



Staff Investigative Report

Presidential Access to Taxpayer Information

October 2016

About Cause of Action Institute

Mission:

Cause of Action Institute (“CoA Institute”) is a government oversight group committed to ensuring that the federal regulatory process is open, honest, and fair. As part of its charitable mission, CoA Institute seeks judicial and legislative oversight of the federal regulatory state to protect against law enforcement abuses and arbitrary discretion, as well as to defend robust public access to government information.

Investigative Function:

CoA Institute uses investigative tools to research federal government waste, fraud, and mismanagement, as well as overreach in the form of arbitrary and burdensome regulations. We employ “sunshine advocacy” tools, including document and information requests, lawsuits, ethics complaints, and requests for investigation to promote transparency, integrity, and accountability in government. Our investigations help to expose and prevent government mismanagement of federal funds and to educate the public on how government can be made more accountable.

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I. EXECUTIVE SUMMARY

Following the misuse and unauthorized release of confidential taxpayer information during President Obama's first term, including the largest breach of taxpayer confidentiality laws by the federal government in United States history, Cause of Action Institute ("CoA Institute") investigated the legal and institutional checks designed to protect against such improper disclosure and the means by which the Obama Administration may have evaded those checks.

That investigation revealed that President Obama has circumvented the congressionally created and authorized procedures for accessing confidential taxpayer information—procedures that were designed to be exclusive—by relying on individual consent forms that were never intended for use by the President. The practice has allowed the President to avoid the reporting requirements and limitations placed on presidential access to taxpayer information by the Tax Reform Act of 1976. In particular, the use of individual consents enables the administration to skirt statutory recordkeeping and reporting requirements to Congress, the limitations on the kind of information available for disclosure, and the extent to which such information can be shared within government agencies and offices.

In addition, the investigation uncovered that the Office of the White House Counsel under President Obama has employed on a continuous basis at least one attorney detailed from the Department of Justice Tax Division. At least two of those attorney-detailees had knowledge of confidential taxpayer information gained while serving as counsel to the Internal Revenue Service concerning litigation with nonprofit groups opposed to President Obama's policies. This Office of the White House Counsel practice is unique to the current administration and appears intended to select Tax Division attorney-detailees who had access to taxpayer information otherwise restricted from disclosure to the President and White House officials.

Equally troubling, neither the Department of Justice Tax Division nor the Office of the White House Counsel has implemented context-specific training, guidelines, or ethical screens to prevent the inadvertent or deliberate disclosure of confidential taxpayer information by attorney-detailees. Inherent conflicts of interest in the detailing program make it imperative that Tax Division attorneys who work on detail to the Office of the White House Counsel, especially those who have served as counsel to the Internal Revenue Service in matters involving the political opponents of the President, receive enhanced training and supervision to ensure the safeguarding of confidential taxpayer information. There does not appear to be any program, specialized training, or targeted guidelines in place.

CoA Institute recommends that Congress amend the Internal Revenue Code to ensure that the exclusive mechanisms created by the Tax Reform Act of 1976 for presidential access to confidential taxpayer information are enforced. Congress should foreclose presidential access to taxpayer information under individual consents, as well as require the Executive Office of the President to develop and report safeguard protocols on the handling of such information. Alternatively, Congress should declare that the use of individual consents by the White House be subject to the Paperwork Reduction Act, which would require the forms used for such consents to be approved by the Office of Management and Budget, as well as an opportunity for public

notice and comment on the use of such forms to collect information. Finally, the Department of Justice Designated Agency Ethics Official, Professional Responsibility Advisory Office, and its Office of Professional Responsibility should be tasked with providing necessary advice, supervision, training, and, when necessary, investigation of the Department of Justice detailing program, while the Department of Justice Inspector General should be empowered to investigate attorney misconduct and to report to the public and Congress with the same scope as other Inspectors General throughout the federal government.

II. FINDINGS

- *During President Obama's first term, the IRS unlawfully disclosed confidential taxpayer information of his political opponents. One of those unauthorized disclosures was litigated and the IRS paid \$50,000 to settle the lawsuit. In another incident, the IRS unlawfully disclosed more than a million pages of return information of tax exempt organizations to the Department of Justice, likely the largest breach of tax confidentiality laws in U.S. History. Other unlawful disclosures by the IRS under the Obama Administration have never been properly investigated.*
- *Congress has authorized limited disclosure of confidential taxpayer returns and return information to the President pursuant to specific safeguards and reporting requirements under 26 U.S.C. § 6103(g). No President, however, has sought access to confidential taxpayer information through these congressionally-designed mechanisms for disclosure.*
- *Presidents have conducted tax checks of potential appointees exclusively under Section 6103(c) of the Internal Revenue Code. By conducting tax checks in this manner, Presidents avoid the reporting requirements and limitations placed on presidential access to confidential taxpayer information in the Tax Reform Act of 1976. In particular, because the kind of taxpayer information disclosed under a Section 6103(c) consent is not limited and such disclosures need not be reported, Presidents can, and do, circumvent congressional oversight and statutory limitations on the sharing of confidential taxpayer information within and among agencies.*
- *During President Obama's tenure, at least ten DOJ lawyers, selected specifically from the DOJ Tax Division, have been detailed to the Office of the White House Counsel.*
- *At least two Tax Division attorneys were detailed to the Office of the White House Counsel after accessing confidential taxpayer information in lawsuits that arose from allegations that the IRS had unlawfully targeted groups opposed to President Obama's policies. Congress investigated the work of one of those lawyers and concluded that his sequential work for the IRS, the DOJ, and the White House created, at the least, the appearance of impropriety.*

- *Both the DOJ Tax Division and the Office of the White House Counsel have failed to implement safeguards, guidelines, or ethical screens to prevent the inadvertent or deliberate disclosure of confidential taxpayer information by attorney-detailees.*
- *Notwithstanding the experience of the Obama Administration in supervising and managing DOJ attorney-details to the Office of the White House Counsel, there appears to be no program, training, guidelines, ethical screens, or other safeguards to address the serious potential conflicts of interest inherent to the detailing program.*
- *The political allure of using individual consents to secure confidential taxpayer information and employing attorney-detailees with knowledge of such information means that the problems identified in this Report will not be self-correcting. Congress and agencies must act to safeguard taxpayer confidentiality.*

III. THE OBAMA ADMINISTRATION MISUSED THE IRS AND CONFIDENTIAL TAXPAYER INFORMATION FOR POLITICAL PURPOSES

A. Introduction: The IRS as a Political Weapon

In almost every administration since the IRS's inception, the information and power of the tax agency have been mobilized for explicitly political purposes.

David Burnham, *A Law Unto Itself: The IRS and the Abuse of Power* (1990)

The risk that a President might misuse the knowledge and power of the IRS for political advantage is not new. For nearly as long as the IRS has existed, Presidents have weaponized it against their foes.¹

According to his son, President Franklin Roosevelt “may have been the originator of the concept of employing the IRS as a weapon of political retribution.”² Opponents of the New Deal were targeted, and the IRS investigated populist politician Huey Long and newspaper moguls William Randolph Hearst and Moses Annenberg.³ A particularly symbolic target, Andrew Mellon, who was Secretary of the Treasury under the Republican administrations of the 1920s, was the target of trumped up tax-evasion charges.⁴

¹ See Gail R. Chaddock, *Playing the IRS card: Six presidents who used the IRS to bash political foes*, CHRISTIAN SCI. MONITOR (May 17, 2013), <http://bit.ly/1sS0Wd1>; James Bovard, *A Brief History of IRS Political Targeting*, WALL ST. J. (May 14, 2013), <http://bit.ly/1WXMjkF>.

² BURTON W. FOLSOM, JR., *NEW DEAL OR RAW DEAL? HOW FDR'S ECONOMIC LEGACY HAS DAMAGED AMERICA* 146 (2008).

³ *Id.*; Bovard, *supra* note 1; Chaddock, *supra* note 1.

⁴ David Burnham, *Misuse of the I.R.S.: The Abuse of Power*, N.Y. TIMES (Sept. 3, 1989), <http://bit.ly/1UggU9d>.

President John F. Kennedy targeted “the discordant voices of extremism” and suggested that the IRS should police the tax exempt status of “questionable” organizations.⁵ In 1961, after conversations between the Office of the White House Counsel and IRS Commissioner Mortimer Caplin, the IRS opened the “Ideological Organizations Project” to examine the tax exempt status of, and contributors to, politically disfavored groups such as the American Enterprise Institute, the John Birch Society, and the Foundation for Economic Education.⁶ The Report of the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities found that, “[b]y directing tax audits at individuals and groups solely because of their political beliefs, the Ideological Organizations Audit Project established a precedent for a far more elaborate program of targeting ‘dissidents.’”⁷

That targeting program was expanded by President Richard Nixon, whose abuse of the IRS to attack political enemies is infamous.⁸ The “political investigations of the Nixon IRS eventually targeted more than 11,000 individuals and organizations.”⁹ The IRS “Special Services Staff” focused on African American and other minority groups and politicized IRS tax exempt status by targeting anti-war organizations and the New Left political movement.¹⁰ As one federal court explained, “attempts were made to use administrative actions against tax exempt organizations, described as ‘left wing’ or ‘activist,’ whose views the White House found offensive.”¹¹ The Articles of Impeachment against Nixon charged that he “endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and

⁵ Chaddock, *supra* note 1; Bovard, *supra* note 1.

⁶ Joseph Thorndike, *IRS Stalking of Political Groups Under Kennedy and Nixon*, TAX HISTORY PROJECT (May 14, 2013), available at <http://bit.ly/1XVqMZA>; Michael Scherer, *New IRS Scandal Echoes a Long History of Political Harassment*, TIME (May 14, 2013), <http://bit.ly/1qMuiYa>; see also *History of IRS Abuse: American Communists*, REAL CLEAR POLITICS, <http://bit.ly/27UIGAo> (last accessed May 6, 2016).

⁷ U.S. S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS 53-54, 94th Cong. 2d Sess., Rep. No. 94-755 (Apr. 26, 1976), available at <http://bit.ly/22qMjsR>.

⁸ See *Tax Reform Research Group v. Internal Revenue Serv.*, 419 F. Supp. 415, 420 (D.D.C. 1976) (“[A]ttempts by the Administration to use the I.R.S. for political purposes [are] already well known”) (citing Joint Committee on Internal Revenue, “Investigation into Certain Charges of the Use of The Internal Revenue Service for Political Purposes,” Dec. 20, 1973, 93d Cong. 1st Sess. (Committee Print)).

⁹ Thorndike, *supra* note 6.

¹⁰ *Id.*

¹¹ *Center on Corporate Responsibility, Inc. v. Schultz*, 368 F. Supp. 863, 867 (D.D.C. 1973); see also *id.* at 870-71 (noting Order to produce recording of White House meeting between President and advisors “regarding the use of taxing mechanisms against White House ‘enemies’”); *id.* at 872 n.19 (“The four documents demonstrate that the White House staff did in fact consider using the IRS against their ‘enemies.’ The conduct is at best reprehensible.”); *id.* at 881 (noting “memoranda between White House staff members relating to the recommendations and attempts to use the Internal Revenue Service in a selective and discriminatory fashion against those tax-exempt organizations which express opposition to the policies and programs of the Administration”).

to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.”¹²

During the administration of President Ronald Reagan, the IRS scrutinized more than a half dozen left-leaning media outlets and revoked the tax exempt status of the Foundation for National Progress, citing its commercial publication of *Mother Jones* as inconsistent with charitable and educational goals, while taking no action against the tax-exempt status of “the Administration’s strongest political ally on the abortion issue.”¹³ And during the administration of President Bill Clinton, allegations arose that the IRS was targeting tax exempt organizations critical of Clinton policies while treating pro-Clinton groups more favorably.¹⁴ One study in *Economics and Politics* found that “[o]ther things being the same, . . . the percentage of tax returns audited by the IRS [between 1992 and 1997 was] markedly lower in states that [were] important to [President Clinton’s] re-election aspirations.”¹⁵ Individuals critical of President Clinton’s sexual misconduct also were subjected to IRS scrutiny. After Paula Corbin Jones accused Clinton of sexual harassment, she “was subjected to an IRS audit almost immediately after declining an offer to settle the case.”¹⁶ Other accusers were similarly targeted, raising serious questions about the use of the IRS as a vehicle for personal, as well as political, retaliation.¹⁷

¹² U.S. H. Comm. on the Judiciary, Articles of Impeachment against Richard M. Nixon, art. II (July 27, 1974), available at *Articles of Impeachment*, WATERGATE, <http://bit.ly/1XAqKVQ> (last accessed May 6, 2016).

¹³ See, e.g., Tim Murphy, *Shocking IRS Witch Hunt? Actually, It’s a Time-Honored Tradition*, MOTHER JONES (May 14, 2013), <http://bit.ly/1TZdRPQ>; Deidre English, *Say It Isn’t So, Uncle Sam*, MOTHER JONES (January 1983) at 7 (noting Mother Jones investigation began with “routine audit” during Carter administration), available at <http://bit.ly/2a5DS50>; Burnham, *supra* note 4 (“By failing to withdraw the church’s tax-exempt status because of these activities, the pro-choice group contended, the I.R.S. in effect provided the church with a substantial illegal subsidy for its political campaigns.”); see also Ryan Chittum, *Nonprofit News and the Tax Man*, COLUMBIA JOURNALISM REV. (Nov. 17, 2011), <http://bit.ly/1Wnwjb9>.

¹⁴ See, e.g., U.S. JOINT COMM. ON TAX., REPORT OF INVESTIGATION OF ALLEGATIONS RELATING TO INTERNAL REVENUE SERVICE HANDLING OF TAX-EXEMPT ORGANIZATION MATTERS 4 (Mar. 2000), available at <http://bit.ly/27UIIZi>; see also Scherer, *supra* note 6 (“In the 1990s, conservative non-profits alleged similar targeting by the Clinton Administration. An investigation into the 1993 firing of seven employees in the White House travel office found that an associate White House counsel had spoken of requesting guidance from the IRS about the conduct of the department. Days after the workers were fired, IRS agents visited UltraAir, the airline that handled most White House press travel.”); Bovard, *supra* note 1 (“More than 20 conservative organizations—including the Heritage Foundation and the America Spectator magazine—and almost a dozen individual high-profile Clinton accusers, such as Paula Jones and Gennifer Flowers, were audited.”).

¹⁵ Scherer, *supra* note 6.

¹⁶ *History of IRS Abuse: Paula Corbin Jones*, REAL CLEAR POLITICS, <http://bit.ly/1Vkxo2k> (last accessed May 6, 2016); Bovard, *supra* note 1.

¹⁷ Chaddock, *supra* note 1 (“[T]he list of Clinton accusers who faced tax audits . . . suggests a pattern of political retaliation, even if not personally directed by the president[.] These [accusers] included many figures involved in the Whitewater investigation, as well as women who accused the president of sexual harassment or rape (Paula Jones and Juanita Broaddrick) or who alleged sexual affairs (Gennifer Flowers and Liz Ward Gracen.”).

B. Under President Obama, the IRS and Administration Officials Improperly Publicized, Discussed, or Disclosed Confidential Information about Taxpayers and Groups Opposed to the President’s Policies

- ***Finding:*** *During President Obama’s first term, the IRS unlawfully disclosed confidential taxpayer information of his political opponents. One of those unauthorized disclosures was litigated and the IRS paid \$50,000 to settle the lawsuit. In another incident, the IRS unlawfully disclosed more than a million pages of return information of tax exempt organizations to the Department of Justice, likely the largest breach of tax confidentiality laws in U.S. History. Other unlawful disclosures by the IRS under the Obama Administration have never been properly investigated.*

The Obama Administration has made frequent and damaging use of the IRS as a political weapon. The targeting of nonprofit public policy groups by the Exempt Organizations Section of the IRS Tax Exempt and Government Entities Division under Lois Lerner is perhaps the most well-known of the Administration’s abuses in this respect.¹⁸ A less well-remembered component of the Administration’s targeting of conservative groups was its campaign to paint such entities as a threat to democracy. The release or use of confidential taxpayer information to identify and thereby harass President Obama’s policy opponents played a crucial part in that attack.

In the summer before the 2010 mid-term elections, for example, President Obama attempted to publicly shame Americans for Prosperity, an advocacy nonprofit group associated with David and Charles Koch, stating: “Right now all around this country there are groups with harmless-sounding names like Americans for Prosperity, who are running millions of dollars of ads . . . And they don’t have to say who exactly the Americans for Prosperity are. You don’t know if it’s a foreign-controlled corporation.”¹⁹ The President’s statements became a theme for the Democratic Party throughout the 2010 campaign (and beyond²⁰). At the end of August 2010, the Democratic Congressional Campaign Committee filed a complaint with the IRS alleging that

¹⁸ See, e.g., U.S. H. COMM. ON OVERSIGHT & GOV’T REFORM, STAFF REPORT: LOIS LERNER’S INVOLVEMENT IN THE IRS TARGETING OF TAX-EXEMPT ORGANIZATIONS (Mar. 11, 2014), available at <http://bit.ly/249UZDb>.

¹⁹ Kimberley Strassel, *An IRS Political Timeline*, WALL ST. J. (June 3, 2013), <http://bit.ly/1Z3Xe9V>; see also, e.g., *True the Vote, Inc. v. Internal Rev. Serv.*, No. 14-5316, slip op. at 17; ___ F.3d ___, ___ (D.C. Cir. Aug. 5, 2016) (explain that “voluntary cessation” of IRS targeting conservative groups’ exemption applications “has never occurred”); *id.* at 19 (IRS failed to demonstrate “that ‘(1) there is no reasonable expectation that the conduct will recur [or] (2) interim relief or events have completely and irrevocably eradicated the effected of the alleged violation’”); *Z St., Inc. v. Koskinen*, 791 F.3d 24, 32 (D.C. Cir. 2015) (any IRS targeting “to process exemption applications pursuant to different standards and at different rates depending upon the viewpoint of the applicants” is “a blatant violation of the First Amendment”).

²⁰ See, e.g., Sarah Jones, *Harry Reid Exposes the Koch Brothers as the Force Behind the GOP’s Obama Obstruction*, POLITICS USA (Apr. 5, 2016), <http://bit.ly/1qMuYgc>; Burgess Everett, *Reid: Kochs want justice reform because of past legal woes*, POLITICO (Oct. 6, 2015), <http://bit.ly/25kNbBa>.

Americans for Prosperity Foundation was running advertisements that were inherently political and asking that its tax exempt status be revoked.²¹

The Administration's attack became more pointed when, on August 27, 2010, Austan Goolsbee, then-Chairman of the White House Council of Economic Advisors, held a conference call with reporters about the President's Economic Recovery Advisory Board's ("PERAB") corporate tax-reform report.²² During the call, Mr. Goolsbee stated that "we have a series of entities that do not pay corporate income tax. Some of which are really giant firms, you know Koch Industries, I think, is one, is a multibillion dollar business."²³

Mr. Goolsbee's purported knowledge of the tax status of Koch Industries and his open discussion of that knowledge with reporters suggested that someone at the IRS may have disclosed confidential taxpayer information in violation of Section 6103 of the Internal Revenue Code. As a result, Senator Chuck Grassley and six other senators wrote to J. Russell George, the Treasury Inspector General for Tax Administration ("TIGTA"), on September 23, 2010 to express their concern about Mr. Goolsbee's statement because it implied "direct knowledge of Koch's legal and tax status, which would appear to be a violation of section 6103."²⁴ In addition, because Mr. Goolsbee made his statement "shortly after the President highlighted the

26 U.S.C. § 6103

(a) General rule

Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

* * *

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

²¹ See Eric Lichtblau, *Group is Accused on Tax Exemption*, N.Y. TIMES (Aug. 27, 2010), <http://bit.ly/1qMv2wj> (in late August 2010, "[t]he New Yorker's Jane Mayer authors a hit piece on the Koch brothers, entitled 'Covert Operations,' in which she accuses them of funding 'political front groups.' The piece repeats the White House theme, with Ms. Mayer claiming the Kochs have created 'slippery organizations with generic-sounding names' that have 'made it difficult to ascertain the extent of their influence in Washington.'"); John D. McKinnon & Martin Vaughan, *Democrats Criticize Group Over Attack Ads, Tax Violations*, WALL ST. J. (Aug. 28, 2010), <http://bit.ly/1XAr9Yz>.

²² The White House Counsel of Economic Advisors is part of the Executive Office of the President. See *Executive Office of the President*, THE WHITE HOUSE, <http://bit.ly/27Umaql> (last accessed May 6, 2015).

²³ Ryan J. Donmoyer, *White House Adviser's Comment on Koch Taxes Probed*, BLOOMBERG BUS. (Oct. 7, 2010), <http://bit.ly/20HIUEB>. Goolsbee's comments were widely reported. See, e.g., John Sexton, *Release the IG Report on Austan Goolsbee*, BREITBART (May 24, 2013), <http://bit.ly/1P1lxVK>; John McCormack, *Koch Industries Lawyer to White House: How Did You Get Our Tax Information?*, WEEKLY STANDARD (Sep. 20, 2010), <http://bit.ly/1TEzxGU>.

²⁴ Letter from Sen. Chuck Grassley, *et al.*, to J. Russell George, Inspector Gen., Treasury Inspector Gen. for Tax Admin., at 2 (Sept. 23, 2010), available at <http://bit.ly/1WXOOU7>; see also U.S. S. Comm. on Fin., Press Release: Inspector General Agrees to Conduct Investigation of Obama Administration on Taxpayer Confidentiality Matter (Oct. 5, 2010), available at <http://bit.ly/1Z3XzcO>. Under 26 U.S.C. § 6103, taxpayer returns and return information "shall be confidential."

advocacy work of certain tax exempt organizations funded by Koch Industries, Inc. and its owners,” the senators were “concerned that the PERAB’s statement singling out Koch Industries, Inc. so soon after the President’s statement was politically motivated.”²⁵

The senators asked TIGTA to address four questions:

1. Did Administration employees, including PERAB employees, have access to tax returns and return information in compiling the PERAB report?
2. If yes, how many companies’ tax returns did the PERAB employees review and did they follow the procedures prescribed under the regulations governing section 6103 for accessing and protecting taxpayer information?
3. Did Administration employees, including PERAB employees, violate section 6103 when they discussed the tax status of Koch Industries, Inc. and its related companies?
4. If violations of 6103 did not occur, what was the basis for the statement regarding Koch’s legal and tax status and was the statement appropriate?²⁶

On September 28, 2010, Inspector General George responded to the senators by stating that he had “ordered the commencement of a review into the matters alleged.”²⁷ On August 10, 2011, TIGTA Special Agent Daniel Carney wrote to Mark Holden, the General Counsel of Koch Industries, to explain that “the final report relative to Austan Goolsbee’s press conference remark is completed, has gone through all the approval processes, and would now be available through a Freedom of Information Act (FOIA) request.”²⁸ Notwithstanding several requests for the report, however, TIGTA has never produced any document disclosing whether any investigation took place or discussing the nature and source of Mr. Goolsbee’s statement.²⁹

Another example of the targeted use of confidential taxpayer information against President Obama’s political foes occurred in November 2012 when the IRS produced to ProPublica, a left-leaning investigative journalism group, confidential application files of certain conservative groups seeking tax exempt status.³⁰ Prior to the disclosure, on November 15, 2012,

²⁵ Letter from Sen. Chuck Grassley, *et al.*, *supra* note 24.

²⁶ *Id.*

²⁷ Letter from J. Russell George, Inspector Gen., Treasury Inspector Gen. for Tax Admin., to John Cornyn, U.S. S. Comm. on Fin. (Sept. 28, 2010), *available at* <http://bit.ly/1WnxXtx>.

²⁸ Email from Daniel Carney, Special Agent, Treasury Inspector Gen. for Tax Admin., to Mark Holden, Gen. Counsel, Koch Inds. (Aug. 10, 2011) (attached as Ex. 1).

²⁹ See John McCormack, *Goolsbee’s Mysterious Tweet About the Koch Brothers’ Taxes*, WEEKLY STANDARD (May 29, 2013), <http://bit.ly/1VkxAi1> (“Goolsbee’s remark led to a federal investigation, the results of which have never been released. . . . [Further,] [t]he White House never formally explained how it came up with the claim”); see also Richard Pollock, *Some wonder if IRS scandal began with Goolsbee remark on Koch taxes*, WASH. EXAM’R (May 24, 2013), <http://bit.ly/1OQ4QXO>.

³⁰ See Patrick Howley, *IRS sent confidential info on conservatives to liberal nonprofit ProPublica*, DAILY CALLER (May 14, 2013), <http://bit.ly/1P1mBZw>; Kim Barker, *Karl Rove’s Dark Money Group Promised IRS It Would Spend ‘Limited’ Money on Elections*, PROPUBLICA (Dec. 14, 2012), <http://bit.ly/1VkxOWr>.

ProPublica had submitted a Freedom of Information Act (“FOIA”) request to the IRS seeking the applications for tax exempt status of sixty-seven nonprofit organizations. Thirteen days later—an unprecedentedly short response time—the IRS produced the applications of thirty-one of those groups.³¹ Included in the production were applications from nine conservative groups on which the IRS had not yet ruled.³²

The IRS is required to keep pending applications for tax exempt status confidential.³³ In May 2013, former acting IRS Commissioner Steven Miller testified to Congress that the IRS release of the nine unapproved applications to ProPublica was “inadvertent” and that the matter had been referred to the TIGTA for review.³⁴

³¹ Kim Barker & Justin Elliott, *IRS Office that Targeted Tea Party Also Disclosed Confidential Docs from Conservative Groups*, PROPUBLICA (May 13 & 20, 2013), <http://bit.ly/249WcKM>.

³² The nine groups were Crossroads GPS, Americans for Responsible Leadership, Freedom Path, Rightchange.com II, America Is Not Stupid, A Better American Now, Citizens Awareness Project, the YG Network, and SecureAmericanNow.org. *Id.* (also reporting that “[n]o unapproved applications from liberal groups were sent to ProPublica”).

³³ The Internal Revenue Code only authorizes public inspection of applications made by organizations the IRS has recognized as meeting the requirements of 26 U.S.C. § 501(c). *See* 26 U.S.C. § 6104(a)(1)(A) (“If an organization described in section 501(c) . . . is exempt from taxation . . . , the application filed by the organization with respect to which the Secretary made his determination that such organization was entitled to exemption, together with any papers submitted in support of such application . . . shall be open to public inspection”); *id.* § 6110(a) (“[T]he text of any written determination [including determination letter about a tax exempt application] and any background file document relating to such written determination shall be open to public inspection”). Determination letters (and related background files) about organizations whose applications for tax exempt status are denied are published in redacted form to remove taxpayer-identifying details and confidential financial information. *See id.* § 6103(b)(2)(A) & (B) (defining confidential information to be “any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110”); Susan L. Paul & Bill Brockner, *Disclosure, FOIA and the Privacy Act, Exempt Organizations – Technical Instruction Program for FY 2003, IRS EO CPE Text*, at C-37 (2003) (listing types of information redacted from determinations and disclosable documents related to applications for tax exempt status); *Tax Analysts v. Internal Revenue Serv.*, 350 F.3d 100, 104 (D.C. Cir. 2003) (“[T]he IRS must disclose determinations denying or revoking tax exemptions, but do so in redacted form, thus protecting the privacy of the organizations involved.”).

³⁴ *See* Jonathan Weisman & Jeremy W. Peters, *Republicans Expand I.R.S. Inquiry, with Eye on White House*, N.Y. TIMES (May 17, 2013), <http://bit.ly/1sdvp4o>.

Also in 2012, the Human Rights Campaign secured from the IRS and posted to its website the confidential Form 990 Schedule B of the National Organization for Marriage, which listed fifty of its donors.³⁵ The *Huffington Post* and several other news outlets picked up on that posting and re-published some of this confidential information, which likely had a chilling effect on donations to the nonprofit organization.³⁶ The National Organization for Marriage sued the IRS under 26 U.S.C. § 7431 for unlawful disclosure of its confidential return information. In 2015, upon admitting that an IRS employee had improperly produced the donor information, the IRS paid \$50,000 to settle the suit.³⁷

26 U.S.C. § 7431. Civil damages for unauthorized inspection or disclosure of returns and return information

(a) In general

(1) Inspection or disclosure by employee of United States. If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

Despite investigations by Congress and TIGTA into the unauthorized disclosure of the donor information,³⁸ however, the National Organization for Marriage—and the tax-paying public—was accorded no resolution. TIGTA never released any report and refused to confirm that its investigation was ongoing.³⁹ The House Ways and Means Committee “identified the individual who divulged the information as an employee in the IRS’s Exempt Organizations Division,” but it would not reveal that person’s identity because of the confidentiality protections

³⁵ Human Rights Campaign, Press Release: Mitt Romney Fuels NOM’s Divisive Racial Tactics (Mar. 30, 2012), available at <http://bit.ly/1Vkys6v>; see also Nat’l Org. for Marriage, Press Release: National Organization of Marriage Demands a Federal Investigation of the Human Rights Campaign and the Internal Revenue Service (Apr. 5, 2012), available at <http://bit.ly/20HKaaR>.

