TAX ENFORCEMENT, GUTTED: TAX LAWYERS' DUTIES WHEN THE REVENUE SYSTEM IS UNDER ATTACK

*Heather M. Field**

ABSTRACT

The Trump administration has been gutting the Internal Revenue Service (IRS). The workforce and budget cuts are far more severe than ever before and are likely to create long-lasting harm to the IRS's enforcement ability. That reduces revenue collections and increases economic incentives for cheating. The dismantling of the IRS, together with escalating politicization of the IRS and political leaders whose actions demonstrate disregard for the tax laws, erode public confidence in the tax system and degrade tax morale. That could create non-compliance norms that, once established, will be difficult to reverse. This is all part of the Trump administration's larger assault on legal institutions and the rule of law more generally. These developments demand a recalibration of tax lawyers' ethical responsibilities. Ample literature discusses tax lawyers' ethical duties, but this Article is the first to grapple with the fundamental question about what it should mean to be a tax lawyer when the IRS, the revenue system, and rule of law are under attack as they have been since early 2025 and as they may be for years to come. Ultimately, this Article argues that tax lawyers must play a stronger gatekeeping role going forward and that standards of practice applicable to tax advisors should be raised accordingly. Tax lawyers must stand up for the revenue system and the rule of law. Otherwise, tax lawyers will be complicit in their collapse.

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*Stephen A. Lind Professor of Law, University of California College of Law, San Franscisco (formerly UC Hastings Law). I appreciated the opportunity to present this project at the Experienced in Tax Conference, and I thank all participants, especially Shuyi Oei, Darien Shanske, and David Gamage.

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I. INTRODUCTION

Efforts by the Trump administration to dramatically cut the Internal Revenue Service (IRS) workforce[1] and budget[2] will likely hamstring the IRS's enforcement capacity, increase taxpayer noncompliance, and reduce revenue.[3] The IRS "began the [2025] year with its largest workforce in recent memory, and then after absorbing a 27% reduction, it ended the year with one of its smallest."[4] And, by December 2025, staffing of the IRS's largest compliance division declined more than 37% from January 2025 and more than 20% from its 2018 low.[5]

The cuts affect not only early career and probationary employees, but also experienced IRS staff with "institutional knowledge that can't easily be replaced."[6] And "[l]eadership attrition has compounded these

1. *See generally* TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2025-IE-R027, SNAPSHOT REPORT: IRS WORKFORCE REDUCTIONS AS OF MAY 2025 (2025) [hereinafter "TIGTA WORKFORCE REPORT"].

2. *See infra* text accompanying notes 13–19.

3. *See* Sara Estep, *The Fiscal Impact of IRS Staffing Cuts*, CTR FOR AM. PROGRESS (May 12, 2025), https://www.americanprogress.org/article/the-fiscal-impact-of-irs-staffing-cuts/ [https://perma.cc/B6Z6-P2H8]; Vanessa Williamson & Ellis Chen, *A Hamstrung IRS Is a Gift to the Rich Tax Cheats and a Headache for Honest Taxpayers*, THE BROOKINGS INST. (Mar. 6, 2025), https://www.brookings.edu/articles/a-hamstrung-irs-is-a-gift-to-rich-tax-cheats-and-a-headache-for-honest-taxpayers/ [https://perma.cc/LU84-EGUD]; *The Revenue and Distributional Effects of IRS Funding*, THE BUDGET LAB AT YALE (Apr. 24, 2025), https://budgetlab.yale.edu/research/revenue-and-distributional-effects-irs-funding [https://perma.cc/AJ4Z-NHGA] [hereinafter "YALE BUDGET LAB ANALYSIS"].

4. NAT'L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 2025, xviii (2026) [hereinafter "NTA ANNUAL REPORT 2025"] (relying on "IRS, Chief Financial Officer data as of Dec. 18, 2025"). In early 2025, the workforce was approximately 103,000 full-time equivalent employees, a staffing high not seen since 1997. *See* INTERNAL REVENUE SERV., 2024 PUB. 55-B, DATA BOOK 74 (2024); TIGTA WORKFORCE REPORT, *supra* note 1, at 4. The exact numbers vary a bit based on the date and source of data. *See, e.g.,* NTA ANNUAL REPORT 2025, *supra*, at vi (reporting approximately 102,000 employees as of January 25, 2025). In December 2025, there were approximately 74,500 employees at the IRS, which was close to the thirty-year nadir experienced in 2018 and 2019. NTA ANNUAL REPORT 2025, *supra*, at vi (reporting staffing data as of December 18, 2025); INTERNAL REVENUE SERV., *supra*, at 71 (listing approximately 73,500 FTEs in 2018 and 2019). The firings have been challenged in court, and litigation continues. *See, e.g.,* Am. Fed'n of State Cnty. & Mun. Emps., AFL-CIO v. OMB, No. 25-cv-08302-SI, 2025 BL 453548, 2025 U.S. Dist. LEXIS 261305 (N.D. Cal. Dec. 17, 2025) (granting a preliminary injunction enjoining reductions in force).

5. *See* NTA ANNUAL REPORT 2025, *supra* note 4, at vi (providing January and December 2025 staffing levels); Lauren Loricchio, *SB/SE Staffing Projected to Dip Below 2018 Levels*, 188 TAX NOTES FED. 840 (Aug. 4, 2025) (describing the IRS Small Business/Self-Employed Division as the IRS's largest compliance division and providing data about staffing levels back to 2018).

6. Andy Kroll, *How DOGE's Cuts to the IRS Threaten to Cost More Than DOGE Will Ever Save*, PROPUBLICA (Mar. 5, 2025, at 06:00 ET),

challenges. As of November 12, 2025, the IRS leadership chart listed 28 positions classified as 'top officials,' the majority of which were either vacant or filled by acting officials,"[7] including the position of IRS commissioner.[8]

Plus, the IRS's depleted workforce is being asked to do more. IRS staff time has been diverted to implement the tax legislation enacted in July 2025 (commonly known as the "One Big Beautiful Bill Act," or the "OBBBA"),[9] which significantly changed federal tax laws and for which Congress did not provide implementation funding.[10] In addition, "the [Trump] Administration has pulled IRS-CI [Criminal Investigation] special agents away from tax enforcement to work on immigration efforts and crime task forces."[11]

In addition to the "triple-whammy of major workforce reductions, the turnover of leadership, and the burden of implementing statutory changes introduced by the One Big Beautiful Bill Act,"[12] the IRS is

https://www.propublica.org/article/how-doge-irs-cuts-will-cost-more-than-savings-trump-musk-deficit [https://perma.cc/5WR4-48AU]. *See also* NTA ANNUAL REPORT 2025, *supra* note 4, at v.

7. NTA ANNUAL REPORT 2025, *supra* note 4, at vii.

8. Treasury Secretary Scott Bessent served as Acting IRS Commissioner from August 2025 until his appointment expired in March 2026. Update on IRS Commissioner Position, IR-2026-36, (Mar. 13, 2026) https://www.irs.gov/newsroom/update-on-the-irs-commissioner-position [https://perma.cc/4YMV-BMDK] (last visited May 10, 2026); Benjamin Valdez, *Bessent Drops Commissioner Title but Retains Duties, IRS Says*, 190 TAX NOTES FED. 2083 (Mar. 23, 2026); *see also* 5 U.S.C. § 3346 (1998) (limiting the time acting officers may serve). The position of IRS Commissioner has since been vacant for more than two months. IRS Organization, https://www.irs.gov/about-irs/irs-organization [https://perma.cc/JHZ8-Y93Z] (last visited May 10, 2026).

9. Pub. L. No. 119-21, 139 Stat. 72 (2025). *See* Ellis Chen & Vanessa Williamson, *New Tax Bill Burdens an Already Overburdened IRS,* BROOKINGS INST. (July 17, 2025) https://www.brookings.edu/articles/the-new-tax-bill-burdens-an-already-overburdened-irs/ [https://perma.cc/5VHN-DRJS]; Kathleen Bryant & Chye-Ching Huang, *Carving Holes an Shrinking the Base: How OBBBA Weakens the Tax System*, THE TAX L. CTR. AT N.Y.U. L., at 14–15 (Dec. 2025) at 14-15 https://taxlawcenter.org/files/The-Tax-Law-Center-How-OBBBA-Weakens-the-Tax-System.pdf [https://perma.cc/NFC2-KXBJ].

10. *See* Bryant & Huang, *supra* note 9 at 14.

11. *Senators Ask About Consequences of IRS Enforcement Cuts,* TAX NOTES (Jan. 29, 2026), https://www.taxnotes.com/research/federal/legislative-documents/congressional-tax-correspondence/senators-ask-about-consequences-irs-enforcement-cuts/7txmm [https://perma.cc/35YU-9HZL] (citing Fatima Hussein, *How the IRS' Crime-Fighting Force Took on Immigration and Other Issues in 2025*, AP NEWS (Dec. 11, 2025), https://apnews.com/article/irs-tax-immigration-criminal-investigations-2f0ab7111f121bbcb7d653528a954017 [https://perma.cc/76ME-GBLP]); *see also* Letter to Acting Commissioner Bessent (Jan. 26, 2026), https://www.finance.senate.gov/imo/media/doc/letter_to_acting_commissioner_bessent_on_audit_fairnesspdf.pdf [https://perma.cc/5KDF-T6C9].

12. Robert Goulder, *The Purple Book — 2026 Edition: Recommendations for a Better Tax System*, 121 TAX NOTES INT'L 1311, 1311 (Feb. 16, 2026).

contending with significant budget cuts. The 2026 fiscal year budget appropriation for the IRS is down 9% overall compared to the 2025 fiscal year, and funding specifically for enforcement is down 8%.[13] This budget cut is not as severe as earlier proposals from the Treasury Department and House Appropriations Committee,[14] but it still imposes "record cuts to the IRS's inadequate base budget [in] yet another blow to a tax system that has already been deeply wounded [in 2025]."[15] And the 2026 fiscal year appropriations agreement "cuts base IRS funding, including enforcement, by over one-third relative to its 2010 level, adjusted for inflation."[16]

Further, the one-time $80 billion special appropriation made in 2022 for IRS modernization, including $45.6 billion to improve enforcement,[17] has been slashed.[18] Cuts reduced the special funding for enforcement by $41.8 billion down to $3.8 billion—a reduction of over 90%.[19] The Congressional Budget Office "estimated that a $20 billion [reduction in the 2022 special enforcement funds] could result in a $44 billion drop in

13. See Cady Stanton, *Trump Signs Funding Deal with IRS Cuts*, 190 TAX NOTES FED. 968 (Feb. 9, 2026).

14. The Treasury only requested $9.8 billion for the 2026 fiscal year, with only $3.6 billion for enforcement. DEP'T OF THE TREASURY & INTERNAL REVENUE SERV., CONGRESSIONAL BUDGET JUSTIFICATION FY 2026, at IRS-3 (2025) [hereinafter "IRS 2026 BUDGET"], https://home.treasury.gov/system/files/266/02.-IRS-FY-2026-CJ.pdf [https://perma.cc/5AAW-TBAW]; OFF. OF MGMT. & BUDGET, TECHNICAL SUPPLEMENT TO THE 2026 BUDGET: APPENDIX 857–74 (2026), https://www.whitehouse.gov/wp-content/uploads/2025/05/appendix_fy2026.pdf [https://perma.cc/KPE8-UV86]; Cady Stanton & Benjamin Valdez, *Detailed Trump Budget Request Would Slash IRS Enforcement Funds*, 187 TAX NOTES FED. 1936 (June 9, 2025). That would have taken the IRS's enforcement budget down by 33% from fiscal year 2025, to the enforcement budget's lowest level since 2001. Doug Sword, *Trump Proposal Would Eclipse Scandal-Era Cuts to IRS Enforcement*, 187 TAX NOTES FED. 1933 (June 9, 2025). The House Appropriations Committee went even further, approving an IRS enforcement budget of only $3 billion, which would have cut enforcement funding by 45% as compared to fiscal year 2025. Doug Sword, *House Appropriators Approve Proposed Historic IRS Budget Cut*, 188 TAX NOTES FED. 1669 (Sep. 8, 2025).

15. Chye-Ching Huang, *Cuts to IRS's Inadequate Base Budget Are Another Blow to Deeply Wounded Tax System*, THE TAX L. CTR. AT N.Y.U. L. (Jan. 12, 2026), https://taxlawcenter.org/blog/cuts-to-irs-budget-base-fy2026-appropriations [https://perma.cc/43N3-QG6A].

16. *Id.*

17. This special appropriation was part of the Inflation Reduction Act of 2022. Pub. L. No. 117-169, § 10301(1), 136 Stat. 1818, 1831–32 (2022).

18. TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2025-IE-R026, SNAPSHOT: THE IRS'S INFLATION REDUCTION ACT SPENDING THROUGH MARCH 31, 2025, at 2 (2025). The government funding package signed by President Trump on February 3, 2026, rescinded yet another $11.7 billion of funding (intended for operations support), from the 2022 special appropriation. *See* Stanton, *supra* note 13.

19. 2025-IE-R026, SNAPSHOT, *supra* note 18.

federal revenues" over a ten year period.[20] The actual reduction has been more than double that size,[21] so there will likely be an even larger drop in federal revenues.

Together, the Trump administration's cuts to the IRS workforce and funding

> make[] clear that the administration is not seeking a return to the IRS as it existed before the modernization funded by the [2022 legislation] began; it is seeking an IRS even less able to provide the services taxpayers deserve and enforce the law than existed before the [2022 legislation]. Those pre-[2022 legislation] funding levels were widely-recognized as highly inadequate, after a decade of funding cuts [through the 2010s] resulted in depleted enforcement capacity, antiquated technology, and unacceptable taxpayer services.[22]

The Trump administration's cuts to the IRS's enforcement resources pose a grave threat to the revenue system because IRS audits are a crucial part of collecting the amounts owed to the U.S. government.[23] For example, for the 2022 tax year, enforcement efforts reduced the tax gap (i.e., the difference between taxes owed to the government and taxes paid) by a projected $90 billion, down to a net of $606 billion.[24] Absent these enforcement-driven collections, the tax gap for 2022 would have been approximately 15% higher.[25] "Treasury, the Congressional Budget Office, and non-partisan experts consistently find that cuts to IRS enforcement resources add substantially to the deficit."[26] "On average, $1 in audit spending initially raises $2.17 in revenue," and for high-income taxpayers, each additional $1 spent auditing "yields more than $12 in

20. *Id.*

21. *See id.*

22. Greg Leiserson & Brandon DeBot, *The Trump Administration's Proposed IRS Cuts Would Declare Open Season for High-End Tax Evasion and Deny Americans Modern Taxpayer Services*, THE TAX L. CTR. AT N.Y.U. L. (June 24, 2025) https://taxlawcenter.org/blog/the-trump-administrations-proposed-irs-cuts-would-declare-open-season-for-high-end-tax-evasion-and-deny-americans-modern-taxpayer-services [https://perma.cc/MZZ5-6EPK].

23. *See Keeping IRS Audits Fair*, U.S. GOV'T ACCOUNTABILITY OFF.: WATCHBLOG, (Feb. 9, 2016) https://www.gao.gov/blog/2016/02/09/keeping-irs-audits-fair [https://perma.cc/K7PR-9AUE].

24. INTERNAL REVENUE SERV. RSCH., APPLIED ANALYTICS & STAT., Pub. 5869 (Rev. 10-2024), FEDERAL TAX COMPLIANCE RESEARCH: TAX GAP PROJECTIONS FOR TAX YEAR 2022, at 4 (2024).

25. *Id.* (indicating the projected gross tax gap for TY 2022 as $696 billion).

26. Leiserson & DeBot, *supra* note 22.

revenue."[27] Thus, the Trump administration's cuts to IRS enforcement resources mean that less revenue will be recouped via audits. And artificial intelligence cannot fill the enforcement gaps created by IRS budget and staffing cuts.[28] The Yale Budget Lab estimated that "[i]f the IRS shrinks by [approximately 22]% (a workforce decrease of about [22],000 people), . . . this significant reduction in IRS staffing and resulting IRS capacity to collect revenues would result in $[219] billion ($[198] billion net) forgone revenue over the 10-year budget window."[29] That workforce reduction was exceeded in 2025.[30]

In addition to reducing the revenue collected via audit, reduced enforcement also reduces the revenue collected via voluntary compliance (i.e., from taxpayers who are not, themselves, being audited).[31] Lack of enforcement resources is likely to "drive[] increased cheating"[32] among taxpayers who might have otherwise complied. As one commentator explained, the IRS resource cuts are "going to have very real consequences [not only] on the ability of the IRS to effectuate tax laws, but also, frankly, on the tax compliance of individuals who are watching an IRS that has lost any capacity to really pursue enforcement actions in a vigorous way."[33] The effect on revenue could be dramatic. This is particularly true because the IRS resource cuts, together with the increasing politicization of the IRS and behavior by political leaders that demonstrates disregard for the tax laws, erodes public confidence in the tax system and degrades tax morale, which could create non-compliance norms that, once created, would be difficult to reverse.[34] The Yale Budget Lab estimated that "[i]f the IRS shrinks by [22]% [which ultimately happened by the end of 2025] … [and i]f the lack of IRS resources leads to a substantial increase in noncompliance, net forgone revenue could rise by $[1.9] trillion over 10-years," which is *more than nine times* the

27. William C. Boning et al., *A Welfare Analysis of Tax Audits Across the Income Distribution*, 140 Q.J. ECON. 63, 63 (2024).

28. *See infra* Part II.A.2.a.

29. YALE BUDGET LAB ANALYSIS, *supra* note 3 at Table 2 (substituting the data from Table 2's estimated impact of "22K Layoffs" into the textual explanation of the estimated impact of "50K Layoffs").

30. *See supra* note 4 and accompanying text.

31. INTERNAL REVENUE SERV. RSCH., APPLIED ANALYTICS & STAT., *supra* note 24 , at 19 (discussing how IRS funding affects voluntary compliance and enforcement revenue).

32. Nathan J. Richman, *Tax Professionals Start Planning Adaptation to New Landscape*, 187 TAX NOTES FED. 1304 (May 19, 2025).

33. Loricchio, *supra* note 5, at 840 (quoting Natasha Sarin of Yale Law School).

34. *See infra* Part II.B.

estimated net revenue loss from enforcement reductions alone (i.e., assuming no change to taxpayers' compliance behavior).[35]

Revenue collection, however, is not merely a product of taxpayers' voluntary compliance preferences and government's enforcement activity. Tax lawyers are third party intermediaries—interposed between taxpayers and the government—who also play a critical role in whether taxpayers ultimately comply.[36] Extensive literature discusses the proper role of lawyers generally,[37] and tax lawyers specifically,[38] in client compliance. However, given the threats to the revenue system created by the systematic dismantling of the IRS's enforcement capacity

35. YALE BUDGET LAB ANALYSIS, *supra* note 3 at Table 3 (substituting the data from Table 3's estimated impact of "22K Layoffs" into the textual explanation of the estimated impact of "50K Layoffs"). *See also supra* text accompanying note 29 for the comparison. A $1.9 trillion revenue reduction is 9.6 times a $198 billion net revenue reduction.

