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I.R.C. § 6103: LET'S GET TO THE "SOURCE" OF THE PROBLEM

MARK BERGGREN*

INTRODUCTION

Each year, millions of taxpayers in the United States voluntarily disclose the most intimate details of their private lives to the Internal Revenue Service ("IRS"). A government official can glean, among other things, a taxpayer's name, social security number, marital status, income, and religious and political affiliations from a tax return's attachments and completed schedules. Despite the plethora of private information supplied to the IRS, prior to the enactment of the Tax Reform Act of 1976, Internal Revenue Code ("I.R.C.") § 6103 stated that a taxpayer's tax return was a "public record" and as such was "open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President."

The lack of protection afforded to returns and return information resulted in the widespread misuse of what taxpayers believed was confidential information. These abuses took the forms of the unauthorized use of tax information for political purposes by presidential

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2. See id. at 827. The report notes that a taxpayer reveals his or her name, address, social security number, marital status, and dependents simply by answering the first seven questions on an individual income tax return. As the taxpayer affixes more attachments, "the more vulnerable he becomes." Id.
4. All Code Section references are to the Internal Revenue Code as amended 1994.
administrations\textsuperscript{7} and the authorized use of tax information by governmental agencies other than the IRS.\textsuperscript{8} However, it was not until the Watergate scandal that these governmental abuses were thrust into the public limelight.\textsuperscript{9} The Watergate investigation led to allegations that President Nixon had used return information for unauthorized purposes\textsuperscript{10} and sought to use IRS audits and investigations for political purposes.\textsuperscript{11}

In response to these misuses of tax information and their potential effect on the voluntary assessment system,\textsuperscript{12} Congress amended I.R.C. § 6103.\textsuperscript{13} The amended version of § 6103 states that return and return information\textsuperscript{14} ("tax information") shall be confidential and

\begin{itemize}
  \item See David Burnham, A Law Unto Itself: Power, Politics, and the IRS 226-54 (1989). During the Franklin Delano Roosevelt administration, even an inquiry by First Lady Eleanor Roosevelt resulted in "a tax investigation with significant political overtones." \textit{Id.} at 236. The subject of the investigation was Frank Gannett, a conservative newspaper publisher, vice chairman of the Republican National Committee, and a critic of the Roosevelt administration. See \textit{id.} Mrs. Roosevelt forwarded a story to the treasury secretary that alleged that the trustees of Cornell University had "used $400,000 of the university's tax-exempt endowment fund to help Gannett purchase the Binghamton Press and thus prevented the establishment of a liberal paper in the upstate New York area." \textit{Id.} at 237. The inquiry by Mrs. Roosevelt led to an immediate investigation by the treasury; the tax-exempt status of Cornell was not affected. See \textit{id.} at 237-38.
  \item See Burnham, \textit{supra} note 7, at 254.
  \item See H.R. REP. NO. 93-1305, at 3 (1974).
  \item See Staff of Joint Comm. on Internal Revenue Taxation, 93d Cong., Investigation into Certain Charges of the Use of the Internal Revenue Service for Political Purposes (1973).
  \item See I.R.C. § 6103(a). Return and return information are both defined broadly by the Code. A return is defined as any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed. \textit{Id.} § 6103(b)(1). Return information is defined as (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, 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 the 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, and (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110 . . . . \textit{Id.} § 6103(b)(2)(A)-(B).
\end{itemize}
shall not be disclosed except in thirteen specific circumstances. Violations of this prohibition may result in criminal sanctions under § 7213 and civil sanctions under § 7431.

These necessary amendments, however, have not silenced the controversy surrounding § 6103. Section 6103’s thirteen exceptions do not contain an exception for tax information that is part of a public record. This omission forced several of the Federal Courts of Appeal to consider the question of whether an authorized disclosure of tax information that subsequently becomes part of a public record loses its § 6103 protection. In order to resolve this question, the Federal

15. The exceptions, listed in I.R.C. § 6103(c)-(o), allow disclosure only under specific circumstances and for specific purposes. The IRS may disclose tax information (1) to a designee of taxpayer; (2) to state tax officials and local law enforcement agencies; (3) to persons having a material interest; (4) to committees of Congress; (5) to the President and certain other persons; (6) to federal officers and employees for tax administration; (7) to federal officers and employees for administration of non-tax-related federal laws; (8) to the Bureau of the Census and Bureau of Economic Analysis for statistical use; (9) for tax administration purposes; (10) for purposes other than tax administration; (11) to assist in identifying the taxpayer for certain purposes; (12) to certain persons in connection with the maintenance of tax administration; and (13) with respect to taxes imposed by Subtitle E and Chapter 35. Each of the thirteen circumstances also has its own set of requirements. For example:

(d) Disclosure to State tax officials and State and local law enforcement agencies
(1) In general

Returns and return information . . . shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws . . . . Such inspection shall be permitted, or such disclosure made, only upon written request by the head of such agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such written request . . . . Such representatives shall not include any individual who is the chief executive officer of such State . . . . However, such return information shall not be disclosed to the extent that the Secretary determines that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation.

Id. § 6103(d)(1).

16. See id. § 7213. The statute imposes criminal liability for willful disclosures of tax information in a manner unauthorized by statute. See id. § 7213(a)(1). Unlawful disclosure is a felony punishable by a maximum fine of $5,000 and imprisonment not to exceed five years, plus the costs of prosecution. See id. If the offense is committed by an officer or employee of the United States, that officer or employee will be dismissed from his position. See id.

17. Civil liability is imposed for willful or negligent unauthorized disclosures. See id. § 7431(a). Liability obligates the defendant to pay the costs of the action plus the greater of $1,000 per unauthorized disclosure or the sum of actual damages and, in the case of willful or gross negligence, punitive damages. See id § 7431(c). There is no liability for disclosures that are the result of “a good faith but erroneous interpretation of section 6103.” Id. § 7431(b). This means that “[g]ood faith is assumed if the statute is ambiguous, and case law either does not cover the point or arguably supports disclosure.” Ridgeley A. Scott, Suing the IRS and Its Employees for Damages: David and Goliath, 20 S. ILL. U. L.J. 507, 531 (1996).

18. See, e.g., Rowley v. United States, 76 F.3d 796, 799-802 (6th Cir. 1996); Mallas v. United States, 993 F.2d 1111, 1117-23 (4th Cir. 1993); Rodgers v. Hyatt, 697 F.2d 899, 901-06 (10th Cir. 1983).

19. Compare Rowley, 76 F.3d at 801 (holding that return information that is filed and re-
Courts of Appeal have adopted different approaches to the problem. The Sixth and Ninth Circuits look to see if the disclosed tax information has lost its confidentiality. Based on this analysis, these circuits reason that tax information that is part of a public record is no longer confidential and, thus, loses its § 6103 protection. In contrast to this approach, the Fourth and Tenth Circuits look at the literal language of § 6103. Because § 6103 has no public records exception to its non-disclosure norm, these circuits conclude that tax information in a public record is still protected by § 6103 and any subsequent disclosures of that information violate § 6103. Not to be outdone, the Seventh and Fifth Circuits have also considered the issue. These circuits focus on the source of the information disclosed. If the disclosure is taken directly from a public record, the disclosure does not contain tax information as statutorily defined and § 6103 is not violated. However, if the disclosure comes directly from tax information, then § 6103 is violated regardless of whether the disclosure is also part of a public record.

