# The President's Tax Returns

*Amandeep S. Grewal**

## Introduction

For around forty years, US Presidents and major party presidential candidates have publicly released their personal income tax returns.[1] However, during the 2016 election cycle, Republican candidate Donald Trump broke from this recent tradition and did not disclose them.[2] This nondisclosure ultimately did not imperil his candidacy, and he became the forty-fifth President of the United States.

But calls for the President's tax returns continued. Many Democratic legislators believed that the President's tax returns could contain important information related to his apparent conflicts of interest and his foreign connections.[3] However, for two years, the Republican-controlled Senate and House of Representatives declined to pursue those returns.

After the 2018 midterm elections, Democrats took control of the House and formally requested President Trump's tax returns.[4] The House Ways & Means Committee, which issued the request,[5] pointed to Section 6103(f)(1) of the tax code.[6] That section provides that congressional tax committees may request from the Internal Revenue Service anyone's tax return or return information (collectively, "tax return information").[7] The

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* Joseph F. Rosenfield Scholar & Professor of Law, University of Iowa.

1 *See* Joseph J. Thorndike, *Tax History: From Nixon to Trump: A Short History of Voluntary Tax Disclosure*, 162 TAX NOTES 612, 612 (2019).

2 *See* Alan Rappeport, *Donald Trump Breaks with Recent History by Not Releasing Tax Returns*, N.Y. TIMES (May 11, 2016, 2:00 PM), https://perma.cc/YGD9-2P4N.

3 *See* Naomi Jagoda, *House Dem Forces GOP to Take Recorded Vote on Trump Tax Returns*, THE HILL (Feb. 27, 2017, 7:39 PM), https://perma.cc/MD2S-3QCX ("Democrats have expressed a desire to see the returns in order to learn more about the president's conflicts of interest," and have argued they "could be helpful in investigating Russia's influence in the presidential election.").

4 *See* Kasie Hunt et al., *House Democrats Formally Request Trump Tax Returns*, NBC NEWS (Apr. 3, 2019, 6:18 PM), https://perma.cc/PQQ5-3SSD.

5 *See* Letter from Richard E. Neal, Chairman, House Comm. On Ways & Means, to Charles P. Rettig, Comm'r, Internal Revenue Serv. 1 (Apr. 3, 2019) (https://perma.cc/4Z8P-WM4J) (invoking authority under Section 6103(f)).

6 *See* I.R.C. § 6103(f)(1) (2012).

7 *See id.* § 6103(b)(1) (defining "return"); *id.* § 6103(b)(2) (defining "return information").

legislators believed that the Internal Revenue Service must comply with their request for President Trump's tax return information, because the statute provides that the IRS "shall" do so.[8] Section 6103(f)(1)'s literal language supports their interpretation.

However, this Article argues that a congressional request under Section 6103(f)(1) faces a constitutional limit. Part I briefly surveys the legislative history related to tax privacy and the circumstances that led to Section 6103(f)(1)'s enactment. Part II examines the general constitutional principles related to Congress's investigative authority and argues that any congressional request for tax return information must fulfill a legitimate legislative purpose. Though Section 6103(f)(1) might speak in unqualified terms, that statute cannot establish congressional access to tax return information beyond that allowed by the Constitution.

Part III examines whether a request for a President's tax return information automatically satisfies the legitimate legislative purpose standard. It concludes that it does not. Congress enjoys broad access to a President's tax return information only through proper impeachment-related inquiries.

Parts I–III explore the legal issues without regard to the dispute over President Trump's tax return information. Part IV turns to the Ways & Means Committee's request for that information. That request has been followed by a committee subpoena[9] and has prompted a lawsuit.[10] New facts have also continued to emerge.[11] Part IV thus offers a framework for analysis but does not offer any definitive conclusions.

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[8] *See* Letter from Richard E. Neal, Chairman, House Comm. On Ways & Means, to Charles P. Rettig, Comm'r, Internal Revenue Serv. 2 (Apr. 13, 2019) (https://perma.cc/5Q4G-DNZL) ("[T]he IRS has failed to provide the requested return and return information despite an unambiguous legal obligation to do so under section 6103(f)."); *see also* George K. Yin, *Congressional Authority to Obtain and Release Tax Returns*, 154 TAX NOTES 1013, 1014 (2017) (noting that the statutory predecessor to Section 6103(f)(1) gave congressional tax committees "the unqualified right to request the tax returns of any taxpayer from the secretary of the Treasury and directed the secretary to comply with that request").

[9] *See* Letter from Richard E. Neal, Chairman, House Comm. On Ways & Means, to Charles P. Rettig, Comm'r, Internal Revenue Serv., and Steven T. Mnuchin, Sec'y, Dep't of Treasury 3 (May 10, 2019) (https://perma.cc/222Z-57P4).

[10] *See* Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury, No. 1:19-cv-01974 (D.C. Dist. Ct. Aug. 29, 2019) (slip copy of signed order).

[11] *See, e.g.*, Aaron Lorenzo, *House Democrats Say Whistleblower Bolsters Case for Getting Trump's Tax Returns*, POLITICO (Aug. 20, 2019, 5:06 PM), https://perma.cc/9G6E-QMRQ.

## I. Taxpayer Privacy & Congressional Access to Tax Return Information

In its earliest form, the income tax law did not protect taxpayer privacy. Under the 1862 act, tax officials posted or published specific taxpayers' income tax liabilities in newspapers.[12] This approach, which had been followed for federal property taxes, apparently helped taxpayers determine their liabilities and encouraged efficient tax collection.[13]

Major newspapers welcomed this transparency.[14] For example, the New York Times often published a front-page feature on prominent persons' tax liabilities.[15] One such feature teased readers with references to the "Queer Revelations of Hotel and Up-Town Life" and pondered "How Men Pay $10,000 for Board and Nothing for Their Income."[16] Another feature noted that though "[t]he good and bad people of this city" would often "look down upon their little sister Brooklyn," the tax data in that neighborhood "demonstrate[d] an amount of mercantile shrewdness and mental culture by no means despicable or limited."[17] These seemingly invasive stories could be justified because they helped "make every citizen a deputy tax collector, spying on neighbors and looking out for the government's interests."[18]

This widespread tax publicity eventually drew sharp criticism. An income tax, unlike some other types of taxes, allegedly "invade[d] the sanctity of a man's most personal affairs."[19] Even the taxpayer's business

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12 *See* Act of July 1, 1862, ch. 119 § 15, 12 Stat. 432, 437 (repealed 1870) (describing assessors' duties to publish tax information); *see also infra*, note 23.

13 *See* George K. Yin, *Preventing Congressional Violations of Taxpayer Privacy*, 69 TAX L. 103, 154 (2015).

14 HOWARD M ZARITSKY, CONG. RES. SERV., HJ 5001A, LEGISLATIVE HISTORY OF TAX RETURN CONFIDENTIALITY: SECTION 6103 OF THE INTERNAL REVENUE CODE OF 1954 AND ITS PREDECESSORS, CRS-1, CRS-6 (1974) (noting that "objections [to tax publicity] appeared to arise more frequently when the major newspapers began to publish incomes of the leading citizens").

15 *See* Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265, 275 (2011).

16 *Our Internal Revenue: The Eighth Collection District and Its Official Lists*, N.Y. TIMES, July 11, 1865, at 1, https://perma.cc/2D5F-5A4A; *see also* Blank, *supra* note 15, at 275 n.46 (citing other examples of Our Internal Revenue).

17 *Our Internal Revenue: The Third (Brooklyn) District Complete*, N.Y. TIMES, June 30, 1865, at 1, https://perma.cc/A279-XB3Q; *see also* Blank, *supra* note 15, at 275 n.46 (citing other newspaper features).

18 ZARITSKY, *supra* note 14, at CRS-6 (discussing competing views of tax publicity during the 1860s).

19 FREDERIC C. HOWE, TAXATION AND TAXES IN THE UNITED STATES UNDER THE INTERNAL REVENUE SYSTEM, 1791-1895, at 240 (1896).

methods could become "open to the inquisitive eye of the official, and perchance the public."[20]

These concerns shifted attitudes. The Commissioner of Internal Revenue, Joseph J. Lewis, believed that tax returns should remain private, such that the income tax "might not be felt to be inquisitorial in its character."[21] Congress subsequently provided that tax officials could not publish tax return information in newspapers.[22] But that information remained available for public inspection.[23]

The Civil War era income tax eventually lapsed, "in part because of problems stemming from publicity of tax returns."[24] When Congress revived the income tax in the late nineteenth century, taxpayer privacy remained a concern. The House Ways & Means Committee proposed, and Congress ultimately adopted, a statute that made improper tax return disclosures punishable as a misdemeanor.[25] Through this, "much of the inquisitorial character of the former income tax ha[d] been removed by the stringent provisions in the new law calculated to insure the utmost secrecy."[26] Generally speaking, identifiable tax return information would remain inside the tax collection agency.[27]

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20 *Id.*

21 1863 Comm'r of Internal Revenue Ann. Rep. 11, https://perma.cc/8VWL-QZKQ.

22 *See* Act of July 14, 1870, ch. 255 § 11, 16 Stat. 256, 259 (prohibiting tax collectors or assessors to permit publication of income tax returns, "except such general statistics, not specifying the names of individuals or firms, as he may make public, under such rules and regulations as the commissioner of internal revenue shall prescribe").

23 *See* Columbus Delano, *Circular Letter to Assessors–Publication of the Annual List of Assessments on Income Returns to Be Discontinued*, 11 INTERNAL REVENUE REC. & CUSTOMS J. 113, 113 (1870) (noting that ending newspaper publication "will not prevent the public from inspecting lists" of assessments).

24 Office of Tax Policy, Dep't of Treasury, Scope and Use of Taxpayer Confidentiality and Disclosure Provisions 16 (2000), https://perma.cc/N878-3X3P; *see also* REPORT ON ADMIN. PROCEDURES OF THE INT'L REV. SERV. TO THE U.S. ADMIN. CONF., S. DOC. No. 94–266, at 838 (1975) ("[T]he furor surrounding publicity was one of the central causes of the early demise of the income tax as a revenue raising instrument.") [hereinafter REPORT TO ACUS].

25 *See* 26 CONG. REC. 1594, 1596 (1894); Tariff Act of 1894, ch. 349 § 34, 28 Stat. 509, 557–58. The current tax code contains various provisions related to taxpayer privacy. *See, e.g.*, I.R.C. § 7213(a)(1) (2012) (imposing criminal penalty for some unauthorized disclosures); *id.* § 7213A(a)(1) (imposing criminal penalty for some unauthorized inspections).

26 Edwin R.A. Seligman, *The Income Tax*, 9 POL. SCI. Q. 610, 639 (1894).

27 Current and prior law allows disclosure of tax-related information that cannot be associated with specific persons. *See* I.R.C. § 6103(a) (providing confidentiality restrictions for tax return information); *id.* § 6103(b)(2) (protected tax return information does not include "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer"); Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. (forthcoming 2020) ("In tax, data transparency has long been paired with tax collection, with a caveat of privacy for individual tax returns. A transparency norm that the federal agency responsible for

The tax laws have since maintained taxpayer privacy protections. Although the 1918 act labeled tax returns "public records,"[28] that label was inaccurate. Tax returns could be inspected "only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President."[29] No President permitted broad inspection of individual tax returns under this provision or its statutory successors.[30] Taxpayers could thus generally count on the privacy of their returns.

The infamous Teapot Dome scandal prompted further amendments and led to a statute granting congressional access to tax return information. A specially established congressional committee believed that private persons may have bribed cabinet members for favorable government leases, including for leases at the Teapot Dome Oilfield.[31] To assist with its investigation, the committee, aided by a Senate resolution, asked that the President "turn over" some tax returns related to various implicated persons and entities.[32]

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collecting taxes publish regular statistical information about tax collection has been followed at least since 1863.").

28 *See* Revenue Act of 1918, ch. 18 § 257, 40 Stat. 1057, 1086.

29 *Id.*; *see also* REPORT ON ADMIN. PROCEDURES OF THE INT'L REV. SERV. TO THE U.S. ADMIN. CONF., S. DOC. No. 94-266, at 829 ("Since [tax return] information has not been generally available to the public, taxpayers seem to have assumed that tax returns are confidential documents.").

30 For a short time, the President permitted public inspection of corporate tax returns. *See* Yin, *supra* note 13, at 160 (discussing T.D. 2961, 2 C.B. 250, 252 (Jan. 7, 1920)). Also, a 1924 statute ordered publication of some basic information related to tax liabilities, but the 1926 revenue act did not include a similar provision. *Compare* Revenue Act of June 2, 1924, ch. 234 § 257(b), 43 Stat. 253, 293 (providing that the "Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection" some tax information), *with* Act of Feb. 26, 1926, ch. 27 § 257(e), 44 Stat. 9, 52 (allowing only for public inspection of taxpayer names). *See* George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right to Know*, 100 VA. L. REV. 1115, 1128 (2014) (repeal of publication rule followed "continued strong opposition from President Coolidge and Secretary Mellon and concerns about taxpayer privacy and misuse of the information by the unscrupulous after newspapers began extensive publication of the information"); *see also* Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 CAP. U. L. REV. 373, 396 n.110 (1993) (summarizing taxpayer privacy rules under 1926 regime). A 1934 statute again called for some tax return information to become public, but Congress repealed it before it went into effect. *See* Revenue Act of May 10, 1934, ch. 277, § 55(a), 48 Stat. 680, 698; Act of Apr. 19, 1935, ch. 74, 49 Stat. 158. For discussion of the related political controversy, *see* Pomp, *supra* note 30, at 398-405.

