

**IRS TARGETING SCANDAL:  
THE NEED FOR A SPECIAL COUNSEL**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**HOUSE OF REPRESENTATIVES**  
ONE HUNDRED THIRTEENTH CONGRESS  
SECOND SESSION

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JULY 30, 2014  
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## **IRS TARGETING SCANDAL: THE NEED FOR A SPECIAL COUNSEL**

**WEDNESDAY, JULY 30, 2014**

HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY  
*Washington, DC.*

The Committee met, pursuant to call, at 10:15 a.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Coble, Chabot, Bachus, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Chaffetz, Gowdy, Labrador, Farenthold, Holding, Collins, Conyers, Nadler, Scott, Jackson Lee, Johnson, Richmond, Garcia, Jeffries, and Cicilline.

Staff Present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Caroline Lynch, Counsel; Robert Parmiter, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apfelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; and Aaron Hiller, Counsel.

Mr. GOODLATTE. Good morning. The Judiciary Committee will come to order.

And without objection, the Chair is authorized to declare recesses of the Committee at anytime. We welcome everyone to this morning's hearing on the "IRS Targeting Scandal: The Need for a Special Counsel," and I will begin by recognizing myself for an opening statement.

On May 10, 2013, the Internal Revenue Service admitted to inappropriately targeting conservative groups for "extra scrutiny," in connection with their applications for tax-exempt status. Following the revelation of the IRS targeting, President Obama denounced the targeting as outrageous and unacceptable and stated that the IRS as an independent agency requires absolute integrity and people have to have confidence that they're applying the laws in a non-partisan way. He pledged that the Administration would find out exactly what happened and would make sure wrongdoers were held fully accountable.

In testimony before this Committee on May 15, 2013, Attorney General Eric Holder promised me and everyone else on this dais that the Justice Department would conduct a dispassionate investigation into the IRS admitted targeting of conservative groups. The Attorney General pledged that this will not be about parties,

this will not be about ideological persuasions, and anyone who has broken the law will be held accountable.

Last month, FBI Director Comey assured this Committee that the FBI was conducting a very active investigation into the IRS targeting matter, and not 2 weeks ago Deputy Attorney General Cole stated that DOJ investigators will follow the facts wherever they lead and apply the law to those facts. Unfortunately, despite the Administration's stated commitment to its investigation, the facts and recent events have demonstrated repeatedly that the Administration's real commitment is to slow walk this investigation and undermine congressional efforts to uncover the truth.

Earlier this year, unnamed Justice Department officials leaked information to the Wall Street Journal suggesting that the Department does not plan to file criminal charges over the IRS targeting of conservative groups. On Super Bowl Sunday, President Obama stated that there was "not even a smidgen of corruption" in connection with the IRS' admitted targeting of conservative groups based upon their beliefs.

Finally, as we all know, the Justice Department appointed an attorney in the notoriously politicized Civil Rights Division to head the investigation. That individual donated more than \$6,000 to President Obama's campaigns in 2008 and 2012. In response to this, on May 7, 2014, the House passed H. Res. 565, a bipartisan resolution calling on the Attorney General to appoint a special counsel to investigate the IRS targeting of conservative groups.

That resolution was supported by 26 Democrats, including two Members of this Committee. Since passage of the House Resolution, additional troubling facts have come to light that solidify the need for a special counsel to investigate the IRS matter.

On June 13, 2014, after agreeing to turn over to Congress all emails belonging to Ms. Lerner, the IRS announced it had lost an untold number of emails belonging to Ms. Lerner. The lost emails covered the period between January 1, 2009, and April 2011, a period when the IRS targeting of conservative groups was occurring regularly.

In his testimony before the House Oversight Committee, Deputy Attorney General Cole made the shocking admission that the Justice Department did not learn until June of this year that the Internal Revenue Service had lost the emails and, even then, only learned of it via media reports. Both the Attorney General and the FBI director have insisted that the Justice Department is conducting a "very active," and "dispassionate investigation." How, then, is it possible that investigators pursuing this matter very actively and dispassionately were unaware that a sizable, potentially key piece of evidence had simply vanished?

On July 10, 2014, U.S. District Judge Emmet G. Sullivan ordered the IRS to provide a full explanation of the notorious computer crash and infamous missing emails within 30 days and assigned a magistrate judge to "assist the parties," in the process. Not surprisingly, less than 2 weeks later, the IRS announced that investigators looking into these missing emails had located backup tapes which may contain the missing Lerner emails.

The relevant special counsel regulations require appointment when the Attorney General determines that three circumstances

exist: One, criminal investigation of a person or matter is warranted; two, investigation or prosecution of that person or matter by a United States Attorney's office or litigating division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and, three, under the circumstances, it would be in the public interest to appoint an outside special counsel to assume responsibility for the matter.

As I have said before, there can be little doubt to any neutral, honest observer that these requirements exist. First, further criminal investigation of this matter is clearly warranted. The Administration, particularly the FBI, admits as much. Second, there is clearly a conflict of interest between the Justice Department investigators and this Administration. The Administration's statements and actions have repeatedly served to undermine the Department's investigation. The fact that President Obama prejudged the investigation by saying there was not a smidgen of corruption and the fact that unnamed department officials leaked information to the media designed to undermine the investigation has made it impossible for the Department to conduct a fair, unbiased investigation. Even assuming for the sake of argument that there is no conflict, there clearly exists other extraordinary circumstances called for in the regulations.

Finally, it is clear that appointing an outside special counsel to investigate this matter would be in the public interest. The American people are very concerned that their government has targeted individual American citizens for harassment solely on the basis of their political beliefs. The Administration's delays, denials, and continued efforts to obfuscate the truth have further eroded this trust.

As I've said repeatedly, the American people deserve to know who ordered the targeting, when the targeting was ordered, and why. I look forward to exploring these and other important issues with our witnesses today.

And it is now my pleasure to recognize the Ranking Member of the Judiciary Committee, the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman and Members of the Committee.

Today is the last full working day before the August recess, and I'm concerned and deeply disappointed by how we have chosen to spend it. Under Federal regulations and according to all available precedent, the appointment of special counsel is reserved for extraordinary circumstances, where a conflict of interest at the highest levels of government requires the Department of Justice to abandon its normal process of investigation and prosecution.

Two separate congressional Committees have sorted through more than half a million pages of documents, conducted 40 transcribed interviews, and held more than three dozen hearings and markups to examine the criteria used by the IRS to screen applicants for tax-exempt status. The Committees have not uncovered one shred of evidence to suggest that the involvement of senior officials of the Department of Justice, the Department of the Treasury or the White House itself. Without that evidence, calls for a special counsel are simply unwarranted.

The Chairman now has mentioned House Resolution 565, which demands that the Attorney General appoint special counsel in this matter. Of course, as a matter of law, the Attorney General has absolute discretion to determine whether a special counsel is necessary. Congress cannot compel him to do so. I repeat: Congress cannot compel him to do so. Nor can this Committee, of course. We might have explained this point had we maintained regular order and discussed House Resolution 565 in this Committee prior to consideration on the House floor.

What troubles me most about this resolution is its preamble: Eight pages of unsubstantiated claims, carefully tailored half-truths, and political innuendo. For example, the resolution references two anonymous sources in a January 13 Wall Street Journal article who claimed that the Department has concluded its investigation. That claim ignores the testimony of both Attorney General Eric Holder and FBI Director James Comey, who assured this Committee that the investigation is ongoing. The resolution claims that the Department of Justice and the FBI have refused to cooperate with congressional oversight. Of course, as the Chairman knows, that under long-standing policy applied consistently by Administrations of both parties, Congress is not entitled to materials related to an ongoing criminal investigation. Otherwise, the department's attempt to accommodate our needs have been, in my mind, extraordinary. The resolution's largest error is the same false premise underlying this hearing. House Resolution 565 claims that the IRS targeted conservative nonprofit groups for extra scrutiny in connection with applications for tax-exempt status. That is partly true, but it is a deliberate half truth and one that leads to the wrong conclusion.

The record is clear. Overwhelmed with applications for tax-exempt status after the Citizens United decision, the IRS created a list of search terms in an attempt to sort legitimate applicants from mere political shells. Those search terms applied across the political spectrum to Tea Party groups but also to groups with the words "progressive" and "occupy" in their titles. We all agree that this approach was poorly conceived, but not a single applicant was denied tax-exempt status because of it. The majority knows or must know that this is a case of bureaucratic ineptitude and not so-called political targeting. They only frame it as such because it is politically expedient to do so.

