functions, including TAS.⁵⁹

TAS has since learned that IRS Field Collection, Examination, Insolvency, and Criminal Investigation personnel opened mail addressed to local TAS offices during the shutdown and extracted any payments that were in the mail. This activity violated the statutory requirement that TAS maintain confidential and separate communications with taxpayers, and exposed taxpayer communications with TAS to the eyes of IRS enforcement employees. Such risk could have been avoided had a few TAS employees selected by the National Taxpayer Advocate, such as LTAs, support staff, and case advocates, been excepted from the furlough for the limited task of opening mail, or at least kept on call, to open mail and receive payments. As noted earlier, collection of tax is an excepted function for the protection of government property.

TAS Will Urge the IRS to Reconsider Its Position and Allow TAS Employees to Be Excepted if the Government Shuts Down Again.

As Congress intended, much of the case work that TAS performs involves emergency situations. In enacting § 1342 of the ADA, Congress contemplated the fact that emergencies involving the safety of human life or the protection of property would occur during a lapse in appropriations, and such emergencies would justify incurring obligations for the excepted employees addressing imminent “emergencies involving the safety of human life or the protection of property.”⁶⁰

Congress created TAS as an independent office within the IRS to preserve taxpayer rights at times when taxpayers are most vulnerable - when they are facing significant hardships. The IRS’s decision not to except any TAS employees from furlough during the shutdown allowed the IRS to initiate or complete enforcement actions without providing taxpayers with recourse to statutory taxpayer rights protections, including TAS’s statutory mission and authority to assist taxpayers experiencing *significant* hardship. The National Taxpayer Advocate is concerned that such a departure from the principles of fair tax administration and misinterpretation of legal authority would compromise the safety of life and property in any future shutdowns.

The National Taxpayer Advocate urges the IRS to reconsider its position and revise its Shutdown Plan to bring its Plan into conformity with the promises made in the

59 Memorandum from Robert L. Hunt, SB/SE Director, Field Collection, *Revised Shutdown Procedures for Processing Mail, Posting Payments* (Oct. 9, 2013).

60 43 U.S. Op. Atty. Gen. 293, 302 (Jan. 16, 1981).

recently-adopted Taxpayer Bill of Rights.⁶¹ The revised Plan should except the National Taxpayer Advocate and those of her employees essential to performing excepted duties as outlined above, including the protection of taxpayer rights when IRS undertakes enforcement actions during the furlough and provision of relief where the protection of human life is implicated, as well as the protection of taxpayer confidentiality when it is deemed necessary to open taxpayer correspondence addressed to the Taxpayer Advocate Service.

61 See TAS, *What the Taxpayer Bill of Rights Means for You*, available at <http://www.taxpayeradvocate.irs.gov/About-TAS/Taxpayer-Rights/What-the-Taxpayer-Bill-of-Rights-Means-for-You>.