31 *See* LATON MCCARTNEY, THE TEAPOT DOME SCANDAL: HOW BIG OIL BOUGHT THE HARDING WHITE HOUSE AND TRIED TO STEAL THE COUNTRY 266-68 (2008). President Harding passed away in 1923, leaving President Calvin Coolidge to deal with the scandal's aftermath.

32 *See* S. Res. 180, 68th Cong., 65 CONG. REC. 3299 (1924) ("[T]he President . . . [is] respectfully requested to direct the Secretary of the Treasury to turn over to the Public Lands and Surveys Committee of the Senate, as by law he is authorized to do, all income-tax returns filed by [various persons and entities] together with all files, claims, papers, settlements, reports, formal and informal, adjustments, memoranda, or refunds, and all other files and data attached thereto or connected

The Coolidge Administration equivocated over whether to comply.[33] The relevant regulations provided limited authority to turn over tax returns,[34] and Gerrard Winston, the Undersecretary to Treasury Secretary Andrew Mellon, questioned whether transmitting them here would be appropriate or lawful.[35] In a memo to Secretary Mellon, Winston wrote that the President could not turn over specific tax returns or allow for selective inspection.[36] That is, the President could not, under the relevant statutes and regulations, order that "'John Jones' return is open for inspection."[37] Rather, any Presidential order could be only "general in character."[38] Otherwise, "the President could select his political enemies and expose their returns to the public."[39]

The Teapot Dome scandal involved congressional attempts to obtain tax return information, not selective disclosures by the President. Nonetheless, Winston believed that the Treasury could not freely transmit returns to "satisfy the curiosity of Congress."[40] That would "defeat the secrecy of returns assured to the taxpayer by statute."[41]

Secretary Mellon reiterated these concerns in a draft letter to the President.[42] He worried that the congressional committee was on a "fishing expedition" that would sacrifice taxpayer privacy rights.[43] He thus prepared a draft response to the Senate, in which the administration would disclaim the President's "authority to pick out specific taxpayers" and turn over their returns.[44] The draft response also warned that casually

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therewith."). For the resolution to which the President ultimately responded. *See* S. Res. 185, 68th Cong., 65 CONG. REC. 3702 (1924) (calling for the President to merely "permit the inspection" of the returns, rather than calling for them to be turned over).

33 *See* George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 856–58 (2013).

34 *See* T.D. 3188 (IRS TD), 1921-5 C.B. 253, 1921 WL 50755 (revising regulations and adding a provision that allows disclosure of tax returns for some law enforcement purposes).

35 *See* Memorandum from Gerrard Winston, Undersecretary, Dep't of Treasury, to Andrew Mellon, Sec'y, Dep't of Treasury (Mar. 3, 1924) (on file with author). The Winston memo addressed S. Res. 180, 68th Cong. (1924), which was an earlier version of the Senate Resolution to which the administration ultimately responded.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 Memorandum from Gerrard Winston, *supra* note 35.

42 *See* Draft Letter and Proposed Response to Congress from Andrew Mellon, Sec'y, Dep't of Treasury, to President Calvin Coolidge (Mar. 5, 1924) (on file with author).

43 *Id.*

44 *Id.*

turning over returns "could arbitrarily deny a right to one citizen which was granted to all other citizens."[45]

President Coolidge did not use Secretary Mellon's draft response. Rather, he relied on an opinion from the Attorney General to deny the committee's request.[46] But the Senate then passed another resolution, which asked only that the President permit inspection of the tax return information.[47] Thus, the executive branch would not formally turn over any materials. This apparently satisfied President Coolidge, and the Treasury subsequently revised its approach to congressional requests.[48] It is impossible to tell why the administration yielded. But Professor George Yin's detailed examination suggests that the new Treasury regulation, requiring a congressional resolution before any inspection took place, "perhaps precluded a complete fishing expedition by Congress."[49]

Congress eventually decided that it should enjoy authority that did not depend on the President's grace. It had earlier rejected, apparently on privacy grounds,[50] bill amendments that would have granted itself disclosure authority like the President's or that would have provided committees with direct access to tax returns.[51] The Teapot Dome and other scandals may have led Congress to weigh its oversight responsibilities more heavily.[52]

Congress might have tried to give any legislator the authority to inspect or obtain tax return information.[53] But the Revenue Act of 1924 did not go that far. Under the statute, only the Senate Finance Committee, the House Ways & Means Committee, or a special

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45 *Id.*

46 *See* 65 CONG. REC. 3700–01 (1924) (arguing that President enjoyed authority to permit only inspection of returns and requests to turn over returns should be made to tax officials, who could amend the existing regulations).

47 *See* S. Res. 185, 68th Cong., 65 CONG. REC. 3702 (1924).

48 *See* Letter from Andrew W. Mellon, Sec'y, Dep't of Treasury, to E. F. Ladd, U.S. Senator (March 15, 1924) (on file with author) (stating that returns described in S. Res. 185 would be open to committee inspection); *see also* T.D. 3566, 26 Treas. Dec. Int. Rev. 58–59 (1924) (allowing for tax return inspection upon a resolution of Congress or of either house, and noting potential statutory penalties).

49 Yin, *supra* note 33, at 857.

50 *See* Yin, *supra* note 13, at 120 ("The decisions in 1910 and 1921 showed that Congress was wary of giving itself authority over, or access to, the confidential information, apparently out of concern that doing so might unduly jeopardize the privacy rights of taxpayers.").

51 *See id.* at 119–20.

52 *See id.* at 120–21 (noting that Congress addressed committee authority as part of "investigation hysteria").

53 Later on, a congressional committee considered such a proposal. *See* Yin, *supra* note 33, at 843 ("The committee recommended that any member of Congress be given access to any tax return at any time and that settlements should not be finalized until publication of the principles upon which they were based.") (citing S. REP. NO. 69-27, at 134; S. REP. NO. 69-27, at 8, 238–39).

committee would enjoy "the right to call on the Secretary of the Treasury"[54] to produce tax return information. When so called, the Secretary would have the affirmative "duty to furnish" any such information "required by the committee."[55]

Information obtained through this regime would not necessarily remain with committee members. Under the statute, the committee could appoint examiners or agents to aid its review.[56] Also, the committee could share "any relevant or useful information" with the entire House, Senate, or both.[57]

This basic framework persists under the current tax code. Section 6103(a) generally provides that tax return information "shall be confidential."[58] Many exceptions apply, including one for congressional access. Under Section 6103(f)(1), the three congressional tax committees —the Senate Finance Committee, the House Ways & Means Committee, and the Joint Committee on Taxation ("JCT")—may, through their chairmen or chairwomen, request tax return information about anyone from the IRS.[59] The statute provides that the IRS "shall furnish" any requested information to these committees.[60]

Taxpayers might be concerned about this broad congressional access to their tax return information. But Section 6103(f)(1) seemingly addresses these concerns. Identifiable tax return information may be provided to the congressional tax committees only in private, that is, when they sit "in closed executive session."[61]

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54 Revenue Act of 1924, Pub. L. No. 68-176, § 257(a), 43 Stat. 253, 293 (Jun. 2, 1924).

55 *Id.*

56 *See id.*

57 *Id.* The current statute contains no similar "relevant or useful" restriction.

58 I.R.C. § 6103(a) (2012). That provision, and not the Constitution, provides the relevant safeguard for tax return information submitted to the IRS. *Cf.* Couch v. United States, 409 U.S. 322, 335 (1973) ("[T]here can be little expectation of privacy [under the Fourth Amendment] where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return."); *but see* DAVID H. CARPENTER, ET AL., CONG. RES. SERV., LSB10275, CONGRESSIONAL ACCESS TO THE PRESIDENT'S FEDERAL TAX RETURNS 4 (2019), https://perma.cc/377K-JHNS ("[T]he disclosure of tax returns to Congress might still be resisted by invoking privacy rights held by the President as a taxpayer. . . . Although the Supreme Court has questioned the continuing vitality of this right, it remains good law in the lower courts.").

59 Through Sections 6103(f)(2) & (3), other congressional committees and the Chief of the Staff of the JCT may obtain tax return information. This Article focuses on committees described in Section 6103(f)(1) because those committees are the ones most likely to request a President's tax returns and potentially make them public under Section 6103(f)(4)(A). However, all the constitutional limitations for requests under Section 6103(f)(1) apply to requests under Sections 6103(f)(2) & (3).

60 I.R.C. § 6103(f)(1).

61 *Id.*

Unfortunately, these privacy protections are misleading. Under Section 6103(f)(4)(A), congressional tax committees may disclose, without any apparent limitation,[62] any tax return information to "the Senate or the House of Representatives, or to both."[63] That disclosure, in turn, would generally make tax return information publicly available.[64] Through the committee access rule and the related disclosure rule,[65] Congress has seemingly provided itself the authority to make tax return information public even without a taxpayer's consent.

A recent controversy illustrates this. In 2014, the Republican-controlled House Ways & Means Committee obtained tax return information about various tax-exempt groups as part of its investigation into the alleged Tea Party scandal.[66] The committee then publicly transmitted some of that tax return information to the Attorney General, in an apparent attempt to shame a senior IRS official.[67] Given the nature of the transmitted information, the harm to taxpayer privacy may have

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[62] Professor Yin has argued that Congress's ability to disclosure tax return information must meet a legitimate legislative purpose test. *See* Yin, *supra* note 13, at 136–37. However, he notes that even if this requirement applies, legislators could not be held liable for any violations, given the protection afforded by the Constitution's Speech or Debate clause. *See id.* at 137–42.

[63] I.R.C. § 6103(f)(4).

[64] The statute does not expressly state that transmittal to the House or Senate will make the tax return information public. However, legislators have understood the statute that way. *See* David van den Berg, *Did Ways and Means' EO Data Dump Break the Law?*, 143 TAX NOTES 519, 519 (2014) (noting Chairman Camp's understanding). Section 6103(f)(4)(B) allows nontax committees to transmit tax return information to the full House or Senate, but only in closed executive session. The absence of any similar restriction in Section 6103(f)(4)(A) suggests that Congress contemplated broader authority for its tax committees. Note, however, that the House likely enjoys the authority to independently lift any restrictions imposed by Section 6103(f)(4)(B). *See* Aaron-Andrew P. Bruhl, *Using Statutes To Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 349 (2003) ("Congress itself appears to hold the view that each house always possesses a constitutionally mandated power to change its own rules, regardless of what any statute says about the matter."). Thus, the House could decide that information transmitted from a nontax committee to the entire chamber could be openly published. Even if Section 6103(f)(4)(B) mandated otherwise, the Speech or Debate clause would shield legislators from liability for any statutory violation. *See, e.g.*, Doe v. McMillan, 412 U.S. 306, 313 (1973) (stating legislative acts that culminated in the publication and distribution of materials about schoolchildren "were protected by the Speech or Debate Clause").

[65] *See* I.R.C. §§ 6103(f)(1), (f)(4).

[66] *See* Letter from Dave Camp, Chairman, House Comm. On Ways & Means, to Daniel Werfel, Acting Comm'r, Internal Revenue Serv. (Sept. 20, 2013) (on file with author) (invoking Section 6103 and requesting tax return information related to several organizations). For a short description of the underlying controversy, *see* True the Vote, Inc. v. I.R.S., 831 F.3d 551, 554–57 (D.C. Cir. 2016).

[67] *See* H.R. REP. NO. 113-414 (2014) (describing potential misconduct by a former IRS official, Lois Lerner).

been minimal.[68] However, Professor Yin warned that it set a potentially dangerous precedent. With "no legitimate reason," a future congressional tax committee "could release with impunity the return information of any taxpayer, including sensitive information belonging to a political enemy of those in control of the committee at the time."[69]

But a higher law provides a safeguard. A statute cannot grant powers beyond those conferred by the Constitution. Congress's powers are "dependent solely" on our founding document.[70] Thus, Section 6103(f) must be read in connection with general constitutional principles.[71]

## II. Constitutional Limits on Congressional Investigative Authority

This Part examines general constitutional limits on congressional investigatory authority and argues that Congress can obtain tax return information under Section 6103(f) only when doing so furthers a legitimate legislative purpose.

### A. *Background on Investigative Authority*

Congress enjoys robust explicit and implicit authority over the executive branch. For example, Congress, not the President, establishes the executive branch departments contemplated by the Constitution.[72] Congress, not the courts, holds the power to impeach and convict executive branch officials.[73] And Congress enacts the federal laws that the President must ensure are faithfully executed.[74]

The Court has repeatedly recognized that Congress needs information to discharge these constitutional responsibilities, and that

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[68] *See* Yin, *supra* note 13, at 106 (noting that the type of information released "probably resulted in a negligible loss of privacy").

[69] *Id.*

[70] *See* Kilbourn v. Thompson, 103 U.S. 168, 182 (1880) ("The powers of Congress itself, when acting through the concurrence of both branches, are dependent solely on the Constitution. . . . [And] neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body."); *cf.* Bowsher v. Synar, 478 U.S. 714, 726 (1986) (". . . Congress cannot grant to an officer under its control what it does not possess.").

[71] *See infra* Part II.B.

[72] *See* U.S. CONST. art. I, § 8; Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and The President's Administrative Powers*, 102 YALE L.J. 991, 1010 (1993) (noting "when Congress creates departments and officers that help the President execute federal law," it has properly acted under the Necessary & Proper Clause).

[73] *See* U.S. CONST. art. I, § 3.

[74] *See id.* § 1 (granting legislative power); *id.* at art. II, § 3.

