

**TESTIMONY OF CLETA MITCHELL  
ATTORNEY  
PARTNER, FOLEY & LARDNER LLP**

**HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
WEDNESDAY, JULY 30, 2014**

**“IRS Abuses: Ensuring that Targeting Never Happens Again”**

MR. CHAIRMAN;

Thank you for conducting this hearing and for conducting the investigation into the unlawful and unconstitutional political targeting of American citizens and citizens groups by the Internal Revenue Service. You have been determined and dogged and relentless – and for those of us on the receiving end of the IRS targeting – the IRS and its top leaders were determined and dogged and relentless in denying the First Amendment rights of hundreds of organizations and literally thousands of law-abiding, patriotic American citizens. What the IRS has done – and which, I believe, they are still doing and planning to do – is unconscionable, unconstitutional and must be stopped and must never be allowed to happen again.

So, how, Mr. Chairman, can the Congress of the United States make certain that the IRS never again singles out Americans for their political beliefs and subjects them to harassment and the denial of the statutory procedures available to others who do not share their beliefs?

I have several recommendations. These recommendations are based on my years as an attorney representing many, many of these groups before the IRS, as someone who realized in early 2010 that something was going on at the IRS with regard to applications for exempt status, and as someone who represents three different citizens groups who have sued the IRS in the past year over various egregious violations of federal law and the US Constitution.

First, I believe that the Internal Revenue Service is so corrupt and so rotten to the core that it cannot be salvaged. It has too much power, too much money, too many employees and it needs to be absolutely jerked out at the roots. I would urge the members of this Committee and all members of Congress to support Rep. Jim Bridenstine’s bill, House Joint Resolution 104, which would repeal the 16<sup>th</sup> Amendment to the US Constitution. It would abolish the income tax and, by extension, it would abolish the IRS. Yes, that’s what I said. **Abolish the IRS.** The only way to ensure that the IRS never does this sort of thing again is to get rid of the agency altogether

The IRS cannot be saved. The 16<sup>th</sup> Amendment and the IRS should both become relics of American history –and the sooner the better.

The IRS is comprised of 90,000 civil service employees and 2 who are not protected by the civil service system. Two. The Commissioner and the Chief Counsel. Congress thought that by protecting the IRS employees from political pressure, the IRS employees would be politically neutral and would not succumb to political pressure. Well, as Dr. Phil says, “how’s that working out for us?” The entire IRS targeting scandal was carried out by civil service employees who were TOTALLY directed and motivated by political pressures and momentum from one side of the political aisle – that is perfectly clear from the investigation this Committee has conducted. This scandal began as a result of political pressure from the White House, from the President’s speeches over many months demanding that ‘something be done’ about these conservative organizations, political pressure from Democrats in Congress and political pressure from liberal interest groups. All demanding, as Lois Lerner remarked, that her office “do something” about these conservative groups. So they did.

An agency which by every objective measure should have total freedom to function in a totally objective manner, instead completely succumbed to political pressure.

And so I say, #1 – abolish the IRS. Repeal the 16<sup>th</sup> Amendment. This agency can NOT be saved.

But knowing how difficult it is to change the US Constitution – its having happened only 29 times in more than 200 years – and the first 10 times came in the first years of the country – I will turn my attention to what I believe Congress should do in the meantime to ensure that the IRS targeting of citizens and citizens groups never happens again.

Here are ten recommendations that Congress should adopt to protect the American people FROM the IRS, while the citizens go about the business of repealing the 16<sup>th</sup> Amendment.

1. **Prohibit IRS employees from being part of a union.** The National Treasury Employees Union provides no protection to IRS employees that federal statutes and the civil service system do not already provide. Holding an IRS employee accountable for his/her actions seems to take an act of God. So it is redundant for IRS employees to belong to a union. IRS employees should not be unionized. Period. It is a conflict of interest for any IRS employee to be part of a political organization like the Treasury employees union, when these are agents and employees who have such power over all the citizens of the United States. The National Treasury Employees union in this cycle alone, has given 94 % of its contributions to Democrats – including to the ranking member and 10 of the minority members of this Committee.

