Privacy and Income Tax Returns

By Mitchell Rogovin

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IT IS ENCOURAGING that President Ford has decided his executive order and draft bill covering inspection of income tax returns and disclosure of tax information were too weak. His first effort, prompted by Watergate and in part by more far-reaching legislation sponsored by Republican Sen. Lowell Weicker of Connecticut and Democratic Rep. Jerry L. Litton of Missouri, showed far more concern for the convenience of bureaucrats than for the privacy of taxpayers.

But while the President's agreement to a bill more along the Weicker-Litton lines is a step in the right direction, it does not answer the basic question of whether the new measure, when drafted, will provide absolute privacy for taxpayers. For the intramural demands within government for access to tax returns for non-tax purposes are strong, while President Ford's commitment to taxpayer privacy—judging by his initial proposal—is not.

The first Ford package did not accept the proposition that privacy is essential in relation to the individual and information about himself on the income tax return. It offered a degree of privacy "consistent with effective tax administration and legitimate needs of other federal agencies to obtain tax information for law enforcement and statistical purposes and of states for purposes of their own tax administration," as Treasury Secretary William E. Simon said in his letter forwarding the administration's bill to Congress. After slicing through the rhetoric, both the executive order and the first legislative proposal stood for the proposition that your federal income tax return is still available for non-tax purposes. It was a "right to rummage" proposal at odds with the Weicker-Litton bill.

In the past, there have been two distinct kinds of threat to the absolute confidentiality of the income tax return. The most recent and most obvious was the unrelenting effort of former President Nixon and members of his staff to turn the Internal Revenue Service into a private hell for enemies of his administration. Although these efforts were in the main blocked by men of good conscience within IRS, the fact remains that senior White House aides (Haldeman, Ehrlichman and Dean) attempted, as John Dean put it, to "use the available federal machinery to screw our political enemies."

Since it is difficult to envision a legitimate set of circumstances that would justify the President or his staff having need to examine tax returns or return information, the initial reluctance of President Ford to give up this authority could only lead to public unease.

The second threat to the absolute confidentiality of the return goes under the name of "governmental efficiency." The income tax return and the information available to IRS with its statutory summons authority represents a virtual gold mine of intelligence data for government investigators.

For example, when an agent of IRS noted that a bank officer reported on his return income received from a borrower of his bank for making the loan, the information was given to the Criminal Division of the Department of Justice. The taxpayer was convicted of the federal offense of receiving a commission for procuring a loan, based upon information supplied in his own tax return.

The list of similar "legitimate" non-tax uses to which tax return information could be put is long. Aside from the vast area of criminal investigations, there are humane, socially desirable areas where tax information would be extremely useful, if available. For years, social welfare agencies have besieged IRS for information regarding runaway husbands who do not support their wives or children. Such requests for information are currently denied.

The significant point is, however, that the arguments of those who claim a right to access to income tax return information are frequently strong, often equitable and always based upon the need for efficiency in government.

Burning the Returns

UNDER PRESENT LAW, legitimate access to information contained in income tax returns has been rather generously distributed throughout various levels of government. Individual income tax returns may be obtained by federal executive departments and independent agencies, by the tax committees of both houses of Congress, by select committees authorized by resolution to investigate tax returns, by other committees as well as the White House staff on order of the President and by foreign, state and local tax administrators under the terms of treaties and compacts.

These disclosure-of-return provisions were formed in an era now passed, by a philosophy now discarded. The initial attempts to work out the relation between privacy and income taxation occurred during the Civil War. The first federal income tax law, enacted in 1861, was silent on the question of access to individual income tax returns. But the first commissioner of internal revenue soon ruled that tax returns were open to the public, and he instructed the assessors to publish lists in local newspapers throughout the country containing taxpayers' names, addresses, amount of taxable income and taxes paid.

Horace Greeley wrote that the publication of such information "is likely to prove beneficial to the revenue as well as to the consciences of some of our best citizens." Greeley, who was not one to understate a good argument, later declared that the publicity given to individual income tax returns "has gone far toward equalizing the payments of income tax by the rogues with that of honest men."

The continuation of the income tax after the Civil War did not meet with popular acclaim. Opposition to disclosures of income tax information grew and, in 1870, the commissioner of inter-

nal revenue forbade his assessors from making such information available for publication. Congress enacted that ruling into law the same year.

The next income tax law, passed in 1894, adopted the same approach but added criminal sanctions to prevent disclosure. After the Supreme Court held the 1894 law unconstitutional, Treasury heeded directions from Congress and burned all the income tax returns.

The central provision of our present law was first enacted in 1910. It provided that corporate returns were open to inspection on order of the President. That provision was carried into the Income Tax Act of 1913 and an amendment allowed state income tax administrators access to such returns.

The Pink Slip Furor

NEITHER PROVISION, however, affected income tax returns of individuals. As late as 1918, Treasury was able to rule that "returns of individuals shall not be subject to inspection by anyone and under no condition made public." But, beginning in 1916 and continuing through 1934, amendments to every revenue act were proposed by the progressives (Sen. Norris and the LaFollettes) for the purpose of making individual income tax returns public records and available generally.