The resolution of this issue has far-reaching implications if one considers the answer’s potential effect on taxpayer compliance. If courts create judicial exceptions to § 6103, taxpayers may not comply with tax laws because their tax information will not be protected from governmental abuse. On the other hand, if the IRS is prevented from publicizing any tax information taken from any source, it may be

20. See Rowley, 76 F.3d at 801; Lampert, 854 F.2d at 338.
21. See Rowley, 76 F.3d at 801; Lampert, 854 F.2d at 338.
22. See Mallas, 993 F.2d at 1120; Rodgers, 697 F.2d at 906.
23. See Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997); Thomas v. United States, 890 F.2d 18 (7th Cir. 1989).
24. See Johnson, 120 F.3d at 1324; Thomas, 890 F.2d at 21.
25. See Johnson, 120 F.3d at 1325-26.
26. Noncompliance, of course, results in large sums of unpaid taxes to the United States. In 1996, approximately $200 billion in unpaid federal taxes were outstanding. See Adam Melita, Note, Much Ado About $26 Million: Implications of Privatizing the Collection of Delinquent Federal Taxes, 16 VA. TAX LAW. 329, 356 (1988) (“The Internal Revenue Service has been, and must continue to be, sensitive to this fundamental aspect of the American compact between citizens and the government. As the amount and diversity of information received by the Service increases, the need to protect confidentiality will become even greater than it is today.”).
unable to deter noncompliance.\(^{28}\) The legislative history of § 6103 indicates that Congress was aware of these concerns and sought to balance them in § 6103 in order to maximize taxpayer compliance.\(^{29}\) However, both § 6103 and its legislative history are silent as to whether tax information that is part of a public record loses its § 6103 protection. Thus, a uniform interpretation of § 6103 is needed not simply for uniformity's sake, but for the effect on taxpayer compliance.

This note explores each circuit's approach to the public records problem and its possible effect on taxpayer compliance. Part I provides the history of § 6103 with an emphasis on the legislative purpose behind the 1976 amendments to § 6103. Part II outlines the split in the circuits according to the three approaches the circuits have taken: the confidentiality approach, the disclosure approach, and the source approach.\(^{30}\) Because the Fifth Circuit's recent decision is the most comprehensive analysis of the public record disclosure dilemma to date, this note discusses its opinion in detail. In Part III, the note critiques each approach in light of the legislative and political history behind § 6103. It concludes that the "source" approach of the Seventh and Fifth Circuits is the best approach because it effectuates the purpose behind § 6103 without imposing a judicially created exception on § 6103.

I. BACKGROUND TO § 6103

A. The Law Prior to the Tax Reform Act of 1976

The controversy surrounding the confidentiality of tax information is not new in the United States. As early as 1862, Congress promulgated legislation that allowed for the open inspection of tax information by the public and government.\(^{31}\) Presumably this was done with the assumption that compliance would be increased if "each citizen knew the details of others' returns."\(^{32}\) Despite this legis-
lation, the Commissioner only allowed Internal Revenue officials access to tax information. Access was limited, according to the Secretary of the Treasury, so that the income tax might not be felt to be inquisitorial.

In 1864, Congress enacted legislation that expressly allowed for the disclosure of tax information in response to the Commissioner’s limitations. The country’s newspapers responded by publishing United States citizens’ incomes, while also criticizing the new legislation. As a result, in 1870, Congress forbade the disclosure of tax information.

Although the income tax was abolished in 1872, upon reenactment in 1894, Congress maintained an antidisclosure position. The Tariff Act of 1913 somewhat modified Congress’ position by stating that returns shall constitute public records but can only be inspected by the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President. By 1924, however, Congress once again vacillated and ordered the Commissioner to publish the names, addresses, and incomes of all persons filing an income tax return. This requirement was loosened in 1926 when Congress simply required that the Commissioner publish a list with the names and addresses of all income tax filers.

In 1936, Congress expanded on these requirements when it passed a “pink slip” requirement. This mandate obligated taxpayers to fill out a slip that was open to the public, containing their gross income, total deductions, net income and tax payable. However, the pink slip requirement was quickly repealed after taxpayer uproar.

33. See id. at 835.
34. Id. (quoting Report of the Secretary of the Treasury on the State of the Finances for the Year Ending June 30, 1863).
35. See id. at 836.
36. See id. at 837.
37. See id. at 837-38. Congress did allow the disclosure of tax information for statistical purposes. See id. at 838. Thus, as early as 1870, Congress implicitly seemed to acknowledge the massive amount of important information to which the Internal Revenue Service was and is privy.
39. S. DOC. No. 94-266, at 842 (quoting the Tariff Act of 1913, ch. 16, 38 Stat. 114 (1913)).
40. See id. at 843.
41. See Smith, supra note 38, at 642-43.
42. See id. at 643.
43. S. DOC. No. 94-266, at 843.
44. See Smith, supra note 38, at 643.
With this repeal, the tax disclosure beast went into a forty-year hibernation.

B. The Tax Reform Act of 1976

1. Events Leading to Change

The break-in at the Watergate Hotel on June 17, 1972, and its implications alerted Congress to the need to protect the information collected from United States citizens by the federal government.\(^{45}\) The IRS was of particular concern to Congress because of the amount of sensitive information that the public voluntarily discloses to it.\(^{46}\) The massive amount of information the IRS possessed caused many other agencies to turn to the IRS for information to be used for nontax purposes.\(^{47}\) Yet, before the amendments to § 6103, adequate safeguards for tax information were not in place. The regulations concerning the availability of tax information did require the requesting agency to state the reasons for the request, but this requirement often resulted in ambiguous statements that amounted to nothing more than conclusions.\(^{48}\) For instance, a request for tax information by the U.S. Customs Service simply stated that the information was requested "[i]n connection with an official matter before this Service involving the collection of customs duties."\(^{49}\)

Governmental agencies were not the only ones who could and did access tax information for nontax purposes. Presidential administrations have used tax information for political purposes since World War I.\(^{50}\) President Nixon’s administration was no exception. In fact, it was his administration’s abuses that brought the disclosure issue back into the public eye.\(^{51}\) One such misuse involved President Nixon’s political strategists’ desire to see gubernatorial candidate George Wallace defeated in the Alabama primary for the Democratic nomi-

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46. See S. Rep. No. 94-938, at 316 (1976), reprinted in 1976 U.S.C.C.A.N. 3439, 3746 (noting that "the IRS probably has more information about more people than any other agency in the country").
48. See S. Doc. No. 94-266, at 856-57.
49. Id. at 857 (quoting request by U.S. Customs Service).
50. See Burnham, supra note 7, at 228 (noting that confidential government documents reveal that officials in the Franklin Delano Roosevelt administration “did not hesitate to mobilize the tax agency in efforts to destroy the careers of individuals they had decided were enemies”).
51. See id. at 254.
It was believed that a defeat in Alabama would lessen Wallace's chances of being elected President in 1972. Thus, when White House Chief of Staff H.R. Haldeman saw a confidential report that Wallace was under investigation by the IRS, he obtained a copy of the IRS report and subsequently ensured that parts of it would be published nationally before the Alabama primary. Abuses such as this formed part of the basis for the House Judiciary Committee's impeachment resolution. Article II of the House Judiciary Committee's Articles of Impeachment charged that President Nixon, "acting personally and through his subordinates and agents," attempted to obtain tax information from the IRS for unauthorized purposes and caused discriminatory tax audits and tax investigations.

The enactment of the Privacy Act of 1974 prevented some of these abuses but did not "focus on the unique aspects of tax returns." Thus after forty years, Congress once again considered the impact of the disclosure of tax information. Recognizing that abusive disclosures of tax information by the government threaten taxpayer compliance, Congress amended § 6103 to generally prohibit the disclosure of tax information.

