NEW YORK UNIVERSITY SCHOOL OF LAW

SPRING 2015
COLLOQUIUM ON TAX POLICY
AND PUBLIC FINANCE

.

"Protecting Taxpayers from Congressional Lawbreaking"

George Yin
University of Virginia
Law School

March 10, 2015
NYU Law School
Vanderbilt Hall-208
Time: 4:00-5:50 p.m.
Number 7

SCHEDULE FOR 2015 NYU TAX POLICY COLLOQUIUM

(All sessions meet on Tuesdays from 4-5:50 pm in Vanderbilt 208, NYU Law School)

1. January 20 – Brigitte C. Madrian, Harvard Kennedy School.
   "Does Front-Loading Taxation Increase Savings? Evidence from Roth 401(k) Introductions."

2. January 27 – David Kamin, NYU Law School. "In Good Times and Bad: Designing Legislation That Responds to Fiscal Uncertainty."

3. February 3 – Kimberly Blanchard, Weil, Gotshal & Manges. "The Tax Significance of Legal Personality: A U.S. View."

4. February 10 – Eric Toder, Urban Institute. "What the United States Can Learn From Other Countries' Territorial Tax Systems."

5. February 24 - Linda Sugin, Fordham University, School of Law. "Invisible Taxpayers."

6. March 3 – Ruth Mason, University of Virginia Law School. "Citizenship Taxation."

7. **March 10 – George Yin, University of Virginia Law School. "Protecting Taxpayers from Congressional Lawbreaking."**

8. March 24 – Leigh Osofsky, University of Miami School of Law, "The Case for Categorical Non-Enforcement."

9. March 31 – Shu-Yi Oei, Tulane Law School. "Can Sharing Be Taxed?"

10. April 7 – Lillian Mills, University of Texas Business School. "Managerial Characteristics and Corporate Taxes."

11. April 14 – Lawrence Zelenak, Duke University School of Law. "Up in the Air over the Taxation of Frequent Flyer Benefits: the American, Canadian, and Australian Experiences."

12. April 21 – David Albouy, University of Illinois Economics Department. "Should we be taxed out of our homes? Leisure and housing as complements and optimal taxation."

13. April 28 – David Schizer, Columbia Law School. "Tax and Energy Policy."

14. May 5 – Gregg Polsky, University of North Carolina School of Law, "Private Equity Tax Games and Their Implications for Tax Practitioners, Enforcers, and Reformers."

Protecting Taxpayers from Congressional Lawbreaking

George K. Yin*
Feb. 24, 2015 draft

Introduction

Current law generally prohibits the disclosure of tax return information by the government. A violation of this law is a misdemeanor, and a willful violation is a felony. The law exists to protect the privacy interests of taxpayers and reflects a Congressional policy concern dating back at least as early as 1870.

This article describes how the U.S. House Ways & Means Committee broke this law in 2014 when it voted to allow confidential tax return information of 51 taxpayers to be made public. The disclosure probably resulted in a minimal invasion of the privacy rights of the taxpayers involved, and if the release had occurred inadvertently, it might have been overlooked altogether. But the disclosure was not inadvertent. Advised that a document he wanted to release to the public contained confidential tax return information, the chairman of the committee convened a markup session for the specific purpose of debating and authorizing the release. The chairman contended that an obscure provision in the tax law, available only to the Congressional tax committees and apparently rarely invoked in its 90-year history (most recently in connection with a bipartisan decision in 1974 to release a staff report investigating President Nixon's taxes), provided the necessary support for the committee's action. Following the debate, the committee voted strictly along party lines to approve the chair's recommended action.

* Edwin S. Cohen Distinguished Professor of Law and Taxation, University of Virginia.

This article explains why the provision relied upon by the committee did *not* authorize its action, and that the disclosure violated the law. Despite this, neither the members of the committee who approved the disclosure nor the staff members who helped implement it may be prosecuted for their crime by reason of the Speech or Debate Clause of the Constitution.[1] As a result, unless some change is made, the precedent established by the committee could be repeated again with impunity to authorize the unlawful public disclosure of *anyone's* tax return information, including confidential and sensitive information belonging to a political enemy of those comprising a majority of the committee at the time of the authorization.

To prevent that outcome and protect taxpayer privacy interests, this article proposes a new restriction on the access of the tax committees to tax return information. If the committees cannot obtain such information in the first instance, then they will be unable to disclose it illegally for improper purposes. The proposal is tailored to protect taxpayer privacy interests while still preserving the ability of the tax committees to use tax return information to carry out their legitimate legislative duties.

Part I describes the circumstances surrounding the committee's disclosure of tax return information and part II shows why it violated the law. Part III then explains that those who broke the law cannot be prosecuted because of the Speech or Debate Clause of the Constitution. Part IV proposes a new restriction on the access of the tax committees to tax return information that preserves their legitimate need for the information while preventing a disclosure for improper purposes.

[1] U.S. Const., art. 1, § 6, cl. 1.

I. Disclosure of Tax Return Information by the House Ways & Means Committee.

A. The DOJ referral letter.

The disclosure of confidential tax return information occurred in connection with the committee's public release of its referral letter to the Department of Justice requesting an investigation of alleged criminal misconduct committed by Lois Lerner when she served as Director of the Exempt Organizations (EO) Division of the IRS. The information behind the allegations had been uncovered by the committee during its ongoing investigation of the IRS's administration of the EO tax laws. The letter states that Lerner may have committed three specific criminal violations:

> (1) "Lerner used her position to improperly influence agency action against only conservative organizations, denying these groups due process and equal protection under the law . . . in apparent violation of 18 U.S.C. § 242";
>
> (2) "Lerner impeded official investigations by providing misleading statements . . . [to] the Treasury Inspector General for Tax Administration (TIGTA), in apparent violation of 18 U.S.C. § 1001"; and
>
> (3) "Lerner risked exposing, and may actually have disclosed, confidential taxpayer information, in apparent violation of IRC § 6103."[2]

1. Lerner's alleged discriminatory treatment of conservative organizations.

In support of the first charge, the letter provides evidence of actions Lerner directed towards Crossroads Grassroots Policy Strategies ("Crossroads GPS"), a prominent right-leaning organization whose application for tax-exempt status under section 501(c)(4) was under consideration by the IRS at the time her actions occurred. In an email to a subordinate, Lerner indicated that she "thought the allegations in the documents [about Crossroads GPS] were really

[2] Letter from Dave Camp, Chmn., H. Comm. on Ways & Means, to Hon. Eric H. Holder, Jr., U.S. Attorney General, Apr. 9, 2014, available at http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf (hereinafter Referral Letter), at 2.

damning," and "wondered why we hadn't done something with the [organization]."[3] She further described the organization as "a prime candidate for exam"[4] and indicated that "we are working on a denial of [its] application."[5] In a follow-up email to the same subordinate, Lerner wrote that "I need to think about whether to open an exam [of Crossroads GPS]. I think yes, but let me cogitate a bit on it."[6] The committee's referral letter indicates that although other IRS personnel with responsibility had not yet decided to deny the Crossroads GPS application, both adverse actions—the proposed denial of the organization's tax-exempt application and its selection for audit—were subsequently taken against the organization.[7] According to the referral letter, "[t]he evidence shows that without Lerner's intervention, neither adverse action would have been taken against Crossroads [GPS]."[8]

The referral letter also states that "Lerner targeted other right-leaning groups."[9] As evidence, the letter provides a one-line email Lerner sent to several subordinates: "I'd like to meet on status of these applications please. Can we talk Friday?"[10] The email referred to a link to a ProPublica article describing five organizations that had allegedly violated their pledge to the IRS not to engage in political activity. The committee's referral letter names the organizations and indicates, based on evidence obtained by the committee (but not included in the letter or exhibits), that certain of the organizations were subjected to higher scrutiny by the IRS and three were selected for audit.[11]

[3] Id. at 5; exhibit 6.
[4] "Exam" presumably meant audit.
[5] Referral Letter, note 2, at 5; exhibit 6.
[6] Id.
[7] See id. at 5-6; id. at. 6 n.29; exhibits 9-11.
[8] Id. at 6.
[9] Id. at 7.
[10] Exhibit 13.
[11] Referral Letter, note 2, at 7. The organizations named in the letter were Americans for Responsible Leadership, Freedom Path, Rightchange.com, America is Not Stupid, and A Better America. Although the letter does not specify it, the implication is that these were all right-leaning groups.

Finally, the referral letter asserts that "Lerner acted in defiance of IRS internal controls."[12] According to the letter, the IRS maintains a safeguard to ensure that the decision to audit a tax-exempt organization will be made independent of the views of any single person in IRS management. The letter asserts that Lerner's email indicating that she was thinking about opening an exam of Crossroads GPS[13] "makes clear that she believes she is entitled to approve or disapprove an application or subject an organization to an audit based on her say so alone and irrespective of the . . . decision [of the independent review committee]."[14] The letter also includes an email of Lerner to the Chief of IRS Appeals, an office independent of Lerner's division, in which she "offers unsolicited advice about how to handle incoming [section 501(c)(4)] denials."[15]

The letter states at several points that Lerner did not direct similar scrutiny to left-leaning groups, but no specific evidence is included in the letter or exhibits.[16] The letter includes an email Lerner sent to a subordinate about the formation of Organizing for Action, a prominent left-leaning group, in which Lerner exclaimed: "Oh—maybe I can get the DC office job!"[17] According to the letter, this email "show[s] Lerner had a favorable disposition toward left-leaning groups, including considering future employment from one."[18] Although the referral letter presents some evidence suggesting an unbiased attitude on the part of Lerner, the letter asserts that "her private actions were different."[19]

[12] Id.
[13] See text accompanying note 6.
[14] Referral Letter, note 2, at 8.
[15] Id. at 9.
[16] See id. at 3, 4, 6. An exhibit to the referral letter contains a letter sent by the chairman of the committee to the IRS requesting tax returns and return information of three left-leaning and three right-leaning organizations. According to the referral letter, "[t]he documents show no special scrutiny of the left-leaning groups." Id. at 3 n.14; exhibit 3.
[17] Id. at 6; exhibit 12.
[18] Id. at 6.
[19] Id. at 3.

2. Lerner's alleged misleading statements to TIGTA.

In support of this charge, the referral letter describes two of Lerner's statements to TIGTA that, according to the letter, were "knowingly misleading."[20] The first statement was her assertion that "[i]n early 2010, [the IRS] witnessed an uptick in the number of applications for § 501(c)(3) or 501(c)(4) status that contained indicators of potentially significant amounts of political campaign intervention."[21] The referral letter provides evidence of an earlier email sent by an IRS specialist (on which Lerner had been copied) in which the specialist recommended changing almost the exact same language in an earlier statement because "we do not have a reliable method for tracking data by issue such as political activity."[22] Rather, the specialist recommended not attributing the observed increase in applications to any particular reason. The committee's referral letter claims that Lerner's repetition of the statement to TIGTA, even though she "knew her answer could not be substantiated, . . . [was] an attempt to minimize her role in the agency's management failures."[23]

Lerner's other TIGTA statement was her assertion that she first learned of the use of the "Tea Party" label as a selection criterion by the IRS on June 29, 2011.[24] According to the referral letter, "[a] series of emails show that Lerner knew as early as April 2010 that tea party cases were being flagged and held in Cincinnati."[25] Lerner's "half-truth appears calculated to obscure her knowledge that 'Tea Party' cases were being treated differently, in part, at her direction."[26]

3. Lerner's alleged improper disclosure of tax return information.

[20] Id. at 9.
[21] Id. at 10; exhibit 17.
[22] Id. at 10; exhibit 20.
[23] Id. at 11.
[24] See id. at 11; exhibit 17.
[25] Id. at 11.
[26] Id.

Finally, in support of this charge, the referral letter provides evidence that on two occasions, Lerner transmitted confidential tax return information through her personal email account.[27] According to the letter, this practice "is prohibited by IRS policy, but is not illegal. However, . . . [i[f persons other than Lerner had access to her personal email account, . . . and accessed this protected section 6103 material, then Lerner may have violated [section 6103]."[28]

B. Tax return information disclosed by the committee.

In general, section 6103(a) of the Internal Revenue Code ("Code") prohibits the disclosure of tax returns and return information by an officer or employee of the United States and certain other persons who have been given access to the information. "Return information" has been interpreted broadly to encompass not only tax information provided by the taxpayer to the IRS but also virtually any information collected by the IRS about a taxpayer's tax liability and the agency's processing of that information.[29] Importantly, to constitute protected tax return information, it must be sufficiently identifiable with a particular taxpayer.[30] A violation of the law is a misdemeanor, and a willful violation is a felony.[31]

The referral letter and exhibits contain confidential tax return information of at least 51 taxpayers.[32] In addition to Crossroads GPS, 24 of the taxpayers had more than one piece of tax return information disclosed. For purposes of the subsequent discussion, the affected taxpayers are separated into the following categories:

[27] See id. at 12; exhibits 26 and 28.
[28] Id. at 13.
[29] See I.R.C. § 6103(b)(2)(A); Landmark Legal Foundation v. IRS, 267 F.3d 1132, 1135 (D.C. Cir. 2001).
[30] See Tax Analysts v. IRS, 117 F.3d 607, 614 (D.C. Cir. 1997); Cause of Action v. TIGTA, __ F.Supp.3d __, 2014 WL 4809423 (D.D.C. 2014) at *5.
[31] See I.R.C. § 7213(a)(1) (felony for willful violations); id. § 7431(a) (civil damages); 18 U.S.C. § 1905 (2012) (unauthorized disclosure of certain tax return information is punishable by fine, imprisonment of not more than one year, and loss of employment).
[32] See Appendix A for details. "Taxpayer" includes an organization applying for recognition of its tax exempt status.

(1) 40 taxpayers whose confidential information is disclosed in one of the exhibits, but whose identities and information are not otherwise referenced, directly or indirectly, in the referral letter or any of the subsequent committee discussion or Congressional action;

(2) One Fund Boston, whose tax return information is disclosed in both the referral letter and one of the exhibits, and whose information Lerner allegedly transmitted through a personal email account;

(3) four Tea Party organizations whose tax return information is disclosed in one of the exhibits;

(4) five right-leaning organizations whose tax return information is specifically referenced in the referral letter;[33] and

(5) Crossroads GPS, of which there were multiple disclosures of tax return information in both the letter and exhibits.

C. The committee's "markup" of the referral letter.

Advised that the referral letter contained confidential tax return information, Ways & Means Committee Chairman Camp (R.-Mich.) convened a meeting to mark up the letter, a procedure usually used to report out proposed legislation.[34] Under section 6103(f)(4)(A) of the Code, the Ways & Means Committee is allowed to submit confidential tax return information to the House or Senate. The chairman explained that if the committee approved submission of the DOJ referral letter to the House, it would permit the confidential information included in the letter to become part of the public record.[35] Following a 2-1/4 hour meeting, the committee voted 23-14 strictly along party lines to approve the submission.

[33] See note 11.

[34] Under House rules, all committee markups must be held in open session subject to the committee's decision, by recorded vote, to adjourn into executive session for specified reasons. Rules of the House of Representatives for the 113th Congress (Jan. 3, 2013), Rule XI (sec. 2(g)(1)). The committee followed this procedure and conducted virtually its entire meeting in executive session, but subsequently released a transcript of the session. See Markup of Referral to the Honorable Eric H. Holder, Jr., Attorney General, of Former Internal Revenue Service Exempt Organizations Division Director Lois G. Lerner for Possible Criminal Prosecution for Violations of One or More Criminal Statutes Based on Evidence the Committee Has Uncovered in the Course of the Investigation of IRS Abuses Before the H. Comm. on Ways & Means, 113th Cong. (2014), available at http://waysandmeans.house.gov/uploadedfiles/040914_markup_transcript_executive_session.pdf (executive session transcript) (hereinafter "Tr.").

[35] See Tr. at 3 ("Should the committee vote to submit the letter to the House, it will enter the public record and members will be free to discuss its contents publicly."); id. at 7 (Chairman Camp) ("By submitting this letter to the House we will make these facts known to the American people.").

One issue discussed during the markup was whether there existed an alternate way to make the tax return information available to the Department of Justice without disclosing it to the public. Several Democratic members of the committee asked about a procedure under the law allowing the committee to designate agents to inspect tax return information.[36] If the Attorney General and/or his designees were appointed as the committee's agents, they could inspect the information without public disclosure. The chairman initially denied the existence of any alternate procedure.[37] Subsequently, he made it plain that the alternative described by the Democrats was unacceptable because it was essential that the committee's action result in a *public* release of the referral letter (including the tax return information it contained).[38]

Although not mentioned during the markup, there potentially existed an even more straightforward alternative: the Justice Department had already initiated a criminal investigation of the IRS's administration of the EO tax laws,[39] and the law provides the Department with *direct* access to certain tax return information in connection with such an investigation.[40] Thus, it is possible that, because of either one of these two provisions, all of the public disclosures of tax return information made by the committee were unnecessary.

---

[36] See I.R.C. § 6103(f)(4)(A) (1st sentence); Tr. at 15 (Rep. Doggett (D.-Tx.)), 26 (Rep. Levin (D.-Mich.)), 66-67 (Rep. Kind (D.-Wisc.)), 76 (Rep. Becerra (D.-Cal.)).

[37] See id. at 15.

[38] See note 52.