This underscores my final point. Given the long list of urgent matters pending before us, this hearing is an unacceptable misuse of our time and our resources. The 113th Congress has spent more than 18 million taxpayer dollars investigating the IRS. The House has held more than three dozen hearings and markups on the topic. We've already voted on the particular question of appointing special counsel, but we have not held one hearing in the House Judiciary Committee on comprehensive immigration reform, not one. We've not held one hearing on legislation to update the Voting Rights Act, not one. Not one hearing on much-needed reform of the Electronic Communications Privacy Act. Not one hearing on stemming the tide of gun violence in this country, a scourge that has claimed nearly 20,000 lives since this Congress began. Not one hearing on a range of local civil rights issues across the map, in-

cluding police practices in New York, due process rights for minors at the Texas border, prison conditions in California, access to the ballot box in Florida, and access to drinking water and other basic utilities in Michigan. Any one of these topics would be appropriate for consideration today, which I repeat is our last full day of work before the break. Instead, we will hold one more hearing in the line of dozens of hearings on a so-called scandal in which one office in the IRS bureaucracy denied zero applications for tax-exempt status.

In terms of actually compelling the Attorney General to appoint a special counsel, this hearing stands about as much chance of success as the Speaker's woefully misguided lawsuit against the President of the United States.

I hope, Members of the Committee, that after the break, cooler heads will prevail. There's still time to correct this Committee's priorities before the Congress ends.

Mr. Chairman, that concludes my remarks, and I yield back. Thank you.

Mr. GOODLATTE. Thank the gentleman.

And we welcome our distinguished panel today.

If you would all rise, I'll begin by swearing in the witnesses.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you, and let the record reflect that all the witnesses responded in the affirmative.

I'll introduce our witnesses. Mr. Jay Sekulow is chief counsel of the American Center for Law and Justice. He is an accomplished Supreme Court advocate, renowned expert on religious liberty, and a respected broadcaster. At the Supreme Court of the United States, Mr. Sekulow has argued several landmark cases which have become part of the legal landscape in the area of religious liberty litigation.

Mr. Sekulow expanded the ACLJ's work globally, working to protect religious liberty and religious freedom. He launched the European Center for Law and Justice, where he serves as chief counsel and has opened offices around the world. Prior to joining ACLJ, Mr. Sekulow worked in the Office of Chief Counsel for the Internal Revenue Service as a tax trial attorney. Mr. Sekulow received his Ph.D. from Regent University with a dissertation on American legal history, is an honors graduate of Mercer Law School, where he served on the Mercer Law Review, and an honors graduate of Mercer University. He was appointed a visiting fellow of Oxford University at Harris Manchester College, where he lectured on Middle East affairs and international law. He also serves as a member of the Summer Research Institute at Oxford from 2013 to 2016.

Professor Ronald D. Rotunda joined the faculty of Chapman University in 2008. Prior to coming to Chapman, he was a university professor and professor of law at George Mason University School of Law. Before that, he was the Albert E. Jenner, Jr., professor of Law at the University of Illinois. He joined the University of Illinois faculty in 1974, after clerking for Judge Walter R. Mansfield of the United States Court of Appeals for the Second Circuit, practicing law in Washington, D.C., and serving as assistant majority counsel for the Watergate Committee. He has coauthored the most

widely used course book on legal ethics and is the author of a leading course book on constitutional law, "Modern Constitutional Law." He has written several other books and more than 350 articles in various law reviews, journals, newspapers, and books. These books and articles have been cited numerous times by State and Federal courts at every level, from trial courts to the United States Supreme Court. He has been interviewed on radio and television on legal issues, both domestically and abroad. In 1993, he was constitutional law adviser to the Supreme National Council of Cambodia and assisted that country in writing its first democratic Constitution. Professor Rotunda received his bachelor of arts and juris doctor degrees from Harvard University.

Professor Charles Tiefer joined the faculty of the University of Baltimore Law School in 1995. Previously, he served as solicitor and deputy general counsel of the U.S. House of Representatives for 11 years. He also taught as a visiting lecturer at Yale Law School and for a decade as an adjunct at Georgetown University Law Center. He was an associate editor of the Harvard Law Review, a court law clerk for the D.C. Circuit, a trial attorney with the Civil Rights Division of the U.S. Department of Justice, and an assistant legal counsel for the U.S. Senate. Professor Tiefer wrote "Congressional Practice and Procedure" and the "Semi-Sovereign Presidency," a book on separation of powers. He has published articles on legislation, separation of powers, international law, and Federal Government operations in the Harvard Journal on Legislation, Yale Journal on Regulation, Texas International Law Journal and the Boston University Law Review and numerous other law reviews. Professor Tiefer received his bachelor's degree from Columbia College and his juris doctor from Harvard University.

I would ask each witness to summarize their testimony in 5 minutes or less, and to help you stay within that time, there's a timing light on your table. When the light switches from green to yellow, you'll have 1 minute to conclude your testimony. When the light turns red, that's it, you're done, time is up. And we will start with Mr. Sekulow. Welcome.

**TESTIMONY OF JAY ALAN SEKULOW, J.D., Ph.D.,  
CHIEF COUNSEL, AMERICAN CENTER FOR LAW AND JUSTICE**

Mr. SEKULOW. Thank you, Mr. Chairman, Ranking Member Conyers, distinguished Members of the Committee, and on behalf of the American Center for Law and Justice, thank you for allowing me to participate today.

I serve as counsel to 41 organizations that have filed Federal litigation against the IRS and related officials regarding the targeting. We were in cooperation with the Department of Justice for a period of time with their investigation, but when I chronicled the order in which things have developed over the last several months, specifically the missing emails, which is key evidence in this case, the faux apology that Lois Lerner gave when this scandal broke over a year ago, I have unfortunately had to conclude that the investigation by the Department of Justice is also a faux investigation. It is at surfaced at best, and we were compelled in a situation where we were producing clients for these investigators, for DOJ officials, for FBI agents, for Ms. Bosserman to interview, with the assurance

from the FBI that our clients were not and have not been subject to criminal investigations and were not targets of those investigations. They made that clear.

Then an email surfaced in a batch of emails that were delivered. This one was dated May 8 of 2013. Of course, it just came out several weeks ago. It is from Lois Lerner. It is to Nicole Flax, who was the chief of staff for the then commissioner of Internal Revenue Service: I got a call today from Richard Pilger, director, Election Crimes Branch at DOJ. I know him from contacts from my days there. He wanted to know who at the IRS the DOJ folks could talk to about Senator Whitehouse's idea that a hearing that DOJ could piece together false claim cases about applicants who "lied"—this is her email—on their 1024s, saying they weren't planning on doing political activity and then turning around and making large visible political expenditures. DOJ is feeling like it needs to do something to respond, but they want to talk to the right folks at the IRS to see whether there are impediments from our side and what, if any, damage this might do to the IRS programs. I told them we need to talk to several folks at IRS. I'm out of town all of next week, so wanted to reach out and see who you think might be right for such a meeting, all hands on this—I'll hand this off to Nan as a contact person if things need to happen while I'm gone.

Piece together false claim cases so that my clients, which, by the way, and let me acknowledge no evidence, could be subject to what, grand jury investigations? And at the very same time—this comes, by the way, out 2 days before the apology from Lois Lerner. So this was an ongoing systematic scheme.

And Ranking Member Conyers, with due respect, there were a couple of liberal groups that were picked up in this dragnet. None of them were denied their tax-exempt status. I've got one client, by the way, that has been held for 5 years, still does not have that status resolved.

So we've got an email saying let's piece together or attempt to piece together false statement cases.

Another email, March 27, just a few months before, this one again Lois Lerner: As I mentioned yesterday, there are several groups of folks from the FEC world that are pushing tax fraud prosecution for (c)(4)s who report they are not conducting political activity when they are or at least these folks think they are. One is my ex-boss, Larry Noble, former general counsel at the FEC, who is now president of Americans for Campaign Reform. This is their latest push to shut these down. One IRS prosecution would make an impact, and they wouldn't feel so comfortable doing this stuff. By the way, the stuff they're talking about is activity protected by the First Amendment.

