IS THE OBAMA ADMINISTRATION CONDUCTING A SERIOUS INVESTIGATION OF IRS TARGETING?

HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC GROWTH,
JOB CREATION AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

FEBRUARY 26, 2014

Serial No. 113–92

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.fdsys.gov
http://www.house.gov/reform

U.S. GOVERNMENT PRINTING OFFICE

87–350 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

DARRELL E. ISSA, California, *Chairman*

JOHN L. MICA, Florida
MICHAEL R. TURNER, Ohio
JOHN J. DUNCAN, JR., Tennessee
PATRICK T. MCHENRY, North Carolina
JIM JORDAN, Ohio
JASON CHAFFETZ, Utah
TIM WALBERG, Michigan
JAMES LANKFORD, Oklahoma
JUSTIN AMASH, Michigan
PAUL A. GOSAR, Arizona
PATRICK MEEHAN, Pennsylvania
SCOTT DESJARLAIS, Tennessee
TREY GOWDY, South Carolina
BLAKE FARENTHOLD, Texas
DOC HASTINGS, Washington
CYNTHIA M. LUMMIS, Wyoming
ROB WOODALL, Georgia
THOMAS MASSIE, Kentucky
DOUG COLLINS, Georgia
MARK MEADOWS, North Carolina
KERRY L. BENTIVOLIO, Michigan
RON DESANTIS, Florida

ELIJAH E. CUMMINGS, Maryland, *Ranking Minority Member*
CAROLYN B. MALONEY, New York
ELEANOR HOLMES NORTON, District of Columbia
JOHN F. TIERNEY, Massachusetts
WM. LACY CLAY, Missouri
STEPHEN F. LYNCH, Massachusetts
JIM COOPER, Tennessee
GERALD E. CONNOLLY, Virginia
JACKIE SPEIER, California
MATTHEW A. CARTWRIGHT, Pennsylvania
TAMMY DUCKWORTH, Illinois
ROBIN L. KELLY, Illinois
DANNY K. DAVIS, Illinois
PETER WELCH, Vermont
TONY CARDENAS, California
STEVEN A. HORSFORD, Nevada
MICHELLE LUJAN GRISHAM, New Mexico
Vacancy

LAWRENCE J. BRADY, *Staff Director*
JOHN D. CUADERES, *Deputy Staff Director*
STEPHEN CASTOR, *General Counsel*
LINDA A. GOOD, *Chief Clerk*
DAVID RAPALLO, *Minority Staff Director*

SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION AND REGULATORY AFFAIRS

JIM JORDAN, Ohio, *Chairman*

JOHN J. DUNCAN Jr., Tennessee
PATRICK T. MCHENRY, North Carolina
PAUL GOSAR, Arizona
PATRICK MEEHAN, Pennsylvania
SCOTT DESJARLAIS, Tennessee
DOC HASTINGS, Washington
CYNTHIA LUMMIS, Wyoming
DOUG COLLINS, Georgia
MARK MEADOWS, North Carolina
KERRY BENTIVOLIO, Michigan
RON DESANTIS Florida

MATTHEW A. CARTWRIGHT, Pennsylvania, *Ranking Minority Member*
TAMMY DUCKWORTH, Illinois
GERALD E. CONNOLLY, Virginia
MARK POCAN, Wisconsin
DANNY K. DAVIS, Illinois
STEVEN A. HORSFORD, Nevada

CONTENTS

IS THE OBAMA ADMINISTRATION CONDUCTING A SERIOUS INVESTIGATION OF IRS TARGETING?

Wednesday, February 26, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION,
AND REGULATORY AFFAIRS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 1:35 p.m., in Room 2154, Rayburn House Office Building, Hon. Jim Jordan [chairman of the subcommittee] presiding.

Present: Representatives Jordan, DeSantis, DesJarlais, Lummis, Meadows, Bentivolio, Issa (ex officio), Cartwright, and Connolly.

Staff Present: David Brewer, Senior Counsel; Drew Colliatie, Professional Staff Member; Linda Good, Chief Clerk; Tyler Grimm, Senior Professional Staff Member; Christopher Hixon, Chief Counsel for Oversight; Ashok M. Pinto, Chief Counsel, Investigations; Sarah Vance, Assistant Clerk; Jeff Wease, Chief Information Officer; Meghan Berroya, Minority Counsel; Susanne Sachsman Grooms, Minority Deputy Staff Director/Chief Counsel; Jennifer Hoffman, Minority Communications Director; Adam Koshkin, Minority Research Assistant; Julia Krieger, Minority New Media Press Secretary; Elisa LaNier, Minority Director of Operations; Juan McCullum, Minority Clerk; Brian Quinn, Minority Counsel; Donald Sherman, Minority Counsel.

Mr. JORDAN. The committee will come to order. Today's hearing constitutes the committee's ongoing oversight of the Department of Justice's investigation into the IRS' inappropriate treatment of conservative groups applying for tax-exempt status. On May 10th, 2013, Lois Lerner apologized for the IRS' targeting of Tea Party groups while answering a pointed question at some obscure Friday morning tax law panel. She said, "They use names like 'Tea Party' or 'Patriots,' and they selected cases simply because the applications had those names in the title. That was wrong. That was absolutely incorrect, insensitive, and inappropriate."

Immediately after Lerner's apology, the President and the Attorney General vowed to get to the bottom of the targeting. Attorney General Holder called it, "outrageous and unacceptable," and the President said his administration would not tolerate this behavior in any agency.

One month later, I asked then FBI Director Mueller a couple of basic questions. I said, Who is the lead agent? How many agents

have you assigned to the case? And have you interviewed any of the victims? His answers were, I don't know, I don't know, I don't know. Not exactly inspiring a lot of confidence in the quality of this investigation, one month after the President and the Attorney General had made the statements that they made.

We sent letters to the FBI and the DOJ seeking information about the investigation. At every turn, they refused to cooperate. There is new information raising concerns about the integrity of the Administration's investigation. Department of Justice Attorney Barbara Bosserman is leading the investigation. Publicly available records show that Ms. Bosserman contributed almost $7,000 to President Obama's political campaigns and the Democratic National Committee over the last few years.

Last month, anonymous sources in the Justice Department leaked information to the Wall Street Journal that no criminal charges would be filed in the IRS matter, despite the fact that many victims of the targeting had not yet been interviewed. And shortly thereafter, on national television, the President declared that there was, "not a smidgeon of corruption in the IRS targeting."

I don't know how the President can make this claim because the Department of Justice had told me and lot of other members that it cannot discuss an ongoing investigation. Earlier this month, the committee heard from victims Catherine Engelbrecht and Becky Gerritson, who testified that they have not been interviewed. Jay Sekulow testified that not one of his 41 clients had been interviewed. He also testified under oath that Ms. Bosserman was the highest ranking Department of Justice official he had spoken with about the investigation.

Just imagine how this looks to the American people. The President says, there is not a smidgeon of corruption. The Administration leaks that it will not file charges, and yet witnesses have not been interviewed, and a substantial contributor to the President is leading the investigation.

Again, doesn't inspire much confidence that this is a true investigation. There is still serious questions that needs to be answered. Our witnesses this afternoon come with years of experience, either working at the Department of Justice or advising the President on governmental ethics. Through their testimony, the hope is we may understand the dangers of perceptions of bias and politicized leaks in how the Administration can work to restore public faith in this critical investigation.

The American people are rightly outraged. They deserve the truth. And that is what we are going to get to today. And with that, I would yield to the ranking member for his opening statement.

Mr. CARTWRIGHT. I thank you, Mr. Chairman.

Today marks the second hearing that this subcommittee has held in a span of 3 weeks about the IRS. In less than 24 hours from now, it will be convening yet another hearing on this very same matter. Thus far, the Oversight and Government Reform panel has interviewed no fewer than 38 IRS and Treasury Department employees and has received more than 385,000 pages of documents to review in this matter. Responding to congressional investigations

in this matter has now cost American taxpayers at least $14 million so far and still counting.

And none of the evidence uncovered so far shows any political motivation or any White House involvement, which is exactly the same thing that the Inspector General of the Treasury Russell George told us in this room many months ago that he found no evidence of a political animus either.

The Department of Justice and the FBI are conducting their own independent investigation to determine if there was any crime committed by anybody at the IRS. They do not rely on our investigative findings, and they will reach their own conclusions. Today's hearing is about allegations that there is some political bias in the Department of Justice's investigation.

Republicans have criticized the Department for failing to discuss the details of its ongoing criminal investigation and that this is somehow a coverup for the political bias that they are alleging. As the majority knows well, the Department of Justice has a longstanding practice, to which I have alluded many times from this side of the dais of not disclosing information about ongoing criminal investigations. It is a practice that Americans are familiar with. When the county sheriff at home is involved in an investigation and is interviewed on television, he or she always says, "I can't comment on an ongoing investigation," and Americans understand that, and they're comfortable with it.

The Justice Department handles it the same way, and this is a practice spanning Democratic and Republican administrations in longstanding practice of not commenting. That is why none of the witnesses testifying today have any direct knowledge about the investigation and including who in the Department is actually leading that investigation, what they found, and when they will conclude.

But maybe the most troubling criticism is the chairman's claim that the investigation has, "the appearance of a substantial and material conflict of interest," and the basis for the chairman's claim is that a career prosecutor who is one of at least 13 DOJ and FBI employees involved in the investigation exercised her constitutional right to participate in the democratic process and made political donations.

During the last hearing we had on this very same topic, I entered into the record the legal opinion of Professor Daniel Richman of Columbia University Law School, who has spent decades working on just such issues, and prior to serving in academia, served as an assistant U.S. attorney in the Southern District of New York and was the chief appellate attorney in that office. Professor Richman categorically rejected the chairman's interpretation of the law saying any claim that these contributions in and of themselves create a conflict of interest strikes me as meritless.

The plain and undisputed—and indisputable language of the law allows career civil servants, like any other American, to exercise their constitutionally protected right to participate in the democratic process. Can you imagine, Mr. Chairman, if a private employer looked into a private citizen's participation in the political process before hiring them or didn't give them an assignment based solely on whether they were a Democrat or a Republican? Where

would it end? Would it end at campaign contributions, or what about signing a petition to get their Member of Congress on the ballot or about whether they—whether or not they simply voted in the last election.

In fact, what is even more interesting is that this is the exact same thing that some of the groups applying for the (c)(4) status at the heart of this matter are complaining about, that they are being scrutinized excessively because of their political stances and their involvement in the political process.

So let me make this final point clear: If the Justice Department were to adopt the Republican position here and start screening career Federal prosecutors for their participation in the democratic process before assigning them cases, it would not only be illegal; it would be unconstitutional and downright un-American.

I yield back, Mr. Chairman.

Mr. JORDAN. I would just remind the ranking member, no one is talking about Ms. Bosserman not keeping her job. No one has ever questioned the character and the professionalism of Ms. Bosserman. All we are saying is, is that 28 CFR. 45.2, says "Disqualification arising from personal or political relationship, the employee's participation would not create an appearance of conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution."

It couldn't be any clearer. This is not—this is not me making this up. This is straight from the rules that apply to the Justice Department personnel. So, to equate it to the private sector, it has just simply no bearing whatsoever on the issue at hand.

With that, I recognize our distinguished panel today.

Excuse me, is Mr. Connolly giving an opening statement? I was looking for the—I thought the chairman and the ranking member of the full committee were going to be here for an opening statement, but if they are not, we are willing to see if Mr. Meadows or Mr. Bentivolio has an opening statement, or Mr. DeSantis.

Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman.

I don't really have an opening statement, other than I just heard the ranking member statement and your own. I would just say if we are going to, you know, apply the standard across the board equally, then frankly, it would tend to disqualify the credibility of the IG, Mr. Russell George, who has done precisely the same kind of political activity, has contributed to Republican causes was a member of the Republican staff, has met exclusively with the Republican staff of this committee. So if we are going to cast aspersions of somebody else's character or just questioning whether she meets the standard, we could apply the same thing to the IG, whose testimony we rely on to create, you know, a great scandal, that turns out to be very limited testimony and rather cherry-picked at that, so I look forward to hearing us explore this issue. I hope we will do it fully and across the board in an evenhanded way.

Thank you, Mr. Chairman.

Mr. JORDAN. We are going to pause for just a second because I know the chairman is on his way and would like to make an open-

ing statement, and I know we do have votes any minute now. Let me introduce our panel.

Maybe we can swear them in and then come back to Mr. Chairman Issa's opening statement.

We have first Mr. George Terwilliger, who is a partner at Morgan Lewis law firm. We have Ms. Eileen O'Connor, who is a partner at the firm Pillsbury Winthrop Shaw Pittman. Mr. Hans von Spakovsky is the Edwin Meese, III,

Center for Legal and Judicial Studies senior legal fellow at the Heritage Foundation. Mr. Glenn Ivey is a partner at Leftwich and Ludaway. And finally, Mr. Richard Painter is a Walter Richey professor of Corporate Law at the University of Minnesota School of Law.

I want to thank you all for being here. We know it is not easy always to come for these, and—but we appreciate your expertise and your willingness to share with us that expertise today.

Pursuant to committee rules, all witnesses will be sworn in before they testify, so if you will please stand and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

Let the record show that each of our witnesses answered in the affirmative.

The rules are, you are going to get 5 minutes, more or less, close to 5 is how we will do it, and we will work right down the line, but unfortunately, that is not going to happen until after we vote, and I am hoping chairman—so we are going to recess now, and the chairman will have an opening statement when we come back and we will get to your testimony. This is a good way to break as we are going to get on a day like today, so you can retire to either room. There are restroom facilities, coffee, whatever you need, and we will be back in, how many votes again?

Mr. CONNOLLY. Three votes.

Mr. JORDAN. Two or three. Three. So, 45 minutes. 30 to 45 minutes is what it is going to take, so thank you very much, and we stand in recess.

[Recess.]

Mr. JORDAN. The committee will be in order. And we recognize the chairman of the full committee with the understanding that Ms. O'Connor is on her way back. But recognize the chairman for his opening statement.

Chairman ISSA. Thank you, Mr. Chairman.

And I took special note of your hearing today. The series of hearings you have held really are critical to a full and complete understanding of the scope of the injustice going on before, during, and after the discovery of the IRS targeting of 501(c)(4) groups. Today's panel is an excellent panel, and I look forward to hearing all of their testimony. I think the one thing that we all know is that solutions for large bureaucracies, and particularly ones that operate by necessity behind closed doors, must first start with a full admission of what has happened, what safeguards existed and were not observed, and what safeguards did not exist.

This committee has discovered that the safeguards of confidential information are selective and that in fact the safeguards to protect against the release of private information, although they failed at times at the IRS, are currently being used to hamper investigation and the public's right to know who was targeted and for how long and, in fact, who is still being targeted. I know tomorrow you will have a list of groups, both nonprofit 501(c)(3)s and 501(c)(4)s, all of whom are opposed to the very selective partisan change that the President has proposed. I am more concerned today with this hearing because DOJ's decision, prosecutory discretion, appears to be a clear abuse of discretion. There is no doubt that DOJ claimed to be doing investigations, but the highest law enforcement officer at the FBI could not name someone. The Attorney General seemed not to know anyone. And there have been mixed statements about nothing was expected to come, but maybe it would come. This is as ambiguous as the Attorney General's statement that he will leave sometime in 2014, or he won't.

I believe that our committee, and with your leadership, Mr. Chairman, has an absolute responsibility to make sure that the Department of Justice reconsiders their investigations and their possible prosecutions of people who abused the trust of the American people. And so, for that, I am already in your debt, Mr. Chairman. I look forward to this hearing, and I very much believe that this committee has a special role in making sure this never happens again. Thank you.

I yield back.

Mr. JORDAN. I thank the chairman for his statement and for his leadership on this issue and many others.

With that, we will turn to our distinguished panel.

Mr. Terwilliger, you are going to start. You have got 5 minutes. There will be members trickling in and out of here, but you have done this before, so fire away.

WITNESS STATEMENTS

STATEMENT OF THE HONORABLE GEORGE J. TERWILLIGER, III

Mr. TERWILLIGER. Thank you, Mr. Chairman, Chairman Issa, Mr. Cartwright, members of the committee.

Thank you for inviting me to express my views concerning the Justice Department's investigation of possible abuse of IRS authority. I am not here today to opine on the merits of the underlying allegations of improper conduct involving the IRS. Rather, I agreed to speak to what is, in my experience and best judgment, the appropriate means for the Department of Justice to conduct such an investigation.

That background and experience at the Department of Justice began when I served while in law school as a law clerk in the Civil Appellate Section and ended when I was the acting Attorney General at the conclusion of the Bush One administration. In the 15 years in between, I served as a career assistant United States attorney, and as the Deputy Attorney General, as well as a Presidential-appointed United States attorney.

I also would like to note at the outset that so long as we have a tax system that depends on voluntary payment by our citizens, we need a strong IRS capable of performing tax examinations and enforcement that can render the tax system equal and fair for all. I am sure most IRS personnel work hard to do just that. But if, from either within or without, their work has been despoiled by the actions of a few, then, obviously, that needs attention.

