The original documents are located in Box 19, folder "Internal Revenue Service - Privacy of Tax Returns (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

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[Aug. 1974?]

EXECUTIVE ORDER

- - - - -

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

By virtue of the authority vested in me by section 6103 (a) of the Internal Revenue Code of 1954 (68A Stat. 753; 26 U.S.C. 6103 (a)), as amended, and in the interest of protecting, consistent with proper internal management of the Government, the right of taxpayers to privacy and confidentiality regarding their tax affairs, and in the future interest of maintaining the integrity of the self-assessment system of Federal taxation, it is hereby ordered that any return (as defined in § 301.6103 (a)-1 (a) (3) (i) of the Regulations on Procedure and Administration (26 CFR 301)) made by a taxpayer in respect of any tax described in § 301.6103 (a)-1 (a) (2) of such Regulations on Procedure and Administration shall be open to inspection by the President only upon his application signed by him personally. Any such application for inspection shall be addressed to the Secretary of the Treasury and state the name and address of the taxpayer whose return is to be inspected; and state the kind of return or returns which are to be inspected and the taxable period or periods covered by such return or returns, and, if applicable, the kind or nature of any data relating

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to or contained in any such return or returns, which the President is to inspect or which is to be furnished to him.

It is further ordered that the President may in any application for inspection authorized by this Executive Order designate by name an employee or employees of the White House Office who are authorized to make such inspection, or receive any such return or data relating to or contained therein, on behalf of the President, provided that any such employee so designated must be an employee whose employment position is classified under chapter 51 of title 5 at Grade GS-18 or whose annual rate of basic pay equals or exceeds the annual rate of basic pay prescribed by 5 U.S.C. 5316.

THE WHITE HOUSE

GERALD R. FORD LIBRARY

cy has been given to Mr. Timmons

THE WHITE HOUSE
WASHINGTON

Eva:
Early Monday (8/19) get copy of this delivered to Doug & ask him for advice on how I should reply to this promptly.
P.

8-19-74
To: Phil
From: Doug

OK for Timmons, if it's still his judgment that a call is necessary. I have added suggested language as Point "E" on page three of the attached. This gives us time to complete our legal review and time to cover Treasury's "preliminary" legal opinion. Note under separate cover. I have calls in to Timmons and Kordologos to close the circuit, but want you to have a record of the disposition in case they contact you before I reach them.

Doug

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THE WHITE HOUSE

WASHINGTON

August 17, 1974

MEMORANDUM FOR: MR. PHILIP W. BUCHEN

FROM: WILLIAM E. TIMMONS

SUBJECT: Access to Tax Returns

Attached is a telephone request I would like the President to make on Monday.

You will notice I suggest the President pledge to personally authorize in writing the Secretary of Treasury to turn over to the Chief Executive any IRS returns that may be necessary for review.

Do you have any objections to this commitment? Frankly, I thought the current law required personal authorization anyway.

Attachment

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THE WHITE HOUSE

WASHINGTON

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THE WHITE HOUSE

WASHINGTON

August 17, 1974

RECOMMENDED TELEPHONE CALL

TO: Senator Lowell Weicker (R-Conn)

RECOMMENDED BY: William E. Timmons

DATE OF CALL: Monday afternoon, August 19

PURPOSE: To urge Weicker to drop his IRS amendment to the White House Authorization

BACKGROUND:

A. The Weicker amendment provides that no federal tax returns shall be made available for inspection by, nor shall any copy be furnished to, any officer or employee of the Executive Branch other than the President or an officer or employee of the Departments of Treasury or Justice concerned with the tax returns, the payment, collection, or recovery of tax or any offense arising out of the return.

B. White House Authorization legislation passed both the House and Senate. The Senate version was less restrictive and the Administration supported it. The Conference adopted basically the Senate language but rejected a Weicker IRS amendment on grounds it was non-germane in the House.

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C. The House agreed to the Conference Report, but the Senate tabled it on motion by Weicker who continued to press for his IRS amendment. Later the House agreed to Senate amendment with amendment, once again deleting Weicker IRS provision. The issue is now before the Senate for third time and Lowell is insisting on his provision.

D. House leaders are fed up with Weicker and said they would sustain a point of order if Senate insisted on IRS amendment. They also point out that Ways and Means Committee is considering comprehensive legislation in the field; amendment prohibits use of tax returns for statistical studies by Census Bureau; etc.

E. Senator Hugh Scott suggested to us that the President meet briefly with Weicker to urge him not to press his amendment and pledge to personally authorize in writing any IRS tax returns that may be necessary to review.

F. Weicker, however, said a meeting would serve no useful purpose because he will insist on his provision.

TALKING POINTS:

A. Lowell, the White House Authorization is important to me. I know how strongly you feel about correcting abuses in the federal government and particularly among White House staff.

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B. If your IRS amendment carries in the Senate, the whole Authorization will be defeated in the House on a point of order.

C. While I'm not familiar with all the legal and appropriate uses of tax return information -- by the Justice Department, Bureau of the Census, etc. -- I can assure you that if it ever becomes necessary for me to look over an individual's return, for high appointive office for example, I will personally write the Secretary of Treasury requesting the information. None of the White House staff will have that authority.

D. I'd appreciate your dropping your amendment so the White House Authorization can be enacted.

E. In the near future (2-3 weeks) I will be sending to the Congress a comprehensive bill governing all aspects of access to and disclosure of tax payer returns - which will avoid dealing with the total question on a piecemeal basis. The bill will specifically address the question of Presidential access. I also instruct appropriate Executive Branch officials to consult with you in this matter

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THE WHITE HOUSE
WASHINGTON

Eva:
Early Monday (8/19)
get copy of this
delivered to Doug
& ask him for
advice on how I
should reply to this
promptly.

R

8/19 copy hand delivered to Mr. Metz

GERALD R. FORD LIBRARY

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WASHINGTON

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IMPORTANT

8/19/74

DOMESTIC COUNCIL COMMITTEE
ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

For
8/20

Phil -

For your info. I am not satisfied with the scope, depth, or quality of their opinion. Geoff Shepard shares my views. I am asking Jean to elaborate on several points.

Should your time permit, I will appreciate your thoughts.

Doug

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OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

UNITED STATES GOVERNMENT

Memorandum

Department of the Treasury
Washington, D.C.

TO : Geoffrey Shepard
Associate Director
Domestic Council

DATE: August 16, 1974

FROM : Donald L. E. Ritger
Acting General Counsel

SUBJECT: Access by the President to Federal Income Tax Returns of Individuals; Treasury Department Taxpayer Privacy Legislative Proposal

In response to your request, we submit herewith a staff memorandum from Associate Tax Legislative Counsel Collinson to General Counsel Albrecht which analyzes various options for limiting access by the President or officials of the Executive Office to tax returns and information.

The Treasury Department suggests that the Office of the President should consider adopting appropriate rules governing Presidential access to tax returns and information by an Executive Order. Treasury's assessment of the pros and cons of the Executive Order method is set forth in Part III. 2. of the attached memorandum.

Mr. Albrecht concurs.

Attachment

cc: George Trubow, Esq.
Meade Whitaker, Esq.
Dale Collinson, Esq.

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OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

UNITED STATES GOVERNMENT

Memorandum

Department of the Treasury
Washington, D.C.

TO : Richard R. Albrecht
General Counsel

DATE: AUG 17 1974

FROM : Dale S. Collinson DC
Associate Tax Legislative Counsel

SUBJECT: Treasury Department Taxpayer Privacy Legislative Proposal

In connection with the interagency review of Treasury's legislative proposal dealing with disclosures of federal tax returns and return information, you have requested an analysis of various options for limiting further the access of the Office of the President to tax returns. Such options might include (1) denying the President the right to receive any tax returns, (2) limiting access solely to the President personally, (3) requiring any request for tax returns to state the purpose and justification of the request, and (4) authorizing tax officials to refuse to comply with any request they consider improper. Such restrictions could be included in the legislation or could be separately adopted through Executive Order or a declaration of executive policy.

This memorandum first sets forth some preliminary consideration underlying our analysis and then examines the pros and cons of such options and of the procedure for their adoption.

