Texas Wesleyan Law Review

Volume 5 | Issue 1 Article 7

10-1-1998

How Far Do the Powers of the I.R.S. Extend in the Fifth Circuit? Johnson v. Sawyer

Darrell Calvin

HOW FAR DO THE POWERS OF THE I.R.S. EXTEND IN THE FIFTH CIRCUIT? *JOHNSON v. SAWYER*

INTRODUCTION

According to 26 U.S.C. § 6103(a)[1] taxpayer returns and return information are to remain confidential, and all officers or employees of the United States are prohibited from disclosing tax return information unless specifically authorized.[2] Return information includes "data, received by, recorded by, prepared by, furnished to, or collected by the [Internal Revenue Service]."[3] If a violation occurs, Congress has provided a statutory cause of action under I.R.C. § 7431.[4] Disclosures are permitted to taxpayer designees,[5] to state tax officials and state and local law enforcement agencies,[6] and in judicial or administrative tax proceedings that relate to tax administration.[7] Decisions from several federal circuits have resulted in judicially-created exceptions to this sweeping rule of non-disclosure.[8] However, at least two circuits have steadfastly adhered to a literal reading of the statute and have refused to find any exceptions where Congress has not specifically delineated them.[9] Until recently, the Fifth Circuit had yet to jump into the fray.

The Internal Revenue Service (hereinafter "the IRS") has a practice of publicizing tax fraud convictions of select individuals through press releases, purportedly to enforce this nation's "voluntary" reporting system.[10] Although legal commentators seem to agree that the

1. Hereinafter 26 U.S.C. will be cited to the Internal Revenue Code as I.R.C.
2. *See* I.R.C. § 6103(a) (1997).
3. § 6103(b)(2)(A).
4. *See id.* § 7431.
5. *See id.* § 6103(c).
6. *See id.* § 6103(d).
7. *See id.* § 6103(h)(4).
8. *See* Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996) (holding that taxpayer information previously disclosed in a publicly-recorded tax lien loses its confidential nature and may be disseminated by the government); Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (holding that taxpayer return information loses its confidentiality when it enters the public domain such as in a judicial proceeding); Thomas v. United States, 890 F.2d 18, 20, 21 (7th Cir. 1989) (holding that if the source of the disclosed information does not come from taxpayer's return or a related document, such as a tax court opinion, there is no violation of I.R.C. § 6103).
9. *See* Rodgers v. Hyatt, 697 F.2d 899, 906 (10th Cir. 1983) (holding that it is the specific statutory authorization, or lack thereof, that is dispositive of whether taxpayer return information may be lawfully disclosed by the government and not a judicial determination of what constitutes confidentiality); Mallas v. United States, 993 F.2d 1111, 1121 (4th Cir. 1993) (refusing to usurp the legislative function by creating an exception to I.R.C. § 6103).
10. *See* Michael G. Little, *Extra Judicial Discussion of Taxpayer Information: The IRS Bully Is Still On The Block*, 43 FLA. L. REV. 1041, 1064 n.182 (1991) (citing Internal Revenue Service Manual, pt. 31, § (31)4(20)0(1) (1989)).

DOI: https://doi.org/10.37419/TWLR.V5.I1.4

judicially-created exceptions developed in the circuits provide the IRS with significant power, and seem to give license to its publicizing practice, some have taken differing views on the propriety of this IRS practice.[11]

Realizing the potential for abuse because of the IRS's vast compilation of information on U.S. citizens, Congress amended I.R.C. § 6103 as part of the Taxpayer Relief Act of 1976.[12] The statutory rules governing disclosure of taxpayer information had not been reviewed for forty years. No specific provision for publicizing tax evasion convictions was provided in the amended statute,[13] although a provision might be found for such a practice depending on how one interprets the term "tax administration."[14] Of course, the legal implications of publicizing tax-evasion convictions can only be certain in those circuits that have found judicially-created exceptions to the statute.[15]

The Fifth Circuit chose to recognize a judicially-created exception to the statute in *Johnson v. Sawyer*.[16] This Note takes issue with the Fifth Circuit's holding in *Johnson*. The IRS is a creature of statute and, as such, should be governed by statute. If any further life is given the agency, it is for Congress, and not the judiciary to declare. If taxpayers convicted in the Fifth Circuit are to have their transgressions publicized, it should be with the specific approval of their elected representatives. Part I of this Note traces the development of judicially-created exceptions to I.R.C. § 6103 in the federal circuits. Part II reviews *Johnson* at its various levels and analyzes the reasoning of the Fifth Circuit in finding an exception to the statute. Part III discusses the flaws in the Fifth Circuit's reasoning, along with the weaknesses inherent in the rule it adopted, and asserts the rule advanced by the Tenth and Fourth Circuits as proper.

11. *Compare* Little, *supra* note 9, at 1063 (claiming threats by the IRS to issue press releases of tax fraud convictions conflicts with the standard of fairness needed in our system of self-assessment) *with* J. Hudson Duffalo, Comment, *The Buttoned Lip: The Controversy Surrounding The Disclosure of Tax Return Information*, 53 ALB. L. REV. 937, 962-63 (1989) (accepting the practice claiming it to be a "valuable tool" in the IRS's efforts to improve compliance with the tax laws).

12. *See* S. REP. NO. 94-938, pt.1, at 317 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3747.

13. *See* Little, *supra* note 9, at 1047.

14. *See id.*

15. *See* Duffalo, *supra* note 10, at 963.

16. 120 F.3d 1307, 1318-19 (5th Cir. 1997) (following the Seventh Circuit in holding that it is the source from which the taxpayer return information is disclosed that is dispositive of whether there has been a violation of the statute).

