

THE IRS'S TARGETING SCANDAL: CHANGING STORIES OF THE MISSING EMAILS

HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC GROWTH,
JOB CREATION AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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CONTENTS

Hearing held on September 17, 2014	Page 1
WITNESSES	
Mr. John Koskinen, Commissioner, Internal Revenue Service	
Oral Statement	7
Written Statement	10
APPENDIX	
Sept. 5, 2014 PSI Report, submitted by Rep. Cartwright	44
June 6, 2013 letter to Daniel Werfel from 26 Democrats, submitted by Rep. Horsford	45
Cause of Action statement for the record	49

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Wednesday, September 17, 2014,

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

The subcommittee met, pursuant to notice, at 2:12 p.m. in room 2154, Rayburn House Office Building, the Honorable Jim Jordan [chairman of the subcommittee], presiding.

Present: Representatives Jordan, DeSantis, Lummis, Collins, Bentivolio, Meadows, Gosar, Cartwright, Connolly, Kelly, Horsford and Issa.

Staff Present: Molly Boyd, Majority Deputy General Counsel and Parliamentarian; David Brewer, Majority Senior Counsel; Drew Colliatie, Majority Professional Staff Member; Linda Good, Majority Chief Clerk; Christopher Hixon, Majority Chief Counsel for Oversight; Michael R. Kiko, Majority Legislative Assistant; Laura L. Rush; Majority Deputy Chief Clerk; Andrew Shult, Majority Deputy Digital Director; Sarah Vance, Majority Assistant Clerk; Jeff Wease, Majority Chief Information Officer; Portia Bamiduro, Minority Counsel; Aryele Bradford, Minority Press Secretary; Donald Sherman, Minority Chief Oversight Counsel; and Katie Teleky, Minority Staff Assistant.

Mr. JORDAN. The committee will come to order.

I want to again welcome our witness, the Commissioner for the Internal Revenue Service, Mr. John Koskinen.

You know how this works, Mr. Koskinen. You have been here a few times and we appreciate your coming back.

We will start with opening statements, as is customary.

The subcommittee meets today to continue our oversight of the IRS and its targeting of conservative groups.

In an interview in July, Commissioner John Koskinen talked about the congressional investigations into the targeting. He said, "There are some people who don't want a straight story; they don't want this to end."

Commissioner Koskinen went on to say, "I'm not sure if people really want a special prosecutor because that would shut everything down. The special prosecutor then would have sole domain over this, so you wouldn't be holding all these fun hearings every week or two."

We will get to this in my questioning, Mr. Koskinen, but I can tell you one thing. We do want a special prosecutor. Every single

Republican voted for it. It is not some fun and games we are playing here. Twenty-six Democrats voted for the resolution as well.

It is not about fun; it is not about amusement. We are here because of the constant flood of false and misleading statements made by the IRS. The reason the American people cannot get a straight story is because the IRS will not give them one.

In March 2012, then Commissioner Doug Shulman gave assurances to the Ways and Means Committee that the IRS was not targeting conservatives. We now know that was not accurate.

In April 2012, Lois Lerner told our staff that the way the IRS was treating conservative groups was part of the "ordinary course of the application process." We now know that was not true either.

On May 10, 2013, Ms. Lerner apologized for targeting by responding to a planted question at an ABA conference here in town. By planting the question, Lerner tried to downplay the misconduct and mislead the public.

That same day, Lois Lerner blamed "line people in Cincinnati for the targeting." We know that was not true either. We know the targeting went all the way up to Washington, D.C.

President Obama's Press Secretary, Jay Carney, blamed the targeting on line employees in Cincinnati. That is not accurate. The President, himself, attribute targeting to "bone-headed decisions by Cincinnati employees," also not accurate.

When we finally got witnesses before the committee in public session, the misleading statements continued. When I had the chance to question Mr. Shulman, I asked him how many times he went to the White House. He said, "I don't have a number," but of course he did remember that he attended the Easter egg roll at the White House.

Imagine that. The IRS Commissioner has no idea how often he visited the White House but what stuck out was the Easter egg roll, even though he went to the White House 157 times, unprecedented for an Internal Revenue Service Commissioner.

Acting Commissioner Werfel testified on August 2, 2013 that the IRS would produce every single Lois Lerner email and that he would "ask the team to prioritize that." We now know from testimony of IRS employees involved in document production that there was no prioritization of those.

The IRS has told us that it takes Section 6103, the part of the Code that protects confidential taxpayer information, "very seriously." That is what they say. That is why they say it takes so long to get the documents. Yet, we have changing interpretation of 6103, redacting information when it suits the IRS's interest, un-redacting that information when it suggests violations of federal law.

Now we know that in 2010, the IRS illegally sent the FBI 1.1 million pages of non-profit information, including confidential taxpayer information protected by Section 6103.

Commissioner Koskinen, during your first appearance here on March 26 when asked whether you would produce all of Lois Lerner's emails, you testified, "Yes, we will do that." Obviously we now know you can't possibly produce every single Lois Lerner email because you have lost some of them.

Then Commissioner Koskinen, you told Congress that the IRS had confirmed that backup tapes no longer existed, but the IG has

told us the backup tapes do exist and that the IRS did not search 760 exchange server drives because you didn't even know you had them.

Commissioner Koskinen, you testified that you remember being told in April about Lois Lerner's missing emails. You didn't tell Congress, the Justice Department, the FBI, and, most importantly, the American people, until June 13 but we now know Kate Duvall, Chief Counsel, knew in February. She even told the Treasury Department in April.

The IRS told its political bosses in the Administration before telling those of us who were investigating the IRS, another effort to mislead the American public.

Commissioner, you testified that the reason you delayed telling Congress was that you went to great lengths, great lengths and spent "a significant amount of money to make sure that no email was missing," but the Inspector General tells us that emails from at least eight employees are missing.

We learned the IRS does not even archive its office communication messages. We learned that the IRS wiped Lois Lerner's Blackberry after Congress had started asking questions about this issue.

We learned from an IRS IT employee that Lois Lerner kept a large amount of data on her hard drive and he recommended that she back it up. He was told that Ms. Lerner did not have time to do that and it was not her responsibility.

Mr. Koskinen, if the IRS was truly trying to ensure that no email was missing, you guys did a pretty bad job. That is why we have invited you back here today. There has been an ever changing story coming out of the IRS about the targeting of conservative groups and missing emails.

Each time you testified, Mr. Koskinen, we later learn something you said wasn't right. You have refused to give the American people a straight story but we hope today, we hope today that they can start to get a straight story, start to get at the truth and not get the run around that we have gotten before. That is why we have you back today.

With that, I would yield to the Ranking Member for his opening statement.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

Thank you, Commissioner Koskinen for testifying before this committee yet again. Your appearance before this committee is becoming quite a recurring event, kind of like the movie Groundhog Day around here.

I am becoming increasingly concerned at this point that committee Republicans are no longer using these hearings for the purpose of investigating what happened to the groups that were the subject of the IG's May 14, 2013 report.

What we are doing here seems to be something entirely different. What is happening here is we have people desperately searching for information about the IRS's response to the committee's investigation.

Counting today, Mr. Chairman, Mr. Koskinen has testified four times before this committee in the past several months and at least seven times before House committees in total this year.

We all have to agree that the purpose of this committee is not publicly to harass federal agency heads. It is to conduct responsible oversight on a host of legitimate critical issues within our jurisdiction.

I believe that these repeated hearings continuing again today are not only a badgering of witnesses but an abuse of authority and a dereliction of this committee's duty in its entirety. I think it is abundantly clear that Chairman Issa and Chairman Camp are also in some kind of a taxpayer-funded foot race to see who can make the most headlines about Lois Lerner's lost emails.

I also, again, want to address Republican claims that the alleged targeting of conservative groups is a government-wide conspiracy initiated after the Supreme Court's 2010 decision in *Citizens United*, a conspiracy involving the President, the IRS, the Department of Justice and every other federal agency.

This committee has obtained no evidence linking these accusations to what we all now know were inappropriate criteria used by IRS employees in Cincinnati to screen applications for tax exempt status.

The IRS has fully cooperated and provided congressional investigations of the alleged targeting with more than 800,000 pages of documents. These congressional investigations have cost the IRS at least \$18 million so far and none of the evidence has shown any political motivation or White House involvement.

Some of my colleagues on the other side of the dais have chosen to overlook the funneling of dark money into the political system of the United States. Republicans have demanded accountability from the IRS but have not demanded the same thing from the corporations who influence our national elections.

In January 2010, the U.S. Supreme Court, in a five to four decision in *Citizens United*, ruled that political spending is a form of protected speech under the First Amendment and that the government may not prohibit artificial entities from spending money to support or oppose a specific candidate in an election, ruling essentially that corporations are not artificial entities, that they have First Amendment rights because after all corporations are people, my friend.

Citizens United allowed for profit corporations, unions and non-profit groups to raise unlimited funds and register for tax exempt status under the 501(c)(4) designation and the IRS became flooded with applications for this kind of status. Section 501(c)(4) designation is exclusively meant for organizations whose primary activity is social welfare defined in the Tax Code as making charitable, educational and recreational contributions to a community.

While 501(c)(4)s are not barred from participating in political campaigns, it is stated plainly and clearly that political participation must be "an insubstantial amount of the group's overall activity accounting for less than 50 percent of expenditures."

The IRS's job was to make sure that these groups were following the rules so that they were not taking tax breaks meant only for groups contributing to the community, not hiding the influence that a select few individuals have on our Nation's electoral politics.

I am also deeply concerned by the recent reports from the Senate Permanent Subcommittee on Investigations regarding the manage-

ment failures of the IRS and TIGTA in investigating alleged targeting of 501(c)(4)s.

While the subcommittee's investigation found no evidence of IRS political bias, PSI found the Inspector General's exclusion of any analysis of how liberal or progressive groups were treated distorted the audit's findings and significantly damaged public confidence in the impartiality of the IRS.

Mr. Chairman, I ask unanimous consent to enter the September 5, 2014 PSI report into the record.

Mr. JORDAN. Without objection.

Mr. CARTWRIGHT. We must shift our focus toward establishing a more objective and transparent set of standards for evaluating 504(c)(4) applicants involved in political activities.

As I have stated in previous hearings, this is about groups doing everything they can do to hide where they get their money, obscure their true intentions and have undue influence on the political system of our country tax free.

Anonymous money in politics is something we do not need in this country and something I have repeatedly said disrupts the normal and natural democratic process and must be changed.

With that, Mr. Chairman, I yield back.

Mr. JORDAN. Will the gentleman yield?

Mr. CARTWRIGHT. Yes.

Mr. JORDAN. I would just point out that the report the gentleman asked be put in the record, which we did, the Ranking Member of that committee disagreed strongly and sort of in an unprecedented fashion, did not sign onto the report. That, of course, is Senator McCain, who I might add is somewhat well known for the McCain-Feingold campaign finance law but yet, he says that report had significant flaws and would not sign onto it as is the custom with that committee in the United States Senate.

With that, I would recognize the gentleman from California, the Chairman of the full committee.

Mr. ISSA. Thank you, Mr. Chairman.

Commissioner, welcome back.

It is apparently Groundhog Day and we have a Pennsylvania member who knows about these things because he certainly is repeating some of the same tired lines we heard from the beginning of this investigation. During questioning, I may ask you some of these, but I just want to make a couple of quick points.

The Ranking Member uses the words tax exempt, but we have already made clear that a 501(c)(4) only has an exemption from having to take other peoples' post-tax paid money and pay some sort of a tax revenue again.

Ultimately, if a 501(c)(4) takes \$100,000 from 1,000 people, \$100 apiece, and spends it on some common effort and exhausts all of it, there really wouldn't be any difference whether it was a (c) corp or a 501(c)(3) or 501(c)(4). At the end of the day, a 501(c)(4) or a conventional (c) corporation, a for profit business, ultimately, at the end of the day, if it exhausts all the money and has no profit, there is no tax.

It is always amazing to me that people want to pretend that a 501(c)(4) is a charity. It is not. People don't get a tax deduction; they don't get a write-off for giving to it. There is no special treat-

ment and every time we establish that, the Minority wants to continue to act like the taxpayers are funding this. There is no taxpayer funding.

More importantly, the Ranking Member erroneously, beyond all possible evidence, continues to say Cincinnati. Mr. Commissioner, you know that Lois Lerner has been referred for criminal prosecution for her role.

The American Bar Association has to look at her. The IG has to look at her because ultimately, she was pivotal to denying these 501(c)(4)s their rights and her missing emails, although deeply wanted, are not completely necessary because the ones that we have seen show that she calls conservatives the A word with a hole afterwards.

She refers, with disdain, to conservatives. She is an active liberal and it is clear her actions were set out to become to the detriment of conservatives.

You, Mr. Ranking Member, can bash the IG anytime you want and you can say Cincinnati as many times as you want, but ultimately it was Lois Lerner who violated the law, went before the Bar Association and made a speech where she planted a question in order to pre-release and try to mislead people as to what she had been doing and try to cast the blame on a group of innocent people in Cincinnati.

This committee has interviewed all of the Cincinnati people. Some of them very bravely said these things should have been approved and they recommended that. Some of them said nothing. Some of them might even have been, in fact, in agreement with Lois Lerner.

Lastly, this Chairman is sick and tired of a false narrative coming from the Democrats that implies that we keep pointing to the President or keep pointing to somebody else. The fact is we have followed the trail where it leads and we have seen it lead to Lois Lerner, the subject of the missing emails, the subject of the emails we have seen and we have made that point very clear.

No one in my key staff and none of my congressional leaders here on the committee has made assertions directly about the President. Yes, we are interested in seeing why a commissioner would endlessly go back and forth to the White House 100 times more than historically reasonable and it was not all for an Easter egg hunt.

We don't know who he talked to. What we do care about is this. There have been bad things happening before your watch, Mr. Commissioner, and you came in to help fix it. That includes the leakage of information that should not leak out of the IRS. It always claimed to be accidental but it happened.

It includes that now famous transfer of over a million records, if you will, to the Department of Justice under Lois Lerner's watch, clearly, in this member's opinion, attempting to encourage the Department of Justice to get involved in a prosecution.

We are deeply concerned with over \$1 billion spent and we cannot maintain a few emails reliably. We are concerned with all of these areas.