Two fundamental points establish why questions need to be answered concerning how the matter is being addressed by the DOJ investigation. First, any credible allegation that IRS powers of inquiry or approval are being influenced by or used in furtherance of partisan political objectives is a matter of the utmost concern and needs to be investigated credibly and thoroughly. Second, and equally important in my view, public confidence in such an investigation is critical, not just to this specific matter, but more broadly to the Justice Department's institutional responsibility to secure the independent administration of justice. These two very critical objectives affecting public confidence in government have now, due to a combination of circumstances, been put in jeopardy by legitimate questions concerning at least the appearance of independence of the current DOJ investigation. How can the public have confidence that an investigation under the control of the Attorney General and subordinates at the Department of Justice will be vigorous in its pursuit of the truth and fair in its analysis of the facts when the President has already stated, in effect, that there is nothing to it, as he has publicly stated while the investigation has been pending.

Public reports also state that the prosecutor leading the investigation, or substantially responsible for it, has provided financial support to Democratic Party campaigns, including the President's. I do not believe such contributions should disqualify this lawyer, nor do I believe that the lawyer assigned is on account of such political contributions incapable of conducting a vigorous and thorough investigation, nor do I believe as a general proposition that the decision as to whom to assign to a case for investigation or prosecution ought to turn on whether a given prosecutor has a particular political affiliation or association.

However, given the circumstances as they have developed in this matter, if the objective is to assure the public that an investigation of allegations that government officials in this administration may have intentionally impeded the exercise of First Amendment rights by private citizens, then this is a case where more investigative independence, rather than less, is needed. I am no fan of the now expired independent counsel statute, and nothing I say today should be construed as suggesting that we put that law back on the books. It is not needed because the Attorney General already has wide authority to make investigative assignments to persons within or outside the Justice Department that can assure the public of the independence and integrity of an investigation.

Such appointments are not new, and examples of them abound. Current FBI Director Comey, for example, while serving as acting Attorney General under President George W. Bush, made such appointments. So did Attorney General Reno during the Clinton administration. And while I served as Deputy Attorney General and

acting Attorney General, we made such appointments. In each of these and many other instances, the common factor in making such an appointment is taking steps to assure the public that an investigation of unquestioned integrity will be conducted.

In my view, it is past time for the Attorney General to act in this instance to use these authorities and appoint a lead counsel for the investigation of alleged IRS abuse who will have a charter of independence. Such an appointment is needed to provide assurance of the integrity of the investigation that the public deserves, and respect for venerable Justice Department practice is required. I thank you.

Mr. JORDAN. I thank the gentleman.

[Prepared statement of Mr. Terwilliger follows:]

Prepared Statement of
Hon. George J. Terwilliger III
before the
House Committee on Oversight and Government Reform
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs
Wednesday, February 26, 2014

Mr. Chairman, Ranking Member Cartwright, members of the Subcommittee:

Thank you for inviting me to express my views concerning the Justice Department's investigation of possible abuse of the examination power of the Internal Revenue Service ("IRS") for political purposes. I am not here today to opine on the merits of the underlying allegations of improper conduct involving the IRS. Rather, I agreed to speak to what is, in my experience and best judgment, the appropriate means for the Department of Justice to conduct the investigation into those allegations that it has already decided is required. My comments today are my own, based on my more than fifteen years of experience as a line and supervisory attorney in the Department of Justice, culminating in my service as the Deputy Attorney General during the George H.W. Bush administration, and I do not speak on behalf of my colleagues at Morgan, Lewis & Bockius LLP or any individuals or entities whom I represent.

I am aware that committees of the Congress and this House are looking into the matter.[1] The review of possible abuse of executive power is, of course, one of Congress's most important oversight responsibilities and a key check on our constitutional balance of power. But legislative oversight is not a substitute for—and was never intended to be a substitute for—a thorough and impartial law enforcement investigation. The public rightly demands that possible misconduct be investigated fairly and impartially. This is particularly true when the possible misconduct involves the Executive Branch.

Two fundamental points establish why questions need to be answered concerning how the matter is being addressed by the DOJ investigation. First, the IRS has unparalleled powers to deeply scrutinize the financial and related activities of individuals and organizations in America. Any credible allegation that these powers are being used in

[1] *See, e.g.*, Memorandum from the Majority Staff, Committee on Oversight and Government Reform to the Members of the Committee on Oversight and Government Reform (Sept. 17, 2013).

furtherance of partisan political objectives is a matter of the utmost concern and needs to be investigated credibly and thoroughly. Second, and equally important, public confidence in the investigation is critical not just as to this specific matter, but more broadly to the Justice Department's institutional responsibility to secure the independent administration of justice.

Let me be clear–I oppose a witch hunt for culprits in the IRS. So long as we have a tax system that depends on voluntary payment by our citizens, we need a strong IRS capable of performing the tax examinations and tax enforcement that can render the tax system equal and fair for all. There are many good people doing what are often unpopular jobs in the IRS. But when questions arise about whether their good work may have been sullied by people within or outside the IRS directing or influencing its activities for improper political purpose, that needs to be investigated thoroughly and in such a way that gives the public confidence in its government.

These two very critical factors affecting public confidence in government—that of non-partisan administration of the laws and impartiality in law enforcement investigations—were captured in a clear and timeless observation by then-Attorney General, and later Supreme Court Justice, Robert Jackson in 1940, when he stated:

> "It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself."[2]

Since the Treasury Inspector General for Tax Administration's ("TIGTA") conclusion in May that the Determinations Unit, a branch of the IRS's Rulings and Agreements office, "developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names,"[3] the Justice Department has announced its intention to investigate this conduct and the Attorney General has recently left open the possibility that

[2] Robert H. Jackson, Attorney General of the United States, Address at the Second Annual Conference of United States Attorneys (April 1, 1940).

[3] Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053, Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review (May 2013).

criminal sanctions may be imposed against wrongful perpetrators in the IRS.[4] It will take more than this statement, however, to assure the public that the investigation is thorough and unbiased. The Justice Department investigation in the IRS matter should be defined by the extent to which the public perceives that investigation to be impartial—that is, one driven by a determination to get the relevant facts without regard to any partisan or political effect disclosure of the facts may have. A combination of circumstances now give rise to legitimate questions concerning the level of confidence the public can have in the independence of the current DOJ investigation.

First, while that investigation has been pending, the President—the unitary head of the Executive Branch and thus the prosecutor's superior—has publicly stated in a nationally televised interview that there was no corrupt abuse of IRS authority.[5] I do not know what the President's intent was in making that very public conclusion, but I know very well what the effect of it can be, even if unintended. How can the public have confidence that an investigation firmly under the control of his Attorney General and subordinates at DOJ will be vigorous in its pursuit of the truth and fair in its analysis of the facts when the President has already stated, in effect, that there is nothing to it?

This is not just any investigation of possible violations of law. Rather, it is one that, if done thoroughly, will examine whether partisan political considerations were involved in making decisions about searching examinations, done for tax purposes, of the activities of organizations and individuals involved in political activity protected from government interference by the First Amendment. Public reports state that the prosecutor leading the investigation has provided financial support to Democratic Party campaigns, including the President's campaign.[6] I do not believe such contributions should disqualify this lawyer from the assignment, nor do I believe that the lawyer assigned is, on account of such political contributions, incapable of conducting a vigorous and thorough investigation. Nor do I believe as a general proposition that the decision to whom to assign a case for investigation ought to turn on whether a given prosecutor has a particular political affiliation or association.

---

[4] Rachael Weiner, *Holder has ordered IRS investigation*, Wash. Post, May 14, 2013; Stephen Dinan, *Holder won't rule out criminal charges for employees in IRS scandal*, Wash. Times, Jan. 29, 2014.

[5] *See* Stephen Dinan, *Obama didn't consult Justice before saying no corruption at IRS*, Wash. Times, Feb. 4, 2014.

[6] Letter from Reps. Darrell Issa and Jim Jordan to Attorney General Eric H. Holder, Jr. (Jan. 8, 2014).

However, considering that this is an investigation of allegations of partisan political activity by government officials, that the prosecutor assigned has made political contributions to the President's party and the President's own campaign and that the President publicly stated his conclusion that there has been no wrongdoing, if the objective is to provide public confidence in the integrity of the inquiry, then this is a case where more investigative independence from the Administration and the Attorney General is needed.

In addition, credible reports show that IRS officials involved in aspects of the matter went to the White House on an unusual number of occasions.[7] Public reports also disclose that since at least 2010, the White House's political operation has been concerned with conservative political organizations.[8] A study conducted by scholars at the non-partisan American Enterprise Institute suggested that the IRS's targeting of Tea Party groups for additional scrutiny had an appreciable negative impact on their effectiveness in turning out voters during the 2012 election.[9] Thus, because a thorough investigation will of necessity involve looking into the political operation within the administration—if to simply rule out any impropriety—this is one of those few, but critically important, instances where an administration should not be investigating itself. Perhaps there is no link between the White House and those IRS employees that scrutinized certain groups, and perhaps there are legitimate explanations for the number of White House-IRS interactions during this period, but such explanations need to be examined and tested by an independent investigation.

I am no fan of the now expired independent counsel statute, and nothing I say today should be construed as suggesting we put that law back on the books.[10] It is not needed because the Attorney General already has wide authority in conducting investigations to make investigative assignments in a manner that can assure the public of the independence and integrity of an investigation. Indeed, existing law permits the Attorney General to appoint a special or independent counsel from within the Justice Department or from outside of it. Such counsels can be given all authority and have the final word on what should be

---

[7] *See, e.g.*, John Steele Gordon, *A Frequent Visitor to the White House*, Commentary Magazine, May 27, 2013; Susan Ferrechio, *Lawmakers zero in on IRS meetings at White House*, The Wash. Examiner, May 23, 2013; Editorial, *IRS Chief's 118 White House Visits Must Be Explained*, Investors.com, May 28, 2013.

[8] *See*, John McCormack, *Koch Industries Lawyer to White House: How Did You Get Our Tax Information?*, The Weekly Standard, Sept. 20, 2010; Editorial, *Obama's IRS 'Confusion,'* The Wall Street Journal, Feb. 7, 2014.

[9] Stan Veuger, *Yes, IRS harassment blunted the Tea Party ground game*, American Enterprise Institute (June 20, 2013), http://www.aei.org/article/economics/yes-irs-harassment-blunted-the-tea-party-ground-game.

[10] *See* 28 U.S.C. § § 591, *et seq.*, expired on June 30, 1999.

investigated or prosecuted, or the Attorney General or another official designated for that purpose can retain the such authority as may be deemed appropriate.[11] In short, the Attorney General has the legal authority to appoint someone to conduct an investigation with as much independence as sound judgment dictates that the circumstances require.

These appointments are not new. Examples of making such appointments abound in presidential administrations of both parties. Current FBI Director Comey, when serving as Acting Attorney General under President George W. Bush, directed a sitting U.S. Attorney to conduct an independent investigation and delegated all the Attorney General's authority to that special counsel. Attorney General Reno, acting in the Clinton administration, moved for appointment of an outside independent counsel under that now repealed statute. When I served as Deputy Attorney General and Acting Attorney General in the George H.W. Bush administration, we appointed special or independent counsels from within and outside the Justice Department and gave them various levels of final authority as we believed the circumstances warranted.

In each of these and many other such instances, the common factor in making such appointments is taking steps that assure the public that an investigation of unquestioned integrity will be conducted. In my view, it is past time for the Attorney General to act in this instance to use these authorities and appoint a lead counsel for the investigation of alleged IRS abuse who will have a charter of independence. Such an appointment is needed to provide assurances of the integrity of the investigation that the public deserves and that respect for venerable Justice Department practice requires.

I thank the Subcommittee again for inviting me to share my views on this matter and look forward to answering your questions.

[11] *See* 28 U.S.C. § 510 (authorizing the Attorney General to delegate any function of his office to any officer, employee, or agency of the Department of Justice).

Mr. JORDAN. Ms. O'Connor.

STATEMENT OF THE HONORABLE EILEEN J. O'CONNOR

Ms. O'CONNOR. I thank the chairman, ranking member, members of the committee. Thank you so much for inviting me.

I speak on my own behalf as a private citizen and not on behalf of my firm or partners or clients. I hope to bring to you some of the understanding I have gained through my many decades of working with the Internal Revenue Code and therefore with the Internal Revenue Service, including the 6 years I was privileged to lead the honorable and dedicated men and women of the Justice Department's Tax Division.

Americans deserve to trust and respect the institutions of their government. Revelations that the machinery of government might have been turned against our own citizens damaged that trust. And I am grateful for your efforts to learn the whole truth about the group of government activities that have collectively come to be called IRS targeting. Perhaps you are more limited than this in your current inquiry, but for my purposes, the targeting you should be considering is not just the disparate and apparently discriminatory treatment of certain groups in the processing of applications for tax exemption, but also the leaking of confidential information, the disproportionate selection of certain groups for examination, what appears to be a coordinated attack by a multitude of Federal agencies based on information that might be available only to the Internal Revenue Service.

I hope that you are looking into the entire spectrum of what looks very much like serious misconduct by IRS and perhaps other government personnel. The U.S. tax system depends on Americans taking upon themselves to gather their tax information and prepare and file their tax returns every year. One reason they are willing to do this, to provide personal information to the government, is the government's solemn promise, embodied in law providing criminal consequences for its violation, that the information they provide will be kept in the strictest confidence.

When people form organizations and apply for tax-exempt status, they are entitled to expect that their confidential information will be respected as such, that their applications will be processed promptly and considered fairly, in accordance with the applicable law, not in accordance with special procedures designed just for them.

On a Friday last May, a planted question at an ABA conference prompted an IRS official, just in time to get out ahead of an IG report, to admit that the IRS had, as some had long suspected, been targeting conservative groups for additional scrutiny. By Monday, according to news reports, Ways and Means Committee Chairman Camp, Senate Finance Committee Chairman Baucus, the President, Senate Majority Leader Reid, former Speaker Pelosi, Senator Warner of Virginia all had expressed outrage and said something must be done.

These were all a day before the IG's report was even issued. The day it was issued, news reports noted that the President's half brother had received, in just over a month, a determination of tax-exempt status for a questionable organization he had been oper-

ating for more than 2 years. Early the following week, a group of nearly 20 organizations spanning the political spectrum had expressed concern about this serious threat to the First Amendment.

What a shame that Members of the House and Senate squandered the opportunity then to immediately use the tools at their disposal to specially authorize an investigating committee, to appoint a special counsel, to engage in outside counsel to investigate them.

I turn now to the administration's investigation of these matters. My written testimony outlines the Federal regulations that describe the authorities of the civil—excuse me, the Civil Rights, Criminal, and Tax Divisions. Generally speaking, the Tax Division handles all litigation, civil and criminal, trial and appellate, arising under title 26, the Internal Revenue Code. But when criminal offenses to be investigated and prosecuted involve allegations of misconduct by IRS personnel, the investigation and prosecution is the responsibility of the Criminal Division. The Civil Rights Division is charged with the enforcement of the Nation's civil rights laws.

DOJ officials have selected a career attorney in the Civil Rights Division to conduct the investigation. Some have criticized the selection as inappropriate because of her political contributions. But when does support for a sitting President and his party make a person an imprudent choice for an assignment? Not usually. But perhaps it does when the assignment is to investigate the administration's alleged mistreatment of its political adversaries.

Here is why: Justice must not only be done; it must be seen to be done. This has two elements. First, when wrongdoing comes to light, the public deserves to know that those responsible have been identified and dealt with appropriately. Second, not only must laws be enforced impartially, but they must be seen to be enforced impartially. This is why judges recuse themselves from cases; not because they can't rule on them impartially, but because there might be something that would make the public think they are not impartial, and damaging the public trust is a dangerous thing to do.

In 1959, Ian Fleming had his character Goldfinger say, "Once is happenstance. Twice is coincidence. Three times is enemy action." We know, because the Treasury IG's administration report says so, that groups banding together to promote an understanding of, and fidelity to, our Nation's founding principles were targeted for special scrutiny that was harsh, intrusive, probably unnecessary, and resulted in delay, if not the constructive denial, of their applications for tax-exempt status, effectively silencing them during the better part of two election cycles. We know, because they had the courage to come forward and tell us about it, that people engaged in activities directed at improving the integrity of our elections were targeted for scrutiny, not just by the IRS but also by other arms of the Federal Government.

We know because we have seen it in the public domain that the private information of people who contributed to organizations devoted to preserving traditional values was made public, in violation of laws providing for fines and imprisonment of up to 5 years. As an American who cares about our country and our laws and our future, I thank the committee for continuing to press to learn the truth about what appears to be the administration's targeting of

people who disagreed with its policies and encourage you to use all the tools available to you to do so. Thank you.

Mr. JORDAN. Thank you, Ms. O'Connor.

[Prepared statement of Ms. O'Connor follows:]

Testimony of
Eileen J. O'Connor, Esq.
Partner, Pillsbury Winthrop Shaw Pittman LLP
Before the House Subcommittee on
Economic Growth, Job Creation and Regulatory Affairs
Hearing on the Obama Administration's Investigation of IRS Targeting
February 26, 2014

Mr. Chairman, Ranking Member, Members of the Subcommittee: thank you for inviting me.

I speak on my own behalf as a private citizen and not on behalf of my firm or partners or clients. I hope to bring to you some of the understanding I have gained through many decades of working with the Internal Revenue Code and therefore with the Internal Revenue Service, including the six years I was privileged to lead the honorable and dedicated men and women of the Justice Department's Tax Division.

Americans deserve to trust and respect the institutions of their government. Revelations that the machinery of government might have been turned against our own citizens damage that trust, and I am grateful for your efforts to learn the whole truth about the group of government activities that have collectively come to be called "IRS targeting." Perhaps you are more limited than this in your current inquiry, but for my purposes, the targeting you should be considering is not just the disparate and apparently discriminatory treatment of certain groups in the processing of applications for tax exemption, but also

- the leaking of confidential information,
- the disproportionate selection of certain groups for examination, and
- what appears to be a coordinated attack by a multitude of federal agencies based on information that might be available only to the IRS.