36. *See* Elaine Doyle, *Encouraging Ethical Tax Compliance Behaviour: The Role of the Tax Practitioner in Enhancing Tax Justice*, 85 L. & CONTEMP. PROBS. 137, 138, 141 (2022).

37. *See, e.g.*, GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING (4th ed. 2018); THE GOOD LAWYER: LAWYERS' ROLES & LAWYERS' ETHICS (David Luban ed., 1984); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 58 (2000); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (2d ed. 2009); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998); W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, (1988); Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439 (1990); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) [hereinafter "Pepper, *Counseling at the Limits of the Law*"]; Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986) [hereinafter "Pepper, *Amoral Ethical Role*"]; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975); W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

38. *See, e.g.*, Linda M. Beale, *Tax Advice Before the Return: The Case for Raising Standards and Denying Evidentiary Privileges*, 25 VA. TAX REV. 583 (2006); Michael C. Durst, *The Tax Lawyer's Professional Responsibility*, 39 FLA. L. REV. 1027 (1987); John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 FORDHAM L. REV. 2721 (2016); Linda Galler, *The Tax Lawyer's Duty to the System*, 16 VA. TAX REV. 681 (1997); Richard Lavoie, *Am I My Brother's Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession*, 44 LOY. U. CHI. L.J. 813 (2013); Rachelle Holmes Perkins, *The Tax Lawyer as Gatekeeper*, 49 U. LOUISVILLE L. REV. 185 (2010); David M. Schizer, *Enlisting the Tax Bar*, 59 TAX. L. REV. 331 (2006); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. KAN. L. REV. 847 (1999); Camilla E. Watson, *Legislating Morality: The Duty to the Tax System Reconsidered*, 51 U. KAN. L. REV. 1197 (2003).

and the likely increase in taxpayer appetite for noncompliance, tax lawyers' responsibilities must be reexamined.

This Article provides that reexamination and argues that tax lawyers must play a stronger gatekeeping role vis-à-vis their clients than in the past. They must take more personal responsibility for clients' compliance with tax laws. Many clients are, or will become, aware of the IRS's weakened enforcement abilities and will likely push their advisors to assist with increasingly aggressive tax positions (i.e., in the gray area between avoidance and evasion) or even with tax evasion.[39] Rather than acceding to these client demands, however, tax lawyers should push back and should be *less* willing than ever before to help clients take aggressive positions.

The argument that tax lawyers should serve as gatekeepers is not new.[40] But the world in which taxpayers act and tax lawyers practice is. This Article analyzes how the gutting of the IRS, the attacks on the revenue system, and the broader assaults on the rule of law should affect both the advice tax lawyers give and tax lawyers' role in society.

When arguing that tax lawyers should play a stronger gatekeeping role, this Article focuses on those who provide planning and compliance advice to high-income individuals, large partnerships, and large corporations. This is because those taxpayers are the source of a disproportionate amount of noncompliance,[41] and they are most likely to seek planning and compliance guidance from tax advisors given the complexity of their matters and their ability to afford to engage expensive experts.[42] Also, the focus here is on planning and compliance situations where the IRS is not yet involved and may never become involved. In these situations, the tax advisor might be the only one who can ever provide a "check" on whether the taxpayer's position complies with the law. On the other hand, this Article does not address tax lawyers who assist with controversy matters because, in those matters, the IRS is

39. *See* Williamson & Chen, *supra* note 3.

40. *See, e.g.*, Beale, *supra* note 38, at 593 (arguing that the ethical rules should limit advisors to helping only with tax planning that is more likely than not to succeed); Lavoie, *supra* note 38, at 827 (arguing that the self-assessment system means that "the goal of reporting the correct tax should also be the guiding principle for the tax adviser"); Perkins, *supra* note 38, at 210 (arguing that tax lawyers should serve as gatekeepers, limiting assistance to positions that are more likely than not to succeed).

41. *See* Boning et al., *supra* note 27, at 103. Increased noncompliance is unlikely to be uniform across taxpayers, and it is difficult to predict how taxpayers will behave. However, this Article focuses on high-end noncompliance for the reasons explained in the text.

42. *See, e.g.,* David S. Mitchell, *Tax Avoidance Among Large, Complex Partnerships in the United States*, Washington Center for Equitable Growth, Feb. 12, 2025, https://equitablegrowth.org/research-paper/tax-avoidance-among-large-complex-partnerships-in-the-united-states/ [https://perma.cc/H8UD-M2WS].

known to be examining a taxpayer's compliance.[43] Further, this Article focuses on tax *lawyers*, and not other types of tax professionals such as accountants because, among other reasons, lawyers are the focus of the legal ethics literature on which this Article builds. Also, tax lawyers are subset of tax professionals who can most plausibly be claimed to have a duty to uphold the rule of law, and this Article analyzes how recent threats to the rule of law impact ethical obligations.[44]

This Article proceeds as follows. Part I provides background about the constraints on tax advisors' ability to provide aggressive tax advice and about the long-standing debate about the duties of lawyers, generally, and the duties of tax lawyers, specifically. Part II argues that tax lawyers' duties must be recalibrated in light of (a) the Trump administration's gutting of IRS enforcement capacity, (b) the erosion of taxpayers' intrinsic motivations to comply with tax law (known as "tax morale"), and (c) the assaults on the rule of law more generally. Specifically, Part II argues that tax lawyers engaged in planning and compliance must play a stronger gatekeeping role, so they do more to ensure tax compliance by their clients. Part III discusses what, specifically, a stronger gatekeeping role for tax lawyers would entail and how it could be implemented. Part IV considers whether this Article's argument for stronger gatekeeping by tax lawyers changes if government uses revenue for evil or amoral ends and a taxpayer wants to pursue noncompliance as a form of civil disobedience. Part V concludes.

43. *See* Schwartz, *supra* note 37, at 671 (making a similar distinction between planning and controversy advising).

44. Some constraints on tax lawyers' behavior, such as Circular 230 and the I.R.C.'s penalty provisions, can also apply to accountants and enrolled agents. *See infra* Part I.A. As a result, this Article sometimes refers to "tax advisors" more broadly when the rules discussed apply to those other tax professionals in addition to lawyers. The Model Rules of Professional Conduct (and each state's variation thereon), on the other hand, only apply to lawyers, which is another reason why this Article is focused on lawyers, and not accountants or enrolled agents. MODEL RULES OF PRO. CONDUCT (A.B.A. 2025). This Article also does not address unregulated tax preparers. Unregulated tax preparers' involvement with noncompliance is certainly a serious problem. *See, e.g.*, NAT'L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 2023, at 65–77 (2024) (identifying "return preparer oversight" as one of the most serious problems encountered by taxpayers because "the lack of return preparer oversight endangers taxpayers, burdens the IRS, and harms tax administration"). However, they generally serve a different cohort of taxpayers (e.g., mostly lower income individuals and small businesses) than those addressed here, and the absence of regulation creates issues that are not present among tax lawyers that are already subject to multiple sources of regulation.

II. THE TAX LAWYER'S ROLE TODAY

A. Constraints on Aggressive Tax Advice

Cuts to IRS enforcement resources are likely to "embolden nefarious [taxpayer] behavior" and make tax minimization schemes seem more tempting to taxpayers.[45] Taxpayers considering such schemes will (hopefully) bring them to their tax advisors for input, and when responding, tax advisors must abide by the authorities that constrain tax advisors' conduct, including penalty provisions in the Internal Revenue Code (IRC),[46] tax-specific standards of practice ("Circular 230")[47] that apply to all who "practice before the Internal Revenue Service,"[48] and the rules of professional conduct applicable in a lawyer's jurisdiction.[49]

If a client or prospective client seeks advice about a scheme that would be tax evasion or fraud, the rules are clear. Tax lawyers may not willfully assist, counsel, or encourage clients to evade tax, commit fraud, or otherwise clearly violate the federal tax law.[50] Doing so constitutes disreputable conduct under Circular 230 that can subject the advisor to sanctions (including loss of right to practice before the IRS),[51] violates the Rules of Professional Conduct for lawyers,[52] and can subject the advisor

45. Estep, *supra* note 3.

46. *See, e.g.*, I.R.C. §§ 6694, 6700, 6701. *See generally* ALAN J. TARR & PAMELA JENSEN DRUCKER, BLOOMBERG TAX, CIVIL TAX PENALTIES (PORTFOLIO 634) pt. VII-VIII (2024) (summarizing tax return preparer as well as promoter and protester penalties). All references herein to the "IRC" or to the "Code" refer to the Internal Revenue Code of 1986, as amended.

47. 31 C.F.R. § 10.2 (2025) [hereinafter "Circular 230"]. *See generally* JONATHAN G. BLATTMACHR ET AL., THE CIRCULAR 230 DESKBOOK: RELATED PENALTIES, REPORTABLE TRANSACTIONS, WORKING FORMS ch. 4 (2025) (compliance handbook helping practitioners comply with Circular 230 amendments).

48. This generally includes anyone who "render[s] written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion" (i.e., tax planners). Circular 230 § 10.2(a)(4). In accordance with recent cases, Circular 230 is being revised to exclude return preparers from the definition of those who "practice before the IRS." 89 Fed. Reg. 104915, 104923 (Dec. 26, 2024) (proposing changes to Circular 230 § 10.2).

49. The rules governing the professional conduct of lawyers vary state to state, so this Article will generally refer to the Model Rules of Professional Conduct, off of which most states' professional conduct rules are based. MODEL RULES OF PRO. CONDUCT (A.B.A. 2023) [hereinafter "MRPC"]. The American Bar Association (the "ABA") has additional pronouncements about expected ethical tax practice. *See, e.g.*, A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 366 (1992); A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 352 (1985), A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 346 (1982).

50. Circular 230 § 10.2; MRPC r. 1.2(d) (A.B.A. 2023).

51. Circular 230 § 10.51(a)(7) (2025).

52. *See* MRPC r. 1.2(d) (A.B.A. 2023).

to civil and possibly criminal penalties under the IRC.[53] Lawyers must decline or withdraw from any representation if "the representation will result in violation of the Rules of Professional Conduct or other law."[54] Further, tax advisors may not "willfully, recklessly, or through gross incompetence" sign a return or advise a client to take a position on a return that is a "willful attempt . . . to understate the liability for tax or a reckless or intentional disregard of rules or regulations."[55]

If a client or prospective client seeks advice about a scheme that is not clearly illegal but is in the gray area between avoidance and evasion, constraints on the tax advisor's behavior depend on the type of matter, the strength of the position, and whether the position is disclosed to the IRS. In general, tax advisors may not "willfully, recklessly, or through gross incompetence" sign a return or advise a client to take a position on a return unless the position either (a) is supported by "substantial authority" or (b) has "reasonable basis" and is disclosed to the IRS.[56] For matters that are "tax shelters" or "reportable transactions" (i.e., transactions identified by the IRS as potentially abusive),[57] the threshold is higher; the position must be "more likely than not to succeed."[58] The terms *more likely than not*, *substantial authority*, and *reasonable basis* are terms of art in tax practice, and they reflect different levels of confidence (greater than 50%, roughly 35 to 40%, and roughly 20 to 25%, respectively) that a position would be sustained *on the merits* if challenged.[59] Violating these constraints constitutes disreputable conduct and can subject the tax advisor to sanctions, including loss of right to practice before the IRS.[60] Further, if a position does not meet the strength requirements and ultimately results in a taxpayer's

53. *See, e.g.*, I.R.C. §§ 6701 (civil penalty for aiding and abetting understatements), 7206(2) (criminal penalties for aiding or assisting with fraud).

54. MRPC r. 1.16(a)(1) (A.B.A. 2023).

55. Circular 230 § 10.34(a) (2025).

56. *See id.* (incorporating the standards described in I.R.C. § 6694(a)(2), (b)(2)).

57. Tax shelters are any entity, plan, or arrangement having the avoidance or evasion of income tax as a significant purpose. I.R.C. § 6662(d)(2)(C). Reportable transactions are those that the government "determines as having a potential for tax avoidance or evasion." I.R.C. §§ 6662A(d), 6707A(c)(1).

58. *See* Circular 230 § 10.34(a) (incorporating the standards described in I.R.C. § 6694(a)(2)(C)).

59. Robert P. Rothman, *Tax Opinion Practice*, 64 TAX LAW. 301, 312–17 (2011); Treas. Reg. § 1.6662-4(d)(2) (2016) (defining substantial authority as "an objective standard involving an analysis of the law and application of the law to relevant facts"). The substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50% likelihood of the position being upheld), but more stringent than the reasonable basis standard as defined in § 1.6662-3(b)(3). *Id.*; *see also* Treas. Reg. § 1.6662-3(b)(3) (2016) (defining "reasonable basis").

60. *See* Circular 230 §§ 10.50, 10.52 (2025).

understatement of tax, not only can the taxpayer be subject to penalties,[61] but the advisor who assisted the taxpayer can also be subject to penalties under the IRC.[62]

Tax advisors must analyze the strength of a position on the merits, without regard to the possibility that a position might not be audited, might not be identified on an audit, or might be challenged by ineffective IRS representatives.[63] Clients might want to consider the audit lottery, but when giving written advice evaluating a federal tax matter, a tax advisor cannot take the audit lottery into account, nor can the advisor consider the possibility that an issue might not be raised on audit.[64] Although an advisor may disclose audit risk to taxpayers, the substantive analysis must continue to be based on the likelihood of success on the merits.[65] So if an advisor would have concluded, for example, that a position lacked reasonable basis during the late Biden administration, the advisor should reach the same conclusion during the Trump administration (assuming no change in the underlying substantive law), even if the likelihood of audit is much lower in the latter.

Tax professionals must also advise clients about penalties and opportunities to avoid them,[66] so even if a tax advisor is allowed to assist a client with an aggressive tax position, the tax advisor must still explain that aggressive clients face downside risks despite a weakened IRS.[67] For example, states will likely ramp up their enforcement efforts in response to IRS cutbacks,[68]and international tax authorities (for cross-border matters) are still enforcing their tax laws.[69] Importantly, even if the IRS's

61. *See, e.g.*, I.R.C. §§ 6662, 6662A (accuracy-related penalties applicable to taxpayers on understatements).

62. I.R.C. § 6694 (understatement penalties for return "preparer[s]"). *See generally* Kip Dellinger, *Tax Advice: A Toolkit*, 149 TAX NOTES 819 (Nov. 9, 2015) ("Tax planning advice is not necessarily subject to the preparer penalty provisions of the Internal Revenue Code if it is provided in the form of pre-transaction planning – unless the tax adviser reconfirms the advice in the return filing position or spends more than 5 percent of the total time involved in furnishing the advice on post-transaction services.").

63. *See, e.g.*, Treas. Reg. § 1.6694-2(b)(1); Circular 230 §10.37(a)(2)(vi) (2025). The standards for penalties applicable to taxpayers themselves are also based on the merits of the position, without regard to audit risk. Treas. Reg. § 1.6662-4(d)(2); *see also* Michael B. Lang & Jay A. Soled, *Disclosing Audit Risk to Taxpayers*, 36 VA. TAX REV. 423, 428 (2017) ("[T]o avoid penalty imposition, whether a particular position satisfies an accuracy standard depends entirely on a position's legal merits rather than its likelihood of being challenged on audit.").

64. *See* Circular 230 §10.37(a)(2)(vi).

65. *See* Lang & Soled, *supra* note 63, at 427–30.

66. Circular 230 § 10.34(c).

67. *See id.* (describing disclosure duties).

68. *See infra* Part II.A.2.b.

69. *See* Andy Brown et al., *A Taxing Week: Global Tax Disputes Predictions for 2026*, INT'L TAX REV. (Nov. 28, 2025),

enforcement abilities are weak over the next few years, the pendulum will hopefully swing back[70] toward increased IRS enforcement under a future administration. Further, the statute of limitations might be long enough for taxpayers taking aggressive positions today to face future enforcement actions by an IRS that looks very different than it does today. If that were to happen, the taxpayer whose position is successfully challenged by the IRS could owe not only back taxes and interest, but potentially penalties as well.[71] Civil penalties impose a monetary burden, but evasion and fraud can even, in some cases, result in criminal penalties for the taxpayer.[72]

B. The Debate about Tax Lawyers' Duties

The constraints on aggressive tax advising imposed by the IRC penalty provisions, Circular 230, and rules of professional conduct for lawyers set outer boundaries for what is allowed. Within those boundaries, tax advisors have discretion about how they approach their role.[73] So, for example, a tax advisor is clearly allowed to assist clients with (non-shelter) positions that the tax advisor believes are likely *not* the right answers under the law.[74] This can include positions that have only a one in three, or even one in four, chance of being sustained on the merits if challenged.[75] Some tax advisors might be willing to assist with those aggressive matters, but others might decline, preferring, for

https://www.internationaltaxreview.com/article/2fmxk17x4bin4fo25boxs/direct-tax/a-taxing-week-global-tax-disputes-predictions-for-2026 [https://perma.cc/KV5S-AXYZ].

70. History has seen this type of pendulum swing before, with weak enforcement periods followed by stronger enforcement periods. *See generally* CONG. BUDGET OFF., TRENDS IN THE INTERNAL REVENUE SERVICE'S FUNDING AND ENFORCEMENT (2020) (examining the decline in IRS enforcement activities between 2010 and 2018); Raymond L. Placid et al., *IRS Enforcement Activities, Past, Present, and Future*, THE TAX ADVISER (July 1, 2008), https://www.thetaxadviser.com/issues/2008/jul/irsenforcementactivitiespastpresentandfuture/ [https://perma.cc/8Y8A-YL4J] (analyzing IRS enforcement activity since 1997); Jeffrey A. Dubin et al., *The Changing Face of Tax Enforcement, 1978-1988*, 43 TAX LAW. 893 (1990) (examining shifts in tax enforcement from 1978 to 1988). A serious concern, however, is that the pendulum might not swing back this time. *See infra* Part I.A.

71. *See, e.g.,* I.R.C. §§ 6662, 6662A (accuracy-related penalties applicable to taxpayers on understatements).

72. *See, e.g.*, I.R.C. § 7201.

73. *See* Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L., ETHICS & PUB. POL'Y 75, 76–83 (2000) (discussing the range of discretionary decisions faced by practicing lawyers). *See generally* Heather M. Field, *Aggressive Tax Planning & the Ethical Tax Lawyer*, 36 VA. TAX REV. 261 (2016) (discussing a range of possible approaches to the exercise of this discretion by tax advisors).

74. *See supra* text accompanying notes 56–59.

75. *See id.*

example, to assist only with positions that the advisor believes are likely to be sustained on the merits if challenged.

