

## ARTICLES

### REFORMING (AND SAVING) THE IRS BY RESPECTING THE PUBLIC'S RIGHT TO KNOW

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## INTRODUCTION

IN a May 2013 meeting of the American Bar Association's ("ABA") Section of Taxation, Lois Lerner, Director of the IRS's Exempt Organizations ("EO") Division, apologized for the IRS's handling of applications submitted to the agency for recognition of the applicant's tax-exempt status.<sup>1</sup> The apology preceded by a few days a report issued by the Treasury Inspector General for Tax Administration ("TIGTA") indicating that the IRS had used "inappropriate criteria" in deciding which EO applications deserved heightened scrutiny.<sup>2</sup> The ensuing torrent of bipartisan criticism directed towards the IRS, the forced resignation of the Acting IRS Commissioner, and Lerner's refusal to testify at a congressional inquiry on Fifth Amendment grounds likely fixed the public's impression of the episode, notwithstanding uncertainty—which may never be completely cleared up—as to exactly what the IRS did.<sup>3</sup> Loss of public respect for the agency and tax system may hurt tax compliance, diminish interest in service in the IRS, demoralize and decrease the effectiveness of the current workforce, and result in continuing budget cuts for the organization whose principal mission provides the lifeblood for the country.<sup>4</sup> The goal of this Article is to help restore and preserve the public's trust in the tax agency and tax system.

<sup>1</sup> See Jonathan Weisman, I.R.S. Apologizes to Tea Party Groups over Audits of Applications for Tax Exemption, N.Y. Times, May 11, 2013, at A11 (describing Lerner's apology for the IRS's actions that were "absolutely inappropriate and not the way we should do things"); Zachary A. Goldfarb & Karen Tumulty, IRS Targeted Tea Party Groups for Tax Scrutiny, Wash. Post, May 11, 2013, at A1 (describing the circumstances surrounding Lerner's apology).

<sup>2</sup> See Treasury Inspector Gen. for Tax Admin., Reference No. 2013-10-053, Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review 5 (2013) [hereinafter TIGTA 2013 Report].

<sup>3</sup> See The 2013 Person of the Year, 142 Tax Notes 7, 7–8 (2014) (summarizing events); Michael D. Shear & Jonathan Weisman, Obama Dismisses Benghazi Furor but Assails I.R.S., N.Y. Times, May 14, 2013, at A1 (describing the President as "join[ing] a bipartisan chorus of outrage over disclosures that the Internal Revenue Service had singled out conservative groups for special scrutiny").

<sup>4</sup> See IRS Oversight Bd., 2013 Taxpayer Attitude Survey 9 fig.9 (2014), available at [http://www.treasury.gov/IRSOB/reports/Documents/IRSOB\\_TAS%202013.pdf](http://www.treasury.gov/IRSOB/reports/Documents/IRSOB_TAS%202013.pdf) (showing public support for IRS funding to enforce tax laws reached ten-year low in 2013); 1 Nat'l Taxpayer Advocate Ann. Rep. to Congress 20–22 (2013) [hereinafter NTA Annual Report] (describing impact of underfunding on compliance); Diane Freda, IRS Exempt Unit Beset by Reduced Guidance, Determinations Amid Workforce Turnover, Daily Tax Rep. (BNA) No. 222, at G-4 (Nov. 18, 2013) (describing deleterious effects on the IRS workforce); Michael Kranish, IRS: America's Feared and Failing Agency, Boston Globe, Feb. 17, 2014, at A1 (characterizing the IRS as a "failing agency" because of its budgetary and other problems);

Current law requires the IRS to determine, among other things, the amount and type of political activity undertaken by certain EOs.<sup>5</sup> Continuing problems with this responsibility have inspired many reform proposals, including repealing exemption categories (or adding new ones), establishing higher thresholds or sharper lines in the law, or shifting the political activity responsibility to other bodies, such as the Federal Election Commission (“FEC”).<sup>6</sup> This Article takes a different ap-

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Casey Wooten, President Signs Omnibus Spending Bill, Slashing IRS Budget by \$526 Million, *Daily Tax Rep.* (BNA) No. 13, at G-5 (Jan. 21, 2014) (describing enactment of FY 2014 appropriations bill with significant cut to the IRS’s budget).

<sup>5</sup> See I.R.C. § 501(c)(3) (West 2014) (limiting amount of lobbying activities by § 501(c)(3) organizations and prohibiting completely their political campaign activities on behalf of or in opposition to any candidate for public office); *Treas. Reg.* § 1.501(c)(3)-1(b)(3) (2013) (same); *id.* § 1.501(c)(4)-1(a)(2) (limiting the amount of political campaign activities by § 501(c)(4) organizations). Other EOs are subject to similar limitations. See Roger Colinvau, *Political Activity Limits and Tax Exemption: A Gordian’s Knot*, 34 *Va. Tax Rev.* (forthcoming 2014) (manuscript at 18) (on file with the Virginia Law Review Association).

<sup>6</sup> See, e.g., *Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities*, 78 *Fed. Reg.* 71,535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1) (proposing regulation identifying specific political activities not qualifying as promotion of social welfare for purposes of § 501(c)(4)); Nat’l Taxpayer Advocate, *Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status* 16–17 (2013) [hereinafter *NTA Special Report*] (recommending exploration of having the FEC or “another specialized agency” handle political activity determination); *Am. Bar Ass’n Section of Taxation, Comments of the Individual Members of the Exempt Organizations Committee’s Task Force on Section 501(c)(4) and Politics*, 45 *Exempt Org. Tax Rev.* 136, 139–42 (2004) (proposing bright-line, expenditure-based test for permissible political activity of § 501(c)(4) organization); Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 *Election L.J.* 363, 402–03 (2011) (proposing new exemption category for EOs engaged primarily in political activities); Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 *Election L.J.* 427, 444 (2011) [hereinafter *Tobin, Campaign Disclosure*] (suggesting a bright-line safe harbor); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 *Geo. L.J.* 1313, 1361–62 (2007) [hereinafter *Tobin, Political Campaigning*] (proposing independent commission outside the IRS to enforce political campaign ban); Richard A. Westin & Joshua G. Berkley, *Exempt Organizations as Political Fig Leaves*, 136 *Tax Notes* 1608, 1611 (2012) (proposing higher threshold for § 501(c)(4) test); Clive Crook, *Sympathy for the IRS*, *Bloomberg View* (May 21, 2013, 6:00 PM), <http://www.bloombergview.com/articles/2013-05-21/irs-foul-up-shows-how-bad-laws-breed-good-scandals> (proposing repeal of § 501(c)(4) and shifting some responsibilities to the FEC). See generally Colinvau, *supra* note 5 (generally proposing conformity of § 501(c)(4)–(6) tax rules with those of § 527 and critiquing other solutions). A key issue discussed in this Article—the confidentiality of EO tax return information—might remain (and possibly be harder to resolve) if the political activity responsibility were shifted to another agency. For a comparison of the institutional capacity of the IRS

proach, and assumes that the substantive EO tax law remains largely unchanged and continues to be administered by the IRS. Under these tough—but realistic<sup>7</sup>—assumptions, what can be done to forestall harm from future controversies and restore trust in the agency? This Article proposes to increase the transparency of the IRS's administrative actions involving EOs. The recommendation responds directly to a chief source of the public's frustration with the agency—the inability to monitor its actions and have confidence that the laws are being implemented in an even-handed way.

Proposals to increase the transparency of government commonly confront some claimed governmental interest in secrecy, such as a national security or law enforcement concern.<sup>8</sup> Transparency of the government's *tax* decisions, however, encounters the further potential objection that it violates the privacy rights of taxpayers. This latter clash arises because the government's tax administration decisions generally turn on the information it has extracted under compulsion from taxpayers. Thus, meaningful transparency of one (the government's tax decisions) almost necessarily requires meaningful transparency of the other (taxpayers' tax return information).<sup>9</sup> The tax agency's performance will always remain

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and FEC to regulate political activities, see Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. Rev. 625, 664–83 (2007).

<sup>7</sup> The “political activities” regulation proposed by the Treasury in late 2013 has already engendered considerable opposition, and the House has passed a bill delaying any change in the applicable law (including finalizing the proposed regulation) for one year. See H.R. 3865, 113th Cong. (2014) (as passed by the House); H.R. Rep. No. 113-353, at 2 (2014); Eliza Newlin Carney, *Tax-Exempt Plan Further Riles Critics*, CQ Weekly, Dec. 9, 2013, at 2030 (describing widespread opposition to proposed regulation); Kenneth P. Doyle, *Liberal Groups Fault IRS 501(c)(4) Proposal, Call for Adoption of ‘Bright Lines’ Alternative*, Daily Tax Rep. (BNA) No. 233, at G-1 (Dec. 4, 2013) (same); Carl Hulse, *Left and Right Object to I.R.S. Plan to Restrict Nonprofits’ Political Activity*, N.Y. Times, Feb. 13, 2014, at A13 (same). In view of the volume of comments received, the IRS has announced that it will likely issue a revised proposed regulation in the future. See Fred Stokeld, *IRS to Redraft Political Activity Regs*, 143 Tax Notes 886 (2014).

<sup>8</sup> See Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. Sch. L. Rev. 81, 83–84 (2011).

<sup>9</sup> See Boris I. Bittker, *Federal Income Tax Returns—Confidentiality vs. Public Disclosure*, 20 Washburn L.J. 479, 493–94 (1981); cf. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 Wash. U. L.Q. 1, 20–22 (describing general conflict between right to know and right of privacy); Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 971–72, 1221–30 (1975) (same). The same conflict potentially arises whenever the government's actions are based on information collected from private parties and Freedom of Information Act (“FOIA”) exceptions (or other laws) protect the underlying information from disclosure. See, e.g., 5 U.S.C. § 552(b)(1) (2012) (protecting certain classified information); *id.* § 552(b)(2) (protecting information involving an agency's personnel

somewhat hidden and potentially suspect as long as the public has no access to the tax return information used by the agency to administer the law. In contrast, if the tax return confidentiality protections of EOs—provided to them and all other taxpayers by Section 6103 of the Internal Revenue Code—were relaxed, the IRS’s decisions affecting EOs could be opened to scrutiny. For example, the IRS could be required to create a public website detailing the progress of each EO application from an initial submission to the final determination. Other administrative actions involving an EO, such as an audit-related development, could be required to be disclosed in the same manner.

Thus, an essential element of the proposal in this Article is greater publicity of EO tax return information. Disclosure of such information has been previously urged primarily to improve public knowledge and monitoring of EO activities and to protect the integrity of the electoral process.<sup>10</sup> This Article offers an additional rationale for increased public-

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rules and practices); id. § 552(b)(4) (protecting trade secrets and similar privileged information); id. § 552(b)(6) (protecting an individual’s information, such as personnel and medical files, if disclosure “would constitute a clearly unwarranted invasion of personal privacy”); id. § 552(b)(7) (protecting certain information compiled for law enforcement purposes); Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 *Admin. L. Rev.* 617, 648–49 (2010) (describing other restrictions on disclosure). Private *tax* information obtained by the government is, however, quite extensive, and the law broadly protects from disclosure such information as well as the government’s administrative use of the information. See 1 Staff of Joint Comm. on Taxation, 106th Cong., JCS-1-00, *Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998*, at 15–16, 21–23 (Joint Comm. Print 2000) [hereinafter JCT, *Study of Present-Law Taxpayer Confidentiality*] (describing broad protections of § 6103 (tax confidentiality statute)); id. at 93–96 (describing cases holding that § 6103 either is an exception to FOIA or preempts it); id. at 127 (quoting Treasury Secretary’s assertion that the IRS has “a data source of unparalleled detail and completeness”); S. Rep. No. 94-938, at 316–17 (1976). In addition, the public’s right to know in some other contexts may be satisfied through mere disclosure of the existence of a collection program and the type of information collected. In contrast, in the tax area, both of those facts are known; what is generally unknown (and protected from disclosure) is the specific information of taxpayers and the government’s administrative decisions with respect to that information.

<sup>10</sup> See, e.g., 2 JCT, *Study of Present-Law Taxpayer Confidentiality*, supra note 9, at 80 (recommending increased disclosures to monitor EOs, including their compliance with tax laws); April, supra note 6, at 403–05 (discussing additional EO disclosures for election law purposes); Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 *Election L.J.* 337, 349–50 (2011) (same); Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 *Fla. Tax Rev.* 183, 226, 232 (2012) (supporting disclosures to monitor EO governance practices); C. Eugene Steuerle & Martin A. Sullivan, *Toward More Simple and Effective Giving: Reforming the Tax Rules for Charitable Contributions and Charitable Organizations*, 12 *Am. J. Tax Pol’y* 399, 441–42 (1995)

ity—to enable the public to know about (and monitor) the operations of its government.<sup>11</sup> For EOs, the loss of confidentiality protections would be balanced by greater assurance that the tax agency is treating them fairly. Moreover, EOs and everyone else would benefit from heightened respect for the integrity of the agency and tax administration process.

Part I describes the conflict between the confidentiality of tax return information and the public's ability to monitor its government. It first provides background on how the law has produced an information imbalance, initially restricting public access to tax return information and then (since 1976) generally restricting government access for non-tax administration purposes. The result has been to make the access of tax administrators more exclusive. This consequence is generally sensible—the information, after all, is collected principally for tax administration purposes—but only if the information is used properly for such purposes. The “semi-secret” nature of tax return information under current law may, to some extent, increase the possibility of misuse of the information by tax administrators, or at least the suspicion of such misuse.

Part I then shows how current law prevents the public from ever learning whether its suspicions are justified. Although the IRS has full access to tax return information, the law bars the agency from sharing the information with the public. This prohibition sometimes creates the perception that the agency has something to hide when its administrative decisions are questioned. Moreover, the IRS may interpret the prohibition expansively to avoid providing responses even when they would not be barred.

In addition, taxpayers can strategically release selective information about themselves and launch charges against the agency—either directly

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(asserting that “in our judgment, public information is potentially the most powerful regulator of [EO] practices”); Tobin, *Campaign Disclosure*, supra note 6, at 439–44 (proposing changes to enhance EO disclosure of political activities, primarily for election law purposes).

<sup>11</sup> For a description of the history and rationale of the public's right to know, see Lloyd Hitoshi Mayer, *Politics and the Public's Right to Know*, 13 *Election L.J.* 138, 140–42 (2014) (summarizing that “the public's right to have access to information about government activities . . . is well established and relatively non-controversial”); David M. O'Brien, *The First Amendment and the Public's “Right to Know,”* 7 *Hastings Const. L.Q.* 579, 586–603 (1980). According to IRS Policy Statement 11-92, “The [IRS] recognizes the people's right to know about their tax laws and the manner in which they are being administered.” IRM 1.2.19.1.7(2) (Oct. 13, 1967), reprinted in 1 *Policy Statements*, Internal Revenue Manual (CCH) at 3653 (2014). For a defense of FOIA's value in providing needed government transparency, see Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 *U. Pa. J. Const. L.* 1011 (2008).

or through their representatives (such as members of Congress)—and the IRS may be precluded from defending itself or providing a complete explanation. When these episodes occur, they further obscure the facts from the public and erode respect for the agency. Finally, when charges of agency wrongdoing are investigated, current law also prevents the investigators from clearly revealing the results of their investigations to the public. In summary, unless taxpayers waive their rights, it is essentially not possible under current law for the public ever to obtain the full account of various controversies and to gain (or retain) confidence in the tax agency.<sup>12</sup> More complete publicity of tax return information and the government's use of that information would tend to deter IRS misbehavior, reduce suspicions of such misconduct, and promote fuller communication both to establish any impropriety and avert false charges against the agency.

The problems outlined in Part I might seem to be unavoidable so long as taxpayer privacy rights trump the public's right to know, the policy preference of this country for virtually the entire period it has collected income tax information. As explained in Part II, however, Congress has long justified publicity of a substantial amount of tax return information of EOs. In particular, there is required publicity of EO application materials (but only if and when the application is approved), EO annual information returns, and written IRS determinations (with taxpayer identifying information generally redacted) issued to taxpayers including EOs

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<sup>12</sup> In April 2014, the House Ways and Means Committee surprisingly approved and carried out a *public* disclosure of tax return information in connection with a referral to the Department of Justice of evidence relating to the committee's investigation of Lois Lerner. The committee believed it had authority to take this possibly unprecedented step (since enactment of heightened confidentiality protections in 1976) under § 6103(f)(4)(A) (second sentence), which permits the committee to submit tax return information to the House or Senate. See Referral to the Honorable Eric H. Holder, Jr., Attorney General, of Former Internal Revenue Service Exempt Organizations Division Director Lois G. Lerner for Possible Criminal Prosecution for Violations of One or More Criminal Statutes Based on Evidence the Committee Has Uncovered in the Course of the Investigation of IRS Abuses: Markup Before the H. Comm. on Ways & Means, 113th Cong. (2014), available at [http://waysandmeans.house.gov/uploadedfiles/040914\\_markup\\_transcript\\_open\\_session\\_.pdf](http://waysandmeans.house.gov/uploadedfiles/040914_markup_transcript_open_session_.pdf) (open session transcript), and [http://waysandmeans.house.gov/uploadedfiles/040914\\_markup\\_transcript\\_executive\\_session.pdf](http://waysandmeans.house.gov/uploadedfiles/040914_markup_transcript_executive_session.pdf) (executive session transcript); David van den Berg, Did Ways and Means' EO Data Dump Break the Law?, 143 Tax Notes 519 (2014). Section 6103(h)(2) and (3) permit tax return information to be disclosed to the Department of Justice (but not to the public). Section 6103(f)(4)(B) (second sentence) permits certain congressional committees (other than the tax-writing committees and the Joint Committee on Taxation) to furnish tax return information to the House and Senate, but only in closed executive session.