I hope that you are looking into the entire spectrum of what appears to be serious misconduct by IRS and perhaps other government personnel.

The U.S. tax system depends on Americans taking it upon themselves to gather their tax information and prepare and file their tax returns every year. One reason they are willing to do this, to provide personal information to the government, is the government's solemn promise, embodied in law providing criminal consequences for its violation, that the information they provide will be kept in the strictest confidence.

And when people form organizations and apply for tax-exempt status, they are entitled to expect that their confidential information will be respected as such, and that their applications will be processed promptly and considered fairly in accordance with the applicable law, and not in accordance with special procedures designed just for them.

~~~~~~~~~~~~~~~
~~~~~~~~~~~~~~~

One Friday last May, a planted question at an ABA conference prompted an IRS official – just in time to get the news out ahead of an IG report – to admit that the IRS had, as some had long suspected, been targeting conservative groups for additional scrutiny. By Monday, according to a Wall Street Journal Washington Wire blog entry posted that day:

- the House Ways and Means Committee had set a hearing a mere four days hence. That Committee had been investigating these allegations for nearly two years.
- Senator Baucus, its Chairman, had said the IRS should prepare for a full investigation by the Senate Finance Committee
- the President had said he was outraged, and that IRS personnel would be held fully accountable for their actions
- Senate Majority Leader Reid had called the prospect of the IRS administering the tax laws selectively based on the political views "troubling" and "a terrible breach of the public's trust"
- Rep. Pelosi had said the tea party targeting had to be "condemned"
- Senator Warner had said "a quick and thorough investigation" should be carried out by the administration and … those responsible for the "betrayal of public trust" should be fired.

These statements of outrage and something-must-be-done came a day before the Inspector General's damning report was even issued. Tuesday, the day it was issued, the New York Post reported that in June 2011 – while conservative groups waited for years – a questionable organization the President's half-brother had established more than two years before received a determination of tax exempt status within about a month of requesting it.

Early the next week, a group of nearly 20 organizations spanning the political spectrum – from the ACLU to the Tea Party Express - had signed a statement that began:

> "It is difficult to conceive of a more serious threat to the First Amendment of the Constitution of the United States than the federal government using its awesome power to target individuals and organizations solely because of their political beliefs."

What a shame that members of the House and Senate squandered the opportunity to immediately use the tools at their disposal -

- to "specially authorize" a committee with authority to investigate the allegations, or
- to appoint a special counsel to investigate the allegations, or
- to engage an outside counsel to advise them in their investigations.

It was right in line with predictions when, just a few weeks later, House Oversight and Government Affairs Committee Ranking Member Cummings said on a Sunday talk show that he thought the evidence adduced to that point showed "that the White House was not involved in this. . . ," adding: "Based upon everything I've seen the case is solved. And if it were me, I would wrap this case up and move on, to be frank with you."

With all due respect, it seems that whether the White House was involved was not only not the only question, but also that it has yet to be fully answered.

~~~~~~~~~~~~~~~~

I turn now to the Administration's investigation of these matters: regulations under Title 28 set out the jurisdictions and responsibilities of various parts of the Justice Department. 28 CFR Part O, Subparts J, K, and M, describe the authority of the Civil Rights, Criminal, and Tax Divisions, respectively. Generally speaking, the Tax Division handles all litigation, civil and criminal, trial and appellate, arising under Title 26, the Internal Revenue Code. But when the criminal offenses to be investigated and prosecuted involve allegations of misconduct by IRS personnel, the investigation and prosecution is the responsibility of the Criminal Division. The Civil Rights Division is charged with the enforcement of the nation's civil rights laws.

DOJ officials have selected a career attorney in the Civil Rights Division to conduct the investigation into the allegations of misconduct by IRS personnel. Some have criticized that selection as inappropriate because the attorney contributed to the President's campaign and to other causes of his political party.

But when does support for the sitting President and his party make one an imprudent choice for an assignment? Not usually. But perhaps it does when the assignment is to investigate the Administration's alleged mistreatment of its political adversaries.

Here is why: Justice must not only be done, it must be seen to be done. This has two elements.

First, when wrongdoing has come to light, the public deserves to know that those responsible have been identified and dealt with appropriately. This is why, when I was at the Department, I initiated a program of press releases to announce newsworthy developments, so that the public would know the law was being enforced, and that there were consequences to violating it. This is important not only to deter potential lawbreakers, but also to reassure law abiding citizens.

Second, not only must the laws be enforced impartially, but they must also be seen to be enforced, in the words of Deuteronomy[1], without respect to persons. It is for this reason

[1] Deuteronomy 1:17 King James Version · Ye shall not respect persons in judgment; but ye shall hear the small as well as the great. .
~~~~~~~~~~~~~~~~

that judges recuse themselves from deciding cases. Not because they would not be able to rule impartially, but because there might be a reason the public might think they are not impartial. It is essential to respect for our laws that even the appearance of partiality be avoided.

These same considerations are applicable in the assignment of a case to a DOJ employee. A prosecutor who might appear to have a personal grudge against a defendant would never be assigned to his prosecution. Similarly, a prosecutor who might appear to favor a defendant wouldn't either. While DOJ might not be permitted to take into account an employee's political contributions, in this case, where the very allegations are of targeting people and organizations for political reasons, avoiding the appearance of partiality or of a conflict of interests might have been in the best interests of justice.

~~~~~~~~~~~~~

In 1959, Ian Fleming had his character Goldfinger say: Once is happenstance. Twice is coincidence. Three times is enemy action.

- We know, because the Treasury IG for Tax Administration's report says so, that groups banding together to promote an understanding of and fidelity to our nation's founding principles were targeted for special scrutiny that was harsh, intrusive, probably unnecessary, and resulted in the delay, if not the constructive denial, of their applications for tax-exempt status, effectively silencing them during the better part of two election cycles.

- We know, because they had the courage to come forward and tell us about it, that people engaged in activities directed at improving the integrity of our elections were targeted for scrutiny not just by the IRS, but also by other arms of the federal government.

- We know, because we've seen it in the public domain, that the private information of people who contributed to organizations devoted to preserving traditional values was made public, in violation of 26 USC §6103, a crime punishable by fines and imprisonment of up to five years.

As an American who cares about our country and our laws and our future, I thank the Committee for continuing to press to learn the truth about what appears to be the Administration's targeting of people who disagree with its policies, and encourage you to use all the tools available to you to do so.

~~~~~~~~~~~~~

Mr. JORDAN. Mr. von Spakovsky.

STATEMENT OF THE HONORABLE HANS A. VON SPAKOVSKY

Mr. VON SPAKOVSKY. Thank you, Mr. Chairman.

I appreciate the invitation to be here today. I am a career veteran of the Civil Rights Division of the Justice Department. I also spent 2 years as a commissioner at the Federal Election Commission, where we worked with the public integrity section of the Criminal Division when there were potential civil and criminal violations of the Federal Election Campaign Act.

Now, on May 14th of last year, Attorney General Eric Holder announced that he was opening up an investigation of the IRS targeting of conservative organizations, something that he called outrageous and unacceptable. Yet the Justice Department has refused to provide this committee with any information or updates on the investigation.

Now, it is certainly true that the Justice Department cannot reveal sensitive information. But an active investigation does not prevent the FBI and the Justice Department from giving Congress basic information that does not compromise the investigation. There is no reason why the Justice Department can't provide this committee with a briefing on, for example, how many FBI agents and Justice Department lawyers have been assigned to the investigation; who the lead lawyer and supervising FBI agent are; what Federal statutes the lawyers are reviewing that they believe might have been violated; what the general plan is for the investigation of this matter; and without identifying them specifically, what types of witnesses they have already interviewed or intend to interview. The Justice Department——

Mr. JORDAN. Mr. von Spakovsky, if I could just interject for a second, I apologize, but in your experience, were those kind of pieces of information given to congressional committees and to people inquiring about an investigation? Were those done in the past?

Mr. VON SPAKOVSKY. We would give basic information, yes.

Mr. JORDAN. All the time?

Mr. VON SPAKOVSKY. Not specific information.

Mr. JORDAN. But I mean basic information you just outlined in your——

Mr. VON SPAKOVSKY. Yeah.

Mr. JORDAN. Okay. Thank you.

Mr. VON SPAKOVSKY. They could also provide you with how long they expect the investigation to take, what progress has been made to date, and when they expect to conduct their preliminary or final review. None of this information would compromise the integrity and confidentiality of the investigation. Yet lawyers representing dozens of the targeted conservative groups say their clients have not even been contacted or interviewed by the FBI.

I find it simply incredible that 9 months after the investigation was opened, little or no basic interviews have been done with the victims about their dealings with the IRS employees who may have been involved in wrongdoing. In addition, there is the troubling selection of Barbara Bosserman, a lawyer in the Criminal Section of the Civil Rights Division, where I used to work, as the lead lawyer in the investigation. She has given almost $7,000 in political dona-

tions to President Barack Obama's Presidential campaigns. Now, the Criminal Section where she works prosecutes cases, and this is according to their own Web site, quote, "Involving the violent interference with liberties and rights through the use of force, threats, or intimidation." Now, as bad as what the IRS may have done, I don't think anyone would characterize the actions of IRS employees as violent. I find it difficult to understand why the Public Integrity Section of the Criminal Division is not conducting this investigation in its entirety.

This scandal involves possible corruption, public corruption by IRS employees. It is the Public Integrity Section of the Criminal Division, not the Civil Rights Division, that has long been responsible for investigating and prosecuting this type of public corruption. That is made clear on its own Web page. And General Holder would certainly know that. Why? Because the very first job he got out of law school, when he went to the Department of Justice, was in the Public Integrity Section of the Criminal Division.

Now, DOJ claims, and others have said, that Ms. Bosserman can't be removed because it would be, according to Justice, a prohibited personnel practice to consider political affiliation making personnel decisions. That claim totally mischaracterizes the situation. Taking a lawyer off a particular case because of a conflict of interest or the possible appearance of a conflict of interest is not a prohibited personnel practice. A prohibited personnel practice would be if they terminated her, changed her pay, disciplined her because of her political views or her political donations.

No one questions the fact that Federal employees can give political donations. But the rules that govern the Justice Department specifically say that lawyers are supposed to avoid even the appearance of corruption and anything that would cause the public to question the integrity of an investigation. Now, that certainly is the case where we have an investigation that potentially could embarrass the administration being conducted by a lawyer who has given a large amount of money to the President. And we have a situation where the President had already told her and others in the Justice Department how he wants their investigation to come out, because he says there is not a smidgen of corruption involved.

Taking a lawyer off a case at the Justice Department to avoid a conflict of interest is a routine occurrence at the Justice Department. DOJ should be making every effort to conduct a thorough investigation and avoid any questions about the objectivity of the attorneys and investigators involved in the investigation. The possible bias of one of the supervising, if not lead, lawyers in this investigation, is a very serious issue. When combined with the refusal of DOJ to provide even basic information about the status of the investigation, as well as the seemingly unjustifiable delays in talking to key witnesses, substantial questions are raised about whether or not a serious and unbiased investigation is being truly conducted. Thanks.

Mr. JORDAN. Thank you.

[Prepared statement of Mr. von Spakovsky follows:]

The Heritage Foundation
LEADERSHIP FOR AMERICA
214 Massachusetts Avenue, NE • Washington DC 20002 • (202) 546-4400 • heritage.org

LEGISLATIVE TESTIMONY

IS THE OBAMA ADMINISTRATION CONDUCTING A SERIOUS INVESTIGATION OF IRS TARGETING?

Testimony before the House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs

February 26, 2014

Hans A. von Spakovsky
Senior Legal Fellow
The Heritage Foundation

My name is Hans A. von Spakovsky.[1] I am a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

[1] The title and affiliation are for identification purposes. The staff of The Heritage Foundation testify as individuals discussing their own independent research. The views expressed here are my own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees, and do not reflect support or opposition for any specific legislation. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under § 501(c) (3) of the Internal Revenue Code. It is privately supported and receives no funds from government at any level; nor does it perform any government or other contract work. Heritage is also the most broadly supported think tank in the United States, with nearly 700,000 supporters in every state, 78% of whom are individuals, 17% are foundations, and 5% are corporations. The top five corporate givers provide The Heritage Foundation with 2% of its 2011 income. A list of major donors is available from The Heritage Foundation upon request.

I spent four years at the Justice Department as a career civil service lawyer, including three years as Counsel to the Assistant Attorney General for the Civil Rights Division. I helped coordinate the investigation of many cases in the voting and elections area. That included working with the Public Integrity Section of the Criminal Division of the Justice Department when there were cases in which there appeared to be both civil rights violations and potential criminal violations of federal election laws. Election cases were the only type of cases I ever saw in which there was a potential intersection between the Civil Rights Division and the Public Integrity Section.

After leaving the Justice Department, I spent two years as a commissioner at the Federal Election Commission. At the FEC, we also worked with the Public Integrity Section in cases in which there were potential civil and criminal violations of the Federal Election Campaign Act.

As this committee is well aware, on May 10, 2013, former IRS official Lois Lerner revealed that the IRS had been targeting Tea Party and other conservative organizations in a presentation at a conference in Washington, D.C. sponsored by the American Bar Association.[2] This was apparently made public because of the pending release of a May 14 report by the Inspector General for the Department of the Treasury detailing the "inappropriate criteria" used by the IRS to identify for review the applications of conservatives organizations for tax-exempt status under Section 501(c)(4) of the Internal Revenue Code.[3] These reviews "resulted in substantial delays in processing" of their applications, and the organizations were also subjected to "unnecessary information requests."[4]

On May 14, 2013, Attorney General Eric Holder announced that the Justice Department was opening an investigation and "was coordinating with the FBI to assess whether or not any laws were broken." Holder at that time called the IRS's action "outrageous and unacceptable."[5]

On January 8, 2014, the *Washington Times* reported that Committee Chairman Darrell E. Issa (R-CA) and Subcommittee Chairman Jim Jordan (D-OH) had discovered that the head of the Justice Department investigation is Barbara Kay Bosserman, a trial lawyer in the Civil Rights Division.[6] According to Federal Election Commission records, Bosserman has given $6,750 in political donations since 2004, $5,600 to President Barack Obama's presidential campaigns, $500 to the 2012 Obama Victory Fund, and $650 to the Democratic National Committee. The

---

[2] "IRS apologizes for inappropriately targeting conservative political groups in 2012 election," ASSOCIATED PRESS (May 10, 2013).
[3] "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053 (May 14, 2013).
[4] *Highlights*, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053 (May 14, 2013).
[5] Lucy Madison, "Justice Dept. to investigate IRS targeting," CBS News (May 14, 2013).
[6] Stephen Dinan, "Justice: Feds pick Obama supporter to led probe into IRS tea party targeting," WASHINGTON TIMES (Jan. 8, 2014).

Committee discovered this information only through its own investigative efforts, not from the Justice Department.

A Jan. 8 letter from the Committee to Attorney General Holder outlined the Justice Department's refusal to provide *any* information or updates on the status of the Department's investigation. The letter notes that the FBI offered to meet with Rep. Jordan to do exactly that but later "rescinded" the offer "after [Justice] Department officials apparently interfered."

It is certainly true that the FBI cannot disclose sensitive information during an ongoing criminal investigation, but an active investigation *does not* prevent the FBI and the Justice Department from giving Congress basic information regarding the status of an investigation that does not compromise their work. There is no reason why the Justice Department could not have provided this committee with a briefing on how many FBI agents and Justice Department lawyers are involved in the investigation; who the lead lawyer and supervising FBI agent are; what federal statutes the lawyers believe might have been violated; what the general plan is for investigating this matter; without identifying them specifically, what types of witnesses they have already interviewed or intend to interview (such as IRS employees in certain offices; chief officers of affected conservative organizations; investigators in the Treasury Department's Office of Inspector General, etc.).

The Justice Department and the FBI could also have generally described to the Committee how long they expect the investigation to take, what progress has been made to date, and when they expect to complete their preliminary and final review. None of this information would compromise the integrity and confidentiality of the investigation.

Yet lawyers representing dozens of the targeted conservative groups have recently testified before this Committee and have said that their clients have not been contacted or interviewed by any FBI agents.

I find that simply incredible – that nine months after the Attorney General announced he was opening an investigation, neither the FBI nor the Justice Department has conducted basic interviews with the victims to gather information about their dealings with the IRS officials and employees who may have been involved in wrongdoing.

In addition to the unjustified refusal of the Department to provide this Committee with any information about its investigation, there is the troubling selection of a Civil Rights Division lawyer, Barbara Bosserman, as the lead lawyer in the investigation.[7] This scandal involves the possibility of public corruption – misbehavior by federal employees in the Internal Revenue

[7] In testimony on Jan. 29, 2014, Attorney General Holder denied the "characterization" of Bosserman as the "lead" lawyer in the matter. *See* Melanie Hunter, "'I Don't Know Anything…' Holder Denies Knowing IRS Investigator Was Obama Contributor," CNS NEWS (Jan. 30, 2014).

Service. It is the Public Integrity Section of the Criminal Division – not the Civil Rights Division – that has long been responsible for investigating and prosecuting this type of public corruption.

