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Presidential Tax Transparency

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Whether the public should have access to the tax returns of the President of the United States, and those who seek the office, is the focus of acute attention and debate. President Donald Trump's refusal to disclose his tax returns throughout his campaigns and presidency has fueled multiple legislative public disclosure proposals. In March 2021, the U.S. House of Representatives passed legislation as part of the For the People Act of 2021 that would require Presidents, Vice Presidents, and nominees to publicly disclose several years of their tax returns through the Federal Election Commission. Many state legislatures have considered similar requirements for candidates who seek to appear on state primary and general election ballots. Proponents of these measures argue that public disclosure of tax returns could expose conflicts of interest, reveal the President's and candidates' annual tax liability and tax rates, and, most importantly, enable the public to observe whether the President or candidates have engaged in tax evasion, pursued tax shelters and other tax avoidance, and participated in audits or tax controversies with the IRS.

This Article intervenes in the disclosure debate by exploring whether, and to what extent, mandatory public disclosure of tax returns would achieve the policy objective of enabling voters to observe candidates' and elected officials' compliance with the tax law. To consider this question, the Article examines information presented in federal income tax returns and reviews the publicly

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disclosed tax returns of Presidents, Vice Presidents, and major party candidates from President Richard Nixon through President Joseph Biden. The primary claim of this Article is that mandatory public disclosure of an elected official's or candidate's federal income tax returns alone would provide the public with only a partial and one-sided view of that individual's tax compliance. This incomplete image is due to the structure of the federal income tax and tax returns themselves and opportunities for strategic reporting and disclosure by elected officials and candidates.

At the same time, the Article argues that public disclosure of tax compliance, if it were possible, could provide valuable information to the electorate, increase public understanding of the tax system, and enable public oversight over the taxing authority. To enhance the public's ability to evaluate tax compliance, the Article presents an alternative model of mandatory public disclosure that would include public disclosure not only of tax returns, but also of documents and processes that would highlight tax actions of both candidates and elected officials and the IRS.

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I. INTRODUCTION

Whether the public should have access to the tax returns of the President of the United States, and those who seek the office, is the focus of acute attention and debate. From his first days as a candidate in 2015 through the end of his term, President Donald J. Trump described his tax returns as “very beautiful,”¹ “extremely complex,”²—and his effective tax rate as “none of your business.”³ As a result of this stance, policymakers, scholars, and journalists criticized Trump for violating a forty-year norm of

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1. *Meet the Press* (NBC broadcast Jan. 24, 2016), <https://www.nbcnews.com/meet-the-press/meet-press-january-24-2016-n503241> [<https://perma.cc/7Q5Z-ZGJ3>] (interviewing Donald Trump).
 2. Bob Bryan, *Trump Has a New Excuse for Declining to Release His Tax Returns as Democrats Prepare Investigative Blitz*, BUSINESS INSIDER (Nov. 7, 2018), <https://www.businessinsider.com/trump-tax-returns-democrats-house-midterm-election-2018-11> [<https://perma.cc/J9KT-KQKD>] (quoting President Donald Trump).
 3. Aaron Elstein, *Trump on His Tax Rate: ‘None of Your Business,’* CRAIN’S NEW YORK (May 13, 2016), <https://www.craigslist.com/article/20160513/BLOGS02/160519926/donald-trump-on-his-tax-rate-none-of-your-business> [<https://perma.cc/B546-4JE2>].

presidential tax return disclosure,⁴ thousands of people joined “Tax March” protests in over 150 locations throughout the United States in 2017,⁵ multiple committees in the U.S. House of Representatives launched investigations and issued subpoenas,⁶ and the U.S. Supreme Court ruled on prosecutors’ attempts to obtain the returns.⁷ Throughout these events, President Trump consistently deferred, and ultimately declined, the release of his returns to the public,⁸ even after a major *New York Times* report published in 2020 alleged that he paid only \$750 in federal income taxes in both 2016 and 2017 and zero federal income taxes in many prior years.⁹ While Trump certainly broke with precedent by refusing to disclose his returns to the public, he offered a legal basis for withholding them: the Internal Revenue Code provides that, without a taxpayer’s consent, all “returns and return information shall be confidential.”¹⁰

President Trump’s unique refusal to disclose any tax return information has fueled numerous federal and state legislative public disclosure proposals. In March 2021, as part of a major democracy reform bill, the For the People Act of 2021,¹¹ the U.S. House of Representatives passed

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4. See Tom Kertscher, *Is Donald Trump the Only Major-Party Nominee in 40 Years Not to Release His Tax Returns?*, POLITIFACT (Sept. 28, 2016), <https://www.politifact.com/factchecks/2016/sep/28/tammy-baldwin/donald-trump-only-major-party-nominee-40-years-not> [<https://perma.cc/RX3D-69CF>].
 5. See *Trump Tax March: Thousands Urge President to Release Finances*, BBC (Apr. 16, 2017), <https://www.bbc.com/news/world-us-canada-39610443> [<https://perma.cc/UM3T-EX35>].
 6. See, e.g., Naomi Jagoda, *House Chairman Issues Subpoenas for Trump’s Tax Returns*, THE HILL (May 10, 2019), <https://thehill.com/homenews/house/443184-house-chairman-issues-subpoenas-for-trumps-tax-returns> [<https://perma.cc/QN9P-UMR6>].
 7. *Trump v. Vance*, 140 S. Ct. 2412 (2020).
 8. See Katie Rogers, *Trump on Releasing His Tax Returns: From ‘Absolutely’ to ‘Political Prosecution,’* N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/2020/07/09/us/politics/trump-taxes.html> [<https://perma.cc/74FT-A5J5>].
 9. Russ Buettner, Susanne Craig & Mike McIntire, *The President’s Taxes: Long-Concealed Records Show Trump’s Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html> [<https://perma.cc/FT2W-Z5EX>].
 10. I.R.C. §§ 6103(a), (b) (2018).
 11. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

legislation that would require public disclosure by Presidents, Vice Presidents, and nominees of ten years of individual and business income tax returns through the Federal Election Commission (FEC).¹² This legislation passed the House previously¹³ and has appeared in another legislative proposal in similar form.¹⁴ At the state level, California enacted legislation in 2019 that would have required presidential and gubernatorial candidates to publicly disclose their federal income tax returns in order to appear on the primary ballot¹⁵ (though the California Supreme Court later struck down the provisions regarding presidential candidates as violating the state constitution).¹⁶ Prior to the 2020 presidential election, many state legislatures considered similar measures.¹⁷

Proponents of mandatory public tax disclosure for elected officials and candidates consistently describe several common objectives. First, they note that tax returns could provide details of a candidate's business relationships and sources of income and, possibly, expose conflicts of interest.¹⁸ Second, they explain that a public disclosure requirement would enable voters to observe the President's or a candidate's annual federal

12. *Id.*

13. For the People Act of 2019, H.R. 1, 116th Cong. § 10001 (2019).

14. Presidential Tax Transparency Act, S. 2979, 114th Cong. § 2 (2016).

15. Presidential Tax Transparency and Accountability Act, S. 27, 2018-2019 Reg. Sess. (Cal. 2019).

16. *Patterson v. Padilla*, 451 P.3d 1171, 1191 (Cal. 2019).

17. *See, e.g.*, S. 119, 218th Leg., Reg. Sess. (N.J. 2019); S. 150, 29th Leg., Reg. Sess. (Haw. 2017); S. 0982, 100th Gen. Assemb., Reg. Sess. (Ill. 2019); S. 26, 202nd State Leg., Reg. Sess. (N.Y. 2018); S. 888, 2017 Leg. Assemb., Reg. Sess. (Ore. 2017); S. 247, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017). For further discussion, see *infra* Section II.B.

18. *See, e.g.*, Norman Eisen & Richard W. Painter, *What Trump's Tax Returns Could Tell Us About His Dealings with Russia*, POLITICO (Oct. 31, 2016), <https://www.politico.com/magazine/story/2016/10/donald-trump-taxes-russia-214405> [<https://perma.cc/43PV-LG3R>]; Laurence H. Tribe, Richard W. Painter & Norman L. Eisen, *Candidates Who Won't Disclose Taxes Shouldn't Be on the Ballot*, CNN (Apr. 14, 2017), <https://www.cnn.com/2017/04/14/opinions/state-laws-requiring-tax-return-disclosure-legal-tribe-painter-eisen/index.html> [<https://perma.cc/86SA-NBAK>]; Sen. Ron Wyden, *Why Americans Care About Trump's Tax Returns*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/opinion/why-americans-care-about-trumps-tax-returns.html> [<https://perma.cc/847G-T4YE>]. For further discussion, see *infra* Section II.C.1.

income tax liability and effective tax rate.¹⁹ This information, they suggest, would allow voters to compare the tax burdens faced by different candidates and also to judge whether candidates face different tax burdens than themselves.²⁰ Last, and most importantly, they assert that mandatory public disclosure of tax returns is necessary to enable the public to determine whether the presidential candidates, the President, and the Vice President have engaged in tax evasion, pursued tax shelters and other forms of tax avoidance, including by taking advantage of “loopholes,”²¹ and participated in audits or tax controversies with the Internal Revenue Service (IRS). This information is relevant to voters, they argue, because it reveals whether the President or candidate is a law-abiding individual or is, as President Richard Nixon famously commented, “a crook.”²²

This Article intervenes in the disclosure debate by exploring whether, and to what extent, mandatory public disclosure of tax returns would

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19. See, e.g., Mark Shields, *Character Truly is Destiny*, CREATORS SYNDICATE (May 28, 2016), <https://www.creators.com/read/mark-shields/05/16/character-truly-is-destiny> [<https://perma.cc/ZU7A-QYSS>] (discussing effective tax rate); Editorial, *Donald Trump Ducks Tax Disclosure*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/01/opinion/donald-trump-ducks-tax-disclosure.html> [<https://perma.cc/PQ6E-Z2SU>] (discussing effective tax rate); Vanessa Williamson, *What Trump’s Tax Returns Tell Us: The Public Needs to See More*, BROOKINGS (Mar. 16, 2017), <https://www.brookings.edu/blog/fixgov/2017/03/16/what-trumps-tax-returns-tell-us-the-public-needs-to-see-more> [<https://perma.cc/J3JA-JB4B>]. For further discussion, see *infra* Section II.C.2.
 20. See *infra* Section II.C.2.
 21. Erwin Chemerinsky, *Requiring Candidate Tax Returns Is Legal*, PRESS DEMOCRAT (Aug. 3, 2019), <https://www.pressdemocrat.com/article/opinion/chemerinsky-requiring-candidate-tax-returns-is-legal> [<https://perma.cc/TS6W-Z9TV>]; see, e.g., Joseph J. Thorndike, *Presidential Tax Disclosure Is Important – and Not Because of Trump*, TAX NOTES (Dec. 16, 2019), <https://www.taxnotes.com/tax-notes-today-federal/information-disclosure/presidential-tax-disclosure-important-and-not-because-trump/2019/12/16/2bnzh> [<https://perma.cc/CT7U-P83Y>]; Mitchell Zuckoff, *Why We Ask to See Candidates’ Tax Returns*, N.Y. TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/06/opinion/why-we-ask-to-see-candidates-tax-returns.html> [<https://perma.cc/9RNA-HZ9H>]. For further discussion, see *infra* Section II.C.3.
 22. *Transcript of Nixon’s Question and Answer Session with A.P. Managing Editors*, N.Y. TIMES (Nov. 18, 1973), <https://www.nytimes.com/1973/11/18/archives/transcript-of-nixons-question-and-answer-session-with-a-p-managing.html> [<https://perma.cc/Y2CR-V5AP>].

achieve the policy objective of enabling voters to observe candidates' and elected officials' compliance with the tax law. To consider this question, the Article examines information presented in federal income tax returns and reviews the publicly disclosed tax returns of Presidents, Vice Presidents and major party candidates from President Richard Nixon through President Joseph Biden.²³ The primary claim of this Article is that mandatory public disclosure of an elected official's or candidate's federal income tax returns alone would provide the public with only a partial and one-sided view of that individual's tax compliance. This incomplete image is due to the structure of the federal income tax and tax returns themselves and opportunities for strategic reporting and disclosure by elected officials and candidates. At the same time, the Article argues that public disclosure of tax compliance, if it were possible, could provide valuable information to the electorate, increase public understanding of the tax system, and enable public oversight over the IRS. To enhance the public's ability to evaluate tax compliance, the Article presents an alternative model of mandatory public disclosure that would include public disclosure not only of tax returns, but also of documents and processes that would highlight tax actions of both candidates and elected officials and the IRS.

Why do federal income tax returns provide an incomplete view of tax compliance? The government has defined tax compliance as occurring where a taxpayer timely files and reports required tax information, correctly self-assesses taxes owed and makes tax payments to the taxing authority voluntarily.²⁴ An individual's tax return, however, reflects only the *taxpayer's* self-assessment of taxes owed. The return may reveal whether the individual has claimed aggressive or conservative tax positions, but it does not reflect the IRS's view of whether the taxpayer has complied with the law.²⁵ Further, the tax return itself provides taxpayers with limited opportunity to explain tax positions on the return or provide supporting

23. For primary source tax returns and related documents, I accessed the Presidential Tax Returns archive hosted by Tax Analysts. *Presidential Tax Returns*, TAXNOTES, <https://www.taxnotes.com/presidential-tax-returns> [https://perma.cc/D59W-FSNX].

24. See, e.g., Internal Revenue Serv., *Update on Reducing the Federal Tax Gap and Improving Voluntary Compliance*, U.S. DEP'T TREASURY iii (Jul. 8, 2009), https://www.irs.gov/pub/newsroom/tax_gap_report_final_version.pdf [https://perma.cc/7NAG-GNCL]; Internal Revenue Serv., *Reducing the Federal Tax Gap: A Report on Improving Voluntary Compliance*, U.S. DEP'T TREASURY 1, 6 (Aug. 2, 2007), https://www.irs.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf [https://perma.cc/ZAU7-T9JF].

25. See *infra* Section III.A.1.

documentation.²⁶ Last, a publicly disclosed tax return does not necessarily reflect whether the IRS has audited the taxpayer's return, imposed tax penalties, or entered into any settlements with the taxpayer.²⁷

In addition, candidates and elected officials may influence the public's view of their tax compliance by pursuing strategic tax return filing and disclosure techniques. Unless the public disclosure requirement is comprehensive, candidates and elected officials may selectively disclose tax return information.²⁸ Likewise, candidates who own businesses rather than who earn wages as employees can manipulate the amount of their taxable income and tax liability for a particular tax year where the return is subject to disclosure. Candidates may also present the public with a partial view of their tax planning and tax compliance by organizing their business affairs in business entities or by filing tax returns separately from their spouses.²⁹

After outlining these obstacles to transparency, the Article presents a normative case for enhanced public disclosure of candidates' and elected officials' tax compliance, if this disclosure were even possible.³⁰ More complete disclosure of tax compliance and tax planning could provide voters with valuable information about candidates' and elected officials' views of the law generally, especially where, like tax law, it features uncertainty and opportunities for personal benefit. Moreover, as a result of the high profile of the President and presidential candidates, a public disclosure requirement that provided more information about whether various tax strategies comply with the tax law could result in greater public understanding and debate of the tax system itself. And a public disclosure

26. See *infra* Section III.A.2.

27. See *infra* Section III.A.3.

28. See *infra* Section III.B.1.

29. See, e.g., Internal Revenue Serv., *Form 1040X: Amended U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 1 (2003), https://s3.amazonaws.com/pdfs.taxnotes.com/2019/J_Kerry_2003.pdf [<https://perma.cc/LRC2-FNUD>] (tax forms of John F. Kerry, claiming married-filing-separately status); Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY (2006-2007), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/79S4-6S8D>] (tax forms of John McCain); see also Katharine Q. Seelye & David E. Rosenbaum, *Campaign 2004: Disclosure; Privacy of Wife's Fortune Casts a Shadow over Kerry*, N.Y. TIMES (Apr. 25, 2004), <https://www.nytimes.com/2004/04/25/us/campaign-2004-disclosure-privacy-of-wife-s-fortune-casts-a-shadow-over-kerry.html> [<https://perma.cc/HH43-SWN8>].

30. See *infra* Section IV.A.

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measure that included the actions of the IRS could enable the public to monitor whether the agency is enforcing the tax law fairly and independently.

In contrast to current proposals to require public disclosure of tax returns, the Article presents an alternative model under which both taxpayer information, including tax returns, *and* IRS actions would be subject to mandatory public disclosure, allowing the public to have an enhanced ability to observe and analyze a candidate's or official's tax compliance.³¹

After describing this model, the Article proposes a comprehensive list of disclosure requirements that policymakers should introduce to provide voters with a more complete understanding of the tax compliance of the President, Vice President, and presidential candidates.³² These proposals, which could be applied to any type of tax return subject to mandatory disclosure, would include: complete tax returns for the covered years, including all amended returns, forms schedules, taxpayer statements, attachments (provided by the IRS directly to the FEC); the results of any IRS audits of the individual's tax returns that are required to be disclosed, including the IRS audits of the President and Vice President that occur currently; a review of the IRS's annual audit of the President by an external institution, such as the Joint Committee on Taxation;³³ documents that show any imposition of tax penalties or settlements with the IRS that have occurred regarding any tax returns that are required to be publicly disclosed; and, last, written tax advice that the candidate or official has received from an advisor regarding a tax position claimed on a return, where the individual paid a minimum fee for the advice.

Proposals to mandate public disclosure of the tax returns of candidates and elected officials raise a variety of important legal, normative, and practical questions. While other scholars have considered whether state and federal proposals would conflict with provisions of the U.S. Constitution,³⁴ this Article does not explore the potential constitutional

31. *See infra* Section IV.B.

32. *See id.*

33. *See infra* Section IV.B.3; I.R.C. §§ 6405(a), 6405(b) (2018).

34. Some legal scholars have questioned whether aspects of the For the People Act of 2021, including provisions that require presidential tax return disclosure, violate constitutional provisions. *See, e.g.,* Adam Liptak, *Constitutional Challenges Loom Over Proposed Voting Bill*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/2021/05/05/us/voting-rights-bill->

challenges to mandatory public tax return disclosure rules that could be enacted by Congress. Rather, the primary objectives of this Article are to examine whether mandatory public disclosure would reveal candidates' and elected officials' compliance with the tax law, consider the normative justification for mandatory public disclosure, and suggest reforms to current mandatory public disclosure proposals in light of this analysis.

The remainder of this Article proceeds as follows. Part II describes the evolution of voluntary tax disclosure in presidential politics, legislative proposals, and the primary objectives of proponents of mandatory public disclosure. Part III shows how mandatory public disclosure of tax returns alone provides only a partial view of a candidate's or elected official's tax compliance. Part IV presents and applies an alternative model of mandatory public tax disclosure. Part V concludes.

II. THE PURSUIT OF PRESIDENTIAL TAX TRANSPARENCY

For over forty years prior to the inauguration of President Donald Trump, every President has shared their personal tax returns with the public.³⁵ President Trump's unprecedented decision to withhold all tax returns raises several important questions for policymakers, scholars, and voters. This Part discusses the evolution of voluntary tax disclosure in presidential politics, legislative proposals to mandate public disclosure of tax returns by Presidents, Vice Presidents, and candidates, and the primary objectives of proponents of mandatory disclosure.

legal.html [https://perma.cc/T5LL-VDUZ] (quoting legal scholar, John O. McGinnis). Other legal scholars have asserted that the federal tax return public disclosure requirements for the President and presidential candidates would be constitutional. *See, e.g.*, Laurence Tribe (@tribelaw), TWITTER (Aug. 24, 2016, 10:01 PM), <https://twitter.com/tribelaw/status/768629289034055680> [https://perma.cc/9KZ6-CQFV] ("The Presidential Tax Transparency Act would indeed be constitutional"). Between these viewpoints, some scholars, such as Derek Muller, argue that state legislatures cannot enact tax return disclosure requirements for presidential candidates without violating constitutional provisions, but that Congress could amend federal financial disclosure requirements without violating the Constitution. *See, e.g.*, Derek T. Muller, *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61, 92-125 (2021); *see also infra* note 327.

35. *See* Joseph J. Thorndike, *From Nixon to Trump: A Short History of Voluntary Tax Disclosure*, TAX NOTES (Feb. 11, 2019); *Presidential Tax Returns*, *supra* note 23.

A. *The Norm of Disclosure*

When a candidate or elected official shares personal tax returns with voters, the act is one of conformity with a norm, not compliance with a law. The Internal Revenue Code contains a statutory presumption that tax returns and return information are confidential and may not be disclosed by the IRS or other federal and state employees, except under certain circumstances. Section 6103 of the Internal Revenue Code protects the confidentiality of “returns” and “return information” and defines both terms to include any: tax or information return; amendments filed with the IRS; and taxpayers’ identities, income, tax deductions and credits, or audit and penalty history, among many other items.³⁶ While this statute shields tax returns from public view, almost all modern Presidents and presidential candidates have shared their returns voluntarily.

1. Presidential Tax Disclosure Over Time

The origin of voluntary public disclosure can be traced to the controversy surrounding the personal tax returns of President Richard Nixon and the resulting actions of journalists, the Joint Committee on Taxation, the IRS, and, eventually, President Nixon himself.

Nixon’s Tax Returns. When President Nixon famously stated “I’m not a crook” in November 1973, he was referring not to the Watergate break-in, but rather to a separate scandal involving his personal tax returns.³⁷ As tax historian Joseph Thorndike has documented,³⁸ in 1973, journalists reported that in 1970, President Nixon had paid only \$793 of federal income tax on reported taxable income of \$262,943 and, in 1971, had paid only \$878 of

36. I.R.C. §§ 6103(a), (b) (2018).

37. R.W. Apple, Jr., *Nixon Declares He Didn’t Profit from Public Life*, N.Y. TIMES (Nov. 18, 1973), <https://www.nytimes.com/1973/11/18/archives/nixon-declares-he-didnt-profit-from-public-life-predicts-both.html> [<https://perma.cc/PB8V-RVHR>] (quoting President Nixon at press conference at Walt Disney World in Orlando, Florida regarding his 1970 and 1971 personal tax returns).

