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EXTRA-JUDICIAL DISCUSSION OF TAXPAYER INFORMATION: THE IRS BULLY IS STILL ON THE BLOCK

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> [T]he IRS relies on intimidation tactics and arm twisting to strike fear in the hearts of those it bullies. . . . And they do this in the name of compliance.[1]

I. INTRODUCTION AND OVERVIEW

This article is about taxpayer privacy and Internal Revenue Service (Service) extortion tactics. Each topic alone is important. Together they decree a compelling need for change.

Taxpayer information[2] is confidential[3] and, with limited exceptions, is statutorily nondisclosable by the government.[4] Some courts, however, have interpreted the exceptions so broadly that they have become the general rule. The interpretation of the judicial and administrative proceeding exception of section 6103 is an example.[5] As a result, taxpayers have lost privacy, and the government has gained a mighty weapon with which to bully taxpayers. Some might call the permission to disclose information extortion.[6]

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1. *Taxpayers' Bill of Rights: Hearings on S. 579 and S. 604 Before the Subcomm. on Private Retirement Plans and Oversight of the Internal Revenue Service of the Senate Comm. on Finance*, 100th Cong., 1st Sess., pt. 1, at 19 (1987) [hereinafter *Taxpayers' Bill of Rights Hearings*] (statement of Sen. Pryor). Senator Pryor further stated, "We must keep in mind the dangers of giving any agency the unchecked force that can literally destroy citizens in this country. These are individual taxpayers. . . . They have rights that must be protected." *Id.*

2. The definition of "return information" is very broad and encompasses many things other than the actual data on the return itself. *See* I.R.C. § 6103(b)(2) (1991) (unless otherwise stated, all references to the Internal Revenue Code will be to the 1986 Code, as amended and in effect for 1991); *infra* notes 36-37 and accompanying text.

3. I.R.C. § 6103(a).

4. I.R.C. § 6103(a). Section 6103(a) provides:

> Returns and return information shall be confidential, and except as authorized by this title—
>
> (1) no officer or employee of the United States,
>
> (2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and
>
> (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), (l)(12), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

Id.

5. *See* I.R.C. § 6103(h)(4).

6. *Cf.* Johnson v. Sawyer, 760 F. Supp. 1216, 1233 (S.D. Tex. 1991) (recounting taxpayer's testimony which indicated that a Service agent threatened the use of news releases in order to secure the taxpayer's cooperation).

The purpose of this article is to both expose the problem of the court's broad interpretation of section 6103 and to suggest solutions. Part II discusses the history of governmental abuses of taxpayer privacy and illustrates why the government, which possesses a huge arsenal of weapons against taxpayer privacy, needs restraint. While the playing field between taxpayers and the Service will never be level, these suggestions will fulfill the congressional mandate of section 6103.

Part III first discusses the 1976 amendments which forced many restraints on government disclosure of taxpayer information. Second, part III critically analyzes several court decisions which effectively removed one such restraint.[7] Unfortunately, this restraint provided the greatest protection to taxpayer privacy. Third, part III analyzes the three court decisions which interpret the statute and fulfill the congressional mandate.[8] Finally, part III discusses a third interpretation of the judicial proceeding exception. This third interpretation implicitly removes taxpayer protection from government protection.[9]

Part IV recommends several alternative statutory amendments in descending order of attractiveness. In addition, part IV recommends that taxpayers more widely utilize an existing remedy against government disclosure offered by protective orders.

II. BACKGROUND

During the Watergate era, the use of "tax hit lists" by the government became apparent, as did the need for more privacy protection for taxpayers.[10] The Privacy Act of 1974[11] partially addressed this

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7. *See* Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989); Peinado v. United States, 669 F. Supp. 953 (N.D. Cal. 1987), *aff'd sub nom.*, Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989); Figur v. United States, 662 F. Supp. 515 (N.D. Cal. 1987), *aff'd sub nom.*, Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989); *infra* text accompanying notes 52-79.

8. Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983); Chandler v. United States, 687 F. Supp. 1515 (D. Utah 1988), *aff'd*, 887 F.2d 1397 (10th Cir. 1989); Johnson v. Sawyer, 640 F. Supp. 1126 (S.D. Tex. 1986); *see infra* text accompanying notes 81-133.

9. *See* Thomas v. United States, 890 F.2d 18 (7th Cir. 1989); *infra* text accompanying notes 134-42.

10. S. REP. No. 938, 94th Cong., 2d Sess., pt. 1, at 318 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3746-47 [hereinafter SENATE REPORT]; STAFF OF JOINT COMMITTEE ON TAXATION, 94TH CONG., 2D SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 314-15 (1976), *reprinted in* 1976-3 C.B. 326-27 [hereinafter JOINT COMMITTEE REPORT].

11. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1988)).

need. Although the Act encompassed privacy in tax returns generally,[12] the legislative history shows that Congress recognized the need for more specific legislation.[13] For example, Congress established the Privacy Protection Study Commission and directed the Commission to report information disclosure by the Service to other federal agencies.[14] In 1976, Congress adopted many of the Commission's recommendations, including the fundamental concept that tax returns should be kept confidential by the Service.[15] Congress's actions implicitly recognized the need for taxpayer privacy.

Prior to 1976, tax returns were "public records" and were open to inspection by government agencies under section 6103.[16] Many returns were even open to public examination under the regulations.[17] The Tax Reform Act of 1976 changed the statute completely. It generally required that tax returns be kept confidential, but allowed limited disclosure.[18] This complete reversal is stated clearly in the legislative history of the Act. In the Joint Committee on Taxation's language, "[a]lthough prior law describes income tax returns as 'public records' . . . Congress felt that returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in newly amended section 6103 where it was determined that disclosure was warranted."[19]

Thus, section 6103 was overhauled completely and took on a whole new purpose of confidentiality and restricted access. This much is clear and free from debate. However, it is far from clear whether the statute actually affords taxpayers real protection. The statute does state that returns shall be confidential,[20] but describes almost exclusively disclosure exceptions.[21]

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12. *Id.* § 5(a). James N. Benedict & Leslie A. Lupert, *Federal Income Tax Returns — The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940, 949 (1979).

13. Privacy Act of 1974, Pub. L. No. 93-579, § 5(a), 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1988)).

14. Benedict & Lupert, *supra* note 12, at 949-50.

15. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202, 90 Stat. 1520 (codified as amended in scattered sections of I.R.C.); *see* Benedict & Lupert, *supra* note 12, at 950; *see also* Francis E. Cullen, Note, *Personal Privacy Versus Public Interests: Government Publication of Tax Information Disclosed in a Judicial Proceeding*, 6 GA. ST. U. L. REV. 115, 115-16 (1989).

16. *See* I.R.C. § 6103 (1954) (current version at I.R.C. § 6103).

17. I.R.C. § 6103(a) (1954) (current version at I.R.C. § 6103(a)).

18. I.R.C. § 6103.

19. JOINT COMMITTEE REPORT, *supra* note 10, at 327.

20. I.R.C. § 6103(a).

21. *See* I.R.C. § 6103(c)-(o).

While the statute discusses both confidentiality and disclosure, the legislative history indicates that the overriding concern of Congress was confidentiality.[22] Congress focused on the potential abuses of taxpayers arising from others using their tax return information for nontax purposes.[23] In particular, Congress feared that the disclosure of return information to other federal and state agencies breached taxpayers' reasonable expectation of privacy.[24] Congress clearly recognized the need for taxpayers to believe they were being treated fairly and that their returns were being kept confidential.[25] Further, Congress realized the public's reaction to the lack of privacy could "seriously impair the effectiveness of our country's very successful voluntary assessment system which is the mainstay of the Federal tax system."[26]

In overhauling section 6103, Congress's goal was to balance the government's need for information with the taxpayer's right to privacy while maintaining continued compliance with the federal tax system.[27] The overriding purpose of the provisions of section 6103 was to protect tax returns and return information from misuse by federal and state agencies.[28] Therefore, the issue to be resolved is whether confidentiality and disclosure should be construed as complementary or as separate and independent protections under the statute.

III. THE CURRENT STATUS OF THE LAW

A. *Preliminary Matters*

Section 6103 acts as a general prohibition against the disclosure of return information.[29] However, the statute does contain several exceptions to the general rule of nondisclosure.[30] The focus of this article is on the judicial or administrative tax proceeding exception of section

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22. SENATE REPORT, *supra* note 10, at 3439, 3746-47.

23. *Id.*

24. *Id.* at 3747.

25. *Id.* A congressional committee specifically mentioned that the Privacy Act of 1974 had some impact on the disclosure of tax information, but that it did not place specific emphasis on the unique aspects of tax returns and tax return information. *Id.*

26. *Id.*

27. *See id.*

28. *See id.* at 3439, 3746-47.

29. Wiemerslage v. United States, 838 F.2d 899, 902 (7th Cir. 1988). *Cf.* Stokwitz v. United States, 831 F.2d 893, 897 (9th Cir. 1987) (holding that § 6103 "applies only to information filed with and disclosed by the IRS"), *cert. denied*, 485 U.S. 1033 (1988).

30. *See* I.R.C. § 6103(c)-(o).