Article I implies investigative authority.[75] Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[76] Thus, Congress can properly survey "defects in our social, economic or political system"[77] so that it can remedy them.[78]

Congress's investigative authority over such defects does not stop once it passes legislation. Rather, Congress can properly inquire into "the administration of existing laws."[79] In that way, Congress can exercise investigative authority over its co-equal branches and "expose corruption, inefficiency or waste."[80] Neither the executive branch nor the judicial branch enjoys absolute immunity from congressional investigations.

Nonetheless, congressional investigative authority faces limits.[81] *Kilbourn v. Thompson*,[82] which dealt with a congressional contempt order issued against a private citizen, provides helpful guidance on those limits.[83] It also indirectly provides guidance on congressional investigative authority over the executive branch.

In *Kilbourn*, the House of Representatives determined that the Navy Secretary improvidently deposited government funds with a private real estate company.[84] The House established a special committee to investigate the company and the government's losses.[85] As part of its investigation, the committee subpoenaed Hallet Kilbourn,[86] but he did not

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75 *See, e.g.*, Watkins v. United States, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process.").

76 McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

77 *Watkins*, 354 U.S. at 187.

78 *See id*; *see also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 453 (1977) (noting that preserving materials needed to understand political processes and the need for remedial legislation "may be thought to aid the legislative process and thus to be within the scope of Congress' broad investigative power").

79 *Watkins*, 354 U.S. at 187.

80 *Id.*

81 *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) ("Although the power to investigate is necessarily broad it is not unlimited. Its boundaries are defined by its source.").

82 103 U.S. 168 (1880).

83 *See id.* at 183–85; *see also* Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 222 (1967) (noting that under *Kilbourn*, congressional committee investigations will be upheld when they pursue a "proper legislative purpose" and are "pertinent to the matter under inquiry").

84 *See Kilbourn*, 103 U.S. at 193.

85 *See id.* at 195.

86 *See id.* at 194. Kilbourn was apparently an employee of the real estate company. *See* DONALD GRIER STEPHENSON, JR., THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY 182 (2003). He was no stranger to controversy, taking on issues related to D.C. home rule and the constitutionality of the

fully cooperate. He would not provide relevant records and would not identify the members of the real estate company.[87] The House thus issued a warrant for his arrest, took him into custody, and held him in contempt.[88] Kilbourn challenged the House's constitutional authority to perform those actions.[89]

The controversy ultimately reached the Supreme Court. In holding for Kilbourn, the Court did not decide whether Congress enjoyed a contempt power.[90] It instead determined that "the House was without authority" to perform the investigation.[91] The body had no "general power of making inquiry into the private affairs of [a] citizen,"[92] and the facts suggested that this inquiry would be "fruitless."[93] There was no suggestion, for example, that the real estate company was "a corporation whose powers Congress could repeal."[94] Absent "valid legislation on the subject to which the inquiry referred,"[95] the House had no "power or authority in the matter more than any other equal number of gentlemen interested"[96] in their government.

By asserting investigative authority, the House "not only exceeded the limit of its own authority,"[97] but it infringed on another branch. An investigation into the real estate company was "in its nature clearly judicial."[98] The federal courts, not the House, provided the forum through which creditors, including the federal government, could seek redress.[99]

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local tax system. *See* Clara Jeffery, *Those Were the Days? Perceptions of Washington, Then and Now*, WASHINGTON CITY PAPER (Feb. 3, 1995, 12:00 AM), https://perma.cc/352Q-K7VJ.

87 *See Kilbourn*, 103 U.S. at 193–95.

88 *See id.* at 196–97.

89 *See id.* at 197–98.

90 In later cases, the Court has recognized the Congress's contempt authority. *See, e.g.*, Marshall v. Gordon, 243 U.S. 521, 547 (1917); *In re* Chapman, 166 U.S. 661, 672 (1897) ("[T]he power to punish for contempt still remains in each House."). *See generally* MORTON ROSENBERG & TODD TATELMAN, CONG. RES. SERV., RL34097, CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE (2007), https://perma.cc/9SH9-Y7N4 (summarizing history).

91 *Kilbourn*, 103 U.S. at 200; *see also id.* at 196 ("... [T]he resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution[.]").

92 *Id.* at 190.

93 *Id.* at 195.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Kilbourn*, 103 U.S. at 192.

98 *Id.*

99 *Id.* at 194.

The legislature had offered "no suggestion" about what it could have done to remedy the wrong inflicted by the real estate company.[100]

In reaching its holding, the Court offered an important qualification. The House, when pursuing its investigation, did not try to impeach the Navy Secretary.[101] Had it done so, "the whole aspect of the case would have been changed."[102] Also, though the Navy Secretary had allegedly made "improvident" use of government funds, there was no "suspicion of criminality."[103] This repelled any indication that the House's investigation related to impeachment, for the Navy Secretary "could only be impeached for 'high crimes and misdemeanors.'"[104]

*Kilbourn*, the first major case related to limits on congressional investigative authority, reveals that Congress enjoys no inherent power to investigate anyone. Instead, any investigation must further a legislative purpose. That purpose usually stems from Congress's enactment or review of legislation. However, Congress can also perform investigations to help discharge its other constitutional responsibilities, such as those related to impeachment or officer appointments.[105] It may also properly investigate private persons if its inquiry relates to potential corruption within executive branch departments.

*McGrain v. Daugherty*[106] illustrates that principle. In *McGrain*, a former Attorney General came under political fire for his alleged failure to prosecute various federal offenses.[107] Congress authorized a select Senate committee to investigate him, and that committee subpoenaed the Attorney General's brother, Mally Daugherty.[108] The committee apparently believed that Mally held important information, but he would not comply with the committee's subpoena.[109] The Senate eventually

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100 *Id.* at 195.

101 *Id.* at 193.

102 *Id.*

103 *Kilbourn*, 103 U.S. at 193.

104 *Id.* Today, it is commonly, but not universally, accepted that impeachable offenses go beyond criminal violations. *See* Frank O. Bowman, III & Stephen L. Sepinuck, *"High Crimes & Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1523–28 (1999). For a thoughtful dissenting view, see Nikolas Bowie, *High Crimes Without Law*, 132 HARV. L. REV. F. 59, 63 (2018) (rejecting the claim that "it is consistent with the text or spirit of the Constitution to convict someone for conduct that was lawful when it was done—that is, to convict someone of 'high Crimes' without law").

105 *See Kilbourn*, 103 U.S. at 197; *see also* Barry v. U.S. *ex rel.* Cunningham, 279 U.S. 597, 616 (1929) (holding that the Senate enjoys investigatory authority when it "acts as a judicial tribunal" and judges "the elections, returns, and qualifications of its members").

106 273 U.S. 135 (1927).

107 *Id.* at 150–52.

108 *Id.* at 152–53.

109 *Id.*

issued a warrant for Mally's arrest, and the Senate's deputy sergeant-at-arms detained him.[110]

Mally sought judicial relief and a district court held his detention unlawful.[111] The court concluded that the investigation exceeded the Senate's powers under the Constitution because the Senate had not contemplated the passage of legislation.[112] The Senate's resolutions also suffered from "extreme personal cast" and revealed a "spirit of hostility towards the then Attorney General."[113] The Senate was not "investigating the Attorney General's office," but was "investigating the former Attorney General."[114] By doing so, it had "put him on trial"[115] and had improperly exercised judicial rather than legislative power.

The Supreme Court reversed because the district court had mischaracterized the investigation.[116] "[R]ightly interpreted," the investigation sought "information for legislative purposes."[117] Though the Senate did not expressly state that it contemplated legislation through its investigation, the subject matter of the inquiry—the operation of an executive branch department—helped establish "the presumption . . . that this was the real object."[118] The Attorney General and the Department of Justice were each "subject to regulation by congressional legislation,"[119] and the department's activities relied on congressional appropriations. There was thus "no warrant for thinking the Senate was attempting or intending to try the Attorney General . . ."[120] The Senate could properly demand information from Mally, and he had been improperly released from custody.[121]

*McGrain* and *Kilbourn* establish general principles related to Congress's investigative authority. Under those principles, Congress can investigate persons and demand information only as an incident to its legislative or other constitutional responsibilities.[122] However, it is not

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110 *Id.* at 153–54.

111 *Ex parte* Daugherty, 299 F. 620, 639–40 (S.D. Ohio 1924), *rev'd sub nom.* McGrain v. Daugherty, 273 U.S. 135 (1927).

112 *Id.* at 638.

113 *Id.*

114 *Id.*

115 *Id.*

116 *McGrain*, 273 U.S. at 182.

117 *Id.* at 177.

118 *Id.* at 178.

119 *Id.*

120 *Id.* at 179.

121 *Id.* at 180.

122 *See also supra* notes 75–81 and accompanying text.

obvious how these principles relate to Congress's investigative authority in the tax context. The next Section addresses that issue.

### B. *Investigative Authority in the Tax Context*

No Supreme Court cases directly address Congress's authority to investigate the IRS and review tax return information held by the agency. Arguably, under the principles of *McGrain*, Congress should enjoy unfettered access to tax return information because it is held by an executive branch department subject to its oversight. Viewed that way, any congressional request for tax return information necessarily meets the legitimate legislative purpose standard. Viewed another way, the principles of *Kilbourn* should apply. Tax return information often includes sensitive, personal, and potentially embarrassing details,[123] and congressional requests for that information merit scrutiny.

The Coolidge Administration's approach suggests that Congress needs a legitimate legislative purpose to obtain tax return information. In 1924, a Senate committee opened an investigation into the Bureau of Internal Revenue and sought tax return information for various companies affiliated with Secretary Mellon.[124] Initially, Secretary Mellon cooperated and obtained privacy waivers from the targeted companies.[125] But President Coolidge eventually stated that the executive branch "ought not to be required to participate in" the investigation.[126] Though President Coolidge acknowledged that he would aid "any legitimate inquiry on the part of the Senate," he believed that the committee investigation went "beyond ... legitimate requirements."[127] He instead posited that the committee "must have been dictated by some other motive than a desire to secure information for the purpose of legislation."[128] By the committee's failure to pursue a legitimate legislative purpose, "the constitutional guaranty against unwarranted search and seizure br[oke] down," and "the prohibition against what amounts to a Government charge of criminal action without the formal presentment of a grand jury [was] evaded."[129]

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123 *See* REPORT TO ACUS, *supra* note 24, at 838.

124 S. Res. 168, 68th Cong., 65 CONG. REC. 4013–14 (1924).

125 Letter from Andrew Mellon to President Calvin Coolidge (Apr. 10, 1924), 65 CONG. REC. 6087 ("All companies in which I have been interested have been sought out. I have aided in obtaining from them the waiver of their right to privacy and in the delivery of their income-tax returns in complete detail to the committee.").

126 Letter from President Calvin Coolidge to the U.S. Senate (Apr. 11, 1924), 65 CONG. REC. 6087.

127 *Id.*

128 *Id.*

129 *Id.*

President Coolidge's concerns, which the New York Times published on its front page,[130] echoed those made by the Court in *Kilbourn*.[131] President Coolidge believed that a congressional investigation could improperly displace or duplicate proceedings assigned to the other branches. However, the Senate did not sue the executive branch for its refusal to comply with its investigation.[132] Thus, no court opined on how the legitimate legislative purpose requirement applies in the tax context.[133]

Nonetheless, other historical controversies show that a legitimate legislative purpose requirement can sensibly apply to requests for tax return information. A 1975 report to the Administrative Conference of the United States describes various congressional requests that seem politically or improperly motivated.[134] The House Committee on Internal Security, for example, obtained the tax returns for the Black Panther Party, the Students for a Democratic Society, the New Mobilization Committee to End the War in Vietnam, and the Progressive Labor Party.[135] That committee also sought tax return information for individual officers in those groups.[136] The Senate Committee on Government Operations disclosed that it sought returns from the IRS related to "campus disturbances and improprieties in the function of non-commissioned officers' clubs."[137]

A legitimate legislative purpose test may have prevented these apparently improper requests.[138] However, the taxpayers never mounted a challenge. Presumably, the IRS transferred the requested tax return information without notifying the affected taxpayers. But principles

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130 *See Text of the President's Message*, N.Y. TIMES, Apr. 12, 1924, at A1, https://perma.cc/G24R-RGCN.

131 Kilbourn v. Thompson, 103 U.S. 168 (1880).

132 For further context related to the Mellon controversy, see Yin, *supra* note 33 at 824–28.

133 One might argue that because Article I refers to a congressional power to "lay and collect taxes," Congress has uniquely broad authority to regulate and participate in tax administration. *See* U.S. CONST. art. I, § 8. However, the taxing power under the Constitution refers to Congress's authority to pass laws related to the imposition and collection of taxes. It does not imply that Congress can participate in the execution of the tax laws. *See id.* § 1 (referring to the "*legislative* powers herein granted") (emphasis added); *see also, e.g.*, THE FEDERALIST NO. 33 (Alexander Hamilton) ("What is the power of laying and collecting taxes, but a legislative power, or a power of making laws, to lay and collect taxes?"). Under similar reasoning, though the Constitution assigns the appropriations power to Congress, the executive branch issues payments, even when a private party specifically petitions Congress for monetary relief. *See* Reeside v. Walker, 52 U.S. 272, 291 (1850).

134 REPORT TO ACUS, *supra* note *24*.

135 *Id.* at 963.

136 *Id.*

137 *Id.* at 964.

138 Given the limited facts available in the report, it is impossible to definitively state that the congressional requests lacked a legitimate legislative purpose.

established by the Supreme Court suggest that taxpayer challenges could have been successful.