It was former President Benjamin Harrison who first gave voice to the philosophical basis for such proposals. In an address before the Union League Club of Chicago in 1898, he said, "We have treated the matter of a man's tax return as a personal matter. We have put his transactions with the state on much the same level with his transactions with his banker, but that is not the true basis. Each citizen has a personal interest, a pecuniary interest, in the tax return of his neighbor. We are members of a great partnership, and it is the right of each to know what every other member is contributing to the partnership and what he is taking from it."

While the full-disclosure amendment never was adopted by Congress, the campaign of the progressives was responsible for the enactment of compromise provisions of narrower scope. In 1924, that campaign resulted in two important changes. As a compromise to the full disclosure amendment, it was suggested that the tax committees and special committees of both houses be allowed to obtain any income tax returns from Treasury without a presidential order. The Senate passed that provision.

In addition, however, the Senate passed the full-disclosure amendment which emerged from conference as a provision that required the commissioner to make available for public inspection the identity and amount of tax paid by individual income taxpayers. Within 24 hours after the Bureau of Internal Revenue announced that tax lists would be open to inspection, its offices throughout the country were besieged by applications from promoters, salesmen and advertisers. Widespread protest finally caused its repeal in 1926.

The full-disclosure advocates attained a limited success again in 1934 —this time in the form of a pink slip provision. The pink slip was a statement that individuals were required to file along with their tax return containing their name, address, gross income, deductions and tax payable. The statements were to be made available for public inspection.

As the new Congress convened, the press—including the New York Times and Herald Tribune—urged repeal. A drive began to obtain repeal before March, 1935, when the pink slips would be due. The case against the pink slip provision was framed by an organization calling itself the Sentinels of the Republic. It claimed that the statements would become the subject of idle gossip, available for commercial solicitations and—most telling—for the underworld.

From the heated debates in Congress emerges a picture of kidnapers diligently sifting pink slips to identify worthwhile victims and the appropriate amount of ransom to request. The campaign was successful; the pink slip provision was repealed; but, in its place, Congress enacted the present provision which permits inspection of individual income tax returns by state and local tax administrators.

Potential for Abuse

SINCE 1934, there has been no substantial change in the treatment given to individual income tax returns. But the picture is not complete without a look at Treasury's regulations. They provided in 1918 that "returns of individuals shall not be subject to inspection by anyone and under no conditions made public," but access was permitted to Treasury employees and for litigation to which the United States was a party. In 1920, the regulations extended access to the taxpayer and his legal representative and to the heads of executive departments. Interestingly enough, apparently no statute has ever conferred power on the typical congressional investigating committee to obtain individual income tax returns, even through executive order. But in the 1930s the practice of allowing such access first developed.

Finally, a recent extension of accessibility has occurred through tax treaties which contain a standard clause allowing the commissioner of internal revenue to exchange pertinent tax information with foreign tax administrators.

The administration's first proposal, while couched in the language of privacy, still would have made tax returns generously available to people outside the IRS. For example, returns would have been available if they "may have a bearing on the outcome of an administrative or judicial proceeding (or investigation leading to such a proceeding)."

Tax information would still be available for the Justice Department's Organized Crime Strike Force units looking into non-tax offenses and the President, under his recently signed executive order, would still be able to authorize White House staffers to view individual returns.

In addition, the potentially abusive tax check (a quick look at the filing record of executive or judicial branch prospective appointees) would still be a permissible activity, one that is ripe with potential for abuse.

Perhaps the most questionable and most intimidating use of tax information involves the tax checks run on prospective jurors. The bill would have allowed the IRS to advise a federal prosecutor whether or not a prospective juror has been under a tax investigation.

Finally, one particularly curious provision in the administration's first proposal would have allowed the "secretary or his delegate" to publicly disclose tax return information to correct the taxpayer's misstatements if the release of such information was "in the interest of federal tax administration." What possible purpose would be served if the Secretary of the Treasury decided that in the interest of tax administraton the IRS should release tax return information relating to the Metzenbaum-Glenn primary election dispute as to who pays more taxes?

What Role for IRS?

THE TAX COLLECTOR cannot be all things to all people. The Internal Revenue Service has a demonstrated capacity to collect revenue. It is not a national police force or a clear-

inghouse for financial data. Congress did not give summons authority to the FBI—why then should an IRS agent be able to issue a summons to obtain financial information from a taxpayer in order to make it available to the FBI? Why should jury duty automatically subject the prospective juror to a tax check? Why would the President, with 75,000 IRS employees at work, have wanted the authority to designate one of his aides to inspect returns and return information?

The Weicker-Litton proposal is a good bill. It is more protective of the privacy of a taxpayer's return. For example, it would regulate White House access to returns by statute rather than through a revocable executive order. It also requires IRS to develop statistical data for such agencies as the Census Bureau and the Social Security Administration as opposed to the administration's proposal which would give such agencies direct access to returns. The most important feature of the bill is its strong stand on prohibiting access for non-tax use.

The Weicker-Litton bill falls short, however, of an absolute privacy position, one that would restrict the return to the purpose for which it was filed.

The IRS should not be a moral arbiter. It should be prepared to tax income from any source and, having done so, it should treat the tax return and related information in an absolutely confidential fashion.

The argument in favor of an inviolate position for income tax returns and return information can be made both in the name of privacy and increased taxpayer compliance. As to the latter, accurate reporting on income tax returns bears a close relationship to the degree of confidence in which the information is held by the Internal Revenue Service.

Congress must decide whether it wants the IRS to raise revenue or to be a clearinghouse for financial information for investigators and others. It cannot do both.