

Congressional Interference in Agency Enforcement: The IRS Experience

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Over the last five years, the nature of the relationship between Congress and the Internal Revenue Service (IRS) has changed dramatically. Although the relationship remains one of interdependence, in which Congress depends on the IRS to execute the Internal Revenue Code and collect the revenues necessary to fund the federal government and the IRS depends on Congress to fund and authorize its operations, two marked changes have occurred.

First, congressional review of tax administration by the IRS has become intense and frequent.¹ Congress's relationship with the IRS began in 1862 with the creation of the Office of Internal Revenue in the Treasury Department.² For more than a century thereafter—until 1975—congressional involvement in IRS affairs was limited largely to the annual review and debate of the agency's budget, and consultation with the commissioner about proposed changes in the tax law.³ To be sure, Congress would at times review the administration of the tax law to uncover corruption,⁴ assess efficiency,⁵ examine enforcement meth-

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1. See pp. 1369-70 *infra*.

2. Act of July 1, 1862, ch. CXIX, § 1, 12 Stat. 432 (1862) (I.R.C. § 7802(a)). For a discussion of tax administration prior to 1862, see L. SCHMECKEBIER & F. EBLE, *THE BUREAU OF INTERNAL REVENUE* 2-6 (1923); R. PAUL, *TAXATION IN THE UNITED STATES* 4-7 (1954).

3. See, e.g., *Proposed Revenue Act of 1918: Hearing Before the House Comm. on Ways and Means*, 65th Cong., 2d Sess. 119 (1918) (statement of Commissioner Roper).

4. See, e.g., SUBCOMM. ON ADMINISTRATION OF THE INTERNAL REVENUE LAWS OF THE HOUSE COMM. ON WAYS AND MEANS, 83d CONG., 1ST SESS., *INTERNAL REVENUE INVESTIGATION: REPORT TO THE COMM. ON WAYS AND MEANS 1* (Comm. Print 1953) (investigation of corruption and incompetence at all levels of revenue administration); *Statement of Information, Book VIII: Internal Revenue Service Hearings Pursuant to H. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) (investigation of allegations that Nixon White House sought to use IRS for political purposes).

5. See, e.g., JOINT COMM. ON INTERNAL REVENUE TAXATION, *INVESTIGATION OF THE BUREAU OF INTERNAL REVENUE: REPORT BY THE ADVISORY GROUP APPOINTED PURSUANT TO*

ods,⁶ or weigh the Service's handling of particular types of cases⁷ or parts of the tax law.⁸ For the most part, however, such involvement was only occasional and sporadic. This is no longer the case.⁹

Second, Congress has shown a recent tendency to use a variety of techniques to prohibit the IRS from executing certain aspects of the Code, rather than changing the Code itself.¹⁰ These techniques involve legislative prohibitions that forbid the IRS to provide nationwide guidance with respect to certain tax issues, and appropriations limitations that restrict the Service's use of operating funds to administer various provisions of the Code.

These congressional prohibitions raise a variety of constitutional and practical issues. Some arguably violate the doctrine of separation of powers, and others may unconstitutionally affect similarly situated taxpayers unequally. From a purely practical standpoint, these prohibitions severely impair the efficient administration of the tax laws and may encourage a public perception that the tax system is unfair, thereby adversely affecting voluntary compliance with the law.¹¹ This Article establishes that these congressional prohibitions are imprudent from a tax policy perspective, and reviews the constitutional problems they may raise. Part I describes the roles of Congress and the IRS in the formulation and implementation of the tax law. Part II analyzes the constitutional and administrative problems that have been caused by

PUBLIC LAW, 80th Cong., 1st Sess. 147 (1948) (structural organization of Bureau caused duplication of efforts); H.R. REP. NO. 2518, 82d Cong., 2d Sess. 1 (1952) (evidence of improper administration of individual taxpayer returns).

6. See, e.g., *Invasions of Privacy (Government Agencies): Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 1119 (1965) (IRS wiretapping activities); *Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Educational Opportunity* (part 3D), 91st Cong., 2d Sess. (1970) (examining enforcement of tax law to deny racially discriminatory private schools benefit of tax-exempt status).

7. See, e.g., *Travel and Entertainment Expenditures: Hearings Before the Senate Comm. on Finance*, 88th Cong., 1st Sess. (1963) (status of regulations under I.R.C. § 274 concerning deductibility of travel and entertainment expenses); *Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Educational Opportunity* (part 3D), *supra* note 6, at 1965 (administration of tax law with respect to racially discriminatory private schools).

8. See, e.g., *Investigation of Conglomerate Corporations: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) (administration of corporate reorganization provisions); *Section 722 of the Internal Revenue Code: Hearings Before the Joint Comm. on Internal Revenue Taxation*, 79th Cong., 2d Sess. (1946) (administration of provision for statutory relief from excess profits tax).

9. See pp. 1369-70 *infra*.

10. See pp. 1370-75 *infra*.

11. For a discussion of voluntary compliance and self-assessment, see R. BLAKEY & G. BLAKEY, *THE FEDERAL INCOME TAX* 567-69 (1940); *THE AMERICAN WAY IN TAXATION: INTERNAL REVENUE, 1862-1963*, at 1-2 (L. Doris ed. 1963).

the recent shift in Congress's role, and Part III suggests changes that could improve the relationship between Congress and the IRS.

I. Parameters of the Relationship Between Congress and the IRS

The relationship between Congress and the IRS, like all interaction between the legislative and executive branches of the federal government, is governed by the powers and restrictions of the Constitution. The separation of powers doctrine, implied from the language of the Constitution,¹² seemingly lodges legislative power in the Congress,¹³ executive power in the President,¹⁴ and judicial power in the courts.¹⁵ It is thus the formal responsibility of Congress to enact revenue laws,¹⁶ and the duty of the IRS as part of the executive branch to ensure that those laws are "faithfully executed."¹⁷ There ends the high school civics lesson, however, for such a formalistic conception hardly reflects the true nature of the interaction between Congress and the executive branch. The Constitution does not create separate institutions with separate powers, but separated institutions with shared powers.¹⁸ That reality affects the roles of and interplay between Congress and the IRS with respect to tax administration.

A. *IRS Duty to Execute the Laws Faithfully*

When the IRS executes the Code, it also makes tax law. Because the execution of any law necessarily requires interpreting it, "lawmaking"

12. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 2 (1978). The division of governmental powers among coequal branches was considered the best way to ensure personal freedom. See *THE FEDERALIST* Nos. 47 and 51; Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935).

13. U.S. CONST. art. I. See generally Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROB. 1 (Summer 1976).

14. U.S. CONST. art. II. See generally Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROB. 46 (Summer 1976).

15. U.S. CONST. art. III.

16. U.S. CONST. art. I, § 8, cl. 1.

17. U.S. CONST. art. II, § 3 (President shall take care that laws be faithfully executed).

18. See, e.g., L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 28-29 (1965) (doctrine of separation of powers is expression of "a general attitude rather than [sic] inexorable table of organization"); Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 386 (1976) (lack of arbitrary lines of separation). It is now widely recognized that each of the three branches performs activities that are primarily within the realm of the other two. See, e.g., *Springer v. Philippine Islands*, 277 U.S. 189, 209-10 (1928) (Holmes, J., dissenting) (the "great ordinances of the Constitution do not establish and divide fields of black and white," and must be interpreted "with a certain latitude or our government could not go on."); L. TRIBE, *supra* note 12, at 16.

is inevitably a part of the faithful execution of the law.¹⁹ Whenever an IRS revenue agent audits a taxpayer's tax return to determine whether additional tax is due, the IRS makes law with respect to that taxpayer. It does so by interpreting the tax law and applying that interpretation to the set of facts represented by the particular taxpayer's return.²⁰ As Karl Llewellyn observed, what "officials do about disputes is . . . the law itself."²¹

The IRS also makes law institutionally, as well as through its individual agents. Nationwide guidance is mandatory if the approximately 85,000 Civil Service employees²² of the IRS are to execute the tax law in a uniform manner. Similarly, the IRS must inform taxpayers and tax practitioners of its various interpretations of the tax law. This nationwide guidance and information may be provided in many forms, including revenue rulings and procedures,²³ acquiescences and non-acquiescences in Tax Court decisions,²⁴ public written determina-

19. See, e.g., Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 360 (1947) ("every statute is a delegation of lawmaking power to the agency appointed to enforce it"); cf. B. BITTKER & J. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶ 14.01, at 14-7 to 14-8 (4th ed. 1979) (IRS can sometimes make "law" by "a lifted eyebrow"; practitioners must study statute, regulations, decisions, published rulings, and "the informal administrative climate").

20. See, e.g., Jaffe, *supra* note 19, at 360 (power to declare law applicable to particular case is the power to apply general formula to specific situation); *S. Con. Res. 21: Hearings Before a Subcomm. of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 215 (1951) (statement of Chief Judge Learned Hand) (administrative agencies cannot simply "carry out their duties" because rules are never so clear as to obviate necessity of interpretation). The Statement of Principles of Internal Tax Administration, published as a preface to every Internal Revenue Bulletin, states that "[a]t the heart of administration is interpretation of the code." See, e.g., 1979-1 C.B. ii.

21. K. LLEWELLYN, *THE BRAMBLE BUSH* 12 (2d ed. 1951).

22. [1978] INTERNAL REVENUE SERVICE ANN. REP. 5.

23. See Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 763-66 (1965) (stressing informative effect of revenue rulings). Revenue rulings set forth the Service's opinion of the tax law with respect to a stated set of facts, and usually originate with a written request from a taxpayer for information concerning the application of tax law or rulings about a matter of general interest. Revenue procedures set forth certain practices and procedures that affect "the rights or duties of taxpayers" or that "should be a matter of public knowledge." See Rev. Proc. 72-1, 1972-1 C.B. 693. Revenue procedures are published weekly in the Internal Revenue Bulletin, and are consolidated in the semiannual Cumulative Bulletin. See generally L. REDMAN & J. QUIGGLE, *PROCEDURE BEFORE THE INTERNAL REVENUE SERVICE* 42-44 (5th ed. 1974). Revenue rulings do not have the force and effect of regulations. See *Stubbs, Overbeck & Assocs., Inc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971) (revenue ruling "is merely the opinion of a lawyer in the agency and must be accepted as such. It may be helpful in interpreting a statute, but it is not binding on the Secretary or the courts.")

24. Acquiescence or nonacquiescence in a particular Tax Court decision indicates the agreement or disagreement of the Service with respect to an adverse decision. These notices are also published in the Internal Revenue Bulletin.

tions,²⁵ the Internal Revenue Manual,²⁶ the IRS Statement of Procedural Rules,²⁷ and information releases.²⁸ The IRS does not possess the legislative power to alter statutes, but it must interpret the laws in order to enforce them.²⁹ The constitutional duty to execute the laws faithfully makes it unavoidable that agencies will make as well as enforce the law.

Moreover, Congress has expressly delegated legislative power to the IRS³⁰ to make "regulations for the enforcement of this title."³¹ In some instances, Congress has specifically instructed the IRS to promulgate regulations in order to carry out the general policies expressed in specific underlying statutory provisions.³² Any regulation contrary to

25. The term, "written determination," is defined at Section 6110(b) of the Code to mean any ruling, determination letter, or technical advice memorandum. With the enactment of Section 1201 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified at I.R.C. § 6110), "written determinations" are now public. Prior to the 1976 Tax Reform Act, private letter rulings were not publicly disclosed. Although written determinations are not published in the Internal Revenue Bulletin, they are summarized on a weekly basis in a private publication, *Tax Notes*, and published by Commerce Clearing House (CCH). Written determinations are also available from the Service.

26. The Internal Revenue Manual is a compilation of instructions promulgated by the Service for the guidance of its employees in administering the tax law. See Parnell, *The Internal Revenue Manual: Its Utility and Legal Effect*, 32 TAX LAW. 687 (1979) (explanation of structure and contents of Manual, and analysis of what legal effect courts should give it).

