



Congressional Access to the President's Federal Tax Returns

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Updated May 7, 2019

UPDATE 5/7/2019: On April 3, 2019, the Chair of the House Ways and Means Committee sent a [letter](#) to the Commissioner of the Internal Revenue Service requesting the individual income tax returns of President Trump, income tax returns for various business entities related to President Trump, and additional administrative files and audit information relating to such returns. The request covers returns filed for tax years 2013 through 2018.

On May 6, 2019, the Secretary of the Treasury [informed](#) the Chairman of the House Ways and Means Committee that, on the advice of the Department of Justice, he will not release the President's tax return information because "the Committee's request lacks a legitimate legislative purpose." The Secretary also stated that the Department of Justice will publicly release its legal reasoning on the subject "as soon as practicable."

The original post from March 15, 2019 follows below.

The Chair of the House Ways and Means Committee is [reportedly](#) preparing to send a request to the Treasury Department's Internal Revenue Service (IRS) to obtain President Trump's federal tax returns. This request appears prompted by the President's departure from the [past practice](#) of sitting presidents and presidential candidates voluntarily disclosing their recent tax returns. This Sidebar analyzes the ability of

Congressional Research Service

7-5700

www.crs.gov

LSB10275

a congressional committee to obtain the President's tax returns under provisions of the Internal Revenue Code (IRC); whether the President or the Treasury Secretary might have a legal basis for denying a committee request for the returns; and, if a committee successfully acquires the returns, whether those returns legally could be disclosed to the public.

Congressional Committee Authority to Obtain Tax Returns

In 1976, Congress amended [Section 6103](#) of the IRC to establish that federal tax return information is confidential by default unless a statute expressly authorizes disclosure. Congress made these changes in part to curtail the President's authority to acquire tax return information in response to revelations that President Nixon sought to use tax return information for improper purposes. Specifically, [Section 6103\(a\)](#) states that individual and business tax returns, and the information in tax returns, are confidential, and officers or employees of the federal government, among others, may not disseminate those returns or the information therein for unauthorized purposes without the taxpayer's consent. [Section 6103\(b\)\(2\)\(A\)](#) defines "return information" to include, among other things, "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, . . . or tax payment." This policy is bolstered by a series of statutes providing for criminal penalties and authorizing the taxpayer to bring a civil action for damages for unauthorized disclosures of return information. However, Congress has established a number of exceptions to this general proscription against disclosing taxpayer information, including certain disclosures for use in legitimate tax administration, criminal proceedings, audits conducted by the Government Accountability Office, and child support enforcement activities.

One such exception is the statute's authorization of certain congressional committees with jurisdiction over federal taxes to acquire tax return information. Congress originally provided this authority in 1924 in part to address perceived difficulties in acquiring tax information during congressional investigations into the Harding Administration's Teapot Dome scandal. Specifically, [Section 6103\(f\)\(1\) of the IRC](#) provides that, upon written request of the Chair of the House Ways and Means Committee, Joint Committee on Taxation (JCT), or Senate Finance Committee (hereinafter referred to as the "tax committees"), the Treasury Secretary "shall furnish" the requested tax returns or return information to the relevant committee. Under [6103\(f\)\(2\)](#), the Treasury Secretary also "shall furnish" requested tax return information to the JCT's chief of staff, who may share the return information to any of the tax committees. Absent the relevant taxpayer's consent, any personally identifiable tax return information received by a tax committee under [6103\(f\)\(1\)](#) or [\(f\)\(2\)](#) may only be provided when the requesting committee is "in closed executive session." [Section 6103\(f\)\(5\)](#) also authorizes a whistleblower who has access to tax return information to disclose it to the tax committees "if such person believes such return or return information may relate to possible misconduct, maladministration, or taxpayer abuse."

[Section 6103\(f\)\(3\)](#) also directs the Treasury Secretary to provide return information to any other non-tax committee in response to a written request, but only if the House or Senate passes a resolution specifically authorizing such committees to inspect return information.

Possible Legal Limitations to Congressional Committee Access under Section 6103

The plain language of [Section 6103\(f\)](#) evinces no substantive limitations on the tax committees' right to obtain covered tax return information from the IRS. Yet, because the provision can probably be viewed as a statutory delegation of Congress' investigative and oversight powers to the tax committees, exercise of the authority granted by [Section 6103\(f\)](#) arguably is subject to the same legal limitations that generally attach to Congress' use of other compulsory investigative tools. Notably, the inquiry must further a "legislative purpose" and not otherwise breach relevant constitutional rights or privileges. At least two

constitutional arguments might be offered by the Treasury Secretary in the event he declined, either under his own initiative or at the [direction](#) of the President, a request by a tax committee under the Section 6103 framework to provide tax return information of the President. First, he may contend that the request lacks a legislative purpose and therefore is beyond Congress' investigative authority. Second, he might declare that providing the tax returns would impermissibly violate the privacy interests of the President.

