

Federal Income Tax Returns—Confidentiality vs. Public Disclosure*

by Boris I. Bittker**

I. INTRODUCTION

This article will examine the relationship between the individual's interest in privacy, reflected in such recent statutes as the Privacy Act of 1974,¹ and the public's right to know, which underlies legislation like the Freedom of Information Act.² The subject is of intrinsic importance, but it is particularly appropriate for an article in this lecture series, since privacy³ and disclosure⁴ were values of special interest to Justice Douglas. Neither the individual's right to privacy⁵ nor the public's right to know⁶ is explicitly protected by the Constitution, but both do have constitutional overtones, and both are protected by various statutory provisions.

Using federal income tax returns as the centerpiece of the discussion, I propose to show how privacy and disclosure can come into conflict—a possibility that has been insufficiently recognized by the courts and the commentators. The leading treatise on political and civil rights,⁷ for example, treats the two subjects in separate chapters with virtually no acknowledgement that they are related, let alone that they

* Copyright 1981 by Boris I. Bittker.

** Sterling Professor of Law, Yale University. This article is the modified text of a speech delivered at the Fifth Annual William O. Douglas Lecture Series, October 30, 1980.

1. Pub. L. No. 93-579, § 3, 88 Stat. 1897 (amended 1975 & 1977) codified at 5 U.S.C. § 552a (1976).

2. Pub. L. No. 89-554, 80 Stat. 383 (1966) (amended 1967, 1974, 1976 & 1978) (codified at 5 U.S.C. § 552 (1976)).

3. See W. DOUGLAS, POINTS OF REBELLION 29 (1970) (if "cause of privacy" is won in legislative halls and constitutional assemblies, "this pluralistic society of ours will experience a spiritual renewal;" if it is lost, "we will have written our own prescription for mediocrity and conformity," *id.*) See also *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 85 (1974) (Douglas, J., dissenting).

4. See W. DOUGLAS, THE COURT YEARS, 1939-1975, at 369 (1980) ("I have long favored full disclosure by all elected or appointed federal officials of the amount of their income and the source of it," *id.*) See also *United States v. Richardson*, 418 U.S. 166, 198 (1974) (Douglas, J., dissenting) ("secrecy is one of the most tempting coverups to save [governmental] regimes from criticism," *id.*).

5. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (privacy, though not mentioned by the Constitution or the Bill of Rights, "share[s] constitutional protection in common with explicit guarantees," *id.* at 580).

6. Justice Stevens, in his concurring opinion in *Richmond Newspapers, Inc.*, described the decision as holding that "the First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of their government," *id.* at 584 (Stevens, J., concurring). See generally N. DORSEN, P. BENDER, & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1976); Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L.L. REV. 329 (1979); Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L.L. REV. 233 (1977).

7. N. DORSEN, P. BENDER, & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1976).

can be rivals requiring a choice between them.⁸ The general tone, instead, is that every increase in the people's right to know is a blow for freedom, and every strengthening of the individual's shield of privacy is also a step forward. Moreover, when commentators call for restrictions on the disclosure of personal data collected by the government in such activities as law enforcement and the census, they often assume disclosure, if permitted, would serve only to allow a malevolent or heartless officialdom to stigmatize or embarrass individuals, and that the resulting increase in public knowledge can serve no useful purpose. I want to avoid this straw man by positing circumstances in which disclosure, however painful to the individuals, *could* be primarily motivated by a defensible public interest; and in which, *mutatis mutandis*, the public interest would be advanced at a heavy cost to the individuals.

To sharpen the issues, consider a proposal—not now on the legislative agenda, but surely not wholly beyond the pale—requiring the Internal Revenue Service (IRS) to open all federal income tax returns to public inspection upon request. To present the conflict between disclosure and privacy in its sharpest form, I will limit myself to the disclosure of individual income tax returns; since corporate returns contain fewer personal details, disclosure would be less dramatic. On initial thought, one may be inclined not to applaud but to deplore the hypothetical disclosure law, or even to view it as unthinkable; but consider a page of history.

More than 100 years ago, when enacting the country's first federal income tax to finance the Civil War, Congress provided that all returns should be "open for examination."⁹ When this instruction was narrowly construed by the Treasury Department, Congress provided explicitly that tax lists could be inspected by "any and all persons" on request—a result initially applauded by the *New York Times*,¹⁰ although a few years later it denounced the disclosure of returns as "offensive and objectionable."¹¹ In 1909, when Congress imposed a federal income tax on corporations,¹² it provided that the returns "shall constitute public records and be open to inspection as such."¹³ Later legislation, as we shall see, shifted from disclosure to confidentiality as the general rule, but disclosure continued to have its supporters. In

8. *Id.* Privacy is addressed in Chapter XII, *Privacy, id.* at 938. The subject of disclosure is discussed in Chapter III, *Government Secrecy and the Public's Right to Know, id.* at 343. *But see* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

9. Act of Aug. 5, 1861, ch. 45, §§ 49, 50, 51, 12 Stat. 309-11. This act was replaced before it went into effect by Act of July 1, 1862, ch. 119, § 89, 12 Stat. 473.