2. Legislative History

The legislative history of § 6103 indicates that Congress amended the statute because of the abuses of tax information and their effect on taxpayer compliance. Congress believed that these "potential and actual disclosures" breach taxpayer privacy which, in turn, could have a negative effect on "our country's very successful voluntary assessment system which is the mainstay of the Federal tax system." If the country's citizens do not trust that the government will not abuse their tax information, the "uniquely successful" voluntary system will be threatened. Taxpayer compliance would decrease.

52. See id. at 250.
53. See id.
54. See id.
55. See id. at 249-50 (quoting H.R. REP. NO. 93-1305, at 3 (1974)).
Fearing this decrease in taxpayer compliance, Congress sought to "balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary assessment system." Based on this balance, it was decided that "returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in . . . section 6103."

Congress amended § 6103 with the purpose of preventing the "potential and actual disclosure" of tax information that threatens taxpayer compliance. The goal of encouraging taxpayer compliance is accomplished by treating tax information as confidential and by limiting disclosure except where statutorily authorized. It is with this purpose in mind that § 6103 must be interpreted.

II. THE CIRCUITS' VARIOUS APPROACHES

The Federal Courts of Appeal differ on the methodology used to determine the question of whether tax information that becomes part of a public record and has, thus, arguably lost its confidentiality, also loses its statutory protection. When faced with this question, the courts developed three different approaches to determine if the otherwise statutorily unauthorized disclosure of tax information already contained in a public record also violates § 6103. These approaches are the confidentiality approach, the disclosure approach, and the source approach.

A. The Confidentiality Approach

Under the confidentiality approach, the court focuses on the confidentiality of the tax information. The court asks whether the statutorily unauthorized disclosure consisted of tax information that is part of a public record and thus is no longer confidential. According to this approach, if the tax information has lost its confidentiality, subsequent disclosure does not violate § 6103. Therefore, under the confi-

63. Id.
65. See Little, supra note 30, at 1048-58 (discussing confidentiality and disclosure approaches).
66. See, e.g., Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996); William E. Schram-
The confidentiality approach is predicated on the belief that the purpose of § 6103 is to protect confidential tax information.\textsuperscript{67} If the tax information is no longer confidential, § 6103's protection is lost and the statute cannot be violated.\textsuperscript{68} Thus, as the Ninth Circuit stated, "A prerequisite to liability . . . is the confidentiality of the disclosed information."\textsuperscript{69}

In \textit{Lampert v. United States},\textsuperscript{70} the Ninth Circuit decided three consolidated appeals\textsuperscript{71} dealing with government press releases containing tax information that had previously been disclosed in public judicial proceedings.\textsuperscript{72} In each case, the taxpayer alleged that the disclosure of the tax information in the form of a press release was unauthorized and violated § 6103.\textsuperscript{73} In turn the government argued that the press releases did not violate § 6103 because they contained information disclosed in public judicial proceedings.\textsuperscript{74} Alternatively, the government argued that even if the disclosures were unauthorized, liability was precluded because the tax information was disclosed based on a good faith interpretation of § 6103.\textsuperscript{75} The government's summary judgment motion prevailed in all three cases, and the taxpayers appealed.

The Ninth Circuit pointed out that the press releases contained return information as defined by § 6103(b) and that the disclosure of the return information in the judicial proceeding was authorized under § 6103(h)(4)(A).\textsuperscript{76} It acknowledged that a “strict, technical read-

\footnotesize{\textsuperscript{67}See, e.g., \textit{Lampert}, 854 F.2d at 337.\textsuperscript{68}See \textit{Rowley}, 76 F.3d at 801; \textit{Schrambling}, 937 F.2d at 1490.\textsuperscript{69}\textit{Schrambling}, 937 F.2d at 1488.\textsuperscript{70}854 F.2d 335 (9th Cir. 1988).\textsuperscript{71}See \textit{Peinado v. United States}, 669 F. Supp. 953 (N.D. Cal. 1987); \textit{Figur v. United States}, 662 F. Supp. 515 (N.D. Cal. 1987); \textit{Lampert v. United States}, 87-1 U.S. Tax Cas. (CCH) § 9361, at 87,872 (N.D. Cal. 1987).\textsuperscript{72}See \textit{Lampert}, 854 F.2d at 336. In \textit{Peinado}, the U.S. Attorney’s Office disclosed tax information in two press releases: one stated Peinado pleaded guilty to the crime of tax evasion; the other announced his sentence. \textit{See id.} In \textit{Figur}, the U.S. Attorney’s Office’s press release summarized tax evasion charges filed against Figur. \textit{See id.} In \textit{Lampert}, the U.S. Attorney’s Office and the IRS issued press releases that described their investigation of the defendants and the government’s filing of an action to obtain an injunction against the defendants’ advertisement and sale of tax shelters. \textit{See id.}\textsuperscript{73} \textit{See id.}\textsuperscript{74} \textit{See id.}\textsuperscript{75} \textit{See id.}\textsuperscript{76} \textit{See id.} at 336-37. I.R.C. section 6103(h)(4)(A) (1994) states:
ing of the statute supports the taxpayers' position” that the subsequent disclosure of tax information in the form of press releases was not authorized by § 6103. However, the court stated that the purpose of § 6103 is to prohibit the disclosure of confidential tax information, not to prohibit public disclosure of tax information. Because the tax information in this case was disclosed in a judicial forum, the court held that it lost its confidentiality and in turn lost its § 6103 protection. The court stated that to give effect to the literal language of § 6103 would undermine its purpose of protecting confidential information. Thus, the Ninth Circuit created a judicial exception to § 6103 and held that the press releases did not violate the statute. The government's summary judgment motions were affirmed.

Three years later, in William E. Schrambling Accountancy Corporation v. United States, the Ninth Circuit again faced the problem of an authorized disclosure of tax information that was then disclosed in a manner unauthorized by statute. This case was the consolidation

(h) Disclosure to certain Federal officers and employees for purposes of tax administration, etc.

(4) Disclosure in judicial and administrative tax proceedings
A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only if—
(A) 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 . . . .

77. See Lampert, 854 F.2d at 338. The Ninth Circuit had previously observed in Stokwitz v. United States, 831 F.2d 893, 896 (9th Cir. 1987), that § 6103 does not create "a general prohibition against public disclosure of tax information." In Stokwitz, the office and briefcase of a civilian attorney employed by the United States Navy had been searched by his supervisor, secretary, and assistant after he had been accused of "misconduct." See id. at 893. The search produced, among other things, Stokwitz's copies of his tax returns for 1982 and 1983. See id. These personal copies were subsequently disclosed to Naval Investigative Service agents and other Navy employees. See id. Stokwitz brought suit against the United States, the Department of Justice, and the Department of the Navy claiming that the disclosures violated § 6103. See id. at 893-94. The Ninth Circuit held that the disclosures did not violate § 6103 because § 6103 "applies only to information filed with and disclosed by the IRS, and Stokwitz's tax returns were not obtained directly or indirectly from the IRS." Id. at 897. Thus, the Stokwitz Court stated that even though § 6103 applies to employees of the United States, it only applies to them to the extent that they receive tax information from the IRS. See id. at 896 n.4.

78. See Lampert, 854 F.2d at 338.

79. See id.

80. See id. ("We believe that Congress sought to prohibit only the disclosure of confidential tax information.").

81. See id. ("[W]e hold that once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate the Act."). Because the court held that the press releases did not violate § 6103, it did not reach the government's alternate argument regarding the good faith exception of § 7431. See id. at 336.

82. 937 F.2d 1485 (9th Cir. 1991).