I. Preliminary Considerations

1. Executive power. The longstanding position of the Internal Revenue Service under the present provisions regulating tax return inspection has been that the President has inherent authority to obtain tax returns. However, this has been in the context of a statute that not only does not restrict Presidential access but that authorizes the President, by Executive Order, to permit inspection and disclosure of tax returns.

We have not attempted an exhaustive examination of the question of whether a statutory limitation on Presidential access to tax returns would be an invalid encroachment on inherent power of the Chief Executive to obtain all necessary information regarding the management and operations of executive departments in order to fulfill the responsibilities of his office. You may want to refer to the Justice Department for an opinion on that question. The issue would be avoided if the restrictions on access were adopted by Executive Order or a declaration of executive policy.

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2. Scope of statute. It should be noted that the draft statute regulates access to a broad category of tax information, as well as tax returns. This is accomplished by the definitions, in section 6103(a)(2), of "tax returns" and "tax return information." The statute protects, among other things, information concerning the audit or investigative status of a taxpayer's return and IRS investigative files, as well as individual items of information on the tax return.

3. Presidential use of tax information. Because of its broad scope, the draft statute protects certain kinds of tax information that we believe almost all persons would concede should be available to the President in the performance of his responsibilities as Chief Executive. For example, review of economic policy options (particularly tax policy options) may require examination of effects on the major components of affected industrial sectors presented in a way that would reveal tax information items for particular corporate taxpayers. Advance briefings on major tax administration developments may entail disclosure of information respecting particular taxpayers' tax liability.

On the other hand, substantial controversy exists respecting access of the Office of the President to raw tax returns. We have focused our analysis on options for restricting such access. However, it should be noted that even if specific limitations were placed on the President's right of direct access to tax returns, the draft legislation would provide other methods, albeit limited, for him to obtain returns. Under sections 6103(c)(1), (5) and (6) or section 6103(k), the President could obtain a return with the consent of the taxpayer, for example, a prospective Vice Presidential appointee. However, it would not be possible or practical to obtain a taxpayer's consent in all cases.

4. Recording provisions. With certain exceptions not applicable to the Office of the President, section 6103(m)(4) of the draft statute would require the IRS to maintain a record of all requests for tax information and the response thereto. This record would be available for examination by the Joint Committee on Internal Revenue Taxation and by its Chief of Staff. This ensures legislative review and oversight of the practice of the Office of the President with respect to requests for tax information.

II. Some Pros and Cons of Substantive Restrictions on Access

1. President and the Office of the President denied any access to tax returns.

Pros

--demonstrates maximum commitment to taxpayer privacy.

--provides some assurance against intervention in IRS enforcement activities.

--simple concept easy to administer and to explain.

Cons

--denies access to information which may be needed for legitimate policy and management purposes and effective Executive oversight.

--questionable whether President should have less access to tax administration information than to information relating to the administration of any other agency.

--potentially difficult to reverse should it prove unworkable, regardless of how initially implemented.

2. Access limited to President personally.*

Pros

--demonstrates commitment to taxpayer privacy.

--provides some assurance against intervention in IRS enforcement activities by Presidential assistants.

--simple concept easy to administer and to explain.

Cons

--impractical for President personally to review and analyze tax returns in all cases and for returns always to be transmitted personally to the President and not through chief Presidential assistants.

--limits policy review capabilities and effectiveness of chief Presidential assistants.

--creates potential for unintentional infraction.

*While not entirely clear in the draft legislation, it is intended that requests for tax information must be signed personally by the President. The draft legislation will be revised to clarify this point.

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3. Require requests for tax returns to state the purpose and justification of the request.

Pros

--necessity to justify request enhances probability that interests of taxpayer privacy will be considered and respected.

--provides more adequate written record for review and oversight of actual practice.

Cons

--invites consideration of whether the stated purpose is proper and the justification adequate and raises question regarding the consequences of a negative conclusion.

e.g., raises question whether IRS can refuse improperly substantiated request or whether taxpayers have judicial remedies.

--may impliedly require publication of standards for justifying requests, which may prove difficult to develop or explain.

--ambiguity respecting implications of requirement enhances, rather than reduces, potential for controversy over Presidential access to tax returns.

4. Direct tax officials to refuse to comply with requests they consider improper and require justification of request.

Pros

--gives assurance of "independent" review of consistency with taxpayer privacy.

--makes it possible to specify consequences of finding request improper.

Cons

--inherently inconsistent with the fundamental organizational principle, under which all officers and employees of the Executive Branch are answerable to the President and carry out his policies.

GERALD R. FORD

--raises potential of controversy over relations between the President and tax officials.

e.g., what if an official who refused to comply with a request were fired or transferred?

5. Create a watachdog mechanism to ensure respect for taxpayer privacy by a review, either by the President or by the Domestic Council Committee on Privacy either initially or on request of IRS.

Pros

--demonstrates commitment to taxpayer privacy.

--maintains flexibility in access to tax information.

--keeps review function within the Executive Office of the President and thereby reduces potential for controversy.

Cons

--may be regarded as paper commitment without real teeth or impact.

--may prove unwieldy and introduce undesirable delay where speed essential.

III. Pros and Cons of Methods of Implementing Restrictions

1. Include all access restrictions in statute.

Pros

--maximum expression of commitment to principle of limiting access.

--invites joint consideration of problem with with Congress.

Cons

--raises Executive Power question.

--limits flexibility for the future and for other Administrations that may have different operating requirements.

--makes Congressional action on issue more likely, with potential of unacceptable restrictions.

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2. Adopt Restrictions by Executive Order.

Pros

--avoids Executive Power problem.

--maintains flexibility for the future.

--permits experimentation with different approaches and gradual identification of maximum workable protection for taxpayer privacy.

--can be done immediately, without awaiting legislation.

Cons

--may be regarded as evidencing less commitment to taxpayer privacy.

--may suggest unwillingness to work out rules with Congress.

3. Adopt by statement of executive policy.

Pros

--maintains maximum flexibility, permitting more rapid initiation of policy and frequent review or revision.

--could be used in conjunction with statute or Executive Order as a supplement or clarification.

Cons

--provides less dramatic commitment to taxpayer privacy.

THE WHITE HOUSE
WASHINGTON

8/22

TO: PHIL BUCHEN

FROM: GEOFF SHEPARD

FYI _____

COMMENT _____

Apparently Justice feels quite strongly about Treasury's proposed legislation to restrict access to tax returns.

OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO
Bruce Davie
Stan Ebner/Bob Bedell
Frank Zarb
Frank Reeder
Arnold Strasser
Dave Hulett
George Kundahl
Fitz Thomas
Wilf Rommel/Bill Skidmore
Geoff Shepard
Mr. Trubow
Dale Collinson-Treasury

FROM Jay Brenneman

DATE 8/21/74

- [ ] Take necessary action
- [ ] Approval or signature
- [ ] Comment
- [ ] Prepare reply
- [ ] Discuss with me
- [ ] For your information
- [ ] See remarks below

REMARKS

May I have your comments on the attached by c.o.b. Friday, August 23.

FORD LIBRARY

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

AUG 20 1974

E.P Brennesa

Honorable Roy L. Ash
Director, Office of
Management and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This is in further response to your request for the views of the Department of Justice on the Department of the Treasury's draft bill "To amend the Internal Revenue Code of 1954 to restrict the authority for inspection of returns and the disclosure of information with respect thereto, and for other purposes." The information and views herein supplement my letter of August 15, 1974, and respond to the request received at a meeting at the Office of Management and Budget on August 16, 1974, for specific details and data in support of the difficulties with the draft enumerated in the earlier letter.

Before detailing the specific support data, we wish to reiterate that we believe the provisions of the proposal limiting access to returns or return information and disclosure thereof in a judicial proceeding seriously impair the independent functioning of the Department of Justice. At the very least, we believe that the restrictive sections which read as follows should be deleted:

> However, such return or return information shall be disclosed to such officer or employee only to the extent that the Secretary or his delegate determines that such disclosure would not seriously impair the administration of Federal tax laws. Section 6103(g).
>
> However, such return or return information shall be disclosed in such a proceeding only to the extent that the Secretary or his delegate determines that such disclosures would not seriously impair the administration of Federal tax laws. Section 6103(h) and (i).

