Hearing on Concurrent Congressional and Criminal Investigations: Lessons from History
Judiciary Subcommittee on Crime and Terrorism
July 11, 2017
Questions for the Record

ANSWERS FROM RICHARD BEN-VENISTE

(1) Please summarize the mechanisms by which a congressional committee can obtain a president's tax returns. Do these procedures differ from the procedures for obtaining the tax returns of other executive branch officials?

I am aware of two mechanisms by which a congressional committee may obtain an individual's tax returns: by requesting the returns directly from the Internal Revenue Service or by means of a subpoena directed at the individual or a third party who possesses copies.

First, a committee may request the returns directly from the Internal Revenue Service under Section 6103(f) of Title 26 of the U.S. Code. Specifically, Section 6103(f)(1) provides that the House Ways and Means Committee, the Senate Finance Committee, or the Joint Committee on Taxation may receive an individual's tax returns upon written request by the chairman of the committee to the Secretary of the Treasury.[1] Section 6103(f)(2) provides that the Chief of Staff of the Joint Committee on Taxation may also receive tax returns on written request and then submit those returns to the above committees. In either case, any tax returns which can be associated with or otherwise identify a particular taxpayer may be furnished to the committee only when sitting in closed executive session, unless the taxpayer consents in writing. Once the committee has received the requested tax returns, the committee or its designated agent may inspect the returns "in such manner as may be determined" by the chairman, and may submit the returns to the full Senate or House. *Id.* § 6103(f)(4)(A).

The power of other congressional committees to receive an individual's tax returns is somewhat more limited. Under Section 6103(f)(3), other congressional committees must be specially authorized by a resolution of the Senate or the House, or, in the case of a joint committee, by concurrent resolution, to receive an individual's tax returns. Such a resolution "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." *Id.* Once the requisite authorization has been given, the chairman of the committee may receive the tax returns upon written request. The committee is also subject to special restrictions once it has received the tax returns: the committee may inspect the returns directly, or the committee may appoint up to four

[1] By its terms, the statute does not permit subcommittees or individual members to request an individual's tax returns. The Office of Legal Counsel has concluded that while a subcommittee may receive and inspect tax returns, the committee chairman must request the returns, and specify the line of inquiry to which the returns relate. *Congressional Access to Tax Returns—26 U.S.C. § 6103*, 1 Op. O.L.C. 85, 91 (1977).

agents—in equal number by the chairman and the ranking minority member of the committee—to inspect the returns. *Id.* § 6103(f)(4)(B).[2]

In either case, it does not appear that the Secretary of the Treasury has discretion to refuse a request authorized by Section 6103. The statute mandates that the Secretary "*shall* furnish such committee with any return or return information specified in such request." *Id.* § 6103(f)(1), (2), (3) (emphasis added). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). Moreover, if the Secretary must provide an individual's tax returns to a committee, presumably the President could not issue a contrary command without violating the law or requiring the Secretary to violate the law.

Second, I believe that a congressional committee may also be able to subpoena copies of the returns from a third party, such as the taxpayer or an accountant. The United States District Court for the District of Columbia has held that Congress may use a subpoena *duces tecum* to require an individual to provide copies of his or her tax returns, and may pursue a contempt of Congress charge if he or she refuses to comply. *United States v. O'Mara*, 122 F. Supp. 399, 400 (D.D.C. 1954); *see also St. Regis Paper Co. v. United States*, 368 U.S. 208, 219 & n.10 (1961) (agreeing with *O'Mara* and holding that "copies in the hands of the taxpayer are held subject to discovery"). However, that decision predated the enactment of 26 U.S.C. § 6301. It is not clear whether Congress intended Section 6103 to provide the exclusive means for Congress to obtain an individual's tax returns and would, therefore, preclude the use of a subpoena. *See* Alissa M. Dolan et al., Cong. Research Serv., RL30240, Congressional Oversight Manual 49 (2014) (describing Section 6301 as "the quintessential example of … self-limiting action").

The Judiciary Committee has the power to issue such a subpoena. Under Rule XXVI of the Rules of the Senate, paragraph 1, every committee "is authorized … to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents." Similarly, Rule IX of the Rules of the Judiciary Committee states that "[t]he Chairman of the Committee with the agreement of the Ranking Member or by a vote of the Committee, may subpoena … the production of memoranda, documents, records, or any other materials," and also provides that "[a]ny such subpoena shall be issued upon the signature of the Chairman or any other Member of the Committee designated by the Chairman." Other Senate committees have similar rules. *See* Michael L. Koempel, Cong. Research Serv., R44247, A Survey of House and Senate Committee Rules on Subpoenas (2017). That said, I am not aware