I would hope at some point, the Minority would quit acting as though they ever were part of this investigation, as though they

ever thought there was any legitimacy, and start recognizing that once a false statement made by the Minority has been disproved such as Cincinnati was responsible, that they would not expose us to Groundhog Day again by bringing up something that is patently untrue and disproven.

Mr. Chairman, I appreciate your continuing to seek the truth. I appreciate the Commissioner continuing to come here, sometimes not as the witness we call but as a voluntary witness who believes he can answer our questions.

I am concerned that, Mr. Commissioner, you don't always come here with the answers that ultimately seem to be accurate. That is not uncommon before this committee. I think the Chairman would like to give you an opportunity to correct or further enlighten us in a lot of areas and I look forward to that.

I know that your job as part of Article II of the Constitution, the Executive Branch, is important. Our job, as Article I, is important for oversight and appropriation. I, for one, would hope that never again from the dais will I hear people who think if the Supreme Court rules, it is open to ridicule rather than the recognition that they are the final words on what is or is not constitutional.

With that, Mr. Chairman, I thank you for your indulgence and I yield back.

Mr. JORDAN. I thank the chairman for his statement.

Members may have seven days to submit opening statements for the record.

Mr. Koskinen, you have done this a few times. Would you please stand. Pursuant to committee rules, we swear in witnesses. Please rise 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?

[Witness responds in the affirmative.]

Mr. JORDAN. Let the record show that the witness answered in the affirmative.

Mr. Koskinen, if you will give your opening statement, we will get right to questions. Thank you again for being here.

WITNESS STATEMENT

STATEMENT OF JOHN KOSKINEN, COMMISSIONER, INTERNAL REVENUE SERVICE

Mr. KOSKINEN. Chairman Jordan, Chairman Issa, Ranking Member Cartwright and members of the subcommittee, thank you for the opportunity to update you on the work being done by the IRS to cooperate with the investigations into the findings by the Treasury Department and the Inspector General for Tax Administration regarding the improper criteria used in processing applications for tax exempt status.

I will also discuss the steps we have taken and continue to take to remedy the issues discussed in TIGTA's 2013 report and in subsequent hearings. The IRS remains committed to cooperating fully with the Oversight Committee investigations and we continue to make every effort to fulfill information requests from Congress and the other investigating entities.

To date, the IRS has produced more than 1 million pages of unredacted documents to the tax writing committees and more than 810,000 pages of redacted documents to the House Oversight and Government Reform Committee and the Senate Permanent Subcommittee on Investigations.

Related to the IRS document production, I want to take the opportunity to clear up a misunderstanding that has arisen about our records retention practices. Recently, there were erroneous press reports that the IRS backs up information by sending it to a government-wide data base.

I want to clarify there is no system outside the IRS, government or otherwise, that the IRS uses to store emails.

I would also like to clear up some confusion about the IRS issued Blackberry device used by former agency executive Lois Lerner. Ms. Lerner's Blackberry was replaced in February 2012 with a newer model as part of an ongoing Blackberry update that involved about 5,000 IRS employees.

Because the old Blackberry was obsolete, it was disposed of under standard IRS recycling procedures at that time. This included erasing any information on the device to prevent dissemination of any taxpayer sensitive information that might be on it.

The information was not transferred to the new Blackberry because our Blackberrys only display email that is managed by the employee's Microsoft Outlook mailbox which is maintained on the IRS's servers. The replacement Blackberry Ms. Lerner received in 2012 and used from that point on is in TIGTA's possession.

Now that the Permanent Subcommittee on Investigations has released the report of this investigation, we look forward to the conclusion of other investigations in the very near future. We stand ready to receive the recommendations of the investigators which we believe will help to ensure that the problems that arose never happen again.

To further guard against such problems as we go forward, the IRS has also been implementing managerial and operational improvements in the determination process for tax exempt status and more broadly, throughout the agency.

As part of this work, the IRS has completed action on all nine recommendations in the TIGTA report. Some of the actions taken include improving employee training in the determinations area, creating a new procedure for documenting why applications are chosen for further review, and establishing a formal process for employees in the determination unit to request help from our technical experts.

We have also established an agency-wide Enterprise Risk Management Program. This has involved creating risk management liaisons in each area of our operation and providing for the regular identification and analysis of risks to be eliminated and managed across the agency.

We are working to create a culture where employees are encouraged to report any issues or problems that occur. Our goal is to have employees understand that the only problems we cannot solve are the ones we do not know about.

As a corollary to that effort, we are encouraging the flow of information from frontline employees up through the organization as well to frontline employees from senior managers.

Another area where the IRS is making improvements involves the retention of official records. We have been consulting with the National Archives and Records Administration to ensure that we are fully aligned with their standards for managing and storing emails deemed to be federal records.

As a first step, we will implement an interim policy that requires our executives' email records to be retained on secure servers rather than on their hard drives. Our next step will be to purchase the necessary equipment and technology to allow us to expand this approach to other employees and to extend the secure storage periods beyond those stipulated in the NARA standards.

Finally, our ultimate goal is to ensure that all email records are not only securely saved and stored but also easily retrievable. This result would require funds we do not presently have but we continue to look for other solutions and we are holding discussions with other government agencies with similar challenges.

This concludes my testimony. I would be happy to take your questions.

[Prepared statement of Mr. Koskinen follows:]

**WRITTEN TESTIMONY OF
JOHN A. KOSKINEN
COMMISSIONER
INTERNAL REVENUE SERVICE
BEFORE THE
HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE
SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION AND
REGULATORY AFFAIRS
SEPTEMBER 17, 2014**

Chairman Jordan, Ranking Member Cartwright and Members of the Subcommittee, thank you for the opportunity to update you on the work being done by the Internal Revenue Service (IRS) to cooperate with the investigations into the findings by the Treasury Inspector General for Tax Administration (TIGTA) regarding the improper criteria used in processing applications for tax-exempt status under section 501(c)(4) of the Internal Revenue Code. I will also discuss the steps we have taken and continue to take to remedy the issues discussed in the TIGTA report and subsequent hearings.

The IRS has been, and remains, committed to cooperating fully with the pending oversight investigations into the issues raised in TIGTA's May 2013 report. The Service continues to work diligently to provide Congress with the information and documents requested in connection with the investigations, and to work to restore any confidence that might have been lost in the IRS's ability and commitment to administer the nation's tax laws in an unbiased, non-political manner.

To date, the IRS has produced more than one million pages of unredacted documents to the tax-writing committees and more than 810,000 pages of redacted documents to the House Oversight and Government Reform Committee and the Senate Permanent Subcommittee on Investigations in connection with TIGTA's May 2013 report. The difference in the number of pages produced reflects the fact that individual case files, which can be voluminous, may be disclosed only to the tax-writing committees under Internal Revenue Code Section 6103.

For more than a year, the IRS has devoted significant resources to complying with the requests for information from the six investigating entities – transmitting documents and facilitating interviews in an effort to provide complete facts about the determination process for tax-exempt status under section 501(c)(4). More than 250 IRS employees have spent more than 138,000 hours working directly on complying with the investigations, at a cost of approximately \$18 million, which also includes the cost of adding capacity to our information technology systems to accommodate the voluminous information requests.

The IRS's document production work began with an effort to identify the IRS employees from whom emails should be collected, and the search terms that should be used to ensure the agency was collecting relevant information to provide to the investigators. Eventually, the IRS identified and collected information from the custodial accounts of 156 employees who were deemed potentially relevant to the exempt organizations determinations investigation. After further review, the IRS determined that a number of these employees were only tangentially related to the subject of the investigations; accordingly, as we advised the committees, we limited our analysis of emails and other electronic documents to the custodial accounts of 82 employees. (There was one additional employee from whom we collected hard copy documents, including printouts of emails.) We searched these accounts for material responsive to the committees' requests utilizing search terms developed after consultation with the committees' staffs. A list of account custodians and search terms was provided in a letter sent to all six investigating entities in August of last year, and I provided this information as well in response to the Chairman's recent letter to me.

In addition to collecting, redacting, and providing to the six investigating entities all relevant emails from these 82 custodial accounts, our work has also included the production of documents in response to special requests from one or another of the investigating entities. Whenever the information produced for one of these special requests was relevant to the common requests of the investigating entities, we provided that information to all of the entities.

In March of this year, we advised the investigating entities that we had completed the production of all documents that appeared to be relevant to the investigation of the exempt organizations determination process. In response to a request from this Committee, once the production of documents relevant to the investigation was completed, we turned to producing all other emails of Lois Lerner, former Director of Exempt Organizations (who was one of the 82 custodians), that had not previously been produced.

As discussed at some length during a number of hearings this summer, we confirmed and reported in June of this year that Ms. Lerner's hard drive had crashed in June 2011, and that as a result, it appeared that certain emails could not be retrieved from her hard drive, notwithstanding the efforts by IRS technicians to reconstitute Ms. Lerner's data following the June 2011 crash.

One of the limitations on our ability to recover emails from the period covered by Ms. Lerner's hard drive crash is that, as previously explained to the Oversight Committee, disaster recovery tapes containing data for that period no longer existed. Although IRS email servers are backed up on a daily basis for disaster recovery purposes, prior to May 2013, this data was retained on tapes for only six months. After six months, IRS disaster recovery tapes were reused – that is, they were written over with new backup data – until they were no longer capable

of recording, at which time the tapes were recycled. In May 2013, the IRS changed its policy, and since then, it has retained these tapes rather than reusing and recycling them. This means that the IRS has preserved disaster recovery tapes containing information from December 2012 onward, but not information prior to that date.

There have been some confusing press reports that the IRS backs up information by sending it to a government-wide database containing electronic communications. It appears these reports are based on a misunderstanding of an informal conversation by a litigant with an employee of the Department of Justice. There is no system outside the IRS – government or otherwise – that the IRS uses to store emails. Even if such a system existed, the IRS would be prohibited under section 6103 from using such a database for email storage.

Despite the issue with Ms. Lerner's hard drive and our disaster recovery procedures, the IRS identified and reviewed emails to and from Ms. Lerner and the other 81 custodians by searching the emails of those custodians that had been identified using the search terms mentioned above. As a result of these efforts, the IRS identified approximately 24,000 of Ms. Lerner's emails from the period between January 1, 2009 and April 2011 – the period apparently affected by the hard-drive crash – from these other custodian accounts. These emails, along with the 43,000 emails collected from Ms. Lerner's computer and her Microsoft Outlook account, brought the total number of Ms. Lerner's emails produced through August 2014 to 67,000.

As the search for and production of Ms. Lerner's emails was concluding, I asked those working on this matter to determine whether computer systems of any of the other 81 custodians had experienced any similar difficulties. It was subsequently determined that 18 of those custodians experienced computer equipment issues that could potentially have resulted in a loss of emails. After we were able to do a thorough review, we determined that only five of those 18 appeared to have lost some emails, and that the other 13 do not appear to have lost any emails as the result of an equipment failure. We provided greater detail about this review in a report we sent earlier this month to all the investigating entities.

In addition, in June, TIGTA began an investigation of the circumstances surrounding Ms. Lerner's hard drive crash. At their request, we delayed completing our review of the issues regarding other custodians until TIGTA had completed all of its interviews. We have provided our complete support to TIGTA, and I understand they are reviewing a range of tapes and other equipment as part of their investigation. We look forward to their report and any additional recommendations they may have.

I would like to clear up a misunderstanding that has arisen regarding Ms. Lerner's IRS-issued BlackBerry device. It is important to note that an IRS

employee's BlackBerry displays only email that is managed by the employee's Microsoft Outlook mailbox (which is maintained on the IRS's servers), and not emails that an employee has archived on his or her computer hard drive. The IRS BlackBerry configuration does not have a default setting to save copies of inbound or outbound messages to the device. The IRS's standard practice for a BlackBerry when it is replaced, upgraded, repurposed, or taken out of use due to a malfunction, is to erase the information stored on the device. The reason for that is that the BlackBerry could contain sensitive taxpayer information that the IRS must ensure is not disseminated. Ms. Lerner's BlackBerry was replaced in February 2012 with a newer model as part of an ongoing BlackBerry update involving approximately 5,000 IRS employees. Because Ms. Lerner's old BlackBerry was obsolete, it was disposed of under standard IRS recycling procedures. As for the replacement BlackBerry that was issued to Ms. Lerner in February 2012, it currently is in TIGTA's possession.

In addition to the work we have been doing to cooperate with the ongoing investigations, the IRS is continuing the efforts it began in Fiscal Year (FY) 2013 to implement broad managerial and operational improvements in the determination process for tax-exempt status. As of late January 2014, the IRS had completed action on all nine recommendations contained in TIGTA's May 2013 report.

The changes we have made in response to the TIGTA recommendations include:

- Establishing a new process for documenting the reasons why applications are chosen for further review;
- Developing new training and workshops on a number of critical issues, including the difference between issue advocacy and political campaign intervention, and the proper way, under current law, to identify applications that require review of potentially significant political campaign intervention;
- Establishing guidelines for specialists in IRS's Exempt Organizations (EO) division on how to process requests for tax-exempt status involving organizations engaging in potentially significant political campaign intervention; and
- Creating a formal, documented process for EO determinations personnel to request assistance from technical experts.

We have also reduced the inventory of section 501(c)(4) applications, including the group of 145 cases in the "priority backlog" – those that were pending for 120 days or more as of May 2013. As of September 9, 2014, 133 of those cases, or 91 percent, have been closed. Of the closed cases, 102 of them were approved, including 43 organizations that took advantage of a temporary self-certification procedure we offered in summer 2013. Of the remaining 31 closed cases, most were closed without a determination, either because the organization withdrew the application or it failed to respond to our questions. To date, four applications have been denied and the remaining 12 cases are still open. None of these 12

organizations opted to accept the self-certification procedure used by 43 organizations to obtain prompt approval of their applications.

We also have established an agency-wide enterprise risk management program, creating risk management liaisons in each area of our operation and providing for the regular identification and analysis of risks to be eliminated or managed across the agency. We are working to create a culture where employees are encouraged to report any issues or problems that occur. My goal is to have employees understand that the only problems we can't solve are the ones we don't know about. As a corollary to that effort, we are encouraging the flow of information from front line employees up through the organization as well as to the front line from senior managers.

I would also like to describe for the Subcommittee the efforts now underway to revamp the IRS's records retention practices to improve the management and storage of emails that are deemed to be Federal records. We are consulting with the National Archives and Records Administration (NARA) to ensure that the IRS is aligned with the standards set by NARA.

