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Department Of The Treasury
Office of Tax Legislative Counsel
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

January 11, 2000

To: Mike O'Connor
White House Counsel's Office

Fax: 456-1647

Number of pages (including this coversheet): 8

From: Elizabeth P. Askey

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Comment: Per our conversation.

UNCLASSIFIED

Department of Justice
Washington, D.C. 20530

AUG 22 1977

MEMORANDUM FOR HONORABLE ROBERT J. LIPSHUTZ
Counsel to the President

Re: White House Reports to Congress on Tax Checks in Connection with Presidential Appointments

This is in response to your request of June 30, 1977, for a memorandum of law on the question whether the White House should comply with the reporting requirements of section 6103(g)(5) of the Internal Revenue Code with respect to tax checks requested of the IRS in connection with Presidential appointments. It is our conclusion that the President should comply with the reporting requirements.

You state in your memorandum that as part of the background review of prospective Presidential appointees and White House staff members, the Internal Revenue Service furnishes your office with limited tax return information on each candidate. The information is released directly to your office pursuant to a written disclosure authorization signed by the taxpayer.

As you point out, section 6103(c) permits the Secretary to disclose a return or return information with respect to a taxpayer "to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure." This provision for consensual disclosures is of general applicability, and makes no specific reference to consensual disclosures to the White House.

In section 6103(g), as added by the Tax Reform Act of 1976, Congress has expressly provided two different types of procedures for the disclosure of tax information to the President or his representatives. Subsection (1) provides that the Secretary may disclose to the President (or a designated White House employee), upon a personal written request of the President, return information on any taxpayer. This section does not require the consent of the taxpayer, although the President must state the specific reason for his request.

Subsection (2) deals with disclosures relating to individuals who are designated as being under consideration for appointment to a position in the Executive or Judicial Branch. Upon the request of the President or the head of a Federal agency, the Secretary may furnish to authorized personnel in the Executive Office or to the agency head (or to the FBI if requested by the President or agency head) certain limited return information with respect to the individual. The only information that may be furnished pursuant to subsection (2) is whether the taxpayer: (A) has filed returns for the last three years; (B) has failed to pay any tax within 10 days of notice and demand to do so, or been assessed any penalty for negligence in the current or preceding three years; (C) is under investigation for possible criminal offenses under the internal revenue laws and if so, the results of the investigation; or (D) has been assessed any civil penalty for fraud under the internal revenue laws. Again, the consent of the individual is not required, but the Secretary must notify the individual within three days of the request for information.

The President is required to file quarterly reports with the Joint Committee on Taxation of all disclosures to the White House requested pursuant to subsection (g), but no reports are required under the general provision for consensual disclosure, subsection (c). You state that the information in question here is obtained with the individual's consent pursuant to subsection (c), rather than under the special procedures for disclosures to the White House established in subsection (g), and you therefore question whether a report must be made to the Joint Committee with respect to the disclosures.

The requirement in subsection (g) that the President report on a quarterly basis to the Joint Committee with respect to tax return information furnished to the White House applies only to requests made "under this subsection" -- i.e., under subsection (g). It is clear that the plain language of the act, just quoted, renders the reporting requirement inapplicable to disclosures made under subsection (c). 1/ The question is whether tax information furnished to the White House with respect to prospective Presidential appointees, even with their consent, is covered by subsection (g) rather than subsection (c).

1/ As you point out, the General Explanation of the Tax Reform Act of 1976 prepared by the staff of the Joint Committee states (at p. 318) that "the Congress felt that the White House should report to the Congress regarding the disclosures of tax information made to it." See also S. Rep. No. 94-938, 94th Cong., 2d Sess. 322 (1976). This passage may be read to contemplate that all disclosures to the White House would be reported. But the reporting requirement can be viewed as a means of deterring abuse by the White House because of the possibility that the Joint Committee will investigate or publicize questionable requests. See S. Rep. No. 94-938, at p. 323. If one reads subsection (g) to be inapplicable to disclosures made with the taxpayer's consent on the ground that there is little potential for abuse in such a situation (a position we reject for reasons given later in this memorandum), then arguably there would be no need for the deterrent effect of reports to the Joint Committee. The language just quoted from the Explanation (and the similar statement in the Senate Report) could therefore be read to apply only to those disclosures to the White House which pose a potential for the abuse to which the reporting requirement is directed -- i.e., those made without consent pursuant to subsection (g). This reading of the Explanation and the Senate Report would be consistent with the plain language of the reporting requirement in subsection (g), which on its face applies only to disclosures made pursuant to that subsection.

We do not believe that Congress contemplated the White House could utilize the provision for consensual disclosure in subsection (c) as an alternative to the procedure for White House access to tax returns established in subsection (g). As mentioned earlier, subsection (c) is a general provision governing consensual disclosures, to persons inside and outside the Government. Subsection (g), on the other hand, specifically addresses the subject of disclosures to the White House. It is a settled rule of statutory construction that a specific statute applicable to a given subject matter controls where it is inconsistent with the terms of a more general statutory provision which might also appear to govern the particular situation. See, e.g., Morton v. Mancari, 417 U.S. 535, 550-51 (1974).

Subsection (g) is not on its face inapplicable where the taxpayer has consented to the disclosure. Indeed, the Senate Report states that under the procedure in effect prior to the passage of the 1976 amendments, "a tax check on a potential Presidential appointee [was] initiated by the White House Office as part of a 'security and conflicts review' to which the potential appointee consent[ed]." S. Rep. No. 94-938, at p. 322 (emphasis added). The tax check procedure was expected to be essentially the same under the statutory procedure established by the Tax Reform Act of 1976, and there is no indication in the legislative history of the Act that Congress expected the practice of obtaining the prospective appointee's consent would cease. 2/ It

2/ The Senate Report (at p. 322) and the Joint Committee Explanation (at p. 318) both state that subsection (g) "to a large extent" codifies President Ford's Executive Order 11805, which restricted access in the White House to employees paid at equivalent to that established for an Executive Level position and provided that tax returns would only be furnished upon the written request of the President. Under the procedure established under the Executive Order, information furnished in tax check situations was identical to that which may be furnished in tax check situations pursuant

(Footnote cont'd on p. 5)

therefore seems unlikely that Congress intended for the procedures codified in subsection (g)(2) for use in tax check situations to be wholly inapplicable merely because the taxpayer consented to the disclosure, and we found no suggestion of this result in the legislative history.

This inference is strengthened by the statement in the Senate Report that the committee "recognizes the President's need for certain tax information, particularly, if not entirely, in the 'tax check' area." S. Rep. No. 94-938, at p. 322 (emphasis added). 3/ We would be reluctant to interpret subsection (g) in a manner that would render it meaningless with respect to most disclosures to the White House, especially in view of the fact that President Nixon's alleged abuses of the income tax system played an important role in the Senate's passage of section 6103 generally and subsection (g) in particular. See Hearings on Federal Tax Return Privacy before the Subcommittee on Administration of the Internal Revenue Code of the Senate Committee on Finance, 94th Cong., 1st Sess. 129-47, 153, 155, 197-98, 202-03 (1975).

It is instructive in this regard that while many of the alleged abuses discussed in the Senate hearings related to attempts to obtain tax information about persons former President Nixon's staff reportedly regarded as political

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2/ (Footnote from p. 4)

to 26 U.S.C. § 6103(g)(2). S. Rep. No. 94-938, at pp. 321-22; Explanation, at p. 318. This suggests that Congress expected the prior practice with respect to tax checks to continue -- and, as explained in the text, the Executive Order's restrictions applied to tax checks to which the prospective appointee had consented.

3/ Similarly, the Joint Committee staff's Explanation states (at p. 318): "The President needs certain tax information, particularly (if not entirely) in the 'tax check' area."

enemies and to cause IRS to investigate these enemies, there was also discussion of efforts by White House personnel to obtain tax information to determine whether IRS was "harassing" politically active persons who were apparently viewed as sympathetic toward the former President. 4/ It is quite possible that a taxpayer would consent to the disclosure of tax information to the White House in the hope that the President or his aides would intercede to halt an IRS investigation. Similarly, the Senate hearings discuss one example of White House access to tax return information for purposes of determining an individual's political reliability for a top Presidential campaign position. Id. at 135-36. An individual might consent to disclosure under these circumstances as well, but it is questionable that tax return information should be obtained for a nongovernmental purpose such as this. If consensual disclosures are excluded from the coverage of subsection (g), there would be no deterrent to this type of abuse afforded by the oversight function of the Joint Committee. 5/

4/ John Wayne and Billy Graham were two individuals mentioned in the Senate hearings (at pp. 130-35, 135-36, 161-62). The White House reportedly also received information regarding an IRS investigation of Donald Nixon. Id. at 139-41.

5/ It is also possible that abuses could occur where an individual consented to the release of tax return information in connection with his possible appointment to a Federal position. The prospect of an appointment could be a sham advanced in order to obtain information for some other purpose. The FBI investigation of Daniel Schorr was initially justified by the White House on this ground, although Mr. Schorr apparently did not give his consent to the investigation. N.Y. Times, June 27, 1973, at p. 51. Also, return information ostensibly sought to determine financial status or possible criminal charges in connection with a prospective appointment could in fact be used to determine the individual's associations, charitable contributions, etc. While these possibilities are perhaps far-fetched, oversight by the Joint Committee would nevertheless help to ensure that they do not occur.

Two other factors also suggest that subsection (g) applies even where a prospective appointee consents to the disclosure. First, subsection (g)(2) requires that within three days of the receipt of a request for a tax check, the Secretary must notify the individual of the request. This undercuts any argument that the reporting requirement is only intended to apply to secret requests for tax information. Moreover, while the tax check need not cease if the individual does not give his consent, it seems that as a practical matter, the notice would in many situations give the prospective appointee an opportunity to withdraw from consideration rather than to have the tax check proceed. The notice requirement therefore generates pressure to obtain the individual's consent in any event.

Second, the Joint Committee's Explanation states that "the Congress felt that the White House should report to the Congress regarding the disclosures of tax information made to it." See also S. Rep. No. 94-938, at p. 322. As previously explained, the all-inclusive tone of this statement would not be enough to require reporting to the Joint Committee of consensual disclosures to the White House if such disclosures are actually governed by subsection (c) rather than subsection (g). However, to the degree the quoted passage reflects an understanding that all disclosures to the White House would be reported under the Act, we believe it indicates that all disclosures to the White House would be governed by subsection (g), which in turn contains the provision for reports to the Joint Committee.

Although the question is not wholly free of doubt, it is our conclusion that tax checks to which prospective appointees have consented should nevertheless be treated as disclosures made pursuant to 26 U.S.C. § 6103(g), and therefore should be reported to the Joint Committee pursuant to subsection (g)(5).

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

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U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGAL COUNSEL
WASHINGTON, D.C. 20530

FACSIMILE TRANSMISSION SHEET

DATE: JANUARY 11, 2000

FROM: RICK A. BIERSCHBACH RAB
ATTORNEY-ADVISOR

OFFICE PHONE: 202/514-3713

TO: MIKE O'CONNOR
WHITE HOUSE COUNSEL'S OFFICE
FAX: 456-2146

NUMBER OF PAGES: 4 (INCLUDING COVER SHEET)

Mike --

Here's the opinion. I'll call you tomorrow after canvassing the rest of the 6103 hits on our database.

ANY QUESTIONS, PLEASE CONTACT OUR ADMINISTRATIVE OFFICE ON 514-2067
OFFICE OF LEGAL COUNSEL FACSIMILE MACHINE NUMBER - 514-0563

User: Rick Bierschbach Date: January 11, 20 0

SUBJECT, TO, FROM, DATE:
MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

SEP 30 1977

DOCUMENT BODY:
You requested our views on a September 13, 1977, memorandum from the Director of the FBI to the Attorney General concerning an August 15, 1977, communication from the Internal Revenue Service. In that communication IRS suggested that the Department of Justice "might want

to consider" voluntarily repoting to the Joint Committee on Taxation the identities of each DoJ employee on whom a consensual "tax check" was run pursuant to section 6103(c) of the Internal Revenue Code. We have considered the matter and recommend that such reports should not be filed since such action would be contrary to the spirit, if not the

letter, of the Privacy Act.

The "tax checks" in question, it should be noted, are run only after a prospective employee or appointee has signed a consent form, DAG-33 (copy attached). The form authorizes disclosure to the Fbi of certain limited tax informaion. The tax information disclosed to the Fbi is precisely the same information disclosed by IRS to an agency or

to the Fbi when a request for such disclosure is made under section 6103(g)(2) of the Internal Revenue Code. Requestes under that section

are not made with the taxpaper's consent, although Treasury must notify the taxpayer of the request within 3 days.

IRS believes that while section 6103(g)(5) requies reporting to the

Joint Committee of all requests under section 6103(g)(2), it does not apply to consensual tax checks under section 6103(c). IRS suggests, however, that the spirit of the Tax Reform Act of 1976 (which contained section 6103) might indicate voluntary disclosure of consensual requests is desirable.

We agree with IRS that section 6103(g)(5) does not require repots to the Joint Committee of consensual tax checks since that requirement

applies only to tax checks pursuant to subsection 6103(g) and not thosre under subsection 6103(c). However, we feel that considerations of employee privacy and the spirit of the Privacy Act outweigh the spirit of the Tax Reform Act.

The Privacy Act, Pub. L. 93-579, Section 3, as amended, generally prohibits disclosure by an agency of information relating to an individual without the written consent of that individual. 5 U.S.C. 552a(b). While an exception to this prohibition exists when disclosure is made to "any joint committee of Congress" of a "matter within its jurisdiction," 5 U.S.C.

552a(b)(9), the legislative history of that provision shows

that it was intended to permit disclosure to Congress of personal information "needed" by Congress "for legislative and investigative reasons." H. Rept. 93-1416 (1974), at 13. Reports on consensual tax checks would appear to be within the jurisdiction of the Joint Committee on Taxation, but routine reports would not appear to be "necessary" to any legislative or investigative function of that committee absent a clear expression of congressional intent such disclosure is required. The present language of section 6103(g)(5) is

not a clear expression of such an intent.