[39] See Feb. 3, 2014 letter from James M. Cole, Deputy Att'y Gen'l, Dept. of Justice, to Rep. Jim Jordan (R.-Oh.), Chmn., Subcomm. on Econ. Growth, Job Creation and Regulatory Affairs, H. Comm. on Oversight & Gov't Reform, reprinted in 160 Cong. Rec. H3914 (daily ed. May 7, 2014) (referring to "Department of Justice's ongoing criminal investigation into the Internal Revenue Service's treatment of groups applying for tax exempt status").

[40] See I.R.C. § 6103(h)(2); Reg. § 301.6103(h)(2)-1(a). The provision limits the type of "third-party" tax return information that may be disclosed to the Justice Department. During the markup, Rep. Levin stated that "[t]he Department of Justice has access to all of the same information" (Tr. at 24, 26) but he seemed to be referring to the Department's ability to conduct interviews and compel testimony, and not necessarily its access to tax return information held by the tax agency. In contrast, the chairman stated that the Justice Department "[doesn't] have access to the documents that we have compiled, which we have gotten from IRS" and that "down the road, we would probably have to vote as a committee to allow [the Justice Department] to have access to any further documents." Tr. at 79-80.

Given the sole purpose of the meeting, it was surprising that there was almost no discussion of the specific tax return information disclosed in the referral letter and exhibits. The chairman described in general terms that tax return information includes not only tax material submitted by taxpayers but also the IRS's processing of that information.[41] But there was no description of the amount or type of material proposed to be disclosed or the taxpayers involved. The only taxpayer specifically mentioned during the markup was Crossroads GPS.[42]

The committee also spent almost no time considering and debating its legal authority to make the public disclosures. The chairman described the provision (I.R.C. § 6103(f)(4)(A)) purporting to provide the authority as "very clear,"[43] and referred several times to "consultations" with, and "advice" received from, three respected offices in Congress: House Counsel, the Parliamentarian's Office, and the Joint Committee on Taxation.[44] But no representative from any of those offices testified at the markup. When a Democratic member of the committee, upon being told by the chairman that the statutory authority for the committee's action was very clear, inquired whether House Counsel would be testifying at the markup, the chairman responded "no."[45] Later, the chairman specifically cut off a line of inquiry asking whether he had received any written advice from House Counsel.[46] The only witness at the markup (a majority staff member of the committee) stated that he was "not a subject matter

[41] See id. at 18-19.
[42] See id. at 6, 22, 31, 42.
[43] See id. at 3 (mentioning I.R.C. § 6103(f)(4)(A)), 17-18 (characterizing statute as "very clear"). The chairman subsequently stated: "6103 provides for this. The statute provides that when the committee, in its oversight role, finds egregious information, we have the authority to release confidential taxpayer information." Id. at 50. Section 6103 contains no such distinctions.
[44] Id. at 3, 13 (describing "consultation" with all three offices), 11 (stating "House Counsel has advised us" about procedure), 15 (stating that "parliamentarians" had recommended procedure as "best way"), 17 (stating that "parliamentarians decided that we should take this course of action . . . [and] House Counsel . . . looked at the criminal liability potentially in the statute and advised us on that regard"), 54 (stating that all three offices "recommended that the committee vote, we have a public debate about the letter, . . . and the documents become part of the public record").
[45] Id. at 17-18 (responding to question from Rep. Thompson (D.-Cal.)).
[46] See id. at 64-65 (directing staff witness not to answer question whether there existed any letter from House Counsel regarding the procedure being followed by the committee).

expert on [section] 6103" (the portion of the tax law dealing with tax return confidentiality).[47] The chairman subsequently stated that the witness's "knowledge of 6103 is not a matter before this committee."[48]

Upon further questioning as to the existence of written advice, the chairman agreed to include as part of the record an email he had received from the House Parliamentarian.[49] After the committee approved submission of the DOJ letter to the House, the chairman released a one-page statement, not attributed to any office or author, that describes the procedural steps to be taken to satisfy the "parliamentary requirements" of section 6103(f)(4)(A).[50] The statement neither analyzes the legal scope of that provision nor discusses whether the committee's proposed disclosure of tax return information fell within that scope. The committee has not provided any other material addressing its legal authority to make the disclosure.

D. Lack of committee rationale for public disclosure of tax return information.

Perhaps the most surprising omission from both the referral letter and the committee's markup discussion was any explanation of the committee's rationale for disclosing the tax return information to the public. According to the committee, the letter was issued as part of its oversight function,[51] and during the markup, the chairman emphasized the need for the letter to be made public.[52] In addition, about one month after the committee's action, the House approved

[47] Id. at 29 (indicating title of witness), 53 (making statement).
[48] Id. at 75.
[49] See id. at 81-82.
[50] See http://waysandmeans.house.gov/UploadedFiles/Chairman_Camp_-_Submission_For_The_Record_040914.pdf.
[51] See Referral Letter, note 2, at 1; Tr. at 13 (indicating committee was acting pursuant to oversight function).
[52] The chairman repeatedly expressed unwillingness to submit a "secret letter" to the Justice Department. Id. at 15, 16, 55, 60, 64; see also Fred Stokeld, Lerner May Have Broken Laws, Ways and Means Tells DOJ, 143 Tax Notes 166, 167 (2014) (quoting the chairman as stating, "I think it's important that the public have an understanding of what went on, and if I sent a secret letter to the Department of Justice, I think that would be doing a disservice to the Americans whose constitutional rights were on the line"). In defending the public nature of the letter, the chairman

H. Res. 565 calling on the Attorney General to appoint a Special Counsel "to investigate the IRS's targeting of conservative nonprofit advocacy groups."[53] Left completely unexplained was why it was necessary to disclose publicly the *tax return information* contained in the letter, even assuming that the committee's oversight function required issuance of a public letter to the Justice Department, and that the letter and findings provided support for the House's subsequent consideration of H. Res. 565.[54] During the markup, the chairman was asked specifically whether a public letter could be sent to the Justice Department while transmitting the confidential tax return information under seal, but he gave no response.[55] Since the only legal restriction facing the committee, and the whole point of the markup, concerned the public disclosure of tax return information, one would have expected the chairman to have had a ready answer to that question.

For the 40 taxpayers whose return information was disclosed in one of the exhibits but never referenced (directly or indirectly) in the referral letter, any of the committee's discussion, or H. Res. 565, there is no discernible reason for the disclosure. An examination of some of these taxpayers shows that they and their tax information had absolutely nothing to do with the claims made by the committee or H. Res. 565. For example, the tax information revealed about the

---

also asserted at various points the public's "right to know" without explaining how the public's understanding of the committee's action (a criminal referral to the Justice Department) was furthered by the disclosure of the tax return information included in the letter. See Tr. at 16, 20; cf. id. at 7 (explaining that committee's submission of letter to the House "will provide transparency into the actions of the Internal Revenue Service officials at the center of the targeting and hold the Justice Department accountable for whether it acts based on these facts").

[53] H. Res. 565, 113th Cong. (2014); 160 Cong. Rec. H3922-23 (daily ed. May 7, 2014) (250-168 vote in favor). During the committee's markup of the letter, no mention was made of any future legislative action. The House also approved H. Res. 574, holding Lois Lerner in contempt of Congress, on the same day it approved H. Res. 565. See 160 Cong. Rec. H3922 (daily ed. May 7, 2014) (231-187 vote in favor). H. Res. 574 was based on a report and evidence provided by the House Committee on Oversight & Government Reform.

[54] One might reasonably question why the referral letter needed to be public, even aside from its inclusion of confidential tax return information, and the chairman never explained his resistance to a confidential letter. The letter merely asks the Justice Department to investigate evidence of possible criminal wrongdoing. A confidential submission would ordinarily have better protected the integrity of the Department's investigation as well as the rights of the accused. In addition, very little information contained in the referral letter is mentioned in H. Res. 565 or the debate relating to that resolution.

[55] See Tr. at 55 (stating disagreement with—but providing no answer to—question of Rep. Doggett); text accompanying notes 36-38.

World Wildlife Fund[56] concerned whether its "sale of carbon credits is substantially related to [its] exempt purposes and thus not subject to [the unrelated business income tax]."[57] The tax information relating to the Miss America Foundation[58] concerned whether "an organization that provides non-forfeitable scholarships to Miss America participants qualifies under § 501(c)(3) as an affiliate of the National Miss America pageant."[59] The information involving Z Street[60] concerned "[w]hether an organization that advocates for legislation to support Israel qualifies for exemption under section 501(c)(3)."[61] None of these taxpayers or their tax return information had any relevance to any of the charges made against Lerner or the call for a Special Counsel.

There is also no evident reason why the committee disclosed the identity and tax return information of One Fund Boston, the taxpayer whose return information was allegedly transmitted by Lerner through a personal email account (thereby potentially exposing it to unlawful disclosure by her). This claim of impropriety by Lerner, if valid, did not turn on the *identity* of the specific taxpayer involved, so inclusion of the taxpayer's name did not serve any committee purpose. It would have been a simple matter to redact the taxpayer's name and any other identifying information.[62]

---

[56] The work of the World Wildlife Fund "has evolved from saving species and landscapes to addressing the larger global threats and forces that impact them." See http://www.worldwildlife.org.

[57] See exhibit 21.

[58] The Miss America Foundation is "a "501(c)(3) organization provid[ing] academic, community service and other scholarships to women between the ages of 17 and 24." See http://www.missamericafoundation.org.

[59] See exhibit 21.

[60] "Z Street is a non-profit corporation dedicated to educating the public about various issues related to Israel and the Middle East." See http://www.forbes.com/sites/peterjreilly/2014/05/28/z-street-suit-on-irs-israel-targeting-can-move-forward/.

[61] Exhibit 24.

[62] The committee carefully redacted a private email address included in one of the exhibits (see exhibit 12), but failed to use similar care to protect any of the confidential tax return information. The referral letter states that "[t]he application [of One Fund Boston] has since been approved and is available for public inspection." Referral Letter at 12 n.63. It is unclear what the committee intended by this statement. The committee may have been under the impression that because section 6104(a) authorizes public release of certain application materials once an exemption is recognized by the IRS, then it was no longer a violation to disclose the tax return information involving One Fund Boston. But that understanding is erroneous. In general, only application material (including supporting documents) submitted by the taxpayer to the IRS and letters or documents issued by the IRS to the applicant must be released publicly. See I.R.C. § 6104(a)(1)(A); Treas. Reg. § 301.6104(a)-1(a), (c), (e), (g). Third-party information, as well

Likewise, there is no reason for the committee's disclosure of the names and return information of the four Tea Party organizations or the five right-leaning organizations allegedly discriminated against by Lerner. The committee's evidence linking Lerner to these organizations was extremely tenuous. As to the Tea Party organizations, the committee used an internal agency memo circulated to Lerner (among others) naming the organizations as evidence that she had earlier knowledge of the targeting of Tea Party organizations by the IRS than she admitted to TIGTA.[63] In the case of the five right-leaning organizations, the committee produced a one-line email from Lerner to certain subordinates asking to meet on the status of applications mentioned in a story naming the five organizations.[64] No other committee evidence connected Lerner to these specific organizations. Thus, even assuming that the evidence somehow shows improper conduct on the part of Lerner, there was no reason for the committee to identify the organizations. A general reference to a "Tea Party" organization—as TIGTA did when it issued its report revealing the possible targeting by the IRS of those organizations[65]—or to "right-leaning organizations" would have served the committee's purpose without disclosing any tax return information.

Finally, although perhaps the only close case, there also does not appear to have been any basis for the committee's public disclosure of the tax return information of Crossroads GPS. Evidence of Lerner's actions against this organization was used to support the committee's claim that she committed criminal misconduct in discriminating against conservative groups. As a

---

as material reflecting the IRS's internal processing of the application (including the material in the committee's referral letter), are not covered by the publicity requirement in section 6104(a). See Lehrfield v. Richardson, 132 F.3d 1463, 1465-67 (D.C. Cir. 1998). For a proposal supporting greater relaxation of the confidentiality protections of EOs to facilitate increased transparency of the IRS's administration of the EO tax laws, see George K. Yin, Reforming (and Saving) the IRS by Respecting the Public's Right to Know, 100 Va. L. Rev. 1115, 1152-62 (2014).

[63] See Referral Letter, note 2, at 11-12; exhibits 21, 24.

[64] See id. at 7; exhibit 13.

[65] See Treasury Inspector Gen. for Tax Admin., Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review, Ref. No. 2013-10-053 (2013).

threshold matter, the evidence in support of this claim is very thin. The committee failed to show why evidence of Lerner's interest in Crossroads GPS was anything other than internal agency discussion (presumably occurring continuously with respect to many different taxpayers) regarding how the agency's limited compliance and enforcement resources should be used.

But even if it is assumed that the criminal discrimination claim against Lerner is a serious one, the evidence assembled by the committee gave it no basis for identifying Crossroads GPS, as opposed to referring to it as "organization X" or "right-leaning organization X." The committee did not show any specific criminal intent on the part of Lerner towards that organization, which might have justified revealing its identity.[66] The committee also did not analyze the tax return information of Crossroads GPS, which might also have justified a disclosure. For example, the committee might have examined the details of a sample of tax-exempt applications—from both left-leaning and right-leaning groups (including Crossroads GPS)—to show inconsistent application of tax law principles or procedures on the part of Lerner (or the IRS). Indeed, as the House's *tax* committee, the Ways & Means Committee might have been expected to provide exactly that type of analysis for Congress.[67] Did the merits of the Crossroads GPS application, including the fact that the IRS apparently received 25 complaints about the organization over a three-year period, provide a legitimate basis for Lerner's interest and the agency's scrutiny, as compared to their treatment of comparable left-leaning groups?[68]

[66] 18 U.S.C. § 242, the criminal statute the committee alleged Lerner may have violated in discriminating against conservative organizations, requires willful conduct on the part of the accused.

[67] In the early 1970s, the staff of the Joint Committee on Taxation carried out two such analyses in an attempt to determine whether the IRS had acted improperly towards selected taxpayers during the Nixon Administration. See Staff of Jt. Comm. on Int. Rev. Tax'n, Investigation into Certain Charges of the Use of the Internal Revenue Service for Political Purposes, JCS-37-73 (1973); Staff of Jt. Comm. on Int. Rev. Tax'n, Investigation of the Special Service Staff of the Internal Revenue Service, JCS-9-75 (1975). In each case, the staff reported its findings without disclosing any tax return information.

[68] See Referral Letter, note 2, exhibit 6 (providing Jan. 7, 2013 email from Nanette Downing to Lerner describing receipt of 25 referrals on Crossroads GPS); id. at 4 n.17 (explaining that a "referral" is a complaint).

Rather, the committee's discrimination charge against Lerner rested on a simple *numerical* claim: she took adverse action against right-leaning organizations but not left-leaning ones. The selective nature of the committee's presentation,[69] the absence of any statistical analysis to support the claim,[70] and a questionable assertion made by the chairman during the markup,[71] all raise serious doubt about the merits of the committee's position. More importantly for present purposes, the committee's numerical claim did not require identification of any of the specific organizations involved, including Crossroads GPS.

E. Summary.

The striking failure to discuss the confidential tax return information proposed to be disclosed, the 51 taxpayers that would be affected, the committee's legal authority to make the disclosure, and (most importantly) the committee's rationale for permitting the information to become public, combined with the dubious nature of the claims presented, paint the picture of a fraud carried out by the chairman and committee majority. What transpired during the markup was not consistent with its purported sole purpose. Rather, it would appear that the entire episode was largely a subterfuge to carry out the chairman's and committee majority's true purpose—to

[69] The referral letter included just 28 documents out of over 500,000 examined by committee staff, with many more documents yet to be received and analyzed. See Tr. 4, 29. Several of the Democratic members expressed concern about the selective nature of the committee's presentation. See id. at 25 (Rep. Levin), 46-48 (Rep. Becerra), 67, 78-79 (Rep. Kind).

[70] H. Res. 565 makes several numerical assertions to support its claim that the IRS mistreated conservative groups, but none of them is based on evidence provided by the referral letter.

[71] The chairman stated that Lerner "never" took adverse action against left-leaning organizations referred to the IRS. Tr. at 6. The basis for his statement is unclear. Exhibit 9 of the referral letter provides a partial transcript of the committee's interview of Victoria Judson, then-IRS Associate Chief Counsel (TE/GE), who testified that upon being informed by Lerner that there might be a denial of Crossroads GPS's application, she asked Lerner whether there were other proposed denials "reflect[ing] different sides of the political spectrum." She said that Lerner replied in the affirmative. Unfortunately, the excerpt from the transcript that is included in the exhibit is cut off at this point without elaboration of this potentially significant testimony.

obtain authorization to reveal publicly Lerner's actions towards Crossroads GPS.[72] This speculation would explain why the chairman was so insistent upon—yet could not explain the reason for—publicity of the tax return information in the referral letter.

If publicizing Lerner's actions towards Crossroads GPS was the objective, it could have been accomplished very easily without violating any taxpayer's confidentiality rights. The committee could have obtained a waiver from Crossroads GPS to disclose publicly its tax return information and redacted the identities of—or omitted altogether any reference to—the remaining 50 taxpayers. The chairman and committee majority may have believed that taking such steps would have made their partisan political objective too transparent. Whatever the explanation, the action they took was directly contrary to the chairman's assertion during the markup that "we have taken every precaution to make sure that taxpayer information is protected."[73] Instead, they acted in total disregard of the privacy interests of the 51 taxpayers.