10. N.Y. Times, July 9, 1866, at 4, col. 4.

11. N.Y. Times, Aug. 7, 1869, at 4, col. 2.

12. Payne-Aldrich Tariff Act of 1909, ch. 6, § 38, 36 Stat. 112.

13. *Id.* at 116.

1924¹⁴ and again in 1934,¹⁵ for example, Congress enacted legislation providing for limited disclosure of individual and corporate federal income tax returns. In short, the idea that is now termed “the public’s right to know” was not invented yesterday.¹⁶

Let me now round out this hypothetical disclosure law by giving it some legislative history. Assume that when the proposal was before Congress witnesses testified (1) that the Internal Revenue Code is riddled with special-interest provisions; (2) that tax reform is made difficult by the public’s lack of information about the persons and classes who benefit from or are harmed by particular provisions; (3) that public analysis and political action would be enhanced if commentators could point to the facts rather than merely speculate about the impact of tax legislation; and (4) that access to the tax returns of legislators, lobbyists, witnesses before legislative committees, contributors to political campaigns, journalists, and persons expressing opinions about tax legislation would enable the public to decide whether their views and actions were disinterested or self-serving.

Assume further that the witnesses acknowledged that publication of returns with the taxpayer’s name deleted would supply some of the desired information and that some candidates for public office might be impelled by public pressure to publish their own returns, but that these would be, at best, half-way measures; nothing short of mandatory disclosure with the taxpayers’ names would open the road to comprehensive tax reform. In addition, it was argued that many provisions of the Internal Revenue Code are disguised subsidies to favored taxpayers rather than genuine income-measuring rules, and that recipients of these so-called tax expenditures should be required to stand up and be counted when they claim benefits from the Treasury.¹⁷

Finally, the hypothetical preamble asserted that there is only a difference of degree, not of kind, between audits of tax returns and judicial proceedings. Congress went on to state that the following comment by the Supreme Court, in a case holding the press cannot be excluded from the trial of a criminal case except for overriding reasons, can be appropriately applied to the audit of tax returns:

14. Revenue Act of 1924, ch. 234, § 257, 43 Stat. 293. In 1926 the provision requiring the amount of tax to be made public was removed. Revenue Act of 1926, ch. 27, § 257, 44 Stat. 52.

15. Revenue Act of 1934, ch. 277, § 55, 48 Stat. 698. The act allowed for public examination and inspection of tax returns. *Id.*

16. For a detailed review of the 1861-1934 disclosure rules for federal income tax returns, see U.S. ADMINISTRATIVE CONFERENCE, ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, S. DOC. NO. 266, 94th Cong., 2d Sess. 835-46 (1976) [hereinafter cited as ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE].

17. For the tax expenditure concept, see Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244 (1969); Surrey & Hellmuth, *The Tax Expenditure Budget—Response to Professor Bittker*, 22 NAT’L TAX J. 528 (1969); Bittker, *The Tax Expenditure Budget—A Reply to Professors Surrey and Hellmuth*, 22 NAT’L TAX J. 538 (1969).

The open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark . . . A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.¹⁸

Having set the stage for a clash of opinions, I want now to shift to a level of analysis that is both more prosaic and more focused by describing how the conflict between confidentiality and disclosure is resolved by existing law. To do so, I must first summarize the threshold rules determining the data *available* to the IRS, since any confidentiality or disclosure requirement can operate only on the information possessed by the government. As every aficionado of spy stories knows, what a secret agent doesn't know he can't disclose.

II. THE IRS' SOURCES OF INFORMATION

A. Tax Returns

To file even a relatively modest federal income tax return an individual taxpayer must disclose not only his or her social security number, employer, wages, investment income, and other receipts, but also such personal details as place of residence, marital status, dependents, charitable and political contributions, union dues, and medical expenses. The history of the federal income tax indicates the list of items of this type will not shrink in the foreseeable future; but, if anything, will grow longer.