³⁶ See Ian Tuttle, *Were a pro-marriage group and its donors targeted by IRS employees?*, NAT’L REV. (June 10, 2013), <http://bit.ly/29aBJUy>; Michael Warren, *National Organization for Marriage Claims IRS Leaked Confidential Info*, WEEKLY STANDARD (Apr. 19, 2012), <http://bit.ly/25owEzq>; Sam Stein, *Mitt Romney’s PAC Funded Anti-Gay Marriage Group Under the Radar*, HUFFINGTON POST (Mar. 30, 2012), <http://bit.ly/1WXQj4P>.

³⁷ See Peter Reilly, *National Organization for Marriage Denied Attorneys Fees in IRS Lawsuit*, FORBES (Dec. 9, 2015), <http://bit.ly/1Z3Z2jj>; Mackenzie Weinger, *IRS pays \$50K in confidentiality suit*, POLITICO (June 24, 2014), <http://bit.ly/249WRvP>.

³⁸ Senator Orin Hatch similarly called on the IRS to investigate how the confidential donor information had been leaked. See U.S. S. Comm. on Fin., Press Release: Hatch Demands IRS Investigate Potential Leak of Non-Profit’s Confidential Tax Information (May 8, 2012), available at <http://bit.ly/1Z3ZkGX>.

³⁹ See Ian Tuttle, *Were a pro-marriage group and its donors targeted by IRS employees?*, NAT’L REV. (June 10, 2013), <http://bit.ly/29aBJUy> (“[The National Organization of Marriage (“NOM”)] received confirmation that an investigation had begun, and the organization was provided a complaint number. One year later, having heard nothing—except for confirmation that the leak had not come from within NOM itself—NOM sent a letter to the TIGTA Disclosure Branch requesting to know whether the investigation was still going on. On May 3, citing confidentiality provisions of the Internal Revenue Code, TIGTA responded that it ‘can neither admit nor deny the existence of any records responsive to your current request.’”).

of Section 6103 of the Internal Revenue Code.⁴⁰ Chairman David Camp summed up that perverse outcome as follows: “What makes this situation even worse is that [Section 6103], intended to protect taxpayers, is being used as a shield for those that perpetrate this wrongdoing.”⁴¹ There is no evidence that the responsible individual was held accountable for the unlawful release of the information.

Perhaps the most egregious example of unauthorized disclosure of confidential taxpayer information by the IRS during the Obama Administration occurred in October 2010 when the IRS turned over more than a million pages of return information to the Federal Bureau of Investigation (“FBI”) and the Public Integrity Section of the Department of Justice (“DOJ”) Criminal Division. That unlawful disclosure is likely the largest and most significant breach of taxpayer confidentiality laws by the federal government in the history of the United States.

On October 5, 2010, Lois Lerner, the then-head of the Exempt Organization Section of the IRS Tax Exempt and Government Entities Division, emailed colleagues about an “urgent” request from the DOJ for tax return information of non-profit organizations who had engaged in political speech, writing: “I am meeting with DOJ on Friday. They would like to begin looking at [IRS Form] 990s from last year from [501(c)(4) organizations]. They are interested in the reporting for political and lobbying activity. How quickly could I get disks to them on this?”⁴² Later that same day, Ms. Lerner wrote to Richard Pilger, Director of the DOJ Public Integrity Section, Election Crimes Branch, to explain that if he could let her know the preferred format for “the disks we spoke about,” the IRS could “get started and have these in about 2 weeks.”⁴³ Mr. Pilger responded the next day to say that the “FBI says Raw format is best because they can put it into their systems like excel.”⁴⁴

A meeting between representatives of the IRS, the DOJ, and the FBI to discuss the political activity of tax exempt organizations occurred on October 8, 2010.⁴⁵ Two weeks later,

⁴⁰ Eliana Johnson, *Investigation IDs IRS Leaker*, NAT’L REV. (Oct. 30, 2013), <http://bit.ly/1TECneS> (“Camp’s panel, nonetheless, has pieced together the NOM case and tells NRO that an IRS agent working in the Exempt Organizations Division—the same division that, until May, was under the direction of Lois Lerner, who retired under duress [in September 2013]—leaked NOM’s Schedule B to Matthew Meisel . . . [who] turned it over to the Human Rights Campaign”).

⁴¹ *Id.*

⁴² Email from Lois Lerner, Internal Revenue Serv., to Sherry Whitaker, *et al.*, Internal Revenue Serv. (Oct. 5, 2010), *reprinted in* U.S. H. COMM. ON OVERSIGHT & GOV’T REFORM, THE INTERNAL REVENUE SERVICE’S TARGETING OF CONSERVATIVE TAX-EXEMPT APPLICATIONS 177 (Dec. 23, 2014) [hereinafter “OGR TARGETING REPORT”], *available at* <http://bit.ly/25kQ9p8>; *see also* Email chain between Dep’t of Justice, Crim. Div., Pub. Integrity Sec., Election Crimes Branch, and Internal Revenue Serv., Tax Exempt & Gov’t Entities Div. (Sept. 29, 2010) (requesting meeting referenced by Lois Lerner; document obtained by Judicial Watch, Inc. under FOIA), *available at* <http://bit.ly/1TD9pa6>.

⁴³ Email exchange between Lois Lerner, Dir., Exempt Organizations, Internal Revenue Serv., and Richard Pilger, Dir., Election Crimes Branch, Public Integrity Section, Crim. Div., U.S. Dep’t of Justice (Oct. 5-6, 2010), *reprinted in* OGR TARGETING REPORT, *supra* note 42, at 178.

⁴⁴ *Id.*

⁴⁵ *See* IRS Summary of Oct. 8, 2010 Meeting (document obtained by Judicial Watch, Inc. under FOIA), *available at* <http://bit.ly/1TEBDXb>.

on October 22, 2010, the IRS transferred to the DOJ a total of 21 computer disks containing confidential return information.⁴⁶ Two 2014 communications from Peter Kadzik, Assistant Attorney General for Legislative Affairs, to the U.S. House of Representatives Committee on Oversight and Government Reform revealed that the disks contained approximately 1.1 million pages of return information protected as confidential by federal law.⁴⁷ In response to those communications, the Committee informed the IRS that “this revelation likely means that the IRS . . . violated federal tax law by transmitting this information to the Justice Department in October 2010.”⁴⁸ The Committee summed up these events by describing how the federal agencies involved had been influenced by the political motivations of the Obama Administration:

These documents suggest that the Department [of Justice] actively considered prosecuting non-profit groups for their political activities. The Department went so far as to meet with the IRS about the investigation and to gather a 1.1 million-page database of information as potential evidentiary material. Even more astounding, the Department considered prosecuting non-profit groups for actions that are legal for 501(c)(4) groups under federal tax law – that is, for engaging in political speech. The documents make clear that like the IRS, the Justice Department responded to the political rhetoric orchestrated by the President in opposition to *Citizens United* and political speech by tax exempt groups. Clearly, as evident from this material, the Department felt the need to do *something* in response to this rhetoric.⁴⁹

The conclusion of the House Committee on Oversight and Government Reform that the IRS likely violated federal law in transferring this confidential taxpayer information to the DOJ

⁴⁶ See OGR TARGETING REPORT, *supra* note 42, at 178 *see also* Email from David K. Hamilton, Internal Revenue Serv., to Sherry Whitaker & Robert Blackwell, Internal Revenue Serv. (Oct. 5, 2010), *available at* <http://bit.ly/1TZf8GO> (“There are 113,000 [501(c)(4)] returns from January 1, 2007 to now. Assuming they want all pages including redacted ones, that’s 1.25 million pages.”).

⁴⁷ OGR TARGETING REPORT, *supra* note 42, at 179 (citing Letters from Peter Kadzik, U.S. Dep’t of Justice, to Darrell E. Issa, H. Comm. on Oversight & Gov’t Reform (May 29, 2014 & June 4, 2014)); *see also* Letter from Darrell Issa & Jim Jordon, U.S. H. Comm. on Oversight & Gov’t Reform, to John Koskinen, Comm’r, Internal Revenue Serv. at 6 (June 9, 2014), *available at* <http://bit.ly/20HKYMU>.

⁴⁸ Issa & Jordan Letter, *supra* note 47, at 6. The submission by the DOJ of the contents of the 21 disks to the House Oversight Committee may itself have been an unauthorized disclosure under Section 6103. *See* 26 U.S.C. § 6103(f) (requiring a House resolution for disclosure to any committee other than the Committee on Ways and Means).

⁴⁹ OGR TARGETING REPORT, *supra* note 42, at 179 (emphasis in original).

and FBI was justified. As mentioned (and discussed in more detail below), the Internal Revenue Code mandates the confidentiality of taxpayer information and permits disclosure only under defined conditions. Section 6103(i)(1) of Title 26 of the United States Code governs disclosure of such information to Federal officers for the administration of federal laws “not relating to tax administration.”⁵⁰ This Section allows disclosure of return and return information for use in a non-tax criminal investigation, but only “upon the grant of an *ex parte* order by a Federal district court judge or magistrate judge,”⁵¹ which was not sought or granted in this case.

26 U.S.C. § 6103(i). Disclosure to Federal officers or employees for administration of Federal laws not relating to tax administration

(1) Disclosure of returns and return information for use in criminal investigations

(A) In general

Except as provided in paragraph (6), any return or return information with respect to any specified taxable period or periods shall, pursuant to and upon the grant of an *ex parte* order by a Federal district court judge or magistrate judge under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency who are personally and directly engaged in—

- (i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party,
- (ii) any investigation which may result in such a proceeding, or
- (iii) any Federal grand jury proceeding pertaining to enforcement of such a criminal statute to which the United States or such agency is or may be a party,

solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.

⁵⁰ Although the DOJ also has a right to seek taxpayer information in “preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court” involving “tax administration” pursuant to 26 U.S.C. § 6103(h)(2), in this instance it sought the information as part of an investigation of potential election law offenses rather than violations of the Internal Revenue Code.

⁵¹ 26 U.S.C. § 6103(i)(1).

Under Section 6103(i)(2), certain officers of the DOJ and FBI may request return information from the IRS for use in a criminal investigation without obtaining an *ex parte* order, but only in defined circumstances and pursuant to a written request.⁵²

In an attempt to determine if any such written request had been made in this case, on October 9, 2012, CoA Institute submitted a FOIA request to the IRS seeking, in relevant part, “requests for disclosure by any agency pursuant to 26 U.S.C. § 6103(i)(2)” from January 1, 2009 through October 12, 2012.⁵³ On March 9, 2016 (1248 days after submission of the request), the DOJ Tax Division responded to CoA Institute to state that the IRS had confirmed that no such request for disclosure had been received from the DOJ Public Integrity Section during that time period.⁵⁴ Documents produced by the IRS to CoA Institute on October 29, 2015 show that the FBI similarly failed to submit any such written request.⁵⁵

A 2010 report submitted by the IRS to the Joint Committee on Taxation confirms the absence of any Section 6103(i)(2) requests to the

26 U.S.C. § 6103(i).

(2) Disclosure of return information other than taxpayer return information for use in criminal investigations

(A) In general

Except as provided in paragraph (6), upon receipt by the Secretary of a request which meets the requirements of subparagraph (B) from the head of any Federal agency or the Inspector General thereof, or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, any United States attorney . . . , the Secretary shall disclose return information (other than taxpayer return information) to officers and employees of such agency who are personally and directly engaged in

- (i) preparation for any judicial or administrative proceeding described in paragraph (1)(A)(i),
- (ii) any investigation which may result in such a proceeding, or
- (iii) any grand jury proceeding described in paragraph (1)(A)(iii),

solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.

(B) Requirements

A request meets the requirements of this subparagraph if the request is in writing and sets forth—

- (i) the name and address of the taxpayer with respect to whom the requested return information relates;
- (ii) the taxable period or periods to which such return information relates;
- (iii) the statutory authority under which the proceeding or investigation described in subparagraph (A) is being conducted; and
- (iv) the specific reason or reasons why such disclosure is, or may be, relevant to such proceeding or investigation.

⁵² *Id.* § 6103(i)(2)(A)-(B).

⁵³ Letter from Karen Groen, CoA Inst., to Ava Littlejohn, Public Liaison, Internal Revenue Serv. (Oct. 9, 2012), *available at* <http://bit.ly/29bw6HV>.

⁵⁴ Letter from Stephanie Sasarak, Civil Trial Section, DOJ, to Ryan Mulvey, CoA Inst. (Mar. 9, 2016), *available at* <http://bit.ly/299dVxF>.

⁵⁵ See EDIMS & AFOIA Charts, Oct. 29, 2015 Interim Production, *Cause of Action v. Internal Revenue Serv.*, No. 13-920 (D.D.C. cmplt. filed June 19, 2013), *available at* <http://bit.ly/29hudIX>. These charts reflect Section 6103(i)(2) requests received by the IRS between January 1, 2009 and October 12, 2012, the majority

IRS from either the DOJ Public Integrity Section or the FBI.⁵⁶ That report shows that all such requests originated from various U.S. Attorneys.

The above admissions and evidence confirm that the transfer and disclosure of the 1.1 million pages of return information to the DOJ and FBI in October 2010 was never authorized and hence a violation of federal law.⁵⁷

IV. PRESIDENT OBAMA, LIKE HIS PREDECESSORS, HAS CIRCUMVENTED THE CONGRESSIONALLY AUTHORIZED MECHANISMS FOR ACCESSING CONFIDENTIAL TAXPAYER INFORMATION

A. Congress Created Two Procedures under 26 U.S.C. § 6103(g) for Presidents to Access Confidential Taxpayer Information, but no President since their Enactment Have Followed Them

The misuse of confidential taxpayer information by the Obama Administration, including the incidents described above, caused CoA Institute to investigate the legal and institutional checks designed to protect against improper disclosure of such information and the means by which the Obama Administration evaded those checks. That investigation included a number of requests for records pursuant to the FOIA and several lawsuits, as set forth and described in Appendix 1. Among other matters, the investigation uncovered that, to date, neither President Obama nor any President before him has followed the specific pathways created by Congress to access confidential taxpayer information.

of which were submitted by U.S. Attorneys across the country. With limited exception, the remainder originated from DOJ Headquarters in Washington, D.C. There are no requests from the FBI.

⁵⁶ INTERNAL REVENUE SERV., DISCLOSURE REPORT FOR PUBLIC INSPECTION PURSUANT TO INTERNAL REVENUE CODE SECTION 6103(P)(3)(C) FOR CALENDAR YEAR 2010 at 3 (May 2011), *available at* <http://1.usa.gov/28JsWrw>.

⁵⁷ On July 15, 2016 the Department of the Treasury Inspector General for Tax Administration, responding to a request by CoA Institute for an investigation of the disclosure, wrote that TIGTA is “conducting a review of this matter and upon completion, to the extent allowable under the law, we will advise you of the results.” *See* Letter from Timothy P. Camus, Dep. Inspector Gen. for Investigations, Dep’t of the Treas., to Alfred J. Lechner, Jr., Pres. & CEO, CoA Inst. (July 15, 2016), *available at* <http://coainst.org/2df9vXB>; *see also* Letter from Alfred J. Lechner, Jr., CoA Inst., to Michael E. Horowitz, DOJ Office of Inspector Gen., and J. Russell George, Treasury Inspector Gen. for Tax Admin. (June 29, 2016), *available at* <http://bit.ly/298ryke> (calling for an investigation by TIGTA and the DOJ Office of Inspector General of unauthorized disclosure); Eliana Johnson, *New Documents Suggest IRS’s Lois Lerner Likely Broke the Law*, NATIONAL REV. (Jun. 29, 2016), <http://bit.ly/2aAXcUR> (“It looks increasingly likely that the file sharing was part of a broader effort on the part of bureaucrats to push back against the Supreme Court’s [*Citizens United*] ruling, an effort that not only almost certainly violated the law but undermined the spirit of the law and the purpose for which it was written in the first place.”).

- ***Finding:*** Congress has authorized limited disclosure of confidential taxpayer returns and return information to the President pursuant to specific safeguards and reporting requirements under 26 U.S.C. § 6103(g). No President, however, has sought access to confidential taxpayer information through these congressionally-designed mechanisms for disclosure.

In the Tax Reform Act of 1976, Congress declared that taxpayer returns and return information “shall be confidential” and prohibited disclosure of such information “except as authorized” by the statute.⁵⁸ As the D.C. Circuit Court of Appeals explained, this confidentiality provision was aimed not simply at protecting against disclosure generally, but more specifically at preventing the indiscriminate sharing of taxpayer information among government agencies:

The purpose of the confidentiality clause of the Tax Reform Act of 1976 was to protect individual taxpayers from unauthorized disclosure of their tax return information. In particular, Congress was concerned about the potential widespread availability of individual tax information to government agencies. The legislative history of section 6103 demonstrates that Congress intended to limit disclosure of tax return information except under narrowly defined circumstances.⁵⁹

The IRS also has recognized the congressional intent to limit sharing of confidential tax information between government agencies:

By the mid-1970s, there was increased congressional and public concern about the widespread use of tax information by government agencies for purposes unrelated to tax administration. This concern culminated with the enactment of section 6103, passed as part of the Tax Reform Act of 1976. There, Congress eliminated much of the executive discretion concerning the disclosure of returns or return information. With this second approach, Congress established a new statutory scheme under which returns and return information are confidential and not subject to disclosure except to the extent explicitly provided by the Internal Revenue Code.⁶⁰

⁵⁸ Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1668, § 6103(a) (codified at 26 U.S.C. § 6103(a)).

⁵⁹ *Tierney v. Schweiker*, 718 F.2d 449, 455 (D.C. Cir. 1983) (citation omitted).

⁶⁰ DEP’T OF THE TREASURY, INTERNAL REVENUE SERV., CHIEF COUNSEL, PROCEDURE & ADMINISTRATION, DISCLOSURE & PRIVACY LAW REFERENCE GUIDE, at 1-1 (2012), available at <http://bit.ly/1TEDPhw>.

There are two specific methods by which the President is authorized to obtain confidential taxpayer information, both of which include safeguards designed to limit potential abuse of that access. Pursuant to 26 U.S.C. § 6103(g)(1), the President may access any taxpayer return or return information through the Secretary of the Treasury, but only upon written request signed by the President personally that states (1) the name and address of the taxpayer, (2) the kind of return or information requested, (3) the taxable period(s) covered, and (4) the specific reason why the inspection or disclosure is required.⁶¹ In addition, if the

President wants to share the disclosed information with other individuals within the White House Office, the President must designate those persons by name.⁶²

The second type of access is authorized by 26 U.S.C. § 6103(g)(2), which provides for so-called “tax checks” of potential presidential appointees. The applicable limitations and requirements under this provision are different from those that apply under Section 6103(g)(1). For tax checks, the Secretary of Treasury may disclose return information of “an individual who is designated as being under consideration for appointment to a position in the executive or judicial branch of the Federal Government” to a representative of the Executive Office of the

26 U.S.C. § 6103

(g) Disclosure to President and certain other persons

(1) In general

Upon written request by the President, signed by him personally, the Secretary shall furnish to the President, or to such employee or employees of the White House Office as the President may designate by name in such request, a return or return information with respect to any taxpayer named in such request. Any such request shall state—

(A) the name and address of the taxpayer whose return or return information is to be disclosed,

(B) the kind of return or return information which is to be disclosed,

(C) the taxable period or periods covered by such return or return information, and

(D) the specific reason why the inspection or disclosure is requested.

⁶¹ 26 U.S.C. § 6103(g)(1).

⁶² *Id.*

President, the head of any Federal agency, or the FBI on behalf of the President or agency head.⁶³ Each request must be in writing, and the information that can be disclosed is limited to whether the potential nominee (1) has filed returns in the last three years, (2) has failed to pay any tax or has been assessed negligence penalties in the preceding three years, (3) is or has been under investigation for tax crimes (including the results of any such investigation), and (4) has been assessed any civil penalty for tax fraud.⁶⁴ In addition, the Secretary must notify any person whose information is requested under Section 6103(g)(2) within three days of the request.⁶⁵

As the IRS itself recognizes, an important requirement of any disclosure made under Section 6103(g)(1) or (g)(2) is that such requests “are subject to the accounting

26 U.S.C. § 6103

(g) Disclosure to President and certain other persons

(2) Disclosure of return information as to Presidential appointees and certain other Federal Government appointees

The Secretary may disclose to a duly authorized representative of the Executive Office of the President or to the head of any Federal agency, upon written request by the President or head of such agency, or to the Federal Bureau of Investigation on behalf of and upon written request by the President or such head, return information with respect to an individual who is designated as being under consideration for appointment to a position in the executive or judicial branch of the Federal Government. Such return information shall be limited to whether such individual—

(A) has filed returns with respect to the taxes imposed under chapter 1 for not more than the immediately preceding 3 years;

(B) has failed to pay any tax within 10 days after notice and demand, or has been assessed any penalty under this title for negligence, in the current year or immediately preceding 3 years;

(C) has been or is under investigation for possible criminal offenses under the internal revenue laws and the results of any such investigation; or

(D) has been assessed any civil penalty under this title for fraud.

Within 3 days of the receipt of any request for any return information with respect to any individual under this paragraph, the Secretary shall notify such individual in writing that such information has been requested under the provisions of this paragraph.

⁶³ 26 U.S.C. § 6103(g)(2).

⁶⁴ *Id.*

⁶⁵ *Id.*

and recordkeeping requirements of the Code.”⁶⁶ Under Section 6103(g)(5), the President must report all Section 6103(g) disclosure requests to the Joint Committee on Taxation “within 30 days after the close of each calendar quarter,” and each report must set forth “the taxpayers with respect to whom such requests were made,” “the returns or return information involved,” and “the reasons for such requests.”⁶⁷

CoA Institute has learned that no President has used either of these two pathways designed by Congress to be the exclusive means for presidential access to confidential taxpayer information. This is admitted in documents supplied by the IRS to CoA Institute in response to FOIA requests.

26 U.S.C. § 6103

(g) Disclosure to President and certain other persons

(5) Reporting Requirements

Within 30 days after the close of each calendar quarter, the President and the head of any agency requesting returns and return information under this subsection shall each file a report with the Joint Committee on Taxation setting forth the taxpayers with respect to whom such requests were made during such quarter under this subsection, the returns or return information involved, and the reasons for such requests. The President shall not be required to report on any request for returns and return information pertaining to an individual who was an officer or employee of the executive branch of the Federal Government at the time such request was made. Reports filed pursuant to this paragraph shall not be disclosed unless the Joint Committee on Taxation determines that disclosure thereof (including identifying details) would be in the national interest. Such reports shall be maintained by the Joint Committee on Taxation for a period not exceeding 2 years unless, within such period, the Joint Committee on Taxation determines that a disclosure to the Congress is necessary.

In an internal email chain dated October 3, 2012, for example, Gary Prutsman, Chief of the IRS Office of Disclosure, forwarded the Section 6103 accounting reports filed for the first three years of President Obama’s first term, explaining that “[d]isclosures to the President under [Section] 6103(g)(1) would have been listed on these reports if made None are listed.”⁶⁸ Mr. Prutsman goes on to say that “[w]e have checked our inventory systems, AFOIA and E-DIMS, and found none. Leg[islative] Affairs checked ETRAK and found none. None of us have any recollection of such a request during our tenures in HQ Disclosure.”⁶⁹

Donald M. Squires, Senior Technician Reviewer in the IRS Disclosure Litigation section, similarly explained that “[n]o president has ever invoked (g)(1) precisely to avoid the whole trouble Nixon got into. Tax checks are routinely done pursuant to consent.”⁷⁰ Sarah E. Tate, a

⁶⁶ OFFICE OF TAX POLICY, DEPARTMENT OF THE TREASURY, REPORT TO THE CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS, VOL. I: STUDY OF GENERAL PROVISIONS at 75 (Oct. 2000), available at <http://bit.ly/1XAthzj>.

⁶⁷ 26 U.S.C. § 6103(g)(5).

⁶⁸ Email from Gary Prutsman, Chief of Disclosure, Internal Revenue Serv., to Bernice B. Fischer, Dir., Governmental Liaison & Disclosure, Internal Revenue Serv. (Oct. 3, 2012) (attached as Ex. 2).

⁶⁹ *Id.*

⁷⁰ Email from Donald M. Squires, Sr. Technician Review, Internal Revenue Serv., to Richard G. Goldman, Acting Dep. Assoc. Chief Counsel, Internal Revenue Serv., and Sarah E. Tate, Sr. Att’y, Internal Revenue Serv. (Oct. 3, 2012) (“I don’t know for sure, but I think reports are only made to the JC when there have been requests, which there haven’t been.”) (attached as Ex. 3).

senior attorney in the IRS Chief Counsel's Procedure and Administration branch, stated that she had confirmed "that the W[hite] H[ouse] uses the tax check program and disclosure consents to get tax records, not 6103(g)(1)."⁷¹

In another email, also sent late on October 3, 2012, Mr. Squires summed up the situation by explaining:

Having reviewed the FOIA request [filed by CoA Institute], the IRS's responses thereto, and the lawsuit filed by Cause of Action, it appears that we should have responded to the request by saying that there are no responsive documents. As far as I understand (and this can be confirmed by the Office of Disclosure), neither this White House or [sic] any other going back to 1976 has ever used section 6103(g) to make the requests for tax information. The tax check process for presidential nominees routinely utilizes consents executed under 6103(c).⁷²

Additional documents obtained by CoA Institute under the FOIA confirm that no White House has used either of the Section 6103(g) mechanisms to conduct tax checks on potential appointees. An email from IRS attorney Deborah Lambert-Dean to an attorney at the DOJ Tax Division, for example, states that "the 'tax checks' we do on behalf of the White House are generally for people who are under consideration for various appointments and all of those people sign consents under 6103(c) which give us authority to provide their tax returns and return information to the WH. To my knowledge, we have never had a request come in from the WH under 6103(g)(1)."⁷³ And, in response to press inquiries concerning a CoA Institute lawsuit to compel production of records about the IRS handling of a FOIA request concerning Section 6103(g), the IRS expressly confirmed that "no requests were made, and no tax returns or return information have been disclosed under Internal Revenue Code 6103(g) during the period in question."⁷⁴

⁷¹ Email from Sarah E. Tate, Sr. Att'y, Internal Revenue Serv., to Charles B. Christopher, Chief Att'y, Internal Revenue Serv., and Richard G. Goldman, Acting Dep. Assoc. Chief Counsel, Internal Revenue Serv. (Oct. 3, 2012) (attached as Ex. 4).

⁷² Email from Donald M. Squires, Sr. Technician Reviewer, Internal Revenue Serv., to Frank Keith, Dir., Communications, Internal Revenue Service, Terry L. Lemons, Chief of Communications & Liaison, Internal Revenue Serv., and Rebecca A. Chiaramida, Dir., Privacy, Governmental Liaison & Disclosure, Internal Revenue Serv. (Oct. 3, 2012) (attached as Ex. 5).

⁷³ Email from Deborah Lambert-Dean, Att'y, Internal Revenue Serv., to Carmen Banerjee, Counsel for FOIA & Privacy Act Matters, Tax Div., Dep't of Justice (Oct. 4, 2012) (attached as Ex. 6); *see also* "FOIA Freak-Out: IRS Wrongly Denies FOIA Request, Comes Unglued Over Media Response, COA INST. (May 13, 2013), <http://bit.ly/1WnAC6t>.

⁷⁴ *See* Examiner Watchdog Staff, *UPDATED! Non-profit wants to know if Obama asked IRS for anybody's tax returns*, WASH. EXAM'R (Oct. 3, 2012), <http://bit.ly/20HLyu6> ("A spokesman for the IRS tells *The Washington Examiner* that the agency received no requests from Obama for tax returns: 'The IRS does not comment on pending litigation,' said Michelle Eldridge. 'However, the IRS can confirm that no requests were made, and no tax returns or return information have been disclosed under Internal Revenue Code 6103(g) during the period in question.'"); Andrew Evans, *The IRS' FOIA Problem*, WASH. FREE BEACON (Oct. 3, 2012), <http://bit.ly/1Z3ZXjG>.

