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President Trump Cannot Hide His Tax Returns From Congress

By Seth Hanlon April 2019



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Introduction and summary

Donald Trump has reneged on a promise he made nearly four years ago to release his tax returns publicly. By keeping his returns hidden, he has broken the precedent every president and major party nominee for president has followed over the past 40 years. His actions also heighten concerns about what he could be hiding.

The new Democratic majority in the U.S. House of Representatives has pledged to conduct the kind of vigorous oversight of the executive branch that has been lacking for the past two years. As part of that oversight agenda, House leaders have said that they intend to invoke their authority under the law to obtain Trump's tax returns from the Internal Revenue Service (IRS) and to review them. Trump's Treasury Department is threatening to withhold the returns from Congress and take the issue to the courts, where his team reportedly hopes to bog down the request in a "quagmire of arcane legal arguments."¹ But the law could not be clearer: Congress' tax committees have the authority to obtain Trump's tax returns on request—and the U.S. Treasury Department has no basis for refusing. Secretary of the Treasury Steven Mnuchin would be violating the law if he directs the IRS to stonewall Congress.

This report explains why Congress has not only the clear authority to obtain Trump's tax returns, but also the constitutional responsibility to do so given his secrecy and his domestic and foreign business entanglements, as well as the powers of the office. It explains that the law giving Congress this authority was intended for situations such as this—to enable Congress to exercise oversight over the executive branch and monitor conflicts of interest. While regular citizens can expect that their tax returns will remain private, the president of the United States should have no such expectation, especially when he refuses to divest his domestic and international business holdings. Tax returns contain information not available elsewhere that could provide critical information to complete the president's financial picture.

Congress has multiple reasons to obtain and review President Trump's tax returns—reasons that are not only legitimate uses of its legislative powers, but also urgently needed, including:

1. To determine if U.S. national security is at risk of being compromised by the president's financial conflicts of interest
2. To determine if Trump has conflicts of interests bearing on his trade and tariffs policies
3. To determine whether the president is violating the U.S. Constitution by receiving benefits from foreign countries without Congress' consent
4. To determine whether he is benefiting from his tax policies despite his many public assertions to the contrary
5. To determine whether the IRS is adequately auditing the president
6. To inform the consideration of additional disclosure requirements for candidates and officeholders

On Election Day 2016, the American people did not know that throughout 2015 and 2016, Donald Trump had been pursuing a Trump Tower Moscow deal that could gain him as much as \$300 million in profits. The public did not know about the deal, because Trump and his campaign repeatedly lied about it.² The extent of Trump's dealings with Russia, or with other foreign governments or interests, remains unclear—and Trump's finances in general are still murky.

Under these circumstances, it is not only appropriate but also vital to the functioning of our democracy for Congress to seek an answer to the basic question: Is President Trump working for the interests of the country, or himself? As this report explains, Congress cannot adequately answer that question without first obtaining and reviewing his tax returns.

The law is crystal clear: Congress can obtain Trump's tax returns

The tax code provides that Congress' tax committees—including the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation (JCT)—are entitled to obtain any tax returns from the IRS that they request.³ Section 6103(f)(1) of the Internal Revenue Code (IRC) reads:

Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary [of the Treasury] shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.⁴

In short: The Treasury Secretary, which, for practical purposes, means the IRS as the relevant agency within the Treasury Department, “shall furnish” each of the tax committees with “any return or return information” requested in writing by its chairman. “Return information” includes related information such as the status of any IRS audits and the files containing documents produced in the process of audits.⁵ As law scholar Harry Litman explains, the term “shall” means exactly what it says: “The language [‘shall’] is the well-established norm, across a range of legal settings, used to denote an absence of discretion on an official’s part. It leaves no room for quibbles.”⁶ As Litman notes, Congress’ power to obtain tax returns parallels prosecutors’ ability to inspect tax records upon an ex parte order from a court, derived from Section 6103(i). In that context, “The practice is entirely routine and swift, usually taking less than a week,” Litman writes. “I know of no attempt by the secretary of treasury ever even to argue discretion not to comply.”⁷

The only limitation that the statute places on the tax committees’ ability to obtain tax returns is that, absent taxpayer consent, they must be in closed session when receiving the material—that is, the tax committees cannot receive tax returns from

the IRS in a setting open to the public. The law further empowers each of the tax committees to inspect the returns and return information “at such time and in such manner” as its chairman determines, including by delegating the task to “such examiners or agents as the chairman ... may designate or appoint.”⁸

The law also requires the IRS to furnish tax returns or return information directly to other congressional committees upon their request. The other, nontax committees must be “specially authorized” to inspect the returns or return information by a House- or Senate-approved resolution. That resolution must “specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.”⁹ These further restrictions do not apply to requests by the tax committees mentioned above.

While portions of the tax code may be byzantine, Section 6103(f) is straightforward: If Congress asks for any tax returns, the IRS must provide them.

