AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Legislative Investigation Powers

*Steven A. Engel*, **Congressional Committee’s Request for the President’s Tax Returns** (2019)[[1]](#footnote-1)

*When Democrats won majority control of the U.S. House of Representatives in the 2018 midterm election, they were clear that congressional oversight of the executive branch would be high on their agenda for the next two years. The House Ways and Means Committee, under the chair Richard Neal, immediately expressed interest in accessing President Donald Trump’s tax returns. One vehicle for doing so is provision 26 USC §6103 of federal law, which states that federal tax returns are “confidential” and not to be disclosed except in a few designated circumstances. Among those exceptions is the one listed in 6103(f)(1), which specifies that the Secretary of Treasury “shall furnish” such information upon the written request of the chair of the House Committee on Ways and Means, the Senate Finance Committee, or the Joint Committee on Taxation.*

*In the spring of 2019, Neal invoked this statutory provision and issued a request to Treasury Secretary Stephen Mnuchin to deliver to him confidential tax information regarding Donald Trump and his businesses for the prior six years. A few weeks later, Mnuchin declined the request, informing Neal that on the advice of the Department of Justice, the administration had concluded that the request “presents serious constitutional questions” and that Mnuchin had determined that the request “lacks a legitimate legislative purpose” and thus could not override the Treasury’s legal duty to keep the tax information of individual taxpayers confidential Shortly after Mnuchin’s decision, the Office of Legal Counsel in the Justice Department released a legal opinion concluding that Neal did not have lawful authority to compel disclosure of the confidential tax information. The House Ways and Means Committee filed suit in federal district court seeking a judicial order to force the administration to hand over the documents.*

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For several decades before 1976, federal tax returns were generally considered “public” records, but they were open to inspection only under regulations or order of the President; while often available to governmental entities, they were nearly always unavailable to the public. By the mid-1970s, Congress had become “increasingly concerned about the disclosure and use of information gathered from and about citizens by [federal] agencies.” Government officials had misused tax returns for political purposes, and the absence of genuine confidentiality was thought to impair voluntary compliance with the tax system. . . .

In the Tax Reform Act of 1976, Congress established that “[r]eturns and return information shall be confidential, . . . except as authorized by this title.” . . .

The Secretary and the IRS Commissioner are the “gatekeepers of federal tax information.” . . .

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The tax committees often rely upon section 6103(f)(1) to inspect tax information, but such requests typically seek “statistical data to inform the drafting of tax legislation.” We have identified only one instance in the four decades since the Tax Reform Act of 1976 when a tax committee publicly disclosed information about specific taxpayers that it had obtained under section 6103(f). In 2014, the Committee investigated allegations of IRS misconduct concerning discrimination against certain conservative organizations in reviewing their tax-exempt status. The Committee obtained tax information about these organizations in connection with its investigation, and some of that information was publicly released when the Committee included it in a criminal referral. There were, however, no indications that the Committee had requested the organizations’ tax information for the purpose of publicly disclosing it.

Congressional committees published personally identifiable tax information on three other notable occasions before the 1976 reforms, but in those instances, the Executive Branch released the information voluntarily. . . . Chairman Neal therefore has accurately stated that his request for President Trump’s tax information is without any precedent.

Chairman Neal’s . . . letter represents the culmination of a sustained effort over more than two years to seek the public release of President Trump’s tax returns. During the 2016 presidential campaign, then-candidate Trump chose not to publicly release his tax returns. The President’s decision became a campaign issue. . . .

After the 2016 election, the minority Members of the House continued to press for the President’s tax returns. . . . The refrain was picked up by, among others, Minority Leader Nancy Pelosi, who called for the Committee “to demand Trump’s tax returns from the Secretary of the Treasury” and to “hold a committee vote to make those tax returns public.” . . .

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To sum up, throughout 2017 and 2018, Chairman Neal and other Members of Congress made clear their intent to acquire and release the President’s tax returns. They offered many different justifications for such an action, suggesting that releasing the returns would “honor tradition,” show “what the Russians have on Donald Trump,” reveal a potential “Chinese connection,” inform tax reform legislation, provide the “clearest picture of his financial health,” and expose any alleged emoluments received from foreign governments. But oversight of “the extent to which the IRS audits and enforces the Federal tax laws against a President” had never been the focus of their demands.

