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For many politicians and others in government, the belief appears to have taken root that when any questions arise about their personal financial integrity, the all-purpose cure is for them to release their tax returns—and such publication will put to rest questions of impropriety. The mystique of tax-return disclosure has been on display recently in the context of the ''Panama Papers'' scandals and the presidential election. Public figures and their counsel should take note.

The Politics of Tax Returns: From the Panama Papers to the 2016 Election

BY ROBERT RIZZI AND DIANNA MULLIS

For many politicians and others in government, the belief appears to have emerged that when any questions arise about their personal financial integrity, the all-purpose cure is for them to release their tax returns—and such publication will put to rest questions of impropriety. The mystique of tax-return disclosure has been on display recently in the context of the ''Panama Papers'' scandals and the presidential election. Public figures and their counsel should take note.

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On April 3, 2016, in connection with what has come to be known as the ''Panama Papers,'' over 11 million pages of confidential law firm files were posted on the Internet. The largest ''leak'' (or, according to the Panamanian law firm whose files were disclosed, ''hack'') of such documents in history, the Panama Papers revealed the names of individuals around the world, including politicians, business executives and media personalities, who were allegedly involved in offshore investments associated with various levels of secrecy and illegality. Identified in the documents were alleged friends of Russian President Putin, members of the extended family of President Xi Jinping of China, and at least two members of the seven-man Standing Committee of the Chinese Communist Party. Among the many interesting things disclosed in the Panama Papers were legal documents relating to estate and gift planning by the family of British Prime Minister David Cameron, which included offshore holdings that had not previously been known to the public.

Six days later, on April 9, 2016, David Cameron made the ''unprecedented decision,'' in the words of *The Guardian*, to release his personal tax records. This release of tax documents took the form of a short paper detailing Cameron's taxable income and tax payments for 2009-10 and 2014-15. The publication was followed quickly by analysis, some technical, some speculative, concerning the financial affairs of the Prime Minister. Contemporaneously, various leaders of the Scottish La-

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bour and Conservative Parties published their own income tax information. Furthermore, the leader of the main Labour Party, Jeremy Corbyn, helpfully suggested that ''all politicians'' should publish their tax returns.

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It is a mystery how David Cameron's tax returns are relevant to the Panamanian leak, especially in light of the fact that all available information indicates that the estate planning by members of his family had little to do with his income, as disclosed in the tax records. The tax records of the other politicians who voluntarily published theirs soon after the leak had even less to do with the Panama Papers.

When in Doubt, Give 'em Your Tax Returns. Despite the lack of a direct connection between the offshore information disclosed in the Panama Papers, on the one hand, and an individual's income tax returns on the other, the publication of personal income tax returns by politicians facing potential financial scandals is common in the United States. For many politicians and others in government, the assumption appears to be, when in doubt, reveal your tax returns, and that such publication will put to rest questions of impropriety.

Why tax-return disclosure is viewed as providing such benefits is an interesting question, and appears to have its roots on this side of the Atlantic. As discussed below, disclosure of income tax returns appears to have a kind of confessional quality that is intended to immunize politicians against skepticism about their affairs, even though income tax returns, per se, reveal relatively little useful information regarding the finances of the taxpayer. Instead, it is the act of disclosure itself that is supposed to satisfy concerns about the bona fides of the politician. This act of fiscal contrition appears to be increasingly demanded by the public. Tax return and other financial information is often regarded as highly personal and highly confidential. In fact, the IRS goes to great lengths to protect confidential taxpayer information, even utilizing criminal statutes to prevent disclosure. Perhaps it is this aura of secrecy that makes the public appetite for such information from its prospective and elected officials nearly insatiable.

There is a long history to the practice of volunteering to publish tax returns and tax information in the United States. Many candidates and perhaps a few appointees take pride in their willingness to publish this information early and often. Since the early 1970s, sitting presidents have universally chosen to release their returns, and an online service has compiled a large archive containing all presidential tax returns since at least Jimmy Carter. Presidential candidates, in many cases, also have volunteered their returns. During the 1996 presidential campaign, Sen. Bob Dole (R-Kan.) voluntarily released an excessive 30 years of tax returns. In a similarly extreme example, the Clintons have made their tax returns public for every year dating back to 1977, a fact proclaimed on the website of Hillary Clinton, along with detailed information regarding total taxes paid and consolidated charitable contributions.