So I can understand why the Democrats on this and other committees are defending the IRS and trying to shut down the Committee's investigation into the IRS targeting.

2. **Eliminate the application process for exempt organizations other than Section 501(c)(3) entities.** Stop this "mother, May I?" application process to the federal government before a citizens group can function. Every exempt organization should do what every for profit entity does and what any other type of tax entity in America does: just file. Tell the IRS what it is that the entity is and just operate that way. The IRS must never again be allowed to decide who can and cannot be a social welfare organization – or a union or a business league or a veterans organization or any other type of exempt organization. The IRS does not get to decide those questions for any other type of entity in America – and the exempt organizations unit should be confined to making those decisions solely about groups that seek exemption as charitable organizations. The IRS in the targeting scandal and, indeed, according to guidance issued this past March, used the application process as a means of conducting program audits of citizens organizations – without any expertise, criteria, legal standards or accountability. Just eliminate the application process altogether and allow random statistically based program reviews of exempt organizations after they have been operational as a means of ascertaining whether the organizations are operating within their designated section of the Internal Revenue Code. But the application process is hopelessly broken and should be eliminated altogether for all but 501(c)(3) organizations. ONLY Section 501(c)(3) groups are entitled to tax deductible contributions. None of the others receive that benefit and there is no justification for an application process that the IRS admits is not required by law. Get rid of it.
3. **Define by statute that political activities ARE social welfare activities.** Social welfare organizations SHOULD conduct candidate debates and they SHOULD tell the public how candidates stand on issues and they SHOULD develop voting records and voter guides and encourage citizen engagement in politics. Political involvement is a good thing, not a bad thing – and it shouldn't be reserved just to the editorial writers and the political consultants and the professional politicians. Normal Americans who join citizens groups whose values and principles they share SHOULD be able to associate for political purposes and we need to get rid of the obstacles to their involvement. And there should NEVER be a situation where the IRS, as the most powerful agency in the country without bombs and missiles, is allowed to run roughshod over the constitutional rights of the American people to engage in protected speech and political activities. That is not their job and it should be made clear that it is not their job.

4. **Repeal the tax imposed on political expenditures by 501(c) organizations.** It cannot be constitutionally permissible for a citizens group to be taxed on the exercise of its First Amendment rights. The tax on political expenditures by 501(c) organizations is an egregious and hateful tax and should be repealed.
5. **Strengthen 26 U.S.C. § 6103 to make it meaningful for taxpayers, not capable of being used as an excuse for the IRS to fail to cooperate with taxpayers whose rights have been violated by the IRS.** Congress enacted Section 6103 for the clear purpose of protecting taxpayers from having their confidential taxpayer information inspected or released by IRS employees. Now, the IRS uses Section 6103 as an excuse for NOT telling taxpayers the truth when an IRS employee has unlawfully inspected or disclosed confidential taxpayer information. Section 6103 is relied upon by the IRS as a shield to protect itself, and its employees, from being held accountable for violating 6103. For example: If I learn or believe that my confidential tax information has been inspected, compromised, or released, the IRS takes the position that it cannot tell me, the taxpayer who is the victim of a violation of this law, anything about the violation. The IRS argues that the IRS employee who perpetrates the offense is ALSO a taxpayer and for the IRS to disclose information to me about the compromise or disclosure of my taxpayer information would constitute a violation of the IRS employee's 6103 rights. Yes, the IRS has turned Section 6103 on its head – it is unbelievable but some courts have bought this legal fiction. Congress has to fix it.