83. See id. at 1488.
of two cases on appeal. The issue the Ninth Circuit faced was whether several improper notices of levy containing tax information violated § 6103 when the information had previously been disclosed in a tax lien in one case and a bankruptcy petition in the other case. Relying on its decision in Lampert, the Ninth Circuit again emphasized its position that the issue is whether the tax information disclosed was confidential. The court stated that this inquiry is necessary because if the tax information is no longer confidential, no violation of § 6103 can occur. Applying this reasoning, the court held that because a tax lien and a bankruptcy petition are part of the public domain, the tax information contained in them lost its confidentiality. Therefore, no violation of § 6103 had occurred.

The Sixth Circuit, in Rowley v. United States, when confronted with an authorized disclosure of tax information followed with a statutorily unauthorized disclosure, also focused on the issue of confidentiality and created a judicial exception to § 6103. In Rowley, the IRS had lawfully filed and recorded a federal lien against the taxpayers. Subsequent to the lien, the IRS levied and seized a cabin belonging to the taxpayers. In order to sell the property, the IRS placed an advertisement in a newspaper that disclosed the taxpayers' names, a description of the property, and the reason for the seizure.

84. See id. at 1486-88.
85. See id. The IRS may disclose tax information to establish liens or levies. See I.R.C. §§ 6321, 6331 (1994); Treas. Reg. § 301.6103(k)(6)-1(b)(6) (1998). In one of the cases before the court, the William E. Schrambling Accountancy Corporation was delinquent in filing income tax returns and paying employment taxes. See Schrambling, 937 F.2d at 1486. The IRS properly delivered a Final Notice and Demand as required by I.R.C. § 6331(d) and sent notices of levy to banks regarding the tax periods in the Final Notice and Demand. See id. Later, the IRS issued 77 more notices of levy that included tax information (in the form of additional tax periods and taxes owed) not included in the Final Notice and Demand. See id. These improper notices of levy, issued in violation of § 6331(d), contained tax information previously disclosed in a federal tax lien. See id.

In the other case before the court, the taxpayer disclosed tax information in a bankruptcy petition. See id. at 1488. Subsequent to the initiation of bankruptcy proceedings the IRS issued three levies, two in violation of 11 U.S.C. § 362(a)(6) (1994) and one in violation of I.R.C. § 6331. See Schrambling, 937 F.2d at 1487. These improper levies contained tax information disclosed in the bankruptcy proceedings. See id. at 1488.

86. See Schrambling, 937 F.2d at 1488 ("Disclosure of return information that is not confidential does not violate section 6103.").
87. See id.
88. See id. at 1489-90.
89. See id. at 1490.
90. 76 F.3d 796 (6th Cir. 1996).
91. See id. at 798.
92. See id.
93. See id.
Based on these facts, the Sixth Circuit held that tax information lawfully disclosed through the filing and recording of a lien, which is then part of the public domain, loses its confidentiality and is not protected by § 6103.94 Thus, the IRS' advertisements containing the previously disclosed tax information did not violate § 6103.95 The court noted that this approach retains "the proper balance between a taxpayer's reasonable expectation of privacy and the government's legitimate interest in disclosing tax return information to the extent necessary for tax administration functions."96

B. The Disclosure Approach

Under the disclosure approach, § 6103 is read as generally prohibiting the disclosure of tax information unless authorized by statute.97 Here, the relevant inquiry is not whether the information disclosed is confidential, but whether the disclosure violates the language of § 6103.98 Under this approach, it is irrelevant that the tax information disclosed is part of a public record.99 In accord with § 6103's purpose, tax compliance is encouraged by assuring taxpayers that their tax information will not be disclosed unless authorized by statute.100

In Rodgers v. Hyatt,101 the Tenth Circuit was faced with a situation wherein Hyatt, then Chief of the Criminal Investigation Division, Office of the District Director, Colorado District of the IRS, testified at a hearing to enforce an IRS summons issued to a bank in connection with the tax liabilities of the taxpayers.102 At the hearing, Hyatt

94. See id. at 801. The Sixth Circuit distinguished liens from judicial proceedings in that the purpose of recording a federal tax lien is to give public notice "and is thus qualitatively different from disclosures made in judicial proceedings, which are only incidentally made public." Id. This statement implies that the Sixth Circuit left open the question of whether an unauthorized disclosure of tax information that was previously disclosed in a judicial proceeding violates § 6103. This is in contrast to the Ninth Circuit, which has held that tax information disclosed lawfully in liens or judicial proceedings loses its § 6103 protection because in either case the tax information is no longer confidential. See Schrambling, 937 F.2d at 1489; Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988).

95. See Rowley, 76 F.3d at 802. Because the court found that the disclosures did not violate § 6103, it did not reach the issues of whether improper levies give rise to § 7431 liability or if the good faith exception of § 7431(b) applied. See id.

96. Id.

97. See Mallas v. United States, 993 F.2d 1111, 1120 (4th Cir. 1993).

98. See Rodgers v. Hyatt, 697 F.2d 899, 906 (10th Cir. 1983).

99. See id.

100. See Mallas, 993 F.2d at 1121.

101. 697 F.2d 899 (10th Cir. 1983).

102. See id. at 900. Hyatt was subpoenaed as a witness by the taxpayers. See id.
testified that based on allegations from the FBI and local law enforcement agencies, the IRS believed that the taxpayers had not reported income obtained from stolen oil.\(^{103}\) One month later, Hyatt, while continuing the investigation of the taxpayers, disclosed to the officers of a corporation that had done business with the taxpayers that the IRS had heard "rumors and allegations" that the taxpayers were involved in an oil theft ring.\(^{104}\) The taxpayers claimed that this disclosure was unauthorized under § 6103; the IRS argued that Hyatt's disclosure to the officers was already part of a public record and no longer confidential and, thus, § 6103 could not be violated.\(^{105}\) The court rejected this argument, stating that the confidentiality of the tax information was not the issue; the issue was whether the disclosure was authorized by statute.\(^{106}\) Because Hyatt's second disclosure was not authorized by statute, the court held that the IRS violated § 6103.\(^{107}\)

The Fourth Circuit, in *Mallas v. United States*,\(^{108}\) held that the purpose behind § 6103 is to prevent IRS disclosure in order to increase full taxpayer compliance.\(^{109}\) In *Mallas*, two investment counsel-

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103. *See id.* Hyatt also testified that the IRS was investigating the taxpayers for the accuracy of income tax due and owing for a number of years and that the IRS suspected that the taxpayer's returns were not correct. *See id.* Interestingly, all this information was elicited by the taxpayer's attorney. *See id.* (noting that "[t]his testimony was elicited, we repeat, by counsel for Taxpayer").

104. *See id.* at 904-05. IRS employees may disclose information for investigative purposes. The statute states:

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 or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

I.R.C. § 6103(k)(6) (1994). Here, however, the court held that the disclosure by Hyatt did not fall under this exception because the disclosure is only allowable "‘to the extent . . . necessary in obtaining information.’” *Rodgers*, 697 F.2d at 904 (alteration in original) (quoting I.R.C. § 6103(k)(6)). The taxpayer's counsel pointed out that if Hyatt had raised the issue of the rumors to gain information regarding the oil theft ring, he would have followed the statement by asking the officers of the company if they knew where the taxpayers allegedly received their oil. *See id.* at 905.

105. *See Rodgers*, 697 F.2d at 906.

106. *See id.*

107. *See id.* ("Even assuming the loss of confidentiality in the content of the statements, we hold that the April 5, 1979, disclosure was clearly unauthorized.").

108. 993 F.2d 1111 (4th Cir. 1993).