(such as an exemption revocation).<sup>13</sup> This exception for EO return information is a very happy coincidence, because it is in the EO area that allegations of possible IRS misconduct continue to arise (and have arisen repeatedly for at least five decades).<sup>14</sup> Thus, slight liberalizations of existing EO disclosure rules might permit the type of government transparency that would satisfy the public's right to know in the precise area of greatest need.

Part III describes the specific new disclosures recommended by this Article. To be exempt, most EOs would be required to apply for recognition of their exemption by the IRS, and all application materials would be publicly available upon submission to the agency. Section 6103 confidentiality protections would also be relaxed for EO audit developments, closing agreements, and final determinations of the agency (without redaction of EO identifying information). Finally, the IRS would be required to disclose in a timely manner its decisions relating to an EO application and such other administrative actions. The IRS would not have to disclose its internal deliberations, including the composition of formulae used for the selection of cases for higher scrutiny or audit. This amount of secrecy is necessary to offset another type of information imbalance—the superior knowledge taxpayers have about their own affairs that might be relevant to a determination of their tax responsibilities. The proposal would also allow information such as trade secrets and similar privileged information, classified information for national defense or foreign policy reasons, and the identity of an EO's donors, to be shielded from publicity.

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As the title of this Article indicates, this reform proposal has been developed to “save” the IRS. Notwithstanding the hopes of its wildest critics, the agency's survival is not in doubt no matter what the current or future controversies ultimately reveal. There is, however, some concern about the *type* of agency that will continue if faith in the agency cannot be restored and maintained. In particular, the incessant attacks and continuing possibility of suboptimal funding increase the likelihood of the agency's capture by those it supposedly regulates.

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<sup>13</sup> See *infra* notes 115–41 and accompanying text.

<sup>14</sup> See *infra* notes 104–12 and accompanying text.



Some capture may occur unintentionally. Resource limitations, for example, may make the agency more reliant on input from trade organizations and practitioner groups to help develop interpretations of the law, and such groups can reasonably be expected to make recommendations most compatible with their narrow interests. That top IRS management thought it both safe and advisable to issue its first public apology in the current controversy to a private group of tax lawyers—rather than to the agency’s superiors within the executive branch, the Congress, or the general public—may indicate that some amount of capture has already occurred.<sup>15</sup> Resource limitations may also force the agency to be less vigilant in monitoring taxpayer practices, in effect ceding (by default) interpretation and enforcement of more aspects of the law to private interests.<sup>16</sup>

Some agency capture may be quite deliberate; for example, to deflect criticism, the agency may develop a more “customer-friendly” attitude that results in the law being twisted in favor of particular groups of taxpayers.<sup>17</sup> Although being “customer-friendly” may be a very smart business practice, it is not necessarily the proper approach for a government agency responsible for enforcing the law. This Article is written in the hope of preserving an agency that never loses sight of the public it serves, which expects it to apply the law fairly, but firmly, and with great rigor.<sup>18</sup>

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<sup>15</sup> See Lindsey McPherson, *Miller Admits Question Prompting Lerner Apology Was Planned*, 139 *Tax Notes* 988, 988 (2013) (describing the Acting IRS Commissioner’s advance knowledge that an apology would be issued at the ABA Tax Section meeting).

<sup>16</sup> See *Amount of Audits, Tax Revenue Decline With IRS Budget in FY 2013*, *Daily Tax Rep.* (BNA) No. 56, at G-3 (Mar. 24, 2014) (reporting a decrease in FY 2013 in the percent of tax returns audited and the amount of additional taxes sought despite an increase in the number of returns filed).

<sup>17</sup> In 1998, Congress adopted reforms—sometimes characterized as making the IRS more “customer-friendly”—that primarily dealt with the IRS’s procedural fairness to taxpayers, and did not include recommendations to favor certain taxpayer groups over others. See *Internal Revenue Service Restructuring and Reform Act of 1998*, Pub. L. No. 105-206, tit. III, 112 Stat. 685, 726–83 (codified as amended in scattered sections of I.R.C.); S. Rep. No. 105-174, at 8–9 (1998) (agreeing with the IRS’s goal of “improving customer service”); Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 *U. Kan. L. Rev.* 971, 980, 990–1008 (2003).

<sup>18</sup> Cf. 1 NTA Annual Report, *supra* note 4, at 20–38 (describing ramifications of underfunding the IRS); William Hoffman, *15 Years After RRA ’98: Time to Re-structure the IRS?*, 140 *Tax Notes* 647, 649 (2013) (stating that IRS enforcement activities fell off significantly following late 1990s charges against the agency and subsequent investigations).

## I. THE CONFLICT BETWEEN TAX RETURN CONFIDENTIALITY AND THE PUBLIC'S RIGHT TO KNOW

This Part explains the conflict between the confidentiality of tax return information and the public's ability to monitor its government's tax activities. Sections I.A and I.B provide background on tax return confidentiality, and show how the law has gradually produced an information imbalance, first restricting public access to tax return information and then (since 1976) generally restricting government access for non-tax administration purposes.<sup>19</sup> The result has been to make the access of tax administrators more exclusive. The imbalance has increased the possibility of misuse of the information by tax administrators, or at least the suspicion of such misuse. Section I.C then describes how the law prevents the public from ever discovering whether its suspicions are justified.

### A. *Tax Return Confidentiality Laws Prior to the Tax Reform Act of 1976*<sup>20</sup>

The first Civil War income tax laws generally gave the public access to tax return information. Tax administrators posted in public places (and published in newspapers) lists showing the amount of tax owed by specific taxpayers, and made full tax return information available for public inspection.<sup>21</sup> The purpose was to advise taxpayers of the amount of their liabilities, facilitate collection of the tax, and discourage fraudu-

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<sup>19</sup> For helpful background, see 1 JCT, Study of Present-Law Taxpayer Confidentiality, *supra* note 9, at 246–79; 1 Office of Tax Policy, U.S. Dep't of the Treasury, Scope and Use of Taxpayer Confidentiality and Disclosure Provisions 15–26 (2000); Richard D. Pomp, The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future, 22 Cap. U. L. Rev. 373, 378–405 (1993). See generally Howard M. Zaritsky, Cong. Research Serv., HJ5001A, Legislative History of Tax Return Confidentiality: Section 6103 of the Internal Revenue Code of 1954 and Its Predecessors (1974) (describing legislative history of § 6103 up to 1974).

<sup>20</sup> The first part of this Section is adapted from an earlier article. See George K. Yin, James Couzens, Andrew Mellon, the “Greatest Tax Suit in the History of the World,” and the Creation of the Joint Committee on Taxation and Its Staff, 66 Tax L. Rev. 787, 843–47 (2013).

<sup>21</sup> See Act of July 1, 1862, ch. 119, § 6, 12 Stat. 432, 434 (requiring taxpayers to submit a “list or return” showing “amount of annual income”); *id.* §§ 14–15, 12 Stat. at 436–37 (describing preparation and publication of assessment lists); *id.* §§ 16, 18–19, 12 Stat. at 437–40 (describing preparation and publication of collector's lists, open to public inspection); *id.* § 93, 12 Stat. at 475 (requiring submission of income tax return); Act of June 30, 1864, ch. 173, §§ 11, 18–20, 27–28, 118, 13 Stat. 223, 225, 228–29, 232–33, 282–83.

lent returns.<sup>22</sup> Congress eventually changed this practice, thanks to leadership from Representative (and future President) James Garfield (R-Ohio), to respect the countervailing privacy interests of taxpayers. Garfield acknowledged the need for some publicity “to act as a pressure upon men to bring out their full incomes,” but objected to publication of the information in newspapers, which he termed “odious.”<sup>23</sup> In 1870, Congress barred tax administrators from publishing tax return information in newspapers, but continued to allow public inspection.<sup>24</sup> Soon after, Congress let the income tax law expire, “in part because of problems stemming from publicity of tax returns.”<sup>25</sup>

The short-lived income tax included in the Wilson-Gorman Tariff Act of 1894 required returns to be kept confidential.<sup>26</sup> Under the Payne-Aldrich Tariff Act of 1909, however, which enacted a corporate excise tax based on the amount of a corporation’s income, the corporate returns were designated as public records “open to inspection as such.”<sup>27</sup> This publicity rule, modified in 1910 to permit inspection only on order by the President under rules prescribed by the Treasury, appears to have been for corporate regulatory purposes rather than to further any tax policy objective.<sup>28</sup> The first Act of the modern income tax in 1913 contin-

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<sup>22</sup> See Zaritsky, *supra* note 19, at CRS-4 to CRS-6.

<sup>23</sup> See Cong. Globe, 39th Cong., 1st Sess. 2789 (May 23, 1866) (statement of Rep. Garfield).

<sup>24</sup> See Act of July 14, 1870, ch. 255, § 11, 16 Stat. 256, 259 (last proviso); Circular Letter from Columbus Delano, Comm’r of Internal Revenue, to Assessors (Apr. 5, 1870), *in* 11 Internal Revenue Rec. & Customs J. 113 (1870) (providing that although publication of information would end, public access would continue).

<sup>25</sup> 1 Office of Tax Policy, *supra* note 19, at 16; see also Pomp, *supra* note 19, at 383 (“The Civil War Income Tax died at the end of 1871, in part due to the rising concerns over privacy, which were not entirely put to rest by the 1870 statutory revision.”).

<sup>26</sup> See Wilson-Gorman Tariff Act of 1894, ch. 349, § 34, 28 Stat. 509, 557–58.

<sup>27</sup> See Payne-Aldrich Tariff Act of 1909, ch. 6, § 38, 36 Stat. 11, 112–17. Confusingly, the statute also made it unlawful to disclose tax return information “except upon the special direction of the President.” *Id.*; see also Report on Administrative Procedures of the Internal Revenue Service to the Administrative Conference of the United States, S. Doc. No. 94-266, at 839–41 (1975) [hereinafter Report on IRS Procedures] (describing conflicting interpretations of the two provisions). President Taft reportedly thought the publicity feature was the best part of the 1909 law, but his Treasury Secretary told him it had generated the most objections. See 45 Cong. Rec. 4131 (1910) (statement of Rep. Underwood (D-Ala.)) (claiming that the public “do[es] not stand with the President” on the publicity issue); Roy G. Blakey & Gladys C. Blakey, *The Federal Income Tax* 57 (1940).

<sup>28</sup> See Act of June 17, 1910, ch. 297, 36 Stat. 468, 494; 44 Cong. Rec. 3344 (1909) (providing President Taft’s statement in support of the corporate excise tax in part because it would enhance “federal supervision” of corporations); 1 Office of Tax Policy, *supra* note 19, at 17; Zaritsky, *supra* note 19, at CRS-27; Marjorie E. Kornhauser, *Corporate Regulation and*

ued the 1910 treatment of corporate returns and applied it to the returns of individuals. Thus, both types of returns were classified as “public records” but available for inspection only under order of the President.<sup>29</sup> But for two minor exceptions, the public has never regained general access to tax return information.

One exception occurred in 1924. Throughout the early years of the modern income tax, the Progressives and other members of Congress urged full publicity of tax return information. A principal reason was to prevent fraud by taxpayers. Supporters argued that full publicity would let people monitor the accuracy of tax filings submitted by their neighbors and others they knew. The potential scrutiny, in turn, would encourage taxpayers to be more honest in the first place.<sup>30</sup> Advocates often drew an analogy to local property tax records, whose publicity facilitated such citizen enforcement of the laws.<sup>31</sup> As one Progressive wrote during the period of the Teapot Dome investigation, “Publicity brings respect for law, whereas secrecy sits on the lid of sizzling teapots.”<sup>32</sup>

Until 1924, these arguments had proved unavailing. Even if so inclined, few persons (other than those already performing income tax withholding or information reporting) would likely be in a position to

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the Origins of the Corporate Income Tax, 66 *Ind. L.J.* 53, 113–18, 124–30 (1990). By regulation, the Treasury Department made the returns of public corporations available to the public. See T.D. 1665, 13 *Treas. Dec. Int. Rev.* 117, 119–20 (1910).

<sup>29</sup> See Revenue Act of 1913, ch. 16, § II(G)(d), 38 Stat. 114, 177. There is ambiguity whether the 1913 “public record” provision extended to the tax returns of individuals as well as corporations. If the provision did not apply to the returns of individuals, then they were completely protected from disclosure. See *id.* § II(I), 38 Stat. at 177–78 (amending Rev. Stat. § 3167 (1894)); Zaritsky, *supra* note 19, at CRS-56 (concluding that the 1913 Act granted “total secrecy for individual returns . . . and Executively discretionary secrecy for corporations”). By 1918, it was plain that the “public record” provision—along with the President’s discretion to order disclosure—applied to all returns, individual and corporate. See Revenue Act of 1918, ch. 18, § 257, 40 Stat. 1057, 1086–87 (treating as public records all “returns upon which the [income] tax has been determined by the Commissioner”).

<sup>30</sup> See 53 *Cong. Rec.* 13,291–92 (1916) (statement of Sen. Husting (D-Wis.)); *id.* at 13,852–53 (statement of Sen. Husting); *id.* at 13,853 (statement of Sen. Reed (D-Mo.)); *id.* at 13,854 (statement of Sen. Norris (R-Neb.)); *id.* at 13,856 (statement of Sen. La Follette, Sr. (R-Wis.)); 61 *Cong. Rec.* 7372 (1921) (statement of Sen. La Follette, Sr.) (“No man would dare to make a false return if he knew that . . . his return was to be published.”); 65 *Cong. Rec.* 1208 (1924) (statement of Sen. Norris).

<sup>31</sup> See 53 *Cong. Rec.* 13,852 (1916) (statement of Sen. Husting); *id.* at 13,853 (statement of Sen. Reed); *id.* at 13,853–54 (statement of Sen. Norris); 65 *Cong. Rec.* 1207–08 (1924) (statement of Sen. Norris); *id.* at 2959 (statement of Rep. Browne (R-Wis.)); *id.* at 7676 (statement of Sen. Norris).

<sup>32</sup> H.R. Rep. No. 68-179, at 75 (1924) (providing separate views of Rep. Frear (R-Wis.)).

detect errors of others.<sup>33</sup> Moreover, real property tax records contained much less private information than a typical income tax return, and the ownership (and approximate value) of such property was generally known without regard to those records.<sup>34</sup> Finally, as Representative Cordell Hull (D-Tenn.) noted, property tax systems suffered from considerable evasion and avoidance, despite the publicity provided.<sup>35</sup> The *New York Times* editorialized ominously against the “malicious tittle-tattle” emanating from income tax publicity, which might “convert[] the whole community into a horde of spies or detectives.”<sup>36</sup>

In 1924, the Progressives finally achieved a measure of success, due in part to the fallout of a bitter feud between Senator James Couzens (R-Mich.) and Treasury Secretary Andrew Mellon in which Mellon was believed to have improperly snooped at Couzens’s tax returns.<sup>37</sup> The Senate Finance Committee reported a tax bill requiring the tax agency to provide public lists of the name, address, and amount of income tax paid by all taxpayers.<sup>38</sup> On the Senate floor, Senator George Norris (R-Neb.) offered an amendment to require full publicity of tax returns and, with the Couzens-Mellon feud providing an important backdrop, the Senate approved it.<sup>39</sup> Although the Norris amendment was dropped in conference, the Finance Committee’s public taxpayer list (including amount of

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<sup>33</sup> The 1913 Act included a broad income tax withholding provision that was replaced by information reporting in 1917. See Revenue Act of 1913 § II(D)–(E), 38 Stat. at 168–70; H.R. Rep. No. 63-5, at xxxviii (1913) (estimating that about two-thirds of the 1913 income tax would be withheld at source); War Revenue Act, ch. 63, §§ 1204(2), 1205, 1211, 40 Stat. 300, 332, 336–37 (1917); 55 Cong. Rec. 5967 (1917) (statement of Sen. Simmons (D-N.C.)) (explaining the 1917 change).

<sup>34</sup> See Bittker, *supra* note 9, at 482–83. Personal property tax records might be more revealing but, unlike an income tax return, they did not necessarily show the source of a person’s income or wealth (or other personal information).

<sup>35</sup> See 65 Cong. Rec. 2956–57 (1924) (statement of Rep. Mills (R-N.Y.)) (reading Hull’s 1918 views into the record).

<sup>36</sup> Editorial, *Futile Tax Publicity*, *N.Y. Times*, May 23, 1924, at 18. Hull was skeptical of any system that had to rely upon informants for its successful operation because he did not think human nature credited that type of behavior, “no matter how good or worthy [the informant’s] intentions.” 65 Cong. Rec. 2957 (1924).

<sup>37</sup> See Yin, *supra* note 20, at 821–22, 844–45.

<sup>38</sup> See H.R. 6715, 68th Cong. § 257(e) (1924) (as reported by the Committee on Finance). The committee report provided no reason for the change. See S. Rep. No. 68-398, at 30 (1924). The prior law had required lists of the name and address of each taxpayer, but without the amount of tax paid. Revenue Act of 1921, ch. 136, § 257, 42 Stat. 227, 270.