Moreover, under present DoJ practices disclosure of such information would appear to violate the provision in the Privacy Act requiring an agency to "inform each individual whom it asks to supply information (of) the routine uses which may be made of the information. . . ." 5 U. S.C. 552a(e)(3)(C). The relevant notifications now used by DoJ, form DoJ-1977-02, and DAG-16 (copies attached), do not indicate that the Joint Committee will routinely be told that a tax check was run on the individual, together with the reasons for the request. In the absence of such notification, disclosure to the Joint Committee would clearly violate the spirit of the Privacy Act and probably violate its "letter" as well.

Finally we are concerned about the practical, as well as the legal,

consequences of disclosing to the Joint Committee the identitis of every individual who consents to tax checks. This procedure has been used by the Department since January 1977. OMF informs us that 538 current DoJ employees have had such tax checks and that an estimated 200 employees or appointees will have such checks run each quarter in the future. The subjects of these checks include all attorneys, all Presidential appointees, all judicial nominees, all clerical employees

in the offices of the AG, DAG and AAG, as well as all Schedule C employees. On occasion a tax check is run on persons who are not ultimately hired, appointed or nominated. In some cases the tax check may disclose derogatory information on the individual. We believe it is unwise to routinely disclose the identity of every subject of a consensual tax check to the Joint Committee.

We understand that current DoJ policy is to use a consent form for all persons subject to FBI field investigations and that the procedure

set forth in section 6103(g)(2) gas not been used in any situation. We are aware of the possibility that this policy might be viewed by the Joint Committee as a means of avoiding reports on individuals being considered for appointment to judicial or senior executive positions. However, our concerns about the privacy of the individual involved lead us to conclude that the present practice should be continued in the absence of explicit congressional action to the contrary.

Attachments

SIGNED BY:
Mary C. Lawton Deputy Assistant Attorney General Office of Legal Counsel

ATTORNEY:
cc: Files Bass Gauf

8

TAX REFORM ACT OF 1976

P.L. 94–455

[page 1]

SENATE REPORT NO. 94–938—PART I

The Committee on Finance, to which was referred the bill (H.R. 10612) to amend the Internal Revenue Code of 1954 to provide for reform and simplification of income taxes, to extend income tax reductions, to provide tax incentives for capital formation and energy development, to strengthen taxpayer rights, and for other purposes, having considered same, reports favorably with amendments and recommends that the bill as amended do pass.

[page 2]

I. SUMMARY

The Finance Committee amendment to the Tax Reform Bill of 1976 (H.R. 10612) is designed to achieve four objectives—

- to improve the equity of the income tax at all income levels without interfering with equally important goals of economic efficiency and growth,
- to simplify many tax provisions, delete unnecessary language and encourage taxpayers to use the standard deduction,
- to continue for the next 12 months the economic stimulus provided in the Tax Reduction Act of 1975 and extended through the first half of 1976 by the Revenue Adjustment Act of 1975, and
- to make improvements in the administration of the tax laws, particularly to strengthen taxpayers' rights.

The revenue effect of the tax revision and simplification provisions of the committee amendment will be to increase receipts by $1.0 billion in fiscal year 1977 and to reduce receipts by $0.1 billion in fiscal year 1978 and by $0.3 billion by fiscal year 1981. The individual income tax reductions will initially reduce tax liability at an annual rate of $15 billion, but since only the earned income credit and the increases in the standard deduction are made permanent, the longrun revenue loss from the individual tax cuts will be $5.5 billion per year. In fiscal year 1977, the individual tax cuts reduce receipts by $12.5 billion. The business tax reductions—the corporate rate cut for small businesses and the extension of the 10-percent investment credit—in the committee amendment will reduce tax liability by $5.4 billion per year and will reduce tax receipts in fiscal year 1977 by $3.0 billion.

Thus, the overall effect of the amendment will be to reduce receipts by $14.5 billion in fiscal year 1977. This consists of $15.5 billion of tax reductions, offset by almost $1 billion of tax reform. This tax reduction is consistent with the First Concurrent Resolution on the Budget for Fiscal Year 1977.

The feedback, or stimulative, effect of the committee action has been simulated with the Wharton Econometric Forecasting model. It suggests that the committee amendment will increase the gross national product by $5.4 billion in 1976 and by $10.5 billion in 1977. It also is expected to increase by 400,000 the number of jobs available in 1977. Finally, the favorable economic impact of the amendment should itself have a favorable effect on revenues to the extent of $1.4 billion in the fiscal year 1977.

The committee believes that individuals and corporations should bear their fair share of the overall tax burden, consistent with the

The court is to examine the matter *de novo* and without regard to a decision to restrain or permit disclosure in any court action between the IRS and a person involved in the written determination or related background file document. The proceedings would be subject to the same rules that would apply under the FOIA if the proceeding were brought under the FOIA on the date of enactment of the bill. Thus, for example, the IRS would generally be required to file its answer within 30 days after the petition or complaint is filed, the case would have a high priority on the docket of the court, the petitioner or complainant could be awarded costs where he substantially prevails in the action, disciplinary proceedings could be commenced against IRS employees in appropriate cases, and failure to comply with a court order compelling additional disclosure could be punished under contempt rules. As under the FOIA, the burden would be on the Secretary or other parties seeking to prevent additional disclosure.

Additionally, the committee amendment provides that where a petition or complaint is filed to compel additional disclosure the Secretary is to notify any person identified by name and address in the written determination within 15 days after the petition or complaint is served on the Secretary. Such person and any person to whom such written determination pertains could intervene in the case. After sending the notice, the Secretary would not be required to defend the case and would not be liable on account of disclosure of the determination (or any portion thereof) in accordance with a final decision of the court.

A decision of the Tax Court in such a case could be appealed only to the United States Court of Appeals for the District of Columbia unless the Secretary agrees with the person involved to review by another court of appeals (sec. 7482(b)).

Under the committee amendment, the public inspection of rulings, technical advice memoranda, and determination letters and related

[page 315]

background files could be accomplished only pursuant to the rules and procedures set forth in the amendment, and not those of any other provision of law, such as the FOIA. However, the amendment is not to be construed as excluding production pursuant to a discovery order made in connection with a judicial proceeding, or with respect to requests pending in the courts under the FOIA.

Effective date

The new rules would apply after October 31, 1976.

Revenue effect

This provision has no effect on Federal revenues.

2. Disclosure of Tax Returns and Tax Return Information (sec. 1202 of the bill and sec. 6103 of the Code)

a. In general

Present law

Under present law, all income tax returns are described as "public records." However, tax returns generally are open to inspection only under regulations approved by the President, or under Presidential order.[1]

This applies to returns concerning income tax, estate tax, gift tax, manufacturers excise taxes, communications tax and transportation tax. The statute does not cover returns concerning a number of other types of taxes.[2]

Additionally, the statute provides a number of specific situations in which tax returns can be disclosed. State and local government officials may inspect tax returns for the purpose of administering State and local tax laws. (Sec. 6103 (b).) Shareholders owning at least 1 percent of the outstanding stock of a corporation may examine the returns of the corporation and its subsidiaries. (Sec. 6103(c).)

Whether a person has filed a tax return is information available to the public. (Sec. 6103(f).)

Returns are available to the Department of Labor and the Pension Benefit Guaranty Corporation as needed to administer the 1974 pension reform act. (Sec. 6103(g).)

Generally, unlawful disclosure of tax information by a Federal or State employee is punishable by a $1,000 fine or a year of imprisonment, or both. A Federal employee also is to be dismissed from office or discharged from employment for unlawful disclosure. Sec. 7213(a) (1).)

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[1] Under the statute, income tax returns are open to inspection upon order of the President and under Treasury rules and regulations approved by the President (sec. 6103(a) (1)) and also are "open to public examination and inspection" to the extent authorized in rules and regulations established by the President. (Sec. 6103(a)(2).)

Estate and gift tax returns and miscellaneous excise tax returns also are open to inspection under rules and regulations established by the President.

[2] Classes of returns open to inspection at the Commissioner's discretion include: (a) Rules Applicable to Recovery of Excessive Profits on Government Contracts. (Chapter 4); (b) Federal Insurance Contributions Act (Chapter 21); (c) Railroad Retirement (Chapter 22); (d) Collection of Income Tax at Source on Wages (Chapter 24); (e) Special Fuels (Subchapter E of Chapter 31); (f) Taxes on Wagering (Chapter 35); (g) Certain Other Excise Taxes (Chapter 36)—(1) Occupational Tax on Coin-Operated Devices (Subchapter B.) (2) Tax on Use of Certain Vehicles (Subchapter D). (3) Tax on Use of Civil Aircraft (Subchapter E); (h) Sugar (Subchapter A of Chapter 37); (i) Regulatory Taxes (Chapter 39); (j) Private Foundations (Chapter 42); (k) Taxes on Distilled Spirits, Wines, and Beer (Chapter 51); (l) Taxes on Tobacco, Cigars, Cigarettes and Cigarette Papers and Tubes (Chapter 52); (m) Taxes on Machine Guns and Certain Other Firearms (Chapter 53). IRM 1272, Disclosure of Official Information Handbook 320.

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These statutory rules have been supplemented by a number of regulations and executive orders. The regulations are of two general types, those allowing inspection on a case-by-case basis, and those allowing general inspection of tax returns. On a case-by-case basis, every Federal agency may have access to tax returns on the written request of the head of the agency and in most cases in the discretion of the Secretary of the Treasury or the Commissioner. Under these "case-by-case" regulations, returns have been made available to a number of agencies.[3]

Also, returns are available on a case-by-case basis to an attorney of the Department of Justice (or U.S. attorney) "where necessary in the performance of his official duties." (Reg. § 301.6103(a)-1(g).) Returns are also available to the Department of Justice for use in litigation in which the United States is interested in the result. (Regs. § 301.6103-1(b).

The regulations allowing general inspection of tax returns apply to a few specific agencies and provide that the agency in question may obtain tax returns for given purposes. Under these regulations, the agency in question does not have to specify the reason for inspection, the person who will inspect, etc. The amount of information disclosed under these regulations varies with the agency. In other cases, disclosure may occur with respect to several thousand returns a year and in other cases (involving use for statistical purposes), disclosure of limited amounts of information regarding millions of taxpayers may occur each year.[4]

In addition to the provisions of the Internal Revenue Code and the Treasury regulations, the Privacy Act of 1974 (Public Law 93-579) and the Freedom of Information Act (5 U.S.C. 552) affect the disclosure of tax information. The Privacy Act generally prohibits an agency from disclosing any of its records concerning an individual to another agency without that individual's consent. However, under this Act, records may be disclosed to other agencies without such prior consent for a "routine use," for civil and criminal law enforcement activities, to the Bureau of the Census for census purposes, and in certain other cases.

Reasons for change

It has been stated that the IRS probably has more information about more people than any other agency in this country. Consequently, almost every other agency that has a need for information

[3] Disclosure of tax returns has been made under this provision, e.g., to the Civil Service Commission, the Department of Defense, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, the Federal Power Commission, the Federal Trade Commission, the Department of the Interior, the Interstate Commerce Commission, the National Labor Relations Board, the Post Office, the Small Business Administration, the Tennessee Valley Authority, the Department of Transportation, and the Veterans Administration. In many of these situations, only a few returns were involved. Generally, the returns were used for investigative purposes in connection with matters within the jurisdiction of the agency.

[4] Under the general inspection regulations, tax information may be obtained by the Department of Health, Education, and Welfare to administer title II (old age, etc. benefits) of the Social Security Act (Regs. § 301.6103(a)-100); by the Securities and Exchange Commission for statistical purposes (Regs. § 301.6103(a)-102); by the Advisory Commission on Intergovernmental Relations for studying the coordination and simplification of the tax laws (Regs. § 301.6103(a)-103); by the Department of Commerce and the Renegotiation Board "in the interest of the internal management of the government" (Regs. § 301.6103(a)-104, 105); and by the Federal Trade Commission to aid in carrying out the Federal Trade Commission Act (Regs. § 301.6103(a)-106). Also, the regulations provide that standing committees of Congress may obtain tax information as authorized by executive order and resolution of the committee (Regs. § 301.6103(a)-101).

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about U.S. citizens, therefore, logically seeks it from the IRS. However, in many cases the Congress has not specifically considered whether the agencies which have access to tax information should have that access.

The statutory rules governing the disclosure of tax information have not been reviewed by the Congress for 40 years. Since that time a number of rules allowing disclosure of tax information to other government agencies have been established by executive order and regulation.[5]

Additionally, questions recently have been raised with respect to disclosure of tax information to the White House. Apparently, tax information was transmited to the White House on a number of well known individuals. Also, tax returns have been provided White House employees in previous administrations.

Among the Federal agencies, one of the biggest users of tax information on an individual case basis (as against a "mass" basis for statistical use) is the Department of Justice. Often this information is used in the investigation of nontax cases, including all types of criminal cases, civil cases involving tort liability of the Government, anti-trust cases, etc. Also, this information is used by strike forces, with IRS agents and agents of other agencies combining their efforts in criminal investigations.

Information on tax returns is provided to other agencies for statistical use. In many cases, this information contains limited items and is used largely as the basis for developing a sample of persons to be polled by the agency. (This information also is used to provide a distribution of revenue sharing funds under the statutory formula.) On the other hand, recently an executive order allowing the Department of Agriculture access to tax information to assist in developing farm statistics was withdrawn after much public and congressional criticism.

Substantial tax information also is provided to State and local governments. In this respect, it has been suggested that there may be inadequate safeguards for preventing unauthorized disclosure of tax information by some State and local governments.

Questions have been raised and substantial controversy created as to whether the present extent of actual and potential disclosure of return and return information to other Federal and State agencies for nontax purposes breaches a reasonable expectation of privacy on the part of the American citizen with respect to such information. This, in turn, has raised the question of whether the public's reaction to this possible abuse of privacy would seriously impair the effectiveness of our country's very successful voluntary assessment system which is the mainstay of the Federal tax system.