The information contained in the Department of the Treasury reports to the Joint Committee on Taxation is consistent with the IRS statements to the press and in the documents supplied to CoA Institute. Available reports show that, whereas 1,855 tax check disclosures under Section 6103(c) were made to the Executive Office of the President (which includes the Office of the White House Counsel) in calendar year 2009, 1,859 in calendar year 2010 (including 824 specifically to “Counsel to the President”), and 3,297 in calendar year 2011, no disclosure was made under Section 6103(g).⁷⁵ The April 4, 2012 Department of the Treasury public report to the Joint Committee on Taxation about disclosures for calendar year 2011 further explains that “[a]ll tax check disclosures were provided pursuant to IRC Section 6103(c) and were accompanied by a waiver signed by the taxpayer authorizing the Internal Revenue Service to provide the information.”⁷⁶ According to IRS records, the Department of the Treasury does not even bother to categorize or display requests pursuant to Section 6103(g) in its reports to Congress because there is no information to report. As one email explains, “[o]ne of the things I just found out in a meeting with the IRS Chief of Staff is that because there have been no Section 6103(g)(1) in decades (if ever), the report authors omit that section from the report because it would always be zeroes.”⁷⁷

B. Instead of Accessing Confidential Tax Information under Section 6103(g), Presidents Access that Information Pursuant to Taxpayer Consents under Section 6103(c)

- ***Finding:*** *Presidents have conducted tax checks of potential appointees exclusively under Section 6103(c) of the Internal Revenue Code. By conducting tax checks in this manner, Presidents avoid the reporting requirements and limitations placed on presidential access to confidential taxpayer information in the Tax Reform Act of 1976. In particular, because the kind of taxpayer information disclosed under a Section 6103(c) consent is not limited and such disclosures need not be reported, Presidents can, and do, circumvent congressional oversight and statutory limitations on the sharing confidential taxpayer information within and among agencies.*

The provision relating to taxpayer consent mentioned in the records cited and quoted above, 26 U.S.C. § 6103(c), allows disclosure of confidential information by the IRS to a designated person or persons when the taxpayer requests or consents to such disclosure.

⁷⁵ Internal Revenue Serv., Annual Disclosure Report CY 2009, sec. I, pt. 3, available at <http://1.usa.gov/29oC0kg>; Internal Revenue Serv., Annual Disclosure Report CY 2010, sec. I, pt. 3, available at <http://1.usa.gov/28JsWrw>; Internal Revenue Serv., Annual Disclosure Report CY 2011, sec. I, pt. 3, available at <http://1.usa.gov/297xdG0>.

⁷⁶ Letter from Douglas Shulman, Comm’r, Internal Revenue Serv., to Thomas A. Barthold, Chief of Staff, U.S. J. Comm. on Taxation (Apr. 4, 2012), available at <http://bit.ly/29zpkAT>; see also Annual Disclosure Reports for CYs 2009-2011, *supra* note 75. The IRS began to include tax check disclosures in the annual report to the Joint Committee on Taxation in 1977, even though the disclosures were made pursuant to section 6103(c) rather than section 6103(g). See OFFICE OF TAX POLICY, *supra* note 66, at 75.

⁷⁷ Email from A. M. Gulas, Office of Chief Counsel, Internal Revenue Serv., to David A. Hubbert, Att’y, Tax Div., Dep’t of Justice (Oct. 3, 2012) (attached as Ex. 7).

The Treasury regulations authorized by this section of the Internal Revenue Code are set forth at 26 C.F.R. § 301.6103(c)-1.⁷⁸ Under those regulations, “Permissible designees . . . include individuals,” business entities, “Federal, State, local and foreign government agencies” or their subunits, “or the general public.”⁷⁹ “When a designee is an individual,” a taxpayer designation does not authorize disclosure “to other individuals associated with such individual, such as employees of such individual or members of such individual’s staff.”⁸⁰ That is, requests or consents for disclosure to an individual under Section 6103(c) must expressly name the specific persons to whom disclosure may occur and no further disclosure to additional persons is allowed.

Congress did not enact the Tax Reform Act of 1976 simply to impose administrative hurdles on governmental access to confidential taxpayer information. Congress crafted the specific safeguards in Section 6103(g) after decades of Executive Branch abuse of the knowledge and power accrued by the IRS and in the immediate aftermath of revelations about the Nixon administration’s use of the agency to target political foes. The congressional and judicially-recognized purpose of the statute was to enhance taxpayer confidentiality and to protect it by limiting disclosure within the government, and to the President in particular. Questions of convenience and temporary, administrative fixes should not outweigh or override the policy choices of Congress, even under the guise of catch-all, generalized notions of taxpayer consent.

Nevertheless, the allure of conducting tax checks pursuant to Section 6103(c) consents rather than under Section 6103(g) is clear. First, the information available to the President under

26 U.S.C. § 6103

(c) Disclosure of returns and return information to designee of taxpayer

The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer’s request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

26 C.F.R. § 301.6103(c)-1(e)(C)

(3) Permissible designees and public forums

Permissible designees under this section include individuals; trusts; estates; corporations; partnerships; Federal, State, local and foreign government agencies or subunits of such agencies; or the general public. When disclosures are to be made in a public forum, such as in a courtroom or congressional hearing, the request for or consent to disclosure must describe the circumstances surrounding the public disclosure, e.g., congressional hearing, judicial proceeding, media, and the date or dates of the disclosure. When a designee is an individual, this section does not authorize disclosures to other individuals associated with such individual, such as employees of such individual or members of such individual’s staff.

⁷⁸ See 26 C.F.R. § 301.6103(c)-1(a) (“This regulation contains the requirements that must be met before, and the conditions under which, the Internal Revenue Service may make such disclosures.”).

⁷⁹ 26 C.F.R. § 301.6103(c)-1(e)(C)(3).

⁸⁰ *Id.*

a Section 6103(c) consent is potentially much greater than the limited tax check information available under Section 6103(g)(2). Second, by proceeding under Section 6103(c), the President can avoid the recordkeeping and quarterly reporting obligations that Congress requires under Section 6103(g).⁸¹ Additional advantages of using a Section 6103(c) consent include the ability of the President to obtain confidential taxpayer information without (1) making a request for disclosure in writing (or signing it), (2) certifying that the disclosure is about a potential appointee, (3) stating the specific reason why the disclosure is requested, and (4) naming the specific people with whom the President intends to share the disclosed information.

The advantage of using Section 6103(c) became apparent during the administration of President Carter. A key problem for President-elect Carter after the November 1976 election was that the express language of Section 6103(g)(2) applies only to Presidents, not Presidents-elect. That prevented President Carter from beginning the vetting process of potential nominees and appointees before his inauguration by requesting tax checks pursuant to Section 6103(g)(2). He therefore resorted to Section 6103(c) consents, thereby establishing a practice that all subsequent Presidents have followed, even outside transitions between election and inauguration. As the Office of Tax Policy at the Department of the Treasury has explained:

The election of President Carter in November 1976 exposed certain deficiencies in the tax check provisions of the new statute. In attempting to assemble a new administration, President-elect Carter could not access or authorize access to tax information to perform tax checks on new appointees. By its terms, section 6103(g) only authorizes disclosure to the President – not to the President-elect. Further, with the exception of information concerning criminal investigations, the statute only authorizes a “yes” or “no” answer for the other three items of information. Thus, even though the prospective appointee could proffer a reasonable explanation with respect to the IRS’s response to any question, the explanation could not be verified with the IRS, nor could the IRS on its own offer additional explanatory information. As an alternative to relying on section 6103(g)(2), the Carter transition team instituted the practice of conducting tax checks through the use of the taxpayer’s written consent, under section 6103(c). This practice continued for tax checks after President Carter’s inauguration and through all successive administrations, and the consent form developed after the inauguration has, in major respects, remained the same.⁸²

CoA Institute has not obtained copies of taxpayer consents supplied to or forms of consent used by the Obama Administration or its Office of the White House Counsel. However,

⁸¹ Compare 26 U.S.C. § 6103(c) (no reporting requirements) with 26 U.S.C. § 6103(g)(5) (setting forth quarterly reporting requirements); see also 26 U.S.C. § 6103(p)(3)(A) (exempting requests and disclosures made under § 6103(c) from the recordkeeping requirements that otherwise apply to requests for disclosure of returns and return information).

⁸² See OFFICE OF TAX POLICY, *supra* note 66, at 75.

a copy of a 1995 consent supplied by Elena Kagan before she served as Associate White House Counsel in the Clinton Administration is available and is reproduced as Figures 1-2 below.

Figure 1: Elena Kagan Tax Check Waiver (page 1)

THE WHITE HOUSE
WASHINGTON

To help the Internal Revenue Service find my tax records, I am voluntarily giving the following information:

MY NAME: Elena Kagan MY S.S.#: [REDACTED] [011]
PHONE NUMBER(S), HOME: (312) 935-2989 WORK: (312) 702-0350

I. IF MARRIED AND FILED A JOINT RETURN:

HUSBAND/WIFE NAME: _____

HUSBAND/WIFE SS#: _____

II. CURRENT ADDRESS: 605 W. Arlington Place, Apt. 3
Chicago, IL 60614

III. NAMES AND ADDRESSES SHOWN ON RETURNS FOR THE LAST THREE FISCAL YEARS (IF DIFFERENT FROM ABOVE)

<u>YEAR</u>	<u>NAME</u>	<u>ADDRESSES</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

DATE: 4/29/15
(WAIVER INVALID UNLESS RECEIVED BY
IRS WITHIN 60 DAYS OF THIS DATE)

Elena Kagan
(SIGNATURE OF TAXPAYER AUTHORIZING THE
THE DISCLOSURE OF RETURN INFORMATION)

Before signing, please be sure that you have reviewed the terms of this agreement listed on the reverse side.

Figure 2: Elena Kagan Tax Check Waiver (page 2)

TAX CHECK WAIVER

I am signing this waiver to permit the Internal Revenue Service to release information about me which would otherwise be confidential. This information will be used in connection with my appointment or employment by the United States Government. This waiver is made pursuant to #26 U.S.C. 6013(c).

I request that the Internal Revenue Service send the information to: President Clinton and the Office of the Counsel to the President, acting on behalf of the President.

The information I wish released is:

1. Have I failed to file any Federal income tax return which was required to be filed for any of the last three years?

If this waiver is received by the Internal Revenue Service before July 1, the "last three fiscal years" shall mean the latest three years for which information is available, since the return for the immediate last year may not yet have been processed.

2. Were any of these returns filed more than 45 days after the due date for filing (determined with regard to any extension of time for filing)?

3. Have I failed to pay any tax, penalty, or interest during the last three years within 45 days of the date on which the Internal Revenue Service gave notice of the amount due and demanded payments?

4. Has any penalty for negligence under section 6655(a) of the Internal Revenue Code been assessed against me this year or during the last three years?

5. Am I or have I ever been under investigation by the Internal Revenue Service for possible criminal offenses, and what were the results of such investigation(s)?

6. Has any civil penalty for fraud been assessed against me?

If the information which is to be released includes a "YES" answer to any of the above six questions, I authorize the Internal Revenue Service to release any information relative to that question.

The Kagan tax check waiver states that it "is made pursuant to 26 U.S.C. § 6103(c)" but limits the authorized disclosure to essentially the same type of information that President Clinton could have sought pursuant to § 6103(g)(2). The question therefore arises why President Clinton did not simply request the same information under Section 6103(g)(2), which would not have required use of a consent form signed by Ms. Kagan.⁸³

⁸³ Under 26 U.S.C. § 6103(g)(2), Ms. Kagan would have been notified "in writing that such information has been requested" within three days of the IRS receiving the President's request.

One discrepancy between Ms. Kagan’s consent form and the requirements of Section 6103(g)(2) is that the former gave permission to the IRS to disclose the taxpayer information to “President Clinton and the Office of the Counsel to the President.”⁸⁴ Section 6103(g)(2) allows disclosure to “a duly authorized representative of the Executive Office of the President,” which includes the Office of the White House Counsel, but it does not authorize disclosure directly to the President.⁸⁵ Conversely, Section 6103(c), although it permits disclosure to a Federal agency, does not allow disclosure to the Office of the White House Counsel as a group because that office is not a “Federal agency” as that term is used in Section 6103 and its regulations.⁸⁶ To the extent that present-day tax checks by the President are proceeding under consent forms similar to Ms. Kagan’s, the process is imperfect. A blanket consent of disclosure to the Office of the White House Counsel is not authorized by Section 6103(c) and the IRS is not justified in disclosing taxpayer information to that Office as a whole (as opposed to a specific individual employed in the Office). Nor, as explained, may disclosures to an individual named in a consent made under Section 6103(c) be shared with other individuals, even persons who work with or in the same office as the designee.⁸⁷

To summarize: conducting tax checks and otherwise obtaining confidential taxpayer information pursuant to Section 6103(c) consents enables Presidents to avoid congressional oversight and transparency because they do not have to submit the detailed quarterly reports required under Section 6103(g), nor is the Secretary of the Treasury required to keep records of such requests. The consent forms used in the past and likely still in use today are imperfect and indicate that, in violation of Section 6103(c) limitations, confidential taxpayer information is disseminated beyond the individuals expressly named in the consent form. The practice of obtaining confidential taxpayer information under Section 6103(c) therefore evades the safeguards Congress tailored to circumscribe a President’s ability to obtain and use confidential taxpayer information. It avoids the judicially recognized intent of Congress “to limit disclosure of tax return information except under narrowly defined circumstances” and to protect individual taxpayers from “potential widespread availability of individual tax information to government agencies.”⁸⁸

⁸⁴ Figure 2.

⁸⁵ See 26 U.S.C. § 6103(g)(2) (“The Secretary may disclose to a duly authorized representative of the Executive Office of the President or to the head of any Federal agency, upon written request by the President or head of such agency, or to the Federal Bureau of Investigation on behalf of and upon written request by the President or such head[.]”).

⁸⁶ See 26 C.F.R. § 301.6103(c)-1(e)(C)(3) (including a Federal agency as a permissible designee for consents under Section 6103(c)); see also 26 U.S.C. § 6103(b)(9) (“The term ‘Federal agency’ means an agency within the meaning of section 551(1) of title 5, United States Code.”); 5 U.S.C. § 551(1); *Meyer v. Bush*, 981 F.2d 1288, 1300 (D.C. Cir. 1993) (entities within the Executive Office of the President are not agencies under the Administrative Procedure Act unless they function as an “instrument of presidential and policymaking control over the executive bureaucracy” and exercise “management, coordination, and administrative functions”); cf. *Nat’l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990) (Office of the White House Counsel is not an agency under 5 U.S.C. § 552).

⁸⁷ See *supra* note 80 and accompanying text.

⁸⁸ *Tierney*, 718 F.2d at 455.

V. SINCE APRIL 2009, THE OFFICE OF THE WHITE HOUSE COUNSEL UNDER THE OBAMA ADMINISTRATION HAS EMPLOYED CONTINUOUSLY ATTORNEYS DETAILED FROM THE DEPARTMENT OF JUSTICE TAX DIVISION

In addition to discovering that no President has followed the congressionally mandated procedures for accessing confidential taxpayer information, the CoA Institute investigation also uncovered a practice by the Obama Administration of regularly employing DOJ Tax Division attorneys in the Office of the White House Counsel. Given the track record of the Obama Administration on misuse of confidential taxpayer information to the political advantage of the President, this practice raises concern that the Obama White House may have recruited these tax attorneys in a further attempt to circumvent the statutory limitations on presidential access to such information.

A. President Obama Sought DOJ Tax Division Attorneys to Serve on Detail as Clearance Counsel in the Office of the White House Counsel

- ***Finding:*** *During President Obama’s tenure, at least ten DOJ lawyers, selected specifically from the DOJ Tax Division, have been detailed to the Office of the White House Counsel.*

Federal law permits employees of a department, agency, or independent agency to be detailed to the White House to assist and advise the President.⁸⁹ In many instances, the White House reimburses the detailing agency for the cost of the detail.⁹⁰ In previous administrations, the White House sought attorney-detailees from a variety of agencies to serve as “clearance counsel.”⁹¹ The principal role of the clearance counsel is to vet candidates for appointment to executive and judicial branch positions by reviewing their confidential tax information, as well as a background check compiled by the FBI.⁹²

⁸⁹ 3 U.S.C. § 112.

⁹⁰ *Id.*; but see Robert F. Diegelman, Acting Ass’t. Att’y Gen. for Admin., Memorandum to the Heads of Department Components Concerning the Approval of and Reimbursement for White House and Other Details (Aug. 30, 2002) [hereinafter “Diegelman Memo”] (exception permitting details to the White House on a “nonreimbursable basis for up to 180 calendar days in a fiscal year”), available at <http://bit.ly/1XVsERj>. Even in situations where the White House reimburses the Tax Division, taxpayers still bear significant cost from detailing lawyers to work for the president rather than doing the jobs they were hired to do in the Tax Division. For instance, in its 2017 Congressional Budget request, the Tax Division states that the legal efforts of its 377 lawyers resulted in collecting \$412 million from offensive litigation and retaining \$483 million at issue in suits seeking refunds during fiscal year 2015. See Tax Div., U.S. Dep’t of Justice, FY 2017 Cong. Budget Request at 1, 5, 12, 36 (“Performance Measure 5”), available at <http://bit.ly/2anwuS3>. On average, then, and assuming reimbursement of salary and benefits, each lawyer detailed away from duties in the Tax Division in that time frame could have been expected to net the government an average of about \$2.4 million annually if not working at the White House.

⁹¹ See generally MARY ANNE BORRELLI, ET AL., THE WHITE HOUSE TRANSITION PROJECT: THE WHITE HOUSE COUNSEL’S OFFICE NO. 2009-29, at 32 (2009), available at <http://bit.ly/1TZgzF2>.

⁹² *Id.*

The use of detailees in the Office of the White House Counsel to vet potential presidential appointees has a checkered history. In many instances, the process has operated under administratively convenient procedures that were not subject to supervisory oversight and failed to protect the privacy rights of citizens. Perhaps the most striking example of this is the FBI background-file controversy during the Clinton Administration, which led to years of investigation and ultimately drove reform at both the FBI and White House. A description of that event and the individuals involved is provided in Appendix 2.

The CoA Institute investigation revealed that the Obama Administration likewise employed detailees in the Office of the White House Counsel but that, contrary to previous practice, it chose the majority of its clearance counsel from litigation lawyers working for the DOJ Tax Division. The first DOJ attorney to serve in this capacity, Diana H. Beinart, worked on detail from April 2, 2009 to March 23, 2010, and there have been a total of ten Tax Division lawyers assigned on detail to the Office of the White House Counsel from April 2009 to the present (*see* Figure 3 below and Appendix 3). In most cases, as soon as the term of one detailee ended, another began.⁹³ In this way, at least one Tax Division lawyer has worked in the Office of the White House Counsel continuously throughout the Obama presidency. As one DOJ official explained in a March 2015 email, the “White House . . . asked for an attorney from the Tax Division to come on detail continuously for at least the past 6 or 7 years to help with any tax issues that may arise during the vetting and clearance process.”⁹⁴

⁹³ *See* Figure 3 & Appendix 3; *see also* Email from Phyllis Wolfteich, Dep’t of Justice, Tax Div., to DOJ Justice Mgmt. Div. (Apr. 26, 2013), *available at* <http://bit.ly/29Jsqtj> (describing detailee as “the next Tax Division attorney to be heading to the WH”); Email from Tamara W. Ashford, Acting Ass’t Att’y Gen., Dep’t of Justice, Tax Div., to Rosemary E. Paguni (Sept. 27, 2013), *available at* <http://bit.ly/29Jsqtj> (noting detail is ending, “but unfortunately [the Office of the White House Counsel is] requesting TAX for another vetting detailee”).

⁹⁴ Email from Roberty Bruffy, Exec. Officer, Dep’t of Justice, Tax Div., to Arthur Gary, Gen. Counsel, DOJ Justice Mgmt. Div., *et al.* (Mar. 17, 2015) (attached as Ex. 8) (“I know this only because we recently received a Freedom of Information Act request from Cause of Action asking for information related to these details.”); *see also* Memorandum from Lee Lofthus, Ass’t Att’y Gen. for Admin., Dep’t of Justice, to Acting Assoc. Att’y Gen. regarding Request Approval to Detail a Tax Division Employee to the White House Counsel’s Office (Mar. 31, 2015) (attached as Ex. 9) (“[T]he White House has requested the continuous presence of a Tax Division Attorney to assist in this process.”).

Figure 3: DOJ Tax Division Detailees to the Office of the White House Counsel, 2009-2015

TAX DIV. ATTORNEY	WHITE HOUSE POSITION	DETAIL PERIOD
Diana Beinart	Tax Advisor	Apr. 2, 2009 – Mar. 23, 2010
Daren H. Firestone	Dep. Assoc. Counsel	Apr. 19, 2010 – Nov. 8, 2010
Todd Ellinwood		Mar. 2011 – Nov. 2011
Michael J. Watling	Dep. Assoc. Counsel for Pres. Personnel	Nov. 14, 2011 – May 11, 2012
Christine D. Mason	Clearance Advisor or Dep. Assoc. Counsel	May 28, 2012 – Oct. 26, 2012
Christopher Strauss	Clearance Advisor/ Clearance Counsel	Oct. 22, 2012 – May 31, 2013
Shelley deAlth Leonard	Clearance Advisor	May 6, 2013 – Dec. 2, 2013
Andrew C. Strelka		Dec. 2013 – Jun. 6, 2014
Norah E. Bringer	Clearance Counsel	Jun. 9, 2014 – Apr. 3, 2015
Carina Federico	Clearance Counsel	Apr. 1, 2015 – Oct. 30, 2015

B. Tax Division Lawyers Detailed to the Office of White House Counsel Worked on Substantive Tax Issues, not Just the Vetting of Potential Appointees

The DOJ detailing program is now governed by Order 1203, which was approved on April 30, 2015.⁹⁵ According to the Order, “external assignments must always be consistent with the needs and the budget situation of the Department and of the [detailing] Component.”⁹⁶ Details are typically justified because they serve the interests of “employee development” or provide “assistance in an area where a DOJ employee has expertise.”⁹⁷

It is not clear why the Obama Administration specifically sought attorneys from the DOJ Tax Division to serve as clearance counsel. Their primary skills are as litigators, and even when the White House requires tax checks to vet potential nominees and appointees, it is the IRS that reviews the tax records to answer the questions about delinquency or other red flags.⁹⁸ To the extent the Office of the White House Counsel believed it needed attorneys with tax expertise, a more effective route would have been to request detailees from the IRS. The U.S. Senate has

⁹⁵ U.S. Dep’t of Justice, Order 1203: Details and Assignments of Employees to Outside Organizations (Apr. 30, 2015) (attached as Ex. 10). This order has not been made publicly available, but was provided in response to a CoA Institute FOIA request. Previous guidance, now superseded by Order 1203, remains on the DOJ website. *See, e.g.*, Diegelman Memo, *supra* note 90; Memorandum from Eric H. Holder, Jr., Dep. Att’y Gen., DOJ, to Heads of Dep’t Components (Sep. 29, 2000), *available at* <http://bit.ly/29exW8W>; Memorandum for Human Resource Officers from Mari Barr Santangelo, Dep. Ass’t Att’y Gen., DOJ (May 2, 2013), *available at* <http://bit.ly/2989ZhA>.

⁹⁶ Order 1203, *supra* note 95.

⁹⁷ *Id.*

⁹⁸ *See* 26 U.S.C. § 6103(g)(2); Elena Kagan Tax Check Waiver (Figs. 1-2).

done just that when faced with the number of nominees to be vetted before confirmation at the start of each new administration.⁹⁹

What is clear is that, by 2013, DOJ leadership was advertising the opportunity to be detailed to the Office of the White House Counsel in terms that went beyond the vetting of presidential appointees. The position of “Clearance Advisor,” to be filled by a lawyer detailed from the Tax Division, was “responsible for helping the White House Counsel’s office generally,” including researching and addressing “a variety of substantive and significant tax issues, as well overseeing the FBI background investigation and tax review processes.”¹⁰⁰ In 2015, the position of “Deputy Associate Counsel” was described in similar terms.¹⁰¹

Andrew Strelka, who served on detail from December 2013 to early June 2014, described his work at the Office of the White House Counsel, as “advis[ing] senior White House staff on Presidential nominee suitability and various federal and state tax issues,” as well as assisting the “White House Office of Legislative Affairs on Senate confirmation matters[.]”¹⁰²

Perhaps the best answer to why President Obama wanted Tax Division lawyers is suggested by the fact that their position as attorneys representing the government in tax litigation allowed them to access confidential taxpayer information.¹⁰³ As discussed below, at least two of the detailed DOJ attorneys represented the Federal government in litigation against groups critical of President Obama’s policy agenda. While serving as counsel for the government in

⁹⁹ See Evan Thomas, *Obama’s Strict Vetting Leaves Many Top Jobs Empty*, NEWSWEEK (Mar. 20, 2009), <http://bit.ly/1X3diuM>.

¹⁰⁰ Email from Kathryn Keneally, Ass’t Att’y Gen., Dep’t of Justice, Tax Div., to distribution list re White House Detail Opportunity (Mar. 13, 2013) (attached as Ex. 11).

¹⁰¹ Email from Caroline D. Ciralo, Acting Ass’t Att’y Gen., Dep’t of Justice, Tax Div. to distribution list re White House Detail Opportunity – Very Short Deadline (Feb. 25, 2015) (attached as Ex. 12). Other DOJ components also provided lawyers for temporary detail work in the Office of the White House Counsel. Documents produced by the DOJ in the course of this CoA Institute investigation show that several Assistant U.S. Attorneys were detailed to serve as Associate Counsel to the President working on different issues. See, e.g., Memorandum from Lee J. Lofthus, Ass’t Att’y Gen. for Admin., to John P. Carlin, Ass’t Att’y Gen. for Nat’l Security re Request to Detail a National Security Division (NSD) Employee (date stamped Apr. 1, 2015) (request from Office of the White House Counsel request for detail from DOJ National Security Division to work “on matters related to national security policy ... and on matters involving federal agencies”), available at <http://bit.ly/29NqjUf>; Memorandum from Lee J. Lofthus, Ass’t Att’y Gen. for Admin., to Monty Wilkinson, Director, Exec. Office for U.S. Att’ys, re Request to Detail an Assistant United States Attorney to the White House Counsel’s Office (Sep. 17, 2014) (detailed attorney “will serve as Associate Counsel working on congressional oversight issues”), available at <http://bit.ly/29TGjES>; Memorandum for the Deputy Attorney General from Lee J. Lofthus, Ass’t Att’y Gen. for Admin., re Request to Ratify the Detail Extension of an Executive Office for U.S. Attorneys (EOUSA) Employee to the White House Counsel’s Office (signed Mar. 7, 2014) (detailee “continues to serve as Associate Counsel to the President ... responsible for congressional oversight issues”), available at <http://bit.ly/29TGjES>.

¹⁰² Andrew C. Strelka, MILLER & CHEVALIER, <http://bit.ly/1TM1bzM> (last visited June 3, 2016).

¹⁰³ See 26 U.S.C. § 6103(h)(2) (“In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice . . . personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or any Federal or State court[.]”); see also *id.* § 6103(h)(2)(A)-(C). But see, e.g., *id.* § 6103(g)(1).

those matters (and, in Mr. Strelka's case, also while serving as an attorney in the IRS Exempt Organizations Section), the attorneys in question had access to detailed, confidential taxpayer information that went beyond the type of information available to the White House under an ordinary tax check. Attorneys in the Tax Division who litigated those matters, in other words, accessed confidential taxpayer information otherwise restricted from disclosure to the President and White House officials, and that knowledge likely made them attractive to the White House.

As discussed next, the detailing of Tax Division attorneys to the Office of the White House Counsel therefore raises concern because those attorneys potentially knew and had access to confidential tax information of parties under investigation by, or in litigation with, the United States, which information might then be disclosed to and used by the Administration to target its political enemies. Moreover, as it appears that neither the Office of the White House Counsel nor the DOJ has established specific safeguards or ethics screens applicable to attorney-detailees and designed to protect the confidentiality of information obtained while working at the DOJ, there is the possibility that such information was and continues to be accessed by or shared with the White House in an unauthorized manner.