As a first step we will implement an interim policy, which is described more fully below. This interim policy is to be followed by a more fully developed enterprise solution for longer-term storage of emails. We are working to complete the development and implementation of the enterprise solution.

Under the interim policy, we will be providing new instructions to IRS executives for protecting the electronic records they create through emails and calendar invitations. Emails that are sent and received by these senior officials and that are Federal Records will be captured and stored on a secure server. Our next step will be to purchase the necessary equipment and technology to allow us to securely store emails that are Federal records according to the following criteria:

- Email records sent or received by Top Level Officials, also known as Capstone officials in NARA email management guidance, will be captured and preserved as permanent records, which will ultimately be accessioned into the National Archives;
- Email records sent or received by other Executives, Senior Managers and specific policy analysts will be secured and stored for 15 years;
- Email records sent or received by all others will be secured and stored for seven years by the IRS; and
- We will also develop guidance on how to manage non-record and personal email materials consistent with the Federal Records Act.

The IRS will work with NARA to implement a records disposition schedule and the implementing directives to reflect the policy above. We believe this approach will meet or exceed the present NARA standards for managing email records.

Our ultimate goal is to ensure that all email records are not only securely saved and stored, but also easily retrievable. This result would require funds that we do not have, but we continue to look for other solutions, and we are holding discussions with other government agencies that are dealing with similar challenges.

This concludes my testimony. I would be happy to take your questions.

Mr. JORDAN. Thank you, Mr. Koskinen.

Commissioner, I plan to do my round of questioning on the fact that you had confirmed there were no backup tapes and we subsequently learned there are backup tapes. You did not tell us about the servers. We have learned there are now servers that contain this information and a host of other things.

The staff pointed out to me just recently, just yesterday, and I re-read it as I walked in. I want to go to a statement that you made in an interview a couple of months ago. In fact, let us put it on the screen.

Mr. KOSKINEN. Do you have a hard copy of that?

Mr. JORDAN. We can give you a hard copy too, although we have a slide that is big enough that we can read. If we could a copy to the Commissioner, that would be great.

Let us go to the highlighted one. Is this a statement that you made, Commissioner? Can you look at it and see if you made this statement? It is reported that you did.

Mr. KOSKINEN. Yes, I recognize it.

Mr. JORDAN. I want to go to the underlines. "There are some people who don't want a straight story, they don't want this to end." Who is the "they"? Who are you referring to?

Mr. KOSKINEN. Just talking generally about the fact that a year and a half ago, the IG issued a report noting that there were management issues at the IRS that needed to be addressed and since then, we have, certainly in the last several months, with regard to that basic issue, have not furthered the discussion very far. We have, as I said, taken all the actions the IG recommended.

Mr. JORDAN. You did not answer my question, Mr. Commissioner. Who is the "they"?

Mr. KOSKINEN. It is a general statement. I did not have anybody in particular in mind.

Mr. JORDAN. Let me go back to the one before that. Who is the "some people" in the sentence before, the clause before—"there are some people who don't want a straight story." Who is the "some people"?

Mr. KOSKINEN. That is just a general statement.

Mr. JORDAN. This is what I cannot understand. What people would not want the truth—what straight story? Who are the people who don't want a straight story thereby meaning who are the people who want a false story? Do you know who they are?

Mr. KOSKINEN. There have been examples. An example would be that a claim is made as a result of passing conversation with the Justice Department.

Mr. JORDAN. Mr. Commissioner, look, look, look.

Mr. KOSKINEN. Can I answer the question?

Mr. JORDAN. You can answer the question. You cannot just talk. "There are some people who do not want a straight story." All I am asking you is—you said this, I did not, so you should know who the "some people" and the "they" are in the two sentences you said. Who are these "some people," who are the "they" who do not want the truth? I want to know who those people are.

Mr. KOSKINEN. They are the people who issue information without a substantial basis that turns out to be erroneous.

Mr. JORDAN. Is the "some people" in that paragraph—go down to the next paragraph where it says "I'm not sure people really want a special prosecutor." Are the "people" in that sentence the same as the "some people" in the sentence above?

Mr. KOSKINEN. Not necessarily, they are two different statements. If you like, I would like to explain the first one.

Mr. JORDAN. Who are you referring to who do not want a special prosecutor?

Mr. KOSKINEN. I am referring there to the fact that, as I say, that a special prosecutor—

Mr. JORDAN. Are you referring to the people who actually voted for a special prosecutor, is that who you are referring to because that is the context of the special prosecutor? Do you think the individual member of the Congress who sponsored the legislation, the resolution for a special prosecutor does not want a special prosecutor?

Mr. KOSKINEN. I think that is right, although I think—

Mr. JORDAN. You do not think I want the special prosecutor to happen? I happen to be the guy who sponsored the resolution. Do you know how many Republicans voted for it, Mr. Commissioner?

Mr. KOSKINEN. No.

Mr. JORDAN. Two hundred and twenty-four. Which one of those 224 Republican members does not really want a special prosecutor?

Mr. KOSKINEN. I am sure they all think they do.

Mr. JORDAN. That is not what you said. You said some of them do not. I am asking you which ones do not.

Mr. KOSKINEN. I did not refer to any Republicans. I just said as a conceptual matter, there are people—

Mr. JORDAN. Let me ask you about the other party then. Do you know how many Democrats voted for the special prosecutor?

Mr. KOSKINEN. There are a whole series of—

Mr. JORDAN. Twenty-six, I know.

Mr. KOSKINEN. Good.

Mr. JORDAN. Twenty-six of them. Twenty-six of them said it is so important, we are willing to go against what our attorney general has recommended. We want a special prosecutor. Are you saying some of those 26 Democrats are the same people who do not want a special prosecutor even though they voted for it?

Mr. KOSKINEN. I am just saying that a special prosecutor would, in effect, take total jurisdiction over all of this and that would—

Mr. JORDAN. Oh, and that is the point and then your point is if there is a special prosecutor, we would not be able to have these "fun hearings." That is the part that just bothers me and more importantly the American people. The American people do not think this is fun, they want the truth.

So far, what has happened every single time you have come in front of this committee is you have told us something that later turned out not to be accurate. You said you could confirm there were no backup tapes and the IG says, in fact, there are backup tapes.

Mr. KOSKINEN. Do you want to have a discussion about that?

Mr. JORDAN. We will but unfortunately, I am out of time because we spent so much time on two sentences you made that you cannot

even tell us who you are referring to. I would love to get into that but I am out of time.

I have to recognize the Ranking Member because you cannot tell me who “they” is you are referring to and you cannot tell me who the “some people” are you are referring to and you cannot tell me who would not want the truth even though you allege that there are members of Congress who do not want the truth and do not want the special prosecutor they voted for.

You alleged all those things and you could not tell me the answer to any of that and now, unfortunately, I have to recognize the Ranking Member.

Mr. KOSKINEN. Could I just note I cannot tell you because you will not let me answer the question.

Mr. JORDAN. I gave you plenty of time to answer the question.

Mr. KOSKINEN. I think the record will show I was not given plenty of time to answer the question.

Mr. JORDAN. The record will show you were given plenty of time to tell me who the “they” is in the sentence you said, who the “some people” were in the sentence you said, “who doesn’t want a straight story, who doesn’t want the truth,” you were given ample time to answer those and you did not do it.

The gentleman from Pennsylvania is recognized.

Mr. KOSKINEN. I would be happy to look at the record with you and demonstrate that as I started to answer that question, you said, “I want an answer. I don’t want you to talk on” and I was going to give you examples and then you cut me off.

I am happy to have you cut me off but I am not happy to have you misrepresent what my statement was.

Mr. JORDAN. The gentleman from Pennsylvania.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

Once again, I will reiterate that we are not in Washington and we are not in Cincinnati today. We are back home in Punxsutawney.

Let me ask you this, Mr. Koskinen. Would you like to amplify your answer to the slew of questions you just got from the Chairman?

Mr. KOSKINEN. I would appreciate that opportunity.

Mr. CARTWRIGHT. Go ahead.

Mr. KOSKINEN. With regard to the statement that I come up here and then say things that are not true, for instance, about the backup tapes, it is not yet clear whether there are any backup tapes that have any information on them.

In all of my hearings, I have testified at some length about the fact that we have disaster recovery tapes and that we keep them for six months. We have actually kept them all now since December 2012. Then those backup tapes are recycled. Never did I say they disappeared. I said they were recycled.

I have not talked to the IG. He does not give me regular updates about this but I do understand—

Mr. JORDAN. Would the gentleman yield just to clarify?

Mr. KOSKINEN. Do I get to answer or do you want to continue talking?

Mr. CARTWRIGHT. He is still answering the whole raft of questions you gave him so far.

Mr. JORDAN. Go ahead.

Mr. KOSKINEN. The IG, as I understand it, and I understand some of that from releases out of this committee, the IG has taken a series of tapes to see if there is anything on them but the tapes he has taken are tapes that, in fact, we have talked about. They are the six month disaster recovery tapes that are recycled, stored and available until they are not usable.

There are no new tapes that are out there that the IG has found. He is simply looking at that supply of tapes. I have encouraged him to do that. I have told him if he can find more emails, that would be terrific because we would support that.

With regard to the issue of the truth, I started to explain that there are people who quickly put out information that does not turn out to be true that they could have checked. The issue about whether the IRS has some participation in some government-wide backup system, which immediately led to press reports and comments from other people that there were somehow now emails from Lois Lerner that existed that we just did not either want to spend the money or the time to go find turned out to be totally untrue.

Somebody could have called us and we would have made it clear to them that whatever the conversation was, which I am not privy to obviously, in passing with the Justice Department turning was with regard the disaster recovery tapes that we have talked about in at least three different hearings.

Thank you for the opportunity.

Mr. CARTWRIGHT. Certainly.

Mr. Koskinen, you were also given a number of questions about the remarks you made in July 2014. Do you want to further explain the gist of those remarks?

Mr. KOSKINEN. Just to those remarks, as I say, there are some people who rather than calling us and saying, do you have a government-wide backup system you participate in or you forgot about, could have been told, no, we do not have one. The only thing we have are disaster recovery tapes that I have provided all the accurate information I can.

Somebody could have called us and said, do the backup tapes, disaster recovery tapes exist and I would have repeated for them, sure, we keep them now from December 2012 and the ones that we recorded over get recorded over several times, so there is a big stack of them.

I do not know where they are but we have never said that they all disappeared. In fact, I had a long conversation and exchange with somebody about the fact that we use them over and over until they are unusable and then we destroy them at that time.

The fact that the IG, which we have supported—I have told the IG anything you want, you can have and anyplace you can find more emails, I would be delighted. The fact that the IG has taken some of those is not new news unless you decide you want to put it out as new news.

Mr. CARTWRIGHT. Let me get this straight, Mr. Koskinen. You are here trying to comply with all the requests for information, is that correct?

Mr. KOSKINEN. Yes.

Mr. CARTWRIGHT. You are here to be helpful in this investigation, right?

Mr. KOSKINEN. To the extent we can.

Mr. CARTWRIGHT. You are also saying that you are willing to be helpful and all I have to do is call your office and say, can you clarify this response, can you clarify that, can you give us more information and you are willing to put up with that as well, is that correct?

Mr. KOSKINEN. It is not putting up. In fact, the chairman was very thoughtful and sent me a letter in advance of the hearing with some questions that he gave me the opportunity to provide the answers to and I appreciated that. We tried to get it back as quickly as we could.

Mr. CARTWRIGHT. But if they don't like one of your answers, instead of working it out over the telephone, they bring you back up here, High Dudgeon, and then act outraged and suggest that you have not been straight with the American public.

I want to give you the chance to say categorically, Mr. Koskinen, every time you have testified, have you testified to the truth to the very best of your ability and recollection?

Mr. KOSKINEN. I have.

Mr. CARTWRIGHT. How interested are you that the American public get the straight story?

Mr. KOSKINEN. I think it is critical. As I said from the start, we take the basic issue seriously. Improper criteria should not have been used. We should do whatever we can to prevent it from happening again.

The American public needs to and deserves to be confident that they will be treated fairly no matter who they are, whatever organization they belong to, or whoever they voted for in the last election. People have to be confident if they hear from the Internal Revenue Service, it is because of an issue either in their tax return or their application and if someone else had the same issue on their tax return or their application, they would get treated the same way.

It is critical to the integrity of the tax collection administration process for the American public to be confident about that.

I have never minimized the problem. I have always said we treat it seriously. The reason I spent time in my testimony today was to try to reassure everyone that we are taking all the actions that we can to make sure this does not happen again.

Mr. CARTWRIGHT. Thank you so much, Commissioner.

I yield back.

Mr. JORDAN. I thank the gentleman.

The gentleman from North Carolina is recognized.

Mr. MEADOWS. Thank you, Mr. Chairman.

Thank you for being back with us.

I think there are three things that the American people want. First is the whole truth. The dribbling out of information, whether it be in the press or with this particular story or another, is troubling.

Most recently, you mentioned the Blackberry that actually was wiped after indeed an investigation had been started not just here congressionally, not just with the IG, but also an internal inves-

tigation, according to testimony given in this room, that had taken place within the IRS. That is troubling.

I also know that this did not happen on your watch. You have been given a task of cleaning up a mess. You are now the fourth Commissioner of the IRS that we have had the opportunity to hear.

I think the people want two things beyond the whole truth. They want the people that were responsible for this to be held accountable. They do not understand why people have not been fired or lost their jobs.

Would you agree that this was not just relegated to a couple of rogue agents in Cincinnati? Would you agree with that?

Mr. KOSKINEN. That is right. I think it is clear that there was a management failure on the part of the agency that needs to be corrected.

Mr. MEADOWS. I am going to bring us to the third point which is really what they want to make sure of is that what can we do to make sure this does not happen again so we can start to rebuild that trust and foundation?

You mentioned IT failures. I know we have had a few conversations. Yesterday, we had, on the House Floor, a number of bills that were passed out of the House that are now being sent to the Senate that would address missing emails and senior level executive folks in terms of those who maliciously will use their private devices to get around the Records Act, whether it be the federal records Act or the presidential records Act.

Those pieces of legislation are designed to make sure that it does not happen again. Is that something that you can support at least in principle? It sounded like from your testimony that you are already going there.