In a more general sense, questions have been raised with respect to whether tax returns and tax information should be used for any purposes other than tax administration.

[6] However, a number of regulations allowing disclosure were established before 1934, which was the last time the Congress dealt specifically with disclosure. These regulations include allowing other government agencies to inspect corporate and individual returns on a case-by-case basis, allowing the Department of Commerce to inspect returns for statistical purposes, allowing inspection by persons with a material interest in the return, and permitting a special Senate committee to examine returns.

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Recent Congressional action with respect to privacy in general has had an impact on the disclosure of tax information. (Privacy Act of 1974, Public Law 93-579.) However, the Congress did not specifically focus on the unique aspects of tax returns in the Privacy Act.

The committee has reviewed each of the areas in which returns and return information are now subject to disclosure.[6]

With respect to each of these areas, the committee has tried to balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary assessment system.

Although present law describes income tax returns as "public records", open to inspection under regulations approved by the President, or under Presidential order, the committee felt that returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103 where the committee decided that disclosure was warranted.

There is no comparable provision in the House bill.

Explanation of provision

The committee amendment provides that as the general rule returns and return information are to be confidential and not subject to disclosure except as further provided in the section. Only those regulations now in effect and subsequently promulgated by the Secretary which interpret a specific provision of section 6103 are to continue to have force and effect after the effective date of this amendment. Consequently, those regulations promulgated under Presidential authority prior to the effective date of the amendment which do not interpret any specific provision of this section are no longer to have any force and effect after the effective date of this amendment.

Under the committee amendment, section 6103 applies to the disclosure of a "return" or "return information." "Return" is defined to mean any tax or information return, declaration of estimated tax or claim for refund which, under the code, is required (or permitted) to be filed on behalf of or with respect to any person. It also includes any amendment, supplemental schedule or attachment filed with the tax return, information return, etc. However, a "written determination" (as defined under section 6110(b)) which is included with or attached to a return filed by a taxpayer is not to be considered a return.

The term "return information" is to include the following data pertaining to a taxpayer: his identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments and tax payments. It also includes any particular of any data, received by, recorded by, prepared by, furnished to, or collected by the IRS with respect to a return filed by the taxpayer or with respect to the determination of the existence, or possible existence, of liability (including the amount of liability) for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense provided for under the code.

[6] Many of the situations in which disclosure is now allowed are not based upon any specific provision of the Code, but instead derive from regulations prescribed by the President under the general authority provided him to do so under section 6103(a).

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Information as to whether a taxpayer's return was, is being, or will be examined or subject to other investigation or processing is also to be considered return information.

Return information is to include any part of any "written determination or any background file document relating to such written determination" (as these terms are defined in section 6110(b)) which is not open to public inspection under section 6110.

"Taxpayer return information" is return information which is filed with or furnished to the IRS by or on behalf of the taxpayer to whom the return information relates. This includes, for example, data supplied by a taxpayer's representative (e.g., his accountant) to the IRS in connection with an audit of his return. It would also include any data received by the IRS from a taxpayer's representative pursuant to an administrative summons which was issued in connection with an IRS civil or criminal tax investigation of the taxpayer.

The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, and his taxpayer identifying number (as defined in section 6109), or a combination thereof.

The term "disclosure" means the making known to any person in any manner whatever, including inspection, a return or return information. The terms "inspected" and "inspection" mean any examination of a return or return information.

b. Disclosure to Congress

Present law

Congressional committees fall into three categories for disclosure purposes. The tax committees may inspect tax information, in executive session. (Sec. 6103(d).) Select committees of the House and Senate may inspect tax information, in executive session, if specifically authorized to do so by a resolution of the appropriate body. (Sec. 6103(d).) Standing and select committees may inspect tax information under an executive order issued by the President for the committee in question,[7] and on the adoption of a resolution (by the full committee) authorizing inspection. (Regs. § 301.6103(a)–101.) The resolution must set out the names and addresses of the taxpayers in question and the periods covered by the returns to be inspected. Subcommittees may inspect tax information under an executive order and resolution of the full committee. The designated agents of any authorized committee also may inspect tax information. (Sec. 6103(d), Regs. § 301.6103(a)–101.)

The tax committees and select committees authorized to inspect tax information may submit "any relevant or useful" information obtained to the House or Senate. (Sec. 6103(d)(1)(C).)

Reasons for change

While the Congress, particularly its tax-writing committees, requires access in certain instances to the data contained in return and return information in order to carry out its legislative responsibilities,

[7] A new executive order must be issued every two years for a committee that wants to continue to obtain tax information, because an executive order is good only for the Congress in which it is issued.

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the committee decided that the Congress could continue to meet these responsibilities under more restrictive disclosure rules than those provided under present law.

Explanation of provision

Under the committee amendment the Committee on Ways and Means, the Committee on Finance, and the Joint Committee on Internal Revenue Taxation, upon written request of their respective chairmen, would continue to have access to returns and return information. Duly authorized subcommittees of these Committees would also have access to returns and return information upon written request of the Chairmen of these Committees. However, returns and return information would be required to be received in a closed executive session unless the returns and return information would not identify a taxpayer or that taxpayer consented in writing to the disclosure of his identify.

The Chief of Staff of the Joint Committee on Internal Revenue Taxation is to continue to have access to returns and return information without first obtaining a delegation of that authority from the

Joint Committee on Internal Revenue Taxation. The Chief of Staff is to have the right to submit any relevant or useful information to any of the tax-writing committees (or duly authorized subcommittees) but only in closed executive session unless the returns and return information would not identify a taxpayer or that taxpayer consented in writing to the disclosure of his identity.

The nontax committees, and designated and duly authorized subcommittees, would be furnished returns and return information in closed executive session upon (1) a committee action approving the decision to request such returns, (2) an authorizing resolution of the House or Senate, as the case may be, and (3) the written request by the Chairman of the committee on behalf of the committee (or on behalf of a subcommittee of such committee) for disclosure of such returns or return information. The resolution of the appropriate body authorizing these committees to obtain returns or return information would specify the purpose for inspection and that inspection was to be made only if there was no alternative source of information reasonably available to the committee (or subcommittee). The committees (or subcommittees), through the committee Chairman and ranking minority member, could designate no more than 4 agents (2 majority and 2 minority) to inspect the returns or return information requested.

The tax-writing committees could submit relevant tax information to the Senate or House, as the case may be. The nontax-writing committees could submit such information to the Senate or House sitting in closed executive session.

The Joint Committee on Internal Revenue Taxation could submit tax information to the Committee on Ways and Means or to the Committee on Finance (or subcommittees thereof) sitting in closed executive session. However, a closed executive session would not be required if a taxpayer were not identified or if the identified taxpayer consented in writing to the disclosure of his identity.

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c. White House (and other Federal Agencies)

Present law

The Internal Revenue Code does not provide specifically for disclosure to the President. However, the Code generally provides that disclosure can be made as authorized in rules and regulations established by the President. (Sec. 6103(a).) Under this provision the President could issue a "rule or regulation" providing for his access, and that of White House employees, to tax information. Additionally, in a previous administration, the then-Chief Counsel of the IRS informed the Commissioner in a legal opinion that, as a constitutional matter, there are no restrictions on the Commissioner disclosing tax information to the President. This interpretation was based on that part of the Constitution which vests executive power in the President and, on this basis it was contended that he was entitled to all information relative to his control of the Executive Branch.

President Ford, by executive order, has established rules that govern the disclosure of tax information to the White House. (Executive Order 11805, September 20, 1974.) Under this order, tax returns are available for inspection by the President. Requests for inspection are to be in writing and signed by the President personally. Requests are to state the name and address of the taxpayer in question, the kind of returns which are to be inspected, and the taxable periods covered by the returns.

Under this executive order, other White House employees also may obtain tax information. The order provides that the President may designate, by name, employees of the White House who may receive tax information. This is limited to employees with an annual rate of basic pay at least equal to that prescribed by 5 U.S.C. § 5316 ($37,800 per year, as of October 1, 1975). No further disclosure (except to the President) may be made by such employees without the written direction of the President.

IRS employees who receive a request for tax information from the White House have been instructed to promptly communicate that fact to the Commissioner, through channels. The Commissioner will evaluate the request, and only the Commissioner (or, in his absence, his deputy) is to make the tax information available to the White House. This procedure also applies to "tax checks" on potential Presidential appointees. (IRS Information Notice 74–23, August 9, 1974.)

Generally, there have been three types of tax information provided to the White House. In some cases, tax returns, parts of tax returns, or analyses of tax information with respect to specific individuals have been provided the White House.[8] The White House also receives

[8] For example, John J. Caulfield testified that, while employed at the White House, he received tax information concerning Billy Graham, John Wayne, a number of individuals in the entertainment industry who were "politically active," and an individual working in the re-election campaign of former President Nixon. (Testimony of John J. Caulfield before the Senate Select Committee on Presidential Campaign Activities, March 23, 1974.)

Additionally, Clark Mollenhoff, while a White House employee, received tax information relating to the 1968 Presidential campaign of Governor George Wallace and to income received by his brother, Gerald Wallace. (Affidavit of Clark R. Mollenhoff before the House Committee on the Judiciary, dated June 4, 1974.) Also, Carmine Bellino, formerly special consultant to President Kennedy, received tax returns in 1961 while conducting investigations for the White House (and simultaneously the Justice Department and the Senate Permanent Subcommittee on Investigations of the Government Operations Committee). (*Congressional Record,* April 16, 1970.)

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information on "tax checks" of Presidential appointees. Under the current procedure, a tax check on a potential Presidential appointee is initiated by the White House Office as part of a "security and conflicts review" to which the potential appointee consents. As part of this review, the FBI conducts a "full field investigation" which includes checks with various governmental agencies, including the Internal Revenue Service. Therefore, the inquiry to the IRS with respect to a potential Presidential appointee comes directly from the FBI rather than from the White House.

Under the procedure established, only the Commissioner (or, in his absence, the Deputy Commissioner) may authorize disclosure of information under a tax check made for the White House. Additionally, under the Commissioner's procedures, the information provided is limited to whether an individual has filed income tax returns for the immediately preceding three years; owes any unpaid taxes and, if so for what years; has been under any criminal tax investigation and the result of such investigation; or has been assessed a penalty for fraud or negligence. (IR Manual, MT 1272–6 (8–22–74).)

This information is reported to the FBI which in turn reports it to the White House Counsel's Office. The White House Office transmits a report to the President that the security and conflicts review of the potential appointee has either been approved or disapproved. The tax information received by the White House Office is, under present practice, not transmitted to any other office in the White House.

The White House security and conflicts review is used for Presidential appointees, White House staff, some of the Executive Office staff and others who receive a "White House pass" giving them access to the White House and to the President. Tax checks are also made on persons nominated for Department of Commerce "E" Awards (established by Executive Order 10978). In addition to tax checks at the request of the White House, some tax checks are made at the request of other Federal agencies. These checks may be made at the request of the head of the other agency, and apparently also may be made at the request of other agency officers or employees.

Reasons for change

The committee recognizes the President's need for certain tax information, particularly, if not entirely, in the "tax check" area. The committee amendment, to a large extent, codifies President Ford's Executive Order 11805, September 20, 1974, which, among other things, restricts access to tax information to a relatively limited number of people in the White House. Moreover, the committee felt that the White House should report to the Congress regarding the disclosures of tax information made to it. Consequently, annual reporting requirements were imposed upon the White House. Similar requirements were also provided with respect to tax checks made by other Federal agencies.

Explanation of provision

Under the committee amendment upon the written request of the President, signed by him personally, disclosure of return and return information is to be made to the President and/or to certain named employees of the White House Office. A request is to be required to specify the name and address of the taxpayer whose return is sought,

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the kind of return and return information sought, the taxable period or periods of such returns and return information, and the reason disclosure is requested.

The President and the head of a Federal agency (and their designated employees) also may make a written request for a "tax check" with respect to an individual who is designated as being under consideration for appointment to a position in the Executive or Judicial Branch of the Federal Government. The "tax check" is limited to the inquiry as to whether an individual has filed income tax returns for the last 3 years, has failed in the current or preceding 3 years to pay any tax within 10 days after notice and demand, has been assessed a negligence penalty within this time period, has been or is under any criminal tax investigation (and the results of such investigation), or has been assessed a civil penalty for fraud.

Disclosure of returns and return information under this provision is not to be made to any employee of the White House or Federal agency who does not earn the rate of compensation specified by section 5316 of title 5, United States Code (currently, $37,800 per year). Moreover, these employees will not be allowed to disclose returns and return information to any other person except the President or the head of the agency, as the case may be, without the personal written direction of the President or the head of the agency.

The President and the head of any agency requesting returns and return information under this section will be required to file an annual report with the Joint Committee on Internal Revenue Taxation. This report is to set forth the taxpayers, the returns or return information involved, and the reason for requesting such returns or return information. However, the President will not be required to report on requests for returns and return information pertaining to current employees of the Executive Branch. The reports will not be disclosed unless the Joint Committee on Internal Revenue Taxation determines that disclosure of such reports (or the parts of the reports) would be in the national interest. Thus, if the Joint Committee on Internal Revenue Taxation determined that the President or any Federal agency used the return or return information obtained under this section for improper political purposes, it could determine to make a report of this to the Congress.

The reports will be maintained by the Joint Committee on Internal Revenue Taxation for a period not exceeding 2 years unless, within that period of time, the Joint Committee on Internal Revenue Taxation determines that a disclosure to the Congress is necessary.

d. Tax Cases

Present law

Tax returns and other tax information may be furnished without written application to U.S. Attorneys and Justice Department attorneys in civil or criminal tax cases referred by the IRS to the Justice Department for prosecution or defense. (Regs. § 301.6103(a)-1(h).) Where the Justice Department is investigating a possible violation of the civil or criminal tax laws and the matter has not been referred by the IRS, a Justice Department attorney or U.S. Attorney may obtain tax information upon written application where it is "necessary in the performance of his official duties." (Regs. § 301.6103(a)-1(g).)