C. Tax Division Detailees with Knowledge of Confidential Taxpayer Information About President Obama's Political Foes Worked in the White House Without Guidelines, Screening Procedures, or Other Safeguards Designed To Enforce Congressional Mandates Against White House Access to that Information

- ***Finding:*** *At least two Tax Division attorneys were detailed to the Office of the White House Counsel after accessing confidential taxpayer information in lawsuits that arose from allegations that the IRS had unlawfully targeted groups opposed to President Obama's policies. Congress investigated the work of one of those lawyers and concluded that his sequential work for the IRS, the DOJ, and the White House created, at the least, the appearance of impropriety.*
- ***Finding:*** *Both the DOJ Tax Division and the Office of the White House Counsel have failed to implement safeguards, guidelines, or ethical screens to prevent the inadvertent or deliberate disclosure of confidential taxpayer information by attorney-detailees.*

1. The Detailing of Attorneys from the DOJ Tax Division to the White House Raises the Potential for Unauthorized Disclosure of Confidential Taxpayer Information

The threat of unauthorized disclosure of confidential taxpayer information through the employment of DOJ Tax Division attorney-detailees in the White House is illustrated by the examples of Norah E. Bringer and Andrew C. Strelka. Ms. Bringer and Mr. Strelka were both Tax Division lawyers when they were detailed to the Office of the White House Counsel in December 2013 and June 2014, respectively. Before such detailing, they worked on several cases with another Tax Division lawyer, Yonatan Gelblum, defending the IRS against allegations

that the agency had improperly targeted conservative groups, exceeded its authority to investigate them, and delayed their applications for tax exempt status.¹⁰⁴ Both Ms. Bringer and Mr. Strelka accessed confidential taxpayer information of the entities against whom their client, the IRS, was litigating.

All three of these lawyers defended IRS Commissioner John Koskinen in a lawsuit brought by Z Street, Inc., which alleged that its tax-exempt-status application had been subjected to “extra scrutiny” because it held “political views inconsistent with those espoused by the Obama administration.”¹⁰⁵ All three lawyers also were counsel of record to the IRS defending the agency against a pair of lawsuits brought by Judicial Watch, Inc. to enforce FOIA requests seeking records about applications for tax exempt status under Section 501(c)(4) of the Internal Revenue Code, communications with government agencies about organizations making such applications (including communications by Lois Lerner when she was head of the IRS Exempt Organizations Section), questionnaires sent to those organizations, and the selection of individuals for audits based on information in those applications.¹⁰⁶

Ms. Bringer and Mr. Gelblum also defended the IRS and TIGTA in FOIA lawsuits brought by CoA Institute in June and August 2013 that sought records about IRS disclosures of taxpayer information to White House officials and TIGTA communications about investigations of improper disclosures. Ms. Bringer accessed confidential taxpayer information in the course of that work¹⁰⁷ and then withdrew as defense counsel on Friday, June 6, 2014, just before starting

¹⁰⁴ Mr. Gelblum, along with Ms. Bringer, also represented TIGTA in a FOIA lawsuit brought by CoA Institute as part of this investigation. See *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, 70 F. Supp. 3d 45, 48 (D.D.C. 2014); see also Stephen Dinan, *IRS inspector general to release documents on privacy probe*, WASH. TIMES (Nov. 25, 2014), <http://bit.ly/1UmKUNK>.

¹⁰⁵ See, e.g., *Z Street, Inc. v. Koskinen*, 44 F. Supp. 3d 48, 50 (D.D.C. 2014) (Norah Bringer and Andrew Strelka appearing; Notice of Appearance by Yonatan Gelblum filed July 1, 2014); Ama Sarfo, *IRS Can't Dodge Israel-Centric Org's Discrimination Suit*, LAW360 (May 29, 2014); see also Answer at 10, *Z Street v. Comm'r*, No. 12-cv-00401 (D.D.C. filed June 26, 2014) (Andrew Strelka original trial attorney assigned by DOJ).

¹⁰⁶ See Notice of Withdrawal of Yonatan Gelblum, *Judicial Watch, Inc. v Internal Revenue Serv.*, No. 13-cv-01559 (D.D.C. not. of withdrawal filed June 6, 2014); see generally *Judicial Watch, Inc. v Internal Revenue Serv.*, No. 13-cv-01759 (D.D.C. cmplt. filed Nov. 9, 2013).

¹⁰⁷ See Notice of in Camera Submission, *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. notice filed Nov. 18, 2013) (Ms. Bringer requesting *in camera* treatment of confidential records protected by § 6103).

her work in the Office of the White House Counsel the next Monday.¹⁰⁸ Mr. Gelblum replaced her in defending TIGTA and the IRS in the litigation against CoA Institute.¹⁰⁹

During the course of Ms. Bringer’s work at the DOJ Tax Division, and before she began her detail at the White House, she therefore worked on lawsuits defending the IRS against allegations that it had unlawfully targeted non-profit entities and, by extension, their organizers, donors, or potential donors, because they opposed policies of the Obama Administration. That and her other work in the Tax Division required her to access, research, and understand confidential information provided in those and other groups’ tax exempt applications and in IRS audit files.¹¹⁰ On a Friday, Ms. Bringer had a litigator’s detailed knowledge of the type of confidential taxpayer information that motivated Congress to safeguard it from access by the President and White House officials—that is, the tax and financial information of political opponents—and then, on the following Monday, she began working as a lawyer for the President in the Office of the White House Counsel.

Concerns about Mr. Strelka’s work similarly arose from his personal involvement as an employee in the IRS Exempt Organizations Section (“EO”) while it considered issues involving groups (and their organizers, donors, and potential donors) that were opposed to President Obama’s policies. Certain of these groups later filed suit against the IRS. After he moved from EO to the DOJ Tax Division, Mr. Strelka defended the IRS in litigation about these issues before moving on to work in the Office of the White House Counsel.¹¹¹ Because of his various roles in these matters, the U.S. House Committee on Oversight and Government Reform (“OGR”) sought Mr. Strelka’s testimony as part of its investigation of the IRS-targeting controversy in which Lois Lerner was a central figure.

Committee members expressed concern that, after working under Ms. Lerner while she was head of EO, Mr. Strelka represented the IRS Commissioner in the litigation involving Z Street, Inc. From 2008-2010, when Z Street, Inc. sought tax exempt status, Mr. Strelka was

¹⁰⁸ See Notice of Withdrawal of Appearance of Norah E. Bringer, *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. filed June 6, 2014). Ms. Bringer also worked with Carmen Banerjee, Counsel to the Tax Division for FOIA and Privacy Act Matters, who signed responses on behalf of TIGTA to the CoA Institute FOIA requests. See Email from Carmen Banerjee, Dep’t of Justice, Tax Div., to Gregory Miller (Jan. 2, 2014), available at <http://bit.ly/29ygCIZ> (“Greg, I am the reviewer in the Freedom of Information Act Cause of Action case you have with Norah. But, I am contacting you in my capacity as the Tax Division’s Freedom of Information Act counsel determining a Freedom of Information Act request submitted to the Tax Division by [REDACTED].”); see also Email from Carmen Banerjee, Dep’t of Justice, Tax Div., to Jennifer Black (Aug. 13, 2014), available at <http://bit.ly/29y6vJr> (“The trial attorney, Norah, handling this case is away on detail[.]”).

¹⁰⁹ See *supra* note 104.

¹¹⁰ See, e.g., *Life Extension Found., Inc. v. Internal Revenue Serv.*, 915 F. Supp. 2d 174, 186 (2013) (IRS submitting materials protected under § 6103 for *in camera* review; Norah Bringer trial attorney for IRS); see also Notice of *In Camera* Submission by Treasury Inspector Gen. for Tax Admin., *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. notice filed Nov. 18, 2013) (requesting *in camera* treatment of numerous records, including those protected by § 6103).

¹¹¹ See *Z Street, Inc. v. Koskinen*, 44 F. Supp. 3d 48 (D.D.C. 2014) (Andrew Strelka and Norah Bringer appearing); Appendix 3.

working at the EO¹¹² and was “one of 14 employees who received an e-mail from agency attorney Ronald Shoemaker on March 17, 2010 instructing them to ‘be on the lookout for a tea party case.’”¹¹³ Ms. Lerner remained a mentor to Mr. Strelka after he left the IRS to join the DOJ Tax Division in August 2010.¹¹⁴ Mr. Strelka’s personal relationship with Ms. Lerner and his continuing ties to and personal interest in IRS personnel and matters involving EO—even months after his departure to the DOJ Tax Division—signaled a clear ethics problem to the Committee:

[T]he Tax Division . . . had similar apparent conflicts of interest. The Tax Division, which is representing the IRS in civil lawsuits relating to the targeting, appointed Andrew Strelka, a former IRS attorney who worked for Lois Lerner, to represent the IRS. While working for Lerner at the IRS, Strelka received an e-mail in March 2010 directing him to “[b]e on the lookout for a tea party case.” Even after he left the IRS, Strelka maintained a close relationship with Lerner, writing to her: “I still feel an EO connection” and “I cherished my time in the EO family and I owe a big thanks to you for hiring me” Strelka’s connection with the IRS is so strong that he was made aware of Lerner’s hard drive crash in June 2011 almost immediately after it occurred. In addition, Strelka’s connection with IRS was important enough that TIGTA and the Justice Department interviewed him in spring 2014 about the IRS targeting. Strelka testified that although he worked on at least two cases at the Justice Department that concerned Exempt Organizations, Strelka never disclosed to the court or his opposing counsel his connection with the IRS or the fact that he was a witness in the criminal investigation into the IRS’s targeting.¹¹⁵

Before OGR, Mr. Strelka stated that he had consulted with his “designated ethics official”¹¹⁶ on several occasions but had never been advised to disclose to the court or opposing

¹¹² Letter from Darrell Issa, Chairman of the U.S. H. Comm. on Oversight and Gov’t Reform, and Jim Jordan, Chairman of the U.S. H. Subcomm. On Econ. Growth, to Eric Holder, U.S. Attorney General, at 3 (Aug. 25, 2014), *available at* <http://bit.ly/1TDbC5t> (“Documents obtained by the Committee show that Strelka was directly involved in the IRS targeting of conservative tax-exempt applicants.”); *see also* Letter from Jim Jordan, Chairman of the U.S. H. Subcomm. On Econ. Growth, to Eric Holder, U.S. Attorney General, at 1 (Sept. 3, 2014), *available at* <http://bit.ly/1TM1t9S> (noting the “startling conflict of interest in Andrew Strelka’s representation of the IRS in *Z Street v. Koskinen*, a civil suit relating to the IRS targeting of conservative groups”).

¹¹³ Eliana Johnson, *A man who once worked for Lois Lerner is representing the agency in court*, NAT’L REV. (July 22, 2014), <http://bit.ly/24niEAK>.

¹¹⁴ *Id.*

¹¹⁵ OGR TARGETING REPORT, *supra* note 42, at 167.

¹¹⁶ The Designated Agency Ethics Official (“DAEO”) for the DOJ is the Assistant Attorney General for Administration. *See* U.S. DEP’T OF JUSTICE, ETHICS HANDBOOK FOR ON AND OFF-DUTY CONDUCT 1 (Jan. 2016), *available at* <http://1.usa.gov/1VCnfyi>; *see also* 5 C.F.R. § 2635.107(a) (“[E]ach agency has a designated agency ethics official who, on the agency’s behalf, is responsible for coordinating and managing the agency’s ethics program[.]”); *id.* § 2635.107(b) (“Employees who have questions about the application of this part or any supplemental agency regulations to particular situations should seek advice from an agency

counsel his personal knowledge as a potential witness of the issues surrounding the IRS targeting of conservative groups or to disclose or otherwise address that knowledge in his new role as advocate:

Q. Okay. Sir, when you entered your appearance in the Judicial Watch litigation relating to the 501(c)(4) applications, did you disclose to the court your previous experience with the IRS?

A. No.

Q. Did you disclose to the court your experience working for Lois Lerner?

A. No.

Q. Did you disclose to the court your experience working 501(c)(4) applications?

A. No.

Q. Did you disclose to opposing counsel that you worked at the IRS.

A. No.

* * *

Q. Did you disclose to opposing counsel your experience working in Lois Lerner's organization?

A. No.

Q. Did you disclose to opposing counsel your experience working on 501(c)(4) applications?

A. No.

Q. And, sir, at the time you entered your appearance in the Judicial Watch Freedom of Information Act matter relating to 501(c)(4) applications, did you disclose to the court that you were aware in 2011 that Ms. Lerner's hard drive had crashed?

A. No.

* * *

Q. And, sir, in your work on the Judicial Watch matter . . . did you ever disclose to the court that you were interviewed by the Department of Justice in connection with the criminal investigation into the IRS's treatment of tax-exempt applicants?

ethics official.”). Upon information and belief, Eileen Shatz was the DAEO for the DOJ Tax Division during the time Mr. Strelka worked there and at the White House.

A. No, and I will add that, on both of those matters, my designated ethics official never stated I had any affirmative duty to do so.¹¹⁷

OGR concluded that, “[a]lthough Strelka testified that the Justice Department’s ethics officials cleared him to work on cases involving tax exempt applications, his involvement on cases—especially litigation concerning documents for which Strelka may have been a custodian while at the IRS—creates the appearance of a conflict.”¹¹⁸ The Committee also cited Mr. Strelka’s detail to the Office of the White House Counsel as another area of concern.¹¹⁹

2. Neither the White House nor the DOJ Appear to Apply Guidelines, Ethics Screen, or Other Safeguards to Protect Against Unauthorized Disclosure of Confidential Taxpayer Information

Under 26 U.S.C. § 6103(g), any presidential request for confidential taxpayer information is subject to statutory safeguards and notification procedures, including limits on the kind of information that can be accessed and regular reports to the Joint Committee on Taxation.¹²⁰ Yet, no President has ever acted under that section of the Internal Revenue Code to obtain tax information about potential appointees; instead, they have relied on individual consents pursuant to Section 6103(c).¹²¹ The Section 6103(c) consent process, however, does not impose the full array of statutory limitations and reporting requirements that Congress intended to prevent abuse when a President accesses taxpayer information.¹²²

- ***Finding:*** *Notwithstanding the experience of the Obama Administration in supervising and managing DOJ attorney-details to the Office of the White House Counsel, there appears to be no program, training, guidelines, ethical screens, or other safeguards to address the serious potential conflicts of interest inherent to the detailing program.*

¹¹⁷ OGR TARGETING REPORT, *supra* note 42, at 167-68.

¹¹⁸ *Id.* at 168.

¹¹⁹ *Id.* at 200; *see also* Issa-Jordan letter, *supra* note 112 at 4 (“Curiously, before his withdrawal from the case, Strelka also completed a detail to the White House Counsel’s Office from December 2013 to June 2014—during which time the White House learned of Lois Lerner’s destroyed e-mails.”).

¹²⁰ *See supra* Section IV.A.

¹²¹ *See supra* Section IV.B.

¹²² *See Tierney v. Schweiker*, 718 F.2d 449, 456 (D.C. Cir. 1983) (“In light of [§ 6103’s] legislative history, the IRS cannot use the consent exception of § 6103(c) as a ‘catch-all’ provision to circumvent the general rule of confidentiality established by Congress.”); U.S. CONGRESS J. COMM. ON TAXATION, STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, vol. 1, at 228 (2000), *available at* <http://www.jct.gov/s-1-00vol1.pdf> (warning IRS about potential for abuse).

Under Federal law, detailees remain employees of the agency from which they are assigned.¹²³ Detailed employees also are subject to the same standards of conduct that would otherwise apply to them at their primary place of employment, as embodied in DOJ Order 1203, which specifies that detailed attorneys “on external assignment remain subject to the requirements of their DOJ position (e.g., . . . standards of conduct) while on assignment.”¹²⁴

The DOJ Ethics Handbook “summarizes the principal ethics laws and regulations governing the conduct of Department of Justice employees,”¹²⁵ but these are couched in general terms that often raise more questions than they answer. DOJ employees must act ethically and “shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards” that apply to Executive Branch employees.¹²⁶ Further, DOJ employees “should avoid situations where [their] official actions affect or appear to affect [their] private interests, financial or non-financial.”¹²⁷ The DOJ recommends remedies where employees face some types of conflicts or potential conflicts. For instance, in a case where an employee’s impartiality might be questioned, the employee “may obtain a formal determination from [his or her] component head that the Department’s interest in [their] participation outweighs the concern that the integrity of the Department’s operations would be questioned.”¹²⁸

Other standards of conduct that apply to DOJ lawyers include the Office of Government Ethics (“OGE”) government-wide rules of conduct,¹²⁹ DOJ supplemental standards,¹³⁰ and the general prohibition under the Administrative Procedure Act (“APA”) against *ex parte* communications.¹³¹ The OGE rules, however, principally address financial conflicts of interest,¹³² not the legal conflicts or complex political situations—including whether and to what extent knowledge of taxpayer information can be shared—that DOJ attorneys typically face while on detail at the White House.

¹²³ See, e.g., Memorandum of Understanding between Exec. Office for U.S. Att’ys, the U.S. Att’y’s Office, District of Md., and Assistant U.S. Att’y Arun Rao (June 2012), available at <http://bit.ly/29t6aBW> (“The AUSA shall continue to be employed by the USAO-MD with no break in federal service.”).

¹²⁴ Order 1203, *supra* note 95, at 8.

¹²⁵ See generally DOJ ETHICS HANDBOOK, *supra* note 116, at 1.

¹²⁶ 5 C.F.R. § 2635.101(b)(14); see D.C. RULES OF PROF’L CONDUCT R. 1.11 cmt. 5; see also Stephen R. Kaye, *Conflicts in Representation: An Overview of Developments During 1987 and 1988*, PRACTICING LAW INST. (Dec. 12, 1989) (“A government attorney is required to be more circumspect than a private lawyer, as improper conduct on the part of a government attorney is more likely to harm the entire system of government in terms of public trust.”). Cf. OGR TARGETING REPORT, *supra* note 42, at 168.

¹²⁷ DOJ ETHICS HANDBOOK, *supra* note 116, at 14; see also *id.* (“Generally, you should seek advice before participating in any matter in which your impartiality could be questioned.”).

¹²⁸ *Id.* at 15.

¹²⁹ 5 C.F.R. pt. 2635.

¹³⁰ *Id.* pt. 3801.

¹³¹ 5 U.S.C. §§ 551(14), 557(d)(1).

¹³² See, e.g., 5 C.F.R. § 2635.703(a).

The White House prepares a Memorandum of Understanding (“MOU”) with agencies, including the DOJ, to govern assignments of detailed employees,¹³³ but none of the MOUs that CoA Institute has reviewed contain any statement about the duties of detailees to protect confidential taxpayer information from unauthorized disclosure.¹³⁴ Nor is there any publicly-available evidence that the Office of the White House Counsel imposes additional rules for detailed attorneys. By way of contrast, detailees to the U.S. Senate are required to abide by Senate ethics rules, which are more comprehensive as compared to the OGE and DOJ standards of conduct.¹³⁵

DOJ Tax Division attorneys detailed to the Office of the White House Counsel also are subject to the District of Columbia Rules of Professional Conduct.¹³⁶ Those Rules, and their American Bar Association analogues, caution against representing a client in a matter where a lawyer could be called upon to appear both as a witness and as an advocate. As Rule 3.7(a) provides, “[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness” without full disclosure to and consent from the client. As Comment 2 to that Rule explains, the rule against advocate-witnesses is intended to prevent prejudice that could result from a lawyer having dual roles at trial: “A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or an analysis of the proof.”¹³⁷ Although Rule 3.7(a) on its face only applies to a lawyer

¹³³ See, e.g., Email from Ken Zwick, Dep’t of Justice, Civil Div., to Steve Parent, Dep’t of Justice, Crim. Div., *et al.* (Mar. 20, 2009), available at <http://bit.ly/29BOJTS>.

¹³⁴ Internal DOJ memoranda approving detail positions of Tax Division lawyers to the Office of White House Counsel state that each detailee “fully understands that [s]he is obligated to disclose to the appropriate authorities, including the Internal Revenue Service and the Department of Justice, any potential civil or criminal violations by potential nominees of which [s]he becomes aware during the vetting process.” See, e.g., Memorandum from Kathryn Keneally, Ass’t Att’y Gen., Dep’t of Justice, to Lee Lofthus, Ass’t Att’y Gen. for Admin., Dep’t of Justice, re Approval for Detail of Tax Division Employee to the White House (Dec. 12, 2012), available at <http://bit.ly/2a2rqzS>.

¹³⁵ See U.S. S. CODE OF OFFICIAL CONDUCT RULE XLI § 3 (ed. Apr. 2008), available at <http://bit.ly/1Z42Cdf>; see also U.S. SELECT COMM. ON ETHICS, SENATE ETHICS MANUAL (S. PUB. 108-1) at 108-09 (ed. 2003), available at <http://bit.ly/27Uo7mx> (“Senate committees may accept the services of non-Senate Federal Government employees as detailees . . . [a]ny such employee must agree in writing to comply with the Senate Code of Official Conduct[.]”); see also 5 C.F.R. § 2635.104(a) (“[A]n employee on detail . . . from his employing agency to another agency for a period in excess of 30 calendar days shall be subject to any supplemental agency regulation of the agency to which he is detailed[.]”); *id.* § 2635.104(b) (“[A]n employee on detail . . . from his employing agency to the legislative or judicial branch for a period in excess of 30 days shall be subject to the ethical standards of the branch or entity to which detailed.”).

¹³⁶ See 28 U.S.C. § 530B(a); DOJ ETHICS HANDBOOK, *supra* note 116, at 17; D.C. RULES OF PROF’L CONDUCT R. 1.11 cmt. 2.

¹³⁷ D.C. Bar Ethics Op. 228, “Lawyer-Witness Participation in Pre-Trial Proceedings” (“While in some instances it may be best for a lawyer-witness to decline representation of a client in a pre-trial motion requiring argument of his/her own testimony, D.C. Rule 3.7(a), by its terms, extends only to prohibit advocacy at a trial. Although it is identical to ABA Model Rule 3.7(a), we decline to extend the D.C. rule beyond its terms. Had the District of Columbia Court of Appeals intended the rule to apply beyond prohibition of courtroom representation, the rule could have been so written.”).

appearing at trial as both an advocate and witness, and not to pre-trial matters, the ABA and the D.C. Bar both emphasize the importance of considering the policy underlying the Rule when interpreting it:

Although noting that Rule 3.7 applies ‘specifically to service “as advocate at a trial,”’ the ABA ethics committee nonetheless believed ‘the policy behind the prohibition applies to any situation where the lawyer is placed in the position of arguing the lawyer’s own veracity’ in a pre-trial proceeding. The ABA thus felt that a lawyer should not argue, without the client’s consent, a pre-trial motion where the lawyer’s testimony is both disputed and material to a contested matter being decided before trial.¹³⁸

Two of the rules discussed above—namely, to avoid situations (1) where an attorney may need to be both an advocate and witness and (2) where an attorney’s official actions may affect, or appear to affect, his private interests, whether financial or non-financial—could have applied to Mr. Strelka’s position while he was at the DOJ Tax Division. Mr. Strelka could have been called upon to testify about communications material to a contested matter in those lawsuits, while his official actions as an attorney defending the IRS could have affected, or appeared to affect, his private, non-financial interest as a former IRS employee who received communications and had knowledge of facts at issue in the Z Street Inc. litigation and similar cases. OGR, in light of Mr. Strelka’s potential as a fact witness and his continuing ties to Lois Lerner and the EO, concluded that his role as an advocate in that IRS litigation created at least the appearance of impropriety—the sort of impropriety that DOJ lawyers have to duty to “endeavor to avoid.”¹³⁹

None of the foregoing ethical standards and rules of professional conduct directly address the specific conflicts of interest that can arise in situations where a government lawyer is detailed from one agency to another, which presents complex issues about identifying the precise client to whom the lawyer owes duties of loyalty, confidentiality, and zealous advocacy.¹⁴⁰ The lack of guidance here is of critical importance because “[n]o universal definition of the client of a government lawyer is possible.”¹⁴¹

¹³⁸ *Id.* (allowing client consent to continued representation after full disclosure of potential conflict and potential for cross-examination of lawyer appearing both as witness and advocate).

¹³⁹ See *supra* note 127; OGR TARGETING REPORT, *supra* note 42, at 168; Issa-Jordan letter, *supra*, at 4; Jordan, Jim September 3, 3014 Letter to Holder, Eric, *supra*, at 1.

¹⁴⁰ See, e.g., Kathleen Clark, *Conflicts, Confidentiality and the Client of the Government Lawyer, Part I*, THE PUBLIC LAWYER, vol. 21, no. 1 (2013).

¹⁴¹ RESTATEMENT 3D OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000). See, e.g., Clark, *supra* note 140 (considering whether the “client” is (1) the employing agency, (2) the agency whose actions are at issue, (3) a particular government official, (4) the President, (5) the entire Executive Branch, (6) the branch of government employing the lawyer, (7) the entire government, (8) the United States, (9) the public at large, or (10) the public interest); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1037 (2007); *id.* at 1049-73 (explaining underlying theories and possible results of various answers); see also *In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998); *Gray v. R.I. Dep’t of Children, Youth & Families*, 937 F. Supp. 153, 157 (D.R.I. 1996).

Moreover, the practice of law in the White House differs from practice at the DOJ or elsewhere in the government. The pace of work and political pressures brought to bear in the Office of the White House Counsel magnify the importance of identifying the client and whose interest the lawyer is protecting. A lawyer who worked in the Office of Legal Counsel during the Administration of George W. Bush described the situation this way:

The significance is that you get a much more politically sensitive legal analyst [sic] of issues rather than a straightforward, ‘What are the legal problems going to be?’ . . . The White House is a very difficult place to practice law in. . . . The issues are politically charged and they come at you with a velocity and volume that are breathtaking. If you’re going to protect the president, you need to rely on places like the Justice Department, where they can step back from the political storm and stress and give you a purely legal opinion, as opposed to having someone from [the White House Office] political affairs leaning in saying, ‘I’ve got to have this answer.’¹⁴²

Rule 1.6(k) of the D.C. Rules of Professional Conduct declares that “[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.”¹⁴³ The application of that seemingly straightforward statement is not free from doubt, however, given that the job of many lawyers employed by the DOJ is to represent other government agencies and particular administrators in litigation.¹⁴⁴ When a DOJ Tax Division lawyer who regularly defends the interests of the IRS is temporarily assigned to represent the President’s interests in the Office of White House Counsel, a third level of potential conflict arises. That is, a potential tripartite conflict over the interests of the DOJ, IRS, and White House faces any DOJ Tax Division attorney assigned to work in the Office of the White House Counsel on detail. The White House Counsel represents the interests of the President *qua* President, that is, when the President’s legal position or interests differs from those of the Legislative Branch or its members, the Judicial Branch, or administrative agencies.¹⁴⁵ The duties of the Attorney General and DOJ, on the other hand, are broader than

¹⁴² Jon Ward, *White House beefs up legal staff*, WASH. TIMES (July 21, 2009).

¹⁴³ D.C. RULES OF PROF’L CONDUCT R. 1.6(k) (2007).

¹⁴⁴ See Clark, *supra* note 141, at 1055 (“[T]his [DC Rules of Professional Conduct] approach is singularly inappropriate for the hundreds of Justice Department lawyers who represent other government agencies and departments in court”); *id.* at 1060 n. 116 (“This would make the Justice Department lawyer’s client the Justice Department.”); Steven, K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?* 41 B.C. L. Rev. 789, 798 (2000) (“[T]his formulation leaves open the question of whether the client is the Department of Justice or the litigant agency in the situation where an attorney employed by the Department of Justice provides legal representation to another executive branch agency.”); see also *United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603, 617 (D.D.C. 1979) (suggesting client can be more than one government agency); ABA MODEL RULES OF PROFESSIONAL CONDUCT, Scope at [18] (some government lawyers “may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients”).

¹⁴⁵ See James R. Harvey, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1590 (1996) (“Other institutions competing for position erode DOJ’s traditional role as the president’s counsel. For example, both the White House Counsel – a smaller, closer, and

protecting and representing the interests of the President and encompass the legal interests of the United States as a whole.¹⁴⁶ The interests of a separate agency such as the IRS are different still.