After Representative Neal became Chairman, he confirmed that the Committee would pursue the public release of President Trump’s tax returns, because “the public has reasonably come to expect that presidential candidates and aspirants release those documents,” but he cautioned that “[w]e need to approach this gingerly and make sure the rhetoric that is used does not become a footnote to the court case.” . . .

On April 3, 2019, Chairman Neal announced that the Committee had “completed the necessary groundwork for a request of this magnitude” and that he felt “certain we are within our legitimate legislative, legal, and oversight rights.”. . . .

. . . . According to the Chairman, “the Committee is considering legislative proposals and conducting oversight related to our Federal tax laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President.” . . .

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The plain language of 26 U.S.C. § 6103(f)(1) does not require a tax committee to provide any purpose in support of its request for tax information. Yet the Committee has repeatedly labored to justify its request for six years of the President’s returns. The Committee’s perceived need to articulate such a justification reflects the fact that the Constitution limits the power that Congress may confer upon its agents. Because each House establishes congressional committees solely to carry out its legislative functions, the Committee may request confidential information from the Executive Branch only to further a legitimate legislative purpose.

While the Executive Branch should accord due deference and respect to a committee’s request, the Committee’s stated purpose in the April 3 letter blinks reality. It is pretextual. No one could reasonably believe that the Committee seeks six years of President Trump’s tax returns because of a newly discovered interest in legislating on the presidential-audit process. The Committee’s request reflects the next assay in a longstanding political battle over the President’s tax returns. Consistent with their long-held views, Chairman Neal and other majority members have invoked the Committee’s authority to obtain and publish these returns. Recognizing that the Committee may not pursue exposure for exposure’s sake, however, the Committee has devised an alternative reason for the request.

The Committee’s request presents a stark legal question. When faced with a congressional request for confidential taxpayer information, must the Secretary close his eyes and blindly accept a pretextual justification for that request? Or must the Secretary implement the statute in a manner faithful to constitutional limitations? We believe that the Executive’s duty to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3, permits only one answer. Where, as here, there is reason to doubt the Committee’s asserted legislative purpose, Treasury may examine the objective fit between that purpose and the information sought, as well as any other evidence that may bear upon the Committee’s true objective. In doing so, Treasury acts as part of a politically accountable branch with a constitutional duty to resist legislative intrusions upon executive power and therefore does not act under the same institutional constraints as the Judiciary. Here, because the Committee lacked a legitimate legislative purpose, its request did not qualify for the statutory exception to taxpayer confidentiality, and the law required Treasury to deny that request.

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The Constitution vests certain “legislative Powers” in Congress. Those legislative powers do not expressly include the “power to investigate,” but such a power is “inherent in the power to make laws.” Thus, “Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws.” Congress’s investigative authority also “comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.” *Watkins v. United States* (1957). But this “power to investigate must not be confused with any of the powers of law enforcement.” *Quinn v. United States* (1955).

The Supreme Court further has made clear that, “broad as is this power of inquiry, it is not unlimited,” because any congressional inquiry “must be related to, and in furtherance of, a legitimate task of the Congress.” . . . As relevant here, the Court has articulated one significant constraint on Congress’s investigative powers. “[T]here is no congressional power to expose for the sake of exposure.” In other words, “there is simply ‘no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress.’” *Doe v. McMillan* (1973). . . .

Although Congress’s investigative authority is sometimes described as including a so-called “informing function,” that function is merely “the power of the Congress to inform *itself* ” of the facts needed to carry out legislative affairs. The informing function does not grant Congress an independent authority to obtain and publicize confidential information. . . .

