taxnotes®

state

Volume 92, Number 13 ■ June 24, 2019

Tax Return Disclosure Legislation

Reprinted from *Tax Notes State*, June 24, 2019, p. 1109

Tax Return Disclosure Legislation

by Jéanne Rauch-Zender

The New York Legislature approved measures authorizing the state to provide tax return information of elected and high-ranking public officials to specific congressional committees. I asked *Tax Notes State* board members to weigh in on how they perceive these measures.

This article is intended for general information purposes only and does not and is not intended to constitute legal advice. The reader should consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances.

Matthew 6:2

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Mandatory disclosure of tax returns? Put aside the theory, let's talk about how it will work. Let's pretend it's about promoting better information and transparency. I work at a section 501(c)(3) nonprofit organization, which means we must complete IRS Form 990 each year. It has some useful information if you want to scope us out: how we define our mission, our financials, how much we spend on programs versus fundraising, how much they pay me, and whether our board has any conflicts of interest. But all that can be done in two or three pages. The thing is 39 pages long and is a headache to fill out. No one is reading it. For their rankings, the Better Business Bureau pulls 20 tidbits of information out of it, and Charity Navigator and GuideStar must extensively supplement the form with questionnaires because Form 990 doesn't ask the right questions in the right way. I can think of several terrible charities or badly performing organizations, and there's no hint of that on their Form 990. If all 12 parts and schedules A through O serve some noble performance purpose, it's failing at it.

I should add that we put the important information from the Form 990 and our audit into our annual report and post it on our website. When I flip through other organizations' annual reports and see some of this vital information missing, I assume it's because they're hiding bad news. And they usually are! Maybe our attitude should be that if someone is evasive about how they make or spend money, we should assume the worst.

In *National Association for the Advancement of Colored People v. Alabama*,[1] the U.S. Supreme Court unanimously rejected the effort by a segregationist Southern state government to force the NAACP to reveal its donor list. No one can pretend Alabama's efforts were based on promoting good governance or greater transparency for donors. It was about getting a list of targets that could be handed off to bullies and murderers. Anyone on Twitter or Facebook knows that a mob can form around just about anyone. Justine Sacco, PR director at InterActiveCorp, made a stupid joke to her 170 Twitter followers as her plane took off, and turned her phone off. By the time she landed, she had lost her job, many of her friends, and collected thousands of death threats. People who knew nothing about her sent her threatening messages, for fun. Putting people in

[1] 357 U.S. 449 (1958).

the stocks for public humiliation isn't just a relic at Old Williamsburg anymore.

Politicians ought to disclose their tax returns, but it ought to be a voluntary decision on their part to do so. They don't owe it to us. It's not like they have a choice to fill out the things. But, I concede, in return, you can assume that anyone holding back basic information is hiding something terrible and scandalous. Either that, or they're a big fan of Matthew 6:2.

Sensationalism

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Our federal and state tax systems are self-reporting systems. Taxing jurisdictions rely upon individuals and businesses to honestly compute and report taxes due. Checks and balances are contained within our system to monitor compliance and act as a deterrent to knowingly bad behavior, such as deliberate underreporting, fraudulent returns, and tax evasion. The sharing and matching of federal and state tax data, mandatory information filings, and the possibility of audits serve to encourage accurate compliance.

Our tax systems are also those of respect, professionalism and confidentiality. Fundamental to the premise of the Taxpayers Bill of Rights and Uniform Revenue Procedure Acts is that taxpayer returns and other tax information are safeguarded by confidentiality provisions. Disclosure of tax return information outside the need for return review and civil and criminal enforcement is prohibited by statute, subject to penalties, fines, the loss of employment (for public employees), and civil damages. There are exceptions to the rules of confidentiality. These exceptions generally permit disclosure for purposes of official investigations, audits, and information sharing with other federal and state agencies. As a tax practitioner, my firm takes extra steps to ensure confidentiality of tax return information is maintained. We file motions to file returns under seal, carefully redact Social Security numbers, federal employer identification numbers, and officer personal addresses in public filings, and limit email transmission of tax returns without encryption.

The current focus regarding disclosure of elected and other high-ranking public officials' tax return information, under the guise of transparency, has no place in our democratic system, even if limited to specific congressional committees. While certainly titillating to the public (has a charitable deduction been taken for the donation of used underwear?) as well as practitioners (was the proper S corporation election made?), there is no reason to void our mandatory confidentiality laws for elected and other high-ranking officials, and permit a wide net to be cast solely to permit an undefined fishing expedition.

The exceptions to established confidentiality rules fully permit revenue agencies to conduct their professional activities under the constraints of our democratic system. One's quality of character does not depend on the magnitude of a deduction taken for bonus depreciation or the utilization of net loss carryforwards. One's value system is not based on the amount of royalties received or capital gain treatment for family investments. The presence of a charitable deduction does not ensure adherence to American values. And certainly, the amount of alimony paid, and names and ages of dependents, has no place in evaluating one's political leanings — right or left. Where does the line get drawn — at the state level? What about local city and county officials? Your local school board? Water commissioner? Why shouldn't all tax information be available for viewing 24/7 on the web? I am certain that even the best talent in Hollywood could not turn that into a plausible reality show. The recent New York legislation goes well beyond delinquent taxpayer lists that were all the rage a few years back.

The better way to evaluate political candidates is to seek nonpartisan information about the individual, learn about their past promises and actions, gauge where they stand on the issues pertinent to you, register to vote, and then go vote — even if it is raining, cold, you're running late, your kids are sick, and there are long lines at the polls. Let's not resort to sensationalism. We have enough to do — unless, of course, you want to be a talking head on the cable network news explaining how bonus depreciation works.

