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CIVIL RIGHTS/TAX LAW—"UNDER COLOR OF" INTERNAL REVENUE LAWS: THE ROLE OF UNITED STATES v. TEMPLE AND SECTION 7214 IN THE "UNDER COLOR OF LAW" DEBATE

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NOTES

CIVIL RIGHTS/TAX LAW—"UNDER COLOR OF" INTERNAL REVENUE LAWS: THE ROLE OF UNITED STATES V. TEMPLE AND § 7214 IN THE "UNDER COLOR OF LAW" DEBATE

INTRODUCTION

On a normal day, most police officers are probably not worried that their actions in the line of duty will result in an IRS audit of their personal tax returns. Yet that is exactly the fear developed by two New York City police detectives on March 5, 2003, when they had the misfortune of arresting IRS Quality Analyst Eva Temple on charges of aggravated harassment.1 In the police car, after several aggressive and violent outbursts, Temple informed the detectives that, as an IRS employee, she had "the ability to initiate investigations and audits [of the detectives'] tax histories" and planned to do so.2

Believing Temple would pursue the audits she had threatened, the detectives reported the incident to the U.S. Treasury Department.3 As a result, Temple was prosecuted under 26 U.S.C. § 7214(a) for willful oppression "under color of law" by an employee of the United States acting in connection with an Internal Revenue law.4

United States v. Temple is the first case to consider the meaning of "under color of law" in the context of § 7214(a).5 The concurring opinion in Temple raises the issue addressed in this Note: In § 7214 cases, should a victim's subjective perception of an actor's authority play any role in determining whether the act was done "under color of law?"6 The majority opinion suggests that the detectives' per-

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1. United States v. Temple, 447 F.3d 130, 132 (2d Cir. 2006), cert. denied, 127 S. Ct. 495 (2006). These charges were unrelated to her employment. Id.
2. Id. (internal quotation marks omitted).
3. Id.
4. Id. at 134 (citing 26 U.S.C. § 7214 (2000)).
5. Id. at 137; First Impressions, 3 Seton Hall Cir. Rev. 113, 120-21 (2006) (including Temple in the list of cases of first impression heard in federal courts in 2006).
6. See Temple, 447 F.3d at 141-45 (Wesley, J., concurring).
ception of Temple's ability to initiate an audit is enough to find that she acted "under color of law" as required by § 7214(a).7 The concurring opinion agrees that Temple's actions were taken "under color of law," but argues that the determination should be based solely on objective criteria.8

Discussion of the role of subjective beliefs in an "under color of law" analysis is new only in the context of § 7214(a). It has been debated for decades in respect to two civil rights statutes that also contain the phrase: 18 U.S.C. § 242 and 42 U.S.C. § 1983.9 In these statutes, the phrase "under color of law" is defined as the abuse of some state-granted authority, and is applied to government actors who overstep the bounds of their authority.10 It is generally agreed, in the context of §§ 242 and 1983, that a victim's subjective belief that the wrongdoer was invoking some official status should not be considered in the "under color of law" analysis.11 Such beliefs could create liability in a government agent acting in a purely personal capacity—a result these civil rights statutes were not intended to achieve.12

The concurring opinion in Temple adopts the reasoning used by courts in § 242 and § 1983 cases to support its assertion that the subjective belief of the victim has no place in an "under color of

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7. Id. at 139 (majority opinion).
8. Id. at 141-42 (Wesley, J., concurring). Specifically, the concurrence argues that the court should look for objective indications of the defendant's official status, use of that status to achieve the harm, and the victim's objective awareness of that status. Id. at 145. Perhaps Temple could have been convicted using a completely objective standard: the detectives knew she was an IRS employee, having arrested her at the IRS office, and Temple knew they were aware of her status as a federal employee when she made the threat, having told them that she was an IRS agent. Id. at 132 (majority opinion). However, for the sake of argument, this Note will assume that the use of a subjective standard was necessary for Temple's conviction and will demonstrate why it was appropriate for the majority to take a subjective approach to the "under color of law" requirement in the context of § 7214.
11. See discussion infra Part I.B.
12. See Screws, 325 U.S. at 111; Temple, 447 F.3d at 142 (Wesley, J., concurring); Libby, supra note 9, at 733-46. Creating liability in an official acting in a personal capacity is objectionable because, historically, § 242 and § 1983 liability for action "under color of law" can only arise when the actor has "a bona fide identity as a state official." Steven L. Winter, The Meaning of "Under Color of" Law, 91 MICH. L. REV. 323, 325-28, 401 (1992).
This Note contends that the appropriate measure of "under color of law" must be determined in light of the particular statute that employs the phrase. The phrase "under color of law" should have consistent meaning throughout the United States Code, but, at the same time, must be applied in the context of the individual statute in which the phrase appears. This Note will demonstrate that, in the context of § 7214(a), using a subjective measure of "under color of law" produces a result consistent with the purposes of that statute and does not produce the same objectionable results as it would in the civil rights statutes.

Part I of this Note provides background on the objective-versus-subjective debate by taking the reader through judicial interpretations of the phrase "under color of law" as it is understood in §§ 242 and 1983, the primary sources of "under color of law" interpretation in American jurisprudence. Part II introduces the legislative history and purpose of § 7214(a) and gives a summary of case law interpreting § 7214(a) to date. Part III summarizes the issue raised in the Temple case—the proper application of the phrase "under color of law" in a § 7214(a) case. Finally, Part IV demonstrates that a subjective measure of "under color of law" is appropriate in § 7214(a) cases, and concludes that the Temple majority correctly considered the detectives' subjective perception of Temple's authority to find that she acted "under color of law."

I. "UNDER COLOR OF LAW" IN AMERICAN JURISPRUDENCE

A. The Definition of "Under Color of Law"

By the time the phrase "under color of law" appeared in American statutes in the nineteenth century, it was a commonly known expression that had been used in English laws since the thirteenth century.14 The phrase "implies a misuse of power made pos-

13. See Temple, 447 F.3d at 141-45 (Wesley, J., concurring).
14. Winter, supra note 12, at 326-27. In his article concerning the construction of 42 U.S.C. § 1983, Winter traces the history of the phrase "colour of office," or "colore officii" back to a 1275 English statute providing "[t]hat noEscheator, Sheriff, nor other Bailiff of the King, by Colour of his Office, without ... Authority certain pertaining to his Office, disseise any Man [of his property]." Id. at 325 (first alteration in original) (quoting 3 Edw.1, ch. 24 (1275) (Eng.)). Winter provides several other examples of use of the phrase "under color of law" in England. Id. at 326-28. He concludes that, by the time of its adoption in American statutes in the 1860s, this expression had become a
sible because the wrongdoer is clothed with the authority of the state."15 While this definition accurately reflects the commonly accepted meaning of "under color of law" in American legal thought,16 it belies the difficulty courts have had in applying this concept to the facts of any given case.17

The phrase "under color of law" appears more than fifty times in the current U.S. Code.18 Yet, the meaning of the phrase has been considered most often in the context of two civil rights statutes: 42 U.S.C. § 1983, which provides a civil remedy for any deprivation of constitutional rights perpetrated "under color of law,"19 and its counterpart criminal provision, 18 U.S.C. § 242.20 Sections 242 and 1983 were both enacted during the Reconstruction era,21 in 1866 and 1870 respectively, to impose criminal and civil penalties on officials in the South who were depriving African Americans of their constitutional rights.22 The primary purpose of these statutes was

term of art referring to actions of officials that appeared to be authorized but, in fact, were not. Id.

15. BLACK'S LAW DICTIONARY 282 (8th ed. 2004) [hereinafter BLACK'S]. This definition is almost identical to the definition of "under color of law" fashioned by the Court in United States v. Classic. See Classic, 313 U.S. at 326.


17. Winter, supra note 12, at 327; see infra Part I.B (reviewing cases interpreting the phrase "under color of law").

18. This number is based on a search of the United States Code, in both Lexis and Westlaw databases, for the phrase "under color of law" in text segments of the Code. Each database located a slightly different number of statutes containing the phrase. However, a comparison of the two sets of results determined that the phrase "under color of law" appeared in the same fifty-three statutes in each database.


Every person who, under color of any statute, ordinance, . . . of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

Id. (emphasis added).

20. 18 U.S.C. § 242 (2000). This statute provides, in relevant part: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" will be subject to criminal penalties. Id. (emphasis added).


to enforce the newly adopted Fourteenth Amendment and prevent the attempts of southern states to reestablish the pre-Civil War social order.23 This goal was recognized by the Court in *Monroe v. Pape*, which stated:

"[O]ne reason [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.24"

It is in the context of these civil rights statutes, which aimed to enforce the Fourteenth Amendment against the states, that the common definition of the phrase "under color of law" has evolved in American law.25 This definition has been parsed out primarily by three Supreme Court cases interpreting §§ 242 and 1983—*United States v. Classic*,26 *Screws v. United States*,27 and *Monroe v. Pape*.28

1. The *Classic* Definition

The case of *United States v. Classic* gave the Supreme Court its first opportunity to consider the meaning of "under color of law" in 18 U.S.C. § 242.29 In *Classic*, the defendants were charged with acting "under color of law" to deprive citizens of their constitutional

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29. See *Classic*, 313 U.S. at 308-09. The Court was actually interpreting the precursor to 18 U.S.C. § 242, which outlawed action taken "under color of any law" to deprive another of his rights under the "Constitution and laws of the United States." *Id.* at 309-10.
right to vote by altering ballots in the course of their official duties as commissioners of elections.\textsuperscript{30} The Court held that action taken "under color of law" is the "[m]isuse of power, possessed by virtue of state law and \textit{made possible only because the wrongdoer is clothed with the authority of state law.}"\textsuperscript{31} In making this statement, the Court borrowed principles from earlier Fourteenth Amendment cases holding that, where an official uses his state-granted power in a manner that violates the Fourteenth Amendment, he is a state actor, whether or not the state actually authorized that specific act.\textsuperscript{32}

Intrinsic in the holdings of \textit{Classic} and the Fourteenth Amendment cases is that the actor must have some connection with the sovereign to be liable for depriving another of his constitutional rights.\textsuperscript{33} As one commentator stated: "[t]his connection with the sovereign is necessitated by the fact that there is no constitutional prohibition against an individual depriving another of his . . . rights, and if the statutes are to be enforced against an individual, the individual must be found connected to the sovereign in some fashion."\textsuperscript{34} In \textit{Classic}, it was the defendants' status as elections commissioners that connected them to the state and gave them the opportunity to alter the ballots and interfere with the citizens' right to vote.\textsuperscript{35} Because the commissioners were acting under the pre-

\begin{itemize}
  \item \textsuperscript{30} \textit{Id.} at 307.
  \item \textsuperscript{31} \textit{Id.} at 326 (emphasis added).
  \item \textsuperscript{32} \textit{See id.} (citing \textit{Hague v. Comm. Indus. Org.}, 307 U.S. 496, 507, 519 (1939); \textit{Home Tel. & Tel. Co. v. Los Angeles}, 227 U.S. 278, 287 (1913); \textit{Ex parte Virginia}, 100 U.S. 339, 346 (1879)).
  \item \textsuperscript{33} \textit{See, e.g., Ex parte Virginia}, 100 U.S. at 347 ("Whoever, by virtue of public position under a State government, deprives another" of due process or equal protection "as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.").
  \item \textsuperscript{34} Maloy, \textit{supra} note 22, at 648; \textit{accord} Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982).
  \item Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.
  \item It also avoids imposing on the State . . . responsibility for conduct for which [it] cannot fairly be blamed . . .
  
  Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State.
  \textit{Id.} at 936-37. Professor Maloy ultimately concludes that the only thing clear about the expression "under color of law" in the civil rights statutes is that it is synonymous with state action. Maloy, \textit{supra} note 22, at 646.
  \item \textsuperscript{35} United States v. Classic, 313 U.S. 299, 325-26 (1941).
\end{itemize}
tense but beyond the scope of their state authority, their actions were deemed to have been taken "under color of law." 36

Four years later, in another § 242 case, the Court reiterated the definition of "under color of law" set out in Classic. 37 In Screws v. United States, the Court affirmed the conviction of three Georgia police officers for beating an African American arrestee to death. Finding this case "indistinguishable" from Classic, the Court noted that "[i]n each [case] officers of the State were performing official duties; in each the power which they were authorized to exercise was misused." 38

The Screws Court adopted the Classic interpretation of "under color of law," calling it the product of "mature consideration," not "hasty action or inadvertence." 39 The Court added depth to the Classic rule saying: "[A]cts of officers in the ambit of their personal pursuits are plainly excluded. [But a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." 40 By excluding action taken in the course of personal pursuits, this holding is consistent with the notion that an actor must have some connection to the state to be held accountable for interference with another's constitutional rights. 41 Therefore, because the goal of §§ 242 and 1983 is to prevent the deprivation of another's constitutional rights, the wrongdoer must be deemed a state actor to be held liable under those statutes. 42 Finally, the Court noted that the Classic construction of "under color of law" will be precedent in this area of law unless Congress acts to change it. 43

36. See id. at 326. It is worth noting that the opinion examines the legislative history of § 242 to ensure that the qualification that a wrongful act was taken based on alienage, color, or race only applied to the second offense created by the statute and not to the deprivation of rights provision. Id. at 326-28. The Court concluded that the deprivation of rights provision applied regardless of the victim's alienage or color. Id.
38. Id. at 110. The police officers in this case were authorized by law to make the arrest and use the force necessary to affect it. Id. at 111. They acted without authority by using excessive force. Id.
39. Id. at 112.
40. Id. at 111.
41. See Maloy, supra note 22, at 648.
2. The Monroe Application of the Classic Definition

Twenty years after Classic was decided, its interpretation of "under color of law" was again affirmed, and extended to § 1983 cases in Monroe v. Pape.\textsuperscript{44} The Court found that the Classic definition of "under color of law" satisfied the legislative purpose of § 1983, and was intended to be a governing rule of law.\textsuperscript{45} In addition, the Court observed that it would only create uncertainty in the law if the meaning of "under color of law" was varied "to meet the exigencies of each case."\textsuperscript{46}

The Court further noted that, in the time since the Classic and Screws decisions, Congress had revised the civil rights laws and enacted three new laws containing the phrase "under color of law" without any debate or fuss over the inclusion of that phrase.\textsuperscript{47} Specifically, the Court said:

If the results of our construction of "under color of" law were as horrendous as now claimed . . . surely the voice of the opposition would have been heard in . . . Committee reports. Their silence and the new uses to which "under color of" law have recently been given reinforce our conclusion that our prior decisions were correct on this matter of construction.\textsuperscript{48}

For these reasons, the Monroe Court concluded that Classic provided the correct meaning of the phrase "under color of law" and that this definition would be used in future § 1983 cases.\textsuperscript{49} To date, the Classic definition has remained untouched by Congress or the Supreme Court.\textsuperscript{50} However, the existence of an established def-

\textsuperscript{44} Monroe, 365 U.S. at 183-87. In Monroe, the plaintiff sued the Chicago Police Department and thirteen officers individually for deprivation of his civil rights when they entered Monroe's home without a warrant and detained him without charges or a hearing before a magistrate. \textit{Id.}

\textsuperscript{45} Monroe, 365 U.S. at 184-85 (quoting Screws, 325 U.S. at 112-13). The Court, after a detailed examination of the legislative history of § 1983, concluded that Congress intended § 1983 to remedy the harms caused by abuses of authority and, therefore, that the definition of "under color of law" as a misuse of power was consistent with the purposes of the statute. \textit{Id. at 172-83; see also} Harrington, \textit{supra} note 22, at 1008. Sections 242 and 1983 were both enacted shortly after the Civil War with the intent to remedy the inequitable legal treatment of emancipated African Americans. \textit{See generally} Maloy, \textit{supra} note 22, at 569-84 (recounting the social and legislative history of §§ 242 and 1983).

\textsuperscript{46} Monroe, 365 U.S. at 185 (quoting Screws, 325 U.S. at 113).

\textsuperscript{47} \textit{Id. at 186}.

\textsuperscript{48} \textit{Id. at 187}.

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} This is not to say that there has not been criticism of the Classic definition. \textit{See id. at 211-24} (Frankfurter, J., dissenting); \textit{accord} Eric H. Zagrans, "Under Color of"
inition of "under color of law" has not simplified application of the concept in § 242 and § 1983 cases.51

B. Application of "Under Color of Law" in § 242 and § 1983 Cases

This Section reviews the difficulty courts have had in applying the Classic definition of "under color of law" in § 242 and § 1983 "personal capacity"52 cases.53 The Classic and Screws decisions mandate that the wrongful conduct in a § 242 or § 1983 case must rise to the level of state action before a penalty can be imposed for the deprivation of constitutional rights.54 Because these statutes do not apply to a private individual, absent some connection to the sovereign, courts must be sure that the wrongdoer was acting under...
the actual or apparent authority of the state before finding that the
action was taken "under color of law."\textsuperscript{55}

In order to determine whether a connection with the state ex­
ists, courts first have to determine what type of evidence they will
use to measure the presence or absence of state authority: Should
they consider objective manifestations of state authority,\textsuperscript{56} the sub­
jective intent of the actor to use her authority,\textsuperscript{57} the subjective per­
ception of the victim that the actor had authority,\textsuperscript{58} or some
combination of the three?\textsuperscript{59} The remainder of this section reviews a
sample of cases that highlight this question and courts' attempts to
answer it.

private party pursuant to [§ 1983], without something more, [is] not sufficient to justify
a characterization of that party as a 'state actor.' "). Courts have created many different
tests to determine whether the necessary connection between the individual and the
sovereign is present. See id. (listing several tests used to determine if a private party is a
state actor, including the "public function" test, "state compulsion" test, "nexus" test,
and "joint action" test); Zambrana-Marrero v. Suarez-Cruz, 172 F.3d 122, 125 (1st Cir.
1999) ("totality of the circumstances" test); Pickrel v. City of Springfield, 45 F.3d 1115,
1118 (7th Cir. 1995) (focusing on the nature of the act); Keller v. District of Columbia,
809 F. Supp. 432, 436 (E.D. Va. 1993) ("outward indicia of state authority"); Miller,
supra note 53, at 336-57. However, in the words of Justice Byron White, it would be
impossible to formulate "an infallible test for determining whether the State . . . has
become significantly involved in private discriminations." Reitman v. Mulkey, 387 U.S.
369, 378 (1967).

\textsuperscript{56} See, e.g., Griffin v. City of Opa-Locka, 261 F.3d 1295 (11th Cir. 2001); Pitchell
v. Callan, 13 F.3d 545 (2d Cir. 1994); Davis v. Lynbrook Police Dep't, 224 F. Supp. 2d
463 (E.D.N.Y. 2002); Samedi v. Miami-Dade County, 134 F. Supp. 2d 1320 (S.D. Fla.
2001).

\textsuperscript{57} See, e.g., Keller, 809 F. Supp. at 435 (discounting the argument that subjective
intent of the wrongdoer should be considered in an "under color of law" analysis). In
Keller, the police-officer defendants argued that they could not be held liable under
§ 1983 for detaining an individual outside of their jurisdiction because the officers did
not believe that they were acting within the scope of their duties. Id. The court re­
jected that defense saying "[n]either reason nor precedent supports the argument that
the 'under color of' law determination should turn on the subjective understanding of
the actor concerning the scope of his duties." Id. (emphasis added). Because the Tem­
ples concurrence only raises issues concerning a victim's subjective beliefs, this Note will
not review cases discussing the role of the actor's subjective beliefs. See United States
v. Temple, 447 F.3d 130, 142 (2d Cir. 2006) (Wesley, J., concurring), cert. denied, 127 S.

\textsuperscript{58} See, e.g., United States v. Giordano, 442 F.3d 30 (2d Cir. 2006); Zambrana-
Marrero, 172 F.3d at 122.

\textsuperscript{59} For a good summary of the different objective and subjective concerns see
Libby, supra note 9.
1. Objective Standard

Logic dictates that in order for harm to be caused by the actor's official status, the victim must be aware of that status at the time of the act. However, many courts are uncomfortable using a subjective test "because it puts the 'color of law' question solely in the hands of the plaintiff." For example, the Court of Appeals for the Second Circuit has stated definitively that to focus on the victim's reaction to the conduct, rather than the nature of the conduct itself, "misses the essence of the color of law requirement and the protection afforded by section 1983." Likewise, a Federal District Court in New York concluded that "under color of law" is an objective analysis and neither the victim's subjective understanding, nor the actor's subjective intent is relevant.

The concern is that if a court were to consider the plaintiff's subjective perception, the plaintiff would be able to create liability for a defendant engaged in purely personal pursuits that § 1983 was not meant to reach. Two recent § 1983 decisions demonstrate the approach taken by many courts—that subjective beliefs have no place in the "under color of law" analysis.

In *Griffin v. City of Opa-Locka*, the Eleventh Circuit held that the city manager's rape of another city employee was made possible only by virtue of his government authority.

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60. *See Miller,* supra note 53, at 345-46.

61. *Id.* at 346. Specifically, Miller raises concerns about defining what it means to perceive "action of the state." *Id.* at 345-46. He also addresses problems with the temporal element: What if the plaintiff did not know the actor was vested with state authority at the time of the incident but later finds out and testifies that he now perceives the conduct as some misuse of official authority? *Id.*

62. *Pitchell v. Callan,* 13 F.3d 545, 548-49 (2d Cir. 1994) (rejecting the plaintiff's argument that he would not have been shot by the off-duty police officer but for the plaintiff's subjective perception that he was safe because he was in "police presence").

63. *Davis v. Lynbrook Police Dep't,* 224 F. Supp. 2d 463, 476 (E.D.N.Y. 2002) (denying defendant's motion for summary judgment because sufficient evidence was presented so that, even without considering the plaintiff's subjective belief, a reasonable jury could find action "under color of law").

64. *See Screws v. United States,* 325 U.S. 91, 111 (1945). This is one of the concerns raised by the *Temple* concurrence: "[E]ven where the official never mentions or uses . . . her position as a government official, a victim's belief . . . no matter how unreasonable, can result in liability for the defendant." *United States v. Temple,* 447 F.3d 130, 142 (2d Cir. 2006) (Wesley, J., concurring), *cert. denied,* 127 S. Ct. 495 (2006); *cf.* *Libby,* supra note 9, at 744 (observing a problem on the other end of the spectrum, that consideration of the plaintiff's subjective impression could allow a defendant who should be found to be acting "under color of law" to avoid § 1983 liability).