27. See 26 C.F.R. Part 601 (1979) (setting forth Service's Statement of Procedural Rules).

28. See L. REDMAN & J. QUIGGLE, *supra* note 23, at 51.

29. See *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). The Supreme Court has often noted that administrative agencies may not usurp Congress's legislative prerogative, of course. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976) (rulemaking power granted administrative agency is not power to make law, but to carry out will of Congress); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) (power to prescribe rules and regulations in order to administer federal statute "is not the power to make law").

30. The legislative power to promulgate regulations is delegated to the Secretary of the Department of the Treasury and not directly to the Commissioner of Internal Revenue, but the responsibility to draft initial regulations falls to the IRS. See L. REDMAN & J. QUIGGLE, *supra* note 23, at 41.

31. I.R.C. § 7805(a).

32. See, e.g., I.R.C. §§ 385, 1502. Despite a confused and uneasy doctrinal development, the Supreme Court has upheld the delegation of legislative power under a multitude of theories. See, e.g., *United States v. Grimaud*, 220 U.S. 506 (1911) (statute delegated merely executive functions); *The Brig Aurora*, 11 U.S. (7 Cranch) 383, 388 (1813) (upholding delegation under theory that statute can operate conditionally). In *Boske v. Comingore*, 177 U.S. 459 (1900), the Supreme Court approved a delegation by Congress that authorized the Secretary of the Treasury to promulgate regulations for the guidance of his department, which included the Bureau of Internal Revenue. *Id.* at 468-69. IRS regulations promulgated by virtue of specific congressional instructions have been held to be a proper delegation of power to the Commissioner when Congress determined that it would have been impractical to prescribe the detailed rules necessary to complete the statutory framework. See, e.g., *United States v. Correll*, 389 U.S. 299, 307 (1967); *S. Slater & Sons, Inc. v. White*, 119 F.2d 839, 845 (1st Cir. 1941).

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the underlying statute promulgated by the IRS is invalid, of course.³³ The power to alter or change the underlying statute belongs exclusively to Congress, and the IRS seeks to ensure that it will not act beyond the scope of its delegated authority by adopting a policy of self-restraint when interpreting the Code.³⁴ Further, Congress possesses the power to investigate the IRS administration of the tax law and may change the underlying statute when it disagrees with a particular IRS interpretation.³⁵ Moreover, courts restrain the IRS by reviewing many of its pronouncements and ranking the weight to be given to various forms of IRS interpretations.³⁶ The recognition that there are limits to the IRS's lawmaking power, however, also acknowledges the constitutionality of that power.

B. Congressional Oversight

Just as the duty of the IRS to enforce the law involves lawmaking, congressional lawmaking has certain obvious features of law enforcement. Although there are important limits on Congress's enforcement authority,³⁷ it has long been acknowledged that the power of Congress

33. See, e.g., *Leary v. United States*, 395 U.S. 6, 24 (1969); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129 (1936).

34. See, e.g., Statement of Principles of Internal Revenue Tax Administration, 1979-1 C.B. ii (responsibility of IRS agent "charged with the duty of interpreting the law [is] to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he is 'protecting the revenue'"; administration should be reasonable within the bounds of law).

35. See, e.g., Revenue Act of 1978, Pub. L. No. 95-600, § 352, 92 Stat. 2846 (uncodified) (invalidating Rev. Rul. 76-242, 1976-1 C.B. 132, which ruled that taxpayer engaged in farming who used accrual method of accounting must inventory growing crops).

36. See, e.g., *Parnell*, *supra* note 26; *Surrey, The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556 (1940).

Legislative regulations issued pursuant to specific congressional delegations of authority are given great deference. See, e.g., *United States v. Cartwright*, 411 U.S. 546 (1973); *FCC v. Schreiber*, 381 U.S. 279 (1965). Such regulations will be overturned only when patently unrealistic or contrary to the underlying statute. Revenue rulings, on the other hand, are considered useful but not binding in construing the tax law. See, e.g., *Stubbs, Overbeck & Assocs., Inc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971). In determining whether the IRS has exceeded its powers, courts have also considered whether the IRS pronouncement was contemporaneous or followed shortly after the enactment of the underlying statute, see, e.g., *Bingler v. Johnson*, 394 U.S. 741, 749-50 (1969) (contemporaneous regulations must be sustained unless unreasonable and plainly inconsistent with statute), and whether the IRS interpretation is long standing or predates the reenactment of the underlying statute.

37. See, e.g., *Quinn v. United States*, 349 U.S. 155, 161 (1955) (congressional power to investigate does not extend to private affairs unrelated to valid legislative purpose, areas in which Congress is forbidden to legislate, or beyond individual protections of the Bill of Rights); *Watkins v. United States*, 354 U.S. 178, 214-15 (1957) (Congress must delineate scope of committee's investigatory authority, and witnesses may challenge relevance of particular questions to subject matter of investigation). Although Congress has the power to subpoena witnesses and documents, see House Rule XI cl. 1(m), H.R. Doc. No. 403,

to investigate is an inherent and indispensable part of its legislative power.³⁸

A host of committees and subcommittees currently are charged with assessing the execution of the Code by the IRS. In the House, both the Subcommittee on Oversight of the Ways and Means Committee³⁹ and the Government Operations Committee⁴⁰ are empowered to investigate and oversee IRS execution of the Code. In the Senate, the Governmental Affairs Committee⁴¹ and the Subcommittee on Oversight of the Internal Revenue Service of the Senate Finance Committee⁴² share this responsibility. In addition, the Joint Committee on Taxation⁴³ may "investigate the administration of . . . taxes by the Internal Revenue Service or any executive department, establishment, or agency charged with their administration."⁴⁴ The appropriations committees of the House⁴⁵ and Senate⁴⁶ also scrutinize agency affairs and can affect IRS

95th Cong., 2d Sess. 411 (1979) (House committees); Section 134(a) of the Legislative Reorganization Act of 1946 (codified at 2 U.S.C. § 190(a) (1976)) (Senate committees); I.R.C. § 8021(b)(2) (Joint Committee on Taxation), some claims of executive privilege are constitutionally based. *See, e.g.,* United States v. Nixon, 418 U.S. 683, 706-08 (1974); *cf.* United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (department heads may also claim privilege of withholding information from Congress). *See generally* Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1386 (1974).

38. *See, e.g.,* Barenblatt v. United States, 360 U.S. 109, 111 (1959); Watkins v. United States, 354 U.S. 178, 195 (1957). In *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), the Court held that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *See generally* J. HAMILTON, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS* (1976); Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975).

39. *See* Rule 4 cl. 6, Manual of Rules of the Committee on Ways and Means for the 96th Congress, reprinted in 125 CONG. REC. H541-43 (daily ed. Feb. 8, 1979) (Subcommittee on Oversight has jurisdiction to evaluate administration of tax law).

40. House Rule X cl. 4(c)(2), H.R. Doc. No. 403, *supra* note 37, at 373 (jurisdiction to conduct investigations of any matter at any time without regard to other committee jurisdictions). House Rule X cl. 2(c), *id.* at 366, requires coordination between the Government Operations Committee and other House committees, but it is questionable whether coordination concerning IRS oversight activities is even partially effectuated. *See generally* J. HARRIS, *CONGRESSIONAL CONTROL OF ADMINISTRATION* 275 (1964) (need for more effective control of investigations to assure that inquiries are fairly and efficiently controlled).

41. Senate Rule XXV cl. 1(k)(2)(B), S. Doc. No. 1, 95th Cong., 1st Sess. 35 (1977) (jurisdiction to study "the efficiency, economy, and effectiveness of all agencies and departments of the Government").

42. [1979-1980 Transfer Binder] CONGRESSIONAL INDEX (CCH) § 12,059.

43. *See* I.R.C. §§ 8001-8023.

44. *Id.* § 8022(1)(B).

45. *See* House Rule X cl. 1(b), H.R. Doc. No. 403, *supra* note 37, at 366 (jurisdiction of House Appropriations Committee); House Rule X cl. 2(b)(3), *id.* (committee may "conduct such studies and examinations of the organization and operation of executive agencies . . . as it may deem necessary").

46. *See* Senate Rule XXV cl. 1(b), S. Doc. No. 1, *supra* note 41, at 27 (jurisdiction of Senate Appropriations Committee). Section 134(a) of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified at 2 U.S.C. § 190b (1976)), authorizes the committee to "make investigations into any matter within its jurisdiction"

activities through their control of the purse.⁴⁷

Some of these subcommittees have displayed avid interest in IRS activities relating to particular taxpayers. For example, six investigative hearings were held during the Ninety-fifth Congress alone concerning the tax-exempt status of the Central States Teamsters Fund.⁴⁸ The Supreme Court has held that congressional investigative power encompasses cases pending before administrative agencies;⁴⁹ although hearings that concern a pending case should not be allowed to affect the ultimate administrative action improperly, it is the IRS that must guard against being improperly influenced by committee hearings⁵⁰ or statements of individual congressmen.⁵¹

Congress also reviews the IRS's institutional interpretations of the tax law. Recently, for example, various congressional committees have held hearings concerning proposed regulations relating to the foreign tax credit.⁵² Such hearings often require that administration officials justify their interpretations against criticism, sometimes voiced in an

47. The network of congressional committees overseeing the IRS is buttressed by the General Accounting Office, which analyzes various facets of tax administration for the oversight committees and the Joint Committee on Taxation. Legislative Reorganization Act of 1970, Pub. L. No. 91-510, §§ 231-236, 84 Stat. 1140 (1970) (codified at 31 U.S.C. §§ 1171-1176 (1976)).

48. See, e.g., *Central States Teamsters Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (1978); *Inquiry Into Activities and Status of the Department of Labor Task Force on Teamsters Pension Fund: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. (1977).

49. See, e.g., *Watkins v. United States*, 354 U.S. 178, 200-01 (1957) (investigative power includes inquiries concerning administration of existing laws). But see I.R.C. § 6103(f) (committees must sit in closed executive session when dealing with tax return information unless the taxpayer consents in writing to public session).

50. In *Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), *rev'd sub nom. Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), the district court determined that certain congressional hearings "constituted an impermissible congressional interference with the administrative process." 405 F. Supp. at 1372. The court of appeals reversed, however, after finding error on "the standing and congressional interference issues." 580 F.2d at 604. But see p. 1378 *infra* (discussing improper congressional influence on administrative process).

51. See p. 1378 *infra*; SUBCOMM. OF THE COMM. ON LABOR AND PUBLIC WELFARE, 82d CONG., 1ST SESS., REPORT ON ETHICAL STANDARDS IN GOVERNMENT 29-30 (Comm. Print 1951) (some Members may try to pressure administrators on behalf of constituents; congressmen must "make sure that the methods of intervening in administrative affairs are not themselves so inherently damaging to the administrative process . . . that they offset any public benefit that might be gained from any such legislative pressure.")

52. See, e.g., *Foreign Tax Credit for Oil and Gas Extraction Taxes: Hearings Before the House Comm. on Ways and Means*, 96th Cong., 1st Sess. (1979); *Foreign Tax Credit for Multinational Oil Corporations: Hearings Before the Subcomm. on Foreign Economic Policy of the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. (1977); *Foreign Tax Credits: Hearings Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 95th Cong., 1st Sess. (1977).

aggressive and hostile manner.⁵³ Similarly, individual members of Congress "are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute."⁵⁴ Although several courts have held particular congressional influences on executive agencies to be improper,⁵⁵ most of these actions seem well within the constitutional authority of congressional committees and individual congressmen.⁵⁶

The power of Congress to investigate the IRS is wide-ranging and may effectively be limited only by discretion and prudence.⁵⁷ Congress's oversight entities possess an almost unwieldy power to inquire into, prod, and make suggestions to the Service. Nonetheless, although the IRS ultimately must be accountable to Congress,⁵⁸ whose members are in turn accountable to the people, the IRS also has a constitutional duty to execute the tax law faithfully by determining and administering it properly. The IRS must give congressional comments only as much deference as they deserve on the merits, for the agency has no duty to placate particular congressmen or committees. Given the fine line between lawmaking and law enforcement, it is always difficult to say when one shades into the other, but clearly there is an inevitable tension between congressional oversight powers and the executive exercise of delegated powers to interpret, articulate, and execute the tax laws. Moreover, recent developments threaten to exacerbate rather than ease that tension.