Giving the Benefit of Law — For Safety's Sake

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In 2015 Hamilton led Texas Republican Gov. Greg Abbott's Strike Force on the Health and Human Services Commission to complete a management analysis of the agency. Before that, Hamilton was the deputy comptroller for the Texas Office of the Comptroller of Public Accounts from 1990 until he retired in 2006. He is also a private consultant, advising on numerous state tax matters.

On May 22 New York lawmakers gave their final approval to a bill that would clear a path for Congress to obtain President Trump's state tax returns, yet another twist in the nasty battle over the president's refusal to release his federal tax returns as every president has done since Gerald Ford.

Despite what the television pundits have been bellowing, New York's new law is not an open invitation to Congress to receive a copy of the president's tax returns by return mail. The legislation would require the commissioner of the New York Department of Taxation and Finance to release the returns to the chairs of the House Ways and Means Committee, the Senate Finance Committee, and the Joint Committee on Taxation for any "specified and legitimate legislative purpose." A written request is required and can be made only after a request for federal returns has been made to the federal Treasury Department.

I suspect a fair amount of attention will be given in the near future to what exactly constitutes "specified and legitimate." It might seem clear, but apparently it's wide open to interpretation: Treasury recently said that it wouldn't honor a congressional subpoena to hand over the president's returns, saying the request lacked a "legitimate legislative purpose" as required by the Internal Revenue Code. The requirement under the New York law is one word more exacting.

Where you stand on this issue depends on where you sit. State Sen. Brad Hoylman (D) from Manhattan — the sponsor of the legislation — said, "It's a matter of New York's prerogative. We have a unique responsibility and role in this constitutional standoff." Republicans have called the legislation a "bill of attainder," which sounds like something out of the musical *Hamilton*, but means an unconstitutional piece of legislation aimed at a single person or group. They believe the law was passed in furtherance of a congressional "fishing expedition."

I am of two minds. I believe the president should release his returns, and as a former tax administrator, I am suspicious of taxpayers who aren't forthcoming despite protestations that they have nothing to hide. On the other hand, as a former administrator, I was taught to protect taxpayer data above all other obligations, and I hate to see a state make an abrupt change in its normal policies of confidentiality for reasons that are — whatever else they may be — inherently partisan.

More to the point, there's an old rule in politics — actually more of a caution than a rule — that you should consider how your opponent will use whatever it is you are about to do when they get the opportunity. Pass a law to get Trump's tax returns now, and Democrats will certainly see the favor returned by Republicans in the future. I don't know how, and I don't know when, but the day will come.

Personally, I'm not worried. Whichever side wants my tax returns can have them for all the good it will do them, but in the end, we should be careful of abruptly abandoning existing laws for any purpose, however merited it may seem at the time. I'm reminded of what Thomas More says in *A Man for All Seasons*, the play by Robert Bolt:

> This country's planted thick with laws from coast to coast — man's laws, not God's — and if you cut them down, d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

Descending Into the Rabbit Hole

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Weaponizing tax returns is a bad idea — full stop — period. The Democratic majority in the New York Legislature had a clear and singular purpose in enacting an exception to the state's taxpayer information confidentiality laws. Their objective was to advance efforts to impeach the President, with the hope of removing him from office or, at least, thwarting his reelection. Whatever one's personal views may be regarding this President, New York's errant adventure in furtherance of political ends erodes the integrity of its tax system.

A good place to start is with first principles. A properly functioning tax system relies upon accurate reporting by taxpayers in the form of tax returns and other filings. A critical feature of an effective tax system is the ability of the government to audit tax returns. Auditing not only enables the state to confirm the accuracy of the information provided, but the very prospect of an audit is a strong incentive for full and honest compliance on the part of taxpayers. Moreover, if during an audit evidence of fraud is discovered, the audit information can, and should, be turned over to the state attorney general for criminal prosecution. If a tax system remains within these boundaries, it deserves the support and confidence of the citizenry.

By its very nature, tax reporting requires the disclosure of private — often highly sensitive — information. So long as confidentiality is respected by government officials, and the information acquired is used for legitimate tax-related purposes, the integrity of the tax system is maintained. If ulterior political motives infect the process, the entire trustworthiness of the system is undermined.

The New York legislation (A7750) is especially egregious. It authorizes the commissioner of the New York Department of Taxation and Finance to release "current or prior year reports or returns" of elected and unelected government officials (and political party chairpersons) upon the mere request of a chairman of one of three designated congressional committees. It requires no prior notice to the taxpayer; no procedure for judicial review (as would be the case if a subpoena were issued for such information); and no evidentiary showing of the basis for the request or the need for such information. To the contrary, the chairman of the congressional committee need only certify that the information is sought for a "legitimate task of the Congress."

Not only is such a sweeping disregard for taxpayer confidentiality problematic in light of the core ethical principles that should underlie a fair system of taxation, but there are also collateral concerns that may have even greater long-term significance.

Increasingly, and not surprisingly, many of America's most promising leaders no longer view government office, elected or appointed, as an attractive opportunity for public service. The prospect of intrusion into their private lives by news agencies, social media, and the confirmation process leave many people, who would otherwise be willing to serve, reluctant to expose themselves to such invasions of privacy. Now New York has posted a further warning:

> "If You Dare Enter Politics or Accept Appointment to Public Office, Your Tax Returns Are No Longer Protected Confidential Information — Proceed at Your Own Risk."

Proponents of New York's "Trust Act" (How's that for a misnomer?) argue that all recent presidents have voluntarily disclosed several years of their tax returns, so what is the big deal about legislating the obligation. The answer is, there is a big difference between what a politician may choose to do as a matter of political expediency, or even because of his or her own view of appropriate transparency, and what the heavy hand of government orders. Moreover, the New York law applies to a broad range of government officials beyond the president.