Bosserman works in the most politicized division within the entire Justice Department. She is a lawyer in the Criminal Section of the Division, whose own website says that it prosecutes cases "involving the violent interference with liberties and rights defined in the Constitution or federal law" through the "use of force, threats, or intimidation." The website's list of cases that the Section has prosecuted involve hate crimes, interference with the exercise of religious beliefs, human trafficking, interference with access to abortion services, and official misconduct. The cases listed under "official misconduct" are almost all cases involving violent assaults, rapes, sexual misconduct, and the use of force by police officers and prison officials.[8] As bad as what the IRS did, I don't think anyone would characterize the actions of IRS employees as "violent."

It is certainly possible that the IRS practices under investigation may be civil rights violations, but it is curious that Attorney General Holder chose to dip into that talent pool for this particular lawyer to lead this investigation, rather than allowing the Public Integrity Section to conduct this investigation in its entirety. The lawyers there are very experienced in investigating and prosecuting the type of official corruption alleged in the IRS scandal. As its own website reflects, it is the Public Integrity Section that "oversees the federal effort to combat corruption though the prosecution of elected and appointed public officials at all levels of government…Section attorneys prosecute selected cases against federal, state, and local officials."[9]

General Holder would certainly understand the specific expertise that the Public Integrity Section brings to such an investigation – the very first job he got at the Justice Department when he was hired right out of law school as part of the Attorney General's Honors Program *was in the Public Integrity Section.*[10]

The Justice Department's pick of Barbara Bosserman to lead or be involved in making decisions about this investigation raises the appearance of a conflict of interest because of her extensive political donations to President Barack Obama, who recently said there was "not even a smidge of corruption" in the IRS scandal – even though the investigation is supposedly not complete.[11]

---

[8] See http://www.justice.gov/crt/about/crm/selcases.php#conduct.
[9] See http://www.justice.gov/criminal/pin/.
[10] Wil S. Hylton, "Hope. Change. Reality.," GQ (Dec. 2010).
[11] "'Not even a smidgen of corruption'" Obama downplays IRS, other scandals," Fox News (Feb. 3, 2014).

When this first became public, Justice Department spokeswoman Dena Iverson claimed that Bosserman could not be removed from the investigation because "[i]t is contrary to department policy and a prohibited personnel practice under federal law to consider the political affiliation of career employees or other non-merit factors in making personnel decisions."[12] The problem with this claim is that it is not true.

Taking a lawyer off a particular case because of a possible conflict of interest or the appearance of such a conflict is not a "prohibited personnel practice" like firing, terminating, or changing the pay of someone for political reasons. Indeed, Justice Department regulations clearly state that DOJ lawyers must avoid even "an appearance of a conflict of interest likely to affect the public perception of the integrity" of an investigation or prosecution.[13]

No one questions the right of career employees to make political donations. This is allowed under the Hatch Act and applicable DOJ regulations, as explained by the Justice Department's Ethics Office.[14] But Bosserman's considerable campaign contributions certainly raises the appearance of a possible conflict of interest in terms of the public's perception of her ability to make unbiased, objective decisions in an investigation that could prove very embarrassing to the president she supports – a president who has already signaled through his public statements what he thinks the outcome of the investigation ought to be.

Contrary to Iverson's claim, the Justice Department has previously acted in the exact way she now says it cannot. During the investigation into the unjustified dismissal of the New Black Panther Party voter intimidation case, the Justice Department's Office of Professional Responsibility removed the first career lawyer assigned to the investigation, Mary Aubry, after reports surfaced that she had contributed more than $7,000 (almost the same amount as Bosserman) to the Democratic Party and Democratic candidates including Barack Obama.[15] In fact, two veterans of the Civil Rights Division told me that DOJ removes attorneys from cases all the time for such perceived potential conflicts of interest. One of them also told me that Bosserman was more of a "research" attorney who almost never goes to court, which seems an odd choice to head up such a significant investigation.

Given the allegations in the IRS case, especially the suspicion that conservative organizations were specifically targeted by IRS officials to help dampen public opposition to President Obama's reelection, the Justice Department should make every effort to conduct a thorough investigation and avoid any questions about the objectivity of the attorneys and investigators involved in the investigation.

---

[12] Josh Hicks, "Obama political donor leading Justice Department's IRS investigation," WASHINGTON POST (Jan. 9, 2014).
[13] 28 CFR §45.2.
[14] *See* http://www.justice.gov/jmd/ethics/politic.html.
[15] Hans A. von Spakovsky, "Is the Fix In at Justice?" National Review Online (Jan. 26, 2011).

This is particularly true given that the Justice Department's Inspector General Michael Horowitz sent a memorandum to General Holder in December reminding him that "public trust in the Department, its senior officials, and its employees is essential to every aspect of the Department's operations." One of the biggest challenges, according to Horowitz, is the Civil Rights Division, where Bosserman works. The Office of the Inspector General reported that the way the division has handled cases "risked undermining public confidence in the non-ideological enforcement" of federal law.[16]

The involvement of the Civil Rights Division and the appearance of possible bias by one of the supervising, if not lead, lawyers in this investigation is a very serious issue. When combined with the refusal of the Justice Department and the FBI to provide even basic information about the status of the investigation, as well as the seemingly unjustifiable delays in talking to key witnesses in the conservative organizations targeted by the IRS, it raises substantial questions about whether or not a serious, objective, unbiased investigation is being conducted.

This Committee should continue to attempt to get more information about the integrity of the government's investigation and should pursue its oversight function vigorously. Otherwise, what happened at the IRS will happen again, and federal employees will believe that they can engage in wrongdoing by targeting the political opposition of the administration without fear of any consequences.

[16] "Top Management and Performance Challenges Facing the Department of Justice – 2013," Memorandum for the Attorney General and the Deputy Attorney General from Michael E. Horowitz, Inspector General (Dec. 11, 2013, re-issued Dec. 23, 2013).

Mr. JORDAN. Mr. Ivey. You have 5 minutes.

STATEMENT OF GLENN F. IVEY

Mr. IVEY. Thank you, Mr. Chairman, members of the subcommittee. I appreciate the opportunity to testify before you today. My name is Glenn Ivey. I am a partner at the Washington law firm of Leftwich & Ludaway, where I specialize in civil and criminal litigation. I am a former Federal prosecutor and elected State prosecutor, and an adjunct professor of law.

I am very familiar with these types of issues you are considering here today in the Oversight hearing. By way of introduction, I spent about half my career as a prosecutor. I served as an assistant U.S. attorney in Washington, D.C., from 1990 to 1994, first under U.S. Attorney Jay Stephens, and then for 2 years under U.S. Attorney Eric Holder. Before leaving, I handled about 45 criminal jury trials and argued appeals and conducted grand jury investigations.

In 2002, I was elected State's Attorney for Prince George's County, Maryland, a jurisdiction of about 850,000 people that covers the eastern border of Washington, D.C. During my two terms there, we handled a variety of high-profile investigations that sometimes overlapped with the U.S. Department of Justice. I also became a founding chairman of the Association of Prosecuting Attorneys.

Finally, for the past 17 years I have taught courses on advanced criminal procedure, white collar crime, and others at the University of Maryland School of Law. With respect to the length of the investigation, I understand from my review of statements by subcommittee members and hearing testimony that there is concern about the length of this investigation. While I was State's attorney, my office conducted several investigations, in fact many, that took long periods of time to complete. Sometimes I was accused of taking longer than I should. But as my father used to say, you measure twice and cut once. It's critical for prosecutors to be extremely careful and thorough in conducting their investigation because they might not get a second chance to do it right. Certainly, when it comes to a matter as sensitive as this one, there should be no rush to judgment and no pressure to cut corners. It is more important to do it right than to do it fast. Moreover, I also had the experience of waiting for the Department of Justice to complete investigations my office had referred to the Department. In one case, an accused cop killer was found dead in his prison cell just 2 days before he was arrested for the murder. And in another, a college student was beaten by local police officers when a college celebration spun out of control. In these and other cases, my office sometimes waited months or even years before the Federal investigation was completed.

So I understand that there can be frustration in waiting for the results of Department of Justice investigations, especially in high-profile matters that have captured a good deal of public attention. Sometimes long investigations lead to public questions about how the prosecutors are conducting the investigation or whether it could have been completed more quickly. Nevertheless, I think it is critical to give prosecutors the time they need to conduct a careful and thorough investigation, particularly in matters with this degree of sensitivity.

With respect to confidentiality, I know from personal experience, there can be a great deal of pressure on prosecutors to release information while an investigation is ongoing. But it is important for prosecutors to control the flow of information made public during the course of their investigations for several reasons: First, prematurely disclosed information can undermine an investigation by tipping off potential witnesses about the scope, direction, and details of the investigation. Second, individuals who might be named in the course of an investigation but ultimately cleared of wrongdoing should be shielded from the negative impact of disclosing incorrect information about them. Finally, any information that is gathered pursuant to the laws that require secrecy, like rule 6(e), might require a court order to be released. That reflects the longstanding view held by both Congress and the courts that matters before a grand jury should largely remain secret before trial. In the short run, these secrecy rules may conflict with the goal of transparency and disclosure. Elected officials want updates; the public and the media want real time information. But in the long run, it usually makes more sense to allow the criminal investigation to run its course before public disclosures are made that might undermine or even preclude a criminal prosecution.

With respect to the politics issue, a hallmark of the Justice Department is that it allows its line prosecutors to do their jobs without forcing them to disclose their political views or bend to political considerations. That is why the department has career prosecutors who have sometimes spent decades in office despite the changes in Presidents and Attorneys General. This provides consistency in the handling of cases, helps to retain top talent, and preserves institutional memory. It also helps to reassure the public that regardless of who is at the top, the line prosecutors will wield their power and handle their cases based solely on the merits.

I know the committee has received letters from the professors that the ranking member mentioned a moment ago, so I won't speak to that. But I do want to say that with respect to my personal experience, I saw these principles in action while I worked at the Department. Fortunately, during the transition that I was present for from the Bush administration to the Clinton administration, line prosecutors were insulated from the politics of the day and allowed to conduct their work in an apolitical environment. After my election, I brought that approach to my State office. I worked hard to reduce the politics that swirled around the office, where line prosecutors had been expected, essentially as a condition of employment, to donate to their bosses' campaigns and to work for their reelections as well. Eventually, my line prosecutors came to understand that they did not have to contribute to my campaign, and I was not going to check whether they worked on political campaigns or made political contributions. My line prosecutors learned that they did not have to sacrifice their constitutional rights to work for me and that they could handle their cases based solely on the merits. That is the way it ought to be, even in high-profile matters like this. So thank you again for giving me a chance to testify today. I look forward to questions.

Mr. JORDAN. Thank you, Mr. Ivey. We appreciate you being here.

[Prepared statement of Mr. Ivey follows:]

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify before you today. My name is Glenn Ivey and I am a partner at the Washington law firm of Leftwich & Ludaway, where I specialize in civil and criminal litigation. I am a former Federal prosecutor, an elected state prosecutor, and an adjunct professor of law. I am very familiar with the types of issues you are considering today in this oversight hearing.

Introduction

By way of introduction, I spent about half of my career as a prosecutor. I served as an Assistant U.S. Attorney in Washington, DC from 1990-1994, first under U.S. Attorney Jay Stephens, and then for two years under U.S. Attorney Eric Holder. Before leaving, I handled about 45 criminal jury trials, argued about a dozen appeals and conducted numerous grand jury investigations.

In 2002, I was elected State's Attorney for Prince George's County, Maryland, a jurisdiction of about 850,000 people that covers the eastern border of Washington, DC. I was elected to two terms, during which we handled a variety of very high profile investigations that sometimes overlapped with investigations conducted by the U.S. Department of Justice. I also became the founding chairman of the Association of Prosecuting Attorneys (APA), a private non-profit entity which supports and enhances prosecutors in their efforts to create safer communities. APA is the only national organization to include and support all

prosecutors, including appointed and elected. Finally, for the past 17 years, I have taught courses on advanced criminal procedure, white collar crime, Congressional investigations and federal criminal law at the University of Maryland School of Law.

Length of the Investigation

I understand from my review of statements by Subcommittee members and hearing testimony that there is concern about the length of this investigation. While I was State's Attorney, my office conducted several investigations that took long periods of time to complete. Sometimes I was accused of taking longer than I should. But, as my father used to say, you measure twice and cut once. It is critical for prosecutors to be extremely careful and thorough in conducting their investigation, because they might not get a second chance to do it right. Certainly, when it comes to a matter as sensitive as this one, where the public confidence in a federal agency has been shaken, there should be no rush to judgment, and no pressure to cut corners. It is more important to do it right than to do it fast.

Moreover, I also had the experience of waiting for the Department of Justice to complete investigations my office had referred. In one case, an accused cop killer was found dead in his prison cell just two days after he was arrested for the murder. In another, a college student was beaten by local police officers when a college celebration spun out of control. In these and other cases, my office

sometimes waited months, or even years, before the federal investigation was completed. So I understand there can be frustration in awaiting the results of Justice Department investigations, especially in high profile matters that have captured a good deal of public attention. Sometimes, long investigations lead the public to question how the prosecutors are conducting the investigation or whether it could be completed more quickly. Nevertheless, I think it is critical to give prosecutors the time they need to conduct a careful and thorough investigation—particularly in matters with this degree of sensitivity. That is especially true when the investigation is complex, involves a large number of witnesses, and potentially implicates criminal laws where intent is the primary issue in determining whether criminal charges are appropriate.

Confidentiality

I know from personal experience that there can be a great deal of pressure on prosecutors to release information while an investigation is ongoing. But it is important for prosecutors to control the flow of information made public during the course of their investigations for several reasons. First, prematurely disclosed information can undermine an investigation by tipping off potential witnesses about the scope, direction and details of the investigation. Second, individuals who might be named in the course of an investigation, but ultimately cleared of wrongdoing, should be shielded from the negative impact of disclosing incorrect

information. In this age where everything lives forever on the Internet, protecting the reputations of the innocent is especially important.

Finally, any information that is gathered pursuant to laws that require secrecy, like Rule 6(e) of the Federal Rules of Criminal Procedure, might require a court order to be released. That reflects the longstanding view, held by both Congress and the courts, that matters before a grand jury should largely remain secret before trial.

In the short run, these secrecy rules may conflict with the goal of transparency and disclosure. Elected officials want updates. The public and the media want real-time information. But in the long run, it usually makes more sense to allow the criminal investigation to run its course before public disclosures are made that might undermine or even preclude a criminal prosecution. At this point, I believe that is the case with the Justice Department's investigation of how the IRS handled this matter.

Politics and Prosecutors

A hallmark of the Justice Department is that it allows its line prosecutors to do their jobs without forcing them to disclose their political views or bend to political considerations. That is why the Department has career prosecutors who sometimes have spent decades in office, despite the changes in Presidents and Attorneys General. This provides consistency in the handling of cases, retains top

talent and preserves institutional memory. It also helps to reassure the public that, regardless of who is at the top, the line prosecutors will wield their power and handle their cases based solely on the merits.

I know the Committee has received letters from Fordham law Professor Bruce Green and Columbia Law School Professor Daniel Richman explaining the legal nuances of recusal and conflict of interest. I want to take a more personal approach. I saw these principles in action while I worked at the Department. Fortunately, during the transition from the first Bush administration to the Clinton administration, line prosecutors like me were insulated from the politics of the day, and allowed to conduct our work in an apolitical environment.

After my election, I brought that approach to my state office. I worked hard to reduce the politics that swirled around the office—where line prosecutors had been expected, essentially as a condition of employment, to donate to their bosses' campaigns and to work for their re-election as well. Eventually, my line prosecutors realized that they did not have to contribute to my campaign, and that I was not going to check whether they worked on political campaigns or made political contributions. My line prosecutors learned that they did not have to sacrifice their constitutional rights to work for me, and that they could handle their cases based solely on the merits. That's the way it ought to be, even in high-profile matters like this.

Conclusion

Thank you again for allowing me to testify at this hearing today. I would be more than happy to answer any questions the Members may have.

Mr. JORDAN. Mr. Painter, you are recognized for 5 minutes.

STATEMENT OF RICHARD W. PAINTER

Mr. PAINTER. Thank you, Mr. Chairman.

I teach corporate law, securities law, lawyers ethics, and government ethics at the University of Minnesota. For 2 and a half years, I was the chief White House ethics lawyer under President Bush.

For the vast majority of Americans, the burden of Federal and State and local taxes is excessive, and the regulations under which taxes are collected are excessively complex. Taxpayers are entitled to competence and impartiality from the government agencies that collect our taxes. It is unacceptable for the Internal Revenue Service to use politicized search terms to single out individuals and organizations for additional scrutiny. Whether such actions result from gross incompetence or from political motivation of IRS employees, it is serious misconduct.

This misconduct took place in one of the most powerful agencies in the executive branch. The President must accept responsibility for it and make sure that it never happens again.

Now let me discuss for a moment the 501(c)(4) organizations and the issues related to campaign finance. These organizations are growing in number, and they have proliferated since the Supreme Court's decision in the Citizens United case. I discuss them extensively in my own book on government ethics that was actually written before that case was decided. I share the concerns of many Americans who are disgusted with the current state of affairs in campaign finance. And I believe that the future of our republican form of government depends on finding some way for ordinary Americans, the vast majority of us who cannot afford to set up our own 501(c)(4) or fund it, to have a meaningful voice in our government.

There are many options, including enactment of constitutionally acceptable campaign finance reform legislation, enhanced disclosure obligations, and additional taxpayer funding of political campaigns.