In *Watkins v. United States*,[139] for example, the Court expressly protected personal information from congressional requests. In that case, Watkins openly testified to a House subcommittee that he was not and had never "been a card-carrying member of the Communist Party."[140] But the subcommittee demanded that he identify persons who may have been a member of that party.[141] Watkins refused to do so and was convicted for contempt of Congress.[142]

The Court reversed his conviction. It emphasized that congressional investigations may be "justified solely as an adjunct to the legislative process."[143] Without that limitation, a committee investigation could "lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it."[144] The Watkins investigation illustrated that danger. The committee's authorizing resolution spoke vaguely of "un-American" activities and propaganda.[145] The Court thus doubted that the investigation related to labor legislation, as the government had contended.[146]

The tax return requests described in the 1975 Report seem like the inquiries described in *Watkins*.[147] Congress may thus have already used tax return information to target politically controversial groups. If no legitimate legislative purpose requirement applies, the executive branch would be powerless to defend against even the most egregious requests. For example, if a congressional tax committee requested tax returns for all minority federal officials, solely to harass them on account of their race, the IRS would have to comply with that request. But if the legitimate legislative purpose requirement applies to tax return information, the IRS could protect persons who were targeted for their skin colors.

One might nonetheless argue that Section 6103(f)(1) displaces the legitimate legislative purpose requirement. Through the statute, the argument might go, Congress has established its unqualified right to executive branch information and has thereby expanded its investigative

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139 354 U.S. 178 (1957).

140 *Id.* at 183.

141 *Id.* at 185.

142 *Id.* at 185–86.

143 *Id.* at 197.

144 *Id.* at 205.

145 *Watkins*, 354 U.S. at 201–02.

146 *Id.* at 202–03. *But see* Wilkinson v. U.S., 365 U.S. 399, 407 (1961) (upholding a conviction based solely upon the defendant's refusal "to answer the single question: 'Are you now a member of the Communist Party?'").

147 *See Watkins*, 354 U.S. at 184–85.

power. But that argument suffers from a major flaw: the Court has already established that Congress's power to investigate is "co-extensive with the power to legislate."[148] Congress thus has no significant gaps to fill by statute.[149] The Constitution addresses the breadth and limits of Congress's investigatory powers.[150]

Arguably, Section 6103(f)(1) expands investigatory powers in a way that does not rely on the impermissible expansion of constitutional authority. Through Section 6103(f)(1), Congress might have limited the confidentiality protections provided to tax return information. Thus, Congress would not need to exercise any investigatory powers to obtain that information. After all, Congress could, through legislation, make all tax return information available on a public database. If it did so, congressional committees would not need to rely on their investigatory powers to review that information. They could simply access the database.

But it is difficult to read Section 6103(f)(1) such that it eliminates taxpayer privacy. Section 6103 was designed to protect, rather than expose, taxpayer information. In 1976, Congress expressly amended Section 6103(a) such that tax return information would be "confidential."[151] This heightened protection would be illusory if Section 6103(f) allowed congressional tax committees to obtain and publish tax return information for any reason.

Admittedly, Section 6103(f) recognizes the special role that congressional tax committees play and might imply broad disclosure authority for them. A non-tax committee must receive special permission from its respective chamber to obtain tax return information, and the related House or Senate resolution must describe the purpose for its request.[152] Also, the non-tax committee cannot publish the acquired tax return information, absent taxpayer permission.[153] The absence of these statutory restrictions for tax committees might imply that tax committees

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148 Quinn v. United States, 349 U.S. 155, 160 (1955).

149 Of course, in close cases, courts might treat consistent congressional practices and statutes as a factor in determining the meaning of the Constitution. *See generally* William Baude, *Constitutional Liquidation,* 71 STAN. L. REV. 1, 13 (2019) (discussing how a path of "indeterminacy, a course of deliberate practice, and settlement" has resolved some constitutional questions).

150 *See supra* note 70.

151 An Act to Reform the Tax Laws of the United States, Pub. L. No. 94-455, Title XII, § 1202(a)(1), 90 Stat. 1667 (1976) (enacting a new version of Section 6103). For a summary of how congressional access to tax return information was addressed under prior law, see H.R. REP. 94-1515, at 30123 (1976) (Conf. Rep.).

152 *See* I.R.C. § 6103(f)(3) (2012).

153 *See id.* § 6103(f)(4)(B).

can obtain and publish tax returns for any reason, including illegitimate ones.[154]

However, if Congress intended to displace the legitimate legislative purpose requirement, this would be a rather awkward way to express that intention. The Congressional Research Service describes Section 6103(f) as a mechanism to "limit" how congressional committees access tax return information.[155] Unfettered congressional tax committee access to tax return information would thus seem inconsistent with the confidentiality principle embraced in Section 6103(a).

Professor Yin has shown how congressional amendments to Section 6103 were intended to protect against, rather than facilitate, improper disclosures.[156] The statute was amended in 1976 to address the abuse committed by the Nixon Administration.[157] But if Section 6103(f) applied no limits to congressional tax committees, "[i]t would mean that the same Congress that restricted the President's access to the information ... nevertheless intended to permit the tax committees to obtain and disclose publicly any information for no legitimate purpose."[158] Professor Yin thus argues that constitutional restrictions apply to congressional requests and disclosures of tax return information.[159]

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154 *Cf.* Yin, *supra* note 13, at 119–26.

155 *See* CONG. RES. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 49 (2014) ("Congress has chosen to enact laws that limit its own ability to access specific types of information. Arguably, the quintessential example of such self-limiting action is [I.R.C.] Section 6103(f), under which only the House Committee on Ways and Means, Senate Committee on Finance, and the Joint Committee on Taxation are permitted access to individual's tax returns."); *see also* DAVID H. CARPENTER, ET AL., CONG. RES. SERV., LSB10275, CONGRESSIONAL ACCESS TO THE PRESIDENT'S FEDERAL TAX RETURNS 2 (2019) ("[B]ecause [Section 6103(f)] 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.").

156 *See* Yin, *supra* note 13, at 129–37.

157 *See* I.R.C. § 6103(g) (establishing procedural rules and disclosure requirements related to a President's access to tax return information).

158 Yin, *supra* note 13, at 134.

159 Professor Yin's article focuses principally on the Section 6103(f)(4)(A) committee disclosure provisions, rather than the Section 6103(f)(1) committee access provisions. *See id.* at 132–37 (arguing that the statutory elimination of a "relevant or useful" requirement for committee disclosures did not meaningfully alter the proper standard that applies to those disclosures). However, Yin's article acknowledges that a legitimate legislative purpose requirement applies under Section 6103(f)(1). *See id.* at 134 ("[A]ccording to the Supreme Court, there is an implicit requirement that a Congressional investigation must have a valid legislative purpose."). *But see* George K. Yin, *How to Get Trump's Tax Returns—Without a Subpoena*, POLITICO (May 4, 2019), https://perma.cc/Q59C-QMCL (arguing that "Congress has a strong case" that "no purpose is needed at all" to obtain tax return information, and a congressional lawsuit proceeding under that theory "will be a good test to determine whether Trump has captured the judiciary").

That approach makes sense, because applying constitutional restrictions to Section 6103(f)(1) harmonizes the treatment of tax return information requests made under that statute with requests made through congressional subpoenas. If Congress demanded tax return information under Section 6103(f)(1) and the IRS refused, courts would not automatically enforce any subsequent congressional subpoena. Rather, the subpoena would be upheld only if it served a legitimate legislative purpose.[160] Thus, to the extent Congress proceeded through the courts, any of its requests for tax return information would face the legitimate legislative purpose test, regardless of what 6103(f)(1) otherwise said.[161]

Admittedly, some legislators may not have had the legitimate legislative purpose test in mind when they voted to pass the statute. During the 1920s, some legislators believed that Congress, as a co-equal branch, should enjoy the same unlimited access to tax returns that the executive branch did.[162] They may have thus believed that Section 6103(f)(1) would give them unfettered access to tax return information.

These legislators may have thought differently if they could have seen how the income tax would evolve. Through the 1930s, only around five percent of Americans, mostly wealthy, paid income taxes.[163] However, revenue needs precipitated by World War II turned the "class tax" into a "mass tax."[164] Unlimited congressional access may have thus originally

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160 *See* LOUIS FISHER, CONG. RES. SERV., RL31836, CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER, CRS-6 (2003) ("Legislative inquiries must be authorized by Congress, pursue a valid legislative purpose, raise questions relevant to the issue being investigated, and inform witnesses why questions put to them are pertinent.") (citing Wilkinson v. United States, 365 U.S. 399, 408-09 (1961)). The D.C. Circuit has applied a legislative purpose requirement to materials sought by Congress from the executive branch. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (rejecting committee subpoena because material sought would not be "critical to the performance of [the committee's] legislative functions").

161 *See, e.g.*, Hutcheson v. United States, 369 U.S. 599, 612 (1962) (upholding conviction that stemmed from the petitioner's failure to cooperate with a congressional investigation and rejecting his claim that the inquiry lacked a legislative purpose); Barenblatt v. United States, 360 U.S. 109, 127 (1959) ("The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose.").

162 *See* Yin, *supra* note 13, at 119-26 (discussing various legislators' statements concerning need for access to tax return information); *see also id.* at 122 ("Providing Congress with direct access to the information would potentially be a way to even the score between the two branches.").

163 *See* Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685, 685 (1989).

164 *See id* at 685-86; *see also* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS 1-11 (2d ed. 1989) (discussing "the conversion of the personal income tax from a levy on a modest fraction of the populace to a mass tax, a metamorphosis attributable to lower exemptions, higher rates, improved economic conditions, and inflation").

meant that legislators could review tax returns filed by Secretary Mellon and other businessmen. But later, it would mean that congressional tax committees could obtain and disclose returns made by ordinary Americans, for no reasons or for purely illegitimate ones.

In any event, the 1920s legislators rested their view on a mistaken understanding of the Constitution. Under our founding document, the President must "take Care that the Laws be faithfully executed."[165] That responsibility ensures the President's access to tax return information. He could not otherwise ensure the proper execution of the tax laws.[166] Congress, by contrast, has no law execution responsibility or authority.[167] It thus has no claim to tax return information in the absence of a legitimate legislative purpose.[168]

## III. Congressional Access to a President's Tax Return Information

The previous Part argued that congressional requests for tax return information must fulfill a legitimate legislative purpose. Otherwise, they exceed the powers granted by the Constitution. But this general approach does not answer whether a congressional request for a President's tax return information would automatically meet the legitimate legislative purpose standard. This Part first argues that such a congressional request would not automatically meet that standard. This Part then shows how Congress's investigatory authority would expand through a proper impeachment inquiry.

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165 U.S. CONST. art. II, § 3; *see also* STAFF OF J. COMM. ON INTERNAL REVENUE TAX'N, 94TH CONG., CONFIDENTIALITY OF TAX RETURNS, JCS-38-75, 8 (Comm. Print 1975), https://perma.cc/29A3-CM8P ("Significant questions may be raised with respect to whether the Congress can substantially limit Presidential access to tax returns.").

166 The executive branch has previously attempted to abuse this authority. *See* STAFF OF J. COMM. ON INTERNAL REVENUE TAX'N, 93RD CONG., INVESTIGATION INTO CERTAIN CHARGES OF THE USE OF THE INTERNAL REVENUE SERVICE FOR POLITICAL PURPOSES, JCS 37-73, 1 (Comm. Print 1973) (describing White House Counsel John Dean's failed attempts to direct IRS enforcement actions against President Nixon's political enemies). In response to Watergate-era concerns, Congress amended Section 6103 and required that the President disclose when he or she examines taxpayer return information. *See* I.R.C. § 6103(g) (2012); *see also* Andy Grewal, *The Battle for Trump's Taxes and the President's Potential Revenge*, 36 YALE J. ON REG.: NOTICE & COMMENT (2018), https://perma.cc/SMN5-CT5P.

167 *See* Quinn v. United States, 349 U.S. 155, 161 (1955) ("[T]he [Congressional] power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary.").

168 *See also* Trump v. Mazars USA, LLP, 940 F.3d 710, 739-40 (D.C. Cir. 2019) ("[I]f a committee could subpoena information irrelevant to its legislative purpose, then the Constitution would in practice impose no real limit on congressional investigations."), *cert. granted*, 2019 WL 6797734 (U.S., Dec. 13, 2019) (No. 19-715).

### A. *Congressional Requests for the President's Tax Returns in Connection with the Legislative Power*

Any argument that Congress may automatically review a President's tax return information must depend on its authority to oversee the executive branch. Under the Constitution, Congress establishes executive branch departments, like the Treasury and the IRS.[169] It also helps appoint officials to those departments, through the Senate's consent function.[170] And Congress may remove executive branch officials through the impeachment process.[171] These powers might collectively establish Congress's automatic right to obtain a President's tax return information. To oversee the executive branch, the argument might go, Congress must (1) see how federal officials handle the President's taxes and (2) determine whether the President has complied with the tax law.

However, general oversight authority cannot establish the constitutional basis for specific tax return information requests. Oversight authority exists only as an incident to other specified powers.[172] If tax return requests rely on the legislative power, they remain valid only to the extent that they facilitate the passage of legislation.[173]

It is doubtful that any proper legislation might arise from congressional inspection of a single President's or individual's tax returns. The tax code provides rules that apply to large classes of taxpayers, not rules that apply differently between persons.[174] The tax returns of a President who owns a farm or a baseball team or a real estate empire would shed no special light on how tax legislation should address those interests.