Sponsors of the legislation argue that federal law permits disclosure of taxpayer information by the IRS to the same committees of Congress.[2]

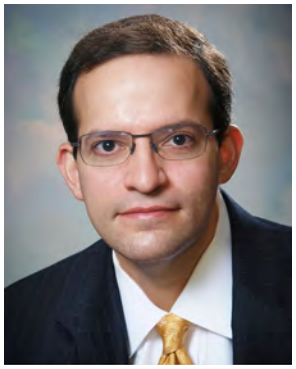
[2] *See* 26 U.S.C. section 6103(f).

Aside from the fact that this federal law prohibits public disclosure of such tax information ("shall be furnished to such committee only when sitting in closed executive session"), any existing risk to the confidentiality of taxpayer information should not be compounded by states further enlarging the scope of congressional authority.

At a time when threats to personal privacy are encroaching on numerous fronts, the public should be wary of state governments using the information they collect from private citizens for purposes unrelated to the original reason such information was collected. For example, should federal and state agencies be permitted to turn over individual Medicare and Medicaid patient information to legislative committees if those patients are government officials? Could such authorization be justified on the grounds that the information is relevant to their physical and mental fitness to serve? Is the fact that recent presidents have voluntarily released their annual medical reports a sufficient justification for making such disclosures mandatory, including for all public officials? How far down the rabbit hole might the New York legislation lead?

As Alice said to the Cheshire Cat: "But I don't want to go among mad people," and the Cat responded: "Oh, you can't help that, we're all mad here."

A.7194-A Misses the Mark on Transparency



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If you witnessed the backslapping and congratulatory language surrounding the passage of A.7194A, you would have thought the New York General Assembly slayed a dragon rampaging its way across the state. Whether they did remains to be seen, but A.7194A stands out as a groundbreaking piece of state legislation in the ongoing investigation of President Trump. At its heart, the legislation authorizes the commissioner of the New York Department of Taxation and Finance to break the stalemate over Trump's federal tax returns by providing Congress with the president's New York tax returns, which, proponents argue, would provide Congress with an equally damning glimpse into the president's financial dealings. This is where we, as citizens, voters, and tax experts need to start asking questions.

Assuming A.7194A is reconciled with the more expansive version of the legislation previously passed by the New York Senate, subsequently signed into law by Gov. Andrew Cuomo (D), and survives a variety of sure-to-come legal challenges, will it be effective? In a word, no. To begin with, the legislation authorizes state tax return disclosure only on request by either the House Ways and Means Committee or Senate Finance Committee. Clearly, Finance Committee Chair Chuck Grassley, R-Iowa, is unlikely to put in such a request with the commissioner. However, given the high drama of potential subpoenas, contempt citations, and litigation surrounding the House's request for the president's federal tax returns, Ways and Means Committee Chair Richard E. Neal, D-Mass., may decide to stick with his present quagmire rather than jumping down to highly uncertain footing at the state level. And, even if Neal did take the New York (and possibly in the near future New Jersey and California) route, would he get what he wants? Likely not. A.7194A requires redaction of any information that would violate state or federal law, or constitute an unwarranted invasion of personal privacy. The legislation calls out Social Security numbers and the like for redaction, but there is so much personal financial data in a tax return that can be used by competitors to harm a person's business interests, and so much of it flows directly from the federal tax return, that mass redaction may be necessary. This would severely limit the value of anything Congress could obtain.

Perhaps more importantly, does A.7194A address the real problem? With all due respect to the New York General Assembly, no. Ostensibly, A.7194A grew out of consternation at Trump's decision to decline to disclose his tax return to the public, breaking with a 40-year tradition among presidential candidates. Purely voluntary, tax return disclosure is grounded in our sense that there is an inherent value to transparency in government. It is based on the premise that a presidential candidate's right to privacy in his or her financial information is outweighed by the public's interest in having sufficient knowledge of a candidate's motivations to cast a well-considered and reasonable vote. A.7194A entirely fails to address these fundamental concerns for the integrity of our democratic institutions, instead focusing on a secret transfer of tax information, which could have been obtained by subpoena, from the state to Congress for the purpose of assisting in investigations of sitting government officials. A better and more intellectually consistent approach would have been to pass a measure to require tax return disclosure in order to be listed on a New York ballot . . . interestingly enough, a bill that died in committee last year.

There can be no denying that A.7194A has been a great vehicle for soundbites and political drama, and will likely drive high-profile litigation after it is ultimately signed into law. In the end, though, there is no reason to expect it to be used, or to be effective if it is, and there is every reason to believe that it misses the mark on the real concern for most voters: transparency in government.

The President's Tax Returns Are His Own Darned Business

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There hasn't been such a kerfuffle over disclosure of confidential tax information since 1993, when President Clinton tried to appoint Zoë Baird as the U.S. attorney general. Much to Clinton's chagrin, however, Baird confessed that she hired illegal immigrants as her chauffeur and nanny, and had not paid Social Security taxes on their wages. This was of personal importance to me because, simultaneously with the president's nomination process, Missouri's newly elected Gov. Mel Carnahan was interviewing me as a candidate for Missouri's director of revenue. You should have seen the look on Carnahan's face when he asked me if I had household employees and I said yes! Fortunately, however, I was dutifully paying taxes for my housekeeper (and still do), so my nomination was able to move forward.

But Carnahan did not ask me for my husband's and my personal federal and state income tax returns, and had he done so, those would have been fightin' words. As director of the Missouri Department of Revenue, part of my job was to protect the confidentiality of all tax returns filed with the department, and the department ensured that all our employees did so, too. In the "Show Me" state, our nickname has never applied to the unauthorized disclosure of otherwise confidential tax information. Here in Missouri, such an action was, and still is, a class D felony,[3] which is consistent with my understanding of federal tax law.[4] During my tenure at the department, none of our distinguished members of Missouri's General Assembly wanted to go anywhere near their opponents' tax return information for fear they'd end up in jail.