Close IRS scrutiny of 501(c)(4) applications to discern so-called political purpose of an organization, however, is not the way to arrive at a better system of campaign finance. The notion that social welfare is somehow distinguishable from politics is in my view unworkable, particularly in a society where politics is the process by which we choose our government, and social welfare is to a great extent help or hindered, I believe usually hindered, by government taxation, expenditure, and regulations.

Now, the IRS needs focus on its mission, which is collecting taxes from people who owe the taxes. And if the statutes and regulations invite the IRS to inquire into the political opinions or political purpose of persons or organizations in determining an organization's tax status, those regulations and statutes need to be changed.

Now, more specifically with respect to the IRS, American taxpayers are entitled to an IRS which responds promptly to their requests. And delay in the response to a 501(c)(4) application for any reason is unacceptable. And I believe Congress should impose on the IRS specific deadlines for taking action with respect to applications for particular taxpayer matters. And if they can't meet their

deadlines, perhaps they should be paying us penalty and interest like we have to pay them when we can't meet our deadlines. As for the DOJ investigation, the Department has opened an investigation, but I believe that it has been compromised by the controversy over the staffing of the investigation. No particular ethics rule explicitly prohibits a career prosecutor who has made campaign contributions from participating in or even directing an investigation such as this one. Not knowing the present scope of the DOJ investigation or where it might lead, however, I cannot be certain that such a conflict would not arise. I discuss in my written testimony the impartiality rule at 5 CFR. 2635.502 that I believe should have led to a discussion within the Department of Justice about the staffing of this investigation. If I had been a senior official at the Department of Justice, I would have chosen in this instance to choose someone to lead the investigation who did not have a strong affiliation with either of the two major political parties.

Finally, I want to point out that there are serious Hatch Act issues here if—and I emphasize if because I do not know the facts in this matter—if IRS employees were politically motivated in the conduct that occurred. If there was an attempt here to influence an election, these 501(c)(4) organizations do have an enormous impact on the outcome of elections. We all know that. And if IRS employees were politically motivated in these decisions, there are serious Hatch Act concerns. And I believe the Office of Special Counsel should be involved in this, whether they conduct their own investigation or whether they review the Inspector General's investigations and determine that no further action is required. But they cannot, in my view, responsibly remain silent. Thank you, Mr. Chairman.

Mr. JORDAN. Thank you, Mr. Painter.

[Prepared statement of Mr. Painter follows:]

Testimony of Richard W. Painter[1] before the United States House of Representatives Committee on Oversight and Government Reform, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs Wednesday, February 26, 2014

Mr. Chairman and Members of the Committee:

Thank you for inviting me to testify here today.

For the vast majority of Americans, the burden of federal, state and local taxes is excessive and regulations under which taxes are collected are excessively complex. Taxpayers are entitled to competence and impartiality from the government agencies that collect our taxes.

It is unacceptable for the Internal Revenue Service (IRS) to use politicized search terms to single out individuals and organizations for additional scrutiny. Whether such actions result from gross incompetence or from political motivation of IRS employees, it is serious misconduct. This misconduct took place in one of the most powerful agencies in the Executive Branch. The President must accept responsibility for it and make sure that it never happens again.

From 2010 through 2012, the IRS apparently searched for certain terms in 501(c)(4) tax-exemption applications and placed on hold the processing of applications of organizations with phrases such as "Tea Party," "patriots," or "9/12" in their names. We are entitled to know who ordered this to happen and why. We are also entitled to know about any other IRS misconduct in connection with similar applications from any groups, both liberal and conservative. And we are entitled to know what concrete steps are being taken to prevent future abuses.

And the American people are entitled to a timely response to this matter. The deadline I suggest for the Executive Branch agencies investigating these incidents of IRS misconduct and for Congressional committees doing the same is the same deadline that the rest of us have in the back of our minds: April 15, 2014. If we are expected to comply with our obligations to the government by that date, the government should by then have told us what happened and why and how similar abuses will be avoided in the future.

---

[1] S. Walter Richey Professor of Corporate Law, University of Minnesota 2007-present; Associate Counsel to the President and chief White House ethics lawyer 2005-2007.

501(c)(4) Organizations and Campaign Finance

Organizations organized under Section 501(c)(4) of the Internal Revenue Code have proliferated in recent years. Even before the Supreme Court's decision in *Citizens United*,[2] there were many of them, and there were many abuses.[3] The *Citizens United* decision then opened the floodgates through which private money – from corporations, individuals and unions – flows into the political process.

I share the concerns of many Americans who are disgusted with the current state of affairs in campaign finance. The future of our republican form of government depends upon finding some way for ordinary Americans – the vast majority of citizens who cannot afford to set up or fund a 501(c)(4) – to have a meaningful voice in our government. There are many options including enactment of constitutionally acceptable campaign finance reform legislation, enhanced disclosure obligations, and additional taxpayer funding of political campaigns.[4]

Close IRS scrutiny of 501(c)(4) applications to discern a "political purpose" of an organization, however, is not the way to arrive at a better system of campaign finance. The notion that "social welfare" is somehow distinguishable from "politics" is in my view unworkable, particularly in a society where politics is the process by which we choose our government and social welfare is to a great extent helped or hindered – usually hindered -- by government taxation, expenditure and regulation.

The IRS needs to focus on its mission, which is collecting taxes from people who owe taxes. Tax statutes and regulations should not invite the IRS to inquire into the political opinions or political purpose of persons or organizations in determining an organization's tax status. These ineffective regulations are no excuse for the conduct that occurred at the IRS in 2010-2012, but the regulations should be revised and if necessary the underlying statute should be amended.

The IRS

American taxpayers are entitled to fair, respectful and legal treatment from the federal agency that collects our taxes. We are also entitled to competence from IRS employees and timely review of applications submitted under particular provisions of the Internal Revenue Code. Timely IRS response in all particular taxpayer matters should be a top priority. Delay of an IRS response to a 501(c)(4) application for any reason, whether or not politically motivated, is unacceptable.

---

[2] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

[3] See Richard W. Painter, Getting the Government America Deserves: How Ethics Reform Can Make a Difference (Oxford U. Press 2009), Chapter 9 (titled "Off-the-Books Lobbying, Electioneering and the Special Purpose Entities that Do It") (discussing 501(c)(4) and other groups and potential abuses in the years immediately before *Citizens United*).

[4] See Id, Chapter 11 (titled "Campaign Finance").

Congress should either impose on the IRS specific deadlines for taking action with respect to applications and other particular taxpayer matters or require the IRS to promulgate regulations that set specific deadlines for its staff. If taxpayers are required to pay penalties and interest when we delay taking necessary action with respect to our taxes, perhaps the IRS should be required to pay us penalties and interest when they don't do their job on time.

The DOJ Investigation

The Department of Justice (DOJ) has opened an investigation of the misconduct at the IRS during the 2010- 2012 time frame. The scope and purpose of this investigation is unclear. The staffing of the investigation, however, has apparently introduced yet more controversy into an already controversial situation.

No particular ethics rule explicitly prohibits a career prosecutor who has made campaign contributions from participating in, or even directing, an investigation such as this one. Not knowing even the present scope of the DOJ investigation, and where it might lead, however, I cannot be certain that such a conflict would not arise.

The impartiality rule -- 5 CFR 2635.502 -- has catch-all language[5] that government employees, including career prosecutors, should consider in these situations. The rule's standards, however, are subjective unless a government employee falls into one of the specific categories of relationships set forth in the rule, and campaign contributions do not alone create a relationship falling into one of these categories.[6] The purpose of the rule is not necessarily to disqualify an employee from a particular assignment but to encourage and in some instances require that the employee consult with agency ethics officials and his or her superiors before making a decision about whether going forward with a particular assignment is in the best interest of the agency.

---

[5] 5 CRF 2635.502(a) reads: "(a) Consideration of appearances by the employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.(1) In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.(2) *An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.*" (emphasis added)

[6] The language in section (a)(2) of the rule above thus determines whether the covered relationship rule applies at all to the situation of a federal employee who was a campaign contributor or otherwise supported a political campaign or party.

Given the enormous controversy about alleged politicization of the IRS, I hope such a conversation about staffing this investigation occurred at the DOJ. If I were a senior official at the DOJ, I would not put the leadership of an investigation such as this into the hands of any employee who appeared to have a strong allegiance to one political party or the other. Others might disagree. I feel strongly, however, that such a conversation about appearances of impartiality should have taken place in the DOJ and I hope it did.

Finally, I am frustrated at not knowing the purpose and scope of the DOJ investigation. Which specific criminal statutes are potentially involved in the investigation, and what evidence is there to date of violations of such provisions and by whom? If there is evidence of criminal activity the DOJ should investigate thoroughly and swiftly, but if not the DOJ should stand down and allow other government officials, including the Inspector General and Congressional oversight committees, to do their job of investigating alleged misconduct that falls short of criminal violations. We learned from the Clinton White House's unfortunate experience with a DOJ investigation after the suicide of Deputy White House Counsel Vincent Foster, that DOJ investigations should not be organized to provide "negative assurances" or "political cover." A DOJ investigation should be a real investigation when it occurs, and should be aggressive and impartial, but it should only occur at all if it is appropriate under the circumstances.

The Hatch Act

My initial reaction to this scandal was that it raised serious concerns under the Hatch Act, which prohibits any use of official position to affect the result of an election.[7] During the two years leading up to the Presidential election of 2012, IRS delay of Section 501(c)(4) applications from groups identified with "Tea Party," "patriots," or "9/12" at least raises a prima facie case of a Hatch Act violation. Given the prominent role that the many 501(c)(4) organizations already approved by the IRS have in influencing public opinion prior to elections,[8] politically motivated IRS denial or delay of 501(c)(4) applications from other groups could affect the result of an election.

The Office of Special Counsel (OSC) is charged with investigating alleged violations of the Hatch Act. In view of the enormous power of the IRS and the potential for abuse, the OSC should aggressively investigate this and any other evidence of Hatch Act violations at the IRS. The OSC may determine that it is appropriate to rely on an Inspector General investigation rather than conduct its own investigation, provided the Inspector General investigation addresses the Hatch Act issues. The OSC, however, should not remain silent. I am not claiming that there necessarily were Hatch Act violations at the IRS – I don't know. However, the American people are entitled to a definitive answer to this question, and the OSC has a responsibility to play a central role in finding it.

---

[7] See 5 U.S.C. Section 7323 (providing that "an employee may not— **(1)** use his official authority or influence for the purpose of interfering with or affecting the result of an election")

[8] See Painter, Getting the Government America Deserves supra Chapter 9 (discussing the influence of these and similar groups on elections).

Mr. JORDAN. I want to thank all our witnesses for their testimony.

We go now to the vice chairman of the committee, Mr. DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman.

Thank you, witnesses, for your testimony.

I think there is a little confusion here with what I am hearing from the other side in terms of, yeah, you can give to a political candidate and be perfectly fair and do your job. And the idea that that should disqualify you I don't think is what anyone up here on this side is saying.

But I think what I am saying and what I think some of my colleagues are saying is this is not like you are just investigating corruption at the Department of HUD for someone lining their pockets. You are talking about a misuse of one of the most potent agencies we have in this government to target dissent from the administration in power seeking to be returned to office in 2012. So that really strikes at the heart of what the First Amendment is all about, what limited government is meant to ensure. And I think the American people need to have the utmost confidence in the investigation.

And so what do we know right now? Well, we know that Jay Sekulow came in front of this committee a couple weeks ago, and he has 40 clients who have been targeted by the IRS in one form or another. Not one of them, as of a couple weeks ago, had been interviewed by anyone associated with this investigation. What do we also know? We know the President went on national TV and said there is not a smidgen of corruption involved with any IRS targeting. It is amazing how he would know that, but nevertheless, you know, that is what he said. And of course, we haven't gotten even rudimentary cooperation from the Department of Justice and the department of FBI. So it may not be against the regulations to have Barbara Bosserman. Look, she is a loyal Obama supporter, and there is nothing wrong with that. And it may not be proscribed exactly. Maybe someone makes the argument it is. Just because it is not, doesn't mean it is the right thing to do. So I would say, in this situation, given the sensitivities involved, why would you not steer clear of any appearance of impropriety, particularly given what we have seen over the last several months.

I think, turning to all these other career people in the Department of Justice would have made probably a lot more sense, who maybe just don't have any bone in this either way. But to go with, you know, you give $7,000 to the Democratic Party and President Obama, you are a loyal foot soldier in the Army of Hope and Change. Let's just be clear about what we are talking about here. So I think—and so, from my perspective, what I see now is I think we need a special prosecutor to look into this just to avoid any of this. Because guys like me, guys like the chairman, if this keeps going on and it just ends with a whimper, we are not going to have a lot of confidence in what happened.

And I know the people who have testified in this committee, they are not going to have any confidence if that one ends up being the outcome. And also, how are you supposed to react when your boss, the President, says there is no corruption? I mean, what kind of

signal does that send to these folks? So I think what we need is some independence here.

So let me just go down, Mr. Terwilliger, do you think that a special prosecutor would be in order given these facts?

Mr. TERWILLIGER. I do.

Mr. DESANTIS. Okay.

Ms. O'Connor?

Mr. CONNOLLY. I do.

Mr. DESANTIS. Mr. von Spakovsky?

Mr. VON SPAKOVSKY. I do.

Mr. DESANTIS. Mr. Ivey?

Mr. IVEY. I guess I have mixed views about it.

Mr. DESANTIS. Let me ask you this. So are you still elected, or you had served two terms?

Mr. IVEY. No, I am in private practice.

Mr. DESANTIS. Okay. And you probably had people who were prosecutors who would be handling cases. You weren't micromanaging everything. People were probably doing their job. It is a little bit different for you because you were a politician, whereas in the bureaucracy, you are not supposed to. But I mean if you would have come out and said, Oh, well, there is nothing doing here, there is no corruption there, then probably your line prosecutors aren't going to then think that is a good signal for them to go and pursue that matter. I mean don't you think there was a little bit of a problem for the President to say that there is not a smidgen of corruption, given that we are supposedly in the middle of this investigation?

Mr. IVEY. No. I actually had a similar kind of scenario with the case I mentioned in my testimony in which the police officer who had been killed, the guy who killed him was allegedly found dead in his prison cell. The county executive at the time announced that this was a lynching. And I had other elected officials who made similar kinds of statements, including some statements from police officials who, as you can imagine, grieving about the loss of a comrade, had strong feelings.

Mr. DESANTIS. But in that instance, you are independently elected from the county executive, correct? So in other words, you didn't report to the county executive like someone in the Justice Department. Ultimately, in our Federal Constitution, you know, you have one person in the executive branch that is elected, and everyone—ultimately, the buck stops with the President. So I take that point, and I think that is a good point, but I think the difference that I would just draw is ultimately you had an independent duty to your voters. You were not somebody who was dependent on any of those elected officials. Is that correct?

Mr. IVEY. That is correct. Although I will say this, the police who actually reported directly to the county executive and many of my prosecutors who had just finished working for him still had strong allegiances.

But with respect to the point about the Federal level of independence issue, unlike the independent counsel statute that Mr. Terwilliger mentioned, you would still have a prosecutor, even a special prosecutor appointed by the Attorney General, and still sub-

ject to the same kind of chain of command essentially that is raising concerns here.

Mr. DESANTIS. No, absolutely.

Mr. IVEY. So the only reason I kind of hesitated about it is because the special prosecutor statute and regs looks a lot like, you know, the sort of just sort of setting it up. And I don't know that it gives you the type of screen that your concerns address. I am not saying it is not appropriate here, but I don't know that it really gets to the heart of the problem that you have outlined.

Mr. TERWILLIGER. Let me be clear, Mr. Chairman, if I may, just quickly, when I said I do to the vice chairman's question, I was addressing not an appointment under the independent counsel regulation, but the use of the Attorney General's plenary authority to appoint a special counsel to whom all the powers of the Attorney General could be delegated if the Attorney General believed that was the right thing to do.

Mr. JORDAN. Unbiased special prosecutor, in light of the circumstances, in light of the fact pattern, unbiased special prosecutor makes sense in this case. Yes, yes, yes.

And Mr. Ivey, you are a maybe.

Mr. IVEY. Maybe.

Mr. JORDAN. Mr. Painter, could you answer?

Mr. PAINTER. If there is evidence of criminal activity, significant evidence of criminal activity, the Justice Department should conduct an investigation. And in this type of situation, I think the investigation should be led either by a career prosecutor who is not affiliated with either political party or by an independent prosecutor. If there is no evidence of criminal activity right now, what I would do is let the inspector general finish their job, and the Office of Special Counsel and have DOJ pick up from there.

Mr. DESANTIS. Thank you, Mr. Chairman.

Yield back.

Mr. JORDAN. Thank the gentleman.

Mr. Cartwright.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

Well, we have had a wide ranging discussion, and I appreciate the presence of all the witnesses here today. I always like to say here in Congress people don't realize we agree on a lot more than what we disagree about. And I want to talk about what we can agree on. You know, the chairman and I had a colloquy right before we went to go vote about whether it was—it would be illegal, whether it would be against the rules for a person who gave a political donation, such as Ms. Bosserman. And I believe the chairman was quite forceful in saying it would be illegal. Am I correct in that?

Mr. JORDAN. No, I simply read the rule, which said if there is an appearance of—the appearance to the public that there might be bias, then that person should not be heading an investigation. I read the rule.

Mr. CARTWRIGHT. Okay. So what I want to do is I want to make sure we are all on the same page.

Are any of the witnesses here today able to confirm or deny that Barbara Bosserman is leading this investigation? Just go ahead and raise your hand if you can say yes or no.