Trump Holds Out. In February of this year, Republican presidential candidates Sen. Marco Rubio (Fla.) and Sen. Ted Cruz (Texas) released summary pages of their recent tax filings. These limited filings were likely an attempt to contrast their campaigns with the highly public refusal of business executive Donald Trump to release similar information, on grounds that his individual income tax returns were under IRS audit. That refusal led to considerable amount of attention concerning whether there were any general legal barriers to the release of tax returns under IRS audit. Perhaps more germane was the possibility that the publication of Trump's returns might lead to a scrum by tax lawyers working for other candidates, who could well identify issues not yet raised by the IRS.

Democratic presidential candidate Sen. Bernie Sanders (I-Vt.), who has released only his 2014 tax return, is withholding his back tax returns until Hillary Clinton releases the transcripts of her Wall Street speeches, even though the two categories are unrelated. This negotiation tactic demonstrates just how much political capital tax returns seem to represent.

Despite this long history of presidential candidates releasing their tax returns, the focus on specific tax information of lower officials of the Executive Branch took on heightened importance in 2008 and early 2009, as a result of a number of special cases involving nominations to the cabinet of president-elect Obama.

Tom Daschle's Disaster The first case was the failed nomination of former Sen. Tom Daschle (D-S.D.) to be the Secretary of the Department of Health and Human Services. That failure was predicated in part upon a series of problems, generally innocent mistakes, related to Daschle's prior taxes. The failure was not directly apparent on the face of his filed returns; rather, the tax items that created the most concern—for example, failure to pay income tax on the value of a car and driver provided by his employer and a failure to report some consulting income as a result of an erroneous Form 1099—were not disclosed at all, and instead were spotted by his personal accountant, unfortunately too late to be able to stem the ensuing scandal. Thus, even had Tom Daschle published all of his income tax returns to the general public in the early stages of his vetting process, these issues likely would not have come to light, without in-depth inquiries concerning a number of aspects of his employment in the private sector.

The concerns regarding Tom Daschle's past taxes occurred contemporaneously with a second case, involving an examination of tax-related questions raised in connection with the nomination for Secretary of the Treasury of Timothy Geithner, in January 2009. Once again, it was not an examination of his income tax returns, but instead inquiries into prior federal tax audits and issues raised thereby, that led to the discovery and payment of certain tax obligations. Geithner was ultimately confirmed by the Senate.

Looking Out for 'Tax Cheats.' These two cases set the stage for the creation, by the opposition party, of an over-arching theme of ''tax cheats'' in the new administration, a theme that once created proved impossible to tamp down. Later in 2009, the chairman of the Senate Finance Committee released a statement saying that the committee staff review of tax issues of Obama nominees was ''not a tax audit that the IRS would conduct,'' an assertion that was technically correct, since no IRS

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audit would ever include 10 follow-up questions concerning home-office deductions, as was the case in the Treasury nominations to which the comments were addressed. The particular nomination was all the more notorious because most of the issues raised in the Finance Committee related to a joint return; the nominee's spouse had already been confirmed to a position in the Department of State, and the Senate Foreign Relations Committee raised none of the tax-related issues that held up the Treasury nomination at least nine months.

In February 2009, the office of White House counsel began a blanket policy of demanding a detailed review of multiple years of tax returns of all prospective appointees for senior positions.

As a result of these and a few other tax-heavy controversies involving nominations for the Obama administration, in February 2009 the office of White House counsel changed long-standing policy concerning the ''vetting'' of tax issues for nominees, and began a blanket policy of demanding a detailed review of multiple years of tax returns of all prospective appointees for senior positions. Indeed, in many cases, at least three and sometimes five years of federal and state income tax returns were submitted. In more recent years, the White House has required review of tax returns for most, but not all, nominees, particularly those who are very high profile and those whose nominations are before the Senate Finance Committee.