66. *Griffin,* 261 F.3d at 1304-05.
relied on testimony of various witnesses as objective evidence that the manager had used his state-granted authority over the victim to create the opportunity to be alone with her on the occasion of the rape.\textsuperscript{67} Because there was objective testimony that the defendant's authority as a state official facilitated the wrongful act, the court found that he acted "under color of law" within the meaning of § 1983.\textsuperscript{68}

Conversely, in \textit{Samedi v. Miami-Dade County}, a sexual harassment case brought under § 1983, a Federal District Court in Florida found that the defendants did not act "under color of law" where the plaintiff failed to present objective evidence of the wrongdoer's authority.\textsuperscript{69} In that case, despite the plaintiff's belief that the defendants were her bosses, and the defendants' admissions that they made statements to that effect, the court found that the plaintiff did not present any objective evidence that the defendants "possessed . . . state authority with respect to [the] Plaintiff."\textsuperscript{70} Noting that there was no precedent to support the proposition "that a plaintiff's subjective belief as to a defendant's authority, without more, is sufficient to establish that the defendant acted under color of law under section 1983," the court granted summary judgment for the defendants.\textsuperscript{71}

2. Subjective Standard

Despite the prevalence of the objective approach, courts in several circuits have considered the role of a victim's subjective perception in an "under color of law" analysis. In a § 1983 action against two off-duty police officers whose intervention in a bar fight led to the death of one fighter, the Court of Appeals for the First Circuit noted that "subjective reactions of the victim may have some relevance" in the "under color of law" analysis.\textsuperscript{72} Most recently, despite the Second Circuit's clear dismissal of the role of

\begin{itemize}
\item \textsuperscript{67} \textit{Id.} at 1303-05.
\item \textsuperscript{68} \textit{Id.} at 1305.
\item \textsuperscript{69} \textit{Samedi}, 134 F. Supp. 2d at 1341.
\item \textsuperscript{70} \textit{Id.} at 1340.
\item \textsuperscript{71} \textit{Id.} at 1339.
\item \textsuperscript{72} \textit{Zambrana-Marrero v. Suarez-Cruz}, 172 F.3d 122, 126 (1st Cir. 1999). However, the court went on to say that "'the primary focus . . . must be on the conduct of the [actor] . . . and whether [that conduct] 'related in some meaningful way . . . to [his] governmental status or to the performance of his duties.'" \textit{Id.} (emphasis added) (quoting \textit{Barreto-Rivera v. Medina-Vargas}, 168 F.3d 42, 47 (1st Cir. 1999); \textit{Martinez v. Colon}, 54 F.3d 980, 987 (1st Cir. 1995)).
\end{itemize}
victims' subjective beliefs in *Pitchell*, 73 the Court of Appeals for the Second Circuit affirmed the conviction of the mayor of Waterbury, Connecticut, based on the victims' belief that he was invoking his official authority.74

Mayor Philip Giordano was charged under § 242 with acting "under color of law" to deprive two girls of their constitutional rights when he sexually abused them.75 There was no objective evidence that Giordano ever used his power as mayor to perpetrate the sexual assaults.76 However, both victims testified that they knew he was the mayor and thought that he had the power to "rule over everybody" and have them put in jail.77 The court found that the victims' belief that Giordano could use his authority to harm them if they told on him was sufficient to find that "the abuse was made possible" because he had acted "under color of law." 78

The *Giordano* decision has revived uncertainty about the role that a victim's subjective understanding should play in the "under color of law" analysis.79 Considering that *Temple* was decided by the Second Circuit less than two months after *Giordano*, 80 the *Temple* concurrence points out that these back-to-back decisions may be read to imply that subjective perceptions are significant to the "under color of law" inquiry.81 However, because *Temple* was litigated under § 7214(a), a statute created for a different purpose than §§ 242 or 1983, this implication is neither as weighty, nor as problematic, as the concurrence suggests.

II. 26 U.S.C. § 7214(a)

In 1868, Congress enacted what is now 26 U.S.C. § 7214, criminalizing certain conduct by federal employees acting in con-
connection with Internal Revenue laws. Section 7214(a) provides in relevant part:

(a) Unlawful acts of revenue officers or agents. —Any officer or employee of the United States acting in connection with any revenue law of the United States—

(1) who is guilty of any extortion or willful oppression under color of law;

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. . . . The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

Eva Temple was charged and convicted under this section of the statute. The next section examines the legislative history and judicial interpretations of § 7214(a) in order to provide an understanding of its purpose and context.

A. Legislative History and Purpose of § 7214(a)

The language of what is now § 7214(a) first appeared in the U.S. Code in 1868 as part of An Act Imposing Taxes on Distilled Spirits and Tobacco, and for Other Purposes. At that time, fed-

82. 26 U.S.C. § 7214(a) (2000). Section 7214 contains three subsections: (a), (b), and (c). Subsection (b) provides penalties for revenue officers having a direct or indirect interest in the manufacture of alcohol or tobacco. Id. § 7214(b). Subsection (c) is a cross reference to a repealed statute. Id. § 7214(c); S. REP. No. 85-2090, at 275 (1958), as reprinted in 1958 U.S.C.C.A.N. 4395, 4395-97. Subsections (b) and (c) are of no consequence to the topic of this Note and will not be discussed further.


84. Temple, 447 F.3d at 134 (majority opinion). Subsection (1) is only the first of nine enumerated offenses under § 7214(a). Further offenses include: knowingly demanding “sums greater than are authorized by law”; knowingly receiving “fees” or “gifts” for the performance of duty or as “compromise, adjustment, or settlement of any . . . alleged violation of law”; failing to perform a duty of office with the intent to avoid application of Title 26; conspiring to or knowingly enabling another to “defraud the United States”; making a fraudulent entry in a book or statement; and failing to report knowledge of a violation of a revenue law. 26 U.S.C. § 7214(a)(2)-(9). However, this Note focuses solely on the first offense in § 7214(a), the only one that requires action to be taken “under the color of law.”

85. An Act Imposing Taxes on Distilled Spirits and Tobacco, and for Other Purposes, ch. 186, § 98, 15 Stat. 125, 165 (1868) (codified at 26 U.S.C. § 7214(a)). The text of § 7214(a)(1) has changed very little in the 140 years since its enactment. Temple, 447
eral taxation was still in its early stages of development. In 1862, in order to finance the Civil War, President Lincoln signed a law creating the first income tax. This law also created the office of Commissioner of Internal Revenue, and granted “the Commissioner the power to assess, levy, and collect taxes, and the right to enforce the law through seizure and prosecution.” The law allowed for the assignment of a collector, assessor, and deputies in each of 185 districts in the country to assist the Commissioner in carrying out his responsibilities. By January of 1863, a total of 3882 persons had been appointed to these positions.

By 1868, taxation of distilled spirits and tobacco had become the federal government’s main source of revenue, providing almost ninety percent of the country’s income. Therefore, Congress took quick action when it discovered widespread fraud in the collection of taxes on distilled spirits. On January 7, 1868, Representative Robert C. Schenck of Ohio, representing the Committee of Ways and Means, informed the House that because “such enormous frauds had been committed,” in the previous year alone, the government had lost $70,000,000 in revenue from the distilled spirits tax. Representative Schenck reported that the primary reason this fraud had been achieved was:

86. Because the United States revolution against England was caused, in part, by a dispute over taxes, there was great reluctance to give taxation power to the central government of the new country. The American Way in Taxation: Internal Revenue, 1862-1963, at 16 (Lillian Doris ed., 1963) [hereinafter American Way]; see also Internal Revenue Service, History and Organization: History of Taxation, Organization of the IRS, Functions within the IRS (1990) [hereinafter History of Taxation]. The first federal tax was not levied until 1791 and only on particular goods.

87. American Way, supra note 86, at 19. A few earlier attempts at taxation were primarily taxes on commodities, like alcohol and slaves, or sales taxes, but not on income. Id. at 17-18.

88. Id. at 31; History of Taxation, supra note 86.

89. American Way, supra note 86, at 32.

90. Id.

91. Id. at 19. The 1862 Act creating income tax originally permitted tax collection from a greater variety of sources but Congress eliminated many of them at the end of the Civil War. Id.


93. See id. at 364. Specifically, Representative Schenck reported that, based on the known amount of whiskey production, at least $100,000,000 a year should have been collected through the distilled spirits tax, but in fact the government was receiving less than $30,000,000 each year. Id. This was a huge amount of money in 1868. If the same fraud occurred in 2007, the government would have lost $1,078,031,783.18. See The
the want of integrity, character, and honesty in the various subordinate agents of the Government scattered throughout the country who are charged with the collection of the revenues. . . . [T]here is no fraud committed in . . . the tax upon distilled spirits . . . which would materially affect the revenue in any instance, except it be done with the connivance of some official, except it be by collusion between him and the party interested in the fraud. The reason is this: instead of men being selected because of their character, capacity and fitness . . . they are selected for other causes, upon recommendations based upon other reasons in too many cases.94

Because the country was losing so much money, Congress passed an emergency measure in January of 1868 to address fraud by changing the process of tax assessment on spirits.95 Meanwhile, the Committee of Ways and Means continued to work on a larger bill addressing general problems within the internal revenue system.96

This larger bill, introduced in June of 1868, included the language of what would become § 7214(a). It provided “[t]hat if any officer or agent appointed and acting under the authority of any revenue law of the United States shall be guilty of any extortion or willful oppression, under color of law” he would be dismissed from office and found guilty of a misdemeanor.97 The penalties for conviction under this section included a fine between $1000 and $5000 and imprisonment of at least six months, but not more than three years.98 This provision passed through the Senate without amendment99 and was signed into law by President Andrew Johnson on July 28, 1868.100

Since 1868, the only substantive change to the language of § 7214(a) occurred with the 1954 recodification of the Internal Revenue Code.101 The 1954 Code increased the penalties for offenses

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94. CONG. GLOBE, 40th Cong., 2d Sess. 364 (1868).
95. Id. at 364-66.
96. Id.
97. Id. at 3503 (emphasis added).
98. Id.
99. Id. at 3772.
100. Id. at 4334-35, 4381.
by revenue employees, capping the fines at $10,000 and the possible prison sentence at five years. More importantly, Congress changed the preamble of the statute, broadening its applicability to reach "any officer or employee of the United States acting in connection with any revenue law," rather than "any officer or agent appointed and acting under the authority of any revenue law," as the statute originally read. Though the House and Senate reports do not discuss the reason for this change, the new language allows all federal employees, not just those employed by the IRS, to be prosecuted under the statute if they act in connection with an Internal Revenue law. The language of § 7214(a) in the most recent publication of the Code is identical to the language of the 1954 (changing the location, but not the effect of the Act's language in the Code); Revised Statutes § 3196, 1 Rev. Stat. 609 (1875) (rearranging the last two sentences of the Act); see also H.R. REP. No. 76-6, at 1-3 (1939) (noting that the 1939 Code merely relocated the language of the 1868 Act into Subtitle E, Personnel Procedures, § 4047, Penalties of the Internal Revenue Code, but did not change the effect of the law). Despite the relocation and minor changes to language in these three recodifications, present-day § 7214(a) is still very similar to the original language of the statute in 1868. Compare 26 U.S.C. § 7214(a), with An Act Imposing Taxes on Distilled Spirits and Tobacco, and for Other Purposes, ch. 186, § 98, 15 Stat. 125, 165 (1868) (codified at 26 U.S.C. § 7214(a) (2000)).

102. Compare with penalties in the original bill discussed supra in text accompanying note 98. The reason for this change was to make IRS employee penalties "correspond to the penalties imposed in the case of offenses by taxpayers generally." STAFF OF J. COMM. ON INTERNAL REVENUE TAXATION, 83D CONG., SUMMARY OF H.R. 8300: THE PROPOSED INTERNAL REVENUE CODE OF 1954 AS PASSED BY THE HOUSE OF REPRESENTATIVES 85 (Comm. Print 1954). The penalties described above were the same for all taxpayer offenses under the new code. Id.


105. The meaning of "officer or employee of the United States" is plain. It includes any individual employed by the federal government, from the president to a postal worker. In theory, after 1954, an individual need not be employed specifically by the IRS to be subject to the provisions of § 7214(a). See Internal Revenue Code of 1954, § 7214 (reading "any . . . employee of the United States").

106. See United States v. Johnson, 398 F.2d 29, 31-32 (7th Cir. 1968). The only other changes in the 1954 recodification altered the specific offenses so that each expressly requires knowledge or intent of the actor as part of the criminal conduct, and completely removed subdivision (7) of § 4047(e) of the 1939 Code, which provided an offense where the employee acted negligently. H.R. REP. No. 83-1337; S. REP. No. 83-1622. These changes were made to ensure that offenses under this statute involve some intentional misconduct "as distinguished from the mere negligent or other improper conduct of an employee, not involving criminal intent, which could continue to be handled . . . by reprimand or dismissal or other action under the civil service laws." H.R. REP. No. 83-1337, at 287.
recodification.\textsuperscript{107} Today, as long as the individual is employed by the federal government and has acted in connection with a revenue law, she is subject to liability for engaging in any of the enumerated offenses of § 7214(a).\textsuperscript{108}

B. \textit{Judicial Interpretation of § 7214(a)}

Though the language of § 7214(a) has been in force since 1868, it has not received much judicial attention.\textsuperscript{109} The Supreme Court has referenced the statute in only two reported decisions, neither of which addresses the substance of § 7214(a).\textsuperscript{110} However, lower federal court decisions interpreting this statute have highlighted three important functions of § 7214(a): to set a standard of conduct for government employees; to regulate action taken in connection with revenue laws; and to provide a criminal cause of action against employees who abuse their authority.