Questions about the appropriate limits on aggressive tax advising and about how tax lawyers should exercise discretion within those limits are part of larger debates about the role of lawyers more generally.[76] These debates have yielded extensive literature reflecting a range of views.

1. The Lawyer's Role, In General

Under the "dominant view" about lawyers' roles,[77] lawyers should take a "client-centered" or "hired gun" approach in which they serve as "zealous advocates" for their clients, "act[] at the direction of the boss/client, taking no responsibility for injury to other people," and be "neutral" and "nonjudgemental" of the client's preferences.[78] Under this approach, the lawyer "generally defers to the client about how aggressive the client wants to be in the client's effort to reduce taxes" and is "willing[] to empower even aggressive taxpayers."[79] The lawyer must "take any action that will advance the client's interest so long as the action does not clearly violate a rule of ethics or other law,"[80] and "if 'the law' is manipulable and without clear limits on client conduct, [the lawyer should make] that aspect of the law . . . available to the client."[81] This would arguably include assisting positions that might subject the client to civil (but likely not criminal) penalties, although the "lawyer may not become an active participant in the client's unlawful activity."[82]

Others argue for a more conservative "legalist" approach, in which the lawyer "adopt[s] the perspective of an unbiased, well-informed judge" and counsels clients in accordance with "what a good-faith interpretation of the legal rule would require in an ideal world without problems of proof, political bias, or unequal wealth."[83] Under this approach, the

76. *See supra* notes 37–38.

77. WENDEL, *supra* note 37, at 368–69.

78. SHAFFER & COCHRAN, JR., *supra* note 37, at 3, 16–29; *see also* Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (explaining that neutrality is central to the "standard conception of the lawyer's role").

79. Field, *supra* note 73, at 282.

80. Nathan M. Crystal, *Using the Concept of "a Philosophy of Lawyering" in Teaching Professional Responsibility*, 51 ST. LOUIS U. L.J. 1235, 1241 (2007).

81. Pepper, *Amoral Ethical Role*, *supra* note 37, at 626.

82. Pepper, *Counseling at the Limits of the Law*, *supra* note 37, at 1548. *See generally* Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251 (2018) (discussing how far a lawyer may to go to assist with activities that, while unlawful, are not criminal or fraudulent).

83. Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487, 516–18 (2009).

lawyer "assume[s] direct responsibility for the substantive validity of [the client's actions]" and must only take actions that have inherent legal merit.[84] This lawyer cannot abdicate their responsibility for their actions on the grounds that the legal system provides an adversary to counterbalance the lawyer's efforts and ultimately ensure a meritorious result; the lawyer must assist the client in doing what is right under the law, behaving as if there were no adversary.[85]

There are views in between the hired gun and the legalist approaches, including the view that lawyers should help clients with positions as long as the positions would not subject the client or the lawyer to penalties (i.e., viewing the threshold for the imposition of penalties as the outer bound of what society, collectively, considers ethical)[86] and the view that a lawyer helping a client with aggressive positions must ensure that any position that is unlikely to succeed on the merits is clearly disclosed.[87]

While necessarily over-simplified because of space constraints, this discussion provides background relevant to understanding the debate about the roles and responsibilities of tax lawyers.

2. Do Tax Lawyers Have Special Duties?

In the tax field, the question is whether tax lawyers are different from other lawyers.[88] Do "tax lawyer[s] have special duties or responsibilities to the tax system, the government, [or] the public?"[89] In the controversy context, where a tax lawyer represents a client involved in a dispute with the tax authority, the answer is generally no.[90] At that point, "the professional standards for all lawyers [are considered to be] sufficient."[91]

In the planning and compliance contexts, however, there is a long-standing debate. Some argue that "the standards for all lawyers are always sufficient."[92] They believe that tax lawyers, even when assisting with planning or compliance, "[have] no separate duty owed either to the

84. Simon, *Ethical Discretion in Lawyering*, *supra* note 37, at 1090, 1096–98.

85. *See, e.g.*, David Luban, *The Adversary System Excuse, in* THE GOOD LAWYER: LAWYERS' ROLES & LAWYERS' ETHICS, *supra* note 37, at 83–118.

86. *See* WENDEL, *supra* note 37, at 363.

87. *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40–44 (1989).

88. *See* Michael Hatfield & Michelle Kwon, *A Study of Tax Lawyers Discussing Duties*, 76 TAX LAW. 73, 94 (2022).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* (citing commentators taking this position).

tax system or to society" beyond the general duty that all lawyers have to "obey and uphold the law."[93] These commentators argue that any such additional duties would adversely affect the lawyer/client relationship.[94]

Many others, however, argue that the insufficiency of government resources, which leads to a relatively weak tax enforcement mechanism and heavy reliance on self-assessment and voluntary compliance, means that tax lawyers must do more than other lawyers to help ensure their clients comply with tax laws.[95] More broadly, some argue that because tax practitioners "play an important role in the government's ability to collect taxes efficiently, . . . [they] play an important role in helping pay for a civilized society and in upholding the democratic social consensus embodied in the tax system."[96] That is, tax lawyers have a duty to "protect the revenue"[97] and to the "laws and system of administration that comprise our nation's revenue raising process" and thus "must balance the immediate demands of their clients against the public's interest in a sound tax system which operates in accord with policy judgments reached through a democratic process."[98] Further, some argue that the need to counteract the erosion of public confidence in the tax system,[99] anti-tax rhetoric,[100] and the development of a broader "culture of tax avoidance"[101]—all of which affect the taxpaying population's intrinsic motivation to comply with tax law (i.e., "tax morale")[102]—means that tax lawyers should do more than is expected from lawyers in general.

To date, these arguments for strong gatekeeping responsibilities of tax lawyers have generally not prevailed, and today's answer to the

93. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, *supra* note 38, at 851.

94. *See id.* at 849–50; David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to Others—The Civil Liability of Tax Attorneys Made Possible by the Acceptance of a Duty to the System*, 63 TAX LAW. 169, 169–70 (2009).

95. *See, e.g.*, Beale, *supra* note 38, at 593; Perkins, *supra* note 38, at 210; Lavoie, *supra* note 38, at 826–27.

96. Dzienkowski & Peroni, *supra* note 38, at 2722–23.

97. Durst, *supra* note 38, at 1050 n. 81.

98. Galler, *supra* note 38, at 688, 693; *see also, e.g.*, Beale, *supra* note 38, at 639.

99. *See, e.g.*, Dzienkowski & Peroni, *supra* note 38, at 2735–36, 2739. Tax advisors' responsibility to counteract the erosion in public confidence in the tax system arguably arises because tax advisors were at least partly responsible for causing that erosion through their historic role in avoidance and evasion. *See* TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS AND THE TAX SHELTER INDUSTRY 217 (2014); Sheldon D. Pollack & Jay A. Soled, *Tax Professionals Behaving Badly*, 105 TAX NOTES 201, 204 (Oct. 11, 2004).

100. *See, e.g.*, Michael Hatfield, *Tax Lawyers, Tax Defiance, and the Ethics of Casual Conversation*, 10 FLA. TAX REV. 841, 844–51 (2011).

101. *See, e.g.*, Henry Ordower, *The Culture of Tax Avoidance*, 55 ST. LOUIS U. L.J. 47, 53 (2010).

102. *See infra* Part II.B.

question about whether and to what extent tax lawyers have special duties is reflected in the rules that constrain tax lawyers' behavior, including Circular 230, the IRC penalty provisions, and Model Rules of Professional Conduct, discussed above in Part I.A. But the debate—both about what tax lawyers should be allowed to do and about how tax lawyers should exercise discretion within the boundaries of what is allowed—continues.[103]

III. TAX LAWYERS SHOULD PLAY A STRONGER GATEKEEPING ROLE

This Part argues that the claims that tax lawyers have special duties, above and beyond what is required of other lawyers, are particularly compelling today given the Trump administration's dramatic reductions to the IRS budget and workforce, actions that undermine tax morale (i.e., taxpayers' respect for the tax system and intrinsic motivation to comply), and assaults on the rule of law more generally. These recent developments demand a recalibration of tax advisors' duties so that tax advisors engaged in planning and compliance play a stronger gatekeeping role. Later, Part III will discuss what, specifically, a stronger gatekeeping role for tax lawyers would entail.

A. IRS Budget & Workforce Reductions Exacerbate the Problem of Underenforcement

1. Resource Cuts Create Long-Term Damage to the IRS's Enforcement Capacity

The Introduction to this Article detailed the Trump administration's severe cuts to the IRS's workforce and budget and the dramatic revenue reductions that could result.[104] These cuts exacerbate the IRS-taxpayer resource imbalance, but the existence of an imbalance is not new, nor is the IRS's inability to challenge all aggressive positions effectively.[105] The U.S. federal income tax system has long relied heavily on taxpayer self-assessment and voluntary compliance, and these conditions have been part of the argument that tax lawyers have some responsibility to help ensure that clients comply with the law.[106]

103. *See, e.g.*, Richard A. Shaw, *2020 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Tomorrow Is Another Day—How Did We Get Here Ethically*, 73 TAX LAW. 753, 757 (2020).

104. *See supra* text accompanying notes 1–30.

105. *See, e.g.,* Schizer, *supra* note 38, at 335–39 (noting longstanding resource limitations at the IRS and its resulting inability to police all taxpayer positions).

106. *See* WENDEL, *supra* note 37, at 363.

Although IRS resources have ebbed and flowed over time,[107] the Trump administration's cuts are particularly likely to be long-lasting and difficult to reverse, making it much less likely than in the past that the current resource ebb will flow again (particularly any time soon). This is for several reasons. First, the cut to the IRS's budget agreed upon for the 2026 fiscal year was smaller than House Appropriations Committee proposal,[108] so it is reasonable to think that legislators might continue the efforts to impose larger budget cuts. Second, even if enforcement-minded legislators regain majorities in both houses of Congress, they will continue to face budgetary pressure because of the already high federal debt[109] and the likelihood that the United States will hit the debt ceiling again within two years.[110]

Third and very critically, even assuming Congress increases the IRS's budget, it is still likely to be very challenging to rebuild an effective enforcement staff. In the 2025 workforce reductions, the IRS lost a lot of expertise and institutional knowledge, which will be difficult to recoup.[111] And hiring and training new staff requires a major investment of time and money.[112]

In addition, it could be challenging for the IRS to hire significant numbers of qualified people because the IRS would have to convince them

107. *See supra* note 70.

108. *See supra* notes 14-15 and accompanying text.

109. The total federal debt through February 2026 is almost $39 trillion. *See What Is the National Debt?*, FISCAL DATA, https://fiscaldata.treasury.gov/americas-finance-guide/national-debt/ [https://perma.cc/2AXA-8QKB] (last visited Feb. 25, 2026).

110. The OBBBA increased the debt ceiling by $5 trillion. Pub. L. No. 119-21, § 72001, 139 Stat. 73, 332 (2025). However, given the cost of the OBBBA and interest on existing federal debt, among other things, the increased debt ceiling will likely to be reached again sometime in 2027. *See Upcoming Congressional Fiscal Policy Deadlines*, COMM. FOR A RESPONSIBLE FED. BUDGET (Jan. 6, 2026), https://www.crfb.org/blogs/upcoming-congressional-fiscal-policy-deadlines [https://perma.cc/QC84-QKXS]. *See generally* Sage Belz et al., *What Is the Federal Debt Ceiling?*, BROOKINGS INST., (July 7, 2025), https://www.brookings.edu/articles/the-hutchins-center-explains-the-debt-limit/ [https://perma.cc/ADQ5-T27Z] (explaining the issues encountered when the country approaches the debt ceiling and why raising the debt ceiling is controversial).

111. Kroll, *supra* note 6.

112. *See Oversight Hearing–U.S. Department of the Treasury Before the H. Comm. on Appropriations*, 119th Cong. (2025) (statement of Scott Bessent, Treasury Secretary) (video recording at 24:00–24:32) [hereinafter Bessent Hearing Testimony] https://appropriations.house.gov/schedule/hearings/oversight-hearing-us-department-treasury [https://perma.cc/K9JK-8YKL] (Bessent explaining that hiring "unseasoned" collections personnel does not immediately translate into effective enforcement because becoming effective is "something that one grows into"). In addition, the IRS has experienced significant delays in onboarding new hires. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2026-108-005, DESPITE PROGRESS MADE ONBOARDING NEW EMPLOYEES, MANY DID NOT TIMELY RECEIVE EQUIPMENT AND PERFORMANCE EXPECTATIONS (Feb. 2026) [hereinafter, "TIGTA ONBOARDING REPORT"].

to leave private practice for public service at the IRS. This is likely to be difficult for multiple reasons, including that public service jobs generally pay less than jobs in private practice, especially for workers with high educational attainment.[113] The pay differential has always been present, but two additional factors—the political environment and the lack of job security that government service historically provided—likely make IRS hiring harder than ever before.

The political environment might dissuade enforcement-minded potential IRS hires especially during President Trump's administration.[114] President Trump has used anti-tax rhetoric that demonstrates public disdain for the IRS,[115] has implemented policies that intentionally hobble the IRS,[116] and has even mused about closing the IRS entirely.[117] Moreover, he nominated, and the Senate confirmed, an IRS commissioner who had ties to the promotion of arguably abusive tax credits,[118] although that commissioner was relieved of his duties after less than two months in the position,[119] which furthered a very tumultuous period for the IRS during which it had *seven* leaders during 2025.[120] In addition, by seeking to use taxpayer information to help with immigration enforcement, President Trump has also contravened long-

113. CONG. BUDGET OFF., COMPARING THE COMPENSATION OF FEDERAL AND PRIVATE-SECTOR EMPLOYEES IN 2022, at 2 (2024), https://www.cbo.gov/publication/60235 [https://perma.cc/4663-MZ6Y]; *accord* Maureen Leddy, *After Further Cuts, Experts Discuss the Future of IRS Enforcement*, BLOOMBERG LAW, Jan. 27, 2026 (quoting an expert as noting that many IRS employees who were targeted during the staffing cuts "have better career opportunities outside the IRS"). *But see* Nathan J. Richman, *Bisignano Eyeing Fraud Enforcement to Shrink the Tax Gap*, 190 TAX NOTES FED. 854, 855 (Feb. 2, 2026) (noting that a special agent in charge of the IRS Criminal Investigation division's Los Angeles field office indicated that he believes that "applications [to the Criminal Investigation division] are still likely to substantially outpace the open positions").

114. *See generally* Mark D. Richardson, *Politicization and Expertise: Exit, Effort, and Investment*, 81 J. POLS. 878 (2019) (claiming politicization of agencies can lead civil servants to exit or disengage).

115. Andrew Duehren, *How Trump Could Upend Taxation in America*, N.Y. TIMES (Sep. 23, 2024), https://www.nytimes.com/2024/09/22/us/politics/trump-tax-plan.html [https://perma.cc/8Q98-7953] (explaining "Mr. Trump's anti-tax crusade, which has played out in social-media posts and pithy slogans offered up at political rallies over the course of the summer and fall").

116. *See supra* text accompanying notes 1–30.

117. David Goldman, *Trump Wants to 'Abolish' the IRS and Replace It with Tariffs. Can It Work?*, CNN (Feb. 20, 2025, at 12:11 ET), https://www.cnn.com/2025/02/20/economy/trump-abolish-irs [https://perma.cc/MMB6-MCPE].

118. *See infra* notes 200–204 and accompanying text.

119. *See* Vanessa Williamson, *The IRS Faces Unprecedented Leadership Turnover*, BROOKINGS INST. (Aug. 12, 2025), https://www.brookings.edu/articles/the-irs-faces-unprecedented-leadership-turnover/ [https://perma.cc/LTU8-XRPW].

120. *See id.*

standing privacy protections for taxpayers and IRS norms;[121] that effort "sparked an exodus of high-ranking IRS officials."[122] The foregoing are unlikely to inspire prospective hires to want to work for the IRS, making it difficult to rebuild an effective enforcement staff—were President Trump to want to do that, which he likely does not.[123]

Prospective hires are also likely to be concerned about job security. Given the Trump administration's actions to cut the workforce and reduce civil service job protections,[124] it would be reasonable for new hire candidates to fear that they could be summarily dismissed based on administration's whim, especially if they do something that is perceived to be contrary to the political preferences of the administration. Moreover, even if a new hire lasts throughout a president's term, the Trump administration's actions create concerns that a future new administration might dramatically reshape the IRS workforce. This type of uncertainty, particularly for positions that historically had public service job protections, can drive away talented individuals who are interested in building sustained careers with an organization over the long term.

2. Other Tools Cannot Fill the Enforcement Gap Created by the Resource Cuts

Tools, such as artificial intelligence, state-level tax enforcement, and traditional strategies for increasing voluntary compliance (i.e., withholding, information reporting, and penalties), could be used to help

121. A federal judge recently ruled that the IRS's disclosures of taxpayer information with U.S. Immigration and Customs Enforcement violated the law. *See* Trevor Sikes, *Taxpayer Data Sharing with IRC Broke the Law, Judge Says,* 190 TAX NOTES FED. 1566 (Mar. 2, 2026).

122. Benjamin Valdez, *Former Officials Troubled by Pace of IRS Data Sharing Efforts*, 187 TAX NOTES FED. 1958, 1958 (June 9, 2025).

123. *See* TIGTA ONBOARDING REPORT, *supra* note 112, at 2 ("The President also issued a memorandum freezing the hiring of Federal civilian employees with additional restrictions for IRS's hiring. The hiring freeze will remain in effect for the IRS until the Secretary of the Department of the Treasury determines that it is in the national interest to lift the freeze."). The IRS has, however, had limited hiring authority despite the hiring freeze, for example, "to pursue hiring customer service staff to help with filing season and Criminal Investigators to assist with other governmentwide initiatives." *Id.*; *see also* Benjamin Valdez, *Treasury Looks to Undo Some IRS Resignations,* 188 TAX NOTES FED. 1514 (Sept. 1, 2025).

124. *See* Shannon Bond, *Thousands of Federal Workers Would Be Easier to Fire Under Trump Rule Change*, NPR (Apr. 18, 2025, at 17:33 ET), https://www.npr.org/2025/04/18/nx-s1-5369550/trump-federal-workers-schedule-f [https://perma.cc/Y57V-HP69]; Erin Schumaker, *Supreme Court Disabuses Federal Workers Who Thought Their Jobs Were Safe*, POLITICO (July 9, 2025, at 16:47 ET), https://www.politico.com/news/2025/07/09/federal-workers-supreme-court-doge-musk-layoffs-00445234 [https://perma.cc/UR53-DZQL].

with enforcement and compliance, but they are unlikely to be sufficient to fill gaps created by the IRS budget and staffing cuts.

a. Artificial Intelligence

The IRS is already using artificial intelligence to assist with tasks such as selecting returns for audit,[125] and Treasury Secretary Bessent, in testimony before the House Committee on Appropriations, has asserted that collections will not be "sabotage[ed]" by the cuts to the IRS's budget and workforce because the IRS can use the "AI boom . . . to enhance collections."[126] Although the Treasury Inspector General for Tax Administration ("TIGTA") in May 2025 concluded that AI "holds substantial promise for improving the IRS's examination efforts,"[127] there are reasons to believe that AI will be unable to fill the enforcement gap created by the recent cuts to the IRS's budget and workforce.