In requiring such disclosures, the federal income tax is totally different from most other taxes. Local real property and state sales taxes, for example, make few distinctions among taxpayers, and virtually none of these distinctions turns on highly personal characteristics that taxpayers normally would wish to keep to themselves. Indeed, the retail sales tax is so impersonal that the taxpayer's name is irrelevant, unless an exemption is claimed because the goods are to be resold in the course of business. Local real property tax records are open to public inspection,¹⁹ but they show only the name of the owner of the property, the amount at which it is assessed, liens reflecting the owner's failure to pay on the due date, and, possibly, the existence of a veteran's or other exemption. These bits of information obviously reveal far less about the taxpayer than even the simplest federal income tax return.

In preparing their federal income tax returns, taxpayers who value their privacy may forego some deductions or other allowances to keep

18. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

19. *See, e.g.*, KAN. STAT. ANN. § 45-201 (Supp. 1980).

the details to themselves—the expense of consulting a psychiatrist, for example, or contributions to an unpopular religious cult—but this practice can be expensive and it is not entirely clear that a taxpayer can properly report more than his true taxable income.²⁰ In any event, even if a taxpayer can properly pass up a deduction if his sole objective is the preservation of privacy, that is a price very few taxpayers will pay.

Moreover, if the intrusion on privacy results not from claiming a deduction or other tax benefits, but from reporting an item of income, the taxpayer cannot even buy his way out. To be sure, if disclosure would be incriminating, the fifth amendment protects the taxpayer; but the scope of this shield is unclear. In *United States v. Sullivan*,²¹ a 1927 opinion of the United States Supreme Court ruling that unlawful business profits are taxable, the Court held that the fifth amendment did not justify a refusal by the taxpayer “to state the amount of his income [on the return] because it had been made in crime,”²² but the Court implied that the taxpayer could have refused to answer specific incriminating questions.²³ In practice, taxpayers who fear self incrimination but who are even more fearful of being prosecuted for tax evasion or failure to file a return often file returns reporting their income (or at least as much as they think the IRS could independently prove they received) in round numbers, with an uninformative label such as “miscellaneous” or “various.” It may be, however, that taxpayers wishing to rely on the fifth amendment must explicitly cite it and that a failure to do so is a waiver of the privilege, permitting the IRS to compel disclosure of the details that the taxpayer hopes to conceal.²⁴ Judging from the lack of litigated cases, however, the IRS has not pursued this possibility but instead treats vague labels as an informal method of claiming the privilege against self-incrimination.

In any event, as a ground for keeping information from the IRS, the fifth amendment is of no use to the average law-abiding citizen, who has no justification for claiming that the information required by the tax return will be incriminating.

Are there any other grounds for refusing to supply the information called for by the return? Taxpayers have offered a mixed bag of excuses, such as the claim that it is an unconstitutional invasion of reli-

20. I once represented a professional gambler who deliberately refrained from deducting charitable contributions, local taxes, casualty losses, dependency exemptions, and medical expenses, hoping that a low profile would help to avoid a potentially embarrassing audit of his financial activities. Since I did not prepare his returns, I was not called upon to decide whether the practice was legally vulnerable; but I could not have given a quick answer to that question.

21. 274 U.S. 259 (1927).

22. *Id.* at 264.

23. *Id.*

24. For the vague doctrine of waiver, see *Brown v. United States*, 356 U.S. 148, 154-57 (1958); 81 AM. JUR. 2d *Witnesses* §§ 63-65 (1976).

gious freedom to require taxpayers claiming deductions for religious contributions to identify the donee church. But claims of this type have been routinely rejected by the courts and the same fate has attended virtually all assertions that questions asked by the return are beyond the IRS' statutory authority to propound.²⁵ It would be an overstatement to claim these defenses are never valid; but for practical purposes they are so peripheral that taxpayers concerned about privacy can regard them as non-existent. In short, a desire for privacy is simply not a basis for withholding information required by the tax return.

B. *Record-keeping*

Taxpayers are required by Internal Revenue Code (I.R.C.) § 6001 to "keep such records, render such statements, [and] make such returns . . . as the [IRS] may from time to time prescribe."²⁶ The IRS, pursuant to this statutory grant of authority, requires taxpayers to "keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown . . . in any return."²⁷ This obligation is as vague as it is broad, and it contains precious few escape routes for taxpayers who want to preserve their privacy.