I. THE SPLIT IN THE CIRCUITS

A. *The Need for Specific Statutory Authorization*

By its holding in *Rodgers v. Hyatt*,[17] the Tenth Circuit was the first federal appeals court to hand down a definitive ruling on the possibility of recognizing a judicially-created exception to I.R.C. § 6103. In *Rodgers*, an IRS agent disclosed taxpayer return information in a meeting with business associates of the taxpayer.[18] The taxpayer's attorney had elicited the disclosed statements from the IRS agent in an earlier hearing to enforce a summons against the taxpayer's bank.[19] On appeal, the IRS agent argued that the prior in-court disclosure had stripped these particular statements of their confidentiality.[20] The court rejected the argument and held the real issue in the case was not whether the information disclosed had lost its confidential nature, but whether the agent had any statutory authority to make such a disclosure in the first place.[21] The court also rejected the agent's argument that such disclosures were made in the course of an investigation of the taxpayer rather than employees of his business associates. Such disclosures would have been authorized in such a case to the extent they would have been *necessary* in obtaining information regarding the taxpayer's tax liability.[22] The court held:

> The fact that Mr. Hyatt had given prior "in court" testimony relative to the alleged "rumors and allegations" which likely removed them from their otherwise "confidential" cloak, 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.[23]

Some ten years later, the Fourth Circuit, in *Mallas v. United States*,[24] followed the Tenth Circuit's reasoning. In *Mallas*, IRS agents had reported the convictions and "financing scheme" of two promoters of a tax shelter to investors and continued to do so even after both convictions were subsequently reversed on appeal.[25] The trial court found the government liable for seventy-three violations of I.R.C. § 6103 with regard to each promoter.[26] On appeal, the government argued that the reports given to investors did not constitute violations of the statute because the convictions were a matter of public record and no

17. 697 F.2d 899 (10th Cir. 1983).
18. *See id.* at 900-1001.
19. *See id.* at 900.
20. *See id.* at 901.
21. *See id.* at 906.
22. *See id.* at 904 (citing I.R.C. § 6103(k)(6)).
23. *Id.* at 906.
24. 993 F.2d 1111 (4th Cir. 1993).
25. *See id.* at 1114-15.
26. *See id.*

longer confidential.[27] In response, the Fourth Circuit held: "[w]e decline the Government's invitation to usurp the legislative function by adding a judicially-created exception to those set forth by Congress in section 6103 . . . . Unless the disclosure is authorized by a specific statutory exception, [the statute] prohibits it."[28] In rejecting the government's argument, the Fourth Circuit relied on Supreme Court precedent,[29] noting that the government conceded that there could be a violation of the statute, even though the information was already known by a number of individuals.[30]

B. *The Public Domain Exception*

The Ninth Circuit was the first circuit court of appeals to find a judicially-created exception to I.R.C. § 6103 in *Lampert v. United States*.[31] In each of the cases that were consolidated on appeal, the government issued press releases publicizing actions being taken against the taxpayer in question or investigations in which the taxpayer had been found guilty of tax evasion.[32] The government responded, as it had in *Mallas*, that it had not violated § 6103 because the information disclosed in the press release was based on documents in public court records, and was no longer confidential.[33] The taxpayers in *Lampert* interpreted the statute literally and argued that although the information in question could be lawfully disclosed in a judicial proceeding, the statute circumscribed any further dissemination of the information, even though it was already a matter of public record.[34] After reviewing the Tenth Circuit's decision in *Rodgers*, and various district court decisions for and against the finding of a violation, the Ninth Circuit held:

> Only a strict, technical reading of the statute supports the taxpayer's position. While 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. We believe that Congress sought to prevent the disclosure of only confidential tax return information. Once tax return information is made part of

27. *See id.* at 1120.
28. *Id.*
29. *See id.* (citing United States Dep't of Justice v. Reporters Comm. for Freedom of The Press, 489 U.S. 749, 770 (1989) (holding that one may have an interest in protecting the disclosure of information even though the event surrounding the information is not entirely private)).
30. *See id.* at 1121 n.10.
31. 854 F.2d 335 (9th Cir. 1988) (*Lampert* was a consolidated appeal of three separate cases from the United States District Court for the Northern District of California.) For background information on these cases, see Peinado v. United States, 669 F. Supp. 953 (N.D. Cal. 1987); Figur v. United States, 662 F. Supp. 515 (N.D. Cal. 1987); and Lampert v. United States, No. C-86-3463 RFP (N.D. Cal. April 8, 1987).
32. *See id.* at 336.
33. *See id.* at 337.
34. *See id.*

> the public domain, the taxpayer may no longer claim a right of privacy in that information. We agree when once information is lawfully disclosed in court proceedings, "§ 6103(a)'s directive to keep return information confidential is moot."[35]

The Ninth Circuit followed the reasoning it employed in *Lampert* when it decided *Schrambling Accountancy Corp. v. United States*.[36] In *Schrambling*, the government disseminated taxpayer-return information following the filing of federal liens and a bankruptcy petition.[37] The Ninth Circuit again stressed that confidentiality was the determinative factor in ruling whether there was a violation of I.R.C. § 6103.[38] In reaching its *Schrambling* holding, the court allowed even greater license than it had in *Lampert*.[39] The court emphasized the recording of tax liens, coupled with the public's right to inspect such records, made the information open to even greater publicity than information released in a judicial proceeding.[40]

Following the Ninth Circuit's lead, the Sixth Circuit decided *Rowley v. United States*.[41] In *Rowley*, taxpayers claimed the government violated I.R.C. § 6103 when IRS agents disclosed their tax-return information in advertising a public auction of the taxpayers' property.[42] The government argued there could be no violation of the statute because the information disclosed was of public record due to the previous filing of federal tax liens.[43] Distinguishing the issue before it from that in *Mallas* and *Rodgers*, the Sixth Circuit employed the reasoning of the Ninth Circuit in *Schrambling*.[44] The Sixth Circuit noted, "[T]he type of previous disclosure involved here (i.e.[,] the recording of a federal tax lien in a County Register of Deeds' office) is designed to provide public notice and is thus qualitatively different from disclosures made in judicial proceedings, which are only incidentally made public."[45] The court further distinguished the case before it from *Mallas* by noting that the IRS agents in *Mallas* had done more than simply publicize the convictions of the promoters; they had also publicized the "financing scheme" used by the promoters.[46] The court noted that unlike the information disclosed in *Mallas*, the information disclosed in *Schrambling* was exactly the same information that could be found in the Register of Deeds' offices.[47]