The law was intended to enable Congress to perform oversight

Congress’ authority to obtain tax returns from the IRS is an important part of its oversight powers—and the law establishing it was intended for situations just like the one Congress faces today. It was enacted to enhance Congress’ investigative powers in the wake of past executive branch corruption: the infamous Teapot Dome scandal of the 1920s.

The legislative history behind the provision is richly described by University of Virginia School of Law Professor George Yin in a recent article.¹⁰ In sum, in 1922, President Warren Harding’s secretary of the interior accepted bribes from businessmen in exchange for favorable no-bid leases on public oil reserves, including the Teapot Dome oil field in Wyoming. Word of the shady transactions got out in the press, and Congress began a multiyear investigation.¹¹ As part of that investigation, Congress sought some of the tax returns of those involved in the scandal.¹² But President Harding’s successor, Calvin Coolidge, initially refused. At the time, Congress had no power to compel tax returns; the president had to approve any release, including to Congress.¹³ Although Coolidge ultimately granted Congress’ request, this episode helped convince Congress that its requests for tax return information to aid investigations should not be dependent on the president’s approval.¹⁴

Around the same time, some members of Congress were also frustrated by their inability to obtain tax information from Treasury Secretary Andrew Mellon to determine whether his sprawling business interests influenced his recommendations to Congress on tax policy. Mellon was one of the country's wealthiest men, and the tax policy changes he recommended to Congress would surely have affected his finances; thus, members sought information on those interests to determine how much weight to place on his recommendations.¹⁵ The Senate also launched an investigation into the Bureau of Internal Revenue, now known as the IRS, including whether it was showing favoritism toward businesses owned by Mellon. Senators found their investigation hampered by their reliance on the executive branch to obtain tax returns and by President Coolidge's hostility to the investigation.¹⁶

Against this background, Congress, via the Revenue Act of 1924, gave itself the power to compel the secretary of the treasury to furnish tax returns upon request.¹⁷ In approving the provision, legislators cited Congress' need to review tax return information "to evaluate Administration tax proposals, develop its own tax legislative initiatives, and carry out investigations."¹⁸ The provision faced opposition from some parties, including Coolidge, Mellon, and members of the business community, on the grounds that it could compromise taxpayer privacy. But in enacting the provision, Congress determined that access to tax returns was important for its legislative prerogatives, including gathering information for prospective legislation and performing oversight of the executive branch. The 1924 provision, with some amendments, is still in effect today.

In the 1970s, after abuses by the Nixon administration and prior administrations came to light, Congress strengthened the rules concerning tax return confidentiality.¹⁹ In 1976, Congress codified the general rule that tax returns are confidential and can be disclosed only in circumstances where Congress has provided an explicit exception. For example, the IRS can share tax returns with state tax authorities and with law enforcement agencies. Congress also retained the power it had established in 1924 to obtain tax returns upon request, now codified in IRC Section 6103(f).²⁰

Congress invokes Section 6103(f) routinely to allow the JCT staff and Government Accountability Office to obtain tax data in bulk for the purpose of analyzing proposed tax legislation and performing audits of the IRS, respectively.²¹ The authority was used as part of congressional investigations as recently as 2013 and 2014, as the House Ways and Means Committee and Senate Finance Committee explored allegations of political bias in the IRS' handling of conservative-leaning groups' applications for recognition of tax-exempt status.²² The Senate Finance Committee received

“extensive information under section 6103(f),” according to its final report on the investigation, while the House Ways and Means Committee obtained confidential information on at least several dozen nonprofit organizations.²³ (The committees’ investigations and a separate U.S. Justice Department probe ultimately uncovered no evidence that political bias influenced IRS employees’ actions, and it has since been revealed that left-leaning organizations received similar scrutiny.²⁴)

As far as we know, Congress has never invoked Section 6103(f) to obtain a president’s tax returns; over the last four decades, it has not been necessary. Every president, and, indeed, every major party nominee for president, voluntarily released his or her tax returns to the public—until Donald Trump²⁵—and no recent president before President Trump maintained such extensive business holdings while in office. Instead, recent presidents have placed their investment portfolios in blind trusts.²⁶

The House Ways and Means Committee has the discretion to make tax information public

IRC Section 6103(f) also gives Congress the discretion to make tax returns or return information public in appropriate circumstances. Professor Yin describes this as Congress’ public “informing function.”²⁷ The relevant statutory text reads:

(4) Agents of committees and submission of information to Senate or House of Representatives

(A) Committees described in paragraph (1)

Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particu-

lar taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(B) Other committees

Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.²⁸

Note that while the nontax committees may submit taxpayer information to the full Senate or House “only when sitting in closed executive session,” that secrecy requirement does not apply to the tax committees.²⁹ This is not an accident. Professor Yin’s analysis of the historical record confirms that this language reflects a deliberate decision by Congress to grant the tax committees the discretion to make tax information public, since the tax committees’ subject matter expertise best enables them to weigh the need for public disclosure against any taxpayer’s privacy interests.³⁰