<sup>39</sup> See 65 Cong. Rec. 7692 (1924) (approving the Norris amendment 48-27).

tax paid) was approved and signed into law.<sup>40</sup> Just two years later, Congress repealed this provision, following continued strong opposition from President Coolidge and Secretary Mellon and concerns about taxpayer privacy and misuse of the information by the unscrupulous after newspapers began extensive publication of the information.<sup>41</sup>

The second exception occurred in 1934, when Congress approved a law requiring taxpayers to attach to their tax returns a pink slip showing the taxpayer's name, address, and amount of gross income, deductions, net income, credits, and tax liability, all of which would become part of the public record.<sup>42</sup> This provision was enacted following an income tax evasion scandal that had been exposed by a Senate investigation.<sup>43</sup> During Senate debate of another full-publicity amendment, proponents again contended that it would help curb tax evasion and avoidance.<sup>44</sup> Importantly, for purposes of this Article, Senator Robert La Follette, Jr. (R-Wis.), also argued that publicity would permit better monitoring of the tax agency:

Today it is an offense for any official of the Internal Revenue Bureau or any employee thereof to disclose any facts concerning any return which has passed under his eye. If this [full publicity] amendment

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<sup>40</sup> See H.R. 6715, 68th Cong. § 257(b) (1924) (as agreed to in conference); Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293. According to Amity Shlaes, the publicity of tax information authorized by the 1924 Act “represented the progressives’ revenge against Mellon and Coolidge.” See Amity Shlaes, *Coolidge 288* (2013).

<sup>41</sup> See Revenue Act of 1926, ch. 27, § 257(e), 44 Stat. 9, 52; 67 Cong. Rec. 2874 (1926) (statement of Sen. Smoot (R-Utah)); *id.* at 2882 (statement of Sen. Harrison (D-Miss.)); *id.* at 3295 (statement of Sen. Couzens); *id.* at 3346 (statement of Sen. Couzens); *id.* at 3488 (statement of Sen. Copeland (D-N.Y.)); Joshua D. Blank, In Defense of Individual Tax Privacy, 61 *Emory L.J.* 265, 276–77 (2011); Mark H. Leff, *The Limits of Symbolic Reform: The New Deal and Taxation, 1933–1939*, at 67 (1984); Pomp, *supra* note 19, at 392–98. In *United States v. Dickey*, 268 U.S. 378, 388 (1925), the Court held that because of the change made in the 1924 Act, publication of the information in newspapers was permissible notwithstanding the general prohibition against disclosing tax return information. See also *United States v. Balt. Post*, 268 U.S. 388, 389 (1925) (affirming a lower court decision based on the *Dickey* holding).

<sup>42</sup> See Revenue Act of 1934, ch. 277, § 55(b), 48 Stat. 680, 698.

<sup>43</sup> See Marjorie E. Kornhauser, *Shaping Public Opinion and the Law: How a “Common Man” Campaign Ended a Rich Man’s Law*, 73 *Law & Contemp. Probs.* 123, 129–30 & n.34 (2010); Leff, *supra* note 41, at 67–70; Pomp, *supra* note 19, at 398–404.

<sup>44</sup> See 78 Cong. Rec. 6544 (1934) (statement of Sen. La Follette, Jr. (R-Wis.)). The Senate approved the full publicity amendment by a 41–34 vote, but the conference committee limited the publicly available information to that required by the pink slip provision. See *id.* at 6554; H.R. Rep. No. 73-1385, at 4 (1934) (Conf. Rep.); George Grayson Tyler & John P. Ohl, *The Revenue Act of 1934*, 83 *U. Pa. L. Rev.* 607, 645–46 (1935).

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shall be adopted, it will be possible for employees in the Bureau who are aware of situations which ought to reach the attention of Senators and Representatives in Congress, and others who are interested in this problem, to bring such situations to their notice. It will do a great deal, in my opinion, to improve the morale and to increase the zeal and vigilance of those who are charged with auditing and passing upon the returns.<sup>45</sup>

Following an extremely well-orchestrated protest, Congress repealed the pink slip provision in early 1935 before it ever had any effect.<sup>46</sup> Thereafter, no significant changes were made to tax return confidentiality law until 1976.

*B. Changes to Tax Return Confidentiality Laws Made by the Tax Reform Act of 1976*

Although the public was denied access to tax return information prior to 1976, the government (beyond the IRS) was not. The 1910 law, continued in 1913 and subsequent acts, gave the President authority to determine access to the “public records,” and, as the Treasury Department later explained, “it would have been unrealistic to assume that the President could . . . resist agency arguments for more information on which to base important decisions.”<sup>47</sup> As a result, the period between 1921 and 1976 was marked by sustained growth in the access to returns by federal and state agencies.<sup>48</sup> One senator described tax return information during this period as a “generalized governmental asset,” with the IRS essen-

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<sup>45</sup> 78 Cong. Rec. 6546 (1934); see also Kornhauser, *supra* note 43, at 129–30 (summarizing the arguments used by Senator La Follette and other publicity proponents); Pomp, *supra* note 19, at 400 (same). In explaining his concern, La Follette alluded to a 1920s investigation of the Bureau of Internal Revenue (“BIR”) (predecessor to the IRS), conducted by a Senate Select Committee led by Senator Couzens, which had purportedly revealed many instances of “gross favoritism” and “special privileges” granted by BIR employees to selected taxpayers. 78 Cong. Rec. 6546 (1934). Although this view was frequently repeated, the investigation actually established very little BIR corruption. See Yin, *supra* note 20, at 823 n.181, 838, 868 n.423.

<sup>46</sup> See Act of Apr. 19, 1935, ch. 74, 49 Stat. 158; Kornhauser, *supra* note 43, at 130–45; Leff, *supra* note 41, at 70–73; Pomp, *supra* note 19, at 400–04.

<sup>47</sup> 1 Office of Tax Policy, *supra* note 19, at 20.

<sup>48</sup> See Report on IRS Procedures, *supra* note 27, at 845–53; 1 Office of Tax Policy, *supra* note 19, at 20.

tially serving as a “lending library” to the rest of the government of the materials submitted to the agency.<sup>49</sup>

This practice was curtailed in 1976 following revelations of abuses occurring during the Nixon administration. Two executive orders allowing the Department of Agriculture to inspect (for “statistical purposes”) the tax returns of all farmers sparked public and congressional outrage.<sup>50</sup> Moreover, the Watergate investigations revealed the extent to which President Nixon and his White House staff had attempted to use the tax agency and its tax return information for political purposes.<sup>51</sup> The 1976 Act removed the “public record” designation of tax returns and substituted instead a general rule of confidentiality under Section 6103. The law generally limited access to tax return information to tax administrators and others specifically identified by Congress and barred them from disclosing the information to anyone else.<sup>52</sup> Even the President’s access was restricted. Beginning with the 1976 Act, in order to obtain tax return information, the President must personally sign a written request describing the information needed and report his action to the Joint Committee on Taxation (“JCT”), which has authority to reveal the disclosure to Congress if it determines it would be in the national interest (such as if the information were obtained for “improper political purposes”).<sup>53</sup> As

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<sup>49</sup> See 122 Cong. Rec. 24,013 (1976) (statement of Sen. Weicker (R-Conn.)); *Stokwitz v. United States*, 831 F.2d 893, 894–95 (9th Cir. 1987).

<sup>50</sup> See Exec. Order No. 11,697, 3 C.F.R. 158 (1973); Exec. Order No. 11,709, 3 C.F.R. 168 (1973); *Inspection of Farmers’ Federal Income Tax Returns* by the U.S. Department of Agriculture: Hearings Before the Subcomm. on Dep’t Operations of the H. Comm. on Agric., 93d Cong. 1 (statement of Rep. de la Garza (D-Tex.), Chairman, Subcomm. on Dep’t Operations) (1973); *Executive Orders 11697 and 11709 Permitting Inspection by the Department of Agriculture of Farmers’ Income Tax Returns*: Hearings Before the Subcomm. on Foreign Operations & Gov’t Info. of the H. Comm. on Gov’t Operations, 93d Cong. 1–2 (statement of Rep. Moorhead (D-Pa.), Chairman, Subcomm. on Foreign Operations & Gov’t Info.) (1973). As a result of the objections, both orders were revoked the following year. See Exec. Order No. 11,773, 3 C.F.R. 857 (1974).

<sup>51</sup> See S. Rep. No. 93-981, at 130–43 (1974); S. Rep. No. 94-938, at 317 (1976); Staff of Joint Comm. on Taxation, 94th Cong., JCS-38-75, *Confidentiality of Tax Returns 6–7* (Joint Comm. Print 1975) [hereinafter JCT, *Confidentiality of Tax Returns*]; John A. Andrew III, *Power to Destroy: The Political Uses of the IRS from Kennedy to Nixon* 179–313 (2002).

<sup>52</sup> See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202(a)(1), 90 Stat. 1520, 1667–88 (amending § 6103 of 1954 Code).

<sup>53</sup> S. Rep. No. 94-938, at 323; see also Tax Reform Act of 1976 § 1202(a)(1), 90 Stat. at 1672–74 (adding § 6103(g)(1) and (5) to the 1954 Code). During the Nixon administration, the IRS’s chief counsel questioned whether the Constitution permitted the President to be barred from obtaining tax return information. See S. Rep. No. 94-938, at 321; JCT, *Confidentiality of Tax Returns*, supra note 51, at 8; Andrew, supra note 51, at 184–85. For a de-



a result, it apparently has become standard practice for Presidents to steer clear of obtaining any tax return information.<sup>54</sup> The basic structure of the law provided by the 1976 Act has continued to this day. Under current law, the confidentiality provided by Section 6103 applies not just to tax returns but to “return information,” defined broadly to include virtually all information obtained by the IRS regarding the taxpayer’s tax liability and the agency’s use of that information.<sup>55</sup>

Given the problem confronting Congress in 1976, its response might seem to have been perfectly reasonable. Since the principal reason for collecting tax return information is for tax administration, and the misuse occurring during the Nixon administration was mainly by those outside of tax administration, it appeared sensible to limit access to tax administrators.<sup>56</sup> But the effect of the changes was to increase the information imbalance and to make the access of tax administrators more exclusive. This claim is not to suggest that their access was (or is) in any way “exclusive”; indeed, the IRS reported that over nineteen *billion* tax records were disclosed outside the tax agency during 2013.<sup>57</sup> But

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scription of the history and legal authority of White House access to tax return information prior to and immediately following the Tax Reform Act of 1976, see Report on IRS Procedures, *supra* note 27, at 968–80; James N. Benedict & Leslie A. Lupert, Federal Income Tax Returns—The Tension Between Government Access and Confidentiality, 64 *Cornell L. Rev.* 940, 964–69 (1979).

<sup>54</sup> The most recent IRS report of disclosures of tax return information indicates that there were no disclosures in 2013 to the “President and Head of Agencies” pursuant to § 6103(g) (the provision authorizing disclosure to the President and certain top executive branch officials). See Staff of Joint Comm. on Taxation, 113th Cong., JCX-52-14, Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 2013, at 3 (Joint Comm. Print 2014) [hereinafter JCT, 2014 Disclosure Report].

<sup>55</sup> See I.R.C. § 6103(a), (b)(2) (West 2014); *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1135 (D.C. Cir. 2001); *Belisle v. Comm’r*, 462 F. Supp. 460, 462 (W.D. Okla. 1978) (holding that the results of an IRS investigation constituted protected return information); 1 JCT, Study of Present-Law Taxpayer Confidentiality, *supra* note 9, at 16, 22–23. A recent survey of the practices in thirty-seven countries found that although there is some significant variation, the tax authorities of most countries “are in principle required to keep [tax] information confidential.” Eleonor Kristoffersson & Pasquale Pistone, General Report, *in* Tax Secrecy and Transparency: The Relevance of Confidentiality in Tax Law pt. 1, at 1, 3 (Eleonor Kristoffersson et al. eds., 2013).

<sup>56</sup> See 1 Office of Tax Policy, *supra* note 19, at 33, 42; Stephen W. Mazza, Taxpayer Privacy and Tax Compliance, 51 *Kan. L. Rev.* 1065, 1094 (2003).

<sup>57</sup> See JCT, 2014 Disclosure Report, *supra* note 54, at 3; see also Staff of Joint Comm. on Taxation, 113th Cong., JCX-8-13, Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 2012, at 3 (Joint Comm. Print 2013) (reporting over eight billion disclosures in 2012). Moreover, the reports do not include every instance of disclosure. See George Guttman, The Confidentiality Statute Needs Re-

some of those with the greatest incentive to monitor the possible improper use of the information—including the President and other top officials in the executive branch, the media, other watchdog groups, taxpayers, and the general public—had their access restricted or denied completely by the 1976 Act and prior changes.<sup>58</sup> And, as explained by Senator La Follette, persons within the agency are also limited in their ability to report possible misuse by others.<sup>59</sup>

Importantly, Congress in 1976 did not follow the alternate strategy of increasing, rather than decreasing, publicity of tax information. As La Follette argued in 1934, such a change might also have helped to prevent misuse of the information by increasing the likelihood that those with competing interests might provide the necessary checks.<sup>60</sup> During the Watergate period, in one of his final public addresses, former Chief Justice Earl Warren offered a similar piece of advice. Echoing John Dean's famous words at the Watergate hearings, Warren stated that "[p]olicies of secrecy . . . are cancerous to the body politic," and "[t]here is but one protection against governmental deception, and that is the accessibility to inspection by the citizenry of public records on every level of government."<sup>61</sup> But rather than shining more light on tax return information, Congress chose in 1976 to confine it to a seemingly safer, though necessarily darker, corner. Viewed in that way, the changes simply relocated where misuse might occur, and possibly increased the risk of it. The changes also left the IRS more vulnerable to suspicions of misuse.

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thinking, 86 Tax Notes 318, 318 (2000). The vast majority of the reported disclosures during 2013 were to congressional committees (including the JCT and Government Accountability Office ("GAO")), state tax administrators, and agencies using the information for statistical purposes, such as the Bureau of the Census and the Bureau of Economic Analysis. There were also a number of disclosures made to child support enforcement agencies and for purposes of the Medicare premium subsidy adjustment and the Affordable Care Act. See JCT, 2014 Disclosure Report, *supra* note 54, at 3.

<sup>58</sup> Certain congressional committees and the JCT chief of staff have access to the information, see I.R.C. §§ 6103(f), 8023(a), as well as persons in the Treasury Department if their "official duties require such [access] for tax administration purposes." *Id.* § 6103(h)(1). IRS and TIGTA personnel have access under the latter provision. In addition, in limited circumstances, IRS Oversight Board members also have access to the information. *Id.* § 6103(h)(6).

<sup>59</sup> In 1998, Congress added a whistleblower provision to permit the reporting of possible misconduct to certain congressional committees. *Id.* § 6103(f)(5).

<sup>60</sup> See *supra* note 45 and accompanying text; cf. Tobin, Campaign Disclosure, *supra* note 6, at 443 n.90 (explaining that public access to information would prevent its misuse).

<sup>61</sup> Earl Warren, Governmental Secrecy: Corruption's Ally, 60 A.B.A. J. 550, 550 (1974).

*C. Current Confidentiality Law Prevents the Public's Right to Know*

Unfortunately, current law prevents the public from discovering whether its suspicions are justified. Section 6103's prohibition on disclosure interferes with the IRS's ability to respond to inquiries about its decisions.<sup>62</sup> The agency's reticence may be legitimate—violation of Section 6103's proscriptions can result in severe penalties<sup>63</sup>—but it also may be opportunistic. As one critic has observed, “[A] major beneficiary of the current confidentiality rules is the IRS itself because it can use the secrecy rules to limit outside scrutiny.”<sup>64</sup> The law encourages the IRS to be nonresponsive since improper disclosure is punished but improper nondisclosure generally is not. Even when the lack of communication is required by law, it increases the perception that the agency has something to hide.<sup>65</sup>

Current law also makes the agency susceptible to unfounded charges. For example, during the Senate Finance Committee's IRS oversight hearings in 1997 and 1998, various taxpayers launched charges against the agency. Because the committee did not obtain waivers from the witnesses to permit open discussion of their tax return information, the IRS was basically prevented from offering full rebuttal.<sup>66</sup> Subsequent exami-

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<sup>62</sup> See I.R.C. § 6103(a) (prohibiting any “officer or employee of the United States,” including a former officer or employee, and others granted access to tax return information from disclosing such information). Courts have concluded that § 6103 either preempts FOIA or qualifies for FOIA exemption (3), see 5 U.S.C. § 552(b)(3) (2012) (excepting from FOIA any information specifically exempted from disclosure by certain other statutes). See 1 JCT, Study of Present-Law Taxpayer Confidentiality, *supra* note 9, at 93–96 (citing *Zale Corp. v. IRS*, 481 F. Supp. 486, 487–89 (D.D.C. 1979) for the preemption proposition and *Aronson v. IRS*, 973 F.2d 962, 964–65 (1st Cir. 1992) for the FOIA exemption (3) proposition).

<sup>63</sup> See I.R.C. § 7213(a)(1) (felony for willful violations); *id.* § 7431(a) (civil damages); 18 U.S.C. § 1905 (2012) (unauthorized disclosure punishable by fine, imprisonment of not more than one year, and loss of employment).