So I've got an email from the IRS referencing a Department of Justice call while the Department of Justice is supposed to be conducting this investigation. We know that there's the missing emails, but what may not be known is that there was actually a much earlier FOIA request. This has not been discussed publicly. This FOIA request was made in May 27 of 2010, right when this whole issue started just getting some attention. It came in from Lynn Walsh. She did this as an independent journalist. She sent it to the Internal Revenue Service disclosure office asking for, as

she phrased it, documents relating to any training, memos, letters, policies, et cetera, that detail how the Tax-Exempt Government Entities Division reviews application for nonprofits, 501(c)(3)s, and other not-for-profit organizations specifically mentioning Tea Party, the Tea Party, Tea Party or tea parties. The response that came in to this request, of course, took until January 6, 2011. It's a quick response. We found no documents specifically responsive to your request. Well, we know that's absolutely false because there's been—take out the ones that are missing, there are literally thousands, tens of thousands that were responsive to this. This is the cavalier attitude upon which the IRS was conducting itself. That's problematic. This is an office I served in, my first job out of law school, 250 years ago, was Chief Counsel's Office of the IRS. I have a lot of respect for the office. I served on the legal faculty for the Department of Justice. This isn't something that I'm pleasant about this. This is damaging, it's troubling, and Mr. Chairman, in all due respect, it could be solved so easily by appointing a special counsel to get to the bottom of what is clearly a significant problem, the last of which is the missing emails. Thank you.

Mr. JORDAN [presiding]. I thank the gentleman for his testimony. [The prepared statement of Mr. Sekulow follows:]\*

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\*Attachments to this prepared statement are not printed in this hearing record but are on file with the Committee and can be accessed at <http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=102569>.



PREPARED WRITTEN TESTIMONY OF

**Jay Alan Sekulow, J.D., PhD**

Chief Counsel, American Center for Law and Justice

**Committee on the Judiciary**

July 30, 2014

**“THE IRS TARGETING SCANDAL: THE NEED FOR A SPECIAL COUNSEL”**

Chairman Goodlatte, Ranking Member Conyers, and distinguished Members of the Committee, on behalf of the American Center for Law & Justice, thank you for allowing me to address the subject of the IRS’s ongoing targeting scandal and the immediate need for a Special Counsel.

On May 7, 2014, the U.S. House of Representatives passed House Resolution 565 (H.Res. 565) calling on Attorney General Eric Holder to appoint a Special Counsel to conduct an investigation<sup>1</sup> into the IRS’s unconstitutional targeting of Americans on the basis of their perceived viewpoints, targeting that included selective audits of individuals and organizations, unlawful disclosures of confidential information, excessive delays in evaluating and approving nonprofit applications, unlawful information demands, and – critically – efforts to engineer criminal prosecutions of law-abiding citizens in the absence of any evidence of wrongdoing.

On June 27, 2014, this committee joined with the House Committee on Ways and Means to send a joint letter to the Attorney General, reminding him of the House Resolution’s request that he appoint a Special Counsel.<sup>2</sup> Attorney General Holder has not responded to either the House Resolution or the joint letter.

The Standard for appointing a Special Counsel found in the Code of Federal Regulations as 28 C.F.R. § 600.1, entitled Grounds for Applying a Special Counsel, states that Special Counsel should be appointed when an Attorney General determines that criminal investigation of a person or matter is warranted and—

- (a) That investigation or prosecution of that person or matter by a United States Attorney’s Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and
- (b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.<sup>3</sup>

<sup>1</sup> H.R. Res. 565, 113th Cong. (2014).

<sup>2</sup> Letter from Bob Goodlatte, Chairman, House Judiciary Committee & Dave Camp, Chairman, House Ways and Means Committee, to Eric H. Holder, Jr., U.S. Attorney General (June 27, 2014), available at [http://waysandmeans.house.gov/uploadedfiles/special\\_counsel\\_on\\_irs.pdf](http://waysandmeans.house.gov/uploadedfiles/special_counsel_on_irs.pdf).

**Congressional Testimony of Dr. Jay A. Sekulow regarding "The IRS Targeting Scandal:  
The Need for a Special Counsel"**  
*Wednesday, July 30, 2014*

In addition, [w]hen matters are brought to the attention of the Attorney General that might warrant consideration of appointment of a Special Counsel, the Attorney General may:

- (a) Appoint a Special Counsel;
- (b) Direct that an initial investigation, consisting of such factual inquiry or legal research as the Attorney General deems appropriate, be conducted in order to better inform the decision; or
- (c) Conclude that under the circumstances of the matter, the public interest would not be served by removing the investigation from the normal processes of the Department, and that the appropriate component of the Department should handle the matter. If the Attorney General reaches this conclusion, he or she may direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials.<sup>4</sup>

Under these regulations, though the appointment of a Special Counsel is completely discretionary with the Attorney General, I am here to underscore the seriousness of this scandal and the immediate need for a Special Counsel who will act independently of the Department of Justice, not subject to its appointed political leadership. In my view, it is clear that the DOJ has demonstrated that it can no longer fairly and justly oversee any further investigations, and the only opportunity for justice for those targeted lies with an independent Special Counsel.

I represent 41 groups from 22 states that were illegally targeted by the IRS. So I come to this hearing with a keen awareness of the scope of this scandal. The ACLJ has been uniquely positioned to evaluate the IRS's original partial admission of wrongdoing, presented in the form of a misleading apology, and its resulting justifications for its misconduct. Simply put, the IRS deceived the public about the extent of its wrongdoing and maintains that deception to this day.

Because of this deception, last year I joined many Members of Congress from both sides of the aisle in calling for an investigation by the DOJ. This seemed to be an obvious next step, as the IRS had already admitted its responsibility for targeting Americans on the basis of their perceived viewpoints.<sup>5</sup> This situation has become more acute in light of the recent revelations that the DOJ was "seeking to piece together" criminal investigations against these groups without evidence to support its claims.

I have always had great respect for the DOJ and spent many years working with former Attorneys General. I also served on the DOJ's teaching faculty, instructing their U.S. attorneys on matters involving First Amendment law. I also served in the Office of Chief Counsel, for the IRS. However, the issues surrounding the current investigation into this targeting scandal have caused me to lose confidence in the Attorney General and his Justice Department.

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<sup>4</sup> 28 C.F.R. § 600.2 (1999).

<sup>5</sup> Abby D. Phillip, *Tea Party Rejects IRS Apology, Republicans Vow Investigation*, ABCNews (May 10, 2013), <http://abcnews.go.com/Politics/irs-admits-targeting-conservative-groups/story?id=19151646>.

**Congressional Testimony of Dr. Jay A. Sekulow regarding “The IRS Targeting Scandal:  
The Need for a Special Counsel”**  
*Wednesday, July 30, 2014*

**The ACLJ’s Discovery of IRS Targeting:**

In early February 2012, our office began to receive requests for legal representation from dozens of conservative organizations from across the country. When we examined the documents they provided, we were outraged at the types of intrusive questions that multiple IRS offices were sending to these groups. Some of these questions were outside the scope of legitimate IRS inquiry and we notified the Acting Commissioner of the IRS in writing on May 13, 2013 to inform him that these questions violated our client’s 1<sup>st</sup> Amendment rights. *See* ATCH A for a copy of this letter.

Upon review of the information that our clients provided, we were able to determine that a targeting scheme had been orchestrated by senior officials at the IRS and Treasury. We had the documents to prove it. As the Administration was attempting to control this story in the media by blaming any misconduct on “line workers” in Cincinnati, I had in my possession a stack of IRS letters received by my clients. Those letters came not just from offices in Cincinnati, but also from at least two offices in California, and the Treasury Department in Washington, DC.<sup>6</sup> *See* ATCH B for examples of these letters.

When we originally compared the voluminous and intrusive demands that the IRS made of these groups, we knew as early as March 2012 that we had evidence of a wide ranging and carefully orchestrated scheme to target American citizens for their perceived political beliefs. It was also clear that the trail of evidence established that senior officials in Washington, D.C. were leading this effort to unlawfully target our clients.<sup>7</sup>

To conceal its ongoing, nationwide targeting campaign, the IRS denied any wrongdoing, even going so far as to issue a false response to an on-point FOIA request on January 6, 2011, responding to a request for documents on the handling of Tea Party matters by declaring there were “no documents” responsive to the request. This came at the time when Tea Party targeting was fully in process, with “BOLO” lists that explicitly named Tea Party groups. *See* ATCH C for a copy of this letter of response from the Department of Treasury regarding this FOIA request.

When the IRS learned that the Inspector General was about to issue a report outlining this targeting, Lois Lerner and her staff schemed to plant a question at an ABA. In answering the question, Lois Lerner admitted the IRS’s guilt in targeting hundreds of groups who were applying for tax-exempt status.<sup>8</sup>

However, in these cases, the way they did the centralization was not so fine. Instead of referring to the cases as advocacy cases, they actually used case names on this list. They used names like Tea Party or Patriots and they selected cases simply because the applications had those names in the title. That was wrong, that was absolutely

<sup>6</sup> Matthew Clark, *More IRS Offices than Single Cincinnati Office Sent Inquiry Demands to Targeted Tea Party Groups*, AM. CIR. FOR LAW & JUSTICE (May 13, 2013, 5:48 PM), <http://aclj.org/free-speech-2/multiple-irs-offices-cincinnati-sent-inquiry-demands-targeted-tea-party-groups>.