6103(h)(4) and the issues arising in enforcement. Section 6103(h)(4) provides in part:

> Disclosure in Judicial and Administrative Proceedings — A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only—
>
> (A) [if] the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;
>
> (B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;
>
> (C) if such return or return information directly relates to a transaction relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or
>
> (D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.
>
> However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.[31]

Thus, section 6103 authorizes disclosure of return information.[32] The provisions of section 6103 are violated when the Service makes an unauthorized disclosure of return information.[33] Violators of section 6103 are subject to both criminal[34] and civil[35] sanctions. "Return infor-

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31. I.R.C. § 6103(h)(4).

32. *Id.*

33. All disclosures of return information are unauthorized unless they fall within the narrow exceptions of § 6103. *See* I.R.C. § 6103(a).

34. *See* I.R.C. § 7213. Willful disclosures in violation of § 6103 are felonies punishable by a fine of up to $5000 or imprisonment of up to five years, or both. I.R.C. § 7213(a).

35. *See* I.R.C. § 7431. This section authorizes a minimum damage award of $1000 against the government for each unauthorized disclosure, as well as punitive damages in the case of willful or grossly negligent disclosure. I.R.C. § 7431(c).

mation" is defined very expansively.[36] It encompasses much more than the actual entries on tax returns. Most significantly, return information includes the fact that the taxpayer is being investigated by the government.[37]

Disclosure of return information in press releases may fall within the exception for disclosure in judicial or administrative proceedings,[38] depending on the definition of administrative tax proceeding. The statute defines tax administration very broadly.[39] The definition includes: "the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws. . . ."[40] Tax administration also encompasses "assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws. . . ."[41] Therefore, press releases could be defined as publications and fall within the definition of tax administration.[42] Yet, although the statute contains over twenty pages of disclosure exceptions, there is only one specific media exception.[43] That exception authorizes the release of taxpayer identification information which notifies persons entitled to refunds that the Service has been unable to locate them.[44] Therefore, this media exception merely permits disclosure as publication of notice to taxpayers entitled to refunds.

In applying section 6103, the underlying question is whether the United States really has a voluntary assessment system. For the vast majority of taxpayers the answer is no.[45] There are severe penalties

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36. I.R.C. § 6103(b)(2). Section 6103(b)(2) provides in part:

> The term "return information" means—
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> . . . a taxpayer's identity, the nature, source, or amount of his income, . . . tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to a determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . . .

I.R.C. § 6103(b)(2)(A).

37. I.R.C. § 6103(b)(2)(A).

38. I.R.C. § 6103(h)(4).

39. I.R.C. § 6103(b)(4).

40. I.R.C. § 6103(b)(4)(A)(i).

41. I.R.C. § 6103(b)(2)(B).

42. *See* I.R.C. § 6103(b)(4)(B). Even more broadly, press releases may be characterized as an aspect of increased taxpayer compliance, and thus as enforcement of the tax laws. *See id.*

43. I.R.C. § 6103(m)(1).

44. *Id.*

45. For the vast majority of taxpayers subject to withholding and informational reporting requirements, the system is clearly one of forced compliance.

for failure to file tax returns.[46] In addition, the Supreme Court long ago established that the Fifth Amendment privilege against self-incrimination will not excuse the filing of returns.[47] The Supreme Court is also of the view that the information that must be shown on a tax return is not compelled disclosure.[48] As a result, there is a need for statutory protection of sensitive information taxpayers are required to reveal in their tax returns.

B. *Judicial Interpretation of Section 6103*

Two distinct lines of reasoning are used in interpreting the scope of the disclosure in tax proceedings. The Ninth Circuit Court of Appeals focuses on the *confidentiality* of the information covered under section 6103.[49] By doing so, the court holds that any return information properly placed on the public record loses its confidentiality and thereby loses the protection of section 6103.[50] The Tenth Circuit Court of Appeals takes the opposite approach. In its view, section 6103 concerns *disclosures* of return information, and it is irrelevant that it loses its confidentiality when it becomes a part of the public record.[51]

1. The Lost Confidentiality Cases (Lampert/Peinado/Figur)[52]

Three cases decided by the Northern District of California and consolidated for appeal to the Ninth Circuit Court of Appeals, decide the issue of whether the government violates section 6103 when it issues press releases containing taxpayer return information. In

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46. *See* I.R.C. §§ 6651, 6652 (providing monetary penalties for failure to file tax return and informational returns); *see also* I.R.C. § 7203 (imposing a fine of up to $25,000 and imprisonment for up to one year for willful failure to file returns).

47. Garner v. United States, 424 U.S. 648, 650 (1976); United States v. Sullivan, 274 U.S. 259, 263-64 (1927).

48. *Garner*, 424 U.S. at 659-61.

49. Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989).

50. *Id.*; *see* Nixon v. Warner Communications, 435 U.S. 589, 597 (1978) (clarifying that open court proceedings become a part of the public record); *see also* Craig v. Harney, 331 U.S. 367, 374 (1947) (establishing that trials are public events and that whatever takes place in the courtroom is the public's property). Thus, matters transpiring in court become a part of the public record and, absent a protective order, they lose any confidentiality they might otherwise have had.

51. *E.g.*, Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983); Chandler v. United States, 687 F. Supp. 1515 (D. Utah 1988), *aff'd*, 887 F.2d 1397 (10th Cir. 1989).

52. Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989).

Peinado v. United States,[53] the government issued two press releases: one announcing that Peinado plead guilty to two counts of tax evasion, and a second announcing his sentence.[54] The district court held section 6103 was not violated because the press releases merely restated indictment allegations or open court proceedings.[55]

The court stated that it was not Congress's intent that section 6103 penalize the government for "repeating information that is already a matter of public record."[56] Moreover, the court found that a press release that "simply announces or broadcasts what is already known from court proceedings is not a disclosure" within the meaning of section 6103.[57]

In *Figur v. United States*,[58] the taxpayer claimed that section 6103 was violated when the United States Attorney's Office issued a press release summarizing various counts in the criminal information filed against the taxpayer.[59] The parties agreed that under section 6103(h)(4) the government may disclose return information in a criminal information, which is a matter of public record.[60] They also agreed that the press release contained return information.[61] The issue was whether the press release was an illegal disclosure of return information under section 6103.[62]

Like *Peinado*, the *Figur* court held that issuance of a press release announcing information contained in the public record does not violate section 6103.[63] In so holding, the court focused on the taxpayer's loss of a reasonable expectation of privacy once a return becomes a part of the public record.[64] The *Figur* court stated that once return information is in the public record, section 6103 protection becomes moot.[65]

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53. 669 F. Supp. 953 (N.D. Cal. 1987), *aff'd sub nom.*, Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989).

54. *Id.* at 954.

55. *Id.*

56. *Id.*

57. *Id.*

58. 662 F. Supp. 515 (N.D. Cal. 1987), *aff'd sub nom.*, Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989).

59. *Id.* at 516.

60. *Id.* at 517.

61. *Id.*

62. *Id.*

63. *Id.* The *Figur* court rejected the opposite result reached in *Rodgers v. Hyatt* by the Tenth Circuit Court of Appeals because the *Rodgers* court ignored the loss of § 6103's protection for information in the public record. 697 F.2d 899 (10th Cir. 1983). *See infra* text accompanying notes 81-92.

64. *Figur*, 662 F. Supp. at 517.

65. *Id.*

Further, the *Figur* court found that the government could not "disclose" or "make known" return information in the public record, because the act of disclosure "presupposes confidentiality or at least limited access to the material revealed."[66] Because there was no confidentiality in the court proceedings, there could be no disclosure.

Lampert v. United States,[67] *Figur* and *Peinado* were consolidated for appeal. *Lampert* was not a criminal case, but a civil action to enjoin the taxpayers from promoting abusive tax shelters.[68] The United States Attorney's Office and the Service each issued separate press releases concerning the filing of the injunction and the investigation of the taxpayers.[69] The district court held that the press release concerning Lampert was a violation of section 6103, but the government could avoid civil damages because the disclosure was made in good faith.[70] On appeal, the Ninth Circuit Court of Appeals held that "once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate" section 6103.[71] The *Lampert* court relied heavily on the earlier decisions of *United States v. Posner*[72] and *Cooper v. I.R.S.*[73] to reason that, once return

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66. *Id.* The statute does not seem to take such a restricted definition of disclosure. The statute itself defines "disclosure" as "the making known to any person *in any manner whatever* a return or return information." I.R.C. § 6103(b)(8) (emphasis added). Interestingly, the court stated its belief that Congress was aware of this potential disclosure in judicial proceedings. *Figur*, 662 F. Supp. at 517 n.1. Because the requirement of safeguarding confidentiality in § 6103(p) does not apply to return information disclosed in a judicial proceeding, the *Figur* court concluded that Congress must have implicitly allowed for § 6103 not to apply to matters of public record. *Id.* at 518.

67. 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989).

68. *Id.* at 336; *see* I.R.C. § 7408(a) (providing for a "civil action in the name of the United States to enjoin any person" from promoting abusive tax shelters). *Lampert* certainly presents a different scenario for the issuance of a press release than the criminal convictions and sentences of *Figur* and *Peinado*. If the aim of publicly announcing taxpayer cases in litigation is to further voluntary compliance, one must question the issuance of press releases in civil cases. *See infra* text accompanying notes 182-98 (discussing aspects of taxpayer compliance).

69. *Lampert*, 854 F.2d at 336.