Which brings me to my thoughts about President Trump's tax returns, and why House Ways and Means Committee Chair Richard E. Neal, D-Mass., is asking for trouble. It doesn't matter whether you love Trump or despise him — it would shock me to think that any sane individual could possibly disagree that Trump is entitled to the same confidentiality protection regarding income taxes as every other taxpayer in the United States.

Trump does not want to release his tax returns to Congress, particularly because he says he is under audit, and that much is true. According to the Internal Revenue Service Audit Manual, the IRS must, in fact, perform annual audits of every president and vice president — I suppose that is one of the most exciting fringe benefits of holding those offices. But the IRS is bound by confidentiality, too, and unless the IRS finds indictable proof of extremely serious wrongdoing, no one other than Trump and his wife will see and deal with their audit results.

Why should Trump have to release his tax returns if no one else does (including past presidents)? Who could possibly want the IRS to release his or her personal income tax returns to the public or the *Washington Post*, *New York Times*, *Wall Street Journal*, *Tax Notes State*, or your favorite local publication? Just think of the field day federal tax and SALT attorneys across the country would have in analyzing the president's personal income tax information, *and think about how embarrassing such exposure would be if it happened to you*. That is exactly what is at risk. If, at the end of the day, the president loses his right to the confidentiality of his tax returns, the rest of us stand the chance of having our own financial privacy invaded in the same manner. No other U.S. president has been asked to provide to Congress what Neal is demanding from the president's tax records, and Treasury Secretary Steven Mnuchin is right to hold firm in saying no.

As with Missouri's statutes, the federal statutes that protect the confidentiality, privacy, and sanctity of our federal income tax returns are as valid now as they were when they were enacted. Although there are exceptions to the nondisclosure rules, "fishing expeditions" and

[3] Mo. Rev. Stat. section 32.057.

[4] For example, under 26 U.S.C. section 6103, federal tax returns are confidential, and under 26 U.S.C. section 7213, an unauthorized disclosure of federal tax return information is a felony.

"witch hunts" are not on the list. Support for Neal's mandated demand is based on: (1) the conclusions he found in an allegedly highly confidential and secret "draft" 10-page IRS memo leaked by an IRS insider,[5] and (2) recent testimony from the president's formerly trusted legal adviser turned informant. Permitting Congress to nose into any individual's tax returns is like opening Pandora's box, and whoever leaked the memo is probably guilty of a federal felony. The shameful lawyer Michael Cohen is probably also headed for prison — who can trust an attorney who would rat out his or her client?

Mnuchin is refusing to comply with Neal's demands and his subpoenas, based on his assertion that the House Ways and Means Committee has no legitimate legislative purpose to seek the president's returns. Good for the Secretary! Even if the committee arguably has a legitimate legislative purpose for its request, the Treasury secretary is not entitled to decide whether this request is legitimate. The president should be able to defend his rights until the U.S. Supreme Court finally decides the issue.

Finally, speaking of litigation, how much is it going to cost taxpayers if this battle over the president's tax returns goes all the way through the court system? It's a shame that the honorable members of Congress cannot take a page from the book of the honorable members of the Show Me State's General Assembly, and just leave well enough (as well as the privacy of tax returns) alone.

[5] Could this possibly be "Deep Pocket," third cousin of "Deep Throat"?

Tax Return Disclosure Legislation: A Necessary Evil?

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The views expressed here are hers and hers alone and should not be attributed to Mayer Brown or any of its clients.

During these politically supercharged and polarized times, it's hard to have a dispassionate conversation about anything — including taxation. Discussions regarding the propriety of disclosing tax returns of public officials, particularly those of the president, whether to the public generally or merely to congressional oversight committees, have become daily fodder for political pundits and the masses alike. New York's proposed legislation,[6] several iterations of which have passed both the Senate and Assembly, would permit the disclosure of state and city tax returns of all types to the House Ways and Means Committee, the Senate Finance Committee, or the Joint Committee on Taxation of the U.S. Congress, if the chairs of those committees certify in writing that the request is made for a "legitimate task of Congress" and the requesting committee has made a request to the Treasury under IRC section 6103(f). Under the most recent proposed New York legislation, federal tax returns would not be provided, and the state and/or city returns would not be made available to the public.

While a motivation for this legislation may have been the president's flouting of convention by departing from the long-held practice by presidents — starting with President Nixon and continuing without exception until now — of voluntarily disclosing their returns or a return summary, and his challenges of any and all congressional attempts to review his tax returns and finances, the current political context does not diminish the appropriateness of New York state's legislative response to an existing problem highlighted by the president. Legislators would be derelict if they did not attempt to address issues as they arise. The more important question is: Does this legislation put the government on a better "footing" to hold high-ranking public officials' feet to the fire? Perhaps. While the politicization of tax return disclosure may not be the best context for the legislation, that context does not diminish the wisdom of the legislation. It is frankly puzzling why *any* senior-level, policy-making public official should *not* be required to disclose his or her tax returns and provide other financial information as a *prerequisite* to being appointed or placed on a ballot for election. Whether those disclosures should be public or merely subject to a more limited scope of disclosure might reasonably be open to debate. Further, to the extent the president's actions have shined a light on a problem does not mean that the legislation is political, if it will continue to apply equally to *all* similarly situated officials regardless of party affiliation.