<sup>7</sup> David French, *A Broad-Based Assault on the Tea Party?*, NAT’L REV. ONLINE (Mar. 2, 2012, 3:29 PM), <http://www.nationalreview.com/corncr/292475/broad-based-irs-assault-tea-party-david-french>.

<sup>8</sup> Gregory Korte, *Planted Question Gambit Backfires on IRS Officials*, USA TODAY (May 18, 2013, 1:55 PM), <http://www.usatoday.com/story/news/politics/2013/05/18/irs-scandal-planted-question/2216747/>.

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incorrect, insensitive, and inappropriate — that’s not how we go about selecting cases for further review. We don’t select for review because they have a particular name.

The other thing that happened was they also, in some cases, cases sat around for a while. They also sent some letters out that were far too broad, asking questions of these organizations that weren’t really necessary for the type of application. In some cases you probably read that they asked for contributor names. That’s not appropriate, not usual, there are some very limited times when we might need that but in most of these cases where they were asked they didn’t do it correctly and they didn’t do it with a higher level of review. As I said, some of them sat around for too long.

....

So I guess my bottom line here is that we at the IRS should apologize for that . . .<sup>9</sup>

This admission of guilt only confirmed what my legal team and I already knew – and what the rest of the country was about to find out.

If the IRS believed its carefully planned apology would defuse the scandal, it was sadly mistaken. President Obama initially made it clear that he was outraged, and Attorney General Holder said that the DOJ would investigate.<sup>10</sup>

On May 15, 2013, before this very committee, when asked by Congressman Smith about DOJ’s investigation of the IRS’ targeting of conservative groups, Attorney General Holder referred to the conduct as “criminal” in the following exchange:

Mr. SMITH. Thank you, Mr. Chairman. Welcome, Mr. Attorney General. You have announced a criminal investigation into allegations that IRS employees have unfairly targeted conservative organizations . . . Is your investigation going to go beyond Cincinnati, beyond Ohio? Is it going to be a national investigation that includes Washington, D.C., as well and includes any allegations wherever they might occur?

Attorney General HOLDER. Yes, it would. The facts will take us wherever they take us. It will not be only one city. We will go wherever the facts lead us.

....

<sup>9</sup> Rick Hasen, *Transcript of Lois Lerner’s Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 AM), <http://electionlawblog.org/?p=50160>.

<sup>10</sup> Lucy Madison, *Justice Dept. to Investigate IRS Targeting*, CBS NEWS (May 14, 2013, 3:47 PM), <http://www.cbsnews.com/news/justice-dept-to-investigate-irs-targeting/>.

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Mr. SMITH. Okay. Without saying whether any criminal laws have actually been broken, what are some possible criminal laws that could have been violated if, in fact, individuals or organizations were targeted for their conservative views?

Attorney General HOLDER. Well, I think it was Congressman Scott who really put his finger on it. There are civil—potential rights—

Mr. SMITH. Right. But do you know of any criminal laws that might have been violated?

Attorney General HOLDER. I am talking about criminal cases, criminal violations in the civil rights statutes, IRS, that I think we find there. There is also the possibility of 1,000—false statements violations that might have been made, given at least what I know at this point.

Mr. SMITH. Okay. I think some of the criminal laws that might have been violated—18 United States Code 242 makes it a crime to deprive any person of rights, privileges, or immunities guaranteed by the Constitution. 18 United States Code 1346 makes it a crime for Government employees to deprive taxpayers of their honest services. So that is a couple of examples.<sup>11</sup>

But it appears that these initial expressions of outrage were little more than contrived efforts at damage control. The Obama Administration never intended for this scandal to be fully and fairly investigated. Within months, Administration officials quickly retreated back to talking points that the IRS targeting was “just another phony scandal.”<sup>12</sup>

The IRS and apparently DOJ and its employees joined in this scheme to actively and systematically attack the free speech rights of thousand of Americans. They tried to intimidate thousands of citizens from forming social welfare organizations, and they did everything in their power to stop a large number of these groups from having any real impact or success as organizations.

We knew that then, and we know that even more now. The evidence is clear and uncontroverted, and we have not and will not relent in our fight to see justice delivered to our clients.

I have one client who applied for tax-exempt status in December 2009. They have still not been approved. The Albuquerque Tea Party is preparing to recognize the fifth anniversary of the day when they mailed their application off to the IRS and this agency cashed their application check.<sup>13</sup>

<sup>11</sup> Holder, Jr., Eric H. Statement to the House, Committee on the Judiciary. Oversight of the U.S. Department of Justice, Hearing, May 15, 2013 (Serial 113-43). Available at [http://judiciary.house.gov/\\_cache/files/8593af4a-l7aa-4e47-8668-615a2b44b0f6/113-43-80973.pdf](http://judiciary.house.gov/_cache/files/8593af4a-l7aa-4e47-8668-615a2b44b0f6/113-43-80973.pdf); Accessed: 7/28/14.

<sup>12</sup> Dave Boyer, *Obama’s ‘Phony’ Scandals Line Draws GOP Retort*, WASHINGTON TIMES (July 25, 2013), <http://www.washingtontimes.com/news/2013/jul/25/obamas-phony-scandals-line-draws-gop-retort/?page=all>.

<sup>13</sup> James Monteleone, *IRS Keeps ABQ Tea Party on Hold*, ALBUQUERQUE JOURNAL (July 16, 2014, 12:05 AM), <http://www.abqjournal.com/429721/news/irs-keeps-abq-tea-party-on-hold.html>.

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Despite all of the news articles, all of the investigations, and all of the congressional subpoenas, nine of my clients are still waiting for approval.

Therefore, on behalf of my 41 clients, we sued the IRS in federal court, naming – and providing specific allegations against – no less than 12 IRS officials, including the IRS’s former Commissioner and Chief Counsel. I will provide a copy of this Complaint and attached exhibits to the Committee. *See* ATCH D.

**The ACLJ’s Cooperation with the DOJ:**

In December 2013, approximately nine months after Attorney General Holder called for an investigation, the DOJ contacted my office. The initial contacts were not made to my legal team, but rather directly to our clients. This occurred despite the fact that DOJ was well aware that these groups were represented by counsel.

For several months, our attorneys cooperated with the DOJ and the FBI in their “investigation.” They were interested in speaking with a few of our clients. The ACLJ facilitated a client interview with the DOJ, FBI, and a representative from TIGTA. DOJ attorney Barbara Bosserman was in attendance at that meeting. The majority of the questions focused primarily on the conduct of low-level field agents, the very “line workers” the IRS initially publicly blamed for its misconduct.

I am very sorry to say that we are no longer cooperating with the DOJ. Soon after our meeting with the DOJ and FBI, we were shocked to learn of evidence that was uncovered in over 1,600 pages of emails that were produced in response to a Judicial Watch FOIA request.<sup>14</sup>

Within these emails were multiple exchanges between Lois Lerner and officials within the IRS where she referenced her conversations with DOJ officials that clearly established a motive, intent, and active scheme to manufacture evidence against conservative groups like our clients to “*piece together*” criminal prosecutions of law-abiding citizens in the absence of any complaints or evidence of wrongdoing.<sup>15</sup>

These emails suggest a troubling coordination between the IRS, FEC, DOJ, and United States Senators and their staff.<sup>16</sup> They also establish a coordinated targeting effort between the IRS, DOJ, and certain U.S. Senators.<sup>17</sup>

<sup>14</sup> *See ACLJ: Tainted Investigation into IRS Scandal Makes It Impossible for Targeted Groups to Meet with Federal Investigators*, AM. CTR. FOR LAW & JUSTICE (June 18, 2014, 10:34 AM), <http://aclj.org/free-speech-2/aclj-tainted-investigation-into-irs-scandal-makes-it-impossible-for-targeted-groups-to-meet-with-federal-investigators>.

<sup>15</sup> E-mail from Lois Lerner, Former Dir. of IRS Exempt Orgs., to Nikole Flax, Chief of Staff to Former IRS Comm’r Steven Miller et al. (May 8, 2013, 5:30 PM), *available at* <http://www.judicialwatch.org/wp-content/uploads/2014/04/JW1559-0001051.pdf>. (emphasis added).

<sup>16</sup> *See, e.g.*, E-mail from Nikole Flax, Chief of Staff to Former IRS Comm’r Steven Miller, to Lois Lerner, Former Dir. of IRS Exempt Orgs. (Feb. 5, 2013, 2:29 PM), *available at* <http://www.judicialwatch.org/wp-content/uploads/2014/07/IRS-Production-3.pdf> (located on p. 596 of PDF document).