II. Unwarranted Curtailment of IRS Power

Prior to 1975, the vast majority of congressional encounters with the IRS concerned annual budget review and proposed tax law changes.

53. See, e.g., *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 879-88 (1979) (colloquy between Congressman Crane and Commissioner Kurtz).

54. *Gravel v. United States*, 408 U.S. 606, 625 (1972).

55. E.g., *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972) (individual congressman improperly influenced agency decision); *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966) (congressional committee inquiry violated due process rights of administrative litigants).

56. Several courts have refused to find congressional influences improper. E.g., *American Pub. Gas Ass'n v. FPC*, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978) (committee action did not improperly affect agency action); *Gulf Oil Corp. v. FPC*, 563 F.2d 588 (3rd Cir. 1977) (committee inquiry did not impermissibly interfere with agency proceeding); *United States ex rel. Parco v. Morris*, 426 F. Supp. 976 (E.D. Pa. 1977) (individual congressman did not impermissibly influence agency action).

57. See *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses" of congressional investigations).

58. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975).

Congressional review of tax law administration was the exception, not the rule, and such review focused entirely on problems of efficiency and corruption. Since 1975, however, there has been an explosion in the number of congressional hearings that review IRS administration of the tax law, coupled with an increasing tendency of Congress to prohibit the IRS from executing certain aspects of the tax law. Some legislative prohibitions effectively stop the administration of the tax law in accord with certain revenue rulings or proposed regulations, and other prohibitions result in the temporary substitution of prior IRS rules.

This shift in emphasis raises a number of constitutional and practical questions that to date have largely been ignored. Do certain congressional enactments violate the separation of powers doctrine or create nonuniformity in the administration of the tax laws that violates the equal protection requirements of the Fifth Amendment? At what point do legislative enactments so impair rational tax administration that they warrant criticism on practical grounds? These questions must be addressed.

A. *Changes in Congressional Review of the IRS*

A few examples will illustrate the increasing tendency of Congress to review the tax administration of the IRS. Both the House Ways and Means Committee and the Senate Finance Committee established oversight subcommittees in January 1975.⁵⁹ During the next five years, through December 1979, the IRS Commissioner or his representative made 134 appearances before these and other congressional committees;⁶⁰ of these appearances, 104 involved congressional oversight of tax administration.⁶¹ During the Ninety-fourth Congress, the subjects of these hearings ranged from IRS intelligence operations⁶² and administration of the tax law with respect to professional sports franchises⁶³

59. See Congressional Budget Act of 1974, Pub. L. No. 93-344, § 701, 88 Stat. 295, 325 (1974) (codified at 2 U.S.C. § 190d(a) (1976)).

60. See Letter from David O'Connor, Assistant to the Commissioner, to Archie Parnell (Oct. 11, 1979) (on file with *Yale Law Journal*); interview with David O'Connor, in Washington, D.C. (Jan. 7, 1980).

61. *Id.* The increase in the number of appearances by the Commissioner was dramatic. Between 1971 and 1974, Commissioners Thrower, Walters, and Alexander made a total of 25 congressional appearances. Between 1975 and 1978, Commissioners Alexander and Kurtz made a total of 65 appearances, an increase of 160%.

62. See *Operation Leprechaun: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. (1975).

63. See SELECT COMM. ON PROFESSIONAL SPORTS, FINAL REPORT ON INQUIRY INTO PROFESSIONAL SPORTS, H. REP. No. 1786, 94th Cong., 2d Sess. 92-107 (1977).

to IRS difficulties in collecting federal taxes in bankruptcy cases.⁶⁴ The Ninety-fifth Congress proved equally curious about tax administration, with hearings that ranged from a review of the IRS's audit program of large corporations⁶⁵ to scrutiny of an IRS proposal to reorganize its smaller district offices.⁶⁶

Moreover, Congress accompanied this increasing scrutiny of tax law administration with legislative efforts to prohibit the IRS from executing certain aspects of the tax law. These prohibitions differ widely; some simply substitute earlier IRS rules for IRS execution in place of subsequent Service rules, whereas others freeze the administration of the tax laws without providing any clear standards at all.

An example of legislative intervention that temporarily substituted prior IRS rules is the provision in the Employee Retirement Income Security Act of 1974 (ERISA) that vitiated proposed regulations concerning the tax treatment of salary reduction plans.⁶⁷ Revenue rulings issued in 1956, 1963, and 1968 essentially provided that the amount contributed by an employer under a qualified salary reduction plan would not be includable in the employee's income until distributed to the employee.⁶⁸ In 1972, regulations were proposed that would have equated the tax treatment of such contributions with those made by employees to a qualified retirement plan.⁶⁹ The ERISA provision prohibited the IRS from issuing final regulations with respect to salary

64. See *The Bankruptcy Reform Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 789 (1975) (statement of Commissioner Alexander).

65. See *Internal Revenue Service Coordinated Examination Program: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (1977).

66. See *Proposed Reorganization of 12 Smallest IRS Districts: Hearings Before the Subcomm. on Administration of the Internal Revenue Code of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 12 (1978). Congressional review of the IRS during this period was supplemented by the report of a special consultant to the Administrative Conference of the United States concerning IRS administrative procedures, see REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 266, 94th Cong., 2d Sess. (1976), and various General Accounting Office probes into the IRS, see, e.g., *Offshore Tax Havens: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 382 (1979) (statement of GAO associate director Richard Fogel).

67. Pub. L. No. 93-406, § 2006(b), 88 Stat. 829 (1974). A salary reduction plan is an agreement between an employee and an employer whereby the employee accepts a salary reduction in return for contributions by the employer to a qualified retirement plan in the amount of the salary reduction. If the employee contributed directly to the plan, the contribution would generally be made out of after-tax income.

68. Rev. Rul. 56-497, 1956-2 C.B. 284; Rev. Rul. 63-180, 1963-2 C.B. 189; Rev. Rul. 68-89, 1968-1 C.B. 402.

69. 37 Fed. Reg. 25,938 (1972).

reduction plans until 1977, and provided that the earlier revenue rulings were to apply in the interim.⁷⁰

Similarly, in the Tax Reform Act of 1976, Congress delayed Revenue Ruling 76-215⁷¹ for one year⁷² in order to give oil companies operating under existing production-sharing contracts a reasonable time to renegotiate their contracts with foreign governments.⁷³ Another provision of the Act prohibited the IRS from following Revenue Ruling 76-231 until 1979,⁷⁴ thus substituting earlier IRS rules.⁷⁵ The ruling required that tips made by way of charge accounts to an employee must be reported to the IRS by the employer.⁷⁶ The earlier practice was not to require such reporting.⁷⁷

Congress continued its newly discovered legislative technique of substituting prior IRS interpretations of the Code in the Tax Treatment Extension Act of 1977. The IRS was instructed to disregard Revenue

70. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2006(c), 88 Stat. 829 (1974). The action was extended by Congress in the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1506, 90 Stat. 1520 (1976), and the Tax Treatment Extension Act of 1977, Pub. L. No. 95-615, § 5, 92 Stat. 3097 (1978). The issue of tax treatment of salary reduction plans was finally resolved by Congress in the Revenue Act of 1978, Pub. L. No. 95-600, § 135, 92 Stat. 2785, (codified at I.R.C. §§ 401(k), 402(a)(18)).

71. 1976-1 C.B. 194 (providing that oil contractor under oil production-sharing contract in Indonesia would not be entitled to foreign tax credit for payments made by government-owned company to Indonesian government).

72. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1035(c), 90 Stat. 1520 (1976). The provision was expanded in order to treat calendar year and fiscal year taxpayers equally in the Revenue Act of 1978, Pub. L. No. 95-600, § 701(u)(9), 92 Stat. 2916 (1978).

73. See STAFF OF JOINT COMM. ON TAXATION, 94TH CONG. 2D SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976 (Comm. Print 1976), reprinted in 1976-3 C.B. 263 (Vol. 2) [hereinafter cited as GENERAL EXPLANATION, with page references to 1976-3 C.B.].

74. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2111, 90 Stat. 1520 (1976).

75. See GENERAL EXPLANATION, *supra* note 73, at 630.

76. Rev. Rul. 76-231, 1976-1 C.B. 379.

77. See Revenue Act of 1978, Pub. L. No. 95-600, § 501, 92 Stat. 2763 (I.R.C. §§ 6001, 6041(d)).

A third provision of the Act prohibited the IRS from following Revenue Ruling 73-395, 1973-2 C.B. 87, which held that prepublication costs attributable to textbooks and visual aids do not constitute research and experimental expenditures deductible under section 174, but that such costs must be capitalized and then depreciated. Under the Act, publishers were allowed to continue their customary tax accounting methods concerning prepublication expenditures "until the IRS issues new, prospective regulations." CONFERENCE REPORT ON THE TAX REFORM ACT OF 1976, S. REP. NO. 1236, 94TH CONG., 2D SESS. 502 (1976), reprinted in 1976-3 C.B. 906 (vol. 3). The House Report that accompanied the bill indicated that the Ways and Means Committee understood "that historically tax accounting practices in the publishing industry have varied greatly and no standard procedures have been developed. Industry members apparently have followed their own interpretations, particularly with regard to the treatment of publishers' publication expenditures." H.R. REP. NO. 658, 94TH CONG., 2D SESS. 337 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3233-34. The effect of the provision is to allow all publishers to construe the tax laws as they deem appropriate, so long as consistent with past practice, without regard to the IRS's position. As a result, the provision essentially substitutes IRS prior practice concerning prepublication expenses.

Ruling 76-453⁷⁸ in determining the deductibility of travel expenses, to follow IRS rules in effect prior to that ruling,⁷⁹ and to issue no rulings or regulations prior to May 1978 with respect to the deductibility of travel expenses.⁸⁰ Similarly, in the Revenue Act of 1978,⁸¹ Congress prohibited the IRS from following proposed regulations concerning the taxability of employees with respect to employer contributions to private deferred nonqualified compensation plans.⁸² It provided that the issue addressed in the proposed regulations be answered with reference to rulings, regulations, and judicial decisions in effect prior to the issuance of the proposed regulations.⁸³

Whatever the wisdom of this legislative technique, it does at least substitute prior standards that are sufficiently clear to allow the IRS to execute the tax law in the affected areas with a fair degree of uniformity. Other legislative devices have not had this virtue. In the Tax Treatment Extension Act of 1977,⁸⁴ Congress prohibited the IRS from issuing any regulations, revenue rulings, or other form of nationwide guidance prior to July 1978 with respect to the taxation of fringe benefits.⁸⁵ The prohibition later was extended until June 1981.⁸⁶ The fringe

78. 1976-2 C.B. 86 (providing that expenses incurred in traveling between taxpayer's residence and place of work, even temporary work place, may not be deducted).

79. Prior to its 1976 ruling, the IRS had stated that construction workers could deduct travel expenses between the area in which they ordinarily lived and worked and a temporary work place outside that area. Rev. Rul. 190, 1953-2 C.B. 303.

80. Tax Treatment Extension Act of 1977, Pub. L. No. 95-615, § 2, 92 Stat. 3097 (1978). Congress later extended these instructions until January, 1980, Act of Oct. 7, 1978, Pub. L. No. 95-427, § 2, 92 Stat. 996 (1978), and then continued them until June, 1981, Act of Dec. 29, 1979, Pub. L. No. 96-167, § 2, 93 Stat. 1275 (1979) (uncodified).