Some recommendations for strengthening Section 6103:

- Congress should provide a cause of action for taxpayers to be able to sue personally any IRS employee who violates Section 6103, and should provide for treble damages to injured taxpayers.
- Any taxpayer, upon written request, should be able to obtain the name and employee ID information about any IRS employee who has accessed or inspected the taxpayer's information and the legal authority for the IRS employee's inspection.
- Congress should repeal the authority of state and local government agencies to have access to the taxpayer's federal tax information or, at the very least, require state or local agencies to issue subpoenas, with notice to the taxpayer of the request for inspection by the state or local government agency, employee or official of the taxpayer's confidential federal tax information.
- Prohibit the sharing of taxpayer information by the IRS with any other federal agency without due process: a subpoena and written notice to the taxpayer that the taxpayer's confidential information is being sought by another federal agency.

- Shift the burden from the taxpayer to the IRS when it comes to taxpayers being forced to provide information to the IRS. Make the IRS responsible for showing that any information it seeks from taxpayers has a lawful, legitimate purpose and is not just demanded by an overreaching federal employee. Section 6103 should protect taxpayers from being forced to provide information to the IRS to which it is not entitled, thereby allowing the IRS to unlawfully inspect confidential information that taxpayers should not have to provide without a legal basis for doing so.

Section 6103, is supposed to protect taxpayers from the unlawful inspection or disclosure of confidential taxpayer information. It should NOT be used as an excuse for the IRS to refuse to tell taxpayers who has unlawfully inspected or disclosed their taxpayer information, and it should not be the catch-all excuse for the IRS to avoid accountability to Congress and the taxpayers for violations of the rights of the American people. Section 6103 needs to be thoroughly reviewed and strengthened for the benefit of the taxpayers, NOT the IRS.

6. **Repeal the provision of the IRC that requires exempt organizations to disclose their donors to the IRS.** There is no public purpose to this mandatory, compelled disclosure of donor information; it is not publicly disclosed, nor should it be. And we saw just three years ago, in the first inkling of the IRS targeting scandal, the situation where the IRS targeted several donors to one conservative group and attempted to impose a gift tax on those donors for their contributions to that exempt organization. There is no public policy imperative for citizens groups to be required to disclose to the IRS the donors to their organizations. Congress should repeal this provision and prohibit the disclosure to the IRS of donors to exempt groups.
7. **Prohibit the use of or reliance upon by the IRS of any/all information regarding contributions to candidates, political organizations, parties, committees or exempt organizations by a taxpayer for purposes of targeting or initiating audits of any taxpayer.** I believe that the IRS has used campaign finance reports of donors / contributors to political campaigns as a selection criteria for personal IRS audits. I believe this Committee should investigate that issue. I have received too many reports from too many people from across the nation to think it is coincidental. And I am quite certain it has happened because I noticed IRS Commissioner Koskinen, in his first appearance before the House Ways & Means Committee in January, came prepared and briefed by his staff – as he always does – he shows up spouting the party line – but he made a preemptory comment that ‘of course donors would be more frequently audited because they are higher income persons...” That is not what has happened. Imagine that the IRS uses campaign finance reports, required to be filed with the FEC – or a state or local campaign finance agency -- as the source for targeting taxpayers for IRS personal tax audits. That should be investigated by this Committee – did they

just use the Romney donor information? Or did they also use the Obama donor information for selecting their targets for audit? This Committee should find the answers to that question – and using reports of donors to political campaigns and committees as a basis for IRS audit should be illegal. Making an after tax voluntary campaign contribution should not subject a donor to an IRS audit. This prohibition should apply as well to the use by IRS employees of contribution and/ or donor information disclosed to the IRS of contributions to exempt organizations – See #7 above – and to the use of ANY reports of taxpayer campaign contributions required to be disclosed to local, state or federal campaign finance agency.

8. **Amend 42 USC Section 1983 to reinforce that citizens are entitled to constitutional protections when dealing with any federal agency; establish under the statute that citizens have a cause of action against IRS employees - and any federal employees - who violate their constitutional rights. Just as it is the case with state and local government employees.** We believe from our legal research that there is a clear cause of action against the IRS employees personally – people like Lois Lerner – who violated the constitutional rights of the organizations targeted by the IRS in this scandal. The IRS employees argue to the federal courts that there is NO cause of action available to the injured citizens and citizens groups because there is no statute which clearly authorizes the suit- and thus, they claim, they are immune from suit. We have argued that that is not the case – and have cited to the Court that the reason there is NOT a specific provision included in the Internal Revenue Code is that, when Congress was considering and enacting the Taxpayer Bill of Rights in 1987, the IRS commissioner testified to Congress that there wasn't a need to include such a provision in the Code because the Supreme Court had already recognized that a federal employee, including any employee of the IRS, who violates the constitutional rights of a citizen may be sued personally for those actions.

