

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

QUESTIONS FOR RICHARD BEN-VENISTE, DANIELLE BRIAN, AND CHARLES
TIEFER FROM SENATOR WHITEHOUSE

- (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?

There's two ways. (1) Subpoena from the President the copy he kept. (2) Get a Senate (or House) resolution under sec. 3106(f) of the IRC. I did it twice, during something called the "Billy Carter" investigation in 1980, and, during Iran-contra. These methods are the same as for other officials.

- (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?

Officials can say, before providing classified answers in open session, that they will do so in closed session. Officials can mention various confidentiality aspects that are exceptions to FOIA, but such an assertion can be readily overruled. Otherwise, as to executive privilege, the official can only withhold answers by stating that he knows preliminarily there may be a Presidential assertion of executive privilege and by promising to expeditiously obtain a decision on assertion. If no privilege is asserted, the committee chair should order and direct the witness to answer, on pain of contempt, and the committee should then report the contempt to the floor. This is the same for agency heads. For White House advisers, there is a provisional expectation that a claim of privilege may be forthcoming because it is unusual for White House staff (e.g., the National Security Adviser) to be summoned to testify (they do come to the Hill for "informal" briefings), and so the witness's assertion of a need to obtain this, should be given a bit of credit but in the end gets resolved the same way.

- (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?

The 1982 memo has been followed. But the period of holding questions “in abeyance” is limited and if the witness does not obtain a prompt Presidential invocation of privilege he should be recalled and questioned on pain of contempt.