It is worthy of note that tax return information has not always been confidential. During the Civil War, for example, personal income tax return information could be viewed by those who asked, and some newspapers published lists of taxpayers along with their reported income. *The New York Times* wrote in 1866 that "the income tax furnishes a key which unlocks every man's strong box" and supported publication of tax return income, writing, "Show every taxpayer's sworn return of income to his nearest neighbors, his most intimate friends, to himself, indeed, in public journals, and you have a security that no laws, no oaths, and no scrutiny, has or can furnish."[7]

While many believe tax return confidentiality is a sacrosanct right, that "right" should be modified when the tax returns are those of high-ranking public officials paid by and (or should be) beholden to the public; if that disclosure would serve a legitimate purpose, such as determining whether the official may have a conflict of interest or be engaged in legally questionable activities. Those seeking election or appointment to high-ranking positions should not only have to

[6] As of this writing, several bills have been passed by both houses of New York's Legislature, including S. 5072, A. 7194, S. 6146, and A. 7750, but none have been sent to the governor.

[7] "The Publication of Incomes," *The New York Times*, July 9, 1866.

undergo federal and state tax audits of their personal and business tax returns, but inasmuch as routine audits are more concerned with the proper reporting of income and not with whether an individual may have violated the public trust, limited disclosure and review by professionals skilled in ferreting out potential issues would also be wise.

No one is forced to seek election or appointment to positions of public trust, and persons seeking or holding those positions are rightfully open to scrutiny. Transparency should be the watchword, and, regardless of political persuasion, legislation furthering such a goal is in the public interest.

The Problem of the 'Quiet' Disclosure

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As a practitioner in this space, and specifically someone who handles New York tax audits for a living, I know how vigilant the New York tax department is about protecting taxpayer information and maintaining taxpayer secrecy. Of course, we all know this is coming from a different political place, but there still is something unusual about such targeted disclosure provisions. Indeed, the bills, as originally drafted, applied to all taxpayers, but amendments were added to limit the scope, so that the disclosures cover only "the president of the United States, vice-president of the United States, [a] member of the United States Congress representing New York state," and other specified high-ranking office holders, along with entities controlled by such individuals.[8]

Even under this limited scope, however, by expanding the disclosure provisions to encompass several groups of persons — that is, the president, vice president, New York congressmen, and certain staff members and other politicos — the legislation seems designed to avoid a potential bill of attainder concern. Article I, section 10 of the U.S. Constitution forbids the states from passing "any Bill of Attainder," which essentially bars the states from passing laws that single out an individual or small group without affording them due process. Some might argue this legislation does just that. As the U.S. Supreme Court explained in *Nixon v. Administrator of General Services*,[9] which also involved a sitting U.S. president, "the Bill of Attainder Clause serves as an important bulwark against tyranny." Sad![10]

But equally as interesting a question to ponder is precisely how such litigation would be initiated. The New York legislation as drafted is fairly simple. Upon written request by certain congressional members or committees, the New York tax commissioner is required to provide copies of any New York tax returns filed by ~~Donald Trump~~ certain political officials, provided the commissioner redacts a copy of a federal tax return (or portion thereof) included with the New York filings; that the requesting congressional body specifies that the request is made under a legitimate legislative purpose (for example, to build a case for impeachment!); that the requesting committee has tried to get the official's federal tax returns; and that they will inspect them in accordance with protections already in existence under federal law for the inspection of a taxpayer's tax return.[11] But what's missing from this? As drafted, there do not appear to be any notice provisions to the taxpayer under investigation. Thus, it appears that a congressional committee can request copies of a taxpayer's New York tax returns without telling the taxpayer, and that the New York tax commissioner must provide the returns to Congress, also without telling the taxpayer. In this scenario, how would an aggrieved taxpayer know whether his or her tax returns have been requested? More directly, how and when would such an affected individual acquire the necessary standing to even bring such a legal action?

Of course, any smart litigator will find a way to address the standing issue. It's likely that, before this can even take effect, some litigation in one form or another will be brought against the commissioner to prohibit him from complying with his responsibilities of this statute. But whatever the case, the lack of any notice provisions in the new law adds another layer to the notion that this provision violates the taxpayer secrecy protections that I know the New York tax department takes seriously.

Also, if the tax returns of one of these elected officials living in Washington have been filed on a nonresident basis, that could signal the beginning of a fun residency audit!

[8] Senate Bill No. 6146 (N.Y. 2019).

[9] 433 U.S. 425 (1977).

[10] Twitter humor, sorry.

[11] Senate Bill No. 6146 (N.Y. 2019).

The Disclosure of Individual Tax Returns: A Historical Overview

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Other Briefs will no doubt deal with disclosing the president's tax returns. I would like to offer a more general historical perspective.

Public access to federal tax return information has been debated since the enactment of the first federal income tax. To fund the Civil War, the Revenue Act of 1862 imposed an income tax on individuals and provided that the public was entitled to see the names of taxpayers and their tax liabilities. The public was notified of this opportunity through newspaper advertisements and posted notices. Presumably, in an era without mass communication, sufficient administrative procedures or machinery, or reliable mail systems, the public posting was a means of notifying taxpayers, first, that they owed taxes; second, of the determination of their taxable income and tax liability; and finally, of the impending arrival of the tax collector.

The Revenue Act of 1864 allowed newspapers to publish the income and tax liabilities of all taxpayers. As public opinion turned against the income tax, Congress prohibited the publication of tax returns in 1870 before ending the income tax altogether a year later.

The Income Tax Act of 1913 provided that tax returns "shall constitute public records and be open to inspection as such: Provided, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." The president, however, did not exercise his authority, allowing progressives in Congress to debate access to income tax returns during subsequent revenue acts. In 1918 the commissioner relented to disclosure advocates and allowed the public to view lists of individual taxpayers who filed returns in a specific district. The publication of this information, however, was prohibited.

The high-water mark in favor of disclosure occurred with the Revenue Act of 1924. Fueled by the Teapot Dome Scandal and that of the IRS, the public disclosure of income tax returns had become a rallying cry for farm-bloc senators, who warned that "secrecy is of the greatest aid to corruption" and urged that "today the price of liberty is not only eternal vigilance but also publicity."