70. *Id.* (citing I.R.C. § 7431(b)).

71. *Id.* at 338. The government argued in the alternative that if there was a violation of § 6103, it was relieved of liability by the good faith, but erroneous exception of § 7431(b). *Id.* at 336. Because the court held that § 6103 was not in fact violated, it did not decide the good faith exception issue under § 7431(b). *Id.*

72. 594 F. Supp. 930 (S.D. Fla. 1984).

73. 450 F. Supp. 752 (D.D.C. 1977). Interestingly, in footnote 4 of the *Cooper* opinion, the court discussed the publication of confidential documents and stated:

> It is, of course, somewhat anomalous to refer to all of the documents in question as confidential. Many are not truly confidential in any respect. For example, some of the documents are deeds and are thus doubtless recorded in some county or

information is placed in the public record, confidentiality and any expectation of privacy no longer apply.[74] Therefore, if a taxpayer's return information is lawfully disclosed in a judicial proceeding, the information is no longer confidential.[75] The information then may be disclosed without regard to section 6103.[76]

The taxpayer in *Lampert* agreed that anyone could obtain the disclosed information from the public record, but insisted the government must rely on a specific statutory exception to disclose information further.[77] The court dismissed the taxpayer's position as too technical and stated that only a strict, literal reading of section 6103 would support the taxpayer's position.[78] The court went on to state, "[W]hile generally our duty is to give effect to the literal language of a statute, we are not obligated to do so when reliance on that language would defeat the purposes of the statute."[79] Therefore, though technically correct, the taxpayer's interpretation of section 6103(h)(4) was rejected because of the Ninth Circuit's interpretation of congressional intent when it enacted the statute in 1976.[80]

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municipal recording office. Therefore, they are already technically public records. *Confidentiality in this case* is limited to the concept that the IRS may not freely divulge this information.

Id. at 754 n.4 (emphasis added).

74. *Lampert*, 854 F.2d at 337.

75. *Id.* at 338.

76. *Id.; see* United Energy Corp. v. United States, 622 F. Supp. 43, 46 (N.D. Cal. 1985). In *United Energy*, the taxpayer applied for a temporary restraining order seeking to stop a Service investigation of the company. *Id.* at 44. A hearing was held in chambers with no court reporter present. *Id.* Following the hearing, the Assistant United States Attorney was quoted in the *Oakland Tribune* as saying the company was the subject of an ongoing Service investigation. *Id.* at 45. The taxpayer sued the government for civil damages under § 7431. *Id.* at 44. The issue in *United Energy* was whether § 6103(h)(4) permitted the Assistant United States Attorney to repeat to reporters the statements made in the judicial proceeding. *Id.* at 45. The court discussed the Tenth Circuit's reasoning in Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983), and concluded that this reasoning was inconsistent with the holding in *Rodgers*. *Id.* at 46. The *United Energy* court cited *Posner* for the proposition that once certain information is in the public domain, all privacy in such information is lost. *Id.* Finally, the court stated: "Once [United Energy Corporation] decided to make certain of its return information public by filing a complaint, it lost any entitlement to privacy in that information." *Id.* Consider the chilling effect on taxpayer-initiated actions under this reasoning.

77. *Lampert*, 854 F.2d at 338.

78. *Id.*

79. *Id.*

80. *Id.*

2. The Disclosure Cases

a. *Rodgers v. Hyatt*[81]

In *Rodgers*, the Criminal Investigation Division was investigating a taxpayer for allegedly underreporting income.[82] At a summons enforcement hearing, the taxpayer's counsel elicited testimony from a Service investigator.[83] The investigator testified that the Service questioned the correctness of the taxpayer's returns when the Service received information that the taxpayer was dealing in stolen oil and not reporting the income received from the sale of that oil.[84] The taxpayer filed a disclosure suit when the allegations and rumors of the dealings in stolen oil were disclosed at the summons enforcement hearing.[85] The district court awarded the taxpayer $1000 in damages against Hyatt for unauthorized disclosure of tax return information.[86]

On appeal, Hyatt[87] contended that the prior in-court exposure of the return information removed the protections of section 6103.[88] The court set out substantial portions of Hyatt's brief and noted the argument that there is no reasonable expectation of confidentiality in matters already of public record.[89] However, the court held that the loss of confidentiality issue need not be reached when the disclosures had in fact violated section 6103.[90]

In rejecting Hyatt's contention that the prior proceeding removed the section 6103 protection, the court concluded that the issue was

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81. 697 F.2d 899 (10th Cir. 1983).

82. *Id.* at 900.

83. *Id.*

84. *Id.* The Service obtained the information concerning the alleged activities of Mr. Rodgers from the Sheriff's Department and FBI. *Id.*

85. *Id.*

86. *Id.* at 901.

87. This case arose prior to the repeal of § 7217 which held the individual employee liable for the disclosure of return information. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202(e)(1), 90 Stat. 1687, *repealed by* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 357(b)(1), 96 Stat. 646. Today § 7431 relieves the individual of civil liability and instead allows the suit against the United States. I.R.C. § 7431.

88. *Rodgers*, 697 F.2d at 901.

89. *Id.* at 902-03.

90. *Id.* at 904. The disclosure in this case violated § 6103(k)(6). Section 6103(k)(6) provides in part: "An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation . . . disclose return information to the extent that such disclosure is necessary in obtaining information . . . ." I.R.C. § 6103(k)(6). The court held that § 6103(k)(6) was violated because the disclosure was not necessary to obtain information where none was sought at the meeting where the challenged disclosure occurred. *Rodgers*, 697 F.2d at 904-06.

whether there was an unauthorized disclosure of return information in violation of section 6103.[91] Furthermore, the court found that the loss of confidentiality resulting from the prior, authorized in-court exposure "did not justify Hyatt's violation of the requirement that he, as an officer of the United States, is prohibited from disclosing 'return information' absent express statutory authorization."[92]

b. *Chandler v. United States*[93]

Chandler also involved the issue of whether a prior in-court exposure of return information renders the protection of section 6103 academic.[94] In *Chandler*, the Service assessed the taxpayers a frivolous return penalty.[95] The taxpayers filed suit to enjoin the collection of the penalty, which was dismissed for lack of jurisdiction.[96] Immediately thereafter, the Chandlers sent the full payment of the penalty and interest, but neglected to furnish their taxpayer identification number (TIN) with their payment.[97] The Service received and processed the payment, but because the Service copied the TIN incorrectly, the Chandler's account was not credited.[98] As a result, the Service levied on Mrs. Chandler's wages.[99]

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91. *Rodgers*, 697 F.2d at 906.

92. *Id.* This is not the only court to find that return information used in a previous court proceeding continues to enjoy protection from future disclosure. *See* Olsen v. Egger, 594 F. Supp. 644 (S.D.N.Y. 1984) (holding that the Service was not required to disclose taxpayer's return information even though the terms of divorce judgment required the taxpayer to disclose his returns).

In Husby v. United States, 672 F. Supp. 442 (N.D. Cal. 1987), the court rejected the Government's contention that by the filing of a Tax Court petition, the taxpayer lost all "reasonable expectation of privacy" under § 6103 for the return in question. *Id.* at 444. The court held further that the Government's interpretation of § 6103 would force the taxpayer to choose between challenging a deficiency or enjoying the protection of § 6103, but not both. *Id.* Thus, if the Government had its way, once a taxpayer filed a petition for redetermination, all return information for the years at issue could be properly disclosed, notwithstanding § 6103. *Id.* This result is clearly inconsistent with the purposes of § 6103.

93. 687 F. Supp. 1515 (D. Utah 1988), *aff'd*, 887 F.2d 1397 (10th Cir. 1989).

94. *Id.* at 1517.

95. *Id.* at 1516.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* The Service did later learn of the payment by the taxpayer, and the Service subsequently credited the taxpayer's delinquent account. *Id.* The Service conceded the levy did disclose "return information." *Id.* at 1516 n.1. However, the Service maintained that the disclosure was due to the taxpayer's failure to remit their TIN with payment. *Id.* at 1516-17.

The threshold issue in *Chandler* was whether the confidentiality of the return information disclosed by the levy was lost when the taxpayer filed suit for injunctive relief.[100] The court discussed *Rodgers*[101] and found that the decision was not an anomaly.[102] Further, the *Chandler* court cited *Olsen v. Egger*[103] as precedent for holding in-court disclosure of return information does not remove the information from the requirements of section 6103.[104] After examining the legislative history, as well as the case law interpreting section 6103, the court held that the prior disclosure of the taxpayer's return information in court was not relevant to the ultimate determination of whether the Service unlawfully disclosed that information.[105]

c. *Johnson v. Sawyer*[106]

In *Johnson I*, decided in 1986, a taxpayer was awarded $21,000 in damages for the unauthorized disclosure of his return information in a press release.[107] In a later decision,[108] (*Johnson II*), the court ordered the Government to pay almost eleven million dollars to the taxpayer.[109] *Johnson II* detailed the factual setting underlying the unauthorized disclosure suit, and serves as an example of the abuses that occur from the uncontrolled discretion of the Service to issue press releases.[110] Therefore, the facts require some detail.

In the late 1970s, the Service began investigating the returns of the taxpayer, Mr. Johnson.[111] Some discrepancies were discovered between his business expenses and the deductions listed on his return.[112]

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100. *Id.* at 1517.