38. Joseph J. Thorndike, *JCT Investigation of Nixon’s Tax Returns*, TAX NOTES (Jun. 14, 2016), <https://www.taxnotes.com/tax-notes-today-federal/tax-history/jct-investigation-nixons-tax-returns/2016/06/14/18513606> [<https://perma.cc/SX4Z-28DZ>].

federal income tax on reported taxable income of \$262,385.³⁹ Eventually, investigators traced the low tax payments to a deduction Nixon had claimed on his 1969 tax return, which he carried over to later years.⁴⁰ The deduction Nixon claimed was for a charitable gift of his personal papers, which he stated had an appraised value of \$576,000, to the National Archives.⁴¹ In late 1973, yielding to demands for his tax returns, President Nixon released his returns and financial records from 1968 to 1972 to the then-named Joint Committee on Internal Revenue Taxation and instructed the Committee to conduct a thorough review and inform him of any taxes owed.⁴²

After months of investigation, the Joint Committee on Internal Revenue Taxation issued a voluminous report in 1974.⁴³ The Joint Committee found that Nixon had misreported significant items on his 1969 to 1972 tax returns, including by improperly claiming a charitable contribution deduction for donating his personal papers and by failing to report capital gains on the sale of properties in California and New York, among many other items.⁴⁴ The total tax deficiency, according to the Joint Committee, was \$476,431 in unpaid taxes and interest.⁴⁵ At the same time, the IRS concluded that Nixon owed \$432,787 in unpaid tax and interest for the years in question.⁴⁶ While Nixon attributed the underpayment of taxes to his

39. Jack White, *Nixon's Income Tax Bill \$1,670 for Two Years*, PROVID. J. (Oct. 3, 1973), <https://www.providencejournal.com/story/news/2020/09/28/from-journal-archives-nixonrsquo-income-tax-bill-1670-for-two-years/42698495> [https://perma.cc/QNF6-4ZW2]; JOINT COMM. ON INTERNAL REVENUE TAX'N, U.S. CONG., EXAMINATION OF PRESIDENT NIXON'S TAX RETURNS FOR 1969 THROUGH 1972, 1, 7 (1974).

40. JOINT COMM. ON INTERNAL REVENUE TAX'N, *supra* note 39, at 9-94.

41. *Id.*

42. See John Herbers, *Nixon Reveals Financial File, Asks Congress Panel to Decide if He Owes \$267,000 More in Tax*, N.Y. TIMES (Dec. 9, 1973), <https://www.nytimes.com/1973/12/09/archives/voluminous-data-emergency-preparation-president-concedes-material.html> [https://perma.cc/8UCG-5HLT]; Thorndike, *supra* note 38; James S. Byrne, *Joint Committee Good Choice for Presidential Audit*, TAX NOTES (Dec. 10, 1973).

43. JOINT COMM. ON INTERNAL REVENUE TAX'N, *supra* note 39.

44. *Id.*

45. *Id.*

46. See Thorndike, *supra* note 38 (describing IRS audit of 1971 and 1972 Nixon returns); *Taxation: Many Unhappy Returns*, TIME (Apr. 15, 1974), <http://content.time.com/time/magazine/article/0,9171,911153,00.html>

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advisers and tax return preparers, he ultimately agreed to pay the tax deficiency to the IRS.⁴⁷

Post-Nixon Era. In contrast to Nixon, President Gerald Ford published a 10-year summary of his tax return information during his first year in office, though he did not disclose his actual returns.⁴⁸ Since then, Presidents, Vice Presidents and presidential candidates have shared their tax returns voluntarily with the public,⁴⁹ though their approaches to disclosure have differed. Some have released their individual federal income tax return, IRS Form 1040, including all accompanying schedules and taxpayer statements, and even state income tax returns.⁵⁰ Others have released only excerpts of their individual federal income tax returns, but have omitted all other documentation.⁵¹ Some candidates have released decades of returns,⁵²

[<https://perma.cc/MCJ9-CFNM>]; *Nixon: I'll Pay 465G in Taxes*, N.Y. DAILY NEWS, Apr. 4, 1974; *Nixon Reported to Pay Back Tax*, N.Y. TIMES, (May 1, 1974), <https://www.nytimes.com/1974/05/01/archives/nixon-reported-to-pay-back-tax-most-of-467000-bill-is-satisfied-an.html> [<https://perma.cc/Z4MG-AY3P>].

47. Press Release, The White House, The President's Income Taxes (April 3, 1974), <https://www.presidency.ucsb.edu/documents/white-house-statement-about-the-presidents-income-tax-returns> [<https://perma.cc/CCS8-DLL2>].
48. See Thorndike, *supra* note 35; James M. Naughton, *Ford Paid \$94,568 in 1975 U.S. Taxes*, N.Y. TIMES (Apr. 21, 1976), <https://www.nytimes.com/1976/04/21/archives/ford-paid-94568-in-1975-us-taxes-looks-to-reagan-as-well-as-other.html> [<https://perma.cc/LX2K-2JX9>].
49. See Thorndike, *supra* note 35.
50. See, e.g., Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return and Form 540: California Resident Income Tax Return*, U.S. DEP'T TREASURY (2019), https://s3.amazonaws.com/pdfs.taxnotes.com/2020/K_Harris_2019.pdf [<https://perma.cc/LJC8-E8D5>] (tax forms of Kamala D. Harris and Douglas C. Emhoff).
51. See Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY (2001, 2004-2007), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/3TVD-WTB4>] (tax forms of Richard B. Cheney and Lynne V. Cheney).
52. See, e.g., Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY (1981-2013), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/QF6P-7254>] (tax forms of John E. Bush and Columba M. Bush).

while others have only disclosed them for the two most recent years.⁵³ And while some candidates have published their tax returns within days of launching their campaigns,⁵⁴ or even before officially announcing their candidacies,⁵⁵ others have waited for months to disclose.⁵⁶

2. The Trump Tax Returns

Despite calls from political opponents, commentators, and the public, President Donald J. Trump never disclosed his own tax returns publicly in either of his presidential campaigns or during his presidency.⁵⁷ In contrast, both of Trump's general election opponents, Hillary Clinton in 2016 and

53. See, e.g., Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY (2006-2007), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/79S4-6S8D>] (tax forms of John McCain).

54. See, e.g., Steve Holland, Linda Stern & Emily Flitter, *Candidate Jeb Bush Releases 33 Years of Tax Returns in Show of Transparency*, REUTERS (Jun. 30, 2015), <https://www.reuters.com/article/us-usa-election-bush/candidate-jeb-bush-releases-33-years-of-tax-returns-in-show-of-transparency-idUSKCN0PA1QF20150701> [<https://perma.cc/WSD2-MDRJ>]; Michael Barbaro and Jonathan Martin, *Jeb Bush Announces White House Bid, Saying 'America Deserves Better'*, N.Y. TIMES (Jun. 15, 2015), <https://www.nytimes.com/2015/06/16/us/politics/jeb-bush-presidential-campaign.html> [<https://perma.cc/6WP6-7KSY>] (June 15, 2015 campaign announcement date).

55. See, e.g., Aris Folley, *Warren Releases 10 Years of Tax Returns*, THE HILL (Aug. 22, 2018), <https://thehill.com/blogs/blog-briefing-room/news/403145-elizabeth-warren-releases-10-years-of-tax-returns> [<https://perma.cc/53FX-6X35>]; Senator Elizabeth Warren, *Presidential Campaign Announcement* (Feb. 10, 2019), <https://awpc.cattcenter.iastate.edu/2019/08/01/elizabeth-warren-announces-shes-running-for-president> [<https://perma.cc/TD7A-DJQ5>] (Feb. 10, 2019 campaign announcement).

56. See Nicholas Confessore & David Kocieniewski, *Romney Reveals He Paid 14% Rate in 2011 Tax Return*, N.Y. TIMES (Sept. 21, 2012), <https://www.nytimes.com/2012/09/22/us/politics/under-pressure-romney-offers-more-tax-data.html> [<https://perma.cc/T2TZ-7HYN>].

57. See, e.g., Chris Cillizza, *Why Has Donald Trump Fought So Hard to Keep His Tax Returns Secret?*, CNN (Feb. 23, 2021), <https://www.cnn.com/2021/02/23/politics/donald-trump-tax-returns-scotus/index.html> [<https://perma.cc/7DDK-E3AK>].

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Joseph Biden in 2020, disclosed several decades of personal tax returns.⁵⁸ Trump consistently answered demands for disclosure by stating that his tax returns were under a “routine audit,”⁵⁹ though no law prevented him from disclosing tax returns under IRS audit.⁶⁰

Despite Trump’s refusal to publish his tax returns voluntarily, journalists gained access to the tax returns of Trump and his family through investigative sources.⁶¹ In September 2020, the *New York Times* published a lengthy special report that analyzed over two decades of President Trump’s personal and business tax returns and other financial documents, which its reporters had obtained.⁶² The report contained several notable allegations, including that: Trump paid no federal income tax in 11 of the 18 tax years examined and paid only \$750 in federal income taxes in each of

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58. See Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY (2000-2015), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/EYZ9-Q8YT>] (tax forms of William J. Clinton and Hillary Rodham Clinton, constituting 16 years of returns); Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY (1998-2020), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/75KQ-T7N7>] (tax forms of Joseph R. Biden, Jr. and Jill T. Biden, constituting 23 years of returns).
59. See Rogers, *supra* note 8 (quoting President Trump regarding IRS audit).
60. See Naomi Jagoda, *I.R.S.: Nothing Prevents Trump from Releasing Tax Returns*, THE HILL (Feb. 26, 2016), <https://thehill.com/policy/finance/270964-irs-nothing-prevents-trump-from-releasing-tax-returns> [<https://perma.cc/E6GD-AGM5>] (quoting IRS statement).
61. See David Barstow, Susanne Craig, Russ Buettner & Meghan Twohey, *Donald Trump Tax Records Show He Could Have Avoided Taxes for Nearly Two Decades*, *The Times Found*, N.Y. TIMES (Oct. 1, 2016), <https://www.nytimes.com/2016/10/02/us/politics/donald-trump-taxes.html> [<https://perma.cc/2VNA-ZY67>] (reporting that Trump had declared a \$916 million tax loss on his 1995 personal federal income tax return); Rachel Maddow: *Exclusive Look at Trump’s 2005 Tax Return* (MSNBC broadcast Mar. 14, 2017), <https://www.msnbc.com/rachel-maddow/watch/exclusive-look-at-trump-s-2005-tax-return-898054723694> [<https://perma.cc/D424-6Y2N>] (reporting that in 2005, Trump paid \$38 million in federal income taxes); David Barstow, Susanne Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/interactive/2018/10/02/us/politics/donald-trump-tax-schemes-fred-trump.html> [<https://perma.cc/N75D-MLBV>] (alleging “outright fraud”).
62. Buettner et al., *supra* note 9.

2016 and 2017;⁶³ Trump was engaged in a years-long IRS audit regarding a “worthless stock deduction” related to his abandonment of an Atlantic City, New Jersey casino, which he had claimed and carried back to offset ordinary income from prior years, enabling him to obtain \$72.9 million tax refund in 2010;⁶⁴ Trump Organization business entities deducted large “consulting fees” paid to family members, including his daughter, Ivanka;⁶⁵ and Trump Organization business entities claimed business expense deductions for the cost of haircuts, makeup, fuel, and meals.⁶⁶

In response to President Trump’s steadfast refusal to disclose his returns, several committees in the U.S. House of Representatives issued subpoenas.⁶⁷ The Treasury Department refused to comply citing lack of legitimate purpose,⁶⁸ and President Trump sued to stop his accounting firm and financial institutions from releasing his financial records.⁶⁹ In *Trump v. Mazars USA LLP* and *Trump v. Deutsche Bank AG*,⁷⁰ which involved subpoenas of Trump’s financial records from his accountants and banks, the U.S. Supreme Court rejected Trump’s executive privilege claims, but

63. *Id.*; see also David Leonhardt, *18 Revelations From a Trove of Trump Tax Records*, N.Y. TIMES (Sept. 22, 2021), <https://www.nytimes.com/2020/09/27/us/trump-taxes-takeaways.html> [<https://perma.cc/6WEA-E6WV>].

64. See Daniel Shaviro, *Ten Quick Takeaways from the New York Times’ Bombshell Article on Trump’s Tax Returns*, JUST SECURITY (Sept. 28, 2020), <https://www.justsecurity.org/72604/ten-quick-takeaways-from-the-new-york-times-bombshell-article-on-trumps-tax-returns> [<https://perma.cc/KD8L-N2XC>].

65. See Buettner et al., *supra* note 9; Leonhardt, *supra* note 63.

66. See Buettner et al., *supra* note 9.

67. See, e.g., Letter from Congressman Richard Neal, Chairman, H. Comm. on Ways and Means, to the Honorable Charles P. Rettig, Comm’r, Internal Revenue Serv. (Apr. 3, 2019); Memorandum from Congressman Elijah E. Cummings, Chairman, H. Comm. on Oversight and Reform, to Members of the H. Comm. on Oversight and Reform (April 12, 2019).

68. Letter from Steven Mnuchin, U.S. Treasury Sec’y, to Congressman Richard Neal, Chairman, H. Comm. on Ways and Means (Apr. 23, 2019).

69. *Trump v. Comm. on Oversight & Reform*, 380 F. Supp. 3d 76 (D.D.C. 2019); *aff’d*, 940 F.3d 710 (D.C. Cir. 2019); *reh’g en banc denied*, 2019 U.S. App. LEXIS 33896, at *1 (D.C. Cir. Nov. 13, 2019); *consol. with Trump v. Deutsche Bank AG*, 140 S. Ct. 660 (2019).

70. *Trump v. Vance*, 140 S. Ct. 2412 (2020) (consolidated decision).

required the lower courts to consider whether the subpoenas were justified in light of a set of separation of powers factors that the Court provided.⁷¹

3. Non-Tax Financial Filings

While the President, Vice President, and candidates are not required by law to disclose their tax returns to voters, they are required by the Ethics in Government Act of 1978 to disclose certain non-tax financial information publicly.⁷² Within 30 days of becoming a candidate for President or Vice President, individuals must file a financial disclosure report (OGE Form 278e) with the FEC and, once elected, Presidents and Vice Presidents must file this form with the U.S. Office of Government Ethics annually.⁷³ After reviewing the form, a representative of the Office of Government Ethics certifies on the first page that, based upon the information disclosed, the reviewer is satisfied that the report is complete and that no position disclosed violates federal law regarding conflicts of interest.⁷⁴

Elected officials and candidates who file this financial disclosure form are required to list their employment outside of the U.S. government and the type and amount of income they have received from these positions during the reporting period.⁷⁵ For example, in 2020, then-candidate Joseph Biden disclosed that he held a full-time appointment as a professor at the

71. *Id.* Separately, in July 2019, the House Ways and Means Committee sued the Treasury Secretary and Commissioner of Internal Revenue to enforce its request for six years of President Trump's tax returns. Comm. on Ways & Means v. United States Dep't of Treasury, 2019 U.S. Dist. LEXIS 147260, at *1 (D.D.C. Aug. 29, 2019). *See also* Amandeep S. Grewal, *The President's Tax Returns*, 27 GEO. MASON L. REV. 439, 440 (2020); *Legislative Proposals and Tax Law Related to Presidential and Vice-Presidential Tax Returns: Hearing Before the Subcomm. On Oversight of the H. Comm. on Ways and Means*, 116th Cong. (Feb. 7, 2019) (testimony of George K. Yin). In *Trump v. Vance*, the U.S. Supreme Court held that Article II and the Supremacy Clause of the Constitution do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting president. 140 S. Ct. at 2431; *Trump v. Vance*, 141 S. Ct. 1364 (mem.) (2021) (denying stay).

72. *See* 5 U.S.C. app. §§ 101-505 (2018).

73. 5 U.S.C. app. § 101 (2018); 5 C.F.R. § 2634.201 (2021); *Public Financial Disclosure Guide*, U.S. OFF. GOV'T ETHICS, <https://www.oge.gov/Web/278eGuide.nsf> [<https://perma.cc/Q2YZ-QBMJ>].

74. 5 U.S.C. app. § 106(b) (2018); 5 C.F.R. §§ 2634.605(a)-(b) (2021).

75. 5 U.S.C. app. § 102(a)(6)(A) (2018); 5 C.F.R. § 2634.307 (2021).

University of Pennsylvania from 2017 to the date of the filing of the form.⁷⁶ Individuals must disclose not only their own information, but also their spouses' employment and income information.⁷⁷

In addition, the financial disclosure form requires individuals to describe their assets and personal liabilities. Individuals must list financial assets that they, their spouses, and their dependent children own, and select approximate value from a list of possible ranges (*e.g.*, Vanguard 500 Index Fund, \$250,001-\$500,000).⁷⁸ The rules also require individuals to disclose any liabilities over \$10,000 that they, their spouses, or any dependent children owed at any time during the reporting period, other than certain exceptions, such as mortgages on personal residences.⁷⁹

Although federal government ethics laws appear to mandate transparency regarding elected officials' and candidates' financial interests, the non-tax financial disclosure rules have been criticized as inadequate, especially in the case of candidates who own businesses or are wealthy.⁸⁰ Ethics scholars have argued, for instance, that the value ranges for reported assets are too broad and too low.⁸¹ Kathleen Clark has noted that the highest category under current law is "greater than \$50,000,000," even though over one-third of the liabilities disclosed by President Trump on his annual filing were in this category.⁸² In addition, several scholars have criticized the U.S. Office of Government Ethics for interpreting the law to not require

76. *OGE Form 278e of Joseph R. Biden, Jr., 2020*, BIDEN HARRIS 3 (May 15, 2020) <https://joebiden.com/wp-content/uploads/2020/05/OGE-Form-278e-signed.pdf> [<https://perma.cc/FT6A-VVGS>].

77. 5 U.S.C. app. § 102I(1) (2018); 5 C.F.R. § 2634.311 (2021).

78. 5 U.S.C. app. § 102(a)(1), (a)(3), (e)(1) (2018); 5 C.F.R. §§ 2634.301, 2634.302, 2634.311 (2021).

79. 5 U.S.C. app. § 102(a)(4), (e)(1) (2018); 5 C.F.R. §§ 2634.305, 2634.311 (2021).

80. *See, e.g., Legislative Proposals for Fostering Transparency: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 115th Cong. 40 (Mar. 23, 2017) [hereinafter *Legislative Proposals for Fostering Transparency*] (statement of Richard W. Painter); Kathleen Clark, *Written Testimony for Hearing on "Taxpayer Fairness"*, WAYS & MEANS COMM. 4 (Oct. 13, 2020), <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/REV-K.%20Clark%20Written%20Testimony.pdf> [<https://perma.cc/EWC8-A8UJ>]; DANIEL I. WEINER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUST., *PRESIDENTIAL TRANSPARENCY: BEYOND TAX RETURNS* (2017).

81. *See* Clark, *supra* note 80, at 4.

82. *See id.*

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disclosure of business-related debts, even though these liabilities may raise the same policy concerns as personal liabilities.⁸³ Some critics have also noted that the current disclosure rules require individuals to disclose only the names of entities in which they own stock, making it difficult for the Office of Government Ethics and the public to determine the assets, sources of income, and liabilities of non-publicly traded entities.⁸⁴ Further, critics note that the current financial disclosure rules do not require elected officials and candidates to provide any information regarding their annual tax liabilities or tax payments.⁸⁵

B. Legislative Proposals

In contrast to current law, federal and state legislators have proposed measures that would mandate public disclosure of the tax returns of Presidents, Vice Presidents, and candidates.

Federal Legislative Proposals. In March 2021, as part of the For the People Act of 2021, the U.S. House of Representatives passed legislation that would require public disclosure by Presidents, Vice Presidents, and nominees of ten years of income tax returns, including both individual and business income tax returns.⁸⁶ The House had previously passed this public disclosure measure in 2019, though it did not advance in the Senate.⁸⁷

The public disclosure proposal in the For the People Act of 2021 followed several other legislative proposals that had been introduced previously. For example, the Presidential Tax Transparency Act, introduced in 2016, would have required presidential candidates to submit their individual income tax returns from the three most recent years to the FEC, which would then publish them.⁸⁸ This requirement would have applied only to presidential candidates who were nominated by a major party as its candidate for the general election.⁸⁹

83. *See id.*; *Legislative Proposals for Fostering Transparency*, *supra* note 80, at 5 (testimony of Richard W. Painter).

84. *See* Weiner & Norden, *supra* note 80.

85. *See, e.g.*, Tribe et al., *supra* note 18.

86. *See* For the People Act of 2021, H.R. 1, 117th Cong. § 10001.

87. *See* For the People Act of 2019, H.R. 1, 116th Cong. § 10001.

88. Presidential Tax Transparency Act, S. 2979, 114th Cong. § 2 (2016).

89. *Id.*

Each of the major federal legislative proposals has also included compliance features. For example, under the For the People Act of 2021, if an elected official or candidate failed to disclose a required tax return, the chairman of the FEC would submit to the Secretary of the Treasury a request for the individual's missing return.⁹⁰ The legislation would require the Secretary of the Treasury to redact from any such returns sensitive information necessary to protect against identity theft, and then to submit the returns to the FEC, which would publish them.⁹¹

State Legislative Proposals. State legislatures have also considered measures that would require public tax return disclosure for an individual to appear on the presidential primary ballot. For example, in 2019, California enacted the Presidential Tax Transparency and Accountability Act, which required any presidential candidate or gubernatorial candidate to disclose federal income tax returns from the five most recent tax years in order to appear on the primary ballot.⁹² Many state legislatures have considered or adopted similar measures.⁹³ While several constitutional law scholars and practitioners argued that California's legislation did not violate the U.S. Constitution,⁹⁴ others identified several plausible challenges, including whether California's actions violated the Presidential

90. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

91. *Id.*

92. Presidential Tax Transparency and Accountability Act, CAL. ELEC. CODE § 6880 (West 2019), *invalidated by* Patterson v. Padilla, 451 P.3d 1171 (Cal. 2019).