The 1924 act required the disclosure of names, addresses, and tax liabilities (or refunds) to discourage evasion and end improper business methods. The House Ways and Means Committee and the Senate Finance Committee could request the actual returns. Some advocates wanted the entire return to be published. Every federal agency could request on a case-by-case basis the tax returns. The request would be acted on by the Treasury secretary or the IRS commissioner. A few agencies had broader access for investigative purposes.

Even this more limited disclosure was opposed by former Treasury Secretary Andrew W. Mellon and President Calvin Coolidge, who argued that publicity would do nothing to raise revenue, would encourage tax evasion, and serve only as popular fodder for newspapers. *The New York Times* and other newspapers devoted entire pages to publishing the taxes paid by thousands of persons. Enterprising persons published pamphlets containing the names of taxpayers and the amounts they paid. The Supreme Court upheld the right of newspapers to print the lists made public.

The disclosure by newspapers was railed against for the breach of individual privacy, failure to uncover tax evasion, questionable use of the information by the public, and cost of disclosure to the government. In 1926 the law was changed to exclude tax liabilities from public disclosure, requiring only the taxpayers' names and addresses.

As a result of a well-publicized tax evasion scandal and the urging by crusader Sen. Robert M. La Follette Jr., Congress revisited the disclosure requirement in 1934, a time during the Great Depression in which popular resentment against the rich was palpable. Rather than publish

the full tax return, individuals were required to complete a "pink slip" containing their name and address, gross income, deductions, net income, credits, and tax liability. These pink slips were to be made public and justified on the assumption that publicity would deter tax evasion.

Opposition was fierce and immediate. The anti-disclosure group, Sentinels of the Republic, led a large media-savvy taxpayer protest. The congressional debate was colored by the Lindbergh kidnapping and the crime wave that marked the Great Depression. Individuals feared that if their returns were made public, kidnappers, con artists, and other defrauders would mark them as possible victims. Prohibition, it was argued, would encourage revenue-starved bootleggers to turn to ransoming the kidnapped. In response, Congress repealed the pink slip requirement before the law could take effect.

That left the law as it stood before the pink slip movement, and subsequent debate over disclosure was marked by a dizzying sequence of policy flips and twists. And of course, this all occurred at a time when few persons even paid the income tax, but those who did were of great wealth and influence.

The law remained unchanged until, in the aftermath of Watergate, Congress enacted IRC section 6103, no doubt the subject of other Briefs.

Deja Vu With a Vengeance

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How sacrosanct should tax secrecy be? Should there be any limits or exceptions? Are there larger concerns the world sees that those of us in our tax bubble are missing?

In 1978 I represented the New York State Department of Taxation and Finance in objecting to a subpoena the Attorney General's Statewide Organized Crime Task Force served on the department.[12] While the procedural perspective was unique (the department initiated an action against the attorney general who, under the New York Constitution, is the legal representative of the department), the court's adoption of the department's position was quite pronounced. The Court of Appeals (New York's highest court) determined:

> The unusually great store which the Legislature place on the erection and maintenance of this wall of confidentiality is brought home by the nature of its prescription of penalties for any breach by the officers or employees of the department. It was not satisfied to rely on the usual administrative disciplinary devices. In this instance, it not only spelled out vocational punishments such as a fine, suspension or discharge, but included imprisonment for a year and prohibition the holding of nay other public office for five years.
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> . . .
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> Significantly, the exceptions contained within the statute are integral to this dominant purpose ["to facilitate tax enforcement"]. By allowing the limited use of returns in investigations and proceedings dealing with the collection of taxes themselves, or in cases in which the returns themselves are at issue, the statute serves to insure swift enforcement of revenue laws and to prevent other irregularities in the processing of tax collections.

I do not believe anything relevant has changed in the 41 years that have passed since that decision was issued (wow, I was a mere kid); the court's statements seem to be valid today.

One area in tax secrecy that seems to be ripe for change is in situations in which one taxpayer's tax obligations, for example, are directly relevant to another taxpayer's (or party's) liability. While this happens in several instances, the two with which I have dealt the most are: (1) in sales and use tax, when either the buyer or the seller has remitted payment to the state, yet the state nevertheless is seeking a second payment; and (2) when a taxpayer is arguing that the federal Internet Tax Freedom Act prohibits a certain tax imposition. In connection with the former, it seems only right for state revenue agencies to establish a system when the appropriate information can be reviewed by an independent person *in camera*. As to the latter, it seems that a state revenue agency should be required to explain exactly how it has treated traditional businesses that are analogous to newer businesses that provide their services via the internet.

As to the issue of New York helping Democratic members of Congress, my first reaction was, as a tax professional, quite negative — tax information should be used only for tax purposes (although I do acknowledge federal law that may provide an exception that could be relevant in the case of President Trump). But then I aggressively questioned myself (you should see the scars) as to whether I was just caught in a tax professional bubble, as I had accused those who automatically, in a knee-jerk reaction, protested the use of *qui tam* actions to help states collect taxes. But just as in the case of *qui tam* cases, my fully considered conclusion was that the automatic, knee-jerk reaction of my fellow tax professional was right.

[12] 44 N.Y.2d 575 (1978).

Sunscreen Helps to Prevent Burn From Sunshine

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A recent initiative by the New York State Legislature to allow the release of tax returns and supporting schedules in certain limited circumstances raises grave questions about tax transparency overall.

I am a huge believer in transparency of all tax enforcement, administration, and policy-type documents. Having litigated a case against a state agency in pursuit of final administrative rulings for a period of over seven years,[13] I for one can state with certainty that there is a need for more and complete transparency on the part of all taxing authorities. That said, even I will acknowledge that statutory authorization for release of actual tax returns and schedules is going way too far.