109. *See id.* at 1121 ("The plain purpose of section 6103 is to encourage full compliance with the tax laws by assuring taxpayers that the IRS will not disclose the information provided to it in confidence.").
ors were convicted of fraud and tax evasion. The IRS then sent Revenue Agent Reports ("RARs") to investors in the counselors' tax shelter. The RARs described the counselors' "financing scheme" and convictions and informed the investors that deductions for their losses through the shelter were disallowed. The court held that without specific statutory authorization, the disclosure of tax information is prohibited under § 6103. Because the RARs disclosed tax information in a manner not authorized by statute, the IRS violated § 6103 and was liable for damages under § 7431. The court noted that it is for Congress to balance the privacy of tax information with the government's interest in disclosing tax information for administrative purposes. While the court acknowledged that the RARs contained tax information not previously disclosed, it held that "even to the extent that the RARs repeated information otherwise available to the public" they still violated § 6103.

C. The Source Approach

The source approach was originally espoused by Judge Richard Posner of the Seventh Circuit in *Thomas v. United States*. There, the taxpayer contested a deficiency assessed by the IRS which was upheld by the United States Tax Court. The IRS then issued a press release which contained tax information that had been disclosed in court.

110. *See id.* at 1114. The investment counselors were indicted on 35 counts of fraud and tax evasion and a jury convicted them on 14 of the counts. *See id.* These convictions were subsequently reversed by the Fourth Circuit. *See id.* at 1115.

111. *See id.* at 1114-15. Though not an explicit factor in the decision, it is interesting to note that the IRS continued to send the same RARs even after the Fourth Circuit reversed the counselors' convictions. *See id.* at 1115.

112. *See id.* at 1114-15.

113. *See id.* at 1120.

114. *See id.* at 1118; *see also id.* at 1120 (noting that no exception permits the disclosure of tax information "simply because it is otherwise available to the public"). The court also rejected the IRS' contention that the RARs fell under the exception in § 6103(h)(4)(C) because the section's plain language does not authorize the disclosure of audits. *See id.* at 1121. Section 6103(h)(4) states in pertinent part that tax information may be disclosed in a "judicial or administrative proceeding pertaining to tax administration" if the tax information "directly relates to a transactional 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." I.R.C. § 6103(h)(4), (h)(4)(C) (1994).

115. *See Mallas*, 993 F.2d at 1124.

116. *See id.* at 1121.

117. *Id.*

118. 890 F.2d 18 (7th Cir. 1989).

119. *See id.* at 19. The Tax Court also punished the taxpayer by awarding damages due to the frivolousness of the taxpayer's suit. *See id.*

120. *See id.* The press release was sent to the taxpayer's hometown newspaper and was sub-
The taxpayer claimed that the press release violated § 6103. The IRS countered that the taxpayer waived the confidentiality of the tax information by contesting the assessment in court and, therefore, the press release did not violate § 6103.

The Seventh Circuit stated that it did not need to decide if the IRS's argument was valid. Instead, the court looked at the source of the disclosed tax information. Here, the immediate source of the tax information disclosed was “a public document [the Tax Court opinion] lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns.” Because the source of the tax information disclosed in the press release was not tax information as defined by § 6103(b)(2), § 6103 was not violated. Although the IRS may not disclose tax information, it may publicize Tax Court opinions. Thus, the court held that it need “not take sides in the conflict between the Ninth and Tenth Circuits over whether the disclosure of return information in a judicial record bars the taxpayer from complaining about any subsequent disclosure,” because the IRS can publicize the court opinion. The court pointed out that to hold that the IRS cannot publicize court opinions could conflict with the First Amendment.

The most recent decision to endorse the source approach is Johnson v. Sawyer. In Johnson, the Fifth Circuit considered whether two IRS press releases containing tax information violated § 6103 when the tax information had previously been disclosed lawfully in a judicial opinion and was part of a public record. In this

\[\text{sequently published. See id.}\]

121. See id. at 20.
122. See id.
123. See id.
124. See id.
125. Id. at 21. Presumably the “lawful access to tax returns” the Seventh Circuit refers to is the access contained in § 6103(h)(4)(A). See supra note 76.
126. See supra note 14.
127. See Thomas, 890 F.2d at 21.
128. See id. The court stated that the IRS could publicize a Tax Court opinion just as the President of the United States could read a Tax Court opinion to a nationwide audience to discourage noncompliance. See id. This statement is true even though as an official of the United States, the President is subject to § 6103. See id.
129. Id. at 20. The court noted that this opinion in no way changed its stance that the statute is a “general prohibition against the disclosure of tax return information unless expressly authorized by an exception.” Id. at 21 (quoting Wiemerslage v. United States, 838 F.2d 899, 902 (7th Cir. 1988)).
130. See id.
131. 120 F.3d 1307 (5th Cir. 1997).
132. See id. at 1310-12. This was the second time the Fifth Circuit ruled on an appeal arising
case, the press releases publicized the taxpayer's plea of guilty to the charge of federal tax evasion.\textsuperscript{133} The Fifth Circuit refused to create any exceptions to § 6103.\textsuperscript{134} Instead, the court held that if the source of an unauthorized disclosure is tax information as defined by § 6103, then the statute is violated regardless of whether the disclosed information has "arguably" lost its confidentiality.\textsuperscript{135} However, unlike the previous cases that applied the disclosure approach, the Fifth Circuit stated that when the IRS discloses information taken directly from a public record, § 6103 is not violated.\textsuperscript{136} Thus, the Fifth Circuit combined the disclosure approach of the Fourth and Tenth Circuits with the source approach of the Seventh Circuit.\textsuperscript{137}

In Johnson, the Fifth Circuit pointed out that all the circuits concur that § 6103, on its face, does not permit the disclosure of tax information because it has lost its confidentiality.\textsuperscript{138} With this in mind, the court stated that when the language of the statute is clear, it is ordinarily "conclusive."\textsuperscript{139} This is true unless the plain language of the statute would lead to results that were not intended by Congress.\textsuperscript{140} The court stated that although it may initially appear that Congress did not intend for § 6103 to protect tax information that has been previously disclosed in a public record, the other provisions of the statute, as well as the legislative history, indicate otherwise.\textsuperscript{141}

Looking at the other provisions of § 6103, the Johnson court observed that § 6103(p) establishes safeguards that certain federal agencies must abide by when the IRS lawfully discloses tax information to them.\textsuperscript{142} These safeguards "shall cease to apply with respect to any from the IRS' press releases regarding the taxpayer. See id. at 1309. Previously, the Fifth Circuit reversed and remanded for dismissal a $10 million Federal Tort Claims Act judgment against the United States. See id. The taxpayer then sought relief against the IRS employees who released the information in the press releases and obtained a $9 million jury verdict. See id. The IRS employees appealed and the parties appeared before the Fifth Circuit again. See id.

133. See id. at 1311. Though not relevant to the § 6103 issue, one of the press releases also contained erroneous information. See id. at 1312.

134. See id. at 1318.

135. See id. at 1323.

136. See id. at 1321 n.1, 1324.

137. See id. at 1318 (noting that the court is following the approach of the Fourth and Tenth Circuits, "modified by the Seventh Circuit's 'source' analysis").

138. See id. at 1319 (citing Mallas v. United States, 993 F.2d 1111, 1120 (4th Cir. 1993); Thomas v. United States, 890 F.2d 18, 20 (7th Cir. 1989); Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988); Rodgers v. Hyatt, 697 F.2d 899, 906 (10th Cir. 1983)).

139. Id. (quoting Rodgers v. United States, 993 F.2d 1111, 1120 (4th Cir. 1993); Thomas v. United States, 890 F.2d 18, 20 (7th Cir. 1989); Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988); Rodgers v. Hyatt, 697 F.2d 899, 906 (10th Cir. 1983)).