93. *See, e.g.*, S. 119, 218th Leg., Reg. Sess. (N.J. 2019); S. 150, 29th Leg., Reg. Sess. (Haw. 2017); S. 0982, 100th Gen. Assemb., Reg. Sess. (Ill. 2019); S. 26, 202nd State Leg., Reg. Sess. (N.Y. 2018); S. 888, 2017 Leg. Assemb., Reg. Sess. (Ore. 2017); S. 247, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).

94. *See, e.g.*, Statement of David Boies, Chairman, Boies Schiller Flexner LLP, Office of Governor Gavin Newsom (Jul. 30, 2019), <https://www.gov.ca.gov/2019/07/30/governor-gavin-newsom-signs-sb-27-tax-transparency-bill> [<https://perma.cc/8X6L-LEGF>]; Erwin Chemerinsky, *California's New Law Requiring Presidential Candidates to Disclose Tax Returns Is Constitutional*, L.A. TIMES (Jul. 31, 2019), <https://www.latimes.com/opinion/story/2019-07-31/california-law-candidates-tax-returns-constitutional> [<https://perma.cc/6LTE-7X55>]; Laurence Tribe (@tribelaw), TWITTER (July 30, 2019, 3:28 PM), <https://twitter.com/tribelaw/status/1156285459213012992?s=20> [<https://perma.cc/LP9G-7XPS>].

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Qualifications Clause.⁹⁵ In October 2019, in *Griffin v. Padilla*,⁹⁶ a U.S. district court enjoined the application of California’s tax return disclosure law, holding that the plaintiffs were likely to prevail on the merits of their arguments that, among other constitutional defects, the legislation violated the Presidential Qualifications Clause by preventing candidates that do not disclose their tax returns from appearing on the state primary ballot for President.⁹⁷ Ultimately, the California Supreme Court struck down the legislation regarding presidential candidates, ruling that it violated the state constitution’s requirement for an “inclusive, open presidential primary ballot.”⁹⁸

C. Objectives of Mandatory Public Disclosure

What information would public tax returns reveal and why would it be valuable to voters? Proponents of mandatory public disclosure often point to three categories of information regarding candidates and elected officials that, they argue, tax returns would provide to voters: potential conflicts of interest, tax liability and tax rate, and compliance with the tax law.

95. U.S. CONST. art. II, § 1, cl. 5; *see, e.g.*, Vikram David Amar, *Should States Force Candidates to Disclose Tax Returns?*, NEWSWEEK (Jan. 7, 2017), <https://www.newsweek.com/should-states-force-candidates-disclose-tax-returns-538973> [<https://perma.cc/2FKT-V7VB>]; Richard L. Hasen, *How States Could Force Trump to Release His Tax Returns*, POLITICO (Mar. 30, 2017), <https://www.politico.com/magazine/story/2017/03/donald-trump-tax-returns-release-214950> [<https://perma.cc/5VGV-WUYE>] (noting that the “argument for the tax return gambit is not a slam dunk”); Muller, *supra* note 34, at 62 (arguing that state tax disclosure requirements “fall outside the scope of the states’ constitutional authority to administer federal elections . . .”).

96. 408 F. Supp. 3d 1169 (E.D. Cal. 2019).

97. *Id.* at 1181.

98. *Patterson v. Padilla*, 451 P.3d 1171 (Cal. 2019). In June 2021, the California Secretary of State announced that the mandatory tax return disclosure requirement applied to candidates in California’s 2021 gubernatorial recall election. Press Release, Dr. Shirley N. Weber, Secretary of State Announces Qualifications for Potential Recall Candidates (June 15, 2021), <https://www.sos.ca.gov/administration/news-releases-and-advisories/2021-news-releases-and-advisories/sw21027> [<https://perma.cc/4HXP-EVUS>].

1. Conflicts of Interest

Proponents of mandatory public disclosure argue that tax returns could reveal potential conflicts of interest that the public should know about before voting to elect or reelect a candidate. Scholars who have advocated for mandatory disclosure, such as Laurence Tribe, Richard Painter, and Norman Eisen, have argued that the non-tax financial disclosure form (OGE 278e) is designed to identify, and prevent, business conflicts, and that “tax return information could serve a similar function.”⁹⁹ For example, critics of President Trump’s decision to allow his hotel business to continue to operate during his presidency argued that Trump’s tax returns could show the income earned by this business during this time.¹⁰⁰ Public disclosure proponents also note that tax returns could show whether an elected official or candidate has business ties to entities that are owned, directly or indirectly, by foreign governments.¹⁰¹ While President Trump repeatedly

99. Tribe et al., *supra* note 18; see also BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 76 (2020) (describing the purpose of the Ethics in Government Act of 1978, requiring the filing of candidates’ financial reports, as “an additional post-Watergate transparency measure to better inform the electorate about the sources of potential conflicts of interest affecting official conduct”).

100. See Eisen & Painter, *supra* note 18; 165 CONG. REC. S3619-20 (June 8, 2016) (statement of Sen. Ron Wyden); Seth Hanlon, *President Trump Cannot Hide His Tax Returns from Congress*, CTR. FOR AM. PROGRESS (Apr. 1, 2019, 2:00 PM), <https://www.americanprogress.org/issues/economy/reports/2019/04/01/468048/president-trump-cannot-hide-tax-returns-congress> [<https://perma.cc/Q444-T9BS>].

101. See Bob Bauer, *Americans Must Know if Their President Is a Crook*, N.Y. TIMES (Jul. 10, 2020), <https://www.nytimes.com/2020/07/10/opinion/trump-taxes-supreme-court.html> [<https://perma.cc/68RW-8UNY>]; Frank Clemente & William Rice, *Donald Trump’s Tax Returns Would Answer 4 Serious Questions About His Fitness and Our Laws*, USA TODAY (Feb. 7, 2019, 11:56 AM), <https://www.usatoday.com/story/opinion/2019/02/07/trump-tax-returns-ethics-legal-fitness-questions-russia-saudi-column/2777843002> [<https://perma.cc/GSR2-TYKU>]; BAUER & GOLDSMITH, *supra* note 99, at 76 (noting that tax returns reveal “all sources of income” and “foreign business dealings”); Elaine Kamarck, *Does Trump Owe Russia? The Supreme Court’s Ruling on the President’s Taxes May Finally Give Us Answers*, BROOKINGS INST. (July 10, 2020), <https://www.brookings.edu/blog/fixgov/2020/07/10/does-trump-owe-russia-the-supreme-courts-ruling-on-the-presidents-taxes-may-eventually-give-us-answers> [<https://perma.cc/AA7M-LQHM>];

denied business dealings with Russia throughout his campaigns and presidency. One of the primary sponsors of disclosure legislation, Senator Ron Wyden, has argued that tax returns would “tell whether Mr. Trump is telling the truth when he claims to have no connections to Russia.”¹⁰²

Proponents of mandatory public disclosure contend that any such conflicts of interest could influence a President’s or Vice President’s decision-making ability. A President’s close business relationship with business entities owned or controlled by a foreign government, for instance, could allow that government to exert leverage over the President. For example, following President Trump’s 2018 joint press conference with President Vladimir Putin in Helsinki, Senator Chuck Schumer exclaimed, “What does Putin have over him that he’s behaving in a way that is basically inexplicable in any rational, logical line of thinking? . . . Well, that’s why his tax returns would be so important.”¹⁰³ Similarly, Speaker Nancy Pelosi has framed nondisclosure of tax returns as raising “a national security issue” because, she has argued, tax returns can reveal what liabilities a President might have to other individuals and entities, including non-U.S. lenders.¹⁰⁴

While public disclosure proponents emphasize the importance of revealing conflicts of interest, some have also acknowledged the limitations of tax returns in providing this information.¹⁰⁵ An individual’s personal and business tax returns report aggregate amounts of income, but they do not necessarily provide the sources of that income, such as the identities of the purchasers of products, renters of property, or purchasers of club memberships. Further, if an elected official or candidate owns an interest in a business entity, such as a corporation, the tax return of that individual

Allan Smith, *There Are Growing Demands for Trump to Release His Tax Returns after Disastrous Summit with Putin*, BUS. INSIDER (July 19, 2018), <https://www.businessinsider.com/trump-putin-summit-tax-returns-2018-7> [https://perma.cc/XYL8-KR59]; George F. Will, *This Sad, Embarrassing Wreck of a Man*, WASH. POST (July 17, 2018), https://www.washingtonpost.com/opinions/this-sad-embarrassing-wreck-of-a-man/2018/07/17/d06de8ea-89e8-11e8-a345-a1bf7847b375_story.html [https://perma.cc/AT8D-3ZRB] (stating that tax returns would reveal “unsavory financial dependencies on Russians”).

102. Wyden, *supra* note 18.

103. Smith, *supra* note 101 (quoting Sen. Chuck Schumer).

104. *Trump Taxes are ‘National Security’ Issue, Nancy Pelosi Says*, BBC (Sept. 28, 2020), <https://www.bbc.com/news/business-54332956> [https://perma.cc/XYL8-KR59] (quoting Speaker Nancy Pelosi).

105. See, e.g., Weiner & Norden, *supra* note 80.

does not show the names of other shareholders, even if they are individuals or entities in other countries.¹⁰⁶ Despite these limitations, government ethics scholars, such as Eisen and Painter, have argued in favor of public disclosure of tax returns as a way to bolster the required non-tax financial disclosure filing and to capture an individual's holdings, liabilities, and business relationships more fully.¹⁰⁷

2. Tax Liability and Tax Rate

Another reason for mandatory public disclosure is to provide voters with basic information about the annual federal-tax obligations of candidates and elected officials. Specifically, public disclosure advocates state that voters should know whether an elected official or candidate has filed tax returns and paid federal income taxes each year, and, if so, the amount of such payments and the individual's effective tax rate.

Voters should know whether an elected official or candidate has filed annual tax returns and paid taxes, proponents of mandatory public disclosure argue, because these acts are fundamental duties of citizenship. As Vanessa Williamson has written, "Public tax forms are about more than elected officials' financial transparency, as critical as that issue is. Paying your taxes is an important civic responsibility."¹⁰⁸ Moreover, they contend that public disclosure of the President's payment of taxes can encourage voluntary compliance with the tax system overall by providing taxpayers with "confidence [that] their leaders are paying taxes too."¹⁰⁹

Proponents of mandatory public disclosure also argue that voters need access not just to an individual's total annual tax payments, but also to the

106. *See id.*; *see also* Jonathan Curry & Luca Gattoni-Celli, *Legal Scholars Question Trump Attorneys' Analysis of Russia Ties*, TAX NOTES (May 22, 2017), <https://www.taxnotes.com/tax-notes-federal/foreign-source-income/legal-scholars-question-trump-attorneys-analysis-russia-ties/2017/05/22/15g0n> [<https://perma.cc/S6Y5-9JVG>].

107. *See* Eisen & Painter, *supra* note 18.

108. Vanessa Williamson, *What Trump's Tax Returns Tell Us: The Public Needs to See More*, BROOKINGS INST. (Mar. 16, 2017), <https://www.brookings.edu/blog/fixgov/2017/03/16/what-trumps-tax-returns-tell-us-the-public-needs-to-see-more> [<https://perma.cc/J3JA-JB4B>].

109. Daniel J. Hemel, *Can New York Publish President Trump's State Tax Returns?*, 127 YALE L.J. F. 62 (2017), <https://www.yalelawjournal.org/forum/can-new-york-publish-president-trumps-state-tax-returns> [<https://perma.cc/6635-RFUJ>].

individual's effective tax rate.¹¹⁰ When candidates voluntarily release their tax returns to the public, their effective tax rate is often a headline item in news reports.¹¹¹ This information, public disclosure advocates argue, allows voters to compare the tax burdens of different candidates and also to compare the candidates' tax burdens to their own.¹¹² As one commentator argued in response to Trump's nondisclosure of his tax returns, voters should be able to determine whether a billionaire presidential candidate paid taxes "at a lower rate than a firefighter or a night-shift nurse."¹¹³

3. Tax Compliance

Finally, proponents of mandatory public disclosure argue that in addition to revealing the tax payments and tax rates of elected officials and candidates, tax returns would enable voters to observe important aspects of these individuals' tax compliance behavior. They often discuss several

110. See, e.g., Opinion, *Mr. Trump Ducks Tax Disclosure*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/01/opinion/donald-trump-ducks-tax-disclosure.html> [<https://perma.cc/8KWJ-9SWH>]; Glenn Kessler, *Trump's False Claim that 'There's Nothing to Learn' from His Tax Returns*, WASH. POST (May 12, 2016), <https://www.washingtonpost.com/news/fact-checker/wp/2016/05/12/trumps-false-claim-that-theres-nothing-to-learn-from-his-tax-returns> [<https://perma.cc/FJ2T-PG7B>]; Steven M. Rosenthal, *Does Donald Trump Pay Taxes, Ever?*, TAX POL'Y CTR. (Oct. 3, 2016), <https://www.taxpolicycenter.org/taxvox/does-donald-trump-pay-taxes-ever> [<https://perma.cc/U5S4-2V5U>].

111. See, e.g., Jeanne Sahadi, *Romney Paid 14% Effective Tax Rate in 2011*, CNN (Sept. 21, 2012), <https://money.cnn.com/2012/09/21/pf/taxes/romney-tax-return> [<https://perma.cc/362T-585E>]; Brian Faler, *Obamas Report Paying 19.6 Percent Effective Tax Rate*, POLITICO (Apr. 10, 2015, 4:35 PM), <https://www.politico.com/story/2015/04/obama-pay-tax-rate-2014-return-116862> [<https://perma.cc/EM9Z-Q25J>].

112. See, e.g., Edward J. McCaffery, *Trump's Devils Could Lurk in Tax Return Details*, CNN (May 11, 2016, 6:29 PM), <https://www.cnn.com/2016/05/11/opinions/trump-tax-reluctance-is-ironic-mccaffery/index.html> [<https://perma.cc/2PFZ-BN5Z>]; Domenico Montanaro, *3 Reasons We Care About Politicians' Taxes*, NPR (Aug. 12, 2016, 1:25 PM), <https://www.npr.org/2016/08/12/489791576/3-reasons-we-care-about-politicians-taxes> [<https://perma.cc/78NP-2TMR>]; Elizabeth Warren (@ewarren), TWITTER (Sept. 27, 2020, 6:44 PM), <https://twitter.com/ewarren/status/1310349680543502336> [<https://perma.cc/XSN4-RG48>].

113. Shields, *supra* note 19.

aspects of tax compliance that may be visible from tax returns, including whether elected officials and candidates have violated the tax law, have engaged in aggressive or abusive tax planning, and have participated in audits or tax controversies with the IRS.

Many public disclosure advocates argue that public tax returns could allow voters to observe whether the President, Vice President, or a candidate has violated the tax law, including by engaging in acts of tax fraud. For example, in advocating for the Presidential Tax Transparency Act in 2016, Senator Elizabeth Warren stated that “the American people should see Donald Trump’s returns so they can decide for themselves if his shameful and, in some cases, illegal behavior disqualifies him from being President.”¹¹⁴ When describing similar legislation in the House in 2019, Representative Bill Pascrell stated that it would enable voters to learn “if a President is cheating the system or evading taxes or otherwise violating the tax laws of our country,”¹¹⁵ further commenting that various alleged tax positions of President Trump “would constitute fraud, and his returns will show that.”¹¹⁶ And in response to a 2018 story in the *New York Times*, Senator Cory Booker commented that if President Trump’s tax returns reflected the tax positions reported in the article, the returns would expose “fraud,” “criminal behavior,” and “significant tax cheat.”¹¹⁷ Similarly, when arguing for mandatory disclosure, commentators frequently quote President Nixon’s assertion that voters have a right “to know whether or not their president is a crook.”¹¹⁸

114. 162 CONG. REC. S5184 (Sept. 15, 2016) (statement of Sen. Elizabeth Warren).

115. *Legislative Proposals and Tax Law Related to Presidential and Vice-Presidential Tax Returns: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 116th Cong. 55 (2019) (statement of Rep. Bill Pascrell).

116. 165 CONG. REC. H2401 (Mar. 6, 2019) (statement of Rep. Bill Pascrell).

117. Natasha Korecki & David Siders, *2020 Dems Pounce on Trump Tax Evasion Report*, POLITICO (Oct. 3, 2018, 5:58 PM), <https://www.politico.com/story/2018/10/03/trump-tax-evasion-2020-democrats-866624> [<https://perma.cc/KCA6-XXHN>] (quoting Sen. Cory Booker).

118. See, e.g., Evan Horowitz, *If There Are No Damning Secrets in Trump’s Tax Returns, Why Hide Them?*, BOS. GLOBE (Sept. 30, 2016, 1:29 PM), <https://www.bostonglobe.com/news/politics/2016/09/30/there-are-damning-secrets-trump-tax-returns-why-hide-them/zdYfDvQUxEJB28g18fwhuO/story.html> [<https://perma.cc/BN7R-QLFR>]; Catherine Rampell, *Trump’s Long-Hidden Tax Returns Make Him Look Like a Terrible Businessman, or a Cheat. Probably Both.*, WASH. POST (Sept. 28, 2020), <https://www.washingtonpost.com/opinions/2020/09/28/trumps->

Other policymakers and scholars have advocated for mandatory public disclosure as a mechanism for showing whether an elected official or candidate has engaged in aggressive or abusive tax planning. Some argue that public tax returns would enable voters to determine whether a candidate has engaged in aggressive tax planning, by taking advantage of “tax loopholes,” ambiguities, or omissions in the tax law.¹¹⁹ Others have argued that public tax returns would also show whether an elected official or candidate has claimed tax positions using abusive tax shelters,¹²⁰ complex transactions that exploit the tax law “in unintended ways” and which, in some cases, the IRS has designated as such.¹²¹ For instance, Edward McCaffery has noted that public disclosure of tax returns would reveal whether a candidate has engaged in tax avoidance using means “legal

long-hidden-tax-returns-make-him-look-like-terrible-businessman-or-cheat [<https://perma.cc/AW5D-7HGU>]; Zuckoff, *supra* note 21; *see also* David Cay Johnston, *Following Trump’s Money Exposes the Awful Truth: Our President Is a ‘Financial Vampire’*, L.A. TIMES (Oct. 4, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-johnston-trump-cons-and-cheats-20181004-story.html> [<https://perma.cc/W9YX-WFK2>] (suggesting that the report from the *New York Times* on the Trump family finances reveals criminal behavior).

119. *See, e.g.*, Chemerinsky, *supra* note 21; Edward J. McCaffery, *supra* note 112; Thorndike, *supra* note 21; *see also* 162 CONG. REC. S5184 (Sept. 15, 2016) (statement of Sen. Warren); 162 CONG. REC. S3620 (Jun. 8, 2016) (referring to “loopholes”).
120. *See, e.g.*, Eisen & Painter, *supra* note 18 (referring to tax shelters); David Cay Johnston, *Why Donald Trump May Never Pay Federal Income Tax Again*, DAILY BEAST (Apr. 13, 2017, 2:17 PM), <https://www.thedailybeast.com/why-donald-trump-may-never-pay-federal-income-tax-again> [<https://perma.cc/ZZ37-S7KW>]; Steven M. Rosenthal, *Tax Fairness: President Donald Trump, a Case Study*, WAYS & MEANS COMM. 6 (Oct. 13, 2020), <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/S.%20Rosenthal%20Written%20Testimony.pdf> [<https://perma.cc/H7PA-MS8K>]; James B. Stewart, *How Donald Trump Turned the Tax Code Into a Giant Tax Shelter*, N.Y. TIMES (Oct. 2, 2016), <https://www.nytimes.com/2016/10/03/business/how-donald-trump-turned-the-tax-code-into-a-giant-tax-shelter.html> [<https://perma.cc/69NN-MEFA>].
121. *The Problem of Corporate Tax Shelters: Discussion, Analysis and Legislative Proposals*, U.S. DEP’T TREASURY 130 (1999), <https://home.treasury.gov/system/files/131/Report-Corporate-Tax-Shelters-1999.pdf> [<https://perma.cc/4KBA-DWZT>] (describing abusive tax shelters).

or otherwise,”¹²² and Steven Rosenthal has described how public disclosure of tax returns could reveal “legal tax avoidance, or illegal tax evasion, or something in between, [including] tax shelters.”¹²³ More generally, proponents of public disclosure characterize tax returns as shedding light on a candidate’s “actions and values,” including “financial integrity.”¹²⁴

Finally, advocates of mandatory disclosure proposals have argued that allowing the public to view the tax returns of the President, Vice President, and candidates would lead to monitoring of the IRS by the public.¹²⁵ As the IRS is both part of the executive branch and the chief federal tax enforcement agency, many commentators have described it as conflicted regarding its review of the tax returns of the President and Vice President.¹²⁶ Mandatory public disclosure of the tax returns of Presidents, Vice Presidents, and candidates, proponents argue, would empower members of Congress to determine whether the IRS has applied the tax law properly and, if not, to hold the agency accountable.¹²⁷

III. THE OPACITY OF PRESIDENTIAL TAX RETURNS

Proponents of mandatory public tax disclosure often emphasize the importance of sharing information about candidates’ and elected officials’ tax compliance with voters. Tax compliance, as the IRS defines it, occurs where a taxpayer timely files and reports required tax information,

122. McCaffery, *supra* note 112.

123. Rosenthal, *supra* note 120.

124. 165 CONG. REC. S3619-20 (Jun. 8, 2016) (statement of Sen. Ron Wyden).