<sup>64</sup> Guttman, *supra* note 57, at 318; see also Shelley L. Davis, *Unbridled Power: Inside the Secret Culture of the IRS* 81 (1997) (“The irony is that by taking steps designed to ‘protect’ tax returns from the wandering eyes of politicians, an unwitting Congress handed the IRS both a weapon and a shield that the tax collector has since used to fend off public scrutiny and evade public accountability.”); *id.* at 165–66, 171–72.

<sup>65</sup> See George Guttman, *Public Relations: The IRS Could Do a Lot More to Help Its Image*, 87 *Tax Notes* 479, 481–82 (2000) (illustrating how § 6103 can work to the agency's disadvantage).

<sup>66</sup> See Donald C. Alexander, *Some Musings About the IRS*, 83 *Tax Notes* 297, 299 (1999) (characterizing hearings as “theatrical,” with IRS being unable to rebut claims); Amy Hamilton, *Time Travel Meets the IRS at the Crossroads*, 81 *Tax Notes* 15, 17–18 (1998) (describing complaints of past and present top IRS officials about the unfairness of the Finance Committee hearings because § 6103 waivers had not been obtained). With JCT approval, the

nation found many of the charges to be baseless, but the harm to the agency and tax system had already been done.<sup>67</sup>

Finally, as illustrated by the TIGTA audit report issued in 2013 as well as a 2000 JCT staff report investigating allegations of politically motivated conduct by the IRS during the Clinton administration in administering the EO tax laws, Section 6103 also prevents investigators from clearly revealing the results of their investigations to the public.<sup>68</sup> In its 2013 report, TIGTA responded to inquiries about whether certain organizations had been unfairly targeted in the EO application process, resulting in both delays and unnecessary information demands.<sup>69</sup> The TIGTA report's central finding was that the IRS had used "inappropriate criteria" in selecting EO applications for greater scrutiny because the agency had at some point based its decision in part on the name of the applicant.<sup>70</sup> TIGTA's headline piece of evidence was that one-third of the applications selected for the higher scrutiny included the words "Tea Party," "Patriots," or "9/12" in their names.<sup>71</sup>

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IRS has a limited ability to disclose return information in order to correct a misstatement of fact. See I.R.C. § 6103(k)(3).

<sup>67</sup> See Office of Special Investigations, U.S. Gen. Accounting Office, GAO/OSI-99-9R, Tax Administration: Investigation of Allegations of Taxpayer Abuse and Employee Misconduct Raised at Senate Finance Committee's IRS Oversight Hearings ¶¶ 2-3 (1999), *reprinted in* GAO Report on Allegations of Taxpayer Abuse, Tax Notes Today, Apr. 25, 2000, available at LEXIS, 2000 TNT 80-13 [hereinafter GAO Special Report]; Ryan J. Donmoyer, Secret GAO Report Is Latest to Discredit Roth's IRS Hearings, 87 Tax Notes 463, 463 (2000); John D. McKinnon, Some IRS Abuse Charges Are Discredited, Wall St. J., Apr. 25, 2000, at A2.

<sup>68</sup> See I.R.C. § 6103(a). In limited circumstances, both the JCT and TIGTA may disclose tax return information. The JCT and its Chief of Staff may submit such information to one of the tax-writing committees, but if the information can be associated with a particular taxpayer, the submission must be made in closed executive session. See I.R.C. § 6103(f)(2) (second sentence), (4)(A) (last sentence). TIGTA may disclose return information in connection with certain activities but only "to the extent [the] . . . disclosure is necessary in *obtaining* information, which is not otherwise reasonably available, with respect to the correct determination of tax . . . or with respect to the enforcement of any other provision of [title 26 of the U.S. Code]." *Id.* § 6103(k)(6) (emphasis added). Disclosures under the latter provision "may not be made indiscriminately or solely for the benefit of the recipient." Treas. Reg. § 301.6103(k)(6)-1(c)(1) (2013). Neither provision authorizes a general disclosure to the public. For possible public disclosures by the congressional tax-writing committees, see *supra* note 12.

<sup>69</sup> See TIGTA 2013 Report, *supra* note 2, at 3 (describing congressional concerns instigating the audit and report).

<sup>70</sup> *Id.* at 5.

<sup>71</sup> *Id.* at 8.

Although a selection process based on the name of an applicant would seem to be an ill-conceived method of administering the law, such evidence does not really respond to the underlying policy concern, which is whether the IRS engaged in selective enforcement of the tax laws for reasons extraneous to sound tax administration.<sup>72</sup> On that critical question, the report is essentially silent.<sup>73</sup> The report does not reveal, for example, the characteristics of the applicant population in order to evaluate whether the one-third figure should be considered problematic.<sup>74</sup> The report also disavows knowledge of whether the policy positions of an organization, as opposed to its name, were taken into account in the selection process.<sup>75</sup> The report states that in certain samples, all of the cases with “Tea Party,” “Patriots,” or “9/12” in their names were subjected to the higher scrutiny.<sup>76</sup> The importance of this finding, however, is ambiguous; since the judgment of the tax agency (apparently for tax administration reasons) was to give greater scrutiny to potential “political cases,” all such applications may have deserved to be selected.<sup>77</sup> In summary, the report provides little guidance on whether the IRS acted appropriately or inappropriately in the EO application process.

If anything, the report issued by the JCT staff in 2000 is even less transparent than the TIGTA report. In general, the staff rejected all of the allegations of politically motivated decisions by the IRS in carrying out its EO responsibilities. Indeed, the staff asserted no fewer than 16 times that it had found “no credible evidence” to support specific charg-

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<sup>72</sup> Id. at 3.

<sup>73</sup> The report merely states that the inappropriate selection criteria “may have led to inconsistent treatment of organizations applying for tax-exempt status.” Id. at 5.

<sup>74</sup> Cf. Martin A. Sullivan, 80 Percent of Tea Party Groups Would Have Been Selected Anyway, 139 Tax Notes 1234, 1235 tbls.1 & 2 (2013) (claiming that the IRS’s selection process fairly accurately achieved the agency’s goal of identifying cases potentially involving significant political campaign intervention).

<sup>75</sup> See TIGTA 2013 Report, supra note 2, at 8 n.18. This qualification seems somewhat inconsistent with an earlier statement in the report that the IRS “developed and began using criteria to identify potential political cases for review that inappropriately identified specific groups applying for tax-exempt status based on their names *or policy positions* instead of developing criteria based on tax-exempt law and Treasury Regulations.” Id. at 5 (emphasis added).

<sup>76</sup> Id. at 8.

<sup>77</sup> See Sullivan, supra note 74, at 1235–36. TIGTA examined a sample of the applications given greater scrutiny and questioned the IRS’s judgment in thirty-one percent of the cases. Less than one-fifth of the questioned cases, however, involved Tea Party, Patriots, or 9/12 organizations. Further, TIGTA apparently did not always have the same information used by the IRS to make its judgment. See TIGTA 2013 Report, supra note 2, at 10 & nn.28–29.

es against the agency.<sup>78</sup> Unfortunately, the staff offered precious little evidence in its 162-page report to back any of its conclusions. According to the staff, Section 6103 prevented it from providing any findings other than general conclusions.<sup>79</sup>

The staff identified approximately 130 organizations and individuals to be within the scope of its investigation based on media reports and other sources. Nine cases involved EO applications, and the rest concerned IRS examinations of EOs.<sup>80</sup> The staff provided evidence of the general approval rate of EO applications (70–75%) and EO audit rate (less than 1%).<sup>81</sup> At no point, however, did the staff reveal what happened to the 130 cases it closely examined, such as the number approved or audited, the nature of the approval or audit process, or its comparison to that of the total EO population or some relevant subgroup.<sup>82</sup> The staff repeatedly concluded that various IRS actions had not been politically motivated or based on the policy views of the EOs.<sup>83</sup> Yet the staff never described how it determined the political or policy views of the EOs, or the analysis it made to assure itself of the IRS's even-handed treatment, such as comparing the tax administration experiences of groups with different views. At one point, the staff noted that inadequate recordkeeping

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<sup>78</sup> See Staff of Joint Comm. on Taxation, 106th Cong., JCS-3-00, Report of Investigation of Allegations Relating to Internal Revenue Service Handling of Tax-Exempt Organization Matters 6–11 (Joint Comm. Print 2000) [hereinafter JCT, Handling of Tax-Exempt Organization Matters].

<sup>79</sup> The report states:

Most of the information supplied by the IRS to the Joint Committee staff in the course of its investigation constitutes taxpayer return information that cannot be disclosed pursuant to section 6103 . . . . Thus, the Joint Committee staff findings do not include any specific findings . . . with respect to the organizations and individuals within the scope of the . . . investigation or any information that might identify such organizations or individuals. These findings represent the general conclusions drawn by the Joint Committee staff from its extensive review of IRS case file information [and other sources of information].

Id. at 6 (footnote omitted).

<sup>80</sup> Id. at 5, 14, 17.

<sup>81</sup> Id. at 51, 61.

<sup>82</sup> In a few places, the report alluded to possible problems with IRS procedures but did not elaborate on them. For example, the report stated that “differences in the manner in which certain determination letter applications were handled may have created perceptions of bias or inconsistent treatment by the IRS.” Id. at 16. The report simply advised the IRS “to work aggressively to ensure that these perceptions do not occur.” Id. Similarly, regarding audits, the report stated that the staff “did identify certain procedural and substantive problems with IRS audit processes that may have contributed to a perception of unfairness and may have hampered the IRS’s ability to demonstrate unbiased treatment.” Id. at 19.

<sup>83</sup> Id. at 6–7.

by the IRS had prevented the staff “from conducting any meaningful analysis of organizations selected for examination versus those not selected,”<sup>84</sup> an admission certainly raising doubt about all of the staff’s conclusions regarding the EO examination process. In short, it seems unlikely that many readers, other than those already convinced that the IRS did no wrong, would have found the JCT staff’s 2000 report very informative or persuasive.

Interestingly, the staff did not follow the model of two Nixon-era JCT staff reports specifically referenced by the JCT in directing the staff’s 2000 investigation.<sup>85</sup> In general, the two earlier reports provided more specific information about the IRS’s activities with respect to particular taxpayers (within the constraints of then-existing confidentiality protections), but largely let readers draw their own conclusions about the propriety of the IRS’s behavior.

In 1973, the staff reported on the possible political use of the IRS against the “enemies” of the Nixon administration, a charge revealed by John Dean in his testimony before the Senate Watergate Committee.<sup>86</sup> The staff examined the audit experiences (for multiple years) of over 700 persons whose names had appeared on either of two different enemies lists, and found that their audit rates (22% and 26%) were somewhat higher than the general audit rate for higher-income taxpayers at the time (14%).<sup>87</sup> The staff speculated on possible tax explanations for the higher rate, including the presence on the lists of a number of journalists and writers whose level of business deductions might have triggered the automated formula in use at the time for identifying returns to be audited.<sup>88</sup> The staff noted that over 80% of the audited returns of persons on the enemies lists were selected as a result of an automated program.<sup>89</sup> Of the audited returns selected manually, the staff verified that virtually all of them contained characteristics justifying the selection

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<sup>84</sup> Id. at 19. The report also stated that because of certain IRS database failures, “It is difficult for an independent review of IRS practices to obtain an accurate summary of IRS examination activity.” Id. at 20.

<sup>85</sup> Id. at 106.

<sup>86</sup> See S. Rep. No. 93-981, at 7–9, 130–33 (1974); John W. Dean III, *Blind Ambition: The White House Years* 316–17 (1976).

<sup>87</sup> See Staff of Joint Comm. on Internal Revenue Taxation, 93d Cong., JCS-37-73, *Investigation into Certain Charges of the Use of the Internal Revenue Service for Political Purposes* 8–9, 11 (Joint Comm. Print 1973) [hereinafter JCT, *Investigation into Certain Charges*].

<sup>88</sup> Id. at 9.

<sup>89</sup> Id. at 9–10.

(based on pre-existing IRS procedures).<sup>90</sup> The staff did not find any evidence of an audit resulting from White House pressure.<sup>91</sup> Finally, the staff found no evidence that the audits were conducted more harshly than normal or resulted in more vigorous collection procedures or more frequent criminal prosecution recommendations.<sup>92</sup> In short, despite ample evidence of White House efforts to use the IRS as a political tool against the administration's perceived enemies, it does not appear that the IRS was complicit in carrying out that objective.<sup>93</sup>

As reported by the JCT staff in 1975, the IRS's actions were seemingly less commendable in connection with a separate Nixon administration initiative to use the tax agency against certain "extremist" organizations (many of which were EOs) and individuals (ultimately totaling over 11,000 cases).<sup>94</sup> This effort resulted in 225 cases being referred to the field for tax collection or audit.<sup>95</sup> Although the staff found that a field referral generally was not made unless there was some indication of a tax law violation, it noted that in some cases, the "tax deficiency potential appeared to be marginal."<sup>96</sup> Moreover, additional information provided by the staff about these referrals suggested the possibility of biased enforcement by the IRS. For example, of the 136 individuals selected for field referral, 120 (or 88%) appear to have been associated with left-leaning organizations, with only 16 connected with right-leaning groups

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<sup>90</sup> Id. at 7, 10–11.

<sup>91</sup> Id. at 10–11.

<sup>92</sup> Id. at 11–12.

<sup>93</sup> IRS critics sometimes fail to distinguish between what those outside the tax agency may have tried to do and what the agency actually did (despite the outside pressure). See Mortimer M. Caplin, *The Presidency and the Internal Revenue Service*, 24 *Tax Notes* 480, 480 (1984) (explaining difference between White House staff and the IRS). Some observers subsequently questioned the quality of the JCT's 1973 probe. See S. Rep. No. 93-981, at 133–34 (1974); Samuel Hastings-Black, *The Politization [sic] of the IRS*, 2 *Tax Notes* 11, 12–13, 18–19 (1974).

<sup>94</sup> See Staff of Joint Comm. on Internal Revenue Taxation, 94th Cong., JCS-9-75, *Investigation of the Special Service Staff of the Internal Revenue Service 11* (Joint Comm. Print 1975) [hereinafter JCT, *Investigation of the Special Service Staff*]. The IRS unit handling these cases was eventually called the "Special Service Staff" ("SSS"). Although they had similar purposes, the activities of the SSS and the Nixon administration's efforts against its "enemies" were separate initiatives. See id. at 5–7 (describing the formation and development of the SSS); JCT, *Investigation into Certain Charges*, supra note 87, at 1 (describing John Dean's information on two initiatives).

<sup>95</sup> JCT, *Investigation of the Special Service Staff*, supra note 94, at 9.

<sup>96</sup> Id. at 10.



(or organizations of unknown political affiliation).<sup>97</sup> Similarly, of the 89 organizations referred to the field, 66 (or 74%) appear likely to have been left-leaning groups, with the remainder uncertain.<sup>98</sup> Of the 225 referrals, only 38 taxpayers suffered any adverse tax consequence.<sup>99</sup> But the mere collection of information and referral of a case to the field could have been a form of harassment even—or especially—if there were no resulting adverse tax consequence.<sup>100</sup> The staff found that although the referrals employed some unusual steps not generally followed by the IRS, they were not handled by the field more harshly than routine cases.<sup>101</sup>

Although more transparent than the later reports, the two issued in the 1970s still left unanswered questions. For example, the apparently disproportionate number of field referrals of left-leaning groups did not foreclose the possibility that the IRS had employed an unbiased selection process (based solely on tax law factors). Again, what was missing was some description of the details of the referred cases as well as the make-up of the general population. It is evident that absent further relaxation of Section 6103 constraints, even a detailed investigation may not be able to reveal sufficient information to the public to evaluate possible misconduct by the IRS.<sup>102</sup>

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<sup>97</sup> The individuals referred to the field were associated with organizations classified by the staff as “Black militant” (63), “anti-war” (24), “left-wing” (10), “right-wing” (7), “civil rights” (10), “student activist” (13), and other or unknown (9). *Id.* at 85.

<sup>98</sup> The organizations referred to the field were classified by the staff as “left-wing” (23), “anti-war” (19), “underground” newspapers (15), “Black militant” (6), “welfare and anti-poverty” (3), “religious” (3), and “civic, educational, social,” or other (20). *Id.* The SSS was also referred 153 cases from the IRS’s EO branch, at least 123 of which (80%) appear to have been left-leaning organizations. As described by the staff, these organizations were “activist students” (11), “anti-war” (20), “Black militant” (48), “civil rights” (27), “left-wing” (4), “right wing” (16), both “Black militant” and “civil rights” (13), and other (14). *Id.* at 98–99.

<sup>99</sup> Thirty-seven cases resulted in tax deficiencies, and one organization’s exemption was revoked. *Id.* at 86.

<sup>100</sup> See S. Rep. No. 94-755, bk. III, at 887–88 (1976) (providing a case study illustrating how “dissident groups which attracted the attention of SSS were subject to being audited merely because of that attention, notwithstanding the lack of tax-related criteria upon which an audit is normally based”).

<sup>101</sup> See JCT, Investigation of the Special Service Staff, *supra* note 94, at 12. A subsequent Senate investigation reported some contrary findings. See S. Rep. No. 94-755, bk. III, at 889–90.