Otherwise, the Department would be required to secure approval of a Commissioner or his delegate to obtain evidence relevant to litigation pending or anticipated and also to the use thereof.

The following material repeats the points made in our earlier letter and then lists supporting data.

1. In almost every criminal income tax case, we encounter defenses of loans or gifts from a third party to the taxpayer under investigation. In these situations, it becomes imperative to obtain the third party's tax returns for the years in question to ascertain if the third party had sufficient income to make the loan or gift in question. Similarly, we would be interested in obtaining any gift tax return that may have been filed by the third party. In the situation of an alleged loan, we would also need the third-party's returns to ascertain whether or not he was reporting any interest income relating to the loan. Some examples of instances in which third-party tax returns were utilized during the investigation, in pretrial preparation, or at trial, are:

a. Hill v. United States, 363 F. 2d 176 (C.A. 5, 1966). In this tax case, the defendant received one-third of certain monies diverted from a corporation. A witness for the Government, who also received some of the corporate money, testified for the Government to the effect that he received some of the money from the corporation. The Government introduced into evidence the return of the third-party witness to show that he had reported the money on his return. The Court held that the return was relevant to show that the witness' testimony was not motivated by a fear of prosecution for tax evasion. Said the Court: "It was admissible upon the question of his interest or lack of interest in the outcome of the trial, and thus went to his credibility."

b. United States v. Wilmoth (N.D. W.Va.). Wilmoth was charged with income tax evasion (Section 7201). The net worth plus nondeductible expenditures method of proof was utilized. As part of the expenditures case, Wilmoth was charged with nondeductible legal fees of $500 per month in each of two years. The legal fees in question had been paid to then Governor W. W. Barron. Wilmoth contended that the payments to Governor Barron constituted political contributions collected by him on behalf of Governor Barron and, thus, did not represent nondeductible expenditures. Governor Barron was also under investigation and was uncooperative with Government agents and the grand jury investigating Wilmoth. Reference was made to Barron's tax returns and underlying workpapers, and it was revealed that Barron treated the Wilmoth payments

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as legal fees, thus supporting the Government's theory of the case. Relying on the Barron tax records, Department of Justice attorneys, and ultimately the grand jury, concluded the payments represented nondeductible expenditures (income) to Wilmoth.

Barron and Wilmoth had also engaged in joint investments which resulted in capital gains on a certain stock transaction. Wilmoth's investment in the stock could only be arrived at indirectly by subtracting the basis reported by Barron from the total purchase price. The remainder represented Wilmoth's cost (basis) for net worth computation purposes.

c. United States v. Nicholas Tweel (S.D. Fla.). Occasionally, taxpayers attempt to evade taxes by shifting their income to others. In this case, which is presently pending in the S. C. of Florida, Tweel caused others to report his income on their returns. In cases such as this, it is essential that Department of Justice attorneys have access to the third-party returns in order to evaluate the adequacy of the case against the taxpayer in obtaining an indictment and as evidence in the trial of the case.

d. United States v. Kerner (D.C. Ill.). The evidence introduced during the trial of this case established that in 1966 Otto Kerner received bribes from one Marj Everett in the form of racetrack stock. Kerner maintained that he purchased the stock in 1962. Mrs. Everett's 1966 tax return and tax audit corroborated her testimony that the transaction occurred in 1966 rather than in 1962 as contended by Kerner.

e. Arthur Zezima (D.J. # 5-14-3319, pending). This is a net worth case in which the taxpayer contends he received a $40,000 loan from his cousin and that the alleged loan in part accounts for his unexplained net worth increases during the prosecution years. Of course, the cousin is uncooperative. Reference to the cousin's tax returns reveal that he had insufficient income to have accumulated and made a $40,000 loan to the taxpayer. In a case such as this, it is essential that the Department of Justice have ready access to the returns of third parties.

2. Under Brady v. Maryland, 373 U.S. 83 (1963), the Government is required to furnish a defendant with any exculpatory material in its possession. Yet the proposed statute would preclude this, if contained in third-party tax returns or return information, unless the Commissioner authorized production in accordance with Subsection (h)(4).

a. United States v. Fruehauf Corporation (E.D. Mich.). Third-party return information in the form of private rulings in the Government's possession and favorable to the taxpayer's position was ordered to be disclosed to the defendant under the rationale of Brady v. Maryland, 373 U.S. 83 (1963).

b. George J. Novicki (N.D. Ohio). In a prosecution of a commercial return preparer for violation of 26 U.S.C. 7206(2), the defendant moved for the production of his client's returns for years preceding the prosecution years, citing Brady v. Maryland, supra. The Government was not ordered to produce the returns because the motion was not timely. The clients were required to produce these returns at trial, however, in a successful defense effort to demonstrate that the clients had been claiming false deductions for many years prior to their relation with the defendant.

c. Nicholas J. Tweel (S.D. Fla.). Citing Brady v. Maryland, supra, the defense has moved for third-party returns in a case involving charges of attempted tax evasion. No ruling has yet been made on the motion. The defense claims that the income which the Government attributes to the taxpayer is actually income of third parties which is reported on their returns.

3. Under the existing Presidentially approved regulations, we are specifically entitled to be advised as to the fact of whether members of the jury panel have had any tax controversies, civil or criminal, with the Internal Revenue Service. The proposed bill makes no provision for the furnishing of such information; to the contrary, the provisions relating to third party returns or information would preclude the Department of Justice from obtaining such desirable information in its conduct of litigation.

In the trial of criminal tax cases, it is essential that the attorney for the Department of Justice be able to determine whether a prospective juror has ever been the subject of a criminal or civil tax investigation. A survey reveals that prior to jury selection and if time permits, the great majority of the attorneys in the Tax Division, Criminal Section, make inquiries concerning whether prospective jurors have been involved in IRS tax controversies of any kind. The primary reason for such inquiries is to prevent a prospective juror from airing the details of his particular IRS problem within hearing of the other members of the jury panel. Armed with knowledge that a prospective juror has been involved with IRS, the trial attorney may exercise a peremptory challenge and thereby foreclose the possibility of the juror making statements prejudicial to the Government's case.

A veteran trial attorney related an incident in which a prospective juror stated that the IRS had recently seized his business for nonpayment of taxes. Despite the juror's denials that he had any ill feeling toward IRS, the effect such a statement had on the other jurors is obvious.

There is always the possibility that a prospective juror engaged in a civil or criminal tax controversy with IRS will not reveal this fact during jury selection. In such an event, the juror may be selected and may, in the course of jury deliberations, discuss his case with the other jurors.

Three of the many cases in which the Government used information obtained from IRS in the jury selection process include: United States v. Levy, 326 F. Supp. 1285 (Conn. 1971), aff'd, 449 F. 2d 769 (C.A. 2, 1971); United States v. Coblentz, 453 F. 2d 503 (C.A. 2, 1972), cert. denied, 406 U.S. 918 (1972); United States v. Windham, 489 F. 2d 1284 (C.A. 5, 1974).

As recently as July 15, 1974, the Commissioner of Internal Revenue recognized the need on the part of Department of Justice attorneys for tax information on prospective jurors when he promulgated Commissioner's Delegation Order No. 83 (Rev. 5), 39 C.F.R. 8072 (1974 CCH ¶6780). This order delegates authority to various IRS officials to furnish an affirmative or negative response concerning whether a prospective juror in any federal litigation has been or is being investigated by the Internal Revenue Service.

4. As in criminal cases, so also in civil cases involving omissions of income, particularly those involving fraud penalties, we might be prevented from using a third party's tax return to assist in proving the receipt of income by the taxpayer before the court, even though that payment may be reported on the third party's return.

We have received third-party returns where deductions were claimed for business expenses paid to third parties.

Heckman v. U.S. (D.C. Nebraska; DJ No. 5-45-1293)

U.S. v. Championship Sports Inc. (S.D. N.Y.; D.J. No. 5-51-8906)

U.S. v. Feature Sports Inc. (S.D. N.Y.; D.J. No. 5-51-11191)

5. and 6. In the case of deductions of a given type or claimed by a certain category of taxpayers, e.g., physicians or attorneys or home office deductions, it is frequently appropriate, if not necessary, to examine, and perhaps use, returns of other taxpayers similarly situated in order to determine whether such deductions are proper or are correctly claimed by the category of taxpayers as related to their business or profession.