My fellow attorneys and I who represent the plaintiffs who have filed these lawsuits disagree and we believe that such a cause of action does exist. But it would certainly enhance the protections available to the American taxpayers against abuse and discrimination against them by the IRS and other federal employees if Congress were to codify the Supreme Court's decision in *Bivens v Six Unnamed Agents*, and to give the American people the same rights against federal employees that now exist against state and local employees. A violation of the civil rights of a citizen should be capable of being redressed whether it is a local policeman or an IRS employee who has committed the violation of a person's constitutional rights.

9. **Reaffirm clearly that the laws Congress enacted to provide due process rights to the American people at the hands of their government and to protect the citizens from over-regulation and overreach by federal agencies – that those laws do in fact apply to the IRS, just as they apply**

**to other federal agencies.** In the past several years, I have seen, heard and watched the IRS assert that the laws enacted by Congress either do not apply to the IRS or the IRS essentially *ignores* the federal law: the Administrative Procedures Act, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Federal Records Act, the Federal Information Security Management Act – these are all examples of federal statutes the IRS either disregards or actually argues are inapplicable to the agency. The IRS has made a mockery of the Freedom of Information Act, either lying outright to citizens who file FOIA requests – telling them there are no responsive documents, but when sued by the taxpayer, it turns out that there are thousands of responsive documents. Or, what appears to be the current practice is for the IRS simply to ignore FOIA requests, forcing citizens to sue to obtain documents from the agency. The IRS has contempt for the law and contempt for the citizens. Congress should at the very least take steps to clarify for the judiciary that, indeed, the IRS and its employees are not immune from the application and coverage of the laws Congress enacts and failure to comply will result in adverse consequences to the agency.

10. **Apply the provisions of 18 U.S.C. § 1001 to federal agencies and employees: if the citizens can be punished for lying to the government, the government and its employees should be capable of being punished for lying to the American people.** 18 U. S. C. § 1001 makes it a criminal offense for any person to make a false statement to a federal agency, agent or investigator. Yet, the IRS has made false statements to the American people consistently, and with seeming impunity. The IRS Commissioner in March 2012 told this Committee that there was no targeting by the IRS of citizens groups based on their political beliefs. That was a lie. The IRS lied to the American people when it stated publicly last November that there were no ‘supporting documents’ related to the proposed IRS regulations for 501(c)(4) organizations. We are now suing the IRS and Treasury for failure to produce such documents via a FOIA request. And we have started receiving documents pursuant to a scheduling order in the federal court – but we know for a fact, again because of the work of this Committee, that there are thousands of documents related to the proposed regulation of citizen speech and political activities, going back several years. The IRS should not be allowed to lie with impunity to the people or their elected representatives in Congress, just as citizens cannot lie to federal agencies such as the IRS without fear of criminal prosecution.

These are recommendations that have arisen based on my experiences with the IRS over the past several years – within the administrative, rulemaking and litigation contexts.

Lois Lerner famously said that the IRS targeting scandal arose because of some ‘rogue’ agents in Cincinnati. That was a lie – and she should be punished for lying to the American people.

But her reference to there being rogue agents is not wrong – the IRS as a whole has gone rogue. Congress has some heavy lifting if it is to try and rein in this out-of-control agency.

I end where I began: repeal the 16<sup>th</sup> Amendment and abolish this monstrosity. But in the meanwhile, get control of the agency by firmly reinstating the rule of law within it – and removing many of the opportunities and temptations that exist under current law for the targeting scandal to happen again.

Thank you for your hard work and efforts on behalf of the American people.