<sup>17</sup> *See, e.g.*, E-mail from Ayo Griffin, Counsel for Senate Judiciary, Subcomm. on Crime and Terrorism, to Suzanne Siano, IRS Leg. Counsel (Mar. 26, 2013, 7:44 PM), *available at* <http://www.judicialwatch.org/wp-content/uploads/2014/04/JW1559-000243.pdf>.

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To put it plainly, the DOJ itself is implicated in the very scandal for which it is investigating the IRS. On March 26, 2013, Ayo Griffin, Counsel for the U.S. Senate Committee on the Judiciary Subcommittee on Crime and Terrorism, sent an email to IRS Legislative Counsel, Suzanne Sinno stating that Senator Sheldon Whitehouse (D-RI) was “interested in investigation and prosecution of material false statements to the IRS regarding political activity by 501(c)(4) groups on form 990 and 1024 under 26 U.S.C. sections 7206.”<sup>18</sup> On March 27, 2013, Lois Lerner sent an email to Nikole Flax (former chief of staff to former IRS Commissioner Steven Miller), Suzanne Sinno, Catherine Barre (IRS staffer), Scott Landes (IRS Legislative Affairs), Amy Amato (Affiliated with the IRS; position unknown), and Jennifer Vozne (Deputy Chief of Staff to former IRS Commissioner Steven Miller) stating that

[T]here are several groups of folks from the FEC world that are pushing tax fraud prosecution for c4s who report they are not conducting political activity when they are (or these folks think they are). One is my ex-boss Larry Noble (former General Counsel at the FEC), who is now president of Americans for Campaign Reform. This is their latest push to shut these down. One IRS prosecution would make an impact and they wouldn’t feel so comfortable doing the stuff.<sup>19</sup>

Finally, Richard Pilger, Director of Election Crimes Branch at the DOJ, contacted Lois Lerner. They spoke about the prospect of a DOJ investigation regarding the very organizations that the IRS had already improperly targeted. Lerner emailed a summary of the conversation to Nikole Flax, Joseph Grant (Commissioner of the Tax Exempt and Government Entities Division), Nancy Marks (IRS Senior Technical Advisor), and Jennifer Vozne. The email stated,

I got a call today from Richard Pilger Director Elections [sic] Crimes Branch at DOJ. I know him from contacts from my days there. He wanted to know who at IRS the DOJ folk s [sic] could talk to about Sen. Whitehouse idea at the hearing that DOJ could piece together false statement cases about applicants who “lied” on their 1024s --saying they weren’t planning on doing political activity, and then turning around and making large visible political expenditures. DOJ is feeling like it needs to respond, but want [sic] to talk to the right folks at IRS to see whether there are impediments from our side and what, if any damage this might do to IRS programs. I told him that sounded like we might need several folks from IRS.<sup>20</sup>

To be clear, these emails were sent mere weeks before the IRS “apologized” for targeting Tea Party and other, similar organizations. Even worse, they were sent well after the time when the IRS claimed that all targeting had ceased. Not only was this statement false, IRS targeting was escalating – in active cooperation with the DOJ – into an effort to manufacture criminal prosecutions.<sup>21</sup> These emails also show that the DOJ is not impartial; rather the DOJ was complicit

<sup>18</sup> *Id.*

<sup>19</sup> E-mail from Lois Lerner, Former Dir. of IRS Exempt Orgs., to Nikole Flax, Chief of Staff to Former IRS Comm’r Steven Miller et al. (Mar. 27, 2013, 12:39 PM), available at <http://www.judicialwatch.org/wp-content/uploads/2014/05/IRS-HQ-FOIA-1559-Full-Production.pdf> (located on p. 39 of PDF document).

<sup>20</sup> E-mail from Lois Lerner, *supra* note 13, at 4.

<sup>21</sup> See E-mail from Ayo Griffin, *supra* note 14.

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in illegally targeting conservative groups in concert with the IRS. See ATCH E for copies of these referenced emails.

Once these emails were discovered, we had no choice but to cease our client’s voluntary cooperation with the FBI. We could no longer allow our clients to speak with a federal agency that, months before, had been actively working with the IRS and the United States Senate to manufacture criminal cases against them.<sup>22</sup> This came despite assurances from the DOJ and the FBI that none of our clients were the subject of a criminal investigation.

In that letter, the ACLJ informed the DOJ of the following:

We are writing to inform you that, in light of new information, we are no longer voluntarily cooperating with your criminal investigation regarding the mistreatment by IRS officials of conservative groups, including our clients, during their tax-exempt application process. We presented the clients you specified for interviews on May 8, 2014, provided you with requested documents and additional information, and also agreed to speak with our thirty-seven other client groups regarding information you requested in your letter of May 13, 2014. During the process we were working under the assurances from the Department of Justice (DOJ) that our clients are not subjects or targets of your investigation.

Recently, hundreds of emails to and from Lois Lerner, who was the then-Director of Exempt Organizations for the IRS, have been made public. One chain of email correspondence, in particular, has raised serious concerns on our behalf. It originates with an email of May 8, 2013, a copy of which is attached, from Lerner to Nikole Flax, the chief of staff to former IRS commissioner Steven Miller. Copied on the email are other IRS officials.

In her email to Flax, Lerner states that she had received a call that same day from Richard Pilger, the Director of the Election Crimes Branch of DOJ’s criminal division. Pilger called Lerner seeking to coordinate with the IRS to see whether they could “piece together false statement cases” against applicants who allegedly “lied” on their tax-exempt application forms. Based on the context of the email and the time period, the tax-exempt groups they were referencing were obviously conservative groups. In the email response of May 9, 2013, which is also enclosed, Flax agreed to the idea and wanted to include the Criminal Investigation Division to help coordinate the effort and possibly the Federal Election Commission (FEC).

I would like to submit for the record a copy of the letter, dated June 18, 2014, that the ACLJ sent to the Department of Justice and the FBI informing them that our clients were no longer voluntarily cooperating with their “investigation.” See ATCH F for a copy of the letter.

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<sup>22</sup> *ACLJ: Tamed Investigation into IRS Scandal Makes It Impossible for Targeted Groups to Meet with Federal Investigators*, supra note 12.

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I find it bizarre that, after all the revelations and disclosures since the IRS’s “apology”, there are still some who call it a “phony scandal” or just argue that this is much to do about nothing. In many cases, these are the same people who suggest that there is nothing strange about a DOJ that currently has one team fighting my clients with a Motion to Dismiss in federal court – aggressively arguing in all of their motions that none of my clients have a claim against the IRS – while another department is assuring our attorneys and clients that their investigation of the widespread targeting and wrongdoing is legitimate and not a sham.

**The DOJ is Compromised:**

The emails that I have referenced and included with my written statement for the record directly link the DOJ as potential co-conspirators in the crime that is the focus of its investigation.<sup>23</sup> The DOJ has been compromised.

The DOJ no longer has the credibility to argue that a Special Counsel should not be appointed.<sup>24</sup> I am well aware of the standard for assigning a Special Counsel.<sup>25</sup>

Because of the separation of powers principals established in the U.S. Constitution, federal law enforcement is an executive function. As such, the power to appoint a Special Counsel to conduct criminal investigations and prosecutions on behalf of the United States lies solely with the Attorney General.<sup>26</sup> Both H.Res. 565 and the joint letter sent to Attorney General Holder accurately state the standards for the appointment of a Special Counsel.<sup>27</sup> These standards are found in the Code of Federal Regulations, which states that a Special Counsel should be appointed when an Attorney General determines that criminal investigation of a person or matter is warranted and; that investigation or prosecution would present a conflict of interest for the Department or other extraordinary circumstances; and that under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.<sup>28</sup>

It should be clear that all of these elements have been met. We already know that a criminal investigation is warranted. Indeed, the Attorney General launched just such an investigation last year. The conflict of interest is also obvious. In fact, there are multiple conflicts.

**The DOJ’s Conflicts of Interest:**

At issue is whether a conflict of interest or an appearance of conflict of interest exists to warrant appointment of Special Counsel when the DOJ is investigating the IRS for its unlawful targeting of conservative organizations.<sup>29</sup> As I have already stated, multiple conflicts exist.

<sup>23</sup> See E-mail from Lois Lerner, *supra* note 18.

<sup>24</sup> See Bernie Becker, *Justice: No Need for IRS Special Prosecutor*, THE HILL (July 17, 2014, 12:15 PM), <http://thehill.com/policy/finance/212559-justice-no-need-for-irs-special-prosecutor>.

<sup>25</sup> *Cf.* Letter from Bob Goodlatte & Dave Camp, *supra* note 2.