<sup>102</sup> Another example of how § 6103 stifles meaningful disclosure is to compare the quality of information provided by two contemporaneous GAO reports investigating allegations of IRS employee misconduct during the late 1990s. The report given privately to Congress be-

In summary, the restrictions placed on access to tax return information conflict with the public's right to know and subvert public confidence in the tax agency and system. This conflict produces a dilemma, since both the Treasury Department and Congress have indicated that the same restrictions *promote* confidence in the tax system by protecting the taxpayer's reasonable expectation of privacy.<sup>103</sup> Thus, it would seem that *either* publicity *or* confidentiality of tax return information might undermine respect for the tax system. As explained in the next Part, one way out of this conundrum is to focus on the tax return information of EOs.

## II. PUBLICITY OF EO TAX RETURN INFORMATION

This Part describes how and why Congress has long required publicity of a substantial amount of EO tax return information, despite the general policy of confidentiality. This exception for EO information is very fortunate since it is specifically in the EO area that the IRS's handling of tax matters has been repeatedly questioned. Notable disputes during the last fifty years include:

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cause of its inclusion of tax return information—but subsequently obtained by the press (with minor redactions of certain identifying information)—was far more revealing than the report issued for public consumption. Compare Gen. Gov't Div., U.S. Gen. Accounting Office, GAO/GGD-99-82, Tax Administration: Allegations of IRS Employee Misconduct (1999) (containing public report), with GAO Special Report, *supra* note 67 (containing private report).

A further weakness of relying on investigations to satisfy the public's right to know is the delay in determining whether particular allegations have merit. According to a timeline included in TIGTA's 2013 report, the first IRS actions potentially triggering taxpayer complaints arose roughly three years prior to the report's publication. See TIGTA 2013 Report, *supra* note 2, at 31. The 2000 JCT staff report had an even greater time lag. The staff was asked in early 1997 to investigate allegations of misconduct occurring in 1995 and 1996 and to report to the JCT within six months, but the staff work was not completed until March 2000. See JCT, Handling of Tax-Exempt Organization Matters, *supra* note 78, at 2 n.7, 12–13, 101–04, 106. In each case, the charges and rumors about the IRS were allowed to fester for some time, thereby potentially causing damage to the agency's (and tax system's) reputation without regard to the truth of the allegations.

<sup>103</sup> See S. Rep. No. 94-938, at 317 (1976); 1 Office of Tax Policy, *supra* note 19, at 21, 33–34; cf. Privacy Prot. Study Comm'n, Personal Privacy in an Information Society 540 (1977) (claiming that “widespread use of the information a taxpayer provides to the IRS for purposes wholly unrelated to tax administration cannot help but diminish the taxpayer's disposition to cooperate with the IRS voluntarily . . . [and] creates a potentially serious threat to the effectiveness of the Federal tax system”).

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- the “ideological organizations” project during the Kennedy administration;<sup>104</sup>
- the activities of the “Special Service Staff” of the Nixon administration;<sup>105</sup>
- the *Center on Corporate Responsibilities* litigation, in which the U.S. District Court for the District of Columbia concluded that the IRS had improperly denied the tax-exempt status of an organization for political reasons;<sup>106</sup>
- the Church of Scientology dispute, in which the IRS’s closing agreement with the Church was characterized by the Ninth Circuit in dicta as an “unconstitutional denominational preference”;<sup>107</sup>

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<sup>104</sup> See JCT, Investigation of the Special Service Staff, *supra* note 94, at 101–10 (describing investigation of allegations); S. Rep. No. 94-755, bk. III, at 843, 890–97 (describing origins and activities); Andrew, *supra* note 51, at 25–74 (same); David Burnham, Letter to the Editor, Kennedy Used IRS for Political Purposes, *Author Says*, 74 *Tax Notes* 652, 652 (1997) (claiming Kennedy administration used IRS for political purposes); IRS Releases ‘Oral History Interview’ of Former Commissioner Caplin, *Tax Notes Today*, June 22, 1994, available at LEXIS, 94 TNT 120-25, at \*8–9 (former IRS Commissioner Caplin explaining Kennedy administration’s interest in investigating “right-wing organizations” and the IRS’s response); Milton Cerny, Letter to the Editor, IRS Was Not Used for Political Purposes, 74 *Tax Notes* 805, 805 (1997) (disputing Burnham’s account).

<sup>105</sup> See *supra* text accompanying notes 94–101; JCT, Investigation of the Special Service Staff, *supra* note 94, at 1–14 (describing investigation of allegations); Staff of the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 93d Cong., *Political Intelligence in the Internal Revenue Service: The Selective Service Staff—A Documentary Analysis* 1–3, 9–51 (Comm. Print 1974) (describing SSS history and activities); S. Rep. No. 94-755, bk. III, at 842, 876–90 (same); Andrew, *supra* note 51, at 250–96 (same); Davis, *supra* note 64, at 82–96 (same).

<sup>106</sup> *Ctr. on Corporate Responsibility, Inc. v. Shultz*, 368 F. Supp. 863, 871 n.17, 873, 878 (D.D.C. 1973).

<sup>107</sup> *Sklar v. Comm’r*, 549 F.3d 1252, 1265 (9th Cir. 2008); *Sklar v. Comm’r*, 282 F.3d 610, 618–19 (9th Cir. 2002); see also Paul Streckfus, *Scientology Case Redux—The Appeal*, 35 *Exempt Org. Tax Rev.* 381, 381–82 (2002) (agreeing with Ninth Circuit characterization but criticizing holding). For background on the extensive problems faced by the IRS in its dispute with the Church of Scientology, see Lawrence Wright, *Going Clear: Scientology, Hollywood, and the Prison of Belief* 279–91 (2013); Elizabeth MacDonald, *Scientologists and IRS Settled for \$12.5 Million*, *Wall St. J.*, Dec. 30, 1997, at A12 (disclosing leaked closing agreement).

- the IRS's treatment of the Progress and Freedom Foundation ("PFF")<sup>108</sup> and the Abraham Lincoln Opportunity Fund ("ALOF"),<sup>109</sup> two EOs with ties to former Speaker Gingrich;
- the IRS's handling of the Christian Coalition's EO application,<sup>110</sup>

<sup>108</sup> After a three and one-half-year audit, the IRS concluded in late 1998 that PFF operated as a § 501(c)(3) organization during its first taxable year ending in March 1994. See I.R.S. Tech. Adv. Mem. (unnumbered) (Dec. 1, 1998), *reprinted in* Tax Notes Today, Feb. 5, 1999, available at LEXIS, 1999 TNT 24-25; cf. Frances R. Hill, Targeting Exemption for Charitable Efficiency: Designing a Nondiversion Constraint, 56 SMU L. Rev. 675, 702 n.111 (2003) (characterizing the IRS's conclusion regarding PFF as "the most inexplicable ruling position [the IRS] has ever taken in this area"); Carolyn D. Wright, Did IRS Do Its Job in Progress & Freedom Foundation Audit?, 28 Exempt Org. Tax Rev. 19, 20-21 (2000) (reporting concerns about political motivation behind audit and doubts about quality of IRS's analysis); Juliet Eilperin, IRS Still Probing Gingrich Ties, Wash. Post, Apr. 26, 1998, at A8 (reporting the claim that the audit was politically motivated); Art Pine & Alan C. Miller, IRS Clears Gingrich but Blurs Fund-Raising Line, L.A. Times, Feb. 27, 1999, at A14 (reporting "debates over whether IRS supervisors really examined the evidence fully or simply took a bow in hopes of heading off a clash with a powerful figure").

<sup>109</sup> The IRS retroactively revoked the tax-exempt status of ALOF, whose lawsuit to overturn the decision was dismissed on procedural grounds. See *Abraham Lincoln Opportunity Found. v. Comm'r*, 80 T.C.M. (CCH) 252, 254 (2000), *aff'd*, 263 F.3d 171 (11th Cir. 2001). The IRS subsequently reversed itself and reinstated ALOF's exemption after the organization's appeal to an independent review process of the IRS (which the agency subsequently abolished later that same year). See J. Christine Harris, Attorney for 'Gingrich Groups' Says News Reports Are Inaccurate, 40 Exempt Org. Tax Rev. 254, 254-55 (2003) (reporting view that reversal was justified on the merits); J. Christine Harris, Talk with IRS Reps Offers More Insight into Review of Gingrich Groups, 41 Exempt Org. Tax Rev. 9 (2003) (providing background and explaining review process); Fred Stokeld, IRS Drops Process that Restored Exemptions to Gingrich Groups, 101 Tax Notes 674, 674 (2003) (reporting abolition of review process); Paul Streckfus, Letter to the Editor, ALOF Reversal Requires IRS Explanation, 40 Exempt Org. Tax Rev. 375 (2003) (questioning reversal); David Johnston, Ruling May Open Finance Loophole, N.Y. Times, June 8, 2003, at N37 (reporting surprise about the reversal and concern about possible political influence).

<sup>110</sup> Even after taking into account a period of justifiable delay, it took the IRS over a decade to process the organization's application. See Elizabeth J. Kingsley, Challenges to 'Facts and Circumstance'—A Standard Whose Time Has Passed?, 20 Tax'n of Exempts 43, 44-45 (2010). A lawsuit filed by the Christian Coalition of Florida ("CC-Fla.") attempting to overturn the IRS's ultimate determination that the organization was not exempt under § 501(c)(4) was dismissed as moot after the IRS refunded the small amount of taxes paid by the organization (the jurisdictional basis for the suit). See *Christian Coal. of Fla. v. United States*, 662 F.3d 1182, 1185-88 (11th Cir. 2011). In 2005, the IRS reached a settlement and recognized the exempt status under § 501(c)(4) of the Christian Coalition International ("CCI"), an affiliated but separate legal entity from CC-Fla. See Gregory L. Colvin, IRS Gives Christian Coalition a Green Light for New Voter Guides, 50 Exempt Org. Tax Rev. 353, 353 (2005); Fred Stokeld, IRS Grants Exempt Status to Christian Coalition International, 109 Tax Notes 576 (2005); see also *Christian Coal. of Fla.*, 662 F.3d at 1186 (explaining the legal relation-

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- multiple allegations of politically motivated decision making in the EO area during the Clinton<sup>111</sup> and G.W. Bush administrations;<sup>112</sup> and
- the current allegations of targeting of conservative political groups in the EO applications process.

The reason the EO area has been so controversial appears to be because the law sometimes implicates core values, key issues are resolved by amorphous tests (supplied by both Congress and the Treasury),<sup>113</sup> and, as a result, the IRS uses a largely non-automated process to select cases for closer examination.<sup>114</sup> Whatever the reason, this important yet peripheral function of the agency seems to have produced harms well out of proportion to the significance of the area for the tax system. Because there is already publicity of a substantial amount of EO tax return

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ship between CCI and CC-Fla.). CCI had previously been awarded attorneys' fees and costs as the prevailing party in prior litigation with the IRS concerning its exempt status in 1990. See *Christian Coal. Int'l v. United States*, 133 F. Supp. 2d 437, 442 (E.D. Va. 2001). For criticism of the IRS's efforts to avoid review on the merits of its positions, see Elizabeth J. Kingsley, *Bright Lines? Safe Harbors?*, 20 *Tax'n of Exempts* 38, 42 (2008); Elizabeth J. Kingsley, *Challenges to 'Facts and Circumstances'—A Standard Whose Time Has Passed?*, *supra*, at 47–48.

<sup>111</sup> See JCT, *Handling of Tax-Exempt Organization Matters*, *supra* note 78, at 4, 6–11, 101–04 (summarizing—but rejecting—allegations of political targeting by Clinton administration and listing numerous news stories concerning questions about IRS's actions); Ryan J. Donmoyer & Fred Stokeld, *IRS May Be Engaging in Politically Motivated Audits . . . or May Not Be*, 74 *Tax Notes* 985, 985–87 (1997).

<sup>112</sup> See Treasury Inspector Gen. for Tax Admin., Reference No. 2005-10-035, *Review of the Exempt Organizations Function Process for Reviewing Alleged Political Campaign Intervention by Tax Exempt Organizations 1–2* (2005) (reporting allegations of politically motivated conduct in EO area during Bush administration, but finding no indication that the IRS's new "fast-track" process inappropriately handled information items reviewed); Frances R. Hill, *Auditing the NAACP: Misadventures in Tax Administration*, 49 *Exempt Org. Tax Rev.* 205, 205, 218–19 (2005) (criticizing the IRS's decision to examine NAACP shortly before 2004 general election and suggesting "improper political influence"); Press Release, All Saints Church, All Saints Church, Pasadena Demands Correction and Apology from the IRS (Sept. 23, 2007), [http://www.charitygovernance.com/charity\\_governance/files/IRS\\_Press\\_Release\\_Sept\\_23\\_2007.pdf](http://www.charitygovernance.com/charity_governance/files/IRS_Press_Release_Sept_23_2007.pdf) (demanding explanation and apology for the IRS's two-year examination of the church); Letter from Marcus S. Owens, Caplin & Drysdale, to J. Russell George, TIGTA (Sept. 21, 2007), *reprinted in* Church Asks for Investigation of IRS Exam, *Tax Notes Today*, Sept. 25, 2007, available at LEXIS, 2007 TNT 186-23 (questioning whether "partisan political concerns" led to the IRS's examination of All Saints Church).

<sup>113</sup> See James J. Fishman & Stephen Schwarz, *Nonprofit Organizations: Cases and Materials* 474–78, 508 (4th ed. 2010); April, *supra* note 6, at 405.

<sup>114</sup> See JCT, *Handling of Tax-Exempt Organization Matters*, *supra* note 78, at 65–66.

information, slight liberalizations of current law might facilitate sufficient government transparency to satisfy the public's right to know in the very area where the controversies have been the greatest. Section II.A provides background on the existing EO publicity requirements, and Section II.B gives the rationale for the current and even greater levels of publicity required by law.

*A. Background of Publicity of EO Return Information*<sup>115</sup>

In 1943, Congress approved the first general requirement for an EO to file an annual information return with the IRS.<sup>116</sup> Congress was concerned that some EOs had become engaged in commercial activities that competed with the businesses of for-profit organizations, and thought that data from the returns would help to determine if any changes to the tax laws (such as repeal of the exemption) were warranted.<sup>117</sup> Congress imposed the requirement only on the subset of EOs that were perceived to be engaging in the competitive activities; in very general terms, it required organizations now classified as private foundations to file returns. Congress exempted from the obligation organizations now considered to be public charities.<sup>118</sup> Once filed, the returns became subject to the same confidentiality rules then applicable to all returns—they were classified as “public records” but open to disclosure only by presidential order.<sup>119</sup>

In 1950, Congress increased the amount of information required to be included in the annual EO returns and required the returns to be publicly available.<sup>120</sup> This legislation grew out of concern about abusive practices by some charitable foundations and trusts, including self-dealing, imprudent investments, and unreasonable accumulations.<sup>121</sup> In response, the House proposed a number of reforms, which the Senate recast “to

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<sup>115</sup> For helpful background, see 2 JCT, Study of Present-Law Taxpayer Confidentiality, *supra* note 9, at 120–26.

<sup>116</sup> See Revenue Act of 1943, ch. 63, § 117(a), 58 Stat. 21, 36–37 (1944) (adding § 54(f) to the 1939 Code).

<sup>117</sup> See H.R. Rep. No. 78-871, at 24–25 (1943); S. Rep. No. 78-627, at 21 (1943).

<sup>118</sup> See Revenue Act of 1943 § 117(a), 58 Stat. at 37 (adding § 54(f) to the 1939 Code) (exempting from the requirement certain religious and educational organizations, charitable organizations supported by government or primarily supported by contributions from the general public, and certain others).

<sup>119</sup> See Internal Revenue Code of 1939, ch. 2, § 55(a)(1), 53 Stat. 1, 29.

<sup>120</sup> See Revenue Act of 1950, ch. 994, § 341(a), 64 Stat. 906, 960 (adding § 153 to the 1939 Code).

<sup>121</sup> See 2 JCT, Study of Present-Law Taxpayer Confidentiality, *supra* note 9, at 121.

remove their harshness.”<sup>122</sup> At the same time, in an unexplained change, the Senate required publicity of the returns.<sup>123</sup> Importantly, the legislation (including the new publicity requirement) was generally limited to the organizations now treated as private foundations. According to the Senate report, “public” charitable organizations would “not . . . likely . . . become involved” in the types of transactions that were thought to be objectionable.<sup>124</sup> The apparent purpose of the new publicity requirement was to permit public oversight of the covered private foundations, which were potentially controlled by just a single donor or family. In contrast, public charities would likely have supporters independent of any single donor who would “have sufficient interest in the charities’ affairs to look into what they were doing.”<sup>125</sup> Thus, public charities possessed “inherent checks” to prevent the abusive practices that worried Congress, whereas the private foundations did not.<sup>126</sup> In summary, following the 1950 change, EOs generally considered to be private foundations today were required to file annual information returns and to make them public; public charities were exempt from both obligations.

In 1958, Congress required publicity of an organization’s application materials submitted to the IRS for recognition of its tax exemption, but only if and when the IRS recognized the exemption.<sup>127</sup> An application was not required of EOs at the time since the statute, and not the IRS, conferred the exempt status. Nevertheless, many organizations, including especially ones that wished to assure their contributors that donations were tax-deductible, applied for the IRS’s “recognition” of the organization’s exemption, and Congress required these application

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<sup>122</sup> S. Rep. No. 81-2375, at 37 (1950); see also Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings*, 27 *Exempt Org. Tax Rev.* 52, 53–54 (2000).