As a bipartisan Senate Finance Committee report stated: “Although the principal purpose of section 6103 is to protect taxpayer-specific information, section 6103 also clearly contemplates the need for the public disclosure in compelling circumstances, and it establishes a formal and carefully considered process for a release: a submission by one of the tax committees to the House or Senate.”³¹

Both House and Senate tax committees have used this authority recently. As part of their investigations of alleged IRS targeting of conservative groups several years ago, both the House Ways and Means Committee and Senate Finance Committee made certain taxpayer information public as part of their investigative findings. The Senate Finance Committee did so after “careful consideration,” according to its final bipartisan report. Because public speculation about IRS political bias had “important

implications for our governmental and political institutions,” the committee decided that it was important for the public to understand the underlying facts—and that “a fully informative report” required limited disclosures of certain taxpayer information that was otherwise confidential.³² The House Ways and Means Committee also released confidential taxpayer information when it referred its investigative findings on the IRS matter to the Justice Department.³³

The House Ways and Means Committee has exercised this discretion once before regarding a president’s tax returns. In 1974, then-House Ways and Means Committee Chairman Wilbur Mills invoked Section 6103(f) to submit to the full House a report from the JCT regarding President Richard Nixon’s tax avoidance. The report, which concluded that Nixon owed nearly \$500,000 in additional tax, contained information that Nixon had given to Congress but had not made public.³⁴

Thus, in requesting President Trump’s tax returns and potentially releasing relevant information to the public, the House of Representatives is on solid legal ground and building on established precedents.

Reviewing the president's tax returns is well within Congress' powers of oversight and investigation

The Trump administration is reportedly preparing to refuse the House Ways and Means Committee's request, potentially relying on specious arguments.³⁵ The administration has dropped hints that it may claim that such a request would be beyond the scope of Congress' powers under the U.S. Constitution. The administration seemingly assumes that any request from the House would be made purely for "political purposes."³⁶ That is simply wrong: As explained below, Congress has numerous reasons for seeking to review the president's tax returns, each of which would be a valid exercise of Congress' legislative powers, including its powers of oversight and investigation.

Congress' oversight and investigation functions are integral to Congress' role in the constitutional framework—and its powers are broad. In *McGrain v. Daugherty*, a 1927 case arising out of one of Congress' investigations into the Teapot Dome scandal, the U.S. Supreme Court stated:

*[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. ... A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.*³⁷

The court has emphasized the breadth of Congress' investigative power. In the 1957 case *Watkins v. United States*, it wrote:

*The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws, as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.*³⁸

As long as Congress has a legitimate legislative purpose, it can exercise its investigative powers. Courts have made clear that Congress can investigate issues that may inform its consideration of new legislation as well as the administration of existing laws—such as the IRS’ enforcement of the tax code. Congress does not need to have a legislative end goal in mind when conducting an investigation—of course, it cannot know in advance what an investigation will uncover—as long as the topic of the investigation is related to issues on which Congress could legislate.³⁹

There are some limitations on Congress’ investigative power. As *Watkins* held, it cannot investigate solely for the purpose of alleging or proving crimes, or to usurp the judiciary’s role in settling disputes. Congress also does not have the power to “expose the private affairs of individuals without justification in terms of the functions of Congress.”⁴⁰ But the *Watkins* case, and similar cases defining the limits of Congress’ investigative power, involve compelled testimony from private individuals—not the most powerful official in the U.S. government.⁴¹ In *Kilbourn v. Thompson*, a 19th-century case involving a private citizen, the Supreme Court held that Congress has no power to investigate subject matters on which it has no power to legislate. But as the next section of this report discusses, the president’s tax returns could provide critical information about many issues that aid Congress in performing its legislative functions, including contemplating new legislation and overseeing the administration of existing laws.

6 reasons why Congress should obtain the president's tax records

In order to exercise its legislative responsibilities, Congress must obtain Trump's tax returns. While not intended to be an exhaustive list, below are six key reasons why.

National security

Congress must review the president's tax returns to determine if America's national security is or might be compromised by financial conflicts of interest.

Congress' most urgent investigative priority is to seek answers to the question posed by House Speaker Nancy Pelosi (D-CA): "What does [Russian President Vladimir] Putin have on the President, politically, personally or financially?"⁴² President Trump has had an extensive business relationship with Russia, which Americans recently learned continued through the 2016 election despite repeated denials from Trump, his campaign, and administration.⁴³ He has been inexplicably complimentary toward the Russian president, despite Putin's fundamental hostility to democratic values, as well as Russia's military aggression and brazen attacks on U.S. democracy.