But however reprehensible the action, was it illegal? Does the law permit the committee to disclose confidential tax return information to the public even in the absence of any legitimate committee purpose? Part II examines that question.

II. Legal Authority of the House Ways & Means Committee to Disclose Tax Return Information to the Public.

A. Section 6103(f)(4)(A).

Section 6103(f)(1) gives the tax committees access to tax return information. Any information that can be associated with or otherwise identify, directly or indirectly, a particular

[72] During the markup, Rep. Levin indicated that the committee was acting because the House Oversight and Government Reform Committee was about to hold Lois Lerner in contempt of Congress, and the "Republican members of the Ways and Means Committee have decided that they do not want to be left behind in the Republican campaign to declare this a scandal and keep it going until November." Tr. at 24.
[73] Id. at 14.

taxpayer must be furnished to such committees only when sitting in closed executive session (unless the taxpayer consents to a disclosure). The committees may designate agents to inspect any of the tax return information obtained.[74]

Section 6103(f)(4)(A) provides that any tax return information obtained by the tax committees pursuant to section 6013(f) "may be submitted by the committee to the Senate or the House of Representatives, or to both." The Ways & Means Committee relied upon this provision to permit the release of the tax return information in the referral letter to the public.[75] As a technical matter, the committee merely approved submission of the referral letter with the information to the House.[76] But the committee clearly understood that the effect of its approval was to authorize *public* release of the tax return information. As the chairman explained in the markup, based on advice he had previously received from the Parliamentarian's Office,[77] "[s]hould the committee vote to submit the letter to the House, it will enter the public record and members will be free to discuss its contents publicly."[78] Moreover, during the markup, the chairman emphasized the need for publicity of the tax return information and repeatedly resisted an alternate method of providing such information to the Justice Department without a public release.[79] As he stated, "it is important that we try to find a way to move [the referral letter (including the confidential information)] into the public sphere."[80] The next section describes why the committee's public disclosure of tax return information in 2014 exceeded the scope of its authority under section 6103(f)(4)(A).

[74] See I.R.C. § 6103(f)(4)(A) (1st sentence).
[75] See Tr. at 3.
[76] See http://waysandmeans.house.gov/calendar/eventsingle.aspx?EventID=375722.
[77] See note 50 and accompanying text.
[78] Tr. at 3.
[79] See id. at 15-16, 55, 60-61.
[80] Id. at 61.

B. Interpretation of section 6103(f)(4)(A).

Enactment of section 6103(f)(4)(A) dates back to the Revenue Act of 1924 when Congress first gave Congressional committees access to confidential tax return information and allowed them to submit the information to the House and Senate. The following sections first describe the development of tax confidentiality laws (to provide context for the 1924 change), then explain the reasons for and meaning of the special rights provided to Congressional committees in 1924, and finally discuss the changes to the provision made by the Tax Reform Act of 1976. The relevant provisions have not been changed since 1976.

1. Development of tax return information confidentiality laws.

The first income taxes in the United States, enacted during the Civil War, generally gave the public full access to the tax return information of taxpayers. Tax administrators posted in public places (and published in newspapers) lists showing the amount of income tax owed by specific taxpayers, and made full tax return information available for public inspection.[81] This practice followed similar publicity given at various times since 1798 to tax information relating to property taxes approved by Congress.[82] The purpose of the publicity of the income tax information was to advise taxpayers of the amount of their tax liabilities, facilitate collection of the tax, and discourage fraudulent returns.[83]

[81] See Act of July 1, 1862, ch. 119, § 6, 12 Stat. 432, 434 (requiring taxpayers to submit a "list or return" showing "amount of annual income"); id. §§ 14–15, 12 Stat. at 436–37 (describing preparation and publication of assessment lists); id. §§ 16, 18–19, 12 Stat. at 437–40 (describing preparation and publication of collector's lists, open to public inspection); id. § 93, 12 Stat. at 475 (requiring submission of income tax return); Act of June 30, 1864, ch. 173, §§ 11, 18–20, 27–28, 118, 13 Stat. 223, 225, 228–29, 232–33, 282–83; George S. Boutwell, A Manual of the Direct and Excise Tax System of the United States 259 (4th ed. 1864).

[82] See Act of July 9, 1798, ch. 70, §§ 16, 18, 19, 27, 1 Stat. 580, 587-90; Act of July 14, 1798, ch. 75, §§ 5, 6, 1 Stat. 597, 599; Act of July 22, 1813, ch. 16, §§ 13, 14, 16, 17, 3 Stat. 22, 28-30; Act of Jan. 9, 1815, ch. 21, §§ 14, 21, 22, 3 Stat. 164, 169-72.

[83] See Howard M. Zaritsky, Legislative History of Tax Return Confidentiality: Section 6103 of the Internal Revenue Code of 1954 and Its Predecessors, Cong. Res. Serv., Libr. of Congress, 74-211A (1974), at CRS-4 to CRS-6.

Early on, publicity of the income tax information drew sharp criticism. In 1862, in introducing a set of proposed internal revenue taxes to help finance the War, Representative Morrill (R.-Vt.), chair of the House Ways & Means Subcommittee on Internal Revenue Taxation, conceded that the income tax proposal was one of the "least defensible" recommendations, describing it as "an inquisitorial [tax] at best."[84] The term, "inquisitorial," became a common refrain of critics of the income tax because the law required taxpayers to reveal some of their private affairs to the tax agency and to respond to the agency's inquiries about such affairs.[85] As one commentator later explained the nature of the grievance:

> [U]pon no point has the income tax been assailed so vehemently, or denounced so bitterly, as regards its administrative features. It is held to invade the sanctity of a man's most personal affairs, to lay open to the inquisitive eye of the official, and perchance the public, his income, and, in case of inspection, his business methods as well. It is, in effect, said to be an inquisitorial tax *par excellence*.[86]

To be sure, only a tiny sliver of the population ever paid the Civil War income taxes.[87] Thus, one must take the privacy objections to the tax with a grain of salt. Still, the argument seemed to have some resonance because it raised an issue of personal fairness and rights, and not just a complaint about the distribution of the nation's financial obligations.

In 1864, the Commissioner of Internal Revenue urged support for a legislative change that would prevent tax return information from being disclosed outside of the tax agency "[i]n

[84] Cong. Globe, 37th Cong., 2d Sess. 1196 (Mar. 12, 1862); see id. at 1252 (Mar. 17, 1862); Joseph A. Hill, The Civil War Income Tax, 8 Qtrly J. Econs. 416, 421 (July, 1894); Harry Edwin Smith, The United States Federal Internal Tax History from 1861 to 1871 (1914), at 51.

[85] See Cong. Globe, 41st Cong., 2d Sess. 3994 (1870) (Rep. Kelley (R.-Pa.)); Elmer Ellis, Public Opinion and the Income Tax, 1860-1900, 27 Miss. Valley Hist. Rev. 225, 230 (1940) ("[i]nquisitorial was the most popular description among those opposed [to the income tax]."); Frederic C. Howe, Taxation and Taxes in the United States under the Internal Revenue System, 1791-1895 (1896), at 95-96; Smith, note 84, at 88.

[86] Howe, note 85, at 240-41. Howe disagreed with the criticism and thought that the income tax was less inquisitorial than state personal property taxes, the tax information of which was usually open to the public. Id. at 241.

[87] See Robert Stanley, Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861-1913 (1993), at 39-40 (estimating highest percentage of population to pay Civil War income tax was 1.3%).

order that [the income tax] might not be felt to be inquisitorial in its character."[88] This change was not made because of pressure from newspapers that wanted to publish the information.[89] Once the War ended, however, there were renewed calls to limit the publicity of tax return information. In 1866, Representative (and future President) James Garfield (R.-Oh.) acknowledged the need for some publicity "to act as a pressure upon men to bring out their full incomes," but objected to publication of the information in newspapers, which he termed "odious."[90] In 1870, Congress barred tax administrators from publishing tax return information in newspapers, but continued to allow public inspection.[91] Two years later, Congress let the income tax law expire, "in part because of problems stemming from publicity of tax returns."[92] As one commentator later summarized the debate surrounding publicity and the Civil War income taxes, "[i]t is very questionable whether the benefit received from publicity was not entirely offset by the injury it did, because of the antagonism to the [income] tax which it aroused."[93]

When interest in an income tax revived about 20 years later, its supporters remained sensitive to the privacy concerns voiced earlier about the tax. In 1893, the Cleveland Administration recommended enactment of a small tax only on "incomes derived from investments in stocks and bonds of corporations and joint stock companies."[94] According to the

[88] Report of the Comm'r of Internal Revenue on the Operations of the Internal Revenue System for the Year Ending June 30, 1863 (1864), at 11.
[89] See Hill, note 84, at 436; Smith, note 84, at 66-67.
[90] Cong. Globe, 39th Cong., 1st Sess. 2789 (May 23, 1866).
[91] See Act of July 14, 1870, ch. 255, § 11, 16 Stat. 256, 259 (last proviso); Circular Letter from Columbus Delano, Comm'r of Internal Revenue, to Assessors (Apr. 5, 1870), 11 Int. Rev. Rec. & Customs J. 113 (1870) (providing that although publication of information would end, public access would continue).
[92] 1 Ofc. of Tax Policy, Dept. of Treasury, Scope and Use of Taxpayer Confidentiality and Disclosure Provisions 16 (2000); see Report on Admin. Procedures of the Int'l Rev. Serv. to the U.S. Admin. Conf., S. Doc. 94-266, 94th Cong., 2d Sess. 838 (1975) (hereinafter IRS Procedures) ("the furor surrounding publicity was one of the central causes of the early demise of the income tax as a revenue raising instrument").
[93] Smith, note 84, at 68; see Hill, note 84, at 436.
[94] Annual Report of the Sec'y of the Treasury on the State of the Finances for the Year 1893 (1893), at LXXXIII.

Treasury Department's explanation, this tax would be "less objectionable" than a general income tax because it is—

> not inquisitorial nor liable to evasion by the fraudulent suppression of facts, because the assessments or returns need not be based upon information extorted by the law from the persons charged with their payment, but upon the public records and the regular and authentic accounts of the corporations and companies in which the investments have been made.[95]

For the same reason, there was interest in Congress in an income tax imposed only on corporations.[96]

The Ways & Means Committee, however, eventually proposed a general income tax on corporations and individuals. To address the privacy objection, the committee also proposed an amendment to make disclosure of certain tax return information outside of the tax agency a misdemeanor.[97] The proposal represented a partial response to taxpayer privacy concerns. Taxpayers would still be required to reveal some personal information to the tax agency, and be subject to its questioning, because the information was essential to the determination of tax liability. But taxpayers would be assured that their information would go no further, and specifically not be shared with the public, thereby providing a measure of privacy protection.[98] This basic compromise, which is what the Commissioner of Internal Revenue had proposed back in 1864,[99] has remained a cornerstone of tax return information confidentiality laws ever since.[100] In 1894, Congress passed both the income tax and the anti-disclosure provision.[101]

---

[95] Id.; see Sidney Ratner, Taxation and Democracy in America 173-74 (1980).

[96] See William L. Wilson, The Income Tax on Corporations, 158 N. Amer. Rev. 1, 6 (1894) (describing an income tax on individuals as "necessarily accompanied by some exasperating and some demoralizing incidents"). The author was chairman of the House Ways & Means Committee at the time.

[97] See 26 Cong. Rec. 1594, 1596 (Jan. 29, 1894) (adding § 63); H. Rep. No. 53-276 (1894) at 3; Howe, note 85, at 235; Edwin R.A. Seligman, The Income Tax, 9 Poli. Sci. Qtrly 610, 639 (1894) (stating that "much of the inquisitorial character of the former income tax has been removed by the stringent provisions in the new law calculated to insure the utmost secrecy").

[98] See Note, Inquisitorial Powers of Federal Administrative Agencies, 48 Yale L. J. 1427, 1432 (1939) ("where information is in the possession of a governmental agency, restrictions on both the availability and the use of the data afford the informant a measure of protection.").

[99] See note 88 and accompanying text.

The income tax proved to be short-lived when the Supreme Court in the next year struck down the tax as unconstitutional.[102] Reflecting again the significance of the privacy objections to the tax, the Treasury Secretary ordered that all income tax returns collected under the 1894 tax be burned.[103] The anti-disclosure provision was unaffected by the demise of the income tax and has remained in the law ever since.[104]

Enactment of the 1909 corporate excise tax (imposed on corporate income) initially seemed to mark a change in public and Congressional attitudes towards privacy and the income tax because the law made the corporate tax returns public records "open to inspection as such."[105] But this rule appears to have been adopted primarily to help with corporate regulation rather than to further any tax policy objective.[106] President Taft reportedly thought the publicity feature was the best part of the 1909 law because of its regulatory potential, but his Treasury Secretary informed him that it had generated the most objections, especially as it applied to the tax information of close corporations.[107] The Secretary was apparently sympathetic to the objections; he indicated that if his corporation were affected, he would do what he could to "evade the law."[108]

---

[100] See Nelson Trottman, Publicity of Income Tax Returns, 2 Nat'l Inc. Tax Mag. 263, 263 (1924) (doubting whether income tax would have survived "had it not been for a more or less general understanding that disclosure of [the] private [tax return] information would be limited to the taxing authorities.").
[101] See Tariff Act of 1894, ch. 349, §§ 27, 34, 28 Stat. 509, 553, 557.
[102] See Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), aff'd on reh'g, 158 U.S. 601 (1895).
[103] See 56 Cong. Rec. 10,167 (Sep. 10, 1918) (reproducing letter of Rep. Hull); Zaritsky, note 83, at CRS-10.
[104] See 18 U.S.C. § 1905 (2012).
[105] See Payne-Aldrich Tariff Act of 1909, ch. 6, § 38 (cl. 6), 36 Stat. 11, 116.
[106] See 44 Cong. Rec. 3344 (1909) (providing President Taft's statement in support of the corporate excise tax in part because it would enhance "federal supervision" of corporations); Marjorie E. Kornhauser, Corporate Regulation and the Origins of the Corporate Income Tax, 66 Ind. L. J. 53, 113-18, 124-30 (1990).
[107] See Roy G. Blakey & Gladys C. Blakey, The Federal Income Tax 57 (1940); 1 Taft and Roosevelt: The Intimate Letters of Archie Butt 262-63 (1930); Kornhauser, note 106, at 125-26 (explaining that complaints especially related to small corporations); Ratner, note 95, at 294 ("Mild as the corporation tax of 1909 was, large and powerful groups of businessmen objected violently both to the imposition of the tax on corporate profits and to the publicity features of the Act.").
[108] See Blakey & Blakey, note 107, at 571; Taft and Roosevelt, note 107, at 263.

No public inspection of corporate returns took place in 1909 because Congress had failed to appropriate any funds for that task.[109] In 1910, the House Appropriations Committee initially again failed to appropriate any funds, apparently in recognition of the opposition to publicity.[110] When the Senate Appropriations Committee proposed an appropriation, it added the important condition that inspection could occur "only upon order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President."[111] On the Senate floor, Senator La Follette, Sr. (R.-Wis.) offered an amendment also to allow Congress, by House or Senate resolution, to authorize inspection of the returns, and it was accepted.[112] Ultimately, La Follette's amendment was not included in the law, and therefore the President was the sole person given discretion to order inspection of the corporate returns.[113]

The only reported debate of this issue occurred in the House when it considered the Senate's recommended appropriation to fund inspection.[114] The debate is limited and includes misstatements by various participants, suggesting that at least some Representatives did not fully understand what was at issue.[115] The House rejected the substance of the La Follette amendment but approved the original Senate Appropriations Committee proposal to give the President sole

[109] See T.D. 1594, 13 Treas. Dec. Int. Rev. 20 (1910); 45 Cong. Rec. 3035-36 (Mar. 10, 1910) (Rep. Fitzgerald (D.-N.Y.)); id. at 4131 (Apr. 1, 1910) (Rep. Underwood (D.-Ala.)); id. at 4137 (Rep. Fitzgerald) (reading Treasury Secretary's 2/16/10 letter to that effect).

[110] See 45 Cong. Rec. 4131 (Apr. 1, 1910) (Rep. Underwood) (characterizing House's failure to appropriate funds as intentional due to the complaints received about publicity, and stating that "the people of the United States have repudiated [publicity] and do not stand with the President of the United States upon it.").

[111] 45 Cong. Rec. 3685 (Mar. 24, 1910).

[112] See id.

[113] See Act of June 17, 1910, ch. 297, 36 Stat. 468, 494.

[114] See 45 Cong. Rec. 4128-4142 (Apr. 1, 1910) (debating and rejecting Senate amendment #78 and then approving revised amendment that give President sole authority to order inspection of returns).

[115] See 45 Cong. Rec. 4133 (Apr. 1, 1910) (Rep. Underwood) (misstating that Senate amendment gives the President "alone" the authority to order publicity); id. at 4134 (Rep. Bartlett (D.-Ga.)) (same); id. at 4135 (Rep. Gillett (R.-Mass.)) (misstating that revised amendment, which gave the President the sole discretion to order inspection, provided the same "as the Senate did").

authority to order inspection of the corporate tax information.[116] It appears that this decision reflected a desire to control more tightly the circumstances in which publicity of the tax information might occur.[117] In view of the opposition towards publicity, the President had apparently assured the Congress that he would *not* order public inspection of the tax information, at least for non-public corporations.[118] (The President subsequently approved a regulation allowing the public to inspect the tax information of public corporations.[119]) With this assurance, the Representatives most concerned with taxpayer privacy voted against the substance of the La Follette amendment and in favor of giving the President sole discretion. There was clearly concern about the potential abuse of this discretion by the President, including possible misuse of the authority for political purposes,[120] and also worry that the President might withhold the information from Congress.[121] Other Representatives, however, gave assurance that the President would use his discretion responsibly and make the information available to Congress if it needed it, and their view prevailed.[122] The requirement that the President exercise his discretion only through promulgation of Treasury regulations may have helped persuade some legislators that the authority would not be used purely for partisan purposes.[123]

---

[116] See id. at 4134-35 (rejecting Senate amendment (as amended by La Follette amendment) by 102-141 vote); id. at 4142 (approving by 132-124 vote revised amendment giving President sole discretion).

