

**Hearing on Concurrent Congressional and Criminal Investigations:
Lessons from History (July 11, 2017)**

**Senate Judiciary Subcommittee on Crime and Terrorism
Questions for the Record**

**PROJECT ON GOVERNMENT OVERSIGHT RESPONSES TO QUESTIONS FOR
DANIELLE BRIAN FROM SENATOR WHITEHOUSE**

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

POGO does not have expertise regarding procedures to obtain a president's tax returns.

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

As a co-equal branch of government with a critical role in government oversight and investigations, Congress has a right to demand and receive answers to questions from the executive branch, including White House personnel. Barring a valid invocation of executive privilege or other laws allowing information to be shielded, the executive branch should work with Congress to provide a briefing, testimony, or other written or oral communications that answer Congressional questions. The executive branch cannot and should not be completely insulated from scrutiny by Congress, and sometimes more actions will be required, including serving and enforcing a Congressional subpoena (including requesting declaratory and injunctive relief), issuing a contempt of Congress citation and holding a contempt hearing, and the using the media or civil society organizations to highlight executive branch malfeasance. Congress has a right to compel the production of records and responses to questions when the executive branch is concealing information that falls outside of the executive privilege.

Individual Members of Congress likely will have a more difficult time obtaining information from the executive branch than Congressional Committees. Even if a Member of Congress is flying solo, they should try to work with the executive branch office or agency to resolve any impasse. If that fails, working with Committee leadership

and other Members, especially Members of Congress from both sides of the aisle, would be helpful in gathering executive branch information. Leadership support is also important when executive branch officials refuse to provide documents or answer questions. Leadership can support a Committee or Member request through formal letters or other actions.

For information on the executive privilege, see:

Congressional Research Service, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, Todd Garvey, Legislative Attorney, December 15, 2014. <https://fas.org/sgp/crs/secrecy/R42670.pdf>

Committee on Oversight and Government Reform v. Lynch, No. 12-1332 (USDC DC filed August 13, 2012) (involving a Congressional subpoena for documents from the Department of Justice related to Operation Fast and Furious).

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

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

POGO does not have expertise regarding the abeyance process.