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35. *Id.* at 338 (citations omitted).
36. 937 F.2d 1485 (9th Cir. 1991).
37. *See id.* at 1486-87.
38. *See id.* at 1490.
39. *See id.* at 1489.
40. *See id.*
41. 76 F.3d 796 (6th Cir. 1996).
42. *See id.* at 797.
43. *See id.*
44. *See id.* at 801.
45. *Id.*
46. *See id.* (quoting *Mallas*, 993 F.2d at 1121).
47. *See id.*

C. *The "Source" Rule*

In *Thomas v. United States*,[48] the Seventh Circuit took a compromise position in the battle over whether to recognize a judicially-created exception to the statute. Thomas refused to pay income taxes on his wages, because he claimed that "he had received them in exchange for services of equal value."[49] He contested the amount of tax he owed in tax court and lost at trial.[50] After judgment was entered against Thomas, the IRS prepared a press release and sent it to Thomas's hometown newspaper describing his loss, the amount of back taxes and interest that he would have to pay, and the additional damages assessed against him due to the frivolous nature of his claim.[51] The government argued that Thomas had waived his right to confidentiality by attacking the IRS's assessment in tax court.[52] The court refused to answer the government's argument and stated:

> [W]e 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. . . .
>
> For there is a narrower ground on which the government is entitled to prevail in this case.
>
> The information disclosed in the press release did not come from Thomas's tax return—not directly, at any rate. It came from the Tax Court's opinion.[53]

In reaching its holding, the *Thomas* court refused to decide whether the tax-court opinion removed the "protective cloak" from the information, so that the IRS would not have been in violation of the statute if it had disseminated the information directly from its files.[54] The court conceded its decision might almost be seen as giving license to the "laundering" of taxpayer information.[55] It noted that its decision might appear contrary to Supreme Court precedent that refuted the idea that information in a public document is known by the whole world, and that there can be no violation of a citizen's right to privacy when such information is disclosed.[56] The court also noted that, unlike the facts of *Rodgers* or *Lampert*, the IRS was not attempting to disclose previously lawfully disclosed information in a more public

48. 890 F.2d 18 (7th Cir. 1989).
49. *Id.* at 19.
50. *See id.*
51. *See id.*
52. *See id.* at 20.
53. *Id.*
54. *See id.* at 21.
55. *See id.*
56. *See id.* (citing *United States Dep't of Justice*, 489 U.S. at 756) (interpreting 5 U.S.C. § 552(b)(7)(c) (1989) known as the Freedom of Information Act).

place but was simply "trumpeting its victory."[57] The court refused to rule on the propriety of the IRS's press release in Thomas's case and stated, "even if what the Internal Revenue Service did here is an abuse of governmental power, it is not the sort of abuse at which [I.R.C.] § 7431 was aimed or for which it makes provision."[58]

II. SUBJECT CASE: *JOHNSON V. SAWYER*

A. *I.R.S. Bungling*

In *Johnson v. Sawyer*,[59] Johnson's troubles began in 1976 after the IRS began auditing key employees of the insurance company for which he was a vice-president.[60] After finding reporting discrepancies made by Johnson and his wife for the years 1974 and 1975, the IRS referred the case to the Department of Justice for prosecution for income tax evasion.[61] In exchange for the U.S. Attorney's promise not to seek indictments, Johnson entered into a plea bargain agreement.[62] Johnson was assured by his employer, American National Insurance Company (ANICO), that as long as there was no publicity regarding the conviction that would embarrass ANICO, he could keep his job despite a conviction for income tax evasion.[63] The U.S. Attorney agreed with counsel for Johnson that U.S. Attorney would keep the matter quiet. Several procedural safeguards to protect Johnson's anonymity were agreed upon.[64] Among the safeguards used were the listing of Johnson's home address as his attorney's downtown office, rather than his actual residence.[65]

Johnson's troubles escalated when the IRS issued a press release reporting his conviction. Although the U.S. Attorney had agreed that no press release would be issued, the IRS was not informed of this agreement.[66] The press release prepared by IRS agents described Johnson's guilty plea and included: his home address,[67] his middle ini-

57. *See id.* The Seventh Circuit seems to suggest the IRS has greater license to publicize when it is the taxpayer that initiates a judicial determination of tax owed.

58. *Id.* at 21-22.

59. 120 F.3d 1307 (5th Cir. 1997).

60. *See id.* at 1310.

61. *See id.*

62. *See id.* at 1311.

63. *See id.* at 1310.

64. *See id.* Johnson's pre-sentence investigation was to be conducted before charges were filed against him and his criminal information was to be filed before his hearing along with his waiver of indictment and the plea bargain agreement. In addition, Johnson's counsel had arranged for the hearing to be conducted at four o'clock on a Friday afternoon on a day when the presiding judge had no other business.

65. *See id.* Johnson's residence was in Galveston, Texas and his attorney's office was located in downtown Houston, Texas.