[117] See id. at 4140 (Rep. Hitchcock) (D.-Neb.) (describing proposed revised amendment (without the La Follette amendment) as an attempt to "lock up [the] information" even further, "so it shall only be made public upon order of the President himself.").

[118] See 45 Cong. Rec. 4134 (Apr. 1, 1910) (Rep. Bartlett).

[119] See T.D. 1665, 13 Treas. Dec. Int. Rev. 117, 119–20 (1910).

[120] See 45 Cong. Rec. 4132 (Apr. 1, 1910) (Rep. Hughes (D.-N.J.) ("I propose to vote against giving the President, or any other administrative or executive officer, the right to publish facts as against any particular corporation around election time and not publish facts as regards other corporations"); id. at 4133 (Rep. Underwood) (same); id. at 4140 (Rep. Hitchcock) (same); id. at 4141 (Rep. Harrison (D.-N.Y.)) (criticizing proposal as "giv[ing] into the hands of an administration a power, a control over the business interests in this country, greater than any emperor in the world has in any other country.").

[121] See 45 Cong. Rec. 4134 (Rep. Bartlett).

[122] See id. at 4136 (Rep. Gillett) (assuring that discretion will be used responsibly); id. at 4138 (Rep. Payne (R.-N.Y.) (assuring about Congressional access).

[123] 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, 857 (2013).

The first Act of the modern income tax, passed in 1913, continued the 1910 treatment of corporate returns, but applied the anti-disclosure rule (approved in 1894) with full force to the returns of individuals.[124] Thus, following the 1913 Act, there was "total secrecy for individual returns . . . and Executively discretionary secrecy for corporations."[125] In 1918, without explanation, Congress conformed the treatment of the two types of returns by classifying them both as "public records." It provided, however, that neither type of return could be inspected except by Presidential order (pursuant to Treasury regulations),[126] and this provision remained the general rule until 1976. Except for the returns of public corporations (which the public was allowed to inspect only until 1920[127]), no President ever used the authority to permit public inspection of returns or return information.[128]

2. Congressional committee access to tax return information.

As previously noted, the issue of Congressional access to tax return information arose briefly in 1910 in connection with whether the President would permit Congress to inspect information that it needed.[129] In 1921, Senator Reed (D.-Mo.) offered an amendment to make returns "open to inspection by any committee of Congress."[130] Under the amendment, the committees were required to hold the information in confidence "unless the Senate or House of

[124] See Revenue Act of 1913, ch. 16, compare § II(G)(d) (38 Stat. 114, 177) (providing rule for corporate returns) with § II(I) (38 Stat at 177-78) (amending Rev. Stat. § 3167 (1894) for general rule).
[125] Zaritsky, note 83, at CRS-56; see Blakey & Blakey, note 107, at 98; Edwin R.A. Seligman, The Federal Income Tax, 29 Poli. Sci. Qtrly 1, 22-23 (1914).
[126] See Revenue Act of 1918, ch. 18, § 257, 40 Stat. 1057, 1086–87 (treating as public records all "returns upon which the [income] tax has been determined by the Commissioner"); T.D. 2961, 2 C.B. 250 (Jan. 7, 1920).
[127] See id. at 252 (regulation 8) (not permitting public inspection of any corporate returns); id. at 253 (regulation 15) (superseding prior regulations).
[128] See IRS Procedures, note 92, at 829; Marc Linder, Tax Glasnost' for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity-Privacy Continuum, 18 Rev. L. & Soc. Change 951, 963 (1990-91).
[129] See notes 121-122 and accompanying text.
[130] 61 Cong. Rec. 6986 (Oct. 29, 1921).

Representatives shall otherwise by resolution direct."[131] Senator Smoot (R.-Ut.), chair of the Senate Finance Committee, immediately expressed concern that the amendment would allow the information to become public.[132] Smoot also questioned whether committees without jurisdiction over taxes should be able to obtain access to the information.[133] This issue, which raised sensitive questions within Congress, frequently arose in the subsequent debate.

Reed argued that Congress was fully as trustworthy and discreet as the executive branch to handle the confidential tax return information, and that it needed the information to perform its legislative duties. He gave as possible reasons a Congressional investigation of the Treasury Department or the development of tax legislation.[134] The Senate subsequently agreed to his amendment once it was revised to require passage of a House or Senate resolution requesting the information.[135] This change meant that access could not be obtained merely through a favorable committee vote.

Reed's amendment was dropped in conference without any official explanation.[136] According to one contemporary commentator, "[f]ew acts of the conferees were subject to more scathing criticism than was this."[137] On the House side, Representative (and future House Speaker and Vice-President) Garner (D.-Tx.) denounced the action and claimed the conferees dropped the provision because they "were not willing to trust either the House or the Senate" with the information.[138] On the Senate side, supporters of the amendment questioned the

[131] Id.
[132] See id.
[133] See id.
[134] See id. at 6984-86.
[135] See id. at 6987-88; H.R. 8245, 67th Cong., 1st Sess. § 257 (1921) (as passed by Senate) (including amendment #556).
[136] See H.R. 8245, 67th Cong., 1st Sess. § 257 (1921) (as agreed to in Conference); H. Conf. Rep. No. 67-486 (1921), at 7-8 (amendment #556), 44 (amendment #556) (indicating House rejects language).
[137] Roy G. Blakey, The Revenue Act of 1921, 12 Amer. Econ. Rev. 75, 97 (1922).
[138] 61 Cong. Rec. 8075 (Nov. 21, 1921).

zealousness of the Senate's conferees in defending its position in conference.[139] The decisions in 1910 and 1921 suggest 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.

Congress overcame its reluctance in 1924 when it authorized committee access to the information. There were several reasons for the change of heart. Principal among them was the revelation of a number of Harding Administration scandals that, by early 1924, had produced "investigation hysteria" in Congress.[140] Over half of the Senate, working on 16 special committees, was investigating scandals concerning the Interior and Justice Departments, the Navy, and the Veterans Bureau.[141] The most famous was the "Teapot Dome" scandal, involving the leasing of public oil fields to private interests in exchange for bribes of government officials. Congress had already sought to obtain from President Coolidge the confidential tax return information of some of the alleged principals involved in that scandal, and the President ultimately acceded to the request (acting under the authority he maintained to permit the inspection of tax return information).[142] But this experience undoubtedly demonstrated to

[139] See id. at 8113-14 (Nov. 22, 1921) (Sen. Simmons (D.-N.C.)); id. at 8114 (Sen. La Follette (R.-Wisc.)); id. at 8159 (Nov. 23, 1921) (Sen. Hitchcock (D.-Neb.); id. (Sen. Jones (D.-N.M.); id. at 8159-60 (Sen. Walsh (D.-Mass.); id. at 8162 (Sen. Hitchcock).

[140] Robert K. Murray, The Harding Era: Warren G. Harding and His Administration 479-82 (1969); see, generally, Robert H. Ferrell, The Presidency of Calvin Coolidge 43-51 (1998); Robert K. Murray, The Politics of Normalcy 102-29 (1973).

[141] See Blakey & Blakey, note 107, at 542; 1 George H. Haynes, The Senate of the United States: Its History and Practice 565-66 (1938).

[142] See 65 Cong. Rec. 3699-3702 (Mar. 6, 1924) (setting forth President Coolidge's initial response to S. Res. 180, which requested the returns); T.D. 3566, 26 Treas. Dec. Int. Rev. 54, 58 (¶ 13) (1924) (allowing returns to be inspected). For a description of the Treasury Department's initial inclination to deny Congressional inspection of the Teapot Dome-related tax information because it was not for a legitimate legislative purpose, see Yin, note 123, at 856-58. The Senate subsequently passed a resolution requiring the Joint Committee on Internal Revenue Taxation to obtain additional Teapot Dome-related tax information and the information was published in the Congressional Record. See 69 Cong. Rec. 9045 (May 18, 1928) (agreeing to S. Res. 235); id. at 9842-43 (May 25, 1928) (publishing tax report with tax return information).

Congress its need to have direct access to the information independent of the President's authority.

Another important factor influencing Congress in 1924 was a Senate investigation of the Bureau of Internal Revenue (BIR) (predecessor to the modern-day IRS). The onset of that investigation earlier in 1924 had been stymied by the inability of the investigating committee to examine tax return information.[143] In addition, the Senate had approved the investigation in part because of a bitter, public feud between Treasury Secretary Mellon and Senator Couzens (R.-Mich.) in which the former was perceived by some in Congress to have unlawfully publicized the latter's tax return information:

> Just the other day, when [Senator Couzens] got into a controversy with [Secretary Mellon], the [latter] . . . made the income returns of this Senator public. He, of course, had access to all the income returns and he used the information and made it public. Why give him any more rights in making these facts public than the rest of the people of the United States? Why did not the Secretary of the Treasury give the same publicity to his own income returns?[144]

Providing Congress with direct access to the information would potentially be a way to even the score between the two branches.[145]

These and other factors ultimately led the Senate to approve in 1924 an amendment offered by Senator Norris (R.-Neb.) to make tax return information fully open to the public, the Civil War income tax rule that had been repeatedly sought by the Progressives and other

[143] See 65 Cong. Rec. 6102-03 (Apr. 11, 1924) (Sen. Jones (D.-N.M.); id. at 6195-96 (Apr. 12, 1924) (Sen. Reed (D.-Mo.)); id. at 6300-01 (Sen. Heflin (D.-Ala.); id. at 7677 (May 2, 1924) (Sen. Norris (R.-Neb.)); id. at 7908 (Sen. Robinson (D.-Ark.); id. at 7917 (Norris).

[144] 65 Cong. Rec. 2959 (Feb. 22, 1924) (Rep. Browne (R.-Wisc.)). Mellon's public reference to Couzens's tax information followed Couzens's own public disclosure of essentially the same information. For background on the feud and how it helped lead to the BIR investigation, see Yin, note 123, at 814-24.

[145] According to one report, at an April 3, 1924 hearing of the Senate Finance Committee (held partly in executive session), "Mr. Mellon virtually was cross-examined by Senator Jones (D.-N.M.) and that much of the information sought required the Secretary to bare his own financial situation." C&F Chronicle (Apr. 5, 1924) at 1615; see Hearings Before the S. Comm. on Finance on Revenue Act of 1924, 68th Cong. 291-96, 307-18 (1924); Yin, note 123, at 846. After Congress passed the committee access provision in 1924, Mellon's undersecretary warned him that it could be used to obtain Mellon's personal tax information. See id. at 858.

supporters since at least 1916.[146] Action in the House in 1924, however, was more measured. It rejected a full publicity amendment but agreed to a provision giving Congressional committees access to tax return information.[147] The conferees dropped the Norris full publicity amendment but agreed to the House provision, and it was signed into law.[148]

The House debate on the committee access provision invoked the Teapot Dome scandal and the Couzens-Mellon dispute.[149] Supporters also contended that Congress needed the information to evaluate Administration tax proposals, develop its own tax legislative initiatives, and carry out investigations.[150] Eventually, Representative Garner played the trump card that swung the debate in favor of the proposed Congressional access:

> 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*.[151]

---

[146] See 65 Cong. Rec. 7692 (May 2, 1924) (approving the Norris amendment 48-27). For prior debate on the full publicity amendment, see 53 Cong. Rec. 13,290-92 (Aug. 28, 1916) (Sen. Hustings (D.-Wisc.); id. at 13,852-53 (Sen. Husting); id. at 13,853 (Sen. Reed (D-Mo.)); id. at 13,854 (Sen. Norris)); id. at 13,856 (Sen. La Follette, Sr.); 61 Cong. Rec. 7365-74, 7518-19 (1921). A similar full publicity amendment was approved by the Senate in 1928, 1933, and 1934, but the provision never made it into law. See 69 Cong. Rec. 9059-64, 9069, 9073-82 (May 18, 1928) (approving amendment of Sen. Norris); 77 Cong. Rec. 5419 (June 9, 1933) (approving amendment of Sen. La Follette, Jr. (R-Wis.)); 78 Cong. Rec. 6554 (April 13, 1934) (approving La Follette amendment).

[147] See 65 Cong. Rec. 2960 (Feb. 22, 1924) (rejecting full publicity amendment 158-80); id. at 2964 (agreeing to committee access provision 158-100); H.R. 6715, 68th Cong., 1st Sess. § 257(a) (1924) (as passed by the House). Agreement on the committee-access provision appeared to have been a compromise, with Rep. Garner (who favored full publicity) indicating that he was willing to accept it in lieu of full publicity. See 65 Cong. Rec. 2436 (Feb 14, 1924) (Rep. Garner) (indicating support for full publicity); id. at 2958 (Feb. 22, 1924) (Garner) (indicating willingness to compromise). The Ways & Means committee bill did not include any provision on committee access. See H.R. 6715, 68th Cong., § 257(a) (1924) (as reported by Ways & Means Committee).

[148] See H.R. 6715, 68th Cong., § 257 (1924) (as agreed to in Conference); Revenue Act of 1924, ch. 234, § 257, 43 Stat. 253, 293.

[149] See 65 Cong. Rec. 2436 (Feb. 14, 1924) (Rep. Garner) (explaining that Ways & Means Committee cannot examine the returns of Harry Sinclair, one the principals allegedly involved in Teapot Dome); id. at 2786-87(Feb. 19, 1924) (Rep. Crisp (D.-Ga.)) (mentioning Mellon-Couzens controversy); id. at 2959 (Feb. 22, 1924) (Rep. Browne (R.-Wisc.) (mentioning Mellon-Couzens dispute and claim that Mellon snooped at Couzens's returns).

[150] See id. at 2786-87 (Feb. 19, 1924) (Rep. Crisp) (complaining about Treasury budget estimates); id. at 2919 (Feb. 21, 1924) (Rep. Jacobstein (D.-N.Y.) (explaining Congressional need for tax return information to "more intelligently draft a corporation income tax law"); id. at 2953 (Feb. 22, 1924) (Rep. Frear (R.-Wisc.)) (claiming that Congress needs information "to draw bills and fix rates"); id. at 2958 (Rep. Garner) (same); id. at 2960 (Rep. Howard (D.-Neb.) (explaining information needed to carry out investigation of Treasury Department).

[151] Id. at 2958 (Feb. 22, 1924) (emphasis added).

Garner's separation of powers argument quickly persuaded Ways & Means Committee chairman Green (R-Iowa) to agree to the substance of the proposed amendment.[152]

The remaining debate focused principally on two related questions: which committees should be given access, and how could the confidentiality of the information be preserved once Congress gained access? Chairman Green wanted to limit access to the tax committees, and argued that "[i]f every committee of the House can call for these returns and scatter them around through the House, everyone knows that they will become public property."[153] This assertion was potentially quite contentious, and Garner (who was ranking member of the Ways & Means Committee at the time) proceeded to exploit its vulnerability:

> I think ... I serve on the best committee in Congress, but it is not the only committee in Congress. I think there are other committees that we can trust. I am not afraid to trust the Congress. You do not want to trust the public, you do not want to trust the newspaper men to look into these returns, but can you not trust the Congress? Can you not trust the committees that we make up? If you cannot, for God's sake what can you trust?[154]

Other members of Congress quickly chimed in with similar views. Representative Lozier (D.-Mo.) stated to applause:

> The country has the right to know whether or not the tax returns made by the idle rich and by the gigantic corporations are fair and reasonable or based on evasion, fraud, and circumlocution. Under this amendment the rights of the ordinary citizen and ordinary corporation are safeguarded. The power [to access and disclose the return information] will never be exercised, except in a comparatively few cases where there is conclusive, or at least persuasive, evidence that there have been gross evasions and fraudulent concealments of such magnitude as to shock the conscience and justify an investigation, and then the returns can only be examined by a duly authorized committee from the Senate or House and under reasonable and proper regulations. I am sure that no committee of the House or Senate will ever abuse this privilege or use the power recklessly.[155]

Likewise, Representative Jeffers (D.-Ala.) asserted:

> Surely you can safely trust to a committee of the Congress of the United States to be wise, and it is unnecessarily and arbitrarily discriminatory to limit it to the one committee which has been

[152] See id.
[153] Id. at 2960.
[154] Id. at 2961; for similar assertions by Garner, see id. at 2436 (Feb. 14, 1924); id. at 2958 (Feb. 22, 1924)
[155] Id. at 2962.