<sup>123</sup> See S. Rep. No. 81-2375, at 125–26.

<sup>124</sup> *Id.* at 38.

<sup>125</sup> Troyer, *supra* note 122, at 63.

<sup>126</sup> See *id.* at 63–64 (describing how the operations of private foundations “commonly were carried on from year to year without the knowledge, interest, or intervention of any outside party”). One author has suggested that disclosure of EO return information is a form of regulation imposed by Congress in lieu of taxation. See Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 *Va. Tax Rev.* 115, 120 (2013).

<sup>127</sup> See Technical Amendments Act of 1958, Pub. L. No. 85-866, § 75(a)(2), 72 Stat. 1606, 1660–61 (adding § 6104(a) to the 1954 Code).

materials to be publicized.<sup>128</sup> Congress generally applied this new requirement to all EOs, not just the private foundations affected by the 1943 and 1950 legislation. Congress added the provision to let the public help the IRS determine “whether organizations are actually operating in the manner in which they have stated in their applications for exemption.”<sup>129</sup>

Congress made two additional changes in 1969. First, Congress generally required organizations claiming to be exempt under Section 501(c)(3) to file an application for recognition of the exemption.<sup>130</sup> Together with the change made in 1958, this requirement meant that application materials for new Section 501(c)(3) organizations, as well as any other EOs filing an application (though not required to do so), became publicly available once the IRS recognized the exemption.<sup>131</sup> Congress added the application requirement to ensure that the IRS had sufficient information as to the “nature, purposes, and activities” of the organizations in question.<sup>132</sup>

Second, Congress generally required all EOs—not just the private foundations already obligated to do so since 1943—to file annual information returns in order to give the IRS more information on a current basis to enforce the laws.<sup>133</sup> Congress believed the added information,

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<sup>128</sup> Cf. H.R. Rep. No. 91-413, pt. 1, at 37 (1969) (explaining that prior to 1969 change requiring § 501(c)(3) organizations to file applications with the IRS, many organizations did so anyway).

<sup>129</sup> H.R. Rep. No. 85-775, at 42 (1957); S. Rep. No. 85-1983, at 95 (1958).

<sup>130</sup> See Tax Reform Act of 1969, Pub. L. No. 91-172, § 101(a), 83 Stat. 487, 492, 494–95 (adding § 508(a) to the 1954 Code requiring an organization to give notice that it is applying for the IRS’s recognition of exempt status). The notice is given through the filing of IRS Form 1023, “Application for Recognition of Exemption.” See Treas. Reg. § 1.508-1(a)(2)(i) (2013). Congress exempted from the notice requirement certain religious organizations, organizations (other than a private foundation) whose gross receipts are normally not more than \$5000 each year, and other organizations exempted by regulation, and these exceptions remain in current law. See Tax Reform Act of 1969 § 101(a), 83 Stat. at 495 (adding § 508(c) to the 1954 Code); I.R.C. § 508(c) (West 2014).

<sup>131</sup> Under current law, § 527 organizations also must file required information with the IRS in order to be exempt under that provision. See I.R.C. § 527(i).

<sup>132</sup> H.R. Rep. No. 91-413, pt. 1, at 38; see also S. Rep. No. 91-552, at 54 (1969) (describing the IRS’s “lack of information” about many EOs).

<sup>133</sup> See Tax Reform Act of 1969 § 101(d)(1)–(2), 83 Stat. at 492, 519–21 (amending § 6033(a) and (b) of the 1954 Code). Congress did not require information returns from substantially the same organizations exempt from the notice requirement, and this exception also remains in current law. See *supra* note 130; Tax Reform Act of 1969 § 101(d)(1), 83 Stat. at 520 (amending § 6033(a)(2) of 1954 Code); I.R.C. § 6033(a)(3). For a recent proposal to extend the information return requirement to religious organizations in order to increase their



along with publicity of the tax returns (required since 1950), would “facilitate meaningful enforcement” of the tax law’s conditions.<sup>134</sup> Congress, however, shielded from publicity the names of contributors to public charities in order not to discourage their gifts.<sup>135</sup>

Finally, in 1976, Congress added Section 6110, which requires publicity of all IRS written determinations issued to taxpayers (including EOs) and the background file documents relating to the determinations.<sup>136</sup> The legislation followed two circuit court decisions holding that certain written determinations were not protected by the confidentiality rules of Section 6103 and were disclosable under FOIA.<sup>137</sup> Congress added Section 6110 to resolve unanswered questions and provide an exclusive means for obtaining the information. Congress was worried that if the determinations remained secret, tax advisors who had knowledge (through their clients) of the IRS’s positions would have an unfair advantage. The “special access” of such advisors to the rules of law would undermine public confidence in the tax system and generate suspicion that the laws were not being applied in an even-handed way.<sup>138</sup> Subsequent litigation clarified that Section 6110 covers written determinations denying or revoking the tax-exempt status of an organization.<sup>139</sup> Under Section 6110, certain information (including anything identifying the taxpayer) must be withheld from disclosure.<sup>140</sup>

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accountability to donors, the public, and the IRS, see John Montague, *The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption*, 35 *Cardozo L. Rev.* 203, 230, 264–65 (2013).

<sup>134</sup> H.R. Rep. No. 91-413, pt. 1, at 36.

<sup>135</sup> See Tax Reform Act of 1969 § 101(e)(1), 83 Stat. at 492, 523 (amending § 6104(b) of the 1954 Code); S. Rep. No. 91-552, at 53. Under current law, donor information of private foundations and § 527 organizations is made public. See I.R.C. §§ 527(j), 6104(b) (second sentence), (d)(3)(A).

<sup>136</sup> Tax Reform Act of 1976, Pub. L. No. 94-455, § 1201(a), 90 Stat. 1520, 1660 (adding § 6110 to the 1954 Code).

<sup>137</sup> See *Tax Analysts & Advocates v. IRS*, 505 F.2d 350, 354–55 (D.C. Cir. 1974); *Freuhauf Corp. v. IRS*, 522 F.2d 284, 289–90 (6th Cir. 1975).

<sup>138</sup> See H.R. Rep. No. 94-658, at 314–15 (1975); S. Rep. No. 94-938, at 305–06 (1976).

<sup>139</sup> See *Tax Analysts v. IRS*, 350 F.3d 100, 103–05 (D.C. Cir. 2003) (invalidating a contrary Treasury regulation); Treas. Reg. § 301.6104(a)-1(f) (2013); Public Inspection of Material Relating to Tax Exempt Organizations, T.D. 9581, 77 Fed. Reg. 12,202, 12,202–03 (Feb. 29, 2012) (preamble); William A. Dobrovir, *Anatomy of a Regulation: How Far the IRS Will Go to Hide Its Law*, 44 *Exempt Org. Tax Rev.* 179 (2004) (describing background of invalidated regulation).

<sup>140</sup> See Tax Reform Act of 1976 § 1201(a), 90 Stat. at 1660–61 (adding § 6110(c) to the 1954 Code); I.R.C. § 6110(c).

In summary, under current law, there is required publicity of EO application materials (but only if and when the application is approved), EO annual information returns, and written IRS determinations issued to taxpayers including EOs (with identifying information generally redacted).<sup>141</sup>

*B. Reasons for Existing and Increased Publicity of EO Return Information*

As just described, Congress has required publicity of a substantial amount of EO tax return information despite generally protecting the confidentiality of such information for all other taxpayers. One important reason relates to the special nature of EO tax law and the special function of EOs. Unlike issues such as the amount of a taxpayer's income, deductions, or credits—matters about which few persons other than the taxpayer (and parties already filing information returns regarding the taxpayer) would likely have much knowledge—EO tax law raises questions such as the nature of an organization's activities (and whether they are consistent with its exempt purpose), the existence of private benefits obtained by persons involved with the organization, and the amount and type of political activity undertaken by the organization.<sup>142</sup> The public might be expected to have useful information about those types of issues. Moreover, the public has an incentive to monitor the tax filings of EOs—in contrast to the returns of individuals or for-profit companies—because many EOs benefit the public and depend upon public support.<sup>143</sup> The publicity might in turn give an EO a strong in-

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<sup>141</sup> See I.R.C. §§ 6104, 6110.

<sup>142</sup> See, e.g., I.R.C. § 501(c)(3) (identifying exclusive purposes of organizations qualifying for exemption under the provision, prohibiting net earnings of such organizations from benefiting any private shareholder or individual, limiting the amount of lobbying activities of such organizations, and barring their intervention in political campaigns); Treas. Reg. § 1.501(c)(4)-1(a)(2) (limiting the amount of political campaign activity of § 501(c)(4) organizations).

<sup>143</sup> Cf. 65 Cong. Rec. 2956–57 (1924) (statement of Rep. Mills (R-N.Y.)) (reading into the record Representative Cordell Hull's view doubting incentive of public to act as informants in the general case); Tal Z. Zarsky, *Transparent Predictions*, 2013 U. Ill. L. Rev. 1503, 1534–35 (emphasizing the importance of public interest in disclosed information); *id.* at 1538–39 (describing the potential for transparency to bring information *into* the government if there is “significant [outside] knowledge . . . regarding the relevant issue and motivation to convey it”). Though perhaps not benefitting the general public, tax-exempt mutual benefit organizations nevertheless benefit a group of persons who might have knowledge about, and reason to scrutinize, the organization. Moreover, the general public supports these organiza-

centive to be compliant in order to protect its public reputation.<sup>144</sup> In short, the Progressives' main argument for publicity—to promote better tax compliance by allowing public scrutiny—may be particularly valid when it comes to EOs, and Congress has long recognized it.<sup>145</sup> Public help monitoring the tax compliance of EOs is especially valuable given significant constraints on the IRS's resources.<sup>146</sup>

Another reason for publicity is that it helps to inform the public about EOs and permits monitoring of their governance practices (even if unrelated to specific tax law conditions).<sup>147</sup> According to the Independent Sector (a trade group of EOs), disclosure is appropriate to assure con-

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tions through their tax exemption and, as Congress determined in 1950, their organizational structure may make them especially needful of public scrutiny. See *supra* text accompanying notes 124–26.

<sup>144</sup> The efficacy of shaming sanctions to improve the compliance of for-profit enterprises has, however, been questioned. See Joshua D. Blank, *What's Wrong with Shaming Corporate Tax Abuse*, 62 *Tax L. Rev.* 539, 590 (2009); David Lenter, Joel Slemrod & Douglas Shackelford, *Public Disclosure of Corporate Tax Return Information: Accounting, Economics, and Legal Perspectives*, 56 *Nat'l Tax J.* 803, 820–21 (2003).

<sup>145</sup> See *supra* text accompanying notes 129 and 134; 2 JCT, *Study of Present-Law Taxpayer Confidentiality*, *supra* note 9, at 65 (claiming that “public oversight of tax-exempt organizations generally is viewed as increasing compliance with Federal and State laws”); *id.* at 80. Recent empirical evidence from a natural experiment in Norway found that public disclosure of tax information increased the amount of reported income. See Joel Slemrod, Thor O. Thoresen & Erlend E. Bø, *Taxes on the Internet: Deterrence Effects of Public Disclosure* 26–27 (CESifo, Working Paper No. 4701, 2013), available at <http://www.ssrn.com/abstract=2220132>. Analysis of another natural experiment in Japan, however, showed that where there was a threshold level of income before disclosure was required, a non-trivial number of taxpayers underreported their income to avoid disclosure in order to save non-tax costs. See Makoto Hasegawa, Jeffrey L. Hoopes, Ryo Ishida & Joel Slemrod, *The Effect of Public Disclosure on Reported Taxable Income: Evidence from Individuals and Corporations in Japan*, 66 *Nat'l Tax J.* 571, 602–03 (2013). Finally, a laboratory experiment found that loss of confidentiality increased compliance. See Susan Laury & Sally Wallace, *Confidentiality and Taxpayer Compliance*, 58 *Nat'l Tax J.* 427, 438 (2005). Another experiment reported that knowledge of the tax filing behavior of a taxpayer's neighbors may affect the taxpayer's filing behavior. See James Alm, Kim M. Bloomquist & Michael McKee, *When You Know Your Neighbor Pays Taxes: Information, Peer Effects, and Tax Compliance* 22–23 (Nov. 2013) (unpublished manuscript) (on file with the Virginia Law Review Association).

<sup>146</sup> See Brody, *supra* note 10, at 216–17; Nancy Ortmeyer Kuhn, *Secretive No More: Non-profits Must Disclose Donors*, 136 *Tax Notes* 1053, 1055 (2012).

<sup>147</sup> See Brody, *supra* note 10, at 226, 232; James J. Fishman, *Improving Charitable Accountability*, 62 *Md. L. Rev.* 218, 270–72 (2003); Steuerle & Sullivan, *supra* note 10, at 440–41; cf. Joe Stephens & Mary Pat Flaherty, *Millions Lost by Nonprofits, with Little Explanation*, *Wash. Post*, Oct. 27, 2013, at A1 (describing illegal diversion of funds from EOs); Fred Stokeld, *Lawmakers React to Charities' Disclosure of Asset Diversions*, 141 *Tax Notes* 602, 602–03 (2013) (describing congressional concern about diversions).

tributors, volunteers, and other EO partners that the EO is acting in the public's interest.<sup>148</sup>

There is also arguably a difference in the privacy expectations of EOs compared to those of all other taxpayers. In general, non-EO taxpayers provide their tax return information to the government under compulsion of law.<sup>149</sup> In contrast, the information provided by EOs to the IRS is to some extent a matter of choice.<sup>150</sup> An organization can obtain the same privacy protections as all other taxpayers by simply not claiming to be exempt. Under this view, the information an EO submits (and that becomes public) is roughly analogous to the tax information of taxpayers who choose to seek judicial resolution of their tax disputes (which exposes their tax information to the public).<sup>151</sup> Obtaining judicial review of tax disagreements is obviously an important taxpayer right, but to pro-

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<sup>148</sup> See H. Comm. on Ways & Means, 106th Cong., WMCP 106-11, Written Comments on Joint Committee on Taxation Disclosure Study 49–50 (Comm. Print 2000). As previously discussed, the first publicity requirement for EO return information grew out of congressional interest in monitoring EO governance practices. See *supra* text accompanying notes 120–26.

<sup>149</sup> See I.R.C. § 6001 (West 2014) (requiring taxpayers to file tax returns and other information); *id.* §§ 6201(a), 7601(a), 7602(a) (giving government broad inquiry and inspection authority); Mazza, *supra* note 56, at 1101 (characterizing the IRS's power to compel disclosure of information from both taxpayers and third parties as "expansive").

<sup>150</sup> See Lloyd Hitoshi Mayer, Nonprofits, Politics, and Privacy, 62 Case W. Res. L. Rev. 801, 821–22 (2012) (explaining that, by claiming to be exempt, "nonprofit organizations are voluntarily choosing to allow the information they provide to the IRS to also be revealed to the public"); cf. Alan B. Morrison, Balancing Privacy and Accountability: What to Do About Tax Returns, 100 Tax Notes 725, 725 (2003) ("[P]rivacy concerns applicable to tax returns of individuals have little or no bearing when it comes to organizations, especially those that are given the benefit of not paying taxes on their income and, in some cases, allowing their supporters to get a tax break for making a donation."). The information provided by an EO on Form 990T, which reports the taxable unrelated business income of an EO, is arguably not submitted as a "matter of choice." But Congress currently requires even this information of § 501(c)(3) organizations to be publicly available. See I.R.C. § 6104(b) (last sentence), (d)(1)(A)(ii).

Professor Tobin has argued that any political organization satisfying the definition contained in § 527(e)(1) *must* comply with that provision's regulatory scheme. Donald B. Tobin, Political Advocacy and Taxable Entities: Are They the Next "Loophole"?, 6 First Amend. L. Rev. 41, 54–56 (2007). If correct, his view might challenge, to that limited extent, the position that claiming tax-exempt status is a matter of choice. Section 527, however, specifically provides that unless an organization gives notice to the Treasury Secretary that it intends to be treated as a § 527 organization, the organization "shall not be treated as an organization described in [§ 527]." I.R.C. § 527(i)(1)(A). Subsequent language in the provision specifying the effect of a failure to provide notice should be read as applicable to organizations that provide untimely notice rather than no notice. See *id.* § 527(i)(1)(B), (2), (4).

<sup>151</sup> See I.R.C. § 6103(h)(4)(A).

tect the integrity of the tax system (and prevent the perception of the existence of secret law), Congress since 1924 has placed a significant condition on the exercise of that right—publicity of the taxpayer’s return information and other materials pertaining to the court’s decision.<sup>152</sup> Another rough analogy to the information submitted by an EO to the IRS is tax data voluntarily given to a financial institution to qualify for a particular type of financing or benefit.