101. *See supra* text accompanying notes 81-92.

102. *Chandler*, 687 F. Supp. at 1518.

103. 594 F. Supp. 644 (S.D.N.Y. 1984). *See supra* note 92.

104. *Chandler*, 687 F. Supp. at 1518-19.

105. *Id.* at 1520. The court ultimately found the Service negligently disclosed return information and awarded the taxpayers $1000 in damages for the unauthorized disclosure. *Id.* at 1521.

106. Johnson v. Sawyer, 640 F. Supp. 1126, 1126 (S.D. Tex. 1986) [hereinafter *Johnson I*].

107. *Id.* at 1136. This was determined by multiplying the statutory $1000 damages by the 21 media outlets who received the press releases. *Id.*

108. 760 F. Supp. 1216 (S.D. Tex. 1991) [hereinafter *Johnson II*].

109. *Id.* at 1233. The taxpayer was awarded a $10,902,117 judgment against the United States under the Federal Tort Claims Act. *Id.*

110. *Id.* at 1218-24. There is alarming documentation of Service personnel's obvious confusion over the proper procedures to follow in issuing press releases. *Id.* at 1223-24. The deposition of a Service Public Affairs Officer states that she was trained to issue releases without verifying the correctness of the information. *Id.* at 1224.

111. *Id.* at 1220.

112. *Id.* This was because, while his wife meticulously recorded the amount of each expense Mr. Johnson incurred, she sometimes inaccurately recorded the nature of the expense. As a result, some personal expenses were in fact deducted. *Id.*

The discrepancies found by the Service agents resulted from Mrs. Johnson's "well-meaning but eccentric procedures" in recordkeeping.[113] As the court points out, Mrs. Johnson's recordkeeping methods had some flaws. Her methods were sometimes in error regarding sources of the expenses, but the amounts were always accurate.[114] Furthermore, the evidence showed that Mr. Johnson did not know of his wife's erroneous recordkeeping methods.[115] This evidence, however, did not stop the examining agent from instituting a criminal referral on the Johnsons' returns for the years 1972 through 1975.

Mr. Johnson feared that his wife would be prosecuted for her recordkeeping methods. To protect his wife, he did not inform the agents that the discrepancies found were due to her actions.[116] The end result of the investigations was a recommendation that Mr. Johnson be criminally prosecuted for tax evasion under section 7201.[117]

After the case was submitted to United States Attorney's Office, Mrs. Johnson revealed that it was her recordkeeping that led to the discrepancies.[118] The United States Attorney's Office offered a plea bargain: Mr. Johnson would plead guilty to one count of tax evasion, and Mrs. Johnson would not be prosecuted. Otherwise, they would both be prosecuted.[119] The plea bargain was subject to several conditions designed to limit the publicity of the case.[120] In addition to agreeing to a plea of nolo contendere, the United States Attorney's Office

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113. *Id.* at 1221. Mr. Johnson would inform his wife of his business and travel expenses. *Id.* at 1219. Mrs. Johnson would then log the expenses into a diary weekly. *Id.* At the end of each month Mr. and Mrs. Johnson would transfer these amounts to spreadsheets. *Id.* Then, at the end of each year, the Johnsons listed the total amounts on an annual spreadsheet which they gave to their accountant. *Id.*

114. *Id.* at 1220. For example, Mrs. Johnson would sometimes list amounts spent for personal items as business expenses when she did not know how to break down some of her husband's business expenses and cash disbursements. *Id.* Her second flaw was the occasional altering of a credit card receipt to cover certain cash disbursements that she did not know how to record. *Id.* The court illustrated this second flaw by example. If Mr. Johnson spent $50 on a credit card and $100 cash on a business trip, Mrs. Johnson might alter the credit card receipt and list it as $150. *Id.* Finally, Mrs. Johnson often arbitrarily allocated cash disbursements among various categories of expenses. *Id.* Again, as the court states: "It is evident, and deserves emphasis, that at all times Mrs. Johnson's reporting was scrupulously accurate as to amounts expended; the weakness of her approach was that she did not recognize the importance of attributing expenses to their proper source." *Id.*

115. *Id.* It is also worth noting that during the course of the investigation, Mr. Johnson passed two polygraph tests and offered to take more, but the Government declined. *Id.* at 1221.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

agreed to recommend probation for Mr. Johnson.[121] A further condition of the plea bargain was that the United States Attorney's Office would not issue a press release.[122]

For four days, the parties proceeded in accordance with the agreement. Thereafter, "the dam broke" when the Service issued a news release to twenty-one media outlets in the Galveston area.[123] The news release, itself a violation of the conditions to the plea agreement, stated that Johnson had plead guilty to federal tax evasion.[124] It made no reference to the plea agreement and it contained several false statements.[125] Further, it gave the erroneous impression that Johnson had falsified deductions and altered documents.[126] Making matters worse, two days after the first press release, the Austin office issued a second press release.[127] After a lengthy discussion of the Federal Tort Claims Act, the *Johnson II* court held in favor of Johnson and awarded him $10,902,117.[128]

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121. *Id.* The court would not accept the nolo plea, but it did agree to probation. *Id.* Thus, Johnson pled guilty to the one count of tax evasion in a courtroom with no outsiders present and received a probated sentence. *Id.* at 1221-22. As the court states:

> As Johnson entered the weekend . . . he had good reason to believe that he had handled a difficult situation in the most sensible way possible, and that he had, though at the cost of pleading guilty to a crime of which he did not feel himself guilty, protected both his wife and his career.

Id. at 1222.

122. *Id.* at 1221. There were five conditions placed on the plea agreement:

> (1) all papers filed in the case would give plaintiff's name as "Elvis Johnson" rather than "E.E. 'Johnny' Johnson," by which he is normally known; (2) papers requiring Johnson's street address would give it as 1100 Milam Street in Houston, which was the address of his attorney, and no reference to his address at 25 Adler Circle, Galveston would be made; (3) the Government would seek to have the presentence investigation completed before the criminal information was filed so that the probation officer's recommendation could be made known to the judge by the time the information was filed; (4) the information would be filed late on a Friday afternoon, and the case would be brought before the judge immediately, so that arraignment and sentencing could be completed that same afternoon; and (5) the U.S. Attorney's office would publish no press release.

Id. at 1221.

123. *Id.* at 1222.

124. *Id.* In addition, the release identified Johnson as an officer of the American National Insurance Corporation, and used his 25 Adler Circle address instead of the Houston address. *Id.*

125. *Id.* For example, the release stated that Johnson pled guilty of evasion for the 1974 and 1975 tax years. *Id.* Actually, he pled guilty only for the 1975 year. *Id.*

126. *Id.*

127. *Id.* This was done "over the strenuous objections of [Johnson's] attorney, who warned IRS officials that it could only compound their liability." *Id.*

128. *Id.* at 1233.

The *Johnson I* court held section 6103 had been violated by the issuance of the press release.[129] The court based its holding on a determination that the statute is quite clear that there can be no disclosure,[130] absent express statutory authorization.[131] The court heavily emphasized the legislative history of section 6103 and relied on portions of the Senate Report for the proposition that return information should "not [be] subject to disclosure *except in those limited situations delineated in* the newly amended *section 6103*."[132] Thus, the *Johnson I* court narrowly construed section 6103 and refused to create any judicial exception to the section's "general ban against disclosure."[133]

d. *Thomas v. United States*[134]

In *Thomas*, the Seventh Circuit Court of Appeals refused to follow either the *Lampert* or *Rodgers* reasoning,[135] but instead added more confusion to the interpretation of the scope of section 6103. While not specifically rejecting the reasoning of the Ninth and Tenth Circuits, the *Thomas* court held that information reported in a news release did not contain "return information" because it had been obtained from a Tax Court opinion, not from the return itself.[136] Thus, the *Thomas* court viewed the press release as merely publicizing a judicial opinion.[137] As a result, there could be no violation of section 6103.

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129. *Johnson I*, 640 F. Supp. at 1133. The later opinion states that the court already held that the news releases violated § 6103. *Johnson II*, 760 F. Supp. at 1224 n.9.

130. *Johnson I*, 640 F. Supp. at 1131 (finding that given the statute's broad definition of disclosure, the press release did in fact disclose return information); *see* I.R.C. § 6103(b)(8); *supra* note 66.

131. *Johnson I*, 640 F. Supp. at 1132-33. The court noted that other courts have held that technical transgressions of § 6103 are not violative of the statute so long as the disclosure does not violate the purposes of § 6103, and Congress would not have intended it to be illegal. *Id.* at 1132 (citing *In re* Grand Jury Investigation, 688 F.2d 1068, 1071 (6th Cir. 1982); Cooper v. I.R.S., 450 F. Supp. 752 (D.D.C. 1977)). However, the court did not agree that Congress was clear in its language. *Id.*

132. *Johnson I*, 640 F. Supp. at 1132 (emphasis in original) (quoting SENATE REPORT, *supra* note 10, at 3747). The court pointed out that the exception found in § 6103(h)(4) could not be extended to cases in which the Service discloses the information to the public. *Id.* at 1132 n.16.

133. *Id.* at 1133. The court then stated in a footnote its recognition that the strict interpretation of § 6103 may limit the Government's ability to issue press releases in tax evasion cases. *Id.* at 1133 n.18. The court went on to state, although the policy may be bad, it was the responsibility of Congress, not the court, to change this result. *Id.*

134. 890 F.2d 18 (7th Cir. 1989).