> mentioned. I know the Ways and Means Committee is a great and a powerful committee, but even so the Ways and Means Committee ought not to try to hog the whole show.[156]

Representative Garner's view prevailed. The House approved an amendment giving access to tax return information to the two tax committees and to a "special committee of the Senate or House." It gave such committees authority to designate agents to inspect the return information and to submit "any relevant or useful" information to the Senate or the House.[157]

In Senate Finance Committee hearings on the House bill, Treasury Secretary Mellon criticized the committee access provision as violating the privacy rights of taxpayers. He urged the committees to receive the information "only in executive session," and to prevent the information from being mentioned in floor debate or published in the Congressional Record.[158] The bill reported by the Finance Committee adopted the House's committee access provision, but narrowed it in two ways. First, it gave access to the two tax committees and to a Senate or House committee "specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution."[159] Thus, it limited the type of non-tax committee that might obtain the information and required more than mere committee approval to do so. Second, following one of Mellon's recommendations, it required any committee (including a tax committee) to sit in executive session in order to receive the information.[160] Like the House, the Finance Committee gave the committees obtaining the

[156] Id.; see id. at 2963 (Rep. Jacobstein (D.-N.Y.)) (arguing in favor of "[w]ise and discreet publicity" of tax return information to and by Congress).
[157] See H.R. 6715, 68th Cong., 1st Sess. § 257(a) (1924) (as approved by the House); 65 Cong. Rec. 2960 (Feb. 22, 1924) (setting forth amendment of Rep. Moore (D.-Va.)); id. at 2964 (approving by 148-139 vote amendment of Rep. Tilson (D.-Conn.) to Moore amendment, and approving by 158-100 vote Moore amendment as amended).
[158] See Hearings Before the S. Comm. on Finance on Revenue Act of 1924, 68th Cong. 61 (1924).
[159] H.R. 6715, 68th Cong., 1st Sess. § 257(b)(1) (1924) (as reported by the Senate Finance Committee); S. Rep. No. 68-398 (1924) at 30.
[160] See H.R. 6715, 68th Cong., 1st Sess. § 257(b)(1) (1924) (as reported by the Senate Finance Committee). The Finance Committee report did not mention this change. See S. Rep. No. 68-398 (1924) at 30.

information the authority to designate agents to inspect it, and to submit any "relevant or useful" information so obtained to the House or Senate.[161]

The Senate quickly approved without discussion the Finance Committee's committee access provision.[162] But then, as previously noted, the Senate agreed to an amendment providing full publicity of tax return information and therefore deleted as unnecessary the committee access provision.[163] When the conferees dropped the full publicity amendment, they returned to the House language giving the tax committees and a "special committee of the Senate or House" access to tax return information (and not requiring the information to be provided in executive session). Like the House and Finance Committee bills, the conferees gave the committees the right to designate agents to inspect the information and to submit any "relevant or useful" information obtained to the House or Senate.[164]

The tax return publicity provisions in the 1924 Act "were more bitterly opposed, perhaps, than any others."[165] Most of the outrage was directed at another provision in the new law that required full publicity of the amount of income tax paid by all taxpayers.[166] But the committee access provision also came in for criticism. As one newspaper wrote:

> Congress seriously proposes to give its committees the privilege of satisfying their malice or curiosity by pawing over the tax returns of every person and every corporation, and making such use of the information as they see fit. If Congress can get away with this breach of trust it will be

[161] H.R. 6715, 68th Cong., 1st Sess. § 257(b)(2) and (3) (1924) (as reported by the Senate Finance Committee).
[162] See 65 Cong. Rec. 7675-76 (May 2, 1924).
[163] See note 146 and accompanying text; H.R. 6715, 68th Cong., 1st Sess. § 257 (1924) (as approved by the Senate) (incorporating amendment # 96).
[164] H.R. 6715, 68th Cong., 1st Sess. § 257(a) (1924) (as agreed to in Conference); H. Conf. Rep. No. 68-844 (1924) at 22-23; 1924 Act, § 257(a), 43 Stat. 253, 293.
[165] Roy G. Blakey, The Revenue Act of 1924, 14 Amer. Econ. Rev. 475, 492-93 (1924); see also Roy G. Blakey, The Revenue Act of 1926, 16 Amer. Econ. Rev. 401, 411-14 (1926).
[166] See 1924 Act, § 257(b), 43 Stat. 253, 293; C&F Chronicle, p. 2526 (May 24, 1924) (reporting "[p]rotests by the thousands poured in on Congress to-day against [the publicity] section of the bill. It is opposed on the ground that it would accomplish no real good but on the other hand would be subversive of the public interest."); Paul Pry Legislation (editorial), The Sat. Evening Post, Dec. 20, 1924, at 20 (criticizing 1924 income-tax paid list, which filled the land "with a luxuriant crop of envy, suspicion, hatred, insinuation and innuendo, much of it false and unfair..."). For a possible connection between this provision and the Couzens-Mellon controversy, see Yin, note 123, at 846.

> encouraged to go further, until it requires no stretch of the imagination to see one's income, whether it be small or large, discust (sic) as freely as the weather.[167]

Both President Coolidge and Treasury Secretary Mellon criticized the committee access provision because of their concern that it would result in disclosures of tax return information to the public.[168] In 1925 hearings before the House Ways & Means Committee, business representatives raised similar concerns with the provision, with one witness urging that access to tax return information should be limited to the "fiscal" committees of Congress sitting in executive session.[169]

In the 1926 Act, without any explanation, Congress amended the committee access provision to incorporate the two narrowing changes provided by the Finance Committee in its 1924 bill. Congress limited the non-tax committees that could gain access to tax return information to a select committee of the Senate or House "specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution."[170] Further, Congress required any committee (including a tax committee) to sit in executive session in order to receive the information.[171] Congress also created in 1926 the Joint Committee on Internal Revenue Taxation (now the Joint Committee on Taxation) (JCT) and its staff, granted the JCT the same access to tax return information as the two tax committees, and

---

[167] Income-Tax "Snooping," The Literary Digest 12 (Mar. 8, 1924) (quoting from Springfield *Union*).

[168] See C&F Chronicle (Jun. 7, 1924), at 2775 (reporting Coolidge's view); C&F Chronicle (May 24, 1924), at 2526 (reporting Mellon's view).

[169] See Hearings Before H. Comm. on Ways & Means on Revenue Revision, 1925, 68th Cong. 65-66 (1925) (statement of James A. Emery, Tax Committee, National Assn. of Manufacturers) (noting that privacy is destroyed if "returns are discussed in open committee or on the floor"); id. at 278 (statement of L.R. Gottlieb, Nat'l Industrial Conf Bd.) (same); id. at 95, 98-99 (statement of Eugene E. Thompson, Chairman, Federal Taxation Comm., Investment Bankers' Assn. Of America); id. at 106-07 (statement of M.L. Seidman, N.Y. Board of Trade and Transportation); id. at 114, 117 (statement of Edward P. Doyle, Real Estate Board of N.Y.); id. at 280-83 (statement of Raymond H. Berry, American Bankers' Assn).

[170] Revenue Act of 1926, ch. 27, § 257(b)(1), 44 Stat. 9, 51.

[171] See id. The Ways & Means and Finance Committee bills included both changes, and neither committee's report mentioned them. See H.R. 1, 69th Cong., 1st Sess. § 257(b)(1) (1925) (as reported by House Ways & Means Committee); H.R. 1, 69th Cong., 1st Sess. § 257(b)(1) (1926) (as reported by Senate Finance Committee). There was no discussion of either change in the floor debate of either chamber. Both bills also removed the "income tax paid" provision in the 1924 Act.

authorized it to submit any "relevant or useful" information to those committees or the Senate or House.[172] These rights and responsibilities were consistent with the original purposes of the JCT, which were to investigate the tax system, develop and propose possible simplification measures, and help provide oversight over the BIR.[173]

Notably, Congress did not adopt the other restriction urged by Secretary Mellon in 1924 that would have prevented the committees from publicizing any of the tax return information obtained.[174] This issue presented a dilemma for Congress: how could it protect taxpayer privacy rights as well as its own "informing function" (the responsibility that Woodrow Wilson had described "should be preferred even to its legislative function"[175])? 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 (and not a loophole, as some commentators have suggested[176]), given the detailed attention Congress gave to these issues—was to rely upon committee discretion. It refused to *prohibit* committee disclosure of the confidential information—as Mellon had advocated—but similarly rejected in 1926 a Senate amendment that would have *mandated* disclosure of the information.[177]

---

[172] See 1926 Act, § 1203(a), (d), 44 Stat. at 127-28.
[173] See id., § 1203(c); Yin, note 123.
[174] See note 158 and accompanying text.
[175] Woodrow Wilson, Congressional Government: A Study in American Politics 303 (1885); see George B. Galloway, The Investigative Function of Congress, 21 Amer. Poli. Sci. Rev. 47, 62 (1927) (stating that "[t]he power and duty of the legislature to inform the voters regarding the administration of existing laws . . . is implicit in the whole theory of democracy and popular sovereignty"); Paul C. Rosenthal & Robert S. Grossman, Congressional Access to Confidential Information Collected by Federal Agencies, 15 Harv. J. on Legisl. 74, 76-77 (1977) (describing Congressional need to balance these two interests).
[176] See Comm. on Fed. Legislation, N.Y.C. Bar, Access to Federal Income Tax Returns, 34 Rec. Ass'n Bar City N.Y. 376, 397 (1979) (calling exception "loophole"); Linder, note 128, at 966 n.88 (terming provision "bizarre[]"); James N. Benedict & Leslie A. Lupert, Federal Income Tax Returns—The Tension Between Government Access and Confidentiality, 64 Cornell L. Rev. 940, 979, 981 n.236 (1979) (criticizing provision); Herman Clurman & Frederick A. Provorny, Publicity and Inspection of Federal Tax Returns, 46 Taxes 144, 155 (Mar. 1968) (same); IRS Procedures, note 92, at 967 (same).
[177] The Senate accepted the amendment but the conferees rejected it without explanation. See 67 Cong. Rec. 3021 (Jan. 30, 1926) (amendment of Sen. Couzens); H.R. 1, 69th Cong., 1st Sess. § 1203(d) (1926) (as agreed to in Conference); H. Conf. Rep. No. 69-356 (1926), at 28.

The committees were given the discretion to determine what tax return information, if any, would be disclosed to the public.

Congress, however, did not give its committees unfettered discretion.[178] No explanation was found in any of the debate as to the meaning of the modifiers included in the statutory permission, which allowed the committees to submit only "relevant or useful" information to the House or Senate. Because the words were added as part of a House floor amendment, they may have been drafted hastily without much thought.[179] On the other hand, the same words were used again in a subsequent provision describing the type of confidential tax information that could be submitted by the JCT to the House or Senate, giving some indication that the choice of words was deliberate and meaningful.[180]

The plain meaning of the words suggests a low bar that left the committees with considerable discretion. Thus, the words likely would not support an interpretation restricting disclosures only to situations that "shock the conscience," as one of the provision's supporters seemed to indicate.[181] At the same time, in view of the solicitude Congress had shown towards taxpayer privacy rights since 1870, its wariness in giving itself authority over, and access to, the confidential information in 1910 and 1921, and the careful steps it delineated in 1924 and 1926 to protect taxpayer privacy even as it accessed and used the information, Congress must have intended the words to impose some limitation on committee discretion.

During the period it was considering the tax changes approved in 1924, Congress became embroiled in a controversy concerning its right to obtain information in connection with its

[178] Cf. Rosenthal & Grossman, note 175, at 92 (explaining that although Congress has access to, and can disclose to the public, information that it has determined to be confidential, "Congress can and should impose some public disclosure limitations on itself.").
[179] See note 157.
[180] See note 172 and accompanying text.
[181] See text accompanying note 155.

investigation of the Teapot Dome scandal and related matters.[182] The law at the time provided that, in the absence of a self-imposed restriction, Congress's right to information was very broad but not unlimited. Among other things, the Congressional inquiry had to further a valid legislative purpose.[183] Since Congress's disclosure of confidential information to the public is more violative of privacy rights than its mere seizure of the same information, a reasonable interpretation of the restriction intended by Congress in 1924 (absent evidence to the contrary) was to require at a minimum the existence of some legitimate committee purpose for a disclosure.[184] This modest requirement was probably implicit in the statutory permission even without inclusion of the limiting words.

The limited evidence in the legislative record supports this interpretation. When Representative Garner and other supporters proclaimed their "trust" in Congress's committees, they were articulating an expectation that the committees would act responsibly to protect the confidentiality of the information, and not release it without a valid purpose.[185] Likewise, those

[182] See Ex Parte Daughterty, 299 Fed. 620 (S.D. Oh., W. D. 1924) (concluding that Senate arrest of individual who refused to testify before that body was invalid), rev'd, McGrain v. Daughterty, 273 U.S. 135 (1927); Galloway, note 175, at 51 (describing events and noting "[g]reat interest" in the case); James M. Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 154-56 (1926) (describing events).

[183] See Kilbourn v. Thompson, 103 U.S. 168, 196 (1880) (concluding that House resolution authorizing an investigation was invalid because its purpose exceeded Congress's constitutional authority); McGrain v. Daugherty, 273 U.S. 135, 177 (1927) (reversing lower court and concluding that Congressional investigation was valid because it was "to obtain information for legislative purposes"); Galloway, note 175, at 54 (describing law as assuming Congressional investigation has a legislative purpose and is "therefore valid until the contrary is shown"); cf. Watkins v. United States, 354 U.S. 178, 198 (1957) ("*Kilbourn v. Thompson* teaches that . . . an investigation into individual affairs is invalid if unrelated to any legislative purpose"); Robert C. Hacker & Ronald D. Rotunda, Officers, Directors, and Their Professional Advisers: Rights, Duties, and Liabilities, 4 Corp. L. Rev. 74, 78 (1981) ("the gist of *Kilbourn* should still be good law: Congress may not issue subpoenas nor use its investigatory powers for an improper legislative purpose"). Subsequent case law has applied the same principle to Congressional efforts to obtain confidential information from executive agencies. See Ashland Oil v. FTC, 409 F. Supp. 297, 305 (D.D.C. 1976), aff'd 548 F.2d 977 (D.C. Cir. 1976) (upholding Congressional subpoena of trade secret information held by executive agency); cf. Watkins v. United States, 354 U.S. 178, 187 (1957) (stating that valid Congressional inquiry "must be related to, and in furtherance of, a legitimate task of the Congress"); Wilkinson v. United States, 365 U.S. 399, 408-09 (1961) (same).

[184] Cf. George D. Webster, Inspection and Publicity of Federal Tax Returns, 22 Tenn. L. Rev. 451, 468-69 (1952) (describing goal of tax privacy legislation since original income tax statute as "giving taxpayers confidence that private affairs would not be divulged when the public interest did not require it").

[185] See text accompanying notes 154-156.

who initially expressed reservations about allowing committee access before supporting it, including Finance Committee Chairman Smoot in 1921 and Ways & Means Committee Chairman Green in 1924, based their concern on the possibility of improper public disclosures of the information.[186]

In summary, following the 1926 Act, tax returns were classified as "public records" but generally open to inspection only upon order of the President (pursuant to regulations issued by the Treasury). In addition, the tax committees (including the new JCT), as well as a non-tax committee with special authorization to investigate tax returns by resolution of the House or Senate, could obtain tax return information while sitting in executive session. The committees were permitted to designate agents to inspect the information and to submit relevant or useful information to the House or Senate. Although the meaning of the words, "relevant or useful," was not explained, a reasonable interpretation is the requirement of at least some legitimate committee purpose to make the submission. This state of the law remained essentially unchanged for the next 50 years.

3. Changes made by the Tax Reform Act of 1976.

In 1976, Congress approved a major revision of the tax return confidentiality rules. The Watergate investigations revealed the extent to which President Nixon and his top White House staff had attempted to use the tax agency and its tax return information for political purposes, and these findings formed the core of one of the Articles of Impeachment against the President.[187]

[186] See notes 132 and 153 and accompanying text.
[187] See Impeachment Article II, approved by H. Judiciary Comm., July 27, 1974; S. Rep. No. 93-981, at 130–43 (1974); Staff of Jt. Comm. on Int. Rev. Tax'n, Confidentiality of Tax Returns, JCS-38-75 (1975), at 6–7.