In civil tax cases, such as those involving the imposition of the accumulated earnings tax, or those involving the reasonableness of deductions for officers' salaries, it is necessary to examine, and sometimes use, tax returns of similar businesses or taxpayers as evidence of the propriety of the liabilities contested in the immediate proceeding.

In reasonable compensation cases, we request returns of competitors to ascertain what salaries they pay.

Miller Box, Inc. v. U.S. (N.D. Ala.)

Palmetto Pump & Irrigation Co. v. U.S. (M.D. Fla.)

O.K. Electric Co. v. U.S. (D.C. Nebraska; D.J. No. 5-45-1337)

Edwins Inc. v. U.S. (W.D. Wisc.)

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In unreasonable accumulations cases, we use third-party returns (531 issue) to show shareholder tax avoided.

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7. Similarly, in cases under Section 482 of the Internal Revenue Code, involving the Commissioner's power to allocate income or deductions between or among commonly controlled organizations, we might be prevented from using the returns of those taxpayer-organizations not parties to the proceeding. Such cases include:

Abel Investment Inc. v. U.S. (D.C. Neb.; D.J. No. 5-45-1309)

U.S. v. Championship Sports, Inc. (S.D. N.Y.)

U.S. V. Feature Sports Inc. (S.D. N.Y.)

8. In all cases which do come within the scope of the narrow restrictions imposed by the bill such as cases involving one side of a purchase and sale transaction, with allocations of the price to covenants not to compete, good will, etc., or in cases involving partnership transactions where we would undoubtedly inspect, and probably use, the returns of the other participants not involved in the litigation, we must still assume the burden of satisfying the Secretary or the Commissioner that our use would not "impair Federal tax administration."

In cases involving covenant not to compete, we use third-party returns.

Moscowitz v. U.S. (E.D. Mo.)

National Service Industries v. U.S. (N.D. Ga.)

Birch v. U.S. (D.C. N.D.)

Wilmington Trust Co., Exec. v. U.S. (Ct. Cls.)

Widow payment cases.

Betty Palmer v. U.S. (W.D. Ark.)

In wrongful levy suit, returns used to impeach plaintiff.

Kabbaby v. U.S. (S.D. Fla.; D.J. No. 5-18-8568)

Lapp v. U.S. (S.D. Fla.; D.J. No. 5-18-8124)

John Young v. U.S. (S.D. Cal.; D.J. No. 5-12-5465)

Other situations:

Individual gift or corporate stock; obtained corporate returns.

Rumley v. U.S. (D.C. Ariz.; D.J. No. 5-8-2579)

Individual loss guaranty of corporate debt; obtained corporate returns.

Modesitt v. U.S. (D.C. Colo.; D.J. No. 5-13-2005)

Reasonable executor fees in issue; obtained executor's individual returns to determine payments made as employee of estate.

Adams v. U.S. (D.C. Kan.; D.J. No. 5-29-2285)

Returns of grantee in fraudulent conveyance action to determine if grantee earned sufficient income to verify purchase price came from savings.

U.S. v. Ethel Anderson (S.D. Ga.; D.J. No. 5-20-397)

To show awareness of officer shareholder of filing requirements of tax returns in late filing penalty case.

T. L. Squared v. U.S. (S.D. Ohio)

Other cases where third-party returns have been used:

Hyde Properties v. Clyde McCoy (W.D. Tenn.; D.J. No. 5-72-447)

Withholding tax returns introduced to show returns were submitted without payment so as to establish knowledge of the corporate officer of the liability and to establish insolvency of the corporation.

Kabbaby v. U.S. (S.D. Fla.; D.J. No. 5-18-8568)

Income tax returns used in this injunction action for impeachment as to the existence of source for money where taxpayer showed negligible amount of income on his return.

U.S. v. Ethel Spray Anderson (S.D. Ga.; D.J. No. 5-20-397)

Tax returns used in a fraudulent conveyance suit to show grantee of property could not have earned sufficient amount of income to support contention that property was purchased with savings.

Rostykus v. Rostykus (W.D. Okla.; D.J. No. 5-60-2341)

Withholding tax returns for a corporation to show responsible officer signed return and was aware of the existence of the liability.

Lapp v. U.S. (S.D. Fla.; D.J. No. 5-18-8124)

Wrongful levy suit. Return used to show wife had no independent source of funds, thus rebutting her contention that her funds were deposited in joint account.

Data Industries (S.D. Tex.; D.J. No. 5-74-1633)

Used corporate tax returns to establish the amount of adjusted gross income reported and to support disallowed claimed deductions.

U.S. v. Park Cities Bank (N.D. Tex.; D.J. No. 5-73-2495)

This is a 3505 case. Withholding tax returns introduced to establish amount of wages paid and tax withheld.

John Young v. U.S. (S.D. Cal.; D.J. No. 5-12-5465)

Wrongful levy suit. Returns used in cross-examination to rebut plaintiff's contention that funds in question were the fruits of his business.

G.M. Leasing Corp. v. U.S. (Utah; D.J. No. 5-77-827)

Return used to show it was improperly executed and thus support the contention that deductions should have been disallowed.

U.S. v. Biddle (S.D. Fla.; D.J. 5-18-8251)

Prior returns introduced into evidence to establish projection of income for years for which no return was filed.

U.S. v. Reel (S.D. Fla.; D.J. No. 5-18-8218)

Withholding tax returns to establish that taxpayer was the responsible officer and liable for the taxes.

In re Sam Senter Farms (S.D. Fla.; D.J. No. 5-18-8180)

Bankrupt's tax returns will be used to compare with trustee's returns so as to assist in establishing the impropriety of certain deductions.

U.S. v. Theodore (S. Car.; D.J. No. 5-67-1222)

Returns prepared by a tax preparer outside of the district to show need of tax preparer's records for clients outside the district.

U.S. v. Linn (S.D. Fla.; D.J. No. 5-18-8513)

Returns of the taxpayer introduced in summons cases to show that respondent held himself out as an accountant rather than as a lawyer.

Jackson v. Wise (Utah; D.J. No. 5-77-807)

Returns introduced in a tort suit to establish that tax preparer-plaintiff had prepared false returns.

United States v. Maurice Krieger (E.D. Pa.; D.J. No. 5-63-598)

Collection action: Corporate return to prove defendant was the sole stockholder who received assets upon dissolution.

U.S. v. J. Donald Schmidt (M.D. Pa.; D.J. No. 5-63-546)

Summons case: Individual return - Accountant questioned concerning specific items and as to whether they were filled in at direction of taxpayer.

U.S. v. Norman Davis (E.D. Mich.; D.J. No. 5-37-2691)

Summons - Attorney for taxpayer questioned about specific items on the return.

Erwin M. Swam v. Philpott (S.D. Ill.; D.J. No. 5-25-745)

Tort action - Taxpayer cross-examined about specific items on his returns.

U.S. v. Gaines Williamson (E.D. Ky.; D.J. No. 5-30-460)

Collection action - returns used to prove taxpayer's signature.

Commonwealth Development Ass'n of Pa. v. U.S. (M.D. Pa.; D.J. No. 5-63-597)

Injunction proceeding - returns were available for purpose of establishing corporate personnel who sought exempt status for corporation.

U.S. v. John C. Boals (W.D. Mo.; D.J. No. 5-54-1035)

Summons - attorney and accountant questioned about specific items on the return.

U.S. v. Duffy (M.D. Pa.; D.J. No. 5-63-579)

Collection action - defendant cross-examined as to specific deductions.

U.S. v. Terzian (W.D. Ky.; D.J. No. 5-53-1563)

Fraudulent conveyance corporate and individual returns to establish taxpayer's financial status at time of transfer.

U.S. v. Rotella (N.D. N.Y.; D.J. No. 5-50-2584)

Fraudulent conveyance - returns necessary to support fraudulent conveyance theory.

U.S. v. Abronzino (N.D. N.Y.; D. J. No. 5-50-2636)

Fraudulent conveyance to establish financial status of taxpayer at time of transfer.