125. *See, e.g.*, Hemel, *supra* note 109109; Joseph Thorndike, *There Oughta Be a Law: Why Presidents Should Be Forced to Release Their Tax Returns*, FORBES (Jan. 9, 2020, 10:10 AM), <https://www.forbes.com/sites/taxnotes/2020/01/09/there-oughta-be-a-law-why-presidents-should-be-forced-to-release-their-tax-returns/?sh=1861682a4cae> [<https://perma.cc/9S6T-HE6K>]; George K. Yin, *Congressional Authority to Obtain and Release Tax Returns*, 154 TAX NOTES 1013, 1014 (2017), <https://www.taxnotes.com/tax-notes-today-federal/politics-taxation/congressional-authority-obtain-and-release-tax-returns/2017/03/08/gf2r> [<https://perma.cc/BN98-UAUP>]; Clark, *supra* note 8080, at 4; Jill Disis, *Presidential Tax Returns: It Started with Nixon: Will It End with Trump?*, CNN (Jan. 26, 2017, 2:06 PM), <https://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/> [<https://perma.cc/7GSB-Q6CL>] (interview with Joseph Thorndike).

126. *See* Clark, *supra* note 8080, at 1.

127. *See* Rosenthal, *supra* note 120, at 6.

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correctly self-assesses any taxes owed, and makes required tax payments voluntarily to the taxing authority.¹²⁸ Mandatory disclosure proponents have argued that requiring candidates and elected officials to disclose their tax returns would empower voters to gauge these individuals' tax compliance by revealing whether they have engaged in tax evasion, pursued tax shelters and other forms of tax avoidance, or participated in IRS audits and tax controversies.¹²⁹

This Part investigates whether and to what extent mandatory public disclosure of tax returns would enable voters to observe the tax compliance of candidates and elected officials along the dimensions of tax evasion, aggressive and abusive tax avoidance, and IRS enforcement. To explore this question, this Part reviews the information that appears on tax returns generally and examines the returns of Presidents, Vice Presidents, and major-party candidates over the past forty years. Mandatory public disclosure of an elected official's or candidate's tax returns alone, this Part argues, would provide voters with only a partial and one-sided view of that individual's tax compliance. This limited view would be due to two features of mandatory public disclosure of tax returns. First, candidates' and elected officials' tax compliance would be shrouded by the structure of the federal income tax and of tax returns themselves. Second, it would be further obscured from public view as a result of opportunities for strategic reporting and disclosure by candidates and elected officials.

A. Why Tax Returns Alone Are Not Enough

Legislative proposals that would mandate public disclosure of tax information by candidates and elected officials have focused exclusively on these individual's annual federal income tax returns.¹³⁰ As a result of fundamental features of tax returns and the tax system, however, mandatory public disclosure of income tax returns alone would provide voters with a restricted and potentially misleading view of tax compliance.

128. *Reducing the Federal Tax Gap: A Report on Improving Voluntary Compliance*, *supra* note 24, at 6.

129. *See supra* Section II.C.

130. *See, e.g.*, For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021); For the People Act of 2019, H.R. 1, 116th Cong. § 10001 (2019).

1. Self-Assessment

Do tax returns reveal a presidential candidate's or President's "integrity" in complying with the tax law, as some have suggested?¹³¹ When viewed by themselves, tax returns show only the taxpayer's application of the tax law and self-assessment of taxes owed. Under the "voluntary compliance" framework of the U.S. income tax system, individuals prepare and file the individual annual tax return, IRS Form 1040, because taxpayers possess "the best knowledge of [their] own financial situation and ha[ve] the best access to needed facts."¹³² Where some taxpayers may attempt to comply with the tax law as much as possible, others may claim aggressive or even abusive tax positions, treating the tax return as "an opening bid with the IRS."¹³³ Tax returns alone, consequently, do not show whether candidates and elected officials have reported tax information and self-assessed taxes owed correctly and in accordance with the law.

A basic informational limitation of the individual tax return is that all of the figures provided are the result of the taxpayer's own reporting and calculations. The first two pages of the 2020 IRS Form 1040, the individual tax return, contains thirty-eight lines for numerical entries, including the taxpayer's taxable income, aggregate itemized deductions, tax credits, and tax liability.¹³⁴ When a candidate or elected official voluntarily discloses an individual return, voters cannot determine whether the figures are correct or are consistent with the tax law by reviewing only that document. For example, presidential candidate Hillary Clinton's 2015 joint tax return showed \$1,281 in deductible meal and entertainment expenses on her IRS Schedule C for her public-speaking activities,¹³⁵ Vice President Mike Pence's

131. 165 CONG. REC. S3619-20 (Jun. 8, 2016) (statement of Sen. Ron Wyden).

132. COMM'R'S EXEC. TASK FORCE ON CIV. PENALTIES, INTERNAL REVENUE SERV., REPORT ON CIVIL TAX PENALTIES, 89 TNT 45-36 (Feb. 22, 1989).

133. Laura Saunders, *It's Easier to Avoid Taxes When You Own a Business. Just Ask Donald Trump (and Joe Biden)*, WALL ST. J. (Oct. 9, 2020), <https://www.wsj.com/articles/its-easier-to-avoid-taxes-when-you-own-a-business-just-ask-donald-trump-and-joe-biden-11602235806> [<https://perma.cc/GC74-7R4X>] (quoting Michael Graetz).

134. See Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY (2020), <https://www.irs.gov/pub/irs-pdf/f1040.pdf> [<https://perma.cc/EFB4-CL3T>].

135. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 13 (2015), <https://s3.amazonaws.com/pdfs.taxnotes>.

2012 joint tax return showed \$1,200 in deductible expenses related to the watercolor-painting business of his wife Karen Pence,¹³⁶ and vice presidential candidate Kamala Harris's 2019 joint tax return showed a \$1,498 depreciation deduction for the iPad of her husband, Doug Emhoff.¹³⁷ While each of these items may be accurate and tax-deductible under the law, the returns alone do not provide enough information for voters to determine that this is the case.

Another limitation of the individual tax return as an indicator of tax compliance is that it only reflects the income that the elected official or candidate has chosen to report to the IRS. For instance, when the Joint Committee on Internal Revenue Taxation published its review of President Nixon's tax returns, it concluded that Nixon had omitted a \$117,836 capital gain on the sale of twenty-three acres at his San Clemente, California estate.¹³⁸ As another example, during the 2008 general election, some tax experts questioned why vice presidential candidate Sarah Palin failed to report approximately \$43,000 as income attributable to the State of Alaska's payment of travel expenses for her family and children.¹³⁹ And in 2020, reporters at *The New York Times* alleged that President Trump had not reported \$287 million in cancellation of indebtedness income (even though he may have had a legal basis for excluding this amount).¹⁴⁰ In each of these examples, third parties—reporters and government investigators—

com/2019/HR_Clinton_2015.pdf [https://perma.cc/FF26-Y55K] (tax form of William J. Clinton and Hillary Rodham Clinton).

136. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 33 (2012), https://s3.amazonaws.com/pdfs.taxnotes.com/2019/2012_Pence_Tax_Return.pdf [https://perma.cc/6L2A-EKSA] (tax form of Michael R. Pence and Karen S. Pence).

137. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 53 (2019), https://s3.amazonaws.com/pdfs.taxnotes.com/2020/K_Harris_2019.pdf [https://perma.cc/FP9R-MYEG] (tax form of Douglas C. Emhoff and Kamala D. Harris).

138. See JOINT COMM. ON INTERNAL REVENUE TAX'N, *supra* note 39; Thorndike, *supra* note 38.

139. See Mary Jacoby & Jesse Drucker, *Reimbursements Raise Tax Issues for Palin*, WALL ST. J. (Oct. 7, 2008, 12:01 AM), <https://www.wsj.com/articles/SB122334021713509963> [https://perma.cc/HLT4-TPS7]. For additional discussion, see Bryan T. Camp, *A Brief Analysis of Governor Palin's Tax Returns for 2006 and 2007* (Oct. 6, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279105 [https://perma.cc/MT3S-2HGL].

140. See Buettner et al., *supra* note 9.

determined that the disclosed tax returns failed to report income.¹⁴¹ Without additional information, such as the documents and interviews that these third parties obtained, it would be difficult, if not impossible, for voters to determine the existence of those unreported items by reviewing only the returns.

While an elected official's or candidate's individual tax return may provide insights into that individual's interpretation of the tax law, the return itself will not necessarily show whether that position is correct. In situations where the tax law involves uncertainty, such as where it requires analysis of business purpose for an activity, taxpayers, often relying upon advisors, must determine how the tax law applies to their circumstances.¹⁴² For example, following public disclosure of their tax returns, commentators focused on presidential candidate Mitt Romney's and his wife Ann Romney's decision to treat their dressage horse, Rafalca, as a business on their 2010 tax returns, which resulted in deductions for expenses related to the horse's training and care.¹⁴³ Similarly, reporters questioned vice presidential candidate Sarah Palin's and her husband Todd Palin's treatment of his snow-machine racing activity as a business on their 2007 tax return, entitling them to deduct \$9,000 in losses.¹⁴⁴ These disclosures may have

141. For discussion of third-party reporting generally, see Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1740 (2010).

142. See, e.g., Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 TAX NOTES 1775 (1999); Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77 (2006); Jay A. Soled, *Tax Shelter Malpractice Cases and Their Implications for Tax Compliance*, 58 AM. U. L. REV. 267 (2008).

143. See, e.g., Lee A. Sheppard, *Is the Tax Law Subsidizing Ann Romney's Horse?*, TAX NOTES (Aug. 1, 2012), <https://www.taxnotes.com/tax-notes-today-federal/individual-income-taxation/news-analysis-tax-law-subsidizing-ann-romneys-horse/2012/08/01/vl3h> [<https://perma.cc/QX5K-CCZ5>]; Matthew Yglesias, *Clarifying The Record on Mitt Romney's \$77,000-Loss Olympic Horse Rafalca*, SLATE (Jun. 19, 2012), <https://slate.com/business/2012/06/clarifying-the-record-on-mitt-romney-s-77000-losses-olympic-horse-rafalca.html> [<https://perma.cc/432R-34M6>].

144. See Dan Slater, *With Palin's Returns, Tax Profs Move Back to the Spotlight*, WALL ST. J. (Oct. 6, 2008), <https://www.wsj.com/articles/BL-LB-6595> [<https://perma.cc/7FRW-KV3D>]; Associated Press, *Palins Release Their Tax Returns*, L.A. TIMES (Oct. 4, 2008), <https://www.latimeswsj.com/archives/la-xpm-2008-oct-04-na-palinsmoney4-story.html> [<https://perma.cc/KQM2-ZKAD>]; <https://perma.cc/7FRW-KV3D>].

provided voters with clues regarding the attitudes of each candidate toward tax compliance or their understanding of the tax law. However, without more information involving the nature of the activity and the taxpayer's involvement, it was not possible to conclude whether these positions complied or conflicted with the tax law.

Further, although some proponents of mandatory public disclosure have argued that the public disclosure of tax returns would enable voters to detect tax fraud or tax evasion,¹⁴⁵ an individual tax return alone does not contain the information necessary to determine that the relevant legal standards apply. In civil tax fraud cases, the government must prove by clear and convincing evidence "an intentional wrongdoing designed to evade tax believed to be owing."¹⁴⁶ In criminal tax fraud cases, the government must prove, beyond a reasonable doubt, that the taxpayer committed a "voluntary, intentional violation of a known legal duty."¹⁴⁷ In each situation, taxpayers can defend against charges of tax fraud by showing good faith reliance on expert advice, including from accountants and lawyers.¹⁴⁸ While proponents of mandatory public disclosure have asserted that public disclosure of President Trump's personal and business tax returns would reveal "criminal behavior," including tax evasion,¹⁴⁹ this determination is not possible without evidence regarding President Trump's intent and consideration of his defenses, including supporting documentation. As a result, an elected official's or candidate's publicly disclosed tax returns do not contain enough information to allow voters to draw conclusions regarding tax fraud.

Finally, when the President or a candidate discloses a tax return voluntarily, the return does not bear a stamp of review or approval from the IRS that states that the agency has examined the return or that the taxpayer's information contained in the return is correct. The IRS is not permitted to disclose whether it is auditing or has audited the tax return of a candidate or elected official, let alone confirm that it agrees with the

145. *See supra* notes 125-127 and accompanying text.

146. *Miller v. Comm'r*, 94 T.C. 316, 332 (1990) (quoting the standard articulated in *Powell v. Granguist*, 252 F.2d 56 (9th Cir. 1958)).

147. *Cheek v. United States*, 498 U.S. 192, 201 (1991).

148. *See* I.R.C. § 6664(c) (2018) (civil tax penalty defense); *Cheek*, 498 U.S. at 199-201; *United States v. Grunewald*, 987 F.2d 531, 535-36 (8th Cir. 1993) (criminal tax penalty defense).

149. *See supra* notes 116-118 and accompanying text.

calculations and legal interpretations of that individual.¹⁵⁰ By contrast, when the President or a candidate files the non-tax financial disclosure form, OGE Form 278e, with the Office of Government Ethics, a reviewer certifies on the first page of the form that each part is complete and no interest or position violates, or appears to violate, federal ethics laws.¹⁵¹ As a result, public disclosure of the President's, Vice President's, and candidates' tax returns alone would not include statements regarding actions (if any) of the IRS.

2. Limited Explanations

Would public disclosure of the tax returns of candidates and elected officials reveal the use of aggressive or abusive tax planning? As tax practitioners and tax scholars have described, tax planning exists along a continuum, where tax strategies ranging from aggressive to abusive occupy the middle section.¹⁵² Aggressive tax planning takes advantage of ambiguities or omissions in the statutory tax law and abusive tax planning claims tax benefits based on transactions that lack economic substance or conflict with legislative intent.¹⁵³ While publicly disclosed tax returns can offer clues regarding the type of tax planning a candidate or elected official pursues, the tax returns themselves often contain limited, or even no, explanations for the tax positions claimed.

The calculations that appear on a candidate's or elected official's tax return often are not accompanied by detailed explanations. Instead, the return may present aggregate figures, such as business expenses, without delineating the specific items for which the taxpayer has claimed tax deductions.¹⁵⁴ Some commentators, for example, have speculated that if

150. See I.R.C. § 6103(a)-(b) (2018).

151. See 5 U.S.C. app. § 106(b) (2018); 5 C.F.R. § 2634.605(b) (2021).

152. For discussion, see Joshua D. Blank & Nancy Staudt, *Corporate Shams*, 87 N.Y.U. L. REV. 1641 (2012); Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law Is Uncertain*, 27 VA. TAX REV. 241, 251-52 & 252 fig.1 (2007).

153. See Blank & Staudt, *supra* note 152; Logue, *supra* note 152; Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. LEGIS. 111, 157 (2009); Sarah B. Lawsky, *Modeling Uncertainty in Tax Law*, 65 STAN. L. REV. 241, 244 (2013).

154. See Internal Revenue Serv., *Form 1040 Line-by-Line Instructions*, U.S. DEP'T TREASURY (Apr. 15, 2021), <https://www.irs.gov/e-file-providers/line-by-line-instructions-free-file-fillable-forms#F1040> [<https://perma.cc/W5WZ-7CPC>];

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President Trump's 2016 tax returns were disclosed, they might reveal that Trump claimed a business expense deduction for a \$130,000 payment to Stephanie Clifford, aka Stormy Daniels, as part of a non-disclosure agreement regarding their alleged affair.¹⁵⁵ Yet even if President Trump did claim this deduction, his tax return may only reflect an aggregate amount of business expenses, including this payment.¹⁵⁶ For this reason, prosecutors in the New York District Attorney's office and congressional committees have sought not only President Trump's tax returns, but also financial accounting records from the Trump Organization.¹⁵⁷

While some candidates and elected officials may include taxpayer statements with their tax returns that they file with the IRS, these statements are often short descriptions of facts rather than detailed descriptions of tax strategies.¹⁵⁸ Taxpayers who earn solely wages and salary often include a statement notation and attach a statement that

see also David Herzig, *President Trump and Tax Return Privacy*, FORBES (Apr. 5, 2018), <https://www.forbes.com/sites/davidherzig/2018/04/05/president-trump-and-tax-return-privacy/> [https://perma.cc/5D84-JN47].

155. See, e.g., Peter J. Reilly, *Is The \$130,000 Paid To Stormy Daniels Tax Deductible? Yes For Michael Cohen; For Trump, Not So Much*, FORBES (Mar. 10, 2018) <https://www.forbes.com/sites/peterjreilly/2018/03/10/130000-to-stormy-daniels-solid-deduction-for-michael-cohen-donald-trump-not-so-much/?sh=7ecf0a4968d3> [https://perma.cc/EJH7-GPMW]; Daniel Shaviro, *Tax issue re. Donald Trump, Michael Cohen, and Stormy Daniels*, START MAKING SENSE (Dec. 17, 2018), <http://danshaviro.blogspot.com/2018/12/tax-issue-re-donald-trump-michael-cohen.html> [https://perma.cc/B93R-VU9K].
156. See, e.g., Internal Revenue Serv., *Form 1040 Schedule C: Profit or Loss From Business*, U.S. DEP'T TREASURY (2020), <https://www.irs.gov/pub/irs-pdf/f1040sc.pdf> [https://perma.cc/3PW2-QB5X]; Internal Revenue Serv., *Form 1120-S: U.S. Income Tax Return for an S Corp*, U.S. DEP'T TREASURY (2020), <https://www.irs.gov/pub/irs-pdf/f1120s.pdf> [https://perma.cc/NQ9P-L26G].
157. See *Trump v. Vance*, No. 20A63 (U.S. Feb. 22, 2021) (denying stay); William K. Rashbaum, Ben Protess & Benjamin Weiser, *Here's What's Next in the Trump Taxes Investigation*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/nyregion/trump-taxes-cyrus-vance.html> [https://perma.cc/UN5Y-3822Y].
158. See, e.g., Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 9 (2019), <https://www.taxnotes.com/presidential-tax-returns> [https://perma.cc/AA7X-GCZL] (tax form of Joseph R. Biden, Jr. and Jill T. Biden) (reporting \$53,384 ordinary income of Celticapri Corp.).

describes the names of their employers and other payors.¹⁵⁹ In the case of aggressive and abusive tax strategies, on the other hand, the tax returns of elected officials and candidates may not contain any statements at all.

Another constraint of the tax returns of candidates and elected officials is that they usually do not contain discussion of supporting legal analysis. For example, whether an expense or payment is tax-deductible often hinges upon whether it is “reasonable.”¹⁶⁰ Yet when individuals claim a deduction or report income on their tax returns, they do not include a discussion of the judicial decisions, regulations and other administrative guidance that address how that deduction or payment satisfies the reasonableness standard.¹⁶¹ President Biden’s 2019 joint income tax return, for instance, shows that he received \$175,319 in salary from Giacoppa Corp., a Subchapter S corporation, but does not explain why this payment was reasonable compensation.¹⁶² Similarly, although journalists have alleged that President Trump’s tax returns show tax deductions for consulting fees paid to his daughter, Ivanka Trump,¹⁶³ the tax returns themselves are unlikely to include an explanation of how the fees paid are reasonable salary. Further, as taxpayers do not include written advice from tax lawyers and accountants with their tax returns when they file them with the IRS, this advice would also not be subject to mandatory public disclosure.¹⁶⁴

159. See Internal Revenue Serv., *Form 1040: Instructions*, U.S. DEP’T TREASURY 65 (Apr. 13, 2021), <https://www.irs.gov/pub/irs-pdf/i1040gi.pdf> [<https://perma.cc/5XFX-ZXPE>](describing statements).

160. See, e.g., I.R.C. § 162(a)(1) (2018) (reasonable allowance for salaries); I.R.C. § 167 (2018) (reasonable allowance for exhaustion, wear and tear); I.R.C. § 217 (2018) (reasonable moving expenses).

161. See *supra* note 158 and accompanying text.

162. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY 10 (2019), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/AA7X-GCZL>] (tax form of Joseph R. Biden, Jr. and Jill T. Biden).

163. See Buettner et al., *supra* note 9.

164. For discussion, see Robert W. Wood, *The Uneasy Topic of Tax Opinion Standards*, TAX NOTES (Dec. 16, 2019) http://www.woodllp.com/Publications/Articles/pdf/The_Uneasy_Topic_of_Tax_Opinion.pdf [<https://perma.cc/DE4E-9252>]; M. TODD WELTY & DENISE M. MUDIGREE, 91 PRAC. TAX STRATEGIES 244 (2013).

3. Audits, Tax Penalties, and Settlements

Would mandatory public disclosure of the tax returns of the President, Vice President, and major-party candidates enable the public to better monitor the IRS? Proponents of mandatory public disclosure have suggested that it would empower congressional committees and the general public to determine whether the IRS has reviewed elected officials' and candidates' tax returns and applied the tax law correctly, and if not, to hold the IRS accountable.¹⁶⁵ This type of review, they note, is important because unlike voters who may review a disclosed tax return, the IRS has the ability to submit questions to taxpayers, initiate audits, and consider additional documentation in order to determine whether taxpayers have engaged in tax shelters and other abusive tax strategies.¹⁶⁶

In contrast to their portrayal by some advocates of mandatory public disclosure, the income tax returns of candidates and elected officials alone would not improve the ability of the public to hold the IRS accountable. Legislative proposals that would mandate tax disclosure refer to candidates' and officials' "income tax returns," a reference to the statutory provision of the Internal Revenue Code that defines this term.¹⁶⁷ This definition refers to any tax or information return filed with the IRS by the taxpayer.¹⁶⁸ It does not incorporate a much broader statutory class of actions, "return information," which includes documents that describe "whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing."¹⁶⁹ Even when Congress has had access to the President's tax returns, such as during its review of President Nixon's returns, it required information from the IRS in order to confirm whether the agency had audited the returns or taken any actions.¹⁷⁰ Because legislative proposals to require public disclosure have been drafted to address only the income tax return itself, they would not require public disclosure of documents that would reveal IRS audits and their results.

