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In this article, Yin discusses Congress's authority to obtain, inspect, and disclose the confidential tax information of any taxpayer, including the president, without the taxpayer's consent.

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President Trump's continuing refusal to release his tax returns despite the contrary common practice of presidents over the last 40 years has spurred interest in finding alternative ways to obtain the information.¹ This article describes the authority of Congress, under section 6103(f)(1) and (4)(A), to obtain, inspect, and disclose the confidential tax information of any taxpayer, including the president, without the taxpayer's consent. The authority may be exercised by any one of three tax committees: the House Ways and Means Committee, the Senate Finance Committee, and the Joint Committee on Taxation.²

¹See letter from Rep. Bill Pascrell Jr., D-N.J., "Pascrell Calls on Ways and Means Chair to Request Trump Tax Returns" (Feb. 1, 2017); George K. Yin, "Congress Has the Power to Obtain and Release Trump's Tax Returns," *The Washington Post*, Feb. 7, 2017; Jeanne Sahadi, "How Congress Could Get Trump's Tax Returns," CNN Money, Feb. 7, 2017; David Morgan, "No-Brainer' or No-No? Congress Split on Probing Trump Tax Returns," Reuters, Feb. 10, 2017; and Andy Grewal, "Can Congress Get President Trump's Tax Returns?" Yale Journal on Regulation Notice and Comment blog (Feb. 13, 2017).

²Under specific circumstances, other congressional committees, as well as the chief of staff of the JCT, also have the right to obtain protected tax information, but they have no ability to disclose it to the public without the taxpayer's consent. Section 6103(f)(2), (3), and (4)(B). Also, many other persons may obtain

(Footnote continued in next column.)

Congress added the authority to the law in 1924. Up until then, the president had the sole authority to determine whether the tax returns of any taxpayer might be disclosed. That presidential authority was created in 1910 following considerable debate during both the Civil War and the 1894 income taxes regarding the proper balance between the privacy interests of taxpayers and the public's right to know. The 1910 presidential authority applied only to corporate returns because only corporations were taxed under the 1909 levy, but it was eventually extended to individual tax returns following ratification of the 16th Amendment and the enactment of the modern income tax in 1913.³

Congress changed the law in 1924 to address a separation-of-powers concern. Democratic Rep. John Nance Garner of Texas, then-ranking member of the Ways and Means Committee, described the problem succinctly on the House floor:

Under the present law, if this House passed a resolution requesting the Secretary of the Treasury to send the returns of John N. Garner to Congress, he could not do it without violating the law. The law tells him that he cannot send it to the House of Representatives without the direction of the President of the United States. So the House of Representatives itself has not the power to get these returns. Now, *I think the House of Representatives ought to have the power to ask the Secretary of the Treasury for these returns and get them.*⁴ [Emphasis added.]

Republican Rep. William Green of Iowa, then-chair of the Ways and Means Committee, promptly concurred with Garner's recommendation. The remaining debate mostly concerned which committees should be given the authority — only the tax committees, or other committees as well — and

tax information for tax administration and other purposes, but they generally may not disclose it further. See section 6103(a)(2) and (3). This article is limited to the right of the tax committees to obtain and disclose the information.

³The presidential authority did not apply to individual tax returns between 1913 and 1918. Thus, there was total secrecy of those returns until the 1918 act extended the president's authority to individual as well as corporate returns. For more background and relevant citations, see Yin, "Preventing Congressional Violations of Taxpayer Privacy," 69 *Tax Law.* 103, 154-160 (2015).

⁴65 *Cong. Rec.* 2958.

what protection should be given to the confidential information once Congress obtained it.⁵

Several matters, including two involving possible conflicts of interest, helped bring the separation-of-powers imbalance to Congress's attention. During that period, Congress was investigating the Teapot Dome scandal — the alleged bribery of government officials in exchange for the leasing of public oil fields to private interests. As part of its investigation, Congress sought from President Coolidge the tax returns of the alleged principals involved in the scandal, but the president initially resisted the request.⁶ Although Coolidge ultimately acceded, the experience undoubtedly made Congress aware of its need to be able to obtain tax information even without the president's permission.⁷

Another matter concerned possible conflicts involving former Treasury Secretary Andrew Mellon, who continued to own many business interests while serving in government. Some in Congress wanted to obtain Mellon's tax information to learn how his interests would be affected by tax legislation that Treasury was proposing to Congress.⁸ Congress was especially exercised by the issue because of the suspicion that Mellon had previously revealed to the public the confidential tax information of Republican Sen. James Couzens of Michigan in connection with a feud between the two men.⁹

Finally, partly as a result of that feud, in early 1924 the Senate began an investigation of the Bureau of Internal Revenue (predecessor to today's IRS), and its initial inquiries had been stymied by the inability of the investigating committee to examine tax returns.¹⁰ Among other things, some members of Congress wanted to determine if the Bureau had shown favoritism to Mellon and his companies.¹¹

The legislation approved in 1924 gave the 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.¹² The unqualified right was necessary to correct the separation-of-powers imbalance; because the right of access of the president and the executive branch to the information was unrestricted, so too should be the legislature's. Aside from slight changes in the language, the law remains the same today.¹³ The right of Congress to obtain any tax information should be interpreted as subject to the implicit condition found by the Supreme Court that any congressional inquiry must relate to a legitimate legislative purpose.¹⁴ The law, then and now, permits the tax committees to designate agents, such as their staff, to inspect any of the returns.¹⁵