66. *See id.*

67. *See id.* at 1311.

tial,[68] his age, his position with ANICO,[69] along with erroneous statements that he had been charged with claiming false business deductions, altering documents, had to pay back taxes with penalties and interest,[70] and he pled guilty to income tax evasion for the tax years 1974 and 1975.[71] In truth, the plea bargain Johnson made had with the government only required that if he would plead guilty to tax evasion for the tax year 1975, he would not be prosecuted for tax evasion for the tax year 1974.[72] None of the IRS agents who prepared the press release were at Johnson's hearing, nor did they have access to any of the court documents.[73] One of the agents claimed that he had obtained the press release information from the U.S. Attorney prosecuting Johnson's case.[74] According to internal IRS procedures, the information released was to be obtained from Johnson's IRS investigatory file, including his age, home address, and occupation.[75] There was no stipulation that the information had to have been disclosed in Johnson's criminal proceeding.[76]

The press release was sent to various media outlets, and before publication, an agent of the the outlets contacted ANICO inquiring about Johnson's conviction.[77] Johnson's attorney immediately informed the IRS of its blunder. Realizing erroneous information had been included in the press release, the agency withdrew it.[78] The U.S. Attorney denied any involvement in the matter.[79] After obtaining a copy of the criminal information, the IRS decided to issue another press release correcting the errors in the first press release.[80] Johnson informed ANICO that the IRS intended to issue a corrected press release; nevertheless five days later, Johnson was asked to resign his executive position, at ANICO, along with his position on ANICO's board of directors.[81] Afterwards, Johnson worked for ANICO as a

68. *See id.* Johnson's middle initial "E." was not given on his defendant information sheet. Only his first and last name, Elvis Johnson, were listed.

69. *See id.* Excluded from evidence in the court record was the transcript of Johnson's hearing in which the judge did make reference to Johnson as being an executive with ANICO. Johnson's occupation was not listed on his information sheet.

70. *See id.* at 1311-12.

71. *See id.* at 1311.

72. *See id.* at 1310.

73. *See id.* at 1311.

74. *See id.*

75. *See id.* at 1311-12.

76. *See id.* at 1312.

77. *See id.*

78. *See id.*

79. *See id.* The U.S. Attorney said to Johnson's attorney, "If they damaged your client in some way, sue . . . them as far as I'm concerned." *Id.* (internal quotes omitted).

80. *See id.*

81. *See id.* at 1312-13.

regional director for five years until reaching mandatory retirement age.[82]

B. *The District Court Refusal to Recognize a Judicially-Created Exception*

Johnson brought an action against the IRS and its agents for the wrongful disclosure of tax-return information in violation of I.R.C. § 6103.[83] Subsequently, he amended his complaint by adding a claim against the government under the Federal Tort Claims Act[84] for negligent supervision.[85] Johnson filed a second amended complaint in which he added a claim under I.R.C. § 6103 for unlawful disclosure of his position with ANICO.[86] In their motion for summary judgment, the defendants argued that Congress would not conclude that the issuance of the press release in Johnson's case would be a violation of I.R.C. § 6103, because, under the circumstances, Johnson had no reasonable expectation of privacy in the information.[87] The trial court responded to the defendants' argument stating that "[t]his Court, . . . believes that Congress made the language of § 6103 quite clear: any disclosure of return information is illegal 'except as authorized by this title.'"[88] Reviewing the legislative history behind I.R.C. § 6103, the district court concluded that it could not carve out an exception to the statute.[89] The court noted:

> This Court recognizes that its strictly enforcing the comprehensive regulation of § 6103 greatly hampers the government's ability to issue press releases concerning the prosecution of tax evaders. If that result is poor public policy, it is for Congress—not the Courts—to amend § 6103 to allow the issuing of such releases.[90]

Johnson's claims against the individual IRS agents were severed, a bench trial was held on his claim under Federal Tort Claims Act, and Johnson was awarded roughly ten million dollars.[91] In its en banc reversal, the Fifth Circuit dismissed Johnson's claim under the Federal Tort Claims Act.[92] On remand, Johnson was awarded six million dol-

82. *See id.* at 1313.

83. *See id.* at 1314.

84. 28 U.S.C. § 1346(b) (1983).

85. *See Johnson*, 120 F.3d at 1314.

86. *See id.*

87. *See* Johnson v. Sawyer, 640 F. Supp. 1126, 1132 (S.D. Tex. 1996).

88. *Id.* (citing I.R.C. § 6103(a)).

89. *See id.* at 1133.

90. *Id.* at 1133 n.18.

91. *See* Johnson v. Sawyer, 760 F. Supp. 1216 (S.D. Tex. 1991), *rev'd en banc*, 47 F.3d 716 (5th Cir. 1995).

92. *See* Johnson v. Sawyer, 47 F.3d 716 (1995) (en banc).

lars in actual damages and three million dollars in punitive damages for his claims based on violations of I.R.C. § 6103.[93]

C. *The Fifth Circuit Looked to The Supreme Court for Guidance*

In reviewing the remand result, the Fifth Circuit chose not to follow the rule laid out by the Ninth Circuit in *Lampert*; instead, the Fifth Circuit chose to follow the Seventh Circuit's "source" analysis from *Thomas*.[94] The Fifth Circuit noted that all circuits were in agreement that a literal reading of I.R.C. § 6103 would not allow for the sort of judicial lawmaking that the Ninth Circuit had attempted in *Lampert*.[95] Nevertheless, the Fifth Circuit stressed that finding a violation for disclosing return information, where most of the information had been previously disclosed in court, would seem bizarre.[96] The court, reasoning that the legislative history and other provisions of the statute had to be looked at in examining the full scope of § 6103(a)'s broad general prohibition, relied on the guidance provided by the Supreme Court in *Demarest v. Manspeaker*[97] and *Consumer Product Safety Commission v. GTE Sylvania, Inc.*[98]

Demarest involved the Supreme Court's analysis of a federal statute regarding whether a witness fee was required to be paid to an incarcerated individual for his testimony in a federal trial.[99] The wording of the statute did not specifically exclude paying witness fees to incarcerated individuals; although, it did provide that no subsistence allowance would be provided to incarcerated individuals.[100] The statute clearly disallowed both a witness fee and subsistence allowance to aliens. In the Court's analysis, these two provisions considered together showed that Congress had considered the issue of incarcerated individuals testifying at trial, and did not exclude witness-fee payments to them when it had specifically done so for aliens.[101] Thus, the Court held that requiring a daily fee paid to prisoners would not be contrary to congressional intent.[102]