Mr. KOSKINEN. Yes, in principle. I have not seen the language of the bills but clearly we already have a policy. One of the things we are doing is making sure everybody understands that you cannot use your personal email for IRS business. That has been a policy. We need to reinforce that.

Mr. MEADOWS. You would agree that has at least occurred on a few occasions within the IRS?

Mr. KOSKINEN. People do it inadvertently. They will send something to their own computer so they can print it out while they are working at home. We are trying to make it clear to everyone, even that simple issue should not be taken. We have trained people. We are going to retrain everyone to make sure they understand that.

Mr. MEADOWS. In your testimony, you talked about not having the resources to do some of the things. As I understand, there is this authorization that the IRS needs to pay some of their IT people above the normal GS levels. That authorization is about to expire.

Is that something you need reauthorized in terms of trying to address some of these IT needs? My understanding is a lot of those people are IT people, is that correct?

Mr. KOSKINEN. People working on it. In fact, Chairman Issa has been a strong supporter over time of the fact that we need to have what is called streamlined critical path authority to make sure we can get the best people to come and work on those systems.

We are trying to improve our IT system, to learn from this lesson and make sure that we store emails and ultimately, that we have a searchable database that makes it easier. We should not have to spend \$18 million to get the information you want.

I said, I hope to talk to Chairman Issa about this. The streamlined critical path only applies to a handful of people, 25 right now. Virtually all of them are technical or analytical people. That authority would be very helpful.

Mr. MEADOWS. If this body does not act, you are saying that authority will disappear at the end of the calendar year?

Mr. KOSKINEN. The authority will disappear at the end of this calendar year and starting in January in a phased process because they are in various stages of their four year contracts, we will lose people. In January, we will lose the head of our Compliance Analytics Unit as we go forward.

Mr. MEADOWS. Let me close with this final question. If we were to give you this authority, can you assure the American people that anyone who is getting paid under this authority was not directly or indirectly involved in any of the targeting work that is going on? Can you assure the American people that is the case?

Mr. KOSKINEN. I can assure you of that. It is 25 people and none of them were involved in any of the use of improper criteria, any of the discussions that went on at that time.

Mr. MEADOWS. I thank you.

I yield back, Mr. Chairman.

Mr. JORDAN. I thank the gentleman.

The gentleman from Nevada is recognized.

Mr. HORSFORD. Thank you, Mr. Chairman.

I want to follow up to my colleague, Mr. Meadows, who I think just laid out a very reasonable set of objectives. I agree with him that the majority of Americans want the truth, accountability and the agency to restore trust with the American people out of this unfortunate situation with the IRS.

I think that because of his questions, you were able to outline a number of specific recommendations that you need from Congress to do your job and the tools that you need, as well as things that you as the IRS need to do specifically to improve the management of the IRS.

I think that is more the tone we should be working from, not the abusive tone that we continue to have from the chairman of this subcommittee or the full committee that turns this into something that it is not.

I want to ask you, Commissioner, about a letter that I and 26 of my other colleagues sent to the Acting Commissioner, Mr. Werfel, relating to the discrepancy between the agency's regulatory interpretation of the law dealing with 501(c)(4)s and what the U.S. Code actually enumerates in statute.

Are you familiar with the request that I made, along with 26 of my colleagues, on June 6, 2013?

Mr. KOSKINEN. I am not familiar with the specific language but I do know a number of people have been encouraging us that when we look at the regulations under the 501(c)(4) to start with the statute which says that social welfare organizations under 501(c)(4) should be exclusively involved in social welfare.

Mr. HORSFORD. The regulation states primarily?

Mr. KOSKINEN. The regulation established in 1959 said primarily.

Mr. HORSFORD. Isn't that problematic?

Mr. KOSKINEN. It has been around for a long time and we have over 150,000 comments about how to deal with that issue which we are seriously taking a look at but it is the issue. One end of the spectrum is it should be exclusive, i.e., no activity and at the other end of the spectrum is there should not be any limitations at all. A third in the middle is primarily some percentage close to 50 would be a good number. We are looking at that entire range of possibilities.

Mr. HORSFORD. Until you make that final determination, this ambiguity remains. Because of the recent Citizens United decision, which created the huge influx of the number of organizations that were applying for tax exemption status, has contributed to this problem, has it not?

Mr. KOSKINEN. You are right. We are still dealing with facts and circumstances. It is interesting. I have been reading and I asked for the most thoughtful comments on both sides of each of these issues—what the definition should be, how much you should be able to do and to whom it should apply.

There is a consensus across the political spectrum, as well as the organizational spectrum, that nobody thinks the present facts and circumstances test gives anybody any guidance as to how it should be.

Mr. HORSFORD. In addition to the critical path authority, the searchable database and some of the internal policies, having a review and to get a standard that is clear on this exclusive requirement would be an additional area you would recommend?

Mr. KOSKINEN. I think if the Congress wanted to take a look at this and pass a law.

Mr. HORSFORD. The law has already been passed.

Mr. KOSKINEN. Right, and if you wanted to look at it, that would be fine. We view it as our responsibility.

Mr. HORSFORD. To follow the law?

Mr. KOSKINEN. To follow the law and to provide a regulation. As I said when I first started, any regulation needs to be clear, needs to be fair to everyone and needs to be easy to administer.

Mr. HORSFORD. I will add one more. It needs to be in compliance with federal law.

Mr. KOSKINEN. It should comply with the federal law.

Mr. HORSFORD. Do we have any idea how much taxpayer money is lost on granting tax exemption to groups that would otherwise be ineligible for 501(c)(4) status?

Mr. KOSKINEN. I do not have that information.

Mr. HORSFORD. I think that is another area I would ask that this committee look into.

Mr. ISSA. Would the gentleman yield?

Mr. HORSFORD. Mr. Chairman, I would like to ask with unanimous consent to enter into the record my letter dated June 6, 2013 along with my colleagues be entered in the record without objection.

Mr. JORDAN. Without objection.

Mr. HORSFORD. Thank you.

My time has expired. I yield back.

Mr. JORDAN. I will recognize the gentleman from California for his five minutes.

Mr. ISSA. Commissioner, this might be a good time to follow up on the gentleman from Nevada.

A 527 versus 501(c)(4), 527 can do 100 percent political, right?

Mr. KOSKINEN. Correct.

Mr. ISSA. Any tax difference?

Mr. KOSKINEN. There are complicated tax issues but basically—

Mr. ISSA. No.

Mr. KOSKINEN. Basically, no.

Mr. ISSA. There is no tax money lost at all. If a 501(c)(4) was suddenly not able to do what they are doing because we take the political free speech portion of what they can do in addition to social welfare to zero and they became 527s, there would be no tax ramification. Isn't that clear and simple?

Mr. KOSKINEN. Not quite.

Mr. ISSA. Revenue to the taxpayers would be de minimis, zero?

Mr. KOSKINEN. Might be. Some organizations spend their money every year and if it is a legitimate expenditure as a business expense, there is some question what is a business expense.

The second issue is if they have funds and invest them, some organizations have capital and they keep it for a while, the earnings on those investments would be taxable if they were not a (c)(4).

Mr. ISSA. But a 527, which the gentleman from Nevada runs a 527 if he thinks about it right, he has a PAC for his reelection?

Mr. KOSKINEN. There are significant differences between the 527s and the 501(c)(4)s.

Mr. ISSA. The canard that somehow the taxpayers are funding this is simply not true. For all practical purposes, if you raise money and spend it each year and do not invest it and make a whole bunch of secondary money off your investments, the taxable event on a 527 is zero?

Mr. KOSKINEN. That is right. As long as your expenditures are deductible and there is some question about the nature of some expenditures.

Mr. ISSA. But a 527's expenditures can be a slam against the gentleman from Nevada and it is okay. They can do an ad that says he is awful and should not be re-elected or they can do one that says I am awful and should not be re-elected.

Mr. CARTWRIGHT. Will the gentleman yield for a moment?

Mr. ISSA. No. The gentleman from Nevada chose not to yield.

The fact is there is no tax consequence and I hope we can put that to rest that although there is a hypothetical, that would not be the reality.

Let me get to one question and I think it is an important question. I realize you are not here as a constitutional scholar. You told me one time you gave up being a lawyer for Lent one year and never went back. It is still the best reason to give up being a lawyer that I can think of.

Before many people on the dais were born, the NAACP v. Alabama, do you know that case?

Mr. KOSKINEN. I am not sure I do.

Mr. ISSSA. That case was fairly simple. It said the NAACP had a right to animus free speech under the First Amendment. It did so because, in fact, contributions to the NAACP support were being sought by people who objected to what they were involved in. That freedom of association and freedom of free speech was founded.

If we look at that case, Citizens United is not so different. The fact is people's ability to let's say support conventional marriage and not have the IRS leak the list of the donors so they can be targeted, in reality, that is something pretty much engrained in the Constitution and repeatedly, the Supreme Court has set up.

I want to digress a little bit, just one quick one, from this because you did mention your need to for a reauthorization. I just want to touch on some areas we are going to be talking about in reauthorization.

Do you remember the name Stephen Manning?

Mr. KOSKINEN. Yes.

Mr. ISSSA. Stephen Manning's job was he was a CIO, Enterprise Networks, a very appropriate person to look at to try to make sure that we kept him if we wanted to get to I guess better email retention and so on, right?

Mr. KOSKINEN. Right.

Mr. ISSSA. A critical person. Manning has had two job titles but his total period of service was 2010 but with a small change from Associate CIO, Enterprise Manager, no pay change, to Deputy CIO for Strategic Modernization. He managed to have his four years extended, isn't that true?

Mr. KOSKINEN. The IG has just actually issued a report or is in the process of issuing a report where they looked at all that. They looked at everybody on the critical path, thought they had been appropriately appointed and where they had new jobs or extensions, they found no problem with that.

Mr. ISSSA. This member finds a potential one because the current statute intends that you hire people for four years and they leave at the end of four years, not that you move the same people around and give them different titles. Let me go into one that concerns me more and it will be a subject for any reauthorization.

Jonathan Davis, do you remember that name?

Mr. KOSKINEN. I do remember that name, yes.

Mr. ISSSA. Jonathan Davis was Chief of Staff to the Office of the Commissioner. He changed when he ran out of his time to Chief of Staff, Executive Director of Strategic and Organizational Development, Office of the Commissioner, \$215,000 increased to \$227,000 for essentially a political choice person to work as Chief of Staff to the Commissioner.

Do you believe that the intent of Congress was to have the technical expertise of being chief of staff be one of them that we pay a quarter of a million dollars nearly and that they change from being chief of staff to some subtitle chief of staff, the seemingly lower position coming second isn't anything other than a circumvention of the intent of the four year limit?

Mr. KOSKINEN. As I said, the Inspector General looked at all—

Mr. ISSSA. No, no. Commissioner, you are talking about people that have to say did you live up to the intent of Congress in our

opinion and should we reauthorize it and should we allow somebody who was deeply involved with the Commissioner potentially in targeting has left, should we allow somebody to be the chief of staff for more than four years make over \$200,000 as part of this reauthorization?

Mr. KOSKINEN. I would not do that. If it were up to me, my chief of staff and the selection would not be a critical pay.

Mr. ISSA. That is part of what this committee is going to have to be part of in reauthorization, to make sure it is limited to four years and technical unless they choose to make it longer.

I will tell you Jonathan Davis, to me, is a poster child for somebody, mostly prior to your coming in, abusing the system.

Thank you, Mr. Chairman. I yield back.

Mr. JORDAN. I thank the chairman.

The gentleman from Virginia is recognized.

Mr. CONNOLLY. Thank you. I would ask the chairman to be accommodated to the tune of one minute and 40 seconds.

Mr. JORDAN. I have done that thus far and I will continue.

Mr. CONNOLLY. Pardon me?

Mr. JORDAN. I have done that thus far.

Mr. CONNOLLY. You are always fair about time and I thank you.

Mr. Koskinen, welcome back.

Mr. KOSKINEN. I am happy to be back.

Mr. CONNOLLY. I want to join with the Ranking Member in thanking you for your service. You were in retirement, a comfortable life and did not have to come and do this. You did it because there was a problem at IRS and you wanted to respond to the request to help.

It is true, is it not, that your predecessor, Mr. Werfel, actually discovered the problem of recordkeeping and actually issued new guidelines for how it should be done, is that correct?

Mr. KOSKINEN. I was not aware of that actually.

Mr. CONNOLLY. Looking at the IG's report, are you familiar with the report that came out by Mr. Levin of the Senate Permanent Subcommittee?

Mr. KOSKINEN. I am.

Mr. CONNOLLY. Have you had a chance to review it?

Mr. KOSKINEN. I have reviewed it.

Mr. CONNOLLY. Do you agree with the findings? Are you taking action with respect to the findings?

Mr. KOSKINEN. At this point, a significant part of the recommendations go to the earlier discussion about the 501(c)(4) regulations. As I said, we got 150,000 comments and those suggestions and comments from the committee will be included in our consideration.

Mr. CONNOLLY. One of the issues with respect to that has to do with the disclosure donors, is that not correct?

Mr. KOSKINEN. That is correct. Ultimately, the difference between the 527s and the 501(c)(4)s is 527s have to review their donors, the 501(c)(4)s do not.

Mr. CONNOLLY. In order to qualify for 501(c)(4) status, what must one do? What does one have to prove in order to qualify for that status?

Mr. KOSKINEN. You have to prove that under the present status that your primary purpose is social welfare.

Mr. CONNOLLY. What does the law say with respect to social welfare? What is the adverb?

Mr. KOSKINEN. The adverb in the law is exclusively.

Mr. CONNOLLY. Right. How did we manage to go from exclusively to primarily?

Mr. KOSKINEN. When it was reviewed in 1959 by the Internal Revenue Service, the decision was made, and I have not been able to have anyone tell me exactly how they came to it, that primarily would be an appropriate measure of activity.

Mr. CONNOLLY. We have used the example before. If you have a couple dating, there is a difference between telling each other this is an exclusive relationship versus this is my primary relationship—primarily, I am going to be faithful to you as opposed to exclusively, I am going to be faithful to you.

The words really do mean different things, do they not, even just to common sense?

Mr. KOSKINEN. They do. I think in a number of areas in the Code, there are issues where it says something like exclusively or only and the regulations have allowed for some leeway so that people did not inadvertently end up in violation of the exclusion.

