

THE INTERNAL REVENUE SERVICE'S MANDATORY WAIVER OF CONFIDENTIALITY—THE PRACTICAL AND CONSTITUTIONAL DEFECTS

INTRODUCTION

On December 10, 1974, the Internal Revenue Service published a set of proposed procedural amendments¹ to the present requirements for obtaining a private letter ruling.² These proposed amendments read in part:

A request for ruling or determination letter . . . must also contain . . . [a] waiver of confidential treatment The waiver of confidential treatment . . . shall be made by written statement in the request signed by or for the person making the request and all other persons whom the Internal Revenue Service shall determine may have a direct interest in maintaining the confidentiality of information in the request. The waiver shall state that each such person expressly waives any right to confidential treatment with respect to the request, all information and correspondence in connection with the request, all information contained in the ruling, determination letter or acknowledgement of withdrawal issued, and all other materials included in the file connected with the request, the ruling, the determination letter or acknowledgement of withdrawal.³

The ramifications of such a condition precedent affect both the viability of the letter rulings program and the personal privacy of the taxpayer. The practical effects of this requirement upon the letter rulings program and the constitutionality of requiring taxpayers who request rulings to leave their personal financial records

1. Proposed amendments to 26 C.F.R. §§ 601.201, 601.702, 601.703, 39 Fed. Reg. 43087 (1974).

2. A private letter ruling is an advance determination of the tax consequences of a proposed transaction. Letter rulings are issued by the Internal Revenue Service pursuant to INT. REV. CODE OF 1954, § 7805(a); 26 C.F.R. § 601.201(a)(2) (1972); Rev. Proc. 3, 1972-1 CUM. BULL. 698. See generally J. CHOMMIE, *THE INTERNAL REVENUE SERVICE 192-96* (1970); Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 763-70 (1965) [hereinafter cited as Rogovin]; Sugarman, *Federal Tax Rulings Procedure*, 10 TAX L. REV. 1 (1954).

3. Proposed 26 C.F.R. §§ 601.201(e)(16)(i) and (17)(i), 39 Fed. Reg. 43087, 43088 (1974).

open to indiscriminate public inspection are the focal points of this Comment.

PRACTICAL IMPLICATIONS

By What Authority?

The Service proposed the procedural amendments as part of a new policy⁴ of disclosure in compliance with the Freedom of Information Act.⁵ Faced with increasing pressure from the courts,⁶ Congress,⁷ and the commentators⁸ to disclose private letter rulings to the public, the Service responded with an abrupt turnabout to a long-established policy⁹ of guaranteeing confidentiality of both

4. News Release, IR-1409, August 9, 1974, in P-H 1974 FED. TAXES ¶ 55,359.

5. 5 U.S.C. § 552 (1970). See generally SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF SENATE COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, S. Doc. No. 82, 93d Cong., 2d Sess. (1974). See also the recent amendments to 5 U.S.C. § 552 (1970) in 13 U.S. CODE CONG. & AD. NEWS 6881 (1975); 12 U.S. CODE CONG. & AD. NEWS 5758 (1974).

6. See *Tax Analysts and Advocates v. Internal Revenue Service*, 505 Adv. F.2d 350 (D.C. Cir. 1974), modifying 362 F. Supp. 1298 (D.D.C. 1973). The court of appeals held that the Service must disclose all past letter rulings which do not fall within the exemptions to the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9) (1970). The district court case is noted in 7 IND. L. REV. 416 (1973) and 1974 WISC. L. REV. 227. *Tax Analysts* has been credited as being the primary motivation behind the Service's proposed requirement of a mandatory waiver of confidentiality. See 42 J. TAX. 104 (1975); however, congressional pressure also appears to have been an important factor. See authorities cited note 7 *infra*.

7. See, e.g., *Hearings on Internal Revenue Service Disclosure Policies Before Subcomm. of Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (July 31, 1974), cited in BNA TAX MGMT. MEM. 3, 6 (No. 22, 1974); 111 Cong. Rec. 11810 (1965) (remarks of Senator Gore); SUBCOMM. ON ADMINISTRATION OF INTERNAL REVENUE LAWS OF HOUSE COMM. ON WAYS AND MEANS, 82d Cong., 2d Sess., REPORT ON INTERNAL REVENUE INVESTIGATION (Subcomm. Print 1952). Questioning of Commissioner of Internal Revenue Donald C. Alexander by Senator Edward Kennedy apparently also influenced the Service's decision to propose the mandatory waiver provision. BNA TAX MGMT. MEM. 3, 6 (No. 22, 1974).

8. See Stone, *Public Hearings for Private Rulings—Four Recommendations*, in TAXATION WITH REPRESENTATION, COMPENDIUM ON THE PUBLIC AND THE RULING PROCESS 72-143 (1972); Reid, *Public Access to Internal Revenue Service Rulings*, 41 GEO. WASH. L. REV. 23 (1972); Note, *Public Disclosure of Internal Revenue Letter Rulings*, 40 U. CHI. L. REV. 832 (1973) [hereinafter cited as U. CHI. Note]. Some authors feel that the issuing of any private letter rulings by the Service is basically unfair. See Kragen, *The Private Ruling: An Anomaly of Our Internal Revenue System*, 45 TAXES 331 (1967). This Comment, while not exploring the issue in depth, takes the position that disclosure of letter rulings is desirable only if the confidentiality of the financial information contained in the rulings and the requests for ruling is not compromised.

9. The Service formerly took the position that private letter rulings

the information submitted in the request for ruling and the letter ruling itself.

The authority for such a reversal can be found in an obscure portion of the regulations¹⁰ which the Service enacted in 1967 to implement the newly passed Freedom of Information Act.¹¹ Although the Act itself provides nine specific exemptions¹² to disclosure, the Service has taken the position that

were nondisclosable because they were not precedential, i.e., only the taxpayer to whom the ruling was issued could rely upon it. See 26 C.F.R. § 601.201(1)(1) (1972); Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, N.Y.U. 20TH INST. ON FED. TAX. 1, 22 (1962) [hereinafter cited as Caplin]. An additional Service contention was that nondisclosure of rulings was required by INT. REV. CODE OF 1954, §§ 6103(a)(1) and 7213(a)(1) which prohibit disclosure of information contained in income tax returns. Both contentions were dismissed in *Tax Analysts and Advocates v. IRS*, 505 Adv. F.2d 350 (D.C. Cir. 1974). As to the precedential value of letter rulings, compare *Hanover Bank v. Comm'r*, 369 U.S. 672, 686 (1962) with *International Business Mach. Corp. v. United States*, 343 F.2d 914, 919-24 (Ct. Cl. 1965).