Seeing no hands, I see that no light is shed on this question here. In fact, Attorney General Holder has testified that Ms. Bosserman is, in, fact not leading the investigation.

Mr. JORDAN. Would the gentleman yield for a second?

Mr. CARTWRIGHT. Certainly.

Mr. JORDAN. Do you know something we don't know? Do you know who is leading the investigation? Because we have asked. What we do know is Mr. Sekulow testified under oath in front of this committee that the highest ranking official he has interacted with in the limited interaction he has had, the highest ranking official at the Justice Department who has interacted with him is Barbara Bosserman.

Mr. CARTWRIGHT. And reclaiming my time, as is absolutely crystal clear from all of this discussion, we do not have evidence that Barbara Bosserman is leading this investigation or any other. And all we are doing is stabbing around in the dark and making suppositions here and there, which I suggest, respectfully to everyone involved, is an inappropriate use of our time and energy, making suppositions like that. I also want to follow up on the question of asking line prosecutors about their political donations. We have a number of people here who have worked for the Justice Department, people who know about this. And I will start with you, Mr. Terwilliger, when you were at the DOJ, did you ever check the political donations of line prosecutors before assigning them cases? Yes or no.

Mr. TERWILLIGER. No, but I certainly would consider removing——

Mr. CARTWRIGHT. I only have limited time.

Ms. O'Connor, did you ever check into the past political donations of line prosecutors before assigning them cases?

Mr. CONNOLLY. I did not, but I did have a trial attorney who was criticized by a conservative columnist on the basis that he believed he was a Democrat attacking Republicans.

Mr. CARTWRIGHT. I have to make use of my time. Mr. Ivey, what about you? Did you ever check prosecutors' past political donations when you were the State's Attorney for Prince George's County?

Mr. IVEY. No.

Mr. CARTWRIGHT. No. In fact, quite the opposite. You made it very plain to them that you didn't care about their political donations, you wanted them to operate in a politics-free environment, didn't you?

Mr. IVEY. Absolutely.

Mr. CARTWRIGHT. All right. In fact, doing so, asking about past political donations, I think Professor Painter has brought up, would raise some serious legal and ethical concerns under the Hatch Act, as well as under civil service laws.

Professor Painter, is it appropriate for DOJ officials to look up career prosecutors' political donations in order to identify potential conflicts of interest before assigning cases?

Mr. PAINTER. No. I wouldn't do that.

Mr. CARTWRIGHT. Let me follow up.

Professor Painter, what are some of the problems with DOJ, or any other prosecuting agency, searching the past political donations of career employees, such as line prosecutors?

Mr. PAINTER. Well, once you get into that you get into a situation, where you could create the appearance of retaliation against someone because they donated to a political campaign, usually campaigns that opposed the President. That is not where you want to go. And that is why the applicable ethics code that I referred to puts the onus on the employee to identify those situations where they think there could be a question about impartiality.

Mr. CARTWRIGHT. Thank you.

Mr. PAINTER. It is the employee's job.

Mr. CARTWRIGHT. Thank you, Professor Painter.

I suppose I should call you Professor Ivey as well. Did you also teach trial advocacy at Harvard?

Mr. IVEY. I do, yes.

Mr. CARTWRIGHT. So you are in the Ivy League as well. You have anything to add to the discussion?

Mr. IVEY. With respect to this issue, I do think that one concern should be the potential of a chilling effect. You know, so I get the point about Ms. Bosserman, and there is thoughts that, you know, maybe if you had it to do over again you wouldn't put her in place. But now that she is there, if you remove her, you really do send a message to all the other prosecutors out there that if you have given contributions, you better stop. And if you have been thinking about doing it, you better stop because you might not be able to be assigned to these types of cases.

Mr. CARTWRIGHT. Dangerous precedent. Thank you, Mr. Ivey. I appreciate it.

Mr. JORDAN. Mr. Terwilliger, I just want to give you a chance to respond fully. You were going to say more. While you indicated it is not appropriate to examine political contributions prior to assigning cases, once you have discovered the facts, once you know she is a maxed out contributor to the President of the United States, who may be a potential target of the investigation, would it then be appropriate to look at saying, Hey, she should be removed after the fact? After you learn that fact? I agree with my colleague, no, you can't be looking that information up ahead of time. But once you know, particularly a case of this sensitive nature where your most fundamental First Amendment political rights, your right to speak out in a political nature is what was the issue at hand, then is it appropriate to say she should be removed from the case?

Mr. TERWILLIGER. Of course, it is.

Mr. JORDAN. And not just from her, but from her superiors as well.

Mr. TERWILLIGER. Absolutely.

Mr. JORDAN. Did you do that at your time at the Justice Department?

Mr. TERWILLIGER. Of course. I will use an example to take it out of the political realm. I wouldn't bar a lawyer from being hired at the Justice Department because in that lawyer's career, he or she may have represented mafioso in the past. But I wouldn't necessarily put them in charge of a large organized crime case either. And it is—even if they were——

Mr. JORDAN. Or if they got assigned a large Mafia case and you found out after the fact in their past, they had represented people there, would you remove them?

Mr. TERWILLIGER. Of course.

Mr. JORDAN. Of course.

Mr. TERWILLIGER. And the reason you would do that, and the reason it is not only proper and not only an exercise in good judgment, but is required, because there is a duty to avoid even the appearance of impropriety. A duty that has been recognized by the Attorney General himself in recusing himself from other matters. It has been recognized by Preet Bharara, the United States attorney in New York, who is a highly reputable and accomplished attorney, who has removed himself from cases. I have removed myself from cases for that reason. And if the circumstances require, in order to assure the public of the integrity of the investigative process, no matter what kind of case it is, a superior has an obligation to do that.

Mr. JORDAN. So the way this really should have worked is Ms. Bosserman should have said you know what, Mr. Attorney General, or you know what, Mr. Tom Perez, who headed the Civil Rights Division, when she was assigned this case, you know what, I may have a conflict. We need to talk about this. They talk about it, and he says, Oh, for goodness sakes, you certainly do. We are going to have to let someone else head this investigation.

Mr. TERWILLIGER. That is what one would hope would happen.

Mr. JORDAN. Ms. O'Connor, would you agree with that analysis we just went through with Mr. Terwilliger?

Mr. CARTWRIGHT. Would the gentleman yield for one question?

Ms. O'CONNOR. Absolutely.

Mr. JORDAN. Sure. Sure. I am letting Ms. O'Connor answer because you didn't give her a chance, and then I will come to you.

Ms. O'CONNOR. I agree completely.

Mr. JORDAN. Okay.

Mr. Cartwright?

Mr. CARTWRIGHT. Okay. Again, one of the reasons I am here is to try to help protect the integrity of this outfit, the House Government and—Oversight and Government Reform Committee. And to protect the integrity of this committee, I say, again, we should stop referring to Barbara Bosserman as the lead investigator on this investigation. We have no evidence of that.

Mr. JORDAN. Does the gentleman from Pennsylvania know who the lead investigator is?

Mr. CARTWRIGHT. I will read the testimony from Eric Holder.

Mr. JORDAN. No, no, no. I asked a specific question. Do you know who it is?

Mr. CARTWRIGHT. It is the Criminal Division of the Public Integrity Section that has actually got the lead, quote-unquote, from the Attorney General of the United States.

Mr. JORDAN. Do you know who the individual is?

Mr. CARTWRIGHT. I do not. Not Barbara Bosserman. I ask that we stop referring to her as the lead if we want to preserve our own integrity.

Mr. JORDAN. Jay Sekulow under oath confirmed she is the highest ranking official at the Justice Department who he has interacted with. Again, we had a chance; we invited Barbara Bosserman to come here and testify. And you sent me a letter saying don't subpoena her. We gave the opportunity to the number two

at the Justice Department to answer my question 3 weeks ago, who is heading the investigation? He wouldn't answer me. So all we know is what we have heard from witnesses who say she is the highest ranking official, and from Jay Sekulow, who testified under oath saying she is the highest ranking official. Mr. von Spakovsky.

Mr. CARTWRIGHT. All well and good, but you can't refer to her as the lead investigator.

Mr. JORDAN. The highest ranking official in this investigation is Barbara Bosserman, who gave $6,750 to the President of the United States. Reclaiming my time, reclaiming my time, Mr. von Spakovsky, do you agree with the analysis we went through with Mr. Terwilliger and Ms. O'Connor that under the circumstances, Mrs. Bosserman should have been recused from the case?

Mr. VON SPAKOVSKY. Yes. And in fact, every lawyer at Justice knows, back to this question of whether the supervisor should be inquiring about their political donations, look, every lawyer there knows that if you are assigned to a case, you have an absolute professional duty to raise with your supervisor any potential conflicts that could bring this into question. And I would point out that in fact, prior to what the administration said currently, this administration certainly agrees with this because a couple of years ago, when evidence came out that a lawyer in the Office of Professional Responsibility at the Justice Department had given almost the same amount of money to the Obama campaign, she was removed by the administration from the IG OPR investigation of the dismissal of the New Black Panther Party case.

Mr. JORDAN. Thank you. That was supposed to be 1 minute, but it turned into 5, so I will have to go to the gentleman from Virginia, and then we will come to Mr. Meadows.

The gentleman from Virginia is recognized for 5 minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Mr. von Spakovsky, based on what I just heard you respond to the chairman, your view is that Ms. Bosserman, as an employee of the civil rights division, should be removed from the case because of her political activity. Is that correct?

Mr. VON SPAKOVSKY. She should be removed because her involvement raises in the public a perception about the integrity of the investigation. And that is one of the regulations at the Justice Department.

Mr. CONNOLLY. But the nature of that taint is that she had partisan political activity of some sort. Is that correct?

Mr. VON SPAKOVSKY. Specifically, she supported and gave a large number of donations to the administration, which itself is being accused of wrongdoing in this particular matter.

Mr. CONNOLLY. I understand. Now, you have some expertise in this field because you served as counsel to the Assistant Attorney General of the Civil Rights Division from 2002 to 2005. Is that correct?

Mr. VON SPAKOVSKY. That is correct.

Mr. CONNOLLY. And one of the Deputy Assistant Attorney Generals that you worked with a was a man named Bradley Schlozman. Is that correct?

Mr. VON SPAKOVSKY. That is correct.

Mr. CONNOLLY. He was a political appointee under the Bush administration. Is that correct?

Mr. VON SPAKOVSKY. That is correct.

Mr. CONNOLLY. Are you familiar with the Department of Justice's inspector general report on Mr. Schlozman?

Mr. VON SPAKOVSKY. Oh, certainly I am aware of it.

Mr. CONNOLLY. And that it concluded he violated Federal law and department policy by considering political affiliations in hiring decisions and other personnel actions such as the assignment of cases for career attorneys. Are you aware of that finding by the inspector general?

Mr. VON SPAKOVSKY. I am aware of the findings of that report. I wouldn't characterize them quite the way you have.

Mr. CONNOLLY. Well, let me quote. "We concluded," meaning the IG, "that Schlozman inappropriately used political and ideological affiliations in managing the assignment of cases to attorneys in the sections of the division he oversaw. According to Sections Chiefs Flynn, Cutler, and Palmer, Schlozman placed limitations on the assignment of cases to attorneys whom he described as libs or pinkos, and he requested that important cases be handled by conservative attorneys he had hired instead." Were you aware of those comments by Mr. Schlozman?

Mr. VON SPAKOVSKY. Not all of them, no, I wasn't.

Mr. CONNOLLY. Any of them?

Mr. VON SPAKOVSKY. I read the report.

Mr. CONNOLLY. Based on your sworn testimony here today, I would assume that you would conclude those were inappropriate remarks by Mr. Schlozman. And based on what you just said to Mr. Jordan, you would have reported them as inappropriate, and requiring his recusal from making such decisions because they are so blatantly partisan. Or are you not consistent when it comes to a Republican administration?

Mr. VON SPAKOVSKY. No, I am consistent in saying that lawyers who are assigned to specific cases——

Mr. CONNOLLY. Could you answer my question, Mr. von Spakovsky?

Mr. VON SPAKOVSKY. I am answering it.

Mr. CONNOLLY. No, sir, you are not. Did you or did you not find those comments—Mr. Chairman, I insist on reclaiming my time. I insist on reclaiming my time. We don't have filibusters here in the House, Mr. von Spakovsky.

Mr. JORDAN. He is trying to answer your question.

Mr. CONNOLLY. No, sir, he is trying to filibuster my question. Did you or did you not report those comments as inappropriate based on what you just said to Mr. Jordan?

Mr. VON SPAKOVSKY. There is nothing in the IG report that says that I did anything wrong. In fact, you can——

Mr. CONNOLLY. I didn't ask that. I didn't ask that.

Mr. VON SPAKOVSKY. You can go through the entire report. I was not accused of making any statements of any kind like that, and I was not—I was not accused of knowing about any statements like that.

Mr. CONNOLLY. Were you asked to be interviewed by the Attorney General, Mr. von Spakovsky?

Mr. VON SPAKOVSKY. I was.

Mr. CONNOLLY. And did you agree to it?

Mr. VON SPAKOVSKY. I set out and said I would be happy to speak with them if they told me what the questions were and if I was able to review my testimony. They refused to allow that to be done.

Mr. CONNOLLY. So you did not in fact allow yourself to be interviewed.

Mr. VON SPAKOVSKY. Because they did not afford me the basic due process rights that are given to anyone who is interviewed in a case like that.

Mr. CONNOLLY. Mr. Schlozman sent you a number of emails, and one of which I will quote from. "If I recall correctly, a certain Voting Section attorney is a crazy lib, Hans," meaning you, "am I right? A detail would be a great way to get him out of our hair for 6 months." Were you aware of that email to you from Mr. Schlozman?

Mr. VON SPAKOVSKY. I recall the email, yes.

Mr. CONNOLLY. Did you think it was appropriate?

Mr. VON SPAKOVSKY. Well, appropriate is very different from whether or not a conflict of interest arises over assignments to a particular case. And that has nothing to do with what we are discussing here today.

Mr. CONNOLLY. Well, I will decide that Mr. von Spakovsky. You are a witness.

Mr. VON SPAKOVSKY. Tell me, are you aware of the IG report from last year?

Mr. CONNOLLY. Did Mr. Schlozman not have a conflict, being a political appointee, in determining the assignment of cases based on someone else's perceived political affiliations? "Crazy lib," is that a professional epithet at the Department of Justice in the Bush administration?

Mr. VON SPAKOVSKY. I am not going to characterize what the IG has said. The report speaks for itself. And if you want another one, you should look at the IG report from March of last year that talked about the harassment and intimidation of conservative employees that has occurred in this administration, including the fact that an employee within the Civil Rights Division lied and committed perjury to the IG, and that employee——

Mr. CONNOLLY. Mr. Chairman, I didn't ask about that. And the witness is answering questions that he was not asked.

I will ask, however, Mr. Chairman, without objection, that a letter regarding the possible appointment of Mr. von Spakovsky to the FEC, opposing that nomination signed by the chief of the Voting Section, the deputy chief of the Voting Section, the senior trial attorney of the Voting Section, the senior trial attorney of the Voting Section, the senior trial attorney of the Voting Section, and the political geographer of the Voting Section, dated June 11th, 2007, and enumerating the reasons why Mr. von Spakovsky was not qualified because of his partisan political activities be entered into the record at this time.

Mr. JORDAN. Without objection.

Mr. CONNOLLY. I thank the chairman.

Mr. VON SPAKOVSKY. Mr. Chairman, could I ask that it be entered into the record the report of the inspector general from March of last year about the Civil Rights Division?

Mr. JORDAN. We can get that report and have a committee member enter that into the record.

To view the document, please visit *www.justice.gov/oig/reports/2013/S1303.pdf*

Mr. CONNOLLY. Mr. Chairman, I have July 2008 inspector general report, and am happy to put that in the record as well.

Mr. JORDAN. Okay. Without objection.

To view the document, please visit *www.justice.gov/opr/oig-opr-iaph-crd.pdf.*

Mr. JORDAN. Now turn to the gentleman from North Carolina, Mr. Meadows.

Mr. MEADOWS. Thank you, Mr. Chairman.

Thank each of you for your appearance here today and for your testimony. I guess the American people want to trust their government again. And the true problem that we have right now is that many do not trust their government and specifically do not trust the IRS. And the only avenue to do that is truly to investigate, to make sure that justice prevails and that a thorough investigation happens. I would ask very quickly each of you, do you not find it surprising that over 40 different individuals that have supposedly been targeted have not been interviewed by an investigative body of this government? Do you not find that surprising?

Mr. TERWILLIGER. I guess if we are going to go in order, Mr. Meadows, I mean, I think from at least from a distant perspective, yes, it is surprising. I think the public would be more reassured if the government were, and the Justice Department with the FBI, were able to at least say this is what we are doing generically, without being specific about it.

That being said, however, and having been on the other side of some of these hearings over the years, the manner in which an investigation, a vigorous investigation, is conducted may be staged in such a way that there are valid reasons not to have known that.

Mr. MEADOWS. Sure.

Mr. TERWILLIGER. But I think what is missing here more than anything, and that your question goes to, is at least some reassurance of the public by disclosure to this committee and elsewhere that in fact a vigorous investigation is being conducted and that there is a strong effort that is appropriate to these what are really serious allegations, to get to the bottom of it.

Mr. MEADOWS. Okay. Very good.

Ms. O'Connor?