140. See id.

141. See id. at 1319-23.

142. See id. at 1320. The opinion succinctly sums up the safeguards federal agencies must
return or return information if, and to the extent that, such return or return information is disclosed in the course of any judicial or administrative proceeding and made a part of the public record thereof.\textsuperscript{143} The court stated that this does not mean that the IRS can disclose tax information when it becomes part of the public record.\textsuperscript{144} This is not an exception to the general rule prohibiting disclosure.\textsuperscript{145} Instead, the Johnson court stated that this indicates that Congress considered the possibility of tax information becoming part of a public record and yet did not create an exception to the general rule prohibiting disclosure.\textsuperscript{146}

The court observed that another provision of § 6103 permits the IRS to disclose tax information to the media under certain conditions.\textsuperscript{147} This is permitted for the purpose of “notifying persons entitled to tax refunds when the Secretary, after reasonable effort and lapse of time, has been unable to locate such persons.”\textsuperscript{148} The court stated that this provision indicates that Congress did not unintentionally omit an exception allowing the IRS to disclose tax information that is part of a public record to the media.\textsuperscript{149}

The Johnson court also stated that the legislative history indicates that there should not be a “public records” exception to § 6103. Despite the fact that the Senate Finance Committee stated that § 6103 “balance[d] the particular office or agency’s need for the information involved with the citizen’s right to privacy and the related impact of the disclosure upon the continuation of compliance with our country’s voluntary assessment system,” Congress did not create an exception for tax information contained in a public record.\textsuperscript{150} Because Congress balanced these concerns and did not create a public records exception, the court said that the judiciary should not now create an excep-

\textsuperscript{143} Id. (quoting I.R.C. § 6103(p)(4) (1994)).
\textsuperscript{144} See id. at 1320-21.
\textsuperscript{145} See id. at 1321.
\textsuperscript{146} See id.
\textsuperscript{147} See id. (referring to I.R.C. § 6103(m)). Section 6103(m) permits disclosure to “the press and other media.” I.R.C. § 6103(m)(1).
\textsuperscript{148} Johnson, 120 F.3d at 1321 (quoting I.R.C. § 6103(m)(1)).
\textsuperscript{149} See id.
tion to the nondisclosure norm.\textsuperscript{151}

Furthermore, the legislative history, according to the Fifth Circuit, indicates that the issue is not the confidentiality of the tax information disclosed; the issue is whether the disclosure violated § 6103.\textsuperscript{152} The court noted that § 6103 states that “‘returns and return information shall be confidential, and except as authorized by this title’” shall not be “‘disclose[d],’” and does not say that “‘[confidential] returns and return information . . . shall [not be] disclose[d].’”\textsuperscript{153} The court also noted that the legislative history states that “‘returns and return information should generally be treated as confidential.’”\textsuperscript{154} Thus, based on the provisions of § 6103 and the legislative history, the court concluded that § 6103 was enacted to prevent disclosure of all return information; not just confidential tax information.\textsuperscript{155} The court was careful to note that, despite this conclusion, it was “not holding that the IRS, or any other federal agency, is prohibited from publishing the contents of a public record, such as a judicial opinion . . . provided it is the public record that is the immediate source.”\textsuperscript{156} Instead, “§ 6103 is violated only when tax return information—which is not a public record open to public inspection—is the immediate source of the information claimed to be wrongfully disclosed.”\textsuperscript{157} Because the source of the information contained in the Johnson press releases was tax return information and not the public record, the IRS violated § 6103.\textsuperscript{158}

\textbf{III. Analysis}

The argument among the circuits is whether § 6103 was enacted to protect only confidential tax information or all tax information.\textsuperscript{159} Although the confidentiality approach has some merit,\textsuperscript{160} a close in-
spection of the language of § 6103 and the legislative and political history surrounding the amendments to it reveals that the source approach reflects the purpose behind § 6103. In other words, this approach will ensure taxpayer compliance, Congress’ primary concern when enacting § 6103.

A. Section 6103’s Protection Is Not Limited

The confidentiality approach’s flaw is that it presupposes that the purpose behind § 6103 is to protect only confidential tax information. This allows the courts and government to determine if an item is confidential and, based on this determination, possibly disclose it without violating § 6103. The plain language of § 6103 does not support this contention. Instead, § 6103 says that “returns and return information shall be confidential . . . and shall [not be] disclose[d]” except as authorized by statute. 161 This means that the government has no choice: 162 tax information is confidential and cannot be disclosed, except as authorized by statute. As the Supreme Court has stated, § 6103 lists what tax information the IRS “is compelled to keep confidential” and, thus, cannot disclose. 163

The structure of § 6103 also indicates that it was not designed to protect only confidential tax information. Section 6103 creates a general prohibition against the disclosure of tax information 164 and then goes on to state the exceptions to this general rule with great specificity. 165 However, none of these exceptions includes a public records exception. The Federal Courts of Appeals do not differ on this issue. 166

Despite this fact, the Sixth Circuit found that creating a judicial exception “strikes the proper balance between a taxpayer’s reasonable expectation of privacy and the government’s legitimate interest in disclosing tax return information to the extent necessary for tax ad-

closure of Tax Return Information, 53 ALB. L. REV. 937, 963 (1989) (arguing “[b]ecause there is no interest in maintaining confidentiality once information has entered the public record, the general prohibition against disclosure should not apply to nonconfidential information”).


162. See BLACK’S LAW DICTIONARY 1375 (6th ed. 1990) (“Shall. As used in statutes . . . this word is generally imperative or mandatory.”).


164. See I.R.C. § 6103(a); Wiemerslage v. United States, 838 F.2d 899, 902 (7th Cir. 1988).

165. See I.R.C. § 6103(c)-(o).

166. See Johnson v. Sawyer, 120 F.3d 1307, 1319 (5th Cir. 1997) (citing Mallas v. United States, 993 F.2d 1111, 1120 (4th Cir. 1993); Rodgers v. Hyatt, 697 F.2d 899, 906 (10th Cir. 1983)).
administration functions.” But Congress balanced these concerns when it amended §6103 to prohibit disclosure except in thirteen specified circumstances. Courts should apply this balance as reflected in §6103. The confidentiality approach creates a new balance.

The legislative history also indicates that §6103’s protection is not limited to confidential tax information. Congress amended §6103 at a time when abuses of tax information by the government were thrust into the public limelight. It had enacted the Privacy Act of 1974, but recognized that tax information required special attention.

This need for attention was further exemplified by the fact that Congress had not considered the disclosure of tax information for forty years. Yet, despite all the consideration that went into amending §6103, Congress did not create a public records exception. A judicial exception for public records changes the legislative scheme that Congress carefully planned and usurps legislative power.

The Senate’s Report states that tax information “should generally be treated as confidential.” The Report goes on to state that “as a general rule returns and return information are to be confidential.” Thus, again it appears that the government has no choice but to treat all tax return information as confidential—whether it is or not—and not disclose it unless expressly permitted to do so by statute.

This blanket provision against disclosure was enacted because Congress feared that abuses of tax information by governmental agencies would jeopardize the voluntary assessment system. The fear was based on the belief that the “actual and potential disclosure of return and return information to other Federal and State agencies for nontax purposes” breaches the privacy expectations of taxpayers. This breach of privacy negatively impacts taxpayer compliance.