If the IRS reviews the tax returns of a President or presidential candidate and challenges a tax position as improper, this challenge is not

165. *See supra* notes 125-127 and accompanying text.

166. *See id.*

167. *See* For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021) (referring to I.R.C. § 6103(b)(1) (2018)).

168. I.R.C. § 6103(b)(1) (2018).

169. I.R.C. § 6103(b)(2)(A) (2018).

170. *See* Thorndike, *supra* note 38; White, *supra* note 39.

visible on the income tax return itself. When the IRS concludes that the taxpayer has underpaid tax liability, it may send the taxpayer a statutory notice of deficiency, describing the IRS's determination that the taxpayer owes additional tax and, possibly, tax penalties and interest.¹⁷¹ The statutory notice of deficiency often includes a cover letter stating the IRS's determination and forms that the taxpayer can sign if the taxpayer agrees to pay the amounts owed.¹⁷² These documents provide a list of the specific items the IRS has challenged as inconsistent with the tax law and include a basis for the IRS's deficiency determination.¹⁷³ Unless a candidate or elected official who has received a statutory notice of deficiency has filed a petition in U.S. Tax Court, these documents would not be visible to the public as a result of the mandatory disclosure of income tax returns.¹⁷⁴

While audits often involve forms that explain the IRS's reasoning for challenging tax positions, these forms would also be excluded from mandatory public disclosure of income tax returns alone. For example, during a tax controversy, the IRS may complete a form that describes its proposed adjustments (IRS Form 5701)¹⁷⁵ and a form that describes all relevant facts (IRS Form 886-A).¹⁷⁶ If a candidate or elected official has been engaged in such a tax controversy with the IRS, these documents would provide valuable information regarding the nature of the dispute. Yet unless the public disclosure statute specifically included documents related to IRS audits, these documents would not be visible to the public.¹⁷⁷ Without information that reveals whether the IRS challenged a candidate's or elected official's tax returns, the public would have difficulty monitoring the IRS and questioning the legal basis for its conclusions.

Another important aspect of IRS enforcement that would not be visible through mandatory public disclosure of income tax returns alone is information regarding tax penalties. The application of tax penalties may be

171. I.R.C. § 6212(a) (2018).

172. IRM 4.8.9.2 (Aug. 11, 2016).

173. *Id.*

174. *See* I.R.C. § 6103(b)(2)(A) (2018).

175. Internal Revenue Serv., *Form 5701 (Notice of Proposed Adjustment)*, U.S. DEP'T TREASURY (Dec. 2006), <https://www.irs.gov/pub/irs-utl/f5701.pdf> [<https://perma.cc/ASD6-SHG6>]; IRM 4.8.9.2 (Aug. 11, 2016).

176. Internal Revenue Serv., *Form 886-A (Explanation of Items)*, U.S. DEP'T TREASURY (Jan. 1994), https://www.irs.gov/pub/irs-tege/pate_form_886a.pdf [<https://perma.cc/J3KU-J77T>]; IRM 4.8.9.2 (Aug. 11, 2016).

177. *See* I.R.C. § 6103(b)(2)(A) (2018).

especially important to the overall policy objective of enabling voters to consider the tax compliance of candidates and elected officials.¹⁷⁸ There are minor tax penalties that taxpayers self-assess on their own tax returns, such as the estimated payment tax penalty that Vice President Harris reported on her 2019 joint income tax return.¹⁷⁹ However, if the IRS asserts any of the major tax penalties for tax noncompliance that apply to abusive tax positions, such as the accuracy-related penalties under Section 6662, these tax penalties do not appear on the income tax return itself. They appear in certain documents prepared by the IRS (such as IRS Form 4549) that are included with a statutory notice of deficiency or that the taxpayer has signed in order to pay the amounts owed (such as IRS Form 4089-B).¹⁸⁰ But as these documents are not included in the definition of “income tax return,” the public disclosure measures that have been proposed would not require candidates or elected officials to release them to the public.¹⁸¹

More generally, documents that describe closing agreements and other settlements with the IRS would not be included in proposals that would require public disclosure of income tax returns exclusively. When taxpayers engage in controversies with the IRS following an audit and file internal appeals within the IRS, they often reach settlements where they agree to pay the tax deficiency and possibly tax penalties and interest.¹⁸² Taxpayers may reach a settlement agreement by signing a specific IRS Form (such as

178. See Doran, *supra* note 153.

179. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY 8 (2019), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/TC5D-GCTZ>] (tax form of Douglas C. Emhoff and Kamala D. Harris).

180. Internal Revenue Serv., *Form 4549: Income Tax Discrepancy Adjustments*, U.S. DEP’T TREASURY (2004), <https://www.irs.gov/pub/irs-tege/form4549e.pdf> [<https://perma.cc/BV7J-K656>]; Internal Revenue Serv., *Form 4089-B: Notice of Deficiency Waiver*, U.S. DEP’T TREASURY (2019), <https://www.irs.gov/pub/irs-pdf/f4089.pdf> [<https://perma.cc/QL5G-55AA>]. For discussion, see MICHAEL SALTZMAN & LESLIE BOOK, *IRS PRACTICE & PROCEDURE* ¶ 9.08 (2020).

181. See I.R.C. § 6103(b)(1) (2018).

182. See Internal Revenue Serv., *What to Expect from Appeals*, U.S. DEP’T TREASURY (Sept. 22, 2021) <https://www.irs.gov/appeals/what-to-expect-from-appeals> [<https://perma.cc/QZ82-6MZG>]; Jane C. Bergner, *IRS Settlement Procedures*, in 14 MERTENS LAW OF FED. INCOME TAX’N § 50:110 (2020).

IRS Form 870-AD)¹⁸³ or by entering into a closing agreement that covers specific matters and that is also summarized on a specific form (IRS Form 906).¹⁸⁴ As defined in the statute, “income tax returns” do not include settlements or related background information.¹⁸⁵

While Presidents, Vice Presidents and candidates have publicly disclosed their tax returns over the past forty years voluntarily, they have not disclosed settlements with the IRS. President George H.W. Bush, for instance, publicly disclosed a power of attorney form with his 1991 income tax return that revealed he had authorized his tax advisors and lawyers to enter closing agreements with the IRS on his behalf, but did not provide any indication that he had engaged in controversies or settlements with the IRS.¹⁸⁶ During the 2012 presidential election, commentators speculated that presidential candidate Mitt Romney may have entered into settlement agreements with the IRS regarding offshore bank accounts, but he never confirmed this allegation or released any documentation regarding settlements.¹⁸⁷ Consequently, a public disclosure requirement that specifically excluded settlements and closing agreements of candidates and

183. Internal Revenue Serv., *Form 870-AD: Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment*, U.S. DEP’T TREASURY (1992), <https://www.irs.gov/pub/irs-utl/form870.pdf> [<https://perma.cc/S3VK-JRAL>].

184. Internal Revenue Serv., *Form 906: Closing Agreement on Final Determination Covering Specific Matters*, U.S. DEP’T TREASURY (1994), https://www.irs.gov/pub/irs-utl/form_906.pdf [<https://perma.cc/F93T-3AV3>].

185. See I.R.C. § 6103(b)(2)(D) (2018).

186. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY 4 (1991), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/MS33-YDHF>] (tax form of George H.W. Bush and Barbara P. Bush).

187. See, e.g., Matthew Yglesias, *Did Mitt Romney Take the 2009 Swiss Bank Account Amnesty*, SLATE (July 17, 2012), <https://slate.com/business/2012/07/romney-s-tax-returns-is-the-2009-swiss-bank-account-amnesty-what-he-doesn-t-want-us-to-see.html> [<https://perma.cc/93FD-64V8>]; David S. Hilzenrath, *What Would Mitt Romney’s Offshore Account Filings Show?*, WASH. POST (Jan. 27, 2012), https://www.washingtonpost.com/business/economy/romney-campaign-says-it-has-filed-paperwork-related-to-offshore-holdings/2012/01/27/gIQADJt7VQ_story.html [<https://perma.cc/9HWF-5H6X>]; Nicholas Shaxson, *Where the Money Lives*, VANITY FAIR (Aug. 2012), <https://archive.vanityfair.com/article/2012/8/where-the-money-lives> [<https://perma.cc/KF7S-C77F>].

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elected officials would significantly restrict the ability of the public to review and question the enforcement actions of the IRS.

B. How Public Tax Disclosure Can be Manipulated

In addition to the structural opacity of income tax returns, mandatory public disclosure of tax returns may provide voters with a distorted view of tax compliance due to deliberate actions that candidates and elected officials may take in response to the disclosure requirement. As this Section shows, even if mandatory public disclosure legislation were enacted, candidates and elected officials would retain strategic opportunities for avoiding public disclosure of abusive tax planning and other tax noncompliance.

1. Selective Disclosure

One likely reaction from candidates and elected officials to a rule requiring public disclosure would be to selectively disclose tax return documents to voters. While legislative measures, such as that contained in the For the People Act of 2021,¹⁸⁸ would require Presidents, Vice Presidents, and major party candidates to disclose as many as ten years of income tax returns, they remain susceptible to selective disclosure.

A weakness of most legislative proposals is that they assign the initial responsibility for disclosing tax returns *to the elected official or candidate who filed the returns with the IRS*. For example, under the For the People Act of 2021, candidates for President and Vice President must submit to the FEC income tax returns for the ten most recent taxable years; the FEC then makes the returns publicly available.¹⁸⁹ While this statute appears to require public disclosure of income tax returns, it does not adequately prevent a candidate from withholding relevant income tax return documents from the FEC. The legislation provides that if a candidate fails to disclose any income tax returns to the FEC for a specific covered year, the FEC shall submit a written request to the Secretary of the Treasury to request the missing income tax returns.¹⁹⁰ However, if a candidate provides some, but not all, tax return documents to the FEC, it is unlikely that officials at the FEC would have the ability to identify every document that the

188. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

189. *Id.*

190. *Id.*

candidate failed to disclose. The following examples illustrate some of the selective disclosure techniques that candidates and elected officials could attempt in light of this statutory design.

Partial Disclosure. Candidates and elected officials could exploit the ambiguity of proposed legislation by filing tax returns with the IRS, but by omitting IRS schedules and taxpayer statements that may reveal tax noncompliance in their filings with the FEC. When voluntarily disclosing their tax returns in the past, Presidents, Vice Presidents, and candidates have engaged in this type of selective public disclosure strategy. For example, Vice President Dick Cheney publicly disclosed his tax returns during his years in office, but in most cases, only provided two pages of his IRS Form 1040.¹⁹¹ By only providing the first two pages of returns, Vice President Cheney was able to state that he had disclosed income tax returns, even though his disclosures prevented voters from reviewing schedules, statements, and other relevant documents he may have filed with the IRS.¹⁹²

A similar partial disclosure strategy may be to file income tax returns with the FEC but omit only certain schedules that might raise questions from political opponents, commentators, and voters. For example, a presidential candidate who owns a business and files IRS Schedule C could disclose an income tax return to the FEC, but omit any taxpayer statements that describe items on Schedule C, such as business expenses, that the candidate filed with the IRS originally.¹⁹³ Or a candidate could disclose income tax returns to the FEC, but omit certain forms and schedules that could reveal abusive tax planning or tax noncompliance, such as forms that show the ownership of an offshore bank account, property holdings in other countries, or participation in potentially abusive tax shelters.¹⁹⁴ Under proposed legislation, officials at the FEC would face the difficult task of

191. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY (2001, 2004, 2005, 2006, and 2007), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/8HPA-DJHM>] (tax forms of Richard B. Cheney and Lynne V. Cheney).

192. Press Release, The White House, *Vice President and Mrs. Cheney Release 2000 Income Tax Return* (Apr. 13, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/04/20010413-5.html> [<https://perma.cc/3KN8-75YY>].

193. See *supra* notes 158-263 and accompanying text.

194. See *id.*

detecting the omission of these schedules and other documents and requesting them directly from the Treasury.¹⁹⁵

Vague Disclosure. Another strategy that candidates and elected officials may adopt could be to provide minimal information on forms they file with the IRS initially, since these forms would later be publicly released by the FEC. For example, current law requires taxpayers to disclose their participation in “reportable transactions”—potentially abusive tax shelter strategies—using special disclosure forms, such as IRS Form 8886, to the IRS Office of Tax Shelter Analysis.¹⁹⁶ Even though these reportable transaction forms are designed to highlight potentially abusive tax strategies to the IRS, these forms may provide only some of the information necessary for voters to reach informed conclusions regarding the tax compliance of candidates and elected officials.

In 2012, presidential candidate Mitt Romney’s 2010 tax returns for his blind trust contained several reportable transaction disclosure forms.¹⁹⁷ In most cases, Romney’s reportable transaction forms contained no explanations regarding the transactions or circumstances that triggered the requirement to file the forms.¹⁹⁸ In other instances, the description lines on the forms were blank, but the forms included a letter from a Goldman Sachs hedge fund, which referenced an IRS Notice and stated the names of specific entities in which the hedge fund had invested.¹⁹⁹ A mandatory public

195. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

196. Internal Revenue Serv., *Form 8886: Reportable Transaction Disclosure Statement*, U.S. DEP’T TREASURY (2019), <https://www.irs.gov/pub/irs-pdf/f8886.pdf> [<https://perma.cc/7RGQ-BUMQ>]; Treas. Reg. § 1.6011-4(e) (describing taxpayer requirement); Treas. Reg. § 301.6111-3(d)(1) (describing material advisor requirement).

197. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY 110 (2010), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/JWU7-WE9T>] (tax form of Willard M. Romney and Ann D. Romney).

198. *Id.* at 111.

199. See, e.g., Harry Bose, *A Reaction to the Romney Tax Return*, ACCOUNTING TODAY (Oct. 1, 2012), <https://www.accountingtoday.com/news/a-reaction-to-the-romney-tax-return> [<https://perma.cc/2J7Y-R4K5>]; Lee A. Sheppard, *News Analysis: Dissecting Mitt Romney’s Tax Returns*, TAX NOTES (Jan. 30, 2012), <https://www.taxnotes.com/> [<https://perma.cc/BFT4-5P73>]; Daniel Shaviro, *Romney’s 2010 and 2011 Tax Returns*, START MAKING SENSE (Jan. 24, 2012), <http://danshaviro.blogspot.com/2012/01/romneys-2010-and-2011-tax-returns.html> [<https://perma.cc/49NX-UU3A>].

disclosure requirement could exacerbate incentives to provide minimal explanatory information on reportable transaction and other “red flag” disclosure forms, as this strategy could provide both tax enforcement and political benefits to the individuals filing these forms.

Non-Income Tax Forms. Last, candidates and elected officials could respond to mandatory public disclosure legislation by applying a narrow reading of the requirement to disclose income tax returns. While the For the People Act of 2021 requires the President, Vice President, and major party candidates to submit their tax returns to the FEC, the legislation uses the phrase “income tax return” throughout the proposed statute.²⁰⁰ A candidate could apply an aggressive reading of this requirement by providing to the FEC copies of the candidate’s IRS Form 1040, an income tax return, but by omitting forms and documents related to non-income taxes, such as gift tax returns.²⁰¹ While at least one President has publicly disclosed gift tax forms voluntarily (IRS Form 709),²⁰² other Presidents and presidential candidates have not included them with their voluntary income tax return disclosures.²⁰³ If the FEC were to challenge an individual’s nondisclosure of gift tax forms, it would have a strong legal argument that the forms are required to be publicly disclosed.²⁰⁴ But officials at the FEC would first need to have reason to suspect that gift tax forms were filed with the IRS and were missing from the FEC filing before requesting the Treasury to provide the missing forms.

2. Taxable Income and Tax Payments

A mandatory tax return disclosure requirement would not prevent strategies that could allow candidates and elected officials to disclose potentially misleading information regarding their taxable income and tax payments. These techniques would take advantage of the annual accounting

200. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

201. See I.R.C. §§ 2503(a),(b) (2018).

202. See Internal Revenue Serv., *Form 709: U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY 48 (2010), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/D9BR-NR86>] (tax form of Barack H. Obama and Michelle L. Obama).

203. See *Presidential Tax Returns*, *supra* note 23.

204. See For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021). The argument would be that even though the legislation refers to “income” tax returns, gift tax forms are included in the statutory definition of tax returns in I.R.C. § 6103(b)(1).

period and procedural tax rules to enable changes to tax returns that could occur outside of public view.

Tax Refunds. Mandatory public disclosure of tax returns would not prevent a presidential candidate or President or Vice President from reporting taxable income and tax liability on a publicly disclosed tax return and then later requesting a refund for this tax liability in a future year.²⁰⁵ For example, a presidential candidate could report on her tax return for the tax year prior to the general election that she paid \$5 million in tax liability to the IRS. While this return would be subject to mandatory public disclosure under proposed legislation, she could later file a claim for a refund of the \$5 million from the IRS.²⁰⁶

Reports from the *New York Times* in 2020 regarding President Trump's returns provide an illustration of this technique.²⁰⁷ The reports allege that in 2010, President Trump claimed a worthless stock deduction due to his ownership stake in a failed Atlantic City casino and that he later carried back the deduction to prior years under tax law in effect at the time.²⁰⁸ The *Times* reporters alleged that, as a result of this carryback, President Trump was able to request a refund for all of the federal income tax he paid in 2005 through 2008, including overpayment interest.²⁰⁹ If the reported facts are accurate, President Trump's original tax returns showed millions of dollars in tax liability for several years, 2005 through 2008, even though he later filed a refund claim that eliminated his tax liability.²¹⁰ Public disclosure of tax returns, thus, may present to voters a misleading image regarding the individual's tax liability and tax compliance.

Amended Returns. A similar strategy would be to file tax returns with the IRS, which would be subject to public disclosure, and then later file amended returns that revise the original filed returns. While taxpayers often file amended returns to claim refunds, they also file amended returns to cure defects in previously filed returns.²¹¹ The option to file amended tax

205. See I.R.C. § 6511(a) (2018) (codifying a statute of limitations on refund claims).

206. *Id.*

207. See Buettner et al., *supra* note 9.

208. *Id.*

209. *Id.*

210. *Id.* If the reported facts are accurate, the likely statute that allowed the carryback was I.R.C. § 172(b)(1)(H).

211. For discussion, see BORIS BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES & GIFTS* ¶ 111.1.8 (2020).

returns would be helpful to elected officials and candidates who do not wish to disclose information on a tax return that would be visible to voters, such as the use of offshore bank accounts or cryptocurrency transactions.

Final Tax Year. Mandatory public disclosure legislative proposals would also fail to reveal tax positions that a President and Vice President claim during their final year in office. Most legislative proposals require the President and Vice President to disclose their tax returns publicly when they are in office and for prior tax years as well. For example, the For the People Act of 2021 provides that “the President or Vice President . . . shall submit to the Federal Election Commission a copy of the individual’s income tax returns for the taxable year and for the 9 preceding taxable years.”²¹² Because individuals file their tax returns by April 15th for the prior tax year, this rule would not cover the final tax year that the President and Vice President serve in office.²¹³

There is one historical example of concerns raised by this lack of disclosure in the President’s final tax year in office. In 1974, President Nixon agreed to pay \$432,787 in unpaid tax and interest to the IRS for his 1969 to 1972 tax years following review by the IRS and the Joint Committee on Internal Revenue Taxation.²¹⁴ As the statute of limitations on Nixon’s 1969 tax year had closed, however, Nixon’s 1974 payment of tax attributable to 1969 could have qualified as a donation to the federal government, entitling Nixon to a large charitable contribution tax deduction in 1974.²¹⁵ Yet as 1974 was Nixon’s final tax year in office, he did not publicly disclose his 1974 tax return when he filed it with the IRS in 1975, after he had resigned.²¹⁶ Recent mandatory disclosure legislative proposals, including

212. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021) (emphasis added).

213. See I.R.C. § 6072 (2018) (establishing the April 15th tax return deadline).

214. See *supra* note 46.

215. See Eileen Shanahan, *Nixon Tax Inquiry Is Closed by I.R.S. And Congress Unit*, N.Y. TIMES, Apr. 5, 1974, <https://www.nytimes.com/1974/04/05/archives/nixon-tax-inquiry-is-closed-by-irs-and-congress-unit-but-several.html> [<https://perma.cc/Z77A-AU5X>]; William D. Samson, *President Nixon’s Troublesome Tax Returns*, TAX NOTES, Apr. 11, 2005, <http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/f8723e3606cd79ec85256ff6006f82c3?OpenDocument> [<https://perma.cc/9Y9U-6D49>].

216. *Id.*

the For the People Act of 2021,²¹⁷ would offer the same final tax year nondisclosure opportunity to future Presidents and Vice Presidents.

3. Business Entities and Spouses

Business entities and family members, especially spouses, provide additional opportunities for candidates and elected officials to avoid disclosing politically damaging acts of tax noncompliance to voters. The federal ethics laws acknowledge the potential for presidential candidates, Presidents and Vice Presidents to obscure information regarding potential conflicts of interest by only disclosing information about their own income and directly-held assets. For this reason, they require individuals who file the non-tax financial disclosure form, OGE 278e, to share information regarding business entities they own and the income, assets and transactions of their spouses and children.²¹⁸ But when candidates and elected officials voluntarily disclose only their own individual income tax returns, they may provide a limited and misrepresentative image of their tax compliance to the public. Because individuals and entities can file separate tax returns, candidates and elected officials can use this option to mask aggressive and abusive tax planning.

The For the People Act of 2021 would have required the President, Vice President, and all major party candidates to disclose not only their individual income tax returns, but also the tax returns of corporations, partnerships, or trusts in which the individual is the sole owner or holds a significant interest.²¹⁹ While the “significant interest” requirement is not clearly defined, this legislative proposal would extend the public disclosure requirement to include the tax returns of business entities.²²⁰ As the inclusion of business-entity tax returns has differed among legislative proposals,²²¹ and could be removed completely in negotiations during the

217. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

218. *See* 5 U.S.C. app. § 102(e)(1) (2018); 5 C.F.R. § 2634.311 (2021).

219. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

220. *Id.*

221. *See, e.g.*, Presidential Tax Transparency Act, S. 2979, 114th Cong. § 2 (2016) (addressing individual tax returns only); Anti-Corruption and Public Integrity Act, S. 3357, 115th Cong. § 602 (2018) (addressing individual tax returns only); For the People Act of 2019, H.R. 1, 116th Cong. § 10001 (2019) (addressing both individual and business tax returns); For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021) (addressing both individual and business tax returns).

legislative process, it is important to consider the role that business entities could play in obscuring the voters' view of tax compliance.

Business Entities. In the U.S., certain business entities file separate tax returns from their owners. Specifically, Subchapter C corporations,²²² Subchapter S corporations,²²³ partnerships²²⁴ and trusts²²⁵ all file their own separate tax returns with the IRS. As a result, the disclosure of a presidential candidate's individual income tax return, but not of the tax return of a Subchapter C corporation in which this individual owns a substantial stake, may prevent voters from observing information that is relevant to the evaluation of the candidate's tax compliance. For example, the corporation could claim business expense deductions that may be personal expenses of the candidate (or the candidate's family members), such as the cost of meals and clothing, and should not be tax deductible.²²⁶ Another possibility is that the corporation could serve as a device for retaining corporate earnings, enabling the candidate to avoid receipt of taxable dividend distributions.²²⁷ Or the corporation could be engaged in aggressive transfer pricing tax strategies or abusive tax shelters.²²⁸ Even though these actions would be

222. Internal Revenue Serv., *Form 1120: U.S. Corporation Income Tax Return*, U.S. DEP'T TREASURY (2020), <https://www.irs.gov/pub/irs-pdf/f1120.pdf> [<https://perma.cc/X6R4-6VJD>].

223. Internal Revenue Serv., *Form 1120-S: U.S. Income Tax Return for an S Corporation*, U.S. DEP'T TREASURY (2020), <https://www.irs.gov/pub/irs-pdf/f1120s.pdf> [<https://perma.cc/YQT7-4DMH>].

224. Internal Revenue Serv., *Form 1065: U.S. Return of Partnership Income*, U.S. DEP'T TREASURY (2020), <https://www.irs.gov/pub/irs-pdf/f1065.pdf> [<https://perma.cc/3A2C-QT4V>].

225. Internal Revenue Serv., *Form 1041: U.S. Income Tax Return for Estates and Trusts*, U.S. DEP'T TREASURY (2020), <https://www.irs.gov/pub/irs-pdf/f1041.pdf> [<https://perma.cc/2MNR-ERKM>].

226. *See, e.g.*, *Bayou Verret Land Co. v. Comm'r.*, 450 F.2d 850 (5th Cir. 1971) (addressing constructive dividends); *Berkley Mach. Works & Foundry Co. v. Comm'r.*, 422 F.2d 362 (4th Cir. 1970) (addressing constructive dividends); *Pevsner v. Comm'r.*, 628 F.2d 467 (5th Cir. 1980) (addressing clothing not deductible).

227. *See* I.R.C. §§ 531-537 (2018); *United States v. Donruss*, 393 U.S. 297 (1969). For further discussion, see Steven A. Bank, *A Capital Lock-in Theory of the Corporate Income Tax*, 94 GEO. L.J. 889 (2006); Katherine Pratt, *The Debt-Equity Distinction in a Second-Best World*, 53 VAND. L. REV. 1055 (2000).

228. For discussion, see JOINT COMM. ON TAXATION, 111TH CONG., JCX-37-10, PRESENT LAW AND BACKGROUND RELATED TO POSSIBLE INCOME SHIFTING AND TRANSFER PRICING

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relevant to voters who seek to learn about the tax compliance of the candidate, they would remain completely hidden from public view if the candidate did not disclose the return of the wholly-owned corporation.

Presidential candidates, Presidents and Vice Presidents have voluntarily disclosed their individual income tax returns to the public over the past forty years, but few have shared the returns of business entities they own.²²⁹ For example, in 2020, President Biden disclosed his joint income tax returns, but not the tax return of his Subchapter S corporation, Giacoppa Corporation,²³⁰ and in 2016, Vice Presidential candidate Mike Pence disclosed his joint return, but not the tax return of his Subchapter S corporation, That's My Towel, Inc.²³¹ Even if President Trump had disclosed his individual income tax returns, these returns would not show the tax positions of business entities he owned. A 2020 *New York Times* exposé focused heavily on the tax returns of President Trump's business entities, including entities that allegedly claimed ordinary and necessary business expenses for haircuts, makeup, and other personal expenses of President Trump and members of his family.²³² Without an explicit requirement that candidates and elected officials publicly disclose the tax returns of their business entities, voters would continue to lack a comprehensive view of these individuals' tax planning and compliance.

Spouses. Finally, the option for married couples to file tax returns separately also offers opportunities to candidates and elected officials for

(2010); *Tax Reform: Tax Havens, Base Erosion and Profit-Shifting: Hearing Before the Comm. on Ways and Means*, 113th Cong. (2013) (statement of Edward D. Kleinbard); MARC M. LEVEY, STEVEN C. WRAPPE, & KERWIN CHUNG, *TRANSFER PRICING RULES AND COMPLIANCE HANDBOOK* ¶ 100 (2006).

229. One exception is presidential candidate Mitt Romney. Internal Revenue Serv., *IRS Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 110-24 (2010), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/B7CR-XUDT>] (Forms 8886 of Willard M. and Ann D. Romney).

230. *See, e.g.*, Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 10 (2019) <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/YCC5-SG2A>] (tax form of Joseph R. Biden, Jr. and Jill T. Biden, reporting \$175,319 of ordinary income from Giacoppa Corp.).

231. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 3 (2012) <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/Z93U-5X79>] (tax form of Michael R. Pence and Karen S. Pence).

232. Buettner et al., *supra* note 9.

avoiding public disclosure mandates. In the U.S. income tax system, two individuals who are legally married may elect “married filing separately” status when filing their income tax returns, requiring each member of the couple to report income, deductions, and other items on separate tax returns.²³³ Over the past forty years, at least three presidential and vice presidential candidates, Geraldine Ferraro,²³⁴ John Kerry,²³⁵ and John McCain,²³⁶ filed their tax returns using the married-filing-separately status and publicly disclosed their separate income tax returns. In each case, following public pressure, the spouses of these candidates voluntarily released some of their own tax returns or return information to the public.²³⁷ One concern that critics voiced was that the separate tax-return

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233. I.R.C. § 1(d) (2018) (imposing a tax on married individuals filing separate returns); I.R.C. § 6013(a) (2018) (providing joint return election); I.R.C. § 7703 (2018) (regarding the determination of marital status); *see* Internal Revenue Serv., *Publication 17: Your Federal Income Tax for Individuals*, U.S. DEP’T TREASURY 20 (Feb. 11, 2021), <https://www.irs.gov/pub/irs-pdf/p17.pdf> [<https://perma.cc/32D5-9ULH>] (describing filing status).
234. *See* Associated Press, *Ferraro Will File Disclosure Forms; Husband Balks*, DESERT SUN (Aug. 13, 1984), <https://cdnc.ucr.edu/?a=d&d=DS19840813.2.6&e=-----en--20--1--txt-txIN-----1> [<https://perma.cc/8FPY-7J5S>].
235. Internal Revenue Serv., *Form 1040-X: Amended U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY (2003), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/LRC2-FNUD>] (tax form of John F. Kerry showing married-filing-separately status).
236. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY (2006), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/34U8-6TNX>] (tax form of John McCain showing married-filing-separately status); Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP’T TREASURY (2007), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/4HJR-YW9A>] (tax form of John McCain showing married-filing-separately status).
237. *See* Jeff Gerth, *Ferraro Reveals Her Tax Figures and Husband’s*, N.Y. TIMES (Aug. 21, 1984), <https://www.nytimes.com/1984/08/21/us/ferraro-reveals-her-tax-figures-and-husband-s.html> [<https://perma.cc/F3KA-QAJR>]; David Cay Johnston & Eric Lipton, *Kerry’s Wife Releases Part of Her 2003 Income Tax Return*, N.Y. TIMES (Oct. 16, 2004), <https://www.nytimes.com/2004/10/16/politics/campaign/kerrys-wife-releases-part-of-her-2003-income-tax-return.html> [<https://perma.cc/H8YF-DM64>]; Steve Holland, *Cindy McCain Releases 2007 Tax Return*, REUTERS (Oct. 17, 2008, 10:42 PM), <https://www.reuters.com/article/us-usa-politics-mccain-cindy/>

status prevented voters from learning about the tax and business affairs of the candidates. During the 2004 controversy over Teresa Heinz's refusal to release her separate returns along with those of presidential candidate John Kerry, her husband, one commentator argued that future candidates could use this approach "nefariously," predicting that "soon everyone will be filing separately."²³⁸

One strategy for using separate tax returns to withhold potentially negative information, including regarding tax compliance, involves the ownership of property within the married couple. If a married couple consisting of a candidate and a spouse purchases interests in a business entity in the name of the non-candidate spouse or assigns ownership in these interests to the non-candidate spouse, then the tax affairs of this entity will not appear on the candidate's individual or business tax returns.²³⁹ Assume, for instance, that a presidential candidate has founded several technology businesses before entering politics. The candidate could provide to the spouse an unlimited tax-free gift of all the stock of one of the candidate's valuable technology corporations (the gift would not be required to be reported on a tax form).²⁴⁰ The candidate and the spouse could then file separate tax returns using the married-filing-separately status, and as a result, the tax and business affairs of the technology corporation would then be concealed from voters.

mccain-releases-2007-tax-return-idUKTRE49G7DM20081018
[<https://perma.cc/E65M-FDCM>].

238. Katharine Q. Seelye & David Rosenbaum, *Privacy of Wife's Fortune Casts a Shadow Over Kerry*, N.Y. TIMES (Apr. 25, 2004), <https://www.nytimes.com/2004/04/25/us/campaign-2004-disclosure-privacy-of-wife-s-fortune-casts-a-shadow-over-kerry.html> [<https://perma.cc/AD8V-QS3Q>] (quoting Bill Allison, Center for Public Integrity). Bob Bauer and Jack Goldsmith have advocated for a public tax return disclosure requirement not only for Presidents, Vice Presidents, and candidates, but also for any members of the President's or Vice President's family who hold senior executive branch positions. BAUER & GOLDSMITH, *supra* note 99, at 83. This proposal, however, would not address the use of the married-filing-separately status by candidates to obscure or conceal aggressive and abusive tax planning in situations where their spouses do not hold senior executive branch positions.
239. See For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).
240. See I.R.C. §§ 1041(a)(1), (b) (2018). As Jay Soled has suggested, it is possible that an individual could use gifts to a spouse to transfer property outside of the United States. See Jonathan Curry & Luca Gattoni-Celli, *Legal Scholars Question Trump Attorneys' Analysis of Russia Ties*, TAX NOTES (May 22, 2017), <https://www.taxnotes.com> [<https://perma.cc/4MYP-AJ96>].

IV. WHAT WOULD TRANSPARENT TAX DISCLOSURE REQUIRE?

When considered alone, the tax returns of the President, the Vice President, and presidential candidates provide only a partial, and potentially false, view of whether and how these individuals have complied with the tax law.²⁴¹ What additional information could policymakers require to be publicly disclosed that would provide voters with a more complete and balanced perspective of candidates' and elected officials' tax compliance, and what would be the reasons for doing so?

Increased transparency regarding the tax compliance of candidates and elected officials, this Part argues, would offer valuable social benefits, including a better-informed electorate, enhanced public tax education, and improved oversight over the taxing authority. In pursuit of these objectives, this Part proposes an alternative model of mandatory public disclosure that would encompass public disclosure not only of tax returns, but also of documents and processes that would highlight tax actions of both candidates and elected officials and the IRS. After presenting the case for this model, this Part offers recommendations regarding specific types of tax return information that should be included in a mandatory public disclosure requirement and then responds to potential drawbacks of extending mandatory disclosure beyond tax returns.

A. *Why Illuminate Tax Compliance?*

A requirement that voters have access not only to tax returns, but also to additional information regarding candidates' and elected officials' tax compliance and actions of the taxing authority, could foster a better-informed electorate, provide public education regarding the design and operation of the tax system, and enable public oversight over the IRS.

1. Informed Electorate

Voters report consistently that they believe presidential candidates should publicly disclose their tax returns prior to elections in order to help them make informed voting decisions.²⁴² During the 2020 presidential

241. See *supra* notes 131-240 and accompanying text.

242. See, e.g., *Negative Views of Trump's Transition, Amid Concerns About Conflicts, Tax Returns*, PEW RSCH. CENTER (Jan. 10, 2017), <https://www.pewresearch.org/politics/2017/01/10/negative-views-of-trumps->

election, one poll conducted by Reuters/Ipsos found that nearly seventy percent of voters believed they should have a right to review candidates' tax returns as part of the election process.²⁴³ Another poll reported that, during the 2016 election, sixty percent of Republicans responded that they believed Trump should have disclosed his personal tax returns.²⁴⁴ Many voters view candidates' tax compliance as an indication of characteristics they believe are relevant to the office the candidates seek, including, among others, integrity, transparency, and respect for the law.²⁴⁵

In order to consider these personal attributes in an accurate and meaningful way, however, voters would need access to more than candidates' and elected officials' tax returns. As Part III illustrated, without supporting information underlying the figures reported, tax returns only describe candidates' self-assessment.²⁴⁶ Where tax returns of candidates contain limited descriptions or lack explanatory schedules, their incomplete nature may cause voters to encounter conflicting analysis of the candidates' tax affairs from political actors, journalists and even tax experts.²⁴⁷ And

transition-amid-concerns-about-conflicts-tax-returns/
[<https://perma.cc/2TY5-VTCM>] (demonstrating that sixty percent of respondents believe that Trump has the responsibility to release tax returns); William Saletan, *The Public Wants Trump's Tax Returns*, SLATE (April 11, 2019), <https://slate.com/news-and-politics/2019/04/trump-tax-returns-voters-polls-show-americans-want-them.html> [<https://perma.cc/MTB9-SK44>] (summarizing polling data); *Clinton Holds Lead Amid Record High Dislike of Both Nominees*, MONMOUTH UNIV. POLLING INST. (Aug. 29, 2016), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_082916 [<https://perma.cc/NJ5N-AG4N>] (showing sixty-two percent of respondents view candidates' tax returns as important information).

243. Chris Kahn, *Two in Three Americans Want to See Trump's Tax Returns, Reuters/Ipsos Poll Shows*, REUTERS (Jul. 15, 2020), <https://www.reuters.com/article/us-usa-election-poll/two-in-three-americans-want-to-see-trumps-tax-returns-reuters-ipsos-poll-shows-idUSKCN24G14N> [<https://perma.cc/69B7-4KLU>].

244. Eli Yokley, *Poll: Most Voters Think Trump Should Release Tax Returns*, MORNING CONSULT (May 24, 2016), <https://morningconsult.com/2016/05/24/donald-trump-tax-returns-poll-results> [<https://perma.cc/QLZ8-JZR7>].

245. See, e.g., Emily Bazelon, *How Much 'Disclosure' Do We Really Expect From Candidates?*, N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/2016/09/11/magazine/how-much-disclosure-do-we-really-expect-from-candidates.html> [<https://perma.cc/H2XU-PTMA>]; Zukoff, *supra* note 21.

246. See *supra* Sections III.A, III.B.

247. See *supra* notes 188-204 and accompanying text.

even though journalists may highlight the effective tax rate of each candidate, this figure may be manipulated by the candidates, especially those who own and operate businesses.²⁴⁸

Increased tax transparency, if it were possible, would enable voters to verify information that most currently accept at face value. For example, throughout the 2016 and 2020 presidential campaigns, President Trump repeatedly proclaimed that his tax returns were “under a routine [IRS] audit”²⁴⁹ While mandatory public disclosure of Trump’s tax returns alone would not have allowed voters to evaluate the accuracy of Trump’s statement, an expanded requirement that included reports of past and ongoing IRS audits would have provided voters with confirmation. (Indeed, in 2020, journalists confirmed that Trump was engaged in a years-long audit with the IRS regarding a multi-million-dollar refund claim.)²⁵⁰ Increased tax transparency could provide voters with an enhanced ability to observe additional aspects of candidates’ and officials’ tax compliance, such as whether they reported and/or paid tax liability to the IRS, participated in abusive tax shelters, disclosed questionable tax positions with their tax returns,²⁵¹ owned offshore bank accounts,²⁵² filed amended returns or requested tax refunds or credits, received IRS notices of deficiency,²⁵³ and paid tax penalties, among myriad other aspects of tax compliance.²⁵⁴

If it were possible for voters to gain a more complete understanding of the tax affairs of candidates and elected officials, this information could enable them to better consider tax compliance as a factor in their voting

248. See *supra* notes 205-217 and accompanying text.

249. Rogers, *supra* note 8.

250. See Buettner et al., *supra* note 9.

251. See, e.g., Internal Revenue Serv., *Form 8275-R: Regulation Disclosure Statement*, U.S. DEP’T TREASURY (2013), <https://www.irs.gov/pub/irs-pdf/f8275r.pdf> [<https://perma.cc/M3GX-UJVV6>]. Taxpayers and tax return preparers use this form to disclose items not otherwise adequately disclosed on a tax return to avoid certain penalties.

252. See *supra* note 187.

253. I.R.C. § 6212(a) (2018).

254. In the FOIA context, Margaret Kwoka has argued that government agencies should practice “affirmative disclosure,” where they release more comprehensive information rather than wait to respond to specific, often repeated, disclosure requests. See Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1430 (2016).

decisions. If voters could observe that a candidate has filed accurate and complete personal tax returns and has not withheld information from the IRS, they might conclude that the individual would show similar allegiance to laws and legal institutions when in office. Conversely, if voters could determine that a candidate has engaged in abusive tax schemes or filed tax forms in ways that were designed to evade IRS detection, they may conclude that the individual will adopt a similar attitude when executing presidential duties. And if voters could determine that a candidate has benefited from certain tax strategies personally, this information might lead them to conclude that the individual has a vested interest in maintaining certain tax rules and regulations.

2. Public Tax Education

A second reason to support increased transparency of candidates' and elected officials' tax affairs is that it could serve a valuable public-education function regarding the U.S. tax system. Behavioral research has demonstrated that specific examples have a more significant effect on individuals' perceptions than anonymous statistics and complex statutory text.²⁵⁵ The tax returns of Presidents, Vice Presidents, and presidential candidates are the epitome of these types of specific examples. They are replete with colorful, memorable images, such as tax deductions related to Presidential candidate Mitt Romney's dressage horse, Rafalca,²⁵⁶ Presidential candidate John Kerry's charitable contribution of used clothing,²⁵⁷ President Richard Nixon's twenty-two dollar deduction for

255. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); Nick Ellis, *Word Meaning and the Links Between the Verbal System and Modalities of Perception and Imagery or In Verbal Memory the Eyes See Vividly, but Ears Only Faintly Hear, Fingers Barely Feel and the Nose Doesn't Know*, in MENTAL IMAGES IN HUMAN COGNITION 313, 314 (1991).

256. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 19 (2010) <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/JV53-5MBQ>] (tax form of Willard M. Romney and Ann D. Romney) (Form 8886); see Sheppard, *supra* note 143.

257. Internal Revenue Serv., *Form 1040-X: Amended U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY 10 (2000), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/H9XB-JPG9>] (tax form of John F. Kerry).

cleaning Mrs. Nixon's bathroom rug,²⁵⁸ and President George H.W. Bush's royalty income for his dog's autobiography, *Millie's Book*,²⁵⁹ to name just a few.

A requirement that candidates and elected officials disclose only their tax returns would limit, and potentially inhibit, this public tax education function. Without access to supporting documentation and analysis, intermediaries, such as tax experts, often face difficulty in identifying the specific tax strategies that are reflected on candidates' and elected officials' tax returns in order to explain them to the public. For example, in 2012, following presidential candidate Mitt Romney's release of his tax returns and financial disclosure statement, tax experts questioned how his tax-deferred retirement account had a value of approximately \$100 million, even though taxpayers were subject to strict limitations on contributions to such accounts under the tax law.²⁶⁰ Some suggested that Romney may have used an aggressive tax strategy to contribute limited partnership interests with a very low valuation to the retirement account.²⁶¹ Yet, in many cases, they cautioned that Romney's returns did not contain statements or other explanations that would allow for full analysis of the issue.²⁶² As tax scholar Edward Kleinbard lamented in 2012 regarding Romney's tax returns,

258. See JOINT COMM. ON INTERNAL REVENUE TAX'N, *supra* note 39, at 135; Samson, *supra* note 215.

259. Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY, Schedule E (1991), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/2KDV-NADP>] (tax form of George H.W. Bush and Barbara P. Bush).

260. See, e.g., William D. Cohan, *What's Really Going on With Mitt Romney's \$102 Million IRA*, ATLANTIC (Sept. 10, 2012), <https://www.theatlantic.com/politics/archive/2012/09/whats-really-going-on-with-mitt-romneys-102-million-ira/261500> [perma.cc/47EU-DSLD]; Lynnley Browning, *How Did Romney's IRA Grow so Big?*, REUTERS (Jan. 23, 2012), <https://www.reuters.com/article/us-usa-campaign-romney-ira/how-did-romneys-ira-grow-so-big-idUSTRE80N04E20120124> [perma.cc/RSK4-272S].

261. See, e.g., William D. Cohan, *The Secret Behind Romney's Magical IRA*, BLOOMBERG (Jul. 15, 2012), <https://www.bloomberg.com/opinion/articles/2012-07-15/the-secret-behind-romney-s-magical-ira> [perma.cc/LAN9-SC9K] (interview with Edward Kleinbard); Tim Dickinson, *Mitt Romney's Tax Dodge*, ROLLING STONE (Oct. 12, 2012), <https://www.rollingstone.com/politics/politics-news/mitt-romneys-tax-dodge-126974> [perma.cc/45MM-BBZY] (interviews with Victor Fleischer and Daniel Shaviro).