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The written application must state the name and address of the taxpayer, the kind of tax, the tax period, and the reason inspection is desired. It must be signed by the Attorney General, Deputy Attorney General, an Assistant Attorney General or by a U.S. Attorney.

The Justice Department can obtain the returns of potential witnesses and third parties. Also, in a tax case, (or any other case), the IRS will answer an inquiry from the Justice Department as to whether a prospective juror has been investigated by the IRS. (Regs. § 301.6103(a)-1(h).) However, other tax information is not available for examining prospective jurors.

Tax information obtained by the Justice Department may be used in proceedings conducted by or before any department or establishment of the Federal Government or in which the United States is a party. (Regs. § 301.6103(a)-1(f).)

The Justice Department is responsible for almost all civil and criminal tax matters litigated before the Federal courts (except for the Tax Court).[9] Most civil tax cases handled by the Justice Department involve refund suits by taxpayers where the taxpayer's liability is directly in issue; in refund cases, it is common for the taxpayer to place his tax return in evidence.

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HOUSE CONFERENCE REPORT NO. 94–1515

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The Managers on the part of the House and the Senate at the conference on the disagreeing votes of the two houses on the amendments of the Senate to the bill (H.R. 10612) to reform the tax laws of the United States, submit the following joint statement to the House and the Senate as an explanation of the effect of the action agreed upon by the Managers and recommended in the accompanying conference report:

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SENATE AMENDMENT NUMBERED 1

House bill.—No provision.

Senate amendment.—The Senate amendment includes the table of contents.

Conference agreement.—The conference agreement omits the Senate table of contents. (The table of contents is inserted under Senate amendment numbered 2.)

SENATE AMENDMENT NUMBERED 2

House bill.—The House bill includes a short title, the table of contents, and the limitation on artificial losses (LAL). LAL provides a limit on accelerated deductions which may be taken currently to the net income from the property. It applied to real estate, farming, oil and gas, movies, equipment leasing, and sports franchises. The amount of the accelerated deductions not allowed currently to be deferred and made available in subsequent years to the extent of net income from the property in a subsequent period.

Under present law, interest and taxes on real property during the construction period may be deducted currently or may be capitalized and depreciated over the life of the property. The House bill applies LAL to interest and taxes during the construction period and to accelerated depreciation (in excess of straight-line depreciation) on a consolidated basis for all real property. Generally, this provision applied to construction beginning after 1975. An exception is provided for residential construction begun before January 1, 1978 (if there is a binding commitment before 1977), and for governmentally subsidized housing on which construction begins before January 1, 1981 (if a binding commitment is obtained before 1979).

Senate amendment.—The Senate amendment includes "findings" that it is the sense of the Senate to deal with the problems of converting ordinary income into captial gain and the deferral of tax resulting from the use of tax shelters by the minimum tax, at risk provisions, recapture provisions, capitalization provisions in certain cases, and partnership provisions.

The Senate amendment does not apply LAL to construction period interest and taxes or to the accelerated depreciation on real property technical advice). Because of their similarity to internal memoranda and attorneys work product, correspondence between the Internal Revenue Service and the Department of Justice regarding a particular civil or criminal investigation or case, which is related to a particular written determination, or with respect to the relationship of a determination to any civil or criminal investigation or case, shall not be considered part of the background file. (The question of the availability of these documents is to be governed by other provisions of law, including the Freedom of Information Act.)

1202. Disclosure of Returns and Return Information

House bill.—No provision.

Senate amendment.—(a) *General.*—Under present law, tax returns are "public records", but they are generally open to inspection only under regulations or under executive orders. Additionally, the statute provides a number of specific situations in which tax returns can be disclosed.

The Senate amendment provides that returns and return information are to be confidential and not subject to disclosure except as specifically provided by statute.

In general, "returns" are defined in the regulations presently in effect as including information returns, schedules, lists, and other written statements filed with the IRS which are supplemental to or become a part of the return and other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof relating to returns and schedules, etc. The Senate amendment defines the term

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"return" to mean any tax or information return, declaration of estimated tax or claim for refund which is required or permitted to be filed with respect to any person. It also includes any amendment, supplemental schedule or attachment, filed with the tax return, information return, etc. "Return information" is defined as any data received by or prepared by the Secretary with respect to a return or with respect to the determination of the existence of the liability of any person for any tax, penalty, interest, fine, forfeiture, or other imposition. Information as to whether a taxpayer's return was, is being, or will be examined is also to be considered return information. Under the amendment, data in a form that cannot be associated with or otherwise identify a particular taxpayer will not constitute return information.

(b) *Disclosure to Congress.*—Congressional committees are classified in three categories for disclosure purposes under present law. The tax committees may inspect tax information in executive session. Select committees of the House and Senate may inspect tax information in executive session if specifically authorized to do so by a resolution of the appropriate body. Standing and select committees may inspect tax information under an executive order issued by the President for the committee in question and on the adoption of a resolution (by the full committee) authorizing inspection.

The Senate amendment provides that the tax-writing committees, upon written request of their respective chairmen, may have access to returns and return information in executive session. The Chief of Staff of the Joint Committee on Taxation may have access to returns and return information. Nontax committees are to be furnished returns and return information in executive session upon

(1) a committee action approving the decision to request such returns, (2) an authorizing resolution of the House or Senate, as the case may be, and (3) a written request by the Chairman of the committee. The resolution of the appropriate body authorizing these committees to obtain returns or return information must specify the purpose for the inspection and that the inspection is to be made only if there is no alternative source of information reasonably available to the committee. The committees, through the committee Chairman and ranking minority member, can designate no more than 4 agents (2 majority and 2 minority) to inspect the returns or return information requested.

Under present law, the tax committees and select committees authorized to inspect tax information may submit "any relevant or useful" information obtained to the House or Senate. The Senate amendment provides that the tax-writing committees may submit tax information to the Senate or House, as the case may be. The nontax-writing committees may submit such information to the Senate or House sitting in executive session. The Joint Committee on Taxation; or its Chief of Staff, may submit tax information to the Committee on Ways and Means or to the Committee on Finance sitting in executive session.

(c) *Disclosure to the President (and other Federal agencies).*—An existing executive order permits so-called "tax checks" and inspection of tax returns by the President and certain designated

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White House employees. Requests for tax checks and inspection are to be in writing and signed by the President personally.

The Senate amendment provides that disclosure of returns and return information can be made to the President and/or to certain named employees of the White House Office, upon the written request of the President, signed by him personally. A request is to specify, among other things, the reason disclosure is requested. The President (or a duly authorized representative of the Executive Office) and the head of a Federal agency also may make a written request for a "tax check" with respect to prospective appointees. The "tax check" is limited to whether the individual has filed income tax returns for the last 3 years, within the last 3 years has failed to pay any tax within 10 days after notice and demand, has been assessed a negligence penalty within the last 3 years, has been or is under any criminal tax investigation (and the results of such investigation), or has been assessed a civil penalty for fraud. The President and the head of any agency requesting returns and return information under this section will be required to file annually a confidential report with the Joint Committee on Taxation identifying the taxpayers, the returns or return information involved, and the reason for requesting such returns or return information. However, the President will not be required to report on requests pertaining to current employees of the executive branch. The reports will be maintained by the Joint Committee on Internal Revenue Taxation for a period not exceeding 2 years unless, within that period of time, the Joint Committee on Taxation determines that a disclosure to the Congress is necessary.

(d) *Tax criminal cases.*—Under present law, tax returns and other tax information of any taxpayer may be furnished upon request without written application to U.S. Attorneys and Justice Department attorneys in civil or criminal tax cases referred by the IRS to the Justice Department for prosecution or defense. Where the Justice Department is investigating a possible violation of the civil or criminal tax laws and the matter has not been referred to the Justice Department by the IRS, a Justice Department attorney or U.S. attorney may obtain tax information upon written application where it is "necessary in the performance of his official duties". The Justice Department can obtain the returns of potential witnesses and third parties. Also, the IRS will answer an inquiry from the Justice Department as to whether a prospective juror has been investigated by the IRS.

Under the Senate amendment, the Justice Department will continue to receive returns and return information with respect to the taxpayer whose civil or criminal tax liability is at issue. Written request is required in cases other than refund cases and cases referred by the IRS. The return or return information of a third party will be disclosed to the Justice Department in the event that the treatment of an item reflected on his return is or may be relevant to the resolution of an issue of the taxpayer's liability under the Code. The return or return information of a third party will also be disclosed to the Justice Department when the third party's return or return information relates or may relate to a transaction between the third party and

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the taxpayer whose tax liability is or may be at issue and the return information pertaining to that transaction may affect the resolution of an issue of the taxpayer's liability. Disclosure of a third party return or return information will be made only pursuant to written request, except for refund cases and cases referred to Justice by the IRS. A third party return may also be disclosed in a court proceeding, subject to the same item and transactional tests described above, except that the items and transactions must have a direct relationship to the resolution of an issue of the taxpayer's liability. In tax cases, the Justice Department and the taxpayer whose liability is at issue will be allowed to inquire of the IRS as to whether a prospective juror has been under an audit or investigation by the IRS. However, responses to such inquiries are to be limited to the existence or nonexistence of an IRS investigation.

(*e*) *Nontax criminal cases.*—Under present law, a U.S. Attorney or an attorney of the Department of Justice may obtain tax information in any case "where necessary in the performance of his official duties". This may be obtained on written application, giving the name of the taxpayer, the kind of tax involved, the taxable period involved, and the reason inspection is desired. The application is to be signed by the U.S. Attorney involved or by the Attorney General, Deputy Attorney General, or an Assistant Attorney General. Tax information obtained by the Justice Department may be used in proceedings conducted by or before any department or establishment of the Federal Government or in which the United States is a party. The IRS also will answer an inquiry from the Justice Department as to whether a prospective juror has been investigated by the IRS.

Under the Senate amendment, tax information can be disclosed to the Justice Department and other Federal agencies for nontax criminal purposes only by order of a U.S. District Court. The order would be issued upon a showing (1) that there is probable cause to believe, based upon information believed to be reliable, that a specified criminal act has been committed, (2) that there is reason to believe that the information contained in the return is directly probative of the commission of the crime, and (3) that the information sought cannot reasonably be obtained from any other source. Only those parts of the return determined by the Court to be necessary to the investigation or prosecution would be subject to disclosure. The amendment authorizes the IRS, either upon its own initiative or pursuant to written request, to disclose in writing to the Justice Department or any other Federal agency, information relating to the possible violation of a Federal criminal law which is received from sources other than the taxpayer and his representatives.

(*f*) *Nontax civil matters.*—Under present law, U.S. Attorneys and officials of other Federal Agencies may obtain tax information in nontax civil cases in the same manner and to the same extent as in nontax criminal cases. The Senate amendment provides that disclosure of returns and return information cannot be made to the Justice Department or other Federal enforcement agencies in civil cases except in those instances where it is defending the United States in a suit involving a renegotiation of contracts previously determined by the Renegotiation Board. Disclosure would be allowed under the amendment to

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Treasury personnel (other than employees of the IRS) of returns or return information for purposes of tax administration.

The GAO does not presently have independent authority to inspect tax returns. It does have access to tax returns when it audits IRS operations as agent of the Joint Committee on Taxation. H.R. 8948 (reported by the Government Operations Committee and passed by the House) would specifically authorize the GAO to conduct audits of the IRS and the Bureau of Alcohol, Tobacco and Firearms. H.R. 8948 would permit GAO to have access to tax returns and tax records to the extent necessary to conduct the audits.

The Senate amendment provides that the GAO can initiate audits of the IRS on its own or at the request of any committee of Congress. The amendment authorizes the GAO to inspect returns and return information to the extent necessary in conducting the audits. It is intended that the GAO examine returns and individual tax transactions only for the purpose of, and in the number necessary to serve as a reasonable basis for, evaluating the effectiveness, efficiency and economy of IRS operations and activities. It is not intended that the GAO would superimpose its judgment upon that of the IRS in individual tax cases. GAO would notify the Joint Committee on Taxation in writing of the subject matter of the planned audit and any plans for inspection of income tax returns. GAO could proceed with its planned audit unless the Joint Committee, by a two-thirds vote of its members, vetoes the GAO audit plan within 30 days of first receiving notice of the proposed audit from GAO.

(*g*) *Statistical use.*—The Census Bureau, the Bureau of Economic Analysis, the Federal Trade Commission, and the Securities & Exchange Commission are presently authorized to use tax returns and return information for statistical purposes.

Under the Senate amendment, Census, the BEA, the FTC, and non-IRS Treasury personnel could obtain tax returns and limited return information for statistical and research purposes. The BEA and the FTC would only receive corporate tax information. Publication of statistical studies identifying any particular taxpayer is prohibited.

(*h*) *Inspection by Federal agencies.*—Under present law, several agencies may generally inspect tax information for qualified purposes without a specific written request. Inspection of tax information on a general basis is made most often by HEW, the Renegotiation Board and the FTC.

Under the Senate amendment, limited disclosures on a general basis would be permitted to the Social Security Administration, the Railroad Retirement Board, the Department of Labor, the Pension Benefit Guaranty Corporation, and the Renegotiation Board in certain limited situations where the return information is directly related to programs administered by the agency in question.

(*i*) *State and local governments.*—On the written request of the State Governor, tax returns may presently be inspected by State tax officials for purposes of administering the State's tax laws. Tax information may also be obtained by the States for local governments to be used in administering the local tax laws.

The Senate amendment provides that Federal tax returns and return information may be disclosed to State tax officials solely for use in

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administering the State's tax laws. The tax information would not be available to the State Governor or any other nontax personnel, or to local governments. No disclosure may be made to any State requiring taxpayers to attach to, or include in, State tax returns a copy of any portion of the Federal return (or any information reflected on the Federal return) unless the State adopts provisions of law by December 31, 1978 protecting the confidentiality of the Federal returns or return information.