First, it is unclear whether and to what extent AI is actually helping. TIGTA identified that "the IRS cannot readily demonstrate in real-world context if AI models are improving the IRS's examination compliance efforts overall."[128] AI might be improving results, but the IRS needs to "create an ongoing process to monitor each model's performance and demonstrate to leadership and stakeholders whether AI models are improving examination performance and achieving the IRS's goals."[129]

Recent evidence from the for-profit sector suggests that AI is not having the impact people expect, so the same might be true for the IRS. Recent research finds that "only 25% of AI initiatives have delivered expected [return on investment] over the last few years, and only 16% have scaled enterprise wide."[130] In part, the AI initiatives' failure to deliver on their promise "trace[s] back to misalignment between business objectives, data readiness, and execution."[131] The IRS has a weak track

125. *See* TREAS. INSPECTOR GEN. FOR TAX ADMIN., 2025-308-022, THE IRS COULD LEVERAGE EXAMINATION RESULTS IN ARTIFICIAL INTELLIGENCE EXAMINATION CASE SELECTION MODELS AND IMPROVE PROCESSES TO EVALUATE PERFORMANCE 1–2 (2025) [hereinafter TIGTA AI REPORT].

126. Bessent Hearing Testimony, *supra* note 112, at 23:00–24:42.

127. TIGTA AI REPORT, *supra* note 125, at ii.

128. *Id.* at 13.

129. *Id.* at 14.

130. *IBM Study: CEOs Double Down on AI While Navigating Enterprise Hurdles*, IBM (May 6, 2025), https://newsroom.ibm.com/2025-05-06-ibm-study-ceos-double-down-on-ai-while-navigating-enterprise-hurdles [https://perma.cc/796E-FVB8]; *accord* IBM INST. FOR BUS. VALUE, 5 MINDSHIFTS TO SUPERCHARGE BUSINESS GROWTH 50 (2025), https://www.ibm.com/downloads/documents/us-en/12f5a711174dc2ac [https://perma.cc/N2LG-NAF4].

131. Rafał Łabędzki, *Why 75% of AI Initiatives Fail, and How Misaligned Business-Tech Collaboration Is the Root Cause*, DEEPSENSE.AI (Aug. 5, 2025),

record when it comes to modern technological infrastructure; for many years, the National Taxpayer Advocate and others have argued that the IRS needed "a substantial overhaul of its IT systems."[132] Although the IRS has recently been modernizing its technology, it is hard to imagine that an agency that has been mired in dated "legacy" technology systems for decades[133] is likely to implement cutting edge technology like AI as well as for-profit industry that regularly updates its technology.[134] As a result, the success rate of the IRS's AI initiatives is unlikely to exceed the success rate of AI initiatives in the for-profit sector and might be lower. Thus, it seems over-optimistic to think that AI will close the enforcement gap created by the cuts to the IRS's budget and personnel.

In addition, funding for the IRS's technology modernization efforts is from the 2022 special funding legislation, and that funding has been dramatically reduced.[135] TIGTA explains that "given the recent governmentwide cost cutting efforts (e.g., [2022 special] funding recission, hiring freeze, and anticipated reduction in force) it is now unclear if the IRS will be able to pursue and achieve" the steps the IRS planned in its effort to "deliver cutting-edge technology, data, and analytics to operate more effectively."[136]

Further, "there is little evidence to suggest that this administration is serious about responsibly expanding the use of AI in a way that would generate new revenue, especially when it comes to high-end compliance."[137]

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https://deepsense.ai/blog/why-75-of-ai-initiatives-fail-and-how-misaligned-business-tech-collaboration-is-the-root-cause/ [https://perma.cc/9T9Q-5DMA].

132. *IT Modernization–The IRS's Reliance on Antiquated Technology Poses a Continuing Risk to Tax Administration*, NAT'L TAXPAYER ADVOC. (Sep. 3 2020), https://www.taxpayeradvocate.irs.gov/news/nta-blog/ntablog-it-modernization/2020/09/ [https://perma.cc/LMT7-BCX4]; *see also Outdated and Old IT Systems Slow Government and Put Taxpayers at Risk*, U.S. GOV'T ACCOUNTABILITY OFF.: WATCHBLOG (Feb. 15, 2023), https://www.gao.gov/blog/outdated-and-old-it-systems-slow-government-and-put-taxpayers-risk [https://perma.cc/9W3G-XQGS] (explaining IT may be delaying tax returns and refunds).

133. *See Information Technology: IRS Needs to Complete Modernization Plans and Fully Address Cloud Computing Requirements*, U.S. GOV'T ACCOUNTABILITY OFF. (Feb. 7, 2023), https://www.gao.gov/products/gao-23-104719 [https://perma.cc/EJ8B-GACT].

134. *See* SARA HINKLEY, U.C. BERKELEY LAB. CTR., TECHNOLOGY IN THE PUBLIC SECTOR AND THE FUTURE OF GOVERNMENT WORK 1, 5 (2023), https://laborcenter.berkeley.edu/wp-content/uploads/2023/01/Technology-in-the-public-sector-and-the-future-of-government-work.pdf [https://perma.cc/6RVT-ZVQ3] (noting that "[w]ith the exception of the military, government has been generally slower to adopt technology than the private sector.").

135. *See* TIGTA AI REPORT, *supra* note 125, at 4–5. *See also supra* text accompanying notes 17–19.

136. TIGTA AI REPORT, *supra* note 125, at 5 (emphasis omitted).

137. Leiserson & DeBot, *supra* note 22.

b. State-Level Tax Enforcement

States are likely to increase their tax enforcement efforts in response to a reduction in enforcement at the federal level.[138] This is because reduced federal tax enforcement threatens not only federal revenue, but also state-level revenue because, among other things, (a) states with income taxes generally conform, to some degree, with the federal income tax regime, (b) states rely on information sharing from the federal government to help with state-level enforcement, and (c) states often piggyback on federal audits for issues on which the state law conforms with the federal (i.e., pursuing a state-level audit after a federal-level audit revealed noncompliance).[139] To protect state coffers, states will need to increase state-level tax enforcement to adjust for the reduction in federal-level enforcement.[140] This includes increasing state tax enforcement budgets and hiring more enforcement personnel.

Effective state-level enforcement could help mitigate reductions in federal-level enforcement because the latter could piggyback on the former,[141] but increases to state-level enforcement will not be enough to fill the enforcement gap created by cuts to the IRS's budget and staffing. This is for multiple reasons.

First, some states do not have income taxes or do not conform to federal tax law.[142] In those states, state-level tax enforcement would not

138. *See* Richman, *supra* note 32.

139. *See* Carl Davis, *Sharp Turn in Federal Policy Brings Significant Risks for State Tax Revenues*, INST. ON TAX'N & ECON. POL'Y (Apr. 9, 2025), https://itep.org/sharp-turn-in-federal-policy-brings-significant-risks-for-state-tax-revenues/ [https://perma.cc/8R6Q-PHYW]; Michael Nunes, *IRS Cuts May Hamper State Tax Enforcement, Officials Warn*, LAW360: TAX AUTH. (July 23, 2025, at 14:55 ET), https://www.law360.com/tax-authority/articles/2364579/print?section=tax-authority/federal [https://perma.cc/VHS5-5RKN]; *Evaluating State Impacts of IRS Budget Cuts: Mathtech's Free Federal Impacts Assessment (FIA)*, MATHTECH https://mathtechinc.com/irs-budget-cuts/ [https://perma.cc/WLE6-8E66] (last visited Jan. 29, 2026) (identifying "changes at the IRS [that] could jeopardize the coordination and data pipelines that support core state functions").

140. *See* Davis, *supra* note 139.

141. *See* Janathan Allen, *The Two Sources of Income Tax Audits in California*, JD SUPRA (July 29, 2025), https://www.jdsupra.com/legalnews/the-two-sources-of-income-tax-audits-in-7369712/ [https://perma.cc/MA4Z-UJ5D].

142. *See How Do State Individual Income Taxes Conform with Federal Income Taxes?*, TAX POL'Y CTR. (Jan. 2024), https://taxpolicycenter.org/briefing-book/how-do-state-individual-income-taxes-conform-federal-income-taxes [https://perma.cc/47YC-D2DD]. *See generally How Does Federal-State Tax Conformity Work?*, INST. ON TAX'N & ECON. POL'Y, https://itep.org/how-does-federal-state-tax-conformity-work/# [https://perma.cc/SD5A-3RN5] (last visited Jan. 29, 2026) (providing background about state conformity to federal tax law).

involve tax laws that also exist at the federal level, and, thus, would not help with federal-level tax enforcement.[143]

Second, states have limited funds, and even if they allocate more funding for enforcement, no one state would be able to allocate enough to make up for the federal-level funding losses.[144] Further, it is highly unlikely that states would coordinate to replace the lost federal funding in the aggregate or coordinate to divide up the needed enforcement actions efficiently among the participating states.

Third, even if states dramatically increased their enforcement budgets and staffing, states have less incentive than the IRS to pursue enforcement actions. The return on state-level enforcement actions is lower than the return on federal-level enforcement on the same issue because state-level tax rates are generally lower, meaning that there are fewer dollars of unpaid taxes available for a state to recover from any one enforcement action.[145] But the time and effort required to pursue the enforcement action is likely relatively similar for state and federal tax authorities.[146] As a result, even if a state had all the resources it needed, some enforcement actions that would likely be cost-effective for the IRS to undertake would not be cost-effective for a state to undertake.

Fourth, and more generally, the federal-level enforcement has economies of scale that state-level enforcement does not, meaning that state-level enforcement is likely to be less efficient, less sophisticated, or both. Devolving responsibility for enforcement of federal tax law to state-level tax enforcement agencies in states that conform to federal law would result in unnecessary duplication of costs, and it might be difficult to find a sufficient number of staff with sufficiently specialized expertise to staff the many state-level enforcement offices.[147] For example,

143. *See How Does Federal-State Tax Conformity Work?*, *supra* note 142.

144. *See generally* Phil Dean & Kathryn Vesey White, *Fiscal Contrast: An Analysis of State and Federal Fiscal Processes*, 2024 GARDNER BUS. REV. 1.

145. *See* Andrey Yushkov & Katherine Loughead, *State Individual Income Tax Rates and Brackets, 2025*, TAX FOUND. (Feb. 18, 2025), https://taxfoundation.org/data/all/state/state-income-tax-rates/ [https://perma.cc/FTZ6-8DAZ]. California has the highest state income tax rate applicable to individuals, with a top rate of 13.3%. *Id.* That is materially lower than the highest federal income tax bracket for individuals at 37%. *See* I.R.C. § 1(j)(2).

146. Perhaps a taxpayer would be more willing to settle with a state tax authority than with the IRS because there is less money at stake with the state-level audit. But if a taxpayer knows that settling a state-level enforcement action might trigger a federal enforcement action on the same issue, the taxpayer is likely to fight just as hard against the state tax authority as they would have fought against the IRS.

147. *See* GRANT A. DRIESSEN & JOSEPH S. HUGHES, CONG. RSCH. SERV., R46382, FISCAL FEDERALISM: THEORY AND PRACTICE 9–10 (2020) (explaining why, when multiple jurisdictions want a particular program, it can be more effective to "hav[e] a higher level of government coordinate the service").

expertise on issues such as complex partnership tax rules is concentrated at the federal level.[148] There might not be enough highly specialized experts to staff all the enforcement offices in all the states that would want such a person, and the quality of the work done in each such office would likely be lower than that done by a cohort of partnership tax experts at the federal level because collaboration among experts can increase the quality and sophistication of the work done by the group.

c. Traditional Strategies for Increasing Voluntary Compliance

Long-standing strategies for increasing voluntary compliance, and thus decreasing the need for enforcement activity, are withholding, information reporting, and penalties. However, expanding these strategies is also unlikely to increase compliance enough to overcome the enforcement gaps created by the reductions in the IRS's budget and staffing.

Withholding & Information Reporting

Withholding involves a third-party intermediary, such as an employer, holding back some amounts otherwise payable to the taxpayer (e.g., salary) and remitting them to the government on the taxpayer's behalf.[149] Information reporting involves a third-party, such as a bank, providing reports to both the government and the taxpayer about the taxpayer's income (e.g., dividends and interest).[150] Tax compliance for amounts subject to withholding or substantial information reporting is extremely high (99% for income subject to both, and 96% for income subject to substantial information reporting but not withholding) because, among other reasons, taxpayers know that the government can

148. *See IRS to Establish Special Pass-Through Organization to Help with High-Income Compliance Efforts; New Workgroup to Blend Current Employees and New Hires to Focus on Complex Partnerships, Other Key Areas*, INTERNAL REVENUE SERV. (Sep. 20, 2023,) https://www.irs.gov/newsroom/irs-to-establish-special-pass-through-organization-to-help-with-high-income-compliance-efforts-new-workgroup-to-blend-current-employees-and-new-hires-to-focus-on-complex-partnerships-other-key-areas [https://perma.cc/KL5G-FCB8].

149. *See, e.g.*, I.R.C. § 3402(a) (withholding on wages). *See* Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 697–99 (2007).

150. *See, e.g.,* I.R.C. § 6042 (requiring information reporting on dividend payments); I.R.C. § 6049 (requiring information reporting on interest payments). *See generally* Bibek Adhikari et al., *Information Reporting and Tax Compliance*, 110 AEA PAPERS & PROCS. 1 (2020) (examining the impact of information reporting on compliance); Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733 (2010) (analyzing the circumstances under which information reporting is more and less effective at increasing compliance).

easily detect noncompliance.[151] Increasing withholding or information reporting for income not currently subject to those requirements could increase compliance and reduce the adverse impact of reduced IRS enforcement capacity.

There are, however, limits to the opportunities to expand the use of these strategies. One reason is that withholding and information reporting require the presence of a third-party intermediary with knowledge of the relevant information that can be required to provide it to the government.[152] For many types of income, including amounts paid in cash or via cryptocurrency, there is no intermediary on which such requirements can be reliably imposed.[153] Even where there is a plausible intermediary on whom additional information reporting requirements could be imposed (e.g., Venmo, which has information about payments made between individuals), such requirements can create significant administrative burdens for the intermediaries and for the IRS, and confusion for the intermediaries and taxpayers, while producing relatively little actionable information for the IRS.[154] Further, legislation to increase information reporting has faced significant resistance, and the OBBBA even reversed earlier legislative action which would have increased those requirements.[155] Given these factors, it is unlikely that the enforcement gap created by the IRS's budget and staffing reductions will be narrowed, to any significant degree, by increasing the requirements for withholding or information reporting.

Penalties for Noncompliance

Another potential way to mitigate the adverse revenue and compliance effects of reduced federal tax enforcement is to increase the penalties that apply if a federal tax position is successfully challenged.[156] Deterrence theory posits that a rational taxpayer's decision to comply (or

151. *See* INTERNAL REVENUE SERV. RSCH., APPLIED ANALYTICS & STAT., Pub. 1415 (Rev. 08-2022), FEDERAL TAX COMPLIANCE RESEARCH: TAX GAP ESTIMATES FOR TAX YEARS 2014–2016, at 20 (2022); CONG. BUDGET OFF., *supra* note 70, at 7 (explaining how the IRS uses information reporting in enforcement); Adhikari et al., *supra* note 150, at 1 (examining the impact of information reporting on compliance).

152. *See* Lederman, *supra* note 149, at 697–98.

153. *See* Manoj Viswanathan, *Tax Compliance in a Decentralizing Economy*, 34 GA. ST. U. L. REV. 283, 296–97 (2018).

154. U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-107028, IRS NEEDS TO TAKE ADDITIONAL ACTIONS TO PREPARE FOR NEW INFORMATION REPORTING REQUIREMENTS 33 (2024).

155. Pub. L. No. 119-21, § 70432, 139 Stat. 243, 243 (reversing the 2021 law that lowered the reporting threshold to more than $600 with no minimum on the number of transactions and reinstating the reporting threshold of $20,000 with more than 200 transactions).

156. *See generally* Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111 (2009) (discussing how tax penalties advance tax compliance).

not comply) depends on the likelihood of detection and the magnitude of penalties if detected.[157] Under the economic deterrence model, the optimal level of compliance can be achieved by setting the penalty rate equal to the inverse of detection rate, and imposing those penalties on a strict liability basis.[158] So if the likelihood of detection declines (e.g., because there are fewer audits or less effective audits), penalties need to increase to yield the same economic return to compliance.[159]

However, there are many reasons to believe that increasing penalties for tax noncompliance will fail to increase tax compliance enough to avoid the significant revenue loss likely to come from reduced IRS enforcement. First, many taxpayers make inaccurate estimates of the likelihood of audit or the magnitude of likely penalties.[160] Thus, it is unclear how effectively increasing penalties would increase compliance even under the basic deterrence model. Second, penalties for noncompliance with federal tax law are often not imposed on a strict-liability basis; there are often exceptions, for example, if the taxpayer had reasonable cause and acted in good faith.[161] That means the taxpayer does not bear the full brunt of the penalties if they fail to comply; they suffer the full penalties only if they fail to comply *and* their behavior fails to afford an exception from the penalties. The fault-based exceptions to penalties reduce the cost of tax noncompliance, increasing the likelihood of noncompliance under the economic model and meaning that penalties would have to be very high to yield high tax compliance. Third, there are political and other impediments to increasing penalties to levels high enough to make the expected cost of compliance less than the expected cost of noncompliance.[162] Lastly, the deterrence model does not provide a full explanation of taxpayer compliance behavior. Many taxpayers do not make compliance decisions by comparing the cost of compliance to the

157. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, *in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 1 (Gary S. Becker & William M. Landes, eds. 1974) (the leading work on the economics of crime); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds. 1970) (1789) (informing Becker's work); Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323 (1972) (drawing on Becker's work to explain the economics of decisions to evade taxes).

158. Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law Is Uncertain*, 27 VA. TAX REV. 241, 244–51 (2007); Michael Abramowicz, *Mandatory Tax Penalty Insurance*, 96 IND. L.J. 105, 137 (2020) (explaining and citing relevant literature).

159. JOINT COMM. ON TAX'N, JCX-19-19, OVERVIEW OF THE TAX GAP 8–10 (Comm. Print 2019) (providing background on the economics of compliance).

160. Doran, *supra* note 156, at 129 n.99 (discussing the "dubious assumption that a taxpayer can determine the expected cost of non-compliance").

161. *See, e.g.*, I.R.C. § 6664(c).