Although President Ford subsequently issued an Executive Order restricting Presidential access to the information, Congress saw the need to include appropriate limitations in the statute.[188]

In addition, Congress was concerned with the widespread dissemination of tax return information permitted by Presidents during the roughly 40 years preceding passage of the 1976 Act.[189] While no President had approved public inspection of the information, Presidents had liberally made the information available to executive agencies.[190] As the Treasury Department later explained, "it would have been unrealistic to assume that the President could . . . resist agency arguments for more information on which to base important decisions."[191] Two of President Nixon's executive orders allowing the Department of Agriculture to inspect (for "statistical purposes") the tax returns of all farmers especially sparked public and congressional outrage.[192]

Presidents had also repeatedly used their authority to permit non-tax Congressional committees to inspect the confidential information. According to one study, there were at least 110 executive orders issued between 1933 and 1975 allowing tax return information to be inspected by non-tax committees.[193] This access was in addition to that permitted by the

[188] See Exec. Order No. 11,805, 3 C.F.R. 896 (1975); S. Rep. No. 94-938, at 322 (1976) (explaining that committee amendment is largely a codification of Exec. Order No. 11,805); 121 Cong. Rec. 643 (Jan. 17, 1975) (Sen. Weicker (R.-Conn.)) (explaining that restrictions are "better preserved by statute than left to the unpredictable course of an Executive order which can be easily changed, revoked, or disregarded.").
[189] See S. Rep. No. 94-938, at 316-18 (1976).
[190] See id. at 316; IRS Procedures, note 92, at 849.
[191] Ofc. of Tax Policy, note 92, at 20.
[192] See Exec. Order No. 11,697, 3 C.F.R. 158 (1973); Exec. Order No. 11,709, 3 C.F.R. 168 (1973); Inspection of Farmers' Fed. Inc. Tax Returns by the U.S. Dept. of Agric.: Hearings Before the Subcomm. on Dep't Operations of the H. Comm. on Agric., 93d Cong. 1 (statement of Rep. de la Garza (D.-Tex.)) (1973); Exec. Orders 11697 and 11709 Permitting Inspection by the Dept. of Agric. of Farmers' Inc. Tax Returns: Hearings Before the Subcomm. on Foreign Operations & Gov't Info. of the H. Comm. on Gov't Operations, 93d Cong. 1–2 (statement of Rep. Moorhead (D.-Pa.)) (1973). As a result of the objections, both orders were revoked the following year. See Exec. Order No. 11,773, 3 C.F.R. 857 (1974).
[193] See IRS Procedures, note 92, at 1044 n.67.

committee access provision enacted in 1924.[194] As described by one Senator, tax return information during this period became a "generalized governmental asset," with the IRS essentially serving as a "lending library" to the rest of the government of the materials submitted to the agency.[195]

In the 1976 Act, Congress removed the "public record" designation of tax returns and substituted instead a general rule of confidentiality under section 6103(a). The law generally allowed only tax administrators and others specifically identified by Congress to access the confidential information, and barred them from disclosing it to anyone else.[196] Thus, Congress eliminated the authority Presidents had had since 1910 to authorize inspection of tax return information by anyone (including themselves).[197] Congress made a willful unauthorized disclosure of the information a felony.[198]

In addition, Congress specifically restricted the ability of the President to access and disclose the information. Under the Act, the President must personally sign a written request specifying any confidential tax information needed (and the reason for the request), and must report the action to the JCT. The JCT may reveal the disclosure to Congress if it determines it would be in the national interest (such as if the information were obtained for "improper political purposes").[199] Furthermore, Congress generally did not provide the President with any authority

[194] See T.D. 6132, 1955-1 C.B. 142 (promulgating Reg. 301.6103(a)-101 applicable to committee requests not pursuant to the provisions enacted in 1924 and 1926); S. Rep. No. 94-938, at 319 (1976) (describing three types of Congressional committee access prior to 1976 Act).
[195] See 122 Cong. Rec. 24,013 (1976) (statement of Sen. Weicker (R.-Conn.)); cf. Stokwitz v. United States, 831 F.2d 893, 894–95 (9th Cir. 1987).
[196] See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202(a)(1), 90 Stat. 1520, 1667–85 (amending § 6103 of 1954 Code).
[197] See S. Rep. No. 94-938, at 321 (1976); note 113 and accompanying text.
[198] See 1976 Act, § 1202(d), 90 Stat. at 1686 (amending § 7213(a)(1) of the 1954 Code). The "willful" condition was added by technical correction in 1978. See Revenue Act of 1978, P.L. 95-600, § 701(bb)(6)(A), 92 Stat. 2763, 2923.
[199] S. Rep. No. 94-938, at 323 (1976); see 1976 Act, § 1202(a)(1), 90 Stat. at 1672–74 (adding § 6103(g)(1) and (5) to the 1954 Code).

to disclose any confidential information obtained.[200] As a result of these changes, it apparently has become standard practice for Presidents to steer clear of obtaining any tax return information.[201]

Finally, Congress also restricted the ability of its committees to access and disclose the information. As explained by the Senate Finance Committee, "[w]hile the Congress, particularly its tax-writing committees, requires access in certain instances to the data contained in return and return information in order to carry out its legislative responsibilities, the committee decided that the Congress could continue to meet these responsibilities under more restrictive disclosure rules than those provided under present law."[202] The principal change made by the Committee was to require non-tax committees to sit in "closed executive session" when submitting any confidential tax information to the House or Senate.[203] The same restriction was not imposed on the tax committees.[204]

On the Senate floor, as one of several hundred "technical amendments" offered by the Finance Committee and considered and accepted en bloc (without any discussion) at the end of

[200] The Act provided an exception for selected information relating to "tax checks" made of possible Presidential or other federal government appointees. See 1976 Act, § 1202(a)(1), 90 Stat. at 1673 (adding § 6103(g)(2)-(4) to the 1954 Code); S. Rep. No. 94-938, at 323 (1976).

[201] The most recent IRS report of disclosures of tax return information indicates that there were no disclosures in 2013 to the "President and Head of Agencies" pursuant to § 6103(g) (the provision authorizing disclosure to the President and certain top executive branch officials). See Staff of Jt. Comm. on Tax'n, Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 2013, JCX-52-14 (2014), at 3.

[202] S. Rep. No. 94-938, at 319-20 (1976).

[203] H.R. 10612 (1976) (as reported by the Senate Finance Committee), § 1202(a)(1) (proposing § 6103(f)(4)(B) (last sentence)). The Finance Committee bill contained several other new restrictions. First, it required that the House or Senate resolution authorizing a non-tax committee to obtain tax return information must specify the purpose for the information and that it "cannot reasonably be obtained from any other source." Id. (proposing § 6103(f)(3) (last sentence)). Second, it clarified that any committee (including one of the tax committees) obtaining tax information that can be associated with a particular taxpayer must receive the information while sitting in "closed" executive session. Id. (proposing § 6103(f)(1) and (3) (first sentence)). Third, it provided that non-tax committees may designate no more than four agents to inspect any return information obtained. See id. (proposing § 6103(f)(4)(B) (first sentence)). Finally, it required that any submission by the JCT (or the JCT Chief of Staff) to one of the tax committees of tax information that can be associated with a particular taxpayer may occur only while the tax committee is sitting in closed executive session (unless the taxpayer otherwise consents). See id. (proposing § 6103(f)(2) (last sentence) and (4)(A) (last sentence)).

[204] See id. (proposing § 6103(f)(4)(A) (second sentence)).

the lengthy Senate debate, the words, "relevant or useful," were struck from the provision in the Finance Committee's bill describing the type of information that may be submitted by the tax committees to the House or Senate.[205] As thus amended, the Senate bill provided that "[a]ny return or return information obtained by [one of the tax committees pursuant to the committee access provision] . . . may be submitted by the committee to the Senate or the House . . .".[206] This change, as well as the other amendments made by the Finance Committee, were enacted in 1976 and remain in the law today.[207]

In view of the potentially significant inclusion of the words, "relevant or useful," in 1924 to limit the type of confidential information that may be submitted by the tax committees to the House or Senate, one might interpret removal of those words in 1976 as having equal significance. Under this view, eliminating the modifiers broadened the discretion given to the tax committees to determine what information could be disclosed publicly. If, as suggested earlier, the 1924 Act required the tax committees to have at least some legitimate purpose to make a public disclosure, the 1976 change potentially authorized the tax committees to make disclosures for no purpose whatsoever (or at least no legitimate committee purpose).

But this interpretation would be contrary to both the general objectives of the 1976 Act changes (which were to tighten existing disclosure rules)[208] and Congress's specific objective in

[205] See 122 Cong. Rec. 26,184 (Aug. 6, 1976) (making change to line 14 of page 691 of the committee bill); id. at 26,182 (technical amendments offered en bloc); id. at 26,188 (amendments agreed to en bloc); H. Conf. Rep. No. 94-1515, at 476 (1976) (noting Senate change but without providing any explanation).

[206] See H.R. 10612 (1976) (as passed by the Senate), § 1202(a)(1) (proposing § 6103(f)(4)(A)).

[207] See 1976 Act, § 1202(a)(1), 90 Stat. at 1671-72 (adding § 6103(f) to the 1954 Code).

[208] See S. Rep. No. 94-938, at 318 (explaining that tax return information "should generally be treated as confidential and not subject to disclosure except in . . . limited situations"); id. at 319-20 (describing need for more restrictive disclosure rules for Congressional committees); id. at 322 (describing need to codify EO 11805 and restrict Presidential access); id. at 324-35 (describing circumstances in which disclosure of confidential information in tax cases was unwarranted); id. at 328 (describing need for new restrictions on use of information in nontax criminal cases); id. at 331 (describing need for new restrictions on use of information in nontax civil matters); id. at 335 (describing many situations in which use of information by executive agencies was not warranted); id. at 347 (describing need to increase criminal penalties for unauthorized disclosures); 122 Cong. Rec. 23,998 (July 27, 1976) (statement of Sen. Long, Chairman, Senate Finance Comm.) (explaining that committee's bill "will reduce

modifying the committee access rule (which was to permit such access "under more restrictive disclosure rules"[209]). It would also be contrary to the only statements found in the record on this issue on the part of legislators or witnesses.[210] No statement was found urging or making any argument in favor of broader discretion for the tax committees to make public disclosures of tax return information. On the contrary, by early 1976, a prominent legislative proposal that (according to its chief sponsor) had the support of two-thirds of the members of the Ways & Means Committee, over half of the members of the House, and 37 Senators, denied altogether the right of the tax committees (other than the JCT) to obtain any confidential tax information, thereby making moot their ability to disclose it.[211]

The interpretation would also be inconsistent with Congress's retention of the rest of the committee access provision, which details the protection that must be given to tax return

---

drastically the number of tax returns that will be floating around"); id at 24,012-13 (statement of Sen. Dole) (explaining that "[t]he tax privacy sections of [the committee's bill] will assure every American that his or her tax return will remain confidential and immune from political misuse"); id. at 24,013 (statement of Sen. Weicker) (same).

[209] The Finance Committee's report, in which the words quoted in the text appear, was issued prior to the adoption of the Committee's technical amendment to delete the words, "relevant or useful." But the same quoted words appear in the JCT's description of the Act issued after adoption of the amendment. See S. Rep. No. 94-938, at 320 (1976); Staff of Jt. Comm. on Tax'n, General Explanation of the Tax Reform Act of 1976, JCS-33-76 (1976), at 317.

[210] See Hearings Before Subcomm. on Administration of the Internal Revenue Code, S. Comm. on Finance, on Federal Tax Return Privacy, 94th Cong. 128 (1975) (hereinafter SFC Privacy Hearings) (providing 1961 memo from then-Comm'r of Internal Revenue Caplan (sic) expressing IRS's concern with possible public disclosure of return information held by committees); id. at 195 (statement of Sen. Dole) (expressing concern about possible disclosure by tax committees); id. at 216 (statement of Sen. Weicker) (explaining that tax committees (other than JCT) should not have access to individual tax records); id. (statement of Rep. Litton) (questioning need of any committee (including tax committee) to obtain information of particular taxpayers); id. at 217 (statement of Sen. Dole) (conceding that even tax committees "do not need to know the names" of individual taxpayers); Hearings Before H. Comm. on Ways & Means on Confidentiality of Tax Return Information, 94th Cong. 99 (1976) (hereinafter W&M Confidential Hearings) (statement of Sen. Weicker) (recommending that only non-identifying information submitted to the House or Senate by the JCT would be permitted); id. at 138 (joint statement of Robert A. Anthony, Chair, U.S. Admin. Conf., and Sheldon S. Cohen, Chair, Steering Comm. for IRS Project of U.S. Admin. Conf.) (recommending tightening committee disclosure rules); id. at 191 (statement of Rep. Kasten (R.-Wisc.)) (recommending that only JCT could make disclosures, and only of non-identifying information); Sec. of Tax'n, Amer. Bar Ass'n, Chairman's Report, 29 Tax Lawyer 447, 452 (1976) (recommending that only non-identifying tax return information be disclosed by tax committees). Post-enactment commentary continued to urge more restrictive disclosure rules for the tax committees. See Comm. of Fed. Legisl., note 176, at 397-98, 415 n.172; Benedict & Lupert , note 176, at 979-80, 981 n.236.

[211] See W&M Confidentiality Hearings, note 210, at 92 (statement of Rep. Litton) (describing support); id. at 99 (statement of Sen. Weicker) (describing bill's treatment of Congressional committee access).

information obtained by the committees to prevent public disclosure. It would mean that the same Congress that restricted the President's access to the information (and denied all ability to disclose it) nevertheless intended to permit the tax committees to obtain and disclose publicly any information for no legitimate purpose.[212] It would mean that Congress meant to make its ability to disclose confidential information to the public subject to a less exacting standard than the Congressional power to obtain such information. As previously noted, according to the Supreme Court, there is an implicit requirement that a Congressional investigation must have a valid legislative purpose.[213]

Finally, such an interpretation would be at odds with the manner in which the Finance Committee offered the amendment to the Senate. As one of a slew of "technical amendments" submitted at the end of a lengthy debate in which many substantive amendments had been considered, the implication was that the change had no substantive consequence. Although one can only speculate, it is possible that the amendment was merely a technical drafting change to conform to the removal of the words, "relevant or useful," in a related provision applicable to non-tax committees. Since, under the Committee's bill, the non-tax committees were permitted to submit information to the House or Senate only while sitting in closed executive session, the qualifiers, "relevant or useful" information, may have been viewed as surplusage, and the words were therefore removed by one of the other technical amendments added at the end of the Senate debate.[214] Consistent with this speculation, the conferees (without explanation) subsequently struck the same words in the only remaining portion of the Senate's committee access provisions

[212] Cf. SFC Privacy Hearings, note 210, at 217 (statement of Sen. Weicker) (explaining need to impose consistent restrictions on the President, the executive agencies, and Congress).
[213] See note 183 and accompanying text.
[214] See 122 Cong. Rec. 26,184 (Aug. 6, 1976) (modifying language on line 12 of page 692 of the committee's bill).

that still included them (relating to the right of the JCT Chief of Staff to submit information to the tax committees).[215]

For similar reasons, the 1976 Act's failure to require the tax committees to sit in "closed executive session" when submitting confidential information to the House or Senate should not be viewed as increasing their discretion to make public disclosures of the information. The problem of balancing taxpayer privacy rights with Congress's informing function was more daunting in 1976 than 1924. By 1976, as shown by the legislative amendments approved in that year, there was heightened interest in protecting taxpayer privacy. At the same time, just two years earlier, Congress had seen that preserving Congressional flexibility to make public disclosures of the confidential tax information was not merely a hypothetical concern. In 1974, the JCT (on a bipartisan basis) invoked its authority (under the committee access provision) to release to the public a staff report reporting on and analyzing the tax positions claimed by President Nixon.[216] The JCT released the report promptly upon its completion and submission by the staff out of concern that the keen public interest would otherwise result in the report being leaked.[217] This experience surely demonstrated to Congress how foresighted it had been in 1924 to permit public disclosures of the confidential information independent of the President's permission.

Indeed, with the proposed curtailment in 1976 of the President's prerogatives, the tax bill essentially allowed no one (aside from Congress) to make disclosures to the public (other than

[215] Compare H.R. 10612 (1976) (as passed by the Senate), § 1202(a)(1) (proposing § 6103(f)(2) (last sentence) with words) with H. Conf. Rep. No. 94-1515, at 161 (showing § 6103(f)(2) (last sentence) without words).

[216] See 120 Cong. Rec. 9454, 9539 (Apr. 3, 1974) (reporting submission by Sen. Long (D.-La.) (chairman of the JCT) of the JCT staff report to the Senate in order to permit its public release); id. at 9564, 9630 (reporting submission by Rep. Mills (D.-Ark.) (vice-chairman of the JCT) of the same report to the House for the same purpose); id. at 9564 (statement of Rep. Schneebeli (R.-Pa.)) (announcing Republican concurrence with action); Staff of Jt. Comm. on Int. Rev. Tax'n, Examination of President Nixon's Tax Returns for 1969 through 1972, H. Rep. No. 93-966 (1974).

[217] See 120 Cong. Rec. 9564 (Apr. 3, 1974) (statement of Rep. Mills) (explaining that "the joint committee felt that it was proper to release the report rather than have the report leaked.").

information that might be revealed in litigation). Thus, Congress no doubt felt compelled in 1976 to preserve some outlet for Congressional disclosures to the public.

It was natural to give this authority to the tax committees. Aside from their heightened need for the information, there were indications that non-tax committees may not have adequately protected the tax return information obtained by them. For example, in one instance, as part of an exposé published by the House Committee on Internal Security on the Students for a Democratic Society (a prominent anti-war group), the committee disclosed some of the group's confidential tax return information obtained through Presidential order.[218] Meanwhile, the Ways & Means and Finance Committees had rarely sought tax return information of particular taxpayers and had handled it without incident.[219] Obviously, the fact that the tax committees were the principal drafters of the legislation resolving the public disclosure question may also have played a role in the final outcome.

Congress's failure to require the tax committees to sit in closed executive session when submitting information to the House and Senate should, therefore, be viewed as a conscious decision to preserve an essential outlet for public disclosures. Importantly, however, there is no evidence indicating any intention to broaden the discretion of the committees beyond that provided them in 1924. As previously described, Congress expected the tax committees to protect the confidentiality of the information and to make public disclosures only for a legitimate committee purpose.

[218] See House Comm. on Internal Security, Anatomy of a Revolutionary Movement: "Students for a Democratic Society," H. Rep. No. 91-1565 (1970), at 170-71 (disclosing tax return information); Staff of JCT, note 187, at 12 (noting disclosure by non-tax committee); IRS Procedures, note 92, at 966-67 (noting possibility that non-tax committee could avoid confidentiality requirement); W&M Confidentiality Hearings, note 210, at 69 (statement of Don Alexander, Comm'r of Internal Revenue) (recommending limitation on non-tax committee access).