In order to protect the confidentiality of returns which the States receive from the IRS under the present exchange programs, the returns are, in most States, processed on computers used solely by the State tax authorities. In certain States, however, the requirements of the tax authorities are not sufficient to justify a separate computer, and, accordingly, the tax authorities have the Federal tax returns processed on central computers shared by several State agencies which are operated by State employees who are not in the tax department. In such situations, the IRS requires that tax department personnel be present at all times when the Federal tax returns are being processed. The Senate amendment would permit those States currently time-sharing with other State agencies to continue to do so to the extent authorized and under the conditions specified in Treasury regulations.

(*j*) *Taxpayers with a material interest.*—Income tax return presently are open to certain persons with a material interest in those returns. For example, returns are open to the filing taxpayers, trust beneficiaries, partners, heirs of the decedent, etc.

Under the Senate amendment, persons with a material interest would continue to have the right to inspect returns and, where appropriate, return information to the same extent as provided under current regulations. Return information (in contrast to "returns") could be disclosed to persons with a material interest only to the extent the IRS determines this would not adversely affect the administration of the tax laws.

(*k*) *Miscellaneous disclosures.*—Also, under present law, address information is provided to the Federal Parent Locator Service regarding "absent parents" under Public Law 93-647 (section 453 of the

Social Security Act). Under the Senate amendment, returns and return information of taxpayers and spouses could be disclosed to appropriate Federal, State and local agencies for purposes of, and only to the extent necessary in, locating deserting parents and determining ability to make support payments.

Several provisions of the regulations allow the disclosure of tax information for miscellaneous administrative and other purposes. In other cases, the statute specifically requires public disclosure and certain types of returns (e.g., applications for exempt status by organizations). Under the Senate amendment, returns would continue to be open to public inspection in those situations where public disclosure is provided for in present law. Limited disclosure of returns and return information would be permitted in some, but not all, of the miscellaneous situations where disclosure is permitted under present law.

(*l*) *Procedures and records concerning disclosure.*—Several different offices of the IRS presently have the responsibility for ap-

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proving the disclosure of tax information to particular agencies. The IRS presently maintains records concerning disclosure, but the type of records maintained are not standardized as between, e.g., Service Centers, and a complete inventory of records is not maintained.

The Senate amendment provides that in those cases in which disclosure or inspection of returns or return information would be permitted, it would be permitted only at the times, in the manner, and at the places prescribed by regulations. The IRS, and each Federal and State agency receiving tax information, would be required to maintain a standardized system of permanent records on the use and disclosure of returns and return information.

(*m*) *Safeguards.*—Except for the general criminal penalty for unauthorized disclosure, the tax law does not presently provide rules for safeguarding tax information disclosed by the IRS to other agencies. The IRS has no authority to audit the safeguards established by other agencies or to stop disclosure to other agencies that do not properly maintain safeguards.

Under the Senate amendment, no tax information would be furnished by the IRS to another agency (including commissions, States, etc.) unless the other agency complies with a comprehensive system of administrative, technical, and physical safeguards designed to protect the confidentiality of the returns and return information. In the event of an unauthorized disclosure by the other agency or its failure to maintain adequate safeguards, the IRS could (subject to an administrative appeal procedure) terminate disclosure to that agency.

(*n*) *Reports to Congress.*—Since 1971, the Joint Committee has received from the IRS a semi-annual report on disclosure of tax information.

The Senate amendment requires the IRS to make a confidential report to the Joint Committee each year on all requests (and the reasons therefor) received for disclosure of tax returns or return information. The report would include, as a separate section to be publicly disclosed, a listing of all agencies receiving tax return information, the number of cases in which disclosure was made to them during the year, and the general purposes for which the requests were made. In addition, the IRS would be required to file a quarterly report with the tax committees regarding procedures and safeguards followed by recipients of returns and return information.

(*o*) *Enforcement.*—Under present law, unauthorized disclosure of a Federal income tax return or financial information appearing thereon by a Federal or State employee is a misdemeanor punishable by a fine of up to $1,000 or imprisonment of up to one year, or both. It is also a misdemeanor punishable in the same manner for any person to print or publish an income tax return or financial information appearing therein.

Under the Senate amendment, the criminal violation of the disclosure rules would become a felony punishable by a fine of up to $5,000 and imprisonment of up to 5 years, or both. It would also be a felony, subject to the same penalties, for any person willfully to receive returns or return information as a result of an offer by that person to exchange an item of material value for the unauthorized disclosure. A civil

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remedy is provided for any taxpayer damaged by any unlawful disclosure of returns or return information.

(*p*) *Effective date.*—The provisions in the Senate amendment concerning the confidentiality of tax returns are effective as of January 1, 1977.

Conference agreement.—The conference agreement generally follows the Senate amendment with the modifications described below.

Under the conference agreement, a prospective employee will receive notice from the IRS at the time it receives a request for a tax check with respect to the prospective employee. The confidential report to the Joint Committee by the President and heads of agencies will be made quarterly rather than annually as provided in the Senate amendment.

In addition, the court order required for disclosure of tax information to the Justice Department and other Federal agencies in nontax criminal cases will be issued upon a showing that: (i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed; (ii) there is reason to believe that the return or return information is probative evidence of a matter in issue related to the commission of the criminal act; and (iii) the information sought to be disclosed cannot reasonably be obtained from any other source unless it is determined that, notwithstanding the reasonable availability of the information from another source, the return or return information sought constitutes the most probative evidence of a matter in issue relating to the commission of the criminal act.

The first requirement set forth above ("reasonable cause . . .") is intended to be less strict than the "probable cause" standard (contained in the Senate amendment) for issuing a search warrant, and this "reasonable cause" requirement is to be construed according to the plain meaning of the words involved. The term "criminal act" includes any act with respect to which the criminal penalty provisions of a Federal nontax statute (which may also include civil penalty provisions) would apply. This court procedure contemplates an *in camera* inspection of the return or return information by the judge to determine whether any part or parts thereof meet the requirements outlined above. Only the part or parts of the return or return information determined by the court to meet these requirements would be subject to disclosure under this provision. In this regard, the conference agreement contemplates that the more personal the information involved (e.g., medical and psychiatric information), the more restrictive the court would be in allowing disclosure.

The return or return information could be introduced in an administrative or judicial hearing if the court finds that it is probative of a matter in issue relevant in establishing the commission of a crime or the guilt of a party. The credibility of a witness does not constitute a matter in issue for purposes of these rules. Thus, under the conference agreement a return or return information would not be admissible for purposes of "collateral impeachment" (i.e., discrediting a witness on matters not bearing upon the question of the commission of a crime on the guilt of a party).

The conference agreement modifies the provision in the Senate amendment requiring those States which require taxpayers to attach

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to, or include in, their State tax return a copy of any portion of their Federal return (or any information reflected on the Federal return) to adopt provisions of law by December 31, 1978, protecting the confidentiality of the attached copy of the Federal return or of the included return information. Although the copy of the Federal return or the return information required by a State or local government to be attached to, or included in, the State or local return does not constitute Federal "return or return information", subject to the Federal confidentiality rules, the policy underlying this requirement is that the attached copy of the return and the included information should be treated by State and local governments as confidential rather than effectively as public information. However, it is not intended to require States to enact confidentiality statutes which are mirror images of the Federal statutes. The conference agreement makes it clear that State tax authorities can disclose State returns and return information, including any portion of the Federal return (or information reflected on the Federal return) which the State requires the taxpayer to attach to, or to include in, his State tax return, to any State or local officers or employees whose official duties or responsibilities require access to such State return or return information pursuant to the laws of such State.

The conference agreement also authorizes the GAO to review and evaluate the compliance by the Federal and State agencies which have received returns and return information from the IRS with the requirements regarding the use and safeguarding of the returns and return information.

The conference agreement modifies the disclosure of return information to the Federal, State and local child support enforcement offices by providing for disclosure of the information from IRS master files and permitting disclosure of other return information only to the extent that it cannot be reasonably obtained from another source.

The conference agreement authorizes the IRS to disclose to other Federal agencies the mailing addresses of taxpayers from whom the agencies are attempting to collect a claim under the Federal Claims Collection Act.

1203. Income Tax Return Preparers

House bill.—Present law provides that tax return preparers must sign returns they prepare, but no penalties are provided for failure to sign. Preparers are subject to criminal fraud penalties of fines up to $5,000 and 3 years' imprisonment for willfully aiding or assisting in the preparation of a fraudulent return. (Also, preparers are subject to penalties for improper disclosure of tax return information.)

Under the House bill, any person who prepares a return or claim for refund for compensation must meet specific disclosure requirements and is subject to penalties for negligent or fraudulent preparation of returns. Injunctions may be sought against preparers engaging in certain specified practices. The provision applies to documents prepared after December 31, 1975.

Senate amendment.—The Senate amendment is the same as the House bill with several modifications, including an exception for preparers of refund claims filed as a result of an IRS audit; authorization for the IRS to modify annual reporting requirements, provided de-

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tailed records and information are available and accessible to the Service. Also, the injunction provision is modified to establish more specifically the practices against which injunctive relief may be obtained. The amendment applies to documents prepared after December 31, 1976.

Conference agreement.—The conference agreement follows the Senate amendment.

The conferees also clarified certain language that appears in the Finance Committee's Report relating to income tax return preparers. The amendment imposes a penalty for any understatement of tax liability caused by an income tax return preparer due to negligent or intentional disregard of rules and regulations. The conferees share the Finance Committee's intention, as stated in the Committee Report, that this provision be interpreted in a manner similar to existing section 6653(a) of the Code which imposes penalties for disregard of rules and regulations by taxpayers on their own returns. Consistent with section 6653(a), the Committee Report states that an income tax return preparer's good faith dispute about an interpretation of a statute is not considered negligent or intentional disregard of rules and regulations.

However, the Report of the Finance Committee goes on to state that an income tax return preparer may complete a return relying on case law that conflicts with rulings or regulations, "provided he clearly sets forth in the return the relevant rulings or regulations which he disputes and the judicial decision upon which he relies." Such disclosure is not required to avoid penalties under section 6653(a) of the Code, and the Committee did not intend that more stringent requirements be applied under the new section 6694(a). The conferees agree that while there may be instances in which some form of disclosure on a return would be necessary to avoid penalties under section 6694(a), that would depend on all the relevant facts and circumstances in the particular case, as is true under section 6653(a).

1204. Jeopardy and Termination Assessments

House bill.—Under present law, no court or administrative review is made of the appropriateness of a jeopardy or termination assessment. No restrictions are placed on sale of property seized pursuant to one type of jeopardy assessment. A termination assessment creates a "deficiency" and presumably short taxable years.

The House bill provides expedited Tax Court review of the appropriateness of jeopardy and termination assessments (and the amount thereof). It also provides restrictions on the sale of seized property until this review is completed. The provisions of the House bill apply to assessments where notice and demand take place after December 31, 1975.

Senate amendment.—The Senate amendment is generally the same as the House bill but contains several modifications. The Senate amendment requires the Internal Revenue Service to furnish the taxpayer with a written statement setting forth the basis for a jeopardy or termination assessment within 5 days after the assessment is made, and provides for administrative review within an additional 15 days. The taxpayer may then obtain an expedited de novo determination of the reasonableness of the assessment by a United States District Court.

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The Commissioner has the burden of proof on whether it is reasonable for a jeopardy or termination assessment to stand, but the taxpayer has the burden of proof on the reasonableness of the amount assessed. In the case of termination assessments, the Senate amendment provide for notice of deficiency to the taxpayer only after the close of the normal taxable year and for no closing or reopening of a taxpayer's taxable year. The Senate amendment imposes the same restrictions on sale of seized property with respect to jeopardy assessments as the House bill, but the restrictions are broadened in the case of termination assessments. These provisions of the Senate amendment apply to assessments where the notice and demand take place after December 31, 1976.

Conference agreement.—The conference agreement follows the Senate amendment. In the court review of a jeopardy or termination assessment, the conference agreement places the burden of proof on the government as to whether the making of the jeopardy or termination assessment is reasonable under the circumstances, but places the burden of proof on the taxpayer as to the reasonableness of the amount assessed. The Report of the Committee on Finance (S. Rept. 94-938, p. 365) analogizes this division of the burden of proof to the division in a civil tax fraud case where the government has the burden of proof on the fraud issue, and the taxpayer the burden on the issue of a deficiency in tax. The analogy was used only to explain the division; neither the Commmittee on Finance nor the conferees intend that the government must carry its burden of proof in the court review of a jeopardy or termination assessment under the special evidentiary standard of proof applicable to proving civil fraud, i.e., "clear and convincing evidence." Rather, the usual standard is to apply, as it does where the government is given the burden of proof in a deficiency case on a tax issue it failed to raise in its notice of deficiency.

1205. Administrative Summons

House bill.—The House bill provides generally, in the case of a third party summons, the taxpayer (or other person to whom the summoned records pertain) is to receive notice of the summons from the Service at the time of its issuance and have the right to stay compliance by notifying the person summoned within 14 days not to comply with the summons. The Service is then required to seek enforcement of the summons in a Federal court and the taxpayer has standing to challenge such enforcement. Notice is not required in the case of an administrative summons to a bank issued in connection with IRS collection activities. In the case of a John Doe summons (where the identity of the taxpayer is not known) the Service must go into court, establish reasonable cause for requesting the summons, and receive court approval before issuing the summons.

Senate amendment.—The Senate amendment is generally similar to the House bill except that it permits the Service a 3-day grace period to mail the notice to the taxpayer. The amendment also provides for suspension of the criminal statute of limitations (as well as the civil statute, which is suspended under the House bill) where the summons is protested by the taxpayer. The amendment suspends the notice requirement where a summons is issued solely to determine if records exists or where notice may result in a material interference in an investigation. The amendment is intended to enable the Service to avoid

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material interference with an investigation where it reasonably believes that this might occur; however, petitions by the Service are not to be granted automatically by the courts and the petitions (and supporting affidavits) must show reasonable cause. The amendment also provides for the reimbursement of witness costs in accordance with regulations.