1. High Standard of Conduct for Government Employees

Congress enacted § 7214(a) to remedy the widespread misconduct of Internal Revenue agents by defining conduct for which agents would be penalized.\textsuperscript{111} In doing so, Congress effectively created a code of conduct for Internal Revenue agents. This code holds employees of the government to a higher standard of conduct than persons employed by private entities.\textsuperscript{112} An early interpretation of § 7214(a)\textsuperscript{113} recognized that the statute provided more severe punishment for an officer of the government because it is the...
duty of the officer to protect the government, and certainly not to commit offenses against it himself.\textsuperscript{114} Significantly, the court stated: "those who have a trust reposed in them, are held to a more rigid accountability than others, and a violation of that trust is punished more severely [sic] when committed by them than where no such special trust is reposed.\textsuperscript{115}

This theme is repeated in modern cases interpreting § 7214(a), such as \textit{United States v. Stern}.\textsuperscript{116} In\textit{ Stern}, the Second Circuit upheld the conviction of an Internal Revenue employee under § 7214(a) for making a false statement to the IRS during its audit of his personal tax returns.\textsuperscript{117} In affirming Stern's conviction under § 7214(a)(7), the court held, in no uncertain terms, that "[s]ection 7214 imposes sanctions on revenue agents for departures from the high standards of conduct demanded of those holding that office."\textsuperscript{118} As an employee of the IRS, Stern violated the high standard of conduct expected of him by intentionally providing false information to the IRS.\textsuperscript{119}

The judicial interpretation of § 7214(a), as a standard for behavior of federal employees, comports with the intent of the drafters to impose sanctions on agents who acted without integrity.\textsuperscript{120} The standard of conduct established by § 7214(a) has endured for the past 130 years.\textsuperscript{121} Not only has it survived, but Congress broadened its applicability in 1954 to reach a larger group of federal employees.

\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{United States v. Stern}, 418 F.2d 198, 199 (2d Cir. 1969); see also\textit{ Hartline v. Clary}, 141 F. Supp. 151, 158 (E.D.S.C. 1956) (holding that § 4047(e), the identical precursor to § 7214(a), imposed a statutory duty on Internal Revenue agents to perform not only their duties under the law but to act in all matters relating to Internal Revenue laws and regulations).
\textsuperscript{117} \textit{Stern}, 418 F.2d at 198-99.
\textsuperscript{118} \textit{Id.} at 199.
\textsuperscript{119} The court also found it unimportant that, in relation to the audit of his personal finances, Stern was acting outside the scope of his employment at the IRS when he made the false statement. \textit{Id.}
\textsuperscript{120} See \textit{CONG. GLOBE}, 40th Cong., 2d Sess. 364 (1868); discussion \textit{supra} text accompanying notes 92-95. This judicial interpretation is further supported by policies of the IRS itself that seek to "assure the maintenance of the highest standards of honesty, integrity, loyalty, security, and conduct among Service employees." \textit{AMERICAN WAY, supra} note 86, at 204.
\textsuperscript{121} See \textit{supra} notes 101-108 and accompanying text (noting that the language of § 7214(a) has remained virtually unchanged since 1868).
2. Action "in Connection with Revenue Laws"

The 1954 recodification of the Internal Revenue Code amended § 7214(a) to apply to "any officer or employee of the United States," acting "in connection with" a revenue law.122 The preamble of § 7214(a) plainly designates the group that is subject to its provisions: employees of the United States.123 Further, § 7214(a) does not require that the employee act under the authority of a revenue law, or in the course of his employment duties, but only that he act in connection with a revenue law of the United States.124

Though this requirement was clear from the revised language of § 7214(a), it did represent a change from the earlier version of the statute,125 and defendants continued to argue that the statute only applied to actions taken in the performance of some official duty under the revenue laws.126 For example, in United States v. Stern, after being charged under § 7214(a) for making a false statement to the IRS, Stern argued that he was acting as a private citizen, not in his capacity as an IRS employee, when he made the statement.127 However, the court found it irrelevant that the mis-

123. Stern, 418 F.2d at 199 ("The preamble merely designates generally which Government employees are under the section.").
124. 26 U.S.C. § 7214(a) (2000) ("Any officer or employee of the United States acting in connection with any revenue law of the United States . . . "). Section 7214 "does not require that [the defendant] be acting under authority of the revenue laws." United States v. Johnson, 398 F.2d 29, 31 (7th Cir. 1968); see infra note 136 and accompanying text.
125. See Williams v. United States, 168 U.S. 382, 387-88 (1897) (holding that under Revised Statute § 3169, an earlier version of § 7214, prosecution against a Treasury Department customs inspector could not be upheld because the statute applied only to officers or agents "appointed and acting under the authority of any revenue law"). In this case, the inspector was (1) not appointed under a revenue law but under acts of Congress to regulate unlawful entry of Chinese into the United States; and (2) the Chinese Exclusion Acts, that he was to enforce, had no relation to Internal Revenue laws. Id.; see also supra notes 103-106 and accompanying text (discussing the one substantive language change to § 7214(a) in 1954).
126. See Stern, 418 F.2d at 198-99 (arguing that § 7214(a) only operates where the acts were committed in the performance of a revenue officer's duties); Johnson, 398 F.2d at 31 (arguing that § 7214(a) does not apply where the activities in question were performed after hours and outside of his duties as an IRS employee).
conduct occurred outside of the officer’s official duties, as long as it occurred while the wrongdoer was a revenue agent.\textsuperscript{128}

In \textit{Stern}, the Second Circuit also used principles of statutory interpretation to support its construction of § 7214(a)(7).\textsuperscript{129} First, it relied on the presumption against redundancy:\textsuperscript{130} because several subsections of § 7214(a) specifically provided that the wrongful act must be committed in the course of official duties, it would be redundant to read that language into the preamble.\textsuperscript{131} Second, the court noted that three other provisions of § 7214(a) that had contained a “performance of duty” requirement in an earlier version of the statute retained that language in the current version, and, therefore, Congress’s omission of this phrase from subsection (7) must have been intentional.\textsuperscript{132} Consequently, the Court held that § 7214(a) was intended to reach activities in connection with revenue laws, whether or not in the course of official duties. As a result, by providing a false statement to the IRS regarding his personal finances, Stern was acting in connection with a revenue law under the meaning of the statute, even though he was not acting in the course of his duties for the IRS.\textsuperscript{133}

Likewise, in 1968, Internal Revenue employee Thomas Johnson was convicted of willfully aiding the preparation of materially false income tax returns under § 7214(a)(4).\textsuperscript{134} Despite the fact that preparing tax returns was not part of Johnson’s official duties,\textsuperscript{135} the court sustained his conviction, stating: “He was charged with acting in connection with the revenue laws and he was so acting in preparing returns \textit{even if he did so away from his office and after regular working hours}.”\textsuperscript{136} This case also demonstrates that

\begin{itemize}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id. at 199.}
\item \textsuperscript{130} \textit{See \textsc{ronald Benton Brown \& Sharon Jacobs Brown}, \textsc{Statutory Interpretation: The Search for Legislative Intent} 84-86 (2002) (statutes should be construed so that every word is valuable and not redundant or duplicative); \textit{see also infra notes 206-207 and accompanying text (discussing why it is correct to apply the principle against redundancy to § 7214).}
\item \textsuperscript{131} \textit{Stern}, 418 F.2d at 199; \textit{see also 26 U.S.C. § 7214(a)(2) (2000) (receiving fees for the performance of any duty); \textit{id. § 7214 (a)(3) (failing to perform any duty with the intent to defeat IRS laws).}
\item \textsuperscript{132} \textit{Stern}, 418 F.2d at 199.
\item \textsuperscript{133} \textit{Id. at 198-99.}
\item \textsuperscript{134} United States v. Johnson, 398 F.2d 29, 30 (7th Cir. 1968).
\item \textsuperscript{135} \textit{Id. (as an examiner for the IRS, Johnson was responsible for checking questionable exemptions and supervising junior personnel).}
\item \textsuperscript{136} \textit{Id. at 31 (emphasis added).}
\end{itemize}
courts have freely applied § 7214(a) to actions of federal employees taken in a purely personal capacity.

3. Section 7214(a) Does Not Create a Private Cause of Action

The final clause of § 7214(a) sets forth criminal penalties for an offense under the statute.\(^{137}\) It also provides that the court "shall render judgment against the . . . employee for the amount of damages sustained in favor of the party injured."\(^{138}\) This language has been interpreted to mean that damages are not available to the injured party until after a criminal conviction has been obtained under this section.\(^{139}\) As recently as 2007, the Court of Appeals for the Tenth Circuit dismissed complaints under several provisions of § 7214(a), holding that it is a "criminal statute[ ] that do[es] not provide for a private right of action and [is] not enforceable through a civil action."\(^{140}\)

The foregoing cases summarize the current judicial construction of § 7214(a) as a criminal penalty against federal government employees who, when acting in connection with revenue laws of the United States, breach the high standard of conduct imposed on them by virtue of their employment.

C. "Under Color of Law" in § 7214(a): United States v. Deaver

*United States v. Deaver* sets out jury instructions in the first known trial to construe the language of § 7214(a)(1).\(^{141}\) Though

137. 26 U.S.C. § 7214(a) (2000) (dismissal from office and fines of up to $10,000, up to five years in prison, or both).


139. United States v. Overton, 44 F. App'x 932, 933-34 (10th Cir. 2002) (dismissing taxpayer's suit under § 7214(a) because taxpayers cannot receive damages until criminal conviction under § 7214(a) has been obtained); Brunwasser v. Jacob, 453 F. Supp. 567, 572-73 (W.D. Pa. 1978) (dismissing civil suit for damages as invalid cause of action under § 7214(a)); see also Detwiler v. United States, 406 F. Supp. 695, 700 (E.D. Pa. 1975) ("[I]t is the intent of Congress that injury to individuals resulting from 'willful oppression under color of law' [by] officers or employees of the Revenue Service are to be redressed by criminal action brought by the United States. Accordingly, 26 U.S.C. § 7214 has no relevancy in this suit" by a private individual.).

140. Andrews v. Heaton, 483 F.3d 1070, 1076 (10th Cir. 2007) (dismissing a father's complaints under § 7214(a)(1), (2), (7), and (8) resulting from an investigation by the Department of Human Services).

141. United States v. Deaver, 14 F. 595, 596-603 (W.D.N.C. 1882). Unfortunately, this opinion only contains jury instructions and gives neither the facts of the case nor its outcome. *Id.*
this opinion is over a century old, it is the only case on record to discuss the application of the phrase “under color of law” in the context of § 7214(a) prior to the Temple decision. In Deaver, the judge instructed the jury that officers of the revenue service “cannot rightfully do any act which is not authorized by law, under color of office.” Therefore, the judge instructed that if the jury found that the defendant acted without, or in excess of his actual authority, under the guise of carrying out his official duties, then the defendant would be guilty of action “under color of law.”

The judge in Deaver defined the expression “under color of law” in the same way as it is defined in Classic—action taken under the deceptive appearance of some state authority—but does not give his reasoning for that definition or the method by which it should be applied.