135. *Id.* at 20.

136. *Id.* at 20-21. Despite its holding, the court maintained that § 6103 is a general prohibition against the disclosure of tax return information. *Id.* at 21.

137. *Id.* at 21.

The *Thomas* decision disregards the broad scope of section 6103. The statute has an expansive definition of return information.[138] Further, in light of the legislative history supporting an expansive definition,[139] the holding can only be viewed as nonsense.[140] Even the *Thomas* court appears to make excuses for its decision.[141] The opinion ends with reference to potential taxpayer abuse by the Service through issuing press releases and states, "even if what the Internal Revenue Service did here is an abuse of governmental power, it is not the sort of abuse at which section 7431 was aimed or for which it makes provision."[142] For these reasons, *Thomas* should not have much impact on courts interpreting the proper scope of section 6103.

C. *Analysis of the Cases*

1. Disclosure versus Lost Confidentiality

Although the courts have analyzed the issue, the question of section 6103's intended purpose still remains unclear. The Ninth Circuit Court of Appeals has found that section 6103 restricts disclosure of only confidential return information.[143] But is the purpose of the section that narrow? Or is the section a general prohibition against the disclosure of return information, unless disclosure is specifically authorized? The Ninth Circuit does not subscribe to the view that section 6103 is a general prohibition against public disclosure of return information.[144]

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138. *See* I.R.C. § 6103(b)(2); *supra* note 36 and accompanying text.

139. *See* SENATE REPORT, *supra* note 10, at 3748.

140. *Thomas* is clearly inapposite to the legislative history of § 6103. SENATE REPORT, *supra* note 10. In fact, "return information" has been broadly interpreted to encompass any information gathered by the Service concerning a taxpayer's tax liability. *See* Dowd v. Calabrese, 101 F.R.D. 427, 438 (D.D.C. 1984).

141. *Thomas*, 890 F.2d at 21. For example, the court seems to question the reality of its own holding where it states:

> We may seem by this ruling to be condoning the "laundering" of confidential information, or indulging in the fiction . . . that every item of information contained in a public document is known to the whole world, so that further dissemination can do no additional harm to privacy — as if only secrets could be confidences.

Id.

142. *Id.* at 21-22. The court also voiced its opinion of the Government's use of the press releases, and said "[t]he IRS's tactic of publicizing Mr. Thomas's defeat in the Tax Court to his home-town newspaper may be tawdry, mean, or inspired; it may be thought to intimidate taxpayers or, more plausibly, to warn them off a course of conduct that can only increase their tax liability." *Id.* at 21.

143. *See* Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989).

144. *See* Stokwitz v. United States, 831 F.2d 893, 896 (9th Cir. 1987) (§ 6103 does not create a general prohibition against public disclosure of tax information), *cert. denied*, 485 U.S.

Other courts view section 6103 as "a general prohibition against the disclosure of tax return information."[145]

The question arises, which is the better view? The best approach is probably somewhere between the polar ends of *Rodgers* and *Lampert*. However, certain factors favor the protection of the taxpayer's privacy interests. Potential abuse exists when the Service widely disseminates taxpayer return information in press releases. Further, the government lacks both concern and protective procedures for taxpayers.[146]

2. The Misplaced Reliance on *Cooper* and *Posner*

The *Lampert* decision suggests the purpose of section 6103 is to prohibit only the disclosure of confidential return information.[147] By relying on the reasoning of *Cooper*[148] and *Posner*,[149] the court focuses on the confidentiality of the return information and not its disclosure. This reliance is misplaced. *Cooper* and *Posner* involved third parties attempting to obtain tax information from the Service under the Freedom of Information Act (FOIA).[150]

In *Cooper*, the question presented to the court was whether the act of returning documents already in the public record to the Service was sufficient to reinstate the confidentiality of the documents.[151] The court analyzed the issue under two criteria: first, how other confidential documents or communications made public are treated; and second, the effect of policies underlying FOIA[152] regarding disclosure of such

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1033 (1988). Compare this interpretation with the statute itself. The only reference to public disclosure is in § 6103(m)(1), which authorizes the publication to the media of taxpayers', who cannot be located, entitlement to a tax refund from the government. I.R.C. § 6103(m)(1).

145. *See* Wiemerslage v. United States, 838 F.2d 899, 902 (7th Cir. 1988) (§ 6103 acts as a "general prohibition against the disclosure of tax return information"); Dowd v. Calabrese, 101 F.R.D. 427 (D.D.C. 1984).

146. *See supra* note 110.

147. *Lampert*, 854 F.2d at 338. The statute protects returns and return information. I.R.C. § 6103(a). Clearly the return information disclosed in the public record remains "return information." Nowhere in the statute does it mention that only "confidential return information" is to be protected. Therefore, so long as the information remains "return information" it should be protected by § 6103 and any disclosure of such information should require express statutory authority.

148. Cooper v. I.R.S., 450 F. Supp. 752 (D.D.C. 1977); *see infra* text accompanying notes 151-57.

149. United States v. Posner, 594 F. Supp. 930 (S.D. Fla. 1984); *see infra* text accompanying notes 160-61.

150. *See infra* text accompanying notes 151-61.

151. *Cooper*, 450 F. Supp. at 754.

152. 5 U.S.C. § 552 (1970) (current version at 5 U.S.C. § 552 (1988)).

documents.[153] The real distinction between *Cooper* and *Lampert* is shown by an analysis of FOIA policy considerations.[154]

According to the *Cooper* court, the underlying purpose of the FOIA is "to facilitate the broadest possible disclosure of information held by the government."[155] In contrast, the primary objective of section 6103 is to limit access to tax return information.[156] Limited access is accomplished by making returns confidential and by restricting the government's ability to disclose this information to very limited circumstances.[157] Because the FOIA and section 6103 have conflicting purposes, courts relying on a FOIA case to decide the scope of disclosure under section 6103 have erroneously focused on lost confidentiality.

In much the same fashion as *Cooper*, *Posner* involved the *Miami Herald's* attempt to gain access to return information admitted into evidence during the criminal tax evasion trial of a taxpayer's co-defendant.[158] The taxpayer wanted to restrict access to only those matters in the return specifically revealed in the prior trial.[159] The court stated that because the returns were admitted into evidence in their entirety, they could be obtained by the FOIA applicant in their entirety.[160] Citing *Cooper*, the court held that once return information becomes part of the public domain, any entitlement to privacy is lost.[161]

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153. *Cooper*, 450 F. Supp. at 754. In its analysis, the court used the example of the attorney-client privilege. *Id.* The court stated that the attorney-client privilege created confidentiality much like that of § 6103. *Id.* Because the confidentiality was the same, the factors which would defeat that confidentiality would also be similar. *Id.* One must question if this is correct. The attorney-client privilege exists for communications voluntarily made between attorney and client to facilitate openness and frankness between the two. On the other hand, return information is not truly voluntary, and is required to be given under penalty of law. *See* I.R.C. §§ 6651-6652, 7203; *supra* note 46 and accompanying text; *supra* text accompanying notes 45, 47-48.

154. *Cooper*, 450 F. Supp. at 755. In the court's words:

> Although much of the discussion so far has concentrated on various provisions of the Internal Revenue Code, it must be remembered that plaintiff requested access to the documents in question pursuant to the Freedom of Information Act. The confidentiality requirements of 26 U.S.C. § 6103 must, therefore, be read in connection with the policies embodied in the FOIA favoring disclosure.

Id.

155. *Id.*

156. *See supra* text accompanying notes 18-20.

157. *See id.*

158. United States v. Posner, 594 F. Supp. 930, 931-32 (S.D. Fla. 1984).

159. *Id.* at 936.

160. *Id.*

161. *Id.*

While *Cooper* and *Posner* may be the correct result in a FOIA action for access to return information, they cannot be equated with the government's issuance of press releases which report information contained in the public record. The fact situations are distinguishable. The two situations can only be equated when every member of the public who obtains such information from these press releases is a FOIA applicant. Therefore, the *Lampert* court's reliance on *Cooper* and *Posner* is misplaced in determining the scope of section 6103.

3. The Public Record, Public Knowledge Fiction

Lampert also maintains that because any citizen could obtain from local court records the very information contained within the press releases, the press releases create no additional harm to the taxpayer's privacy interests.[162] Thus, *Lampert* implies that there is no difference between a third party requesting return information in the public record and the Service publicly announcing such information.[163] Such an argument has obvious weaknesses. There is a significant difference between an individual searching through court documents out of personal interest, and a disinterested public learning court document information because of active dissemination of that information by the government. Additionally, simply because documents are available does not mean that the public will ever know or ever care to know about the information contained in them.

The United States Supreme Court has recognized the weakness of the argument that no differences exist between the two scenarios.[164] In a recent interpretation of the Privacy Act of 1974, the Supreme Court noted "the fiction" that matters in the public record are known to all so that a subsequent disclosure to the press merely repeats what is already known by the public, and thereby does no further harm to privacy.[165]

4. A Complementary View of Confidentiality and Disclosure

The *Rodgers*'s court focused on the authorized or unauthorized nature of the disclosure of return information under section 6103,

162. *Lampert*, 854 F.2d at 338.