Conference agreement.—The conference agreement follows the Senate amendment. In addition, the agreement clarifies the definition of a third-party record keeper, limiting this category to attorneys, accountants, banks, trust companies, credit unions, savings and loan institutions, credit reporting agencies, issuers of credit cards, and brokers in stock or other securities. The conference agreement makes it clear that the criminal and civil statutes of limitations are to be suspended where the notice who protests enforcement of the summons is either the taxpayer himself (as under the House and Senate bills), his nominee or agent, or another person actually under the direction or control of the taxpayer. A corporation controlled by the taxpayer, for example, is covered under this rule. On the other hand, if the third-party record keeper (attorney, accountant, bank, etc.) protested enforcement of the summons, this would not suspend the statute of limitations with respect to the taxpayer because the third-party recordkeeper is not the noticee. (Also, these persons ordinarily would not be under the actual direction or control of the taxpayer.) The conference agreement also provides that the Service is not required to give notice or to follow the "John Doe" procedure where the purpose of the inquiry is simply to learn the identity of the person maintaining a numbered bank account (or similar arrangement). For purposes of these rules, a numbered bank account (or similar arrangement) is an account through which a person may authorize transactions solely through the use of a number, symbol, code name or other device not involving the disclosure of his identity. A person maintaining the account includes the person who established it and any person authorized to use the account or to receive records or statements concerning the account.

1206. Assessments in case of mathematical or clerical errors

House bill.—Under present law, where a tax deficiency results from a mathematical error, the taxpayer does not have a right to appeal to the Tax Court, as provided in other cases. In practice, the Internal Revenue Service allows the taxpayer time to explain and substantiate a claim that there is no error. The Service has applied the mathematical errors procedure in 5 general categories of mistakes, only one of which literally involves arithmetic miscalculations.

The House bill defines five sets of mathematical or clerical errors, and the procedure and timetable which is to be followed before the Service may assess a deficiency. Under the procedure, the taxpayer must be given an explanation of the error and time to file a request for abatement of the assessment. The Service may not assess a deficiency before the taxpayer has agreed to it or the specified period has expired. The provision covers: (1) arithmetic errors; (2) errors in transferring amounts on the tax forms; (3) missing schedules or forms; (4) inconsistent entries and computations; and (5) entries that exceed statutory limitations. The timetable allows (1) the taxpayer 90 days from date of notice to file a request for abatement, (2) the Service 60 days to abate or renew the assessment, and (3) the taxpayer another 30 days

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to demand abatement. This provision applies to returns filed after December 31, 1975.

Senate amendment.—The Senate amendment modifies the House provision by allowing 60 days for the taxpayer to file a request for abatement. If such a request is filed, the Service must abate the assessment; the Service then may assert a deficiency. The amendment applies to returns filed after December 31, 1976.

Conference agreement.—The conference agreement follows the Senate amendment.

1207(a). Withholding State Income Taxes From Military Personnel

House bill.—Under present law, Federal withholding of State income taxes from military personnel is prohibited. The House bill provides for Federal withholding of State income taxes where requested by a member of the military. Such withholding is to be implemented within 120 days of enactment.

Senate amendment.—The Senate amendment is the same as the House bill except that withholding is mandatory rather than voluntary.

Conference agreement.—The conference agreement follows the Senate amendment.

1207(b). Withholding of State or Local Income Tax From Members of the National Guard or Ready Reserve

House bill.— Under present law, withholding of State or local income tax from members of the National Guard or ready reserve by the Federal Government is prohibited. The House bill requires the Federal Government to withhold in those cases when the State and local income taxes are paid for regular training. Withholding is to be implemented within 120 days of the date of enactment.

Senate amendment.—The Senate amendment is the same as the House bill.

Conference agreement.—The conference agreement is the same as the House bill and the Senate amendment.

1207(c). Voluntary Withholding of State Income Taxes From Federal Employees

House bill.—The House bill contains no provision.

Senate amendment.—Under present law, Federal withholding of State income taxes from Federal employees in States where withholding is voluntary is prohibited. The Senate amendment permits Federal withholding of State income taxes from Federal employees in States where it is voluntary when employees request it. This withholding is to be implemented within 120 days of date of enactment.

Conference agreement.—The conference agreement follows the Senate amendment.

1207(d). Withholding of Income Tax on Certain Gambling Winnings

House bill.—Under present law, withholding of Federal income tax from gambling winnings is not required although information reports

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Office of the White House Press Secretary

E.O. 11805

THE WHITE HOUSE

EXECUTIVE ORDER

INSPECTION BY PRESIDENT AND CERTAIN DESIGNATED EMPLOYEES OF THE WHITE HOUSE OFFICE OF TAX RETURNS MADE UNDER THE INTERNAL REVENUE CODE OF 1954

By virtue of the authority vested in me as President of the United States, and in the interest of protecting the right of taxpayers to privacy and confidentiality regarding their tax affairs consistent with proper internal management of the Government, and in the further interest of maintaining the integrity of the self-assessment system of Federal taxation, it is hereby ordered that any return, as defined in Section 301.6103(a)-1 of the Treasury Regulations on Procedure and Administration (26 CFR Part 301) as amended from time to time, made by a taxpayer in respect of any tax described in Section 301.6103(a)-1(a)(2) of such regulations shall be delivered to or open to inspection by the President only upon written request signed by the President personally.

Any such request for delivery or inspection shall be addressed to the Secretary of the Treasury or his delegate and shall state: (i) the name and address of the taxpayer whose return is to be inspected, (ii) the kind of return or returns which are to be inspected, and (iii) the taxable period or periods covered by such return or returns.

In any such request for delivery or inspection, the President may designate by name an employee or employees of the White House Office who are authorized on behalf of the President to receive any such return or make such inspection, provided that the President will not so designate an employee unless such employee is the holder of a Presidential commission whose annual rate of basic pay equals or exceeds the annual rate of basic pay prescribed by 5 U.S.C. 5316. No disclosure of such return, or any data contained therein or derived therefrom shall be made by such employee except to the President, without the written direction of the President.

All persons obtaining access to such return, or any data contained therein or derived therefrom shall in all respects be subject to the provisions of 26 U.S.C. 6103, as amended.

FOR IMMEDIATE RELEASE SEPTEMBER 20, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

On Executive order entitled "Inspection by President and Certain Designated Employees of the White House Office of Tax Returns Made Under the Internal Revenue Code of 1954"

An Executive order limiting White House access to tax returns was issued by the President today. The order was issued under authority vested in him by the Constitution.

In the past, regulations issued by the Treasury Department and approved by the President pursuant to Section 6103 of the Internal Revenue Code have placed strict limitations upon agency and public access to tax return information. However, there have been no explicit legal restrictions upon White House access.

The Executive order sets forth strict and legally binding procedures by which the President's access will be governed as well as access by members of his staff. Under this Order, the President must personally specify in writing the returns desired and must personally designate in writing the member of his staff who is authorized to see the returns on his behalf.

On September 11, 1974, the Secretary of the Treasury submitted to Congress proposed legislation to limit generally access to tax returns and related information. The Order issued today complements this proposal, but is effective immediately.

or between your staff and his staff—resignation in exchange for a full pardon.

The question is: Is there or was there, to your knowledge, any kind of understanding about this?

THE PRESIDENT. There was no understanding, no deal between me and the former President, nor between my staff and the staff of the former President, none whatsoever.

ACCESS TO INCOME TAX RETURNS

[7.] Q. Mr. President, sir, there is a bill that the Treasury Department has put forward, I think it is about 38 pages. Under this bill, which deals with getting hold of the returns, Internal Revenue returns, of citizens of the country, you could take action to get those returns whenever you wanted to.

I wonder if you are aware of this and if you feel that you need to get those returns of citizens?

THE PRESIDENT. It is my understanding that a President has, by tradition and practice and by law, the right to have access to income tax returns. I personally think that is something that should be kept very closely held. A person's income tax return is a very precious thing to that individual, and therefore, I am about to issue an Executive order [11805] that makes it even more restrictive as to how those returns can be handled. And I do think that a proposed piece of legislation that is coming to me and subsequently will be submitted, as I recollect, to the Congress would also greatly tighten up the availability or accessibility of income tax returns. I think they should be closely held, and I can assure you that they will be most judiciously handled as far as I am concerned.

OWNERSHIP OF PRESIDENTIAL PAPERS

[8.] Q. Mr. President, looking beyond the Nixon papers and in view of some criticism in Congress, do you believe we may have now reached the point where Presidential White House papers should remain in the Government's hands as the property of the Government?

THE PRESIDENT. As far as I am personally concerned, I can see a legitimate reason for Presidential papers remaining the property of the Government. In my own case, I made a decision some years ago to turn over all of my Congressional papers, all of my Vice Presidential papers, to the University of Michigan archives.

As far as I am concerned, whether they go to the archives for use or whether they stay the possession of the Government, I don't think it makes too much difference. I have no desire, personally, to retain whatever papers come out of my Administration.

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c. White House (and other Federal Agencies)

Present law

The Internal Revenue Code does not provide specifically for disclosure to the President. However, the Code generally provides that disclosure can be made as authorized in rules and regulations established by the President. (Sec. 6103(a).) Under this provision the President could issue a "rule or regulation" providing for his access, and that of White House employees, to tax information. Additionally, in a previous administration, the then-Chief Counsel of the IRS informed the Commissioner in a legal opinion that, as a constitutional matter, there are no restrictions on the Commissioner disclosing tax information to the President. This interpretation was based on that part of the Constitution which vests executive power in the President and, on this basis it was contended that he was entitled to all information relative to his control of the Executive Branch.

CHIEF COUNSEL OPINION

President Ford, by executive order, has established rules that govern the disclosure of tax information to the White House. (Executive Order 11805, September 20, 1974.) Under this order, tax returns are available for inspection by the President. Requests for inspection are to be in writing and signed by the President personally. Requests are to state the name and address of the taxpayer in question, the kind of returns which are to be inspected, and the taxable periods covered by the returns.

Under this executive order, other White House employees also may obtain tax information. The order provides that the President may designate, by name, employees of the White House who may receive tax information. This is limited to employees with an annual rate of basic pay at least equal to that prescribed by 5 U.S.C. § 5316 ($37,800 per year, as of October 1, 1975). No further disclosure (except to the President) may be made by such employees without the written direction of the President.

IRS employees who receive a request for tax information from the White House have been instructed to promptly communicate that fact to the Commissioner, through channels. The Commissioner will evaluate the request, and only the Commissioner (or, in his absence, his deputy) is to make the tax information available to the White House. This procedure also applies to "tax checks" on potential Presidential appointees. (IRS Information Notice 74-23, August 9, 1974.)

Generally, there have been three types of tax information provided to the White House. In some cases, tax returns, parts of tax returns, or analyses of tax information with respect to specific individuals have been provided the White House.[9] The White House also receives

[9] For example, John J. Caulfield testified that, while employed at the White House, he received tax information concerning Billy Graham, John Wayne, a number of individuals in the entertainment industry who were "politically active," and an individual working in the re-election campaign of former President Nixon. (Testimony of John J. Caulfield before the Senate Select Committee on Presidential Campaign Activities, March 28, 1974.) Additionally, Clark Mollenhoff, while a White House employee, received tax information relating to the 1968 Presidential campaign of Governor George Wallace and to income received by his brother, Gerald Wallace. (Affidavit of Clark R. Mollenhoff before the House Committee on the Judiciary, dated June 4, 1974.) Also, Carmine Bellino, formerly special consultant to President Kennedy, received tax returns in 1961 while conducting investigations for the White House (and simultaneously the Justice Department and the Senate Permanent Subcommittee on Investigations of the Government Operations Committee). (*Congressional Record*, April 19, 1976.)

competition in education, between private and public, is good for the student. There is no reason why there should be a monopoly in education just on the public side. And private education has contributed over a long period of time at the primary, secondary, and graduate levels significantly to a better educated America. And I would hope that we could find some constitutional way in which to help private schools.

ACCESS TO INCOME TAX RETURNS

[14.] Q. In the matter of income tax privacy, Mr. President, can you explain the difference between your Executive order [11805] on White House practices, which is very tough on safeguarding the taxpayers, and the legislation which you sent to the Hill, which Congressional experts say is weaker than what went on under the Nixon Administration when there were reported attempts by the White House to subvert the Internal Revenue Service?

THE PRESIDENT. Well, if that legislation is weaker than the Executive order that I issued, we will resubmit other legislation.

Mr. DeFrank [Thomas M. DeFrank, Newsweek].

TRANSITION FUNDS FOR THE FORMER PRESIDENT

[15.] Q. Mr. President, you recently asked Congress to appropriate $850,000 to cover transition expenses of former President Nixon. The House has already cut that figure down to $200,000. The Senate seems likely to do the same.

Some of your aides have said in the last few days that they believe that the cutback from $850,000 to $200,000 is both stingy and punitive, and I use their words.

I am wondering if you agree with them that the cutback is stingy and punitive and whether or not you intend to ask the Congress to restore some of those funds?

THE PRESIDENT. A recommendation was made to the Congress for the figure of $850,000 for the transition period. About 10 years ago Congress passed a law which provided for transition expenses for an outgoing President. The amount that was submitted on this occasion was roughly comparable to the amounts that have been made available to other Presidents who were leaving office.

Now, the facts and the figures I think can be shown that what was recommended for Mr. Nixon was comparable to others. The Congress, of course, has the right to take whatever action it wants, but under the circumstances, I am not going to use such language myself. I will let the Congress make its decision, right or wrong.

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memorandum

to: Randolph W. Thrower
Commissioner

April 14, 1970

from: K. Martin Worthy KMW
Chief Counsel

subject: Disclosure of Income Tax Returns to the President

You have requested my opinion with respect to whether you have authority to disclose income tax returns to a member of the President's immediate staff.

Section 6103(a)(1) of the Internal Revenue Code of 1954 provides:

"(a) PUBLIC RECORD AND INSPECTION. --

"(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President."