10. 26 C.F.R. § 601.701(b)(3) (1972).

11. The Service, like other administrative agencies, was forced to extensively revise its disclosure proceedings in order to comply with the Freedom of Information Act. 26 C.F.R. §§ 601.601-702 (1972) are the result. See generally Note, *Freedom of Information: The Statute and the Regulations*, 56 Geo. L.J. 18, 54-57 (1967).

12. 5 U.S.C. § 552(b) (1970) reads as follows:

This section [requiring disclosure] does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological or geophysical information and data, including maps, concerning wells.

The exemptions applicable to the information contained in requests for rulings are the (b) (4) exemption relating to commercial or financial informa-

[e]ven though an exemption . . . may be fully applicable to a matter in a particular case, the Internal Revenue Service may, if not precluded by law, elect under the circumstances of that case not to apply the exemption to such matter.¹³

While this apparently contradicts the legislative intent behind the exemptions,¹⁴ Professor Kenneth Culp Davis' analysis of the purpose of the Freedom of Information Act¹⁵ strongly supports the Service's position:

The Act contains no provision *forbidding* disclosure. It requires disclosure of all records except what is 'specifically' within the nine exemptions and other provisions. *The exemptions protect against required disclosure, not against disclosure. The Act leaves officers free to disclose or withhold records covered by the exemptions, but they may then be governed by other statutory law, by the common law, by executive privilege, by executive order, or by agency-made law in the form of regulations, orders, or instructions.*¹⁶

Thus exists the anomaly that an agency may rely on the statutory exemptions in denying disclosure, but the person most directly affected, the submitter of the information, has no recourse in the Freedom of Information Act for resisting disclosure.¹⁷

Importance of Letter Rulings

Letter rulings play a significant role in both the business plan-

tion and possibly the (b) (6) exemption relating to invasions of personal privacy. See also Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard*, 60 CORNELL L. REV. 109 (1974); Annot., 21 A.L.R. FED. 224 (1974).

13. 26 C.F.R. § 601.701 (b) (3) (1972).

14. For the legislative history behind the exemptions see S. REP. NO. 813, 89th Cong., 1st Sess. (1965); H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1964). The Senate version is preferred. The Service intends to honor the "trade secrets" aspect of the (b) (4) exemption, *supra* note 12, but to completely disregard the "commercial or financial information" section of the exemption. See 39 Fed. Reg. 43087 (1974) where it is stated:

Information is not a trade secret merely because it is commercial or financial information. Accordingly commercial or financial information obtained from a person requesting a ruling . . . will not be withheld from public inspection.

15. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

16. *Id.* at 766 (emphasis added).

17. *Id.* at 765-66, 807-08. Although Professor Davis is a noted authority in the field of administrative law, the disclosure requirements appear to be susceptible of a different reading. 5 U.S.C. § 552(c) (1970) states that:

This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section* (emphasis added).

This could be interpreted to mean that the exemptions are controlling as to disclosure. Cf. *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171, 1173 (D.D.C. 1973) in which a corporation was allowed to intervene to protect its interest in nondisclosure.

ning and tax administration of this country.¹⁸ Although only 25,000 to 30,000 private rulings are issued per year,¹⁹ their influence on the national economy is quite extensive.²⁰ By eliminating the risk of an unforeseen tax result, the letter ruling provides an invaluable aid in business planning.²¹ As the financial magnitude of a proposed transaction increases, so do the attendant tax consequences; thus, in such large transactions as corporate mergers, the advance determination of the tax effects becomes a virtual necessity.²² Due to the inherent complexity in applying the Internal Revenue Code, many transactions would simply not be undertaken without a letter ruling.²³ The continued vitality of the letter rulings program is, therefore, of legitimate concern to the taxpayer who desires to effectively plan his economic affairs.²⁴

18. Caplin, *supra* note 9, at 1-2, 6-7. The importance of letter rulings is admitted even by the proponents of full disclosure. Indeed, this seems to be one of the main reasons for desiring disclosure. See Reid, *supra* note 8, at 24, 28-29; U. CHI. Note, *supra* note 8, at 833, 835, 837-38.

19. For example, the following number of requests for letter rulings were processed by the Service in prior years:

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|------|--------|
| 1973 | 13,970 |
| 1972 | 31,662 |
| 1971 | 32,297 |
| 1970 | 30,114 |
| 1969 | 27,827 |
| 1968 | 26,585 |
| 1967 | 25,393 |
| 1966 | 27,672 |

See 1973 IRS ANN. REP. 7; 1972 IRS ANN. REP. 5; 1971 IRS ANN. REP. 8; 1970 IRS ANN. REP. 10; 1969 IRS ANN. REP. 8; 1968 IRS ANN. REP. 8; 1967 IRS ANN. REP. 9; 1966 IRS ANN. REP. 6. The figure for 1973 appears unrepresentative because the Service did not include requests for rulings on a change of accounting periods, traditionally the most numerous category of requests.

20. Rogovin, *supra* note 2, at 764.

21. Caplin, *supra* note 9, at 7; Sugarman, *supra* note 2, at 4.

22. Caplin at 7; Sugarman, *supra* note 2, at 4. This opinion has been shared by other commentators. See, e.g., Goldberg, *Private Rulings on Proposed Transactions Can Give Advance Assurance as to Tax Results*, 11 TAX. FOR ACC. 132 (1973); Rose, *The Rulings Program of the Internal Revenue Service*, 35 TAXES 907, 910 (1957); Taylor, *Tax Rulings: New Rules and Procedures*, N.Y.U. 21ST INST. ON FED. TAX. 69, 91 (1963).

23. Based on interviews with members of the tax bar of San Diego conducted in January of 1975. Cf. Rogovin at 764. See also note 46 *infra*.

24. Caplin at 1; Rogovin at 756, 765. The extensive citations to Messrs. Caplin and Rogovin are dictated by the fact that both individuals were in a unique position to know. Mr. Caplin was formerly the Commissioner of Internal Revenue Service, and Mr. Rogovin was formerly Chief Counsel for the Service.

The Service also has a vested interest in maintaining a viable rulings program. Former Commissioner of Internal Revenue, Mortimer Caplin, has declared that the “[i]ssuance of rulings to taxpayers is one of the major functions of the Internal Revenue Service.”²⁵ By enabling the Service to decrease potential litigation and keep informed about new techniques employed in business transactions, letter rulings are a key element in the orderly administration of the tax system.²⁶ Additionally, the work of the field agents may be simplified, for they need only verify the accuracy of the details of the transaction as proposed in the request for ruling.²⁷ In short, letter rulings greatly expedite business planning and tax administration.