C. *IRS Power to Issue Summons*

The records kept by taxpayers pursuant to I.R.C. § 6001 and the regulations thereunder might not see the light of day, however, were it not for the investigative authority conferred on the IRS by I.R.C. § 7602. This provision empowers the IRS to "examine any books, papers, records, or other data which may be relevant or material" in determining the tax liability of any person. It also allows the IRS to issue administrative summons requiring taxpayers and third persons "to produce [any relevant or material] books, papers, records, or other data" before an IRS official. Although enforcement of an administrative summons requires a court order, the Supreme Court ruled in *United States v. Powell*²⁸, decided in 1964, that enforcement does not require a probable cause showing but only that the investigation will be conducted pursuant to a legitimate purpose, the inquiry may be relevant to the purpose, the IRS does not already have the material demanded,

25. See, e.g., *United States v. Stout*, 601 F.2d 325 (7th Cir. 1979) (Form 1040 identifying taxpayer by name and address but otherwise blank save for objections based on first, fourth, seventh, eighth, ninth, tenth, thirteenth, fourteenth and sixteenth amendments; conviction for failure to file returns affirmed); *Cupp v. Commissioner*, 65 T.C. 68 (1975), *aff'd per curiam*, 559 F.2d 1207 (3d Cir. 1977); *Roberts v. Commissioner*, 62 T.C. 834, 838-39 (1974); *Muste v. Commissioner*, 35 T.C. 913 (1961) (freedom of religion not violated).

26. I.R.C. § 6001.

27. Treas. Reg. § 1.6001-1(a), T.D. 7577, 1979-1 C.B. 409.

28. 379 U.S. 48 (1964).

and that a few formal threshold procedural steps have been taken.²⁹ These requirements are not very confining and they rarely provide taxpayers with even the shadow of a justification for resistance. Indeed, tax practitioners comply with the overwhelming bulk of IRS requests for records without waiting for a summons, recognizing that intransigence usually does no more than prolong the agony and that it may reduce the chance of compromising any debatable issues.

The principal grounds for resisting a summons are that the information requested is not relevant or material; that disclosure would breach a common-law privilege, such as the relationship between attorney and client, husband and wife, or physician and patient, and that the information is covered by the privilege against self-incrimination.³⁰ Of these potential defenses, claims that the information requested by the IRS is not relevant or material are easily made but almost never upheld. The common-law privileges rarely apply because information sought by the IRS is seldom received in the course of a confidential relationship. By contrast, the self-incrimination claim is normally accepted at face value by the IRS—although this usually results in a more vigorous investigation since a refusal to answer questions is virtually certain to whet the appetite of any red-blooded revenue agent.

D. *The Required Records Doctrine*

Curiously, it is possible that the privilege against self-incrimination, though routinely accepted by the IRS as a barrier to an administrative summons, is not applicable to the books and records that taxpayers are required by I.R.C. § 6001 to maintain. This tantalizing possibility—so at odds with common understanding—stems from *Shapiro v. United States*,³¹ decided by the Supreme Court in 1948. *Shapiro* involved a subpoena requiring a businessman to appear before an enforcement officer of the World War II Office of Price Administration with his sales records, kept pursuant to regulations under the Emergency Price Control Act.³² A divided Court held that the privilege against self-incrimination was not violated by the subpoena, because the privilege does not encompass “records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation.”³³

29. *Id.* at 57-58.

30. See generally *Fisher v. United States*, 425 U.S. 391 (1976); *Bellis v. United States*, 417 U.S. 85 (1974); *Couch v. United States*, 409 U.S. 322 (1973); *United States v. Noall*, 587 F.2d 123 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); *United States v. Malnik*, 489 F.2d 682 (5th Cir. 1974).

31. 335 U.S. 1 (1948). Justice Douglas joined the majority in this case, which was decided by a 5-to-4 vote.

32. Act of Jan. 30, 1942, ch. 26, 56 Stat. 23-37 (terminated June 30, 1947 under provisions of Act of July 25, 1946, ch. 671, § 1, 60 Stat. 664).

33. 335 U.S. at 33 (citing *Davis v. United States*, 328 U.S. 582, 589-90 (1946)).

Shapiro did not explicitly hold that the records kept by the businessman in that case became public documents; but the required records doctrine comes close to investing the regulated citizen with the mantle of an unpaid, involuntary recorder of deeds who must record *his own* deeds. In a sharply-worded dissent, Justice Frankfurter asserted: "If records merely because required to be kept by law ipso facto become public records, we are indeed living in glass houses."³⁴ He went on to suggest the government might not need a search warrant to enter and seize public records at any time, no matter where they are stored.³⁵

Shapiro has never been overruled and, indeed, has been favorably cited by the Supreme Court on several recent occasions.³⁶ But it has fallen into desuetude at the level of practice since, as previously noted,³⁷ the IRS regularly accepts self-incrimination as a valid defense to a summons demanding production of an individual taxpayer's books and records. Although this failure of the government to utilize the required records doctrine is surprising, one must recall that the privilege against self-incrimination is of no help to taxpayers who object to producing their books and records or to answering questions on privacy grounds rather than because they fear prosecution. For these taxpayers, the IRS' authority is overwhelmingly broad, whether the required records doctrine is applicable to tax records or not.

