AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

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

*IRS Office of Chief Counsel*, **Draft Memo on Congressional Access to Returns and Return Information** (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, a draft legal opinion prepared in the Office of Legal Counsel in the Internal Revenue Service was leaked to the press. That memo, which was not adopted as the formal legal position of the Treasury Department, concluded that there was no constitutional obstacle to disclosing the return. 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.*

. . . .

The House Ways and Means and Senate Finance Committees’ oversight authority regarding tax issues is rooted in the constitutional oversight authority of the Legislative Branch over the Executive Branch. *Watkins v. United States* (1957). Article I, Section 1 of the U.S. Constitution vests all legislative power in a Congress of the United States, which shall consist of a Senate and House of Representatives. By statute, each standing committee of Congress, including the Ways and Means and Finance Committees, reviews on a continuing basis the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee. Congress has subpoena power, and the failure to produce testimony or documents in response to a congressional subpoena is subject to penalty.

. . . .

. . . . Sections 6103(f)(1) and (f)(2) provide clear statutory authority for the Chairs of the Ways and Means and Finance Committees and the JCT Chief of Staff to request and receive access to returns and return information. Congress in its oversight and investigative role could seek to compel by subpoena a refusal to disclose returns or return information requested. One potential basis for a refusal in these circumstances to comply with the committee’s subpoena would be the invocation of the doctrine of executive privilege.

Executive privilege is based on the separation of powers doctrine. The theory of the privilege is that the Executive Branch of the government, even in light of various governmental checks and balances, may require confidentiality in discharging certain of its constitutional responsibilities. . . .

Executive privilege is invoked most often to protect the type of information . . . – opinions, recommendations, and advice generated in the process of formulating policies and making decisions – the so-called “deliberative process” of the government. But it has also been invoked to prevent Congress from receiving information about an agency’s open investigations. . . . The specific mandatory disclosure authority afforded the congressional tax writers through section 6103(f)(1) and the entire structure of section 6103, which clearly lays out areas within which the Secretary can exercise discretion to refuse to make disclosures of return information, might be read to preclude a claim of executive privilege against the disclosure of returns and return information.

The IRS has on occasion considered declining section 6103(f)(1) requests for access to returns and return information. In the mid-1990s, the IRS and Ways and Means reached an informal agreement not to provide Congress files of open criminal investigations should a request from one of the Chairs or the JCT Chief of Staff implicate open criminal matters, confidential informant inquiries, or information subject to Federal Rule of Criminal Procedure 6(e) (grand jury secrecy). The agreement was made to avoid possible impairment of IRS criminal enforcement efforts that could result from sharing such information outside the agency. . . . It is unknown whether returns and return information have ever been specifically requested and/or withheld under this informal agreement.

. . . .

[S]ubsections (f)(1) and (2) do not require Ways and Means and Finance Chair or JCT Chief of Staff to include a reason or purpose for the request. There, the Secretary’s obligation to disclose return and return information would not be affected by the failure of a tax writing committee or the JCT to state a reason for the request. In contrast, nontax writing committees must include a purpose for their request for returns and return information when seeking access under section 6103(f)(3).

. . . .

1. Excerpt taken from Internal Revenue Service Office of General Counsel, Draft Memo on Congressional Access to Returns and Return Information (undated). [↑](#footnote-ref-1)