The importance of the letter ruling is highlighted by the lack of an effective alternative. Currently, the only possible substitutes are the closing agreement²⁸ and the determination letter;²⁹ however, both appear incapable of replacing letter rulings. The very origin of the present rulings program is due to the unworkability of previous systems,³⁰ the core of which was the closing agreement.³¹ Additionally, determination letters would suffer from the same basic disability as letter rulings—the disclosure requirements of the proposed amendments.³² While the tax bar and the Internal Revenue Service may someday devise a practical alternative to the

25. Caplin at 1. This opinion is borne out by the number of man-hours the Service devotes to processing letter rulings. In 1971 approximately 340,000 man-hours were utilized. Reid, *supra* note 8, at 24 n.6.

26. Caplin at 7; Rogovin at 765. Caplin and Rogovin also argue that taxpayer confidence in the Service's fair administration of the tax laws is another major benefit of the letter rulings system. However, the proponents of disclosure seem to have effectively rebutted this argument by pointing out that nondisclosure of private letter rulings can equally promote taxpayer suspicions of favoritism and unevenness in tax administration. See, e.g., Reid, *supra* note 8, at 25-33.

27. Rogovin, *supra* note 2, at 765.

28. Issued pursuant to INT. REV. CODE OF 1954, § 7121, 26 C.F.R. § 601.201 (a) (7) (1972). See also Rogovin at 770. Closing agreements would be unaffected by the proposed procedural amendments.

29. Issued pursuant to INT. REV. CODE OF 1954, § 7805, 26 C.F.R. § 601.201 (a) (2) (1972). See also Rogovin at 770-71.

30. CHOMMIE, *supra* note 2, at 193; Caplin, *supra* note 9, at 4-6.

31. Caplin at 4-6. Because a closing agreement cannot be revoked in the absence of fraud, malfeasance, or material misrepresentation, see 26 C.F.R. § 601.201 (a) (7) (1972), the Service would probably devote much more time to investigating the transaction, thus nullifying the expeditious aspect of the present ruling process. A letter ruling, on the other hand, may be revoked even retroactively, although this is rarely done. See Rev. Proc. 3 § 13, 1972-1 CUM. BULL. 698, 705-06; Note, *Retroactive Revocation of Revenue Rulings*, 42 N.Y.U. L. REV. 91 (1967).

32. Proposed amendment to 26 C.F.R. § 601.201, 39 Fed. Reg. 43807 (1974).

letter rulings system, no such program, or even proposed program, presently exists.

Information Required by the Service to Obtain a Ruling

In order that the Service may determine the tax consequences of the proposed transaction, certain information must be submitted by the taxpayer in the request for ruling.³³ This information includes the specific elements of the transaction, the names of all the interested parties, and any relevant documents such as financial statements, contracts or bank loan agreements.³⁴ The exact nature of any additional data required to be submitted varies according to the type of transaction contemplated by the taxpayer. In a request for a change in accounting method, for example, financial statements showing the prior method and the effect of the proposed change must be made available by the taxpayer.³⁵

Revenue Ruling 74-296,³⁶ pertaining to the question of whether or not a contraction of a business qualified as a valid partial liquidation,³⁷ provides an example of just how detailed the required information must sometimes be. In the request for ruling, the taxpayer was forced to reveal the complete workings of a failing business. These details³⁸ included the profit margins in the various departments, bad debt analyses, amount of floor space allocated to various products, number of employees, the amount of inventory, fixed assets, accounts receivable, and sales volume.

Similar types of confidential data must be submitted for other types of transactions.³⁹ If these details were revealed to competi-

33. Rev. Proc. 3, 1972-1 CUM. BULL. 698, 701-02.

34. *Id.*

35. See Treas. Reg. §§ 1.442-1(b), 1.446-1(e) (1957). A ruling by the Commissioner is required by statute for most changes in accounting methods and all changes of accounting periods. INT. REV. CODE OF 1954, §§ 442, 446 (e).

36. 1974 INT. REV. BULL. No. 25, at 15.

37. INT. REV. CODE OF 1954, § 346.

38. Without the request for ruling, it is impossible to state with complete accuracy what information was actually submitted by the taxpayer. However, based on discussions with the tax bar of San Diego and an analysis of the ruling itself, the information that is hypothesized in the text is a conservative assumption.

39. See, e.g., the checklist of information which must be submitted to obtain a ruling regarding a corporate reorganization. Treas. Reg. § 1.367-1; Rev. Proc. 23, 1968-1 CUM. BULL. 821.

tors, grave injury could result to the taxpayer's business.⁴⁰ The irony of the proposed procedural amendments is that even if the taxpayer did not receive a favorable ruling, all the information contained in the request for ruling would be available to the general public, including his competitors.⁴¹ Thus, a taxpayer who wishes to receive a ruling would have to seriously weigh the adverse effects of possible disclosure against the necessity for obtaining the ruling.⁴²

Probable Effects of a Mandatory Waiver of Confidentiality

Since the letter ruling is an essential part of tax administration and business planning, and no workable alternative to the program presently exists, it is necessary to examine the possibility that the mandatory waiver provision will seriously impair the effectiveness of the letter rulings program.

Present users of the system may elect to proceed with the transaction absent a ruling on the tax consequences.⁴³ This would be the case where disclosure of the ruling and the information required to obtain it is potentially more costly than uncertainty as to tax consequences, but the transaction itself is a necessity. This failure to request a ruling could, in turn, lead to increased litigation if the parties' determination of the tax differs from the Service's—a likely possibility.⁴⁴

40. Similar concern was voiced in letters submitted to the Service by various individuals, organizations, and law firms commenting on the proposed procedural amendments. See, e.g., a letter from Robert Whitemore to the Internal Revenue Service, January 3, 1975, which states:

Such disclosure would be unfair because it would force the small businessman, as the price of obtaining tax certainty, to disclose his confidential financial secrets to his competitors, potential competitors, labor unions, suppliers, and all others with whom he deals or competes. In the business world, such disclosure can spell financial disaster for the small businessman whose competitors, discovering he is hard pressed, act to take advantage of his temporary financial weakness. Or perhaps larger companies, upon disclosure of the attractive profits of a smaller company, may become competitors, ultimately forcing the smaller company to sell out or give up its business. Similarly, financial disclosures are certain to put management at a serious disadvantage in dealing with collective bargaining representatives of the company's employees. *Id.* at 1-2.