163. *Id.* The simple magnitude of the disclosure through press releases should by distinction be enough. The taxpayers in these cases agree that anyone could go to the local office of public records and obtain any return information existing in the public record. *Id.* The issue still remaining is what the government can do with such information under § 6103.

164. *See* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 1480-81 (1989). The case dealt with the interpretation of § 552(b)(7) of the Privacy Act of 1974. *Id.*

165. *Id.* at 762-71.

without regard to confidentiality. In contrast, the *Lampert* court found the *Rodger*'s interpretation of section 6103 was too literal.[166] The *Lampert* court held that the true intent of Congress was misapplied.[167] *Lampert* finds the proper focus of section 6103 is on the actual confidentiality of the return information.[168] By claiming that Congress was concerned most with either confidentiality or disclosure, the courts and commentators disregard the overriding concern of Congress in enacting the statute — preventing the abuses against taxpayers by government misuse of their return information.[169] Therefore, confidentiality and restricted disclosure go hand-in-hand. They should not be construed as competing policies, but instead, they should be seen as consistent and interrelated tools to prevent governmental abuses.[170]

A close look at the language of section 6103 reveals an emphasis on the disclosure of return information and not the confidentiality of that information. Most of the statute provides for exceptions to nondisclosure.[171] The provision that return information shall be confidential does not suggest that, once the information loses its confidentiality, it becomes subject to unlimited disclosure by the government. The two should not be read as mutually exclusive protections. Under the *Lampert* reasoning, so long as the information is lawfully placed in the public record, it may be disclosed by the Service to anyone.[172] The *Lampert* interpretation suggests that the only limit on disclosure is that the government must first lawfully place the confidential information into the public record before disclosing the information. This is usually accomplished by means of judicial proceedings in open court. But after *Lampert*, the government can make taxpayer information part of the public record by simply filing a civil action for an injunction against the taxpayer.[173] However, Congress enacted section 6103 to

166. *See Lampert*, 854 F.2d at 338; *supra* text accompanying notes 78-79.

167. *See Lampert*, 854 F.2d at 338.

168. *Id.*

169. *See* SENATE REPORT, *supra* note 10, at 317-18.

170. Because of recent congressional awareness of the abuses of taxpayers, this finding would not be at all unwarranted. *See Taxpayers' Bill of Rights Hearings*, *supra* note 1. The Taxpayer's Bill of Rights is an illustration of the concern that taxpayers be treated more fairly by the Service. *See id.* The legislative history shows that the abuses of taxpayers by the Service are not only real, but common. *See* SENATE REPORT, *supra* note 10, at 317-18.

171. *See* I.R.C. § 6103(e)-(o) (dealing with either disclosure exceptions or disclosure safeguards).

172. *See Lampert*, 854 F.2d at 338; *supra* text accompanying notes 74-76.

173. Another area that has been the subject of governmental abuses is the issuance of press releases following indictments against taxpayers. *See* United States v. Kilpatrick, 575 F. Supp. 325 (D. Colo. 1983); *see also Oversight of IRS and Justice Department Prosecution of*

prevent the widespread use of taxpayer information for improper purposes.[174] Furthermore, the possibility of governmental abuse under *Lampert* is too great to go unchallenged. Taxpayers are in an uneven bargaining position with the Service when their entire tax return becomes subject to public broadcast simply from the filing of a civil action.[175]

5. The Issue of Increased Voluntary Compliance

There can be little doubt that the possibility of a press release is a substantial bargaining weapon for Service negotiations.[176] However, threatening the taxpayer with such a weapon conflicts with the standard of fairness needed in our system of self-assessment.[177] In addition,

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Several Tax Court Cases, Hearing Before the Subcomm. on Oversight of the IRS of the Senate Comm. on Finance, 99th Cong., 2d Sess., pt. 1 (1986) [hereinafter *Prosecutorial Misconduct Hearings*] (statement of Sen. William Armstrong) (noting examples of government misconduct in tax cases).

174. *See* Rueckert v. I.R.S., 775 F.2d 208 (7th Cir. 1985). In *Rueckert*, the Seventh Circuit, in interpreting the scope of § 6103, stated: "Section 6103 was enacted in response to the use of tax return information for political purposes. . . . In addition to protecting tax returns and return information from misuse for partisan political purposes, the Act ensures that, 'the public . . . should not have wholesale, unregulated access to tax information. . . .'" *Id.* at 210 (quoting McSurely v. McAdams, 502 F. Supp. 52, 56 (D.D.C. 1980)). The government maintains it is necessary to issue press releases announcing its "victories" against taxpayers as an enforcement policy to deter further noncompliance by taxpayers. However, studies show that the only real deterrent is the existence of criminal prosecution. *See infra* text accompanying notes 184-89.

175. This argument is furthered with the issuance of pre-filing notices (PFN) to investors in tax shelters. The government consistently wins these cases on the argument that the PFN is the first step in auditing taxpayers. As such, it is an authorized disclosure under § 6103(h)(4). Mid-South Music Corp. v. United States, 818 F.2d 536, 539 (6th Cir. 1987); First W. Gov't Sec., Inc. v. United States, 796 F.2d 356, 360 (10th Cir. 1986); Solargistics Corp. & Geodesco Inc. v. United States, 65 A.F.T.R.2d 90-741, 90-743 (N.D. Ill. 1989), *aff'd*, 921 F.2d 729 (7th Cir. 1991). *See also* United Energy Corp. v. United States, 622 F. Supp. 43, 46 (N.D. Cal. 1985) (finding that a taxpayer who filed a temporary restraining order "lost any entitlement to privacy in that [return] information" to which the restraining order related).

176. *See* Johnson v. Sawyer, 760 F. Supp. 1216, 1221-22 (S.D. Texas 1991); *supra* notes 119-22 and accompanying text. In *Johnson*, the taxpayer chose to plead guilty to tax evasion to protect his wife and to avoid publicity by way of press release. *See id.*

177. In assessing ways to improve taxpayer compliance, several goals must be furthered: fairness, voluntariness, efficiency, and privacy. *The Taxpayer Compliance Improvement Act of 1982 Hearing Before the Subcomm. on Oversight of the Internal Revenue Service of the Senate Comm. on Finance*, 97th Cong., 2d Sess. 358, 359-61 (1982) [hereinafter *Taxpayer Compliance Hearing*] (noting statements of Assistant Secretary of the Treasury Donald C. Lubick & Colette C. Goodman). With respect to the privacy aspect in furthering compliance, Lubick and Goodman state, "Any system of compliance also must be designed in a manner that will minimize intrusions into the affairs of individual taxpayers. A system that is overly intrusive, or that has the appearance of being overly punitive, will undermine the public's perception of the tax system and willingness to comply with our tax laws." *Id.* at 361.

taxpayers could lose faith in the system of voluntary compliance if the government abuses their return information.[178] Congress was acutely aware of this problem. In the Senate Report on the 1976 Tax Reform Act, the Senate Finance Committee stated:

> Questions have been raised and substantial controversy created as to whether the present extent of actual and potential disclosure of return and return information to other Federal and State agencies for nontax purposes breaches a reasonable expectation of privacy on the part of the American citizen with respect to such information. This, in turn, has raised the question of whether the public's reaction to this possible abuse of privacy would seriously impair the effectiveness of our country's very successful voluntary assessment system which is the mainstay of the Federal tax system.[179]

By this statement, and by defining return information so broadly,[180] it can be inferred that Congress knew the damaging effects of releasing information that the taxpayer is under either Service or Justice Department investigation. If taxpayers feel they are being subjected to the government abuse addressed by Congress, then faith in the self-assessment system will be eroded.[181]

Despite the damage to the targeted individual from releasing return information, the Service claims it needs to trumpet its victories in order to further voluntary compliance.[182] This claim arguably may have some merit in a post-conviction setting. However, it is not clear whether issuing a press release of a pending civil or criminal case is a deterrent to noncompliance. After all, the purpose of the judicial or

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178. SENATE REPORT, *supra* note 10, at 3747. The report also states, "In a more general sense, questions have been raised with respect to whether tax returns and tax information should be used for any purposes other than tax administration." *Id.*

179. *Id.*

180. *Id.* at 3748.

181. *See id.* at 3747.

182. *See* INTERNAL REVENUE SERVICE MANUAL, pt. 31, § (31)4(20)0(1) (1989) (stating that "[b]ecause the Internal Revenue Service achieves the greatest deterrent effect through news coverage of criminal tax prosecutions, the Attorney General, has approved the issuance, by the Service, of appropriate press releases," but requiring that "material contained in such news releases be limited to facts that are a matter of public record"); *see also id.* pt. 30, § (30)(11)00-2(1) (1982) (stating that "because tax administration benefits from deterrent publicity, the Service will assist with the preparation and distribution of news releases to be issued in the name of U.S. Attorneys").

administrative proceeding is to determine whether the taxpayer has in fact been guilty of any wrongdoing.[183] Further, prior to the determination, the Service has no victory to trumpet.