One might assert that congressional review of a President's tax return information could facilitate legitimate legislation targeted towards her. For example, if a President claimed a deduction or exclusion that Congress thought improper, it might pass legislation revoking the President's right

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169 *See* U.S. CONST. art. I, § 8; Prakash, *supra* note 72, at 1010; *see also* Act of July 1, 1862, Ch. 119, 12 Stat. 432 (1862) (establishing a Commissioner of Internal Revenue within the Treasury Department); An Act to Establish the Treasury Department, Ch. 12, 1 Stat. 65 (1789).

170 *See* U.S. Const. art. II, § 2, cl. 2; Staff of the J. Comm. on Tax'n, 116th Cong., Background Regarding the Confidentiality and Disclosure of Federal Tax Returns, JCX-3-19, 26–29 (Comm. Print 2019), https://perma.cc/Y8HJ-QVUJ (discussing congressional use of tax return information in connection with two Vice Presidential appointments).

171 *See* U.S. CONST. art. II, § 4.

172 *See, e.g.*, Watkins v. United States, 354 U.S. 178, 187 (1957) ("No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.").

173 *See* Quinn v. United States, 349 U.S. 155, 161 (1955) (explaining that investigative authority does not "extend to an area in which Congress is forbidden to legislate").

174 *See, e.g.*, I.R.C. § 162(a) (2012) (providing general rules for the deduction of business expenses).

to that tax benefit. But that legislation would likely reflect a bill of attainder or violate substantive due process principles.[175] The related tax return information requests thus could not relate to "a legitimate task of Congress,"[176] unless the passage of unconstitutional legislation somehow qualifies.[177]

Congress might instead believe that proposed changes to the Ethics in Government Act of 1978 support its inspection of a President's tax return information.[178] Under that act, the President, Vice President, members of Congress, and many other government officials must make detailed personal financial disclosures.[179] Legislators have proposed expanding the disclosure rules to include tax returns, and they may believe that a President's tax returns will aid the legislative process.[180] But it is doubtful that any given President's returns must be examined to amend ethics legislation.[181] Legislators who have advocated for tax return disclosure amendments presumably want their changes to apply to all future Presidents, not only to the sitting one.

Tax return demands based on ethics legislation seem especially strange because those demands subvert the compromise reached through that legislation. That is, through the Ethics in Government Act, the entire Congress and the President passed a law that determined the specific disclosures that federal officials, including the President, *must* make.[182] If a single congressional committee or a single chamber could nonetheless

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175 Any legislation that denied a taxpayer a claimed tax benefit would necessarily have retroactive effect. *See* Amandeep S. Grewal, *The Congressional Revenue Service*, 2014 U. ILL. L. REV. 689, 708–12 (2014) (discussing authorities that could render targeted, retroactive tax legislation susceptible to challenge as an unconstitutional bill of attainder or as inconsistent with substantive due process principles).

176 *Watkins*, 354 U.S. at 187.

177 *See* Trump v. Mazars USA, LLP, 940 F.3d 710, 723 (D.C. Cir. 2019) ("If no constitutional statute may be enacted on a subject matter, then that subject is off-limits to congressional investigators."), *cert. granted*, 2019 WL 6797734 (U.S., Dec. 13, 2019) (No. 19-715). *Cf.* Buckley v. Valeo, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." (citation omitted)).

178 *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

179 *See* 5 U.S.C. App. §§ 101–03 (2012).

180 *See* For the People Act, H.R. 1, 116th Cong. § 10001(b) (2019) (requiring disclosure of 10 years' returns for future candidates for President and Vice President, and for the current President and Vice President).

181 *Cf.* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) ("While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events.").

182 *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1836–37.

freely demand and potentially disclose the President's tax returns, that would upset the legislative agreement.[183] If problems exist with the Ethics in Government Act, that law should be amended through legislation and not undermined through congressional committee requests.[184]

Congress might instead believe that the Foreign Emoluments Clause[185] establishes its automatic right to a President's tax returns. That clause states that a "Person holding any Office of Profit or Trust under" the United States must receive congressional consent before she "accept[s]

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[183] Of course, a disclosure to a congressional committee does not necessarily imply public disclosure. *See Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978) ("We have heretofore held that release of information to the Congress does not constitute 'public disclosure.'") (quoting *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 979 (1976)). Thus, one might argue that transmittal of tax return information to a congressional committee supplements, rather than subverts, the ethics act. But Section 6103(f)(4)(a) provides, without limitation, that congressional tax committees may transmit tax return information to the full House or Senate, which effectively makes that information public. Even putting that aside, if Congress wanted the President to privately disclose further information, it likely would have made its intent clear. After all, the ethics act squarely addresses non-public disclosures for some officers and employees. *See* 5 U.S.C. App. § 107(a)(2) (2012) (financial information of some supervised officers or employees "shall be confidential and shall not be disclosed to the public"); *In re* Carollo, 31 FCC Rcd. 1461, 1465 (2016) ("Congress has determined that employee financial disclosures should be filed confidentially and withheld from public release for all but the most senior of government officials."). And, even if courts do not presume that Congress will disclose any information it receives, the disclosure to Congress itself may qualify as a judicially cognizable harm. *See* Trump v. Deutsche Bank AG, 943 F.3d 627, 637 (2d Cir. 2019), *cert. granted*, 2019 WL 6797733 (2019) (19-715) (agreeing with district court below that the "plaintiffs have an interest in keeping their records private from everyone, including congresspersons" and that disclosure to Congress of the plaintiffs' financial information "would cause irreparable harm").

[184] In *Trump v. Mazars*, the D.C. Circuit, over dissent, invoked existing and potential ethics legislation to support Congress's authority to obtain financial information from President Trump's accounting firm. 940 F.3d 710, 714–16 (D.C. Cir. 2019), *cert. granted*, 2019 WL 6797734 (U.S., Dec. 13, 2019) (No. 19–715). In doing so, the court emphasized that President Trump asserted no executive privilege over the requested information and that no accountant-client privilege existed under federal law. *See id.* at 724. Thus, the court believed the relevant documents enjoyed no legal protection. How the court would have treated federal tax return information remains uncertain, given the differences between that information and ordinary accounting records. *See, e.g.*, I.R.C. § 6103(a) (ensuring that tax returns would generally be treated as "confidential"); Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1411 (5th Cir. 1993) ("Income tax returns are highly sensitive documents; courts are reluctant to order their routine disclosure as a part of discovery. Not only are the taxpayer's privacy concerns at stake, but unanticipated disclosure also threatens the effective administration of our federal tax laws given the self-reporting, self-assessing character of the income tax system." (citations omitted)); Progressive N. Ins. Co. v. Sampson, No. 10–CV–566–GKF–PJC, 2011 U.S. Dist. LEXIS 76486, at *4–5 (N.D. Okla. July 14, 2011) (summarizing "compelling need" test used by various district courts in discovery disputes over tax returns); STAFF OF J. COMM. ON INTERNAL REVENUE TAX'N, 94TH CONG., JCS-38-75, CONFIDENTIALITY OF TAX RETURNS 4 (Jt. Comm. Print 1975) (acknowledging the "unique aspects of tax returns" and issues over "whether tax returns and tax information should be used for any purposes other than tax administration").

[185] *See* U.S. CONST. art. I, § 9, cl. 8.

of any present, Emolument, Office, or Title" from a foreign government.[186] If this clause applies to the President,[187] then Congress arguably must examine her tax returns to determine whether she has accepted prohibited emoluments.

But Congress has never approached the Foreign Emoluments Clause this way. Over the years, that clause has applied to thousands of appointed federal officers and arguably to several million federal employees.[188] If Congress really needed tax returns to exercise its consent function under the Foreign Emoluments Clause, it probably would have demanded those documents from federal officers or employees.[189] However, Congress has repeatedly addressed Foreign Emoluments Clause issues through legislation, Comptroller General opinions, and resolutions, without the aid of tax returns.[190] It is thus hard to believe that that clause establishes Congress's automatic right to review the President's or anyone else's tax returns.

None of this means that Congress remains powerless to investigate problems with the tax administration process. *Watkins* establishes that Congress may investigate the executive branch to "expose corruption, inefficiency or waste."[191] This investigatory power would include improprieties related to audits of a President's tax returns.

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186 *See id.*; *see also* Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 641–42 (2017) (arguing that "emolument" in the Constitution refers to compensation received in exchange for the performance of services).

187 *See* Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 412 (2012) (describing "several good reasons to believe that *Office of Profit or Trust under [the United States]*, as used in the Foreign Emoluments Clause, does not reach federal elected positions, i.e., members of Congress, the presidency, and the vice-presidency"). In *Mazars*, the D.C. Circuit stated, without meaningful analysis, that the Foreign Emoluments Clause applied to the President. *See Mazars*, 940 F.3d at 734. The dissent noted that "the scope of the Foreign Emoluments Clause is an unresolved question that is currently pending before this court." *Id.* at 778 (Rao, J., dissenting).

188 *See* Andy Grewal, *What DOJ Opinions Say About Trump and the Foreign Emoluments Clause*, NOTICE & COMMENT, YALE J. REG., (Dec. 7, 2016), https://perma.cc/KLT8-VVR3 (discussing different positions taken by the Department of Justice Office of Legal Counsel on the scope of persons subject to the Foreign Emoluments Clause).

189 In recent decades, various Presidents have publicly released their tax returns. However, the public record reveals no instance in which Congress relied on those returns to exercise its consent function under the Foreign Emoluments Clause. Additionally, the public record does not reveal any instance in which Congress relied on a President's tax returns to make impeachment determinations under the Domestic Emoluments Clause. *See* U.S. CONST. art. II, § 1, cl. 7.

190 *See generally* Grewal, *supra* note 188 (discussing and citing numerous legal authorities related to the Foreign Emoluments Clause).

191 Watkins v. United States, 354 U.S. 178, 187 (1957).

President Richard Nixon's tax problems illustrate this. Nixon had allegedly claimed an improper charitable contribution deduction, and the public grew concerned.[192] Some commentators believed that IRS officials would not "audit the tax returns of the President of the United States as if he were an ordinary taxpayer."[193] Even if IRS officials did so, the President's influence over the executive branch made it unlikely that any audit results would be "reached in the proper disinterested manner."[194]

Congress eventually investigated Nixon's proper tax liability when he voluntarily disclosed his returns to the JCT.[195] The JCT found substantial understatements, as did the IRS when it responded to public pressure and reexamined Nixon's returns.[196] This unfortunate episode shows that unique dangers may arise when a President's subordinates process his tax returns.

However, IRS procedures, originally adopted in 1977, should address basic congressional concerns in this area.[197] Under the Internal Revenue Manual, the President's tax returns face "mandatory examinations and cannot be surveyed."[198] Those returns also face "different processing, safeguarding, and auditing rules than other tax returns."[199] The returns must go to a specific IRS service center, rather than the one located near the President's residence.[200]

The President does not select the IRS personnel who will process her returns.[201] Rather, a director in the small business division assigns and transfers the returns to a specific manager.[202] That manager then determines the group of auditors who will examine the President's returns. These auditors will be insulated from political influence and

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192 *See* Joseph J. Thorndike, *JCT Investigation of Nixon's Tax Returns*, 151 TAX NOTES 1527, 1529, (2016), https://perma.cc/U8S2-M5AC (describing journalistic efforts to uncover facts related to donation). The JCT eventually found problems with Nixon's returns beyond the charitable deduction donation. *See id.* at 1534 (describing issues related to a real estate sale and Nixon's apartment in New York). For further discussion, see generally David A. Ludtke, *Tax Primer for Practitioners: Senate Report 93-768*, 54 NEB. L. REV. 58 (1975) (summarizing JCT investigation and issues addressed).

193 Ira L. Tannenbaum, *Income Tax Treatment of Donation of Nixon Pre-Presidential Papers*, 134 TAX NOTES 313, 319 (2012), https://perma.cc/P6E8-FEBU.

194 *Id.*

195 *See* S. REP. NO. 93-768, pt. 1, at 1 (1974).

196 *See* Thorndike, *supra* note 192, at 1533-35.

197 IRM 4.2.1.15 (Aug. 24, 2017); *see also* IRM 3.28.3.5.3 (Jan, 1, 2020).

198 IRM 4.2.1.15; *see also* IRM 3.28.3.5.3.

199 STAFF OF J. COMM. ON TAX'N, 116TH CONG., BACKGROUND REGARDING THE CONFIDENTIALITY AND DISCLOSURE OF FEDERAL TAX RETURNS 20 (2019) [hereinafter 2019 JCT Report].

200 I.R.M. 4.2.1.15.

201 *See id.*

202 *Id.*

"must never initiate, terminate, or in any way modify" their responsibilities based on requests from others.[203] After this audit, the President's returns undergo *another* mandatory review by IRS personnel in Baltimore.[204] This final review verifies that the audit followed the mandated procedures and that it reached the correct conclusions.

If Congress has concerns that the IRS has not properly audited a President's tax returns, its investigation should begin with the IRS. For example, Congress can appropriately meet with the IRS Commissioner and discuss whether the mandatory audits had been performed.[205] Congress could also fairly request documentation confirming those audits. These sorts of inquiries fit comfortably within legislative oversight principles and do not step into law execution.[206] If these inquiries raise concerns that the President or the IRS has engaged in wrongdoing, Congress could establish the legitimate legislative purpose required to request tax return information.

To identify wrongdoing, Congress can also rely on the Treasury Inspector General for Tax Administration ("TIGTA"), whose office it established under the Internal Revenue Service Restructuring and Reform Act of 1998.[207] TIGTA acts like the "internal watchdog"[208] for the IRS and does not shy away from controversy. It has "become an outspoken critic of IRS practice,"[209] particularly when responding to

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203 2019 JCT REPORT, *supra* note 199, at 22 (citing I.R.M. 4.10.2.2.3).