Mr. CONNOLLY. I agree. As I said earlier, justice must not only be done, it must also be seen to be done. And it would seem that actually contacting the victims—we know who the victims are—it would seem as though contacting the victims would not tip off anyone's hand about the direction that the investigation is taking, and would therefore not harm its integrity.

Mr. MEADOWS. Okay. On down the line.

Mr. VON SPAKOVSKY. I agree. Particularly in this case because, look, I coordinated investigations of probably hundreds of cases when I was at the Justice Department, and you talk to the victims

first because you want their information, what they can tell you before you go and you confront the individuals who are accused of wrongdoing because you use that information to check what they are saying, to cross-examine them. And to not have talked to any of the victims after 9 months, like I said, I just find that incredible.

Mr. MEADOWS. Okay.

Mr. Ivey, I can tell by your response that you have a different take on it. Mr. Ivey, go ahead.

Mr. IVEY. Well, I would at least say I think I need more information along the lines of what Mr. Terwilliger suggested. You want to know what the investigative strategy is. Other things I would like to know is if these individuals have already given other statements, whether it is to this body or to the inspector general or whoever, because of the prosecutor.

Mr. MEADOWS. Yeah, but in your testimony, you were talking about the fact that we shouldn't rush to a conclusion, that sometimes these investigations should take a long time and may very well take a long time and that we should keep them private. That is what you said in your opening testimony, I believe.

Mr. IVEY. Yes.

Mr. MEADOWS. So, would you say when the President on Super Bowl Sunday made a conclusion to what the investigation outcome already is, do you think that undermines the process?

Mr. IVEY. I would hope not. I would hope that the Attorney General statement and beyond that——

Mr. MEADOWS. So the President of the United States making a comment——

Mr. IVEY. With the understanding within the Department of Justice——

Mr. MEADOWS. I didn't mean to interrupt. I am sorry.

Mr. IVEY. That they can go forward with the investigation but to still be protected.

Mr. MEADOWS. So the President of the United States making a definitive statement, there is no corruption, wouldn't influence anybody. Is that your understanding?

Mr. IVEY. We hope not. That is correct.

Mr. MEADOWS. I know we hope not, but that is your testimony, you believe that it did not.

Mr. IVEY. If that is not the case, and I know there is a call for a special prosecutor, then that wouldn't work either.

Mr. MEADOWS. Right.

Mr. IVEY. We are sort of left with the return of the independent counsel here, and I share Mr. Terwilliger's that that would be a bad idea.

Mr. MEADOWS. So let me follow up with you, Mr. Ivey, one question, in terms of political contributions. Do you think it affects the way that people view other people, political contributions?

For example, you have donated to the Obama and Victory campaign. You ran——

Mr. IVEY. I am pretty sure I did.

Mr. MEADOWS. I know you did.

Mr. IVEY. Okay.

Mr. MEADOWS. You donated to a Democrat that ran against me in North Carolina, and you ran——

Mr. IVEY. Okay. Sorry.

Mr. MEADOWS. So you think it would—so do you think it would affect the way that I would view you?

Mr. IVEY. I hope not.

Mr. MEADOWS. I would hope not, too.

Mr. IVEY. Yeah.

Mr. MEADOWS. All right.

But in that, even if it gave the appearance that my questions were more directed toward you or more definitive because of that, do you not think that would be good to recuse—if you had a prosecutor that just, just the appearance that it might be a problem, don't you think it would be smart?

Your clinical students there at Harvard, don't you tell them, wouldn't it be a good idea if it is just the appearance that you ought to recuse yourself? Now, be careful because you are going to have lots of students answering your question that may be following this.

Mr. IVEY. I am sure this will be on the internet, but I mean, the scenario, for example, the U.S. attorney who is of one party in a State where the leadership is dominated by another party, I would never say that that U.S. attorney is incapable of leading an investigation against——

Mr. MEADOWS. Right.

Mr. IVEY. —the Governor or someone like that.

Mr. MEADOWS. But this is different. This is the IRS. This is the very foundations of freedom. This is reaching in and actually taking—do you not think that this requires a higher standard?

Mr. IVEY. Doesn't it sort of depend on the scenario? I mean, the Governor of Illinois——

Mr. MEADOWS. I think it does. That is what I am saying. Even with the higher standard?

Mr. IVEY. The Governor of Illinois, who was alleged to be selling Senate seats, I would say, goes to the heart of democracy, and nevertheless, you know, the automatic strategy of the people that represented him was to accuse the U.S. attorneys of——

Mr. MEADOWS. I would conclude that the IRS reaching in on our liberties and our freedoms goes to the heart of what we are about, and there is no higher calling. I appreciate the patience of the chair. I yield back.

Mr. CONNOLLY. Would my colleague yield?

Mr. JORDAN. The gentleman is recognized briefly.

Mr. CONNOLLY. I just want to confess. I may have contributed to your opponent, too, I am sorry.

Mr. MEADOWS. And I will forgive you there.

Mr. JORDAN. He expected it out of you but not Mr. Ivey.

Let me just pick up real quickly before going to Mr. DesJarlais, and we have got votes coming, I think, in about 15 minutes.

Mr. Ivey, in your testimony, you talked—well, first of all, you talked about the concern about the length. I don't know anyone is concerned—at least, I know I have not expressed concern about the length of the investigation. My concern is about the quality. And later in your testimony, you said this, "It usually makes more sense to allow the criminal investigation to run its course before

public disclosures are made that might undermine or even preclude a criminal prosecution."

Mr. IVEY. Yes.

Mr. JORDAN. I want to go right back to where Mr. Meadows—I mean, the President said there is no corruption. The FBI has leaked to the Wall Street Journal no one is going to be referred for prosecution. So do you think those public disclosures undermine the investigation at the Justice Department of targeting of political—targeting of groups for their political beliefs?

Mr. IVEY. Well, I would honestly say I don't think so, and I think if we want to talk about sort of historical scenarios where a President says something——

Mr. JORDAN. Tell me what kind of public disclosures are you referencing here then if the head of the government, who is a potential target of the investigation, says——

Mr. IVEY. What is the actual disclosure that the President's statement contains?

Mr. JORDAN. It was definitive. It was absolute. It was, There is not a smidgeon of corruption. I am head of the executive branch and——

Mr. IVEY. As a defense lawyer, what I would be looking for for statements from the government, which we seek in every case, is information that I can use to try and figure out what is the scope of the investigation, where is it going, what questions are they asking about my client, what other—who are—which other individuals their investigating——

Mr. JORDAN. Let me see if people have a different opinion than you, Mr. Ivey.

Mr. Terwilliger, do you think those public disclosures by the President of the United States and someone at the Justice Department who leaked to the Wall Street Journal that no one was going to be referred for prosecution, do you think those help?

Mr. TERWILLIGER. Let me take those separately and address. The President's statement is most unfortunate. I really like to believe he didn't intend to have that effect, but even if he didn't intend to have the effect and even if it doesn't have the effect of changing one iota of how the investigation is conducted, that doesn't mean it doesn't affect public confidence in the investigation.

Mr. JORDAN. Sure.

Mr. TERWILLIGER. And confidence in the government. When the President of the United States, can you imagine if Ronald Reagan in the middle of Iran Contra, an investigation going on, had come out publicly and said, Well, there is nothing to all this. Of course, it is going to shake public confident because it is telling the public that this is all a big waste of time, there is—there is nothing really here to look at.

Mr. JORDAN. Right.

Mr. TERWILLIGER. In terms of the leak from the FBI, that—that is particularly devastating because I think, you know, objectively, and I hope Mr. Cartwright would agree with this, that what we are really looking for here, we the public, that is, are really looking for here is confidence that a thorough investigation, a law enforcement investigation will be conducted. And when you have the principal law enforcement agency in the United States, if in fact that that

is the real view, saying, well, nothing is going to result from this before the investigation is completed, that shakes public confidence in the integrity of that process.

Mr. JORDAN. Ms. O'Connor or Mr. Painter, would you, and Mr. von Spakovsky, would you agree with Mr. Ivey's statement, it makes more sense to allow criminal investigations to run their course before public disclosures are made that might undermine the prosecution, do you think that would make—do you agree with Mr. Ivey's statement in that what took place here is a direct contradiction to his statement?

Ms. O'CONNOR. Investigations do need to be permitted to run their course with the appropriate confidentiality so that they can be run with integrity.

I would like to address your point about the President's statement, if I might. President's statements carry a lot of weight. They do a lot of good or a lot of harm. Markets can rise and fall on the statement by the President, and not only did this President say that there was not a smidgeon of corruption, but back in 2010, he started bashing conservative groups and suggesting that they were shadowy and had questionable contributions. And the Internal Revenue Service started opening unprecedented audits of donors that contributed to conservative groups, so certainly the statements of a President have a tremendous impact on the people who work for the Federal Government.

Mr. JORDAN. Thank you.

Allow you to go quickly, Mr. von Spakovsky and Mr. Painter, if you could.

Mr. VON SPAKOVSKY. Of course, a criminal investigation should be allowed to run its course, but that does not prevent the Justice Department from providing general information on the status of the——

Mr. JORDAN. Sure.

Mr. VON SPAKOVSKY. —investigation to you because of your oversight functions.

Also, look, the President is the chief law enforcement officer, everybody else reports to him, and it is completely inappropriate for him to be telling the people working for him, here is what your conclusions——

Mr. JORDAN. But we got—you use that—we got the worse of everything here. We couldn't get the basics from the Justice Department: Who is heading the investigation? How many agents? Have you talked to any of the victims? We couldn't get the basics, but we get definitive public disclosures from the President of the United States and leaks to the Wall Street Journal saying, No harm, no foul here, no one is going to be prosecuted, not a smidgeon of corruption, so we got the worst of everything.

We couldn't get the basics that when you all worked at Justice, you gave all the time, but we get definitive statements saying no one is going to be prosecuted, nothing is wrong here.

So it was exactly backwards what we got from this Justice Department.

With that, I went over time so I have to yield to the gentleman from Tennessee. I apologize. The gentleman is recognized for 5 minutes.

Mr. DESJARLAIS. No problem. Thank you, Mr. Chairman.

And thank you all for being here today.

The title of today's hearing, "Is the Obama Administration Conducting a Serious Investigation of IRS Targeting?" Based on the testimony, what we have heard here today, let me just go down the line and say, just yes or no, do you feel like there is a serious investigation going on?

Mr. TERWILLIGER. Honestly, sir, I can't tell, and the fact that I can't tell is exactly the problem, because the public needs to understand that in fact a serious investigation is going on.

Mr. DESJARLAIS. Okay.

Ms. O'Connor.

Ms. O'CONNOR. That is exactly right. I have no basis on which to form an opinion, and the public does deserve to know that there is a serious investigation under way if there is.

Mr. DESJARLAIS. Okay.

Is everyone's opinion the same, we really can't tell.

Mr. VON SPAKOVSKY. We really can't tell, and that in itself is a real problem.

Mr. DESJARLAIS. Okay.

Ms. O'Connor, do you think that there is any reason that this targeting took place other than to affect the political outcome?

Ms. O'CONNOR. Well, I certainly can't speak to the motivations, but that was the result.

Mr. DESJARLAIS. Okay. Do you think that—that rogue agents within an agency like the IRS would be capable of independently constructing a targeting scheme of this magnitude without direction from higher up?

Ms. O'CONNOR. That is highly unlikely.

Mr. DESJARLAIS. Okay. So, you know, the President was very upset when he learned of this. Well, everybody was, both sides of the aisle were extremely upset, but now as time has passed, it is turned into, you know, more of a joke, either that or this side of the aisle in this committee is the only one that doesn't have as much information as the President and everyone else because they seem to have already concluded that there is not going to be any criminal charges, that there is not a smidgeon of corruption, but yet a political election could have been impacted and probably was by the actions of these agents in the IRS. So, in your opinion, there had to be somebody giving direction, and therefore, this is something that should be investigated seriously.

Ms. O'CONNOR. We have seen the consequences of the misconduct. We know that it happened. What needs to be found out is how and why did it happen.

Mr. DESJARLAIS. Okay. Is there any—I mean, really, can anyone sit there and think that there is any other reason that it happened other than to prevent people from expressing their political opinions?

Mr. PAINTER. I don't think we know. We are entitled. The American people are entitled to answers to this, but we just don't know.

Mr. DESJARLAIS. But yet we are getting the attitude now that there is nothing to see here, we need to move on. I think there was a President a few years ago that claimed he was not a crook, and we all know how that turned out.

Mr. Ivey, you know, I agree that an investigation should be thorough, but would you be the first one in line to say this President should be impeached if he was involved in this?

Mr. IVEY. I have no reason to think that impeachment should be even part of the conversation with respect to this issue.

Mr. DESJARLAIS. But this President is competent that there was not a smidgeon of corruption, yet he was outraged when this broke, and now all of a sudden he seems to have answers that we don't have. So, going back to President Nixon, who was not a crook, if President Obama knows what was going on here, should he be impeached?

Mr. IVEY. I wouldn't think that impeachment is really a viable part of the discussion on this at this point.

I did want to say quickly though with respect to President Reagan. I do recall him making a statement with respect to Iran Contra that he wasn't aware of any wrong—I believe it was a statement from the Oval Office because I remember watching it, and as we know, the investigation took its course. I think that is what is going to happen here, too.

Mr. DESJARLAIS. Okay. Well, we hope that we get answers because that is why we are here today. We are trying to have a serious investigation, but yet, for some reason, we can't seem to get answers. We can't get Lois Lerner back here. Hopefully, that will change because there is certainly something that was going on. The IRS admitted that they wrongfully targeted these groups, and we know that these groups were probably going to be in opposition to this President, and we know that it went to a political appointee from the White House, so we have learned all these things through the process of the investigation, but yet we are sitting here today with basically the Attorney General and an anonymous source saying that there is not going to be any criminal charges, so it is hard to think that there is a serious investigation going on when this is the kind of runaround that we are getting here. It is getting to look like somebody really wants us to move on from this. It is not much unlike Benghazi. It seems to be there is a pattern going on here.

So, at any rate, you know, we are going to continue to push. We are going to continue to look for answers, and you know, this is not going to go away so——

Mr. TERWILLIGER. If I may.

Mr. DESJARLAIS. Yes, sir.

Mr. TERWILLIGER. Before you yield your time, sir, respond to Mr. Ivey's comment about President Reagan.

If President Obama had come out and said, I was out of the loop, I didn't know what happened in any of this IRS business, that would be perfectly fine. He has a political base to cover and so forth, and that is what my recollection, as with Mr. Ivey's, is basically what President Reagan said.

But that is not what President Obama said. What President Obama said was a definitive statement that there was no corruption, not his personal involvement but everybody else. And what kind of message does that send to the American people about a commitment to the kind of investigation that we all seem to agree is needed?

Mr. DESJARLAIS. I appreciate that observation.

Thanks to all the witnesses.

I yield back.

Mr. DESANTIS. [Presiding.] The gentleman yields back.

I recognize the ranking member.

Mr. CARTWRIGHT. Thank you, Mr. Chair.

So, Mr. Terwilliger, you are recommending the President say, I was out of the loop; is that what you are recommending?

Mr. TERWILLIGER. Well, if he was going to say anything at all, all I am saying is that that kind of statement would not be—would not be inappropriate. The statement that he did make is ill advised, at best.

Mr. CARTWRIGHT. Thank you, sir.

Ms. O'Connor, you are now in the private sector, I take it?

Ms. O'CONNOR. Yes, I am.

Mr. CARTWRIGHT. And you are with a private firm providing tax advice and assistance?

Ms. O'CONNOR. I wouldn't exactly call it tax advice, but yes, I——

Mr. CARTWRIGHT. Tax law advice.

Ms. O'CONNOR. I am in private practice.

Mr. CARTWRIGHT. Very good. Do you represent any progressive or liberal groups that were applying for (c)(4) status?

Ms. O'CONNOR. I do not, nor conservative.

Mr. CARTWRIGHT. Well, the reason I ask you that is we were here—I am sorry Dr. DesJarlais has left, but we were here on this committee when the inspector general of the Treasury came, Mr. Russell George, and he had authored something like a 28-page report which blew the lid off of the BOLOs, the "be on the lookout" for Tea Party and conservative groups, concerning liberty—groups with conservative sounding names, and the whole report detailed the discussion of the conservative groups, and there was a footnote that said, and some other groups were involved as well. But he never mentioned that—that progressive or liberal groups were also on the "be on the lookout" list, that the searches included progressive and liberal groups; in other words, the opposite end of the political spectrum. He never revealed that to us, so we were here in this full committee in a high state of outrage. In fact, Ranking Member Cummings went through the roof when he—when Russell George was first here testifying to that report. And I was outraged myself personally because it is fundamentally un-American the kinds of things he was talking about to say that one particular type of political group would be targeted by civil servants in the IRS. And it was only after that that we found out that both ends of the political spectrum were targeted, and that is why I ask you that question, Ms. O'Connor.

Mr. Chairman, I thank you, and I yield back.

Mr. DESANTIS. I thank the gentleman.

Ms. O'CONNOR. Might I comment?

Mr. DESANTIS. Sure.

Ms. O'CONNOR. The—you said that Mr. George hid from you the fact that some progressive sounding groups had also been targeted, but you did have the report, and it was in the report.

I might add that the number of conservative groups caught in that filter versus the number of progressive groups was something like 100 to 2.

Mr. CARTWRIGHT. I am glad you mention that because when we start talking statistics and bandying about numbers, one of the things you wonder is, well, as a percentage, how many—how many of the progressive groups got targeted, how many of the conservative groups—is it a fact that there are just way more conservative groups who were applying for (c)(4) status? I think that is an appropriate inquiry at some time we ought to engage in. Thank you, Ms. Connor.