The legislative history and cases discussed in this Part provide a comprehensive interpretation of the meaning and purpose of § 7214(a) generally. However, this Part also reveals a lack of congressional or judicial discussion of the meaning of the phrase “under color of law” or how that phrase should be applied in § 7214(a) cases. It is against this backdrop that the Temple case was decided.

III. THE TEMPLE DECISION

The Temple case provides a factual context in which to examine whether a victim’s subjective perceptions should be considered in a § 7214(a) “under color of law” analysis. After being arrested at work in the New York City IRS office, Temple

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142. This case is still good law in the sense that it has not been expressly or impliedly overruled or abrogated, and has been positively cited to as recently as 2007. See Wilkie v. Robbins, 127 S. Ct. 2588, 2606 (2007) (citing Deaver for its definition of extortion).

143. Deaver, 14 F. at 596-601. The cases discussed supra Parts II.B.1-2 provide judicial interpretations of the entirety of § 7214(a) or of subsections other than (a)(1). None of the previously discussed cases specifically interprets subsection (a)(1), which contains the phrase “under color of law.”

144. Id. at 602.

145. Id. at 599. As to count one, the judge instructed the jury that the defendant may be found guilty if he misrepresented circumstances to his superiors to get authorization to use force more excessive than necessary. Id. As to count two, the jury was instructed that the defendant could be found guilty of acting “under the color of law” when he “destroy[ed] the still of John Wortman” if he did so prior to a judicial decree condemning the property and thus was “without authority of law” to destroy it. Id. at 600 (emphasis added). Finally, on count three, the jury could find the defendant guilty if it found that he collected sums before they were due, again acting under the appearance of but without authority of law. Id. at 601.

threatened to initiate audits of the arresting officers' personal tax returns.\textsuperscript{147} Having witnessed Temple's belligerent and threatening behavior,\textsuperscript{148} the detectives were concerned that she might carry out these threats and they reported her actions to the U.S. Treasury Department.\textsuperscript{149} Their report resulted in Temple's prosecution under \textsection{} 7214(a).\textsuperscript{150}

Though Temple was convicted by a jury, the district court judge granted her motion for acquittal, holding that there was insufficient evidence for the jury to have concluded that she acted "under color of law."\textsuperscript{151} On appeal, the Court of Appeals for the Second Circuit unanimously reinstated Temple's conviction, holding that there was sufficient evidence for a reasonable jury to find that she acted "under color of law."\textsuperscript{152} However, while the judges were unanimous in the result, the majority and concurrence disagreed as to whether "under color of law" should be measured subjectively or objectively.

A. The Majority Opinion

The majority, acknowledging that this was a case of first impression under \textsection{} 7214(a), began its analysis by looking at \textsection{} 242 and \textsection{} 1983 case law.\textsuperscript{153} It stated that "tests established [in \textsection{} 242 and \textsection{} 1983 cases] are helpful in determining whether an action is taken under color of federal law."\textsuperscript{154} The court adopted the civil rights statutes' definition of "under color of law": "[o]ne who abuses a position given to him or her by the government is said to act under color of law."\textsuperscript{155}

\begin{itemize}
    \item \textsuperscript{147} United States v. Temple, 447 F.3d 130, 132-33 (2d Cir. 2006), cert. denied, 127 S. Ct. 495 (2006).
    \item \textsuperscript{148} See id. at 132-33. Temple began to flail and curse at the detectives as they escorted her out of the IRS building. \textit{Id.} She attempted to get out of the squad car. \textit{Id.} After being handcuffed, she continued to curse at the detectives and was yelling that this was a racial conspiracy against her. \textit{Id.} She kicked Detective Montes as he rode with her in the back of the car and continued the physical and verbal abuse at the police station. \textit{Id.}
    \item \textsuperscript{149} \textit{Id.}
    \item \textsuperscript{150} \textit{Id.} at 134.
    \item \textsuperscript{151} \textit{Id.} at 135 (citing United States v. Temple, 342 F. Supp. 2d 233, 240 (S.D.N.Y. 2004), rev'd, 447 F.3d 130 (2d Cir. 2006)).
    \item \textsuperscript{152} See id. at 130.
    \item \textsuperscript{153} \textit{Id.} at 137-38.
    \item \textsuperscript{154} \textit{Id.} The court acknowledged that \textsection{}\textsection{} 242 and 1983 dealt with action under the color of \textit{state} law but found them helpful in its analysis nonetheless. \textit{Id.}
    \item \textsuperscript{155} \textit{Id.} at 138 (citing West v. Atkins, 487 U.S. 42, 49-50 (1988)); see supra Part I.A. (reviewing the Court's construction of "under color of law" in \textsection{}\textsection{} 242 and 1983).
\end{itemize}
Once it ascertained the meaning of "under color of law," the majority applied the phrase to the specific facts of the Temple case. Though the majority never expressly stated that it was relying on the detectives' subjective perceptions to determine that Temple acted "under color of law," this fact can be inferred from the opinion. The majority looked at Temple's authority as it was perceived by the detectives at the time the threats were made.\textsuperscript{156} The majority explicitly rejected the district court's contention that the detectives should not have believed Temple's threats because of facts that came to light after the threats were made.\textsuperscript{157} Instead, the court held that because the detectives had no reason to doubt that Temple would follow through at the time the threats were made, the detectives' subjective impression that they would be audited demonstrated a misuse of authority by Temple.\textsuperscript{158}

Further, the majority justified its conclusion by noting that in Giordano, the victims' subjective belief in their attacker's state authority, even without a specific threat under the guise of that authority, was sufficient to determine that he acted "under color of law."\textsuperscript{159} The majority also noted that subjecting Temple to penalties under § 7214(a) was consistent with the purpose of the statute to "'impose[] sanctions on revenue agents for departure[ ] from the high standards of conduct demanded by those holding that office.'"\textsuperscript{160}

B. The Concurring Opinion

The concurrence expressed concern that the majority opinion would be read to allow a victim's subjective perception of authority to control an "under color of law" analysis, particularly when read

\textsuperscript{156} See Temple, 447 F.3d at 138.

\textsuperscript{157} Id. at 138-39. The district court held that a reasonable jury could not find that Temple had acted under the color of law because she did not in fact have the ability to initiate an audit. Temple, 342 F. Supp. 2d at 239-40. It also found that the detectives should not have believed Temple because she made statements at the police station that had caused the detectives to question her mental capacity. Id. at 240. However, because these facts were not known to the detectives at the time Temple threatened them, the Court of Appeals held that they had no bearing on the "under color of law" analysis. Temple, 447 F.3d at 138-39; see also Miller, supra note 53, at 346 (arguing that an "under color of law" violation should be based on what is known when the wrongful act occurs).

\textsuperscript{158} Temple, 447 F.3d at 138-39.

\textsuperscript{159} Id. at 139; see supra text accompanying notes 74-78 (reviewing the Giordano decision).

\textsuperscript{160} Temple, 447 F.3d at 139 (quoting United States v. Stern, 418 F.2d 198, 199 (2d Cir. 1969)).
in conjunction with the Giordano decision. Specifically, it argued: "There is no basis for allowing subjective impressions, beliefs, or fears to cloud, much less drive, color-of-law analysis, and doing so will make consistent application of color-of-law statutes in this Circuit difficult, if not impossible." The concern was that reliance on a victim's subjective belief would allow liability to attach in the absence of any official status of the actor. The concurrence asserted that if a defendant's position and behavior as a public official are no longer essential to determining the applicability of the phrase "under color of law," liability under these statutes would be unpredictable, and any distinction between official action and personal pursuits would be eliminated.

The concurring opinion did not take issue with the majority's adoption of the Classic definition of "under color of law," but contended that some objective manifestation of authority should be required to render action "under color of law." The concurrence's position is supported by case law, specifically Pitchell v. Callan, which held that focusing on the victim's subjective reaction "misses the essence" of the "under color of law" requirement. However, the concurrence relied exclusively on § 242 and § 1983 case law to reach this conclusion and did not consider the role of subjective beliefs in the context of § 7214(a).

By failing to consider the history and purpose of § 7214(a) and the judicial interpretations of other provisions of § 7214(a), the concurrence did not accurately apply the phrase "under color of law" in the context of § 7214(a). The last section of this Note argues that, given the particular purpose of § 7214(a), it is appropriate to

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161. Id. at 141 (Wesley, J., concurring).
162. Id.
163. Id. at 144. See generally supra Part I.A.1 (reviewing early interpretations of the phrase "under color of law" that required an actor to have some connection to the state to be held liable for the wrongful conduct under §§ 242 and 1983).
164. Temple, 447 F.3d at 142 (Wesley, J., concurring).
165. See id. at 141 ("I do not quarrel with much of the majority opinion, including [the conclusion that Temple acted "under color of law"], but I would hold that Temple's threats were under the color of law without regard to the detectives' subjective beliefs or fears.").
166. Pitchell v. Callan, 13 F.3d 545 (2d Cir. 1994).
167. Temple, 447 F.3d at 144 (Wesley, J., concurring) (quoting Pitchell, 13 F.3d at 549).
168. Id. at 143-44. The concurring opinion does acknowledge that there is little case law regarding § 7214(a)(1) and that the language of § 7214(a) has remained unchanged since 1868, but it does not look into the purpose of the statute any further. See id.
consider the subjective view of the victim in a § 7214(a) "under color of law" analysis.

IV. Subjective Analysis is Appropriate Under § 7214

The key issue identified by the Temple concurrence is whether, when considering a statute that requires action to be taken "under color of law," courts should use an objective or subjective standard to measure the requisite misuse of authority.169 This Analysis argues that applying a subjective standard of "under color of law" in § 7214(a) cases achieves a result consistent with the purposes of the statute and does not cause the problems associated with reliance on a subjective standard in § 242 and § 1983 cases.170 While the phrase "under color of law" can be defined consistently across statutes in which it appears, it should be applied in light of the unique purposes of the statute before the court.171 As it is used in § 7214(a), "under color of law" may be defined consistently with §§ 242 and 1983 as a misuse of power made possible because the actor has authority of law, but unlike §§ 242 and 1983, can be applied using a purely subjective measure. Further, this Analysis contends that the concerns raised by the concurring opinion in Temple are misplaced because they focus on the problems caused by using a purely subjective measure of "under color of law" in § 242 and § 1983 cases,

169. See id. at 141; see also Libby, supra note 9 (highlighting the fact that this debate over the use of an objective or subjective standard is common among courts considering any statute containing the phrase "under color of law").

170. The author does not mean to suggest that the courts must use an exclusively subjective standard in § 7214. A purely objective standard, or some combination of objective and subjective measures could also theoretically satisfy the purposes of § 7214(a). However, because this Note is focused on rebutting the contention of the Temple concurrence that a purely subjective standard should never be used, the focus of this Analysis will be on the suitability of applying a subjective standard.

171. There are two concepts of statutory interpretation that are essential to this Analysis. The first is that courts have a duty to both interpret and apply statutes in light of the statute's particular goals, and that there is a difference between these two functions. Office of Legal Policy, U.S. Dep't of Justice, Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation 37-39 (1989) [hereinafter Using and Misusing Legislative History]. The second concept is that every statute has an individualized history and purpose, and courts must recognize the unique context of the statute they are interpreting, and then apply it in a way that achieves that purpose. See Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process 1-2 (1997); Moffatt Hancock, Fallacy of the Transplanted Category, 37 Can. B. Rev. 535, 549-51 (1959); infra notes 189-195 and accompanying text (discussing contextualism and examining the context and purpose of § 7214(a)); see generally Brown & Brown, supra note 130 (discussing the distinction between application and interpretation).
and fail to recognize that the same problems do not exist in the context of § 7214(a). 172

A. Interpretation of “Under Color of Law” in § 7214(a)

When deciding any case involving a statute, it is the court’s duty to both interpret and apply the statutory language. 173 Though the distinction between interpretation and application is subtle, it is vital to the constitutional principle of separation of powers. 174 Interpretation seeks to ascertain the actual meaning of the statute as manifested by the text, 175 without reference to any particular set of

172. This phenomenon of blindly transporting the application of a concept from one legal context to another without considering the difference in contexts has been succinctly described by one scholar as the “fallacy of the transplanted category.” See Hancock, supra note 171. Tracing a line of cases interpreting the word “consent,” Hancock points out that even where a single word is always used in reference to the same subject matter (with consent, in “reference to . . . the state of a person’s mind in relation to a particular transaction”), because of the diverse policy goals of the different statutes in which the word appears, it is illogical to assume that the phrase will always have the same scope. Id. at 549-51 (“[T]he meaning of a legal term will usually vary according to the legal result involved . . . .”). Likewise, the phrase “under color of law” is used in reference to the same subject matter—some perceived abuse of government authority—in both the civil rights statutes and § 7214. However, because the situation in which that abuse of authority occurs varies between the statutes, so too should the application of the phrase “under color of law.”