It would seem quite clear that under this statute you are fully authorized to disclose any return "made with respect to taxes imposed by Chapter 1, " relating to income taxes, "upon order of the President." In fact, by virtue of the provisions of Section 2 of Article II of the Constitution, which provides that "the President *** may require the Opinion, in writing, of the principal Officer of each of the executive Departments, upon any Subject relating to the duties of their respective Offices, *** ," it would seem quite evident that as an officer of the Executive Branch of the Government, you may be required by the President to disclose to him any matter coming to your attention (or to that of your subordinates) in the performance of your official duties.

Section 1 of Article II of the Constitution provides that "the Executive power shall be vested in a President of the United States of America," and Section 3 of the same Article provides that " *** he shall take Care that the Laws be faithfully executed ***." It is quite apparent that the President cannot carry out these responsibilities in a nation of this size, or a Government of this size, entirely on his own, but must call upon others duly appointed to the Executive Branch to assist him in carrying out these duties. As early as Marbury v. Madison, 1 Cranch 137, 5 U.S. 60 (1803), the Supreme Court said:

> "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his Country and his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.
>
> "In such cases, their acts are his acts: and whatever opinion may be entertained of the manner in which Executive discretion may be used, still there exists, and can exist, no power to control that discretion." 1 Cranch 137 at 165-166, 5 U.S. 60 at 70.

Numerous opinions of the Supreme Court have repeatedly enunciated this same propostion.

It would accordingly seem quite clear that the President may relay any lawful order to you through his subordinates and that you have no choice but to comply therewith. It further seems quite apparent from the statute that Congress intends that income tax returns be disclosed "upon order of the President" as he may direct.

It should perhaps be noted that Section 6103(a)(1) provides that income tax returns be open to inspection

"upon order of the President," and

"under rules and regulations prescribed by the Secretary or his delegate and approved by the President."

It is inconceivable that the President should be bound by administrative rules and regulations in prescribing the circumstances or manner in which returns are to be disclosed to a member of his staff for his use. Since any such rules and regulations are subject to revision or modification by the Secretary at any time with the approval of the President, and the Secretary is a subordinate of the President appointed to serve at the pleasure of the President, it cannot be believed that he should be limited by the requirements of any such rules or regulations or that Congress so intended.

The statute as I interpret it, and as interpreted by my predecessors, is not the source of the right of the President to inspect returns, but merely sets forth the manner in which returns may be made available to other persons without Presidential order.

Thus, as indicated, there is no question about the President's right of access to these returns through a designated member of his Staff. While there is no legal requirement that such requests for returns be in writing, we believe this is procedurally preferable.

A more detailed opinion relating to this matter is in process of preparation.

K. Martin Worthy

K. MARTIN WORTHY
Chief Counsel

[COMMITTEE PRINT]

POLITICAL INTELLIGENCE IN THE INTERNAL REVENUE SERVICE: THE SPECIAL SERVICE STAFF

A DOCUMENTARY ANALYSIS PREPARED BY THE STAFF

OF THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

DECEMBER 1974

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APRIL 22, 1970.

Memorandum to: Randolph W. Thrower, Commissioner
From: K. Martin Worthy, Chief Counsel
Subject: Disclosure of Income Tax Returns to the President

Further reference is made to your request for my opinion with respect to whether you have authority to disclose income tax returns to a member of the President's immediate staff. Under date of April 14, 1970, I furnished you with a brief summary opinion to the effect that there is no question about the President's right of access to income tax returns through a designated member of his staff. I then advised you that a more detailed opinion was in process of preparation.

The specific background concerns the disclosure by the Service of federal income tax returns to the Honorable Clark R. Mollenhoff, Deputy Counsel to the President, pursuant to the procedures and understanding outlined in your memorandum to Mr. Mollenhoff, dated September 18, 1969 (copy of which is attached as Exhibit A). You have advised me that at the time Mr. Mollenhoff discussed with you his access to designated federal income tax returns he indicated to you that he was acting under authority of the President.

Our more detailed study fully confirms my conclusion that there is no question that Mr. Mollenhoff acting on behalf of the President lawfully had the right of and was lawfully given, access to federal income tax returns and related data.

Section 6103(a)(1) of the Internal Revenue Code of 1954 provides:

"(a) PUBLIC RECORD AND INSPECTION

"(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President."

It would seem quite clear that under this statute you are fully authorized to disclose any return "made with respect to taxes imposed by" Chapter 1, relating to income taxes, "upon order of the President." In fact, by virtue of the provisions of Section 2 of Article II of the Constitution, which provides that "the President * * * may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, * * *," it would seem quite evident that as an officer of the Executive Branch of the Government, you may be required by the President to disclose to him any matter coming to your attention (or to that of your subordinates) in the performance of your official duties. "* * * [I]n contemplation of law under our theory of Government, all the records of the executive departments are under the control of the President of the United States * * *." H. Rept. 141, 45th Cong., 3 (1879).

Section 1 of Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America," and Section 3 of the same Article provides that "* * * he shall take Care that the Laws be faithfully executed * * *." It is quite apparent that the President cannot carry out these responsibilities in a nation of this size, or a Government of this size, entirely on his own, but must call upon others duly appointed to the Executive Branch to assist him in carrying out these duties. As early as *Marbury* v. *Madison*, 1 Cranch 137, 5 U.S. 60 (1803), the Supreme Court said:

"By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion." 1 Cranch 137 at 165, 5 U.S. 60 at 70.

This proposition has been repeatedly enunciated by the courts. See, *e.g.*, *Myers* v. *United States*, 272 U.S. 52 (1926):

P. 010/016

The vesting of the executive power in the President was essentially a grant the power to execute the laws. But the President alone and unaided could execute the laws. He must execute them by the assistance of subordinates. is view has since been repeatedly affirmed by this Court.
* * The highest and most important duties which his subordinates perform those in which they act for him. In such cases they are exercising not their a but his discretion." 272 U.S. 52 at 117, 132.

It is also clear that even in the case of one who has no power to delegate, may, without delegation exercise his authority through persons he appoints. , for example, *Shreveport Engraving Co., Inc. v. United States*, 143 F. 2d at 226 (5th Cir., 1944), citing Mechem on Agency, Vol. I, Section 804.

It would be noted that even in the case of heads of departments and other cers of the Government, *of lesser stature than the President*, they may thorize inspection of returns by their subordinates acting for them. See, for ample, Regulations Sec. 301.6103(a)-1(f). The President would seem to have lesser authority.

It would further seem quite clear that the President may relay any lawful der to you through his subordinates and that you have no choice but to comy therewith. It is common knowledge that orders to military and civilian rsonnel are frequently stated as being "By the direction of the President." ough signed by his subordinates, and it has long been settled that such orders ay be presumed to be of the same lawful effect as if delivered by the Presient in person. See, for example, Opinion of the Attorney General, 7 O.A.G. 53 (1855). It seems quite apparent from the statute that Congress intends that come tax returns be disclosed "upon order of the President" as be may direct.

It should be noted that Section 6103(a) (1) provides that income tax rerns be open to inspection "upon order of the President" and "under rules and regulations prescribed by the Secretary or his delegate and approved by the President." It has been suggested that the President himself can only quire that returns be made available for inspection by complying with the rules and regulations" referred to in this section. If this were so, the words the statute "upon order of the President" would become meaningless since e obviously could provide by such "rules and regulations" for inspection by anyone. It is inconceivable that the President should be bound by such rules and regulations in prescribing the circumstances or manner in which returns re to be disclosed to a member of his staff for his use. Since any such rules and regulations are subject to revision or modification by the Secretary at any me with the approval of the President, and the Secretary is the subordinate of the President appointed to serve at the pleasure of the President, it cannot e believed that he should be limited by the requirements of any such rules and regulations or that Congress so intended.

You have furnished us a copy of a legal opinion dated April 9, 1970, to Mr. Lawrence F. O'Brien, Chairman, Democratic National Committee, by Mortimer M. Caplin (former Commissioner of Internal Revenue); Sheldon S. Cohen (former Chief Counsel and later Commissioner of Internal Revenue) and Mitchell Rogovin (formerly Assistant to the Commissioner and later Chief Counsel of the Internal Revenue Service). In their opinion they state that "a presidential request would presumably have to comply with the various requirements of the regulations"—and specifically with Regulations Sec. 301.6103(a)-1(f). Such regulations provide for inspection of returns upon the application of the head of an executive department—specifically making such inspection dependent upon "the discretion of the Secretary of the Treasury or the Commissioner of Internal Revenue or the delegate of either." To assume that a "presidential request" must comply with such regulations assumes that the Secretary of the Treasury or the Commissioner of Internal Revenue could frustrate a request of the President for returns—in the face of the fact that the statutory provision says that they should be open for inspection on his order.

The statute as I interpret it, and as interpreted by my predecessors, is not the source of the right of the President to inspect returns, but merely sets forth the manner in which returns may be made available to other persons without Presidential order.

The opinion letter of Messrs. Caplin, Cohen, and Rogovin previously referred to states that: "It has been suggested that since the employee in question acts as agent for the President in matters of investigation, no written request by the

President is required. We are unaware of any theory of law which would support such an argument."

Although cases have not frequently arisen where disclosure to the President or someone acting for him was questioned, the Office of Chief Counsel has clearly and repeatedly taken the position that neither the statute nor the regulations limit such disclosure.

Prior to 1961 this office had apparently never addressed the problem. In 1961 the question first formally arose regarding disclosure to a special consultant to the President. While no opinion of Chief Counsel was written on the question, access to the returns by Mr. Bellino as Special Consultant to the President was clearly approved by various representatives of the Office of Chief Counsel. In a memorandum of March 28, 1961, to the General Counsel of the Treasury from Commissioner Caplin the followig statement concerning the inspection of returns and the legality thereof was stated:

"On January 28 Mr. Bellino, Special Consultant to the President, called at my office and requested permission to inspect our files on — — — — and others. Although we had no precedent to guide us, we decided that Mr. Bellino, in his capacity as a representative of the President, could inspect our files without a written request. This reflects the view that Section 6103 of the Code specifically provides that returns shall be open to inspection upon order of the President, and since Mr. Bellino's official capacity constitutes him the representative of the President, the action taken is regarded as conforming to law. Based on this decision, we permitted Mr. Bellino to inspect the files relating to — — — —. Since that time we have also permitted him to inspect tax returns and related documents pertaining to other persons."

Our files show that this memorandum was reviewed by the Director of the Enforcement Division in this office (then responsible for disclosure matters) and an Assistant Chief Counsel before being sent by the Commissioner to the General Counsel. It is our understanding that Mr. Bellino inspected files without written request at various times after the position was taken that he could have access to the returns under pertinent law. (See memorandum of May 23, 1961 to Robert H. Knight, General Counsel of the Treasury, from Mortimer Caplin, Commissioner, re: "Inspection of Returns by Congressional Committees," copy of which is attached as Exhibit B.)

Eighteen months later, in 1962, then Chief Counsel Hauser furnished an opinion to Commissioner Caplin, at his request, dealing with both the question of whether the President was limited by statute in his power to disclose to committees of Congress certain information required to be filed by exempt organizations with the Internal Revenue Service, and the further question of whether the President, in exercising such power, could act through a subordinate. After careful analysis of various authorities bearing on the questions, the opinion concluded that "the vesting of executive power in the President under the Constitution requires that he be entitled to all information relative to his control over the executive branch," and also that:

"* * * an official in the Executive Branch when acting in line of duty acts for the President and actually exercises the President's discretion for him. His acts are considered to be the acts of the President, as he is and must be the President's alter ego in the matters of the Executive Branch where the President is required by law to exercise authority."[3]

(See memorandum dated November 19, 1962, from Chief Counsel Hauser to Commissioner Caplin, and Memorandum of Law referred to therein and forwarded therewith, dated November 1, 1962, a copy of which is attached as Exhibit C.)

In January 1964, this office was again called upon for an opinion with respect to disclosure of returns to the President or someone acting for the President. President Johnson had issued Executive Order 11130 establishing a commission,

[3] The opinion of Messrs. Caplin, Cohen and Rogovin, dated April 9, 1970, previously referred to, suggests that disclosure of returns in response to a presidential request, other than in accordance with Regulations Sec. 301.6103(a)-1(f), constitutes a misdemeanor under Secs. 7213 of the Internal Revenue Code (Title 26) and 1905 of the Criminal Code (Title 18). It may be noted that the opinion to Commissioner Caplin of November 19, 1962, referred to above, specifically concluded in this connection that, "As the President is the Chief in the chain of command in the Executive Branch of Government, it is clear that Section 1905, Title 18 United States Code, and Section 7213, Title 26 United States Code, are inapplicable to disclosures made to him."

ith Chief Justice Warren as chairman, to investigate and report on the as-
sasination of President Kennedy; the Executive Order contained no reference
disclosure or non-disclosure of tax information but merely indicated that all
gencies and departments should furnish the Commission with such facilities,
rvice and cooperation as might be requested. The opinion of this office, pre-
ared in the Enforcement Division of this Office on January 6, 1964, concluded
1) that the executive order constituted authority for the Commission to examine
e returns and (2) that, in any event, the Commission "acting as an 'arm' of
e President," "in the President's stead," and "for the President" had full
uthority to examine the returns without regard to the regulations and without
e necessity of any further Presidential order. The opinion states in pertinent
art:

"* * * the provision in Sec. 6103(a)(1) for prescription of rules and regula-
ons by the Secretary or his delegate is merely an authorization for facile im-
ementation of a Presidential order rather than a restriction on Presidential
uthority.

"* * * there can be no congressional restriction on the authority of the Com-
issioner to release information to the President.

"* * * it is axiomatic that in the exercise of power of his office the President
not required to personally take care of day to day details but may, in
is discretion, delegate certain functions to others. * * * Manifestly, Sec.
103(a)(1) could not have been designed to require the Secretary or his delegate
nd the President to prescribe and approve rules and regulations regarding a
ersonal inspection of returns by the President. Such construction should apply
qu to an inspection by the Commission acting for the President.

* The President, by virtue of his office, is the head of all executive de-
artments and the inspection of returns by the head of the department is not
n any real sense a disclosure. The same is true with respect to the President's
elegate."