Regardless of the reasons for the New York Legislature taking this unprecedented step, disclosure of actual compliance tax returns and schedules is unnecessary, creates a myriad of other potential issues and problems, and is simply bad business in a voluntary tax compliance model used universally here in the United States.

Try this — think of transparency as existing on a continuum: At one end is absolute, total disclosure, no redaction, no secrets, everything is available to see by anyone. At the other end is an absolute lockdown, bunker-type dynamic where no one can see anything about any item or topic on taxation. Needless to say, there are few who would support one extreme or the other. So, the long-standing balancing test of the public's need to know versus the individual's right to privacy kicks in. By New York taking such unprecedented action, the Legislature has put its thumb on the proverbial scale, and moved tax transparency toward the absolute end of the transparency continuum.

To say it bluntly, release of tax returns and schedules in the proposed manner can create myriad problems. Let's put aside personal questions, potential embarrassment, and quite literally an invasion of privacy. Turn instead to what may happen once those types of returns move into the public realm. Think *qui tam* potential based on tax returns being released publicly. Or class action lawsuits based on a position or disclosure made (or not made, for that matter) on a return. How about all the tens of thousands of local tax jurisdictions in the United States that may be interested in sifting through available tax return information, hunting for potential audit or assessment opportunities? And lastly, consider contingent, bounty-hunter-type audit providers, working on a contingent wage for various taxing agencies and authorities.

Wouldn't public release of tax return and schedule information have an impact on these situations, scenarios which have increasingly become more common and problematic in the state and local tax space?

Balancing disclosure with privacy is the hallmark of "sunshine acts," freedom of information requests, open records, public disclosure, etc. After all, the value in tax transparency is in the policy, not confidential taxpayer information, learned. Regardless of the name of the legislative authorization enabling a governmental agency to release otherwise taxpayer-type information, maintaining the privacy of the taxpayer's compliance filings, be it a human or an entity, is paramount to the successful enforcement of taxation in a voluntary compliance business model. Let's keep it that way.

[13] *Department of Revenue v. Mark F. Sommer and Tax Analysts*, No. 2017-SC-0071 (Ky. 2018) (unpublished), *aff'g* No. 2015-CA-1128 (Ky. 2017), *aff'g* No. 13-CI-00029 (Franklin Cir. Ct. Aug. 26, 2014).

To Share Tax Information or Not Is the Question

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Disclosing tax return information has always been a dicey topic. Under the guise of transparency, there have been several proposals by tax advocates over the years to disclose tax information. The focus of these proposals has generally been on the taxes paid by corporate America and the use of tax planning strategies. As a general principle, this type of limited public disclosure does not lead to good tax policy. The New York legislation, however, does not authorize this type of public disclosure of tax information. Setting the political undertones aside for the moment, one could argue the legislation is merely an expansion of existing governmental tax sharing arrangements.

The New York legislation has limited application. Specifically, upon written request of the chair of the House Ways and Means Committee, chair of the Senate Finance Committee, or the chair of the Joint Committee on Taxation, the commissioner shall furnish New York tax return information for certain elected officials including the president, vice president, a member of Congress representing New York, a statewide elected official, as well as any person employed in the executive branch or holding a position that is subject to confirmation by the U.S. Senate.

The return information will only be furnished if the chair requesting the information certifies it is being used for a legitimate task of Congress and a request has been made to the IRS for the federal return information. Included in the information required to be provided if requested is New York tax return information related to entities, for example, corporations, partnerships, and joint ventures, in which one of the enumerated elected officials has an ownership interest. To the extent the information is provided to the committee, the federal tax information reflected on the New York returns must be redacted. In essence, the legislation basically requires the commissioner to cooperate with congressional investigations.

In fact, it could be argued the legislation is rooted in IRC section 6103(f), which provides that the Secretary of the Treasury shall furnish tax return information upon the request of the chair of the Ways and Means Committee, the chair of the Senate Finance Committee and/or the chair of the JCT. There are safeguards in place to prevent public disclosure of the requested information, including requiring review in executive session when the data identifies specific taxpayers.

While tax information sharing arrangements between governmental agencies have not been overly controversial in the past, one must look at this legislation in today's political environment. It is that environment that makes this legislation controversial. The IRC requires tax return information to be provided to Congress upon request. The code expressly permits the inspection of returns by the Ways and Means Committee, the Senate Finance Committee, and the JCT. Compliance with these code provisions may have made this type of state legislation unnecessary.

While this legislation may have been politically motivated, that motivation should not be the driving factor in determining whether it is good or bad tax policy. Rather, the policy implications of the legislation should be analyzed considering the rationale for the existing tax information sharing agreements and whether an expansion or strengthening of those information sharing agreements is needed to obtain compliance.

Trump vs. Congress and (Now) New York

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This question whether Congress can obtain President Trump's personal and business tax returns either under federal law or under a New York statute (in the opinion of this author) is found in IRC section 6103 (a), which reads as follows:

> Returns and return information shall be confidential, and . . . no officer or employee of the United States, no officer or employee of any State, any local law enforcement agency . . . no other person (or officer or employee thereof) who has or had access to returns or return information shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

One of the fundamental tenets of a tax system based on voluntary compliance is that the information reported to the government is confidential. Exceptions to this fundamental right of privacy should be rare, but do exist and that is where the controversy lies. Section 6103(f) authorizes the chairs of the Senate Finance Committee, the House Ways and Means Committee, and the Joint Committee on Taxation to request confidential returns and return information. Any return or return information, which can be associated with or identifies a taxpayer, can be furnished to the Senate or House of Representatives only when sitting in closed executive session unless the taxpayer consents in writing to such disclosure.