81. Pub. L. No. 95-600, § 132, 92 Stat. 2763 (1978).

82. Prop. Treas. Regs. § 1.61-16, 43 Fed. Reg. 4638 (1978). The proposed regulations construed the constructive-receipt doctrine to require the inclusion in an employee's gross income of contributions to the nonqualified plan by the employer in the year the contributions were made. See Treas. Reg. § 1.451-2(a) (taxpayer may not exclude from gross income any income that taxpayer has right to receive, even if not actually received, if right is not subject to substantial restrictions).

83. Revenue Act of 1978, Pub. L. No. 95-600, § 132, 92 Stat. 2763 (1978). But see H. REP. No. 1445, 95th Cong., 2d Sess. 60 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7046, 7097 (provision not intended to restrict judicial interpretation of law concerning proper tax treatment of deferred compensation).

84. Pub. L. No. 95-615, 92 Stat. 3097 (1978).

85. *Id.* § 3. This prohibition was in response to activity that began in 1975 when a discussion draft of proposed regulations was issued concerning the taxation of fringe benefits under Section 61. 40 Fed. Reg. 41,118 (1975). A series of revenue rulings dealing with the taxation of fringe benefits were drawn up, but Treasury Secretary William Simon announced that those rulings would not be issued and on December 28, 1976, the discussion draft of proposed regulations was formally withdrawn. 41 Fed. Reg. 56,334 (1976). At the time of the congressional action in 1978, however, there were hints that the IRS was about to issue new guidelines. See STAFF OF THE HOUSE WAYS AND MEANS TASK FORCE ON EMPLOYEE FRINGE BENEFITS, 96TH CONG., 1ST. SESS., DISCUSSION AND REPORT ON EMPLOYEE FRINGE BENEFITS 2 (Comm. Print 1979).

86. Act of Dec. 29, 1979, Pub. L. No. 96-167, § 1, 93 Stat. 1275 (1979). Congress had

benefit prohibition is a restriction on the IRS without any substitution of a prior rule, and it leaves a void in both the IRS's and the public's understanding of the proper tax treatment for these benefits. Section 61 of the Code demands that all income be included in gross income, regardless of source or form, unless excluded by law.⁸⁷ Courts consistently have held that section 61 "is broad enough to include in taxable income any economic or financial benefit . . . whatever the form or mode by which it is effected."⁸⁸ By forbidding the IRS to issue any nationwide guidance with respect to certain questions that inevitably arise from the administration of such a broad statutory command, Congress effectively stopped the administration of the tax law with respect to fringe benefits.⁸⁹

The Revenue Act of 1978 included a similar provision that prohibited the IRS from issuing any nationwide guidance prior to January 1980 concerning the classification of employees and independent contractors for federal tax purposes.⁹⁰ The provision also provided that workers could be treated as independent contractors in the interim if there was a "reasonable basis" for doing so, and defined what this "reasonable basis" must be.⁹¹ Congress has extended the pro-

earlier extended the prohibition to January, 1980, in Act of Oct. 7, 1978, Pub. L. No. 95-427, § 1, 92 Stat. 996 (1978). Although the language of the statutory prohibitions concerns only regulations, Congress intended to prohibit all forms of nationwide guidance. See note 108 *infra*.

87. It might be argued that the IRS has had a long-standing practice not to tax certain fringe benefits, and that this practice has gained the force of law. See O.D. 514, 2 C.B. 90 (1920) (employee reimbursement for supper, when paid in connection with voluntary overtime work, is not includable in gross income); O.D. 946, 4 C.B. 110 (1921) (railroad passes issued to railroad employees do not constitute income). IRS revenue agents, however, traditionally have raised the fringe benefit issue during audits of individual tax returns. See *Tax Treatment of Employee Fringe Benefits: Hearings Before a Task Force of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 9, 12 (1978) (statement of Commissioner Kurtz) (fringe benefit practices have come under closer scrutiny since advent of special employment tax enforcement program in 1972). The IRS has not changed its long-standing practice, but has undertaken a more effective enforcement strategy.

88. Commissioner v. Smith, 324 U.S. 177, 181 (1945); see Commissioner v. Kowalski, 434 U.S. 77 (1977); James v. United States, 366 U.S. 213 (1961).

89. See pp. 1377-80 *infra*.

90. Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2763, 2885 (1978).

Important consequences flow from this classification. If a worker is classified as an employee, the employer must withhold income taxes and the employee's portion of Social Security taxes from the employee's wages. I.R.C. §§ 3102, 3402. The employer also must pay the federal unemployment tax and the employer's portion of Social Security taxes with respect to the employee. I.R.C. §§ 3111, 3301. If a worker is classified as an independent contractor, however, no employee/employer relationship exists and the employer need not withhold or pay federal unemployment taxes and Social Security taxes for the worker.

91. The provision defined "reasonable basis" as reliance on judicial precedent or earlier IRS pronouncements, on the fact that a prior IRS audit did not result in tax assessments with respect to the classification of employees, or on the long-standing practice of a significant segment of an industry.

vision, thus effectively amending the underlying statutes until 1981.⁹²

In addition to these legislative prohibitions, Congress recently has limited the IRS use of appropriated funds to carry out certain aspects of the tax law.⁹³ Last year, Congress provided that none of the fiscal year 1980 funds appropriated for the IRS could be used to formulate or implement any nationwide guidelines that would cause the loss of the tax-exempt status of private secular or private religious schools, unless the guidelines were in effect prior to August 22, 1978.⁹⁴ This limitation was Congress's reaction to the IRS's release on that date of a proposed revenue procedure that set forth new guidelines to determine whether the operations of a private school were racially discriminatory, thus making the school ineligible for tax-exempt status.⁹⁵ Congress also provided that no fiscal year 1980 funds could be used by the IRS to carry out any revenue ruling that provided that a taxpayer is not entitled to the charitable contribution deduction for contributions that are used for educational purposes by a religious school.⁹⁶ This appropriations limitation was intended to prohibit the IRS from enforcing Revenue Ruling 79-99,⁹⁷ which provided that taxpayers are not entitled to charitable contribution deductions for payments to a private tax-exempt religious school unless they exceed the fair market value of the education provided to the taxpayer's child.⁹⁸

From Congress's standpoint, the important distinction between appropriations limitations and legislative prohibitions on the IRS is that of committee jurisdiction.⁹⁹ From the IRS's perspective, however, there

92. Act of Dec. 29, 1979, Pub. L. No. 96-167, § 9(d), 93 Stat. 1275, 1278 (1979).

93. Treasury, Postal Service and General Government Appropriations Act, 1980, Pub. L. No. 96-74, §§ 103, 614, 615, 93 Stat. 559, 562, 576-77 (1979).

94. *Id.* §§ 103, 615.

95. The IRS issued a revised version of the revenue procedure on February 9, 1979. Both the original and revised version of the proposed revenue procedure are reprinted in *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means* (part 1), 96th Cong., 1st Sess., 21, 41 (1979).

96. Treasury, Postal Service and General Government Appropriations Act, 1980, Pub. L. No. 96-74, § 614, 93 Stat. 576 (1979).

97. 1979-1 C.B. 108.

98. See pp. 1381-82 *infra* (discussing provision).

99. The appropriations committees of the House and Senate have jurisdiction over appropriations limitations, whereas the tax-writing committees of Congress have jurisdiction over legislative prohibitions concerning the IRS. Both the House and Senate Rules fortify the jurisdiction of the two house's respective appropriations committees by forbidding appropriations in bills reported by legislative committees. House Rule XXI cl. 5, H.R. Doc. 403, *supra* note 37, at 541; Senate Rule XLI, S. Doc. 1, *supra* note 41, at 68. Conversely, both the House and Senate Rules provide that it will not be in order to consider substantive legislation in appropriations bills. House Rule XXI cl. 2; Senate Rule XVI, cls. 2 & 4; see Borda, *Legislative Aspects of Appropriation Bills—The Point of Order, Its Use and Effects*, 32 Geo. L.J. 395, 400 (1944) (congressional rules against legislative propositions on general appropriations bills).

These rules are not always followed, however, and the courts have often been called

is little if any practical difference between an appropriations limitation that restricts the use of funds to carry out guidelines issued after a certain date and a legislative prohibition that forbids the issuance of new guidelines after a certain date.¹⁰⁰ Both types of restrictions prevent the IRS from following its current interpretations of the Code. Both create similar administrative problems, and both raise similar constitutional questions.

B. *Prudential and Constitutional Considerations*

As discussed above, the effect of some recent congressional prohibitions has been the substitution of prior IRS rules for subsequent IRS interpretations of the Code, or, in some cases, an effective freeze of the administration of the tax law. The two types of prohibition raise quite different constitutional and practical issues. When Congress substitutes fairly definite earlier IRS rulings, the IRS is left with clear standards for enforcement and thus may minimize problems of nonuniform application of the tax laws. Congressional substitution of prior IRS rules for proposed new interpretations of the Code may be a useful method by which Congress can indicate that the IRS's proposed changes deviate from what Congress intended the tax laws to be, an action that doubtless is constitutionally appropriate. At the same time, such legislative substitutions may be criticized on prudential grounds as undermining public confidence in the fairness of the tax laws. The IRS often proposes new interpretations of the Code in response to apparent inconsistencies and inequities in the treatment of similarly situated taxpayers, and congressional reversion to prior rules perpetuates these

upon to determine the legal effect of various provisions embodied in appropriations acts. See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-91 (1978); *United States v. Dickerson*, 310 U.S. 554, 555-61 (1940). In no case has a court refused to give substantive legal effect to a provision in an appropriations act solely on the basis of House and Senate Rules. But see *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 136 (1st Cir. 1979) (Bownes, J., dissenting) (congressional rules of procedure expressly prohibit changing existing law via appropriations acts, and "compel a finding that there was no substantive amendment" of statute under consideration). Although amendments by implication via appropriations acts "are not favored," *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936), courts need not find explicit congressional intent to amend existing law if there is a "positive repugnancy" between the two statutes that leaves them irreconcilable. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939)); see *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968).

100. Unlike the legislative prohibition concerning fringe benefits, however, the appropriations limitations may have amended by implication the relevant underlying sections of the Code. See pp. 1382-83 *infra*. In either case, unless there exist fairly definite rules prior to a certain date, the IRS is placed in the troublesome position of being required to execute portions of the tax law without definite guidance and without the opportunity to formulate new rules.

apparent difficulties. Nevertheless, this decision ultimately must rest with Congress, which is directly accountable to the public.

Prudential considerations become critical, however, when the effect of the congressional prohibition is to prevent the administration of the tax law altogether. When Congress prohibited the IRS from issuing nationwide guidance concerning fringe benefits, for example,¹⁰¹ it provided no basis for IRS action whatsoever. In the words of Commissioner Jerome Kurtz, the prohibition has caused "severe problems for tax administration. Existing inconsistencies continue and expand. Uncertainties and apparent inequities in the treatment of different benefits undermine the voluntary compliance system."¹⁰²

Congressional actions that freeze the administration of the tax laws deserve strong criticism both from a tax policy perspective and on practical grounds. With regard to tax policy, such a freeze promotes the nonuniform treatment of similarly situated taxpayers and thus threatens the orderly administration of the tax laws. Similarly, the appropriations limitation that prevents the IRS from spending funds to deny tax-exempt status to discriminatory private schools appears likely to reinforce the public's cynicism about lawmaking and government.¹⁰³

In practice, the results of a freeze can be ludicrous. When Congress postpones the effective date of revenue rulings by tacking on riders to an appropriations act, the result may be hidden from those who are most concerned. Taxpayers who read the Code, regulations, and even pertinent judicial decisions will not be aware of such one-year changes in the tax law. Must tax practitioners now review appropriations acts to determine the content of current tax law? Should the IRS revise its instructions for taxpayers on such a basis? Moreover, appropriation acts are valid for only one year, and a fiscal year at that. Do changes in the law apply only for the last quarter of one calendar tax year and for the next three quarters of the next calendar tax year? At the end of the fiscal year, does the former substantive law again come into effect? It is not clear what should happen to tax deficiencies pending before the pertinent fiscal year; presumably, prior law would continue to apply. Appropriation act amendments to the Code are simply without justification in terms of prudent tax policy and interfere with the orderly and consistent administration of the tax law.