In addition to his attempts to build a Trump Tower in Moscow, Trump also has a long history of doing business with Russian-linked individuals and entities.⁴⁴ He repeatedly partnered with the Bayrock Group, a real estate company run by a former Soviet official, and worked extensively with "convicted Russian mobster" Felix Sater.⁴⁵ Furthermore, Trump has received numerous loans from Deutsche Bank, which was involved in a \$10 billion Russian money laundering scheme.⁴⁶ In 2008, Russian oligarch Dmitry Rybolovlev purchased Trump's Palm Beach mansion for \$95 million, which was \$53 million more than Trump had paid for the property in 2004.⁴⁷ This sale sparked Sen. Ron Wyden (D-OR) to request records related to this sale from Treasury Secretary Mnuchin, noting that it is "imperative that Congress follow the money and conduct a thorough investigation into any potential money laundering or other illicit financial dealings between the President, his associates, and Russia."⁴⁸

A review of President Trump's tax returns could prove essential in order for Congress to evaluate whether he is compromised by Russian financial entanglements. In March 2017, to address concerns from Congress and the public about the obvious possibility of conflicts of interest, Trump's tax lawyers claimed that they had performed a review of his tax returns and that the returns showed no income, debts, or investments from "Russian persons or entities"—with a few known exceptions, including the 2008 Palm Beach mansion sale.⁴⁹ But Congress must not simply accept these claims without independently verifying them. Notably, the letter did not deny debts or investments from offshore entities that could be ultimately owned or controlled by Russians, a common tactic used by wealthy Russians seeking to move their money overseas.⁵⁰

The Trump administration has also repeatedly tried to blunt the impact of U.S. sanctions on Russia. These attempts began even before Trump took office, when, in December 2016, then-national security adviser Michael Flynn called then-Russian Ambassador Sergey Kislyak to discuss sanctions.⁵¹ Flynn has since pleaded guilty to lying to investigators about these calls.⁵² Recently, the administration has failed to provide a sufficient explanation for its decision to lift sanctions against companies owned by Russian oligarch Oleg Deripaska, a close Putin ally and former business associate of Trump campaign chairman Paul Manafort.⁵³ House Ways and Means Committee Chairman Richard Neal (D-MA) has twice written Treasury Secretary Mnuchin demanding that he address "the impact [sanctions relief] would have on the U.S. effort to end Russia's malign activities aimed at our country," and urging him to delay the lifting of sanctions until Congress has the opportunity to conduct a meaningful review.⁵⁴ Congress clearly has a legitimate legislative purpose in investigating whether the administration's sanctions policies are influenced by financial conflicts of interest. The findings of such an inquiry could inform Congress as it determines whether to overturn any given actions by the administration or curb the administration's discretion over sanctions policy.

The question of whether or not President Trump's potential conflicts of interest affect or have affected sanctions policy extends far beyond Russia. Most prominently, the Trump administration's failure to respond to the murder of *Washington Post* journalist Jamal Khashoggi, as well as its apparent complicity in the cover-up of the crime, raises stark questions in light of public statements and other reports about Saudi Arabia's role in President Trump's finances.⁵⁵

Trade and tariffs

Congress must also review the president's tax returns to determine if he has conflicts of interests bearing on his trade and tariffs policies.

International trade policy is another area where the president wields enormous power and where personal financial interests potentially influence his actions. Over many decades, Congress has delegated tremendous power over trade and tariffs to the president, effectively giving him the authority to negotiate and set tariff rates, subject to certain limitations.⁵⁶ Congress has also conferred Trade Promotion Authority (TPA), also known as fast-track authority, on the president, giving him the power to negotiate trade agreements that can be brought to Congress for approval under expedited procedures, including an up-or-down vote in each chamber with no opportunity for amendments. Last year, since Congress did not enact a resolution of disapproval, TPA was extended for three more years, through July 1, 2021.⁵⁷

But the authority over tariffs ultimately rests with Congress. If Congress were to determine that the president has too much power over trade policy, it could limit his discretion through legislation, including by reclaiming the power to set tariffs directly, revoking TPA, or otherwise modifying the president's authorities. Some members of Congress have introduced legislation to rein in the president's powers over trade.⁵⁸ In theory, Congress could also delegate more power to the president, if it so chose.

In contemplating any legislation to modify the president's powers over trade and tariffs or in considering trade agreements, Congress needs to know whether the president's actions and policies are influenced by personal financial interests, including business interests in foreign countries.⁵⁹ That assessment requires a complete and accurate picture of his business interests, including income and taxes paid in foreign countries, foreign assets, and foreign financial accounts.

Foreign emoluments clause

The president's tax returns could help determine whether the president is violating the U.S. Constitution by receiving benefits from foreign countries without Congress' consent.