GTE Sylvania involved the disclosure of consumer product information by the Consumer Product Safety Commission (hereinafter "CPSC") under provisions of the Consumer Product Safety Act.[103] The CPSC had released information in response to consumer groups'

93. *See* Johnson v. Sawyer, No. H-83-2173, 1996 WL 414050 (S.D. Tex. May 15, 1996) *vacated by*, 120 F.3d 1307 (5th Cir. 1997).
94. *See* Johnson v. Sawyer, 120 F.3d 1307, 1318 (5th Cir. 1997).
95. *See id.* at 1319.
96. *See id.*
97. Demarest v. Manspeaker, 498 U.S. 184 (1990).
98. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1990).
99. *See Demarest*, 498 U.S. at 184 (discussing 28 U.S.C. § 1821 (1991)).
100. *See id.* at 187-88.
101. *See id.* at 188.
102. *See id.* at 190.
103. *See GTE Sylvania*, 447 U.S. at 104.

requests under the Freedom of Information Act (hereinafter "the FOIA") without complying with the notice requirements that were to be given to manufacturers prior to such disclosures.[104] The Court struck down the CPSC's argument that, although the FOIA itself provided for no such exemptions, the disclosure restrictions only applied to affirmative disclosures by the CPSC rather than at the request of consumer groups pursuant to FOIA requests.[105] The Court noted that Congress had considered provisions of the FOIA under the exemptions section of the 28 U.S.C. §1821 and had stated in other parts of §1821 that the provisions of the FOIA applied to the CPSC, whether they were making affirmative disclosures or whether they were acting pursuant to consumer requests.[106]

D. *The Fifth Circuit Followed Supreme Court Lead in Analyzing Subsections*

After taking guidance from the Supreme Court cases of *Demarest* and *GTE Sylvania*, the Fifth Circuit analyzed I.R.C. § 6103. The court focused on the provisions of § 6103(p)(4), which outline procedures that must be followed if the IRS releases taxpayer-return information to another governmental agency, including various safeguards to protect against improper dissemination of taxpayer information.[107] The court noted that these safeguards are loosened when the information in question has already been disclosed in a judicial proceeding.[108] The court stressed that this alone did not give the IRS license to publicly release the information.[109] Borrowing from the reasoning of *Demarest* and *GTE Sylvania*, that the Fifth Circuit concluded Congress had considered that certain taxpayer information might be available to the public through judicial records, yet it had purposefully failed to make any provision for governmental disclosure under such circumstances.[110]

In addition to looking at § 6103(p), the Fifth Circuit also analyzed § 6103(m), which allows the IRS to disclose taxpayer-return information to the media when the IRS is unable to locate a particular taxpayer for refund purposes.[111] The court concluded that because Congress had specifically addressed IRS disclosures to the media for refund purposes, the failure to give the IRS the authority to disclose taxpayer information when publicizing tax-evasion convictions, was

104. *See id.* at 106.
105. *See id.* at 109.
106. *See id.* at 110.
107. *See* Johnson v. Sawyer, 120 F.3d 1307, 1320 (5th Cir. 1997) (discussing I.R.C. § 6103 (p)(4) (1994)).
108. *See id.*
109. *See id.* at 1320-21.
110. *See id.* at 1321.
111. *See id.* (discussing I.R.C. § 6103(m)(1) (1994)).

not unintentional.[112] Thus, the court held that "applying the plain meaning of the statute leads to neither an absurd result nor one that is demonstrably at odds with congressional intent."[113]

E. *The Fifth Circuit Looked to Legislative History and the Specific Language of § 6103(a)*

Next, the Fifth Circuit discussed the legislative history of 28 U.S.C. §6103(a). It noted that although Congress had provided that strict adherence to the record-keeping requirements would not apply when taxpayer information was open to the public generally, that fact could not be considered an abandonment of the non-disclosure rule.[114] In balancing the government's need for taxpayer information against a citizen's right to privacy, and the effect disclosures have on our voluntary system, the court held that Congress chose not to make an exception for disclosure of taxpayer information that was otherwise available in public records.[115] The court refused to "strike the balance" the Sixth Circuit had in *Rowley* regarding a citizen's right to privacy against a legitimate interest on the part of the government in disclosing taxpayer information for tax administration purposes.[116] Following the Fourth Circuit's reasoning in *Mallas*, the Fifth Circuit determined such a task was in Congress's domain.[117]

The Fifth Circuit held that the critical distinction refuting the appellants' argument that the court should recognize an exception to the statute, was the simple fact that Congress had made no distinction between confidential and non-confidential tax-return information in the language of the statute, but instead provided that "returns and return information shall be confidential."[118] The court reviewed what it had previously held on appeal concerning the scope of § 6103:

> The regulation is *prophylactic*, proscribing disclosure by such an individual of any such information *so obtained* by him. Plainly, Congress was not determining that all of the information on a tax return would always be truly private and intimate or embarrassing. Rather, it was simply determining that since much of the information on tax returns does fall within that category, it was better to proscribe disclosure of all return information, rather than rely on *ad hoc* determinations by those with official access to returns as to

112. *See id.*

113. *Id.*

114. *See id.* (discussing S. REP. NO. 94-938, at 343 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3773).

115. *See id.* at 1321-22 (discussing S. REP. NO. 94-938, at 318).

116. *See id.* at 1322 (citing Rowley v. United States, 76 F.3d 796, 802 (6th Cir. 1996)).