The deterrent effect of releasing information on successful Service actions is controverted. Civil penalties have never been shown to deter noncompliance,[184] but may even further increase noncompliance.[185] Therefore, the Service's self-proclaimed need to trumpet its victories in civil actions is unsupported.[186] Even the deterrent effect of criminal prosecution for noncompliance is unclear. Various studies on compliance have produced conflicting data.[187] Furthermore, studies have consistently shown that the severity of both civil and criminal penalties have no real effect on the taxpayer's noncompliance.[188] The vast studies

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183. *See* David Pryor, *Let's Halt IRS Abuse Now; Too Often, the IRS Exhibits a Bully Mentality, Slapping Honest Citizens with Liens and Levies in Police-State Fashion*, READER'S DIGEST, Oct. 1988, at 146-50; Denise M. Topolnicki, *Presumed Guilty by the IRS*, MONEY, Oct. 1990, at 82-92.

184. Steven Klepper & Daniel Nagin, *Tax Compliance and the Risks of Detection and Criminal Prosecution*, 23 L. SOC'Y REV. 209, 209 (1989).

185. Ann D. Witte & Diane F. Woodbury, *The Effect of Tax Laws and Tax Administration on Tax Compliance: The Case of the U.S. Individual Income Tax*, 38 NAT'L TAX J. 1, 8 (1985). This study measured the effect of various tax enforcement methods including auditing a return, assessing the civil fraud penalty, and pursuing a criminal conviction. *Id.*

186. *E.g.*, Lampert v. United States, 854 F.2d 335, 336 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989). In *Lampert*, the Service filed an injunctive order to prevent the taxpayer from promoting abusive tax shelters. *Id.* The Service and Justice Department each issued separate press releases and announced that suit had been filed and the taxpayers were investigated. *Id.* These press releases cannot be necessary for their deterrent effect, nor can they be announcing any victory other than the fact that the Service obtained an injunctive order in an ex parte proceeding. *See* I.R.C. § 7408.

187. Michael J. Graetz & Louis L. Wilde, *The Economics of Tax Compliance: Fact and Fantasy*, 38 NAT'L TAX J. 355 (1989); Klepper & Nagin, *supra* note 184, at 217-19; Kent W. Smith & Karyl A. Kinsey, *Understanding Taxpayer Behavior: A Conceptual Framework with Implications for Research*, 21 L. & SOC'Y REV. 639 (1987); Witte & Woodbury, *supra* note 185, at 6-9.

188. Klepper & Nagin, *supra* note 184, at 238-39. The authors point out that because so few studies have found any deterrent effect related to the severity of sanctions, some commentators have concluded that the perceived severity has no deterrent effect. *Id.* at 239. *But see* Winslow, *Civil Penalties: "They Shoot Dogs, Don't They?"*, 43 FLA L. REV. 811 (1991) (citing study in which taxpayers polled agreed that higher penalties prompt greater taxpayer compliance). The author explains that this result may be because any risk of criminal prosecution may be an absolute deterrent. *Id.* If it is an absolute deterrent, there would be no increases in compliance as the penalties increased. Klepper & Nagin, *supra* note 184, at 238-39. On other hand, other studies have indicated that the probability of criminal sanctions was not significantly related to compliance. Witte & Woodbury, *supra* note 185, at 8.

on taxpayer compliance have found the only possible deterrent to noncompliance is fear of detection and criminal prosecution.[189]

Results of the numerous studies on taxpayer compliance do consistently indicate that Service action can have an effect on compliance.[190] These studies have also revealed that increasing the frequency of audits, informational reporting, and withholding requirements have significant effects on closing the "tax gap."[191] Unfortunately, sufficient resources are not available to implement these methods to the extent necessary to cause a significant increase in the percentage of taxpayers audited.[192] The informational reporting and withholding requirements make the tax system one of forced compliance,[193] and, may also be seen as too much of an intrusion on the taxpayer's privacy.[194]

Commentators have suggested that the emphasis should turn to long-range goals — turning away from the economic deterrence theory and toward a proper standard of acceptable behavior — to encourage taxpayer compliance.[195] One commentator states deterence is thwarted by the political, and apparently nonoptimal, constraints on the audit process and seems further unlikely given the struggle for over a century to find an aspirational reporting standard.[196] Therefore, if taxpayer compliance is to be significantly increased, it likely will not result from fear of punishment by the Service.[197] Instead, the more

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189. *See* Klepper & Nagin, *supra* note 184; Witte & Woodbury, *supra* note 185. Again this is based on the taxpayers who were subject to audits. Klepper & Nagin, *supra* note 184, at 3; Witte & Woodbury, *supra* note 185, at 211. Increasing the level of audits to the point necessary to reach the desired level of compliance is administratively impossible. *See also* Winslow, *supra* note 188, at 865-70.

190. Witte & Woodbury, *supra* note 185, at 9.

191. *See* Winslow, *supra* note 188, at 865-70.

192. *Id.*

193. *Id.* This certainly runs contrary to the belief that improved compliance should seek to promote the goals of voluntariness and privacy. *See Taxpayer Compliance Hearing, supra* note 177, at 360-61.

194. The role of privacy as a goal in increasing voluntary compliance requires minimal intrusions into the affairs of individuals. *Taxpayer Compliance Hearing, supra* note 177, at 361. If the system is viewed by taxpayers as "overly intrusive, or has the appearance of being overly punitive, it will undermine the public's perception of the tax system and willingness to comply with our tax laws." *Id.*

195. Winslow, *supra* note 188, at 871-73. Winslow points out that it would be far more realistic to change our focus from fear of punishment toward attaining a proper aspirational standard for taxpayer behavior. *Id.*

196. *Id.*

197. Increased compliance will come about "not by continuing to browbeat taxpayers, but by reestablishing respect for the IRS in the manner in which it performs a difficult and unpopular task." *Taxpayers' Bill of Rights Hearings, supra* note 1, pt. 1, at 4 (statement of Sen. Pryor).

realistic view is to emphasize respect for the rights of taxpayers, so they in turn will have more respect for the Service. By adopting this policy, the government may then attain its ultimate goal of increasing the aspirational reporting standards of taxpayers.[198]

IV. RECOMMENDATIONS

A. *Amendment of the Statute*

Congress must ultimately determine the proper level of taxpayer protection by clarifying the meaning of section 6103.[199] The need for taxpayer protection has to be balanced delicately with the need of the government to assess and collect revenue in the most efficient manner possible.

1. No Extra-Judicial Communications Under Section 6103

Congress should specifically amend section 6103 and prohibit any extra-judicial communication of taxpayer information by the government. Further, Congress should make clear that press releases and other extra-judicial communications to the general public are not authorized disclosures under the statute. The inconsistent court interpretations of section 6103 mandate congressional action. By further limiting disclosure, Congress also should clarify that the requirements of confidentiality and limited disclosure are complementary, and not inconsistent. Such a limitation would not be contrary to recent legislation which focuses on protecting taxpayers rights.[200] The proper concern

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198. *See supra* notes 195-96 and accompanying text.

199. In the words of Senator Levin:

> There are few issues more important than guaranteeing the right of citizens to expect and receive fair treatment from their government, particularly in the area of tax collection where extraordinary powers have been placed in the hands of the IRS and where limits on those powers must come from Congressional oversight and corrective legislation.

Taxpayers' Bill of Rights Hearings, *supra* note 1, pt. 1, at 16 (statement of Sen. Levin, D-Mich.)

200. *E.g.*, Omnibus Taxpayer Bill of Rights, Pub. L. No. 100-647, 102 Stat. 3730-52 (1988). This act was the culmination of over a decade of concern for the protection of taxpayers from unfair treatment by the Service. *See, e.g.*, JOINT COMMITTEE REPORT, *supra* note 10, at 314-15. Prior to enactment, Congress held several hearings in which stories of taxpayer mistreatment and abuses were disclosed. *See, e.g.*, *Taxpayers' Bill of Rights Hearings*, *supra* note 1.

On March 2, 1992, the House of Representatives adopted legislation which is aimed at giving greater rights to taxpayers in dealings with the Service. The legislation, H.R. 4287, abolishes the Office of the Ombudsman established under the Taxpayer Bill of Rights in 1988. The Ombudsman would be replaced with a more independent Office of the Taxpayer Advocate who would answer regularly to Congress. One significant omission from earlier versions of the Bill is a provision for expanded attorneys' fees. The Bill's sponsor, J.J. Pickle (D-Tex.), had

now, as it was at the time of the Tax Reform Act of 1976, is that tax return information should not be misused by the government.[201]

Collecting taxes is, of course, critical to the proper functioning of our government. Therefore, the need to collect taxes in the most efficient manner possible also is an important goal. As a result, the propriety of press releases as tax administration tools must be carefully weighed against the protection of the privacy interest of individual taxpayers. Since press releases of taxpayer information have a minimal deterrent effect and carry an incredible potential of abuse, they should be severely restricted. By restricting the government's discretion to issue press releases, the taxpayer and the government will be placed on a more level playing field in the negotiation and settlement of tax disputes.

2. No Extra-Judicial Communications in Pretrial Actions

The argument that announcing victories is necessary in criminal cases because of its deterrent effect may have some merit.[202] However, if press releases are to continue, they must be limited to the post-conviction criminal setting.[203] The government should not be permitted to issue pre-conviction press releases because resolution is unknown. Recent congressional action has focused on charges of various abuses of taxpayers by the Service.[204] To limit these abuses, pretrial press releases must be prohibited.[205]

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pushed for the allowance of attorneys' fees for taxpayers who represent themselves successfully in tax disputes. On the Senate side, Senator Pryor (D-Ark.) introduced similar legislation on February 20, 1992. The legislation, S. 2239, referred to as "The Taxpayer Bill of Rights 2" or "T2," contains similar measures to that of H.R. 4287 and is aimed at strengthening the rights of taxpayers won in the 1988 Taxpayer Bill of Rights.