Given the inherent ambiguity in determining whose interests a government attorney should serve, some Executive Branch departments and agencies require detailees to undertake specific training or supplemental education about prohibited activities prior to the start of their detail, particularly with respect to protecting personal and confidential information from unauthorized disclosure. At the National Institutes of Health, for example, employees detailed to congressional committees or the Executive Office of the President must state that they have consulted with the Deputy Ethics Counselor on Conflict of Interest issues.¹⁴⁷ Likewise, the U.S. Department of Health & Human Services requires that detailees to the White House submit “a statement that the employee has consulted with a Deputy Ethics Counselor on Conflict of Interest issues.”¹⁴⁸ The Department of Defense requires that the Office of the Secretary of Defense and Department of Defense Component Heads “[p]rovide each detailee practical training on avoidance of prohibited political activities and appropriate standards of conduct before performing duty in the Legislative Branch[.]”¹⁴⁹ The United States Department of Homeland Security, Federal Emergency Management Agency comments that “[t]he President of the United States, the United States Congress, the Secretary of U.S. Department of Homeland Security and other authorized federal agencies have prescribed that certain federal employees, detailees, and contractors be provided certain information or complete certain trainings so they are aware of their responsibilities, legal requirements, or identified protocols and procedures.”¹⁵⁰

more discrete office – and the Office of Management and Budget are now used more frequently as the ‘Counsel for the President’ than is the Attorney General.”); *see also id.* n.148 (“[A]s DOJ placed more emphasis on independence, the White House developed a greater need for the White House Counsel’s guidance.”) (citation omitted).

¹⁴⁶ *See, e.g.*, 28 U.S.C. § 518 (“When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested....”); Berenson, *supra* note 144, at 801 (summarizing same); Harvey, *supra* note 145, at 1569 (“No overarching standard, law, or guideline clearly defines DOJ’s duties and loyalties.”); *see also id.* at 1569 n. 2 (“The unresolved problem arises when ethical responsibilities are in question because multiple institutions are competing for an attorney’s loyalty.”).

¹⁴⁷ NAT’L INSTS. OF HEALTH, POLICY MANUAL pt. 2300-112-1: Details to Congress or the Executive Office of the President, section E. 4 (Apr. 28, 2009), *available at* <http://1.usa.gov/28JcSFL>.

¹⁴⁸ DEP’T OF HEALTH & HUMAN SERVICES, INSTRUCTION 300-3-70: DETAIL OF EMPLOYEES TO CONGRESS, THE WHITE HOUSE, EXECUTIVE OFFICE OF THE PRESIDENT (EOP), OR OTHER LEGISLATIVE ORGANIZATIONS at (B)(f), *available at* <http://1.usa.gov/1VkJAvr4> (last accessed June 3, 2016)

¹⁴⁹ DEP’T OF DEF., INSTRUCTION NO. 1000.17: DETAIL OF DOD PERSONNEL TO DUTY OUTSIDE THE DEPARTMENT OF DEFENSE AT ENCLOSURE 3: RESPONSIBILITIES at 10 (Oct. 30, 2013), *available at* <http://1.usa.gov/28K0I56>.

¹⁵⁰ FED. EMERGENCY MGMT. AGENCY, MANDATORY TRAINING REQUIREMENTS (2016 Matrix), *available at* <http://1.usa.gov/1UmPyve> (last accessed June 3, 2016). Indeed, FEMA’s mandatory training requirements for all employees includes a segment on “Protecting Personal Information.” *Id.*

The IRS also has a statutory mandate to ensure that other government agencies with whom it shares confidential taxpayer information have instituted express “procedures ... for safeguarding” confidential taxpayer information they might receive from the IRS.

Section 6103 provides that the IRS may not furnish returns and return information to another agency unless that agency establishes procedures satisfactory to the IRS for safeguarding the returns or return information it receives. Disclosure to other agencies is conditioned on the recipient: maintaining a secure place for storing the information; restricting access to the information to people to whom disclosure can be made under the law; restricting the use of the information to the purpose for which it was provided; providing other safeguards necessary to keeping the information confidential; and, returning or destroying the information when the agency is finished with it. The IRS must review, on a regular basis, safeguards established by other agencies.¹⁵¹

In March 2015, Carina Federico, just prior to beginning her White House detail, suggested to Eileen Shatz, the Tax Division’s Designated Agency Ethics Official, that “it would be prudent” for them to “discuss any potential ethics issues that may arise when I am on detail.”¹⁵² Other than agreeing to meet with Ms. Federico, the CoA Institute investigation did not reveal any response from Ms. Shatz as the Designated Agency Ethics Official for Ms. Federico. Nor did the investigation reveal any statements, advice, or training about potential legal and ethical conflict-of-duty or conflict-of-interest issues raised by the detailing of a DOJ Tax Division lawyer to the Office of the White House Counsel. Records of such statements would have been responsive to an April 15, 2015 CoA Institute FOIA request to the Tax Division.¹⁵³

The CoA Institute investigation uncovered only two other records relevant to the issue of ethics training for attorney-detailees, one relating to the detail of Mr. Strelka and the other to the detail of Ms. Bringer. Both records merely state that the detailee should “touch base” with Ms. Shatz about the “ethical concerns” and a “conflict of interest issue” that might arise while detailed to the White House.¹⁵⁴

A reference in the first of the two records shows that the “conflict of interest” issue being addressed was simply the requirement that a DOJ employee report back to the DOJ if the detailee

¹⁵¹ DEP’T OF THE TREASURY, INTERNAL REVENUE SERV., CHIEF COUNSEL, PROCEDURE & ADMIN., DISCLOSURE & PRIVACY LAW REFERENCE GUIDE at 1-14 (2012), *available at* <http://1.usa.gov/20XYImF>; *see also* Section VI.B below.

¹⁵² Email from Carina C. Federico, Dep’t of Justice, Tax Div., to Eileen M. Shatz, Dep’t of Justice, Tax Div. (Mar. 10, 2015), *available at* <http://bit.ly/29yW7OI>.

¹⁵³ *See* Appendix 1.

¹⁵⁴ *See* Email from Phyllis Wolfeich, Dep’t of Justice, Tax Div., to Andrew Strelka, Dept’ of Justice, Tax Div. (Nov. 20, 2013), *available at* <http://bit.ly/29vqWk3> (“touch base with Eileen Shatz before you go. There are ethical concerns...”); Email from Phyllis Wolfeich, Dep’t of Justice, Tax Div., to Tamara Ashford, Acting Ass’t Att’y Gen., Dep’t of Justice, Tax Div., *et al.* (June 2, 2014), *available at* <http://bit.ly/29Ib2bQ> (“I have shared the general text with Norah and spoken to Eileen, so they will be touching base on the conflict of interest mentioned in the memo (Norah’s responsibilities if she finds something related to tax issues).”).

“finds something related to tax issues.”¹⁵⁵ An undated DOJ memorandum also indicates that detailees are obliged to disclose “to the appropriate authorities” any potential civil or criminal violations by potential nominees or appointees.¹⁵⁶ Such matters could indeed be addressed in a meeting designed to “touch base.” As discussed, however, the critical ethical issues inherent in a detailing program involving lawyers from the DOJ Tax Division, especially those who have represented the IRS in tax litigation, arise from the complications of having duties toward at least three separate clients, namely, the DOJ, the IRS, and the President. To identify the set of unique and potentially conflicting interests among those identifiable clients, and to understand how to analyze and resolve them in a particular factual context, requires more training than a simple “touching base” with the Tax Division’s Designated Agency Ethics Official.

Thus, as CoA Institute’s investigation has revealed, the DOJ Tax Division detailees to the Office of the White House Counsel have been provided essentially no context-specific training, guidelines, or screening procedures designed to ensure that they comply with the strict limitations on disclosing confidential taxpayer information to the President and other White House employees. Nor do there appear to be any training materials, guidelines, or screening procedures in place at the Office of the White House Counsel to guard against potential disclosure, whether accidental or deliberate, of the confidential taxpayer information known by detailees from their work in the DOJ Tax Division. Given these lack of context-specific safeguards and the fact that the Obama Administration—unlike any that came before it— included the continuous presence of clearance counsel attorney-details from the Tax Division, it is probable that confidential taxpayer information was disclosed to the Obama White House without authorization.

VI. RECOMMENDATIONS

- ***Finding:*** *The political allure of using individual consents to secure confidential taxpayer information and employing attorney-detailees with knowledge of such information means that the problems identified in this Report will not be self-correcting. Congress and agencies must act to safeguard taxpayer confidentiality.*

As discussed, the CoA Institute investigation uncovered a practice by which the Office of the White House Counsel, throughout the tenure of President Obama, has employed at least one Tax Division lawyer from the DOJ through regularly rotated details. This detail to the White House ostensibly was arranged to provide a government lawyer with tax expertise to assist in the clearing of potential presidential appointees. In fact, notwithstanding the name of their DOJ component, the expertise of the detailed Tax Division lawyers was not in tax but litigation.

The rotation placed in the White House lawyers who, as part of their work in the Tax Division, accessed confidential taxpayer information about political opponents of the

¹⁵⁵ Memorandum from Caroline Ciruolo, Acting Ass’t Att’y Gen., Dep’t of Justice, Tax Div., to Stuart Delery, Acting Assoc. Att’y Gen., Dep’t of Justice, *et al.* at 2 (undated), *available at* <http://bit.ly/29y7PvK>.

¹⁵⁶ Memorandum from Tamara E. Ashford, Acting Ass’t Att’y Gen., Dep’t of Justice, Tax Div., to Tony West, Assoc. Att’y Gen., Dep’t of Justice, *et al.* at 2 (undated), *available at* <http://bit.ly/29sHw57>.

President—information that Congress specifically sought to deny the White House under the Tax Reform Act of 1976 except when subject to oversight by the Legislative Branch through the reporting requirements of 26 U.S.C. §§ 6103(g)(1), (g)(2), and (g)(5). In addition, the attorney-client privilege renders communications between the President and his legal counsel nearly non-discoverable, which has erected a further obstacle to congressional oversight beyond the presidential evasion of the reporting requirements of Section 6103(g).

The risks that unauthorized disclosure of taxpayer information will occur and go unreported and undiscovered are heightened in the absence of training and safeguards specifically tailored to the context of DOJ lawyers working in the Office of the White House Counsel. Some government offices and agencies require that detailed workers receive information and training about the conflicts of interest inherent to their new position, or that they certify an understanding that their responsibilities and the applicable protocols and procedures differ from those that apply to their regular position. By contrast, the CoA Institute investigation uncovered no context-specific safeguards, training, or supervision designed to ensure that the White House practice of rotating lawyers detailed from the Tax Division complies with the limitations Congress placed on presidential access to confidential taxpayer information. The White House, moreover, continues a decades-old practice of using consent forms to conduct tax checks for potential presidential appointees, thereby avoiding express safeguards that Congress implemented to limit the President's ability to access taxpayer information and to prevent politicization and abuse of the IRS by the Executive Branch. The administrative convenience and long-standing pedigree of the practice makes it unlikely that the problems identified in this Investigative Report will self-correct.

A. Congress Should Amend the Internal Revenue Code to Reassert the Confidential Nature of Taxpayer Information under Section 6103(c) and Extend Section 6103(g) to Presidents-Elect

CoA Institute recommends that Congress amend Section 6103 of the Internal Revenue Code to reestablish confidentiality protections originally enacted in the Tax Reform Act of 1976. Under current procedures, the IRS relies on Section 6103(c) taxpayer consents or waivers to disclose confidential information to the President and White House staff. Under the current practice, the prospective nominee or appointee loses the statutory confidentiality that would otherwise protect the returns or return information that IRS provides to the White House from further re-disclosure because Section 6103(c) “imposes no use or disclosure restrictions on a designee who receives returns or return information.”¹⁵⁷ Nor are the disclosures subject to the reporting requirements of Section 6103(g), inhibiting the ability of the Joint Committee on Taxation to monitor presidential access to and re-disclosure of taxpayer information as intended under the Tax Reform Act of 1976 and reducing the transparency of the disclosure process to the President. An amendment to the Internal Revenue Code to prevent the use of Section 6103(c) by

¹⁵⁷ DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., CHIEF COUNSEL, PROCEDURE & ADMINISTRATION, DISCLOSURE & PRIVACY LAW REFERENCE GUIDE, at 2-24 (2012), available at <http://bit.ly/1TEDPhw>; see also Treas. Reg. 26 C.F.R. § 301.6103(c)-1(b); IRM Part 11.3.31.1-1 (May 20, 2015); *supra* notes 63-67 and accompanying text.

the President and mandate Section 6103(g) as the President's exclusive means of requesting confidential taxpayer information would foreclose these problems.

Congress also should amend the provisions of Section 6103(g)(1) and (g)(2) expressly to authorize their use by Presidents-elect, thereby removing the original excuse used to justify proceeding under Section 6103(c) rather than through the tailored mechanisms that were designed with appropriate safeguards to limit the President's access to confidential taxpayer information. Finally, Congress should amend Section 6103(c) to obligate taxpayer designees to maintain the confidentiality of the information they receive pursuant to taxpayer consent except to the extent further disclosure is expressly allowed by the taxpayer's statement of consent.

B. Congress Should Amend Section 6103(p) to Require the Executive Office of the President to Develop and Report Safeguards for Confidential Taxpayer Information

Congress should amend 26 U.S.C. § 6103(p)(4) to include the Executive Office of the President, of which the Office of the White House Counsel is a part, among the federal and state government entities whose receipt of tax returns and return information is conditioned upon reporting to the Secretary of the Treasury "the procedures established and utilized by such agency . . . for ensuring the confidentiality of" the taxpayer information provided.¹⁵⁸ That change would empower the Secretary of the Treasury to require the White House to adopt express confidentiality procedures consistent with the underlying policy of the Tax Reform Act of 1976, that is, safeguarding confidential taxpayer information from access by the President and his political staff except when that access is subject to the limitations and reporting requirements of Section 6103(g). White House confidentiality procedures should include rules ensuring that confidential taxpayer information known by or accessible to particular workers in the Executive Office of the President, such as those on detail from the DOJ Tax Division or other agencies, be strictly safeguarded from disclosure to the President and other staff, and that tax check information be disclosed only to individuals specifically named on taxpayer-consent forms.

Amending Section 6103(p)(4) to include the Executive Office of the President also would promote the underlying policy objectives of the Tax Reform Act of 1976 more directly. That change would require the White House to (1) maintain a recordkeeping system about every request for confidential taxpayer information, the reasons for and date of the requests, and what tax information was provided in response to each; (2) establish secure storage for the information; and (3) restrict access to persons whose duties require the information "and to whom disclosure may be made under the provisions of" the other parts of Section 6103 and the Internal Revenue Code.¹⁵⁹ The same amendment also would trigger a requirement that the

¹⁵⁸ 26 U.S.C. § 6103(p)(4)(E) (requiring "a report to the Secretary, at such time and containing such information as the Secretary may prescribe, which describes" agency procedures for "ensuring the confidentiality of returns and return information required by" Section 6103(p)).

¹⁵⁹ See 26 U.S.C. § 6103(p)(4)(A)-(D). Requiring such a recordkeeping system would ensure that White House personnel appropriately consider privacy implications and have context specific rules to follow when they are asked to share confidential federal tax and other information possessed by the White House with other federal agencies, as contemplated by their own regulations. See, e.g., Dep't of Defense, Office of the Sec'y,

Secretary of the Treasury report the safeguards used by the White House as well as any “instances of deficiencies in, and failure to establish or utilize, such procedures” each calendar year to the Joint Committee on Taxation, the House Committee on Ways and Means, and the Senate Committee on Finance.¹⁶⁰ The White House would thereby be required to develop and apply confidentiality safeguards (about which the Secretary of Treasury would report annually to Congress), even if it continued to obtain taxpayer information through individual consents pursuant to Section 6103(c).

The IRS Safeguards Program is charged with ensuring that the practices of federal, state, and local agencies which receive federal tax information actually protect the confidentiality of such information as if it remained in IRS hands. Safeguards Program staff do this by periodically reviewing agency training and awareness programs, information disclosure, disposal, storage, and security protocols, and reports of unauthorized disclosures.¹⁶¹ Current DOJ policy, however, merely states the generalized rule that its “attorneys and support staff must safeguard [taxpayer] information [provided by the IRS] to prevent unauthorized disclosure and use.”¹⁶² Including the Executive Office of the President within the ambit of 26 U.S.C. § 6103(p)(4) would ensure that express, discretely articulated systems, procedures, and restrictions are put in place to enable staff, while working for the President, to recognize situations implicating the confidentiality of taxpayer information and to comply with the general statutory rule in that specific factual setting.

C. Congress Should Clarify that the Paperwork Reduction Act Applies to White House Use of Taxpayer Consents to Authorize Disclosures for Tax Checks and the IRS Should Enforce Existing Section 6103(c) Regulations

To the extent that the White House continues to use taxpayer consent forms for the disclosure of confidential taxpayer information, Congress should declare that the Office of the White House Counsel is subject to the Paperwork Reduction Act, which would help reestablish proper oversight of and limitations on the use of such consents. In addition, existing regulations

Privacy Act of 1974, Notice to Add a System of Records, 65 Fed. Reg. 75246 (Dec. 1, 2000) (files to facilitate White House Presidential Appointee vetting process to include items such as White House Personal Data Statement and tax check waiver, and sources of files “may include the White House”); Dep’t of State, Privacy Act of 1974, Altered System of Records and Creation of a New System of Records, 64 Fed. Reg. 921 (Jan. 6, 1999) (files regarding personnel seeking presidential appointments requiring Senate confirmation to include items such as White House Personal Data Statement and tax check waiver, and sources of files may include the White House Office of Presidential Personnel).

¹⁶⁰ See 26 U.S.C. § 6103(p)(5).

¹⁶¹ See, e.g., IRS, SAFEGUARDS PROGRAM, <http://1.usa.gov/295KXDG> (last visited June 29, 2016).

¹⁶² UNITED STATES ATTORNEYS’ MANUAL, TITLE 6: TAX, § 6-1.100 (Sep. 2007), available at <http://bit.ly/29VHRz3>. The online edition of the U.S. Attorneys’ Manual references a twice-superseded version of IRS Publication 1075, which explains the Safeguards Program and its requirements. Compare *id.* with TAX INFORMATION SECURITY GUIDELINES FOR FEDERAL, STATE, AND LOCAL AGENCIES (IRS PUBLICATION 1075 (Rev. 10-07)), at ii (“This publication revises and supersedes Publication 1075 (October 2010) and is effective January 1, 2014.”), available at <http://bit.ly/29YG4sZ>.

on disclosure under Section 6103(c) should be enforced to limit such disclosure to permissible designees.

The practice of accessing returns and return information by consent under Section 6103(c), as illustrated by the Kagan tax check waiver, suggests that the Office of the White House Counsel and the IRS are operating on the premise that the former (or the Executive Office of the President) is a “federal agency” under IRS implementing regulations.¹⁶³ As such, if the office is using a standardized form to obtain such consent, its practice should have triggered application of the Paperwork Reduction Act, which imposes certain procedural requirements on the collection of information by the government. Specifically, if the Executive Office of the President or the Office of the White House Counsel were subject to the Paperwork Reduction Act, the practice of obtaining taxpayer information under Section 6103(c) would be considered a “collection of information,”¹⁶⁴ which requires prior approval by the Office of Management and Budget (“OMB”) and the issuance of a control number to the form used to collect that information, as well as an opportunity for public comment on the proposed collection of information and a notice published in the Federal Register.¹⁶⁵ There is no OMB control number on the copy of the Elena Kagan tax check waiver obtained by CoA Institute, however, which suggests that the White House has not obtained the required OMB approval.

Current IRS Form 13362, OMB No. 1545-1856, can serve as a model for implementing this recommendation and achieving the purposes of the Paperwork Reduction Act. Applicants for IRS employment use Form 13362 to consent to the agency reviewing their last three years of tax-return information as part of their application.¹⁶⁶ The information that Form 13362 authorizes the IRS to disclose is nearly identical to the tax-check information that the President and heads of government agencies are authorized to receive under Section 6103(g)(2) and the information that Elena Kagan consented to the IRS disclosing to President Clinton pursuant to Section 6103(c).¹⁶⁷ In 2008, the IRS Office of Chief Counsel stated that Form 13362 could be

¹⁶³ The regulations governing taxpayer authorization of IRS disclosure under Section 6103(c) provide that “[p]ermissible designees” include various types of entities such as corporations, partnerships, and “Federal . . . government agencies or subunits of such agencies.” 26 C.F.R. § 301.6103(c)-1(e)(C)(3). Inasmuch as the Kagan tax-check waiver authorized disclosure of her information to “President Clinton and the *Office of the Counsel to the President*” (emphasis added), it implied an understanding of the Office of the White House Counsel as a federal agency or subunit, at least for purposes of Section 6103(c) and 26 C.F.R. § 301.6103(c)-1(e)(C)(3). Otherwise the consent could not operate to authorize disclosure to other lawyers or staff in the Office of the White House Counsel beyond the specific individual serving as White House Counsel. *See supra* notes 85-87 and accompanying text.

¹⁶⁴ *See* 44 U.S.C. § 3502(3).

¹⁶⁵ *See id.* § 3507(a).

¹⁶⁶ *See* IRS FORM 13362 (REV. 9-2011), CONSENT TO DISCLOSURE OF RETURN INFORMATION, OMB NO. 1545-1856 AT 2, available at <http://1.usa.gov/28Oz4Nc>. Form 13362 also conditionally authorizes the IRS to provide an applicant’s tax-check information to the U.S. Office of Personnel Management and the Merit Systems Protection Board if the IRS decides not to hire the applicant because of the tax check.

¹⁶⁷ Compare 26 U.S.C. § 6103(g)(2) and Figures 1-2 with Form 13362 (authorizing disclosure of an applicant’s (1) failure to file a Federal income tax return in the last three years, (2) filing more than 45 days late in that time period, (3) or failure to pay tax, penalty, or interest during last three calendar years within 45 days of notice from IRS, and (4) whether the applicant is or was under IRS investigation for a tax crime).

standardized and used by other agencies for applicants to allow IRS to conduct a tax check.¹⁶⁸ In 2015 the Treasury Department requested public comments on the continuing suitability of Form 13362 and received no complaints or other comments.¹⁶⁹

Unfortunately, the lack of publicly available information in this area leaves certain questions unanswered, including (1) whether the consent form used by the current White House is substantially similar to the one used for the Kagan tax-check waiver, and (2) whether that collection of information is in fact subject to the Paperwork Reduction Act. To the extent that Congress does not directly proscribe the use of Section 6103(c) by the President, it should clarify that the Paperwork Reduction Act applies to the use of taxpayer consent forms by the White House, which (along with the safeguard development and reporting requirements of Section 6103(p)(4)) would help ensure proper implementation of the limitations on the disclosure to and sharing of such information among government offices and agencies that Congress established under the Tax Reform Act of 1976.

In the meantime, the IRS must follow the existing regulatory requirement that limits disclosure of taxpayer information under Section 6103(c) to the specific individuals named on the consent form.¹⁷⁰ Unless and until the Executive Office of the President or the Office of the White House Counsel is designated a federal agency for purposes of Section 6103, the IRS should refuse to process any taxpayer consent that purports to authorize the disclosure of taxpayer information to those offices rather than to specific individuals.

D. The DOJ Office of Professional Responsibility Should Exercise Supervision of the DOJ Detailing Program and Congress Should Pass the Inspector General Access Act

The DOJ, through its Office of Professional Responsibility (“OPR”) and Professional Responsibility Advisory Office (“PRAO”), and the Tax Division’s Designated Agency Ethics Official (“DAEO”) should provide greater supervision of and training to the DOJ detailing program.

The mandate of the OPR is to ensure that DOJ lawyers live up to the ethical standards expected of them and to investigate allegations of misconduct.¹⁷¹ After an investigation of

¹⁶⁸ See Memorandum from Margo L. Stevens, Dep. Assoc. Chief Counsel for Legislation & Policy, Internal Revenue Serv., to Katherine Q. Janosek, Director, Policy, Planning & Adjudications, Internal Revenue Serv. (May 30, 2008), available at <http://1.usa.gov/28Qii3w>.

¹⁶⁹ Proposed Collection; Comment Request for Form 13362, 80 Fed. Reg. 7683 (Feb. 4, 2015). No comments were received during the period for public comment. See INTERNAL REVENUE SERV. SUPPORTING STATEMENT, CONSENT TO DISCLOSURE OF RETURN INFORMATION, FORM 13362, OMB # 1545-1856 at 1, ¶ 8, available at <http://1.usa.gov/28RPjhD>.

¹⁷⁰ When a taxpayer designates an individual to receive their tax information, the applicable Treasury regulation “does not authorize disclosures to other individuals associated with such individual, such as employees of such individual or members of such individual’s staff.” 26 C.F.R. § 301.6103(c)-1(e)(C)(3); see also *supra* notes 80, 85-87 and accompanying text.

¹⁷¹ See U.S. DEP’T. OF JUSTICE, ABOUT THE OFFICE & OPR POLICIES AND PROCEDURES, <http://1.usa.gov/1OsqHdn> (last visited Aug. 6, 2016).

alleged attorney misconduct at DOJ, “OPR may include in its report information relating to management and policy issues noted in the course of the investigation for consideration by Department officials.”¹⁷² PRAO, on the other hand, is charged with answering questions from DOJ attorneys about contemplated activities and providing “prompt, consistent advice to Department attorneys and Assistant United States Attorneys with respect to professional responsibility and choice-of-law issues.”¹⁷³

As part of its oversight work, CoA Institute asked the DOJ Inspector General to investigate the agency practice of detailing attorneys to the White House “to ensure that detailed attorneys are appropriately screened” to prevent protected taxpayer information “from being unlawfully accessed or disclosed.”¹⁷⁴ On June 22, 2015, the Inspector General replied, stating that jurisdictional limitations prevented him from proceeding with any investigation.¹⁷⁵ Significantly, he did not disagree with the CoA Institute suggestion that investigation or reform were needed. Indeed, the Inspector General forwarded the CoA Institute letter and his response to both Eileen Shatz, the Tax Division’s Designated Agency Ethics Official, and to Robin C. Ashton, OPR Counsel, asserting that “jurisdiction to review” the conduct of DOJ attorneys when they act in their capacity as lawyers “is provided to the DOJ’s Office of Professional Responsibility.”¹⁷⁶

Neither of those individuals nor the OPR office responded to CoA Institute after the Inspector General forwarded our request to them, suggesting there is little institutional desire to investigate, address, or reform the problems inherent to the detailing program. It is apparent, however, that DOJ attorneys need and require additional oversight and training.¹⁷⁷ A federal district court, for example, recently entered an order sanctioning DOJ attorneys because they had deliberately been untruthful during a dispute regarding U.S. immigration policies and

¹⁷² *Id.*

¹⁷³ See U.S. DEP’T OF JUSTICE, PROFESSIONAL RESPONSIBILITY ADVISORY OFFICE, <http://bit.ly/2aJ1dFZ> (last visited Aug. 6, 2016).

¹⁷⁴ Letter from Daniel Epstein, CoA Inst., to Michael Horowitz, Inspector Gen., Dep’t of Justice (Apr. 15, 2015), available at <http://bit.ly/298y3Vi>.

¹⁷⁵ Letter from Michael Horowitz, Inspector Gen., Dep’t of Justice, to Daniel Epstein, CoA Inst. (June 22, 2015), available at <http://bit.ly/296IUdy>.

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., Opinion, *Bringing Justice to Justice*, WALL ST. J., June 5, 2016, <http://on.wsj.com/28MH8BC> (evidence of federal prosecutors sharing grand jury testimony, interviewing witnesses without counsel, improperly threatening perjury charges against witnesses contradicting government theory); Sen. Chuck Grassley, Press Release, *Grassley, Lee Call on DOJ to Investigate Claims of Prosecutorial Misconduct in Moonlight Fire Case* (Mar. 27, 2015), <http://1.usa.gov/1sGKYlk> (questioning whether federal prosecutors failed to provide relevant information, retaliated against colleague who disclosed withheld documents, and targeted prosecutions to raise revenue); Sen. Chuck Grassley, Press Release, *Grassley Questions Oversight of U.S. Attorneys’ Offices* (Sept. 19, 2014), <http://1.usa.gov/1YrTArS> (questioning management and oversight of U.S. attorneys’ offices based on disclosure of non-public Inspector General investigations of DOJ attorney misconduct).

practices.¹⁷⁸ That court’s memorandum opinion specifically faults the OPR for not living up to its mandate:

Finally, whatever it is that the Department of Justice Office of Professional Responsibility has been doing, it has not been effective. The Office of Professional Responsibility purports to have as its mission, according to the Department of Justice’s website, the duty to ensure that Department of Justice attorneys “perform their duties in accordance with the high professional standards expected of the Nation’s principal law enforcement agency.” Its lawyers in this case did not meet the most basic expectations. The Attorney General is hereby ordered to inform this Court within sixty (60) days of what steps she is taking to ensure that the Office of Professional Responsibility effectively polices the conduct of the Justice Department lawyers and appropriately disciplines those whose actions fall below the standards that the American people rightfully expect from their Department of Justice.¹⁷⁹

Misconduct by DOJ attorneys also has prompted Senators Mike Lee, Jon Tester, Chuck Grassley, and Lisa Murkowski to introduce the Inspector General Access Act, bi-partisan legislation that would give the DOJ Inspector General jurisdiction to investigate allegations of misconduct by DOJ personnel.¹⁸⁰ Under this proposed legislation, the Inspector General would no longer be required merely to refer allegations of misconduct by DOJ lawyers to the OPR.