The Constitution's foreign emoluments clause provides a safeguard against improper foreign influence over the U.S. government. It prohibits the president and other federal officials from receiving any "Emolument" from any "King, Prince, or foreign State"—without the consent of Congress.⁶⁰ The Constitution thus specifically entrusts Congress with determining whether a U.S. official's dealings with foreign states could compromise the integrity of the government. In 2017, a federal court dismissed lawsuits by private parties seeking to enforce the foreign emoluments clause with respect to President Trump, reasoning: "As the only political branch with the power to consent to violations of the Foreign Emoluments Clause, Congress is the appropriate body to determine whether, and to what extent, [the president's accepting payments from foreign governmental guests at his hotels] unlawfully infringes on that power. If Congress determines that an infringement has occurred, it is up to Congress to decide whether to challenge or acquiesce to [the president's] conduct."⁶¹ Another federal court has ruled that states can proceed with their lawsuits seeking to enforce the foreign emoluments clause, but the central responsibility for enforcing the clause still clearly rests with Congress.⁶²

Congress clearly cannot fulfill this responsibility without the ability to fully investigate payments or other financial benefits flowing from foreign governments to the president and his businesses. And the president's personal and business tax returns could shed light on the financial flows between the Trump Organization and foreign governments, or businesses owned by foreign governments. In addition to gifts or cash payments, foreign emoluments could theoretically come in many forms, including equity investments, loans, or loan forgiveness through business entities.

President Trump has said that his business's net profits from transactions with foreign governments totaled about \$150,000 in 2017 and \$200,000 in 2018.⁶³ But these claims simply raise more questions: He has provided no accounting or documentation of how his team calculated those amounts, nor the gross amount of payments from foreign governments.⁶⁴

Tax policy

Congress must review the president's tax returns to determine whether he is benefiting from his own tax policies—and to what extent—despite his many public assertions to the contrary.

As highlighted above, one of the reasons that Congress enacted Section 6103(f) was to enable itself to determine if Treasury Secretary Mellon's tax policy recommendations were colored by his personal financial interests. That determination is even more urgent with regard to President Trump.

President Trump repeatedly represented to Congress and the American people that the tax plan that his administration pushed through Congress in the fall of 2017 would increase his taxes. On September 27, 2017, Trump claimed that his tax plan was "not good for me. Believe me."⁶⁵ On November 7, 2017, he claimed that he was a "big loser" under the tax legislation and that his accountant had told him that he would "get killed."⁶⁶ On November 29, he claimed: "This is going to cost me a fortune, this thing, believe me. This is not good for me. ... I think my accountants are going crazy right now."⁶⁷

Numerous skeptics observed that the tax bill included several changes that would be highly likely to benefit the president and his family—including a special new deduction for pass-through businesses such as the Trump Organization; exemptions for real estate from new limits on interest deductions and tax-free exchanges; a substantial reduction in the alternative minimum tax; and a massive cut in the tax on multimillion-dollar estates.⁶⁸ However, in part because members of Congress may have relied on the president's representations to the contrary in supporting the legislation, it is incumbent on Congress to verify whether those claims were true. Congress also needs to know to what extent Trump would benefit from making temporary aspects of the tax law permanent—including the pass-through deduction—as Trump has recommended.⁶⁹ It should also seek to determine whether President Trump is benefiting from the regulatory actions that his Treasury Department has taken pursuant to the 2017 tax law, including the regulations concerning the pass-through deduction. Doing so could inform Congress as it decides whether to amend the tax law or repeal it in full or in part. A more complete picture of the president's finances would also inform Congress as it considers future tax policy recommendations from the administration, including those in his recently released budget. If the president is personally benefiting from his recommended tax policies, Congress could reasonably decide to give those recommendations less weight. To the extent the president is not paying a fair amount of tax for a person of his income and wealth, his returns could also highlight areas of the tax code in need of reform.

Congress must determine whether the IRS is adequately auditing the president.

The president sits at the top of the executive branch, and federal agencies, including the IRS, ultimately answer to him. The president's power over the IRS creates the risk that the agency will give him preferential treatment. President Nixon publicly released his tax returns in 1973—setting the modern precedent that Trump has now broken—in order to quell speculation that the IRS was showing him favoritism.⁷⁰ “[T]he confidentiality of my private finances is far less important to me than the confidence of the American people in the integrity of the President,” Nixon said as he released his tax returns and requested that Congress review them.⁷¹ In fact, Nixon's famous quote, “[P]eople have got to know whether or not their president is a crook. Well, I am not a crook,” came in response to scrutiny over how little tax he paid.⁷² The subsequent report from the JCT found that the IRS had, in fact, failed to ensure Nixon paid what he owed. He agreed to pay nearly half a million dollars in back taxes.⁷³

In the 1970s, the IRS began a practice of automatically selecting presidents and vice presidents for audit every year, which the Carter administration said would help “allay any concerns in the public about the President's payments of taxes.”⁷⁴ The IRS' practices for these audits are spelled out in its internal handbook, the Internal Revenue Manual.⁷⁵ But the IRS is not required to abide by these internal procedures, and there is no way for Congress or the American people to know whether the IRS is actually auditing the president adequately, or whether the president is exercising inappropriate influence.