U.S. v. St. Mary (E.D. Pa.; D.J. No. 5-62-3113)

Fraudulent conveyance - cross-examination of defendant as to financial status.

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U.S. v. Merrell (N.D. N.Y.; D.J. No. 5-50-2589)

Summons action - attorney questioned about specific items on the return.

John P. Clark v. IRS (E.D. Pa.; D.J. No. 5-62-3712)

Injunction action - returns were requested for purpose of cross-examination during discovery proceedings.

The foregoing information is not all inclusive and more examples could be obtained by delving further into the files. It is believed, however, that the included information illustrates the problems and points convincingly to the need for changes in the draft proposal.

Sincerely,

W. Vincent Rakestraw
Assistant Attorney General

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August 24, 1974

Vice-President Rockefeller

It is perhaps too much to expect any President to appoint a truly great man as his Vice-President. The chief executive has problems enough without inviting

More security at IRS

Of all the unpleasant incidents revealed by the Watergate investigations, none was nastier than the systematic attempt by President Nixon and his aides to use the Internal Revenue Service to harass their "enemies." Now that some of the dust has settled,

checking. But all these functions should be performed with discretion and with respect for the taxpayer's privacy. To insure this, the laws governing access to tax information should be tightened.

The purpose of the IRS is to collect taxes, efficiently and fairly. The law must leave no opportunity to convert it into a secret police force.

A limited experiment

Two natural gas pipeline companies, El Paso and Texas Eastern, want to build two plants to convert coal into synthetic natural gas on the New Mexico

DRAFT:RRAlbrecht:jsl 8/26/74

EXECUTIVE ORDER

- - - - - -

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

In order to preserve the integrity of the voluntary income tax collection system and to assure to taxpayers the confidential treatment of information on their tax returns, and by virtue of the authority vested in me as Chief Executive, it is hereby ordered that any return made by a taxpayer in respect of any tax under the Internal Revenue Code of 1954 shall be open to inspection by employees of the Executive Office of the President only within the following limitations and pursuant to the following procedures:

(a) Such returns shall be open to inspection by employees of the Executive Office of the President only upon written request signed personally by the President, addressed to the Secretary of the Treasury or his delegate, specifying the name and address of the taxpayer whose return is to be inspected and the kind of return or returns and taxable period or periods for which the inspection is requested;

(b) All returns requested pursuant to paragraph (a) shall be delivered or opened for inspection only to the President personally or to such employee or employees of the Executive Office of the President as have been identified by name in the request for such returns.

The White House

August _____, 1974

8/27/

THE WHITE HOUSE
WASHINGTON

Ed Schmoltz of Treas.
Trade-off of
Treas bw enforcement
agency access to
DOJ files
Task forces re
organized crime

Sil borman sending memo

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OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

August 27, 1974

MEMORANDUM FOR: Philip Buchen
Counsel to the President

FROM: Laurence H. Silberman LHS
Deputy Attorney General

SUBJECT: Proposed legislation to amend the Internal Revenue Code provisions governing inspection and disclosure of tax returns and tax return information

The Internal Revenue Service has prepared and submitted to OMB for clearance a draft legislative proposal to amend Section 6103 and related sections of the Internal Revenue Code dealing with disclosure and use of Federal tax returns. This proposed legislation would replace the current system of inspection of tax returns and use of return information only upon order of the President and under IRS regulations based on his Executive Orders. The Department of Justice is deeply concerned about the impact of this proposed legislation, particularly with regard to our responsibility to enforce the criminal laws.

The draft legislation is presumably an outgrowth of proposed privacy initiative #6 considered at the meeting of the Domestic Council Committee on the Right of Privacy last July 10th. The decision paper for initiative #6 considered at that meeting refers generally to "new initiatives that further assure the security and confidentiality of taxpayer data furnished to the Internal Revenue Service." The paper also refers specifically to "information disclosure practices pertaining to such agencies as the Renegotiation Board, Bureau of the Census and Department of Agriculture." Nowhere does the paper mention that a fellow law enforcement agency such as the Department of Justice is to be affected by any new legislation.

In light of this background, we were alarmed to discover that the proposed IRS draft would supersede and change the direction of the long-standing and thoroughly-considered procedures spelled out in detail under 26 CFR 301.6103.

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We bring this matter to your attention because we found, in discussions with the IRS, that the Service is adamant on two matters:

(1) The IRS views as "non-negotiable" a statutory provision on access to IRS returns, as opposed to access according to IRS regulations based on Presidential Executive Orders.

(2) The Service demands that final authority rest with the Secretary of the Treasury or his designate, (the Commissioner of the IRS) if a conflict arises with another Executive Department concerning access to tax returns or return information.

Virtually all of the recently publicized abuses of tax information involved violations of existing law which could be prosecuted under the existing statutory scheme. As a policy matter, it seems to us highly cumbersome to approach this matter through further legislative enactments. In the case of abuse of tax returns by government agencies other than the Treasury Department, it seems to us that a revision of current Executive Orders would be a more appropriate way to attack the problem.

In our judgment, the IRS proposal would severely inhibit the Attorney General in the performance of his statutory responsibilities and run a severe risk of impairing the efforts of Federal agencies against organized crime.

We are particularly dubious about the concept of removing from the President of the United States and vesting in one subordinate Department final authority to resolve conflicts with other Executive Departments and Agencies as to questions of need for and access to income tax return information.

Finally, it strikes us as most inappropriate that the approach taken by the Treasury with regard to information in the files of the IRS is directly contrary to the position taken by Treasury with this Department with respect to Treasury's need for access to law enforcement and information contained in the files of Justice. We have been very sympathetic to the stated needs of Treasury Department units, such as IRS, A,T&F and the like, for information contained in the files of this Department. This Department has a similar need for information contained in IRS files. Tax returns and return information are often essential in the prosecution of non-tax cases, particularly those relating to "white collar crimes"

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and such crimes as extortion, loan-sharking and racketeering.

The proposed legislation would significantly impair the ability of the FBI, the Criminal Division, and other Justice Department components in accomplishing our statutory responsibilities to enforce the criminal law. Specifically, our major problems with the bill in non-tax areas are as follows:

(1) The Treasury Secretary would be permitted to obstruct or otherwise frustrate the Department of Justice in the enforcement of the criminal law.

The legislation proposed would enable IRS to deny access to return information when, in its own judgment, disclosure of that information would "seriously impair the administration of Federal tax laws." It therefore explicitly allows IRS to subordinate the legitimate and statutory law enforcement interests and responsibilities of the Attorney General to its own perceived "needs."

(2) The proposed legislation would likely permit a taxpayer to challenge in Court the access of another Department or Agency to his return or return information.

Under the present regulations, another Department's request for access to income tax data is resolved within the Executive Branch. Although the proposed legislation contains no provision expressly permitting judicial review, the substantive criteria set forth with respect to access to and use of return information create a serious danger that Courts may engraft upon the law both judicial review and judicial remedies. For example, should a taxpayer learn of a Justice Department request for his tax return -- perhaps through an attempt to obtain his consent -- he might seek to intervene in the courts. Clearly, the prospect of a taxpayer intervening with respect to the decision whether the IRS should turn over his tax returns to the Department of Justice would severely impair our criminal investigations. Moreover, if the Courts determine that judicial review is available to an aggrieved taxpayer, they might fashion a requirement of notice to him whenever the IRS determines to grant access to his tax returns, or conceivably even at the point when a request for access is made.

(3) The substantive standards set forth in the proposed legislation with respect to access to third-party returns are too restrictive.

Under the draft bill, such returns would have to have "a direct

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bearing on the outcome of the proceedings" because of a "direct transactional relationship" or "successor in interest" relationship. However, the returns might be needed in other areas, such as to impeach the credibility of a witness, and their availability or unavailability could be decisive in particular cases.

(4) The use in prosecutions of return information only to the extent that the information could not "readily be obtained" elsewhere imposes severe evidentiary problems.

Under the proposed legislation, a prosecutor would in effect be required to "prove a negative" -- that is, that the information was not already obtainable from another source. Moreover, to the extent a return contains an admission of a fact by the taxpayer, the return might constitute "better evidence" than the "other source." The proposed bill and our discussion with IRS have disclosed no good reason why there should be an inhibition against cumulative evidence.