201. *See* SENATE REPORT, *supra* note 10, at 3746-47; *supra* notes 22-28 and accompanying text.

202. *See supra* text accompanying note 189.

203. The stated policy of the Service is that it will not issue press releases regarding indictments or other pretrial actions, nor will it participate in press conferences connected with pretrial actions. INTERNAL REVENUE SERVICE MANUAL pt. 30, § (30)(11)00-2(2) (1986). However, news releases related to pretrial actions can be released on a case-by-case basis upon approval of the U.S. Attorney, and Service officials may participate in press conferences at the invitation of the U.S. Attorney. *Id.* pt. 9, § 9448.23(1).

204. *See Taxpayers' Bill of Rights Hearings*, *supra* note 1; *Prosecutorial Misconduct Hearings*, *supra* note 173.

205. *See Prosecutorial Misconduct Hearings*, *supra* note 173, at 4. The hearings contain a quote from a portion of an editorial which discusses the government's attempt to prevent the release of a judicial opinion. The judicial opinion criticized the conduct of several Tax Division attorneys. *Id.* That editorial states:

3. No Extra-Judicial Communications in Civil Cases Only

At a minimum, there should be a different standard between civil and criminal cases for issuing press releases. The deterrent effect of announcing civil investigations is minimal when contrasted to the effect of announcing criminal convictions.[206] When weighed against the possibility that taxpayers will be abused, there is little justification for the Service to issue press releases in civil cases.[207]

If press releases must remain a weapon in the battle for increased compliance, there should be a distinction between taxpayer and government-initiated actions. Taxpayers should not be forced to choose between protecting their property interests or their privacy interests. If we accept the argument that all information in the public record loses its confidentiality, then taxpayers will be forced to make such a choice. For example, if a taxpayer files a Tax Court petition for redetermination of an asserted deficiency, the taxpayer has made the returns in question a part of the public record. Under the *Lampert* reasoning, the protections of section 6103 are lost forever. This result occurs solely because the filing of the petition makes the return information part of the public record.[208] Such an interpretation of section 6103 would be absurd.[209]

B. *The Protective Order Remedy*

Filing a protective order immediately upon notification of a court proceeding by the Service may be necessary for practitioners to protect their clients.[210] In the Tax Court, rule 103 allows the request to be

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> When the indictment came down in 1982 against Kilpatrick and other defendants, the Department of Justice issued a four page press release without worrying about the reputations of the accused before they had their day in court. Now, suddenly, they are extremely worried about the reputations of their attorneys . . . claiming that they have not had their day in court.

Id.

206. *See supra* notes 184-89 and accompanying text.

207. The Service's policy in civil matters allows no extra-judicial statement, if "there is a reasonable likelihood that such dissemination will interfere with a fair trial. . . ." INTERNAL REVENUE SERVICE MANUAL pt. 9, § 9448.3(1) (1977). However, only extra-judicial statements connected with civil cases for matters not referenced to the public record are prohibited. INTERNAL REVENUE SERVICE MANUAL pt. 10, § (10)162 (1974).

208. *See* Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989); *supra* notes 74-76 and accompanying text.

209. *See* Husby v. United States, 672 F. Supp. 442, 444 (N.D. Cal. 1987) (holding under facts very similar to those set out above, that this interpretation of § 6103 would be absurd).

210. *See* Scott M. Fabry, *The Unexercised Power of the Tax Court to Seal Business, Personal, and Other Confidential Information in Civil Tax Litigation*, 68 TAXES 811 (Nov.

filed.[211] In the district courts, rule 26(c) of the Federal Rules of Civil Procedure[212] can protect the privacy rights of individuals in spite of the overbroad interpretation of section 6103.[213]

It is well-settled that the court has the power to seal records within its possession.[214] Section 6103 authorizes the disclosure of return information in judicial proceedings; however, it does not override the court's broad discretionary authority to control its own procedures.[215] One court has held specifically that an individual's tax returns would be

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1990); Martin M. Lore & Marvin J. Garbis, *Tax Court Can Restrict Disclosure of IRS Material*, 70 J. TAX'N 316 (May 1989).

211. TAX. CT. R. 103(a). Rule 103(a) states in pertinent part,

> Upon motion by a party or any other affected person, and for good cause shown, the Court may make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:
>
> . . .
>
> (6) That a deposition or other written materials, after being sealed, be opened only by order of the Court.
>
> (7) That a trade secret or other information not be disclosed or be disclosed only in a designated way.

TAX CT. R. 103(a)(6)-(7).

212. FED. R. CIV. P. 26(c). The rule states in relevant part,

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Id.

213. *See* Fabry, *supra* note 210. In addition, *Thomas v. United States* illustrated the potential use of the protective order remedy. 890 F.2d 18, 20 (7th Cir. 1989). The *Thomas* court pointed out that because the taxpayer failed to seek a protective order to prevent the dissemination of the return information on record, he may have been barred from later complaining about a subsequent news release reporting information obtained from the Tax Court opinion. *Id.*

214. Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 918 (1985). This comes under the authority of the courts to restrict discovery and to control the cases before it. Estate of Yeager v. Commissioner, 92 T.C. 180 (1989).

215. *Yeager*, 92 T.C. at 185. The court also stated that both the Fifth and Ninth Circuits have held that the Service's authority to disclose under § 6103 does not take precedence over the district court's broad power to control its own proceedings. *Id.* (citing United States v. Author Servs., Inc., 804 F.2d 1520, 1525 (9th Cir. 1986), *opinion amended by* 811 F.2d 1264 (9th Cir. 1987)); *see* United States v. Barrett, 837 F.2d 1341 (5th Cir. 1988), *cert. denied*, 492 U.S. 926 (1989); United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), *aff'd in part, rev'd in part*, 491 U.S. 554 (1989).

filed with the court under seal and not subject to disclosure to protect the privacy and confidentiality interest given to tax returns.[216]

With the over 70,000 cases docketed in the Tax Court alone, potential judicial overload clearly exists with the automatic filing of a protective order.[217] Nonetheless, the protection exists. When the interests of the taxpayer outweigh the public's need for access to return information, the protective order should be granted. The uncertainty of this protection is the courts' inconsistent application of the rules.[218] Nonetheless, the order should be sought to adequately preserve the taxpayer's privacy rights.[219]

V. CONCLUSION

Much confusion and uncertainty exists as to the proper scope of the "tax administration proceeding" exception to section 6103. To resolve the dispute and provide uniform interpretation, Congress should amend section 6103. Without congressional action, taxpayers may have protection from government press releases through protective orders. If the taxpayer meets the proper standards, the court may seal the record. However, without congressional action, the Service retains the power to abuse taxpayers through the actual or threatened use of the press releases.

As a final illustration of the real abuses government press releases can cause taxpayers, this article ends with a portion of the direct examination testimony of the taxpayer in *Johnson v. Sawyer*:[220]

> Q: Now, did he ever have occasion to give you a lecture about what the IRS was trying to accomplish in your case, sir?
> A: Yes sir.
> Q: Would you please repeat that to the Judge?
> A: Early on after the agent came on the case . . . I said to him . . . "If I have done something wrong, why don't you

216. Sendi v. Prudential-Bache Securities, 100 F.R.D. 21, 23 (D.D.C. 1983).

217. *See* Fabry, *supra* note 210, at 826; *see also* I.R.C. § 7512 (listing penalties for frivolous actions in the Tax Court).

218. *See* Fabry, *supra* note 210, at 826.

219. *See* Thomas v. United States, 890 F.2d 18, 20 (7th Cir. 1989) (holding that because the taxpayer had not moved for a protective order sealing the tax returns in the record, he could not complain about the later publication of such information in a press release); *see also* Fabry, *supra* note 210, at 826 (stating that, "By recognizing that its authority to issue a protective order pursuant to Rule 103(a) even where disclosure is permitted under section 6103, the Tax Court has taken an important step towards reestablishing the privacy and confidentiality interests that should be accorded a petitioner's return and return information.").

220. 760 F. Supp. 1216, 1233 (S.D. Tex. 1991).

> at least tell me or our attorneys what it is that I have done so that we can fix it and get on with — let me get on with what I am doing?" His reply to me was that the only favorable publicity that the Internal Revenue Service can get is when they bring a big one down and he said "your name is a household word to thousands of people" and I said "do you mean to tell me that you think you can take me to a court of law and get a conviction on me with what you have from my records?" He said, "probably not, but I can get your name in the newspapers and that will have accomplished my purpose."[221]

One can only hope that this agent's attitude was neither the result of the Service's training, nor is it the prevalent attitude of the Service concerning taxpayer news releases.[222] Maybe this is reason enough for Congress to act and make sure there are no more *Johnson v. Sawyer*.

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221. *Id.*

222. *Id.* The court stated in finding for the taxpayer, "If the IRS continues to allow mishaps of the type that blighted Johnson's life to occur, we shall be forced to conclude that this agent's attitude is typical of the spirit in which the IRS publicizes information about tax evaders." *Id.*