41. The proposed procedural amendments make no distinction regarding disclosure between favorable and unfavorable rulings. 39 Fed. Reg. 43087 (1974).

42. Tax bar interviews, *supra* note 23.

43. *Id.*

44. See, e.g., letter from individual members of American Bar Association's Section on Taxation to Internal Revenue Service, June 10, 1974, where it is stated:

The proposed regulations will discourage taxpayers from seeking

In the future, users may submit less detailed information than is now given in the request for ruling, making an accurate determination of the tax consequences of the event by the Service much more difficult, if not impossible. This could give rise to two effects: increased litigation if auditing agents find discrepancies between the actual and proposed transaction, and an increased reluctance on the part of the Service to issue rulings at all because the information it receives is simply not trustworthy.⁴⁵

Finally, many transactions might not occur at all without a ruling,⁴⁶ resulting in a stifling of creativity and growth within the economic community and an ossification of existing, less-efficient business methods. Thus, a rather insignificant administrative regulation could, through a domino effect, end up affecting both the economy⁴⁷ and the public's attitude toward voluntary compliance with the present tax system.⁴⁸

Conjecture is, however, more art than science. Assuming that none of the preceding possibilities occur, a question remains. Should the taxpayer be required to waive the ability to restrict public access to otherwise confidential financial information in order to obtain a letter ruling? The constitutional dimensions of this question require careful examination.

CONSTITUTIONAL IMPLICATIONS

Issues

Two distinct issues emerge when the constitutionality of the proposed procedural amendments is considered. First, is the financial information submitted in the request for letter rulings constitu-

rulings . . . and will promote litigation . . . by taxpayers going forward without obtaining a ruling *Id.* at 3.

45. Tax bar interviews, *supra* note 23.

46. See letter from Machinery and Allied Products Institute to the Internal Revenue Service, January 17, 1975:

In many other instances, the possible tax consequences of activities are so significant that taxpayers simply will not proceed with them without a ruling. *Id.* at 2.

47. Cf. Caplin, *supra* note 9, at 1; Rogovin, *supra* note 2, at 765.

48. See letter from the American Institute of Certified Public Accountants to Internal Revenue Service, January 10, 1975:

[O]ur tax system is based on the concept that each taxpayer assesses his own tax pursuant to the tax laws. This assumes that each taxpayer, either directly or through his advisor, can obtain adequate knowledge of the laws and their interpretation. *Id.* at 1.

tionally privileged? That is, would indiscriminate release of such information to the public violate a person's right to privacy? Second, assuming that a constitutional privilege attaches to such information, may the government condition the receipt of a benefit such as a letter ruling by requiring a waiver of a constitutionally protected right? The key question, therefore, is whether a constitutional privilege attaches to personal financial information, for if it does not, there could be no constitutional violation in requiring a mandatory waiver of confidentiality.

*The Right of Privacy*⁴⁹

The Supreme Court established a constitutional right to privacy in *Griswold v. Connecticut*⁵⁰ and has affirmed this holding in subsequent cases.⁵¹ However, the exact extent of the right is unclear because the Court has been determining its application on a situational or ad hoc basis.⁵² An additional complicating factor is that the extent of the right seems to depend, in part, on its constitutional origin, upon which the Court has been continuously divided.⁵³ Therefore, to determine whether the right of privacy extends to commercial, financial or economic information, it is necessary to examine the constitutional origins of the right.

Origins of the Right of Privacy

The Court has ascribed the origin of the right of privacy to pen-

49. A complete, or even summary discussion of the complex nature of the right to privacy is beyond the scope of this Comment. Only the constitutional nature of the right, as developed by Supreme Court cases and other sources, will be utilized in the determination of whether economic information may be constitutionally privileged. For a more detailed examination of the conceptual nature of the right to privacy see S. HOFSTADER & G. HOROWITZ, *THE RIGHT OF PRIVACY* 1-16 (1964); A. WESTIN, *PRIVACY AND FREEDOM* 1-63 (1967); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Fried, *Privacy*, 77 YALE L.J. 475 (1968); Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34 (1967); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROB. 281 (1966). The seminal article was, of course, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

50. 381 U.S. 479 (1965).

51. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967).

52. See Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 230-33 (1965); Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1174 (1974).

53. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

umbral emanations from the specific guarantees to the Bill of Rights,⁵⁴ the due process clause of the fourteenth amendment,⁵⁵ and the ninth amendment.⁵⁶ There is a great degree of overlap between the penumbral, due process,⁵⁷ and ninth amendment analyses because all ultimately depend on the character of the right to be protected.⁵⁸ If the right is deemed fundamental,⁵⁹ constitutional protection may be granted under what must be acknowledged as substantive due process.⁶⁰ However, the shadow of *Lochner v. New York*⁶¹ should not stop further inquiry into the matter. That which is involved in establishing a limited right of economic privacy is *privacy*, primarily the privacy of individuals, as opposed to economics.⁶² Since the Court has not hesitated to use the doctrine in

54. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

55. *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

56. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (Goldberg, J., concurring).

57. The instant situation differs from the *Griswold* case in that the Federal government, not the states, has control over the dissemination of the information contained in letter rulings. This would preclude analysis under the fourteenth amendment save by analogy to the due process clause of the fifth amendment. See *Barron v. The Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1883).

58. *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 492-93 (Goldberg, J., concurring), 500 (Harlan, J., concurring) (1965).

59. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). See also Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 515-16 (1973).

60. See Tribe, *The Supreme Court 1972 Term—Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 5-10 (1973).

61. 198 U.S. 45 (1905). This case represents the epitome of the Court's previous intrusions into the value-laden realm of social and economic policy making. The Court has declined to use substantive due process as a basis for invalidating economic or social legislation in an unbroken string of cases beginning with *Nebbia v. New York*, 291 U.S. 502 (1934). See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

62. While letter rulings deal with the talismanic area of economic matters, the invasion of privacy generated by disclosure has its greatest effect on individuals in their private lives. Public corporations are already obligated to disclose much financial information by such laws as the Securities Exchange Act of 1934, 15 U.S.C. §§ 78-78jj (1970). The primary brunt of the disclosure would fall upon close corporations, partnerships, sole proprietorships and individuals not presently required to disclose. This revealing of personal wealth would affect the individuals involved by endangering themselves and their families. See text accompanying note 86 *infra*.

other cases⁶³ involving individual rights, albeit interstitially, it should not do so here if consistency with prior determinations is desired.