101. See pp. 1372-73 *supra*.

102. *Tax Treatment of Employee Fringe Benefits: Hearings Before a Task Force of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 12 (1978) (statement of Commissioner Kurtz).

103. Professor B. Wolfman, Letter to the Editor, *New York Times*, August 31, 1979, § A, at 22, col. 3.

Just as important as any prudential issues, however, are the constitutional problems that Congress raises when it decides “not to face substantive issues in various areas, but simply to stop administration.”¹⁰⁴ Such actions may violate the equal protection guarantees of the Fifth Amendment and contravene the separation of powers doctrine. “The tax system fails when Congress has neither provided legislative answers nor permitted the IRS to provide national guidance as to the administration of existing law.”¹⁰⁵ In some cases, this failure may be of constitutional significance.

1. *Violation of Separation of Powers Doctrine*

The contours of the separation of powers doctrine are vague, and it is probably impossible to determine the precise point at which congressional activity violates the doctrine. It is not even clear which plaintiffs would possess standing to litigate such questions.¹⁰⁶ As a conceptual matter, however, there are at least two ways in which congressional prohibitions on the IRS arguably violate the separation of powers doctrine.

The first occurs when Congress halts or changes the administration of the tax law without amending, even by implication, the underlying statute on which the administration is based. The IRS, like any executive agency, is charged with seeing that the laws “be faithfully executed.”¹⁰⁷ Some congressional prohibitions make this impossible. For example, when Congress restricted the IRS from issuing nationwide guidance with respect to the treatment of fringe benefits,¹⁰⁸ its failure to amend section 61 left the underlying law exactly as it had been. Commissioner Kurtz, commenting on the administrative nightmare thus created, explained the IRS’s difficulty: “As an administrator, I

104. Address by Commissioner Kurtz, A.B.A. Section on Taxation Annual Meeting, August 11, 1979; see Bureau of National Affairs, Daily Tax Report G-5 (Aug. 17, 1979) (quoting portions of address).

105. *Hearings on Miscellaneous Tax Bills II: Hearings Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 78 (1979) (statement of Donald Lubick, Assistant Secretary for Tax Policy of the Treasury Department).

106. See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447, 487-89 (1923) (neither state nor taxpayer possesses standing to challenge federal spending statute). It may be possible, however, for the IRS, the Treasury Department, and the President to litigate the question. See, e.g., *Kennedy v. Sampson*, 511 F.2d 430, 434 (D.C. Cir. 1974) (upholding senator’s standing to sue executive branch for intrusion into legislative powers).

107. See pp. 1362-65 *supra*.

108. Although the fringe benefit prohibition applied expressly only to the issuance of regulations, it was intended to apply to the issuance of revenue rulings and revenue procedures as well. H.R. REP. NO. 1232, 95th Cong., 2d Sess. 5 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2508, 2510.

can administer a law that says an item is exempt, but I can't administer a law which says, 'Don't tell anybody,' but that is essentially where we are on fringe benefits."¹⁰⁹ When Congress enacts a provision that so substantially restricts the IRS that a particular provision of the Code cannot be enforced effectively, Congress unconstitutionally intrudes into the domain of the executive branch.¹¹⁰

There is some judicial support for this conclusion. "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them," as the Supreme Court noted in *Springer v. Philippine Islands*.¹¹¹ There are important limits on congressional authority to interfere with agency administration of the law. One parallel may be drawn to cases holding that congressional pressure may not be permitted to change agency decisions made under operating statutes.¹¹² Another parallel exists to cases holding that congressional pressure may not interfere with an administrative agency's adjudicative functions¹¹³ or violate the due process rights of parties to an administrative proceeding.¹¹⁴ A third parallel may be drawn to agency prosecutorial discretion¹¹⁵ and to the rule that Congress may

109. *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means* (part 2), 96th Cong., 1st Sess. 896 (1979) (statement of Commissioner Kurtz).

110. It could be asserted that the President did not perceive any unconstitutional interference because he did not veto the enactment. See *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182-83 (2d Cir. 1967) (President's failure to veto statute, said to violate separation of powers, weighs strongly in favor of its validity). The President may have chosen not to raise the issue for political reasons, however.

111. 277 U.S. 189, 202 (1928); see *Buckley v. Valeo*, 424 U.S. 1, 139 (1976).

112. E.g., *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972) (overturning agency decision to approve construction of bridge on statutory grounds, because decision had been improperly influenced by congressman's threat to block appropriations for unrelated project); *United States ex rel. Parco v. Morris*, 426 F. Supp. 976 (E.D. Pa. 1977) (House subcommittee did not violate separation of powers doctrine by influencing change in immigration policy, but relief granted because agency did not give notice and allow public comments concerning rule change). Although Congress theoretically could remove any statutory prohibitions on congressional interference in agency action, that might "only succeed in forcing courts to explicitly constitutional grounds in order to disapprove improper influence in the administrative decisionmaking process." Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1437 (1977).

113. E.g., *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 610 (3rd Cir. 1977) ("courts must not tolerate undue legislative interference with an administrative agency's adjudicative functions").

114. E.g., *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966) (invalidating FTC divestiture order on basis of congressional hearings conducted while case was pending before agency, and finding that to "subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him" violated due process rights of party to agency proceeding).

115. E.g., *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *Moog Indus., Inc. v. FTC*, 355 U.S. 411 (1958) (FTC has discretionary determination whether to prosecute suit).

not terminate a pending agency investigation or order courts or agencies to decide a particular case in a particular way.¹¹⁶ It is for the courts, not Congress, to say when an existing law has been misinterpreted.¹¹⁷ If the power to execute the laws means anything, it is that neither Congress nor individual congressmen may interfere with the executive decisions of administrative agencies as to how they interpret laws already in force. If certain fringe benefits are not covered by section 61, courts may reverse the IRS's interpretation. If fringe benefits were never intended to come under section 61, Congress may amend the law. But Congress may not instruct the IRS not to enforce existing law any more than it can withdraw jurisdiction from a court in order to decide the outcome of a pending case.¹¹⁸

It does not greatly help Congress's position to note that the IRS can still enforce section 61 with respect to fringe benefits on a case-by-case basis,¹¹⁹ or that Congress suspended national policymaking by the IRS in order to provide itself sufficient time to study this complex issue.¹²⁰ Congress clearly recognized that the use of fringe benefits has been increasing over the years¹²¹ and that fringe benefits may fall under section 61.¹²² Although these facts demand an institutional response from the IRS, Congress has effectively barred enforcement of current law without attempting to resolve the substantive issues involved.¹²³

116. See *United States v. Klein*, 80 U.S. 128, 147 (1871) (act passed after plaintiff won judgment in Court of Claims that directed court to dismiss suit by any unpardoned rebel for want of jurisdiction was unconstitutional encroachment on judicial power to weigh and give proper effect to evidence, and thus "passed the limit which separates the legislative from the judicial power"); *id.* at 147-48 (Congress may not pass laws that impair President's pardoning power); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (bill of attainder clause prevents Congress from prohibiting former rebels to become members of certain professions).

117. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (it "is emphatically the province and duty of the judicial department to say what the law is."); *Kilbourn v. Thompson*, 103 U.S. 168, 192-93 (1881) (reversing contempt citation on ground that matter under inquiry was "in its nature clearly judicial" and therefore "confided by the Constitution to the judicial and not to the legislative department of the government.")

118. See note 116 *supra* (citing cases).

119. See note 87 *supra*.

120. See H.R. REP. NO. 1232, 95th Cong., 2d Sess. 5 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2508, 2510 ("a proper review" of fringe benefit issues "requires a longer period of time").

121. H.R. REP. NO. 1232, 95th Cong., 2d Sess. 5 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2508, 2510.

122. *Id.* at 4 (citing *Commissioner v. Smith*, 324 U.S. 177, 181 (1945), for rule that Section 61 is broad enough to include "any economic or financial benefit" conferred as compensation "whatever the form or mode by which it is effected").

123. See *Pinc, Panel Decides to Block Tax on Benefits*, Wash. Post, Sept. 13, 1979, § C, at 1, col. 3. Congressman Collins has introduced a bill that if enacted would permanently forbid the IRS from issuing regulations with respect to the taxation of fringe benefits. H.R. 5165, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H7364 (daily ed. Sept. 5, 1979).

If a taxpayer requests a private letter ruling concerning the taxability of a particular fringe benefit, the IRS cannot give that taxpayer an answer. If a revenue agent requests technical advice concerning the taxability of a particular fringe benefit, the IRS cannot give that revenue agent an answer. To permit enforcement in such circumstances only on a case-by-case basis, according to individual revenue agents' interpretations of the law, is effectively to halt the formulation and implementation of general IRS policy approaches in the form of revenue rulings and instructions to the field. Because the "power of an administrative agency . . . necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress,"¹²⁴ it follows that when Congress restricts the IRS from exercising this "necessary power" it unconstitutionally interferes with the executive branch.¹²⁵

Congressional restrictions on the IRS also may violate the separation of powers doctrine when they clash with prior judicial commands that the IRS execute the law in a certain manner. Because it is the province of the courts, not Congress, to interpret what an existing law means, Congress may not oppose such a judicial interpretation or deny the IRS the funds necessary to execute the law in accordance with judicial interpretation¹²⁶ unless Congress explicitly alters the law itself. Otherwise, the same law may have as many different meanings as there are sessions of Congress.

One example of such a clash is Congress's interference with IRS efforts to provide nationwide guidance with respect to the revocation of the tax-exempt status of racially discriminatory private schools.¹²⁷ In 1971, the Supreme Court affirmed an injunction against the IRS in *Green v. Connally*¹²⁸ ordering that tax-exempt status not be given to such schools, that tax-exempt status previously accorded to such schools

124. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

125. See note 108 *supra* (Congress prohibited not only promulgation of regulations concerning taxability of fringe benefits, but all other forms of nationwide guidance such as revenue rulings and procedures as well).

126. Cf. *Califano v. Westcott*, 443 U.S. 76, 92-93 (1979) (extending unemployment benefits rather than overturning whole program as unconstitutional, despite greater cost of remedy); *Clark v. Board of Educ.*, 374 F.2d 569, 571 (8th Cir. 1967) (courts cannot accept "the position that the flow of federal money is the final arbiter of constitutionally protected rights"). But cf. *Newman & Keaton, Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?* 41 CALIF. L. REV. 565, 568 (1953) (Congress may slash appropriations for enforcement of certain laws without violating separation of powers).

127. See p. 1374 *supra*. See generally Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378 (1979).

128. 330 F. Supp. 1150 (D.D.C.), *aff'd sub. nom.* *Coit v. Green*, 404 U.S. 997 (1971).

be revoked, and that tax deductions for contributions to such schools be disallowed.¹²⁹ The Court's decision was based on a statutory interpretation of the Code.¹³⁰ In these circumstances, as Professor Laurence Tribe noted in testimony before the House Ways and Means Oversight Subcommittee, "to intrude the legislative branch into the Federal district court proceedings would raise the most profound questions of the separation of power in our Constitution."¹³¹ Nevertheless, the Ashbrook Amendment¹³² to the fiscal year 1980 appropriations act provided that none of the funds made available for the IRS could be used to implement rules to cause the revocation of tax-exempt status for such schools.¹³³

Similarly, the Dornan Amendment¹³⁴ to the fiscal year 1980 appropriations act prohibited the IRS from using any of its funds to enforce Revenue Ruling 79-99.¹³⁵ As discussed above, this ruling provided that taxpayers are not entitled to charitable contribution deductions for payments to a private tax-exempt religious school unless the contributions exceed the fair market value of the education provided to the taxpayer's child.¹³⁶ The ruling was no radical interpretation of the

129. 330 F. Supp. at 1179-80.