Under such a scenario, either the committee chair or the committee's house of Congress might seek [judicial enforcement](#) of the chair's request. The House recently obtained judicial resolution of information-access disputes with the executive branch, but those [cases](#) were expressly authorized by the House and involved congressional [subpoenas](#) rather than requests for information pursuant to a statutory access provision. Individual [Members](#) and legislative [officials like the Comptroller General](#), without a subpoena and without explicit authorization by a house of Congress, have generally been unsuccessful obtaining judicial enforcement of demands for information. A federal court may, therefore, be more likely to hear a lawsuit to enforce Section 6103 filed with the support of either house of Congress, than it would be to hear a claim filed unilaterally by a committee chair without such support.

Regardless of the merits of the case, if litigation ensues over the Treasury Secretary's denial of a tax committee's request for the tax returns, some have suggested that resolution of the matter may take [months or possibly longer](#).

Legislative Purpose

Because the investigative power derives implicitly from the Constitution's vesting of legislative power in the Congress, congressional inquiries must be undertaken "[in aid of the legislative function](#)." This "legislative purpose" requirement is relatively [generous](#), and authorizes inquiry into any topic upon which legislation could be had, including attempts by Congress to inform itself for purposes of determining how laws function, whether new laws are necessary, and whether Congress should repeal or alter old laws. Congress may also exercise its "power of inquiry" for the purposes of conducting government oversight to ensure compliance with, and proper administration of, existing law. Although the investigatory power is both "[penetrating and far reaching](#)," courts have made clear that Congress is not furthering a legislative purpose when it seeks solely to "[expose for the sake of exposure](#)." Nor does Congress [possess](#) "the general power of making inquiry into the private affairs of the citizen" when such an inquiry could "result in no valid legislation."

In light of these principles, if a chair of a tax committee seeks the President's tax returns solely for the purpose of public dissemination without any nexus to a legislative or oversight function, a court could view that request as pursuing "exposure for the sake of exposure" and not within Congress' or the tax committee's power. Yet the validity of even this type of request would be subject to some ambiguity, especially regarding returns filed after the President took office. The precise line between an impermissible inquiry driven by the purpose of exposure and a permissible inquiry involving [Congress' authority](#) to "inquire into *and publicize* corruption, maladministration or inefficiency in agencies of the Government" is not clear, especially since the U.S. Supreme Court has characterized Congress' role in [informing the public](#) (known as the "informing function") as "indispensable" and "not to be minimized." One significant factor in making this determination appears whether the information sought reflects or [relates to](#) the "workings of [] government" or purely "private affairs."

There are a number of reasons why a committee's attempts to obtain a President's tax returns could serve a legislative purpose. For example, a purpose grounded in a tax committee's need to gather information necessary for Congress to alterations to the tax code that may relate to presidential tax obligations would seem to be "in aid of the legislative function." The same may be true of a request made as part of a broader oversight effort to review the relationship between the President and the IRS or possible financial conflicts of interest. Under this reasoning, a committee's legislative purpose would appear to be strongest

with regard to returns filed by a president while in office, or perhaps while a presidential candidate, as opposed to those filed while a purely private citizen. The House Ways and Means Committee appears to have begun laying the groundwork to support a valid legislative purpose for seeking the President's tax returns. In February, the Committee's Oversight Subcommittee held a [hearing](#) examining the need for legislation that would require the President and Vice President to publicly disclose their tax returns.

Privacy Rights

Whereas the previous section discussed the boundaries of Congress' investigative power, this section discusses grounds upon which legislative inquiries may be impeded by protections available to the subject of the inquiry. Because that subject is the President, questions regarding the scope of [executive privilege](#) may be raised. That privilege, at least regarding the President's generalized interest in preserving the confidentiality of his communications, has been [interpreted](#) by the Supreme Court as "limited to communications" made "in performance" of the President's "responsibilities of [] office" and "in the process of shaping policies and making decisions." Because tax returns, which are [required](#) to be filed for everyone who has reportable income above a certain threshold, appear to lack a clear nexus to either presidential responsibilities or of presidential decision-making functions, executive privilege would not seem to provide a legally compelling reason for denying a committee access to the President's tax records.

However, even if executive privilege does not apply, the disclosure of tax returns to Congress might still be resisted by invoking privacy rights held by the President as a [taxpayer](#). In [two cases](#) decided during the 1970's the Supreme Court referred to a constitutional "interest in avoiding disclosures of personal matters," which has come to be known as a "[right to informational privacy](#)." Although the Supreme Court has [questioned](#) the continuing vitality of this right, it remains [good law](#) in the lower courts. In applying this right to informational privacy, courts have generally conducted a balancing test to determine whether legitimate governmental interests outweigh the relevant privacy interests. For example, in one of the Supreme Court cases recognizing a right to information privacy, *Nixon v. Administrator of General Services*, the Court reviewed a challenge to a provision of the Presidential Recordings and Materials Act that required federally employed archivists to process and screen presidential papers and tape recordings of the former President. In upholding the act against a challenge based on President Nixon's interest in informational privacy, the Supreme Court described the law as a reasonable balance between the government's interest in preserving records relating to the former President's performance in office and President Nixon's interest in the privacy of personal information unrelated to his government service. In reaching this conclusion, the Court noted that the bulk of the information at issue pertained to the "official conduct of his Presidency," and concluded that any invasion of privacy was mitigated because non-pertinent information would be returned to the former President without public disclosure.