[219] See W&M Confidentiality Hearings, note 210, at 132 (statement of Sheldon Cohen) (describing protection provided by tax committees); Staff of JCT, note 187, at 11.

C. Summary.

In 1924, Congress gave the tax and certain non-tax committees considerable discretion to determine what confidential tax return information, if any, might be released to the public. But the discretion was not unlimited. Congress expected the committees to act responsibly and to make public disclosures only if there were some legitimate committee purpose for doing so.

In 1976, Congress ended the ability of non-tax committees to make public disclosures but continued to permit the tax committees to do so. Importantly, however, Congress did not intend to broaden the discretion of the tax committees. As was true prior to 1976, the committees were expected to protect the confidentiality of the information and to permit a public disclosure only if there were a legitimate committee purpose. The relevant provisions have remained unchanged since 1976.

Under this interpretation, the Ways & Means Committee in 2014 exceeded the scope of its authority to release tax return information to the public. As described in part I, the committee gave no explanation for its public release of the tax return information contained in the referral letter to the Department of Justice and, for virtually all (if not all) of the taxpayers involved, there was no legitimate committee purpose for doing so. Accordingly, in authorizing the release, the Ways & Means Committee broke the law.[220] The next part describes, however, why those who authorized and helped to carry out the release may not be prosecuted for their crime.

[220] Any criminal liability for the violation would depend in part upon the type of tax return information disclosed and whether the action was willful. See 18 U.S.C. § 1905 (2012) (making disclosure of only certain tax return information a misdemeanor); I.R.C. § 7213(a) (making disclosure of any tax return information a felony, but only if action is willful).

III. Speech or Debate Clause Protection of Legislators and Staff.

The Constitution provides in pertinent part that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place."[221] As interpreted by the Supreme Court, the Speech or Debate Clause provides immunity to members of Congress (and, in certain cases, their legislative aides) for their legislative acts. The immunity is absolute, and cannot be defeated by an allegation of improper purpose on the part of the legislator.[222]

The Clause allows members of Congress to perform their legislative duties free from intimidation by the executive branch or the judiciary.[223] The purpose is not simply to provide personal or private benefit to legislators, "but to protect the integrity of the legislative process by insuring the independence of individual legislators."[224] The Clause reinforces the principle of separation of powers.[225]

The Speech or Debate Clause provides two basic protections for legislators. First, it grants them a testimonial privilege.[226] The Clause expressly states that a member "shall not be questioned in any other place," meaning that a member cannot be questioned about matters falling within the protection of the Clause.[227] This privilege shields legislators from attempts to use grand jury investigations and criminal prosecutions to call into doubt their legislative acts.[228] Second, the Clause provides members of Congress with immunity from both civil and criminal liability for activities within its protection.[229] Imposition of such liability would also be a form of

[221] U.S. Const., art. 1, § 6, cl. 1.
[222] See Tenney v. Brandhove, 341 U.S. 367, 377 (1951).
[223] See United States v. Johnson, 383 U.S. 169, 181 (1966).
[224] United States v. Brewster, 408 U.S. 501, 507 (1972).
[225] See Johnson, 383 U.S. at 178.
[226] See Gravel v. United States, 408 U.S. 606, 616 (1972) (applying Clause to prevent grand jury questioning of legislative aide).
[227] See John E. Nowak & Ronald D. Rotunda, Constitutional Law 308 (8th ed. 2010).
[228] See 1 Laurence H. Tribe, American Constitutional Law 1013 (3d ed. 2000).
[229] See Johnson, 383 U.S. at 184-85 (reversing criminal conviction); Dombrowski v. Eastland, 387 U.S. 82, 84 (1967) (dismissing civil suit).

prohibited "questioning" of legislators.[230] The immunity generally ensures "that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."[231]

In its first decision interpreting the Clause, the Supreme Court read the protection broadly to cover not merely "speech or debate" but "things generally done in a session of the House by one of its Members in relation to the business before it."[232] Based on the reason for the rule, the Court indicated that preparing committee reports, passing resolutions, and voting would all be protected activities.[233] More recent cases have drawn a distinction between protected "legislative" acts and unprotected "political" acts.[234] In the first category are "speaking on the House or Senate floor, introducing and voting on bills and resolutions, preparing and submitting committee reports, acting at committee meetings and hearings, and conducting investigations and issuing subpoenas."[235] In the second category are "speaking outside of Congress, writing newsletters, issuing press releases, private book publishing, distribution of official committee reports outside of the legislative sphere, and constituent services."[236]

Both *Gravel v. United States*[237] and *Doe v. McMillan*[238] required the Court to interpret the Clause in factual circumstances roughly similar to the Ways & Means Committee's action in 2014. *Gravel* concerned a Federal grand jury investigation of possible criminal conduct in connection with the release and publication of the Pentagon Papers (which bore a security classification of "Top Secret-Sensitive"). On June 26, 1971, the Supreme Court had heard oral

[230] See Nowak & Rotunda, note 227, at 308.
[231] Powell v. McCormack, 395 U.S. 486, 505 (1969); see Tenney, 341 U.S. at 377.
[232] Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).
[233] See id.
[234] See Brewster, 408 U.S. at 512-13; Tribe, note 228, at 1016-17.
[235] Alissa M. Dolan & Todd Garvey, The Speech or Debate Clause: Constitutional Background and Recent Developments, Cong. Res. Serv. Libr. of Congress, R42648 (Aug. 8, 2012), at 4 (citations omitted).
[236] Id. (citations omitted); see Brewster, 408 U.S. at 512.
[237] 408 U.S. 606 (1972).
[238] 412 U.S. 306 (1973).

argument on whether it was permissible to restrain newspapers from publishing the Papers. Pending the decision of the Court, publication was barred, and the President sent a set of the documents to Congress. Very late in the evening of June 29, Senator Gravel (D.-Alaska), Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a hearing of his subcommittee at which he read extensively from a copy of the Pentagon Papers and placed the entire 47 volumes into the public record. The next day, the Supreme Court issued its decision permitting publication.[239]

The grand jury subpoenaed an aide to Gravel who had assisted the Senator in preparing for and conducting the hearing. Gravel intervened to quash the subpoena, and claimed that requiring the aide to testify would violate the Senator's privilege under the Speech or Debate Clause. The Supreme Court agreed. It found "incontrovertible" Gravel's claim that the Clause protected him from liability and questioning with respect to the events occurring at the subcommittee hearing.[240] In addition, the privilege also prohibited inquiry of the aide's activities if, had they been performed by the Senator personally, they would have been protected.[241] The Court reasoned that because of their many responsibilities in the legislative process, members of Congress must delegate tasks to staff assistants. If the activities of their aides could be questioned, then "the central role of the Speech or Debate Clause—to prevent intimidation by the

[239] See N.Y. Times Co. v. United States, 403 U.S. 713 (1971). For a description of the underlying facts, see United States v. Doe, 332 F. Supp. 930, 933 (D. Mass. 1971); Gravel, 408 U.S. at 609.
[240] Id. at 615. The government had challenged the legitimacy of the legislative action, given Gravel's position as subcommittee chair of a Public Works committee. Gravel contended that the costs of the Vietnam War had affected the availability of funds for the construction or improvement of public buildings, and therefore the conduct of the war was properly within the jurisdiction of his subcommittee. The District Court rejected the government's argument without detailed consideration of it "on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations." See 332 F. Supp. at 935; 408 U.S. at 610 n.6.
[241] See id. at 616, 618.

Executive and accountability before a possibly hostile judiciary . . .—will inevitably be diminished and frustrated."[242]

The Court also held, however, that Gravel's action in arranging for publication of the Papers by a private publisher was not protected and therefore, the aide could be questioned about it.[243] Such activity "was in no way essential to the deliberations of the Senate,"[244] and therefore fell outside the protection of the Clause. In general, protected activity "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[245]

In *Doe v. McMillan*, the plaintiffs claimed that publication of a Congressional committee report violated their privacy rights. The report, which concerned an investigation of the D.C. public school system, contained somewhat derogatory information about certain specifically named students, including their grades, disciplinary problems, and deviant conduct.[246] The Court held that the Speech or Debate Clause protected the legislators, committee staff, and certain others who had helped to assemble the information in the report "for introducing material at Committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report."[247] These actions, as well as the subsequent distribution and use of the report by legislators, congressional

[242] Id. at 617 (internal citation omitted).
[243] Id. at 628.
[244] Id. at 625.
[245] Id.
[246] See Doe v. McMillan, 412 U.S. 306, 308 n.1 (1973).
[247] Id. at 312 (internal citation omitted).

committees, and "institutional or individual legislative functionaries . . . . were 'legislative acts,' . . . and, as such, were immune from suit."[248]

The Court specifically rejected the plaintiffs' argument that because the material identifying particular children was "unnecessary and irrelevant to any legislative purpose,"[249] inclusion of that material was actionable conduct:

> Although we might disagree with the Committee as to whether it was necessary, or even remotely useful, to include the names of individual children in the evidence submitted to the Committee and in the Committee Report, we have no authority to oversee the judgment of the Committee in this respect or to impose liability on its Members if we disagree with their legislative judgment. The acts of authorizing an investigation pursuant to which the subject materials were gathered, holding hearings where the materials were presented, preparing a report where they were reproduced, and authorizing the publication and distribution of that report were all 'integral part(s) of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.' . . . As such, the acts were protected by the Speech or Debate Clause.[250]

These decisions make clear that the action of the Ways & Means Committee in 2014 was protected by the Speech or Debate Clause. Even if the public release of tax return information approved by the committee violated the law, the action was undertaken by the committee while conducting the legislative acts of exercising oversight responsibilities, preparing a legislative document, holding a markup, and voting to approve submission of the document to the House. Moreover, as the Court stated in *Doe*, so long as the action occurred in the context of a protected activity, the Clause prevents the courts from questioning the legitimacy of the committee's

[248] Id.
[249] Id.
[250] Id. at 313 (internal citation omitted). The Court also concluded, however, that the Superintendent of Documents and the Public Printer, who had carried out the legislative order to publish and distribute the report, fell outside of the protection provided by the Speech or Debate Clause, at least if their actions went "beyond the reasonable bounds of the legislative task." See id. at 315. The Court drew a fine (and somewhat unclear) distinction between preparation of the report for the internal use of members of Congress (including its availability to the press and the public unless prohibited by Congressional order) versus public distribution "beyond the halls of Congress . . . and . . . the apparent needs of the 'due functioning of the [legislative] process.'" Id. at 317. The first activity is protected whereas the second is not.

decision to include particular information in the document.[251] Accordingly, both the legislators who approved the release and the staff aides who assisted in conducting the markup were immune from prosecution.

Consideration of the immunity provided by the Speech or Debate Clause reveals that the careful steps specified by Congress in 1924, 1926, and 1976 to protect the confidentiality of tax return information obtained by one of its committees may have been largely for naught. Because of the privilege, a committee that violates one of the restrictions may escape any consequence as long as the violation occurs as part of a protected legislative act. Although not as audacious as what Senator Gravel did in 1971, the Ways & Means Committee's action in 2014 was arguably more pernicious since it allowed the committee to exploit the gap in protection under a veneer of legitimacy. Apparently, all that is necessary to authorize public release of anyone's tax return information—including, potentially, that of a political enemy of the majority of the committee—is to convene a committee meeting and conclude it with a favorable vote. No explanation for the committee's action need be provided at the meeting (and no legitimate reason need exist). Unlike Gravel, who at least subjected his likely illegal act openly to the judgment of his constituents, the manner in which the Ways & Means Committee proceeded probably allowed it to escape scrutiny from both the judicial process and the court of public opinion.

To be sure, each House of Congress has constitutional authority to prevent such behavior on the part of its members.[252] But such protection would be quite flimsy if an improper disclosure were motivated by purely partisan, political objectives supported by the majority in

[251] See text accompanying note 250. Similarly, the Clause prevented the Court from questioning the legitimacy of Gravel's publicizing information about the Vietnam War, given his position as chair of a Public Works Subcommittee. See note 240; Johnson, 383 U.S. at 180 (indicating that protection covers both conduct and motivation of legislator); Brewster, 408 U.S. at 525 (same).

[252] See U.S. Const., art. 1, § 5, cl. 2 (specifying that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.").

Congress. As the Court has stated, "it would be somewhat naïve to assume that [those responsible for disciplining one of their own members] would be wholly objective and free from considerations of party and politics and the passions of the moment."[253] Part IV therefore considers options apart from Congressional disciplinary rules to prevent unauthorized disclosures of tax return information by the committees and to protect taxpayer privacy.

IV. Restricting Congressional Access to Tax Return Information.

This part briefly explores two options for Congress to consider to prevent its misuse of confidential tax information. It might seem unrealistic to expect Congress to take any action that would restrict its prerogatives in any way. Yet history shows that Congress has done exactly that, first in 1910 and 1921 (when it explicitly refused to assume responsibility over, and obtain access to, the confidential information), and then in 1924, 1926, and 1976 (when it limited its ability to obtain, use, and disclose the information).[254] Moreover, possible harm from misuse is indiscriminate; today's majority in Congress may obviously be tomorrow's minority. Thus, every legislator should have an interest in preventing future disclosures of the confidential information for illegitimate purposes.

A. Institutional waiver of legislative privilege.

One option would be for Congress to pass a law imposing meaningful restrictions on the ability of its committees to disclose tax return information and explicitly waiving the Speech or Debate privilege of legislators and their staff who violate the law. This option would effectively

[253] Brewster, 408 U.S. at 519-20. The Court also stated that "Congress is ill-equipped to investigate, try, and punish its Members for a range of behavior that is loosely and incidentally related to the legislative process." Id. at 518; cf. Laura Krugman Ray, Discipline through Delegation: Solving the Problem of Congressional Housecleaning, 55 U. Pitt. L. Rev. 389, 422 (1994) (stating that "[t]here is virtually universal agreement that Congress has been consistently and remarkably unsuccessful in disciplining its own members for misconduct.").

[254] See notes 113, 136, 164, 170, 171, and 206 and accompanying text.

delegate to another branch of government some of the responsibility for preventing misbehavior by members of Congress.

This possibility was first raised (but not resolved) by the Supreme Court in *United States v. Johnson*,[255] in which the Court overturned a criminal conspiracy conviction of a former Representative on Speech or Debate grounds. The Court stated:

> without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.[256]

Thus, the Court introduced the possibility that Congress could pass a statute that both regulated the behavior of its members in carrying out a protected legislative act and waived their legislative immunity in the event of a prosecution under that statute.

It appears that delegation of Congress's disciplinary responsibility under the Constitution would be permissible. *Burton v. United States*[257] involved a Senator who was convicted under a statute prohibiting a member of Congress from receiving compensation for services rendered in connection with any matter in which the United States had an interest (an action that fell outside the protection of the Speech or Debate Clause). In upholding the conviction, the Court rejected the defendant's claim that the statute violated Congress's authority under the Constitution to discipline its own members:

> . . . it was never contemplated that the [Senate's disciplinary] authority . . . should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it. In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several departments, Congress . . . may prescribe such regulations to those ends . . . if they be not forbidden by the fundamental law.[258]

[255] 383 U.S. 169 (1966).
[256] Id. at 185.
[257] 202 U.S. 344 (1906).
[258] Id. at 367.

The validity of an institutional waiver of the legislative privilege is, however, open to question. Subsequent to *Johnson*, the Court has twice raised the possibility of institutional waiver (without resolving whether it would be constitutionally permissible).[259] But in each case, the Court provided some indication that the privilege may be an individual right of each legislator, rather than the institutional right of the legislature as a whole.[260] In addition, in its latest case considering institutional waiver, the Court specifically noted the risk that such a waiver might permit the controlling party in the legislative and executive branches "to use the courts to destroy political opponents."[261]

Moreover, as a practical matter, even if Congress supported the policy objective of protecting taxpayer privacy rights, it seems highly unlikely that it would be willing to expose its members to possible civil or criminal liability to achieve that goal. There were strong Congressional objections to the Court's decisions in both *Gravel* and *United States v. Brewster* (in which the Court concluded that the Speech or Debate Clause did not prohibit the prosecution

[259] See Brewster, 408 U.S. at 529 n.18; United States v. Helstoski, 442 U.S. 477, 492 (1979).

[260] See Brewster, 408 U.S. at 507 (explaining that purpose of Speech or Debate Clause was to insure "the independence of *individual* legislators.") (emphasis added); Helstoski, 442 U.S. at 493 (citing with approval Coffin v. Coffin, 4 Mass. 1 (1808), which interpreted a similar legislative privilege under Massachusetts law and concluded that the right was an individual, and not an institutional, one). (The Court had previously described *Coffin v. Coffin* as "the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution . . . is of much weight." Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).) In *Helstoski*, the Court rejected on evidentiary grounds the government's assertions of institutional waiver by the legislature as well as individual waiver by the defendant, and therefore did not resolve the validity of either one. See 442 U.S. at 490-94. In *Brewster*, three dissenters argued against the possibility of institutional waiver. See 408 U.S. at 540-41 (Brennan, J., joined by Douglas, J., dissenting), id. at 562-63 (White, J., joined by Douglas and Brennan, JJ., dissenting). Commentators are divided as to whether an institutional waiver is permissible. See Craig M. Bradley, The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?, 57 N.C. L. Rev. 197, 223-25 (1979) (arguing that institutional waiver is valid); Ray, note 253, at 434-37 (same); Robert J. Reinstein & Harvey A. Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113, 1166 (1973) (arguing that privilege is personal right of each legislator); James J. Brudney, Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees, 36 Harv. J. on Legisl. 1, 28-30 (1999) (same).