Ms. O'CONNOR. Happy to.

Mr. DESANTIS. Mr. von Spakovsky, just—this is a little bit tangential, but you have time at the FEC?

Mr. VON SPAKOVSKY. Yes.

Mr. DESANTIS. Is that correct?

Mr. VON SPAKOVSKY. Two years.

Mr. DESANTIS. Okay. And I am curious because there is this issue that has come up recently where maybe the most vicious of the President's critics in terms of books and movies, Dinesh D'Souza was indicted for potentially illicit campaign contributions. And what caught my eye and actually some members of the Senate Judiciary Committee, Republicans have written to ask about what the process is because it just seemed weird that that would just be a routine review to see that there were $20,000 that I guess the allegation is he reimbursed those. So, how did it go? How would these reviews take place at the FEC, and would the FBI come in and do routine reviews? Can you just give us a brief snapshot on how you understood the process when you were there?

Mr. VON SPAKOVSKY. Well, I don't recall the FBI coming in for routine reviews when I was there. The odd thing about that statement is, what—the accusation against Dinesh D'Souza is a conduit contribution; in other words, that he reimbursed other individuals for contributions they made. A routine review of donation records would not turn that up.

Mr. DESANTIS. Exactly.

Mr. VON SPAKOVSKY. Because the donations that he supposedly reimbursed folks for would have been made by other individuals in their names, so just reviewing the records isn't going to show that. The only way you can discover that is if you get some kind of information, a witness or somebody, who calls you and says, I know that this person was reimbursing these contributions. So a routine review would not reveal that.

Mr. DESANTIS. Great. And so do you think that it is worth writing, as the Senators did, to ask about what the typical review consists of, and given that that was the explanation that we have gotten, which is not really sufficient?

Mr. VON SPAKOVSKY. I think that is fully within the oversight responsibilities of Congress.

Mr. DESANTIS. Very good.

And then, Ms. O'Connor, this is my final. I mean, you mentioned the auditing of donors, how that is kind of—and I just anecdotally, I have had people come up to me and just say, I have been in business 20, 30 years, started writing checks for Romney, and now I

have gotten audited. Now, that is just—you know, correlation does not equal causation, but I have heard it enough to where it is just—it is something that—so can you speak to that? Is that something that you have dealt with in your practice.

Ms. O'CONNOR. It is not something that I have personally dealt with in my practice, but I was aware of the fact because I was getting calls about it, that whereas the Internal Revenue Service had never before audited contributors for 501(c)(4)s for gift tax obligations, they began doing that, and I think it was 2010, and again, it was after the President had made public statements in his weekly radio address, in speeches bashing contributors to conservative organizations, challenging that they were shadowy, that they were questionable, just making—you know, encouraging the IRS, whose obligation it is to look into these things, to look into these things. And so it was unprecedented. There were letters from Congress to the Commissioner of the Internal Revenue saying why are you all of a sudden looking at the gift tax obligations arising from contributions to 501(c)(4)s. Steve Miller as deputy commissioner at the time wisely told everybody at the IRS to stand down on this issue, that before the IRS started enforcing laws in this fashion, it was going to have to have some notice and public comment.

So this, again, is an outgrowth of public statements letting the Internal Revenue Service know what they ought to be doing.

Mr. DESANTIS. Well, thank you for that.

And I thank the witnesses for your time and your thoughtful testimony.

I thank the ranking member for your participation.

And I would just say, I think, you know, we can disagree about—even amongst Republicans. Democrats, Republicans have different views on some of this stuff, but I think it is true that at this point, you know, there is at least an appearance that this investigation is not going the way that we would hope an investigation would go, and given the sensitivities involved, I think that we really do need to move in a different direction. And I would just agree with the witnesses who have said the Attorney General can appoint a special prosecutor, and let's just get to the bottom of this because, ultimately, whatever accountability is there, there has got to be a sense amongst the public that they have some confidence in what happened, given this situation.

And so I thank the chairman, who had to leave, for holding this committee.

And right now, we have votes, so I will excuse all the witnesses.

Thanks, again, and we are adjourned.

[Whereupon, at 4:02 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

June 11, 2007

The Honorable Diane Feinstein
The Honorable Bob Bennett
Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
Washington, DC 20510

Dear Chairperson Feinstein and Ranking Member Bennett:

As former career professionals in the Voting Section of the Department of Justice's Civil Rights Division, we urge you to reject the nomination of Hans A.von Spakovsky to the Federal Election Commission (FEC). Prior to his current role as a recess appointee to the FEC, Mr. von Spakovsky oversaw the Voting Section as Voting Counsel to the Assistant Attorney General of the Civil Rights Division from early in 2003 until December, 2005. While he was at the Civil Rights Division, Mr. von Spakovsky played a major role in the implementation of practices which injected partisan political factors into decision-making on enforcement matters and into the hiring process, and included repeated efforts to intimidate career staff. Moreover, he was the point person for undermining the Civil Rights Division's mandate to protect voting rights. Foremost amongst his actions was his central decision-making role on a matter where he clearly should have recused himself. We urge you to use this confirmation process as an opportunity to thoroughly examine Mr. von Spakovsky's tenure at the Department of Justice and how his commitment to party over country will affect his decision making at the FEC.

Each of us came to the Voting Section to participate in the crucial role the Department of Justice plays in protecting all Americans without fear or favor. We saw this as an honor. Our commitment to public service was grounded in the belief that every American should have an equal opportunity to participate in our political process. We sought to work for the Civil Rights Division because of our patriotism, because of the honor of service and because of our commitment to the historic and heroic work of our predecessors in the Division. We are deeply disturbed that the tradition of fair and vigorous enforcement of this nation's civil rights laws and the reputation for expertise and professionalism at the Division and the Department has been tarnished by partisanship. Over the past five years, the priorities of the Voting Section have shifted from its historic mission to enforce the nation's civil rights laws without regard to politics, to pursuing an agenda which placed the highest priority on the partisan political goals of the political appointees who supervised the Section. We write to urge you not to reward one of the architects of that unprecedented and destructive change with another critical position enforcing our country's election laws.

During his three years in the front office of the Civil Rights Division, Mr. von Spakovsky assumed primary responsibility for the day to day operation of the Voting Section. His superiors gave him the authority to usurp many of the responsibilities of the career section chief and institute unprecedented policies that have led to a decimation of the Section and its historic and intellectual resources.

Personnel management decisions in place at the Justice Department were abandoned during Mr. von Spakovsky's tenure. Rules designed to shield the civil service from the political winds of changing administrations were cast aside in favor of a policy designed to permit partisanship to be inserted into career hiring decisions. In the past, career managers took primary responsibility for the hiring decisions of the civil service. During Mr. von Spakovsky's tenure that changed. Career managers were shut out of the process and criteria for hiring career staff shifted from rewarding legal capacity, experience and especially commitment to civil rights enforcement, to prioritizing a candidate's demonstrated fidelity to the partisan interests of the front office. Mr. von Spakovsky vigorously carried out this policy in hiring interviews he conducted.

Mr. von Spakovsky also corrupted the established personnel practices that led to a productive working environment within the Section. He demanded that the Chief of the Section alter performance evaluations for career professionals because of disagreements with the legal or factual conclusions of career attorneys and differences with the recommendations they made, not the skill and professionalism with which these attorneys did their jobs. Such changes in performance evaluations by political appointees had never occurred in the past. There is good reason for giving deference to the section chief's judgment in performance given that political appointees lack the day to day work experience that a section chief possesses in his work with all members of the section. Not surprisingly, actions such as these undermined Section morale.

The matter which best demonstrates Mr. von Spakovsky's inappropriate behavior was his supervision of the review of a Georgia voter ID law in the summer of 2005. It demonstrates the unprecedented intrusion of partisan political factors into decision-making, the cavalier treatment of established Section 5 precedent of the Voting Section, and the unwarranted and vindictive retaliation against Voting Section personnel who disagreed with him on this matter.

Prior to his coming to the Civil Rights Division in 2001, Mr. von Spakovsky had vigorously advocated the need to combat the specter of voter fraud through restrictive voter identification laws. In testimony before legislative bodies and in his writings, Mr. von Spakovsky premised his conclusions upon the notion – not well-supported at the time and now discredited – that there was a widespread problem with ineligible voters streaming into the polling place to influence election outcomes. In this same period, starting in 1994, the Voting Section had on several occasions reviewed other voter ID laws pursuant to its responsibility under § 5 of the Voting Rights Act, to determine if they had a negative impact on the ability of minority voters to participate in elections. Precedent from these prior reviews was clear: changes requiring voters to provide government-issued photo identification without permitting voters to attest to their identity

if they did not have the required ID have a greater negative impact on minority voters than white voters because minority voters are less likely to have the government issued photo identification required by these laws.

Despite his firm position on voter ID laws and his partisan ties to his home state of Georgia, Mr. von Spakovsky refused to recuse himself from considering a Georgia law that would be the most restrictive voter identification law in the country. To the contrary, he was assigned the task of managing the process by the front office. Most disturbing was that just before the Department began consideration of the Georgia law, Mr. von Spakovsky published an article in a Texas law journal advocating for restrictive identification laws. Possibly understanding the impropriety of a government official taking a firm stand on an issue where he was likely to play a key role in the administrative decision concerning that issue, as the Department does under §5, Mr. von Spakovsky published the article under a pseudonym, calling himself "Publius." Such a situation -- where the position he espoused in an article that had just been published is directly related to the review of the Georgia voter ID law -- requires recusal from Section 5 review of this law, either by Mr. von Spakovsky or by his superiors. No such action was taken.

After careful review of the Georgia voter ID law, career staff responsible for the review came to a near unanimous decision, consistent with the precedent established by the Department in previous reviews; that the Georgia provision would negatively affect minority voting strength. Four of the five career professionals on the review team agreed. The one who did not had almost no experience in enforcing §5 and had been hired only weeks before the review began through the political hiring process described above. The recommendation to object to the law, detailed in a memo exceeding 50 pages was submitted on August 25, 2005. The next day, Georgia submitted corrected data on the number of individuals who had state-issued photo identification. The career review team was prevented by Mr. von Spakovsky from analyzing this data and incorporating the corrected data into their analysis. Instead, there was an unnecessary rush to judgment and the law was summarily precleared on August 26, the same day the corrected data had been submitted. Subsequent analysis of this data by a Georgia political scientist revealed that hundreds of thousands voters did not have the required voter ID, a disproportionate number of whom were poor, elderly and, most importantly for the Voting Rights Act review, minorities. In short, this data provided further evidentiary support for the objection recommended by professional staff. Subsequently, a federal court in Georgia found that this law violated the poll tax provision of the Constitution.

The personnel fallout after this review is at least as disturbing as the decision-making process. The Deputy Chief for the Section 5 unit who led the review, a 28 year Civil Rights Division attorney with nearly 20 years in the Voting Section, was involuntarily transferred to another job without explanation. The three other professionals who recommended an objection left the Voting Section after enduring criticism and retaliation, while the new attorney who was the only one not to recommend an objection received a cash award. The Section 5 unit suffered serious morale problems and it has lost at least four analysts with more than 25 years of experience, all of whom are African-

Americans. In addition, more than half of the Section's attorneys have left the Section since 2005.

Of equal concern, is an action taken against one of the career professionals on the Georgia review team, a career professional who had participated in the recommendation to object to the Georgia voter ID law. After the decision to preclear in August, 2005, this career employee filed a complaint with the Office of Professional Responsibility (OPR) directed at the inappropriate actions taken during this review, a complaint that remains pending, more than 18 months since it was filed. About three months later, Mr. von Spakovsky, along with Deputy Assistant Attorney General Bradley Schlozman, filed an OPR complaint against this employee. The complaint was based solely on emails that they had obtained from this person's records without his authorization. Such an intrusion of privacy is unprecedented in our experience and caused an increased level of distrust in the Voting Section. OPR recognized the frivolous nature of this complaint and dismissed it within three months.

Other decisions reflect similar inappropriate behavior. A unanimous recommendation to object to the unprecedented mid-decade redistricting plan that Texas submitted in 2003 by career staff was rejected by a team of political appointees that included Mr. von Spakovsky. Subsequently, the plan was found by the Supreme Court to violate the voting rights of Latino voters. Mr. von Spakovsky also rushed through a preclearance of the harsh and discriminatory Arizona voter ID and proof of citizenship law over the recommendation by career staff to seek more information to determine its impact on minority voters.

Mr. von Spakovsky's involvement concerning enforcement of the Help America Vote Act ("HAVA") raises several other concerns. He violated decades-long traditions and policies of the Voting Section against issuing advisory opinions by sending a series of letters to state officials which had the effect of forcing states to implement HAVA in an exceedingly restrictive way. For example, in one letter, he advocated for a policy keeping eligible citizens off the voter rolls for typos and other mistakes by election officials. When Washington State followed this advice, the rule was struck down by a federal court. He also usurped the role explicitly set forth in Section 214(a)(13) of HAVA that the Voting Section chief serve on the EAC Advisory Board, and exclusively handled, with no consultation of the section chief, all communications for the Division with the EAC. According to e-mails that have been made public, Mr. von Spakovsky tried to pressure the Chairman of the EAC, Paul deGregorio, to rescind a letter stating that Arizona had to accept federal voter registration forms that did not include documentary proof of citizenship. The emails further indicate that he proposed to the Chairman "trading" the EAC's rescinding the letter mentioned above for the Department's rescinding a letter the Civil Rights Division had earlier issued which improperly stated that Arizona voters had to provide identification before they could cast a provisional ballot. Mr. von Spakovsky's attempt to bargain over the interpretation of federal law was specifically criticized by Mr. DeGregorio.

Mr. von Spakovsky adopted the same restrictive approach during the 2004 election cycle when he once again broke with established Department policy by getting involved with contentious and partisan litigation on the eve of an election. Mr. von Spakovsky drafted legal briefs in lawsuits between the Republican and Democratic parties in three battleground states, Ohio, Michigan and Florida, just before the election, all in favor of the Republican party's position and included a position that the Civil Rights Division had never taken before with regards to statutes it enforces, i.e. that there was no private right of action to enforce HAVA. These briefs ran counter to the well-established practice of the Civil Rights Division not to inject itself into litigation or election monitoring on the eve of an election where it could be viewed as expressing a political preference or could have an impact on a political dispute. Moreover, in another case between the Republican and Democratic parties which concerned an Ohio law that permitted political parties to challenge voters, he drafted a letter that was sent to the court which supported the Republican Party position even though the law did not implicate any statute that the Department enforces.

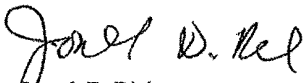
He also changed the enforcement direction of the Department regarding the National Voter Registration Act. In 2005, Mr. von Spakovsky introduced a new initiative to target states to demand that they purge their voter lists under Section 8 of the Act. This was done despite a lack of evidence that registration deadwood leads to invalid votes and instead of enforcing important federal requirements that states make voter registration more accessible to all its citizens. Moreover, the cases filed seeking large-scale purges were in states with a tight partisan split – like Missouri and New Jersey – rather than states like Texas and Utah where the rolls were equally or more inflated. A federal court in Missouri recently threw out the Department of Justice's complaint because the Department insisted on suing on only the (Democratic) Secretary of State, instead of those counties with actual deadwood problems, also noting that there was no evidence of voter fraud or evidence that any voter was denied the right to vote.

Finally, Mr. von Spakovsky never appeared to understand that his role as a Department of Justice attorney was to represent the "United States of America." Instead, on several occasions he took actions indicating a stubborn view that the Department represented the Bush Administration, the Republican Party or the Assistant Attorney General. For example in the *Georgia v. Ashcroft* litigation, Mr. von Spakovsky took a leading role in the case on remand. In that case, he proposed that the United States sign a joint co-counsel agreement with the defendant-intervenors – who were represented by top lawyers for the Georgia Republican Party -- which would have been an unprecedented and inappropriate political action. At a court hearing in the case he insisted on sitting at counsel with the Voting Section's attorneys but refused to file a notice of appearance for the United States, bizarrely claiming that he represented the Assistant Attorney General. Such a gross misunderstanding of the proper role of a Department of Justice attorney typifies his shortcomings

We have served the Department through Democratic and Republican administrations, consistently seeking to protect minority voters regardless of the impact of these actions on the political parties. While the priorities of the front offices in these administrations

change based on the results of the elections, never before has professionalism given way to partisanship. We may have disagreed with our front office colleagues, but those disagreements were given a forum and, between professionals, we found resolution. Mr. von Spakovsky and others in this front office violated the sacred rule that partisanship should be checked at the door of the Justice Department so the business of protecting the American people through federal law enforcement can be honored without prejudice. We urge you to explore Mr. von Spakovsky's role in this unfortunate endeavor and refuse to reward him for this dubious stewardship.

Sincerely,



Joseph D. Rich
Chief, Voting Section, 1999-2005
Civil Rights Division Attorney, 1968-2005

Robert A. Kengle
Deputy Chief, Voting Section, 1999-2005
Voting Section Attorney. 1984-2005

Jon Greenbaum
Senior Trial Attorney, Voting Section, 1997-2003

David J. Becker
Senior Trial Attorney, Voting Section, 1998-2005

Bruce Adelson
Senior Trial Attorney, Voting Section, 2000-2005

Toby Moore
Political Geographer, Voting Section, 2000-2006

○