Assuming, therefore, that the initial spectre of *Lochnering* can be overcome, why should the right to economic privacy regarding personal financial information be considered fundamental?

Fundamentality of a Limited Right of Economic Privacy

1. Penumbra Theory

Under the rationale of *Griswold*,

[the] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.⁶⁴

The amendments which give rise to such "zones of privacy"⁶⁵ are listed as the first, third, fourth, fifth and ninth.⁶⁶ Several of these amendments have no application to commercial or financial information. For example, the third amendment, regarding the quartering of soldiers in civilian homes, has no relevance. Likewise, the fifth amendment privilege against self-incrimination has little bearing on commercial or financial information submitted *voluntarily* by the taxpayer,⁶⁷ for it is unlikely that one would incriminate oneself for the mere benefit of obtaining an advance determination of a tax.⁶⁸ However, two of the remaining amendments do have application to the area in question.

a. First Amendment

Although not specifically mentioned in the amendment itself, a limited freedom of association is guaranteed under the first amend-

63. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500, 505-08 (1964) and *Kent v. Dulles*, 357 U.S. 116, 125-27 (1958) (right to travel); *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) (right to practice profession). *Contra*, *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965). The Court draws what appears to be an untenable distinction between economic and individual rights in the application of substantive due process. See Reich, *The New Property*, 73 YALE L.J. 733, 771-74 (1964); Tribe, *supra* note 60, at 9-10.

64. 381 U.S. at 484.

65. *Id.*

66. *Id.*

67. However, the scope of the privilege against self-incrimination has been severely limited in the area of financial and tax information. See, e.g., *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911).

68. For the use of the privilege against self-incrimination in regard to information contained in tax returns, see generally Note, *Civil Versus Criminal: Taxpayers' Rights Under the Fourth and Fifth Amendments*, 38 BROOK. L. REV. 130 (1971); 26 VAND. L. REV. 350 (1973).

ment.⁶⁹ Commercial or financial data is, in part, the record of these associations. Information concerning such items as contributions to political, religious, and other organizations reveals much about a person—his thoughts, desires and beliefs.⁷⁰ Information pertaining to creditors and debtors may reveal the source of economic beneficiaries and personal obligations. Information such as customer and shareholder lists also trace economic associations. In short, commercial or financial information is integrally linked with personal relationships.

Complete disclosure of these associations to the general public may, in turn, discourage a person from engaging in them. Such discouragement has been held in similar situations⁷¹ to be an impermissible chilling of first amendment rights and, therefore, unconstitutional. The chilling effect may not extend to all persons requesting letter rulings; however, certain politically active individuals or socially oriented corporations may find that their rights of association are severely restricted by potential disclosure.⁷²

b. Fourth Amendment

Although the government is not engaging in the conventional search and seizure found in criminal investigations, the fourth amendment does provide an indication that records of an individual's personal financial affairs are protected from arbitrary governmental intrusion. There is little doubt that the seizing of an in-

69. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

70. See *California Banker's Ass'n v. Schultz*, 416 U.S. 21, 89, 97-99 (1974) (Douglas, J., dissenting). *California Banker's Ass'n* gave the Court an opportunity to determine whether the right of privacy extended to commercial information. However, the Court declared that certain individual plaintiffs lacked standing, precluding a consideration of the privacy issue. 416 U.S. at 71-76.

71. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960) (compulsory listing by teacher of all memberships); *NAACP v. Alabama*, 357 U.S. 449 (1958) (statute requiring disclosure by organization of membership lists).

72. For example, if the NAACP wished to obtain a letter ruling and was forced to disclose certain financial information, would that data be available to persons who were seeking to harm the NAACP by retaliating against contributors? The situation is one step removed from *NAACP v. Alabama*, 357 U.S. 449 (1958), for it may be necessary for the person seeking the information to draw inferences from the data rather than being able to directly ascertain the information desired. However, the danger to associational rights is equally potent.

dividual's financial records without a warrant or probable cause would be a violation of the fourth amendment.⁷³ There is no differentiation based on the economic character of the information, and thus a limited zone of economic privacy is created by the fourth amendment. It is not readily apparent why this should not be extended to cover information which is in governmental possession.⁷⁴

2. Due Process under the Fifth Amendment

As discussed above,⁷⁵ the self-incrimination clause of the fifth amendment is not applicable to the present situation. However, the due process clause of the fifth amendment does provide a strong rationale for finding governmental release of private information to be a violation of fundamental rights.

Keeping personal information confidential may be considered either an aspect of property⁷⁶ or personal liberty⁷⁷ within the terms

73. See, e.g., *Stanford v. Texas*, 379 U.S. 476, 477-79 (1965); *Boyd v. United States*, 116 U.S. 616, 662 (1886). But see *California Banker's Ass'n v. Schultz*, 416 U.S. 21, 65-67 (1974) discussed in *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 188-96 (1974) which held that compulsory record-keeping requirements did not violate the fourth amendment or due process rights of banks. 416 U.S. at 65-67. The individual's right to privacy must be distinguished from the lesser degree of privacy that a corporation possesses under the fourth amendment. See *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Hale v. Henkel*, 201 U.S. 43 (1906).

74. The Census Bureau's safeguards against the release of confidential data provide a successful example of how such information should be protected. See Ruggles, *On the Needs and Values of Data Banks*, 53 MINN. L. REV. 211, 218-19 (1968). Although the United States Supreme Court has not ruled definitely in the area of economic privacy, the California Supreme Court in *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970), held that a state statute compelling disclosure of politicians' personal finances was unconstitutional under both the fourth amendment and penumbral theories of the right of privacy. The case is criticized in Comment, *Financial Disclosure by Public Officials and Public Employees in Light of Carmel-by-the-Sea v. Young*, 18 U.C.L.A. L. REV. 534 (1971); 49 TEXAS L. REV. 346 (1971).

75. See text accompanying note 67 *supra*.

76. Information is a commodity that is sold by credit bureaus, and certain cases have recognized a property right in names and likenesses of individuals. See, e.g., *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). The concept that personal information is property is severely criticized in Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1223-26 (1969). Professor Miller takes the position that property rights, with their attendant legal history, cannot be successfully grafted onto the right of privacy relating to personal information. He favors an "information-trust" approach. *Id.* at 1226-29. However, Professor Miller ignores the possibilities inherent in a due process use of "property" which would entitle the subject of the information to some protection against arbitrary governmental action, a protection not currently available.