162. *See, e.g.*, Doran, *supra* note 156, at 130; Michael J. Graetz & Louis L. Wilde, *The Economics of Tax Compliance: Fact and Fantasy*, 38 NAT'L TAX J. 355, 358 (1985).

cost of noncompliance.[163] Other motivations often drive legal compliance, and increasing penalties might not affect compliance decisions driven by those non-economic motivations.[164]

3. Underenforced Tax Laws Still Demand Compliance

Underenforcement of the tax law is a long-standing problem, but the recent cuts to the IRS's budget and personnel make the enforcement problem much more severe. Options for filling the enforcement gap are likely to have limited success, and the exacerbated enforcement problem is likely to persist. With less enforcement, the economic incentive to comply declines.[165] This means that many taxpayers have a larger economic incentive than ever before to cheat.[166] This can include outright fraud (e.g., not reporting large amounts of gross income received or inventing deductions for which there is no justification) or taking more aggressive positions, that are quite unlikely to succeed but for which a non-frivolous argument can plausibly be made. However, underenforced tax laws still demand compliance.

a. There Can Be No "Efficient Breach" of Tax Law

When laws—tax or otherwise—are underenforced, people wonder whether they still must comply. Literature on this question is extensive.[167] Some scholars say yes.[168] Among scholars who consider answering this question in the negative at least in some situations, one common approach to evaluating the ethical duty to comply with underenforced law is to ask whether the legal rule is a "prohibition" or a "price."[169] A "prohibition" is "conduct not to be tolerated," whereas a

163. *See, e.g.,* Doran, *supra* note 156, at 131–38 (discussing the "norms model" for tax compliance as an alternative to the "deterrence model"). *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (discussing non-deterrence based reasons that explain compliance behavior). *See also infra* Part II.B (discussing tax morale as a non-economic factor driving compliance decisions).

164. *See infra* Part II.B.

165. *See* Allingham & Sandmo, *supra* note 157.

166. *Id*.

167. *See, e.g.*, Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1735–36 (2006); Ostas, *supra* note 83; Pepper, *Counseling at the Limits of the Law*, *supra* note 37; M. B. E. Smith, *Is There a Prima Facie Duty to Obey the Law?*, 82 YALE L.J. 950, 951 (1973); Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1285 (1998).

168. *See, e.g.*, Williams, *supra* note 167, at 1276.

169. Ostas, *supra* note 83, at 493–97.

"price" is "conduct to be penalized in some legal fashion, but which a citizen is still free to choose to do."[170]

Where a legal rule is a "price," there is a possibility of "efficient breach" in which "there is nothing unethical about deliberately breaching . . . so long as the breaching party compensates the aggrieved."[171] This "breach and pay" strategy is common in contract law, and some scholars extend this strategy to other areas of law, "find[ing, for example,] nothing wrong with deliberately violating economic regulations and then paying the penalty."[172]

Were tax laws to be treated as a "price," breaching the tax law would result in an obligation to pay the injured party for violating the law. In the case of tax law noncompliance, the public is the injured party. To compensate the public for that injury, the taxpayer would need to pay the fisc (on behalf of the public) the amount of taxes that the taxpayer otherwise owed.[173] Because the original obligation requires payment,[174] the "breach and pay" strategy for tax noncompliance is effectively equivalent to complying in the first instance.

Accordingly, under the "prohibition" or "price" approach to analyzing whether compliance with underenforced tax laws is required, it does not matter which way tax law is treated. If the tax law is a prohibition, compliance is required. And if the tax law is a price, payment equivalent to compliance is required. Either way, the tax owed must be paid, even if the laws are underenforced. That is, the "price" argument for allowing noncompliance when rules are underenforced would not allow noncompliance with underenforced tax laws.

b. Reduced Enforcement Due to Recent Resource Cuts Does Not Condone Tax Noncompliance

Some might argue that, where legal rules are not strictly enforced, the rules need not be strictly obeyed. This could be because a lack of active enforcement indicates a judgment by the enforcer that, for example, the rules involve "relatively less serious" actions and thus are

170. *Id.* at 496 (citing Pepper, *Counseling at the Limits of the Law*, *supra* note 37, at 1576–77).

171. *Id.* at 494.

172. *Id.* (citing Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Target of Tender Offers*, 80 MICH. L. REV. 1155 (1982)).

173. This assumes that the "penalty" for the breach is paid largely contemporaneously with the breach, so that there would be no additional interest or penalties.

174. The analysis could be different if the tax obligation at issue is a reporting obligation (e.g., to send Form 1099s to other taxpayers) rather than a payment obligation. However, the focus here is on whether a taxpayer pays the amount owed.

not as important to obey as other rules,[175] that the rules are so onerous that "total compliance is . . . excessive or impossible,"[176] or that the rules have penalties that are "too severe in relation" to the violation.[177] Or lack of enforcement could imply "a lack of social consensus regarding the wrongfulness of the act," such that the un(der)enforced law is not really regarded as "law" that merits compliance.[178]

There are some contexts in which the IRS has announced that it will not challenge a particular position even though it could.[179] These are usually situations where there is uncertainty about how the substantive law rightly applies in the circumstance or where administrative challenges (e.g., valuation) mean that the cost of enforcement would outweigh the revenue recouped from enforcement such that it is more cost-effective to provide a clear, even if taxpayer-favorable, rule. In these types of situations, it is reasonable to infer from the IRS's announced decision not to pursue enforcement actions that taxpayers need not comply with what a technical reading of the law could, at least arguably, require.

It is different, however, if the IRS's enforcement resources are slashed, resulting in reduced enforcement generally. That type of enforcement reduction is (1) not specific to individual issues for which technical compliance is excused, (2) not the product of deliberate decision-making about the meritoriousness of enforcing the particular law in particular circumstances, and (3) not made public, such that taxpayers generally could benefit from knowledge about the need not to comply.

Moreover, although Congress dramatically cut the IRS's enforcement budget and President Trump's administration cut staffing significantly, those actions should not be viewed as meaning that there is a social consensus that tax law compliance and enforcement are not important. Treasury Secretary Bessent, on behalf of the administration, has repeatedly said that tax collections and enforcement remain priorities and that enforcement efforts remain, and will remain, effective despite the budget and staffing cuts.[180] Although many (including me) are

175. Ostas, *supra* note 83, at 495; *see* Pepper, *Counseling at the Limits of the Law*, *supra* note 37, at 1576–78.

176. Shu-Yi Oei & Diane M. Ring, *"Slack" in the Data Age*, 73 ALA. L. REV. 47, 61 (2021).

177. *Id.*

178. Ostas, *supra* note 83, at 498.

179. *See, e.g.*, Rev Proc. 93-27, 1993-2 C.B. 343 (announcing that, if specified conditions are met, the IRS will not assert that the receipt of a profits interests is taxable); I.R.S. Announcement 2002-81, 2002-37 I.R.B. 533 (Sep. 16, 2002) (announcing that, if specified conditions are met, the IRS will not assert that an employee is taxable on frequent flyer miles received from employer-funded flights).

180. *See, e.g.*, IRS 2026 Budget, *supra* note 14, at IRS-1 (explaining that for the 2026 fiscal year, "the IRS will prioritize revenue collections," that the IRS is "committed to . . .

skeptical, the position of the administration and of the congressional majority is that budget and staffing cuts reduce inefficiencies and bloat, not efficacy of revenue collection.[181] Under that position, tax laws and tax compliance are still important, and IRS resource cuts do not imply tacit approval for tax noncompliance.

c. Tax Advice Should Not Take Advantage of Underenforcement

Given that even underenforced tax laws demand compliance, tax advisors—at a minimum—should not take advantage of underenforcement. This means that legal analysis should be based on the substantive merit of positions and not the likelihood of enforcement. Thus, the tax advisor's analysis of the merits of a position during the Trump administration should be the same as the advisor's analysis was during the Biden administration (assuming no change to the underlying law). The substantive analysis should not change because of the expected enforcement reductions.

The client counseling interaction, however, might need to change (e.g., as compared to the interaction during the Biden administration). Just as tax advisors should not take advantage of underenforcement, tax advisors should also advise *clients* not to take advantage of underenforcement. At the very least, tax advisors should advise clients not to take advantage of the recent *reduction* in enforcement. When the likelihood of enforcement declines (i.e., after the IRS resource cuts during the Trump administration), rational taxpayers will be incentivized to take more aggressive positions than they otherwise would have prior to the enforcement reduction.[182] A taxpayer who becomes more aggressive because of reduced enforcement is taking advantage of that reduction in enforcement.[183] Advisors should discourage taxpayers from being more aggressive than they would have been prior to the enforcement

ensuring fair compliance," and that modernization efforts "will enable the IRS to better focus audit resources on more significant pockets of non-compliance"); Bessent Hearing Testimony, *supra* note 112, at 24:43–24:50 ("I would expect collections to continue to be very robust as they were this year.").

181. *See* The White House, *President Trump is Making Government Work for You Again*, Mar. 4, 2025), https://www.whitehouse.gov/releases/2025/03/president-trump-is-making-government-work-for-you-again/ [https://perma.cc/2LKX-D5WR] (asserting that "President Trump reversed the massive over-expansion of the IRS that took place during the Biden Administration" as part of the "bold, necessary effort to downsize the federal government by ending the waste, fraud, and abuse that has permeated virtually all aspects of the bureaucracy").

182. *See supra* text accompanying notes 157–159 (discussing deterrence theory).

183. *Id.*

reductions. This is not to say that a taxpayer's prior appetite for aggressivity is appropriate. The point is that tax advisors should do what they can to dissuade the taxpayer from becoming *more* aggressive because of the reduction in enforcement resources. Ultimately, because the cuts to IRS enforcement resources increase taxpayers' incentives for aggressivity, the cuts also increase the demands on tax advisors, who must do more than they historically would have to counteract taxpayers' increased incentives for aggressivity. That means playing a stronger gatekeeping role.

B. Politicization of the IRS, Cuts to IRS Resources, and Leaders' Personal Tax Behaviors Threaten Tax Morale, Which Undermines Compliance

Some also argue that tax advisor conservatism is warranted to counteract the erosion of public confidence in the tax system.[184] Whether these arguments have been persuasive in the past, they are more compelling today given the cuts to the IRS's budget and staffing, political developments that threaten to erode tax morale, and the difficulty of reversing non-compliance norms once they are established. Tax professionals are in a unique position to help arrest tax morale erosion.

1. Tax Morale Is Especially Important when Enforcement Declines

Taxpayers' economic incentives about compliance depend on enforcement (e.g., the likelihood that noncompliance would be detected), but noneconomic factors can also affect a taxpayer's decision whether to comply. The literature often groups those noneconomic factors together under the concept of "tax morale," which is defined as the "intrinsic motivation to pay taxes."[185] Research shows a significant positive connection between high tax morale and tax compliance,[186] and tax

184. *See supra* notes 99–101.

185. OECD, TAX MORALE: WHAT DRIVES PEOPLE AND BUSINESSES TO PAY TAX? 4 (2019), https://www.oecd.org/content/dam/oecd/en/publications/reports/2019/09/tax-morale_8d593d89/f3d8ea10-en.pdf [https://perma.cc/L522-4V4H] (citing Benno Torgler, *Tax Morale and Direct Democracy*, 21 EUR. J. POL. ECON. 525 (2005)); *see also* BENNO TORGLER, TAX COMPLIANCE AND TAX MORALE: A THEORETICAL AND EMPIRICAL ANALYSIS 4 (2007) (exhaustively reviewing the empirical studies exploring the nature of tax morale); Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 601 (2006); Erzo F. P. Luttmer & Monica Singhal, *Tax Morale,* 28 J. ECON. PERSPS. 149, 150 (2014).

186. *See, e.g.*, Martin Halla, *Tax Morale and Compliance Behavior: First Evidence on a Causal Link*, 12 B.E. J. ECON. ANALYSIS & POL'Y 1 (2010); Juan Carlos Molero & Francesc

morale is thought to be part of the explanation as to why tax compliance in the United States is higher than it would be if predicted using an economic model alone.[187] "'[M]ost scholars agree that society's ability to enforce compliance with the law [including tax law] lies less in the government's power to impose sanctions than it does in the norms and attitudes by which people direct their lives.'"[188] Thus, given the Trump administration's cuts to IRS resources and the resulting reduction in enforcement, maintaining (and ideally, raising) tax morale becomes increasingly important to revenue collection.

The research on the mechanisms for, and magnitude of, increases and decreases in tax morale is still developing, but the literature identifies several factors as relevant. These include the perceived tax compliance behavior of others (i.e., whether taxpayers perceive others are cheating or complying), procedural fairness (i.e., the belief in the neutrality of decisions and the decision-maker, and perception of the IRS as honest and fair), attitudes of political or group leaders toward taxpaying (which affect tax morale of the leader's constituency or group), and the "legitimacy of the government which the taxes support."[189]

2. Tax Morale Is at Risk of Erosion (and Might Already Be Eroding)

There is some evidence suggesting that tax morale in the United States might be declining. The IRS's Comprehensive Taxpayer Attitude Survey published in December 2024 found that the percentage of taxpayers indicating that it is "not at all acceptable to cheat on your income taxes" is lower in 2022–24 (85% for 2022–23, 84% for 2024) than

Pujol, *Walking Inside the Potential Tax Evader's Mind: Tax Morale Does Matter*, 105 J. BUS. ETHICS 151, 152-53 (2011); Benno Torgler, *Speaking to Theorists and Searching for Facts: Tax Morale and Tax Compliance in Experiments*, 16 J. ECON. SURVS. 657, 658 (2002).

187. *See* Gaetano Lisi, *Tax Morale, Tax Compliance, and the Optimal Tax Policy*, 45 ECON. ANALYSIS & POL'Y 27, 27 (2015) ("The concept of tax morale was introduced in the tax compliance literature to resolve the *tax compliance puzzle*, i.e. to explain the high degree of tax compliance in the presence in many countries of a very low deterrence level."). *See generally* VANESSA S. WILLIAMSON, READ MY LIPS: WHY AMERICANS ARE PROUD TO PAY TAXES (2017) (arguing that Americans view paying taxes as a moral and civic duty).

188. Donald L. Ariail et al., *Ethical Attitudes Toward Taxes in the U.S.: Changes over 20 Years and Demographic Differences*, 27 FLA. TAX REV. 1, 8 (2023) (quoting Professor of Law at Rutgers Law School–Newark, Stuart P. Green).

189. Kornhauser, *supra* note 185, at 613–16; *see also* OECD, *supra* note 185, at 4 ("[O]ne approach to understanding [the interlinked elements comprising tax morale] is proposed by the World Bank . . . [which] highlights the dynamic relationships between trust, facilitation, and enforcement, and their role in building tax morale. The theory posits that trust is driven by the degree to which the tax system, including the approach to facilitation and enforcement, is characterized as fair, equitable, reciprocal, and accountable.").

in the five preceding years (ranging from a low of 87% in 2018 to a high of 89% in 2021).[190] "Trust in the IRS fairly enforcing its tax laws" is down a little in 2024 as compared to 2022–23, as is "trust in the IRS helping taxpayers understand their tax obligations."[191] So far the changes are small, and the long-term trend is not clear. However, these results offer at least some reason to be concerned about the possibility that tax morale might be eroding.[192]

Several recent developments might be adversely affecting tax morale. These include matters relating to President Trump's personal taxes including his failure to voluntarily disclose his tax returns, in a break from long-standing tradition;[193] the failure of the IRS to do annual audits of President Trump's tax returns during his first term (in contravention of the Internal Revenue Manual's guidelines, and in contrast to IRS practices under other administrations),[194] and allegations of President Trump's past tax improprieties.[195] As one commentator explained, when President Trump personally demonstrates "callous disregard for our tax laws" and "acts in ways that call into question the very nature of our collective civic duty, a failure to have a real accounting [for his actions] could erode our common sense of duty."[196]

President Trump's actions in his official capacity as president might also have an adverse effect on tax morale. An example is the Trump

190. INTERNAL REVENUE SERV., Pub. 5296 (Rev. 12-2024), COMPREHENSIVE TAXPAYER ATTITUDE SURVEY (CTAS) 2024, at 17 (2024) [hereinafter Pub. 5296] (noting that there was some change in methodology).

191. *Id.* at 18–19.

192. *But see* Ariail et al., *supra* note 188, at 31–32 (reporting on a study of college students that compared "ethical tax attitudes in 2000 to those in 2020 produced mixed results," and found an increase in the percentage of respondents who answered "not at all" when asked "what is an acceptable amount for someone to cheat on their tax return").

193. *See* Joshua D. Blank, *Presidential Tax Transparency*, 40 YALE L. & POL'Y REV. 1, 3–4 (2021).

194. Emma Braden, *Trickle-Down Compliance: How Codifying the Mandatory Presidential Audit Can Improve Tax Morale and Tax Compliance*, 75 U.C. L.J. 471, 481–82 (2024).

195. *See, e.g.*, David Barstow et al., *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/U944-Z6M2]; Andrea Bernstein et al., *Former President Donald Trump's Company Is Found Guilty of a Criminal Tax Fraud*, NPR (Dec. 6, 2022, at 17:20 ET), https://www.npr.org/2022/12/06/1140756394/former-president-donald-trumps-company-found-guilty-criminal-tax-fraud [https://perma.cc/VBZ5-R3XY].

196. Philip Hackney, *Trump's Taxes Raise IRS Red Flags. But His Flouting of Civic Duty Is Equally Concerning*, NBC NEWS (Oct. 1, 2020, at 04:31 ET) (alteration in original) https://www.nbcnews.com/think/opinion/trump-s-taxes-raise-irs-red-flags-his-flouting-civic-ncna1241623 [https://perma.cc/U6PU-9UKQ].

administration's severe cuts to the IRS's funding and staff,[197] which "erode trust in public institutions."[198] Commentators argue that "high tax morale" and the sense that "taxpaying is a civic responsibility" are "imperiled by the administration setting ablaze the agency tasked with assisting tax filers and ensuring that tax laws apply to everyone."[199] In addition, President Trump's stewardship of the IRS's leadership may undermine public trust in the IRS and its leaders. For example, President Trump nominated Billy Long to be the IRS Commissioner.[200] Mr. Long cosponsored legislation to completely defund the IRS when he was a member of the House of Representatives,[201] promoted a nonexistent tax credit (which he claims he erroneously believed was real),[202] and "liberally encourag[ed] businesses, some of questionable eligibility, to claim a [different] fraud-ridden tax credit."[203] President Trump stood behind Long despite serious questions about his qualifications to lead the IRS, and Long was ultimately confirmed by the Senate.[204] Installing someone like Long as the head of the IRS implies that actions like Long's (i.e., that advance questionable tax schemes and demonstrate disrespect for the IRS) are not only acceptable, but are commendable. President Trump ultimately removed Long from his role as IRS commissioner less than two months after Long's confirmation,[205] but not because of Long's questionable qualifications; early indications suggested that President

197. *See* sources cited *supra* notes 1–19 and accompanying text.