Relying on *Nixon*, federal courts of appeals have generally upheld state laws requiring government officials to release certain financial information. For example, in *Plante v. Gonzalez*, the Fifth Circuit upheld a state law requiring state legislators to publicly disclose personal financial information, on the grounds that the mandated disclosure advanced the government's legitimate interest in deterring corruption and conflicts of interest, and created public confidence in state government. The court viewed these interests as sufficient to overcome the legislators' interests in financial privacy, which were limited by their voluntary decision to run for office. Similarly, in *Barry v. City of New York*, the Second Circuit found that a city ordinance requiring city officials to submit financial disclosures to the city clerk, where they could be subject to public inspection upon request, was supported by the same legitimate government interests as in *Plante*, namely the deterrence of corruption and conflicts of interest, and the enhancement of public confidence in governmental integrity.

With respect to the disclosure of the President's tax return information to Congress, it is likely that Members seeking the information would assert the same government interests that the plaintiffs asserted

in *Plante* and *Barry*, including deterrence of corruption, detection of conflicts of interest, and enhancement of public trust or faith in government. Those seeking access may also argue the President's voluntary choice to run for office diminished any privacy interest he might assert in his tax returns. In response, the President may argue that the amount of personal information in a tax return that is not related to his performance in office or another legitimate government interest should weigh against disclosure. While not dispositive, such an argument might be stronger with respect to those tax returns from before his candidacy or time in office. Additionally, the President might argue that the chance of broader disclosure of such tax return information to the House or the Senate under Section 6103 exacerbates any invasion of privacy, because a larger group of persons would have access to the information. However, if a court were to adopt the analysis from *Plante* and *Barry*, the President's privacy interests would not appear to be sufficient to overcome a legitimate governmental interest in his tax return information.

Further Disclosure of Tax Return Information Received by a Tax Committee

In the event that a tax committee obtains return information under [Section 6103\(f\)](#), the statute further states that “[a]ny return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both.” As written, there do not appear to be any textual limitations in Section 6103(f) on the re-disclosure from the tax committees to the House or the Senate. Importantly, unlike the limitation applicable to the tax committees, the statute does not state that the full House or Senate be in closed executive session to receive tax return information from the tax committees. Additionally, while previous versions of Section 6103(f) had limited disclosures to the chambers to those that were either “[relevant or useful](#),” Congress amended the statute in 1976 to remove those qualifiers.

However, at least one commentator has [argued](#) that the lack of any limiting language should not be read that there are no legal constraints on information sharing, but instead that the authority to share information with the House and the Senate would, at a minimum, be [subject](#) to the “legislative purpose” test described above. However, even assuming this limitation was read into Section 6103(f), as a practical matter, Members of Congress are not likely to suffer any legal consequences for its violation. Although the disclosure of tax return information in violation of Section 6103 could result in civil and criminal liability, it is unclear whether some of these [liability provisions](#), for example those that apply to “officer[s] or employee[s] of the United States,” cover Members of Congress. Even if they do, and for those liability provisions that attach more broadly to “[any person](#),” Members who utilize the legislative process to disclose tax return information in a manner that potentially violates Section 6103 would likely be protected from legal liability by the U.S. Constitution's [Speech or Debate Clause](#).

The Supreme Court has [repeatedly stated](#) that, under the Speech or Debate Clause, Members are “immune from liability for their actions within the ‘legislative sphere,’ even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.” Consequently, Members of Congress could be exempt from liability if tax return information is released pursuant to a “[legislative act](#),” for example by being read on the House or Senate floor or being submitted into an official record of Congress. However, disclosure [directly to the public](#), through a press release for example, likely would not be protected. Moreover, while the Clause protects a Member from liability imposed by the executive or judicial branches, the Clause does not prevent the imposition of internal discipline by the House or Senate for violation of either body's rules. Accordingly, the Speech or Debate Clause would appear to provide Members with broad, though not absolute, protections for subsequent disclosures of tax returns received under Section 6103.

The tax committees appear to have sparingly exercised their authority to release tax return information publicly by submitting the information to the full House or Senate. The JCT submitted various aspects of President Nixon's tax returns to the Senate in 1974. (Although President Nixon consented to the release of his tax returns and requested a JCT analysis of them, the resulting report apparently included additional details that were not included in the returns released by President Nixon.) A more recent example occurred in 2014, when the House Ways and Means Committee, as part of a Department of Justice criminal referral letter submitted to the House, disclosed the tax return information of approximately 51 taxpayers as part of the Committee's investigation into political-based targeting of entities seeking tax-exempt status. At least one scholar has criticized the use of the authority in 2014 because he argues that it did not further a legitimate legislative purpose. Nevertheless, it does not appear that any Member of Congress faced civil or criminal charges for the exercise of the authority after either incident.