<sup>26</sup> 28 C.F.R. § 600.2 (c) (1999).

<sup>27</sup> See Letter from Bob Goodlatte & Dave Camp, *supra* note 2.

<sup>28</sup> 28 C.F.R. § 600.1 (1999).

<sup>29</sup> See *id.*

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To fully understand the impact of the DOJ’s suggestion that the IRS piece together False Statement cases to refer to the DOJ so that they could prosecute them, it is important to note what the standard is for prosecution of False Statements.

26 U.S.C. § 7206(1), entitled “Fraud and false statements,”<sup>30</sup> applies to issues of false statements brought up by Senator Whitehouse. As mentioned above, Richard Pilger, Director of Election Crimes Branch at the DOJ called Lois Lerner regarding DOJ’s plan to “piece together false statement cases about applicants who ‘lied’ on their 1024s—saying they weren’t planning on doing political activity, and then turning around and making large visible political expenditures.”<sup>31</sup> According to 26 U.S.C. § 7206(1),

Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.<sup>32</sup>

After a review of the statute, it becomes clear that the DOJ was urging the IRS to “piece together” felony charges against conservative groups, which would result in huge fines and imprisonment. The collusion of the DOJ with the IRS as shown by the emails above, supports the assertion that the DOJ and the IRS were acting in violation of 18 U.S.C. § 241, which makes it illegal for “two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person in any State . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.”<sup>33</sup>

Freedom of speech and freedom of association are both rights guaranteed by the First Amendment, and tax exemption is a privilege defined and protected by federal statute. When the DOJ and IRS worked together to deny the privilege of tax exemption and suppress the constitutionally-protected rights of free speech and free association, they potentially engaged in a conspiracy “to injure, oppress, threaten, or intimidate any person . . . in the free exercise of any right or privilege.” As outlined above, such action is a violation of federal criminal law.

Next, the DOJ’s own ethics rules provide for disqualification of DOJ employees from participating in a criminal investigation or prosecution due to their personal or political relationships.<sup>34</sup> 28 C.F.R. § 45.2(a)(1)–(2), titled *Disqualification Arising from Personal or Political Relationship*, forbids a DOJ employee from participating in a criminal investigation or prosecution if he has a personal or political relationship with:

- (1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or

<sup>30</sup>26 U.S.C. § 7206 (2010).

<sup>31</sup>E-mail from Lois Lerner, *supra* note 13, at 4.

<sup>32</sup>26 U.S.C. § 7206 (2012).

<sup>33</sup>18 U.S.C. § 241.

<sup>34</sup> 28 C.F.R. § 45.2(a)(1)–(2) (2006).

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- (2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.<sup>35</sup>

DOJ employees are prevented from participating in a criminal investigation if a personal or political relationship exists between the employee and a person “substantially involved in the conduct that is the subject of the investigation” or a person who has “a specific and substantial interest” in the outcome of the investigation.<sup>36</sup> Once such a relationship exists, the individual must report the relationship and can only be reinstated to work on the project by a written report from the supervisor.<sup>37</sup> The report must determine that “the employee’s participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation.”<sup>38</sup> As a general rule, DOJ regulations require employees to “avoid situations where [their] official actions affect or *appear to affect* [their] private interests, financial or non-financial.”<sup>39</sup> In fact, in a memorandum to Attorney General Holder, dated December 11, 2013, Inspector General Michael E. Horowitz reiterated that “the non-ideological, non-partisan enforcement of law is fundamental to the public’s trust in the Department.”<sup>40</sup>

Although Attorney General Holder has denied any conflict of interest, the conflicts are plain. For example, Barbara Bosserman, a major contributor to the Obama campaign, is still leading the criminal investigation focused on IRS targeting, an investigation that could reach into the White House itself.<sup>41</sup>

The DOJ has previously removed officials from investigations due to their personal or political relationships. For instance, “[d]uring the investigation into the unjustified dismissal of the New Black Panther Party voter intimidation case,”<sup>42</sup> the DOJ’s Office of Professional Responsibility removed Mary Aubry, the lawyer assigned to the investigation, “after reports surfaced that she had contributed more than \$7,000 (almost the same amount as Barbara Bosserman) to the Democratic party and Democratic candidates including Barack Obama.”<sup>43</sup>

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 28 C.F.R. § 45.2(b) (2006).

<sup>38</sup> 28 C.F.R. § 45.2(b)(2) (2006).

<sup>39</sup> DEPT OF JUSTICE, DEPT ETHICS OFFICE, ETHICS HANDBOOK (2010), available at [http://www.justice.gov/jmd/ethics/ethics\\_handbook.pdf](http://www.justice.gov/jmd/ethics/ethics_handbook.pdf) (emphasis added).

<sup>40</sup> Memorandum from Michael E. Horowitz, U.S. Inspector General to U.S. Attorney General Eric H. Holder & U.S. Deputy Attorney General James M. Cole (Dec. 20, 2013), available at <http://www.justice.gov/oig/challenges/2013.htm#6>.

<sup>41</sup> *Attorney General Holder Says IRS Investigation Doesn’t Warrant Special Prosecutor*, OFFICE OF TED CRUZ (Jan. 29, 2014), [http://www.cruz.senate.gov/?p=press\\_release&id=856](http://www.cruz.senate.gov/?p=press_release&id=856) (When asked whether he knew that Barbara Bosserman was a major Obama donor, “Attorney General Holder denied he had any reason to believe the IRS investigation is conflicted, saying ‘I don’t have any basis to believe that the people who engaged in this investigation are doing so in a way other than investigations are normally done.’”).

<sup>42</sup> Hans von Spakovsky, *Real And Perceived Bias In The IRS Investigation*, NAT’L REV. ONLINE (Jan. 10, 2014, 2:30 PM), <http://www.nationalreview.com/article/368132/real-and-perceived-bias-irs-investigation-hans-von-spakovsky/page/0/1>.

<sup>43</sup> *Id.*

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DOJ spokeswoman, Dena Iverson, by contrast commented on the requested removal of Bosserman stating, "It is contrary to department policy and a prohibited personnel practice under federal law to consider the political affiliation of career employees or other non-merit factors in making personnel decisions."<sup>44</sup> She added, "Removing a career employee from an investigation or case due to political affiliation, as chairmen Issa and Jordan have requested, could also violate the equal opportunity policy and the law."<sup>45</sup> Neither the Justice Department's previous actions nor their written policy support Ms. Iverson's statement.<sup>46</sup> The DOJ cannot justify retaining Barbara Bosserman when Mary Aubry was removed for conflict of interest under virtually identical circumstances.

When the head of the DOJ's criminal investigation of the IRS is a financial supporter of the President and is tasked with investigating potential crimes committed in concert with individuals from her own agency, the conflicts of interest are apparent.

The only way for the DOJ to avoid a clear conflict of interest is for the Attorney General to appoint a Special Counsel.

**Conclusion:**

The targeting of any American based upon their personal beliefs or freedoms of association is repugnant to the Constitution. Americans are outraged, and its time for a real investigation. We need to know what happened. Those responsible for this scandal must be brought to justice.

In this case, the IRS and the DOJ have proven that they are completely compromised on this investigation.

The Constitution requires the President to faithfully execute the laws of the United States by defending the First Amendment rights of all American citizens. If my clients are going to find justice, we must have a Special Counsel.

I thank the Committee and am happy to respond to any questions.

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<sup>44</sup> Josh Hicks, *Obama Donor Leading Justice Department's IRS Investigation*, THE WASHINGTON POST (Jan. 9, 2014), [http://www.washingtonpost.com/politics/federal\\_government/obama-donor-leading-justice-departments-irs-investigation/2014/01/09/980e010a-796a-11e3-8963-b4b654bce9b2\\_story.html](http://www.washingtonpost.com/politics/federal_government/obama-donor-leading-justice-departments-irs-investigation/2014/01/09/980e010a-796a-11e3-8963-b4b654bce9b2_story.html).

<sup>45</sup> *Id.*

<sup>46</sup> See 28 C.F.R. § 45.2(a)(1)-(2) (2006).

Mr. JORDAN. I would just point out that that very first email you referenced, we had Mr. Cole in front of the Oversight Committee—2 weeks ago asking about that very email, and nothing happened, he said, afterwards, and the reason nothing happened is because 2 days later, that email that you first referenced, May 8—2 days later, May 10, Lois Lerner went public and told the story. So, of course, nothing happened after the fact, but we'll get to that in a second.

But professor, you are recognized for your 5 minutes.

**TESTIMONY OF RONALD D. ROTUNDA, PROFESSOR,  
CHAPMAN UNIVERSITY**

Mr. ROTUNDA. Thank you very much.