130. *Id.* at 1164-65.

131. See *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 366 (1979) (statement of Professor Laurence Tribe).

132. Treasury, Postal Service and General Government Appropriations Act of 1980, Pub. L. No. 96-74, § 103, 93 Stat. 562 (1979) [hereinafter cited as Ashbrook Amendment].

133. *Id.* Specifically, Congress provided that none of the funds made available to the IRS

shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

Although the court's injunction in *Green* concerned only private schools in Mississippi, the prohibition embodied in the Ashbrook Amendment does not allow the IRS to spend funds even in Mississippi with respect to post-August 22, 1978, revenue rulings concerning private schools. Moreover, the *Green* court stated that the "underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt." 330 F. Supp. at 1174. The guidelines in effect prior to August 22, 1978, are not sufficient to satisfy the court's injunction. See note 152 *infra*.

134. Treasury, Postal Service and General Government Appropriations Act of 1980, Pub. L. No. 96-74, § 614, 93 Stat. 576 (1979) [hereinafter cited as Dornan Amendment]. The amendment prohibits the IRS from using any funds to

carry out any revenue ruling of the Internal Revenue Service which rules that a taxpayer is not entitled to a charitable deduction for general purpose contributions which are used for educational purposes by a religious organization which is an exempt organization as described in section 170(c)(2) of the Internal Revenue Code of 1954.

135. 1979-1 C.B. 108; see 125 CONG. REC. H5975-76 (daily ed. July 16, 1979) (remarks of Congressman Dornan) (introducing amendment prohibiting use of funds to enforce Revenue Ruling 79-99).

136. See p. 1374 *supra*.

Code, it should be noted, but simply a restatement of firmly established principles concerning the deductibility of charitable contributions. Indeed, the ruling was based on the facts and holding of *Oppewal v. Commissioner*,¹³⁷ and it is not clear why the IRS thought a revenue ruling was necessary at all. In any event, like the Ashbrook Amendment, the Dornan Amendment denies the IRS the funds to carry out the interpretation of a section of the Code in a way that a federal court has held is required under that section. Commissioner Kurtz has acknowledged the awkward position in which the IRS is now placed, stating that the IRS is at a loss as to "how not to administer a revenue ruling that simply restates a court decision."¹³⁸

In analyzing the separation of powers concerns here, the first question must be whether the Ashbrook and Dornan amendments defy the courts by prohibiting the IRS from carrying out their instructions and interpretations, or whether the spending limitations implicitly amend the underlying statutes on which the courts' interpretations rest. The latter would not violate the separation of powers doctrine, because Congress clearly has the power to change the law. There are serious objections to such an interpretation, however. First, it is a violation of Congress's own rules to enact substantive legislation in an appropriations act.¹³⁹ Second, the constitutionality of such amendments by implication is itself subject to doubt on grounds of vagueness. Nothing in the Code itself now repeals *Oppewal* or *Green* or the sections on which they rest. The Dornan Amendment of the appropriations act obviates a revenue ruling that merely restates a standard interpretation of the Code without explicitly amending that section. Congress could amend the relevant sections explicitly without violating the separation of powers doctrine, but the prohibition of funds for executive enforcement of certain sections of the Code implies only that a particular Congress disagrees with the way in which courts have interpreted such sections. Congress should not be allowed to effect implicit amendments of the Code by prohibiting funds for enforcement when the result clashes with judicial interpretation of what those sections require. Such congressional prohibitions raise separation of powers issues that, although not easily answered, should not be lightly dismissed.

It seems likely, however, that the IRS must conclude that the Dornan and Ashbrook amendments do amend the Code, if only by implica-

137. 468 F.2d 1000 (1st Cir. 1972).

138. Address by Commissioner Kurtz, *supra* note 104.

139. See note 99 *supra*.

tion,¹⁴⁰ and that such amendments by implication are probably valid.¹⁴¹ The next question then must be whether the amendments clash with interpretations in *Oppewal* and *Green* that are based on the Constitution. If so, the Ashbrook and Dornan amendments would apparently violate the separation of powers doctrine by contravening a judicial interpretation of the Constitution. Although the *Green* court focused on statutory interpretation,¹⁴² its clear and uncompromising language as to the probable unconstitutionality of a contrary statutory interpretation¹⁴³ makes it reasonable to conclude that the court's decision was based in part on constitutional grounds. *Oppewal* makes no mention of the Constitution at all, but a contrary statutory interpretation in that case might raise constitutional problems that are discussed below. No clearer violation of the separation of powers doctrine can be imagined than a situation in which Congress ignores the constitutional interpretations of the federal judiciary.

2. Other Constitutional Violations

Congressional prohibitions on the IRS that effectively stop the administration of the tax law may be unconstitutional for reasons aside from the violation of the separation of powers doctrine. The Dornan and Ashbrook amendments in particular may be unconstitutional violations of the establishment clause¹⁴⁴ or the equal protection component of the due process clause of the Fifth Amendment.¹⁴⁵

140. Senator Chiles, Chairman of the Senate Appropriations Subcommittee responsible for the IRS budget, complained during the Senate debate on the Ashbrook and Dornan amendments that the amendments were legislative in effect:

There is a Committee on Finance that is supposed to have jurisdiction over the Internal Revenue Service. . . . But suddenly, we have been here [two] days now, and . . . we have not been arguing appropriations. . . . I do not know how we have gotten into this situation where legislation is continually attached to the appropriations bill.

125 CONG. REC. S11,983 (daily ed. Sept. 6, 1979) (remarks of Senator Chiles); see 125 CONG. REC. H5880-85 (daily ed. July 13, 1979) (remarks of numerous congressmen, all assuming legislative effects of amendments). Given the apparent irreconcilability of the Code and the amendments and the fact that a number of congressmen intended to amend the Code, it is difficult to imagine how the IRS could conclude that the Dornan and Ashbrook amendments did not amend the Code by implication.

141. The courts have often been asked to determine the legal effect of provisions embodied in appropriations acts. See note 99 *supra* (discussing cases).

142. See p. 1381 *supra*.

143. See 330 F. Supp. at 1164-65 ("a contrary interpretation of the tax laws would raise serious constitutional questions" because "it would be difficult indeed to establish" that tax exemptions and deductions could be given to schools practicing racial discrimination "consistently with the Constitution").

144. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion").

145. U.S. CONST. amend. V (no person shall "be deprived of life, liberty, or property,

The first question here is whether the tax-exempt status accorded private schools by virtue of section 501(c)(3) or the deductibility of contributions to such schools permitted by section 170(c)(2) so involve the federal government as to constitute federal action.¹⁴⁶ If so, the IRS is constitutionally obligated to revoke the tax-exempt status of racially discriminatory private schools and to deny the deductibility of contributions to religious schools in cases that violate the establishment clause. If the IRS is thus obligated, then Congress violates the Constitution in passing legislation that prohibits the IRS from using any of its funds to comply with constitutional mandates.

Although no court has determined whether section 501(c)(3) and section 170(c)(2) involve the government to such an extent as to constitute federal action, that would appear to be the case. A three-judge court in *McGlotten v. Connally*¹⁴⁷ determined that the federal government's allowance of charitable contribution deductions under section 170(c)(4) and the allowance of tax-exempt status under section 501(c)(8) to fraternal orders that excluded nonwhites from membership did constitute "federal action."¹⁴⁸ Such tax benefits amount to tax subsidies, the court said, and when granted to racially discriminatory fraternal orders those subsidies violate both the due process clause of the Fifth Amendment and the Civil Rights Act of 1964.¹⁴⁹ By virtue

without due process of law"). The Fifth Amendment's due process clause has been held to encompass the equal protection clause of the Fourteenth Amendment, which prohibits state discrimination on the basis of race, color, or religion. *See, e.g.,* *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

146. It is clear that the federal government could not provide these benefits directly. In *Norwood v. Harrison*, 413 U.S. 455 (1973), a case involving state rather than federal aid, the Supreme Court held:

if the [private] school engages in discriminatory practices, the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."

Id. at 464-65 (quoting *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)). *See generally* Note, *supra* note 127, at 396-400.

Plaintiffs in the *Green* case have reopened the suit, alleging that the IRS is not complying with the court's permanent injunction and order. In *Green v. Miller*, (D.D.C. 1980), [1980] FED. TAXES (P-H) ¶ 80-650, the court denied plaintiffs' and defendants' motions for summary judgment, but supplemented the injunction in order to establish procedures and standards for reviewing compliance with the previous court order.

147. 338 F. Supp. 448 (D.D.C. 1972).

148. *Id.* at 459.

149. 42 U.S.C. § 2000(d) (1976). The *McGlotten* court also held that social clubs, though racially discriminatory, were entitled to tax-exempt status under Section 501(c)(7). 338 F. Supp. at 458. Congress thereafter added Section 501(i) in order to deny tax-exempt status to social clubs that discriminate "against any person on the basis of race, color, or religion," Pub. L. No. 94-568, § 2(a), 90 Stat. 2697 (1976), even though Congress acknowledged that this rule was already implied in Section 501(c)(3). *See* S. REP. NO. 1318, 94th Cong., 2d Sess. 8 & n.5 (1976).

It is generally agreed that many income tax provisions operate as a form of "govern-

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of such tax treatment, "the Government has become sufficiently entwined with private parties to call forth a duty to ensure compliance with the Fifth Amendment."¹⁵⁰

This reasoning applies with equal force to the allowance of charitable contributions deductions under section 170(c)(2) to private schools that practice racial discrimination and to the tax-exempt status granted to such schools under section 501(c)(3). The IRS is constitutionally obligated to forbid deduction of contributions to racially discriminatory schools and to deny such schools a tax-exempt status.¹⁵¹ The guidelines in effect prior to August 22, 1978, are simply not sufficient to satisfy the constitutional duty placed on the IRS,¹⁵² and the Ashbrook Amendment thus effectively prohibits the IRS from carrying out its constitutional duty. This places the constitutionality of the Ashbrook Amendment in grave doubt; appropriations acts have been held just as unconstitutional as substantive legislation.¹⁵³ If the Ashbrook Amendment is held unconstitutional under the Fifth Amendment, that defect should be cured by Congress allowing an adequate

ment spending for . . . favored activities of groups through the tax system rather than through direct grants, loans, or other forms of government assistance." Surrey & McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C.L. Rev. 225, 228 (1979). Such provisions are commonly referred to as tax expenditures, and are different from those structural provisions required for the implementation of a normal income tax. The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974), requires the Director of the Congressional Budget Office to report tax expenditures listed in the Presidential budget to the Committee on the Budget in each House. 2 U.S.C. § 601, 602(f)(1) (1976).

150. 338 F. Supp. at 456. The court reasoned that the allowance of the charitable contribution deductions involved the federal government to a greater degree than the allowance of other deductions, in part because of "the aura of Government approval inherent in an exempt ruling by the Internal Revenue Service . . ." *Id.* at 457.

151. *See id.* at 459 (tax-exempt status granted fraternal organizations under Section 501(c)(8) deemed sufficient government involvement to invoke Fifth Amendment). *But cf.* Williams v. Howard University, 528 F.2d 658, 660 (D.C. Cir. 1976) (university's tax-exempt status and receipt of federal funds does not show sufficient government control to make its readmission decisions equivalent to federal action).