(5) The disclosure provisions with respect to Presidential appointees and other Federal Government appointees are inadequate to permit proper screening of high level appointees in terms of possible conflicts of interest.

This difficulty could be resolved by permitting, as under current procedures, access to additional return information if information detrimental to the potential appointee is uncovered in connection with materials disclosed under the draft as it currently stands.

The Justice Department has already submitted to OMB our detailed views as to the impact of the IRS legislation in tax cases. Copies of our letters to Mr. Ash in this regard are attached for your information.

Attachments

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

AUG 20 1974

Honorable Roy L. Ash
Director, Office of
Management and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This is in further response to your request for the views of the Department of Justice on the Department of the Treasury's draft bill "To amend the Internal Revenue Code of 1954 to restrict the authority for inspection of returns and the disclosure of information with respect thereto, and for other purposes." The information and views herein supplement my letter of August 15, 1974, and respond to the request received at a meeting at the Office of Management and Budget on August 16, 1974, for specific details and data in support of the difficulties with the draft enumerated in the earlier letter.

Before detailing the specific support data, we wish to reiterate that we believe the provisions of the proposal limiting access to returns or return information and disclosure thereof in a judicial proceeding seriously impair the independent functioning of the Department of Justice. At the very least, we believe that the restrictive sections which read as follows should be deleted:

> However, such return or return information shall be disclosed to such officer or employee only to the extent that the Secretary or his delegate determines that such disclosure would not seriously impair the administration of Federal tax laws. Section 6103(g).
>
> However, such return or return information shall be disclosed in such a proceeding only to the extent that the Secretary or his delegate determines that such disclosures would not seriously impair the administration of Federal tax laws. Section 6103(h) and (i).

Otherwise, the Department would be required to secure approval of a Commissioner or his delegate to obtain evidence relevant to litigation pending or anticipated and also to the use thereof.

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The following material repeats the points made in our earlier letter and then lists supporting data.

1. In almost every criminal income tax case, we encounter defenses of loans or gifts from a third party to the taxpayer under investigation. In these situations, it becomes imperative to obtain the third party's tax returns for the years in question to ascertain if the third party had sufficient income to make the loan or gift in question. Similarly, we would be interested in obtaining any gift tax return that may have been filed by the third party. In the situation of an alleged loan, we would also need the third-party's returns to ascertain whether or not he was reporting any interest income relating to the loan. Some examples of instances in which third-party tax returns were utilized during the investigation, in pretrial preparation, or at trial, are:

a. Hill v. United States, 363 F. 2d 176 (C.A. 5, 1966). In this tax case, the defendant received one-third of certain monies diverted from a corporation. A witness for the Government, who also received some of the corporate money, testified for the Government to the effect that he received some of the money from the corporation. The Government introduced into evidence the return of the third-party witness to show that he had reported the money on his return. The Court held that the return was relevant to show that the witness' testimony was not motivated by a fear of prosecution for tax evasion. Said the Court: "It was admissible upon the question of his interest or lack of interest in the outcome of the trial, and thus went to his credibility."

b. United States v. Wilmoth (N.D. W.Va.). Wilmoth was charged with income tax evasion (Section 7201). The net worth plus nondeductible expenditures method of proof was utilized. As part of the expenditures case, Wilmoth was charged with nondeductible legal fees of $500 per month in each of two years. The legal fees in question had been paid to then Governor W. W. Barron. Wilmoth contended that the payments to Governor Barron constituted political contributions collected by him on behalf of Governor Barron and, thus, did not represent nondeductible expenditures. Governor Barron was also under investigation and was uncooperative with Government agents and the grand jury investigating Wilmoth. Reference was made to Barron's tax returns and underlying workpapers, and it was revealed that Barron treated the Wilmoth payments

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as legal fees, thus supporting the Government's theory of the case. Relying on the Barron tax records, Department of Justice attorneys, and ultimately the grand jury, concluded the payments represented nondeductible expenditures (income) to Wilmoth.

Barron and Wilmoth had also engaged in joint investments which resulted in capital gains on a certain stock transaction. Wilmoth's investment in the stock could only be arrived at indirectly by subtracting the basis reported by Barron from the total purchase price. The remainder represented Wilmoth's cost (basis) for net worth computation purposes.

c. United States v. Nicholas Tweel (S.D. Fla.). Occasionally, taxpayers attempt to evade taxes by shifting their income to others. In this case, which is presently pending in the S. D. of Florida, Tweel caused others to report his income on their returns. In cases such as this, it is essential that Department of Justice attorneys have access to the third-party returns in order to evaluate the adequacy of the case against the taxpayer in obtaining an indictment and as evidence in the trial of the case.

d. United States v. Kerner (D.C. Ill.). The evidence introduced during the trial of this case established that in 1966 Otto Kerner received bribes from one Marj Everett in the form of racetrack stock. Kerner maintained that he purchased the stock in 1962. Mrs. Everett's 1966 tax return and tax audit corroborated her testimony that the transaction occurred in 1966 rather than in 1962 as contended by Kerner.

e. Arthur Zezima (D.J. # 5-14-3319, pending). This is a net worth case in which the taxpayer contends he received a $40,000 loan from his cousin and that the alleged loan in part accounts for his unexplained net worth increases during the prosecution years. Of course, the cousin is uncooperative. Reference to the cousin's tax returns reveal that he had insufficient income to have accumulated and made a $40,000 loan to the taxpayer. In a case such as this, it is essential that the Department of Justice have ready access to the returns of third parties.

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2. Under Brady v. Maryland, 373 U.S. 83 (1963), the Government is required to furnish a defendant with any exculpatory material in its possession. Yet the proposed statute would preclude this, if contained in third-party tax returns or return information, unless the Commissioner authorized production in accordance with Subsection (h)(4).

a. United States v. Fruehauf Corporation (E.D. Mich.). Third-party return information in the form of private rulings in the Government's possession and favorable to the taxpayer's position was ordered to be disclosed to the defendant under the rationale of Brady v. Maryland, 373 U.S. 83 (1963).

b. George J. Novicki (N.D. Ohio). In a prosecution of a commercial return preparer for violation of 26 U.S.C. 7206(2), the defendant moved for the production of his client's returns for years preceding the prosecution years, citing Brady v. Maryland, supra. The Government was not ordered to produce the returns because the motion was not timely. The clients were required to produce these returns at trial, however, in a successful defense effort to demonstrate that the clients had been claiming false deductions for many years prior to their relation with the defendant.

c. Nicholas J. Tweel (S.D. Fla.). Citing Brady v. Maryland, supra, the defense has moved for third-party returns in a case involving charges of attempted tax evasion. No ruling has yet been made on the motion. The defense claims that the income which the Government attributes to the taxpayer is actually income of third parties which is reported on their returns.

3. Under the existing Presidentially approved regulations, we are specifically entitled to be advised as to the fact of whether members of the jury panel have had any tax controversies, civil or criminal, with the Internal Revenue Service. The proposed bill makes no provision for the furnishing of such information; to the contrary, the provisions relating to third party returns or information would preclude the Department of Justice from obtaining such desirable information in its conduct of litigation.

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In the trial of criminal tax cases, it is essential that the attorney for the Department of Justice be able to determine whether a prospective juror has ever been the subject of a criminal or civil tax investigation. A survey reveals that prior to jury selection and if time permits, the great majority of the attorneys in the Tax Division, Criminal Section, make inquiries concerning whether prospective jurors have been involved in IRS tax controversies of any kind. The primary reason for such inquiries is to prevent a prospective juror from airing the details of his particular IRS problem within hearing of the other members of the jury panel. Armed with knowledge that a prospective juror has been involved with IRS, the trial attorney may exercise a peremptory challenge and thereby foreclose the possibility of the juror making statements prejudicial to the Government's case.

A veteran trial attorney related an incident in which a prospective juror stated that the IRS had recently seized his business for nonpayment of taxes. Despite the juror's denials that he had any ill feeling toward IRS, the effect such a statement had on the other jurors is obvious.

There is always the possibility that a prospective juror engaged in a civil or criminal tax controversy with IRS will not reveal this fact during jury selection. In such an event, the juror may be selected and may, in the course of jury deliberations, discuss his case with the other jurors.