In normal times, this might be a hypothetical concern. Recent White Houses have respected a firewall with the IRS on taxpayer enforcement matters. However, President Trump has demonstrated that he has little regard for established norms within the executive branch that protect against abuses of power. He has repeatedly sought to exert control over the Justice Department's probe into Russian interference in the 2016 campaign and spinoff investigations.⁷⁶ He reportedly ordered a White House aide to direct the Justice Department to block a corporate merger involving CNN's parent company to punish the network for what he perceived as unfavorable news coverage of him.⁷⁷ He meddled in the Government Services Administration's decision on whether to relocate the new FBI headquarters, apparently to prevent a competing hotel from locating across the street from the Trump

International Hotel in downtown Washington, D.C.⁷⁸ Trump seems quite capable of trying to exert pressure on an IRS audit of him and his businesses—and if he did, there would be no way for Congress to know unless it obtains his audit file.

Even if there has been no direct interference, Congress must still ensure that the IRS is not treating the president differently or leniently, for any reason. The public disclosure of past presidents' tax returns allowed for Congress and the public to review them in connection with other information about the president's finances. Trump's refusal to disclose his returns makes that kind of verification impossible.

Ensuring that the IRS adequately audits the president is always important—but especially so when there is abundant evidence that a particular president has been less than honest in paying taxes. Investigative reports in the press based on isolated tax disclosures and other evidence have found that Trump may have avoided paying income taxes for up to 18 years based on a questionable \$916 million deduction; that he engaged for years in numerous aggressive schemes to reduce his family's estate and gift tax liability by hundreds of millions of dollars, including the use of a sham corporation and “instances of outright fraud”; and numerous other instances of aggressive tax avoidance, if not illegal tax fraud.⁷⁹ The president's former lawyer, Michael Cohen, recently testified to Congress that Trump did not release his tax returns publicly, because Trump believed that scrutiny of his returns would lead to audits, back taxes, and penalties.⁸⁰ Under these circumstances, Congress would be derelict if it does not review Trump's returns and other return information, including audit files, to determine if he has been audited sufficiently.

H.R. 1

Congress should review the president's tax returns as it considers additional disclosure requirements for candidates and officeholders.

Congress is currently considering H.R. 1, the For the People Act, sweeping reform legislation to strengthen democracy and curb corruption. It includes a number of transparency measures to root out corrupting conflicts of interest in government and to empower voters with greater information about candidates—including requiring major party nominees for president and vice president to disclose 10 years of tax returns.⁸¹

Obtaining and reviewing President Trump's tax returns can inform Congress' consideration of H.R. 1 in important ways. For example, evidence of conflicts of interest or other problematic issues previously hidden from the public could clarify the urgency of the legislation. The review could also inform members of Congress as they consider important details in the bill, including the number of years for which candidates are required to disclose returns and whether they are required to disclose only personal returns or both personal and business returns, for example.⁸² At the same time, as Tax Policy Center Senior Fellow Steven Rosenthal notes, reviewing the president's returns in closed session would help enable the House Ways and Means Committee evaluate claims that the legislation would impinge upon legitimate privacy interests and weigh any privacy interests against the much greater public interest in disclosure.⁸³

Some of these issues are within House Ways and Means Committee jurisdiction, while others are within other committees' jurisdiction or overlap with the Ways and Means Committee's. But as Professor Yin testified, the House Ways and Means Committee is empowered to obtain tax returns to inform Congress on any issue—not only those within the committee's legislative jurisdiction. Permissible purposes for this committee obtaining and reviewing returns include “any responsibility given to Congress under the Constitution.”⁸⁴ If necessary, the House could also pass a resolution enabling the other committees to obtain the president's returns from the IRS.

Tax returns can provide important information not disclosed elsewhere

Tax returns can provide important information about a president's finances that is not disclosed elsewhere. When reviewed in connection with other documents or publicly available information, the returns can therefore help form a more complete picture of the president's finances and business dealings.