In saying this, I do not mean to imply that the required records doctrine is without significance to taxpayers hoping for privacy. For them, the doctrine is a potential threat. The more one pushes the theory that records kept under compulsion are tantamount to public records, the more plausible it becomes to argue the public has a right to know the contents of these so-called public records. To use a dramatic simile offered by Mr. Justice Frankfurter in the *Shapiro* case, if the records kept by a taxpayer under legal compulsion are public documents, then the place where they are kept—even if it is a taxpayer's residence or place of business—can be likened to a public library, which must be thrown open to all who want to read, not merely to government officials.³⁸

E. *Third Party Records*

In gaining information, the IRS can rely not only on information reported on tax returns and on records that *taxpayers* are required to keep, but also on records that third persons are required to maintain

34. *Id.* at 51 (Frankfurter, J., dissenting).

35. *Id.* at 54-55 (Frankfurter, J., dissenting).

36. *See, e.g.,* *United States v. Batchelder*, 442 U.S. 114, 122 (1979); *New Jersey v. Portash*, 440 U.S. 450, 457 n.7 (1979).

37. *See* note 30 and accompanying text *supra*.

38. 335 U.S. at 55 (Frankfurter, J., dissenting).

and produce for official inspection. These third party sources have long been important in many circumstances, but *California Bankers Association v. Shultz*,³⁹ a 1974 Supreme Court decision, brought to the surface a number of legal issues in holding that the record-keeping provisions of the Bank Secrecy Act of 1970 are constitutional.

In *California Bankers*, the Court held that Congress could properly authorize the Treasury to require banks to maintain records of their customers' identity, to make and retain microfilm copies of checks and other documents, and to report certain foreign banking transactions in excess of \$5,000 as well as domestic deposits and withdrawals of currency exceeding \$10,000.⁴⁰ The Court declined to pass on certain constitutional objections to the legislation, including a privacy claim,⁴¹ on the ground that they were advanced prematurely. Two of the justices who joined in the majority opinion—Powell and Blackmun—filed a concurring opinion suggesting Congress had gone about as far as they would permit:

A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process.⁴²

For Justice Douglas, who dissented, Congress had already gone too far. But even he did not elevate the claim of privacy above all other considerations: "Customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected in their bank accounts. That wall is not impregnable. Our Constitution provides the procedures whereby the confidentiality of one's financial affairs may be disclosed."⁴³ It is not clear, however, what Justice Douglas meant by this qualification.⁴⁴ If he meant that the legislation would have been acceptable if it provided a method by which taxpayers could object to the disclosure of their financial records to the IRS on self-incrimination grounds alone, his theory would not be

39. 416 U.S. 21 (1974). The decision elicited a majority opinion, a concurring opinion, and three dissenting opinions, including one by Justice Douglas.

40. *Id.* at 45-52.

41. The American Civil Liberties Union, one of the plaintiffs in the case, contended that the legislation could result in disclosure of its members and contributors through an examination of the organization's bank records. The Court, however, dismissed this claim as premature. *See id.* at 55-56, 75-76.

42. *Id.* at 78-79 (Blackmun, J., joining Powell, J., concurring).

43. *Id.* at 82 (Douglas, J., dissenting).

44. "Procedures" might refer to the constitutional rules governing search warrants.

comforting to taxpayers who object to disclosure solely on privacy grounds and who have no ground for claiming that disclosure would be incriminating. If he meant there is *substantive* privacy protection, his reference to "the procedures whereby the confidentiality of one's financial affairs may be disclosed" is puzzling.

In any event, Justice Douglas, who found the legislation constitutionally invalid, described its consequences for privacy as follows:

A mandatory recording of all telephone conversations would be better than the recording of checks under the Bank Secrecy Act, if Big Brother is to have his way. The records of checks—now available to the investigators—are highly useful. In a sense a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on *ad infinitum*. These are all tied to one's social security number; and now that we have the data banks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.⁴⁵

A full analysis of *California Bankers* would require more time than I can devote to it in this article; but I have said enough to lay the ground for my main points:

1. It is of course true, as asserted by Justice Douglas, that bank records provide many clues to the personality and activities of the bank's customers.