117. *See id.*

118. *Id.* (quoting I.R.C. § 6103 (a)).

whether particular items were or were not private, intimate or embarrassing.[119]

The court noted that newly passed legislation upheld the conclusion that Congress believed taxpayers have a statutorily created "privacy" interest in their tax-return information under § 6103, even though that information might not be entirely "secret."[120] Furthermore, the court relied on the Supreme Court case *United States Department of Justice v. Reporters Committee for Freedom of the Press* for the proposition that an individual may have a privacy interest in information even though that information may be known by others.[121] The court concluded that interest would be served by finding a violation based on the *source* of the disclosed information rather than whether such information could be considered confidential or not.[122]

F. *The Fifth Circuit Refused to Address Appellants' First Amendment Claims*

Having determined that it is the source of the disclosed information that is dispositive of whether I.R.C. § 6103 has been violated, the Fifth Circuit did not reach the appellants' First Amendment arguments.[123] The appellants relied on the Supreme Court's ruling in *Cox Broadcasting Corp. v. Cohn*[124] for the premise that, constitutionally, there could be no violation of the statute because of the prior court proceedings.[125] *Cox Broadcasting* involved the name of a rape victim disclosed by a reporter who had attended a court hearing involving the defendants charged with the crime.[126] The Supreme Court ruled that the reporter could not be sanctioned for violation of a Georgia statute, due to the public's interest in knowing what happens in open court.[127] The Fifth Circuit responded to the appellants' argument that *Cox Broadcasting* was controlling by noting, "IRS agents . . . are not members of the media and therefore have no First Amendment responsibility to report on criminal proceedings or other government operations. Moreover, the media's source in *Cox Broadcasting* was court documents, not information protected by a non-disclosure statute, such as § 6103."[128] The court noted that the Court in *Cox Broad-*

119. *Id.* (citing Johnson v. Sawyer, 47 F.3d 716, 738 (5th Cir. 1995)) (emphasis in original).
120. *See id.* (discussing the Taxpayer Browsing Protection Act of 1997, to be codified at I.R.C. § 7213 A and 7431).
121. *See id.* at 1323 (citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 770 (1989)).
122. *See id.* (citing Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989)) (emphasis in original).
123. *See id.* at 1323-24.
124. 420 U.S. 469 (1975).
125. *See Johnson*, 120 F.3d at 1324 (citing *Cox Broadcasting*, 420 U.S. at 471-72).
126. *See Cox Broadcasting*, 420 U.S. at 472-74.
127. *See id.* at 491-92, 495.
128. *Johnson*, 120 F.3d at 1324.

casting had stressed its holding was specifically limited to the facts presented in that case.[129] The Fifth Circuit reasoned that under its interpretation, a violation of I.R.C. § 6103 only occurs when the source of the information is not a public document; therefore, the precedent relied upon by the appellants was not applicable.[130]

III. *RODGER'S* SUPERIORITY, *THOMAS'S* WEAKNESS AND *LAMPERT'S* FALLACY

A. *Reliance on Other Subsections Supports* Rodger's *Holding*

In its reliance on subsections of the Internal Revenue Code other than § 6103(a), the Fifth Circuit missed the mark in *Johnson*. The subsections on which it relied in its analysis necessarily call for adoption of the Tenth Circuit's lack-of-statutory-authorization rule. The Fifth Circuit stressed that although the safeguard provisions of § 6103(p) are loosened when disclosure has been made in a judicial proceeding, the non-disclosure prohibition still remains in place.[131] If, unlike the safeguard procedures, the non-disclosure requirements placed on the government are not loosened when that information has already been released in a judicial proceeding, how is it that IRS agents may go to the nearest courthouse and release taxpayer information from the court's file, when they are prohibited from doing the same from their own files? Either the non-disclosure requirements are loosened or they are not. If the source from which the information is released truly does make a difference, then contrary to the Fifth Circuit's analysis in *Johnson*, the non-disclosure requirements *are* loosened, with the only difference being the physical location from where the information is released. If the court believed that Congress intended that the safeguard provisions should not be relaxed, then the lack of explicit statutory authority analysis espoused by the Tenth Circuit in *Rodgers* is what it should have adopted.

In addition to its reliance on § 6103(p), the Fifth Circuit's reliance on § 6103(m) also calls for an adoption of the Tenth Circuit's lack-of-statutory-authorization rule. The Fifth Circuit noted that Congress was considering IRS disclosures to the media from the IRS's own files when Congress enacted § 6103(m) for refund notification, yet Congress failed to make any provision for IRS disclosures of tax-evasion convictions obtained from IRS files.[132] The Fifth Circuit failed to discuss that there was no statutory provision providing that the IRS *may* disclose taxpayer information, as long as the information is obtained from public documents. It appears that the Fifth Circuit finds the lack of statutory authorization meaningful in deciding whether the IRS

129. *See id.* (citing *Cox Broadcasting*, 420 U.S. at 497 n.27).
130. *See id.*
131. *See id.* at 1320-21.
132. *See id.* at 1321.

may disclose taxpayer information directly from its own internal documents, yet the Fifth Circuit fails to find the lack of statutory authorization persuasive in finding that the IRS may make such disclosures from a source other than its own files. This reasoning is inconsistent. One is left to speculate why the court deems lack of statutory authorization important in one context and not the other.

B. *A True Acknowledgment of Taxpayer Privacy Interests?*

The Fifth Circuit also missed the mark in its analysis of furthering taxpayers' privacy interests. The court claimed that taxpayers' privacy interests in limiting the dissemination of their taxpayer information are furthered by adoption of the Seventh Circuit's source rule.[133] In so doing, the Fifth Circuit drew a distinction between § 6103(a) and the Texas tort of public disclosure of embarrassing private facts and noted:

> The Texas tort and section 6103(a) address totally distinct subject matters and impose distinctly different duties: the latter, applicable only to certain individuals who in connection with their government-related duties obtain tax information, enjoins them not to disclose any of it so obtained, even though it is not private and not intimate or embarrassing and is of public concern . . . .[134]

Under this analysis, the court concluded that "if tax return information is the immediate source for the information claimed to be wrongfully disclosed, it makes no difference that the information is neither 'private' nor 'confidential.'"[135]

Clearly, invoking the Seventh Circuit's source rule over the rule issued by the Ninth Circuit in *Lampert* gives taxpayers greater protection from having their return information being disclosed publicly. However, if it makes no difference whether the information disclosed is private or confidential, then the lack-of-statutory-authorization rule is the better one to follow. More protection is given to taxpayers' privacy interests by following the Tenth Circuit's lack-of-statutory-authorization rule than by following the Seventh Circuit's source analysis. Even after acknowledging the Supreme Court's holding in *Reporters Committee for Freedom of the Press,* the Fifth Circuit adopted the Seventh Circuit's source rule, and in doing so "watered down" the privacy interests of taxpayers in protection of their tax-return information.