Section 501(c)(3)s basically have a standard that basically says you have to virtually everything but if you actually inadvertently spend some portion of your money and time on an otherwise not allowed activity, it will not cause you to lose your certificate.

I think probably what they had in mind with primarily was to not have people inadvertently get caught up in ex post facto review of what they were doing.

Mr. CONNOLLY. One might suggest it is time to return to that subject and the meaning of those two adverbs because I think there are organizations that I do not think anybody in the public would agree are primarily or exclusively social welfare organizations. They are primarily political organizations. That is fine but that is not what the law called for and the interpretation is very liberal.

In the time remaining to me, I want to go back to the TIGTA report. The IG was informed or the IG office was made aware as early as January 2012 that the IRS should use BOLOs but included the words occupy and others that could be associated with progressive groups. Are you aware of the fact that they were notified as early as January 2012?

Mr. KOSKINEN. I did not know that until I read the report.

Mr. CONNOLLY. Assuming that is corroborated, can you explain why the audit, knowing that back in January 2012, nonetheless would only look at conservative trigger words in its audit on BOLOs?

Mr. KOSKINEN. I do not know the background of what the IG was doing. I think the IG would have to answer that question.

Mr. CONNOLLY. Is it true that since the release of the TIGTA report, the IRS has eliminated BOLO listing for conservative as well as progressive groups?

Mr. KOSKINEN. That is correct. Those lists and anything that looks like those lists is no longer used. As I said, we have taken

the problem seriously and are anxious to make sure it never happens again.

Mr. CONNOLLY. If the problem was exclusively targeting conservative groups such as the Tea Party or Patriot, why would you eliminate BOLOs for progressive groups?

Mr. KOSKINEN. Again, I think judging an organization as to whether it is subject to more review or whether it qualifies simply by the name of the organization is improper, whatever the name of the organization is.

Whether it has progressive or some other liberal sounding name, Tea Party or some other conservative sounding name, the name itself should not be the criteria.

Mr. CONNOLLY. Mr. Chairman, thank you for the extra time.

Thank you, Mr. Koskinen, for your service to your country.

Mr. JORDAN. I thank the gentleman.

The gentleman from Arizona is recognized.

Mr. GOSAR. Thank you, Mr. Chairman.

Can you put up your original slides from your original testimony, please?

Mr. Koskinen, there is a lot of debate back and forth so I would like to get your take. Mr. Shulman denied any targeting. Would you agree with that?

Mr. KOSKINEN. I am sorry?

Mr. GOSAR. Would you deny or confirm number one up there?

Mr. KOSKINEN. There has been this long debate as to whether the use of improper criteria is targeting or not. Clearly, the IG report made a finding that none of us have disagreed with that improper criteria were used.

To move to the next step and say whether there was targeting or not is, in fact, the basis of a lot of the discussion back and forth. Clearly, improper criteria were used.

Mr. GOSAR. I agree. We are going to go through this kind of quickly.

Mr. KOSKINEN. Okay.

Mr. GOSAR. Lerner denies any targeting, the second one. Can you confirm or deny that second one?

Mr. KOSKINEN. Again, there is this issue so that clearly improper criteria were used and it was applied to organizations when it shouldn't have been.

Mr. GOSAR. Once again, you are upholding number one and number two, right, they are false and misleading statements?

Mr. KOSKINEN. I am saying targeting is not a word that I use as a matter—the IG didn't use.

Mr. GOSAR. Semantics, semantics.

Mr. KOSKINEN. Some people attach a lot of significance to semantics. If the question is, were those misleading to the extent that they maintained improper criteria, were not used, then that was not true. The improper criteria were used.

Mr. GOSAR. Let us go to three, this makes it easy. Lerner apologizes for line people in Cincinnati, true or false?

Mr. KOSKINEN. Apologizes for?

Mr. GOSAR. That this happened because of line people in Cincinnati, true or false?

Mr. KOSKINEN. I think that probably, from what I understand, is not true.

Mr. GOSAR. That is what I thought. Jay Carney also blamed line people, so that is a false statement as well?

Mr. KOSKINEN. I think on the basis of what everyone now knows, this was not a problem only in Cincinnati.

Mr. GOSAR. That is what I thought.

If we go down to number five, Mr. Werfel commits to producing all the Lerner emails, we know that is not possible, right?

Mr. KOSKINEN. That is not because he didn't try or we didn't try but that is right, we do not have all of her emails. We have produced all the emails that we have and probably all of us, when we say we are going to produce everything, should say everything that we have.

Mr. GOSAR. Number six, the President in his Sunday address in front of the mainstream media with Bill O'Reilly, talks of not even a smidgen of corruption here. Would that have been a wise comment to say?

Mr. KOSKINEN. As I said at one of these hearings or early on back and forth, there have been a lot of people making judgments and statements before all the investigations are done. Generally, I think people are well advised to see what goes on.

I do not think there has been any evidence at this point, that I know of, of corruption as most people would think of it. Mistakes were made.

Mr. GOSAR. Ms. Lerner's activities would not constitute a violation?

Mr. KOSKINEN. A violation of a law?

Mr. GOSAR. Yes.

Mr. KOSKINEN. There is a referral in the Justice Department—

Mr. GOSAR. So I think you have to be recalcitrant in what you just said there, anybody. You would have to eliminate Ms. Lerner?

Mr. KOSKINEN. You are right. There is a question about Ms. Lerner, exactly right.

Mr. GOSAR. That brings me to my point. Are you familiar with the term, trust is a series of promises kept? Have you ever heard that? Trust is a series of promises kept.

Mr. KOSKINEN. No, but I like that.

Mr. GOSAR. Isn't it nice? I think that is what the American people deserve in regards to the IRS. Mr. Meadows and a number of others on that dais want the facts and right now, we have seen this play out over and over again, brought up that there is not a smidgen of corruption in the IRS.

There is a reason why the people are scared of the IRS, right? The power to tax is the power to destroy.

Mr. KOSKINEN. We don't tax, we simply collect, but people do worry that if you don't pay your taxes, we are not going to be happy. That is true.

Mr. GOSAR. How do you feel about the law? We are a law abiding country, right?

Mr. KOSKINEN. I personally feel everyone should follow the law. The IRS follows the law. I think the law of the land should be obeyed.

Mr. GOSAR. You are familiar with the Federal Records Act, right?

Mr. KOSKINEN. Yes.

Mr. GOSAR. Everyone should be, particularly if they have spent any time in the Federal Government, right?

Mr. KOSKINEN. Correct.

Mr. GOSAR. Do you believe the IRS violated that Act in any way, shape or form?

Mr. KOSKINEN. To my understanding, NARA reviewed our recordkeeping Act for 2011 and 2012 or 2012 and 2013 and rated us over 95 percent each year. NARA said that if are new records had been destroyed in Lois Lerner's email loss, we had an obligation to advise NARA but there is no evidence yet as to whether those were records that were destroyed or not.

If they were and we did not advise NARA, then that was, in fact, not consistent with the law but thus far, there is no evidence that we knew records were destroyed. We have advised NARA and are working with them, as I said, to try to make sure none of this happens again to the extent we can prevent it.

Mr. GOSAR. You will notify us at the same time as the White House and the DOJ?

Mr. KOSKINEN. Yes. I would just note that we have not passed any of this information on to either the White House or the Department of Justice.

Mr. GOSAR. When we review this philanthropic aspect or 501(c)(3) narratives, are you going to be equal opportunity and review the Tides Foundation?

Mr. KOSKINEN. I am going to review them all. As I said, the most thoughtful comments on both sides of the issue are what is the definition of political activity, how much of it should be allowed and to whom should that apply.

My goal is whatever regulation comes out should not only be clear, it should be fair to everyone and should be easy to administer. I am committed to trying to make that happen.

Mr. GOSAR. I appreciate the gentleman's answers.

Mr. JORDAN. I thank the gentleman.

The gentleman from Georgia is recognized.

Mr. COLLINS. Thank you, Mr. Chairman.

My alarm clock went off this morning, I woke up and it was Groundhog Day. You were back on the schedule, back on the dime, coming here under the same similar kind of situations. We had conversations, I am going to talk to you about it, on September 5, 2014 that disclosed that there were more emails received by five other employees in addition to Ms. Lerner had been destroyed.

Now we find out about 760 IRS exchange drives which have never been discussed because you thought they had been destroyed but they have not been. There is no way we can say everything has been complied with.

I agree, at one point, with my gentleman friend from Virginia. I believe exclusively and primarily do have meanings. I believe exclusively and primarily can have a similar meaning because I believe exclusively and primarily the IRS is a tax collection agency that should be above reproach, should have truth and honesty with the American people, and fidelity to do their job. We have talked about this before.

I take extreme pressure, however you want to put it, with those two words in my own faithfulness to my wife and others but you seem to be following me around.

I went home to August recess and spent several townhalls, went everywhere and everywhere I went, there was a question, what about the IRS? What is going on? They lost the emails? If they were serious about it or not laughing about it or saying, are you kidding me, it was a continual breakdown of trust everywhere we went. Now we are getting ready to go home in October and we find out more.

Before I ask a specific question, I asked you this last time so as I said, we are experiencing Groundhog Day again as we go through. What is the problem that we cannot seem to not have something else come out?

We are going to leave in October, come back in November and December. I expect to see you back here. I hope not to have another discovery that there are computers missing again. Tell me the truth.

Mr. KOSKINEN. Congressman, I have tried to tell you the truth every time I have been here.

Mr. COLLINS. Somebody is undermining you. You may be trying but it keeps coming out.

Mr. KOSKINEN. It keeps coming out. What came out and has come out on September 5 is somehow an implication that there are emails out there that we did not find. No one has found a single email that I know of.

Mr. COLLINS. Have you looked in these areas? It was already stated that you did not know they were because you thought they had been destroyed.

Mr. KOSKINEN. Okay. Would you like to know what the story with the servers is?

Mr. COLLINS. At this point, yes.

Mr. KOSKINEN. The story with the servers is they were not looked at because when we changed in 2010 and 2011 and upgraded our Microsoft Office, all the data in the old servers was put on the new servers. When people were searching for servers, they thought the old ones were destroyed. Even if we knew they were there, there was no data on them that was not on the servers we had.

If someone found new emails, I would be delighted but it is not as if someone is finding more emails at this point. What we have is an implication for the public like the mysterious backup system that is government-wide that has Lois Lerner emails on it. There has been a continual implication that suddenly new emails are being found or it is possible they might be found.

Thus far, no one has produced another email although, as I said, if they could, I told the IG it would be terrific but thus far, no one has.

Mr. COLLINS. At this point, like I said, it continually goes back to this exclusion from what is the role and the trust factor that is completely gone.

Mr. KOSKINEN. I agree with your statements about trust and people should have confidence in us, they should view us as tax ad-

ministrators only and should feel they are going to get treated fairly. We should do that for them and I totally agree with that.

Mr. COLLINS. I want to go back to our previous meeting on July 23, 2014. I asked you if IRS had produced all the emails from Holly Paz, William Wilkins and Jonathan Davis as required by the subpoena which is here. Not surprisingly, your answer was no.

Today, 56 days later, I am going to ask you the exact same questions. Have you produced all emails to and from Chief Counsel William Wilkins as required by this subpoena?

Mr. KOSKINEN. No.

Mr. COLLINS. Have you produced all emails to and from Holly Paz as required by this subpoena?

Mr. KOSKINEN. At this point, you have about 7,500 emails from her. We expect that there are another 45,000 we are going through and any of those that are not duplicates, we will provide to you. We hope to do that before the fall is out. That is what we are focused on now.

The answer to the other parts of the subpoena below Lois Lerner and Holly Paz, we have not gotten to those yet. We look forward to continuing to work with the committee. Some of those requests are to search 90,000 email hard drives to find emails—

Mr. COLLINS. I am going to stop you right there. As an attorney who did not give up being an attorney for Lent, your answer is eloquent but the answer would be no?

Mr. KOSKINEN. I said no, I agree. Holly Paz you have 7,500 and we are working through the next 45,000.

Mr. COLLINS. Again, if I included that word all, as you said a few moments ago, words do have meanings and I do place meaning on it, all would be no?

Mr. KOSKINEN. All would be no.

Mr. COLLINS. Jonathan Davis, all as required by the subpoena?

Mr. KOSKINEN. No.

Mr. COLLINS. I wish you the best, I do, but the problem is it comes back to this every single time. As I said, you follow me and I think follow many members of both parties around because of the agency which you head now and the issues that we keep developing over trust, fidelity, clarity exclusive and primarily.

We can go down every adverb in the world but it all bottoms down to trust. Right now, others on this committee would like to talk about what is the new definition for how you are going to examine the tax status. That is all great for another hearing. This has nothing to do with that. Are we getting to the bottom of what did happen so that we can move forward.

I am sure we will see you again. I hope it is not a Groundhog Day moment in which here we go again and something else is out there that undermines the very trust.

Mr. KOSKINEN. If I could add, in March we notified the investigative committees that we had produced all the emails we could find and were identified as being relevant to the determination process.

Mr. COLLINS. Stop right here. Let us just hold this right here. The subpoena does not ask for all and relevant. I know there is some discussion about let us clarify this. We were almost to the end here. I was actually going to yield back and go from here. By definition, all is all.

Mr. KOSKINEN. All is all.

Mr. COLLINS. Thank you.

Mr. KOSKINEN. My only point is the all that we are getting is a lot of stuff that does not have anything to do with the determination process but we are happy to provide. We are committed to continuing to work to provide you with all those.

Mr. COLLINS. The subcommittee chairman and the Chairman have said all. I know Mr. Jordan has asked for all, not filtered. As I like to hear from my wife and kids, if you have bad news, give me all, don't just send it out in small streams.

This is the problem we are having. It is a subpoena.

Mr. KOSKINEN. You are going to get them all. Some of them are going to take a while because you want them from 90,000 but you will get them all.

Mr. COLLINS. Whether that is an issue for you and I, all is all. That is what the committee has asked for. I am asking for the committee.

Mr. Koskinen, have a good day.

Mr. JORDAN. I thank the gentleman.

The gentlelady from Wyoming is recognized.

Mrs. LUMMIS. I thank the gentleman.

I was at another hearing and am scooting off to yet another hearing today.

Mr. KOSKINEN. It is a busy day.

Mrs. LUMMIS. It is a busy day.