2. But most banks kept records of this type even before they were legally required to do so, as do many other persons (such as the taxpayer's customers, suppliers and employees) who are not subject to legal compulsion even now. The IRS *now* has the legal power to inspect these third party records and the taxpayer cannot prevent such an inspection on either privacy or self-incrimination grounds. Given these facts, and the business needs compelling financial institutions to keep records for their own purposes, it is only a slight exaggeration to say that, so far as privacy is concerned, the holding in *California Bankers* was much ado about nothing.

There is nothing in Justice Douglas' dissent to suggest that *taxpayers* cannot be required to keep their own banking transaction records to facilitate audits of their tax returns. Nor does Justice Douglas suggest they can withhold their records from the IRS on privacy grounds, as distinguished from self-incrimination grounds.

In short, if *California Bankers* had been decided as Mr. Justice Douglas wanted, it would have been helpful to taxpayers with a self-incrimination defense to the production of their own records, since they

45. 416 U.S. at 85 (Douglas, J., dissenting).

can refuse to produce their own records but cannot prevent a bank from producing its records of the same transaction. But a contrary result in *California Bankers* would have done very little for taxpayers who have a privacy objection to disclosure without an accompanying self-incrimination objection.

F. *Third Party Summons*

As previously noted,⁴⁶ when taxpayers are ordered by the IRS to produce their books and records, they can refuse to comply with the summons on self-incrimination and a few other narrow grounds, but not on privacy grounds. If the subpoena is issued not to the taxpayer, but to a bank, customer, supplier, or business associate with whom the taxpayer has had dealings—a so-called third-party subpoena—the taxpayer is allowed by I.R.C. § 7602 to intervene in some, but by no means all, enforcement proceedings. This procedural right, however, is usually an empty privilege since the taxpayer has virtually no substantive grounds for preventing the IRS from inspecting third party records.⁴⁷ The fact that the taxpayer will be incriminated, for example, is irrelevant.

To be sure, the taxpayer can object if production of the data will violate the attorney-client or similar privilege; but the overwhelming bulk of third party subpoenas are not vulnerable to this or to any other legal objection. For practical purposes, therefore, the taxpayer's right to intervene when the IRS seeks to inspect a third party's records of its transactions with the taxpayer may delay, but it will rarely prevent, IRS access to the data sought.

III. CONFIDENTIALITY OF INFORMATION OBTAINED BY THE IRS

I have spent a good deal of time showing that the power of the IRS to get information about taxpayers, both from them and from third persons with whom they deal, is extremely sweeping and that the right of privacy⁴⁸ plays virtually no role in this information-gathering process. We are now ready to see whether the taxpayer can prevent the IRS from disclosing this information or conversely, whether the public's "right to know" requires disclosure. In other words, is the battle over once the taxpayer's privacy has been breached; or does the taxpayer have a last clear chance to prevent disclosure of the information to the public?

46. See note 30 and accompanying text *supra*.

47. See generally S. REP. NO. 938, 94th Cong., 2d Sess. 370, reprinted in 1976-3 C.B. 408.

48. The right to privacy, described by Justice Brandeis as "the right to be let alone," was called by him "the right most valued by civilized men." -*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Before examining the legal rules governing IRS use of taxpayer data, I want to point out that whatever the rules, leakage is inevitable. Aside from inadvertant violations, there are bound to be deliberate leaks by officials with political axes to grind, by persons acting out of malice, and by so-called whistle blowers who seek to expose what they see, rightly or wrongly, as bureaucratic misconduct. Recent experience shows that the detection and punishment of persons responsible for leaks are problematical at best. Moreover, taxpayers who wish to litigate their tax liabilities must open the relevant facts to judicial, and hence to public, inspection. An Internal Revenue Code that differentiates among taxpayers by reference to marital status, medical expenses, sources of income, and the like, necessarily forces taxpayers to disclose the relevant facts or bow to IRS determinations of their liability.

Turning now to current law, the basic legislation governing the status of tax returns and return information is I.R.C. § 6103, enacted in 1976 to replace a statutory provision whose legislative history can be traced back to the Civil War federal income tax.⁴⁹ Section 6103 begins bravely enough—it provides that returns and return information shall be confidential and forbids any federal official or employee (and certain other persons) to disclose any return or return information obtained in connection with their official service. Severe penalties are prescribed for violations of I.R.C. § 6103's rules.⁵⁰

But I.R.C. § 6103 is not merely a privacy statute. Its initial prohibition on disclosure is qualified by a very detailed set of rules allowing disclosure to specified persons in specified circumstances. For purposes of this article, the authorized recipients of returns and return information can be divided into three categories: private persons; government agencies concerned with tax administration; and other government agencies. By ruthlessly suppressing a vast amount of detail, the access allowed to these groups can be summarized as follows.