198. Estep, *supra* note 3.

199. Vanessa Williamson & Ellis Chen, *IRS Cuts and Privacy Threats Endanger Public Trust and Revenue*, BROOKINGS INST. (Apr. 15, 2025), https://www.brookings.edu/articles/irs-cuts-and-privacy-threats-endanger-public-trust-and-revenue/ [https://perma.cc/5SN3-9ZSL].

200. Benjamin Valdez & Doug Sword, *Trump Taps Former Lawmaker to Serve as IRS Commissioner*, 185 TAX NOTES FED. 2050 (Dec. 9, 2024).

201. *See Cosponsors: H.R.25 — 113th Congress (2013–2014)*, https://www.congress.gov/bill/113th-congress/house-bill/25/cosponsors [https://perma.cc/7N2G-M47J] (last visited Jan. 29, 2026).

202. Andrew Duehren, *Trump's Pick to Lead IRS Promoted a Nonexistent Tax Credit*, N.Y. TIMES (May 20, 2025) https://www.nytimes.com/2025/05/20/us/politics/billy-long-irs-confirmation-trump.html [https://perma.cc/CM3R-VWYQ].

203. Williamson, *supra* note 119 (citing Andrew Duehren, *How a Consulting Firm and Trump's I.R.S. Pick Pushed a Problematic Tax Credit*, N.Y. TIMES (Dec. 24, 2024), https://www.nytimes.com/2024/12/24/business/billy-long-irs-tax-credit.html [https://perma.cc/YH5F-SPT6]).

204. *See id.*; I.R.S. News Release IR-2025-70 (June 23, 2025), https://www.irs.gov/newsroom/long-sworn-in-as-the-51st-irs-commissioner [https://perma.cc/X7Z5-ZV8H].

205. *See* Andrew Duehren et al., *Trump Is Removing I.R.S. Chief 2 Months After He Was Confirmed*, N.Y. TIMES (Aug. 8, 2025), https://www.nytimes.com/2025/08/08/us/politics/trump-billy-long-irs-commissioner.html [https://perma.cc/7E4A-Q8E4].

Trump removed Long because Long resisted "White House . . . pressure [on the IRS] to turn over taxpayer data."[206] After Long's removal, President Trump named Treasury Secretary Bessent as the Acting IRS Commissioner, and Bessent was the seventh person to act as the IRS Commissioner in 2025;[207] he served in that capacity for the maximum 210-day period allowed under the Federal Vacancies Reform Act, after which the position of IRS Commissioner has been vacant for more than two months.[208] This "unprecedented leadership turnover" creates the impression (and possibly reality) of an IRS in disarray, thereby possibly undermining trust in the institution.[209]

Further, increasing politicization of the IRS might undermine the perception that the IRS is a neutral arbiter of the tax laws and makes decisions in an honest and fair way, which could adversely affect tax morale. Politicization involves "giv[ing] more control of tax administration to political appointees." [210] "President Trump has been trying to use the IRS for his own political purposes,"[211] including by trying to access "taxpayer data from the IRS to facilitate large-scale immigration enforcement operations . . . [which is arguably a] violation of legal protections afforded to all individuals,"[212] by asking the IRS to

206. Williamson, *supra* note 119.

207. *Id.*; *See Commissioner Scott Bessent (Acting)*, INTERNAL REVENUE SERV. (Aug. 2, 2025), https://www.irs.gov/about-irs/commissioner-scott-bessent [https://perma.cc/A7K3-67B2].

208. *See* sources cited *supra* note 8; 5 U.S.C. § 3346 (1998) (limiting the time acting officers may serve). Although the position of IRS Commissioner is vacant, Scott Bessent retains the authority and responsibility to perform the functions and duties of the IRS Commissioner, albeit because he is the Secretary of the Treasury (rather than because of his now-expired appointment as Acting IRS Commissioner); the Treasury Secretary retains such authority for all Treasury offices not filled on either a permanent or acting basis. *See id.*; 5 U.S.C. § 3348(b) (providing that only the head of an agency can perform the functions of and duties of a subordinate vacant office).

209. Williamson, *supra* note 119.

210. Vanessa Williamson & Ellis Chen, *What's Going on at the IRS?*, LAWFARE (May 13, 2025, at 08:00 ET), https://www.lawfaremedia.org/article/what-s-going-on-at-the-irs [https://perma.cc/QTD3-XVGA].

211. Scott Horsley, *Trump Is Looking to Use the IRS for His Own Political Ends. Nixon Tried It Too*, NPR (May 12, 2025, at 05:00 ET), https://www.npr.org/2025/05/12/nx-s1-5379585/irs-harvard-trump-nixon [https://perma.cc/NJG4-HS2U].

212. Debbie Wasserman Schultz et al., *Dems Caution Against Use of IRS Data for Immigration Enforcement*, TAX NOTES (Mar. 25, 2025), https://www.taxnotes.com/research/federal/legislative-documents/congressional-tax-correspondence/dems-caution-against-use-irs-data-immigration-enforcement/7rt4v [https://perma.cc/XC2L-88FL] (a letter from Democratic members of Congress to Acting IRS Commissioner Melanie Krause and Secretary of Homeland Security Kristi Noem); *see also* Sikes, *supra* note 121 (discussing a judge's determination that such data sharing did, in fact, violate the law).

revoke Harvard University's tax-exempt status,[213] and by otherwise pursuing political enemies.[214] These examples of politicization of the IRS are from the right, but there are also examples from the left, including the leaking of President Trump's personal tax returns in contravention of tax privacy laws,[215] the targeting of conservative nonprofit organizations for extra scrutiny,[216] and allegations of political interference in inquiry into Hunter Biden's taxes, resulting in his receipt of special treatment.[217] "Research consistently shows that politicization undermines government capacity and performance,"[218] "encourages corruption and extremism in government," and "open[s] the door to abuse of the tax system for political ends,"[219] all of which can undermine trust in government. Politicization of the IRS risks increasing the perception that the IRS cannot be trusted to fairly administer the tax laws,[220] which "would inevitably damage the voluntary compliance system that is the foundation of our tax system."[221] Moreover, the increased partisanship of the political environment more generally undermines the "legitimacy of

213. Jacob Bogage & Jeff Stein, *Trump Administration Asks IRS to Revoke Harvard's Tax-Exemption Status*, WASH. POST (Apr. 16, 2025) https://www.washingtonpost.com/business/2025/04/16/trump-harvard-tax-exempt-irs/ [https://perma.cc/7G2Z-BCMG].

214. *See* Horsley, *supra* note 211; Andrew Duehren, *Stalled Audits and a Skeleton Staff: Inside Trump's War on the I.R.S.*, N.Y. TIMES (Mar. 13, 2025), https://www.nytimes.com/2025/03/10/us/politics/irs-taxes-trump-musk-federal-workers.html [https://perma.cc/9456-NMNB].

215. *Ex-IRS Contractor Sentenced to 5 Years in Prison for Leaking Trump's Tax Records*, NPR (Jan. 30, 2024 at 01:29 ET), https://www.npr.org/2024/01/30/1227826718/ex-irs-contractor-sentenced-to-5-years-in-prison-for-leaking-trumps-tax-records [https://perma.cc/W5MK-UF8N].

216. Peter Overby, *IRS Apologizes for Aggressive Scrutiny of Conservative Groups*, NPR (Oct. 27, 2017, at 15:08 ET), https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups [https://perma.cc/BG2Q-X8ZF].

217. *See* Bernie Becker, *IRS Hunter Biden Whistleblowers Will Probe Alleged Wrongdoing in Case*, POLITICO (Mar. 19, 2025, at 15:19 ET), https://www.politico.com/news/2025/03/18/whistleblowers-to-probe-hunter-biden-tax-case-00235146 [https://perma.cc/GWC3-93GE].

218. Don Moynihan, *The Risks of Schedule F for Administrative Capacity and Government Accountability*, BROOKINGS INST. (Dec. 12, 2023), https://www.brookings.edu/articles/the-risks-of-schedule-f-for-administrative-capacity-and-government-accountability/ [https://perma.cc/XK2M-FT8L].

219. Williamson & Chen, *supra* note 210 (citing Moynihan, *supra* note 218).

220. *See* Alexander Rifaat & Benjamin Valdez, *Treasury to Root Out 'Politicization' in IRS Audits, Bessent Says*, 187 TAX NOTES FED. 1099 (May 12, 2025).

221. Karen E. Kelly, *Inconsistent Tax Enforcement Is a Threat to All*, 189 TAX NOTES FED. 623, 626 (Oct. 27, 2025).

the government which the taxes support,"[222] further endangering tax morale.

3. Failure to Arrest Tax Morale Erosion Now Will Create Lasting Compliance Problems

The erosion of tax morale is particularly concerning because tax morale is "sticky." "Once tax morale dips, it is hard to restore it to prior levels."[223] In part, this is because factors affecting tax morale (for good or bad) create a feedback loop.[224] If a development adversely affects tax morale and leads to more noncompliance, examples of that noncompliance further discourage compliance, which negatively affects tax morale, potentially fostering more noncompliance and creating a "downward spiral."[225] Research demonstrates that unethical behavior can be contagious,[226] and that a non-compliance norm, once established, tends to persist.[227] Thus, arresting the erosion of tax morale is important, lest it go unabated and create lasting compliance problems.

Halting the degradation of tax morale is a complex task that requires a multi-factored response, but tax advisors can be part of that effort by advancing a pro-compliance message and assuming a stronger gatekeeping role. "Tax practitioners, as the intermediaries that sit between taxpayers and the tax authorities . . . . are critical actors in the tax compliance process . . . ."[228] That is, they have direct access to taxpayers whose tax morale we seek to preserve.[229] In addition, research suggests the attitudes of tax professionals can affect the tax morale of their clients.[230] Specifically, experiments illustrate that direct

222. Kornhauser, *supra* note 185, at 615. Tax morale is affected by norms of any group with which a person identifies, and an anti-government norm of a political party out of power can decrease trust in government more generally. *See id.* at 613.

223. *Id.* at 603 (citing studies).

224. *See id.*

225. *Id.*

226. *See generally* Sebastian J. Goerg et al., *Norm Violations and Behavioral Spillovers—Evidence from the Lab and the Field*, 166 EUR. ECON. REV. 104 (2024); Chase E. Thiel et al., *Rationalize or Reappraise? How Envy and Cognitive Reappraisal Shape Unethical Contagion*, 74 PERS. PSYCH. 237 (2020) (examining how observing others engage in unethical behavior fosters envy and moral disengagement); Li Zhao et al., *Academic Dishonesty and Its Relations to Peer Cheating and Culture: A Meta-Analysis of the Perceived Peer Cheating Effect*, 36 EDUC. RSCH. REV. 100455 (2022) (examining the effects of perceived peer cheating on academic dishonesty).

227. *See* Anders Jensen et al., *Norms of Tax Compliance*, CTR. FOR ECON. POL'Y RSCH.: VOXEU COLUMN (Feb. 12, 2015) https://cepr.org/voxeu/columns/norms-tax-compliance [https://perma.cc/5M88-3KRU] (using the U.K. poll tax as a natural experiment).

228. Doyle, *supra* note 36, at 138.

229. *See id*. at 141.

230. *See id.*

interactions with high rule-following individuals more frequently temper cheating by low rule-following individuals than vice versa.[231] Extrapolated to the tax advising setting, we would expect that direct interaction with a compliance-endorsing advisor could increase the likelihood of compliance and attitude toward compliance among clients who would otherwise lean toward non-compliance. This is not a surprising outcome, and taxpayer attitude surveys provide evidence supporting this result. In the most recent study, more than 50% of taxpayers surveyed reported that using a tax professional increased their motivation to file an accurate and timely return, with only 4% reporting that using a tax professional made them less motivated to comply.[232] Given that tax morale is contagious, the hope is that clients whose attitudes toward taxpaying improve after interacting with a tax advisor might subsequently have a positive effect on the attitudes of others that they encounter, thereby spreading positive tax morale. The magnitude of the impact of tax professionals on the transmission of tax morale is unclear, but the direction is not—whether the tax professional's impact on tax morale is positive or negative depends on the tax professional's attitude toward compliance and how they convey that attitude to their client.

Not only are tax advisors well-positioned to improve, and capable of improving, their clients' attitudes toward compliance, tax advisors also *should* try to do so. Among other reasons, this is because not trying to improve clients' attitudes toward compliance encourages clients to take advantage of underenforcement.[233] And as a pragmatic matter, failing to promote tax compliance also likely makes it harder for the tax professionals to live up to the standards of practice applicable to them.[234] In addition, the tax profession has a history of harming tax morale through participation in sheltering and evasion, so efforts to improve tax morale now could be understood as part of correcting the profession's past mistakes.[235] Further, counteracting threats to tax morale are, as will be discussed in the next Part, part of discharging tax practitioners' duty to the tax system.

231. *See* Jörg Gross & Carsten K.W. De Dreu, *Rule Following Mitigates Collaborative Cheating and Facilitates the Spreading of Honesty Within Groups*, 47 PERSONALITY & SOC. PSYCH. BULL. 395, 395 (2020) ("[R]ule-abiding individuals mitigate the emergence and spreading of collaborative cheating, leading to a transmission advantage of honesty. Accordingly, interindividual differences in rule following provide a basis through which honest behavior can persist.").

232. *See* Pub. 5296, *supra* note 190, at 33.

233. *See supra* Part II.A.3.c.

234. *See supra* Part I.A.

235. *See* Dzienkowski & Peroni *supra* note 38, at 2739.

C. IRS Resource Reductions & Increased Threats to Tax Morale Underscore the Importance of Tax Lawyers' Duty to Tax System

The notion that tax lawyers have a broader "duty to the system" or "duty to protect the revenue" is hotly debated,[236] but the arguments for these duties resonate more strongly now given the long-lasting impact that the Trump administration's actions are likely to have on both tax enforcement and tax morale.

The tax system is the democratically determined mechanism through which members of society fund government, and the severe cuts to the IRS's resources and the resulting underenforcement mean that the IRS cannot be relied upon to "uphold[] the democratic social consensus embodied in the tax system."[237] In such a situation, the integrity of the tax system risks collapse if it is wholly dependent on a functioning IRS. For a legitimate tax system to perpetuate, tax lawyers must contribute to the integrity of the tax system. Indeed, "the less reliable the procedures and institutions, the more direct responsibility [the lawyer] need[s to] assume for substantive justice."[238] Thus, particularly in the wake of the severe cuts to the IRS's enforcement resources, tax lawyers must take more responsibility for compliance of their clients. If they do not, and if private tax advisors aid clients in noncompliance, tax lawyers would create free riders, undermine the collective action system created to fund government, and hasten the undoing of the bargain that members of society agreed upon through the democratic process.[239] This would harm the "unrepresented citizens who ascribe value to a well-functioning tax system."[240] Moreover, because a functioning government depends on participation by all members of society in the tax system (i.e., the democratically agreed-upon government funding mechanism), tax lawyers must help uphold the integrity of the tax system, particularly when its operation is being starved of necessary resources. If tax lawyers do not help, they hinder government's ability to function.[241]

236. *See supra* note 38. Although the notion of a "duty to the system" is commonly discussed in academic examinations of tax practitioner ethics, a recent study of "how [tax planning specialists] experience ethical tensions" and "how they discuss their ethical duties" found that "[n]one of the interviewees claimed that tax lawyers have a special duty to the tax system." Hatfield & Kwon, *supra* note 88, at 98, 134.

237. *See* Dzienkowski & Peroni, *supra* note 38, at 2722–23.

238. Simon, *Ethical Discretion in Lawyering*, *supra* note 37, at 1098.

239. *See* Wendel, *supra* note 37, at 399–400.

240. Galler, *supra* note 38, at 693–94 (citation omitted).

241. *See* Dzienkowski & Peroni, *supra* note 38, at 2722–23. Tax lawyers' duties should not change even if tariffs are expected to yield significant revenue that would enable government to have sufficient resources to function. That still would not permit tax lawyers to help clients with noncompliance. As long as the tax laws remain in effect, they reflect the

The recent cuts to IRS enforcement resources are part of a larger assault on legal institutions and the rule of law more generally, and lawyers—including tax lawyers—have a duty to "stand for the rule of law."[242] The rule of law includes a "fair, robust, and accessible legal process in which rights and responsibilities based in law are evenly enforced."[243] In the face of dramatically decreased tax enforcement, standing up for the rule of law includes doing more to ensure that clients comply, thereby protecting fisc, the general public, and the government itself from those who seek to take advantage of the decreased enforcement.

Of course, there are arguments that push against a stronger gatekeeping role for tax lawyers, including the importance of being a zealous advocate for clients and empowering client autonomy, and concerns that stronger gatekeeping responsibilities would co-opt private tax advisors and turn them into tools of the government. These concerns, however, can be addressed by how a stronger gatekeeping role is implemented, which will be discussed in the next Part.

Another, even more fundamental, concern about a stronger gatekeeping role for tax lawyers arises if the government itself is immoral. Should tax lawyers still promote compliance among their clients if the revenue collected by the government will be used for evil? That question will be discussed at the end of this Article after the discussion about how to implement more gatekeeping for tax lawyers in general.

agreed-upon rules that apply to all members of society. If tariffs yield excess revenue, it is up to Congress to decide how that revenue will be spent or how other taxes will be reduced. *See* Christopher A. Casey, *U.S. Tariff Policy: Overview*, CONG. RESEARCH SERV. IF11030 (Jan. 31, 2025) (explaining that tariff revenue is deposited into the General Fund of the United States); U.S. CONST. art. I, § 9, cl. 7 (vesting in *Congress* the power of the purse). Neither individual taxpayers nor their tax advisors are entitled to decide whose taxes get reduced. If that were allowed, tax advisors would be actively undermining the decisions that only Congress is entitled to make, and tax advisors would be complicit in stealing (albeit indirectly) from the unrepresented cohort of taxpayers who lack advisors to help them cheat.

242. *See Bar Organizations' Statement in Support of the Rule of Law*, A.B.A. (Mar. 26, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/03/bar-organizations-statement-in-support-of-rule-of-law/ [https://perma.cc/4QDN-GUKY].

243. *What Is the Rule of Law*, A.B.A., https://www.americanbar.org/advocacy/global-programs/who-we-are/rule-law-initiative/what-is-rule-of-law/ [https://perma.cc/QAX5-8GZA] (last visited Jan. 30, 2026). *See generally* BRIAN Z. TAMANAHA, ON THE RULE OF LAW (2004) (outlining the history and theory of the rule of law ideal).

IV. IMPLEMENTING A STRONGER GATEKEEPING ROLE FOR TAX LAWYERS

This Part considers how a stronger gatekeeping role for tax lawyers could be implemented and what such a role would entail. The approach that could begin to be implemented immediately involves tax lawyers voluntarily altering their advising approach to include more gatekeeping. The most challenging approach, which would take longer to implement but might be the most impactful, would be for Congress and the IRS to change the tax penalty provisions and Circular 230, respectively, to tighten the constraints on aggressive tax advice. A middle ground would involve developing professional norms (although not obligations) for stronger gatekeeping. Each approach will be discussed below.