We have an anniversary today actually, 40 years ago to the day President Nixon released the White House tapes to comply with the U.S. Supreme Court order. A day earlier, the House Judiciary Committee approved articles of impeachment—one dealt with abuse of power, and one of the counts was that the President unsuccessfully tried to use the IRS to harass his political opponents. Now any claim that Lois Lerner, any IRS official tried to use the IRS to harass or attack political opponents undercuts the people's faith in the IRS, which is supposed to be nonpartisan; not bipartisan, but nonpartisan. So we all should be very happy if the President is correct when he solemnly assured us that there's not even a smidgen of corruption regarding Lois Lerner and the IRS.

The problem is that there's a lot of evidence of a smidgen of corruption, and I think a thorough investigation by a special counsel would hopefully show how far this leads. Does it go up within the IRS, above Lois Lerner? Does it go to the Department of Justice? What was the basis for the President's assurance that there's not a smidgen? Did somebody in the Department of Justice mislead him, either intentionally or unintentionally, either incompetently or with scienter? We all know she pled the Fifth Amendment and refused to testify just after assuring us under oath that she had committed no crimes.

The months after the President's assurances of not a smidgen of corruption, the inspector general issued an audit that said that the IRS systematically used inappropriate criteria to identify the tax-exempt applications for review, and the inspector general is also nonpartisan. Last month, the IRS, represented by the DOJ, agreed to pay \$50,000 for the illegal disclosure of tax return information leaking the 2008 return and donor list of the National Organization for Marriage to an activist who turned it over to NOM's adversary, the Human Rights Campaign. That's a coincidence: the president of the organization just happened to be the national cochair of the President's reelection campaign.

The DOJ is defending the IRS and actually defending itself against these charges. We really can't expect the DOJ to competently and objectively investigate itself. By the way, the DOJ refused to give immunity to this activist who could tell us who gave him the information. He said he got it from a good contact in the IRS, and there was more to be given. But we're not going to find out.

Now, there's no longer a statute that provides for a special prosecutor. However, we don't need a statute to have one. There was a special prosecutor for Teapot Dome done by regulation, not by statute. No statute for Watergate. That was also by regulation. The regulation says the Attorney General will appoint a special prosecutor of criminal investigation—he will appoint if criminal investigation of a person or matter is warranted, there's a conflict of interest, or in the public interest to appoint the outside special counsel. We cannot expect the DOJ to impartially investigate itself, and it will not do this impartially.

The problem here, frankly, is not simply how far up in the IRS did it go. It is the DOJ part of the cover-up? The impartial investigation may undercut the President's assurance that there's not a smidgen of corruption or maybe the independent counsel will determine that, in fact, there's nothing wrong or it didn't go past Lois Lerner, and then we would all be much happier for that.

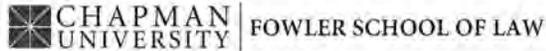
Now, the special counsel regulation is not a statute. It's a regulation, but regulations are law, as the Supreme Court explained in the *United States v. Nixon*, when referring to the regulation that governed the Watergate special counsel, "so long as this regulation is extant, it has the force of law." Then it went on to say, the Supreme Court went on to say, As long as the Attorney General's regulations remain operative he denied himself the authority to exercise his discretion.

Now, that doesn't mean that a court will order him to appoint a special prosecutor. There are a lot of laws that people don't obey, and there's no way we can enforce them. The President could have refused to turn over the tapes, and we don't see a court putting him in contempt, jailing the President, but the President complied, and the Department of Justice, the Attorney General should recognize he's also under the law.

The government officials require us to turn square corners when dealing with them. They should turn square corners when dealing with us. The Attorney General should follow the regulations when he denied himself the authority to exercise discretion. By the way, even discretion, the cases say, is not abuse of discretion. You may not abuse your discretion.

Now, the Attorney General can restore America's faith in a non-partisan IRS and in the DOJ by appointing the special counsel. It probably should be a Republican. During the Watergate counsel, during the Watergate controversy, the Attorney General appointed a prominent Democrat, first Archibald Cox and then Leon Jaworski, to investigate the President. In the Teapot Dome, the Attorney General appointed two prosecutors, one Democrat, one Republican, to investigate. If a Democrat had given Nixon a clean bill of health, we would feel better for it, and if a special prosecutor gives the IRS a clean bill of health, we would feel good about that, too, and we hope that's what would happen. Thank you.

[The prepared statement of Mr. Rotunda follows:]



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THE COMMITTEE ON THE JUDICIARY  
*A Hearing on, The IRS Targeting Scandal: The Need for a Special Counsel*  
Wednesday, July 30, 2014, 10:00 a.m.  
Room 2141, Rayburn House Office Building.

**Ronald D. Rotunda**  
The Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence  
Chapman University  
The Dale E. Fowler School of Law

We celebrate an anniversary today. On July 30, 1974 — 40 years ago to the day — President Nixon released the White House tape recordings to comply with an order of the U.S. Supreme Court. Just one day earlier, the House Judiciary Committee approved Articles of Impeachment against the President. Article 2 dealt with “abuse of power.” The first count complained that the President *attempted* to use the Internal Revenue Service to harass his enemies.

(1) He has, acting personally and through his subordinated and agents, *endeavored to obtain from the Internal Revenue Service*, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, *income tax audits or other income tax investigation to be initiated or conducted in a discriminatory manner*. [Emphasis added.]<sup>1</sup>

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<sup>1</sup> <http://www.historyplace.com/unitedstates/impeachments/nixon.htm>

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I remember the incident quite well because I was then assistant majority counsel to the Senate Watergate Select Committee.<sup>2</sup> Note that the charge was not that the President had caused the IRS to engage in discriminatory enforcement of the tax laws. No, the claim was that the President had tried, *unsuccessfully*, to do so.<sup>3</sup>

We all will agree that any claim that a federal official has ever *tried* to use the IRS to attack or harass those perceived to be political opponents is very serious, because it undercuts the faith that we have in an honest IRS. Our tax system is, to a great extent, voluntary: we report our income and list our deductions. When the people lose faith in the IRS as a nonpartisan agency, we are all the worse for that. Thus, we should all be happy if the President is correct when he assured us that there is “not even a smidgen of corruption” regarding Lois G. Lerner and the IRS targeting of Tea Party groups.<sup>4</sup>

The problem is that there are many suggestions of much more than a smidgen of corruption. We would like to know what was the basis for the President’s assurance that there is not a smidgen of corruption. What did the Department of Justice tell him that allowed him to represent to the American people that there is not a smidgen of corruption? We would not expect the President to plead Executive Privilege to the information he received because the point of him receiving it was to pass it on to the people, to all of us.<sup>5</sup>

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<sup>2</sup> For your information, I am attaching a copy of my latest resume at the end of this testimony.

<sup>3</sup> See, e.g., the discussion, in JOHN W. DEAN, *BLIND AMBITION — UPDATED EDITION: THE END OF THE STORY* 22-24, 132-33 304 n. \* (2009).

<sup>4</sup> E.g., <http://www.forbes.com/sites/robertwood/2014/06/14/dear-mr-president-is-there-a-smidgen-of-corruption-in-irs-lost-lerner-emails/>; <http://thehill.com/policy/finance/197224-obama-not-a-smidgen-of-corruption-behind-irs-targeting>; <http://www.foxnews.com/politics/2014/02/03/not-even-smidgen-corruption-obama-downplays-irs-other-scandals/>. The President acknowledged that the then-IRS Commissioner Doug Shulman visited the White House more than 100 times but said he could not recall speaking to him on any of these occasions.

<sup>5</sup> One cannot plead attorney client privilege when the client (the President) asks the lawyer (the Department of Justice) to evaluate information (the Lois Lerner controversy) so that the client can rely on that evaluation to assuage or satisfy the concerns of third parties (e.g. Congress, the American People). E.g., RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL Footnote continued on next page.*

Yet, information is not forthcoming. We know, for example, that —

- Ms. Lerner pled the Fifth Amendment and refused to testify before Congress, oddly enough just *after* assuring us, under oath, that she did nothing wrong and had no need to plead the Fifth Amendment.
- The Department of Justice (DOJ) interviewed her about these most serious allegations, but DOJ has, oddly enough, not disclosed the content of her interview — although doing so could support the President’s claim that there is not a “smidgen of corruption” if she really did nothing wrong.
- Since February of 2010 (about nine months before the elections of 2010), The IRS began targeting conservative nonprofit groups for enhanced scrutiny when they filed their routine application for tax-exempt status.
- The IRS focused on groups with “Tea Party” in their name, and on February 1, 2011, Lois G. Lerner wrote that the “Tea Party matter [was] very dangerous.”<sup>6</sup>
- Months *after* the President assured us that there is not a “smidgen of corruption,” the Inspector General for Tax Administration (IG) issued an audit report that concluded that the IRS “systematically” used “Inappropriate Criteria” to “Identify Tax-Exempt Applications for Review.”