The 1924 law also authorized the tax committees to submit any "relevant or useful" tax information to the House or Senate, effectively making it public. In 1976 Congress amended the statute to delete the words "relevant or useful."¹⁶ Thus, the current code authorizes the tax committees to submit any tax information to the House or Senate.¹⁷

In recent research, I concluded that despite the very low bar seemingly created by the modifiers "relevant or useful" (which were never defined in the legislation or discussed in the committee reports or any of the debate), and the removal of those words in 1976, a committee disclosure must be for a legitimate committee purpose. Among other things, I argued that because public disclosure of confidential information is more violative of privacy rights than the mere seizure of the same information by Congress, Congress's right to disclose must be subject at a minimum to the same implicit condition applicable to its investigative power.¹⁸

After 1924 there is some indication that the tax committees used their authority to release tax information to the House and Senate to make it public.¹⁹ In recent years, that extraordinary authority has apparently been invoked very rarely. In 1974 Democratic Rep. Wilbur Mills of Arkansas, then-chair of

⁵See Yin, *supra* note 3, at 123-125.

⁶See 65 *Cong. Rec.* 3699.

⁷See Yin, *supra* note 3, at 121. For Treasury's initial reasoning to deny the request, see 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, 856-858 (2013).

⁸See Revenue Act of 1924: Hearings Before the Senate Committee on Finance, 68th Cong., at 307-318 (1924); and Yin, *supra* note 7, at 820-821.

⁹See 65 *Cong. Rec.* 2959 (statement of Republican Rep. Edward E. Browne of Wisconsin); and Yin, *supra* note 7, at 822 n.178. For background on the feud, see Yin, *supra* note 7, at 814-824.

¹⁰See Yin, *supra* note 3, at 121.

¹¹See Yin, *supra* note 7, at 824.

¹²Revenue Act of 1924, ch. 234, section 257(a), 43 Stat. 253, 293.

¹³Section 6103(f)(1). Current law permits the chairs of the tax committees to make the request and requires that the committees sit in "closed executive session" to receive any information that can be associated with a particular taxpayer (unless the taxpayer consents otherwise). The latter rule was added in 1926. See Yin, *supra* note 3, at 126.

¹⁴See *id.* at 128.

¹⁵Revenue Act of 1924, ch. 234, section 257(a), 43 Stat. 253, 293; section 6103(f)(4)(A) (first sentence).

¹⁶See Yin, *supra* note 3, at 132.

¹⁷Section 6103(f)(4)(A) (second sentence).

¹⁸See Yin, *supra* note 3, at 127-137.

¹⁹See 69 *Cong. Rec.* 9842-9843 (publishing tax report with Teapot Dome-related tax information).

the JCT, referred to the authority when the committee, on a bipartisan basis, submitted to the House its staff report containing and analyzing the confidential tax information of President Nixon.²⁰ Although Nixon had already released a substantial amount of his tax information to the public, Mills referred to the committee's special authority perhaps out of an excess of caution. In 2014 the Ways and Means Committee invoked the same authority to release to the public the tax return information of 51 taxpayers. In my recent research, I concluded that this disclosure was improper because the committee lacked a legitimate purpose for doing so.²¹

Following Watergate, as part of the Tax Reform Act of 1976, Congress ended the power of the president to order disclosure of tax return information. However, it retained the authority of its tax committees to do so. This decision was necessary for Congress to protect its informing function. The recent experience involving Nixon had shown the potentially great importance of preserving an ability to make a public disclosure of tax information.²²

²⁰See 120 Cong. Rec. 9564. For background on the staff investigation of Nixon's taxes, see Joseph J. Thorndike, "JCT Investigation of Nixon's Tax Returns," *Tax Notes*, June 13, 2016, p. 1527.

²¹See Yin, *supra* note 3, at 149.

²²See *id.* at 126-127, 135-136.

In the present situation, concerns over President Trump's possible conflicts of interest — including conflicts with tax legislation the committees may soon be asked to approve — would certainly seem to justify a tax committee effort to obtain and inspect his confidential tax information. A review could also assure the American public that the IRS is treating him like any other taxpayer and not giving him preferential treatment. This would not be an idle concern; an initial IRS audit of Nixon's returns did not result in any proposed adjustment even though the JCT staff later found (and the IRS concurred on second audit) that Nixon actually owed almost \$500,000 in additional taxes. And as previously described, Congress had the same worries about the tax agency's favorable treatment of Mellon. The parallels between the present-day concerns and those that contributed to the creation of the tax committee authority in 1924 are very close.²³

Whether there should be disclosure of any information obtained is a separate question. There must also be a legitimate purpose for any disclosure. Once the tax committees complete their investigation, they can determine whether any disclosure to the public would be appropriate. ■

²³On February 14, an initial effort to get the Ways and Means Committee to request the president's returns was defeated. See Stephen K. Cooper and Asha Glover, "House Democrats Press GOP Leaders on Trump's Tax Returns" (Feb. 15, 2017).

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