The OPR should be reinvigorated to live up to its mandate of ensuring that DOJ attorneys act “in accordance with the highest professional standards expected of the nation’s principal law enforcement agency” and to make full use of its “jurisdiction to investigate allegations of

¹⁷⁸ *State of Texas v. U.S.*, Civ. No. B-14-254 (S.D. Texas Mem. Op. and Order entered May 19, 2016); *see also id.* at n.18 (noting that both the Fifth and Sixth Circuits have recently “questioned the conduct” of DOJ employees, “just two of an ever-growing number of opinions that demonstrate the lack of ethical awareness and/or compliance by some at the Department of Justice”) (citation omitted). Other independent observers have likewise suggested that DOJ’s oversight and supervisory practices need improvement, especially with respect to IRS-related work and the high ethical standards expected from government lawyers. For example, AG Holder’s appointment of Barbara Bosserman, a DOJ lawyer and major campaign donor to President Obama and the Democratic National Committee, to oversee the criminal investigation of whether the IRS targeted certain groups on the basis of their political views has been criticized for creating a “conflict of interest” and raised questions about why such an obvious political supporter of the administration had any role in the investigation. *See* U.S. H. COMM. ON OVERSIGHT & GOV’T REFORM, STAFF REPORT: THE INTERNAL REVENUE SERVICE’S TARGETING OF CONSERVATIVE TAX-EXEMPT APPLICATIONS: REPORT OF FINDINGS FOR THE 113TH CONGRESS (Dec. 3, 2014) at 166, *available at* <http://1.usa.gov/1tyX94r>.

¹⁷⁹ *Id.* at 27 (citation and footnote omitted).

¹⁸⁰ Inspector General Access Act, S. 618, 114th Cong. (2015); *see also Bringing Justice to Justice*, *supra* note 177 (“Maybe [Department of] Justice needs a new Yates memo that focuses on the consequences for DOJ lawyers who bring cases that never should be brought – with sanctions for legal abuses.”); *Grassley, Lee Call on DOJ to Investigate Claims of Prosecutorial Misconduct in Moonlight Fire Case*, *supra* note 177 (asking Acting Dep. Att’y Gen. Yates for staff briefing on whether OPR has initiated investigation of DOJ lawyers for retaliation and revenue-related prosecution); *Grassley Questions Oversight of U.S. Attorneys’ Offices*, *supra* note 177 (asking GAO “to evaluate and report on general practices of EOUSA, the Office of Professional Responsibility and the U.S. attorneys’ offices and how misconduct is addressed”).

professional misconduct against Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. . . .”¹⁸¹ Lessons learned from investigating allegations of misconduct, particularly with respect to identifying situations in which ethical misconduct by DOJ attorneys has occurred, should be incorporated into advice rendered by PRAO and, as necessary, made known to the DAEO. In addition, Congress should enlarge the jurisdiction of the DOJ Office of Inspector General through the Inspector General Access Act so that it is empowered to investigate the conduct of attorneys and report to the public and Congress with the same scope as other Inspectors General throughout the government.¹⁸² Such legislative and administrative intervention will help ensure that past misconduct is brought fully to light and that, going forward, any detailing of attorneys between the DOJ Tax Division and the Office of White House Counsel will be subject to appropriately detailed policies, safeguards, training, and supervision.

VII. CONCLUSION

Congress enacted the Tax Reform Act of 1976 to enhance taxpayer confidentiality and to protect it by limiting disclosure within the government, including to the President in particular. The safeguards erected include specific, enumerated situations in which the President is authorized to access that information, limitations on the dissemination and sharing of the disclosed information, and reporting requirements designed to promote transparency and oversight. Convenient, administrative fixes do not outweigh and should not override these policy choices of Congress.

The current and past reliance by the White House on taxpayer consent to facilitate tax checks of potential presidential appointees is problematic. Congress authorized two forms of disclosure of taxpayer information to the President and the Executive Office of the President, neither of which (because of the limitations and safeguards in place under the statute) contemplates or requires taxpayer consent. Congress imposed those closely drawn limitations and procedures on disclosures to the President in an effort to enforce its own oversight powers and to require sufficient transparency so as to minimize potential abuse. To obtain taxpayer information through the use of individual consents is an evasion of that congressional intent and cloaks disclosure of taxpayer information to the President in secrecy, providing the exact opposite of transparency.

In addition, the ethical conflicts inherent in detailing agency attorneys to the White House have barely been acknowledged by the management and supervisory personnel of the DOJ Tax Division, the DOJ generally, or the Office of the White House Counsel. The CoA Institute

¹⁸¹ U.S. DEP’T OF JUSTICE, ABOUT THE OFFICE & OPR POLICIES AND PROCEDURES, <http://1.usa.gov/1OsqHdn> (last visited Aug. 6, 2016).

¹⁸² See Sen. Mike Lee, Press Release, *Lee Introduces Bipartisan Bill to Increase Accountability Within the Department of Justice* (Mar. 4, 2015), <http://1.usa.gov/1YuaXZv> (explaining that “under current law, the Department of Justice is the only agency whose Inspector General does not have complete jurisdiction to carry out its mission” and that the proposed Inspector General Access Act “gives the men and women charged with judging the action of attorneys the power to mete out justice within the Justice Department”).

request for an investigation into what, if any, arrangements, safeguards, or guidelines are in place to identify a detailed lawyer's ethical duties and to help them navigate conflicts of interest as they arise was left unresolved. CoA Institute also did not receive any records from the relevant offices in response to its FOIA requests for documents showing that training was in place or that appropriate personnel at the DOJ were supervising detailees to the White House. The DOJ has supplied a regular stream of Tax Division lawyers to the Obama White House for more than seven years, all without any apparent guidance or safeguards to ensure against the unauthorized disclosure of taxpayer information.

This lack of responsiveness and inattention to the safeguarding of confidential taxpayer information are the heart of the problems described in this Investigative Report. President Obama, following the practices of five Presidents before him, has evaded the mechanisms designed by Congress to safeguard the confidentiality of taxpayer information and to promote the transparency and oversight of disclosures to the President. And he is the first President to have recruited litigation specialists from the DOJ Tax Division, some of whom had knowledge of confidential taxpayer information concerning his political opponents. That practice has been compounded by the Administration's failure and recalcitrance to respond to oversight groups, whether from the private sector or Congress. Without legislative intervention and reform at the DOJ and IRS, the President's ability to misuse taxpayer information will continue unabated.

###

APPENDIX 1

THE CAUSE OF ACTION INSTITUTE INVESTIGATION

CoA Institute began its investigation into the potential government abuse of taxpayer confidentiality laws in 2012 by requesting records of the Internal Revenue Service (“IRS”) about the disclosure of confidential taxpayer information under 26 U.S.C. § 6103(g) to the President or others in the Office of the White House Counsel (such as Austan Goolsbee, then-Chairman of the Council of Economic Advisers¹⁸³).

CoA Institute’s first request under the FOIA, dated March 27, 2012, sought records of communications by or from the President or White House staff concerning requests for tax records pursuant to Section 6103(g)(1),¹⁸⁴ as well as any documents referencing the required reports that would have been filed about those requests with the U.S. Congress Joint Committee on Taxation.¹⁸⁵ When the IRS responded on May 23, 2012, it denied the request by citing the confidentiality provisions of Section 6103(a)¹⁸⁶ and by indicating that certain responsive records were outside the control of the IRS and were records “maintained by the Joint Committee on Taxation.”¹⁸⁷

On October 2, 2012, following an unsuccessful administrative appeal, CoA Institute filed suit to compel disclosure of the records requested in the March 2012 FOIA request.¹⁸⁸ The IRS and Department of Justice (“DOJ”) were immediately concerned about the press attention generated by the litigation.¹⁸⁹ The next day, CoA Institute learned from press reports that the IRS

¹⁸³ See generally Eliana Johnson, *The Missing Koch Report*, NAT’L REV. (Aug. 20, 2013), <http://bit.ly/1TDbVNn>.

¹⁸⁴ 26 U.S.C. § 6103(g)(1) (“Upon written request by the President . . . the Secretary shall furnish to the President, or to such employee or employees of the White House Office as the President may designate by name in such a request, a return or return information with respect to any taxpayer named in such request.”)

¹⁸⁵ See Letter from J. Keith Gates, CoA Inst., to Douglas Shulman, Comm’r, Internal Revenue Serv. (Mar. 27, 2012), available at <http://bit.ly/2a2qs6D>; 26 U.S.C. § 6103(g)(5) (describing reporting requirements for disclosures to the President).

¹⁸⁶ Exemption 3 permits agencies to withhold records “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3). Section 6103 is a qualifying nondisclosure statute. Dep’t of Justice, Office of Info. Pol’y, *Statutes Found to Qualify Under Exemption 3 of the FOIA at 12* (Jan. 2014), available at <http://bit.ly/1WXV6mT>.

¹⁸⁷ Letter from Susan R. Marks-Jensky, Internal Revenue Serv., to J. Keith Gates, CoA Inst. (May 23, 2012), available at <http://bit.ly/29PMxZZ>.

¹⁸⁸ *Cause of Action v. Internal Revenue Serv.*, No. 12-1633 (D.D.C. cmplt. filed Oct. 2, 2012; *stip. dismissal* Dec. 5, 2012).

¹⁸⁹ See, e.g., Email from Richard G. Goldman, Acting Dep. Assoc. Chief Counsel, Internal Revenue Serv., to Deborah C. Lambert Dean, Office of Chief Counsel, Internal Revenue Serv. (Oct. 3, 2012), available at <http://bit.ly/29Hu1li> (“This is coming your way. . . . Media relations is excited about this and I am told CNN will also pick this up.”); Email from A.M. Gulas, Office of Chief Counsel, Internal Revenue Serv., to Carmen

was claiming that the requested records did not exist. According to the IRS, since the inception of Section 6103(g) in 1976, no President had ever requested taxpayer information through that congressionally-created mechanism.¹⁹⁰

Based on the IRS response to our inquiry into the use of Section 6103(g), CoA Institute hypothesized that the President and other White House officials may have gained access to confidential taxpayer information in an unauthorized manner.¹⁹¹ On October 9, 2012, CoA Institute sent a second FOIA request to the IRS seeking a variety of records to help understand how this might have happened. This second request sought records about disclosures under other provisions of Section 6103, as well as records of informal requests for disclosure—such as by email—and records about investigations by the Treasury Inspector General for Tax Administration (“TIGTA”), the IRS “watchdog,” into unauthorized disclosure of taxpayer information to the Executive Office of the President.¹⁹²

On December 11, 2012, the IRS provided its “interim response,” stating that it was still processing portions of the October 2012 FOIA Request.¹⁹³ With respect to records about the President’s use of provisions other than Section 6103(g), the IRS indicated that “all requests made to the IRS from White House personnel were for ‘tax checks.’”¹⁹⁴ The IRS noted that “tax checks” are undertaken “when an individual is a prospective Presidential appointee, under consideration for employment within the Executive Branch,” and “signs a waiver authorizing the

M. Banerjee, Tax Div., Dep’t of Justice (Oct. 3, 2012), *available at* <http://bit.ly/29yjZzD> (“Just an FYI to be on the lookout for this lawsuit.”); Email from Terry L. Lemons, Chief of Communications & Liaison, Internal Revenue Serv., to Beth Tucker, Dep. Comm’r, Internal Revenue Serv. (Oct. 3, 2012), *available at* <http://bit.ly/29C09qw> (“Just popped up. Think we need to give [the press] the statement. Also CNBC’s Eamon Javers has tweeted on this, probably should give to him as well.”); Email from Michelle L. Eldridge, Dir., Office of Legislative Affairs, Internal Revenue Serv., to Terry L. Lemons, Chief of Communications & Liaison, Internal Revenue Serv. (Oct. 2, 2012), *available at* <http://bit.ly/29HeW2P> (forwarding background information about *The Washington Free Beacon* reporter, Andrew Evans, who asked the IRS for response to the CoA Institute lawsuit).

¹⁹⁰ See, e.g., Examiner Watchdog Staff, *UPDATED! Non-profit wants to know if Obama asked IRS for anybody’s tax returns*, WASH. EXAM’R (Oct. 3, 2012), <http://bit.ly/20HLYu6>; Andrew Evans, *The IRS’ FOIA Problem*, WASH. FREE BEACON (Oct. 3, 2012), <http://bit.ly/1Z3ZXjG> (“The IRS provided the *Free Beacon* with the following statement: The IRS does not comment on pending litigation. However, the IRS can confirm that no requests were made, and no tax returns or return information have been disclosed under Internal Revenue Code 6103(g) during the period in question.”); see also *FOIA Freak-Out: IRS Wrongly Denies FOIA Request, Comes Unglued Over Media Response*, COA INST. (May 13, 2013), <http://bit.ly/1WnAC6t>.

¹⁹¹ Although the March 2012 request only sought records about Section 6103(g)(1), the IRS’s admission about the lack of responsive records included possible presidential access under Section 6103(g)(2), which permits disclosures of limited types of return information for presidential and other Federal appointees. See 26 U.S.C. § 6103(g)(2).

¹⁹² Letter from Karen Groen, CoA Inst., to Ava Littlejohn, Pub. Liaison, Internal Revenue Serv. (Oct. 9, 2012), *available at* <http://bit.ly/29hOU6m>.

¹⁹³ Letter from Bertrand Tzeng, Internal Revenue Serv., to Brandon Sherman, CoA Inst. (Dec. 11, 2012), *available at* <http://bit.ly/296iveL>.

¹⁹⁴ *Id.*

disclosures of his/her return and return information under [26 U.S.C. §] 6103(c).¹⁹⁵ The IRS withheld these responsive records under FOIA Exemption (3), in conjunction with Section 6103.¹⁹⁶

The IRS issued a final FOIA determination on March 4, 2013, producing 790 pages of records.¹⁹⁷ The bulk of the records, many of which were redacted, consisted of IRS and DOJ communications about preparing to respond to press inquiries and reports about the October 2012 lawsuit. With respect to other records responsive to the request, the IRS reasserted its application of FOIA Exemption 3, in conjunction with Section 6103.¹⁹⁸

On April 8, 2013, CoA Institute appealed the IRS final determination, arguing that both the IRS search for responsive records and its assertion of certain exemptions were inadequate.¹⁹⁹ The appeal argued that the IRS improperly limited its searches to authorized requests for taxpayer information because the agency's response only addressed Presidential requests under Sections 6103(c) and 6103(g), both of which, by definition, would be statutorily authorized.²⁰⁰ The appeal also objected to the IRS use of Exemption 3, in conjunction with Section 6103, because "a communication requesting return information does not itself constitute return information."²⁰¹ On May 6, 2013, the IRS denied the administrative appeal.²⁰²

On June 19, 2013, CoA Institute filed suit to challenge the adequacy of the IRS search for records responsive to the October 2012 FOIA request, as well as the agency's use of FOIA

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* In response to the portion of the request that sought records about Section 6103(i), the IRS asserted that all responsive material would be similarly protected by Exemption 3, in conjunction with Section 6103. The request that sought records about criminal investigations was referred for direct response to TIGTA. This item of the request eventually became the subject of its own litigation. *See Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, 70 F. Supp. 3d 45 (D.D.C. 2014).

¹⁹⁷ Letter from Bertrand Tzeng, Internal Revenue Serv., to Karen Groen, CoA Inst. (Mar. 4, 2013), *available at* <http://bit.ly/29bEpQj>.

¹⁹⁸ *Id.*

¹⁹⁹ Letter from Karen Groen Olea, CoA Inst., to Steven T. Miller, Internal Revenue Serv., at 5-6 (Apr. 8, 2013), *available at* <http://bit.ly/296iJT2>.

²⁰⁰ *Id.* at 6.

²⁰¹ *Id.* at 7.

²⁰² Letter from T. Mitchell, Internal Revenue Serv., to Karen Groen Olea, CoA Inst., at 7 (May 6, 2013) (in file with CoA Inst.) ("We have reviewed the response ... and have determined that the response was appropriate.").

Exemption 3.²⁰³ CoA Institute filed a separate lawsuit against TIGTA on August 12, 2013 to compel production of the requested records concerning criminal investigations.²⁰⁴

In an opinion issued August 28, 2015, following summary judgment briefing in the lawsuit against the IRS, the District of Columbia federal district court agreed with CoA Institute that the agency had failed to conduct a reasonable search for records about unauthorized disclosures and ordered the agency to undertake supplemental search efforts.²⁰⁵ The court also agreed with CoA Institute that “it is not at all clear that all Executive Branch requests for ‘return information’ can be characterized as ‘return information’ that is factual in nature and shielded from disclosure by the taxpayer confidentiality statute.”²⁰⁶ Finally, the court found that the IRS refusal to search for certain records concerning Section 6103(i)(2), which permits disclosure of return information to Federal officers or employees for criminal investigations not involving tax administration,²⁰⁷ was also unjustified and required the agency to search for responsive records.²⁰⁸

As for the portion of the request referred to TIGTA for direct response, the agency initially provided a so-called *Glomar* response on November 30, 2012, stating that it could “neither admit nor deny the existence of responsive records.”²⁰⁹ CoA Institute again found itself in court attempting to defeat TIGTA’s use of *Glomar* after an unsuccessful administrative

²⁰³ Compl., *Cause of Action v. Internal Revenue Serv.*, No. 13-920 (D.D.C. filed June 19, 2013). On April 14, 2014, more than eighteen months after the October 2012 FOIA request was submitted, and thirteen months after the initial production of 790 pages of records, the IRS produced an additional three pages and removed some redactions it had previously applied to the responsive material. See Letter from Norah E. Bringer, Tax Div., Dep’t of Justice, to Robyn N. Burrows, CoA Inst. (Apr. 14, 2014), available at <http://bit.ly/29y7BEX>. The attorney responsible for this supplemental production—as well as portions of the summary judgment briefing in the two cases against the IRS—was Norah Bringer, a trial attorney at the Tax Division who withdrew her appearance to begin a detail at the White House six weeks later. See Not. of Withdrawal, *Cause of Action v. Internal Revenue Serv.*, No. 13-920 (D.D.C. filed June 6, 2014); Not. of Withdrawal, *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. filed June 6, 2014).

²⁰⁴ Compl., *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. filed Aug. 12, 2013).

²⁰⁵ *Cause of Action v. Internal Revenue Serv.*, 125 F. Supp. 3d 145, 157-58 (D.D.C. 2015).

²⁰⁶ *Id.* at 152, 163.

²⁰⁷ See 26 U.S.C. § 6103(i)(2).

²⁰⁸ *Cause of Action*, 125 F. Supp. 3d at 170-71.

²⁰⁹ Letter from Diane Bowers, Treasury Inspector Gen. for Tax Admin., to Karen Groen, CoA Inst. (Nov. 30, 2012), available at <http://bit.ly/29k1Qdh> (also stating that “[t]his response should not be taken as an indication that such records exist; rather it is our standard response to requesters seeking records on third parties.”). *Glomar* responses are used when confirming or denying the existence of responsive records could jeopardize national security interests or, in the case of law enforcement records, invade an individual’s privacy interests in some stigmatizing way. See, e.g., *Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976).

appeal.²¹⁰ On September 29, 2014, the district court agreed with CoA Institute that TIGTA’s *Glomar* response was inappropriate and ordered the agency to process the request.²¹¹

The court based its opinion on two grounds. First, it ruled that TIGTA could not employ *Glomar*, in conjunction with Exemption 3, because the existence of an investigation is not itself “return information,” as the term is defined under Section 6103.²¹² Second, notwithstanding the use of Exemption 3, TIGTA’s *Glomar* response could not be sustained under FOIA Exemptions 6 and 7(C) because the agency had waived such reliance by officially acknowledging the existence of an investigation into the Austan Goolsbee incident.²¹³ The court identified the record evidence about that investigation:

In 2010, Mr. Goolsbee made a statement during a press conference that led some to be concerned that he had “improperly accessed and disclosed” the confidential return information of a taxpayer, Koch Industries, Inc. On September 28, 2010, [TIGTA] sent a letter to several U.S. Senators stating that [it] would commence a “review” into Mr. Goolsbee’s comment. And on August 10, 2011, a TIGTA Special Agent sent an email to the Chief Legal Counsel of Koch Industries, stating that “the final report relative to the investigation of Austan Goolsbee’s press conference remark is completed . . . and would now be available through a [FOIA] request.” . . . [E]ven if the Inspector General’s letter to the Senators was not alone sufficient to constitute a waiver, the letter combined with the email supplies official confirmation of the existence of responsive records—the one fact that the *Glomar* response was intended to withhold.²¹⁴

On December 1, 2014, TIGTA wrote to CoA Institute to indicate that it had located over 2,500 pages of potentially responsive records, but would withhold all documents pursuant to FOIA Exemption 3, in conjunction with Section 6103.²¹⁵ Following a second round of summary judgment briefing, the court issued an opinion on September 16, 2015, holding that TIGTA’s search was adequate and that none of the records in question were responsive to the CoA Institute request.²¹⁶

²¹⁰ See Letter from Karen Groen, CoA Inst., to Michael McCarthy, Treasury Inspector Gen. for Tax Admin. (June 12, 2013), available at <http://bit.ly/29hAOCW>; Letter from Gladys M. Hernandez, Treasury Inspector Gen. for Tax Admin., to Karen Groen, CoA Inst. (July 10, 2013), available at <http://bit.ly/29bG9J3>.

²¹¹ *Cause of Action*, 70 F. Supp. 3d at 58.

²¹² *Id.* at 50-54. The court also ruled that it did not owe *Chevron* deference to TIGTA’s interpretation of “return information” under 26 U.S.C. § 6103(b)(2). *Id.* at 52.

²¹³ *Id.* at 54-58.

²¹⁴ *Id.* at 57-58 (citations omitted).

²¹⁵ Letter from Gregory Miller, Treasury Inspector Gen. for Tax Admin., to Karen Groen, CoA Inst. (Dec. 1, 2014), available at <http://bit.ly/296jTxS>. Eventually, TIGTA produced a few dozen pages of responsive records.

²¹⁶ *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, 130 F. Supp. 3d 270, 276-77 (D.D.C. 2015).

While CoA Institute was litigating its TIGTA and IRS cases, Norah Bringer, the attorney at the DOJ Tax Division who defended the IRS and TIGTA in those matters, withdrew from both cases on June 6, 2014.²¹⁷ Later that year, Congress began asking the Attorney General Eric Holder about Andrew Strelka, another Tax Division lawyer.²¹⁸ Mr. Strelka worked at the IRS Exempt Organizations Section during the time the IRS improperly targeted conservative nonprofit organizations and developed a personal relationship with Lois Lerner, the head of the Exempt Organizations Section, which he maintained after he left the IRS to work in the DOJ Tax Division.²¹⁹

Although the DOJ declined to provide information to Congress about Mr. Strelka, the U.S. House of Representatives Committee on Oversight and Government Reform eventually learned that Mr. Strelka had been assigned to the Office of the White House Counsel office on detail and then subsequently returned to the Tax Division, where he worked on at least two cases defending the IRS against allegations of improper targeting.²²⁰

Ms. Bringer's withdrawal in June 2014, being so near the time that Mr. Strelka returned to the Tax Division from the White House, suggested to CoA Institute that Ms. Bringer could be leaving the Tax Division to embark on a similar detail at the White House.²²¹ On October 30, 2014, CoA Institute submitted FOIA requests to the IRS, TIGTA, and the DOJ Tax Division seeking various categories of records concerning the detailing of Norah Bringer, as well as records about the detailing of Tax Division attorneys more generally.²²² On March 17, 2015, the

²¹⁷ See *supra* note 203.

²¹⁸ See, e.g., Letter from Darrell Issa and Jim Jordan, U.S. H. Comm. on Oversight & Gov't Reform, to Eric Holder, U.S. Att'y Gen., Dep't of Justice, at 3-4 (Aug. 25, 2014), *available at* <http://bit.ly/1sB9Yu3>; Letter from Hon. Darrell Issa and Jim Jordan, U.S. H. Comm. on Oversight & Gov't Reform, to Eric Holder, U.S. Att'y Gen., Dep't of Justice (Sept. 3, 2014), *available at* <http://bit.ly/1sS38B5>.

²¹⁹ See Letter from Darrell Issa and Jim Jordan, U.S. H. Comm. on Oversight & Gov't Reform, to Eric Holder, U.S. Att'y Gen., Dep't of Justice, at 3-4 (Aug. 25, 2014), *available at* <http://bit.ly/1sB9Yu3>.

²²⁰ See *Justice's IRS Connection*, WALL ST. J. (Aug. 11, 2014), <http://bit.ly/1RuGS4e>; see also *Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environmental and Natural Resources Divisions and the U.S. Trustee Program: Hearing Before the H. Judiciary Comm., Subcomm. on Regulatory Reform, Commercial Law & Antitrust Law* (May 19, 2014) (testimony of Daniel Z. Epstein, Exec. Dir., CoA Inst.), *available at* <http://bit.ly/1RuGkex>.

²²¹ See, e.g., Daniel Epstein, *A Revolving Door for Confidential IRS Information, Commentary*, ROLL CALL (Jun. 19, 2015) ("This set-up could potentially enable the White House to circumvent federal law, which permits presidential administrations to ask the IRS for return data, so long as it keeps Congress informed of its requests. Strangely, no requests have been reported in the past seven years, even though Goolsbee and potentially other administration officials appear to have gained access to such information through as-yet-unknown means. The lawyer-detailing program is now the logical place to look.").

²²² See Letter from Ryan P. Mulvey, CoA Inst., to Bertrand Tzeng, Internal Revenue Serv. (Oct. 30, 2014), *available at* <http://bit.ly/29mvo7A>; Letter from Ryan P. Mulvey, CoA Inst., to Amy P. Jones, Treasury Inspector Gen. for Tax Admin. (Oct. 30, 2014), *available at* <http://bit.ly/298jpYH>; Letter from Ryan P. Mulvey, CoA Inst., to Carmen M. Banerjee, Tax Div. Counsel for FOIA & Privacy Act Matters, Dep't of Justice (Oct. 30, 2014), *available at* <http://bit.ly/29cQJzn>.

Tax Division issued a partial determination that included a list of Tax Division lawyers detailed to the White House from April 2009 through December 2014.²²³

In addition to this first batch of FOIA requests, CoA Institute filed a second set with various DOJ components on April 15, 2015.²²⁴ The requests sought records concerning detailing procedures and the existence—or lack thereof—of safeguards against disclosure of confidential, sensitive, or proprietary information by DOJ attorneys while on detail. One of these requests was directed to the DOJ Professional Responsibility Advisory Office (“PRAO”).²²⁵ PRAO describes its mission as providing “definitive advice to government attorneys and the leadership at the [DOJ] on issues relating to professional responsibility”²²⁶ and to ensuring “prompt, consistent advice to [DOJ] attorneys . . . with respect to professional responsibility[.]”²²⁷

Another request was sent to the DOJ Office of Professional Responsibility (“OPR”),²²⁸ which investigates allegations of misconduct involving DOJ attorneys. This particular request sought complaints or allegations of misconduct in connection with the improper disclosure of tax information by DOJ attorneys detailed to another department or agency. On April 24, 2015, OPR responded that its search “failed to locate any [responsive] documents.”²²⁹

On April 15, 2015, CoA Institute also asked the DOJ Inspector General to investigate the agency’s practice of detailing attorneys to the White House “to ensure that detailed attorneys are appropriately screened to prevent confidential taxpayer returns and/or return information protected under [26 U.S.C. § 6103] . . . from being unlawfully accessed or disclosed.”²³⁰ Although the Inspector General ultimately declined to conduct such a review because of the lack

²²³ Letter from Carmen Banerjee, Tax Div. Counsel for FOIA & Privacy Act Matters, Dep’t of Justice, to Ryan P. Mulvey, CoA Inst. (Mar. 17, 2015), *available at* <http://bit.ly/29j7p92>.