A. Discretionary Gatekeeping: Individual Lawyers Should Voluntarily Do More to Advance Compliance

1. Tax Lawyers' Approaches to Voluntary Gatekeeping Can Vary

A tax lawyer who is persuaded about the need to play a stronger gatekeeping role can (and should) do so immediately. Tax lawyers need not assist with all aggressive tax planning that the constraints allow. They have the discretion to draw more conservative lines about the matters with which they will and will not assist.[244] A lawyer who fully embraces a gatekeeping role would take a legalist approach and only help a "client in taking actions that the [advisor] believes are allowed under the best interpretation of the law and are more likely than not to succeed on the merits if challenged."[245] This lawyer should also discourage clients from pursuing aggressive tax-motivated transactions even when they are arguably technically defensible.[246] A slightly less conservative route, but one that still embraces a gatekeeping role to a significant degree, would mean that the lawyer would assist only if the client discloses any position that is not more likely than not to succeed on the merits, even if disclosure is not required under the law (e.g., for a non-shelter position supported by substantial authority).[247]

244. *See, e.g.*, Field, *supra* note 73, at 265–67 (discussing discretionary choices facing tax practitioners).

245. *Id.* at 289 (citing Wendel, *supra* note 37, at 396–98); *see* Beale, *supra* note 38 at 630.

246. *See* Lavoie, *supra* note 38, at 858–59.

247. *See* Gaetke, *supra* note 87, at 48. Under current law, substantial understatement penalties can be avoided *without* disclosure if the position has substantial authority. I.R.C. § 6694(a)(2). Thus, the text suggests an approach that is more conservative than what is required.

At minimum, tax lawyers wanting to do more gatekeeping should counsel aggressive-leaning clients that voluntary compliance is important for upholding the rule of law, particularly in the face of weakened enforcement capacity. They should further advise clients that aggressive approaches reduce revenue, undermine trust in government, and impede the government's ability to function effectively, all of which are already threatened by efforts to slash the IRS and the federal government more generally. If a client is ultimately unpersuaded by the lawyer's arguments for compliance and insists on pursuing a position that is more aggressive than one on which the lawyer is willing to assist (e.g., a position that is not more likely than not to succeed for the advisor who embraces a legalist approach), the lawyer should withdraw from the representation.[248]

When analyzing the substantive merits of a position and trying to effectuate their chosen approach to advising, tax lawyers should also work to ensure they accurately assess the strength of the position on the merits, assuming perfect enforcement, but doing that can be harder than it sounds because "ethical lapses can occur more easily and less intentionally than we might imagine."[249] Even experienced professionals can be susceptible to "bounded ethicality," which involves subconscious biases that impact decision-making.[250] Accurate analysis of a position's strength requires intentional effort to counteract factors, such as institutional influences, client influence, and cognitive biases, that could lead a tax lawyer to overstate the strength of a position because of subconscious consideration of the enforcement environment.[251] As the tax shelter heyday of the 1990s illustrates, even sophisticated tax advisors can, whether intentionally or unintentionally, cross ethical lines to help aggressive taxpayers.[252] Tax lawyers seeking to avoid a similar result should, among other things, make sure they consider all possible anti-abuse doctrines that might apply; be particularly wary if the transaction

248. MRPC r. 1.16(b) (allowing discretionary withdrawal if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement"). Discretionary withdrawal under such circumstances is not allowed in all states, which increases the importance of declining the representation at the outset if the advisor anticipates a prospective client is likely to want to be overly aggressive. *See* CAL. RULES OF PRO. CONDUCT r. 1.16(b).

249. Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1112 (2013).

250. *See id.* at 1114–24 (drawing on extensive social science research in behavioral psychology).

251. *See* Field, *supra* note 73, at 310–17 (discussing such biases and their influence on the independent judgment of tax advisors).

252. *See* ROSTAIN & REGAN, JR., *supra* note 99, at 86–92 (examining the role tax advisors played in tax shelters).

is tax-motivated, relies on a highly technical reading of the statute, is arguably contrary to Congressional or regulatory intent, or makes a "novel" argument; and reflect carefully on how they would have analyzed the same issue before the IRS resources were slashed.

2. A Stronger Gatekeeping Role Can Be Consistent with Honoring One's Duties to Clients

Tax lawyers can honor their duties to their clients even while doing the type of gatekeeping described above. To do so, tax lawyers must be transparent with clients. Before entering into a representation, the tax lawyer should disclose to prospective clients both how they approach their role and the matters on which they will and will not assist. This gives prospective clients the opportunity to seek other counsel if the tax lawyer's approach to representation is not consistent with what the client seeks. If a client hires a tax lawyer after such disclosure, the client agrees to the limits on the lawyer's services. That is, the client agrees to what zealous advocacy means in the context of the representation and to the actions that the lawyer will or will not take in advancing the client's objectives.[253] Agreement on those limits means that the lawyer can simultaneously honor their agreed-upon duties to the client and their gatekeeping responsibilities.

Further, during the representation, the lawyer should still tell the client about aggressive (but nonfrivolous) positions if the client wants to know, even if the lawyer does not recommend the aggressive positions. The lawyer would explain why they advise against such approaches, hopefully persuading the client to follow that advice. If the client decides they want to pursue the aggressive approach, they are free to find other counsel. The tax lawyer is not obligated to assist, and the client was on notice—before hiring the lawyer—that the lawyer would decline to assist with aggressive positions. However, by ensuring that a client who wants to know about more aggressive approaches has full information even about plausible positions with which the lawyer will not assist, the lawyer ensures that the client gets comprehensive advice. This empowers client autonomy and ensures that the lawyer is not substituting their

253. The scope of a representation can be limited with client consent. MRPC r. 1.2 cmt. 6 ("The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. . . . [T]he terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.").

moral judgement and risk preferences for those of the client. In this way, the tax lawyer can be both a zealous advocate and a gatekeeper.

3. Discretionary Gatekeeping Is Not the Best Response to the Hobbling of the IRS

The more a tax lawyer adopts a gatekeeping approach to client representations, however, the more clients (and revenue) the tax lawyers might lose to more aggressive lawyers. Loss of business could threaten the livelihoods of lawyers who engage in more gatekeeping. The business considerations can be significant, and reduced enforcement, when aggressive positions are more likely to go unchallenged, might lead to a "race to the bottom," where tax lawyers compete for business based on how much money they can help a client save in taxes (legally or illegally). This business dynamic could embolden, and increase the number of, unscrupulous tax lawyers and could ultimately create two major camps of lawyers—gatekeepers and aggressors—like there was during the shelter heyday, where the tax profession was largely divided into the "regular tax bar" and the "shelter lawyers."[254] The "allure of lucrative professional fees" can overwhelm ethical instincts and drive bad behavior by "professionals"[255] particularly where enforcement and consequences for bad behavior are lacking. This could also entrench the adversarial view of tax practice, serve to paint gatekeeper-style tax lawyers as government lackeys who cannot be trusted to advance client interests, and turn most private sector tax advising work into a game focused on devising tax reduction schemes clients can get away with. This dynamic would hurt not only the tax lawyers who are trying to discharge a duty to the tax system and the tax profession as an industry, but this dynamic would also harm society at large because it could lead to significant revenue losses and a society where "only the little people [i.e., the poor, the poorly advised, and the suckers] pay taxes."[256]

254. *See* Peter C. Canellos, *A Tax Practitioner's Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47, 55–57 (2001) (arguing that there were two distinct groups of tax lawyers). *But cf.* Beale, *supra* note 38, at 596 (arguing that "[t]here is not such a clear line between good and bad tax bars[, but rather that] [t]here is instead a spectrum of behavior from prudent to abusive, with many tax advisors sometimes at the riskier end and some almost always there, depending on market pressures").

255. Pollack & Soled, *supra* note 99, at 202–05.

256. *Maid Testifies Helmsley Denied Paying Taxes*, N.Y. TIMES, July 12, 1989, at B2 (reporting that, during Leona Helmsley's tax fraud and extortion trial, that Helmsley's maid testified that Helmsley said, "Only the little people pay taxes."). Helmsley became known for that quote for the rest of her life. Enid Nemy, *Leona Helmsley, 'Queen' of Hotel Chain, Is Dead at 87*, N.Y. TIMES (Aug. 21, 2007),

This full parade of horribles might not come to pass, but there are personal, industry-wide, and societal risks if some tax lawyers increase their gatekeeping efforts, as explained above. Thus, a pragmatic lawyer who is convinced by this Article's arguments but who wants to minimize potential downsides, including for their own financial well-being, might ultimately choose to do less gatekeeping than they might ideally want to do. That approach could protect the lawyers' livelihood and might even reduce overall societal harm. Perhaps it is better to help a client be *a little* aggressive rather than pushing so hard for compliance that the client seeks out another lawyer who is much more willing to take advantage of the lack of enforcement and who will help the client be *extremely* aggressive.

Thus, even if tax lawyers are persuaded by the arguments for embracing an increased gatekeeping role, they might not ultimately discharge that role given the realities of practice. In addition, some tax lawyers might be unpersuaded by the above arguments and might either do more to help clients take advantage of the IRS's weakened enforcement abilities or merely continue to help with aggressive planning in the same way they did before the Trump administration's cuts. Ultimately, we cannot rely on the individual tax lawyers to *voluntarily* adjust their approach to ethical tax advising in response to the Trump administration's effort to gut the IRS.

B. Mandatory Gatekeeping: The Standards of Practice Applicable to Tax Lawyers Should Be Raised

Because voluntary gatekeeping is likely insufficient to respond to the hobbling of the IRS, the penalty thresholds and the standards of practice should be raised to *obligate* tax advisors to do more to protect the fisc when they advise clients. Some argued for raising these standards even before the Trump administration's cuts to the IRS.[257] But those cuts demand renewed attention to tax advisors' obligations because the cuts worsen resource imbalance between taxpayers and the IRS, pose a grave threat to the revenue and to a functioning government, and are likely to erode public confidence in the tax system.[258] And these problems are likely to persist long after the Trump administration because the steepness of the decline in staff will be hard to reverse and because other measures are unlikely to be able to fill the enforcement gap created by

https://www.nytimes.com/2007/08/21/nyregion/21helmsley.html [https://perma.cc/N77K-QWZK].

257. *See* sources cited *supra* note 40.

258. *See supra* Part II.

the cuts.[259] Long-term enforcement problems need a structural response that coordinates the actions of people who, acting collectively, can mitigate the effects of the cuts to the IRS. Hence, this Article recommends raising tax advisors' ethical obligations.

1. Striking the Right Balance Between Tax Lawyers' Obligations to the Tax System and Tax Lawyers' Obligations to Their Clients

Specifically, the IRC understatement penalty provisions should be changed so that tax advisors can avoid understatement penalties for undisclosed taxpayer positions (non-shelter) only if the position is likely compliant (i.e., it has a greater than 50% chance of succeeding on the merits if challenged).[260] This is higher than the threshold today, under which tax advisors can avoid such penalties if such positions are supported by "substantial authority,"[261] which generally requires authority supporting approximately 40% chance of success on the merits.[262] Under this article's recommendation, the positions that have between approximately 40% and 50% chance of success on the merits would have to be disclosed for the tax advisor to avoid understatement penalties. Also, because Circular 230's standards of practice depend on the Code's penalty thresholds, increasing the requirement for avoiding penalties would automatically cause Circular 230's standards to increase so tax practitioners would be precluded from advising a client to take an undisclosed position that is not at least 50% likely to succeed on the merits.[263] Increased standards would need to be accompanied by

259. *See supra* Part II.A.

260. This would redefine "unreasonable position" for non-shelter matters under I.R.C. § 6694(a)(2). The understatement penalty abatement standard for taxpayers would also need to change accordingly so that the preparer and taxpayer standards match. *See* I.R.C. § 6662(d)(2). Otherwise, the penalty provisions create an inherent conflict between the obligations and incentives of tax advisors and taxpayers. *Cf.* Michael Hatfield, *The Rise of Law and the Fall of Circular 230: Tax Lawyer Professional Standards, 1985–2015*, 24 FLA. TAX REV. 828, 879–85 (2021) (discussing a period of time when tax advisor's standards were higher than those that applied to taxpayers).

261. I.R.C. § 6694(a)(2)(A) (preparer penalties for non-shelter matters); I.R.C. § 6662(d)(2)(B) (taxpayer penalties for non-shelter matters).

262. *See* JOINT COMM. ON TAX'N, JCS-3-99, STUDY OF PRESENT-LAW PENALTY AND INTEREST PROVISIONS, JCS-3-99, at 160 (1999) (defining "substantial authority" as requiring 40% likelihood of success if challenged).

263. *See* Circular 230 § 10.34(a)(1)(i)(B), (ii)(B) (2011) (tying the standard in Circular 230 to the definition of "unreasonable position" in I.R.C. § 6694(a)(2)). For a practitioner to be able to advise a client to take a position supported only by substantial authority, the position would have to be disclosed. At this point, I do not recommend a change to the reasonable basis standard, so disclosure allows for penalty abatement regardless of

education initiatives to help firms and advisors understand the revised rules and the reasons for them and by additional requirements that would hold firms accountable for compliance by their members.[264]

A benefit of increasing the standards of practice for all tax advisors and making it harder to avoid penalties for aggressive positions, as compared to discretionary gatekeeping where some lawyers voluntarily choose to adhere to higher thresholds, is that there are uniform standards applicable to all tax advisors. Widely applicable standards likely make it easier to convince clients to take less aggressive positions. First, clients might be more willing to respect the advisor's ethical boundaries because the advisor's standards are imposed upon the advisor rather than being a matter of the advisor's personal choice. Second, uniform standards applicable to all tax advisors make it less likely that an aggressive-leaning client would be able to find a more aggressive advisor. Third, assuming requirements for taxpayers to avoid penalties are changed in tandem with changes to the requirements for tax advisors to avoid penalties, the clients themselves would face the possibility of penalties for taking any undisclosed position that is unlikely to be compliant.

Admittedly, this Article's recommended approach is more permissive than a strict gatekeeping requirement, which would require a "more likely than not" level of confidence for all tax advice and taxpayer positions, whether or not disclosed.[265] However, this Article's recommendation strikes a better balance than a strict gatekeeping requirement would because this Article's approach increases tax advisors' gatekeeping responsibilities as compared to today while still allowing zealous advocacy for clients. The change does not prevent advisors from assisting clients with positions that have between 40% and 50% chance of success on the merits; the change merely requires that such positions be disclosed. Requiring disclosure for positions that are, on balance, likely not the right answer helps prevent tax advisors and their clients from taking advantage of the IRS's weakened enforcement capabilities. Disclosure highlights for the IRS any position that is not likely to succeed, so the IRS would not need to use its enforcement resources to identify the positions for possible audit; the position is already identified, and the IRS can just decide whether to audit it. This levels the playing field (at least a bit) between well-resourced taxpayers

whether the position has substantial authority or reasonable basis. The point is to ensure disclosure of all positions that are not "more likely than not" to succeed.

264. *See* Dzienkowski & Peroni, *supra* note 38, at 2747–52 (making specific recommendations).

265. *Cf.* Beale, *supra* note 38, at 593 (endorsing a strict gatekeeping approach).

and the under-resourced IRS. At the same time, tax advisors can still honor their duties to even aggressive-leaning clients because, as explained in Part III.A.2, the tax advisor can and should still tell the client about aggressive (but nonfrivolous) positions if the client wants to know,[266] even if the advisor does not recommend the aggressive positions, and the advisor would explain why they advise against such approaches, hopefully persuading the client to follow that advice. Even if the advisor is not allowed to assist with specific actions, the advisor gives the client comprehensive information.

Even this somewhat permissive recommendation might be difficult to implement. Changes to the penalty standards require an act of Congress, and today, Congress seems more interested in reducing, not increasing, tax enforcement.[267] In addition, there is likely to be significant pushback from tax advisors and aggressive-leaning taxpayers, impeding reforms.[268] The Treasury Department could change the standards of practice in Circular 230 without Congressional action,[269] but this seems unlikely given the workforce reductions and the additional work that implementing the OBBBA will require. Moreover, I am skeptical that the Treasury Department would prioritize the raising of ethical standards.[270] Despite political feasibility concerns, it is worth trying to raise the ethical obligations of tax advisors. Even if the effort fails, discussing it could increase the salience of the issue for tax advisors.

2. Enforcing Tax Lawyers' Increased Obligations

One additional concern about this proposal is weak enforcement of the rules applicable to tax advisors. Unless the IRS or a court determines that an advisor's *client's* tax position results in an understatement of tax,

266. A client might prefer conservative advice and might not want to hear about aggressive approaches. In that case, the advisor need not disclose the details of the aggressive approaches.

267. *See* Leiserson & DeBot, *supra* note 22.

268. *See* Jason J. Fichtner & Jacob M. Feldman, *The Hidden Costs of Tax Compliance,* MERCATUS RESEARCH CENTER 12-15 (May 20, 2013) https://www.mercatus.org/research/research-papers/hidden-costs-tax-compliance [https://perma.cc/Q924-M4RR] (explaining that taxpayers lobby to obtain and protect tax provisions that benefit them).

269. Circular 230 is included in regulations issued by the Treasury Department and thus does not require Congressional action to amend as long as the amendment is within the authority granted. 31 C.F.R. pt. 10; *see, e.g.,* I.R.S. News Release IR-2024-315 (Dec. 20, 2024), https://www.irs.gov/newsroom/treasury-and-irs-propose-regulations-to-update-rules-for-tax-professionals-who-can-practice-before-the-irs [https://perma.cc/2WF4-G7LV].

270. Certainly, questionable ethical decisions by the head of the executive branch or an IRS Commissioner do not provide leadership on ethics. *See supra* text accompanying notes 193–204.

the advisor is generally not at risk of any understatement penalties.[271] And the IRS's Office of Professional Responsibility (OPR), which enforces Circular 230, has been criticized as largely ineffective, particularly at sanctioning tax advisors in large firms for failing to meet the standards of practice for questionable positions.[272] Even though Circular 230 actions are separate from the penalty provisions and can be brought even without any enforcement action against the advisor's clients, OPR often pursues cases only after receiving referrals about tax advisors against whom penalties have been assessed, and sometimes referrals go unpursued.[273]

If enforcement of tax advisors' standards of practice is weak, then raising those standards might not have a meaningful impact.[274] However, investment in OPR, which can push higher standards of practice both by bringing enforcement actions and educating tax advising firms,[275] can be an efficient way to increase compliance broadly, particularly in a world of limited resources. This is because many firms are comprised of multiple tax advisors, and many tax advisors assist (and influence the compliance behavior of) multiple clients. Although there are many tax advising firms, there are many fewer firms than taxpayers. Thus, increasing the ethical standards of firms, and investing the money to create a reasonable enforcement mechanism, could have a ripple effect that increases the compliance of (perhaps) orders of magnitude more taxpayers, without the larger amount of government resources that would be required to increase individual enforcement efforts by the same proportion. Ultimately, this strategy involves "enlisting the tax bar" in

271. *See* I.R.C. § 6694(a), (e) (providing that an understatement penalty is only imposed on a return preparer if a return they prepared contains an understatement of the taxpayer's tax liability).