152. *See Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means* (part 1), 96th Cong., 1st Sess. 3-8 (1979) (statement of Commissioner Kurtz). Specifically, under pre-August 22, 1978, guidelines, a private school needs only to profess a nondiscrimination policy even though it actually practices racial discrimination. As a result, some schools that have been adjudicated to be racially discriminatory have nonetheless retained their tax-exempt status. *Id.*

153. Appropriations acts have been held as effective as ordinary bills in enacting legislation, *see, e.g.,* Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974), and like substantive legislation, such acts can violate constitutional mandates, *see, e.g.,* Franklin Township v. Tugwell, 85 F.2d 208, 221 (D.C. Cir. 1936); *cf.* Welden v. Ray, 229 N.W.2d 706, 710 (Iowa 1975) (legislature may not "under the guise of a qualification upon an appropriation" violate state constitution). Without such a doctrine, the flow of federal money would be the final arbiter of constitutionally protected rights. Clark v. Board of Educ., 374 F.2d 569, 571 (8th Cir. 1967).

appropriation to support the IRS's compliance with the Constitution.¹⁵⁴

Similarly, a special provision to make educational fees for attending private religious schools deductible might violate the establishment clause of the First Amendment.¹⁵⁵ By restricting the IRS's enforcement of section 170(c)(2) in a way that advantages private religious schools, the Dornan Amendment might be held to be an unconstitutional form of aid to such schools.

Finally, it is at least arguable that congressional prohibitions that inevitably lead to the unequal treatment of similarly situated taxpayers also violate the equal protection component of the Fifth Amendment.¹⁵⁶ By preventing the IRS from formulating nationwide guidelines for the treatment of fringe benefits, but leaving the IRS free to enforce section 61 as it affects fringe benefits on a case-by-case basis, Congress has virtually guaranteed there will be different treatment of similarly situated taxpayers. When Congress thus interferes with the administration of the tax laws, it may violate the equal protection component of the Fifth Amendment even if it does not also violate the separation of powers doctrine.

III. Improvement of the Relationship Between Congress and the IRS

The recent tendency of Congress to review and restrict the IRS's administration of the tax laws raises a number of difficult constitutional and practical issues. Congressional disregard for the administrative difficulties caused by these restrictions and the impact of these restrictions on the public's perception of the fairness of the tax laws suggests that the relationship between Congress and the IRS is at a low ebb. Continuing the current relationship may impair the efficient and equitable operation of the tax system and undermine the morale of

154. Given the length of time necessary for a judicial determination and the fact that an appropriations act is in force for only one year, it is likely that the issue will be moot by the time a court could address the constitutionality of the Ashbrook Amendment. Even so, a court might accept jurisdiction under the theory of *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), that a "continuing controversy" would exist unless the court acted. See *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (first articulating "capable of repetition, yet evading review" formula); *Civil Liberties Alert*, October, 1979 (ACLU newsletter) (predicting annual amendments making similar restrictions).

155. See, e.g., *Meek v. Pittenger*, 421 U.S. 349 (1975) (holding unconstitutional certain aspects of state program aiding predominantly church-related schools); *National Coalition for Pub. Educ. and Religious Liberty v. Califano*, 446 F. Supp. 193 (S.D.N.Y. 1978) (denying summary judgment on claim of unconstitutional federal aid to religious schools made by original plaintiffs in *Flast v. Cohen*, 392 U.S. 83 (1968)).

156. See *State Bd. of Tax Comm'rs v. Jackson*, 283 U.S. 527, 537 (1931) (tax laws do not violate equal protection if the "classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy"); *McCarthy v. Jones*, 449 F. Supp. 480 (S.D. Ala. 1978) (holding state tax statute unconstitutional because it provided for assessment of taxes on property in same class at different rates in different counties).

those who administer it. There are, however, steps that can be taken to improve the relationship between Congress and the IRS.

A. *Resolving the Constitutional Problems*

A number of possible approaches to the constitutional issues raised by recent congressional activity deserve discussion, even if only to show that these approaches are all ultimately unsatisfactory and thus that the constitutional issues may never be resolved. First, the IRS could attempt to litigate the separation of powers issue directly. Although such a case would be one of first impression, there exists some authority for the proposition that the IRS could litigate such a claim against Congress.¹⁵⁷ Such an approach would force judicial resolution of Congress's efforts to restrict the operation of the IRS.

Second, the IRS could narrowly interpret congressional restrictions or ignore them completely. For instance, because the fringe benefits restriction only expressly prohibits the IRS from promulgating "regulations in the final form,"¹⁵⁸ the agency could achieve its constitutional duty to execute a nationwide policy by employing means other than regulations, including oral or less formal written instructions. Indeed, the IRS may be under a constitutional duty to interpret all statutes so that they come within constitutional limits when the agency has doubts as to their validity.¹⁵⁹ Even if such an action provoked a legal challenge, the ensuing court action might benefit the IRS. Once sued, the IRS could assert the constitutional claims discussed above, and the courts too would share the duty to construe statutes so as to avoid constitutional challenges addressed to them.¹⁶⁰

157. See, e.g., *Kennedy v. Sampson*, 511 F.2d 430, 434 (D.C. Cir. 1974) (dictum that executive branch may appropriately invoke separation of powers doctrine when it perceives unconstitutional intrusion by legislative branch); *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980) (executive branch officers may sue superior officers to free themselves from directives that arguably impose unconstitutional limits on their powers); cf. Note, *Judicial Resolution of Inter-Agency Legal Disputes*, 89 YALE L.J. (forthcoming 1980) (arguing that agencies have capacity to sue in order to vindicate institutional interests in effective regulation).

158. Tax Treatment Extension Act of 1977, Pub. L. No. 95-615, § 3, 92 Stat. 3097 (1978). But see note 108 *supra* (although provision only applied expressly to regulations, Congress intended it to cover all forms of nationwide guidance including revenue rulings and revenue procedures).

159. See, e.g., *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 171-72 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969) (quoting with approval Commissioner's opinion that FCC should not use regulatory process to require self-censorship contrary to First Amendment); cf. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (agency must formulate procedures that conform to due process requirements). Such a duty is also implied in the Administrative Procedure Act, 5 U.S.C. § 706(2)(B) (1976), which empowers courts to set aside agency decisions "contrary to constitutional right, power, privilege, or immunity."

160. See, e.g., *California v. Arizona*, 440 U.S. 59, 66 (1979) (on motion to file bill of complaint); *Lorillard v. Pons*, 434 U.S. 575, 577 (1978). This rule of construction also

Similarly, the IRS could seek the opinion of the Attorney General as to the constitutionality of various congressional prohibitions.¹⁶¹ Assuming the Attorney General rendered an opinion that a particular restriction was unconstitutional, the Commissioner could then decide whether to ignore the restriction on that basis, or whether to use the Attorney General's opinion as the foundation for a supplementary budget request for enforcement funds. Merely requesting an Attorney General's opinion might put Congress on notice of the questionable constitutionality of its earlier practice, thus making Congress more likely to grant the supplementary budget request or repeal the prohibition.

The difficulty with all of these approaches is that they might further alienate or provoke Congress with regard to the IRS. Some congressmen might construe a lawsuit by the IRS as a direct attack on the legislative power of Congress,¹⁶² and any refusal to interpret restrictions as Congress intended or to obey appropriations restrictions might mean a major confrontation between the IRS and Congress that could only bring further difficulties for the agency. The recent congressional restrictions on the IRS may ultimately be tested in the courts, but it may be expecting too much of an administrative agency to ask that it take on the politically hazardous task of provoking such a lawsuit directly.

In short, there may be no acceptable way for the IRS to test the constitutionality of a congressional restriction in the courts. Moreover, given the subtle nature of the separation of powers issues raised by some of these recent restrictions, there is no way to predict whether the courts would find such restrictions unconstitutional. At the same time, the novel kinds of congressional statutes considered here raise enormous practical and administrative difficulties even if they are not clearly unconstitutional. In view of the separation of powers policies and the enforcement problems, it does not seem too much to ask that Congress

applies to statutes delegating authority to administrative bodies. *E.g.*, *National Cable Television Ass'n v. United States*, 415 U.S. 396, 341-42 (1974); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). *But see* *United States v. Sullivan*, 332 U.S. 689, 693-94 (1948) (Court will not attempt to avoid constitutional question by construing statute contrary to express meaning given to it by Congress).

161. See 28 U.S.C. § 512 (1976) (permitting head of any executive department to require opinion of Attorney General). Under this provision, the IRS would have to request that the Secretary of the Treasury seek the opinion. See 1 Op. Atty. Gen. 211 (1818) (subordinate officers to seek opinions through departmental heads).

162. Wilbur Mills, former Chairman of the House Ways and Means Committee, has suggested that any such lawsuit would ultimately harm the relationship between Congress and the IRS even if the agency were successful, because of the probable animosity such a lawsuit would engender. Interview with Wilbur Mills, in Washington, D.C. (Nov. 5, 1979).

revert to its more traditional forms of lawmaking and agency review. From this perspective, constitutional objections are only a symptom of the underlying problem, which is the quality of the relationship between Congress and the IRS.

B. *Avoiding the Need for Constitutional Resolution*

There are a number of ways in which Congress and the IRS might act in order to make a resolution of possible constitutional problems unnecessary. This means reducing Congress's perceived need for statutes that freeze tax administration or cut off funds for enforcement, thus reducing the likelihood that Congress will continue to adopt such statutes.

As an initial matter, it is important to note that congressional action to acquire greater direct control over the IRS is not likely to lead to a long-term lessening of tensions.¹⁶³ Congress could, for instance, institute a legislative veto,¹⁶⁴ requiring the IRS to submit proposed rules and regulations to Congress for its approval.¹⁶⁵ Even aside from the constitutional problems such a scheme might raise,¹⁶⁶ however, it is not clear that Congress is equipped to handle the massive detail of the tax system¹⁶⁷ or that such a scheme would improve the administration of the tax laws.¹⁶⁸ Alternatively, Congress could grant the President

163. Cf. H. REP. NO. 1232, 95th Cong., 2d Sess. 12 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2508, 2514-15 (additional views of Rep. Ketchum on H.R. 12841) (arguing that executive agencies including IRS require more effective control by Congress).

164. For discussion of such proposals, see Abourezk, *supra* note 14, at 323-25; Bruff & Gellhorn, *supra* note 112, at 1370-71; Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978).

165. See, e.g., H.R. 495, 95th Cong., 1st Sess. (1977). Under these schemes, the congressional reviewing entity usually has a fixed period of time in which to veto the proposed agency rule, which becomes effective if not disapproved. A number of statutes now contain legislative veto provisions. E.g., Education Amendments of 1974, Pub. L. No. 93-380, § 509(a), 88 Stat. 567 (1974).

166. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 593-97 (1953) (legislative veto usurps executive function to implement and enforce laws, and bypasses presidential veto power); Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975). The one case that has expressly addressed the issue upheld the constitutionality of a one-house veto, although it emphasized "several special factors" and did not consider "the general question of whether a one-House veto is valid as an abstract proposition, in all instances." *Atkins v. United States*, 556 F.2d 1028, 1059 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

167. See Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROB. 673 (1969).

168. See, e.g., Bruff & Gellhorn, *supra* note 112, at 1437-39 (legislative veto scheme would adversely affect certainty of IRS rules); *id.* at 1439 (Congress should abandon legislative veto as device for oversight of agency rulemaking); Watson, *supra* note 166, at 988 (legislative veto scheme would cause general shift in focus of governmental power and operations of government system).

statutory oversight power¹⁶⁹ with particular exercises of that power subject to congressional veto.¹⁷⁰ Such a change would probably serve only to increase agency vulnerability to executive and congressional pressures,¹⁷¹ however, without greatly enhancing congressional confidence in the IRS.¹⁷²

Similarly, congressional doubts as to the wisdom of IRS policies might be allayed if Congress expanded judicial review of IRS interpretations of the tax laws, but this approach too is unlikely to lead to significant progress. Congress could eliminate judicial deference to the legality of an agency's rules and regulations. Under this change, the IRS might be made to bear the burden of persuading courts that a proposed rule is correct instead of the current practice that requires a challenger to persuade the court of the rule's illegality.¹⁷³ Such a proposal seems indefensible, however, because it misapprehends the nature of current judicial "deference,"¹⁷⁴ ignores instances in which agencies must choose between several equally satisfactory alternatives in making one definite rule,¹⁷⁵ and also seems unlikely to improve

169. See, e.g., Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975) (proposing grant of statutory power to President to consider, modify, or reverse any agency policies, rules, or regulations); 65 A.B.A.J. 1284 (1979) (ABA House of Delegates endorsed this proposal during 1979 annual meeting).