A Matter of Optics. In representing dozens of Executive Branch nominees in the past 15 years, we have found that, in almost every case, their income tax returns:

1) disclose very little that is not otherwise known about their financial affairs (mainly through the disclosure of detailed financial information available to the public as part of the OGE Form 278);

2) are often prepared by Big Four or other highly sophisticated tax accounting professionals and rarely reveal aggressive tax positions; and

3) rarely identify significant issues and almost never uncover any ''smoking guns'' that will serve to prove or disprove the suitability of these individuals for federal service.

While we have found that a small amount of tax return information might be relevant to statutes and rules regulating the conduct of public officials, for the most part, tax return disclosure is largely a matter of public relations, rather than substance. In terms of resources, the amount of time and fees expended in reviewing tax returns far outweighs any useful practical information concerning a nomination.

Potential nominees should be aware that opponents may use any errors found in their tax returns to label them ''tax cheats.''

On the other hand, at least in the United States, potential nominees must take extra precautions in vetting their own tax returns to make sure that slight imperfections in the returns do not cause major obstacles to the success of their nominations. The changes in political norms noted above, concerning the equation of tax errors with ''tax cheats'' makes this an essential step for a successful nomination. Importantly, a thorough review of multiple years of tax returns is a critical first step that should be taken by all nominees for senior positions before they commit to federal service. Problems associated with taxes (including both state and local as well as federal taxes), along with a number of other government ethics issues, have been ''weaponized'' in recent years, as a result of a number of unfortunate developments. Those problems can be exaggerated and can create a cascade of other obstacles to the successful nomination.

The main tax-related issues include the following:

- unpaid taxes for household employees (i.e., nanny taxes);
- tax ''penalties'' for prior years, including penalties related to estimated taxes;
- foreign bank accounts and offshore holdings and income;
- Schedule C (trade or business) income and expenses;
- charitable deductions and substantiation;
- mortgage interest deductions (on any debt in excess of $1 million home mortgage limitation);
- fringe benefits and executive compensation;
- car and private airplane related expenses; and
- reportable transactions relating to alleged tax shelters.

Getting Ahead of the Curve. This array of potential issues, combined with the increasing tendency to overdisclose tax return information and the assumption that such disclosure will immunize the official from questions concerning financial propriety, requires nominees and their counsel to take extra care with highly sensitive tax documentation. Returns do indicate some significant telltale patterns of personal financial behavior that have become highly politicized.

Year-by-year effective tax rates are important facts in the current political climate, especially in light of the famous challenge credited to investor Warren Buffett (who noted that his effective tax rate was a smaller percentage than that of his secretary).

Amounts and beneficiaries of charitable deductions are scrutinized.

Substantial capital gains, especially when attributable to partnership ''carried'' interests, also attract attention.

Going forward, the pattern appears to be an increase in the willingness of political figures to disclose their tax return information at the outset (Mr. Trump is a significant exception), but there does not appear to be a consensus about what type of information to provide. Disclosing a ''tax summary'' may be sufficient for elected officials, despite some negative comments in recent cases, but is strictly speaking hardly adequate if the intent is to reveal the totality of the financial (or at least income) profile of the candidate in question.

For presidential appointments to Executive Branch positions, however, the pattern that was created in the early Obama administration may well become the custom for the next administration as well. Under this practice, potential appointees will be required to provide copies of at least three years of tax returns, and complete back-up and related schedules to be combed through by tax lawyers to preempt challenges under the ''tax cheat'' rubric.

The practice in the Obama administration was for government tax lawyers (generally from the Justice Department tax division) to review the tax returns line by line and to request complete supporting documentation where appropriate (for example, receipts for every charitable contribution and every schedule C expense). Submission to the White House vetting process therefore has been tantamount to volunteering to undergo a process similar to (and in fact more intense than) a full IRS field audit. Although in theory the tax return vetting system is separate from the Internal Revenue Service (IRS lawyers were not used in the process), well-advised potential appointees would make sure that their returns were reviewed by their own accountants and tax lawyers before being submitted to White House counsel.

One open question is whether—given the scrutiny of tax returns and the inevitable publicity that will occur once a high-profile nominee has entered the vetting process, especially at the Senate committee level—it has become advisable to disclose tax returns, or at least tax return information, more proactively. The example of Prime Minister Cameron, in attempting to use his own individual tax returns to preempt a challenge to the possibility of improper use of foreign accounts, may be instructive for certain purposes in the U.S. system as well.

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