Thank you for being here.

I am going to yield my time to the Chairman, Mr. Jordan.

Mr. JORDAN. I thank the gentlelady.

We will finish here and then do a quick second round. We have votes probably in 30 minutes.

Mr. Koskinen, earlier you said, all we have to do is ask. Get on the phone and call you and you will give us whatever we want.

It seems to me there is some information that frankly you should volunteer that is of such a critical nature, you should give that to us. We should not have to learn, for example, that there are 760 backup servers from the IG. That is something you should have told us.

We should not have to learn from the IG that there is a separate OCS chat system at the IRS that Ms. Lerner was pleased was not recorded and kept. We should not have to learn that from the IG, we should have learned that from the IRS.

We should not have to learn from a deposition that there were nine backup tapes. That is something you should have told us.

We should not have to learn from a judge, based on Judicial Watch's FOIA action, that Ms. Lerner's Blackberry was wiped clean. You should have told us that.

We should not have to learn from Judicial Watch's FOIA request that the IRS gave 1.1 million pages of information, 21 disks of information, some of it containing 6103 confidential information, to the Justice Department. You should have told us those kinds of things. Those are critical facts pertinent to the investigation.

No, no, no, you make us come get it. When we do ask you, you do not answer our questions; you do not help us out because we ask repeatedly. We wanted to interview certain witnesses and you said,

no, cannot do it, there is an ongoing investigation. You cannot have it both ways.

You cannot sit here and say all you have to do is call us and then when we call you and try to get witnesses, nope, you cannot interview them. We had to subpoena them. You cannot have it both ways.

Here is where I really want to go. Mr. Meadows earlier said you spoke to him, I want to make sure I say this right, about reauthorizing the streamline critical pay authority, is that right, Mr. Koskinen? Is that something you are looking to do?

Mr. KOSKINEN. Yes.

Mr. JORDAN. This is to pay people more than the top level of the federal employee pay scale, something higher than the top level and requires statutory authority to do that, correct?

Mr. KOSKINEN. That is correct. It was granted to the IRS in 1998 and has been granted and operated until 2013.

Mr. JORDAN. I understand.

We did a little investigation looked at the people who are currently, over the last five years, getting paid more than the top employees under the normal and customary federal employee pay scale. We are going to put that up on the screen if we can.

Our calculation was 83 different folks are paid above this level. We can probably scroll through the pages.

Mr. KOSKINEN. There are 25 right now on the program.

Mr. JORDAN. I am talking about the last five years, 83 different people over the last five years, frankly, the relevant time frame that we have been looking at when this targeting started to roll and took place.

There were 83 different people and 56 of them, the business unit says are information technology, so 56 of them are IT folks making \$202,000, \$227,000, getting performance bonuses of \$28,000, \$19,000, \$19,000, \$20,000, making in some cases as the chairman said, almost a quarter of a million dollars. You think this should continue?

Mr. KOSKINEN. Those people, not all of them make \$220,000; some are at \$160,000 or \$170,000. For instance, the guy who runs our IT system worked in the private sector probably making four times that amount.

If you go through all those, in fact, one of the requirements is that they have to have made multiples of what they are making here which is part of the reason they get hired under the streamline authority.

They are primarily technical people, primarily modeling and our analytical people, all of whom should have, if the programmers run them, the IG just completed a review of it and said we did fine. All of them should have been making significantly more.

Mr. JORDAN. Fifty-six out of 83 are making higher than the highest employees are supposed to make in the federal employee pay scale, many making \$250,000, many getting bonuses of over \$20,000.

Mr. KOSKINEN. I would stress again there are only 25 now. The program is limited to 40 at any time and we have never had 40 at any time. Over five years, it means people have been moving in and out which is what the program is supposed to do.

Mr. JORDAN. Here is my question. Fifty-six of them are IT people. You are asking us to reauthorize this at a time when IT people making a quarter of a million dollars at a time when you lost Lois Lerner's emails, that is what you are coming forward to do?

Mr. KOSKINEN. Ms. Lerner's email crash occurred three years ago.

Mr. JORDAN. At a time when you did not tell us there were any backup tapes; at a time when you did not tell us there were 760 servers but there are; at a time when you did not tell us that her Blackberry was wiped clean but it was; at a time when you tell us you had trouble retaining the records, you had a duty to keep the records and disclose them, all this was going on and yet you still think it is appropriate to come to Congress and say, in spite of all this, all these problems with our information technology and the fact that we lost emails from the key person in this investigation, you come to Congress and say you know what, I need special statutory authority to keep paying IT people over \$200,000 and give them \$20,000 bonuses?

Mr. KOSKINEN. There is a statutory limit. You cannot make \$220,000 and get a \$20,000 bonus but I am coming here and asking—

Mr. JORDAN. I see right here.

Mr. KOSKINEN. These are the senior people running us. If we do not have the ability to keep them or replace them in the course of the program, it runs a real risk of crippling the agency. I think that is important for people to understand.

I would not ask for it willy-nilly. It is a small program.

Mr. JORDAN. I am not saying you asked for it willy-nilly. I am saying it takes a lot of gumption to come to Congress and say we just lost her emails but we need special authority to pay IT people more than anyone else in the Federal Government can make and give them \$20,000 bonuses. That is what I am asking.

Mr. KOSKINEN. I am just telling you that the people who run our online services program, the people who run the IT department—

Mr. JORDAN. Maybe you should switch. Maybe you need to hire a few more people at a lower salary who are actually going to do the job and would not lose Lois Lerner's emails. Maybe you should think about that approach versus the approach you are taking.

Mr. KOSKINEN. We have, as I said, taken the approach that we are going to fix that problem. We are actually going to have our senior executives immediately store on a separate shared drive rather than on their hard drives. I agree with you destroying emails on hard drives—

Mr. JORDAN. The taxpayer might say we are giving \$20,000 bonus, paying people over \$200,000 and it takes a special law to do this, are we getting our money is worth here? They lost Lois Lerner's emails.

Mr. KOSKINEN. If you go on our website, 200 million people have pushed an app that says where is my refund and immediately you can find it. That is what these people did. You can run an app from our website, push an app and get your transcript for the last year only. That is what these people did.

We are actually trying to make life easier for taxpayers through technology. To do that, we have to have the best we can.

Mr. JORDAN. What remedy are you telling people who were systematically targeted, had their First Amendment rights abused and the person at the center of the scandal, we cannot even find her emails, what do you say to them? What button do they push?

Mr. KOSKINEN. You have 76,000 of her emails.

Mr. JORDAN. I am not asking about that. I am asking what button do they push? You lost her emails. You are paying people a quarter of a million dollars and giving them bonuses. What button do they push? That is a question.

Mr. KOSKINEN. You can ask that question. I am just telling you that the 25 people on that program are critical across the agency. If you want to deny us—

Mr. JORDAN. When you find that button, that is a button we are trying to find, that is a button we are trying to push to get to the bottom of that, how people's First Amendment rights were abused.

With that, I would recognize the gentleman from Pennsylvania.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

Mr. Koskinen, just so it is clear, when did you start as Commissioner of the IRS?

Mr. KOSKINEN. December 23, 2013, part of my holiday celebration.

Mr. CARTWRIGHT. What were you doing before that?

Mr. KOSKINEN. I was on two publicly-traded company boards and basically semi-retired.

Mr. CARTWRIGHT. You were not even working at the IRS in any capacity before December 23, 2013?

Mr. KOSKINEN. Correct.

Mr. CARTWRIGHT. When you talk about, for example, computer hard drive crashes, were those things happening after you started at the IRS?

Mr. KOSKINEN. Hard drive crashes continue as we speak.

Mr. CARTWRIGHT. I am talking about Lois Lerner's Blackberry exchange. Did that happen before or after you started at the IRS?

Mr. KOSKINEN. It was all before I was there. All of the issues that we have been holding hearings about occurred before I came.

Mr. CARTWRIGHT. You are the one coming here to get hollered at for all of that. Are you here under subpoena today, Mr. Koskinen?

Mr. KOSKINEN. No, I come voluntarily.

Mr. CARTWRIGHT. You have come voluntarily to do that. It has been said before, but I thank you for your service to the United States. This is an amazing act of selflessness that you do this for our Nation and that you look into ways that we can improve our systems with transparency and accountability in the way we collect taxes in this country.

To that end, much of your testimony today talked about looking forward, going forward and making sure these things get better as time goes on with the IRS. First of all, to the point about whether you pay people, what happens if you do not pay the market rate, the going rate for IT people? What happens to those people?

Mr. KOSKINEN. In fact, we will not be able to make the improvements we want. We have an antiquated Model T we are running. Some of the applications we run were running when John F. Kennedy was President. We are trying to upgrade all of that.

If we do not have the appropriate leadership, that is not going to happen and we are going to have an IT system that makes no more progress.

Mr. CARTWRIGHT. I understand this is beyond the comprehension of some of the members here, but if you do not pay people the going rate, the market rate, for what they are worth, they wander off and find better jobs, don't they?

Mr. KOSKINEN. All of these people, as I said, made three to four times what we are paying them. All of them have options to go elsewhere. These are people, as the chairman noted, who rotated through the program. They have been here and then have gone back out.

None of the people working for us will have a problem. They will not be unemployed for a day.

Mr. CARTWRIGHT. Commissioner Koskinen, last May the Inspector General issued a report finding that "ineffective management" at the IRS allowed inappropriate criteria to be developed and stay in place for more than 18 months and resulted in substantial delays in processing certain applications and allowed unnecessary information requests to be issued.

The IG has repeatedly testified that his audit did not uncover any evidence of political motivation behind the inappropriate handling of these applications by IRS employees. You are familiar with that report, I take it?

Mr. KOSKINEN. I am.

Mr. CARTWRIGHT. The IG report also contained several recommendations to address the IRS management failures that led to the inappropriate handling of applications for tax exempt status, am I correct?

Mr. KOSKINEN. That is correct.

Mr. CARTWRIGHT. Has the IRS implemented all of the IG's recommendations?

Mr. KOSKINEN. All of those recommendations have been implemented.

Mr. CARTWRIGHT. Can you describe what additional steps the IRS has taken to ensure that the management failures that led to the inappropriate handling of applications for tax exempt status do not occur again?

Mr. KOSKINEN. Included in my oral statement and my full statement is a discussion of some of the other actions we are taking because I do think it is important for the committee as well as for the American public to understand that we take the problem seriously, including the difficulties with both saving and finding emails.

We are doing our best to make sure none of these problems happen again and that we take them seriously. I think it is important. As I say, I want the committee members as well as the public to know we have done everything anyone has recommended thus far to make sure it does not happen again.

I am looking forward, as I said from the start, to reports from the various investigative bodies, their finding is factual and most importantly, their recommendations that we should consider.

Thus far, we have taken the recommendations we found we were able to implement and I think we have made major progress in en-

sureing it is important for the public to feel confident and comfortable about that, ensuring we do not have this problem again.

Mr. CARTWRIGHT. I want to take the opportunity to thank you for your public service and also for your testimony. This is the kind of testimony where you are required to answer our questions and you are also required to anticipate what questions might be important to us so that you volunteer the answers to those questions even without being asked.

It is a tough job and I do not envy you. Thank you for coming, Mr. Koskinen.

Mr. JORDAN. The gentleman from North Carolina is recognized.

Mr. MEADOWS. Thank you, Mr. Chairman. I will be brief.

I guess one of the issues here is using federal tax dollars for political targeting. We know about the Hatch Act and the Politico ran a story. This came home to me just a couple of days ago where we had federal employees in my district that had been sharing actually with people who were supporters of mine to make sure that they do not vote for me.

I had a choice to either make a big deal of it, which I did not, or to try to just ignore. When you run for office, you get thick skin. If not, you really need to have thick skin.

Your choice in December 2013 is the closest thing I can think of to anybody running for political office. With that being said, Politico ran a story about an IRS worker who was suspended for urging people to re-elect Mr. Obama. Are you aware of that, a violation of the Hatch Act?

Mr. KOSKINEN. I am aware of that.

Mr. MEADOWS. Let us play the recording. I think it gets to the underlying point on some of this that we have to come clean and restore it.

[Video shown.]

Mr. MEADOWS. When you have these kinds of things that happen, you are a big agency, I understand that but this gentleman, as I understand it, was suspended, is that correct?

Mr. KOSKINEN. I do not know the details and the privacy laws do not allow me to testify. I am happy to have someone give you all a briefing.

Mr. MEADOWS. Is he working for the IRS today?

Mr. KOSKINEN. That I do not know but we will find out that information for you.

Mr. MEADOWS. You do not know whether this guy is employed today and working for you today?

Mr. KOSKINEN. No. All I can say is, we take these situations very seriously. There is an image somehow that in the Federal Government nobody ever gets terminated for cause. I would say in the termination issue, the top five people, starting with the Commissioner on down, are not there anymore in terms of accountability.

Without getting into the details and numbers, we have a significant number of employees every year who are terminated. They are terminated either because they take actions like this, they are terminated because they willfully do not pay their taxes regularly.

Although we have a great work force, we have the highest tax compliance rate, over 99 percent, but we take it very seriously and the employees understand that. I think it is important and we con-

tinue to reinforce that with regard to politics, no IRS employee during their official hours should do anything that sends any signal, one way or the other, about their political beliefs.

We need to be non-political. We are in the tax administration business. People have to understand that is our business. If people on their own time on weekends want to do whatever they want, that is fine. The law is clear and we take that very seriously.

Mr. MEADOWS. When we hear things like this, the more you dig, the more you feel like you have to dig because when you start to hear these kinds of things and if they were not terminated, it gives me great concern that this kind of environment will foster more people to do it if there is really no repercussion.

Mr. KOSKINEN. I am happy to get you that but I feel very strongly, as you do, that if people are going to engage in political activity while they work, that is cause for termination.

Mr. MEADOWS. We have a couple seconds left and I think we will go to the gentleman from Nevada. You have counsel here with you. Can they inquire and get you the answer so we can have that before the hearing is over today?

Mr. KOSKINEN. As I said, on an individual matter, I cannot publicly give you the answer but we can give it to you—

Mr. MEADOWS. All I know is his first name and his ID. I have no idea what his last name is. I just need to know is he still working for the IRS?

Mr. KOSKINEN. We will do our best to check on that and if we cannot get it to you before this is over, we will get it to you promptly.

