
Lessons of Past Intra-Government Investigations

By Eugene Steuerle Thu, Oct 31, 2019

The 1998 Taxpayer Bill of Rights offers guidance for preventing politically-motivated governmental investigations, writes our guest columnist, an economist.



Recent stories in the news raise important questions about the ability of government to impose constraints on abusive government investigations.

I'm not here to judge the credibility of the allegations that President Trump used his office to encourage foreign governments to investigate Joe Biden's son or that a Treasury Department official interfered with audits of the President's or Vice-President's tax returns.

Instead I want to turn to the history of the IRS to draw out important lessons in how issues such as these have been addressed in the past and then use that information as a base from which Congress can consider further guardrails to prevent future abuses. Among the possibilities are to further require, not simply offer protection for, whistle blowing.

The first line of defense, of course, is the integrity of public officials themselves and the norms they help create. More than four decades ago, White House Counsel John Dean gave IRS Commissioner Jonnie Mac Walters a copy of President Richard Nixon's "enemies list" that included about 200 Democrats whose tax returns he wanted audited. Walters and Treasury Secretary George Schultz agreed between themselves to throw the list into a safe and forget about it.

When Walter's successor, Donald Alexander, discovered that a handful of IRS staffers had been assigned to investigate the returns of about 3,000 groups and 8,000 individuals, often because of their political views, he disbanded the group. Those of us who knew him are aware of how proud he was for standing up to the White House and protecting the integrity of the IRS.

Interestingly, it wasn't until 1998 that Congress turned this normative prohibition into law. The Taxpayer Bill of Rights, part of a bill that restructured the IRS that largely came out of a Republican-led Senate, said this:

It shall be unlawful for any applicable person to request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of the taxpayer.

Congress said applicable persons include the President, Vice President, and any employee of the White House and most Cabinet-level appointees.

The Taxpayer Bill of Rights made clear that Congress was concerned about protecting potential victims, not just punishing offenders. Each individual is entitled to equal justice under the law, and Congress determined that politically motivated investigations violated that justice standard. The Joint Committee on Taxation staff in their explanation of the law listed another reason: The concern that improper executive branch influence could have a “negative influence on taxpayers’ view of the tax system.”

The 1998 law not only prohibited this improper influence, it explicitly required disclosure:

Any officer or employee of the Internal Revenue Service receiving any request prohibited by subsection (a) shall report the receipt of such request to the Treasury Inspector General for Tax Administration.

It says “shall.” Disclosure is not optional. Congress made it a crime for “any person or employee of the IRS receiving any request” to fail to report it, whether it was direct or indirect. No explicit quid pro quo necessary to get the Inspector General involved.

In the current context, the statute is clear: Anyone in the IRS, including the Commissioner, must report any improper attempt by high-level executive branch officials at interfering with audits of the president and vice-president or anyone else.

Thus, there are at least five bulwarks against inappropriate political interference with IRS investigations.

Appointment of professionals and strong leaders who will protect the integrity of their offices;

Social norms that most politicians would feel reluctant to violate;

Penalties on those who interfere in the investigative process;

A requirement that those receiving the unlawful request report it;

Penalties on those who fail to report the request (to go along with the penalties on the requestor).

No law is perfect, and a president or other person could find their way around current law or protect others who abuse it. Still, norms and laws do constrain the quantity and extent of bad actions. So does a transparent disclosure system for revealing abuses. Even if some figure out how to violate legitimate boundaries, fences still can limit trespassing.

As citizens, and taxpayers, we all have rights to equal justice. Enforcing those rights often requires laws, as well as norms. The development of law protecting taxpayers against abuses of the IRS audit process may set an example for Congress to apply to elected officials, officers, and employees beyond the IRS and to investigations undertaken by other agencies.

This article was first published in the TaxVox blog at taxpolicycenter.org.