Because Congress may not authorize its agents to wield powers in excess of its own, section 6103(f) could not confer upon a tax committee a right to obtain confidential information that did not serve a legitimate legislative purpose. Congress could enact legislation that makes tax returns available to the public at large, but it has chosen instead to make them confidential and to prohibit Treasury from releasing them to unauthorized persons. Lacking any role in implementing the laws itself, Congress may confer upon its agents a right to request and receive confidential information only to the extent necessary to serve a legitimate legislative end. . . .

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Section 6103 charges the Secretary with the “duty of protecting return information from disclosure to others *within the federal government*, and to the public at large.” . . . Thus, the Secretary must decide, in the first instance, whether a request meets the “preconditions” for any exception, and, if so, how to exercise his statutory authority. The statutory scheme would make little sense (and would provide scant guarantee of taxpayer confidentiality) if a requester were the sole arbiter of whether an exception had been satisfied.

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Allowing a congressional committee to dictate when Treasury must keep tax information confidential and when it must disclose such information would impermissibly intrude on executive power by ceding control to the Committee over ensuring that section 6103 is implemented in a manner consistent with the constitutional limitations. *Bowsher v. Synar* (1986). . . .

This approach to section 6103 is consistent with how the Executive Branch addresses congressional requests for information in connection with congressional oversight. This Office has long advised that “a threshold inquiry that should be made [by the Executive] upon receipt of *any* congressional request for information is whether the request is supported by any legitimate legislative purpose.” 10 O.L.C. 68, 74 (1986). As then-Assistant Attorney General William Barr explained, the Executive Branch will assess its “interest in keeping [requested] information confidential” only after “it is established that Congress has a legitimate legislative purpose for its oversight inquiry.” 13 O.L.C. 153, 154 (1989). . . .

In many circumstances, Treasury will not need to engage in close scrutiny of a congressional committee’s request under section 6103(f), because the underlying, legitimate purpose will be self-evident. But the separation of powers dictates that a congressional request cannot require the agency to close its eyes to overwhelming evidence that a congressional committee’s stated purpose is a pretext for an illegitimate one. . . .

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The Supreme Court has specifically rejected the proposition that a court may not police the boundaries of congressional inquiries. In *Watkins*, for example, the Supreme Court declined to “assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected.” . . .

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Where courts have declined to engage in searching inquiries about congressional motivation, they have phrased their reluctance in terms of the institutional limits on the Judicial Branch. As the Supreme Court has explained: “In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.” As a result, “*courts* should not go beyond the narrow confines of determining that a committee’s inquiry may fairly be deemed within its province.” *Tenney v. Brandhove* (1951). . . .

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These same limitations do not apply to the Executive Branch, which operates as a politically accountable check on the Legislative Branch. The Founders separated the President from the Congress, giving him “a separate political constituency, to which he alone was responsible,” and “the means to resist legislative encroachment” upon his duty to execute the laws. . . . The head of the Executive Branch, who is elected separately from Congress, ultimately must answer to the people for the manner in which he exercises his authority. The separation of powers would be dramatically impaired were the Executive required to implement the laws by accepting the legitimacy of any reason proffered by Congress, even in the face of clear evidence to the contrary. In order to prevent the “special danger . . . of congressional usurpation of Executive Branch functions,” we believe that Treasury must determine, for itself, whether the Committee’s stated reason reflects its true one or is merely a pretext.

Applying the foregoing legal framework, we concluded that the Secretary reasonably and correctly found that the Committee lacked a legitimate purpose for seeking six years of the President’s tax information. The Committee’s asserted purpose—to consider legislation regarding the IRS’s practices in auditing presidential tax filings—was implausible. The objective mismatch between the Committee’s stated purpose, on the one hand, and the particular information that the Committee demanded, on the other, provided strong evidence of pretext. In addition, the nature of the request, the long series of events that preceded it, and Chairman Neal’s pointed failure to renounce his oft-proclaimed purpose of publicly releasing the President’s tax returns all confirm that the Committee’s purpose was the constitutionally impermissible one of forcing the public disclosure of the President’s tax returns.

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1. Excerpt taken from Steven A. Engel, Congressional Committee’s Request for the President’s Tax Returns under 26 U.S.C. §6103(f) (June 13, 2019). [↑](#footnote-ref-1)