Mr. MEADOWS. Thank you.

I yield back.

Mr. JORDAN. The gentleman from Nevada is recognized.

Mr. HORSFORD. Thank you, Mr. Chairman.

Mr. Meadows, you had me at the first round. I just find the second round interesting that we would use one example of one employee when there are some 90,000 employees.

Mr. MEADOWS. If the gentleman will yield, this came personally to me. I actually had a VA employee who was campaigning against me just the other day and I found out. We all know that whether they are a Democrat or a Republican, the federal tax dollar is not anyplace that needs to be promoting, I would not want them campaigning against you and vice versa.

I appreciate the gentleman.

Mr. HORSFORD. Reclaiming my time, I believe that there are certain staff, including Ms. Lerner, who have not served this Administration well, that due to poor management, poor decision-making, we are in a position to have to have these types of hearings.

I am not going to defend every action or every decision that certain former staffers of the IRS have taken, but I also think it is inappropriate for members of this committee to apply such a broad brush to all staff or all management of the IRS or other federal agencies.

I also think it takes a lot of gumption of certain members of Congress to question the request for critical pay authority when this is the least productive Congress in the history of Congresses. Hard-working people cannot get a raise but members of Congress con-

tinue to get paid whether they do their job or get anything done around here or not.

At the same time that we are having this hearing, which is the 15th hearing, there is debate on the Floor right now that is crucial to our country's safety, to international relations and is one of the most serious issues that this Congress is being confronted with.

Instead, this chairman has decided to have the 15th hearing on the same issue trying to assert the same allegations and never getting to the point of action on anything.

Mr. Chairman, either we get on with the business of the American people, that they have sent us here for or we need to stop wasting time and taxpayer resources. There are important issues that we need to be tackling but unfortunately, this committee's time has been wasted, in large part.

Commissioner, I will take you at your word that you are working in earnest on this regulation because I think this is part of the problem. We had nearly 200,000 applications filed for tax exempt status between 2010 and 2012, 73,319 applications in 2012 alone. Your agency at that time did not approve about 22,000 of them.

This is the world after Citizens United. My colleagues on the other side, the chairman of the full committee, may want to say this has nothing to do with it but it has everything to do with it. Just because someone decides to make a donation to a 501(c)(4) does not necessarily guarantee that tax exempt status should apply if they are not meeting the standard of the law, the federal law.

For us to not get a clear answer from the agency as to why since 1959, the agency has been out of compliance with the federal law, is the basis of the problem.

I am not here to attack individual members of the IRS, I am not here to cast aspersions on every action that has been taken but I am here to hold you guys accountable. One thing that I will do every hearing is to ask you what is the status of you coming into compliance with the federal statute that requires the exclusive benefit to the social welfare, not primarily benefiting social welfare.

I will take you at your word that is something you are earnestly working on and I await your action and recommendations to this Congress.

Thank you.

Mr. JORDAN. We will just finish with a quick closing statement from myself and the Ranking Member.

I would say this. The previous member offered a critique of Mr. Meadows for bringing up this example. This was brought to light by the Office of the Special Counsel. It is entirely appropriate. This whole thing is about politics.

The gentleman from Nevada said to use this political example, he did not feel was appropriate. That is what this is all about.

Mr. HORSFORD. Would the gentleman yield?

Mr. JORDAN. In just a second.

People were systematically targeted for their political beliefs. That is what took place here. Because conservative groups around the country disagreed with the President, they were systematically harassed and targeted. That is as political as it gets. That is a violation of the most fundamental aspect of the First Amendment, your right to speak out against your government.

This example is one where you are supporting violating the Hatch Act. What took place at the IRS was targeting of the Bill of Rights' First Amendment. The member said it is a waste of time to dig into that? Are you kidding me? This is why we should have hearing after hearing to find out exactly what happened.

Again, I will repeat, if the IRS would be a little more forthcoming and give us straight answers that would be a lot more helpful. That would help us get to the truth a lot sooner and hopefully protect people's most fundamental liberties as we move forward.

I will yield to the gentleman if he still wants to be recognized.

Mr. HORSFORD. Thank you, Mr. Chairman.

The issue of a political nature is the fact that these hearings continue to make the political accusations even though after 15 hearings, there is nothing to substantiate that accusation. The wrongdoing that did occur needs to be held accountable.

One of the ways to hold that accountable is by making sure that the regulation, which is not in compliance with the federal law—do you agree there is—

Mr. JORDAN. Reclaiming my time, the reason we are bringing Mr. Koskinen back is because on March 25, 2014, he told this committee, the full committee actually, Mr. Cummings actually asked the question, he would get us all of Ms. Lerner's emails even though at that time his Chief Counsel already knew they could not. His Chief Counsel knew in February there was a problem with Ms. Lerner's hard drive but they waited until June to tell us.

Then he told us he could confirm there were no backup tapes. We have learned that is wrong. Those are just a couple of examples. We have a bunch more that I cited in my opening statement.

The reason we keep bring Mr. Koskinen back is because when he tells us something, we later learn it is not accurate. In the interest of good government and the truth, we give him a chance to fix the record time and time again.

This will come as no surprise to anyone. I am going to keep bringing him back every time he says something that turns out not to be true. You had a guy violate the Hatch Act that has been reported in the press and he cannot even tell us if he still works at the IRS.

I know there are lots of employees there but there are not many who get referenced in the paper for violating the Hatch Act for political activity. You would think he would know if that guy still works there. He does not so we are going to give him a chance to give us that answer at some point.

I yield to the gentleman from Pennsylvania.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

I will keep coming to these hearings too. I will keep doing what we are expected to do. Many of these things we agree on. We need to protect accountability of our government and need to protect legal responsibility. We need to make sure our laws are not violated by people who are unrepentant and are not chastised, fired, fined, or imprisoned for it.

We need to protect the First Amendment rights of the people. We need to protect people's rights to engage in politics in a fair and forthright manner.

Above all, we need to protect our American democracy and protect it so that it is not stolen away from us in the dark of night. That is what I am really worried about. I am worried about the difference.

Anyone listening to these hearings, we talk a lot about the difference between the 529s, the chairman of the full committee brought this up. The difference between the 529s and the 501(c)(4)s. This whole fist fight going on right now is about 501(c)(4)s. What is the difference between 529s and 501(c)(4)s? Both of them are tax statuses for outfits that people put money into and are they going to use it for political purposes in advertising.

The difference is not in the taxation, the difference is in the disclosure, the transparency and the accountability because the 501(c)(4)s do not have to disclose their donors. That is why this is so important. That is why so many applications were put in for 501(c)(4) status by outfits and people that wanted to contribute to politics and not be identified.

We are talking about people and entities that wanted to go undisclosed. They wanted to remain secret. They wanted to be hidden from the American people and put in all this money and direct American politics and distort American democracy with this money.

I do not apologize because I call it dark money because nobody knows where it came from, from whom it came, or even whether it came from foreign countries and foreign nationals. We do not know that with 501(c)(4)s.

That is why, Mr. Koskinen, it is so vital that we go back to exclusively engaging in social welfare as opposed to primarily. The difference between those words is vast. If we go back to only granting 501(c)(4) status to outfits that exclusively engage in social welfare, we do not have to worry about dark money wrecking our American democracy.

With that, I yield back, Mr. Chairman.

Mr. JORDAN. I thank the gentleman.

The committee will be adjourned.

[Whereupon, at 4:00 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Mr. Cartwright's submitted 228-page report can be found at the following link:

[file:///C:/Users/stvance/Downloads/REPORT%20-%20IRS%20&%20TIGTA%20Mgmt%20Failures%20Related%20to%20501\(c\)\(4\)%20\(Sept%2005%202014,%209-9-14%20update\)%20\(1\).pdf](file:///C:/Users/stvance/Downloads/REPORT%20-%20IRS%20&%20TIGTA%20Mgmt%20Failures%20Related%20to%20501(c)(4)%20(Sept%2005%202014,%209-9-14%20update)%20(1).pdf)

7/17 EC IRS h21na

Congress of the United States
Washington, DC 20515
June 6, 2013

Mr. Daniel I. Werfel
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW, Room 3000
Washington, DC 20224

Dear Acting Commissioner Werfel:

Recent revelations that the IRS unevenly scrutinized applications for tax-exempt status highlight the need to revise regulations issued by the IRS for Section 501(c)(4) of the Internal Revenue Code. It goes without saying that any display of political bias by IRS officials is wholly unacceptable. However, there would be no room for any such behavior if these regulations more accurately reflected the intent of Congress in establishing a tax exemption for social welfare organizations and civic leagues whose work benefits our communities.

The tax exempt status written into the Tariff Act of 1913 clearly defines this exemption for "Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees." The current regulations run afoul of the law by taking what was clearly defined as an organization operated exclusively for the promotion of social welfare and changing it to one "primarily engaged in promoting in some way the common good and general welfare of the people of the community." The significant distinction created here in the difference between the words "exclusively" and "primarily" is obvious to any casual observer, and the problems with the IRS interpretation of this statute has been recognized by the courts as well. These regulations have flouted the Internal Revenue Code for more than half a century, and with them the IRS created a door to tax-exempt political activity that was never established by Congress.

That door swung wide open with the Supreme Court's 5-4 ruling in *Citizens United v. FEC*, which granted nonprofits and other private entities the unfettered right to influence the outcome of federal elections without disclosing their donors to the Federal Election Commission. Since that decision, the number of applications for 501(c)(4) tax-exempt status has more than doubled. Despite the influx of applications, very few organizations have been denied tax-exempt status. In fact, according to the Center for Public Integrity, the IRS has only denied applications to 60 of the 8,214 groups seeking it. It is no surprise that in 2012, nearly a quarter billion dollars spent by outside groups to influence the outcome of our elections came from these 501(c)(4) entities. There are dozens of flagrant examples of 501(c)(4) groups being formed for the purpose of funneling anonymous money to Super PACs. According to the IRS, however, this practice is consistent with the law so long as such transfers are not the "primary" purpose of the tax-exempt organization.

We are asking that you reexamine the IRS rules that wrongfully opened the door to significant political activity by 501(c)(4) groups by establishing a standard that permits 501(c)(4) only *de minimis* or insubstantial amount of work outside its social welfare mission. The new regulation should completely prohibit any 501(c)(4) organization from making expenditures supporting or

opposing a candidate for public office and making monetary or in-kind contributions to political action committees or any other entity engaged in campaign activity.

While this simple revision is no replacement for comprehensive legislation to create a more accountable and transparent campaign finance system, it is an important first step at preventing purely political organizations—of all ideological persuasions --from gaining 501(c)(4) status. As we continue to push for comprehensive campaign finance reform in Congress, we look forward to working with you on a critical rule change that will preserve the true societal value of 501(c)(4) groups and at the same time protect the American taxpayer.

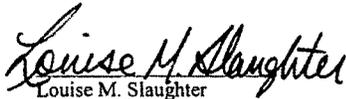
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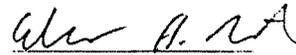
Theodore E. Deutch
MEMBER OF CONGRESS



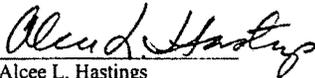
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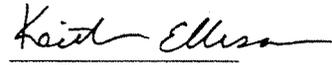


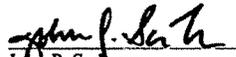
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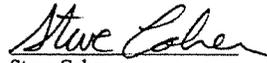


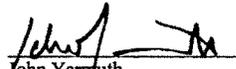
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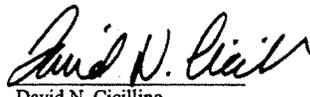

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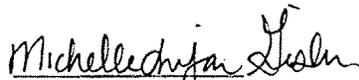

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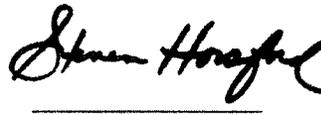

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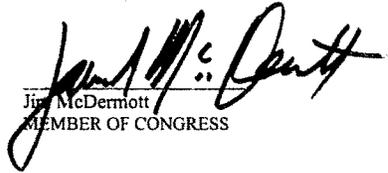

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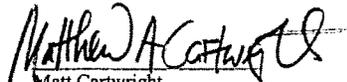

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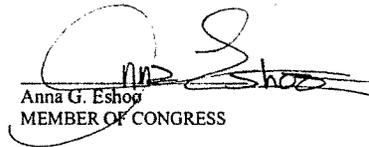

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STATEMENT FOR THE RECORD

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION AND REGULATORY AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

September 17, 2014

Hearing on "The IRS Targeting Scandal: Changing Stories of Missing E-Mails"

2154 Rayburn House Office Building
Chairman Darrell E. Issa (R-CA) and Subcommittee Chairman Jim Jordan (R-OH)

Prashant K. Khetan
Senior Counsel

Thank you, Chairman Issa and Subcommittee Chairman Jordan, for the opportunity to submit this statement for the record to the Committee on Oversight and Government Reform, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs. My name is Prashant K. Khetan and I am a Senior Counsel at Cause of Action, a non-profit, nonpartisan government accountability organization that uses investigative, legal, and communications tools to educate the public on how government transparency and accountability protect economic opportunity for American taxpayers.¹

Cause of Action is at the forefront of exposing the politicization and malfeasance that has occurred at the Internal Revenue Service (the "IRS"). From our legal efforts to prevent the IRS from finalizing widely-criticized proposed rules affecting 501(c)(4) social welfare organizations,² to exposing the White House's highly politicized policy concerning "White House Equities" for reviewing and advising agencies (including the IRS) as to which documents to produce to Congress and the public,³ we are committed to oversight of the federal government in an effort to improve its broken components.

Relevant to this Hearing, Cause of Action has experience with the IRS in connection with requests under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), investigations and

¹ CAUSE OF ACTION, available at www.causeofaction.org.

² *Cause of Action Sues IRS Over Proposed Regulations Affecting Nonprofits*, CAUSE OF ACTION, <http://causeofaction.org/cause-action-sues-irs-proposed-regulations-affecting-nonprofits/> (last visited Sept. 16, 2014).