²²⁴ In addition to the requests discussed in the following two paragraphs, CoA Institute filed FOIA requests with the DOJ Tax Division, the Justice Management Division (“JMD”), and the Office of the Deputy Attorney General (“ODAG”), *available at* <http://bit.ly/298dgxx>; <http://bit.ly/29dC61Q>; and <http://bit.ly/29eBrvV>, respectively.

²²⁵ Letter from Ryan P. Mulvey, CoA Inst., to Michael Kingsley, Dep’t of Justice, Prof’l Responsibility Advisory Office (Apr. 15, 2015), *available at* <http://bit.ly/29uyyVw>.

²²⁶ Dep’t OF JUSTICE, PROF’L RESPONSIBILITY ADVISORY OFFICE, NEW ATTORNEY HANDBOOK at 2, *available at* <http://bit.ly/22qQ4hU>; *see also id.* (PRAO also “[a]ssemble[s] and maintain[s] the codes of ethics, including, inter alia, all relevant interpretative decisions and bar opinions of the District of Columbia and every state and territory” and provides “tools to make informed judgments about the circumstances that require [DOJ attorneys’] compliance with 28 U.S.C. § 530B”).

²²⁷ DEP’T OF JUSTICE, PROF’L RESPONSIBILITY ADVISORY OFFICE, OFFICE MANUAL, *available at* <http://bit.ly/22qQ4hU> (“PRAO complies with the rules of professional conduct that impose on lawyers and their staff a duty to preserve and protect confidential information.”).

²²⁸ Letter from Ryan P. Mulvey, CoA Inst., to Lyn Hardy, Dep’t of Justice, Office of Prof’l Responsibility (Apr. 15, 2015), *available at* <http://bit.ly/295Zf61>.

²²⁹ Letter from Lyn Hardy, Dep’t of Justice, Office of Prof’l Responsibility, to Ryan Mulvey, CoA Inst. (Apr. 24 2015), *available at* <http://bit.ly/29uB3aj>.

²³⁰ Letter from Daniel Z. Epstein, Exec. Dir., CoA Inst., to Michael E. Horowitz, Inspector Gen., Dep’t of Justice (Apr. 15, 2015), *available at* <http://bit.ly/298y3Vi>.

of jurisdiction, the matter was referred to OPR and to Eileen Shatz, the Tax Division's Designated Agency Ethics Official.²³¹

On May 26, 2015, CoA Institute filed a lawsuit to compel the production of records responsive to the October 2014 and April 2015 FOIA requests.²³² That litigation is still ongoing, but the defendant agencies have nearly completed production. At the date of this report, only the Tax Division continued to process responsive records. Both the IRS and PRAO failed to locate any responsive records. The Justice Management Division, the final defendant DOJ component, has completed production.

Most recently, on May 19, 2015, CoA Institute filed a third FOIA request with the DOJ Tax Division requesting records of correspondence between detailees to the Office of the White House Counsel and the Division's Designated Agency Ethics Official, Eileen Shatz.²³³ The Tax Division has yet to issue an interim or final response or to produce any records responsive to this last request.

²³¹ Letter from Michael E. Horowitz, Inspector Gen., Dep't of Justice, to Daniel Z. Epstein, Exec. Dir., CoA Inst. (June 22, 2015), available at <http://bit.ly/296IUdy>.

²³² *Cause of Action Inst. v. Internal Revenue Serv., et al.*, No. 15-770 (D.D.C. Cmplt. filed May 26, 2015).

²³³ Letter from Ryan P. Mulvey, CoA Inst., to Carmen M. Banerjee, Tax Div. Counsel for FOIA & Privacy Act Matters, Dep't of Justice (May 19, 2015), available at <http://bit.ly/29z8Ymz>.

APPENDIX 2

THE FBI BACKGROUND-FILES CONTROVERSY

The FBI background-files controversy during the Clinton Administration led to years of investigation, litigation, and political turmoil, and ultimately drove reform at the FBI and the White House, but only after the privacy rights of hundreds of citizens were violated for years. The privacy violations were traced to employees in part of the Office of the White House Counsel who were on detail or political operatives hired to vet potential presidential appointees. Striking parallels between the practices at issue then and the practices uncovered by this CoA Institute investigation suggest that important lessons were not learned about the dangers of operating under administratively convenient procedures adopted solely on the basis of past practice, without safeguards or training to help detailees and political appointees identify and avoid activities or information that are restricted from or not allowed in the White House, enabling wholesale violation of fundamental privacy and confidentiality protections important to every citizen.

The Clinton Administration improperly gained access to FBI security-clearance files for hundreds of individuals who had worked in the Reagan and George H.W. Bush Administrations.²³⁴ Before the Clinton presidency, prior administrations had “engaged in a careful process of performing background checks and granting or rejecting security clearances on individuals to determine their suitability and stability for working at the White House and throughout the executive branch.”²³⁵ Each person individually authorized the FBI to conduct their background investigation, the file for which was compiled from self-disclosure forms, searches of criminal databases, field interviews, and research.²³⁶ FBI security-clearance files encompass much more than ordinary personnel files. They “contain the most private and personal information on an individual . . . spouse and family.”²³⁷

In prior administrations, access to background-clearance files, because of their sensitive content, was strictly controlled and limited to the highest levels of presidential advisors. Custody of the records was vested in the White House Office of Personnel Security (“OPS”), a part of the Office of the White House Counsel, which had responsibility for checking the background of

²³⁴ See U.S. H. COMM. ON GOVT’ REFORM & OVERSIGHT, INVESTIGATION INTO THE WHITE HOUSE AND DEPARTMENT OF JUSTICE ON SECURITY OF FBI BACKGROUND INVESTIGATION FILES: INTERIM REPORT, H.R. Rep. No. 104-862, 104th Cong., 2d Sess. (1996) [hereinafter “GRO Investigation”], available at <http://bit.ly/1OQ8twW>. GRO has since been renamed the Committee on Oversight and Government Reform.

²³⁵ *Id.* at 6.

²³⁶ *Id.* at 13. White House staffers are required to complete Form SF86 before they begin work. “The SF86 is a questionnaire which calls for sensitive and personal information from the appointee. Former White House Counsel A.B. Culvahouse described the form as ‘designed to affirmatively encourage the furnishing of adverse or derogatory information.’” *Id.* at 25.

²³⁷ *Id.* at 2; see also *id.* at 10.

everyone with access to the White House.²³⁸ “[F]ormer Counsels to the President and [a] predecessor in [OPS] testified to the careful, and painstaking process that was followed in order to ensure the confidentiality of these sensitive files. . . . [T]his function was never handed over to political operatives, or detailees from outside agencies[.]”²³⁹

At the start of the Clinton Administration, however, Craig Livingstone was put in charge of OPS. Far from a career security professional, Mr. Livingstone’s background consisted mostly of advance work for democratic candidates’ political campaigns. The FBI’s background investigation of Mr. Livingstone raised enough red flags that he did not obtain his own White House security pass until November 1993, nine months after he became OPS director.²⁴⁰ Starting in August 1993, Anthony Marceca, a civilian investigator “handpicked by Livingstone,” was detailed to OPS from the Army’s Criminal Investigative Division.²⁴¹ The FBI’s investigation of Mr. Marceca was not completed until December 1993 and contained enough warning signs that his detail was not renewed, ending in February 1994. In the meantime, however, “Army Detailee Anthony Marceca was given unfettered access to confidential FBI law enforcement files and allowed to remove confidential information from the White House, despite his own inability to receive White House clearance.”²⁴²

²³⁸ *Id.* at 12-13 (“Previous White House Counsels testified to this committee that in each administration in which they served, the background investigation process was limited to a very small number of high level individuals. Those individuals included the White House Counsel to the President, the Deputy White House Counsel and the Assistant to the Counsel for Security. In a small number of instances, aspects of a particular FBI background report would have been discussed with a senior level staff member on a need to know basis, without sharing the file. Background files were never shown to others in the White House, including the President, the Vice President, the chief of staff or the director of presidential personnel,’ according to Richard A. Hauser, Deputy Counsel to President Reagan.”); *id.* at 20 (“Former White House Counsel C. Boyden Gray made clear that substantive judgments on the background investigations were reserved exclusively to the White House Counsel and Deputy Counsel. The responsibility for the adjudication was kept at the highest levels of the Counsel’s Office not only to ensure immediate access to the President with any problems, but also to ensure the confidentiality of the files.”).

²³⁹ *Id.* at 6 (emphasis added). The prior Director of OPS who had responsibility for the files from 1972 to 1993, “never allowed detailees from outside the White House or interns to work in the Security Office because of the sensitive nature of the files and paperwork.” *Id.* at 33; *see also id.* at 2 (“The fact that two individuals, Craig Livingstone and Anthony Marceca, with extensive political involvement and checkered pasts were in charge of handling the files is cause for alarm and investigation.”); *id.* at 25 (“In previous administrations, only the Counsel to the President, his deputy and the director of the Security Office would review the SF86’s.”); *id.* at 63 (“As the Washington Post opined on June 17, 1996: ‘The last people in government to have access to, let alone be custodians of, sensitive background investigation reports and material should be political operatives. That, unfortunately, is what the Clinton administration seems to have done.’”).

²⁴⁰ *Id.* at 18, 62; *see also* Mary Jacoby, *More FBI Files Traced to White House*, CHI. TRIB. (June 26, 1996), <http://bit.ly/20HRp2i> (“[T]he FBI agent who conducted Livingstone’s own background investigation for his White House job told Senate investigators that Livingstone lied during that check.”).

²⁴¹ GRO Investigation, *supra* note 234, at 5, 7, 22.

²⁴² *Id.* at 11; *see also id.* at 70-71 (“[T]he use of detailees and interns with insufficient background in security or name recognition was a key problem. . . . Security work is extremely sensitive, but there appears to have been an extremely lax attitude in the treatment of FBI files.”).

By March 1994, hundreds of Clinton White House employees still did not have security clearances and the White House admitted that OPS mismanagement was serious.²⁴³ In addition, OPS had obtained FBI files containing background-check reports about former White House employees from the prior Reagan and Bush administrations. Following a decades-old procedure of convenience that relied on the good faith of both OPS and the FBI, Mr. Marceca ordered hundreds of files from the FBI by simply writing names on an unsigned, photocopied form.²⁴⁴ As the Report issued by the then-House Committee on Government Reform and Oversight explains:

[OPS and the FBI] maintained a system of mutual convenience which allowed low level staff to access any file without question by the FBI. The Clinton administration ha[d] on a number of occasions, failed to implement safeguards that would have prevented this lapse in security. Further, the longstanding policy of the FBI, which relied on the honor of White house employees, was exploited by Clinton administration employees.²⁴⁵

That convenient procedure was “ripe for abuse,” inasmuch as Mr. Marceca and others read “all the files” on hundreds of persons employed in the previous Republican administrations and passed along “derogatory information” to Mr. Livingstone.²⁴⁶

None of the congressional inquiries, Independent Counsel’s investigations, or private lawsuits about the FBI background-files controversy resulted in an indictment or civil liability for anyone in OPS or the White House.²⁴⁷ But agents of all three branches of the Federal

²⁴³ See Pierre Thomas & George Lardner, *FBI Plans to Tighten Rules Governing Requests for Background Reports*, WASH. POST (June 14, 1996), <http://bit.ly/1TDdPO4> (“[F]ormer FBI agent Gary W. Aldrich, who worked at the White House for five years before his retirement last June, said in an op-ed article in the Wall Street Journal that ‘FBI management had plenty of warning that elements of security and background investigations were drastically wrong at the Clinton White House’”); GRO Investigation, *supra* note 234, at 62 (“[A] new administration normally completed its pass issuance within approximately 6 months, or at most 9 months. In comparison, the GAO reported that only two Clinton staffers had permanent passes 9 months into the administration.”). By August 1994, Congress was involved and Democratic Senator Dennis DeConcini wrote to President Clinton suggesting that Mr. Livingstone be replaced with a security professional. *Id.* at 7.

²⁴⁴ FBI Director Louis Freeh stated, “The prior system of providing files to the White House relied on good faith and honor. Unfortunately, the FBI and I were victimized. I should have known before last week about a decades old system that failed.” *Id.* at 40; see also Mary Jacoby, *supra* note 240 (counting 700 files obtained); David Jackson, *Senate Subpoenas Former White House Aide Who Gathered FBI Files*, CHICAGO TRIB. (July 17, 1996), <http://bit.ly/1TEJyDQ> (Mr. Marceca “gathered at least 700 sensitive FBI background files”).

²⁴⁵ GRO Investigation, *supra* note 234, at 10-11.

²⁴⁶ *Id.* at 6, 70. In addition, Mr. Livingstone and Mr. Marceca “had numerous teenage interns working inside the security office and even in the vault [containing the background files held by OPS]. The interns did not have background investigations, security clearances, or proper supervision. They had access to all confidential FBI background files and a photocopier machine stood nearby.” *Id.* at 6. “The committee was provided with testimony and evidence that staff and interns without the necessary clearances had unfettered access to the highly sensitive material in the FBI background files including that of more than 400 former Bush and Reagan administration officials.” *Id.* at 11.

²⁴⁷ The Independent Counsel expressly did not investigate whether Mr. Marceca violated the Privacy Act and also granted him immunity in exchange for his testimony. See Final Report of the Independent Counsel (*In re*

government realized that the controversy arose out of “violation[s] of the constitutional rights and private lives of many upstanding citizens.”²⁴⁸

The Clinton White House publicly apologized to the “hundreds of people . . . whose classified FBI personnel files were obtained by the Clinton administration and reviewed by an Army security officer.”²⁴⁹ The White House also reformed its procedures to require a consent form from every person subjected to requests for background files “except in extraordinary circumstances.”²⁵⁰

The FBI undertook an investigation and found that the White House “victimized” the FBI and gained “unquestionably unjustified” access to the files, resulting in “egregious violations of privacy.”²⁵¹ The FBI also acknowledged blame for its own failures “to supervise properly the dissemination of information from FBI background reports” and “to assess and balance adequately the competing interests underlying the Privacy Act.”²⁵² The FBI, therefore, reformed its procedures to include more documentation to justify each request for a background file and an internal review before fulfilling such requests.²⁵³

Other investigators questioned the FBI’s professionalism and political independence from the White House,²⁵⁴ and the Attorney General found that a conflict of interest required an independent counsel rather than relying on the FBI to investigate itself.²⁵⁵ The Attorney General therefore expanded the scope of the ongoing Independent Counsel “Whitewater” investigation by

Madison Guaranty Savings and Loan Assoc.) in re Anthony Marceca, Div. No. 94-1 (D.C. Cir. [Spec. Div.] Mar. 16, 2000) at 4 n.7 & 7-8.

²⁴⁸ GRO Investigation, *supra* note 234, at 10.

²⁴⁹ *Id.* at 40 (discussing statement on national television by White House Chief of Staff, Leon Panetta).

²⁵⁰ William Neikirk, *FBI Charges Abuse Over Files*, CHI. TRIB. (June 15, 1996), <http://bit.ly/1Z45C9k>.

²⁵¹ *Id.* (“The reforms adopted by the FBI call for more justification to be included with each request and require a more thorough internal review and checks before files are given to the White House.”).

²⁵² See HOWARD M. SHAPIRO, REPORT OF THE FBI GENERAL COUNSEL ON THE DISSEMINATION OF FBI FILE INFORMATION TO THE WHITE HOUSE (June 14, 1996) (Statement of Louis J. Freeh, Dir., Fed. Bureau of Investigation) (cited in Marceca Final Report, *supra* note 247, at 25-26); see also, e.g., GRO Investigation, *supra* note 234, at 40 (Louis Freeh stated, “The FBI and I fell victim to my lack of vigilance, and this failure to exercise proper management controls also affected the privacy rights of many persons.”).

²⁵³ See Thomas & Lardner, *supra* note 243 (“The FBI, embarrassed by its rubber-stamp release of background reports on Republicans from past administrations to the Clinton White House, plans to overhaul its procedures for disseminating such information”);

²⁵⁴ See, e.g., GRO Investigation, *supra* note 234, at 11.

²⁵⁵ See Final Report of the Independent Counsel (*in re Madison Guaranty Savings and Loan Assoc.) in re Bernard Nussbaum*, Div. No. 94-1 (D.C. Cir. [Spec. Div.] Mar. 16, 2000) at 6 (discussing “suspicions that OPS’s requests for confidential FBI background reports were part of a scheme by senior White House officials, including Mrs. Clinton, to misuse the FBI background reports to compile derogatory information on political opponents for future partisan political purposes” and the Attorney General’s citation of “a political conflict of interest”); John F. Harris & George Lardner, *Reno Seeks Starr Probe of FBI Files*, WASH. POST (June 21, 1996), <http://bit.ly/1P1sPsq>; William Neikirk, *‘Filegate’ Prosecutor Clears White House*, CHI. TRIB. (Mar. 17, 2000), <http://bit.ly/25kUKI3> (quoting Bush employee: “These ‘raw’ investigative files invariably contain material that is not necessarily true, but almost certainly is negative and embarrassing. . . . The FBI improperly gave our files to unauthorized and politically hostile individuals.”).

Kenneth Starr to include the FBI background-files controversy.²⁵⁶ The Independent Counsel eventually found that the White House “fail[ed] to employ experienced personnel and to train and supervise the staff to understand the sensitivity of the background reports.”²⁵⁷

Lawsuits by the individuals whose files were reviewed lasted a decade and a half, from 1996 until 2011. In his final ruling, the federal trial judge made special note that the plaintiffs’ privacy had “indeed” been violated and that they did “have cause to complain . . . even if not in the sense contemplated by the Privacy Act.”²⁵⁸

²⁵⁶ On the Whitewater scandal, *see* Marceca Final Report, *supra* note 247, and Nussbaum Final Report, *supra* note 255, at 25-26. The final reports that dealt specifically with the FBI background-file controversy were issued by Robert W. Ray, who was appointed as the Independent Counsel on October 18, 1999, after Kenneth Starr resigned. *See* Marceca Final Report, *supra* note 247; Nussbaum Final Report, *supra* note 255.

²⁵⁷ Marceca Final Report, *supra* note 247, at 13.

²⁵⁸ *Alexander v. Fed. Bureau of Investigation*, 691 F. Supp. 2d 182, 197 (D.D.C. 2010).

APPENDIX 3

DOJ TAX DIVISION DETAILEES TO THE OFFICE OF THE WHITE HOUSE COUNSEL, 2009-2015

TAX DIVISION DETAILEE	TITLE AT WHITE HOUSE	TERM ¹	COMMENTS
Diana Beinart	Tax Advisor	Apr. 2, 2009 – Mar. 23, 2010	Detail began when Gregory Craig, President Obama’s first White House Counsel, was expanding the size and scope of the office’s work. ²
Daren H. Firestone	Deputy Assoc. Counsel	Apr. 19, 2010 – Nov. 8, 2010	Firestone was a Trial Attorney in the Tax Division from September 2007 through June 2013. ³
Todd Ellinwood		March 2011 – Nov. 2011	A Tax Division lawyer since 2006, Ellinwood returned to its Southern Criminal Enforcement Section and became Dep. Ass’t AG for Criminal Matters. ⁴
Michael J. Watling	Deputy Assoc. Counsel for Pres. Personnel	Nov. 14, 2011 – May 11, 2012 ⁵	Watling was a criminal attorney in the Tax Division and he and Strauss prosecuted criminal tax cases together. ⁶
Christine D. Mason	Clearance Advisor ⁷ or Deputy Assoc. Counsel for Pres. Personnel ⁸	May 28, 2012 – Oct. 26, 2012	A DOJ internal memo states that Mason would “assist with the vetting process and oversee[] background investigations.” ⁹
Christopher Strauss	Clearance Advisor/ Clearance Counsel	Oct. 22, 2012 – May 31, 2013	Strauss’s title was Clearance Advisor in October 2012, but changed to Clearance Counsel on December 13, 2012. ¹⁰
Shelley Leonard	Clearance Advisor	May 6, 2013 – Dec. 2, 2013	Leonard was detailed from the Tax Division’s Court of Claims team and returned to the Tax Division for another 18 months. ¹¹
Andrew Strelka		Dec. 2013 – June 6, 2014 ¹²	Strelka described his detail as “advis[ing] senior White House staff on Presidential nominee suitability and various federal and state tax issues” and assisting the “White House Office of Legislative Affairs on Senate confirmation matters[.]” ¹³
Norah Bringer	Clearance Counsel	Jun. 9, 2014 – Apr. 3, 2015	A Tax Division lawyer since October 2011, Bringer defended the IRS in lawsuits concerning § 6103, IRS targeting of conservative groups, and CoA Institute’s FOIA requests. ¹⁴
Carina Federico	Clearance Counsel	Apr. 1, 2015 – Oct. 30, 2015 ¹⁵	Federico was notified, like others, that she was “obligated to disclose to” IRS and others “any potential civil or criminal violations by potential nominees.” ¹⁶

¹ DOJ documents provide inconsistent information about when some details began or ended, as noted where applicable, and some of the detail periods overlapped. At times DOJ was less than certain where each of its attorneys was. *See, e.g.*, Email from Sharon Werner, Dep't of Justice, Off. of Att'y Gen., re Details Outside of the Department (May 20, 2013), available at <http://bit.ly/29sDQAh> (“we’re trying to create a comprehensive list of Department attorneys who are currently serving on details outside of the Department”) (emphasis added). As of 2012, DOJ internal correspondence provides “a caveat” that, as to start dates for the White House details, the agency information “is an estimate because we don’t always have the precise date.” *See* Email from Phyllis Wolfeich, Dep't of Justice, Tax Div., to [redacted], Dep't of Justice, Tax Div., re detail report (May 10, 2012), available at <http://bit.ly/29D92zy>.

² Email from Diana Beinart to [redacted] re detailee processing (Mar. 19, 2010), available at <http://bit.ly/29xZAzB> (“We are desperate for [Firestone] to start...”).

³ *See* Daren Firestone, LINKEDIN, <http://bit.ly/1OQ7Wv4> (last visited Mar. 3, 2016). During a later detail to OMB, Firestone was “part of a small team that conceived and drafted the first report . . . recommending reforms to rationalize the paperwork required of Presidential nominees.” *Id.* This group proposed sets of “Core Questions” to be answered by nominees for positions requiring Senate confirmation, including a set of questions on “Tax Compliance.” EXEC. OFFICE OF THE PRESIDENT, WORKING GROUP ON STREAMLINING PAPERWORK FOR EXEC. NOMINATIONS, STREAMLINING PAPERWORK FOR EXECUTIVE NOMINATIONS: REPORT TO THE PRESIDENT AND RANKING MEMBERS OF THE SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENT AFFAIRS AND THE SENATE COMMITTEE ON RULES & ADMINISTRATION 43 (Nov. 2012), available at <http://bit.ly/1TLxn2Y>. The “core questions” do not reference section 6103(c) as authorization to obtain tax information about potential nominees and appointees.

⁴ *See* Email from Todd Ellinwood, Att'y, Dep't of Justice, Tax Div., to Kelli Ferry, Dep't of Justice, USANCW, re Job Update) (Feb. 11, 2011), available at <http://bit.ly/29vq8eK>; Email from Shawn Noud, Dep't of Justice, Tax Div., to DL-TAX-OAAG-ALL re On behalf of DAAG Ron Cimino) (May 7, 2013), available at <http://bit.ly/29ya4db>.

⁵ *See* WH Form Rev. 01/09 regarding Watling’s detail (undated), available at <http://bit.ly/29y0gFq> (suggesting June 14, 2012 end date); Email from Ronald Cimino, Dep. Ass’t Att’y Gen., Dep’t of Justice, Tax Div. to Kathryn Keneally, Ass’t Att’y Gen., Dep’t of Justice, Tax Div. *et al.* re [redacted]) (Dec. 14, 2012), available at <http://bit.ly/2a2mefr> (“Ellinwood’s detail was extended, and another criminal attorney, Mike Watling, was detailed to the White House General Counsel’s office.”).

⁶ *See, e.g.*, “North Dakota Executive Sentenced to Prison for Tax Fraud,” DEPARTMENT OF JUSTICE (Dec. 14, 2009), available at <http://1.usa.gov/1WXVWzY> (last accessed Mar. 15, 2016).

⁷ Memorandum from Rishi Sahgal, Dir. White House Personnel, to James Cole, Dep. Att’y Gen., re Request of Detail – Christine D. Mason (May 24, 2012), available at <http://bit.ly/29BXWeT>.

⁸ Memorandum from Lee Lofthus, Ass’t Att’y Gen., Admin., to Dep. Att’y Gen. re Request to Detail an Employee to the White House) (May 3, 2012), available at <http://bit.ly/29BXMJ>.

⁹ *Id.*

¹⁰ *See* Email from Monica Doyle, Ass’t Dir., HR, Justice Mgmt. Div., Dep’t of Justice, to Phyllis Wolfeich, Dep’t of Justice, Tax Div., re Detail of Shelley Leonard to the White House) (May 9, 2013), available at <http://bit.ly/29y421n>.

¹¹ *See* Email from Tamara Ashford, Acting Ass’t Att’y Gen., Dep’t of Justice, Tax Div., to Phyllis Wolfeich, Dep’t of Justice, Tax Div., *et al.* re FW: Details Outside of the Department) (Oct. 31, 2013), available at <http://bit.ly/2a2mFq9>; Chart: DOJ Details Outside of the Department) (May 10, 2013), available at <http://bit.ly/29ydWen>; *see also* Email from [redacted], DOJ Tax Div., to Phyllis Wolfeich, Dep’t of Justice, Tax Div., *et al.* re Notification: Shelley de Alth Leonard has been detailed on 05/06/2013 (May 22, 2013), available at <http://bit.ly/29sZX91>; Email from Tamara Ashford, Acting Ass’t Att’y Gen., Dep’t of Justice, Tax Div., to Phyllis Wolfeich, Dep’t of Justice, Tax Div., *et al.* re FW: Details Outside of the Department (Oct. 31, 2013), available at <http://bit.ly/2a2mFq9>; *Shelley de Alth Leonard*, LINKEDIN, <http://bit.ly/1Ugm7Oe> (last visited Mar. 3, 2016).

¹² After returning to the Tax Division, Strelka represented the IRS Commissioner in *Z Street Inc. v. Koskinen*, a case about improper targeting by the IRS from which he withdrew on July 28, 2014. *Z Street Inc. v. Koskinen*, No. 1:12-cv-401-KBJ (D.D.C. notice of withdrawal filed July 28, 2014).

¹³ Andrew C. Strelka, MILLER & CHEVALIER, <http://bit.ly/1TM1bzM> (last visited Mar. 2, 2016).

¹⁴ *See* Norah Bringer, LINKEDIN, <http://bit.ly/1TM20bU> (last visited Mar. 2, 2016).

¹⁵ *See* Email from Phyllis Wolfeich, Dep’t of Justice, Tax Div., to [redacted], Dep’t of Justice, Tax Div., *et al.* re Notification: Carina Clark Federico was detailed on 04/06/2015 (Apr. 7, 2015), available at <http://bit.ly/29rtog9>; *see also Walton v. United States*, No:1:13-cv-01772-WTL-TAB (S.D. Ind., notice of withdrawal filed Mar. 24, 2015). The end date of Federico’s detail is inferred from the White House Visitor Access Records, available at <http://1.usa.gov/1TRwBGS> (last visited Mar. 24, 2016).

¹⁶ Memorandum from Caroline Ciralo, Acting Ass’t Att’y Gen., Dep’t of Justice, Tax Div., to Stuart Delery Acting Assoc. Att’y Gen., re Approval for detail of a Tax Division employee to the White House (undated) at 2, available at <http://bit.ly/29y7PvK>.