173. Brown & Brown, supra note 130, at 11 (“It is the courts’ duty to determine the legislative intent and give it effect.”); Using and Misusing Legislative History, supra note 171, at 37-39.

174. Using and Misusing Legislative History, supra note 171, at 39-40; see also Brown & Brown, supra note 130, at 3 (recognizing a distinction between interpretation and application, the authors note that “[c]areful interpretation is important to the larger venture of using statutes”). As Chief Justice Marshall stated: “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.” Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) (emphasis added). However, the interpretation and application processes are often combined by courts, which ask only whether the legislature intended the statute to apply in this way. See Mikva & Lane, supra note 171, at 6. Searching for the legislature’s intended application of a statute impermissibly expands the role of the legislature by giving it power to apply a statute, a power granted solely to the judiciary in Article III of the Constitution. See Using and Misusing Legislative History, supra note 171, at 39.

175. See Using and Misusing Legislative History, supra note 171, at 21-23 (discussing the differences between actual meaning and intended meaning). Actual meaning is the meaning that the words of the statute convey to a typical reader. Id. at 21. This approach focuses on the legislative intent as it is objectively manifested in the text of the law and recognizes that it is the text of the statute that has to be agreed on by both houses of the legislature, as well as the president, in order for a bill to become law. See Brown & Brown, supra note 130, at 13-14 (approaching legislative intent under contract law theory, parties are held to the intent they have objectively manifested to each other); Using and Misusing Legislative History, supra note 171, at 27-28. Proponents of an actual meaning approach argue that it is “essential to stability in the
 Courts are required to interpret a statute based on the meaning expressed by Congress. Application, on the other hand, is the process of determining the legal consequences of the statute on a given fact pattern. Because application determines the outcome of a case, this process is the sole province of the courts.

Before applying any statute containing "under color of law" language, the court's duty is to determine the actual meaning of that phrase—the meaning the legislature created in the text of the statute. This Note does not quarrel with the Temple court's definition of "under color of law" in § 7214(a) as an abuse of official authority. Rather, it defends the court's definition as accurate in the context of § 7214(a).

Laws must be fixed and knowable to the public to maintain a stable, ordered society, and the intended meaning of the legislature is "inherently less knowable and fixed than actual meaning." The Department of Justice makes a convincing constitutionally based argument for the "primacy" of actual meaning. It also demonstrates how a search for actual meaning alleviates many of the criticisms of the use of legislative history. See id. at 79-80.

This requirement stems from the need to preserve the separation of powers between the legislative and judicial branches of government. See Mikva & Lane, supra note 171, at 4; Using and Misusing Legislative History, supra note 171, at 33-34. It is universally accepted that courts should "adhere to the legislative intent" in the process of statutory interpretation. Brown & Brown, supra note 130, at 11 (citing Donajokowski v. Alpena Power Co., 596 N.W.2d 574, 577 (Mich. 1999)). There are many criticisms of the process of ascertaining legislative intent. See, e.g., Mikva & Lane, supra note 171, at 29-31; Using and Misusing Legislative History, supra note 171, at 47-56 (both discussing the problems with use of legislative history to ascertain intent). However, it is a necessary evil if the courts are to fulfill their role of interpretation without overstepping the bounds of their constitutional powers. Further, these criticisms can be overcome by focusing on the actual meaning of the statute rather than the intended meaning. See Using and Misusing Legislative History, supra note 171, at 21-23.

See generally id. at 39-40. The power granted to the judiciary by Article III of the U.S. Constitution is the power to decide specific cases and controversies by applying legislative rules. U.S. Const. art. III, § 2. Once the legislature has enacted a statute, "its power to control the outcome of litigation is at an end." Using and Misusing Legislative History, supra note 171, at 39-40.


United States v. Temple, 447 F.3d 130 (2d Cir. 2006), cert. denied, 127 S. Ct. 495 (2006). After accurately noting that this is the first case to consider the phrase "willful oppression under color of law" in the context of § 7214(a), the majority looked to "commonly held concepts to illuminate the phrase." Id. at 137. For the terms "willful" and "oppression," the court used dictionary definitions to supply their meaning. Id. But then, for the phrase "under color of law," the court relied solely on § 242 and § 1983 case law to define "under color of law" in § 7214(a). Id. at 137-38. Though the
The search for actual meaning should begin with the text of the statute and go no further if that language is plain. However, there is no plain meaning of the phrase “under color of law” because it is an idiom—its meaning cannot be ascertained from the literal meaning of its combined elements. Alternatively, even if a court were to argue that “under color of law” can be understood as a metaphor—the phrase is still ambiguous on its face.

In a case like this, when the statute’s meaning is not plain, courts must use extrinsic evidence to put the language in context to ascertain the actual meaning of the statute. As a legislative response to a particular problem, every statute has an individualized history and purpose. To accurately interpret a statute, courts must recognize the unique context of the statute they are considering. Though many different sources can be used to give context to a statute, this Analysis will focus on the problem § 7214(a) was designed to remedy and the meaning of the phrase “under color of

use of a phrase in other statutes may be a consideration in defining that phrase, it should not be relied on to the exclusion of other methods to determine the scope of language as it is used in a specific statute. See WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 159 (1942). When discussing the definition of “under color of law” in the Temple case, this Note refers to the Temple court generally, rather than distinguishing between the majority and concurring opinions because both opinions adopt the same meaning of the phrase. They differ only on the proper method of applying that definition in § 7214(a) cases.

182. Caminetti, 242 U.S. at 485; BROWN & BROWN, supra note 130, at 38-40; MIKVA & LANE, supra note 171, at 9 (“The starting place for any search for statutory meaning obviously must be in the language of the statute in question, for it is the language of a statute that the legislature enacts.”). In the words of Chief Justice Marshall, it is “the duty of the court to effect the intention of the legislature, but this intention is to be searched for in the words which the legislature has employed to convey it.” Schooner Paulina’s Cargo v. United States, 11 U.S. (7 Cranch) 52, 60 (1812).

183. MERRIAM-WEBSTER, supra note 21, at 616.

184. Id. at 780 (“[A] figure of speech in which a word or phrase literally denoting one . . . idea is used in place of another . . . .”); see also Winter, supra note 12, at 384-89 (analyzing “under color of law” as a metaphor).

185. See BROWN & BROWN, supra note 130, at 38-39 (plain meaning rule). Statutory language often can be unclear “simply because the English language by its very nature . . . is an inherent breeding ground for ambiguity.” Id. at 2; see also Schwemm-Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (Jackson, J., concurring); MIKVA & LANE, supra note 171, at 9-10.

186. See MIKVA & LANE, supra note 171, at 1-2.

187. See HANCOCK supra note 171, at 538 (noting that judges should consider “verbal context and . . . relation to the factual problem which the statute deals with” when interpreting a word or phrase).

188. See USING AND MISUSING LEGISLATIVE HISTORY, supra note 171, at 19-20 (stating that context may be established narrowly by looking the words surrounding the phrase in question, or broadly by looking at the history and circumstances of a statute’s enactment).
law" in other statutes to demonstrate why the Temple court was correct to define the phrase as a misuse of authority.

1. The Problem to be Remedied by § 7214(a)

"Contextualism" is a method of statutory interpretation that considers what was happening economically, politically, or socially at the time a statute was enacted, as well as the way in which words or phrases were used at that time. These extrinsic factors can help a court understand the purpose of the statute, and thus to interpret it in a manner consistent with that purpose. The social circumstances in 1868 and the problem Congress was attempting to resolve by enacting § 7214(a) support the definition of "under color of law" adopted by the Temple court.

In 1868, Congress was presented with evidence that Internal Revenue agents across the country were misusing, or acting beyond the scope of, their actual authority as agents. Widespread alcohol tax fraud was occurring because of Internal Revenue agents' lack of integrity and their willingness to cooperate with whiskey rings. Revenue agents were also unlawfully seizing property under the guise of authority and extorting settlements for tax debts. This abuse of authority was rampant and apparently difficult to prevent among the 3882 agents scattered across the country, especially without any criminal penalties to deter agent

189. BROWN & BROWN, supra note 130, at 47-48; see also Edwards v. Aguillard, 482 U.S. 578, 594-95 (1987) (noting that the inquiry into legislative purpose requires examination of "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history" as well as "the historical context of the statute . . . and the specific sequence of events leading to passage of the statute"). Legislative history can be used to reveal the problem a statute was intended to remedy, as well as the historical circumstances in which it was enacted. BROWN & BROWN, supra note 130, at 43 ("The court [should] seek[] to identify the 'evil' . . . the statute was intended to eradicate and interpret it in a manner to accomplish that purpose.").

190. BROWN & BROWN, supra note 130, at 47-48; see also USING AND MISUSING LEGISLATIVE HISTORY, supra note 171, at 67 ("Statutory meaning that might otherwise be uncertain may take on a distinctive color through the context provided" by understanding the legislative goal.). An understanding of the purposes of the statute will also help the court in applying the statute. See infra Part IV.B.1.

191. See CONG. GLOBE, 40th Cong., 2d Sess. 364 (1868).

192. See id.; supra notes 91-94 and accompanying text (discussing the historical circumstances that necessitated the enactment of § 7214).

193. See, e.g., United States v. Deaver, 14 F. 595, 599-602 (1882) (instructing the jury on charges against a revenue officer for the destruction of a taxpayer's still under the guise of his office, but without actual authority, and for collecting "special taxes" that were not officially sanctioned).

194. AMERICAN WAY, supra note 86, at 32. The lack of technology in 1868—no telephone, fax, e-mail, or even next-day delivery service to facilitate communication—
misconduct. It was within this state of affairs that Congress passed § 7214(a). Because the statute was created specifically to remedy a documented abuse of authority by Internal Revenue agents, it is logical to conclude that the phrase "under color of law" was used to connote an abuse of authority.

In addition, there are some well-established canons of construction that, when applied to the phrase "under color of law" in § 7214(a), also support the definition adopted by the Temple court. One canon is that a court should presume that if the word used has a technical meaning or is a term of art the legislature intended that meaning in the statute. By the time the phrase "under color of law" first appeared in American laws, it had become a term of art understood to imply action taken by an official under the deceptive appearance of authority. The jury instruction published in United States v. Deaver demonstrates that in the 1800s, "under color of law" was understood as a term of art.

presumably allowed much agent misconduct to go unseen by supervisors in the time it took them to physically travel to IRS outposts across the country.

195. The youth of the IRS, combined with its rapid growth and lack of organization, were probably also factors contributing to the misconduct of its agents. See AMERICAN WAY, supra note 86, at 31-33; HISTORY OF TAXATION, supra note 86. In addition, revenue agents were either appointed to the IRS based on political ties or contracted by the government as private collectors, without regard to their character and fitness for the job. See CONG. GLOBE, 40th Cong., 2d Sess. 364-66, 3378-81 (1868); AMERICAN WAY, supra note 86, at 33.