204 I.R.M. 4.2.1.15.

205 "Whether [a] taxpayer's return was, is being, or will be examined or subject to other investigation or processing" constitutes return information protected by Sections 6103(a) & (b)(2)(A). However, given that the IRS already publicly discloses its mandatory audits for Presidents, a request for general information about those audits would be easily supported by Congress's investigatory powers. Also, though an IRS officer or employee may face consequences for improper disclosures of tax return information, no penalty applies for disclosures authorized by the tax code. *See* I.R.C. § 7213(a) (2012). Thus, if a congressional committee requests tax return information under Section 6103(f) and its request is supported by a legitimate legislative purpose, an IRS officer or employee may lawfully comply with the request.

206 *See* Sinclair v. United States, 279 U.S. 263, 295 (1929) (holding that absent independent legislative purpose, "Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits"), *overruled on other grounds by* United States v. Gaudin, 515 U.S. 506 (1995).

207 *See* Pub. L. No. 105-206, § 1103(a), 112 Stat. 685, 705 (1998) (codified at 5 U.S.C. App. 3 § 2). The IRS's Inspection Service had previously performed some of the monitoring functions now performed by TIGTA.

208 MICHAEL I. SALTZMAN & LESLIE BOOK, IRS PRACTICE & PROCEDURE ¶ 1.03 (Research Inst. of Am. rev. 2d ed. 1991).

209 *Id.*

congressional concerns.[210] If Congress believes that the IRS has improperly handled the President's tax returns, it can seek assistance from TIGTA, the agency that it established to investigate that sort of impropriety.

Congress may rely on other features of the statutory disclosure regime that it established. Usually, federal employees cannot disclose tax return information that they obtained through their government service.[211] Protected tax return information would generally include whether and how someone was audited.[212] But Section 6103(f)(5) allows whistleblowers to disclose that information. Under that provision, a federal employee can disclose any tax return information to a congressional tax committee if that information relates to "possible misconduct, maladministration, or taxpayer abuse" by the IRS. Thus, if a federal employee became aware that the President's tax returns had been audited corruptly, she could notify a congressional tax committee. Congress need not rely solely on the President's word—federal employees can step forward in cases of IRS wrongdoing.

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210 TIGTA has frequently initiated investigations in response to congressional concerns. *See, e.g.*, U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., REVIEW OF THE ISSUANCE PROCESS FOR NOTICE 2018-54, REFERENCE NO. 2019-14-019 (2019) ("TIGTA initiated this audit based on a request from the Chairman of the U.S. House of Representatives Committee on Ways and Means concerning the prioritization and issuance of IRS Notice 2018-54."); U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., REVIEW OF THE PROCESSING OF REFERRALS ALLEGING IMPERMISSIBLE POLITICAL ACTIVITY BY TAX-EXEMPT ORGANIZATIONS, REFERENCE NO. 2019-10-006 (2018) ("A U.S. Senate Committee on Finance (Committee) bipartisan investigation concluded that the IRS had not performed any examinations of 501(c)(4) tax-exempt groups based on referrals alleging impermissible political activity from 2010 to 2014. . . . The Committee recommended that TIGTA review the IRS's revised procedures and whether referrals have resulted in examinations."); U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., THE INTERNAL REVENUE SERVICE CONTINUES TO REHIRE FORMER EMPLOYEES WITH CONDUCT AND PERFORMANCE ISSUES, REFERENCE NO. 2017-10-035 (2017) ("This audit was requested by a U.S. Senator."); U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., ELECTRONIC RECORD RETENTION POLICIES DO NOT CONSISTENTLY ENSURE THAT RECORDS ARE RETAINED AND PRODUCED WHEN REQUESTED, REFERENCE NO. 2017-10-034 (2017) ("This audit was requested by the Chairman of the House Committee on Ways and Means and Chairman of the Senate Committee on Finance . . . "); U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., AFFORDABLE CARE ACT: ANALYSIS OF TAX YEAR 2014 NONFILERS WHO RECEIVED ADVANCE PREMIUM TAX CREDIT PAYMENTS, REFERENCE NO. 2017-43-021 (2017) ("This audit was conducted at the request of the Chairman of the U.S. Senate Committee on Finance."); U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW, REFERENCE NO. 2013-10-053 (2013) ("TIGTA initiated this audit based on concerns expressed by members of Congress.").

211 *See* I.R.C. § 6103(a). When speaking about Section 6103 and related tax statutes, this Article refers to employees in the colloquial sense. That is, various tax code provisions refer to IRS officers *or* employees. Here, "employees" refers to both. The term also includes various other persons covered by Section 6103(a) and related provisions. Further details about the statutory regime and covered persons are unnecessary to understand the points argued here.

212 *See id.* §§ 6103(a), (b)(2)(A).

In some cases, IRS personnel *must* report Presidential influence over the tax administration process. Under Section 7217(a), the President and some other persons cannot request that the IRS begin or end any audits or investigations.[213] Under Section 7217(b), if an IRS employee receives such a request, he must report that request to TIGTA.[214] If he does not, he faces up to five years of imprisonment.[215] Thus, if the President orders that the IRS end an audit or investigation into her own tax liability, she faces the risk that TIGTA and potentially Congress will learn about her order.[216]

The JCT's refund review function might also provide Congress with assurances that a President has not gotten away with massive tax fraud. Under Section 6405(a), the IRS cannot pay a refund greater than two million dollars to any individual unless it first reports to the JCT the identity of the taxpayer involved, the amount of the proposed refund, and a summary of the relevant facts.[217] Though the statute merely imposes a thirty-day waiting period on the IRS, the JCT in practice enjoys veto authority over large refunds.[218] The IRS will not pay those refunds over the JCT's objection or will delay payment (beyond the statutory thirty-day review period) until it hears from the JCT.[219] To the extent that Congress has concerns that a President has improperly received large refunds

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213 *See id.* § 7217(a) ("It shall be unlawful for any applicable person to request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer."); *id.* § 7217(e) (defining "applicable person" to include the President and some others). The statute's plain language flatly restricts the President from participating in a key aspect of the tax administration process. This creates constitutional concerns beyond the scope of this Article.

214 The statute applies to IRS employees and officers. *See id.* § 7217(b) ("Any officer or employee of the Internal Revenue Service receiving any request prohibited by subsection (a) shall report the receipt of such request to the Treasury Inspector General for Tax Administration."). The persons covered by Section 7217 do not correspond to the broader class of persons covered by Section 6103. *Compare id.* (covering all officers and employees of the IRS), *with id.* § 6103(a) (covering all state and federal officers and employees as well as those with access to returns and return information). However, fine distinctions between the two statutes are not necessary to understand the argument presented here.

215 *See id.* § 7217(d).

216 TIGTA prepares semiannual reports for Congress and could generally describe any Section 7217(a) requests in those reports. *See* 5 U.S.C. App. 3 § 5(a) (providing list of issues that TIGTA must inform Congress about and providing discretion to supply further information). It's theoretically possible that the President could avoid the statutory restrictions by directing her Attorney General to issue the audit-related order. *See* I.R.C. § 7217(e)(2) (providing that the Attorney General is not subject to Section 7217(a) limitations). However, depending on the facts, a President's order to the Attorney General could be treated as an order directly from her to the IRS.

217 I.R.C. § 6405(a).

218 *See* Grewal, *supra* note 175, at 695–99 (discussing JCT practice and providing illustrative examples).

219 *See id.* at 695–96.

described in Section 6405(a), it should already have the information needed to begin an investigation.

One might naturally argue that if the JCT already receives individual tax return information through Section 6405, there should be no constitutional objection to further requests for a President's tax return information. But that argument overlooks that, whatever its wisdom, the JCT refund review function remains constitutionally dubious.[220] The D.C. Circuit Court of Appeals has already struck down, on separation of powers grounds, a statute that mandated a congressional review period like the one described in Section 6405.[221] Also, in the 1990s, the JCT refund review function came under fire when one congressional subcommittee chair argued that it is "the IRS's job to determine tax refunds—not Congress'."[222] And when Congress passed legislation that would have formally provided the JCT with a veto over large refunds, President Herbert Hoover vetoed that legislation.[223] Thus, existing congressional involvement in large refund determinations can hardly deflect constitutional concerns with committee requests for specific tax return information.

### B. *Congressional Requests for the President's Tax Returns in Impeachment Proceedings*

The foregoing analysis considered congressional requests made in connection with the legislative power. In that context, if Congress investigates individuals, courts must guard against the improper assumption of executive or judicial powers. The President prosecutes individual cases and the judiciary decides them. Congress cannot properly perform those functions.

But congressional impeachment proceedings change everything. To impeach the President or another officer, Congress must, in a sense, try and decide an individual case.[224] In this context, Congress's right to

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220 *See id.* at 700–19.

221 *See* Hechinger v. Metro. Wash. Airports Auth., 36 F.3d 97, 105 (D.C. Cir. 1994) (striking down arrangement under which a federal agency could not take some key actions unless it provided a board, led by members of Congress, with notice and opportunity to review those actions).

222 *See* Sheryl Stratton, *JCT Oversight of IRS Should Be Expanded, Not Eliminated, Say Pearlman, Alexander*, TAX NOTES TODAY, June 15, 1995, at 1 (quoting June 12, 1995 statement by subcommittee Chair Ron Packard).

223 *See* Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56 (1936) (explaining grounds for Hoover's decision to veto the legislation).

224 Under the Constitution, the House enjoys the power to impeach and the Senate has "the sole Power to try" those impeachments. U.S. CONST. art. I, §§ 2–3. The reference to "try" does not necessarily imply procedures analogous to a criminal trial, and the Supreme Court has emphasized that the term "lacks sufficient precision to afford any judicially manageable standard of review . . ."

information about an officer supports information requests broader than those made in the legislative context.

Early Presidential practice illustrates this. In 1796, for example, President George Washington resisted the House's request for information related to the Jay Treaty.[225] He emphasized that the Senate, not the House, played a role in treaty ratification, and that the treaty negotiation process must be kept secret.[226] To grant the House "all the papers respecting a negotiation with a foreign power" would "establish a dangerous precedent."[227] But President Washington acknowledged that the treaty documents could be relevant if the House had pursued impeachment.[228] This admission shows that information that cannot be obtained through one congressional power may be obtained through another.

Other Presidents have expressed similar sentiments, albeit through equally defensive postures. President James Polk, for example, refused a congressional request for some information but "cheerfully admitted" that the impeachment power gave Congress "the right to investigate the conduct of all public officers under the government."[229] The legislature's right to information could "penetrate into the most secret recesses of the executive departments," and could "compel [federal officials] to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge."[230] Nonetheless, because Congress had not specified executive branch wrongdoing, President Polk advised Congress that it should enact a statutory amendment if it desired the otherwise protected information.[231]

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Nixon v. United States, 506 U.S. 224, 230 (1993). Thus, impeachment procedures are roughly analogous, but not identical to, the indictment and trial process followed in the federal courts for criminal defendants.

225 LOUIS FISHER, CONG. RES. SERV., RL30966, CONGRESSIONAL ACCESS TO EXECUTIVE BRANCH INFORMATION: LEGISLATIVE TOOLS, CRS-5–CRS-9 (2001), https://perma.cc/4CBR-5C8K.

226 25 ANNALS OF CONG. 760 (1796), https://perma.cc/Q7H2-MPGF.

227 *Id.*

228 *Id.* ("It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment; which the resolution has not expressed.").

229 Letter from President James K. Polk to the House of Representatives (Apr. 20, 1846), *in* H.R. JOURNAL, 29th Cong., 1st Sess. 693 (1846). President Polk's comments were made in response to a request for information about some expenditures related to international relations. *See id.* at 694. Polk would not disclose information that President John Tyler had previously determined, through his statutory authority, should remain private. *See id.* at 691–92. Polk advised that Congress should consider amending the statute if it deemed it wise to do so. *See id.* at 694.

230 *See id.* at 693.

231 *See id.* at 694.

President Andrew Jackson reacted more fiercely to an allegedly baseless congressional information request. He would not permit himself or "the Heads of the Departments to become our own accusers, and to furnish the evidence to convict ourselves."[232] But he acknowledged that if the investigating committee could establish even "the slightest reason to suspect corruption," he would open the executive branch to "the fullest scrutiny by all legal means."[233] President Ronald Reagan's Attorney General similarly emphasized the executive branch's general authority to withhold documents from Congress. But he acknowledged that the executive branch would not withhold materials when they contained "evidence of criminal or unethical conduct by agency officials."[234]

The Supreme Court has less equivocally observed that Congress's investigatory power expands in the impeachment context. *Kilbourn*, discussed earlier,[235] invalidated a congressional attempt to secure information from a private person about a company that had conducted business with the United States. But the Court acknowledged that if Congress had pursued impeachment against the federal official involved (the Navy Secretary), the "whole aspect" of the case would have changed.[236] This again shows that Congress can obtain information through impeachment inquiries that it might not be able to secure through other means.

Those principles aside, congressional authority to investigate a federal official's wrongdoing may face important limits. In 1948, for example, the House Committee on Un-American Activities made serious accusations against Edward Condon, a Senate-confirmed and potentially impeachable federal official.[237] The committee believed that Condon presented a national security threat, and that he was not loyal to the United States.[238] It thus sought his personnel file, but the Commerce

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[232] *See* Letter from President Andrew Jackson to the House of Representatives (Jan. 26,1837), https://perma.cc/7U6M-7HAK.

[233] *Id.*

[234] *See* Assertion of Exec. Privilege in Response to Cong. Demands for Law Enf't Files, 6 Op. Att'y Gen. 31, 36 (1982).

[235] *See infra* Part II.A.

