

9/21/17

Chairman Orrin Hatch, Senate Committee on Finance
Ranking Member Ron Wyden, Senate Committee on Finance

Re: Pending Vacancy in the Office of Commissioner of the Internal Revenue Service

Dear Senators:

We are writing to express our deep concern about the Trump Administration's failure to name a nominee to replace Internal Revenue Service Commissioner John Koskinen, whose term is about to expire. Given that no nominee has yet been named, it is extremely likely that an Acting Commissioner will be appointed when Commissioner Koskinen's term expires on November 13, 2017.

In light of the enormous importance of the Internal Revenue Service (IRS) and given Donald Trump's unique conflicts of interests, we do not believe an Acting Commissioner should be selected by the president and/or Secretary of the Treasury Steven Mnuchin.

We ask that the Senate Committee on Finance pressure the President to follow the Constitution and seek the Senate's advice on a new Commissioner. In the interim, in order to provide assurance that any Acting Commissioner is qualified and impartial, we believe the Senate should advise the president to retain John Koskinen as Acting Commissioner while the process of nominating his successor moves forward. Above all else, it is imperative that any Acting Commissioner be a professional currently working at the IRS and without any indications that he or she is an ally of the President or any key members of the President's team (like Treasury Secretary Mnuchin).

IRS VACANCY IS IMMINENT

The IRS website notes that John Koskinen's last day in office as Commissioner of the Internal Revenue is November 9, 2017 and that the next Commissioner's 5 year term begins on November 13, 2017.¹

That is consistent with 26 U.S. Code § 7803(a)(1)(B), which states that, "The term of the Commissioner of Internal Revenue shall be a 5-year term, beginning with a term to commence on November 13, 1997. Each subsequent term shall begin on the day after the date on which the previous term expires."²

The Senate has not yet received a nomination for a successor to John Koskinen.³ It seems likely that a nomination cannot be made and confirmation received within the window of time now available to the Senate.

¹ <https://www.irs.gov/uac/the-commissioners-section>

² <https://www.law.cornell.edu/uscode/text/26/7803>

³ https://www.senate.gov/legislative/nom_cmtec.htm , last accessed September 19, 2017

TRUMP ADMINISTRATION PRACTICES CREATE CAUSE FOR CONCERN

Last month, the nonpartisan Partnership for Public Service noted that, “President Trump lags well behind all of his recent predecessors” in terms of “the number of people nominated for critical leadership positions.”⁴

ProPublica has noted that the Trump “administration has installed more than 1,000 people through political appointments at every major federal agency, handing over control of the government’s day-to-day operations to industry insiders and loyalists to an unprecedented degree.”⁵

This record is in considerable tension with Article 2, Section 2 of the U.S. Constitution, which mandates that “officers of the United States” be appointed only with the “Advice and Consent” of the Senate.⁶

One specific example of the installation of a powerful figure without Senatorial advice or consent is especially worrisome. Secretary Mnuchin appointed a then private sector lawyer (Keith Noreika) as Acting Comptroller of the Currency. (“U.S. Treasury Secretary Steven T. Mnuchin today announced his intention **to appoint Keith Noreika as a Deputy Comptroller and designate him the First Deputy Comptroller** of the Office of the Comptroller of the Currency (OCC).”)⁷

Under the Federal Vacancies Reform Act, specifically 5 U.S.C. § 3345(a)(2) and § 3345(a)(3),⁸ the President has enormous discretion to appoint an Acting Commissioner from among Senate-confirmed members of his Administration and relatively senior employees of the IRS. Moreover, the Trump Administration appears to view its discretion as even greater, permitting it to appoint a private sector figure to the position of “first assistant” to the relevant Senate-confirmed position and then shortly thereafter elevating that newly named “first assistant” to that Senate-confirmed position, as it did with Noreika.

Given the Trump Administration’s general practice of bypassing of the Senate confirmation process and the specific Noreika precedent within the Department of Treasury, the need for the Senate to aggressively assert its constitutional prerogatives concerning the Commissioner of the IRS could not be any greater.

SPECIFIC REASONS SENATE SHOULD EXERT CONSIDERABLE EFFORT IN ITS CONSTITUTIONAL “ADVICE” GIVING ROLE

The various investigations into the Trump Campaign’s possible conspiracy with Russia will necessarily implicate IRS resources and records, as is common in white collar criminal

⁴ <https://ourpublicservice.org/publications/viewcontentdetails.php?id=1953>

⁵ <https://www.propublica.org/article/lifting-the-veil-on-another-batch-of-shadowy-trump-appointees>

⁶ U.S. Const. art. II, § 2.

⁷ <https://www.treasury.gov/press-center/press-releases/Pages/sm0072.aspx> (emphasis added)

⁸ <https://www.law.cornell.edu/uscode/text/5/3345>

investigations pursuing complicated financial connections. In order for the Trump Campaign to either be exonerated with credibility or for any potential criminal activity to be pursued appropriately and fully, the IRS' cooperation with prosecutors and congressional investigators cannot reflect any favoritism toward the president.