President Trump has filed the personal financial disclosures required of federal candidates and officeholders—Office of Government Ethics Form 278e. But as ethics experts have emphasized, those disclosures are far from perfect, and they lack information that would appear on tax returns, and vice versa. According to Norm Eisen, the Obama White House's special counsel for ethics, "The financial disclosure rules are the result of compromises and are antiquated. They were built for another day and time—not for the complicated financial entanglements of the Trump administration."⁸⁵ Trump himself has pointed out the incomplete nature of the financial disclosure forms, once complaining that they failed to show the true extent of his wealth.⁸⁶ In filing his first disclosure in 2015, his campaign offered the disclaimer: "This report was not designed for a man of Mr. Trump's massive wealth."⁸⁷

Trump's financial disclosures only date back to 2014, whereas the tax committees could obtain and review tax returns for earlier years.⁸⁸ Tax returns show income and losses, whereas financial disclosures show only income. Furthermore, business entities might not be listed on a financial disclosure if they produced losses and no longer had positive value during the filing period.⁸⁹ Tax returns show amounts of income and deductions to the dollar, whereas financial disclosures only report income streams within ranges, and with very large amounts only appearing as "greater than" the highest amount on the form.⁹⁰ Tax returns require detailed information on foreign assets and foreign accounts.⁹¹ And of course, only tax returns show the amounts of taxes a person has paid. They could potentially also reveal strategies for avoiding or evading taxes, including even belatedly disclosed offshore bank accounts.⁹²

Moreover, information that has come to light has already revealed that at least one of Trump's financial disclosure forms was incomplete. On his report filed in June 2017, Trump failed to disclose that he had reimbursed his attorney, Michael Cohen, to cover up extramarital affairs. Trump belatedly disclosed the payments on the following year's disclosure form after they were reported in the press.⁹³

Some commentators have pointed out that Trump's finances and business relationships will not be evident on the face of his tax returns.⁹⁴ That may be true, but the critical point is that the tax returns are only one piece of the puzzle. Piecing together Trump's finances and sprawling business interests requires all available sources of information. In recent testimony to the House Ways and Means Committee, Noah Bookbinder, the executive director of Citizens for Responsibility and Ethics in Washington, explained that in his experience as a public corruption prosecutor, tax returns "often provided important, sometimes even critical, information. But it was rarely if ever the case that tax return information *standing alone* provided the answer to questions we needed to ask. That information needed to be understood in context, compared with other information we had, and viewed as part of a larger picture."⁹⁵

For a full picture, Congress would need both Trump's personal and business tax returns, since his personal returns total up the flows from the more than 500 business entities he owns.⁹⁶ These entities include S-corporations and partnerships, which file their own tax returns reporting income, deductions, assets, liabilities, foreign transactions, and other items.⁹⁷ The income, deductions, and other items reported on these entities' tax returns flows through to their owners' personal tax returns. For a person such as President Trump, who owns many business entities, his personal tax returns will essentially provide summary information, while the business returns will reveal much more information, including more specific information from each entity filing a return. As now-IRS Commissioner Charles Rettig explained in 2016:

*For wealthy individuals, individual tax returns sometimes only provide a brief financial overview linked to numerous other conclusions and entities. To fully understand the financial status of Trump, one would likely need to see returns for multiple years, the work-papers for the individual returns and the returns for numerous related entities.*⁹⁸

Understanding Trump's financial picture requires untangling this complex web of entities by reviewing their tax returns in light of other available information.

U.S. presidents should not expect privacy regarding their financial affairs

Some Republican members of Congress have argued that the president, like other Americans, should have an expectation of privacy in his or her tax returns. But if the president of the United States has any privacy interest at all in his tax returns, it is overwhelmed by Congress' interest in informing itself and thereby fulfilling its function within the constitutional system of checks and balances. As the most powerful person in the world, the president should not expect any degree of privacy with regard to his or her business or financial matters; these matters are, by virtue of the unparalleled powers of the office, public issues. Presidents and presidential candidates are scrutinized about every aspect of their lives, including their careers, values, religion, family history, personal behavior, and personal habits.⁹⁹ The information on a tax return is far more important and far less personal than what we expect from candidates in other areas.

Tax returns are generally confidential—but only because Congress enacted a law making them so. And that law has exceptions, including Section 6103(f), enabling congressional oversight and investigations that may require tax returns and return information. If Congress determines that public disclosure of information from the president's tax returns is warranted, it can decide whether to exclude or redact information that unnecessarily impinges on the privacy interests of other taxpayers, such as business partners.

The hypothetical possibility of an unauthorized leak is no excuse

The administration has hinted that refusing to provide President Trump's tax returns to Congress would be justified, because Congress would inevitably "leak" information from the president's tax returns.¹⁰⁰ This argument is unfounded and illogical. As explained above, the House Ways and Means Committee is specifically given the authority to release tax returns publicly if it decides that, in Professor Yin's words, fulfilling its "informing function" is important enough. Since the law gives Congress the discretion to release returns and return information publicly, it would defy logic to suggest that the possibility of an unauthorized leak prevents Congress from obtaining returns in the first place.