³ *Cause of Action Sues a Dozen Federal Agencies for Allowing the White House to Obstruct Transparency*, CAUSE OF ACTION, <http://causeofaction.org/cause-action-sues-dozen-federal-agencies-allowing-white-house-obstruct-transparency/> (last visited Sept. 16, 2014); *White House "Equities" in FOIA Requests*, CAUSE OF ACTION, <http://causeofaction.org/our-work/white-house-equities-in-foia-requests/> (last visited Sept. 16, 2014).

litigation that relate to uncovering the full ramifications of the allegedly lost emails of Lois Lerner, former director of the Internal Revenue Service's Exemption Organizations Unit.⁴

The IRS Appears to Have Violated the Federal Records Act

Every federal agency, including the IRS, is required to preserve its electronic records in accordance with applicable statutes, regulations, and agency policies. The Federal Records Act ("FRA"), which establishes the framework for records management throughout the federal government, requires the head of every agency to "establish safeguards against the removal or loss of records." 44 U.S.C. § 3105.⁵ The National Archives and Records Administration ("NARA"), which is the primary agency for records management oversight, is responsible for assisting agencies in maintaining satisfactory documentation of agency policies and transactions.

When agency records are unlawfully or accidentally removed, defaced, altered, or destroyed, the custodial agency must "promptly" notify NARA and produce a comprehensive report. 36 C.F.R. § 1230.14. Moreover, the head of the custodial agency must collaborate with the Archivist of the United States to "initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed." 44 U.S.C. § 3106. If an agency does not contact the Attorney General within a reasonable period of time, the Archivist is required to do so on his own, while simultaneously notifying Congress that "such a request has been made." *Id.*⁶

The Archivist, David Ferriero, testified before Congress that the IRS failed to notify NARA about the loss of Lois Lerner's emails and, as such, "did not follow the law."⁷ This would appear to represent a violation of the FRA, which would have obligated the Commissioner of the IRS to report the loss of the records contained on Lois Lerner's hard drive to NARA, and then to contact the Attorney General. The Archivist has not publicly confirmed whether he has independently requested that the Attorney General undertake any action to recover the lost

⁴ Cause of Action has submitted numerous FOIA requests to the IRS and others in its investigation of Ms. Lerner's lost emails. See, e.g., *FOIA Request to the IRS Regarding Policies and Practices Concerning Applications for 501c4 Status*, CAUSE OF ACTION, <http://causeofaction.org/foia-request-to-the-irs-regarding-policies-and-practices-concerning-applications-for-501c4-status/> (last visited September 16, 2014). On June 23, 2014, Cause of Action and Tea Party Patriots submitted a FOIA request for various records pertaining to the Lerner emails, including the IRS's records management practices. *FOIA Request to IRS regarding IRS Targeting and Records Management*, CAUSE OF ACTION, <http://causeofaction.org/foia-request-irs-regarding-irs-targeting-records-management/> (last visited September 16, 2014). To date, the IRS has refused to produce a single document in response to this request, despite repeated efforts to work with the IRS regarding the scope of the search for and production of responsive documents.

⁵ See *generally Competitive Enterprise Inst. v. EPA*, No. 13-1532, 2014 U.S. Dist. LEXIS 122907 (D.D.C. Sept. 4, 2014) (discussing Federal Records Act).

⁶ On September 16, 2014, the House passed the Federal Records Accountability Act of 2014 (a bill that originated in this Committee), which would modify the FRA. Among other provisions, the bill would require: that agencies designate a "Senior Agency Official for Records Management" (at the Assistant Secretary level or higher) to ensure compliance with all applicable records management requirements; that the Senior Agency Official for Records Management notify the agency head whenever becoming aware of the actual or threatened unlawful destruction of any record; and that the agency head, whenever becoming aware of the actual or threatened unlawful destruction of any record, publish a description of such records on the agency's website (in addition to notifying the Archivist, already required by the FRA). Federal Records Accountability Act of 2014, H.R. 5170, 113th Cong. (2014).

⁷ E.g., Rachel Bade, *Archivist: IRS Did Not Follow Law On Lost Emails*, POLITICO (June 24, 2014), available at <http://www.politico.com/story/2014/06/irs-lost-emails-archivist-108242.html>.

emails, or whether he has reported the matter to Congress, as required by the FRA. *See* 44 U.S.C. § 3106.⁸

The Loss of the Lerner Emails May Have Violated Other Laws

The loss of Ms. Lerner's emails may have violated criminal laws as well.⁹ Specifically, the IRS might have criminally obstructed Congress by failing to preserve Ms. Lerner's emails. The Antitrust Civil Process Act prohibits the obstruction of congressional or federal administrative proceedings, and defines three essential elements for this crime. 18 U.S.C. § 1505. First, there must be an inquiry or investigation by either the House of Representatives or the Senate, or any congressional committee or joint committee. *Id.* Second, the defendant must be aware of the pending proceeding. *Id.* And third, the defendant must have intentionally endeavored, among other things, to withhold or destroy documentary evidence, or to corruptly endeavor to influence, obstruct, or impede the pending proceeding. *Id.* The term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." *Id.* § 1515(b).

By letter dated June 3, 2011, Congressman Dave Camp, Chairman of the U.S. House Committee on Ways and Means, requested then-IRS Commissioner Douglas Shulman to produce various information about the IRS's unusual scrutiny of 501(c)(4) organizations and their donors.¹⁰ Although the IRS responded to Chairman Camp by letter dated July 1, 2011 – stating "that the IRS's actions in this area were in no way influenced by political considerations" – it noted in several instances that the agency was still "in the process of performing an electronic search of files of individuals involved in this matter."¹¹ This is significant because on June 13, 2011 – only *ten days after* Chairman Camp's request – Ms. Lerner's computer allegedly crashed, resulting in the loss of all the emails that Ms. Lerner had sent and received between January 2009 and April 2011.¹² Thus, a sufficient basis exists to allege that IRS officials are criminally liable for obstructing a congressional investigation.¹³

⁸ Cause of Action recently submitted FOIA requests seeking records of any communications between the IRS, the Archivist, Congress, the Attorney General and the President in connection with Ms. Lerner's lost emails, as contemplated by the law. (On file with Cause of Action).

⁹ *See, e.g.*, 18 U.S.C. § 2071 ("Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record . . . filed or deposited . . . in any public office . . . shall be fined . . . or imprisoned not more than three years, or both." The same punishment may be applied to whomever "willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same," while having the records under his possession, and with the additional punishment that he "shall forfeit his office and be disqualified from holding any office under the United States."); 18 U.S.C. § 641 ("Whoever . . . without authority . . . disposes of any record . . . of the United States or of any department or agency thereof . . . shall be fined under this title or imprisoned not more than ten years.").

¹⁰ Letter from Hon. Dave Camp, Chairman, U.S. House Comm. on Ways & Means, to Hon. Douglas H. Shulman, Comm'r, IRS (June 3, 2011), *available at* http://waysandmeans.house.gov/uploadedfiles/non_6103_ltr_final.pdf.

¹¹ Letter from Deputy Comm'r Steven T. Miller, IRS, to Hon. Dave Camp, Chairman, U.S. House Comm. on Ways & Means (July 1, 2011), *available at* http://waysandmeans.house.gov/uploadedfiles/july_1_2011.pdf.

¹² *See* Megan McArdle, *Missing E-Mail Is the Least of the IRS's Problems*, Bloomberg View (June 17, 2014), *available at* <http://www.bloombergview.com/articles/2014-06-17/missing-e-mail-is-the-least-of-the-irs-s-problems>.

¹³ *See, e.g.*, *United States v. Technic Servs., Inc.*, 314 F.3d 1031, 1044 (9th Cir. 2002) (affirming Section 1505 conviction for tampering with evidence before the EPA), *overruled in part on other grounds*, *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010). The theory underlying Section 1505 is similar to that of the "litigation

In the past few months, the IRS asserted first, that it had recovered approximately 24,000 Lerner-related emails and second, that there may be hard drives with additional recoverable emails.¹⁴ But even if the IRS recovers *all* of the emails in question, that would not preclude an allegation of a Section 1505 violation. Rather, such a violation occurs if an effort was made to accomplish “the evil purpose” outlawed by the statute, regardless of whether the defendant succeeds in his endeavor to obstruct.¹⁵ Moreover, to bring a charge against the IRS, “[c]ircumstantial evidence alone is sufficient . . . and such evidence need not remove every reasonable hypothesis except that of guilt.”¹⁶

In addition, the White House may have played a role in improperly disposing of records. Under the Presidential Records Act, the President may “dispose of . . . records that no longer have administrative, historical, informational, or evidentiary value if – (1) the President obtains the views, in writing, of the Archivist . . . and (2) the Archivist states that he does not intend to take any action under subsection (e).” 44 U.S.C. § 2203(c). Subsection (e), in turn, requires the Archivist to “request the advice of [various committees with] respect to any proposed disposal of Presidential records whenever he considers that – (1) these particular records may be of special interest to the Congress; or (2) consultation with the Congress regarding the disposal of these particular records is in the public interest.” If the President at any time possessed the Lerner emails and disposed of such emails, he could have done so lawfully *only* with the consent of the Archivist *and* in consultation with Congress. Thus, if Ms. Lerner’s emails were in the possession of White House officials, but can no longer be found, the Administration also may have violated federal records laws.¹⁷

As set forth above, in connection with the missing Lerner emails, ample grounds exist to investigate various federal officials for potential violations of the law.¹⁸ To date, however, no

hold” concept requiring parties to preserve materials relevant to a litigation. *See, e.g., Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (noting that “[a] party has a duty to preserve potentially relevant evidence . . . once [that party] anticipates litigation”) (internal citations omitted). Once Chairman Camp sent his June 3, 2011 letter, the IRS was on notice and required to retain any relevant documents. *See, e.g., Ashland Oil v. FTC*, 548 F.2d 977 (D.C. Cir. 1976).

¹⁴ *See* Letter from Leonard Oursler, National Director for Legislative Action, to Sens. Ron Wyden, Chairman, and Orrin Hatch, Ranking Member, Committee on Finance (June 13, 2014), available at <http://www.irs.gov/PUP/newsroom/IRS%20Letter%20to%20Senate%20Finance%20Committee.pdf>; Frank Thorp V, *GOP Investigators: Lerner Hard Drive Was Only ‘Scatched’*, NBC News (July 22, 2014), available at <http://www.nbcnews.com/politics/congress/gop-investigators-lerner-hard-drive-was-only-scratched-n162336>.

¹⁵ *See, e.g., United States v. Sprecher*, 783 F. Supp. 133, 163-64 (S.D.N.Y. 1992) (in finding Section 1505 violation, noting that “intent may be inferred from proof that the defendant knew that his corrupt actions would obstruct justice”); *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (discussing rebuttable presumption of unfavorable evidence where bad faith destruction of evidence occurred).

¹⁶ *United States v. Blackwell*, 459 F.3d 739, 761-62 (6th Cir. 2006) (finding sufficient evidence to conclude that defendant intended to obstruct an SEC proceeding); *see also United States v. Mitchell*, 877 F.2d 294, 300-01 (4th Cir. 1989); *United States v. Tallant*, 407 F. Supp. 878, 888 (N.D. Ga. 1975).

¹⁷ At the very least, evidence suggests that the White House knew about the missing emails at least two months before the IRS informed Congress and may have been communicating with Treasury officials regarding the lost emails. *See* Josh Hicks, *IRS chief’s legal adviser spread word of missing e-mails to Treasury lawyer*, Wash. Post (Sept. 9, 2014), available at <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/09/09/irs-chiefs-legal-adviser-spread-word-of-missing-e-mails-to-treasury-lawyer/>.

¹⁸ The IRS also has abused its authority in interpreting other laws (unrelated to losing emails). For example, 26 U.S.C. § 6103 (“Section 6103”) protects confidential taxpayer returns and return information from unauthorized disclosure except in a limited number of statutorily prescribed circumstances. Section 6103(g) permits the President

such investigation has taken place.¹⁹ It is for these reasons and others that Cause of Action encourages the Committee to recommend the appointment of a special independent counsel to investigate all matters related to Ms. Lerner's lost emails.

Thank you for your consideration of our views. We would be pleased to provide the Committee with any further information the Committee needs or to answer any questions raised by this Statement.

Sincerely,



PRASHANT K. KHETAN
SENIOR COUNSEL

to request in writing, and by his own signature, the tax return and return information of any individual taxpayer. *Id.* § 6103(g)(1). Concerned by the prospect that the White House contravened the processes delineated by Section 6103(g), Cause of Action sent a FOIA request to the IRS to determine whether the President had, in fact, sought to access tax return information in an unauthorized manner. Letter from Cause of Action to Ava Littlejohn, Public Liaison, Internal Revenue Serv. (Oct. 9, 2012), available at <http://causeofaction.org/assets/uploads/2013/05/2012-10-9-IRS-WH-FOIA-Request.pdf>. In its response, the IRS stated that the only responsive records it could locate were records of "tax checks," which are requests by the Administration for return information provided on a voluntary basis by taxpayers pursuant to Section 6103(c). Letter from Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv. (Dec. 11, 2012), available at <http://causeofaction.org/assets/uploads/2013/06/Exhibits-for-TIGTA-Appeal.pdf>. The IRS refused to release these records, however, claiming that "tax checks" were categorically "return information" and could be withheld regardless of the IRS's ability to segregate and release non-personally-identifying information. *Id.* This interpretation, however, is inconsistent with the law. See 5 U.S.C. § 552(b) (requiring an agency to produce any "reasonably segregable portion" of responsive records after deleting exempt portions); see also *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 611 (D.C. Cir. 1997) (IRS has duty to "delete[] exempt matters, including [Section] 6103 return information," before releasing records). Moreover, this response shows that the IRS will choose when and how Section 6103 applies based on the level of interest in keeping the subject matter of requested records hidden from scrutiny.

¹⁹ Reports from earlier this year indicated that the FBI does not expect any criminal charges to emerge from its investigation of IRS targeting. See Devlin Barrett, *Criminal Charges Not Expected in IRS Probe*, Wall St. J. (Jan. 13, 2014), available at <http://online.wsj.com/news/articles/SB10001424052702303819704579318983271821584>. Cf. Jonathan Strong, *Letter: Holder Aide Accidentally Calls Issa Staff For Help Spinning IRS Scandal*, Breitbart (Sept. 9, 2014), available at <http://www.breitbart.com/Big-Government/2014/09/09/Letter-Holder-Aide-Accidentally-Calls-Issa-For-Help-Spinning-IRS-Scandal> (reporting on call by senior Justice aide seeking help to "spin" the IRS scandal).