There are credible reports that President Trump is “especially disturbed” that Special Counsel Mueller will be “able to access several years of his tax returns.”⁹ Former Trump Campaign Chair Paul Manafort, a major subject of the Special Counsel’s inquiry,¹⁰ also has potential tax law exposure, with reports stating, “the focus now for investigators is whether Manafort was involved in money laundering or tax violations in his business dealings with pro-Russia parties in Ukraine.”¹¹ President Trump himself has a record of repeated proximity to money laundering activities, and in 2015 “the Taj Mahal was fined \$10 million—the highest penalty ever levied by the feds against a casino—and admitted to having “willfully violated” anti-money-laundering regulations for years.”¹²

As the IRS notes in its manual, “Tax and money laundering violations are closely related and the Internal Revenue Service (IRS) has used the money laundering statutes to combat tax evasion.”¹³ The IRS even maintains pages on its website with examples of money laundering investigations it has helped prosecute.¹⁴

Investigations into potential money laundering by Paul Manafort, President Trump, and others involved in the Trump Campaign necessarily implicate the resources and records of the IRS.

Additionally, Trump’s key supporters face major decisions from the IRS. For example, currently, the IRS “is demanding a whopping \$7 billion or more in back taxes from the world’s most profitable hedge fund,” Renaissance Technologies LLC.¹⁵ As noted by McClatchy, Renaissance Technologies’ “co-chief executive, Robert Mercer, has morphed into a political force who might be owed a big presidential favor.”¹⁶

Finally, President Trump has justified publicly his decision not to release his tax returns by claiming to have been under audit for a dozen years prior to his election.¹⁷ If that statement is true, there is real cause for concern about Trump in effect choosing the supervisor of his auditor.

⁹ https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html

¹⁰ <http://www.cnn.com/2017/08/30/politics/mueller-new-york-attorney-general-manafort/index.html>

¹¹ <http://www.cnn.com/2017/08/03/politics/mueller-investigation-russia-trump-one-year-financial-ties/index.html>

¹² <https://newrepublic.com/article/143586/trumps-russian-laundromat-trump-tower-luxury-high-rises-dirty-money-international-crime-syndicate>

¹³ https://www.irs.gov/irm/part9/irm_09-005-005.html

¹⁴ E.g., <https://www.irs.gov/compliance/criminal-investigation/examples-of-money-laundering-investigations-for-fiscal-year-2017>, <https://www.irs.gov/compliance/criminal-investigation/examples-of-money-laundering-investigations-fiscal-year-2016>, and <https://www.irs.gov/compliance/criminal-investigation/examples-of-money-laundering-investigations-fiscal-year-2015>

¹⁵ <http://www.mcclatchydc.com/news/politics-government/article147454324.html>

¹⁶ <http://www.mcclatchydc.com/news/politics-government/article147454324.html>

¹⁷ <https://www.bloomberg.com/news/articles/2016-11-11/trump-s-taxes-to-stay-under-audit-but-will-public-see-them>

That concern about a conflict of interest will be heightened if there is an Acting IRS Commissioner who has been handpicked by President Trump without having been scrutinized for that position by the Senate.

TREASURY SECRETARY MNUCHIN IS ALSO TAINTED BY A CLEAR CONFLICT OF INTEREST

Treasury Secretary Steven Mnuchin was the national finance chairman of the Trump Campaign.¹⁸ Given that serious allegations of illegal campaign contributions surround the investigations into the Trump Campaign and Russia,¹⁹ having President Trump delegate his authority to appoint an Acting IRS Commissioner to Secretary Mnuchin would not adequately address our concerns about the independence of the IRS.

CONCLUSION

In order for the American people to retain full confidence in (a) investigations into Trump Campaign's potential collusion with Russia, (b) the treatment of Trump allies like Robert Mercer, and (c) whether any audits of President Trump are conducted impartially, it is important that President Trump not be allowed to unilaterally install an ally as Acting Commissioner of the IRS. We call upon the Senate to perform its Constitutional role and advise the president to retain Commissioner Koskinen until there is a Senate confirmed successor.

Sincerely,

Revolving Door Project
American Family Voices
Center for Media and Democracy
CREDO
Demand Progress
Indivisible
MoveOn.org
National LGBTQ Task Force
People For the American Way
Public Citizen

cc:

Chairman Kevin Brady, House Ways and Means
Ranking Member Richard E. Neal, House Ways and Means
The Honorable Steven Mnuchin, Secretary of the Treasury
The Honorable Eric Thorson, Inspector General of the Department of the Treasury
The Honorable J. Russell George, Treasury Inspector General for Tax Administration

¹⁸ <http://www.politico.com/story/2016/05/trump-names-national-finance-chair-222846>

¹⁹ <https://www.vox.com/world/2017/7/10/15950590/donald-trump-ir-new-york-times-illegal>