The Facts So Far: Congress and the Department of Treasury

On April 3 Ways and Means Committee Chair Richard E. Neal, D-Mass., sent a letter to IRS Commissioner Charles Rettig requesting the individual income tax returns of President Trump and related business entities, administrative files, and audit information related to such returns. On May 6 Treasury Secretary Steven Mnuchin informed Neal that on advice of the Justice Department, he will not release the president's tax returns because the committee lacks a legitimate legislative purpose. On May 10 the chairman sent a subpoena to Mnuchin and Rettig demanding they produce the president's tax returns and related business entities by May 17. Mnuchin rejected the subpoena, setting the stage for a lawsuit to be filed by Neal in federal district court.

At issue is the legislative purpose of the request by the committee. The plain language of IRC section 6103(f) sets forth no substantive limitations on the tax committees' right to obtain tax return information from the IRS. Yet, because the provision can be viewed as a statutory delegation of Congress's investigative and oversight powers to the tax committees, exercise of the authority granted by IRC section 6103(f) arguably is subject to the same legal limitations that generally attach to Congress's use of other compulsory investigative tools. Notably, the inquiry must further a "legislative purpose" and not otherwise breach relevant constitutional rights or privileges, such as a right to privacy.[14]

The Facts So Far: New York State

In the interim, the New York Legislature (realizing that it is uniquely situated to jump into this "tempest in a teapot" and help out their fellow Democrats in Congress) sent a bill to the governor, which opened the door for the chair of Ways and Means to request the president's state tax returns without obstruction.[15] This bill amends several provisions of New York tax law to state that upon written request from the chair of the

[14] *See* David H. Carpenter, Todd Garvey, and Edward C. Liu, *Congressional Access to the President's Federal Tax Returns*, Congressional Research Service (updated May 7).

[15] Assembly Bill A.7194A (and related Bill S. 5072).

Ways and Means Committee, the Finance Committee, or the chair of the Joint Committee on Taxation, the commissioner (of the New York Department of Taxation and Finance) shall furnish any reports or returns filed with the state as specified in the request. The commissioner shall redact any information that would violate federal or state law, or constitute an invasion of privacy. The chair making such request must certify in writing that reports/returns are requested for a specified and legitimate legislative purpose, the requesting committee has made a written request to the secretary of the Treasury for the reports/returns, and that the reports/returns will be inspected and/or submitted to another committee, the House of Representatives, or the Senate in compliance with IRC section 6103(f).

So What Does It All Mean?

In its final form, the bill seems aimed at one person: Trump. Bills of this nature are sometimes referred to as a bill of attainder, or a legislative act that singles out an individual or group for punishment without a trial. The Constitution forbids legislative bills of attainder — in federal law under Article I, section 9, and in state law under Article I, section 10.

The New York statute includes the requirement that the request must state a "specified and legitimate legislative purpose." In his letter of May 10 to the IRS commissioner and secretary of Treasury, Neal stated that the committee needed the president's tax returns (and administrative files about the audits conducted by the IRS of the president's tax returns) so that the committee could evaluate the extent to which the IRS audited and enforced the laws of the United States against the president. The committee wants to be sure the IRS takes all necessary steps when auditing the president and IRS employees. Further, although the Internal Revenue Manual states the president and vice president will be audited every year, this is not codified in the statute. The committee needs the president's tax returns to assist with developing legislation to make annual audits mandatory.

The president insists this demand is simply a political move that has nothing to do with formulation of tax policy. There is some case law to support the president's refusal to hand over the tax returns. In *Kilbourn v. Thompson*, the Supreme Court held that Congress can't use its powers to delve into someone's financial matters unless there is proper legislative purpose.[16] And later (in 1957), the Court stated that all legislative investigations must be related to, and in furtherance of, a legitimate task of the Congress.[17] This question looks like it is headed to the courts.

Presenting a request for Trump's state tax returns to the New York commissioner could undermine Neal's request for the federal files. The state returns, as originally filed and amended, will disclose state adjustments that were required because of federal adjustments (which presumably arose upon audit). The committee could get an idea of how frequently Trump was audited and estimate the size of the federal adjustment. It could be argued that the committee has the information it wanted, and there is no need to disclose the federal returns. In the alternative, the state tax return is not the IRS workpapers, audit procedures, and audit files, which would detail the issues raised (and the issues which were ignored). These records would also discuss issues that were settled with the taxpayer. This information is not included on the state return and is the information Neal would need to evaluate if his intent is to review the thoroughness of the IRS process.

There is other information on the state return that might be of interest. The New York return would show what Trump reported as state taxable income and whether he zeroes out his income with NOL carrybacks or carryforwards. Although this can be perfectly legitimate under both state and federal law, it appears to be of interest regarding profitability of Trump's businesses.

Also, New York individual filers must include certain federal tax forms/schedules with their state returns. This includes Schedule C (trade or business), Schedule D (capital gains/losses), Schedule E (rents and royalties), and IRS Form 4797 (sales of depreciable property) amongst others.[18]

[16] 103 U.S. 168 (1880).

[17] *Watkins v. United States*, 354 U.S. 178 (1957).

[18] *See* Amy Hamilton, "Trump's New York State Return Would Include Federal Tax Data," *Tax Notes*, May 20, 2019, p. 1219.

But there is a question regarding whether Neal will even request the New York tax returns. His argument that his request directed at the Treasury is for a "legitimate legislative purpose" focuses on ensuring the IRS is auditing the president (their boss) as aggressively as they would audit other taxpayers. Questions regarding the audit process (issues raised and the procedures involved in carrying out the audit) are best answered by the IRS. These questions cannot be answered from the state return. If this is Neal's reason for demanding the federal returns, what is his "legitimate legislative purpose" for requesting the state return? Under the New York statute, this is a requirement that must be met. ■