Three of the many cases in which the Government used information obtained from IRS in the jury selection process include: United States v. Levy, 326 F. Supp. 1285 (Conn. 1971), aff'd, 449 F. 2d 769 (C.A. 2, 1971); United States v. Coblentz, 453 F. 2d 503 (C.A. 2, 1972), cert. denied, 406 U.S. 918 (1972); United States v. Windham, 489 F. 2d 1284 (C.A. 5, 1974).

As recently as July 15, 1974, the Commissioner of Internal Revenue recognized the need on the part of Department of Justice attorneys for tax information on prospective jurors when he promulgated Commissioner's Delegation Order No. 83 (Rev. 5), 39 C.F.R. 8072 (1974 CCH ¶6780). This order delegates authority to various IRS officials to furnish an affirmative or negative response concerning whether a prospective juror in any federal litigation has been or is being investigated by the Internal Revenue Service.

4. As in criminal cases, so also in civil cases involving omissions of income, particularly those involving fraud penalties, we might be prevented from using a third party tax return to assist in proving the receipt of income by the taxpayer before the court, even though that payment may be reported on the third party's return.

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We have received third-party returns where deductions were claimed for business expenses paid to third parties.

Heckman v. U.S. (D.C. Nebraska; DJ No. 5-45-1293)

U.S. v. Championship Sports Inc. (S.D. N.Y.; D.J. No. 5-51-8906)

U.S. v. Feature Sports Inc. (S.D. N.Y.; D.J. No. 5-51-11191)

5. and 6. In the case of deductions of a given type or claimed by a certain category of taxpayers, e.g., physicians or attorneys or home office deductions, it is frequently appropriate, if not necessary, to examine, and perhaps use, returns of other taxpayers similarly situated in order to determine whether such deductions are proper or are correctly claimed by the category of taxpayers as related to their business or profession.

In civil tax cases, such as those involving the imposition of the accumulated earnings tax, or those involving the reasonableness of deductions for officers' salaries, it is necessary to examine, and sometimes use, tax returns of similar businesses or taxpayers as evidence of the propriety of the liabilities contested in the immediate proceeding.

In reasonable compensation cases, we request returns of competitors to ascertain what salaries they pay.

Miller Box, Inc. v. U.S. (N.D. Ala.)

Palmetto Pump & Irrigation Co. v. U.S. (M.D. Fla.)

O.K. Electric Co. v. U.S. (D.C. Nebraska; D.J. No. 5-45-1337)

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Birch v. U.S. (D.C. N.D.)

Wilmington Trust Co., Exec. v. U.S. (Ct. Cls.)

Widow payment cases.

Betty Palmer v. U.S. (W.D. Ark.)

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In wrongful levy suit, returns used to impeach plaintiff.

Kabbaby v. U.S. (S.D. Fla.; D.J. No. 5-18-8568)

Lapp v. U.S. (S.D. Fla.; D.J. No. 5-18-8124)

John Young v. U.S. (S.D. Cal.; D.J. No. 5-12-5465)

Other situations:

Individual gift or corporate stock; obtained corporate returns.

Rumley v. U.S. (D.C. Ariz.; D.J. No. 5-8-2579)

Individual loss guaranty of corporate debt; obtained corporate returns.

Modesitt v. U.S. (D.C. Colo.; D.J. No. 5-13-2005)

Reasonable executor fees in issue; obtained executor's individual returns to determine payments made as employee of estate.

Adams v. U.S. (D.C. Kan.; D.J. No. 5-29-2285)

Returns of grantee in fraudulent conveyance action to determine if grantee earned sufficient income to verify purchase price came from savings.

U.S. v. Ethel Anderson (S.D. Ga.; D.J. No. 5-20-397)

To show awareness of officer shareholder of filing requirements of tax returns in late filing penalty case.

T. L. Squared v. U.S. (S.D. Ohio)

Other cases where third-party returns have been used:

Hyde Properties v. Clyde McCoy (W.D. Tenn.; D.J. No. 5-72-447)

Withholding tax returns introduced to show returns were submitted without payment so as to establish knowledge of the corporate officer of the liability and to establish insolvency of the corporation.

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Kabbaby v. U.S. (S.D. Fla.; D.J. No. 5-18-8568)

Income tax returns used in this injunction action for impeachment as to the existence of source for money where taxpayer showed negligible amount of income on his return.

U.S. v. Ethel Spray Anderson (S.D. Ga.; D.J. No. 5-20-397)

Tax returns used in a fraudulent conveyance suit to show grantee of property could not have earned sufficient amount of income to support contention that property was purchased with savings.

Rostykus v. Rostykus (W.D. Okla.; D.J. No. 5-60-2341)

Withholding tax returns for a corporation to show responsible officer signed return and was aware of the existence of the liability.

Lapp v. U.S. (S.D. Fla.; D.J. No. 5-18-8124)

Wrongful levy suit. Return used to show wife had no independent source of funds, thus rebutting her contention that her funds were deposited in joint account.

Data Industries (S.D. Tex.; D.J. No. 5-74-1683)

Used corporate tax returns to establish the amount of adjusted gross income reported and to support disallowed claimed deductions.

U.S. v. Park Cities Bank (N.D. Tex.; D.J. No. 5-73-2495)

This is a 3505 case. Withholding tax returns introduced to establish amount of wages paid and tax withheld.

John Young v. U.S. (S.D. Cal.; D.J. No. 5-12-5465)

Wrongful levy suit. Returns used in cross-examination to rebut plaintiff's contention that funds in question were the fruits of his business.

G.M. Leasing Corp. v. U.S. (Utah; D.J. No. 5-77-827)

Return used to show it was improperly executed and thus support the contention that deductions should have been disallowed.

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U.S. v. Biddle (S.D. Fla.; D.J. 5-18-8251)

Prior returns introduced into evidence to establish projection of income for years for which no return was filed.

U.S. v. Reel (S.D. Fla.; D.J. No. 5-18-8218)

Withholding tax returns to establish that taxpayer was the responsible officer and liable for the taxes.

In re Sam Senter Farms (S.D. Fla.; D.J. No. 5-18-8180)

Bankrupt's tax returns will be used to compare with trustee's returns so as to assist in establishing the impropriety of certain deductions.

U.S. v. Theodore (S. Car.; D.J. No. 5-67-1222)

Returns prepared by a tax preparer outside of the district to show need of tax preparer's records for clients outside the district.

U.S. v. Linn (S.D. Fla.; D.J. No. 5-18-8513)

Returns of the taxpayer introduced in summons cases to show that respondent held himself out as an accountant rather than as a lawyer.

Jackson v. Wise (Utah; D.J. No. 5-77-807)

Returns introduced in a tort suit to establish that tax preparer-plaintiff had prepared false returns.

United States v. Maurice Krieger (E.D. Pa.; D.J. No. 5-63-598)

Collection action: Corporate return to prove defendant was the sole stockholder who received assets upon dissolution.

U.S. v. J. Donald Schmidt (M.D. Pa.; D.J. No. 5-63-546)

Summons case: Individual return - Accountant questioned concerning specific items and as to whether they were filled in at direction of taxpayer.

U.S. v. Norman Davis (E.D. Mich.; D.J. No. 5-37-2691)

Summons - Attorney for taxpayer questioned about specific items on the return.

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Erwin M. Swam v. Philpott (S.D. Ill.; D.J. No. 5-25-745)

Tort action - Taxpayer cross-examined about specific items on his returns.

U.S. v. Gaines Williamson (E.D. Ky.; D.J. No. 5-30-460)

Collection action - returns used to prove taxpayer's signature.

Commonwealth Development Ass'n of Pa. v. U.S. (M.D. Pa.; D.J. No. 5-63-597)

Injunction proceeding - returns were available for purpose of establishing corporate personnel who sought exempt status for corporation.

U.S. v. John C. Boals (W.D. Mo.; D.J. No. 5-54-1035)

Summons - attorney and accountant questioned about specific items on the return.

U.S. v. Duffy (M.D. Pa.; D.J. No. 5-63-579)

Collection action - defendant cross-examined as to specific deductions.