C. *Inherent Weaknesses in the Source Rule*

The Seventh Circuit's own statements in *Thomas* reflect the inherent weakness in the rule it adopted. Strangely enough, in *Thomas,* the

133. *See id.* at 1323.
134. *Id.* (quoting Johnson v. Sawyer, 47 F.3d 716, 735-36 (5th Cir. 1995)).
135. *Id.*

Seventh Circuit stated that it would not depart from its prior holding in *Wiemerslage v. United States,*[136] that I.R.C. § 6103 is a broad general prohibition against disclosures of taxpayer returns and return information unless a specific statutory authorization can be found.[137] However, the Seventh Circuit's ultimate decision in *Thomas* holds opposite. After stating it was not making such a departure, the court concluded that the statute's prohibition was not applicable to the disclosure of information found in tax court opinions.[138] Section 6103(a) cannot be a broad general prohibition on the disclosure of taxpayer information and, at the same time, a statute which allows unauthorized dissemination of such information. Either the non-disclosure provisions of the statute are broadly prohibitory or they are not.

The reasoning employed by the Seventh Circuit allows the IRS to achieve indirectly what it is prohibited from doing directly. Essentially, it is nothing more than a judicially-constructed conduit by which administrative officials can work their way around the laws enacted by Congress and perform a clear end run around I.R.C. § 6103's language. One of the primary purposes for Congress enacting I.R.C. § 6103 was to require that taxpayer information remain confidential *with the IRS.*[139] As one commentator has correctly pointed out, the Seventh Circuit's source rule fails to take into account that regardless of whether tax return information is taken from a source other than the return (or other IRS internal documents), the information is still ultimately taxpayer return information.[140] "Such information should not be deemed converted into non-tax return information merely because it can also be found in a court record."[141]

Even though this Note takes the position that it truly is the place of Congress to give or refuse license to the IRS in its publicizing efforts, another troubling aspect of the Fifth Circuit's adoption of the Seventh Circuit's source rule is the way in which such a rule stamps the court's endorsement onto this IRS practice. Not only did the Fifth Circuit decide that the IRS may do indirectly what it is prohibited from doing directly, the court like the Seventh Circuit in *Thomas* refused to take a position on the propriety and legality of this IRS practice, when the source of the information originates other than from a court document or public record. Because of the Fifth Circuit's adoption of the *Thomas* rule, and its subsequent refusal to rule on the appellants' First Amendment claims, taxpayers in the Fifth Circuit are left to wonder

136. 838 F.2d 899 (7th Cir. 1988).

137. *See* Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989) (citing *Wiemerslage*, 838 F.2d at 902).

138. *See id.*

139. *See* S. REP. NO. 94-938, pt. 1, at 317 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3747 (emphasis added).

140. *See* J. Hudson Duffalo, Comment, *The Buttoned Lip: Controversy Surrounding The Disclosure of Tax Return Information*, 53 ALB. L. REV. 937, 952-53 (1989).

141. *Id.* at 952.

just how far the powers of the IRS extend. An adoption of the Tenth Circuit's rule in *Rodgers v. Hyatt* would have laid such curiosity to rest.

D. Lampert *"Confidentiality" and Why* Rodgers *is the More Logical Choice*

The Ninth Circuit's decision in *Lampert* was premised on a misconception of the central purpose of Congress's enactment of I.R.C. § 6103. According to the Ninth Circuit, the primary central purpose was to "prohibit only the disclosure of *confidential tax return information.*"[142] According to the Ninth Circuit, a taxpayer has no privacy interest in her return information once that information has been lawfully disclosed in the public domain.[143] As far as the Ninth Circuit is concerned, the confidentiality and non-disclosure provisions of the statute are not to be read together.[144] The non-disclosure provisions of the statute would only seem to come into play after a judicial determination that certain information is indeed "confidential."[145] Thus, for courts considering whether to adopt the *Lampert* rule, "the issue to be resolved is whether confidentiality and disclosure should be construed as complementary or as separate and independent protections under the statute."[146]

Some commentators have taken the position that the Ninth Circuit was correct in its interpretation of I.R.C. § 6103 in *Lampert.*[147] Agreeing with the Ninth Circuit in *Lampert*, they question the reasoning that an unauthorized disclosure can come about from non-confidential information, arguing that confidentiality, rather than disclosure, is the overriding concern of the statute.[148] Several problems lie behind such reasoning and therefore, the central holding of *Lampert.* First, the caption of I.R.C. § 6103 reads "[c]onfidentiality *and disclosure* of returns and return information."[149] Second, the statute reads "[r]eturns and return information shall be confidential, *and* except as authorized by this title . . . no officer or employee of the United States, . . . *shall disclose* any return or return information."[150] When Congress enacted I.R.C. § 6103, Congress intended for the confidentiality and disclosure provisions to be read together; therefore, any interpretation that focuses solely on the confidentiality provision,

142. Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (emphasis added).
143. *See id.*
144. *See id.*; *see also* Michael G. Little, *Extra-Judicial Discussion of Taxpayer Information: The IRS Bully Is Still On The Block*, 43 FLA. L. REV. 1041, 1062 (1991).
145. *See Lampert*, 854 F.2d at 338.
146. Little, *supra* note 144, at 1045.
147. *See* Duffalo, *supra* note 140, at 939 (claiming that the disclosure prohibitions of I.R.C. § 6103 are only in place to ensure confidentiality of confidential information).
148. *See id.* at 961.
149. I.R.C. § 6103 (1997) (emphasis added).
150. *Id.* at § 6103(a)(1) (emphases added).

and excludes the prohibition against disclosure, misinterprets the plain meaning of the statute.