A. *Private Persons*

First, I.R.C. § 6103 does not give the general public a right to inspect tax return information. Disclosure to private persons is authorized only if the person has a special relationship to the taxpayer. For example, beneficiaries can inspect the returns of their trusts and estates; partners can inspect their partnership's return; and shareholders owning more than one percent of a corporation's stock can inspect its return.

49. See note 16 *supra*.

50. Unauthorized disclosures are felonies, punishable by a fine of up to \$5,000 or imprisonment up to five years, or both, plus the costs of prosecution. I.R.C. § 7213. If the person violating the rules contained in I.R.C. § 6103 is an officer or employee of the United States, he or she may also be subject to the criminal penalties imposed by 18 U.S.C. § 1905 (1976).

As will be seen, the raw data obtained from returns can be assembled by the IRS or other government agencies into statistical tables, and the Freedom of Information Act requires disclosure of these anonymous summaries on demand.⁵¹ The public's so-called 'right to know, however, does not entitle you to inspect your neighbor's tax return, even if you are motivated not by idle curiosity but by a conviction that disclosure could show that the neighbor is filing fraudulent returns, is supporting the enactment or repeal of a statutory provision for selfish reasons, or is running for public office while burdened with financial interests that may affect his or her official behavior.

B. Tax Officials

Second, I.R.C. § 6103 allows disclosure to government officials concerned with tax administration. This category of authorized recipients of returns and return information includes not only officials of the Treasury and Department of Justice, whose need for the information is obvious, but also state employees charged with tax responsibilities. Even though these state officials are forbidden to make any further disclosures, it is obvious that every increase in the number of people authorized to inspect federal income tax returns increases the possibility, indeed, the likelihood, of unauthorized disclosures.

C. Federal Nontax Agencies

Finally, I.R.C. § 6103 authorizes disclosure to federal agencies outside the tax area, subject to very detailed provision. Of these, only the most important provisions, those governing disclosure to the White House and to Congress, will be addressed here.

Under I.R.C. § 6103(g), returns and return information may be supplied to the White House only in response to a request signed "personally" by the President. The request must identify the taxpayer and specify the reason for the requested disclosure or inspection. This requirement of the President's personal sanction evokes memories of the so-called enemies list compiled by President Nixon's staff, resulting in selective audits of journalists, antiwar protesters, and other civic gadflies, as well as some less dramatic events during John F. Kennedy's presidency.⁵² Section 6103(g) also authorizes the Treasury to disclose return information about potential appointees to high-level executive or judicial posts, limited to such matters as whether the designated in-

51. See *Cliff v. IRS*, 496 F. Supp. 568 (S.D.N.Y. 1980) (IRS not obligated to "sanitize" tax return information by deleting matter exempt from disclosure and releasing the remainder of the documents).

52. In both cases, White House operatives acted in the President's name, but in such a way that their actions could be disowned if and when they backfired. See ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, *supra* note 16, at 968-71.

dividual filed income tax returns for the immediately preceding three years, failed to make timely payment of any tax, or was the subject of a fraud investigation or penalty.

These limits on White House fishing expeditions are buttressed by the reporting requirements of I.R.C. § 6103(g)(5), under which the Joint Committee on Taxation must be notified within thirty days after the end of each calendar quarter of the names of the taxpayers involved and the reasons for the requests. An exception is carved out for presidential requests concerning persons who were officers or employees of the executive branch of the federal government when the request was made.

For Congressional demands for tax returns and return information, I.R.C. § 6103(f) authorizes the IRS to comply with requests by the chairmen of the House Ways and Means Committee, the Senate Finance Committee, the Joint Committee on Taxation, and the chief of staff of the Joint Committee on Taxation. Returns and return information that can be associated with particular taxpayers, however, are to be furnished to the appropriate committee only in closed executive session. Other committees of Congress may obtain returns and return information for use in closed executive session on written request by the chairman, if authorized by the committee itself and by a resolution of the Senate or the House or, in the case of joint committees, by concurrent resolution.

Once a legislative committee obtains a tax return, it can refer it to the full Senate or House. But if the taxpayer can be identified, the material must be submitted to a closed executive session of the Senate or House unless the taxpayer consents to disclosure. Only a naive observer, however, would have much faith in these attempts to keep members of Congress from speaking freely, though some might take the precaution of leaking the material to the press in lieu of publishing it directly. When a barrier to publicity is installed on Capitol Hill, it is bound to become a sieve in short order.