77. Cf. *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold v. Connecticut*,

of the fifth amendment. When the government releases private information to the public, the private nature of the information is obviously destroyed. Therefore, regardless of whether the privacy of such information is considered to be property or a component of liberty, the deprivation of that privacy should be governed by due process. The primary problem created by the Service's proposed amendments is the complete absence of due process considerations. There is no mandatory judicial or administrative determination of the "need to know" of the person requesting disclosure. The information is simply open to "public inspection and copying . . . [at] the Reading Room of the National Office during regular office hours."⁷⁸ The failure to provide for an impartial determination of the relative interests involved seriously affects the reasonableness of the proposed amendments.

3. Ninth Amendment

According to Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,⁷⁹ the ninth amendment protects certain unenumerated fundamental personal rights against governmental abridgment.⁸⁰ It has been intimated⁸¹ that the ninth amendment is little more than a security blanket for justices who venture into the uncharted waters of fundamental rights.⁸² However, it can be equally argued that the ninth amendment does, in fact, provide an explicit constitutional statement by the Framers that certain implicit but unenumerated rights are entitled to constitutional protection. This, in turn, tends to legitimate the entire process of determining fundamental rights and the Court's authority to do so.⁸³

381 U.S. 479, 500 (1965) (Harlan, J., concurring).

78. Proposed 26 C.F.R. § 601.703(c), 39 Fed. Reg. 43087, 43089 (1974).

79. 381 U.S. 479 (1965).

80. *Id.* at 484.

81. Kauper, *Penumbra, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 254-55 (1965).

82. *Id.*

83. *Griswold v. Connecticut*, 381 U.S. 479, 488-93 (1965) (Goldberg, J., concurring). Justice Goldberg applies the same test that is used in determining which rights are fundamental under the due process clause. *Id.* at 492-94.

4. Human Experience

In assessing whether a right is fundamental, reference must be made to the collective "traditions and conscience of our people."⁸⁴ Measured by normal human conduct, privacy relating to personal financial data meets the test.

One does not readily reveal information about personal resources without the inducement of a benefit to be gained. The need for credit, for example, results in an exchange of information in return for present access to money or goods. The need to support public expenditures via taxation annually results in revealing the extent of one's personal financial resources. In the absence of a benefit, however, people are loathe to disclose such intimate data.⁸⁵ If one were to approach a stranger and try to ascertain in detail the extent of his personal wealth, such a question would be universally dismissed as rude, insulting, and unworthy of an answer. Yet, the precise effect of the proposed procedural amendments would be to allow the government to do that which no individual would do.

An additional consideration is the potential harm that the release of such information could cause to the taxpayer. Indiscriminate disclosure of personal wealth could lead to harassment by salesmen and promoters. Furthermore, the taxpayer or his family could become the victims of criminals such as extortionists and kidnappers. Unfounded lawsuits induced by the hope of a quick settlement based on nuisance value are yet another possibility.⁸⁶

84. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

85. Even when information has been revealed to a credit agency, for example, the implicit understanding is that such information will only be turned over to other persons if they are, in turn, willing to give some *quid pro quo* for its use, such as more credit or employment. However, after an exchange has taken place such as the granting of credit, great concern is presently being voiced over the threat to personal privacy by such accumulations of data. See, e.g., Countrymen, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEXAS L. REV. 837 (1971). Miller, *supra* note 76; O'Connor, *The Right to Privacy: Bank Credit Reports*, 87 BANK. L.J. 771 (1970). See also TRIAL, Jan.-Feb. 1975 at 12-39. For a discussion of the costs involved in businesses implementing safeguards against privacy violations see Goldstein & Nolan, *Personal Privacy Versus the Corporate Computer*, 53 HARV. BUS. REV., Mar.-Apr. 1975, at 62.

86. These hypotheses were advanced in *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 270, 446 P.2d 225, 233, 85 Cal. Rptr. 1, 9 (1970). See also letter from Selig Levitan to Internal Revenue Service, December 13, 1974, which states:

We have in mind actual instances where individuals were involved in applications for rulings and if the information concerning their financial position became publicly available it takes little imagination to anticipate how their privacy might be violated and to what risks their families might be exposed. *Id.* at 1.

5. Legislative Action

Governmental protection afforded personal financial information is additional evidence that the right to privacy regarding such information is fundamental.⁸⁷ Disclosure of information contained in tax returns, for example, is specifically prohibited by statute.⁸⁸ The Freedom of Information Act,⁸⁹ the codification of the "public's right to know," contains specific exemptions⁹⁰ from disclosure reflecting a legitimate legislative concern for the area of privacy.⁹¹

A strong indication that Congress considers the right of privacy to be fundamental can be found in the recent Right to Privacy Act,⁹² passed in December of 1974. In the preamble to the Act, the right to privacy is explicitly recognized as a fundamental right protected under the Constitution.⁹³ This should dispel any notion that the Court is sitting as a "super-legislature"⁹⁴ if constitutional protection is extended to the economic information contained in letter rulings. Although the Act is too recent to have been interpreted by the judiciary, the existence of a legislative pronouncement may enable the Court to determine, by reference to statutory interpretation rather than constitutional law,⁹⁵ whether the proposed procedural amendments should be allowed to stand.

87. See, e.g., 13 U.S.C. §§ 9(a), 13 (1970) which provide for criminal penalties upon disclosure of Census Bureau information.

88. INT. REV. CODE OF 1954, § 7213(a)(1).

89. 5 U.S.C. § 552 (1970).

90. See note 12 *supra*; Davis, *supra* note 15, at 783-801.

91. See also *Hearings on S. 1791 Before Subcomm. on Constitutional Rights of Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

92. 13 U.S. CODE CONG. & AD. NEWS 6881 (1974).

93. *Id.* at 6882. The text reads: "the right to privacy is a personal and fundamental right protected by the Constitution. . . ."

94. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

95. See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Because the Right to Privacy Act of 1974 is an amendment to the Freedom of Information Act, the Court could find that any disclosure requirements made in compliance with the Freedom of Information Act must also comply with the Right to Privacy Act of 1974. *But see* the legislative history of the Privacy Act of 1974 which defines "individual" as a . . . citizen of the United States or an alien lawfully admitted through permanent residence. This term is used instead of the term 'person' throughout the bill in order to distinguish between the rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be covered by this Act. This distinction was to insure that the bill leaves untouched the Federal

Taken as a whole, the zones of privacy created by specific constitutional amendments, the normal course of human experience, and legislative action serve to establish the fundamental character of a limited right to economic privacy. Admittedly, this right is not of the same dignity as the intimate personal relationships in *Griswold v. Connecticut*⁹⁶ and *Roe v. Wade*.⁹⁷ However, the fundamentality of unenumerated rights should not be restricted solely to the procreative process, nor has the Court so determined in the past.⁹⁸

Governmental Interests and Alternative Measures

In questioning whether the Service has acted constitutionally, consideration must be given to the governmental interest involved.⁹⁹ If a reasonable or compelling¹⁰⁰ governmental interest

Government's information activities for such purposes as economic regulations (emphasis added). 14 U.S. CODE CONG. & AD. NEWS 8038, 8115 (1975).