196. Courts bear a heavy burden in interpreting statutes. They are bound to enforce the command of the legislature but are often stuck in situations where the language of a statute is ambiguous, and there is scant or unreliable legislative history available to clarify the ambiguity. To help ease this burden, the judiciary has developed canons of construction that function as presumptions about legislative meaning. BROWN & BROWN, supra note 130, at 71-74; see also MIKVA & LANE, supra note 171, at 23-25 (listing numerous canons of construction used in statutory interpretation). These canons are used by courts to "fill the void that exists when there is no other reasonable way to know how to interpret [the language of a] statute." BROWN & BROWN, supra note 130, at 72.

197. Id. at 87-88. When words have "acquired a legal and technical signification we must presume that the legislature used them in their legal and technical sense." Deaver, 14 F. at 596-97; see also MIKVA & LANE, supra note 171, at 25 ("Words are to be given their common meaning, unless they are technical terms or words of art."). Contra Hancock, supra note 171, at 541-42 ("[T]his canon had always yielded to the least suggestion of contrary intention.").

198. See generally Winter, supra note 12, at 323-28 (summarizing the history of the phrase "under color of law"). Winter concludes that where Congress uses a phrase with a technical meaning, it intends to adopt that phrase as a term of art, and this is why there is little debate over the use of the words "under color of law" within the legislative history of 42 U.S.C. § 1983. Id. at 384.

199. Deaver, 14 F. 595; see supra text accompanying notes 141-146 (explaining how the judges' failure to consider the meaning of "under color of law" demonstrates a
The judge in *Deaver* specifically noted that this was the court's first occasion to interpret § 7214(a) and for that reason provided the jury with a thorough explanation of the terms "willful" and "oppression." 200 Yet he did not offer any definition of the phrase "under color of law." 201 This lack of explanation supports the inference that "under color of law" had a commonly understood meaning that the jury would grasp without further instruction. 202 Because at the time § 7214(a) was drafted, the phrase "under color of law" was a commonly known term of art referring to action taken under the deceptive appearance of authority, the *Temple* court was correct to assume that the legislature used the phrase in that sense.

Another canon of statutory interpretation recognizes that there is significance in the words that Congress did not use. 203 The logic of this approach is that the use of specific words creates a negative implication, namely that other words were avoided for a reason. 204 Applying this principle to § 7214(a), if Congress meant to create an offense for the willful oppression of another with *actual authority*, it would have used the words "actual authority." It is significant that Congress chose the term "under color of law," knowing that it had a technical meaning that relied on the appearance of authority, but not actual authority. In § 7214(a), Congress's use of a phrase implying abuse of apparent authority must exclude from the reach of that statute action properly taken within the bounds of authority. This principle of negative implication further

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202. The fact that Congress did not debate the use or meaning of the phrase in enacting § 7214 may also evidence that it was considered a term of art with an undisputed meaning. See *Cong. Globe*, 40th Cong., 2d Sess. 364-66, 3378-81 (1868) (demonstrating no debate over the phrase "under color of law"). However, it is also possible that the phrase was simply not discussed because the provisions of § 7214(a) were not the main focus of the bill the committee was instructed to draft. *See id.* at 3379. Arguably, this phrase may have slipped through unnoticed in the midst of more heated arguments over the appropriate tax rate on distilled liquor. *See id.* at 3378-80, 3397-99.

203. *See Brown & Brown, supra* note 130, at 78-81. This principle is also embodied in the phrase, *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of others. *See id.* at 81.

204. *Id.* at 78-81.
confirms that Congress intended § 7214(a) to apply to action that constituted an abuse or misuse of authority.205

Finally, the principle against surplusage or redundancy assumes that Congress intended each word of the statute to have meaning and that unnecessary words would have been filtered out by the time the statute was enacted.206 Applying that principle, because the original language of § 7214(a) required that action be taken "under the authority of any revenue law of the United States,"207 "under color of law" must have a meaning other than actual authority. It would be redundant to interpret the phrase "under color of law" to mean actual authority of law where the drafters expressly required action under authority of law in the language of the preamble.

The social circumstances in which the statute was drafted, combined with the foregoing canons of construction, support the Temple court’s definition of “under color of law” in the context of § 7214(a) as an abuse of authority. In addition, because the definition of “under color of law” adopted in Temple was created by, and is still applied to, §§ 242 and 1983, Temple preserves a consistent meaning of the phrase “under color of law” across all statutes. By adopting the same meaning as in §§ 242 and 1983, the court has adhered to the principle of construction that statutes on the same subject be read consistently with one another,208 and has also addressed one of the concurring opinion’s main concerns.209

It is appropriate that §§ 242, 1983, and 7214 should all employ the same definition of “under color of law” because they were each designed to remedy some type of official misconduct.210 However,


206. BROWN & BROWN, supra note 130, at 84-86; MIKVA & LANE, supra note 171, at 24.


208. See MIKVA & LANE, supra note 171, at 24 (“Statutes that relate to the same subject matter . . . are to be construed together.”).


210. See, e.g., Lurie, supra note 23, at 2090-92 (“[T]he purpose of section 1983 is to deter local actors from using their authority to deprive individuals of their federally guaranteed rights, and to provide relief if that deterrence fails.” (citing Wyatt v. Cole, 504 U.S. 158, 161 (1992))).
it is on the proper method of applying "under color of law" in § 7214(a) that the Temple majority and concurrence differ. The majority, by considering the victims' subjective reactions to Temple's conduct, correctly applied the phrase "under color of law" in a manner that achieves the purposes of § 7214(a). The concurrence, on the other hand, erred in arguing that subjective beliefs should not be considered in § 7214(a) because of the problems that arise using a subjective measure in the context of §§ 242 and 1983.

B. Application of "Under Color of Law" in § 7214(a)

This Note argues that applying the phrase "under color of law" in § 7214(a) in the same way it is applied in civil rights statutes is incorrect. To be sure, it is tempting, and indeed common, to assume that a phrase that appears in multiple legal rules has the same scope in each of them. But to give in to that temptation, as the Temple concurrence has done, "has all the tenacity of original sin and must constantly be guarded against." The scope of any legal term is developed through decisions influenced by policy considerations relevant to the specific case before the court. To blindly apply that term the same way "in a different legal context where a different legal result is [at] issue" is improper and may actually frustrate the policies behind the statute. In order to correctly apply a statute, a court must look at its purpose and determine how to apply it to the facts in a way that furthers that statute's specific goals. The Temple concurrence falls victim to the "fallacy of the transplanted category" when it assumes that "under color of law" in § 7214 should be applied the same way as it is in §§ 242 and 1983. The concurring opinion overlooks the unique goals of § 7214 and the differences in the actors and the types of misconduct § 7214 was intended to reach when it assumes that the phrase "under color of law" should be applied identically in all three statutes.

For any statute containing the phrase "under color of law" to apply to a case, there must be some indication of government authority that facilitated the wrongdoing. The difficulty is deter-
mining how to measure the presence of such authority: objectively, subjectively, or by some combination of the two.\textsuperscript{218} A majority of courts in § 242 and § 1983 cases favor a purely objective analysis, arguing that consideration of subjective beliefs could allow liability to be imposed on an official acting in a purely personal capacity, conduct that §§ 242 and 1983 are constitutionally prevented from reaching.\textsuperscript{219} The problem with the concurring opinion in the Temple case is that it assumes that the search for indicia of authority should be the same in § 7214(a) as in §§ 242 and 1983: using an objective standard, but never a purely subjective measure.

Although “under color of law” has the same meaning in all three statutes, § 7214(a) has a history and purpose unique from that of the civil rights statutes and should not be applied in the same way. Using a purely subjective standard to measure whether action is taken “under color of law” in § 7214(a) is appropriate because it achieves the purposes of the statute without raising the issues associated with use of subjective belief in §§ 242 and 1983 cases. This Section reviews the purpose of § 7214(a) and demonstrates that the Temple majority achieved the statute’s goals using a subjective standard to find that Temple acted “under color of law.” Further, this Section rebuts the concerns raised in the concurring opinion by demonstrating that application of a subjective standard in § 7214(a) does not create the same problems as it would in the civil rights statutes.

1. Using a Subjective Test Achieves the Purposes of § 7214(a)

Congress enacted § 7214(a) in the early years of the IRS for a unique purpose: to remedy the rampant transgressions of Internal Revenue employees by creating criminal penalties for misconduct.\textsuperscript{220} Since 1868, that purpose has been expanded to impose a standard of conduct on any federal employee acting in connection with a U.S. revenue law and to punish deviations from that standard regardless of whether the employee is acting in an official ca-

\textsuperscript{218} See Libby, supra note 9, at 733. See generally supra Part I.B. (reviewing the approaches courts have taken to the “under color of law” inquiry in §§ 242 and 1983).
\textsuperscript{219} See Screws, 325 U.S. at 111; supra notes 33-34, 40-42 and accompanying text.
\textsuperscript{220} See CONG. GLOBE, 40th Cong., 2d Sess. 364-66, 3380-450 (1868); supra text accompanying notes 191-195 (history of § 7214’s enactment).
pacity when such misconduct occurs. As a result, there are two primary purposes of § 7214(a) today: (1) to set a standard of conduct for federal employees, and (2) to reach any of those employees acting in connection with revenue laws who breach that standard.

To achieve these goals, courts have liberally applied § 7214(a) to conduct by federal employees that only remotely implicates Internal Revenue laws, and without regard whether or not such action is taken in the course of official duties. Indeed, § 7214(a) has frequently been applied to actions of federal employees taken in a purely personal capacity. For example, in United States v. Stern, the court explicitly recognized that the purpose of the statute was to impose high standards of conduct on federal employees and that, "[q]uite realistically, some of these derelictions may be committed outside the performance of the officer's official duties."

As illustrated by the Temple majority, using a subjective measure of "under color of law" can successfully carry out the goals of § 7214(a). Indeed, the result in Temple was the conviction of a federal employee whose behavior toward two New York City police detectives departed from the high standard of conduct demanded of federal employees under § 7214(a). Temple, a quality analyst for the IRS, falls into the category of individuals the statute is intended to reach both because she was an employee of the United States

221. See United States v. Stern, 418 F.2d 198, 199 (2d Cir. 1969); United States v. Johnson, 398 F.2d 29, 31 (7th Cir. 1968); United States v. McDonald, 26 F. Cas. 1085, 1085 (C.C.E.D. Mo. 1876) (No. 15,670) (discussing the "rigid accountability" to which officers of the government should be held).

222. Section 7214(a) was originally enacted to create a code of conduct for Internal Revenue agents. See supra notes 93-94 and accompanying text.

223. Since its enactment, the goal of § 7214(a) has been expanded to impose a high standard of conduct on all federal employees acting in connection with a revenue law. See supra notes 103-108 and accompanying text.

224. See Johnson, 398 F.2d at 31; supra Part II.B.2 for a discussion of conduct in connection with revenue laws. Because "willful oppression under color of law" is only one of nine enumerated offenses in § 7214(a), the remainder of which do not require action to be taken "under color of law," it would be inaccurate to say that preventing action taken "under color of law" is the main purpose of § 7214(a). See 26 U.S.C § 7214(a) (2000). The proper application of the statute for any one offense must be determined in light of the purpose of the statute as a whole. See MIKVA & LANE, supra note 171, at 24 ("A statute should be read to avoid internal inconsistencies.").

225. See Stern, 418 F.2d at 198-99 (holding an IRS agent liable for fraudulent statements made on his personal tax return); Johnson, 398 F.2d at 31-32 (holding a revenue agent liable for inaccurate statements on returns prepared by him for others, outside of work, for compensation, and where his position at the IRS had nothing to do with the preparation or review of tax returns).