262. See, e.g., Cohan, *supra* note 261; Dickinson, *supra* note 261.

“What’s very frustrating to me about all this is that we can only talk in abstractions and generalities because, again, of the lack of disclosure.”²⁶³

But if it were possible to require disclosure of information that could better equip tax experts to analyze the tax returns of candidates and elected officials, public education regarding the tax system could be enhanced. At the very least, experts would have a better chance of correctly identifying the specific tax issue or tax strategy reflected on the candidate’s or elected official’s tax return.²⁶⁴ While the use of some tax provisions, such as Section 1031 tax-deferred like-kind exchanges, is apparent from specific forms contained in the tax returns,²⁶⁵ others, such as the contribution of carried interest to tax-preferred accounts²⁶⁶ or the use of Subchapter S corporations to avoid payroll taxes,²⁶⁷ require additional information. If this information were available, commentators could use it to explain the structure of these tax strategies and how specific candidates or elected officials have used them. The result could be a unique opportunity to provide public education on complex tax topics during primary elections and the general election, times when members of the general public have shown disproportionately heightened interest in discussions involving candidates’ tax returns.

Enhanced public knowledge of the tax system, and how it operates in practice, may promote discussion, debate, and, ultimately, reform of the tax law. Several historical examples provide support for the public education function of tax disclosure. As a result of the public release of documents related to President Nixon’s tax returns, for instance, the public learned of

263. Cohan, *supra* note 261 (quoting Edward Kleinbard).

264. For example, following the 2020 *New York Times* investigative on President Trump’s tax returns, which revealed far more details than would be apparent from tax returns alone, tax experts were able to deliver clear summaries of Trump’s tax planning and tax disputes. *See, e.g.*, Shaviro, *supra* note 64.

265. *See* I.R.C. § 103 (2018); Internal Revenue Serv., *IRS Form 8824: Like-Kind Exchanges*, U.S. DEP’T TREASURY (2020), <https://www.irs.gov/pub/irs-pdf/f8824.pdf> [<https://perma.cc/7YK4-AVAH>].

266. *See* Dickinson, *supra* note 261 (interviews with Victor Fleischer and Daniel Shaviro).

267. *See* Internal Revenue Serv., *Form 1120S: U.S. Income Tax Return for an S Corporation*, U.S. DEP’T TREASURY (2020), <https://www.irs.gov/pub/irs-pdf/f1120s.pdf> [<https://perma.cc/X8ZQ-X3V6>]; Richard Rubin, *Joe Biden Used Tax-Code Loophole Obama Tried to Plug*, WALL ST. J. (Jul. 10, 2019), <https://www.wsj.com/articles/joe-biden-used-tax-code-loophole-obama-tried-to-plug-11562779300> [<https://perma.cc/24H9-P7W4>].

the tax law that allowed government officials to claim charitable contribution deductions for gifts of personal papers and expressed outrage regarding this substantive tax rule (even though Congress had repealed it several years earlier).²⁶⁸ As another example, commentators have attributed one motivation for the Tax Reform Act of 1986,²⁶⁹ a landmark legislative reform, to the publication by Citizens for Tax Justice of tax information regarding household name corporations that had paid no income tax due to safe harbor leasing and other strategies.²⁷⁰ As one scholar has noted, this information had a “profound effect on educating the public” and on shaping public opinion.²⁷¹

If past experience is any guide, increased public education regarding the tax compliance of Presidents, Vice Presidents, and presidential candidates could stimulate discussion and debate of US tax laws and how they treat different types of taxpayers differently.²⁷² Topics that could become sources of possible legislative action include tax rules that treat owners of businesses differently from wage earners, allow some business taxpayers and individuals to smooth their income using loss carrybacks and

268. For discussion, see Thorndike, *supra* note 38; Walter Pincus, *Mr. Nixon's Papers: The Tax Question*, WASH. POST, Jan. 7, 1974, 1. In addition, Watergate prosecutors alleged that one of President Nixon's motivations for preserving recordings from the White House taping system was to create “non-paper material, such as tapes,” which he would later contribute as tax-deductible gifts to the National Archives following his presidency. *See Nixon Tapes Tied to Tax Deduction*, N.Y. TIMES, May 9, 1974; *Deduction of Tapes as Gifts Faces Bar*, N.Y. TIMES, May 21, 1974.

269. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324; Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172; Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494.

270. For discussion of how public awareness of tax issues involving specific taxpayers motivated legislative action in 1986, see, for example, Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990). *See also* CITIZENS FOR TAX JUST., *CORPORATE INCOME TAXES IN THE REAGAN YEARS* (1984); CITIZENS FOR TAX JUST., *CORPORATE TAXPAYERS & CORPORATE FREELoadERS* (1985); CITIZENS FOR TAX JUST., *MONEY FOR NOTHING: THE FAILURE OF CORPORATE TAX INCENTIVES, 1981-1984* (1986); CITIZENS FOR TAX JUST., *130 REASONS WHY WE NEED TAX REFORM*, 2-7 (1986).

271. Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 CAP. U. L. REV. 373, 375 (1993).

272. *See, e.g., supra* note 269.

carryforwards, and enable some taxpayers to avoid payroll and other taxes, among others.

3. IRS Oversight

Last, increased transparency regarding the actions of the IRS could enhance the public's ability to exercise oversight over the IRS and hold the agency accountable for its actions—or lack thereof. While mandatory public disclosure advocates have suggested that disclosure of tax returns alone would serve this oversight function,²⁷³ without information regarding the agency's audits, this function would be muted, at best. Even under a mandatory tax return disclosure regime, IRS employees would be prohibited from discussing any individual's tax returns publicly.²⁷⁴

Under its own internal procedures, the IRS automatically audits the tax returns of the President and Vice President each year that they are in office.²⁷⁵ This procedure, contained in the IRS's own Internal Revenue Manual, provides that the audits of the tax returns of the President and Vice President "require expeditious handling at all levels to ensure prompt completion."²⁷⁶ Even though the IRS executes these audits every year, and on an accelerated schedule, IRS officials do not share the results of the audit with Congress or address any aspect of the President's or Vice President's tax returns publicly.²⁷⁷ And none of the major federal legislative proposals would require public disclosure of the results of these annual IRS audits.²⁷⁸

While the IRS has established safeguards regarding the automatic audit of the President and Vice President,²⁷⁹ it is possible that intrusion from political appointees could occur, or at least that the public could suspect such improper interference. For example, in July 2019, a whistleblower filed a complaint with congressional committees and the Treasury Inspector

273. *See supra* note 126 and accompanying text.

274. I.R.C. § 6103 (a), (b) (2018).

275. I.R.M. 4.8.4.2.5 (Mar. 12, 2015) ("Audit of President and Vice President"); I.R.M. 4.2.1.15 (Apr. 23, 2014) ("Processing Returns and Accounts of the President and Vice President").

276. I.R.M. 4.2.1.15.

277. *Id.*; I.R.C. § 6103(a), (b) (2018).

278. *See* For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021); For the People Act of 2019, H.R. 1, 116th Cong. § 10001 (2019); Presidential Tax Transparency Act, S. 2979, 114th Cong. § 2 (2016).

279. *See supra* note 275.

General for Tax Administration (TIGTA), alleging that a political appointee within the Treasury Department had attempted to interfere in the automatic audit of President Trump's tax returns.²⁸⁰ Subsequently, following the *New York Times's* 2020 report on President Trump's tax returns,²⁸¹ commentators questioned whether the IRS had reviewed or challenged Trump's tax positions. Joseph Thorndike, for instance, questioned, "How well has [President Trump] been audited since he's been president?"

The IRS's inability to participate in public discussion of its audits of presidential and vice presidential tax returns has led to skepticism regarding the agency's review at other times as well. Following reports of President Nixon's low tax payments in 1971 and 1972, members of Congress and political commentators questioned whether the IRS had even audited the President's tax returns.²⁸² In 1973, Thomas Field, Executive Director of Tax Analysts, requested that the IRS appoint an independent auditor to review Nixon's returns, including reported questionable charitable contribution deductions.²⁸³ As Field and others argued, without being able to review and verify the IRS's audit of the President's returns, the public would lose confidence that the IRS was enforcing the tax law fairly, independent of inappropriate influence from the White House.²⁸⁴

280. See *Neal Says Lawyers Aim to Talk to Trump Tax Audit Whistleblower*, BLOOMBERG TAX (Oct. 1, 2019), <https://news.bloombergtax.com/daily-tax-report/neal-says-lawyers-aim-to-talk-to-trump-tax-audit-whistleblower> [<https://perma.cc/GDM7-65UL>]; Jeff Stein, Tom Hamburger, & Josh Dawsey, *IRS Whistleblower Said to Report Treasury Political Appointee Might Have Tried to Interfere in Audit of Trump or Pence*, WASH. POST (Oct. 3, 2019), https://www.washingtonpost.com/business/economy/irs-whistleblower-said-to-report-treasury-political-appointee-might-have-tried-to-interfere-in-audit-of-trump-or-pence/2019/10/03/0c768b34-e52e-11e9-a331-2df12d56a80b_story.html [<https://perma.cc/837N-AARN>].

281. Buettner et al., *supra* note 9.

282. Tax Notes Staff, *Analyzing the President's Tax Returns*, FORBES (Oct. 5, 2020), <https://www.forbes.com/sites/taxnotes/2020/10/05/analyzing-the-presidents-tax-returns/?sh=4883d59223c3> [<https://perma.cc/C7UM-M5FK>] (quoting Joseph Thorndike).

283. See Letter from Thomas F. Field to the Hon. Donald C. Alexander, Comm'r of Internal Revenue (Oct. 30, 1973), <https://taxprof.typepad.com/files/field-2.pdf> [<https://perma.cc/B32K-JGYB>].

284. See *id.*

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Increased transparency regarding the actions of the IRS could change this dynamic. If it were possible for the public to review the results of the annual automatic IRS audit of the President and Vice President, the public would at least have confidence that the IRS had reviewed these returns. With public disclosure of the IRS audit results of the President and Vice President, the IRS would suddenly have a voice in the public discussion of these tax returns through its actions during audits, challenges, and settlements. Further, as was the case during the Nixon era, if the IRS's review itself raised questions of lack of independence or objectivity, members of Congress, on behalf of the public, could question the agency through hearings and other fora.²⁸⁵ Without increased tax transparency beyond tax returns, legislators and members of the public could lose confidence in the IRS's ability to enforce the tax law against the President and Vice President fairly and effectively. This perception could, in turn, adversely impact the IRS's attempts to launch enforcement initiatives, implement new rules and regulations, and seek increased funding from Congress.²⁸⁶

Public disclosure of tax returns and tax audits could also provide a more limited oversight function in the case of candidates other than a sitting President or Vice President. For these candidates, increased tax transparency that included the results of IRS audits may reveal that the IRS did not audit or challenge their past returns. This result would not be surprising, given the low overall audit rate of individual taxpayers.²⁸⁷ The absence of an IRS audit or challenge may show that nothing in the candidate's return was inappropriate, at least to the point of triggering IRS review. But it could also show a questionable tax position on a candidate's return and, under an expanded disclosure requirement, a lack of corresponding audit or inquiry by the IRS. One response to public disclosure of non-enforcement is that congressional committees and other

285. See *supra* notes 38-47 and accompanying text.

286. See, e.g., Eric Yoder, 'Draconian' Cut to IRS Budget Advances, WASH. POST (June 11, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/06/11/draconian-cut-to-irs-budget-advances> [https://perma.cc/U5BH-RSDT].

287. In fiscal year 2018, the IRS audited 0.69% of individual returns with adjusted gross income between \$1 and \$25,000 and 2.21% of individual returns with adjusted gross income between \$1 million or \$5 million. 2018 Internal Revenue Service Data Book, INTERNAL REVENUE SERV. 27 (2019), <https://www.irs.gov/pub/irs-prior/p55b--2019.pdf> [https://perma.cc/3T4W-8C36].

government actors, such as TIGTA, may also inquire why the IRS did not audit or challenge the taxpayer. Under both current law and proposed public disclosure legislation, the absence of IRS enforcement would remain hidden from public view.²⁸⁸

B. Elements of Transparent Tax Disclosure

This Section describes specific types of information that policymakers should subject to mandatory public disclosure, as a whole rather than piecemeal, in order to provide voters with a more comprehensive understanding of the tax compliance of the President, Vice President, and presidential candidates. These requirements could be added to any type of tax return to which mandatory public disclosure rules would apply.

The proposed disclosure requirements outlined below are relevant to recent legislative proposals, including the For the People Act of 2021, which passed the U.S. House of Representatives in March 2021.²⁸⁹ As discussed earlier, this legislation would require the President, Vice President, and major party candidates to disclose 10 years of individual and business income tax returns to the FEC, which would then publish them.²⁹⁰ If this proposed legislation is enacted, each of the recommendations below could be instituted through further legislative and administrative action. If the proposed legislation is not enacted, this model of transparent disclosure can serve as a framework for future mandatory tax disclosure proposals.

1. Complete Tax Returns

As Part III illustrates, selective disclosure opportunities may arise where a mandatory public disclosure rule contains an ambiguous definition of “tax return” and where candidates and elected officials retain control over the submission of documents to election authorities.²⁹¹ One possible approach to addressing selective disclosure is to expand the definition of tax returns that candidates and elected officials are required to submit to the FEC beyond the current statutory definition of tax return (in Section

288. See I.R.C. § 6103(b) (2018); For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

289. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

290. See *supra* notes 86-87 and accompanying text.

291. See *supra* notes 167-169 and accompanying text.

6103(b)(1))²⁹² to include *any* document filed by the candidate or elected official with the IRS during a specific period of time. The purpose would be to mandate public disclosure of complete tax returns, including all amended returns, forms, schedules, taxpayer statements, and attachments, whether they relate to income taxes or other types of taxes, including gift taxes. Without a comprehensive tax return definition, candidates and elected officials may pursue the types of selective disclosure strategies they have used during the past forty years of voluntary tax return disclosure.²⁹³

The other critical feature of an effective mandatory disclosure rule is a mechanism for public disclosure that is not susceptible to manipulation. Every major federal and state legislative proposal requires candidates and elected officials to file their tax returns with the FEC or state election authorities, which would then disclose them to the public.²⁹⁴ While this approach offers the symbolism of the candidate or elected official engaging in an act of transparency before voters, it also provides opportunities for abuse. Under the approach contained in most legislative proposals, candidates could submit tax returns that excludes certain documents, such as reportable transaction forms or optional tax statements that describe aggressive tax strategies, without raising the risk of detection of the nondisclosure by election authorities.²⁹⁵ And, with one exception,²⁹⁶ most federal and state legislative proposals do not require the candidate or elected official to declare that the tax returns submitted are complete copies of the documents that they filed with the IRS.²⁹⁷ Without contrary information, FEC officials would not know that a candidate or official has omitted a form, schedule or statement in order for these officials to then request additional action from the IRS. And IRS officials would not be authorized to comment on any aspect of the tax returns, including whether they are complete.

292. I.R.C. § 6103 (b) (2018).

293. *See supra* notes 188-204 and accompanying text.

294. *See* For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021); For the People Act of 2019, H.R. 1, 116th Cong. § 10001 (2019); Presidential Tax Transparency Act, S. 2979, 114th Cong. § 2 (2016). For state legislative proposals, see note 17 and accompanying text.

295. *See supra* notes 188-204 and accompanying text.

296. *See* S. 253, 2019 Gen. Assemb., Reg. Sess. (Ky. 2019). <https://apps.legislature.ky.gov/record/19rs/sb253.html> [<https://perma.cc/JX3U-M6K4>].

297. *See supra* note 294.

An alternative approach would be for policymakers to require the Secretary of the Treasury to direct the IRS to provide the complete tax returns for the covered years directly to the FEC for public disclosure. The primary benefit of this approach is that it would ensure that all documents that candidates and elected officials have filed with the IRS are submitted to the election authorities without any changes or omissions. Congressional committees have submitted requests of this scope to the Treasury Department in their inquiries into the tax affairs of President Trump and President Nixon.²⁹⁸ A similar approach could be used regularly, not just when candidates or elected officials are the subject of investigations.

While the scope of complete tax returns and the direct delivery mechanism may threaten to expose sensitive personal information of candidates and elected officials publicly, there is precedent for addressing personal privacy concerns. If the IRS were to deliver all required documents directly to the FEC, policymakers could provide candidates and elected officials an opportunity to propose redactions that are clearly specified on a list, such as Social Security numbers and home addresses.²⁹⁹ This type of taxpayer review and redaction process is similar to methods that the IRS already employs, such as when it allows taxpayers to review background documents related to private letter ruling requests before these documents are disclosed publicly.³⁰⁰

2. IRS Audits

A more balanced approach to mandatory public disclosure would enable voters to review not only tax returns, but also the actions of the IRS. As this Section argues, policymakers should consider how to require public disclosure of IRS audits and other actions related to the tax returns of Presidents, Vice Presidents, and presidential candidates.

Presidential and Vice Presidential IRS Audits. In order to provide the public with a more complete view of the tax compliance of the President and Vice President, policymakers should mandate that the IRS publicly disclose the results of its automatic annual audits. For example, such a requirement

298. See, e.g., Letter from Cong. Richard Neal, Chairman of the Comm. on Ways and Means, U.S. H.R., to the Hon. Charles P. Rettig, Comm'r of Internal Revenue (Apr. 3, 2019), [https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Neal%20Letter%20to%20Rettig%20\(signed\)%20-%202019.04.03.pdf](https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Neal%20Letter%20to%20Rettig%20(signed)%20-%202019.04.03.pdf) [<https://perma.cc/H8G2-3T99>].

299. See For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

300. I.R.C. § 6110(c)(1) (2018); Treas. Reg. § 301.6110-2(g) (1977).

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could direct the IRS to issue a report to Congress each year in which it would describe its review of the President's and Vice President's tax returns, whether it determined that the returns reflected any deficiencies, and whether it reached any agreements regarding these deficiencies with the taxpayer.³⁰¹ The public disclosure requirement could also authorize the IRS to allow its officials to testify regarding the audit of the President's and Vice President's tax returns before congressional committees, such as the House Committee on Oversight and Reform and the United States Senate Finance Subcommittee on Taxation and IRS Oversight.

Public disclosure of presidential and vice presidential audits would achieve several important policy objectives. While public disclosure of audits could shed light on potential conflicts of interest of the President and Vice President, it could also reveal whether the President and Vice President reported all required information properly and otherwise complied with the tax, at least from the perspective of the IRS.³⁰² In addition, if the public could learn more about the IRS's actions, or lack thereof, regarding these tax returns, its representatives in Congress could question the IRS officials and, if permitted by law, they could respond. This model of increased transparency, which would require disclosure of more than tax returns alone, would empower the public to hold the IRS accountable, achieving one of the core objectives of proponents of mandatory public disclosure of tax returns.

Candidate Audits. The IRS does not automatically audit the tax returns of presidential and vice presidential candidates other than sitting Presidents and Vice Presidents. However, mandatory tax return public disclosure could still include information regarding IRS audits of candidates that have occurred in years prior to the election.

One approach would be to require any formal notices of audit or challenge that the IRS has sent to candidates to be included in the documents contained in each candidates' tax return file that would be subject to mandatory public disclosure. Documents related to IRS audits would enable voters to learn whether the IRS flagged specific items as improper, whether due to reporting error or the use of abusive tax

301. Under current law, the IRS submits annual reports to congressional committees on topics such as its procedures and safeguards necessary to protect tax returns and return information. I.R.C. § 6103(p)(5) (2018).

302. Other proponents of public tax return disclosure have also advocated for public disclosure of the annual IRS audit of the President and Vice President. See Bauer, *supra* note 101; BAUER & GOLDSMITH, *supra* note 99, at 84, 358; Clark, *supra* note 80.

strategies. Moreover, under its own audit policies, when auditing taxpayers who have elected married-filing-separately tax return filing status, the IRS automatically examines the returns of both members of the couple.³⁰³ Disclosure of past IRS audits, thus, may also allow the public to learn of abusive tax planning or other forms of tax noncompliance by the candidate, even though a spouse's separately filed return might otherwise obscure it.³⁰⁴

3. Independent Analysis of IRS Audits

To protect the legitimacy of the annual presidential and vice presidential IRS audits, policymakers should also require that another government entity review the results of these audits each year. Independent review of the annual automatic IRS audits by a government entity outside of the executive branch could alleviate concerns of improper influence and strengthen the public's confidence in the result of the audits.

The Joint Committee on Taxation of the United States Congress is one possible entity that could provide independent review. The Joint Committee is a bipartisan group of ten members of Congress, each of whom is a member of the tax writing committee of each house, with a full-time staff of tax experts.³⁰⁵ As a matter of its regular responsibilities, the Joint Committee is required by statute to review any proposed refund payment that exceeds a threshold amount prior to the IRS's issuance of refund payments.³⁰⁶ In similar fashion, the Joint Committee could be required to conduct its own review of the IRS presidential and vice presidential audit results, review documents and other materials obtained by the IRS during the audits, and be empowered to request records from the taxpayer, and issue its own report on the IRS's analysis, including any recommended changes. During the controversy over President Nixon's tax returns, the Joint Committee conducted such a study and issued a report.³⁰⁷

Review by the Joint Committee could improve the quality of the presidential and vice presidential audit by the IRS and increase public

303. *See, e.g.*, Internal Revenue Serv., Serv. Center Advice 200030022 (Jul. 28, 2000), <https://www.irs.gov/pub/irs-sca/0030022.pdf> [<https://perma.cc/P7BV-C5EJ>].

304. *See supra* notes 233-238 and accompanying text.

305. *See* I.R.C. §§ 8000-05, 8021-23 (2018).