This definition appears inapposite to letter rulings. It is undisputed that the government may require that information be submitted in the request for ruling. The true question is whether the government may indiscriminately release the information once it is obtained. To this point, the new Act is silent.

96. 381 U.S. 479 (1965) (right of marital privacy).

97. 410 U.S. 113 (1973) (right of bodily integrity).

98. See authorities cited note 63 *supra*. See also Tribe, *supra* note 60, at 42-46.

99. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973); Note, *Roe v. Wade and Doe v. Bolton: The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628 (1973).

100. If the Court determines that economics alone is involved, either the rational relationship or minimal "perceive a basis" test should legitimate the proposed procedural amendments. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955); *West Coast Hotel v. Parrish*, 300 U.S. 379, 385 (1937). However, where fundamental rights are limited by legislation, the measuring standard has been that of a "compelling state interest." See *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). The objection may also be raised that invalidating a regulatory scheme under substantive due process "leaves ungoverned and ungovernable conduct which many people find objectionable." *Railway Express Agency v. New York*, 336 U.S. 106, 111 (1949) (Jackson, J., concurring), analyzed in Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 22-23 (1972). The converse to the above objection is that if statutes and regulations which intrude on fundamental rights are not subject to the restraints of due process, this leaves arbitrary and unreasonable governmental conduct which many people find objectionable. A middle ground may be to deny that invalidation under substantive due process leaves the state powerless to act, but instead imposes a duty to act reasonably when drawing a regulatory scheme intruding on fundamental rights. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) which allowed the state to regulate, but not proscribe, the sale and use of

can be shown for the proposed amendments, the intrusion may be constitutionally justified.¹⁰¹ However, the government appears to have no such interest.

Private letter rulings are still considered nonprecedential by the Service and may only be relied upon by the taxpayer to whom they are issued.¹⁰² Thus, dissemination of the information for tax determination by other taxpayers is not a present Service concern.¹⁰³ Considering the potential harm to the taxpayer involved,¹⁰⁴ gratification of public curiosity hardly seems a legitimate governmental interest. The only viable reason for instituting the proposed amendments appears¹⁰⁵ to be the administrative benefits such a procedure would give the Service.¹⁰⁶

By freeing the Service from interpreting what is confidential under rulings and requests for rulings, and eliminating litigation over that determination, an argument can be made that the Service is merely allocating its resources in an efficient manner.¹⁰⁷ However, the argument lacks substance.¹⁰⁸ The Service could require that

birth control devices.

101. The claim cannot be made that *Tax Analysts and Advocates v. Internal Revenue Service*, 505 Adv. F.2d 350 (D.C. Cir. 1974) compels such an invasion of privacy. The Court specifically held that commercial or financial information which was privileged could be protected, stating:

We emphasize that there is still available . . . [an] exemption under § 552(b) (4) to prevent disclosure of 'commercial or financial information obtained from a person and privileged or confidential.' *Id.* at 355.

102. 26 C.F.R. § 601.201(l) (1) (1972).

103. Of all the proponents of disclosure, none has advocated such a radical program of disclosure as the proposed procedural amendments would institute. See authorities cited note 8 *supra*. But see letter from Tax Analysts and Advocates to Internal Revenue Service, January 10, 1975. The letter, rubbing salt into the wound, reminds the Service that past rulings as well as prospective rulings must be disclosed on the basis of the Tax Analysts recent court victory.

104. 5 U.S.C. § 552(b) (6) (1970) relating to "clearly unwarranted invasions of personal privacy" would seem to negate the premise that satisfying public curiosity about others is a legitimate governmental purpose. See note 12 *supra*.

105. The Service has stated no reason other than compliance with the Freedom of Information Act. See note 4 *supra*.

106. See U. CHI. Note, *supra* note 8, at 850-53.

107. See letter from James B. Swenson of Price Waterhouse & Co. to the Internal Revenue Service, January 23, 1975:

We appreciate that deleting the taxpayer's identity in over 28,000 ruling letters is not practical. *Id.* at 1.

108. If the Service is already spending approximately 340,000 man-hours

the taxpayer identify the information he considers confidential in the request for ruling.¹⁰⁹ Certain guidelines could be established to prevent the unwarranted assertion of confidentiality.¹¹⁰ An appellate procedure whereby the taxpayer could test Service determinations regarding confidentiality should be a component of the system. Such an appeal could be taken either within the Service or to the courts.¹¹¹ Computerization of rulings and the information contained in requests for rulings would also substantially alleviate storage and retrieval of data problems.¹¹² A system of deletions and changes could be instituted for private letter rulings in much the same manner as is done for the published rulings program.¹¹³ Finally, the costs of such a system could be borne by those who request the rulings¹¹⁴ and the information.¹¹⁵ The presence of

per year on letter rulings, *see* note 25 *supra*, it is not clear why the simple deletion of identity and confidential details would strain the administrative system of the Service.

109. This has been the most widely advocated method of disclosure. *See, e.g., Reid, supra* note 8, at 33, 34; U. CH. Note, *supra* note 8, at 849. *See also* letter from the law firm of Roberts and Holland to Internal Revenue Service, January 15, 1975, which states:

The policy of publication under the Act and under the proposed regulations can be maintained, consistent with the taxpayer's privacy, and without imposing a substantial administrative burden on the Service, by permitting the taxpayer to file a duplicate request from which all identifying data and other confidential information are deleted. Alternatively, the taxpayer could include identifying data in a covering letter, which would enclose a request for ruling from which all identifying data would be omitted by the use of letter symbols to identify the persons involved. The Service's ruling could refer to the persons in the letter symbols used in the request and could be made available to the public in that form. *Id.* at 3.

110. These guidelines could be established in a Revenue Procedure similar to present Service guidelines for submitting a request for ruling on a corporate reorganization. *See* Rev. Proc. 23, 1968-1 CUM. BULL. 821.

