

## The Problem With Wearing Two Hats

by Lawrence M. Axelrod



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In this article, Axelrod describes the untenable situation that David Kautter has been placed in as both Treasury assistant secretary for tax policy and acting IRS commissioner.

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Last month the administration announced the appointment of Treasury Assistant Secretary for Tax Policy David Kautter as acting IRS commissioner upon the expiration of Commissioner John Koskinen's five-year term in November. By all accounts, the assistant secretary is a man of unimpeachable integrity and would never allow the status of the IRS as an independent, nonpolitical agency to be compromised. Still, by accepting the appointment, he has put himself in an untenable situation.

A few years ago, when I was special counsel at the IRS, former Commissioner Lawrence B. Gibbs gave an inspiring lecture about times when the IRS as an institution was under siege. He recalled being interviewed for the commissioner's job by then-Treasury Secretary James Baker. At the close of the interview, Baker asked Gibbs if he had any recommendations regarding the position — whether or not he got the job. Gibbs responded by suggesting that the commissioner and the president should never communicate directly, but that all communication should go through the

Treasury secretary. That, in fact, has been the practice for several decades. The last time a president stepped foot in the IRS building was when President Kennedy addressed the troops in the early 1960s at the invitation of Commissioner Mortimer Caplin. The black-and-white footage of that speech in the IRS auditorium is quaint and charming.

In 2015, when allegations regarding the treatment of conservative organizations applying for tax-exempt status were at their height, IRS Chief Counsel William Wilkins attended a photo op at the White House. Following the photo op, conservative media were abuzz with a story that it was a ploy for the White House to exert political pressure on the IRS.

In his wonderful autobiography, *A Lawyer's Life: Deep in the Heart of Taxes*, the late Edwin S. Cohen described his tenure as assistant secretary for tax policy during the early years of the Nixon administration and the development of the proposals that led to the Tax Reform Act of 1969. In the book, Cohen describes what was supposed to be a 15-minute briefing of President Nixon on those proposals. Nixon, having been a corporate lawyer and partner at Mudge, Rose, Guthrie, Alexander & Ferdon between serving as vice president and becoming president, grilled Cohen for an hour, as a law firm partner might grill a young associate.

Presumably, Kautter's job as assistant secretary may entail a direct briefing of President Trump. Although Secretary Steven Mnuchin is reputed to be a very smart man, there is no substitute for a lifetime of tax practice. The job should fall to the assistant secretary. But it is not possible for Assistant Secretary/acting Commissioner Kautter to simultaneously be there and not be there. Moreover, the pending legislative proposals to overhaul the IRC require the full and undivided attention of the assistant

secretary. He should gracefully decline the offer to be acting commissioner.

Finally, for several decades administrations have realized that the position of IRS commissioner requires the skills to manage a large bureaucracy and to understand the needs for computer and security modernizations, skills not necessarily associated with tax lawyers. If the commissioner needs to understand the intricacies of the tax law, he can ask his lawyer, the chief counsel. That role is now filled by acting Chief Counsel William Paul, but he cannot continue in it indefinitely. There is no shortage of qualified candidates for the positions of both IRS commissioner and chief counsel, and the administration should fill those positions yesterday. ■

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