226. Stern, 418 F.2d at 199; accord Johnson, 398 F.2d at 31.
and, because by telling the detectives she would initiate an audit against them, she acted in connection with a revenue law.\(^{227}\)

Moreover, Temple's actions amounted to willful oppression of the detectives "under color of law."\(^{228}\) The majority focused on the detectives' perception of Temple's official status when she threatened them as evidence that Temple acted "under color of law." The detectives' subjective understanding of Temple's conduct—their belief that she would have them audited—demonstrated that she had misused her authority as an Internal Revenue employee to threaten the detectives.\(^{229}\)

The majority expressly acknowledged that the purpose of § 7214(a) was to punish departures from the high standard of conduct demanded of federal government officials, and that its holding accomplished this purpose—concluding that "Temple's . . . behavior represent[s] a significant departure from those standards."\(^{230}\) Because her threats were related to an Internal Revenue law and were intentionally made by a federal employee for the purpose of intimidation, Temple's actions constituted willful oppression "under color of law" as defined by § 7214(a).\(^{231}\) The Temple majority was correct to allow the subjective perception of the victims to drive the analysis of Temple's conduct because doing so satisfied the purposes of the statute. Furthermore, using a subjective analysis does not create the same problems in § 7214(a) that a purely subjective measure raises in § 242 and § 1983 analyses.

2. A Subjective Test Does Not Create Problems in § 7214(a)

The Temple concurrence focuses on problems caused by the use of a subjective standard in the "under color of law" inquiry.\(^{232}\) The concurrence's major objection to the use of a subjective stan-

\(^{227}\) United States v. Temple, 447 F.3d 130, 132, 137 (2d Cir. 2006), cert. denied, 127 S. Ct. 495 (2006); accord United States v. Temple, 342 F. Supp. 2d 233, 238 (S.D.N.Y. 2004), rev'd, 447 F.3d 130 (2d Cir. 2006). The District Court did acknowledge that there may be some dispute on this element of the charge but that "a reasonable jury could have found that Temple was acting in connection with the revenue laws because her threat to the detectives involved IRS audits." \textit{Id.} at 238.

\(^{228}\) \textit{Temple}, 447 F.3d at 137-39.

\(^{229}\) \textit{Id.} at 139 ("[Temple's] oppressive conduct was indeed made possible by her \textit{perceived} ability to invoke the . . . authority of her department." (emphasis added)).

\(^{230}\) \textit{Id.}

\(^{231}\) \textit{See id.} at 137 (defining "willful oppression" as an intentional, unjust exercise of power).

\(^{232}\) \textit{Id.} at 141-44 (Wesley, J., concurring).
standard is that it will destroy the distinction between action taken in a personal capacity and state action, which is a constitutional prerequisite to the applicability of the civil rights statutes. Additionally, the concurrence is concerned about the possibility of inconsistent application of "under color of law" statutes given that the victim's subjective belief is not a consideration under the civil rights statutes. However, these concerns are misplaced because they focus on issues that arise only because of the constitutional limits of §§ 242 and 1983. As the remainder of this Section will demonstrate, none of the problems raised by the concurrence exist when applying a subjective measure of "under color of law" in the context of § 7214(a).

a. Liability for action taken in a personal capacity is permissible in § 7214(a) cases

In analyses of the phrase "under color of law" in §§ 242 and 1983, the primary concern with relying on the victim's subjective belief in the actor's authority is that it may create liability for action taken by an official in a purely personal capacity. Actions taken in a personal capacity are plainly outside the scope of the civil rights statutes. Because those statutes seek to prevent the deprivation of constitutional rights, there must be some connection between the actor's status and the harm done. The phrase "under color of law" was used in the civil rights statutes to ensure that the Constitution's state action requirement would be met before those statutes could apply. The concern in § 242 and § 1983 cases is that when subjective beliefs are considered, "it is no longer the defendant's status and conduct as a public official ... that determines whether [the] statute will apply." 

However, § 7214(a) does not address the deprivation of constitutional rights, and therefore does not require that the actor have a connection with the sovereign. Thus, it is not problematic that a subjective analysis may create liability for personal capacity actions

233. Id. at 144 (stating that use of a subjective standard "would eliminate any distinction between acts under color of law and personal pursuits"). In § 242 and § 1983 cases, most courts have rejected a purely subjective standard of "under color of law" because it may impose liability on government officials acting in a personal capacity. See supra notes 32-35, 40-43 and accompanying text.

234. Temple, 447 F.3d at 145 (Wesley, J., concurring).


236. See supra notes 33-34, 40-42 and accompanying text.

237. Temple, 447 F.3d at 142 (Wesley, J., concurring).

in § 7214(a) cases. On the contrary, § 7214(a) has been expressly applied to federal employees acting in a personal capacity outside the scope of their official duties. Congress specifically removed the requirement that a wrongdoer must act under the authority of revenue laws, and the statute's current language contains no requirement that employees be acting in the course of their duties to be subject to the penalties of § 7214(a).

Under the plain language of § 7214(a), as long as the actor is a government employee acting in connection with a revenue law, he may be charged with any of the offenses under the statute. So long as the two objective criteria of the preamble—that the actor is both a federal employee and has acted in connection with a revenue law—are met, it is irrelevant for the purposes of § 7214(a) whether the actions were taken in a personal or official capacity. Consequently, it is not problematic to use a subjective measure of "under color of law" in § 7214(a), even if it does result in liability for actions taken in a personal capacity because the statute is intended to reach such conduct.

b. Subjective approach maintains consistent meaning of "under color of law"

The concurring opinion in Temple is also concerned that use of a subjective standard would result in inconsistent application of statutes containing the phrase "under color of law." However, this concern ignores the subtle distinction between application and interpretation. Application requires the court to give effect to the purposes of a specific statute. It is illogical to insist on consistent application of the phrase "under color of law" where it is used in statutes that have distinctly different purposes. Though §§ 242, 1983, and 7214(a) were all designed to remedy some official misconduct, they are different types of statutes, distinct from each other in the group of persons and scope of conduct to which they apply.

239. See United States v. Stern, 418 F.2d 198, 198-99 (2d Cir. 1969); United States v. Johnson, 398 F.2d 29, 31 (7th Cir. 1968); discussion supra Part II.B.2.
242. Temple, 447 F.3d at 145 (Wesley, J., concurring).
243. See supra notes 173-179 and accompanying text (discussing the two concepts).
244. See Using and Misusing Legislative History, supra note 171, at 39.
245. See generally Hancock, supra note 171.
Sections 242 and 1983 are civil rights statutes, originally designed to protect the constitutional rights of newly emancipated slaves.\textsuperscript{246} Determining whether action was taken "under color of law" is a constitutional prerequisite to their application.\textsuperscript{247} These statutes do not name a concrete group of actors to whom they apply. Rather, they are applicable to any person who deprives another of her constitutional rights "under color of law"—that is, with some indication of state authority.\textsuperscript{248} Therefore, the determination of whether there is a sufficient connection between the actor and the sovereign to find that action was taken "under color of law" becomes the essential element in applying the civil rights statutes.\textsuperscript{249}

On the other hand, § 7214(a) is a criminal statute located within the Internal Revenue Code. It explicitly defines the category of persons and scope of conduct to which it applies.\textsuperscript{250} Additionally, because action taken "under color of law" is an element in only one of the nine offenses under the statute,\textsuperscript{251} the "under color of law" inquiry is not central to the purpose of § 7214(a) as a whole. Even when a defendant is charged under § 7214(a)(1), the one offense that requires action to be taken "under color of law," the "under color of law" determination is only one element of that offense.\textsuperscript{252} It is equally important in a § 7214(a) case for the court to find that the conduct in question was done by a federal employee acting in connection with a revenue law and that it willfully oppressed the victim.\textsuperscript{253} The scope of the "under color of law" inquiry is narrower and not of the same constitutional magnitude in § 7214(a) than it is in § 242 and § 1983. To require consistent application among all "under color of law" statutes ignores the distinct purposes the phrase serves in these different legal contexts.

Alternatively, if the concurrence's real concern is that "under color of law" be defined consistently across statutes, that concern is also unfounded because the majority has adopted a meaning of

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\item \textsuperscript{246} Maloy, supra note 22, at 571-72; supra text accompanying notes 23-24.
\item \textsuperscript{247} See supra notes 21-25 and accompanying text (giving history of the civil rights statutes).
\item \textsuperscript{249} See Lugar v. Edmondson Oil Co., 457 U.S. 922, 938-39 (1982); supra notes 33-34, 40-42.
\item \textsuperscript{250} See 26 U.S.C. § 7214(a) (2000).
\item \textsuperscript{251} See id.
\item \textsuperscript{252} Section 7214(a)(1) creates an offense for a federal employee "who is guilty of any extortion or willful oppression under color of law." Id.
\item \textsuperscript{253} See id.
"under color of law" consistent with the civil rights statutes' definition of the phrase. The Supreme Court held that the definition of "under color of law" in United States v. Classic "formulated a rule of law which has become the basis of federal enforcement in this important field." The Temple court abided by this rule, and adopted the exact meaning of "under color of law" defined in Classic and used in §§ 242 and 1983 cases since. It is sufficient that there be consistent meaning of "under color of law" among statutes employing the phrase. Consistent application, however, is unnecessary and is contrary to the text and purposes of the statute.

c. Use of a subjective measure will not flood courts with § 7214(a) litigation

Finally, the concurrence implies that the application of a subjective standard will result in "uncontrolled" use of "under color of law" statutes, which will flood courts with frivolous litigation. Yet, this concern is unfounded for several reasons. Section 7214(a) can only be applied to a limited group of people—federal employees who are acting in connection with a revenue law. In addition, the statute only prohibits nine specific types of behavior by members of that group. These criteria naturally limit the applicability of § 7214(a) and, consequently, the number of suits that could arise under it.

Most important, § 7214(a) only provides a criminal remedy to be pursued by the government; it does not create a private cause of action. This limits the number of cases § 7214(a) will generate because the actions alleged must be serious enough to be reported to, and prosecuted by, the government. Even if subjective beliefs are allowed to drive the "under color of law" analysis in § 7214(a), it is highly unlikely that a flood of cases will follow. None of the

254. See United States v. Temple, 447 F.3d 130, 137-38 (2d Cir. 2006), cert. denied, 127 S. Ct. 495 (2006); supra Part I.A.1-.2 (presenting the § 242 and § 1983 definition of "under color of law").
256. Temple, 447 F.3d at 138.
257. See id. at 145 (Wesley, J., concurring).
259. See id.
260. See id.; Overton v. United States, 44 F. App'x 932, 933-34 (10th Cir. 2002); supra Part II.B.3 (no private cause of action under § 7214).
issues raised by the concurring opinion in *Temple* are valid concerns in the context of § 7214(a).

**CONCLUSION**

Appropriate application of the phrase "under color of law" must be determined in the context of the statute in which it appears. The concerns raised in the *Temple* concurrence about the use of a subjective standard\(^\text{261}\) are misplaced because they focus on the application of "under color of law" in § 242 and § 1983 cases, not in the context of § 7214(a). The phrase "under color of law" in § 7214(a) is used only to define one type of prohibited conduct under that statute, and it was not intended to be applied the same way as it is in the civil rights statutes, where the phrase operates as a constitutional limitation on the statutes' applicability.\(^\text{262}\) The *Temple* majority opinion takes the correct approach by defining the phrase "under color of law" consistently with its definition in §§ 242 and 1983, but applying the phrase differently in § 7214(a) in order to achieve the purposes of that statute.\(^\text{263}\)

In § 7214(a) cases, the victim's subjective perception of the wrongdoer's authority should be considered in the "under color of law" analysis. Use of a subjective standard achieves the purpose of § 7214(a)—to impose a high standard of conduct on federal employees acting in connection with Internal Revenue laws.\(^\text{264}\) Further, because objective criteria in the preamble of § 7214(a) specifically define the category of persons the statute can reach, reliance on a victim's subjective perception cannot create liability in a party that the statute was not intended to reach. The *Temple* majority correctly applied the phrase in the context of § 7214(a) when it held that Temple acted "under color of law" based on the detectives' subjective reaction to her conduct.

*Sarah T. Biolsi*

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262. See discussion supra Part IV.B.2.
264. See discussion supra Parts II.A, II.B.1.