[236] Kilbourn v. Thompson, 103 U.S. 168, 193 (1880).

[237] Condon served as the director of the National Bureau of Standards. *See* Jessica Wang, *Science, Security, and the Cold War: The Case of E. U. Condon*, 83 ISIS 238, 238 (1992). He was confirmed to his position in November 1945; *see* PHILIP M. MORSE, NAT'L ACAD. OF SCI., EDWARD UHLER CONDON: 1902–1974 137 (1976), https://perma.cc/HF58-EY5C.

[238] *See* Richard P. Milloy, *Power of the Executive to Withhold Information from Congressional Investigating Committees*, 43 GEO. L. J. 643, 651 (1955) (describing controversy); *see also* COMM. ON UN-AMERICAN ACTIVITIES, REPORT TO THE FULL COMMITTEE OF THE SPECIAL SUBCOMMITTEE ON NATIONAL SECURITY OF THE COMMITTEE ON UN-AMERICAN ACTIVITIES: INVESTIGATION OF UN-AMERICAN ACTIVITIES IN THE UNITED STATES, 80TH CONG. 2D SESS. (1948).

Secretary would not furnish it.[239] President Harry Truman then issued a broad order protecting executive branch personnel records from disclosure.[240] That order stated that "[a]ny subpoena or demand or request" should be declined and forwarded to his office.[241] Though Truman's order did not specifically refer to impeachment-related subpoenas, its sharp language suggests that no modifications would have been made for them.[242]

This historical practice suggests that when Congress initiates an impeachment inquiry, the separation of powers limitations at issue in cases like *Kilbourn* must yield.[243] But other limitations need not. The executive branch could properly ignore a subpoena driven solely by racial animus, even if it were issued through an impeachment investigation. No authority suggests that a congressional committee can invoke impeachment for illegitimate reasons and then obtain any information it wants.

However, it is unclear whether and how a court would handle these issues. If, as then-House Minority Leader Gerald Ford claimed, "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history,"[244] courts might lack any discretion to quash an impeachment related subpoena. Congress could even argue, rather strangely, that *complying* with the tax law qualifies as an impeachable offense. It might then demand the President's tax returns to see whether she has so complied. More realistically, a committee might assert an interest in some official wrongdoing that might be reflected on tax returns. In that case, a court might reluctantly determine whether such potential wrongdoing could qualify as a high crime or misdemeanor under the Constitution.[245]

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239 *See* Milloy, *supra* note 238, at 651 (describing controversy).

240 Confidential Status of Employee Loyalty Records, Exec. Dir., 13 Fed. Reg. 1359, 1359 (Mar. 13, 1948), https://perma.cc/3SH7-UC9W.

241 *Id.*

242 For further discussion of the legal issues raised by Truman's order, see *Power of the President to Refuse Congressional Demands for Information*, 1 STAN. L. REV. 256 (1949).

243 *Kilbourn* itself noted each chamber's broad investigatory authority in impeachment matters. *See* Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) ("Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases.").

244 116 CONG. REC. 11913 (1970).

245 *See* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 731 (1988) ("No statute presently undertakes to provide any general definition of impeachable offenses. In such a case the nature of the proceeding makes it more difficult for the court to apply any judicial criteria for review."). *Kilbourn* suggests, however obliquely, that the Court may

Litigation issues aside, Congress enjoys exquisitely broad, but not unlimited, authority to obtain information about executive branch officers under impeachment investigations. In the tax context, if Congress made impeachment inquiries about a President and properly determined that the President's tax return information was relevant to its inquiry, the IRS could not plausibly withhold that information. Additionally, though Section 6103(f)(1) speaks of congressional attempts to secure tax return information from the IRS, a statute cannot limit the persons from whom Congress can require information.[246] That is, as part of a proper impeachment inquiry, Congress could demand the President's tax return information from the President himself or even from private persons with access to that information.

But outside the impeachment context, Congress may obtain a President's tax return information only for a legitimate legislative purpose. This Part explained why. The next Part explores other legal issues that would arise if the IRS rejected a Section 6103(f)(1) request and Congress subsequently issued a subpoena seeking the President's tax return information.

## IV. Judicial Enforcement

If a congressional committee sought a President's tax return information from the IRS, a legitimate legislative purpose would need to support it. Otherwise, the IRS would likely ignore the committee's request.[247] Even if the committee sought judicial relief,[248] a court would quash any subpoena for tax return information that lacked a legitimate legislative purpose.

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examine whether congressional justifications for information relate to an impeachable offense. *See supra* notes 102–104 & accompanying text.

[246] *See* Bruhl, *supra* note 64, at 351. *Cf.* ALISSA M. DOLAN, ET AL., CONG. RES. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 41 (2020) (describing Section 6103(f) as a "self-limiting action" by Congress).

[247] *Cf.* Tax Analysts v. I.R.S., 117 F.3d 607, 613 (D.C. Cir. 1997) ("The IRS and the Office of Chief Counsel are the gatekeepers of federal tax information. Through § 6103, Congress charged these two agencies and their employees with the duty of protecting return information from disclosure to others within the federal government, and to the public at large.").

[248] It is unclear whether courts may entertain congressionally initiated lawsuits. *See* Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S.Ct. 2652, 2665 n.12 (2015) ("[W]hether Congress has standing to bring a suit against the President. . . . raise[s] separation-of-powers concerns . . ."). For further analysis, see generally Amandeep S. Grewal, *Congressional Subpoenas in Court*, 98 N.C. L. REV. 1043 (2020) (arguing that Congress lacks Article III standing to judicially enforce its subpoenas). *See also* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1154 (2009) ("[C]ourts have never offered a persuasive reason why a congressional subpoena to an executive branch official is a matter of which the judiciary can properly take notice.").

The legitimate legislative purpose standard raises potentially difficult factual questions, but one can imagine some easy cases. Suppose, for example, that a congressional committee had concerns about whether a President's tax returns were properly audited. Suppose further that the congressional committee followed normal practices and asked TIGTA to investigate. If TIGTA's report revealed improprieties, the committee would have solid grounds to investigate and demand any relevant tax return information.

One can also imagine easy cases that run the other way. If a congressional committee requested a President's tax return information solely to harass him on account of his race, the IRS could properly refuse that request. Pursuing "invidious racial discrimination" does not qualify as a legitimate legislative purpose.[249] Though Section 6103(f)(1) says, without qualification, that the IRS "shall furnish" tax return information to congressional committees,[250] the Constitution controls over the statute's language.

Unfortunately, real-life cases will rarely present the issues as cleanly as these hypotheticals. The recent tax return dispute over President Trump's tax return information illustrates this.[251] Through its chairman, the House Ways & Means Committee asked the IRS to provide President Trump's complete tax returns from the past six years.[252] The committee also requested the complete tax returns for several entities in which President Trump holds an interest.[253] These requests were followed by a subpoena,[254] which the Department of Treasury—acting on the advice of the Department of Justice—defied.[255] The parties have now taken their dispute to federal court.[256]

To support its litigation position, the committee has described its interest in the extent to which the IRS audits and enforces the tax laws

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249 *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) (referring to the "invidious racial discrimination forbidden by the Constitution").

250 I.R.C. § 6103(f)(1) (2012).

251 *See* Letter from Rep. Richard E. Neal to IRS Comm'r Rettig and Dep't of Treasury Sec'y Mnuchin, *supra* note 9, at 4–8 (containing the subpoena as an attachment to letter); *see also* Comm. on Ways & Means, United States House of Representatives v. United States Dep't of the Treasury, No. 1:19-cv-01974 (D.C. Dist. Ct. Aug. 29, 2019) (slip copy of signed order).

252 *See* Letter from Rep. Richard E. Neal to IRS Comm'r Rettig, *supra* note 5, at 1.

253 *See id.* at 2.

254 *See* Letter from Rep. Richard E. Neal to IRS Comm'r Rettig and Dep't of Treasury Sec'y Mnuchin, *supra* note 9, at 4–8.

255 *See* Dep't of Treasury Office of Legal Counsel, Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f) (Jun. 13, 2019).

256 *See* Comm. on Ways & Means, United States House of Representatives v. United States Dep't of the Treasury, No. 1:19-cv-01974 (D.C. Dist. Ct. Aug. 29, 2019) (slip copy of signed order).

against a President.[257] To pursue that investigative interest, the committee wants information on whether the IRS, under its mandatory audit procedures for Presidents, also automatically examines business tax returns that might affect the President's returns.[258] Given this focus on IRS audit processes, the committee has subpoenaed all administrative files related to the requested returns.[259] The committee claims that the subpoenaed tax return information will help the committee evaluate legislative proposals and perform its oversight responsibilities.[260]

Whether the committee subpoena furthers a legitimate legislative purpose presents a novel question. Under one view, the Ways & Means Committee oversees the IRS and therefore enjoys broad authority to subpoena tax return information related to agency audits.[261] Inquiries on Presidential audits enjoy particularly strong support given the potential that the President might wield his influence to secure favorable treatment from the IRS. Under this view, a legitimate legislative purpose supports the committee subpoena. For Congress to appropriately monitor the executive branch, it must know how the IRS treats the President. Otherwise, a President could engage in improper tax avoidance, as many allege that President Trump may have done.[262]

Under another view, the committee subpoena, on its face, raises concerns about whether a legitimate legislative purpose exists. The committee subpoena seems pretextual given the disjunction between the stated purpose and the documents requested. The committee has requested, among other things, internal IRS files on President Trump's returns that were prepared in 2013, 2014, 2015, and 2016.[263] But these materials have nothing to do with how the IRS audits a President because Donald Trump did not take office until 2017.

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257 *See* Letter from Rep. Richard E. Neal to IRS Comm'r Rettig and Dep't of Treasury Sec'y Mnuchin, *supra* note 9, at 2.

258 *See* Letter from Rep. Richard E. Neal to IRS Comm'r Rettig, *supra* note 5, at 1–2.

259 *See* Letter from Rep. Richard E. Neal to IRS Comm'r Rettig and Dep't of Treasury Sec'y Mnuchin, *supra* note 9, at 5.

260 *See id.* at 1–2.

261 *See* Letter from Rep. Richard E. Neal to IRS Comm'r Rettig, *supra* note 5, at 1 (emphasizing committee's oversight authority); *see also* Seth Hanlon, *President Trump Cannot Hide His Tax Returns from Congress*, CTR. FOR AM. PROGRESS (Apr. 1, 2019, 2:00 PM), https://perma.cc/5A3G-XR6J ("Congress has multiple reasons to obtain and review President Trump's tax returns[.]"); Daniel Hemel, *Democrats Demanded Trump's Tax Returns. Then They Dragged Their Feet.*, POLITICO (Mar. 8, 2019), https://perma.cc/Z6TH-AMHW (encouraging a request for President Trump's tax returns and outlining potential justifications).

262 *See, e.g.*, Lily Batchelder, Opinion, *Trump Is a Bad Businessman. Is He a Tax Cheat, Too?* N.Y. TIMES (May 9, 2019), https://perma.cc/FEV8-PJP4.

263 *See* Letter from Rep. Richard E. Neal to IRS Comm'r Rettig and Dep't of Treasury Sec'y Mnuchin, *supra* note 9, at 5 (Schedule A).

The committee might respond that it has a legitimate interest in seeing how elevation to the Presidency affects IRS audit practices. That is, the Ways & Means Committee may wish to compare the handling of President Trump's 2017 tax returns with the handling of his 2013–2016 returns. This could yield insights on whether the Presidency leads to greater (or lesser) IRS scrutiny. However, this sort of taxpayer-specific inquiry raises concerns about whether the committee wishes to engage in law execution rather than legislative oversight. The committee might have stood on firmer ground if it had subpoenaed the corresponding tax return information for all Presidents subject to the IRS's mandatory audit procedures.

Because the Ways & Means Committee has subpoenaed the tax return information for only one President, its request creates tensions with the principles established in *McGrain*.[264] In that case, discussed in Part II.A, the Court blessed a congressional subpoena for documents related to a past Attorney General. In doing so, the Court found that Congress had sought to investigate the Department of Justice[265] and was in no way "attempting or intending to try the Attorney General"[266] for crime or wrongdoing. But the committee's surgical request for President Trump's tax return information suggests that it wants to investigate President Trump specifically, rather than Presidential audits generally.

Statements by individual legislators may also raise concerns about improper pretexts. Legislators have heavily criticized President Trump for withholding his tax returns, but they have not done so on oversight grounds.[267] Some have expressed concerns about conflicts of interest, foreign business connections, and emoluments violations.[268] Others have promised to publicly release President Trump's tax returns for the sake of doing so, without any mention of legitimate legislative purposes.[269]

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264 *See* McGrain v. Daugherty, 273 U.S. 135, 177–81 (1927).

265 *Id.* at 177 ("[T]he subject to be investigated was the administration of the Department of Justice . . . Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.").

266 *Id.* at 179.

267 *See* Letter from Hon. Steven T. Mnuchin, Sec'y, Dep't of Treasury, to Hon. Richard E. Neal, Chairman, House Comm. On Ways & Means 6–52 (Apr. 23, 2019), https://perma.cc/HTC4-98PN (collecting various legislators' statements, including some indicating desire to secure President Trump's tax returns for the purpose of publicly disclosing them).

268 *See, e.g.*, Damian Paletta & Erica Werner, *Treasury Secretary Misses Deadline For Providing Trump Tax Returns to House Panel, Says He Will Make Final Decision by May 6*, WASH. POST (Apr. 23, 2019, 5:40 PM), https://perma.cc/9KXW-MFSA (noting that some Democrats believe Trump's tax returns "could provide insight into Trump's entanglement with foreign governments, whether he improperly inflated or deflated the value of his assets in dealing with financial institutions, and potentially whether he benefited personally from the 2017 tax law").