171. See Johnson, 120 F.3d at 1322 (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure [for] that of the legislative body.”) (alteration in original) (quoting THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).
175. See id. (emphasis added).
The use of the word "potential" in the legislative history is significant because the nondisclosure norm of § 6103 ensures taxpayers that there will not be any actual disclosure of their tax information and that there is no potential that their tax information will be unilaterally disclosed by the IRS unless statutorily authorized. The potential for disclosure is limited to the statutorily authorized exceptions. The fact that tax information will not be disclosed unless statutorily authorized ensures that taxpayers' expectations of privacy are met and because these expectations are met, taxpayer compliance is encouraged.

A judicially created confidentiality exception threatens taxpayers' privacy expectations. IRS disclosure of tax information will no longer be limited to statutory exceptions. Taxpayer's tax information will potentially be disclosed by the unilateral actions of the IRS. In *William E. Schrambling Accountancy Corporation v. United States,* the Ninth Circuit stated that "[a] prerequisite to liability . . . is the confidentiality of the disclosed information." If this statement is correct, the judicially created exception might not be limited to tax information that is part of the public domain. The IRS could use its discretion and disclose tax information that it believed is not confidential. The IRS could avoid liability for this disclosure even if a court determines that the information is confidential by claiming that the disclosure was based on a good faith interpretation of § 6103. The discretion to disclose tax information is put back into the hands of the IRS. Congress did not intend to give the IRS such wide discretion. Instead, Congress chose to prohibit the disclosure of all tax information in order to prevent the government from determining which items should be kept confidential. The confidentiality approach ignores Congress' clear and deliberate choice to prohibit dis-

176. 937 F.2d 1485 (9th Cir. 1991).
177. Id. at 1488.
178. See I.R.C. § 7431(b) (1994). The good faith defense will be easier to claim in a confidentiality approach jurisdiction because good faith is assumed if case law "arguably supports disclosure." Scott, supra note 17, at 531.
179. See Johnson v. Sawyer, 120 F.3d 1307, 1322 (5th Cir. 1997). Not only did Congress decide to generally prohibit the disclosure of tax information, Congress has now also decided to provide civil damages for unauthorized negligent or willful inspection of tax information and criminal penalties for the unauthorized willful inspection of tax information. See Taxpayer Browsing Protection Act, Pub. L. No. 105-35, 111 Stat. 1104 (1997) (codified as amended at I.R.C. §§ 7213, 7213a, 7431). The legislative history behind this Act also reflects Congress' fear that taxpayer compliance will decrease if tax information is abused by the IRS. See 143 CONG. REC. H1463 (1997) (statement of Rep. Johnson) ("The American public's willingness to provide the Federal Government with sensitive personal information on their tax returns each year depends on the confidence that the people have that this information will be held in the strictest confidence.").
closure. The confidentiality approach will have a negative effect on taxpayer compliance and undermine the purpose of § 6103.  

The confidentiality approach also ignores the fact that information that is part of a public record does not necessarily lose its confidentiality. To the contrary, a public record is not "known to the whole world." An individual may still have a privacy interest in a public document and want to prevent its further dissemination. This is apparent in the situation where a taxpayer gives an IRS official consent to disclose some of the taxpayer's tax information to a congressional committee hearing. After the hearing, the IRS cannot repeat the disclosures given during the hearing because the consent extended only to the hearing; thus, even though a congressional committee heard the tax information, the IRS cannot further disseminate the information because the taxpayer still has a privacy interest in it. However, the confidentiality approach seems to assume that tax information that is disclosed to, or accessible by, more than one person is no longer confidential.

B. The Disclosure Approach: Close, but Not Perfect

The disclosure approach reflects Congress' desire to encourage taxpayer compliance by increasing confidence in the voluntary assessment system. As previously noted, prior to 1976 Congress had not considered the tax information disclosure issue for forty years. As abuses by the federal government came to light, Congress began to fear that taxpayer confidence in the voluntary tax assessment system would begin to wane. Because taxpayer confidence in the fairness of

180. See Johnson, 120 F.3d at 1322.
181. See id. at 1323.
182. Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989).
184. See IRS Fact Sheet 97-12, reprinted in 97 TNT (Tax Analysts) 185-24 (Sept. 24, 1997).
185. See, e.g., Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996); Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988).
187. See id. at 317, 1976 U.S.C.C.A.N. 3746 ("[Q]uestions recently have been raised with respect to disclosure of tax information to the White House. Apparently, tax information was transmitted to the White House on a number of well known individuals. Also, tax returns have been provided White House employees in previous administrations.").
188. See id. at 317, 1976 U.S.C.C.A.N. 3747 (the disclosure of tax information on the part of the government "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").
the tax system affects taxpayer compliance,\textsuperscript{189} Congress amended § 6103 to prevent the government from disclosing tax information except where outlined by statute. Therefore, it is unlikely that Congress intended to protect only confidential tax information in light of the abuses it was trying to ameliorate and its concerns about taxpayer compliance. Instead, as the Supreme Court stated in a different context, the primary purpose of the amendment to § 6103 was to prohibit access to tax information except in limited statutory circumstances.\textsuperscript{190} By limiting access to tax information, Congress sought to encourage taxpayer compliance.\textsuperscript{191} To create a judicial exception to § 6103 would be to usurp legislative authority.\textsuperscript{192}

When applying the disclosure approach, the Fourth Circuit stated: “The plain purpose of section 6103 is to encourage full compliance with the tax laws by assuring taxpayers that the IRS will not disclose the information provided to it in confidence.”\textsuperscript{193} While the disclosure approach as applied by the Fourth and Tenth Circuits encourages taxpayer compliance by ensuring that the IRS will not disclose tax information, it fails to allow the IRS to encourage taxpayer compliance by publicizing judicial opinions. Under the disclosure approach, the IRS is prevented from publicizing successful criminal tax prosecutions whether it acquires its information from tax information or from a judicial opinion. This prohibition prevents the IRS from telling its side of the story and deterring noncompliance. Because the disclosure approach does not allow the IRS to increase taxpayer compliance by publicizing judicial proceedings in a nonabusive manner, it fails to fully effectuate the purpose behind § 6103.

The disclosure approach may also run afoul of the First Amendment. In \textit{Cox Broadcasting Corporation v. Cohn},\textsuperscript{194} the Supreme Court faced a situation where a reporter broadcast the name of a rape victim despite a Georgia statute that prohibited the publication of a rape victim’s name.\textsuperscript{195} The reporter had obtained the name from judicial records which were open to public inspection.\textsuperscript{196} The Court emphasized that the media is relied on to report governmental proceed-

\begin{thebibliography}{99}
\bibitem{189} See American Bar Ass’n, \textit{supra} note 27, at 351.
\bibitem{190} See Church of Scientology v. Internal Revenue Serv., 484 U.S. 9, 15 (1987).
\bibitem{191} See \textit{Mallas v. United States}, 993 F.2d 1111, 1121 (4th Cir. 1993) (noting that § 6103 defines disclosure broadly to further this purpose).
\bibitem{192} See \textit{Johnson v. Sawyer}, 120 F.3d 1307, 1322 (5th Cir. 1997).
\bibitem{193} \textit{Mallas}, 993 F.2d at 1121.
\bibitem{194} 420 U.S. 469 (1975).
\bibitem{195} See \textit{id.} at 471-74.
\bibitem{196} See \textit{id.} at 491.
\end{thebibliography}
ings and, "[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." 197 Based on this reasoning, the Court held that a state may not "impose sanctions on the publication of truthful information contained in official court records." 198 Although the holding of Cox may be limited to its factual context, the disclosure approach could collide "with the policies that animate the free-speech clause of the First Amendment." 199 This is an unnecessary problem that can be avoided. The source approach spares the tax information disclosure conundrum any more controversy by taking it out of the world of the First Amendment. 200

C. The Source Approach: Perfection

The source approach reflects the purpose behind § 6103 by deterring noncompliance while maintaining the trust of American taxpayers. Under the source approach, the IRS is allowed to "trumpet its victory" 201 as long as the source of the publicity is part of a public record or the public domain. 202 This publicity acts as a deterrent to taxpayers who may not otherwise comply with the tax system and thus aids the IRS in administering our tax laws. 203 If courts prevent the IRS from publicizing tax information taken directly from a judicial proceeding, our system of voluntary compliance will be jeopardized because the IRS will be unable to deter noncompliance.