111. It would seem naive to think that disputes would not arise, considering the volume of past litigation over what is disclosable under the Freedom of Information Act. *See, e.g., Developments under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251. It would also appear that ultimately the courts must decide these questions. *See also* 12 U.S. CODE CONG. & AD. NEWS 5758, 5759 (1974), which contains amendments to the Freedom of Information Act enlarging the role of the judiciary in determining classification of documents.

112. A computerized procedure of evidencing private rulings has also been proposed by Tax Analysts and Advocates, presumably for different reasons. *See* U. CH. Note, *supra* note 8, at 849 n.122.

113. *See* Roberts and Holland letter, *supra* note 109.

114. *See* the extensive cost-allocation proposal offered in U. CH. Note, *supra* note 8, at 851-53 & n.127. This program generally provides that the people who receive the benefit of the rulings program, *i.e.* the users, should bear part of the cost of administering it. General statutory authority exists at present for such a fee requirement. *See* 31 U.S.C. § 438a (1970).

115. The Freedom of Information Act already contains a provision for charging those who request information: 5 U.S.C. § 552(a) (3) (1970).

these alternative procedures substantially lessens the impact of the administrative burdens argument and increases the likelihood that the Service's intrusion into personal privacy is constitutionally impermissible.¹¹⁶

Unconstitutional Conditions

Assuming that the right to privacy concerning personal financial affairs is fundamental and that no legitimate governmental interest exists for invading this privacy, may the Service require a mandatory waiver of confidentiality as a condition to the granting of an administrative benefit?

The Service is under no compulsion to issue private letter rulings,¹¹⁷ however, the doctrine of unconstitutional conditions¹¹⁸ precludes the withholding of the benefit unless constitutional rights are waived. The doctrine has been applied to such diverse requirements as submission to warrantless searches,¹¹⁹ waiver of access to

116. See *Shapiro v. Thompson*, 394 U.S. 618, 636-38 (1969) which held that administrative convenience was not a sufficient justification for infringing upon the fundamental right to travel. Because *Shapiro* was an equal protection case, the analogy to the instant question is not exact. Another differing consideration is that the plaintiffs in *Shapiro* were indigent, thus arguably involving a suspect classification when fundamental rights are at stake. However, it would appear to be reverse discrimination if the wealthy, admittedly the most frequent users of the letter rulings system (see tax bar interviews, *supra* note 23), were not granted similar protection of their fundamental rights. See also Struve, *The Less-Restrictive-Alternative and Economic Due Process*, 80 HARV. L. REV. 1463 (1967).

117. See Rev. Proc. 3 § 5, 1972-1 CUM. BULL. 698, 701; Caplin, *supra* note 9, at 7-9.

118. For a more complete discussion of the development of the doctrine see French, *Unconstitutional Conditions—An Analysis*, 50 GEO. L.J. 234 (1961); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929); O'Neill, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Note, *Judicial Acquiescence in the Forfeiture of Constitutional Rights through Expansion of the Conditional Privilege Doctrine*, 28 IND. L.J. 520 (1953); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

119. See *Camara v. Mun. Ct.*, 387 U.S. 523 (1967); See *v. City of Seattle*, 387 U.S. 541 (1967). But see *Wyman v. James*, 400 U.S. 309, 324 (1971) where it is stated that:

It seems to us that the situation is akin to that where an Internal Revenue Service agent, in making a routine civil audit of a taxpayer-

federal courts,¹²⁰ violations of religious precepts,¹²¹ and the involuntary disclosure of associations.¹²²

The basic rationale behind the doctrine is that the government should not be allowed to do indirectly what it cannot do directly.¹²³ Constitutional rights, such as the right to privacy, should not be allowed to be "manipulated out of existence,"¹²⁴ yet this is precisely what the proposed procedural amendments would accomplish regarding personal financial privacy. It has been shown previously¹²⁵ that no reasonable governmental purpose may be attributed to the waiver of the right to privacy regarding personal financial information. A balancing of the individual's interest and the governmental purpose should reveal that the blanket requirement of a waiver is both overly broad and unnecessarily violative of constitutional rights.

CONCLUSION

This comment has focused upon both the practical and constitutional defects present in the Internal Revenue Service's proposed requirement of a mandatory waiver of confidentiality as a condition precedent to the issuing of a private letter ruling. The primary

er's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his 'rights' in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making.

However, the mandatory waiver of confidentiality contemplated by the Service is readily distinguishable from the Court's dictum. That the Service may require the information in the request for ruling is not denied. This is similar to the proof of a deduction. However, waiver of a statutory "right" such as a deduction cannot be meaningfully compared with the waiver of a fundamental right guaranteed under the Constitution, such as the right to privacy.

120. *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Insurance Co. v. Morse*, 87 U.S. (20 Wall) 445 (1874).

121. *Sherbert v. Verner*, 374 U.S. 398 (1963).

122. *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

123. *Van Aylstine*, *supra* note 118, at 1445-46. Formerly, it was thought that the greater right to completely withhold the benefit encompassed the lesser power to condition its receipt upon any terms desired. *See, e.g.*, *Packard v. Banton*, 264 U.S. 140, 145 (1924); *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897); *Hale*, *supra* note 118, at 321-22. However, this assumption has been shown to rest upon the logical fallacy of four terms. *See French*, *supra* note 118, at 236-39; *Powell*, *The Right to Work for the State*, 16 *COLUM. L. REV.* 99, 110-11 (1916).

124. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926).

125. *See* text accompanying notes 102-116 *supra*.

practical defect in the proposed amendments is that such a requirement may seriously undermine the present program of private rulings which plays an important part in both business planning and tax administration. The exact defects of the waiver requirement, while unknown, may prove costly to both the Service and the taxpayer.

The constitutional defects are that if a taxpayer has an independent constitutional right to privacy, limited to information which he would not normally reveal, the release of such information by the government to interested third parties may constitute a distinct violation of the individual's right to privacy. On the other hand, the requirement that the taxpayer voluntarily relinquish his right of privacy in order to obtain a letter ruling may be an indirect way of accomplishing the same end and, therefore, equally unconstitutional.

In determining what is or is not constitutionally privileged, reference must be made to what is considered basic or fundamental in the American tradition. Analysis of the Constitution, human experience, and legislative concern indicates that the right to privacy of personal financial information is a fundamental part of American life. Therefore, in the absence of a compelling governmental interest on the part of the federal government's release of such information, its confidentiality should not be violated. Because of the basic alternatives available to the government and the possible consequences of the indiscriminate release of the information, no such governmental purpose has been shown to exist. The basic constitutional faults in the proposed procedural amendments should be cured by the adoption of procedural rules which protect the confidentiality of the information.

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