Besides the White House and Congress, federal and some state and local agencies outside the tax area can obtain tax returns and return information for such diverse purposes as statistical studies, audits of the IRS by the Comptroller General, administration of the social security system (including enforcement of child support obligations), determination of eligibility for food stamps, notification of persons entitled to unclaimed tax refunds, collection of defaulted government loans to students, location of persons exposed to occupational hazards, and numerous other specialized activities.⁵³

53. I.R.C. § 6103(i), (j), (l), & (m). See Joyce, *Raiding the Confessional—The Use of Income Tax Returns in Nontax Criminal Investigations*, 48 *FORDHAM L. REV.* 1251 (1980).

D. *Safeguards and Enforcement*

To insure compliance with these privacy-disclosure rules, I.R.C. § 6103(p) requires the Treasury and other government agencies to establish and maintain a permanent system of standardized records of requests for returns and return information, as well as actual inspections and disclosures. It also provides for periodic reports to the Joint Committee on Taxation and audits by the Comptroller General. In addition, I.R.C. § 7217 authorizes persons injured by unauthorized disclosures to sue for actual and punitive damages. The crime of unauthorized disclosure was elevated in 1976 from a misdemeanor to a felony, punishable by a fine of up to \$5,000 and/or imprisonment for up to five years.⁵⁴

E. *Freedom of Information Act*

You may be surprised that I have virtually ignored the Freedom of Information Act. This legislation enables the public to inspect rulings and many other IRS documents, files, and memoranda, but it does not encompass "matters [that are] specifically exempted from disclosure by statute."⁵⁵ Thus, it bows to the rules of I.R.C. § 6103, although some peripheral aspects of the relationship between these two sets of rules are obscure and remain to be elucidated.

IV. CONCLUSION

Let me now return to my hypothetical law, which would open all federal income tax returns to public inspection. My conclusions can be briefly stated.

First, the interest in privacy plays virtually no role in determining what must be disclosed to the Internal Revenue Service on the taxpayer's tax returns, what must be recorded in the taxpayer's books and records and disclosed when the IRS wishes to inspect these books and records, or what transactions with the taxpayer must be recorded by third parties and disclosed to the IRS on demand.

Second, opening income tax returns to public inspection would require taxpayers to share their financial and many of their personal affairs with the general public, not merely with government officials bound by an obligation of secrecy.

Third, given the mass of information that must be supplied by taxpayers to comply with the federal income tax, a choice must be made between the public's desire to know and the individual's desire to live a life of privacy.

54. I.R.C. § 7213(a).

55. 5 U.S.C. § 552(b)(e)(3) (1976).

Fourth, the competing claims of privacy and public information could be resolved by deleting taxpayer identifications and publishing only statistical summaries or anonymous returns. But this compromise would reject the public's right to know matters that, it can be plausibly argued, are pertinent to decision-making in a democratic society.⁵⁶

Finally, much of the discussion of the public's right to know stems from complaints about the secrecy of governmental operations, involving information that is wholly or largely impersonal. Opinions may differ about whether disclosure in these circumstances is good or bad, but it seldom entails an invasion of anyone's privacy. The bureaucracy and its staff may be embarrassed, but the information sought is rarely "personal," even though it may disclose the way public officials discharged their public duties.

By contrast, the information that we have been considering concerns the private behavior of private citizens, which is relevant to their federal income tax liabilities but is otherwise personal. When journalists, legislators, and jurists speak of the "public's right to know," therefore, they ought to distinguish between these two types of information. It is possible, as the preamble to my suppositious disclosure statute suggests, to build a case for requiring disclosure of what I have just loosely called "personal information." But the disclosure of this type of information would have a fundamentally different impact on privacy—another cherished value—than disclosure of the type of impersonal information that is ordinarily at stake in claims that the public's right to know has been improperly restricted or should be enlarged. In short, when privacy and the public's right to know are examined in the context of the data disclosed by taxpayers on their federal income tax returns, "[t]he clash between the right of privacy and the right to know is obvious," since "[o]ne is almost the exact opposite of the other."⁵⁷

56. Analysis of "the public's right to know" in the context of attempts by officialdom to preserve "governmental secrets," which simply disregards the possibility that the "governmental secrets" consist of data about private persons rather than official actions, is illustrated by the title of Chapter III of the treatise on political and civil rights cited in note 6 *supra*—*Government Secrecy and the Public's Right to Know*. See also Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A.J. 550 (1974). This article is Chief Justice Warren's last published address, which similarly contrasts the public's right to know with secrecy claims asserted solely on behalf of governmental activities.

57. Emerson, *supra* note 8, at 20.