[2] Section 6103 also contains a whistleblower provision permitting a person with access to an individual's tax returns to disclose the returns to the House Ways and Means Committee, the Senate Finance Committee, or the Joint Committee on Taxation, or to an authorized agent of any of these committees, "if such person believes such return or return information may relate to possible misconduct, maladministration, or taxpayer abuse." *Id.* § 6103(f)(5). However, it is not clear whether Section 6103(f) refers only to misconduct or maladministration by the IRS, or whether it also encompasses misconduct by the individual taxpayer. *See* Bryan Camp & Victor Thuronyi, *Disclosing President Trump's Tax Returns – An Unconventional Idea*, Forbes (Feb. 21, 2017, 12:17 PM), https://www.forbes.com/sites/procedurallytaxing/2017/02/21/disclosing-president-trumps-tax-returns-an-unconventional-idea/#344715a85010.

of any subsequent cases where Congress has used a subpoena to obtain an individual's tax returns.

To the best of my knowledge, the procedures for obtaining the president's tax returns do not differ from the procedures for obtaining the returns of other executive branch officials. Neither Section 6103 nor the rules of the Senate or House distinguish between obtaining the president's tax returns and obtaining the tax returns of other officials. Nor am I aware of any commentary suggesting that Congress has less access to the tax returns of the president, as compared to the tax returns of other officials. Indeed, in 1974, the Joint Committee on Taxation relied on its authority under Section 6103 in submitting its staff report on President Nixon's tax returns to the full House. 120 Cong. Rec. 9564. Thus, I believe that a congressional committee would be able to obtain the president's tax returns to the same degree that it would be able to obtain the tax returns of any other executive branch official.

(2) Based on your understanding, under what circumstances is it appropriate for executive branch officials to refuse to answer questions from members of Congress when no privilege has been asserted? In cases in which neither the White House nor the witness have asserted legal privileges, how should Congress respond to executive branch officials' refusals to answer questions at public hearings? Do the answers to these questions differ depending on whether the witness is a White House advisor or an agency head?

There is no legitimate basis for an executive branch official to refuse to answer questions from members of Congress when no privilege has been asserted. The law has long recognized the "fundamental maxim that the public … has a right to every man's evidence." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quotation omitted). That important principle applies with no less force to proceedings before Congress. *See United States v. Bryan*, 339 U.S. 323, 331 (1950). Of course, in some cases, a witness may be able to refuse to testify on the basis of an applicable privilege, such as the Fifth Amendment (which must be asserted by the witness him- or herself) or executive privilege (which must be asserted by the President). But where no such privilege has been invoked, the witness has an obligation to answer the questions asked.

If an executive branch official refuses to answer questions asked by Congress, yet does not invoke any recognized privilege to justify his or her refusal, then Congress should consider holding the witness in contempt. In doing so, Congress should weigh the importance of the witness's testimony, any other avenues it could use to obtain the requested information, and the practical difficulties involved in attempting to enforce compliance. While Congress has multiple options to compel a witness to testify, each has certain drawbacks.

First, Congress can exercise its inherent contempt powers to compel a witness to testify. The House or the Senate may order its respective Sergeant-at-Arms to bring the witness before the chamber, try him or her before the bar of the body, and, following conviction, imprison the witness in the Capitol or elsewhere as punishment or until the witness agrees to testify. Because of the logistical hurdles involved in trying a contempt case before the House or Senate (or potentially a committee) and then incarcerating a contemnor, this procedure has rarely been invoked, and not since 1935. *See* Todd Garvey, Cong. Research Serv., RL34097, Congress's

Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure 12 (2017).

Second, Congress can certify a contempt citation to the executive branch for criminal prosecution. Under Section 192 of Title 2 of the U.S. Code, any person who appears before Congress or any committee thereof but then "refuses to answer any question pertinent to the question under inquiry" is guilty of a misdemeanor. Section 194 then establishes the procedure for referring the witness's refusal for prosecution. A committee must approve the contempt citation and report it to the full House or Senate; the committee's report must be read on the floor; if Congress is in session, the House or the Senate must approve a resolution authorizing the Speaker of the House or the President of the Senate to certify the report to the appropriate U.S. Attorney; if Congress is not in session, or if the requisite resolution has been approved, the Speaker of the House or the President of the Senate must then certify the report to the U.S. Attorney. *See* 4 Deschler's Precedents § 17 (1994). However, U.S. Attorneys have frequently invoked prosecutorial discretion to decline to prosecute a contempt citation when the contemnor is an executive branch official. *See* Garvey, *supra*, at 22.