272. *See* Dzienkowski & Peroni, *supra* note 38, at 2746–48.

273. *See* David Van Den Berg, *OPR Data Review Turns Up Unreferred Cases*, TAX NOTES TODAY (Oct. 10, 2018), https://www.taxnotes.com/lr/resolve/tax-notes-today-federal/opr-data-review-turns-up-unreferred-cases/28hjj?highlight=OPR%20Data%20Review%20Turns%20Up%20Unreferred%20Cases [https://perma.cc/H7FX-WHZG].

274. This is particularly true given that, in a series of interviews of tax planning lawyers, "Circular 230 almost escaped mention." Hatfield & Kwon, *supra* note 88, at 133. It is unclear why Circular 230 did not come up in the interviews. Perhaps it is because the requirements inherent in Circular 230 are already built into their approach to tax advising. If, however, Circular 230 is not salient to them, perhaps changes to those rules might also not be salient.

275. *See Office of Professional Responsibility and Circular 230*, INTERNAL REVENUE SERV. (Aug. 26, 2025), https://www.irs.gov/tax-professionals/office-of-professional-responsibility-and-circular-230#: [https://perma.cc/KBY3-PRDH] (detailing OPR's purpose and function).

increasing tax compliance.[276] Many others have identified the potential value of leveraging tax advisors to improve taxpayer compliance,[277] and this article's proposal builds on that prior work and recommends seizing this challenging moment in history to try to bring that strategy closer to a reality.

C. Developing Professional Norms for Stronger Gatekeeping

Regardless of whether mandatory gatekeeping becomes a reality, developing professional norms that endorse stronger gatekeeping can help persuade tax advisors to take more personal responsibility for compliance by their clients.[278]

> Strengthening the identification of tax professionals with the integrity of the tax system can improve their willingness to cooperate with the IRS. This would decrease aggressive tax planning directly since much of such advice is "supply" driven by the professionals. It would also signal to clients a tax compliance norm that could have a ripple affect [sic] on their clients, who respect and identify with these professionals.[279]

Changing attitudes in the tax profession is a complex endeavor, but norms for stronger professional gatekeeping could certainly be fostered if professional organizations such as the ABA (either as a whole or via the Tax Section) and state bar associations (or their tax sections) endorse increases to professional ethics obligations given the Trump administration's cuts to the IRS.[280] Although a statement of organizational policy would not bind tax advisors, it could encourage the organization's members to take on more of a gatekeeping role. Similarly, statements by individual firms about the standards of practice expected from their members who advise clients on tax matters could, if those statements support increased gatekeeping, nudge the firm's members toward more conservative tax advising.

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276. *See* Schizer, *supra* note 38, at 331–34; *see also* Dzienkowski & Peroni, *supra* note 38, at 2725.

277. *See* Schizer, *supra* note 38, at 331–33.

278. *See, e.g.*, Darius Fatemi et al., *The Influence of Ethical Codes of Conduct on Professionalism in Tax Practice*, 164 J. BUS. ETHICS 133, 134 (2020) (examining how framing and presentation of ethical professional expectations affects tax practitioners' judgments).

279. Kornhauser, *supra* note 185, at 614.

280. An endorsement of higher standards by the AICPA would help encourage accountants to do more gatekeeping as well.

V. BUT WHAT IF GOVERNMENT IS EVIL? THE TAX LAWYER'S ROLE WHEN NONCOMPLIANCE IS INTENDED AS CIVIL DISOBEDIENCE

This Article's recommendation for a stronger gatekeeping role for tax advisors might be tested if government itself is evil or deeply corrupt. What if government uses tax revenue in morally offensive ways—advancing authoritarianism, actively harming its population, or committing human rights violations and even crimes against humanity? In these situations, clients might want to not file at all, not pay at all, underreport or underpay to deny the government the percentage of their taxes otherwise owed to the extent those funds would be used to fund objectionable activities, or otherwise not comply as a form of protest.[281] As one commentator put it:

> If one embraces the dystopian vision of government as dishonest, untruthful, or worse, it would border on irrational to comply voluntarily with complex regulations or willingly fork over one's income to a government one believes is corrupt and inefficient. After all, the thinking might go: Why should I give up my hard earned dollars to scoundrels who govern so poorly, so dishonestly, so irresponsibly?[282]

History has many examples of people who refuse to pay taxes because they object to government sponsored activity or government policy.[283] This includes Quakers who withheld funds that would be used to pay for the military during the Revolutionary War, and people who refused to pay tax to protest the United States' involvement in the Vietnam War[284] or the Second Gulf War in the 2000s.[285] This also includes people who

281. *See* Andrew F. Popper, *Discontent and Discord: The Effect of Anti-Government Animus on Compliance with the Norms of Governance*, 101 DENV. L. REV. F. 1, 9–11 (2023).

282. *Id.* at 8–9.

283. *See An International History of War Tax Resistance*, NAT'L WAR TAX RESISTANCE COORDINATING COMM., https://nwtrcc.org/war-tax-resistance-resources/international-history-of-war-tax-resistance/ [https://perma.cc/3U5X-PRKF] (last visited Feb. 1, 2026) (providing examples of tax resistance as war protest from before the 1700s through the 2020s).

284. *See* Michele Frank, *Taxes Are Due Even If You Object to Government Policies or Doubt the Validity of the 16th Amendment's Ratification*, GOV'T EXEC. (Apr. 15, 2024) https://www.govexec.com/management/2024/04/taxes-due-object-government-policies-doubt-validity-16th-amendments-ratification/395701/?oref=ge-author-river [https://perma.cc/U72Q-Q87U] (discussing war tax protesters); Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 945–60 (1999) (providing a brief history of war tax protesters).

285. *See, e.g.*, Pia Sarkar, *The Tax Bucks Stop Here / Resisters Withhold Payment in Protest of U.S. Sending Troops to Iraq*, SFGATE (Apr. 3, 2007),

seek to protest non-war related government activity. For example, "[w]omen suffragists . . . refused to pay their taxes because women were denied suffrage,"[286] and some people have refused to pay taxes because their taxes fund government programs (e.g., funding medicine or abortion) that are inconsistent with their religious beliefs.[287] Some commentators have been calling for tax protests to object to the MAGA agenda and "expose the [Trump] regime's criminality,"[288] as "a way of protesting President Donald Trump's efforts to hobble and dismantle the federal bureaucracy,"[289] and in response to America's support for violence in Gaza.[290]

These "tax protesters" or "tax resisters" are different from "tax deniers" or "tax defiers" in that the latter "include[] people who deny that the government has a right to levy income taxes," whereas the former "do not deny the government's right to levy taxes."[291] "Rather, they refuse to pay some or all of their taxes in order to protest government-funded policies and programs that are inconsistent with their moral and ethical beliefs."[292] Unsurprisingly, both courts and the IRS have rejected the arguments made by all these people, without regard to their motivation.[293] With respect to tax protesters and tax resisters, in particular, the IRS's position is that:

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https://www.sfgate.com/business/article/the-tax-bucks-stop-here-resisters-withhold-2604917.php [https://perma.cc/W724-97YV].

286. Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 U. ILL. L. REV. 265, 268 (1994).

287. *See, e.g.*, United States v. Lee, 455 U.S. 252, 252 (1982) (discussing an Amish employer that refused to pay Social Security taxes that funded a social welfare program conflicted with his religious beliefs).

288. Judith Levine, *It's Time for Americans to Withhold Their Taxes*, GUARDIAN (Feb. 20, 2025, at 11:00 ET), https://www.theguardian.com/commentisfree/2025/feb/20/americans-government-taxes [https://perma.cc/WRA8-ZQTZ].

289. Ken Picard, *Tax Resistance Is Booming After Gaza and Trump's Reelection*, SEVEN DAYS. (Apr. 2, 2025), https://www.sevendaysvt.com/news/tax-resistance-is-booming-after-gaza-and-trumps-reelection-43218289 [https://perma.cc/8Z5G-GQDP].

290. *See* Lauren Fadiman, *Could Tax Protests Defund the American War Machine?*, CURRENT AFFS. (Mar. 18, 2025), https://www.currentaffairs.org/news/what-happened-to-war-tax-protests [https://perma.cc/KM43-T43S].

291. *See* Frank, *supra* note 284.

292. *Id.*; *see also* Nathan J. Hochman, *Tax Defiers and the Tax Gap: Stopping "Frivolous Squared" Before It Spreads*, 20 STAN. L. & POL'Y REV. 69, 69–70 (2009) (distinguishing legitimate tax protestors from illegitimate tax defiers).

293. *See, e.g.,* Schehl v. Comm'r, 855 F.2d 364, 367 (6th Cir. 1988) ("Alleged vocal opposition to taxes for a particular reason, and refusal to pay taxes, even if all assertions were taken as true . . . are simply not a basis to challenge an assessment of taxes."); Randall v. Comm'r, 733 F.2d 1565, 1567 (11th Cir. 1984) ("[A]rguments involving objections to the Government's military expenditures as a basis for non-payment of taxes have been raised by taxpayers many times, and in each instance the courts have rejected them.").

> Taxpayers may not refuse to file tax returns and may not claim deductions or credits on their tax returns based on their opposition to government programs or policies. Any claim that individuals may reduce their federal tax liability based on objections to the use of the taxes to support government programs or policies is frivolous and has no merit.[294]

Nevertheless, some might still want to not comply with the tax laws as a form of civil disobedience. Indeed, "Thoreau's famous act of civil disobedience was a refusal to pay a poll tax . . . ."[295]

Whether tax noncompliance is an appropriate method of civil disobedience is a matter of debate. The "traditional argument" opposes "allowing conscientious objection to tax" and thereby opposes "allowing taxpayers to pick and choose the uses to which the government can put their tax monies[, which] would undermine the viability of the tax system."[296] The contrary view argues that conscience-driven tax protesters should be treated differently because they "ground their protests in conscientious objection belong[ing] to an American tradition that has historically been sheltered by a deeply rooted respect for freedom of religion and conscience," and thus they "do not pose the same danger to the tax system as [tax defiers and tax deniers] do."[297]

The question relevant to this Article, however, is not whether tax noncompliance can constitute civil disobedience.That is an important and challenging topic, deserving of more academic attention especially given actions taken by the Trump administration.[298] Yet, that is beyond the scope of this Article, which focuses on the tax *advisor*, not the tax*payer*. The question relevant to Article is whether the argument for stronger gatekeeping by tax lawyers resonates differently if a client's interest in aggressivity and noncompliance is motivated by an ethical or moral

294. Rev. Rul. 2005-20, 2005-1 C.B. 821.

295. Lawrence Zelenak, *Justice Holmes, Ralph Kramden, and the Civic Virtues of a Tax Return Filing Requirement*, 61 TAX L. REV. 53, 65 (2007) (emphasis removed) (citing HENRY DAVID THOREAU, THE VARIORUM CIVIL DISOBEDIENCE 11–27 (Walter Harding ed. 1967) (1849)).

296. Kornhauser, *supra* note 284, at 944–45 (citing United States v. Lee, 455 U.S. 252 (1982)).

297. *Id*. at 944.

298. For some literature on this topic, see Jennifer Carr, *Complicity and Collection: Religious Freedom and Tax*, 11 U. ST. THOMAS L.J. 183 (2014); Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 BYU L. REV. 1515 (2005); Colleen M. Garrity, *The Religious Freedom Peace Tax Fund Act: Becoming Conscious of the Need to Accommodate Conscience*, 64 OHIO ST. L.J. 1229 (2003); Hochman, *supra* note 292; Anthony C. Infanti, *Tax Protest, "A Homosexual," and Frivolity: A Deconstructionist Meditation*, 24 ST. LOUIS U. PUB. L. REV. 21 (2005); Jones, *supra* note 286; Kornhauser, *supra* note 284.

objection to government activity rather than by antipathy toward taxes or a mere preference to pay less. The answer to that question is no.

The analysis of the tax lawyer's gatekeeping responsibility should be the same regardless of the client's motivation for noncompliance. IRS resource reductions mean that noncompliers (whatever their reason for noncompliance) are more likely to escape detection, and noncompliance (again, for whatever reason) takes advantage of the IRS/taxpayer resource imbalance.[299] Tax lawyers should not take advantage of that. In part this is because of the noncompliance spiral that could be created if more people decide not to comply for reasons of conscience and they escape detection.[300]That might embolden them and others to increase their protests, and the more it becomes known that noncompliance, particularly as a protest, lacks consequences, the more people—including people who may feign reasons of conscience to conceal mere preferences to pay less—will be inclined to follow. This would decrease tax morale and tax revenue, potentially impeding government's ability to function.[301] Perhaps that is the goal of people who choose noncompliance as civil disobedience. However, a tax lawyer's duty to the system is not discharged by starving government for funds in an effort to cripple it, hoping that will reduce the government's ability to undertake the objectionable activity. It is better to take a stronger gatekeeping role for tax compliance and help clients take more direct action to change the problematic aspects of government. Efforts to improve the problems of government will be for naught if government lacks funds with which to implement improvements. Thus, tax lawyers must inform clients about the potential adverse consequences of failing to comply, advise against tax noncompliance, and decline to assist with it.

The analysis is different when tax lawyers are advising clients about good faith challenges to arguably unconstitutional tax laws. In these cases, the taxpayer typically files in a way that complies with the law and then files an amended return, claiming the noncompliant position and filing for a refund.[302] These cases do involve a tax position that is

299. *See supra* Part II.A.3.c.

300. *See supra* notes 223–227 and accompanying text.

301. *See supra* Part II.B.

302. *See generally* Moritz v. Comm'r, 469 F.2d 466 (10th Cir.), *cert. denied* 412 U.S. 906 (1972) (argued by Ruth Bader Ginsburg on behalf of the taxpayer, and successfully claiming that a tax deduction unavailable to unmarried men violated equal protection under the Fifth Amendment on the basis of sex discrimination); *see also* United States v. Windsor, 570 U.S. 744 (2013) (successfully challenging the denial of the estate tax spousal exemption to the surviving member of a same-sex couple married under New York State law on the grounds that Defense of Marriage Act's failure to recognize her same-sex marriage violated the Due Process Clause of the Fifth Amendment).

technically noncompliant, often driven by ethical or moral concerns. However, when assisting with a good faith challenge to the constitutionality of a law,[303] the tax advisor ensures that (a) the taxpayer pays the taxes due as part of the original return, which is prepared in compliance with the tax law, so there is no possible underpayment of tax due to the noncompliant position; (b) the noncompliant tax position will be reviewed by the IRS, meaning that the taxpayer does not take advantage of the possibility that the noncompliance will go undetected; and (c) the taxpayer's argument ultimately *advances compliance* with the highest law of the land, thereby *furthering* the rule of law. In contrast, if a tax advisor assists with noncompliance, whether out of ethical or moral objection to the government's policies or whether out of a client's mere preference for paying less tax, the tax advisor (a) knowingly facilitates the underpayment of legitimately owed taxes; (b) takes advantage of the resource imbalance between the IRS and taxpayers because the advisor knows that the client's noncompliance may escape detection due to underenforcement; and (c) undermines compliance with the nation's tax laws.

Although a tax lawyer should not assist with tax protesting as a form of civil disobedience, the tax lawyer need not disregard the client's moral concerns.

> [A] lawyer is free to convey the[] [complexities and] subtleties to the clients in the form of moral counseling[, and] . . . lawyers [may] convey[] a sense that the law is misguided, out of touch with reality, or perverse, but these judgements by the lawyer do not give the lawyer license to counsel the client—even indirectly, with a wink and a nod—to ignore the law.[304]

"[L]awyers are responsible for ensuring that their advice conforms to the duties and permissions [] in the law."[305] The tax lawyer can, however, provide advice about legal ways to reduce the client's tax bill, such as through larger charitable contributions, which might better advance the client's moral preferences. The lawyer should, however, be cautious about accidentally being overly optimistic about tax-reduction strategies that,

303. Circular 230 § 10.34(d) (2025) (providing that practitioners may advise clients to submit a good faith challenge to the validity of a law, provided the taxpayer complies with current law and discloses the challenge appropriately).

304. W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727, 737–38 (2012).

305. *Id.* at 738.

when analyzed objectively, are not likely to succeed on the merits.[306] The tax lawyer should also advise the client about the variety of ways—other than tax noncompliance—through which the client can express their condemnation for government's actions. Such steps could include organizing and participating in rallies and in-person protests, writing op-eds, contacting their representatives to share their views, lobbying for policy changes, supporting candidates for office that share their views, and running for office themselves.[307]

If this approach—pushing back against clients who want to protest government action via tax noncompliance—is contrary to the tax lawyer's personal morality, such that the tax lawyer believes that they cannot, in good conscience, fulfill their responsibility, the lawyer *still* should not facilitate noncompliance. Rather, a tax lawyer who cannot discharge their responsibilities should find a different professional role. Perhaps the tax lawyer should switch from tax planning and compliance work to tax controversy work, representing clients who—without any involvement by the lawyer—arguably did not comply with the tax laws. Or perhaps, the tax lawyer should pursue another aspect of law—such as doing impact litigation or advocacy work—through which they can try to curtail the government's bad behavior directly. Making such a change is not easy, but someone who cannot do what is ethically required of a role should not do the role at all.

CONCLUSION

This Article argues that tax lawyer should take on more personal responsibility for the tax compliance of their clients. Some commentators have argued this for years.[308] And maybe they were right—both that gatekeeping has always been the proper role of tax lawyers and that the standard to which tax lawyers have been held has always been too low. Regardless, the arguments for more gatekeeping responsibilities are now stronger than ever before given the Trump administration's gutting of the IRS's budget and staffing, which will likely create long-lasting problems for revenue collection, and given the Trump administration's broader threats to the rule of law. These developments demand a recalibration of tax lawyers' responsibilities and compel tax lawyers to play a stronger gatekeeping role.

306. *See supra* text accompanying notes 249–252.

307. *See How to Resist*, NAT'L WAR TAX RESISTANCE COORDINATING COMM., https://nwtrcc.org/resist/how-to-resist/ [https://perma.cc/4ZSE-T2WV] (last visited Feb. 1, 2026) (providing some examples of ways to protest legally and illegally).

308. *See supra* note 40.

The revenue system and the rule of law, more generally, are under attack. Tax lawyers must stand up for them. Otherwise, tax lawyers will be complicit in their collapse.