Finally, the history of Section 6110 reflects Congress’s concern about the development of “secret law” of the IRS. But the problem of secret law goes beyond the substantive positions the agency develops to interpret the law. It applies equally well to the *operational* steps actually undertaken by the agency to carry out the law.<sup>153</sup> How the agency uses its

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<sup>152</sup> *Id.*; see also *id.* §§ 7458, 7461(a) (requiring publicity of Tax Court proceedings, reports, and evidence); Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 253, 337–38 (requiring publicity of Board of Tax Appeals (predecessor to the Tax Court) reports and evidence); S. Rep. No. 68-398, pt. 2, at 12 (1924) (expressing concerns that secret tax adjudications permit favoritism, arbitrary action, fraud, and collusion); 65 Cong. Rec. 8132–33 (1924) (statement of Sen. Jones (D-N.M.)) (asserting publicity was necessary to “understand the facts upon which decisions are reached, and the taxpayers in the country may have an opportunity to know just how it all happens”). Section 6103(h)(4)(A) applies equally to judicial proceedings outside the Tax Court. See *Lampert v. United States*, 854 F.2d 335, 337–38 (9th Cir. 1988). In a rare (and perhaps unprecedented) exception, the Tax Court permitted the entire record of a case (including the name of the petitioner) to be shielded from public scrutiny in *Anonymous v. Commissioner*, 127 T.C. 89, 94–95 (2006). The court concluded that the risk of severe physical harm to the petitioner (who was a foreign national) and petitioner’s family if the litigation were made public was sufficiently great to outweigh the public’s interest in knowing about the case, and that the respondent’s position was not prejudiced by the lack of public access to the information. *Id.* For a recent argument supporting increased transparency of the judicial system, see Lynn M. LoPucki, *Court-System Transparency*, 94 Iowa L. Rev. 481, 537–38 (2009).

<sup>153</sup> According to Professor Weidenbruch, full disclosure of the agency’s rules and procedures should assure taxpayers that “tax administrators are treating them fairly vis-à-vis similarly situated taxpayers [and demonstrate] that neither political nor any other form of influence is involved in individual case determinations.” Peter P. Weidenbruch, Jr., *Disclosure of Government Tax Information and Action*, 27 Nat’l Tax J. 395, 395 (1974). Yet without revealing taxpayer return information—which Weidenbruch would keep confidential—it is difficult to see how such disclosure provides any information to the public about the agency’s procedures *in operation*. Cf. David Heald, *Varieties of Transparency*, in *Transparency: The Key to Better Governance?* 25, 31–32 (Christopher Hood & David Heald eds., 2006) (distinguishing “procedural” transparency (disclosure of the rule book of an organization) from “operational” transparency (disclosure of the rule book’s application to particular cases)); Tobin, *Political Campaigning*, *supra* note 6, at 1359–60 (explaining that the IRS’s formal procedure to limit partisan influence in the EO enforcement area “does not insulate the process from political manipulation, nor does it provide for any type of transparency regarding enforcement”); Zarsky, *supra* note 143, at 1512–13 (describing the lack of information

limited resources to enforce the law may be at least as important as the interpretive positions the agency takes. Thus, publicity that allows operational transparency should promote public confidence in the tax system in the same manner as substantive transparency.<sup>154</sup> Operational transparency, of course, would benefit all taxpayers, not just EOs. Given, however, the special problems the IRS has experienced in administering the EO tax laws, it may be proper to focus on providing operational transparency in that area.

### III. PROPOSALS TO INCREASE PUBLICITY OF EO TAX RETURN INFORMATION AND THE IRS'S EO DECISIONS

This Part describes specific proposals to increase publicity of EO tax return information and thereby permit greater disclosure of IRS decisions regarding EOs.

#### *A. Transparency of the EO Application Process*

Under current law, application materials submitted by an organization to the IRS for recognition of its tax exemption and any documents issued by the IRS relating to the application are publicly available if and when recognition is granted.<sup>155</sup> Third-party communications received by the IRS relating to an application are not covered by the publicity rule.<sup>156</sup> In addition, information such as trade secrets, other privileged information,

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provided by the IRS pursuant to a congressional mandate to disclose the agency's auditing procedures without prejudicing its law enforcement efforts).

<sup>154</sup> See Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 *Can. J.L. & Jurisprudence* 95, 103 (2005) ("In regards to taxes, individual citizens essentially have two rights to know: a right to know what the tax laws are and a right to know that these laws are being administered fairly. Publicity better serves both these functions . . ."); cf. 2 JCT, *Study of Present-Law Taxpayer Confidentiality*, *supra* note 9, at 65 (arguing that increased disclosure "may lead to fairer application of the Federal tax laws by enabling taxpayers and others to determine if the IRS is applying the law in a consistent manner"); Kara Backus, Note, *All Saints Church and the Argument for a Goal-Driven Application of Internal Revenue Service Rules for Tax-Exempt Organizations*, 17 *S. Cal. Interdisc. L.J.* 301, 328–30 (2008) (urging greater transparency of IRS processes and reasoning in EO area); Eric R. Swibel, Comment, *Churches and Campaign Intervention: Why the Tax Man Is Right and How Congress Can Improve His Reputation*, 57 *Emory L.J.* 1605, 1637–38 (2008) (urging publicity of IRS investigations of churches).

<sup>155</sup> See I.R.C. § 6104(a)(1)(A); Treas. Reg. § 301.6104(a)-1(a), (c) (2013).

<sup>156</sup> See *Lehrfeld v. Richardson*, 132 F.3d 1463, 1465–67 (D.C. Cir. 1998) (upholding validity of Treasury Regulation § 301.6104(a)-1(e) providing that third-party communications were not required to be disclosed by § 6104).

or confidential material for reasons of national defense, may be shielded from the publicity.<sup>157</sup>

The proposal would make application materials, third-party communications related to the application, and any follow-up submissions publicly available upon their submission to the IRS.<sup>158</sup> The same exceptions for trade secrets, other privileged information, and confidential material would continue to apply.

The reason application materials are public under current law is to allow the public to help enforce the tax laws.<sup>159</sup> Members of the public who are familiar with the operations of an EO can assist in determining whether its activities are consistent with those described in the EO's application materials. But this help, for the most part, comes too late. Due to resource constraints, the principal time the IRS evaluates the eligibility of an organization for exemption is when the organization first applies for recognition.<sup>160</sup> Once the agency recognizes an organization's exemption, it is rare for the IRS to reconsider the issue.<sup>161</sup> Thus, public input at the earlier stage—when an application is still pending—would provide the most valuable help to the agency. This help can occur only if the application materials are available to the public at the earlier point.

To be sure, when an application is still pending, many organizations may have little or no track record of activities, and the public, therefore, may have little information about them. But in selected cases, the IRS looks beyond the four corners of an organization's application materials to determine whether its representations are consistent with other availa-

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<sup>157</sup> See I.R.C. § 6104(a)(1)(D).

<sup>158</sup> See 2 JCT, Study of Present-Law Taxpayer Confidentiality, *supra* note 9, at 7, 86–88.

<sup>159</sup> See *supra* text accompanying note 129.

<sup>160</sup> See Jody Blazek, *Tax Planning and Compliance for Tax-Exempt Organizations* 15, 536 (5th ed. 2012) (“[T]he highest scrutiny many organizations ever receive occurs during the determination process.”); Brody, *supra* note 10, at 208.

<sup>161</sup> The IRS reported processing just over 770,000 EO returns in 2012 and examining just under 10,600 returns (1.4%) in FY 2013. See IRS Data Book, 2013, at tbl.13 (2014), available at <http://www.irs.gov/uac/SOI-Tax-Stats-IRS-Data-Book>. Of the returns examined, most were taxable returns of an EO (such as an employment tax return or one reporting unrelated business income). *Id.* Only about 2900 (0.4%) EO annual information returns were examined. *Id.*; see also Brody, *supra* note 10, at 216–17 n.129 (reporting an estimate of 0.2% EO audit rate and a claim that the audit rate is “‘pretty close to infinitesimal, especially when you exclude targeted audits [of colleges and hospitals]’” (quoting Paul Streckfus, EO Tax J. 2010-185 (Dec. 16, 2010, 8:05 AM), <http://eotaxjournal.com/eotj/?m=201012&paged=2> (alteration in original))).

ble information about the organization.<sup>162</sup> At least in those cases, public input might be useful.<sup>163</sup>

Moreover, publicity of the application materials upon their submission to the IRS would facilitate fuller disclosure of the IRS's consideration of the application. If, for example, delays in processing an application or excessive information demands cause an organization to withdraw its application, there is no public record of it under current law (absent complaint from the organization).<sup>164</sup> More generally, as illustrated by the current controversy, the procedure used by the agency to process EO applications is shrouded in secrecy.<sup>165</sup> The proposal would require timely public disclosure of the agency's administrative decisions involving an application. The IRS might be required, for example, to create a public website detailing the progress of each EO application from initial submission to final determination.<sup>166</sup> The IRS currently maintains a web-based system for internal use called the Tax Exempt Determination System ("TEDS"), which contains EO application case histories; it may be possible to adapt this system to permit public access.<sup>167</sup> Disclosure of third-party communications relating to an applica-

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<sup>162</sup> See Bruce Hopkins, *The Law of Tax-Exempt Organizations* 738 (10th ed. 2011) (describing the IRS's search of an applicant's website for additional or contradictory information).

<sup>163</sup> See David van den Berg, *Practitioners Concerned About Confidentiality of EO Tax Data*, 138 *Tax Notes* 665, 667 (2013) (reporting that Marcus Owens (former Director of the IRS's EO Division) indicated that there is a "compelling policy argument" to make pending applications public once they have been filed, to let the public assist in determining whether recognition should be granted).

<sup>164</sup> The IRS provides aggregate data on applications. In FY 2013, of about 53,000 closures of applications for tax-exempt status, about 44,000 were approved, 91 were disapproved, and about 8800 fell into an "other" category, which included withdrawn applications. See *IRS Data Book*, 2013, *supra* note 161, at tbl.24.

<sup>165</sup> See Paul Streckfus, *Letter to the Editor, IRS Transparency: The Future Looks Cloudy*, 56 *Exempt Org. Tax Rev.* 337 (2007). For a brief description of the general process used by the IRS in 2011–2012 to process § 501(c)(3) applications, see *Advisory Comm. on Tax Exempt & Gov't Entities, Report of Recommendations, Exempt Organizations: Form 1023 – Updating It for the Future 8–11* (2012), available at [http://www.irs.gov/pub/irs-tege/tege\\_act\\_rpt11.pdf](http://www.irs.gov/pub/irs-tege/tege_act_rpt11.pdf).

<sup>166</sup> For a description of flaws in current, mandatory online disclosures by government, see Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 *Yale L. & Pol'y Rev.* 79, 93–106 (2012).

<sup>167</sup> See *IRM 7.15.1* (June 7, 2011), *reprinted in 3 Rulings & Agreements, Internal Revenue Manual* (CCH) at 72,151 (2011); *Advisory Comm. on Tax Exempt & Gov't Entities*, *supra* note 165, at 8; *NTA Special Report*, *supra* note 6, at 25; Hopkins, *supra* note 162, at 749.



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tion, such as communications from members of Congress, would add to the overall transparency.<sup>168</sup>

The proposal, however, would not require disclosure of the agency's internal deliberations, including the details of formulae used by the agency to select applications for higher scrutiny. This amount of agency secrecy is necessary to protect the agency's deliberative process and offset another type of information imbalance—the superior knowledge taxpayers have about information potentially relevant to their tax responsibilities. Since enforcement of the tax laws is to some extent a cat-and-mouse game, the agency's ability to use its limited enforcement resources most efficiently must be preserved.<sup>169</sup> The administrative decisions after applying the formulae, however, would have to be disclosed, so the IRS would have strong incentives to use only tax-based factors in its selection process.

One possible argument against the proposal is that it might result in disclosure of the return information of non-EOs.<sup>170</sup> This outcome would occur if an application is withdrawn or if the IRS refuses to recognize the applicant's exemption. But this concern misconceives the reason for the different publicity of EO and non-EO tax return information. Publicity of EO information is required not because of the organization's *status* as exempt, but because of the type of issues raised by EO tax law and the public's potential interest in monitoring the applicant organization's compliance with that law. To be exempt, an organization must meet the conditions of that law and, in general, provide a public benefit and/or have public supporters. Since the public may have information relating to the eligibility conditions (and an incentive to provide over-

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<sup>168</sup> Publicizing third-party communications might have an undesirable chilling effect on the speaker. On the other hand, publicizing the communication would give the public a fuller understanding of any action ultimately taken by the agency. It would also help assure the speaker that the comment will be taken seriously. A possible middle ground—publicizing the communication without identifying the speaker—has the disadvantage of impairing the public's ability to evaluate the significance of the comment. See Frederick Schauer, *Anonymity and Authority*, 27 *J.L. & Pol.* 597, 606 (2012) (“The identity of a speaker, and the signals about reliability that may be provided by knowing the speaker's identity, are part and parcel of the content of what a speaker says and of how listeners evaluate it.”).

<sup>169</sup> Cf. Zarsky, *supra* note 143, at 1553–58 (generally defending government opacity of proxies developed to identify wrongdoers).

<sup>170</sup> See H. Comm. on Ways & Means, *supra* note 148, at 15 (statement of Committee on Exempt Organizations, ABA Section of Taxation); *id.* at 25 (statement of Coalition for Non-profit Health Care).

sight), it is appropriate to allow publicity of application materials even if the application is ultimately withdrawn or denied.

Another possible concern with the proposal is that applicants will be less forthright in their submissions if they know their materials will be immediately available to the public.<sup>171</sup> Further, through reverse engineering of the disclosed IRS application decisions, organizations may be able to discern which representations are most likely to result in a favorable decision and will tailor their submissions accordingly. These possibilities, however, already exist under current law. Since applicants expect their applications to be approved, they already make submissions in anticipation that their materials will be exposed to the public. More generally, even without the expected public scrutiny, applicants are well-advised to be cautious regarding the amount of information included in their submissions.<sup>172</sup> Finally, applicants are currently able to tailor their submissions to conform to successful representations made by others since the materials of successful applications are publicly available. The proposal does not change the risk (however small) to any applicant that is less than fully candid in its application. If an organization ultimately is found to carry out activities substantially different from the representations in its application, the organization could suffer retroactive revocation of its exemption.<sup>173</sup>

Finally, there may be concern that the proposal would further politicize the application process.<sup>174</sup> There might be a natural tendency for the public to use the new transparency to fixate on the few “hard” (and debatable) decisions revealed by the IRS.<sup>175</sup> But the potentially controver-

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<sup>171</sup> See Peter L. Faber, *The Joint Committee Staff Disclosure Recommendations: What They Mean for Exempt Organizations*, 28 *Exempt Org. Tax Rev.* 31, 35 (2000).

<sup>172</sup> See Blazek, *supra* note 160, at 538 (describing “common error” of applicants submitting “too much information”).

<sup>173</sup> See *Treas. Reg.* § 1.501(a)-1(a)(2) (2013) (permitting continued reliance on an exemption determination only if there is no substantial change in an exempt organization’s character, purposes, or methods of operation).

<sup>174</sup> See H. Comm. on Ways & Means, *supra* note 148, at 15 (statement of Committee on Exempt Organizations, ABA Section of Taxation); *id.* at 25 (statement of Coalition for Non-profit Health Care); *id.* at 46 (statement of Free Speech Coalition); *id.* at 60 (statement of Independent Sector); Faber, *supra* note 171, at 35–36 (“[O]ne fears that in many instances what has been an efficient administrative process will become a circus.”).

<sup>175</sup> Cf. Archon Fung & David Weil, *Open Government and Open Society*, in *Open Government: Collaboration, Transparency, and Participation in Practice* 105, 106–08 (Daniel Lathrop & Laurel Ruma eds., 2010) (describing the risk that increased transparency will result in the public focusing excessive attention on government mistakes).

sial nature of the IRS's EO decisions is a consequence of the substantive EO tax law and its impact on matters of fundamental importance, such as elections. Making the decisions in secret does not make them any less contentious; if anything, it may heighten the degree of controversy. Moreover, the public may already have knowledge of some of the hard (and debatable) cases because of disclosures by the organizations affected. Those disclosures, however, may be incomplete so that the organization can put its position in the best light. Opening up the applications and the IRS's decision-making process would tend to ensure greater fairness by the tax agency in processing the applications and promote fuller communication to help insulate the agency from unfounded criticism.<sup>176</sup>

Under current law, not all organizations are required to file an application for recognition of their exemption, and the new publicity requirement might discourage them from doing so.<sup>177</sup> This consequence would exacerbate existing administrative difficulties when organizations whose exemptions have not yet been recognized begin filing information returns as if they were exempt.<sup>178</sup> The proposal, therefore, would require most EOs to file for recognition in order to be exempt.<sup>179</sup> This step would provide the IRS with more information about more EOs on a current basis.

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<sup>176</sup> Cf. Zarsky, *supra* note 143, at 1549–50 (arguing that it is in the government's interest to disclose strategies to prevent false or biased public impressions of government practices).

<sup>177</sup> Under current law, unless certain exceptions apply, an organization must submit an application in order to qualify as a § 501(c)(3) or § 527 organization. See I.R.C. § 508(a), (c) (West 2014) (providing application requirements with respect to § 501(c)(3) organizations); *id.* § 527(i) (providing notice requirements with respect to § 527 organizations). No application is required to qualify for exempt status under most other provisions, such as § 501(c)(4)–(6). See Aprill, *supra* note 6, at 402.

<sup>178</sup> See Blazek, *supra* note 160, at 538 (describing how the IRS may not accept the information return unless the organization has previously filed an application); see also Aprill, *supra* note 6, at 402 & n.318 (discussing the IRS's attempts to deal with the administrative problem); Frances R. Hill & Douglas M. Mancino, *Taxation of Exempt Organizations* ¶ 32.03 (2007) (same); Tobin, *Campaign Disclosure*, *supra* note 6, at 439–40 (reporting that many EOs apply for recognition to avoid the administrative headaches that accompany filing a Form 990 without first applying for recognition).