306. I.R.C. §§ 6405(a), (b) (2018).

307. JOINT COMM. ON INTERNAL REVENUE TAX'N, *supra* note 39.

confidence in the validity of the audit results. George Yin, former chief of staff of the Joint Committee, has endorsed a role for the Joint Committee in reviewing the annual IRS audits of the President and Vice President, and reporting the result of its review to congressional committees privately and, if necessary, in a public report.³⁰⁸ My proposal would expand the scope of reports required to be made public, by requiring public disclosure of both the IRS audit results and the Joint Committee report on an annual basis, whether or not the Joint Committee agrees with the IRS. When released together, both reports may provide the public and members of Congress with a better understanding of the tax compliance of the President and Vice President, including the legal basis for the information reported on the returns. Annual public disclosure of reports by both the IRS and a bipartisan legislative committee could strengthen public confidence in the results of the annual review of the President's and Vice President's returns and improve the public's understanding of the tax law.

4. Settlements and Tax Penalties

To provide voters with a greater ability to evaluate the tax returns of candidates and elected officials, as well as the actions of the IRS, mandatory public disclosure should include documents that show any taxpayer settlements with the IRS, including agreements by the taxpayer to pay civil tax penalties. As Part III discussed, closing agreements and other settlements that occur between the taxpayer and the IRS are not included in the statutory definition of tax returns, as provided in the For the People Act of 2021 and other legislative proposals.³⁰⁹

In situations where a candidate or elected official has entered a settlement agreement with the IRS regarding a specific tax year, public disclosure of only that year's original tax return, without any information regarding the settlement, would provide a distorted view of the candidate's or elected official's tax compliance. For example, under proposed legislation, a candidate could disclose a tax return from a prior year to voters but withhold information that shows the candidate ultimately engaged in a controversy over this return with the IRS and reached a

308. George K. Yin, *Repairing the Tax Privacy Rules*, TAX NOTES (Nov. 30, 2020), <https://www.taxnotes.com/featured-analysis/repairing-tax-privacy-rules/2020/11/25/2d6j6> [<https://perma.cc/V7WD-UDRM>]; see *Taxpayer Fairness: Hearing Before the H. Comm. on Ways and Means*, 116th Cong. (2020).

309. See *supra* notes 167-170; For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

settlement where the candidate agreed with the IRS's assertion and also paid civil tax penalties.³¹⁰

Mandatory public disclosure of both IRS audit documents and the ultimate settlement agreements would serve multiple functions. First, publicly disclosed settlement agreements (such as IRS Form 870-AD³¹¹ or IRS Form 906³¹²) would show whether the individual involved conceded that the original filed return contained improper tax positions, omissions, or other reporting errors. Second, these agreements could also show voters whether candidates or elected officials agreed to pay any civil tax penalties to the IRS.³¹³ Last, publicly disclosed settlement agreements would enhance public oversight over the IRS by revealing how the IRS pursued its original deficiency findings during the negotiation and resolution of settlements with candidates and elected officials. Public disclosure of the absence of civil tax penalties in situations involving blatant abusive tax planning could cause legislators to review the IRS's enforcement decisions or reconsider the design of the relevant tax penalties.³¹⁴

5. Tax Advice

A final item that policymakers should subject to mandatory public disclosure is certain written tax advice received by candidates and elected officials. As many proponents of public tax return disclosure have suggested that one of their motivations is to highlight abusive tax planning and tax shelter activity,³¹⁵ mandatory disclosure of certain written tax advice would provide voters with needed context for analysis of tax returns.

310. See H.R. 1 § 10001.

311. Internal Revenue Serv., *Form 870-AD: Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment*, U.S. DEP'T TREASURY (1992).

312. Internal Revenue Serv., *Form 906: Closing Agreement On Final Determination Covering Specific Matters*, U.S. DEP'T TREASURY (1994), https://www.irs.gov/pub/irs-utl/form_906.pdf [<https://perma.cc/BN36-36F7>].

313. See *id.*; see also *supra* notes 178-181 and accompanying text.

314. See *supra* notes 37-47 and accompanying text.

315. See, e.g., Chemerinsky, *supra* note 21; McCaffery, *supra* note 109; Thorndike, *supra* note 21; see also 162 Cong. Rec. S5184 (2016) (statement of Sen. Warren).

Tax advice often plays an important role in tax planning, especially in the case of high-income and wealthy individuals. Written tax advice serves two purposes: it provides legal guidance to taxpayers and it enables taxpayers who rely upon it to defend against future assertion of certain tax penalties by the IRS.³¹⁶ For example, all taxpayers may be subject to accuracy-related civil tax penalties when they underpay their tax liability as a result of acts such as negligence, disregard of rules or regulations, and substantial understatements.³¹⁷ These taxpayers may defend against such penalties, however, by showing “reasonable cause and good faith,” which they can demonstrate by showing, among other possibilities, reasonable reliance on advice from a professional tax advisor regarding the treatment of a tax position.³¹⁸ The reasonable cause defense, and specifically the reliance on advice exception, have played a significant role in tax planning by high-income and wealthy taxpayers.³¹⁹

Written tax advice describes the facts of a transaction, as the taxpayer has represented them, considers the application of statutory and regulatory tax law and caselaw to these facts, and, finally, reaches an opinion.³²⁰ Under federal tax ethics rules, tax lawyers and other tax practitioners must consider the relevant facts and apply the relevant law in a reasonable manner.³²¹ Tax opinions and other forms of written tax advice often provide high-income and wealthy individual and business taxpayers with justification for claiming tax positions on their returns, especially where the tax law is uncertain.³²² Taxpayers do not submit their tax opinions to the IRS when they file their tax returns, but rather, they retain them in the event that they face the assertion of civil tax penalties by the IRS.³²³

316. See I.R.C. § 6664(c) (2018).

317. See I.R.C. §§ 6662(a), (b) (2018).

318. See Treas. Reg. § 1.6664-4(c) (as amended in 2003).

319. See Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77 (2006); Jay A. Soled, *Tax Shelter Malpractice Cases and Their Implications for Tax Compliance*, 58 AM. U. L. REV. 267 (2008); Dennis J. Ventry, Jr., *Raising the Ethical Bar for Tax Lawyers: Why We Need Circular 230*, 111 TAX NOTES 823 (2006).

320. See Treas. Reg. § 1.6664-4(c)(2) (as amended in 2003).

321. See 31 C.F.R. § 10.0-10.93 (2021).

322. See Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 TAX NOTES 1775 (1999); TANINA ROSTAIN & MILTON C. REGAN, JR., *CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS AND THE TAX SHELTER INDUSTRY* (2014).

323. See Bankman, *supra* note 322.

As part of a requirement that tax returns must be disclosed publicly, policymakers should also mandate public disclosure of any written tax advice regarding any tax return required to be disclosed, where the candidate or elected official has paid a minimum fee for the advice. The amount of the minimum fee should be high enough to ensure this measure would only apply to written tax advice involving high-value tax planning, such as tax-motivated transactions, rather than routine, low-value tax advice, such as instructions for making payments to the IRS. (For example, a minimum fee of \$50,000 would match the model that the Treasury has used in tax shelter reporting rules for material advisors.³²⁴) Further, such a measure should also require the candidate or elected official to certify that all written tax advice subject to this rule has been disclosed.

Without this proposed measure, the public would likely continue to receive selective disclosure of tax opinions and analysis regarding candidates' tax returns. For example, when presidential candidate Mitt Romney released his tax returns during the 2012 presidential election, his campaign issued a press release featuring a written tax opinion by former Commissioner of Internal Revenue Fred Goldberg.³²⁵ As Goldberg concluded in a short letter, after reviewing Romney's returns, he opined that "[t]here is no indication or suggestion of any tax-motivated or aggressive tax planning activities."³²⁶ These types of abbreviated statements provide minimal explanation of the tax strategies behind the items on the disclosed returns and, instead, have the potential to mislead voters.

This proposal would treat the privacy interests, including attorney-client privilege, of Presidents, Vice Presidents, and candidates differently from those of all other taxpayers. Yet as tax returns would also be required to be public under this legislation, it is difficult to object to the additional disclosure of documents that offer explanation of those returns on personal privacy grounds. Moreover, candidates would have advance notice of the

324. Treas. Reg. § 1.6011-4(b)(3)(iii) (as amended in 2010).

325. Press Release, Mitt Romney, Statement by Former IRS Commissioner Fred Goldberg on Mitt Romney's Tax Returns (Sept. 21, 2012), <https://www.presidency.ucsb.edu/documents/press-release-statement-former-irs-commissioner-fred-goldberg-mitt-romneys-tax-returns> [https://perma.cc/DE5F-6PYP].

326. *Id.* For further discussion, see Daniel Strauss and Justin Sink, *Romney Releases his 2011 Tax Return and 20-Year Average Tax Rate*, THE HILL (Sept. 21, 2018), <https://thehill.com/blogs/blog-briefing-room/news/251019-romney-releases-20-year-average-tax-rate-but-only-2011-returns> [https://perma.cc/7JXT-THGW].

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public tax disclosure requirements, including regarding written tax advice, allowing them to decide whether they are willing to seek office if it requires sacrificing privacy.

C. Drawbacks of Transparent Tax Disclosure

While expanding disclosure requirements beyond tax returns would increase voters' ability to observe and analyze candidates' and elected officials' tax compliance, this approach would also likely face several objections. These include that increased public disclosure requirements could result in politicization of tax administration, discourage business and wealthy candidates from entering presidential and vice presidential elections, and eliminate the signaling benefits of voluntary disclosure. Each of these potential objections is addressed below.³²⁷

1. Politicization of Tax Administration

Public disclosure of IRS actions related to the tax returns of the President, Vice President, and presidential candidates, in addition to disclosure of the returns themselves, could lead to the politicization of tax administration. Mandated disclosure of IRS audits and settlements of candidates and elected officials would empower members of Congress and other commentators to question and criticize the IRS's enforcement

327. While this Article does not evaluate potential constitutional challenges to mandatory public tax return disclosure, it acknowledges that any federal public tax return disclosure requirement that applies to candidates and elected officials would likely lead to litigation regarding constitutional issues, including the Presidential Qualifications Clause, the First Amendment, and separation of powers. *See, e.g., supra* note 34. The potential for such challenges may be heightened as a result of the U.S. Supreme Court's 2021 decision in *Americans for Prosperity v. Bonta*, 141 S. Ct. 2373 (2021), which held that a state disclosure requirement regarding major donors to charitable organizations burdened donors' First Amendment rights and was not narrowly tailored to an important government interest. *See* Richard L. Hasen, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (Jul. 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> [https://perma.cc/E4C7-TWN3]; Adam Liptak, *Supreme Court Backs Donor Privacy for California Charities*, N.Y. TIMES (Jul. 1, 2021), <https://www.nytimes.com/2021/07/01/us/supreme-court-donor-privacy.html> [https://perma.cc/N9XN-CKE4].

decisions.³²⁸ This new dynamic could influence IRS officials' approaches to audits and tax controversies involving the President, Vice President, and presidential candidates, causing them to address these matters differently than they otherwise might.

Although increased mandatory disclosure of IRS and Joint Committee on Taxation actions could result in scrutiny and politically motivated questioning, this review would likely be more balanced than that which would occur if only tax returns were required to be disclosed. For example, when *The New York Times* reported alleged abusive tax positions and potential tax fraud involving tax returns of President Trump and his family,³²⁹ many commentators pointed to these stories as evidence of IRS underenforcement.³³⁰ While it is possible that the IRS had audited these returns and challenged tax positions, under current law, IRS officials could not respond to this criticism.³³¹ Mandatory public disclosure of both tax returns and audit results involving the President and Vice President would allow the IRS's actions regarding the return to be public information.

Further, the framework proposed earlier would not require the IRS to engage in new audits of presidential candidates. Increased tax transparency would require public disclosure of presidential candidates' tax returns and any related IRS audits and settlements that may have occurred with respect to those returns. The IRS would not be placed in the awkward position of conducting a new audit of major party presidential nominees, for instance, in the weeks following nomination and prior to the general election. If the FBI's past experience with pre-election investigations is any guide, this type

328. *See supra* notes 281-283.

329. *See* Buettner et al., *supra* note 9.

330. *See, e.g.*, Eric Levitz, *Trump's Returns Make Case for Funding the Tax Police*, N.Y. MAG. (Sept. 29, 2020), <https://nymag.com/intelligencer/2020/09/trump-tax-returns-irs-enforcement-trillion.html> [<https://perma.cc/RF6R-HST9>]; Naomi Jagoda, *Trump Tax Revelations Shine a Spotlight on IRS Enforcement*, THE HILL (Sept. 30, 2020), <https://thehill.com/policy/finance/518851-trump-tax-revelations-shine-a-spotlight-on-irs-enforcement> [<https://perma.cc/PG72-9AAZ>]; Seth Hanlon, *Trump's Tax Returns Show Why We Need to Fund Tax Enforcement*, BLOOMBERG (Oct. 8, 2020), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/X92VP834000000?bna_news_filter=daily-tax-report#jcite [<https://perma.cc/4J7Y-HM8M>].

331. I.R.C. §§ 6103(a), (b) (2018).

of proposal would likely cause some members of the public to view the IRS as a political entity, diminishing its perceived legitimacy.³³²

2. Disincentive to Wealthy and Business Candidates

Another potential objection that opponents of increased tax return public disclosure measures could raise is that they would discourage wealthy individuals and individuals who lead or own businesses from running for office. During discussion of mandatory public disclosure of candidates' tax returns, some commentators have noted that the requirement could disadvantage wealthy and business candidates as a result of the complexity of their returns and likely public confusion their disclosure could generate.³³³ Increased tax transparency, which would include past IRS audits, settlements, and written tax advice, could further disincentivize these potential candidates.

The disincentive concern is not a compelling reason to avoid increased tax transparency, especially as a result of other personal information that candidates and elected officials are required to disclose under current law. While current financial disclosure requirements, including OGE Form 278e, have been subject to criticism, they still require presidential candidates to share personal information regarding their income, liabilities, and assets and that of their family members.³³⁴ If elected, candidates may also be required to divest of, or relinquish control over, business interests and other investments.³³⁵ These factors cast doubt on the claim that mandatory disclosure of individual and business tax returns would dissuade wealthy and business candidates from seeking office.

In addition, increased mandatory tax disclosure would create risks of exposure of politically damaging information for all types of presidential

332. See, e.g., JAMES COMEY, *A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP* (2018); Adam Serwer, *How the FBI Helped Sink Clinton's Campaign*, ATLANTIC (Apr. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/04/comey-mccabe-fbi-clinton/558200> [<https://perma.cc/MSB8-DQQ4>].

333. See Yin, *supra* note 308.

334. See *supra* notes 72-84.

335. See 18 U.S.C. § 208 (2018); Letter from Walter M. Shaub, Jr., Director, U.S. Off. of Gov't Ethics, to the Hon. Thomas R. Carper, Ranking Member, Comm. on Homeland Sec. and Governmental Affs., U.S. Senate (Dec. 12, 2016), [https://www.oge.gov/Web/OGE.nsf/Congressional%20Correspondence/28423B540841AA8F852585B6005A1920/\\$FILE/Carper%20response.pdf?open](https://www.oge.gov/Web/OGE.nsf/Congressional%20Correspondence/28423B540841AA8F852585B6005A1920/$FILE/Carper%20response.pdf?open) [<https://perma.cc/WEM2-DZ8Q>].

candidates, not just wealthy and business candidates. While reporters have focused on the tax returns of business candidates, such as complex transactions and tax strategies pursued by President Trump³³⁶ and presidential candidate Mitt Romney,³³⁷ they have also scrutinized potential tax noncompliance by individuals who have filed relatively simple returns. For example, in 2008, commentators questioned vice presidential candidate Sarah Palin's exclusion of travel reimbursements and deductions for expenses associated with activities that could be considered hobbies, items that amounted to hundreds or thousands of dollars, not millions or billions.³³⁸ Increased disclosure requirements, thus, may affect the willingness to run of all potential candidates, not just those whose tax returns are complex as a result of their wealth, assets, or occupations.

3. Benefits of Voluntariness

A final drawback of increased mandatory tax disclosure is that it could eliminate the signaling benefit that voters gain from presidential candidates' decisions to disclose tax information voluntarily under current law. Individuals who want to pursue cooperative relationships with others use certain behaviors, such as dressing in business attire or shaking hands, to signal information about themselves indirectly.³³⁹ Voluntary tax return disclosure is such a signal. By choosing to disclose, or not disclose, their tax returns voluntarily, candidates signal information about their personal characteristics that are relevant to voters, such as openness or secrecy.³⁴⁰ A concern raised by increased mandatory tax disclosure is that this requirement would deprive voters of the opportunity to observe candidates' decisions regarding whether to disclose their tax returns voluntarily.

336. See Buettner et al., *supra* note 9.

337. See *supra* notes 260-263 and accompanying text.

338. See *supra* note 139 and accompanying text.

339. See Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1787 (2000); Eric A. Posner, *The Signaling Model of Social Norms: Further Thoughts*, 36 U. RICH. L. REV. 465, 468 (2002); Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's LAW AND SOCIAL NORMS*, 36 U. RICH. L. REV. 367, 369 (2002); Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625 (2001).

340. For further discussion, see Joshua D. Blank, *Trump's Tax Withholding Is a Signal*, WALL ST. J. (Aug. 30, 2016), <https://www.wsj.com/articles/trumps-tax-withholding-is-a-signal-1472512464> [<https://perma.cc/W36S-TMQ8>].

Yet even if presidential candidates were required to disclose not just tax returns, but also the results of IRS audits, payment of tax penalties and written tax advice, they could still share their personal characteristics and values with voters through their tax return information. Despite a mandate to disclose large amounts of personal tax information, some candidates may choose to disclose more than the required amount, such as additional years of federal returns or state returns,³⁴¹ to show they support transparency and openness, traits that many voters value.³⁴² As another example, some candidates may opt to disclose their tax returns voluntarily at the earliest possible point, rather than waiting for the statutorily prescribed tax return release date.³⁴³ And some candidates may signal information about their personal beliefs in the way in which they complete their tax returns, such as by showing significant charitable contributions or by submitting optional taxpayer worksheets and other documentation to the IRS.³⁴⁴

Policymakers can also structure mandatory disclosure rules to preserve the potential for candidates to provide this type of signal. For instance, rather than requiring disclosure of candidates' tax returns within 15 days of when these individuals become major party candidates,³⁴⁵ policymakers could create a longer window, such as 60 days, in order to allow some candidates to decide to disclose their returns voluntarily at the earliest possible point. Mandatory increased tax transparency, thus, could still allow candidates to utilize opportunities to signal information about their

341. See, e.g., Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY (1981-2013), <https://www.taxnotes.com/presidential-tax-returns> [<https://perma.cc/QF6P-7254>] (32 years of tax forms of Jeb Bush).

342. See *id.*

343. See, e.g., Steve Leblanc, *US Sen. Warren Releases 10 Years of Her Tax Returns Online*, ASSOCIATED PRESS (Aug. 22, 2018), <https://apnews.com/article/north-america-ma-state-wire-ap-top-news-massachusetts-elizabeth-warren-b845b18790af4e8299596de5ac8d261f> [<https://perma.cc/STD6-74XT>].

344. See, e.g., Internal Revenue Serv., *Form 1040: U.S. Individual Income Tax Return*, U.S. DEP'T TREASURY (2019), https://s3.amazonaws.com/pdfs.taxnotes.com/2020/K_Harris_2019.pdf [<https://perma.cc/FP9R-MYEG>] (tax form of Douglas C. Emhoff and Kamala D. Harris); Ryan J. Foley, *Booker Tax Returns Show Income Drop, High Charitable Giving*, ASSOCIATED PRESS (Apr. 24, 2019) <https://apnews.com/article/e73b036b0e1f4e13b14a1c5fca264a2b> [<https://perma.cc/EF2G-WQNX>].

345. For the People Act of 2021, H.R. 1, 117th Cong. § 10001 (2021).

personal characteristics and beliefs through their decisions regarding voluntary tax return disclosure.

V. CONCLUSION

This Article has intervened in the ongoing debate over public disclosure of the tax returns of the President, Vice President, and presidential candidates by exploring whether, and to what extent, mandatory public disclosure would achieve the policy objective of enabling voters to observe candidates' and elected officials' compliance with the tax law. In addressing this question, the Article has made several contributions to the legal literature and policy debates.

First, the Article has argued that mandatory public disclosure of tax returns exclusively would provide voters with only a partial and one-sided view of candidates' and elected officials' compliance with the tax law. This limited view, the Article has asserted, would be attributable to two features of mandatory public disclosure of tax returns. First, the tax compliance of candidates and elected officials would be obscured by the structure of the federal income tax and of federal income tax returns themselves. Second, tax compliance would be further obstructed from public view as a result of opportunities for strategic reporting and disclosure by candidates and elected officials.

Second, the Article has explored whether policymakers could mandate disclosure of information that would provide voters with a more complete and balanced perspective of candidates' and elected officials' tax compliance and, if so, whether this disclosure would be justified. The Article has presented a normative argument for increased transparency regarding the tax compliance of candidates and elected officials. As it has argued, increased tax transparency would offer valuable social benefits, including a better-informed electorate, improved public tax education, and enhanced public oversight over the IRS.

Third, the Article has proposed an alternative model of mandatory public disclosure that would encompass disclosure not only of tax returns, but also of documents and processes that would highlight tax actions of both candidates and elected officials and the IRS. The Article has provided a comprehensive list of concrete disclosure requirements that policymakers should include when mandating public disclosure of candidates' and elected officials' tax returns.

Presidential tax transparency has attracted immense public attention due to the events surrounding President Trump's tax returns, but it is an issue that has been debated throughout election cycles for decades and will remain a focus in presidential and non-presidential elections, at both the

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federal and state levels, in the future. The analysis and recommendations in this Article are relevant to tax law and election law scholars, federal and state legislators, tax practitioners, and legal scholars who study disclosure and transparency.