(See memorandum to General Counsel Belin from Acting Chief Counsel
Herzog, dated January 6, 1964, a copy of which is attached as Exhibit D.)

It is of interest to note that no attempt was thereafter made to comply with
he requirements of Regulation Sec. 6103(a)-1(f) in that no request was received
rom Chief Justice Warren as head of the Commission but that requests were
ccepted from the General Counsel of the Commission. Your files indicate that on
everal occasions, thereafter during 1964 various returns were furnished the
Commission (presumably on the basis of the foregoing opinion) under the signa-
ture of Mr. Rogovin as Assistant to the Commissioner.

Thereafter a question arose as to whether the returns disclosed to the Warren
Commission could be published by the Commission. This resulted in a request by
Sheldon Cohen (who had meanwhile become Chief Counsel) to the Director,
Legislation & Regulations Division of this Office, for its opinion as to whether
the Commission had authority to inspect returns. The Legislation & Regulations
Division advised Mr. Cohen by opinion on September 24, 1964, that it concurred
in the January 6, 1964, opinion of the Enforcement Division, reiterating that:

"* * * the Commission is the 'alter ego' of the President, and since there is
no restriction on the President's authority to inspect tax returns, likewise there
is no restriction on the right of the Commission as his 'alter ego', to inspect tax
returns within the scope of the Executive order."

(See memorandum to Chief Counsel Cohen from the Director, Legislation &
Regulations Division, dated September 24, 1964, attached as Exhibit E.)

These prior opinions of my predecessors, insofar as they relate to the present
question, seem to me to be correct as a matter of law. Thus, there would seem
to be no question about the President's right of access to these returns through a
designated member of his staff. While as I indicated in my earlier summary
opinion, there is no legal requirement that such requests be written, the proce-
dure you have followed requiring that all requests be detailed in writing is
procedurally preferable to accepting oral requests.

Very truly yours,

K. MARTIN WORTHY,
Chief Counsel.

AUGUST 1, 1957.

MEMORANDUM ON INSPECTION OF TAX RETURNS AND DISCLOSURE OF RELATED TAX DATA TO CONGRESSIONAL COMMITTEES

1. Congressional committees not authorized to inspect tax returns under Section 6103(d) or Section 8023 derive the privilege of inspection from Section 6103(a).[1] Under subsection (a), returns "shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President."

The President may impose reasonable conditions upon the inspection of such returns under subsection (a). He discloses returns[2] to Congressional committees if he considers that such disclosure would be in the public interest.

2. The President may also refuse to disclose tax returns to committees authorized under Sections 6103(d) and 8023 to inspect tax returns if he considers that such inspection would be contrary to the public interest. Though such refusal is contrary to the express terms of Sections 6103(d) and 8023, it is justified by the doctrine of separation of powers and the right and obligation of the President as Head of the Executive Department not to disclose confidential information of that Department if the disclosure would be contrary to the public interest.

3. Since the year 1933 the President has issued approximately fifty Executive Orders opening returns to inspection under Section 6103(a), or its predecessor statutes including Section 55(a) of the 1939 Code. Each of these Executive Orders has provided in substantially identical language that the returns covered thereby should "be open to inspection" by the committee in question subject to the "conditions and restrictions" of an accompanying Treasury Decision also approved by the President. Since 1946 each of such Treasury Decisions has contained substantially identical language as follows:

"Such data shall be furnished, or such return shall be made available for inspection, in an office of the Internal Revenue Service. Any information thus obtained by such committee or subcommittee shall be held confidential: *Provided, however*, That any portion thereof relevant or pertinent to the purpose of the investigation may be submitted by the investigating committee to the appropriate house of the Congress."

4. The uniform practice has been to permit inspection of tax returns and related data to Congressional committees (indicating a desire for returns under Section 6103(a)) only in accordance with an applicable Executive Order and Treasury Decision of the type above noted.

For example, Commissioner Harrington's letter to Senator McClellan dated May 13, 1957, states that permission to inspect returns is given "pursuant to authority contained in Executive Order 10708 and Treasury Decisions 6132 and 6133." Treasury Decisions 6132 and 6133 (relating respectively to the 1954 Code and the 1939 Code) both contain the language quoted in paragraph 3 above. Moreover, Commissioner Harrington's current instructions relating to inspection of returns by Senator McClellan's Select Committee require that any Service employees state (before exhibiting returns and related data) that they are made available only for the purposes authorized in Executive Order 10708 and Treasury Decisions 6132 and 6133.

5. Congress itself has recognized that if a Congressional committee deriving its authority from Section 6103(d)—or its predecessor statutes—desires to make public the contents of a tax return or related data, Congressional action specifically authorizing such public disclosure is required. In 1937 S.J. Res. 155 (75th Cong.), 50 Stat. 253, which established the Joint Committee on Tax Evasion and Avoidance provided in part as follows:

"Sec. 3. * * *

"(b)(1) The Secretary of the Treasury and any officer or employee of the Treasury Department, upon request from the joint committee, shall furnish such committee (*at a public hearing or otherwise, as the joint committee or a subcommittee thereof consisting of two or more members, may determine*) with any data of any character contained in or shown by any return of income, estate, or gift tax." (Emphasis added)

[1] Section 6103(d) relates only to the Senate Finance Committee, the House Ways and Means Committee, the Joint Committee, and select committees specially authorized to investigate returns by a resolution of the Senate or House. Section 8023 relates only to the Joint Committee.

[2] For convenience, the term "tax return," as used herein, includes information return.

The reasons for this provision in section 3(b)(1) were stated by Senator Harrison, as follows:

"* * * There is no question about the holding of public hearings by the joint committee. However, under the present law relating to income-tax returns, those returns can be submitted by the Treasury or Treasury officials only to the Ways and Means Committee of the House, the Finance Committee of the Senate, the Joint Committee on Internal Revenue Taxation, or some special committee appointed by Congress with powers to investigate income-tax returns *sitting in executive session*.

"Therefore we had to incorporate in the joint resolution a change in the present law in order to make public the income-tax returns. * * *" (Emphasis added), 85 Cong. Rec. 5520.

6. No Executive Order or Treasury Decision conferring on a Congressional committee the authority to inspect tax returns and related tax data has ever sought to permit the making public of such returns and data to a greater degree than would be permitted by a committee deriving its authority from Section 6103(d) or the predecessor statutes. The undeviating practice to date has been in aid of the statutory policy of protecting the secrecy of returns and has, therefore, limited inspection and disclosure to precisely the same areas as are permitted to Congressional committees operating under Section 6103(d).

7. If a Congressional committee were to permit returns to be inspected at a public hearing or otherwise publicly disclose related tax data taken from such returns or furnished by the Internal Revenue Service, such action (i) would violate the Executive Order (such as Order No. 10708) under which inspection [illegible]rmitted and (ii) would involve the committee's staff members (though [illegible]ably not the committee because of their Congressional immunity) in illegal conduct under Section 7213 of the Code.[1]

As to whether employees of the Service would be guilty of a criminal conspiracy if with knowledge of such intended use they nevertheless permitted such inspection or furnished such data, a difficult question is presented and no opinion is here expressed. Normally employees of the Service are entitled to rely on the presumption that data furnished in accordance with established procedures will be properly used; but this presumption can hardly be relied on in the face of clear evidence to the contrary. In any case, the danger of such a charge by resourceful, outraged witnesses should not be ignored.

8. If a select committee desiring to inspect returns and to receive tax data under Section 6103(a) is not granted an empowering Executive Order or if an outstanding Executive Order is revoked, it may nevertheless qualify for the right to inspect such returns and receive such data under Section 6103(d). But in the latter case, being only a select committee of the Senate or House, it would require special authorization to investigate returns by a resolution of the Senate or House. And its use of tax returns or any related tax data would be limited to such use "in executive session" or to submission of such data to the Senate or House, or both, as the case may be—unless an appropriate enactment (see paragraph 5 above) specifically authorized public disclosure. The Congress could by legislation also authorize a standing committee to inspect returns to any extent it deemed appropriate.

The term "executive session" is clearly understood as barring the public, and involving only "confidential" use of information, within the meaning of the term "confidential" in a typical Treasury Decision on this subject. See, for example,

[1] Section 7213 provides in part as follows:

"Sec. 7213. Unauthorized Disclosure of Information.

(a) Income Returns—

(1) FEDERAL EMPLOYEES AND OTHER PERSONS.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United [illegible]tes he shall be dismissed from office or discharged from employment."

Senate Manual, 84th Congress, 1st Session, page 51, "Executive Sessions", and page 60, "Committee Procedure".[4]

9. The present Executive policy against permitting photostatic copies of tax returns and tax data to be furnished to a committee under Section 6103(a) is expressed in a letter from the President to the Chairman of the House Committee on Government Operations, dated September 20, 1954. This letter reads in part as follows:

"The use of photostatic copies endangers the secrecy of the returns involved to a greater extent than other methods of inspection. While the use of photostatic copies might be advantageous to your Committee, it would not appear to be essential to the discharge of the Committee's functions. These considerations seem to outweigh the fact that the unavailability of photostatic copies of the returns will impose some additional expense on your Committee. For these reasons, it would be difficult to justify permitting your Committee to make and use photostatic copies of returns, particularly since no other congressional committee enjoys such a privilege. Accordingly, I am constrained by the spirit of the law limiting the availability of returns for inspection to accede only to your request for extension of your Committee's previous authority to include returns for 1953."

10. With respect to the meaning of the phrase "any data relating to or contained in any such return" (T.D. 6132 and T.D. 6133), the Commissioner, by long standing administrative practice, has exercised his discretion to divide these data into two parts: (A) Material submitted by or directed to the taxpayer of which the taxpayer, therefore, is presumed to have knowledge; (B) all other material in the administrative file relating to the taxpayer. Normally included within (A) are the return, schedules, protests, briefs, claims, waivers, examiners' reports (if previously furnished to the taxpayer) and other statements or documents designed to be supplemental to or to become part of the return.[5]

The statutory authority for the Commissioner's discretion in this regard is found in section 6103(a) itself. Pursuant to section 6103(a), inspection and disclosure are permitted "only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President." Under Treasury Decisions 6132 and 6133, approved by the President, the Secretary has in fact authorized the Commissioner to exercise reasonable discretion in permitting such inspection and disclosure. Appropriate classification of data to be so inspected and disclosed is a necessary part of such discretion.

[4] "An executive session is one from which the public is excluded and at which only such selected persons as the Board may invite are permitted to be present." *Blum v. Board of Zoning and Appeals*, 149 N.Y.S. 2d 5, at p. 8, 1956.

[5] The foregoing applies only to nonfraud cases; in open cases involving fraud or criminal prosecutions which are either pending or have been referred to the Department of Justice, no inspection of documents other than the bare return is in general permitted.

APR 22 1970

Dear Senator Long:

Chief Counsel Martin Worthy has today supplied me with his opinion on the legality of disclosure by the IRS of income tax returns to the President and I am enclosing a copy for your attention. This is set forth as a legal opinion to me with relevant attachments including earlier opinions of the Chief Counsel's office dealing with this same subject matter.

This opinion replaces and reaffirms the [illegible] opinion from the Chief Counsel dated April 14, 1970 which was given to you during the consideration of this subject in Executive Session on that day.

Copies are also being sent to the members of the Joint Committee and the Chief of Staff.

Sincerely yours,

(Signed) Randolph W. Thrower

Randolph W. Thrower
Commissioner

Honorable Russell B. Long
Chairman, Joint Committee on
Internal Revenue Taxation
United States Senate
Washington, D. C. 20510

Enclosure

12

THE WHITE HOUSE

WASHINGTON

TAX CHECK WAIVER

I am signing this waiver to permit the Internal Revenue Service (IRS) to release information about me which would otherwise be confidential. This information will be used in connection with my appointment or employment by the United States Government. This waiver is made pursuant to 26 U.S.C. 6103(c).

I request that the Internal Revenue Service release the following information to: President Clinton and the Office of Counsel to the President, acting on behalf of the President.

1. Have I failed to file a Federal income tax return for any of the last three years for which the filing of a return might have been required? (If the filing date without regard to extensions and normal processing period for the most recent year's return has not yet elapsed on the date IRS receives this waiver, and the IRS records do not indicate a return for the most recent year, the "last three years" will mean the three years preceding the year for which returns are currently being filed and processed.)

2. Were any of the returns in #1 filed more than 45 days after the due date for filing (determined with regard to any extension(s) for time for filing)?

3. Have I failed to pay any tax, penalty or interest liability during the current or last three calendar years within 45 days of the date on which the IRS gave notice of the amount due and requested payment?

4. Am I now or have I ever been under investigation by the IRS for possible criminal offenses?

5. Has any civil penalty for fraud been assessed against me during the current or last three calendar years?

I authorize the IRS to release any additional relevant information necessary to respond to the questions above.

To help the IRS find my tax records, I am voluntarily giving the following information:

MY NAME:______________________________ MY SSN:______________________
(Please Print or Type)

CURRENT ADDRESS: ______________________________

____

TELEPHONE NUMBERS: (HOME) ______________ (WORK) ______________
(PLEASE INCLUDE AREA CODES)

IF MARRIED AND FILED A JOINT RETURN:

NAME OF SPOUSE: ______________ SPOUSE'S SSN: ______________

NAMES AND ADDRESSES SHOWN ON LAST THREE RETURNS (IF DIFFERENT FROM ABOVE:)

YEAR	NAME(S)	ADDRESS

If a return for any of the last three years was not filed, please explain why. If there was insufficient income to meet filing requirements or filing requirements were met by filing with a foreign tax agency (e.g., Puerto Rico or the Virgin Islands), please describe the circumstances.

____

____

____

____

DATE: ______________
(WAIVER INVALID UNLESS RECEIVED BY THE IRS WITHIN 60 DAYS OF THIS DATE)

SIGNATURE: ______________
(SIGNATURE OF TAXPAYER AUTHORIZING THE DISCLOSURE OF RETURN INFORMATION)