<sup>179</sup> See Aprill, *supra* note 6, at 401–02 (urging application at least for § 501(c)(4) status); Tobin, *Campaign Disclosure*, *supra* note 6, at 433–34, 439–40 (recommending application for § 501(c)(4)–(6) status if an organization has sufficiently large contributions or expenditures). The proposal could continue the current law's exceptions for certain religious organizations and very small EOs. See *supra* note 130.

*B. Publicity of Other EO Return Information and IRS Administrative Decisions*

Current law requires publicity of the most recent three years of an EO's information returns.<sup>180</sup> Except for private foundations and Section 527 organizations, an EO's donor information is shielded from publicity.<sup>181</sup> Current law also requires publicity of IRS written determinations issued to any taxpayer, including an EO, but with certain information (including taxpayer identifying information) redacted.<sup>182</sup> The general confidentiality protection of Section 6103 applies to all other tax administrative actions involving an EO, such as audit-related developments and closing agreements.<sup>183</sup>

The proposal would not change the publicity requirements relating to annual information returns, including the nondisclosure of most donor information. While there may be important election law reasons to increase disclosure of donor information,<sup>184</sup> there are only very limited tax policy reasons for such disclosure, such as whether a Section 501(c)(3) organization qualifies as a public charity rather than a private foundation.<sup>185</sup> Since the purpose of the proposals in this Article is to increase the transparency of the IRS's decisions, there needs to be sufficient *tax* reason to justify the publicity. Publicity of donor information also raises concerns about its impact on giving and the privacy interests of the donors.<sup>186</sup>

The proposal would relax confidentiality protections with respect to other IRS administrative decisions involving an EO, such as audit-

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<sup>180</sup> See I.R.C. § 6104(b), (d).

<sup>181</sup> See *id.* § 6104(b) (second sentence), (d)(3)(A); *id.* § 527(j)(2)–(3) (requiring disclosure of contributors giving \$200 or more during the calendar year).

<sup>182</sup> See *id.* § 6110(a)–(c).

<sup>183</sup> Neither § 6110 nor § 6104 requires disclosure of closing agreements, and they are therefore confidential tax return information under § 6103. See *id.* § 6103(b)(2)(D); H.R. Rep. No. 94-658, at 316 (1975); S. Rep. No. 94-938, at 306–07 (1976); *Tax Analysts v. IRS*, 410 F.3d 715, 722 (D.C. Cir. 2005) (holding that closing agreement is protected from disclosure by § 6103). As part of its settlement with an EO, the IRS can require the terms of a closing agreement to be made public. See 2 JCT, *Study of Present-Law Taxpayer Confidentiality*, *supra* note 9, at 84–85.

<sup>184</sup> See Aprill, *supra* note 6, at 403–05; Kuhn, *supra* note 146, at 1056–57; Mayer, *supra* note 150, at 812, 814, 821–23; Tobin, *Campaign Disclosure*, *supra* note 6, at 443–44.

<sup>185</sup> See I.R.C. § 509(a)(2)(A) (generally excluding a § 501(c)(3) organization from private foundation status if it has sufficient broad-based support); Brody, *supra* note 10, at 205.

<sup>186</sup> See S. Rep. No. 91-552, at 53 (1969); 2 JCT, *Study of Present-Law Taxpayer Confidentiality*, *supra* note 9, at 81; Mayer, *supra* note 150, at 822–23.

related developments, written determinations (with no redaction of taxpayer identifying information), and closing agreements,<sup>187</sup> and generally require their timely disclosure by the IRS. The precise form and extent of the IRS's disclosures would need to be determined by Congress after consultation with all interested parties—the IRS, EOs, and watchdog groups, among others. In FY 2013, there was extremely limited IRS examination activity in the EO area, and most of it involved the amount of an organization's employment tax liability or unrelated business income tax liability.<sup>188</sup> In other words, there seems to have been almost no auditing of core questions, such as an organization's entitlement to exemption.<sup>189</sup> If the required agency disclosures were limited to its handling of core issues, there might in fact be almost nothing to disclose.<sup>190</sup> Still, the proposed transparency would be useful in revealing to the public (and to Congress) what the IRS is (and is not) doing. The relaxation of EO confidentiality protections would also permit the IRS to respond to allegations of unfair treatment by the agency.

For the same reason discussed in connection with EO applications, disclosure would not be required of internal agency decision making relating to how it can best utilize its limited enforcement resources. Thus, the details of formulae developed by the IRS to identify specific returns to be audited would not have to be disclosed.<sup>191</sup> The outcomes, however, after applying those formulae—that is, the identity of the audited EOs and the progress of the audits—would have to be disclosed. The IRS again would have strong incentive to apply only tax-based factors in making its administrative decisions.

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<sup>187</sup> See 2 JCT, Study of Present-Law Taxpayer Confidentiality, *supra* note 9, at 7, 83–86.

<sup>188</sup> See *supra* note 161.

<sup>189</sup> IRS data merely indicates that about a quarter of the very few examinations in FY 2013 involved EO information returns (as opposed to taxable returns), with no indication as to the issues raised in the information return examinations. See IRS Data Book, 2013, *supra* note 161, at 33.

<sup>190</sup> Cf. 2 JCT, Study of Present-Law Taxpayer Confidentiality, *supra* note 9, at 66 (suggesting that disclosures could be limited to claimed violations of tax-exempt status).

<sup>191</sup> See *supra* note 169 and accompanying text; I.R.C. § 6103(b)(2) (West 2014) (last sentence) (generally prohibiting disclosure of standards used for the selection of returns for examination); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3503(a), 112 Stat. 685, 771 (requiring the IRS to provide public statement of criteria and procedures for selecting taxpayers for examination, but not to include “any information the disclosure of which would be detrimental to law enforcement”); cf. Zarsky, *supra* note 143, at 1510–13 (explaining the reason for IRS secrecy in this area).

One possible concern about this proposal is that the newly disclosed information will be confusing and potentially misleading to the public.<sup>192</sup> Closing agreements, for example, are negotiated settlements in which the parties make concessions on disputed points to avoid the greater cost of litigation. In their initial stages, audits may include mere assertions by a revenue agent with little or no basis in fact or law. Because of resource constraints, the IRS may choose to audit only selected EOs while leaving other, similarly situated ones alone. All of these outcomes, if disclosed, might conceivably result in the public drawing an incorrect inference about an EO or the IRS. Concern about that possibility might deter an EO from entering into a closing agreement, agreeing to an audit adjustment, or seeking out an IRS written determination, and might also change IRS administrative practice.

EO tax law is complicated, and it is reasonable to think that administrative actions based on that law may not be easily understood by the public.<sup>193</sup> Taken to its logical conclusion, however, this objection would lead to no disclosures at all, with all administrative (as well as judicial) decisions being made entirely behind closed doors.<sup>194</sup> For the reasons described in this Article, a better balance is needed to promote public confidence in the tax agency and system. Each of the problems described could likely be addressed through additional disclosures by an EO (or the IRS) clarifying the nature of the administrative action to the public.<sup>195</sup> More generally, an important consideration for Congress in determining the specific format of the required IRS disclosures would be the minimization of public confusion and misunderstanding. Ultimately,

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<sup>192</sup> See H. Comm. on Ways & Means, *supra* note 148, at 5–6 (statement of American Hospital Association); *id.* at 9 (statement of American Society of Association Executives); *id.* at 14–15 (statement of Committee on Exempt Organizations, ABA Section of Taxation); *id.* at 24 (statement of Coalition for Nonprofit Health Care); *id.* at 44–45 (statement of Free Speech Coalition, Inc.); *id.* at 57–59 (statement of Independent Sector); Faber, *supra* note 171, at 33–35. The problem of processing disclosed information is a general concern with transparency proposals. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 716–18 (2011); Amitai Etzioni, *Is Transparency the Best Disinfectant?*, 18 J. Pol. Phil. 389, 398–400 (2010).

<sup>193</sup> See Steuerle & Sullivan, *supra* note 10, at 441 (describing the possible problem of “congestion costs”); *cf.* 1 Office of Tax Policy, *supra* note 19, at 33–37 (discussing the public policy reasons for confidentiality of tax return information generally).

<sup>194</sup> *Cf.* Lenter et al., *supra* note 144, at 823–24 (discussing similar objections in the context of publicity of corporate tax returns).

<sup>195</sup> *Cf.* Brody, *supra* note 10, at 190 (“[T]he solution to the problem of a misinformed public is more disclosure . . . .”); Zarsky, *supra* note 143, at 1560–62 (explaining the risk of public misinterpretation of disclosed information and the possible solution of more information).

efforts such as these may simply be part of the necessary cost of successful self-governance if, as famed Progressive publisher S.S. McClure wrote over one hundred years ago, “[T]he vitality of democracy depends on popular knowledge of complex questions.”<sup>196</sup>

Another possible concern with the proposal is that the disclosure will show how little enforcement activity is actually undertaken by the IRS. Some believe, for example, that compliance is promoted by the appearance of a very robust agency and would be reduced if this illusion were shattered.<sup>197</sup> But aggregate data on the scanty amount of IRS EO enforcement activity is already publicly available.<sup>198</sup> Moreover, some portion of that activity concerns compliance with exemption conditions rather than the collection of any significant tax revenue from EOs. To be sure, if conditions are not met and exempt status is lost, there might be some significant tax liability at issue. But that result would be a second order concern—the agency’s principal role in this area is a regulatory one to make sure an EO continues to operate in the manner required by the law. Thus, if the proposal affects compliance in the manner suggested, it would likely mean increased disregard by EOs of one or more of the EO eligibility conditions (rather than a major loss to the fisc). The development would help force policymakers to confront how seriously they wish those conditions to be taken.<sup>199</sup> This same explanation should also help to allay concerns that the required IRS disclosures may go too

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<sup>196</sup> Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism*, at xiv (2013) (quoting McClure) (internal quotation marks omitted). Even if the specific information disclosed is difficult for the public to process, the mere fact of greater openness may help the tax agency’s public reputation.

An alternate proposal would have an intermediary—such as TIGTA, the GAO, or the JCT—assemble and present the disclosed information to the public rather than mandate direct agency disclosures to the public. The efficacy of this alternative would depend upon how quickly the disclosures could be provided by the intermediary and the public’s trust in it. If an intermediary could successfully present the information in a manner that would minimize public confusion, there is no clear reason why Congress (after consultation with such an intermediary) could not require the IRS to make the same presentation (and dispense with the intermediary).

<sup>197</sup> See Blank, *supra* note 41, at 347–48; Paul Schwartz, *The Future of Tax Privacy*, 61 *Nat’l Tax J.* 883, 889–90 (2008) (describing reduced compliance in Italy after the government’s (lack of) enforcement capability was disclosed); cf. Zarsky, *supra* note 143, at 1558 (arguing that too much transparency with respect to the IRS’s auditing practices may encourage taxpayers to cheat in areas not being audited).

<sup>198</sup> See *supra* note 161 and accompanying text.

<sup>199</sup> Cf. Lenter et al., *supra* note 144, at 821–22 (describing how increased disclosures in the corporate tax context might alert lawmakers to the need for reforms).

far in exposing the agency's strategies and thereby undermine its EO enforcement effort.

Some may question why EOs should be "singled out" for loss of confidentiality protections since the claimed benefit would be to the tax system as a whole. This possible reaction, however, seems small-minded. For whatever reason, the IRS's administration of EO tax laws has been a repeated source of public dissatisfaction that can be alleviated through increased transparency of the tax agency's actions in that area. More generally, as Gene Steuerle has written, "If [the EO sector] cares about the public, as it claims, then it must also care about . . . the viability of tax administration."<sup>200</sup>

Finally, some may be worried that the end result of these proposals (as well as those involving EO applications) would be to increase the amount of controversy for the IRS. Greater knowledge of how the agency operates may simply generate more and more complaints about its judgments, and the IRS's limited resources would be stretched even thinner. But the purpose of the proposals in this Article is not to reduce the general level of IRS controversies, however desirable that may be. Confronting and resolving disputes about the meaning of law and its application to a set of facts would seem to be a major and necessary function of any tax collector. Rather, this Article hopes to minimize a particular type of dispute—whether the IRS is "playing fair" with the tools at its disposal. The public's respect for the tax agency and tax system depends upon receiving assurance that this very basic promise of government is being kept.

#### CONCLUSION

The current controversy involving the IRS's administration of the EO tax laws is simply the latest in a long succession of similar questions spanning at least five decades. This Article has proposed addressing the problem through increased transparency of the IRS's administrative actions involving EOs. Greater transparency responds directly to the public's frustration in not being able to monitor the agency and gain confidence that the laws are being applied in an even-handed manner.

As explained in this Article, the public's right to know conflicts with taxpayer privacy rights because disclosure of government tax decisions

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<sup>200</sup> Gene Steuerle, A Win-Win Option for Charity and Tax Policy, 48 *Exempt Org. Tax Rev.* 135, 135 (2005).



almost necessarily requires disclosure of the underlying tax information that is the basis for the decision. Fortunately, however, Congress has long recognized good policy reasons to publicize a substantial amount of tax return information of EOs. Thus, slight liberalizations of the disclosure rules already in place may allow sufficient government transparency to satisfy the public's right to know in the precise area of the law that has generated the most controversy. Opening up more EO tax return information and IRS EO decision making to public scrutiny would tend to deter IRS misbehavior, reduce suspicions of such misconduct, and promote fuller communication both to establish any impropriety and avert false charges against the agency.

Some readers may view this Article and its proposals as overly pessimistic. As one distinguished practitioner wrote in opposing an earlier proposal for greater publicity of EO tax information: "Most practitioners who represent exempt organizations on a daily basis believe that the IRS generally does a pretty good job of carrying out its responsibilities. Involving the general public in the regulation of exempt organizations, particularly with respect to exemption applications and audits, is unnecessary and undesirable."<sup>201</sup>

This comment reflects the more general concern that although increased transparency may succeed in deterring some harmful and even possibly corrupt acts, it also can be expected to reduce the number of laudable (though possibly controversial) decisions by well-meaning (but risk-averse) public servants who become somewhat intimidated by their increased visibility.<sup>202</sup> From this practitioner's perspective, we should just have faith in our "pretty good" tax agency and let it fulfill its responsibilities without interference from the public.

But, as illustrated by the current controversy, a "pretty good" tax agency may need more than skilled, well-intentioned professionals; it

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<sup>201</sup> Faber, *supra* note 171, at 40; see also Grant Williams, Tax Report Shakes Up Charities, *Chron. of Philanthropy* (Mar. 9, 2000), <http://philanthropy.com/article/Tax-Report-Shakes-Up-Charities/50616/> ("You should give the I.R.S. the space, if you will, to make its own determination as best it can without outside influences." (quoting Michael A. Thrasher, a former IRS official)).

<sup>202</sup> See Andrea Prat, *The More Closely We Are Watched, the Better We Behave?*, in *Transparency: The Key to Better Governance?* 91, 99–100 (Christopher Hood & David Heald eds., 2006) (explaining why increased transparency may lead agents to behave suboptimally); Frederick Schauer, *Transparency in Three Dimensions*, 2011 *U. Ill. L. Rev.* 1339, 1354 ("It is likely true that the more strictly we are watched, the less likely we are to behave badly. But it is also true that, at times, the more closely we are watched, the less likely we are to behave admirably.").

may need staff who are also truly impartial politically—a challenging expectation.<sup>203</sup> Moreover, the well-meaning decision makers at the tax agency do not serve in a vacuum. Among other things, they must have adequate resources and public support and cooperation in order for their well-meant decisions to result in positive outcomes. As shown in this Article, the law has isolated the IRS—even more than what would normally occur to a nation’s tax collector—and hamstrung its ability to rebut criticisms and quash unfounded charges. Combined with the underlying assumption of this Article—that the substantive EO tax laws (including the vague test of permissible political activities of EOs) remain essentially unchanged and continue to be administered by the IRS—there is a toxic mix that seems destined to produce continuing doubts about the performance and integrity of the agency in the public’s mind. A critical first step must be to break the long cycle of suspicions of IRS misconduct and stabilize the agency’s public reputation. Only then can the agency’s well-intentioned decision makers—both within and outside the IRS’s EO division—begin to achieve the success we all hope for.

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<sup>203</sup> Although various rules may help to insulate civil servants from *external* political influences, a more challenging obstacle is overcoming the *internal* biases most people develop from their personal and professional experiences. See David Eaves, After the Collapse: Open Government and the Future of Civil Service, in *Open Government: Collaboration, Transparency, and Participation in Practice* 139, 144–45 (Daniel Lathrop & Laurel Ruma eds., 2010) (asserting the death of truly impartial civil service); Beth Simone Noveck, The Single Point of Failure, in *Open Government: Collaboration, Transparency, and Participation in Practice*, supra, at 49, 51 (“[G]overnment or government-endorsed professionals are not more imperious to political influence than the impassioned public that bureaucrats are supposed to keep at arm’s length.”); cf. George K. Yin, The Role of Nonpartisan Staff in the Legislative Process, 139 *Tax Notes* 1415, 1417–19 (2013) (describing meaning, and questioning expectations, of “nonpartisan staff” in Congress).