U.S. v. Terzian (W.D. Ky.; D.J. No. 5-53-1563)

Fraudulent conveyance corporate and individual returns to establish taxpayer's financial status at time of transfer.

U.S. v. Rotella (N.D. N.Y.; D.J. No. 5-50-2584)

Fraudulent conveyance - returns necessary to support fraudulent conveyance theory.

U.S. v. Abronzino (N.D. N.Y.; D. J. No. 5-50-2636)

Fraudulent conveyance to establish financial status of taxpayer at time of transfer.

U.S. v. St. Mary (E.D. Pa.; D.J. No. 5-62-3113)

Fraudulent conveyance - cross-examination of defendant as to financial status.

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U.S. v. Merrell (N.D. N.Y.; D.J. No. 5-50-2589)

Summons action - attorney questioned about specific items on the return.

John P. Clark v. IRS (E.D. Pa.; D.J. No. 5-62-3712)

Injunction action - returns were requested for purpose of cross-examination during discovery proceedings.

The foregoing information is not all inclusive and more examples could be obtained by delving further into the files. It is believed, however, that the included information illustrates the problems and points convincingly to the need for changes in the draft proposal.

Sincerely,

W. Vincent Rakestraw
Assistant Attorney General

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AUG 15 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This is in response to your request for the views of the Department of Justice on the Department of the Treasury's draft bill "To amend the Internal Revenue Code of 1954 to restrict the authority for inspection of returns and the disclosure of information with respect thereto, and for other purposes."

Under existing law, tax returns are public records to be disclosed under regulations to be prescribed by the President. The President, in turn, has approved regulations which, for many years, have provided that returns may be furnished to, and used by, attorneys of the Department of Justice when necessary in the performance of official duties and/or for use in litigation in which the United States is interested, or in preparation for such litigation. In cases arising under the internal revenue laws, the returns are to be furnished to our attorneys without written application; in all other cases, a written application by the Attorney General, the Deputy Attorney General, an Assistant Attorney General or the United States Attorney is required. No further restrictions are imposed.

The bill reverses existing law by providing that all returns and return information shall be confidential and shall not be disclosed except as provided therein.1/

1/ The bill also creates a new category of "return information" as distinguished from a "return". Under the bill, "return information" includes not only information as to items on a return but "any data, in whatever form (whether as a report, investigative file, memorandum or other document) or manner received by, recorded by, prepared by, or furnished to the Secretary or his delegate with respect to a return". This would appear to include the entire Internal Revenue Service file with respect to any taxpayer.

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With respect to matters involving tax administration, returns and return information are open to inspection or disclosure to officials of the Treasury Department whose official duties require such inspection or disclosure. (Subsection (f)(1)).

In contrast, such returns or information shall be open to inspection by or disclosure to, attorneys of the Department of Justice, in tax administration matters, without written request, solely for use in a proceeding or investigation before a Federal grand jury or a Federal or State court, but only if (a) it is a return of a taxpayer who is a party; (b) the taxpayer consents; or (c) the requested return or information may have a direct outcome on the proceeding because treatment of an item of a party may be determined by the treatment on such third party return, or such third party return relates to the transaction at issue, or the liability of a party for an offense or penalty which is the subject of a proceeding may be determined by reference to such third party return or information. (Subsection (f)(2)).

As to non-tax matters, returns or information may be made available to United States officers or employees for administrative or judicial proceedings under restrictions similar to those contained above, but only upon written request, containing such information as the Secretary may require, if the head of the department or agency, or, in the case of the Department of Justice by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General. (Subsection (g)(2)). Thus all United States Attorneys would have to proceed through the designated officials in order to obtain tax returns or information for non-tax matters.

Subsection (h) covers disclosure in judicial and administrative tax proceedings. It provides that in Federal or State judicial or administrative proceedings before a court, grand jury, department or "Executive establishment" returns or return information may be disclosed under virtually the same conditions as outlined before. Most significantly, this subsection then provides:

> However, such return or return information shall be disclosed in such a proceeding only to the extent that the Secretary or his delegate determines that such disclosure would not seriously impair the administration of Federal tax laws.

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In the Internal Revenue Service explanation accompanying the bill, it is stated that third party returns may not be used in litigation unless they have a direct bearing on the outcome, and only to the extent of that bearing. It is then stated:

> Further, even if a third party's return and return information have a direct bearing on the outcome of the litigation, they could not be used if the Secretary or his delegate determined that disclosure would seriously impair Federal tax law administration.

Thus, the Commissioner would become the ultimate arbiter on the use of such returns and every request would have to be justified to him.

Effects of the Proposed Legislation on the Department of Justice

1. In almost every criminal income tax case we encounter defenses of loans or gifts from a third party to the taxpayer under investigation. In these situations it becomes imperative to obtain the third party's tax returns for the years in question to ascertain if the third party had sufficient income to make the loan or gift in question. Similarly, we would be interested in obtaining any gift tax return that may have been filed by the third party. In the situation of an alleged loan, we would also need the third party's returns to ascertain whether or not he was reporting any interest income relating to the loan.

2. Under Brady v. Maryland, 373 U.S. 83 (1963), the Government is required to furnish a defendant with any exculpatory material in its possession. Yet the proposed statute would preclude this, if contained in third party tax returns or return information, unless the Commissioner authorized production in accordance with Subsection (h)(4).

3. Under the existing Presidentially approved regulations, we are specifically entitled to be advised as to the fact of whether members of the jury panel have had any tax controversies, civil or criminal, with the Internal Revenue Service. The proposed bill makes no provision for the furnishing of such information; to the contrary, the provisions relating to third party returns or information would preclude the Department of Justice from obtaining such desirable information in its conduct of litigation.

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4. As in criminal cases, so also in civil cases involving omissions of income, particularly those involving fraud penalties, we might be prevented from using a third party's tax return to assist in proving the receipt of income by the taxpayer before the court, even though that payment may be reported on the third party's return.

5. In the case of deductions of a given type or claimed by a certain categroy of taxpayers, e.g., physicians or attorneys or home office deductions, it is frequently appropriate, if not necessary, to examine, and perhaps use, returns of other taxpayers similarly situated in order to determine whether such deductions are proper or are correctly claimed by the category of taxpayers as related to their business or profession.

6. In civil tax cases, such as those involving the imposition of the accumulated earnings tax, or those involving the reasonableness of deductions for officers' salaries, it is necessary to examine, and sometimes use, tax returns of similar businesses or taxpayers as evidence of the propriety of the liabilities contested in the immediate proceeding.

7. Similarly, in cases under Section 482 of the Internal Revenue Code, involving the Commissioner's power to allocate income or deductions between or among commonly controlled organizations, we might be prevented from using the returns of those taxpayer-organizations not parties to the proceeding.

8. In all cases which do come within the scope of the narrow restrictions imposed by the bill such as cases involving one side of a purchase and sale transaction, with allocations of the price to covenants not to compete, good will, etc., or in cases involving partnership transactions where we would undoubtedly inspect, and probably use, the returns of the other participants not involved in the litigation, we must still assume the burden of satisfying the Secretary or the Commissioner that our use would not "impair Federal tax administration".

9. We have an emergent need for returns with respect to witnesses called by the opposing party, when such witnesses testify to material facts known to us to be false from their own tax returns. Proper cross-examination and impeachment, not to mention the ends of justice , can only be fostered by immediate use of the returns, not the

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cumbersome procedure set forth in the bill. Presumably, also, the determination as to when the use of such returns will "seriously impair Federal tax administration" may vary from Secretary to Secretary, or Commissioner to Commissioner, since no standards are set forth in the bill.

10. In non-tax matters, United States Attorneys must, under the bill, obtain tax returns or information through the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, and may disclose such returns or information only to the extent not obtainable from another source, subject to the restrictions previously noted, and subject to the ultimate determination of the Secretary that disclosure will not "seriously impair Federal tax administration".

While in no way denigrating the importance of the interests sought to be protected by the proposed legislation, it is our view that Justice Department access to tax return information would be too restrictive under this bill. Therefore, the Department of Justice objects to the submission of this proposed legislation as presently drafted.

Sincerely,

W. Vincent Rakestraw
Assistant Attorney General

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