Moreover, Congress handles confidential and highly sensitive information all the time, including classified information relating to national security. It could not make informed policy decisions or exercise oversight over the executive branch were this not the case.¹⁰¹

Congress has also demonstrated that it can receive confidential tax return information without leaking it. The JCT and Government Accountability Office routinely receive millions of tax return disclosures from the IRS.¹⁰² The staff of the JCT also reviews particular tax returns because it has the responsibility of approving very large tax refunds.¹⁰³ As Professor Yin notes, Congress entrusted the power to review tax returns to the tax committees because they have "handled the information responsibly and without incident."¹⁰⁴

Congress is perfectly capable of taking precautions against unauthorized release of returns. In fact, the House Ways and Means Committee could decide not to take custody of the returns and instead to send members and designated agents to review them at the IRS, where the president's tax file is reportedly kept in a vault.¹⁰⁵ Alternatively, Congress could establish a similarly secure setting to review the returns on Capitol Hill. In any event, the chairman of the House Ways and Means Committee is given unfettered authority under IRC Section 6103(f) to determine the "time" and "manner" for his committee's review of the returns.

Conclusion

For two years, Congress failed to exercise its basic oversight responsibilities in the face of an administration rife with potentially compromising conflicts of interest and corruption. By keeping his tax returns hidden, President Trump has failed the basic standard of transparency set by his predecessors while maintaining a sprawling and largely opaque business empire, with business in and connections to many foreign countries.

To fulfill its constitutional role as a check on the executive branch, Congress must seek to answer the question: Is President Trump working for the interests of the country, or himself? Congress cannot adequately answer that question without a complete picture of Trump's finances and business and financial entanglements; his personal and business tax returns are essential to that inquiry, because they could provide information not available elsewhere. A century-old law provides Congress with the clear authority to obtain Trump's tax returns upon request and, should it so decide, to release the returns or information from them to the public. Congress' request would be well within its legitimate investigative and oversight powers. If Treasury Secretary Mnuchin chooses to defy Congress' request and keep Trump's tax returns hidden, he will simply be breaking the law.

About the author

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Appendix:

26 U.S. Code Section 6103(f)

The following is the text of Internal Revenue Code (26 U.S.C.) Section 6103(f), requiring the secretary of the treasury to furnish tax returns to Congress upon request and enabling public disclosure through submission by the committees to the full House or Senate.¹⁰⁶

(f) Disclosure to Committees of Congress

(1) Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation

Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(2) Chief of Staff of Joint Committee on Taxation

Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(3) Other committees

Pursuant to an action by, and upon written request by the chairman of, a committee of the Senate or the House of Representatives (other than a committee specified in paragraph (1)) specially authorized to inspect any return or return

information by a resolution of the Senate or the House of Representatives or, in the case of a joint committee (other than the joint committee specified in paragraph (1)) by concurrent resolution, the Secretary shall furnish such committee, or a duly authorized and designated subcommittee thereof, sitting in closed executive session, with any return or return information which such resolution authorizes the committee or subcommittee to inspect. Any resolution described in this paragraph shall specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.

(4) Agents of committees and submission of information to Senate or House of Representatives

(A) Committees described in paragraph (1)

Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(B) Other committees

Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or

to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(5) Disclosure by whistleblower

Any person who otherwise has or had access to any return or return information under this section may disclose such return or return information to a committee referred to in paragraph (1) or any individual authorized to receive or inspect information under paragraph (4)(A) if such person believes such return or return information may relate to possible misconduct, maladministration, or taxpayer abuse.

Endnotes

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- 30 See Yin, “Preventing Congressional Violations of Taxpayer Privacy,” pp. 126–127 and 132–136. The original provision authorized the tax committees to submit any “relevant or useful” information from tax returns to the full House or Senate, which would effectively make the information public. As Professor Yin emphasizes, Congress very deliberately left it within the tax committees’ discretion whether to make tax returns or return information public: “Congress needed to preserve flexibility to report to the public on matters that might be included in the confidential information. The solution that Congress devised—one that should be viewed as fully intended ... was to rely upon committee discretion. ... The committees were given the discretion to determine what tax returns, if any, would be disclosed to the public.” The 1976 changes removed the qualifier that the tax committees can only release “relevant or useful” tax return information to the whole House or Senate—though Yin interprets that change as having little or no effect, since the expectation that Congress would need to act within a proper legislative scope was already implicit.
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- 39 *McGrain v. Daugherty* at 178, citing *In re Chapman*, 166 U.S. 661, 681 (1897), available at <https://supreme.justia.com/cases/federal/us/166/661/>: “We cannot assume on this record that the action of the Senate was without a legitimate object. ... [I]t was certainly not necessary that the resolutions should declare in advance what the Senate mediated doing when the investigation was concluded”; and citing *People v. Keeler*, 99 N.Y. 463, 482-483 (1885), available at <https://casetext.com/case/people-ex-rel-mcdonald-v-keeler>: “Where public institutions under the control of the State are ordered to be investigated, it is generally with the view of some legislative action respecting them, and the same may be said in respect of public officers.” *Watkins v. United States*, p. 187: Congress’ oversight power “encompasses inquiries concerning the administration of existing laws, as well as proposed or possibly needed statutes.”
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