269 *See supra* note 267 and accompanying text.

How these alternative concerns affect the legitimate legislative purpose inquiry remains unclear. To the extent those concerns themselves reflect proper legitimate legislative purposes, presumably no harm to the committee's position should be done. But remarks about exposing tax returns solely for the sake of doing so raise further issues. It is doubtful that "under any circumstances, the publication of tax return information which indicates the identity of the taxpayer involved is necessary to the accomplishment of the legislative purpose."[270] As the Supreme Court has warned, "there is no congressional power to expose for the sake of exposure."[271] Congress cannot pursue "a fruitless investigation into the personal affairs of individuals."[272] Though a committee may assert that it has pursued legitimate legislative purposes, that claim is not "conclusive on the court."[273]

Unfortunately, these exhortations return us to square one: does the committee subpoena serve a legitimate legislative purpose? In *Watkins*, the Court advised that individual members' improper motives "would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."[274] Thus, for example, if a TIGTA report described irregularities in Presidential audits, a congressional committee could probably pursue an investigation even if individual members harbored ill motives. But the Ways & Means Committee has not pursued the TIGTA process here. Thus, courts must

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270 *See* Report on Admin. Procedures of the Int'l Rev. Serv. to the U.S. Admin. Conf., S. Doc. No. 94-266 at 967.

271 Watkins v. United States, 354 U.S. 178, 200 (1957). Though taxpayers do not enjoy any constitutional right to tax privacy, our laws have long recognized the sensitivity of tax return information. *See infra* Part I. Thus, it appears highly doubtful that congressional committees can freely obtain tax return information to harass citizens simply because that information otherwise enjoys only statutory protections against unlawful disclosure.

272 Kilbourn v. Thompson, 103 U.S. 168, 194-95 (1880). *Cf. also* Fed. Trade Comm'n v. Am. Tobacco Co., 264 U.S. 298, 305-06 (1924) ("Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." (citation omitted)); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 105 (D.D.C. 2008) (dictum) (stating that qualified immunity might be applied in a setting involving declaratory relief and congressional subpoenas "where Congress is not utilizing its investigation authority for a legitimate purpose but rather aims simply to harass or embarrass a subpoenaed witness").

273 United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977) (rejecting, in a congressional subpoena dispute, "claims of either the executive or the legislative branch that its determination of the propriety of its acts is conclusive on the court"); *see also id.* at 129 (the Speech or Debate Clause "does not and was not intended to immunize congressional investigatory actions from judicial review. Congress' investigatory power is not, itself, absolute.").

274 *Watkins*, 354 U.S. at 200.

balance the committee's broad investigatory powers against claims that it has acted pretextually.[275]

Senate involvement may make any related litigation even more complex. Under Section 6103(f)(1), the Senate Finance Committee enjoys the same authority that the House Ways & Means Committee enjoys for tax return requests. Yet, Senate leaders have forcefully criticized their House counterparts.[276] In litigation, the Senate might argue, as an amicus curiae, that a politically motivated request for tax return information compromises its own oversight authority. That is, public confidence in congressional investigations may diminish if, as Senator Chuck Grassley colorfully alleged, those investigations become viewed as "ways to sow division and tear down your political opponents."[277]

Of course, the Senate cannot formally veto or limit the House's investigatory authority. Either chamber may independently "conduct investigations and exact testimony from witnesses for legislative purposes."[278] Thus, a court would not invalidate a House subpoena simply because the Senate believed that subpoena unwise. But it may be awkward for the judiciary to dismiss concerns expressed by the President and the Senate while exalting the concerns expressed by the House.[279]

Thus far, the House Ways & Means Committee has focused on enforcement of its subpoena through a lawsuit directed against the Department of Treasury. However, to avoid potential standing problems,[280] the House might hold Treasury Secretary Steven Mnuchin in criminal contempt for his refusal to furnish President Trump's tax return information.[281] A federal statute would then require that the appropriate

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275 In a formal opinion, the Department of Justice concluded that Representative Neal's request was pretextual and did not serve a legitimate legislative purpose. *See* Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C. *16–17 (Jun. 13, 2019) (slip op., https://perma.cc/E9P2-N42K).

276 *See, e.g.*, 165 CONG. REC. S2260 (daily ed. Apr. 4, 2019) (statement of Sen. Grassley) ("[T]he courts have been clear that congressional requests for information like those tax returns or anything else we are trying to do, must have a legitimate legislative purpose. That is where the Democrats come up very, very short.").

277 *Id.*

278 McGrain v. Daugherty, 273 U.S. 135, 172 (1927).

279 When the rights of a private person are at issue, courts will readily decide issues about which the political branches disagree. However, the Supreme Court has never reached the merits of an interbranch dispute, like the one between the House Ways & Means Committee and the IRS. *See* Raines v. Byrd, 521 U.S. 811, 826–29 (1997) (discussing history of interbranch disputes and lack of judicial involvement).

280 *See* Grewal, *supra* note 248.

281 *See* 2 U.S.C. § 192 (2012) (any person who willfully refuses "to produce papers upon any matter under inquiry before either House" will be deemed guilty of a misdemeanor). Congress also enjoys the power to arrest those who unlawfully resist their subpoenas. *See* Chafetz, *supra* note 248, at 1135–39

United States Attorney present charges to a grand jury.[282] If the Treasury Secretary were brought to trial, he might argue that the congressional subpoena lacked a legitimate legislative purpose. In this way, a court might address the validity of a subpoena through an ordinary criminal trial, rather than through a protracted interbranch lawsuit.

But, even putting aside the pardon possibility,[283] the contempt path would not guarantee a judicial opinion.[284] Though the contempt statute uses mandatory language, the executive branch would likely exercise its discretion and decline to prosecute Mnuchin..[285] Additionally, if the Treasury Secretary followed DOJ advice in his refusal to furnish tax returns,[286] subsequent prosecution by that agency would seem absurd.

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(describing the congressional arrests of executive branch officials in 1879 and 1916). Any such arrest could trigger a prompt habeas corpus petition and compel speedy judicial resolution of the issues. However, Congress has long since abandoned physical measures of this sort. *See* Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. POL. 41, 43 (2009) ("Congress has not exercised its direct contempt powers in any significant way since 1935."); *see also id.* at 41–42 (describing the 1934 the arrest of William P. MacCracken by the Senate sergeant-at-arms, on the charge of contempt of Congress, and the resulting Senate trial).

282 *See* 2 U.S.C. § 194 (the relevant congressional leader will describe the failure to comply under 2 U.S.C. § 192 "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action"). The executive branch has concluded that it retains the discretion over whether to prosecute congressional contempt actions. *See infra* note 285.

283 In *Ex parte Grossman*, 267 U.S. 87 (1925), the Court affirmed the President's power to pardon all "offenses against the United States," Article 2, § 2, cl. 1, including those stemming from the contempt of federal courts. *Grossman*'s rationale would suggest that the President could similarly pardon the contempt of Congress; *see also Dr. Townsend Dies; Led Old-Age Plan*, N.Y. TIMES, Sept. 2. 1960, at 1, 23 (discussing the "unsolicited pardon" granted by President Franklin Roosevelt to Francis Townsend, regarding his conviction for the contempt of Congress).

284 *See generally* TODD GARVEY, CONG. RES. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 53 (2017) ("[E]fforts to punish an executive branch official for non-compliance with a subpoena through criminal contempt will likely prove unavailing in many, if not most circumstances.").

285 *See* Prosecutorial Discretion Regarding Citations for Contempt of Congress, 38 Op. O.L.C. *4 (June 16, 2014) (slip op.) (". . . [P]rosecutorial discretion . . . applies regardless of whether the contempt citations are related to an assertion of executive privilege"); Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 115 (1984) ("The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals.").

286 Section 6103(f)(1) describes duties for the Treasury Secretary. However, he can properly seek advice from the Justice Department on how to handle any congressional request for tax return information. *See* 28 U.S.C. § 512 (2012) ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."); 28 C.F.R. § 0.25(a) (delegating agency advisory responsibilities to the Justice Department's Office of Legal Counsel). Some scholars also argue that the President, as the sole repository of executive power, may freely direct how federal officers execute their statutory responsibilities. *See* U.S. CONST. art II, § 1, cl.

Thus, at this point, it remains unclear how the judiciary will address the request for President Trump's tax return information. If a court gives weight to legislators' public statements,[287] it could find that the request was driven by improper purposes. However, courts do not lightly make subjective inquiries of this sort.

If a court excludes legislators' statements from its analysis, then it must determine if the narrowness of the committee's investigation suggests that the committee has improperly attempted to execute the law. Additionally, the court may need to wrestle with the extent to which, outside of the impeachment context, Congress may engage in oversight of the President. Congress plainly may investigate executive branch departments, but "[t]he President occupies a unique position in the constitutional scheme."[288] That unique position implies weaker Congressional oversight authority.[289] A court's view on the extent to which Congress may regulate the chief executive may very well determine whether it upholds the subpoena for President Trump's tax return information.

## Conclusion

In a recent interview, former IRS Commissioner Mark Everson expressed concerns about the Ways & Means Committee's request for

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1 ("The executive Power shall be vested in a President of the United States of America."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) ("I argue that a statutory delegation to an executive agency official—although not to an independent agency head—usually should be read as allowing the President to assert directive authority."); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 713 (2003) ("When a statute requires an executive action to be taken or an executive decision to be made, the president may act or make the choice because the Constitution establishes that only he enjoys the executive power."). For a more restricted view of Presidential authority, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–4 (1994).

287 In *Trump v. Deutsche Bank*, the Second Circuit discussed the various complexities associated with evaluating whether a congressional committee subpoena furthers a legitimate legislative purpose. *See* Trump v. Deutsche Bank AG, 943 F.3d 627, 652–66 (2d Cir. 2019), *cert. granted*, No. 19-760, 2019 WL 6797733 (Dec. 13, 2019).

288 Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982). *Cf.* Clinton v. Jones, 520 U.S. 681, 707 (1997) ("The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity [from personal lawsuit], is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.").

289 *See* Trump v. Mazars USA, LLP, 940 F.3d 710, 733 (D.C. Cir. 2019) ("Congress's constitutional authority to regulate the President's conduct is significantly more circumscribed than its power to regulate that of other federal employees."), *cert. granted*, 2019 WL 6797734 (U.S., Dec. 13, 2019) (No. 19-715); *see also* Josh Blackman, *Can Congress Impose Ethics Requirements on the President or the Supreme Court?*, JOSH BLACKMAN'S BLOG (Nov. 23, 2016), https://perma.cc/AHY4-8EXJ.

President Trump's tax returns.[290] Though he believed that Section 6103(f)(1) forces the IRS to turn over those returns, he warned that the committee request, which coincided with the tax filing season, did not serve the tax system. By insinuating that the President's returns had not been audited correctly, the committee "compromise[d] the IRS" and increased "the partisanship in the country."[291] The decision to "put the tax system in the middle of politics" was not a "good thing."[292]

Everson's concerns were well founded. Taxpayers submit sensitive information to the IRS so that the agency can assess liabilities and collect amounts owed. But if taxpayers believe that public officials will expose tax returns for political gain, their confidence in the tax system may diminish.[293] Another former IRS Commissioner, Lawrence Gibbs, warned that if politicians released the President's tax returns, they were "likely to do the same thing to anyone else they choose to target in the future," including "supporters of any public figure in any political party."[294]

Nonetheless, voters may legitimately want detailed financial information about political candidates and elected representatives. There is nothing inherently wrong or improper about voter requests for tax return information. But when a congressional committee makes that request about a sitting President, the issues become far more complicated, especially when that President stands as a political rival.

This Article has addressed the constitutional issues in that context. But major policy questions will not be resolved through a single legislative–executive branch dispute. Rather, voters, through their elected representatives, must ultimately decide whether Presidents and other

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290 *See Interview with Mark Everson*, CNN (Apr. 5, 2019) ("[Section 6103(f)] hasn't been used in this manner before."), https://perma.cc/9DPU-8K4Q; *see also* @CNN, TWITTER (Apr. 10, 2019, 2:21 PM), https://perma.cc/T9X7-AVNQ.

291 @CNN, TWITTER, *supra* note 290.

292 *Id.*; *see also Interview with Mark Everson*, *supra* note 290 ("I was on record as saying that the president, when he was a candidate, should have released the returns. I think that's very important. But I don't want the independence of the IRS to be compromised through what is really a political process.").

293 *See* Office of Tax Policy, *supra* note 24, at 21 (noting that in considering amendments to Section 6103, Congress "recognized that citizens reasonably expected that the tax information they were required to supply to the IRS would be kept private. If the IRS abused that reasonable expectation of privacy, the loss of public confidence could seriously impair the tax system"); STAFF OF J. COMM. ON INTERNAL REVENUE TAX'N, *supra* note 165, at 4 (acknowledging that use of tax returns for purposes other than tax administration may "impair the effectiveness of voluntary assessment that is the mainstay of the Federal tax system"); *cf.* Yin, *supra* note 13, at 130 ("Two of President Nixon's executive orders allowing the Department of Agriculture to inspect the tax returns of all farmers especially sparked public and congressional outrage.").

294 Lawrence Gibbs, *Insight: Let's Not Forget There's a Reason for Keeping Tax Returns Private*, BLOOMBERG TAX (Aug. 14, 2019, 9:01 AM), https://perma.cc/QGG4-83MT.

persons should release tax return information. The Ways & Means Committee's request, well-grounded or not, may spark that important discussion.