170. See Cutler & Johnson, *supra* note 169, at 1415 (Congress would have 60 days to veto executive orders implementing proposed presidential action concerning agency rule or policy under review).

171. See McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1172 (1977) (agencies under this scheme "will have tremendously increased incentives to bow to executive and congressional pressures"); p. 1365 *supra* (potential for improper congressional influence concerning agency action).

172. The proposal to increase presidential statutory power has also been criticized as being "legally questionable and politically dangerous," see Note, *Delegation and Regulatory Reform: Letting the President Change the Rules*, 89 YALE L.J. 561, 573-78 (1980), and for making the White House a super administrative agency and "simply putting in another layer of bureaucrats to make government more complicated," 65 A.B.A.J. 1284 (1979) (summary of remarks of opponents to proposal eventually endorsed by House of Delegates). Any presidential reversal of the IRS for nontax reasons would also impair congressional confidence in the IRS as an impartial enforcement agency.

173. For an example of this approach, see the bills to accomplish this change introduced by Senator Bumpers over the last five years. S. 111, 96th Cong., 1st Sess., 125 CONG. REC. S410 (daily ed. Jan. 23, 1979); S. 86, 95th Cong., 1st Sess., 123 CONG. REC. S125 (daily ed. Jan. 10, 1977); S. 2408, 94th Cong., 1st Sess., 121 CONG. REC. 29942 (1975). See generally 125 CONG. REC. S12,146 (daily ed. Sept. 7, 1979) (remarks of Sen. Bumpers) (legislative change would increase judicial control over executive agency action).

174. Courts already "establish principled boundaries to agency discretion by reference to the type of decision under review and the nature of the agency's statutory authority." McGowan, *supra* note 171, at 1166; see p. 1365 *supra*.

175. Interview with Jerome Kurtz, Commissioner of Internal Revenue, in Washington, D.C. (Nov. 6, 1979) (when several equally acceptable alternatives exist, agency may not be able to meet burden of persuading court of any one rule's correctness).

congressional confidence in the IRS.¹⁷⁶ Proposals to expand taxpayer standing to challenge "lenient tax rules"¹⁷⁷ seem more desirable from an administrative point of view,¹⁷⁸ although such proposals would also increase the burdens on the judiciary¹⁷⁹ without necessarily improving the relationship between Congress and the IRS. Moreover, the congressional restrictions discussed in this Article have been responses to perceptions that IRS policies were too harsh, not that they were too lenient.¹⁸⁰

If congressional controls of the IRS—either directly, or through the President or the courts—are unlikely to ease tensions between the two bodies, then what steps might be successful? Several possibilities appear promising. Even in the absence of legislative changes, the IRS can reduce congressional perception of the need to increase control over the administration of the tax laws. First, if the IRS is to persuade Congress of the need to avoid constitutionally suspect and administratively troublesome restrictions, it must communicate more effectively with the legislative branch. The agency should continue to inform appropriate congressmen of significant modifications in its practices or interpretations of the tax law,¹⁸¹ but it should expand its efforts in order to explain vigorously why certain congressional practices create vast administrative difficulties.¹⁸² In doing so, the agency must be wary of

176. See McGowan, *supra* note 171, at 1164 (proposal makes administrative agencies mere agents of courts charged only with making factual determinations and presenting possible interpretations of law); *id.* at 1168 (proposal would remove self-imposed restraints on judiciary, thereby involving them in political issues).

177. See, e.g., Asimow, *Standing to Challenge Lenient Tax Rules: A Statutory Solution*, 57 TAXES 483, 491-92 (1979) (proposing statute that would grant taxpayer standing to challenge lenient tax rules); Tannenbaum, *Public Interest Tax Litigation Challenging Substantive IRS Decisions*, 27 NAT'L TAX J. 373 (1974) (current standing law does not permit potential litigants to challenge lenient tax rules).

178. The IRS is as likely to misinterpret tax law when making favorable interpretations as when making unfavorable ones, and such proposals would permit taxpayers to challenge IRS misinterpretations that are now beyond the review of any court. See note 177 *supra*. Reliance problems under this scheme could be avoided by permitting courts to revoke improperly lenient IRS rules only prospectively, and an absolute right of intervention could be provided for anyone asserting an interest in maintaining the challenged rule in order to guard against a less than wholehearted defense of lenient rules by the IRS. See Asimow, *supra* note 177, at 502-03.

179. See Thrower, *Public Interest Litigation to Affect Substantive Decisions*, 27 NAT'L TAX J. 389, 392 (1974) (proposal "could be seriously disruptive of orderly administration").

180. See pp. 1370-74 *supra*.

181. Interview with Donald Alexander, former Commissioner of Internal Revenue, in Washington, D.C. (Nov. 5, 1979); interview with Mortimer Caplin, former Commissioner of Internal Revenue, in Washington, D.C. (Nov. 2, 1979); interview with Sheldon Cohen, former Commissioner of Internal Revenue, in Washington, D.C. (Nov. 6, 1979); interview with Jerome Kurtz, *supra* note 175.

182. See Kefauver, *Executive Congressional Liaison*, in CONGRESS AND THE PRESIDENT 41, 43 (W. Travis ed. 1967) (area that most urgently needs improvement between executive and legislative branches is flow of information).

exposing itself to improper congressional influence,¹⁸³ or contradicting positions taken by the Assistant Secretary of the Treasury for Tax Policy and thus confusing various tax issues and congressional understanding of administration policy.¹⁸⁴ Nevertheless, a more effective communication of IRS concerns to Congress seems crucial to a solution of its administrative problems.

Second, the IRS could begin to construct a public record of all congressional contacts concerning its interpretations of the tax law. Congressional hearings and the comments of individual congressmen in response to a notice of proposed IRS rulemaking are already a matter of public record, of course,¹⁸⁵ but this is not true of other, less formal contacts.¹⁸⁶ A public record of these contacts would heighten congressional awareness of the fact that ultimately it is the agency's responsibility to interpret and execute the Code.

On the other hand, Congress too could dramatically improve its relationship with the IRS and thus avoid the need for any constitutionally questionable restrictions on the agency. First, it could instruct the parliamentarians of the House and Senate to adopt a more realistic test for determining whether an appropriations act is legislative in effect, thus ensuring the ability to follow congressional rules that substantive legislation cannot be considered in appropriations bills.¹⁸⁷ When the Ashbrook and Dornan amendments were proposed, consideration of the amendments was allowed because they took the form of limitations on spending,¹⁸⁸ despite the fact that several congressmen declared them to be legislative.¹⁸⁹ The parliamentarians should adopt

183. See p. 1367 *supra* (possibility of improper congressional request for assistance with regard to constituent tax problems).

184. Interview with Rep. Al Ullman, Chairman of the House Ways and Means Committee, in Washington, D.C. (Nov. 2, 1979).

185. Treas. Reg. § 601.702(d)(9) (1980). Courts have suggested that executive agencies must compile a public record of all third party contacts with agency officials who may reasonably be expected to be involved in agency rulemaking after the issuance of formal notice of rulemaking, and of such contacts made prior to the formal notice of rulemaking that ultimately form the basis of agency action. *E.g.*, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). It should be noted that I.R.C. § 6103 prohibits publications of a constituent's name if a congressman refers a matter to the IRS.

186. Even though revenue rulings, revenue procedures, and the Internal Revenue Manual are at times functionally equivalent to Treasury regulations, they are generally adopted without notice of rulemaking or provision for public comment. See Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521, 525 (1977); Comment, *Revenue Rulings and the Federal Administrative Procedure Act*, 1975 WIS. L. REV. 1135.

187. See note 99 *supra*.

188. Interview with William Holmes Brown, Parliamentarian of the United States House of Representatives, in Washington, D.C. (Nov. 2, 1979).

189. See note 140 *supra*.

the test developed by the courts, which considers whether an appropriations act provision is irreconcilable with underlying statutory provisions.¹⁹⁰ The judicially derived effects test would restore meaning to the House and Senate rules that prohibit substantive legislation in appropriations bills, thus making statutes such as the Ashbrook and Dornan amendments less likely in the future.

Second, the House Ways and Means Committee and the Senate Finance Committee should consider amending their rules to require administrability findings in reports that accompany tax bills.¹⁹¹ Such a requirement would increase congressional sensitivity to the impact of its actions on the administration of the tax law and thus encourage increased attempts to avoid administrative problems.¹⁹² Had Congress realized the difficulties that would be caused by the prohibition on fringe benefit guidance by the IRS, for example, it seems less likely that Congress would have passed the prohibition without amending the underlying law.

Third, Congress should attempt to coordinate its oversight activities of the IRS more effectively. Changes in House or Senate rules do not seem necessary,¹⁹³ because congressional rules already require the coordination of oversight committees.¹⁹⁴ There is room for enormous improvement in this effort, however.¹⁹⁵ Congress might also consider reorganization of its committee and subcommittee structure as it relates

190. See note 99 *supra*.

191. Senate Rule XXIX cl. 5, S. Doc. 1, *supra* note 41, at 55-56, requires each report that accompanies a bill to include an evaluation of the regulatory impact of the bill, including the number of individuals and businesses affected and the amount of additional paperwork reasonably anticipated. House Rule XI cl. 2(1)(3)(A), H.R. Doc. No. 403, *supra* note 37, at 406, requires each report that accompanies a bill to include oversight findings with respect to the bill's subject matter. These rules could be broadly construed so as to require administrability findings with respect to certain provisions, although both rules are now narrowly applied. See, e.g., H. REP. No. 1656, 95th Cong., 2d Sess. 9 (1978) (recommending enactment of black-lung benefits trust provision on basis of oversight findings).

192. Such a requirement might also contribute to the simplification of the tax law. Given the amount of business of the tax-writing committees of Congress, it might be advisable to limit the number of provisions that require an administrability finding by certifying such provisions through consultation among the oversight subcommittees, the IRS, and the staff of the Joint Committee on Taxation.

193. Indeed, some changes could be imagined that would only aggravate the problem. Congressional rules might limit the number of times per session that executive branch officials could be requested to appear before Congress, but this might lead to an impractical rush at the beginning of each Congress that might be worse than the current system.

194. See note 40 *supra* (duties of oversight subcommittees to coordinate review of IRS activities).

195. See p. 1366 *supra*. By monitoring the number of appearances made by IRS officials, the oversight subcommittees might persuade other committees to resist requesting excessive or unnecessary appearances.

to IRS activities, because the current fragmentation of responsibility and duplication of effort among several bodies in the same house are barriers to the development of coherent tax policy and increase the likelihood that Congress may act unwisely.

In the end, these simple efforts seem likely to improve the relationship between Congress and the IRS and thus avoid the need to resolve the constitutional problems raised by recent congressional restrictions on the IRS. It is clear, however, that some improvement is imperative. Congress has prohibited the IRS from administering certain aspects of the tax law, disregarding the difficulties thereby created for the IRS and the impact of those prohibitions on the public's perception of the fairness of the tax system. These prohibitions create administrative difficulties, but they also suggest serious constitutional problems that are caused when Congress interferes with an executive agency's duty to execute the laws faithfully. Unless the relationship between Congress and the IRS improves in a way that eliminates congressional perceptions of the need for such statutes, these constitutional issues must eventually be resolved in a judicial arena that holds only hazards for both of the principal actors in our tax system.

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