Index to Exhibits

- Exhibit 1: Email from Daniel Carney, Special Agent, Treasury Inspector Gen. for Tax Admin., to Mark Holden, Gen. Counsel, Koch Inds. (Aug. 10, 2011).
- Exhibit 2: Email from Gary Prustman, Chief of Disclosure, Internal Revenue Serv., to Bernice B. Fischer, Dir. of Governmental Liaison & Disclosure, Internal Revenue Serv. (Oct. 3, 2012).
- Exhibit 3: Email from Donald M. Squires, Sr. Technician Review, Internal Revenue Serv., to Richard G. Goldman, Acting Deputy Assoc. Chief Counsel, Internal Revenue Serv., and Sarah E. Tate, Sr. Att’y, Internal Revenue Serv. (Oct. 3, 2012).
- Exhibit 4: Email from Sarah E. Tate, Sr. Att’y, Internal Revenue Serv., to Charles B. Christopher, Chief Att’y, Internal Revenue Serv., and Richard G. Goldman, Acting Deputy Assoc. Chief Counsel, Internal Revenue Serv. (Oct. 3, 2012).
- Exhibit 5: Email from Donald M. Squires, Sr. Technician Reviewer, Internal Revenue Serv., to Frank Keith, Dir. of Communications, Internal Revenue Serv., Terry L. Lemons, Chief of Communications & Liaison, Internal Revenue Serv., and Rebecca A. Chiaramida, Dir. of Privacy, Governmental Liaison & Disclosure, Internal Revenue Serv. (Oct. 3, 2012).
- Exhibit 6: Email from Deborah Lambert-Dean, Att’y, Internal Revenue Serv., to Carmen Banerjee, Tax Div. Counsel for FOIA & Privacy Act Matters, Dep’t of Justice (Oct. 4, 2012).
- Exhibit 7: Email from A. M. Gulas, Office of Chief Counsel, Internal Revenue Serv., to David A. Hubbert, Tax Div. Att’y, Dep’t of Justice (Oct. 3, 2012).
- Exhibit 8: Email from Roberty Bruffy, Exec. Officer, DOJ Tax Div., to Arthur Gary, Gen. Counsel, DOJ Justice Mgmt. Div., *et al.* (Mar. 17, 2015).
- Exhibit 9: Memorandum from Lee Lofthus, Ass’t Att’y Gen. for Admin., DOJ, to Acting Assoc. Att’y Gen. regarding Request Approval to Detail a Tax Division Employee to the White House Counsel’s Office (Mar. 31, 2015).
- Exhibit 10: U.S. Dep’t of Justice, Order 1203: Details and Assignments of Employees to Outside Organizations (Apr. 30, 2015).
- Exhibit 11: Email from Kathryn Keneally, Ass’t Att’y Gen., DOJ Tax Div. to distribution list re White House Detail Opportunity (Mar. 13, 2013).
- Exhibit 12: Email from Caroline D. Ciruolo, Acting Ass’t Att’y Gen., DOJ Tax Div. to distribution list re White House Detail Opportunity – Very Short Deadline (Feb. 25, 2015).

EXHIBIT

1

REDACTED

From: Carney Daniel K TIGTA <Dan.Carney@tigta.treas.gov>
Sent: Wednesday, August 10, 2011 10:41 AM
To: Holden, Mark (Koch Legal)
Subject: TIGTA Report

Mark,

I wanted to let you know that the final report relative to the investigation of Austan Goolsbee's press conference remark is completed, has gone through all the approval processes, and would now be available through a Freedom of Information Act (FOIA) request. If you go to TIGTA's main website, there is a link that walks you through this request.

Thanks,

Daniel K. Carney

Special Agent

U.S. Treasury Department (TIGTA)

Covington, Kentucky

(859) 669-7847 office

(859) 669-2748 fax

(513) 476-4603 cell

EXHIBIT

2

From: Prutsman Gary T
To: Fischer Bernice B;
cc: Blagg Mahlon E; Davis John H;
Chiaramida Rebecca A;
Subject: FW: F12111-0031 Accounting (Source Documents)
Date: Wednesday, October 03, 2012 10:39:35 AM
Attachments: F12111-0031 Accounting (2011).pdf
F12111-0031 Accounting (2009).pdf
F12111-0031 Accounting (2010).pdf

Attached are the Section 6103 accounting reports as filed with the JCT for the three years of President Obama's term. The 2012 report will be due March 31, 2013.

Disclosures to the President under 6103(g)(1) would have been listed on these reports if made (sorry about my previous mis-statement on this point). None are listed. We have checked our inventory systems, AFOIA and E-DIMS, and found none. Leg Affairs checked ETRAK and found none. None of us have any recollection of such a request during our tenures in HQ Disclosure.

These reports list disclosures to the Executive Office of the President. These are Tax Checks under 6103(c), not to be confused with requests by the President under (g).

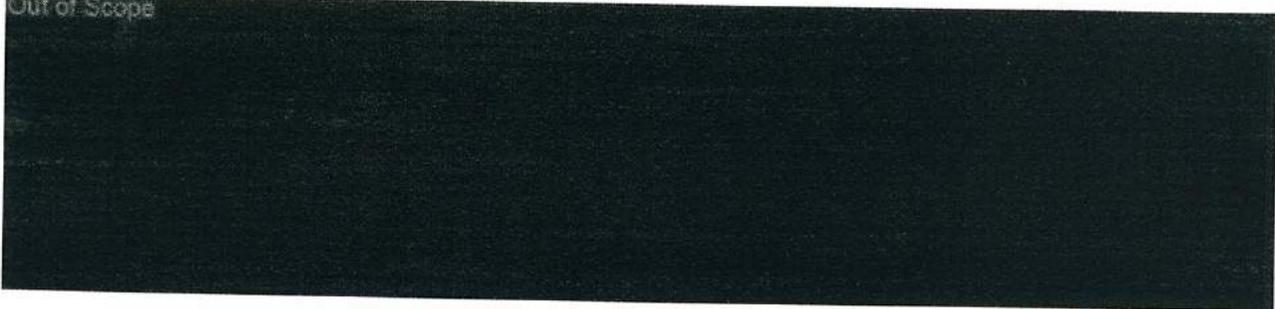
We are talking to Sarah Tate in Counsel about the issues. It is our position (Mahlon and mine) that the fact of a request from the President, or the lack of any requests, is discloseable through FOIA, but the identity of the subject is not. More specifically, we should have responded to this FOIA that there were no requests, therefore we have no responsive information. Counsel has not confirmed that position as of yet.

I am aware that Michelle Eldridge spoke to Don Squires and Richard Goldstein in Counsel about this case yesterday, primarily about what, if anything, she could say to refute the press release from Cause of Action.

EXHIBIT

3

Out of Scope



From: Goldman Richard G
Sent: Wednesday, October 03, 2012 11:57 AM
To: Squires Donald M; Tate Sarah E
Subject: RE: lawsuit inquiry (Cause of Action) [NEED URGENT RESPONSE FROM COUNSEL!]

I assume we may need a declaration to that effect.

From: Squires Donald M
Sent: Wednesday, October 03, 2012 11:54 AM
To: Goldman Richard G; Tate Sarah E
Subject: RE: lawsuit inquiry (Cause of Action) [NEED URGENT RESPONSE FROM COUNSEL!]

No president has ever invoked (g)(1), precisely to avoid the whole trouble Nixon got into. Tax checks are routinely done pursuant to consent. I don't know for sure, but I think reports are only made to the JC when there have been requests, which there haven't been.

From: Goldman Richard G
Sent: Wednesday, October 03, 2012 11:51 AM
To: Tate Sarah E
Cc: Squires Donald M
Subject: RE: lawsuit inquiry (Cause of Action) [NEED URGENT RESPONSE FROM COUNSEL!]

(b) (5)



EXHIBIT

4

Second of 11.

From: Tate Sarah E
Sent: Wednesday, October 03, 2012 9:55 AM
To: Christopher Charles B; Goldman Richard G
Cc: Tucker Andrea S; Squires Donald M; Pettoni Barbara M
Subject: FW: lawsuit inquiry (Cause of Action) [NEED URGENT RESPONSE FROM COUNSEL!]

FYI --

New FOIA litigation apparently is on the way. The request and response are attached. The field withheld under a Glomar approach, asserting 6103(a).

I confirmed with Julie Schwartz that the WH uses the tax check program and disclosure consents to get tax records, not 6103(g) (1). Apparently the underlying true answer to the request is that no responsive documents exist.

Sarah Tate
Senior Attorney (P&A, Br 7)
202-622-6968

From: O'Reilly Rhonda M [mailto:Rhonda.M.O'Reilly@irs.gov]
Sent: Wednesday, October 03, 2012 9:09 AM
To: Tate Sarah E
Subject: FW: lawsuit inquiry (Cause of Action) [NEED URGENT RESPONSE FROM COUNSEL!]

Rhonda O'Reilly
Tax Law Specialist - HQ Disclosure

EXHIBIT
5

From: Squires Donald M
To: Lambert-Dean Deborah C;
Subject: FW: Cause of Action lawsuit
Date: Friday, October 05, 2012 9:06:54 AM

FYI

From: Squires Donald M
Sent: Wednesday, October 03, 2012 2:52 PM
To: Keith Frank; Lemons Terry L; Chiaramida Rebecca A
Cc: Prutsman Gary T; Goldman Richard G
Subject: Cause of Action lawsuit

Having reviewed the FOIA request, the IRS's response thereto and the lawsuit filed by Cause of Action, it appears that we should have responded to the request by saying that there are no responsive documents. As far as I understand (and this can be confirmed by the Office of Disclosure), neither this White House or any other going back to 1976 has ever used section 6103(g) to make requests for tax information. The tax check process for presidential nominees routinely utilizes consents executed under section 6103(c).

(b) (5)  That said, nothing in section 6103 would prohibit the IRS from responding to media inquiries about this lawsuit by affirming that there have been no requests by the White House for tax information under section 6103(g).

Don Squires
Senior Technician Reviewer
Procedure & Administration
CC:PA:6
202-622-3608

EXHIBIT
6

Out of Scope



From: Squires Donald M
Sent: Wednesday, October 03, 2012 11:54 AM
To: Goldman Richard G; Tate Sarah E
Subject: RE: lawsuit inquiry (Cause of Action) [NEED URGENT RESPONSE FROM COUNSEL!]

No president has ever invoked (g)(1), precisely to avoid the whole trouble Nixon got into. Tax checks are routinely done pursuant to consent. I don't know for sure, but I think reports are only made to the JC when there have been requests, which there haven't been.

From: Goldman Richard G
Sent: Wednesday, October 03, 2012 11:51 AM
To: Tate Sarah E
Cc: Squires Donald M
Subject: RE: lawsuit inquiry (Cause of Action) [NEED URGENT RESPONSE FROM COUNSEL!]

(b) (5)



From: Tate Sarah E
Sent: Wednesday, October 03, 2012 9:55 AM
To: Christopher Charles B; Goldman Richard G
Cc: Tucker Andrea S; Squires Donald M; Pettoni Barbara M
Subject: FW: lawsuit inquiry (Cause of Action) [NEED URGENT

EXHIBIT

7

From: [Gulas A M](#)
To: [Lambert-Dean Deborah C;](#)
Subject: FW: Statement related to 6103(g)1
Date: Friday, October 19, 2012 6:49:57 AM

From: Hubbert, David A. (TAX) [<mailto:David.A.Hubbert@usdoj.gov>]
Sent: Wednesday, October 03, 2012 2:49 PM
To: Gulas A M
Cc: Banerjee, Carmen M. (TAX)
Subject: RE: Statement related to 6103(g)1

Remember to stick that information in a draft declaration if we get there.

From: Gulas A M [<mailto:A.M.Gulas@irscounsel.treas.gov>]
Sent: Wednesday, October 03, 2012 2:34 PM
To: Hubbert, David A. (TAX)
Cc: Banerjee, Carmen M. (TAX)
Subject: RE: Statement related to 6103(g)1

One of the things I just found out in a meeting with the IRS Chief of Staff is that because there have been no 6103(g)(1) requests in decades (if ever), the report authors omit that section from the report because it would always be zeroes.

From: Hubbert, David A. (TAX) [<mailto:David.A.Hubbert@usdoj.gov>]
Sent: Wednesday, October 03, 2012 2:03 PM
To: Gulas A M; Banerjee, Carmen M. (TAX)
Subject: RE: Statement related to 6103(g)1

How does the IRS know this for both (g)(1) and (g)(2)? I just pulled the 2010 6103(p)(3) report from the JCT site, and it doesn't have a line for 6103(g)(1) or (2). Is that information somewhere else?

Dave

EXHIBIT

8

From: Lamary, Mary (JMD)
Sent: Tuesday, March 17, 2015 11:10 AM
To: Bruffy, Robert (TAX); Gary, Arthur (JMD); Sutton, Lynn (JMD)
Cc: Thompson, John E. (JMD); Allen, Michelle M (JMD)
Subject: RE: Detail to White House- Federico

Thanks so much for the background, it is very helpful.

Generally, because of the approval process requirements, we (JMD) are required to obtain OGC concurrence, so there is no need for you to also assume that responsibility. No sense in either delaying your submission of the request to JMD while you await an approval that we would also have to obtain. (though Art might be just as happy with replying to all of us when responding to your submissions.)

Regards,
Mary

From: Bruffy, Robert (TAX)
Sent: Tuesday, March 17, 2015 11:04 AM
To: Gary, Arthur (JMD); Sutton, Lynn (JMD)
Cc: Thompson, John E. (JMD); Allen, Michelle M (JMD); Lamary, Mary (JMD)
Subject: RE: Detail to White House- Federico

All

I was not aware that JMD's OGC must concur with details outside the Department. We will make sure to coordinate future requests with Art.

The White House has asked for an attorney from the Tax Division to come on detail continuously for at least the past 6 or 7 years to help with any tax issues that may arise during the vetting and clearance process. (I know this only because we recently received a FOIA request from Cause of Action asking for information related to these details). While we fully understand the benefit provided by our attorneys in this process, the Tax Division would prefer that our attorneys remain in the Division working on tax litigation. It is ironic that the internal DOJ process requires that we request approval for this detail, which we did not request.

As Art mentions, the White House can avoid reimbursement if the detail is for 6 or fewer months during a fiscal year, and thus there is an incentive from their end to structure the details in that manner. The White House has provided reimbursement for details that exceeded 6 months when necessary, and they do not seem to view this as an impediment, nor do they plan start-dates around this issue. Our experience has been that the 6-month details initially requested by the White House are extended to one year more often than not; thus it is more efficient to set up the approval process within DOJ to allow at the outset for the likely extension from 6 months to a year.

Bob Bruffy
Executive Officer, Tax Division
U.S. Department of Justice
(202) 616 8412

From: Gary, Arthur (JMD)

EXHIBIT

9



Washington, D.C. 20530

MAR 31 2015

MEMORANDUM FOR THE ACTING DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL *SFD 4/2/15*

FROM: Lee J. Lofthus *JLL*
Assistant Attorney General
for Administration

SUBJECT: Request Approval to Detail a Tax Division Employee to the
White House Counsel's Office

PURPOSE: To obtain your approval to detail Carina Federico to the White House Counsel's Office, a sub-unit within the White House Office, for one year. Ms. Federico is an Attorney with Civil Division's Civil Trial Section. The proposed effective date for this detail is April 6, 2015.

TIMETABLE: As soon as possible.

DISCUSSION: Ms. Federico will be detailed to the White House Counsel's Office to serve as Clearance Counsel. She will assist in the nominee vetting process for nominees to Presidential appointments and will be responsible for handling tax-specific issues that are addressed by the White House vetting Team. In recent years, the White House has requested the continuous presence of a Tax Division Attorney to assist in this process. In fact, Ms. Federico will replace another Tax Division Attorney, Norah Bringer, whose detailed terminates March 27, 2015. The detail is non-reimbursable. Non-reimbursable details to the White House Office are limited to 180 days during any fiscal year (FY) by title 3, section 112 of the United States Code (3 U.S.C. 112). This detail complies with that requirement.

RECOMMENDATION: The proposed non-reimbursable detail complies with the requirements of 3 U.S.C. 112. If approved, a Standard Form 52, Request for Personnel Action, is also attached for your signature

APPROVE: *[Signature]* *for SFD 4/2/15*

Concurring Component:
None

DISAPPROVE: _____

Nonconcurring Component:
None

OTHER: _____

Attachments

EXHIBIT
10



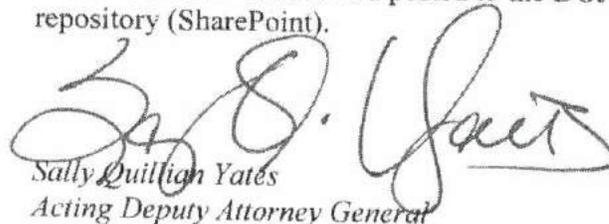
Approved On: 30 APR 2015

DOJ Order

DETAILS AND ASSIGNMENTS OF EMPLOYEES TO OUTSIDE ORGANIZATIONS

- PURPOSE:** This Order establishes Department of Justice policy and procedures regarding the temporary assignment of Department employees to organizations outside of the Department.
- SCOPE:** All DOJ Components
- ORIGINATOR:** Justice Management Division (JMD), Human Resources Staff (HR)
- CATEGORY:** (I) Administrative, (II) Human Resources
- AUTHORITY:** 3 U.S.C. § 112; 5 U.S.C. §§ 301, 3343(d), 3373(b), 3582; 28 U.S.C. §§ 503, 509, 530C (a) (2); 31 U.S.C. § 1535.
- CANCELLATION:** Memorandum from Deputy Attorney General Eric H. Holder, Jr., "Details of Employees to Organizations Outside the Department of Justice," September 29, 2000; Memorandum from Acting Assistant Attorney General for Administration Robert F. Diegelman, "Approval of and Reimbursement for White House and Other Details," August 30, 2002; Memorandum from Deputy Assistant Attorney General Mari Barr Santangelo, "Details Outside of the Department of Justice," May 2, 2013; any other DOJ memoranda to the extent inconsistent with this Order.
- DISTRIBUTION:** This Order is distributed electronically to those Components referenced in the "SCOPE" section and posted to the DOJ Directives electronic repository (SharePoint).

APPROVED BY:


Sally Quillian Yates
Acting Deputy Attorney General

ACTION LOG

All DOJ directives are reviewed, at minimum, every five years and revisions are made as necessary. The action log records dates of approval, recertification, and cancellation, as well as major and minor revisions to this directive. A brief summary of all revisions will be noted. In the event this directive is cancelled, superseded, or supersedes another directive, that will also be noted in the action log.

Action	Authorized by	Date	Summary
Initial Approval	Sally Quillian Yates Acting Deputy Attorney General	30 APR 2015	Establishes DOJ policy on assignments of DOJ employees to outside organizations

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GLOSSARY OF TERMS

DEFINITIONS

Term	Definition
Component	An office, board, division, or bureau of the Department of Justice.
Detail	A temporary assignment of a DOJ employee to a different position in the federal service (within or outside DOJ) with the expectation that the employee will return to the official position of record upon expiration of the detail.
Detail to an International Organization	The assignment or loan of an employee to an international organization without a change of position at the federal agency by which he is employed.
External detail	The detail of a DOJ employee to an organization outside DOJ.
External assignment	An external detail, Intergovernmental Personnel Act assignment, or transfer to an international organization and, including all extensions of the original assignment.
International Organization	A public international organization or international-organization preparatory commission in which the Government of the United States participates.
Transfer to an International Organization	The change of position by an employee from an agency to an international organization.

ACRONYMS

Acronym	Meaning
AAG/A	Assistant Attorney General for Administration
DAG	Deputy Attorney General
DOJ	Department of Justice
HR	Human Resources
IPA	Intergovernmental Personnel Act
JMD	Justice Management Division
U.S.C.	United States Code

I. Policy

A. General

The Department of Justice (DOJ) may temporarily assign or detail employees to organizations outside DOJ as authorized by law, including to other federal agencies, international organizations, and state, local, and tribal governments. Such assignments may serve various purposes, including employee development, interagency collaboration on common projects, and responding to another agency's request for assistance in an area where a DOJ employee has expertise. However, external assignments must always be consistent with the needs and the budget situation of the Department and of the Component. This Order specifies the officials with authority to approve external assignments, their roles and responsibilities, and the criteria governing external assignments.

B. Duration

Details to other Executive Branch agencies and other branches of government should last no longer than necessary and, in any case no more than one year. Approval of details lasting longer than one year will be granted only in exceptional circumstances. Intergovernmental Personnel Act (IPA) assignments and details and transfers to international organizations are governed by statutory and regulatory time limits that provide for longer terms. Extensions beyond those terms will be granted only in exceptional circumstances and must comply with the time limits specified in law and regulation.

C. Reimbursement

In general, a non-reimbursable external assignment is permitted by law only when:

1. There is specific statutory authority for the non-reimbursable assignment, for example, 3 U.S.C. § 112 (details to certain offices in the Executive Office of the President for periods not to exceed 180 days in a given fiscal year), 5 U.S.C. § 3373(b) (Intergovernmental Personnel Act assignments), or 5 U.S.C. § 3343(d) (details to international organizations); or
2. The detail involves a matter that is similar or related to matters ordinarily handled by the Component, and it will aid the Component in accomplishing a purpose for which its appropriations are provided.

In all other circumstances, external details must be reimbursed. Even in cases where a non-reimbursable detail is permitted, Components should seek reimbursement if feasible.

II. Roles and Responsibilities

A. Deputy Attorney General

The approval of the Deputy Attorney General (DAG) is required for:

1. Details to any organization within the Executive Office of the President;
2. Details to the Judicial Branch;
3. Details to offices of special counsel or similar offices created on an *ad hoc* basis to conduct specific investigations or prosecutions;
4. Details and transfers to international organizations under 5 U.S.C. § 3343 and 5 U.S.C. § 3582; and,
5. Assignments to State, local, and tribal governments and other organizations under the IPA, 5 U.S.C. §§ 3371-76.

B. Associate Attorney General

The Associate Attorney General (AAG) must approve the external assignments specified in Section II A above, for those Components under the Associate Attorney General's direction, before the DAG acts on such requests.

C. Assistant Attorney General, Office of Legislative Affairs

The approval of the Assistant Attorney General for the Office of Legislative Affairs is required for details to the United States Senate, House of Representatives, or other Legislative Branch entities.

D. Heads of Components

1. Delegation of Authority

The authority to approve external assignments not listed in Section II.A or II.B above is delegated to the Heads of Components with respect to employees in their respective Components.

2. Requests for Approval

With regard to external assignments requiring DAG approval, the Component shall submit the request to the Justice Management Division Human Resources Staff (JMD/HR) for transmittal to the DAG, in accordance with any guidance or instructions issued by JMD. Such requests shall be made under the signature of the Head of Component or principal deputy or equivalent position.

3. Reporting

With the exception of details and transfers to international organizations, which already require a separate reporting requirement to the Department of State, Components must report to JMD/HR semi-annually, in October and April, external assignments made during the previous six-month period. The report must include the name, title, series, and grade of the employee, the receiving organization, the type of assignment, the beginning and ending dates of the assignment, the length of the assignment, and whether it was reimbursable.

4. Documenting External Assignments

In Components responsible for maintaining their own employees' Official Personnel Folders (OPF), i.e., Components with delegated human resources authority, Heads of Components must ensure that:

- a. All external assignments, regardless of the approving authority, are documented in the affected employees' OPF via a completed and signed Standard Form 52 (SF-52), Request for Personnel Action and, for transfers to international organizations, an SF-50, Notice of Personnel Action; and,
- b. All supporting documentation is filed on the temporary side of the affected employee's OPF;

In Components serviced by JMD/HR (i.e., Components that do not have delegated human resources authority), Heads of Components must ensure that the Component provides the documentation described above to JMD/HR for inclusion in the affected employee's OPF.

5. Other Requirements

All Heads of Components are responsible for ensuring that:

- a. Employees do not begin external assignments until the appropriate authority has approved the assignment;

- b. All external assignments are tracked to ensure they are terminated on the prescribed date and that approvals for extensions are obtained prior to the effective date of the extension;
- c. Requests for extensions are submitted to JMD 30 days' prior to the end date of the original assignment.
- d. Employees return to their home organization at the end of the assignment period unless an extension has been approved;
- e. Documentation regarding all external assignments is readily available for audit or other reporting purposes;
- f. The Component determines whether the assignment should be reimbursable or non-reimbursable;
- g. When sending an employee on a reimbursable external assignment, the Component seeks and obtains timely reimbursement from the outside organization.
- h. Employees' performance standards are modified, as necessary, to incorporate their work on external assignments and that such work is recorded and considered appropriately in the rating process for the applicable performance cycle.
- i. Employees are informed of procedures for applying for promotion opportunities that occur while they are on an external assignment.
- j. Employees on external assignment remain subject to the requirements of their DOJ position (e.g., bar membership, medical and physical requirements, standards of conduct) while on assignment.

6. Requirements for Non-Reimbursable Assignments

In the case of non-reimbursable assignments, the Head of Component is responsible for ensuring that the Component reviews the proposed non-reimbursable assignment to determine whether the Component's funds are being used properly in accordance with Section I.C above. Components must conduct this review prior to submission of a request for DAG approval or before a Head of Component approves an external assignment under his or her delegated authority. The review must include a written determination by the appropriate legal counsel for the Component that the assignment meets the above criteria for non-reimbursement.

E. Assistant Attorney General for Administration

1. Review of Requests for External Assignments

With regard to requests requiring DAG approval, the AAG/A shall review and transmit a Component's request to the DAG, and when appropriate, through the Associate Attorney General, indicating whether the AAG/A recommends approval of the request.

2. Guidance to Components

The AAG/A, or the AAG/A's delegate, shall issue guidance or instructions to the Components regarding the submission of external assignment requests requiring DAG approval, as necessary.

EXHIBIT

11

From: [b6] (TAX) <[b6]@tax.USDOJ.gov>
Sent: Wednesday, March 13, 2013 11:02 AM
To: Mullarkey, D. Patrick (TAX) <D.Patrick.D.Mullarkey@tax.USDOJ.gov>
Subject: Fw: White House Detail Opportunity

Chief -- I am interested in this detail and it seems like perfect timing. Do we have any more information on the position?

[b6] Trial Attorney
U.S. Department of Justice, Tax Division
P.O. Box 55, Benjamin Franklin Station
Washington, D.C. 20044
(202) 616-[b6]
Fax: (202) 514-5238
[b6]@usdoj.gov

From: Keneally, Kathryn (TAX)
Sent: Wednesday, March 13, 2013 08:44 AM
To: DL-TAX-ALL-A
Cc: Keneally, Kathryn (TAX)
Subject: White House Detail Opportunity

A detail opportunity for a Tax Division attorney to serve as a Clearance Advisor at the White House has become available, to begin on April 18, 2013. The Clearance Advisor is responsible for helping the White House Counsel's office generally, and the vetting team in particular, research and address a variety of substantive and significant tax issues, as well as for overseeing the FBI background investigation and tax review processes.

We have been asked to make a recommendation for a candidate, who will then be interviewed by the White House. A candidate must be in a position to begin on April 18 (i.e., to have cases completed or reassigned by that date). Preference will be given to individuals who have more than 4 years of experience with the Division.

If you are interested in the detail, **please express interest to your Chief by COB today, March 13.** Each Chief has been asked to recommend not more than one attorney from his or her section, with an explanation as to why that person is a good candidate for the detail. I am asking the Chiefs to give me their recommendations by mid-day Thursday, so that our recommendation may be made by close of business on Friday. The White House plans to conduct interviews next week.

EXHIBIT
12

From: Ciruolo, Caroline D. (TAX) <[b6]@tax.USDOJ.gov>
Sent: Wednesday, February 25, 2015 10:25 PM
To: DL-TAX-ALL-A <DL-TAX-ALL-L@tax.USDOJ.gov>
Subject: White House Detail Opportunity - Very Short Deadline

Tax Division Attorneys:

A six-month detail opportunity for a Tax Division attorney to serve as a **Deputy Associate Counsel** at the White House has become available, to begin in **early April**. The Deputy Associate Counsel is responsible for helping the White House Counsel's office generally, and the vetting team in particular, research and address a variety of substantive and significant tax issues, as well as vetting candidates for Presidential appointments and nominations.

We have been asked to make a recommendation for a candidate(s), who will then be interviewed by the White House. A candidate must be in a position to begin in early to mid-April (*i.e.*, to have cases completed or reassigned by that date).

If you are interested in the detail, please express interest, and send your resume, to your Chief by **6:00 p.m. (Friday), February 27**. Each Chief has been asked to recommend not more than one attorney from his or her section, with an explanation as to why that person is a good candidate for the detail. Additionally, each Chief is to consider the needs of his or her section and the cases in the section, as well as the benefits of this opportunity for a particular attorney, in making his or her recommendation.

I am asking each Chief to send me his or her recommendation (together with the current resume of the recommended attorney) by the end of the day on **Monday, March 2**, so that our recommendation(s) may be made to the White House early next week. The White House plans to conduct interviews shortly thereafter, which may be later next week.