Although compliance is not accomplished solely through deter-
The source approach also encourages taxpayer compliance because the taxpayer will know that the tax information provided to the government will not be subject to abuse—a major factor that affects the compliance of taxpayers and one that concerned Congress when enacting § 6103. Allowing the IRS to publicize information obtained from a judicial opinion does not jeopardize taxpayers' view that tax information will not be subject to abuse because, in contrast to the confidentiality approach, the IRS will not be able to disclose tax information it unilaterally determines is not confidential. No new rights are created for the IRS. Instead, the IRS may only publicize public records. Taxpayers' privacy expectations in tax information are preserved and, because of this, taxpayer compliance is encouraged. Like the pure disclosure approach, the source approach encourages taxpayer compliance because taxpayers' tax information will be protected. However, unlike the pure disclosure approach, the source approach also encourages taxpayer compliance because the IRS can publicize court opinions. The source approach accomplishes both these assurances of taxpayer compliance without giving the IRS discretion to disclose tax information it has decided is no longer confidential.

The source approach does place the taxpayer in the position of choosing between litigating a civil liability and not having private information disclosed, but this choice is made all the time in other areas of the law. When litigating any matter, the potential for the disclosure of embarrassing facts is always present. Litigating a tax liability is no different. No matter what the issue, the judicial proceeding becomes part of a public record open to inspection. If the taxpayer wants to protect the tax information disclosed in a judicial proceeding, a protective order may be requested.

Although under the source approach an improper levy that discloses information taken directly from a properly issued public lien

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204. See American Bar Ass'n, supra note 27, at 348.
205. See id. at 351.
207. Trust is essential in maintaining a successful voluntary assessment system. As Senator Weicker remarked in 1976 when praising the amendments to § 6103, "[T]he American system of Internal Revenue is uniquely successful; its success flies in the face of the experience of most nations of the world, and throughout the history of the world. . . . I attribute this to one central fact: trust." 122 CONG. REC. S24,013 (1976).
209. See Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989).
210. See Little, supra note 30, at 1069-70.
may not violate § 6103, the IRS will be subject to sanctions for the improper levy.\textsuperscript{211} Civil damages are available for unauthorized collection actions.\textsuperscript{212} Even under the source approach, the IRS will not be able to escape liability for any abusive improper levies.

Based on the above analysis, the source approach most completely effectuates the purpose behind § 6103. Although the differences between the source approach, the disclosure approach, and the confidentiality approach are subtle, they are important for two reasons. First, unlike the confidentiality approach, the source approach does not create a judicial exception to § 6103. The IRS is not given any new rights and is unable to argue that § 6103 is not violated because an item of tax information has lost its confidentiality. Taxpayers' privacy expectations are maintained and taxpayer compliance is encouraged. Second, unlike the disclosure approach, the source approach does not have the potential to run afoul of the Free Speech Clause of the First Amendment. The source approach allows the IRS to publicize information taken directly from a judicial opinion, thus deterring noncompliance. The source approach encourages taxpayer compliance in a fair and nonabusive manner and in this way reflects the purpose behind § 6103.

**CONCLUSION**

After neglecting the issue of tax information disclosure for forty years, Congress amended § 6103 with the Tax Reform Act of 1976. The amendments prohibit the disclosure of tax information subject to thirteen statutory exceptions. Congress felt these amendments were necessary to ensure taxpayers of the privacy of their tax information

\textsuperscript{211} Of course an improper lien will violate § 6103 because it will not be publicizing information taken from a public record.

\textsuperscript{212} See I.R.C. § 7433(a) (1994). That section provides:

(a) In general

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432 [Civil damages for failure to release lien], such civil action shall be the exclusive remedy for recovering damages from such actions.

Damages available are the lesser of $100,000 or "the sum of—(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional actions of the officer or employee, and (2) the costs of the action." Id. § 7433(b). To recover damages the successful plaintiff must have exhausted all administrative remedies available. See id. § 7433(d)(1). The damages are further reduced by the amount a plaintiff could have reasonably mitigated. See id. § 7433(d)(2).
and, thus, encourage compliance with tax laws. However, the Federal Courts of Appeal have disagreed whether lawfully disclosed tax information that becomes part of the public record loses its § 6103 protection even though § 6103 does not contain a public records exception. This disagreement must be resolved because of its potential negative effect on taxpayer compliance.

If judicial exceptions to § 6103 are created, taxpayer compliance may decrease because taxpayers will see § 6103's protection eroded. On the other hand, if the IRS is not allowed to publicize its cases that are part of a public record, it may not be able to deter noncompliance. Thus, a uniform interpretation of § 6103 as applied to tax information in public records is needed. Thus far, three approaches to this problem have surfaced in the circuits: the confidentiality approach, the disclosure approach, and the source approach.

Under the confidentiality approach, as espoused by the Sixth and Ninth Circuits, the focus is on whether the disclosed information has lost its confidentiality. The circuits following this approach have held that when tax information becomes part of a public record, it loses its confidentiality and, thus, loses its § 6103 protection. Because a public records exception is not found in § 6103, a judicial exception is created.

The disclosure approach, as followed by the Fourth and Tenth Circuits, focuses on the language and the purpose of § 6103. These courts hold that because the literal language of § 6103 does not contain a public records exception, tax information that is part of a public record does not lose its § 6103 protection. This approach emphasizes that the purpose of § 6103 is to increase taxpayer compliance by "assuring taxpayers that the IRS will not disclose the information provided to it in confidence." However, this approach is flawed in that in its pure form, the IRS is prevented from disclosing tax information taken directly from public records. Thus, the IRS cannot deter non-compliance by publicizing its victories.

The recent decision in Johnson v. Sawyer presents the most logical solution to the controversy surrounding the "public records" exception to § 6103. Following the lead of the Seventh Circuit, the Fifth

213. See Rowley v. United States, 76 F.3d 796, 799-801 (6th Cir. 1996); Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988).
214. See Mallas v. United States, 993 F.2d 1111, 1117-23 (4th Cir. 1993); Rodgers v. Hyatt, 697 F.2d 899, 906 (10th Cir. 1983).
215. Mallas, 993 F.2d at 1121.
Circuit looked at the source of the tax information disclosed.\textsuperscript{216} This approach, labeled herein as the source approach, refuses to create a judicial exception to \textsection 6103. But, unlike the disclosure approach, this approach does not eliminate the possibility of the IRS publicizing its victories. As the Fifth and Seventh Circuits pointed out, if the IRS discloses information taken directly from a public record and not from statutorily defined tax information, \textsection 6103 is not violated. This approach avoids facing a possible constitutional question while encouraging full compliance with our voluntary assessment system. The goal of taxpayer compliance is accomplished by ensuring taxpayers that tax information will not be disclosed unless authorized by statute, while at the same time allowing the IRS to publicize its cases and deter potential noncompliance. The source approach furthers the goals of \textsection 6103. Tax information maintains its veil of confidentiality. As the 1975 Report on Administrative Procedures of the Internal Revenue Service states, if the veil "is to be lifted, Congress should do so."\textsuperscript{217}