The proper interpretation of the confidentiality provision in I.R.C. § 6103 calls for returns and return information to remain confidential *with the government* unless release is specifically authorized. Other commentators agree.[151] Congress could just as easily have declared that returns and return information shall be confidential and no officer or employee of the United States may disclose such information *unless the recording of such information in public records removes its "confidential" nature*, but it did not. Confidentiality is a matter of degree, and simply because material may be available for public inspection, it should not be implied that the public already has or ever will obtain knowledge of such information. "[S]imply because documents are available does not mean that the public will ever know or ever care to know about the information contained in them."[152] Whether public information is found in a court opinion or a public record, the public awareness of such information is generally very limited. Thus, neither the Sixth nor the Ninth Circuit has offered a logical guide in enforcing I.R.C. § 6103.

The reasoning of *Lampert* is further flawed because the taxpaying public is subject to, and at the mercy of, what individual government agents deem to be "confidential" at any given moment. For this reason, the rule adhered to by the Tenth Circuit provides not only the greatest protection for actually maintaining the confidentiality of taxpayers' tax return information, but also works against the potential for abusive practices by government employees in positions of power. The issuance of a press release publicizing a tax-evasion conviction may indeed strike fear in some; however, the effectiveness of such publicity has been brought into question,[153] and the potential success this practice has in deterring tax evasion cannot be the only consideration.

In forging the disclosure exceptions to I.R.C. § 6103, Congress sought to balance taxpayers' privacy interests against the government's need to use that information to encourage taxpayer compliance.[154] When taxpayers have little trust in the government, and the officers and employees that work for it, they may be less inclined to be faithful to its mandates when tax day rolls around each year. If the federal government desires respect from taxpayers in its so-called vol-

151. *See* Little, *supra* note 144, at 1062 (citing S. REP. NO. 94-938, pt. 1, at 317-18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3747, for the proposition that the central purpose of Congress enacting the statute was to prevent government abuses of taxpayer information).

152. *Id.* at 1061.

153. *See id.* at 1065-66.

154. *See* S. REP. NO. 94-938, pt. 1, at 317 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3747.

untary assessment system, it must give respect in return.[155] One way to achieve the greatest degree of respect between the government and taxpayers is to ensure that government agents are not allowed to abuse power simply because it is there for the taking.

E. *Supreme Court's Statements Suggest Turning Away From* Lampert *and Adopting* Rodgers

Over a decade ago, the Supreme Court reviewed § 6103 in the case of *Church of Scientology of California v. Internal Revenue Service*.[156] One commentator has noted that the Court's statements on the scope of § 6103 in that case merely provide a starting point for analyzing the true scope of the statute.[157] However, the Court's opinion might indeed suggest much more. The case did not address the issue of IRS press releases. It concerned the issue of whether the IRS could be forced to turn over return information pursuant to a Freedom of Information Act request in which the petitioners claimed disclosure would not violate § 6103 if identifying information was redacted.[158] The Court held that such redacted material would still constitute return information within the meaning of § 6103(b). Even though identifying material could not be gleaned from the documents, such alterations would not make the documents discloseable.[159] Although the case mainly concerned what constitutes return information under the meaning of I.R.C. § 6103(b), the decision shows that the Court will not brush aside lightly the mandate of § 6103's non-disclosure provisions. Furthermore, if all identifying information had been redacted and the documents handed over to the petitioners, the fear of the loss of confidentiality would be lacking. The petitioners would not have known whose return information they had. Perhaps the Court believes that the confidentiality factor is not the primary concern of the statute, as the Ninth Circuit suggests. The Supreme Court denied certiorari in *Lampert*,[160] and until the Court takes a stand on the issue of whether the IRS may issue press releases publicizing tax convictions, the battle will continue to be waged in the courts. Now that yet another circuit has entered the field, perhaps the Supreme Court will decide the time is right for a decision.

CONCLUSION

The Fifth Circuit adopted the wrong position on the disclosure of taxpayer information through IRS press releases in *Johnson v. Saw-*

155. *See* Little, *supra* note 144, at 1067.
156. 484 U.S. 9 (1987).
157. *See* Duffalo, *supra* note 140, at 955-56.
158. *See Church of Scientology*, 484 U.S. at 10-11.
159. *See id.* at 18.
160. *See* Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied,* 490 U.S. 1034 (1989).

yer.[161] If the Fifth Circuit truly believes that it is the domain of Congress to "strike the balance" between taxpayer's privacy interests and the government's interest in disclosing such information, its adoption of the Seventh Circuit's source rule was not the most effective way to further that position. It would seem that Congress has already struck the balance in the favor of taxpayers, through the general prohibition that returns and return information shall remain confidential and non-discloseable unless specifically authorized. The Seventh Circuit's source rule creates another exception for administrative officials, but it lacks legislative support. Perhaps, the Fifth Circuit's own words in *Johnson* express better than any why the rule of *Rodgers v. Hyatt,*[162] the lack-of-statutory-authorization rule, is the more appropriate judicial path to follow in interpreting I.R.C. § 6103. "IRS agents . . . are not members of the media and therefore have no First Amendment responsibility to report on criminal proceedings or other governmental operations."[163]

Congress explicitly protected taxpayers' rights when it drafted the sweeping statutory language of I.R.C. § 6103. It is not the place of the courts to find exceptions where Congress has provided for none. The statute was drafted to tie the hands of government agents in an area ripe for potential abuse. Courts seeking to take away taxpayers' rights should return to basics. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."[164]

Darrell Calvin

161. 120 F.3d 1307 (5th Cir. 1997).
162. 697 F.2d 899 (10th Cir. 1983).
163. *Johnson*, 120 F.3d at 1324.
164. Marbury v. Madison, 5 U.S. 137, 163 (1803).