Third, Congress can seek a civil judgment from a federal court directing the witness to comply. Under Section 288(d) of Title 2 of the U.S. Code, the Senate can direct the Counsel to bring a civil action to secure a declaratory judgment regarding a threatened refusal to testify. Another statute, Section 1365(a) of Title 28, provides that jurisdiction for such a suit will lie in the United States District Court for the District of Columbia. Section 1365(a) also provides that it does not apply to subpoenas issued to officers or employees of the executive branch acting within their official capacity, unless their refusal to testify "is based on the assertion of a personal privilege or objection and is not based on a governmental privilege or objection the assertion of which has been authorized by the executive branch of the Federal Government." Thus, the Senate could presumably seek a declaratory judgment regarding an executive branch witness who refuses to testify without asserting any privilege. While there is no analogous statute for the House, the House has authorized such suits through individual resolutions. *See* Garvey, *supra*, at 23.

The answers to these questions are no different depending on whether the witness is a White House advisor or an agency head. Each has the same obligation to answer the questions asked by Congress if no privilege has been asserted. By the same token, Congress's response should be consistent: if a witness refuses to answer valid questions without invoking any sort of privilege, Congress should consider holding the witness in contempt.

(3) A 1982 memorandum from President Reagan to the heads of executive agencies sets forth a formal procedure through which an agency head can temporarily hold off inquiries that raise "substantial questions of executive privilege" while the president decides whether to claim privilege. In order to invoke the procedure outlined in the memorandum, however, the agency head must expressly request that Congress hold its requests "in abeyance" while the President makes his privilege determination.

- **What is your understanding with respect to an executive branch witness' ability to request that a congressional committee hold its questions "in abeyance" while a determination is made by the president as to the assertion of executive privilege?**

President Reagan's Memorandum for the Heads of Executive Departments and Agencies, on Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982) lays out a process by which an executive branch witness may request that a congressional committee hold its questions in abeyance pending a presidential determination regarding executive privilege. According to the memorandum, a witness must comply with congressional requests for information "as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege." *Id.* at 1. If the head of the executive department or agency concludes that compliance would raise a substantial question of executive privilege, he or she must promptly consult with the Assistant Attorney General for the Office of Legal Counsel as well as the White House Counsel. *Id.* at 2. If one of those officials believes that the circumstances would support invoking executive privilege, the issue must be presented to the President for a final determination. *Id.* While the President's decision is pending, the head of the department must ask the committee to hold its request in abeyance, expressly indicating that the purpose for the abeyance is to permit the President to make a final decision. *Id.*

President Reagan's memorandum has generally been adhered to by successive presidential administrations, with some modifications. The recent administration of President Barack Obama formally adopted the process described in the memorandum. *See* Memorandum from Gregory Craig, Counsel to the President, for all Executive Department and Agency Heads, Regarding Congressional Requests for Information (July 30, 2009). Similarly, the current administration has claimed that it also adheres to the process laid out in the memorandum. Lauren Carroll, *Jeff Sessions Cites 'Longstanding Policy' to Deflect Senators' Questions in Russia Hearing*, Politifact (June 14, 2017, 2:00 PM), http://www.politifact.com/truth-o-meter/statements/2017/jun/14/jeff-sessions/jeff-sessions-cites-longstanding-policy-deflect-se/.

While a congressional committee is not bound by a presidential memorandum and, therefore, is not required to hold its requests in abeyance, the importance of interbranch comity suggests that it should generally seek to accommodate legitimate assertions of executive privilege by the executive branch. The United States Court of Appeals for the District of Columbia Circuit has held that there is an "implicit constitutional mandate" requiring each branch "to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). In other words, each branch should "make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981).

In that spirit, if an agency head asks the committee to hold a request for information in abeyance, then the committee generally should agree to do so for a reasonable amount of time to permit the executive branch to engage in internal deliberations. However, a congressional committee is not required to affirmatively offer to hold a request in abeyance if the agency head does not so request. Moreover, under the Reagan Memorandum, only an agency head may

request that a committee hold its request in abeyance; it does not appear that other executive branch employees, such as deputies, would be permitted to make such a request.

It is also important to note that accommodation is a two-way street. Before agreeing to hold the request in abeyance, a congressional committee may wish to require an express commitment from the witness to ascertain whether the administration intends to assert executive privilege, as well as a date by which the administration will give the committee an answer. Otherwise, a witness may seek to hold a request in abeyance without actually intending or attempting to obtain a presidential determination regarding the privilege, as has frequently been the case. *See* Andy Wright, *About that Executive Privilege "Policy": Congress Should Call the Bluff*, Just Security (June 20, 2017, 10:12 AM), https://www.justsecurity.org/42364/executive-privilege-policy-and-congress-call-bluff/.