[261] Helstoski, 442 U.S. at 493.

of a former member of Congress for alleged bribery to perform a legislative act).[262] Each case was perceived as improperly narrowing the scope of protected legislative activities. Senator Sam Ervin (D.-N.C.) complained of the Court's "emasculation" of the privilege and wrote:

> most Members of Congress would much prefer to adhere to the Constitution and be judged by their peers and their constituents for alleged misbehavior rather than be subject to intimidation by the executive and accountability before a possible hostile jury.[263]

If Ervin's view is representative of current Congressional attitudes, it makes the possibility of an institutional waiver of the legislative privilege seem pretty fanciful.

B. Use of staff intermediary to obtain and disclose confidential information.

Given the uncertain constitutional validity and practical unlikelihood of an institutional waiver of the legislative privilege, a more promising option would be to limit Congressional access to confidential tax information. If Congress were barred from obtaining the information, then it would not be able to disclose it for improper purposes. Some mechanism, however, would be needed to protect Congress's ability to inform itself, as well as the public (if necessary), about matters contained in the information.

Suppose a staff intermediary were given the exclusive right in the legislative branch to obtain confidential tax information from the IRS. The intermediary could use the information to assist Congress in performing its legislative tasks and could also disclose the information to Congress. Information that could be associated with a particular taxpayer, however, could only be disclosed in specified circumstances. One possible test would be to permit an identifying disclosure only if required by "the national interest"—the condition in the present statute

[262] See Jt. Comm. on Congressional Operations, The Constitutional Immunity of Members of Congress, S. Rep. No. 93-896 (1974); Hon. Sam J. Ervin, Jr., The *Gravel* and *Brewster* Cases: An Assault on Congressional Independence, 59 Va. L. Rev. 175 (1973); Ray, note 253, at 424-26 (describing Congressional denunciation of two decisions).
[263] Ervin, note 262, at 183 (internal quotation and footnote omitted).

enabling the JCT to disclose the President's access to tax return information[264]—although some less exacting (and more definitive) standard might be satisfactory. If the disclosure by the staff intermediary under this authority were not protected by the Speech or Debate Clause, it would permit any constraint imposed by Congress on the intermediary's discretion to be enforced. Thus, this arrangement might protect taxpayer privacy rights while still preserving an outlet for Congressional access to identifying information in necessary situations.

For at least two reasons, the intermediary's disclosure of information to Congress might fall outside of the scope of the legislative privilege. First, the action may not be a protected "legislative act." Although the line between protected and unprotected acts is far from clear, the Court's most recent jurisprudence seems to have narrowed the former category to activities that are directly part of the legislative process, such as conducting hearings and committee meetings, participating in debate, and voting.[265] In *Gravel*, the Court stated that the Speech or Debate Clause "recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, [but] it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts."[266] Thus, although those who perform a legislative act, such as voting to approve certain action, are protected, those who "prepare for" or "implement" the act may not be.[267] Under this view, if Congressional committees ordered the staff intermediary to disclose confidential information to them, and then released the information disclosed to the public in the course of conducting a protected legislative act, the committees would be immune. The intermediary's act of complying with the

[264] I.R.C. § 6103(g)(5) (third sentence).
[265] See Brewster, 408 U.S. at 514-16; Gravel, 408 U.S. at 624-25; Hutchinson v. Proxmire, 443 U.S. 111, 131-33 (1979).
[266] 408 U.S. at 626.
[267] Cf. id. at 621 (recognizing that distinction "may . . . to some extent frustrate[] a planned or completed legislative act").

order, however, might not be protected.[268] Similarly, in *Brewster*, the Court distinguished between conduct merely *related to* the legislative process (which may or may not be protected) and actions "clearly a part of the legislative process—the due functioning of the process" (which are protected).[269]

Dombrowski v. Eastland[270] provides further support for this interpretation. In that case, the plaintiffs' records were illegally seized by Louisiana state officials who turned them over to a Senate subcommittee pursuant to the subcommittee's subpoena. The plaintiffs sued the chairman and chief counsel of the subcommittee, and alleged that they had conspired with the state officials to obtain the records in violation of the plaintiffs' Fourth Amendment rights. The D.C. Circuit found that both defendants were immunized by the Speech or Debate Clause because their actions were taken in the course of protected legislative activities.[271] The Supreme Court affirmed the ruling with respect to the chairman of the subcommittee but reversed it as applied to the chief counsel. According to the Court, the D.C. Circuit focused only on the actions of the defendants in connection with the subcommittee's activity in obtaining the records following their seizure by the state officials.[272] There was, however, a material dispute of fact whether the chief counsel (but not the subcommittee chairman) had actively collaborated with the state officials to carry out the illegal seizures, and those actions of the chief counsel were not

[268] See Kilbourn, 103 U.S. at 205 (holding that members of Congress who authorized an illegal arrest were privileged but House Sergeant-at-Arms who carried out the order was not); Powell, 395 U.S. at 504-06, 550 (holding that legislators who voted to exclude plaintiff from the House were protected but that House Sergeant-at-Arms, Doorkeeper, and Clerk, who carried out Congressional order, were not); Doe, 412 U.S. at 315-16 (holding that legislators who voted to publish potentially actionable material beyond the reasonable requirements of the legislative function were immune but Superintendant of Documents, Public Printer, and other legislative personnel who carried out such action enjoyed no immunity).
[269] 408 U.S. at 515-16.
[270] 387 U.S. 82 (1967).
[271] See Dombrowski v. Burbank, 358 F.2d 821, 824 (D.C. Cir. 1966).
[272] See Dombrowski, 387 U.S. at 83-84.

protected by the legislative privilege.[273] In the same manner, disclosure of confidential tax information by a staff intermediary to Congress would be preparatory to consideration of the information in the legislative process, and therefore may not be a protected act.

A further reason why the staff intermediary's disclosure of information to Congress may not be privileged would be the independence of the intermediary from any member of Congress. *Gravel* articulated a potentially broad test, immunizing any activity of an aide if a legislator performing the same activity would have been privileged.[274] Yet there have been many situations in which legislative employees have been found not to be protected by the legislative privilege.[275] Moreover, *Gravel* involved an aide who worked directly under the Senator in preparing for and conducting the subcommittee hearing in which the disclosure of top-secret information occurred.[276] The Court in *Gravel* reasoned that because of the press of business, members of Congress must necessarily delegate some of their responsibilities to aides who should, therefore, be privileged when they do those tasks for their bosses. The Court stated that a legislator and his aide should be "treated as one," and characterized an aide as a mere extension of the legislator or the legislator's "alter ego."[277] These characterizations would seem to be a far cry from a staff intermediary who does not work directly under any member of Congress and, indeed, would have a right and responsibility that no legislator would have. Thus, even if the staff intermediary's disclosure of information were considered to be an otherwise protected "legislative act," there is an argument that the privilege would still not be available to the

[273] See id. at 84-85; Gravel, 408 U.S. at 619-21 (emphasizing that chief counsel in *Dombrowski* was left unprotected because of the scope of his activities (rather than his status as a legislative aide)); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 514 n.1 (1975) (Marshall, Brennan, and Stewart, JJ., concurring) (providing same interpretation of *Dombrowski*).
[274] See 408 U.S. at 618.
[275] See note 268; Dombrowski, 387 U.S. at 84.
[276] See 408 U.S. at 609. The aide was on the personal staff of the Senator, worked only for the Senator, and was paid out of the Senator's share of Congressional funds. See 332 F. Supp. at 937; Note, The Speech or Debate Clause Protection of Congressional Aides, 91 Yale L. J. 961, 966 (1982).
[277] See 408 U.S. at 616-17.

intermediary. Questioning the intermediary would not necessarily threaten the independence of any legislator.[278] The Court has previously indicated that the protection available to legislative employees may not be as robust as that available to legislators.[279]

In short, there is at least some doubt whether disclosure by the staff intermediary would be privileged. This uncertainty may be all that is needed to ensure that any restrictions placed on the intermediary's discretion would be respected. After all, the intermediary would not likely be willing to risk exposure to criminal or civil liability by violating such restrictions.

Identifying an appropriate intermediary may be straightforward. For many years, the staff of the JCT has played a role in Congress very similar to that of the hypothetical staff intermediary.[280] Although the specific duties of the JCT staff have evolved over the years, they have generally required staff access to tax return information, and ever since the staff's creation in 1926, Congress has given the staff that access as well as the right to use and disclose the information to Congress. To my knowledge, there has never been an instance of the staff not properly protecting the confidentiality of the information. That the staff is nonpartisan and serves both Houses of Congress provides further support for its possible role as intermediary. Thus, the only changes that may be required from current law would be to bar Congressional committees from having direct access to the information, and to subject to an appropriately high standard the JCT staff's disclosure of identifying information to the Congress.

[278] Cf. Gravel, 408 U.S. at 618 (providing reason why aide's conduct should be protected).

[279] See Tenney, 341 U.S. at 378 (observing that a legislator's privilege "deserves greater respect" than the privilege of a legislative employee); Dombrowski, 387 U.S. at 85 (stating that the privilege "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves"); but cf. Gravel, 408 U.S. at 622 (refusing "to distinguish between Senator and aide in applying the Speech or Debate Clause").

[280] Under current law, the JCT (and not just its staff) arguably plays such an intermediary role between the IRS and Congress in connection with the President's access to tax return information. See I.R.C. § 6103(g)(5); W&M Confidentiality Hearings, note 210, at 49-50 (statement of Richard Albrecht, Gen'l Counsel, Dept. of Treasury).

Conclusion

This article has shown that the U.S. House Ways & Means Committee broke the law in 2014 when it authorized public release of the tax return information of 51 taxpayers. The law required the committee to have at a minimum a legitimate purpose for disclosing the confidential information. Yet, as detailed in this article, the committee failed to satisfy this minimal requirement. The committee did not give any explanation for its disclosure of the protected information, and for virtually all (if not all) of the taxpayers involved, there was no legitimate committee purpose for doing so. The committee's action violated a cherished right of taxpayers, one that Congress has assiduously protected for over 140 years.

That it should be the Ways & Means Committee that violated the law is especially surprising and unfortunate. Because of the Origination Clause[281] and its jurisdiction in the House over tax legislation, the committee is uniquely situated to initiate change of any tax law that it considers to be unsound or outdated. Moreover, pending change, one would ordinarily expect the committee to be particularly mindful to respect the law that it or its predecessors helped to craft. The committee has—or certainly has access to—the resources necessary to determine the meaning of the law as written and intended by earlier legislators. Although the DOJ referral letter and committee markup both provide some indication of hasty action carried out by the committee, there is no clear reason why it may have felt compelled to act in haste. There was no pending legislative matter addressing the issues raised in the referral letter nor was there any indication of a prompt conclusion to the Justice Department investigation of the IRS that the committee was purportedly trying to assist.

Whatever the explanation for the committee's action, it has now exposed the gap in the protection of confidential tax information held by Congress, and it is incumbent on the

[281] U.S. Const., art. 1, § 7, cl. 1.

committee to take steps to rectify the situation. Any solution must take into account the absolute immunity of legislators and their aides under the Constitution when they perform protected legislative acts. Prohibiting Congressional committee access to the information and permitting the JCT staff (which would retain such access) to disclose any information that could be associated with a particular taxpayer to Congress only in specified, exigent circumstances would be an effective way to prevent future disclosures of the information for improper purposes.

George K. Yin, Protecting Taxpayers from Congressional Lawbreaking

Appendix A: Tax Return Information Disclosed by Ways & Means Committee

	tax return information (TRI) included?																
name of organization	Letter	Ex 6	Ex. 9	Ex. 10	Ex. 11	Ex. 12	Ex 21	Ex 23	Ex 24	Ex 25	Ex. 28	more than one TRI?	never subsequently referenced?	Tea Party?	6103 claim?	right-leaning groups?	Crossroads
Crossroads GPS	Y	Y	Y	Y	Y	N	N	N	N	N	N	Y					Y
Amers for Responsible Leadership	Y	N	N	N	N	N	N	N	N	N	N					Y	
Freedom Path	Y	N	N	N	N	N	N	N	N	N	N					Y	
Rightchange.com	Y	N	N	N	N	N	N	N	N	N	N					Y	
America is Not Stupid	Y	N	N	N	N	N	N	N	N	N	N					Y	
A Better America	Y	N	N	N	N	N	N	N	N	N	N					Y	
One Fund Boston	Y	N	N	N	N	N	N	N	N	N	Y				Y		
Sidney Shelby County Library	N	N	N	N	Y	N	N	N	N	N	N		Y				
KSP True the Vote	N	N	N	N	Y	N	N	N	N	N	N		Y				
CKC PIA Assn	N	N	N	N	Y	N	N	N	N	N	N		Y				
U.S. Health Freedom	N	N	N	N	Y	N	N	N	N	N	N		Y				
Just Liberty	N	N	N	N	Y	N	N	N	N	N	N		Y				
CVFC	N	N	N	N	Y	N	N	N	N	N	N		Y				
Wekumpa Tea Party	N	N	N	N	Y	N	N	N	N	N	N			Y			
Bedford County Patriots	N	N	N	N	Y	N	N	N	N	N	N		Y				
NE Tarrant Tea Party	N	N	N	N	Y	N	N	N	N	N	N			Y			
Amer Patriots for Conserv Action	N	N	N	N	Y	N	N	N	N	N	N		Y				
Comeback America	N	N	N	N	Y	N	N	N	N	N	N		Y				
Priorities USA	Y	N	N	N	N	Y	N	N	N	N	N	Y	Y				
Prescott Tea Party	N	N	N	N	N	N	Y	N	N	N	N			Y			
Albuquerque Tea Party	N	N	N	N	N	N	Y	N	Y	N	N	Y		Y			
Amer Pakistan Fdtion	N	N	N	N	N	N	Y	N	N	N	N		Y				
Bluegrass Family Health	N	N	N	N	N	N	Y	Y	Y	N	N	Y	Y				
Calhoun Academy	N	N	N	N	N	N	Y	Y	N	N	N	Y	Y				
Delta Dental of Delaware	N	N	N	N	N	N	Y	Y	Y	Y	N	Y	Y				

Appendix A: Tax Return Information Disclosed by Ways & Means Committee

	tax return information (TRI) included?												never				
name of organization	**Letter**	**Ex 6**	**Ex. 9**	**Ex. 10**	**Ex. 11**	**Ex. 12**	**Ex 21**	**Ex 23**	**Ex 24**	**Ex 25**	**Ex. 28**	**more than one TRI?**	**subsequently referenced?**	**Tea Party?**	**6103 claim?**	**right-leaning groups?**	**Crossroads**
Emerge Maine	N	N	N	N	N	N	Y	Y	Y	N	N	Y	Y				
Emerge Nevada	N	N	N	N	N	N	Y	N	Y	N	N	Y	Y				
Emerge Massachusetts	N	N	N	N	N	N	Y	N	Y	N	N	Y	Y				
Emerge Oregon	N	N	N	N	N	N	Y	N	Y	N	N	Y	Y				
EPM Civil Rts	N	N	N	N	N	N	Y	Y	Y	N	N	Y	Y				
Jewish Giving	N	N	N	N	N	N	Y	Y	N	N	N	Y	Y				
Lehman Health	N	N	N	N	N	N	Y	Y	Y	N	N	Y	Y				
Muslim Alliance	N	N	N	N	N	N	Y	Y	N	N	N	Y	Y				
Methodist Int'l	N	N	N	N	N	N	Y	Y	Y	N	N	Y	Y				
Nat'l RR Retirement	N	N	N	N	N	N	Y	Y	Y	Y	N	Y	Y				
Tenn. Pooled Assets	N	N	N	N	N	N	Y	Y	Y	N	N	Y	Y				
United Order of Texas	N	N	N	N	N	N	Y	Y	Y	Y	N	Y	Y				
World Wildlife Fund	N	N	N	N	N	N	Y	Y	Y	N	N	Y	Y				
Kamehameha Schools	N	N	N	N	N	N	Y	Y	N	N	N	Y	Y				
Miss America Fdtion	N	N	N	N	N	N	Y	Y	Y	N	N	Y	Y				
Ballott Initiative Gp. Mo.	N	N	N	N	N	N	N	Y	N	N	N		Y				
Credit Counseling Compliance	N	N	N	N	N	N	N	Y	N	N	N		Y				
Group Rulings	N	N	N	N	N	N	N	Y	N	N	N		Y				
Imagine Schools	N	N	N	N	N	N	N	Y	Y	N	N	Y	Y				
Mortgage Foreclosure	N	N	N	N	N	N	N	Y	Y	N	N	Y	Y				
TAG-18	N	N	N	N	N	N	N	Y	N	N	N		Y				
Compassionate Cannabis	N	N	N	N	N	N	N	Y	Y	N	N	Y	Y				
American Junto	N	N	N	N	N	N	N	N	Y	N	N		Y				
Z Street	N	N	N	N	N	N	N	N	Y	Y	N	Y	Y				
Harvard Medical Collaborative	N	N	N	N	N	N	N	N	Y	N	N		Y				
Ground Zero Mosque	N	N	N	N	N	N	N	N	N	Y	N		Y				
total count:												25	40	4	1	5	1
																tot. # TPs	51