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ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §§ 2.3-1, 2.3-2, & 2.3-3 (ABA, West-Reuters 2014-2014 edition); Proposed Federal Rule of Evidence 503(b)(4); RESTATEMENT OF THE LAW GOVERNING LAWYERS, Third §§ 70, 71, & Comment *d* (ALI 2000). By analogy, whatever the extent of Executive Privilege, it should not apply to information that the President has publicly disclosed. *See also, e.g.,* RONALD D. ROTUNDA & JOHN S. DZIFENKOWSKI, *supra*, at § 1.6-2-2(a): “The client may inadvertently lose the attorney-client evidentiary privilege. For example, if the client voluntarily reveals a portion of his privileged communications, courts typically find that he may not withhold the remainder.”

<sup>6</sup> I do not mean to suggest that the abuse of the IRS powers is limited to Tea Party groups. We recently learned, from an email, that Ms. Learner was also interested in using IRS powers against Senator Charles E. Grassley (Republican, Iowa). Any IRS investigation can be very onerous, although the targeted taxpayer has done nothing wrong. The IRS can demand records going back many years. The taxpayer may not respond to the IRS in the way that the IRS has responded, by announcing, belatedly, that it has “accidentally” destroyed relevant documents.

- Nonetheless, on March 22, 2012, IRS Commissioner Douglas Shulman assured the House Ways and Means Committee that “I can give you assurances \* \* \* [t]here is absolutely no targeting” of Tea Party groups applying for tax-exempt status.
- On May 15, 2013, the President called the IRS’s targeting “inexcusable,” yet on February 2, 2014, he represented that there was “not even a smidgen of corruption” in connection with the IRS targeting activity, but did not explain what information caused him to change his mind.
- Many emails and other forms of electronic communication related to the Lois Lerner matter have disappeared, or perhaps not disappeared — the IRS has not been completely and promptly forthcoming on this issue. The emails that the IRS belatedly said are “lost” just happen to fall within the time frame from January 1, 2009 and April 2011, the period that is directly relevant.<sup>7</sup>
- Last month, the IRS agreed to pay \$50,000<sup>8</sup> for the illegal disclosure of tax return information — “leaking” the 2008 tax return and list of major donors of the National Organization for Marriage [NOM] to an activist who turned over that tax data to NOM’s adversary, the Human Rights Campaign. The President of that organization just happened to be the national Co-Chair of President Obama’s Reelection Campaign.<sup>9</sup> This

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<sup>7</sup> Of course, the Special Counsel would also want to subpoena all the most recent emails in order to determine how present IRS officials responded to the disclosure of the IRS illegal targeting.

<sup>8</sup> *E.g., IRS Admits Wrongdoing, to Pay \$50,000 in Leaking of Marriage Group’s Tax Return*, <http://dailysignal.com/2014/06/24/irs-admits-wrongdoing-pay-50000-leaking-marriage-groups-tax-return/> (June 24, 2014).

<sup>9</sup> In testimony on June 4, 2013, John Eastman, who is Chairman of the Board, of the National Organization for Marriage and also Professor of Law at Chapman University’s Dale E. Fowler School of Law, testified:

March 30, 2012, NOM became aware that its confidential tax information—specifically, its 2008 Form 990 Schedule B—had been obtained by the Human Rights Campaign (“HRC”)—NOM’s principal opponent in the political battles over the redefinition of marriage—published on its website, and republished on numerous other websites such as the Huffington Post.

*Footnote continued on next page.*

relationship shows an obvious conflict of interest, when lawyers supporting the President are ultimately in charge of the investigation that involves the national Co-Chair of President Obama's Reelection Campaign.

- When NOM deposed this activist who received the confidential IRS tax information, he (like Ms. Lerner) pled the Fifth Amendment. The DOJ indicated that it would not be filing any charges against this person. Hence, NOM asked the DOJ to give him immunity. That would force him to testify but not compromise any criminal investigation against him because the DOJ said it would not be filing charges. Inexplicably, the DOJ refused to grant him immunity.<sup>10</sup> That decision appears to place the DOJ in a conflict between its job to find out what happened and a conflicting interest in not finding out what happened.

As we know, there is no longer a special statute that provides for a Special Prosecutor or Independent Counsel. However, the Attorney General does not need a statute in order to appoint a Special Counsel. There was a Special Counsel in the Teapot Dome scandal although there was no statutory authorization. Similarly, there was no statutory authorization for the appointment of a Special Counsel in the Watergate affair.

What we have now, as in the case of Watergate, is a regulation. We find the relevant regulations in Code of Federal Regulations, Title 28: Judicial Administration, Chapter VI. Offices of Independent Counsel, Department of Justice, Part 600, *General Powers of Special Counsel*. In particular, we look at 28 C.F.R. § 600.1. It provides:

The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel when he or she determines *that criminal investigation of a person or matter is warranted and--*

- (a) That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the

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Committee on Ways and Means, U.S. House of Representatives, Hearing on Internal Revenue Service Targeting of Non-Profit Entities Because of their Political Views, June 4, 2013, testimony of Dr. John C. Eastman.

<sup>10</sup> <http://www.powerlineblog.com/archives/2014/06/crimes-of-the-irs-john-eastman-comments.php>

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Department of Justice would present *a conflict of interest* for the Department or other *extraordinary circumstances*; and

(b) That under the circumstances, it would be *in the public interest* to appoint an outside Special Counsel to assume responsibility for the matter.

The Attorney General has already determined that there should be a criminal investigation. We also know that the Department of Justice is in a *conflict of interest* in continuing that investigation, because the President has compromised it. That occurred when the President (the chief law enforcement officer of the United States) announced last February that there has not been a “smidgen of corruption” even though neither he nor the Department of Justice could have examined all the evidence, in particular the emails and other electronic information. The Attorney General and all top officials of the Department of Justice serve at the pleasure of the President. They are in a conflict because any impartial investigation could serve to undercut the representation and solemn assurance of the President that there is not a smidgen or hint of any IRS corruption in the Lois Lerner affair. The Department of Justice is also in a conflict because an impartial investigator will have to determine if DOJ lawyers were aiding Mr. Lerner in a cover-up of the IRS targeting scandal when they interviewed her after she pled the Fifth Amendment. We cannot expect the DOJ to impartially investigate itself.

We also know that the present circumstances are extraordinary. Emails disappear. IRS backup disks are destroyed, while the IRS is involved in litigation where those backup disks are relevant. The IRS does not appear to keep the records that the law requires it to keep. The President assures the American People that there this is no hint, “not a smidgen of corruption,” although the DOJ has not yet completed its purported investigation. The Attorney General and other lawyers in charge of the investigation are political supporters of the President, raising another conflict under the Washington, D.C. Rules of Professional Conduct governing lawyers.<sup>11</sup>

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<sup>11</sup> Washington D.C. Rules of Professional Conduct: Rule 1.7(b)(4), explaining that there is a conflict if —

The lawyer’s professional judgment on behalf of the client will be or reasonably *may be* adversely affected by the lawyer’s responsibilities to or interests in a third party or the lawyer’s own financial, business, property, or *personal interests*. [Emphasis added]

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We also know that there most certainly is the *appearance of a conflict* of interest<sup>12</sup> when lawyers within the Department of Justice who are supporters of the President are ultimately in charge of the investigation that involves the national Co-Chair of President Obama's Reelection Campaign. There is also a conflict because the President appears to have undermined any DOJ investigation by announcing the conclusion before the investigation was complete. Let me put the matter in another way: if the DOJ and the Attorney General wanted to hide the evidence that one or more Administration officials used the IRS to harass opponents, they would act exactly the way they are acting now.

The Attorney General can restore America's faith in the nonpartisanship of the Internal Revenue Service by fulfilling his duties under §600.1. He should appoint a Special Counsel. The Counsel should probably be a prominent Republican. Recall that during the Watergate controversy, the Attorney General appointed a prominent Democrat, first Archibald Cox and then Leon Jaworski. If a Democrat had given Nixon a clean bill of health, the people would have believed it. Similarly, if now, the Attorney General appoints a Republican to investigate the misuse of the IRS, and if that Republican finds not a smidgen of corruption, the people will believe that. If, on the other hand, the Special Counsel finds corruption and a cover-up, well, let the chips fall where they may.

Granted, this Special Counsel regulation is not a statute, but it is still the law. As the Supreme Court explained in *United States v. Nixon*, 418 U.S. 683, 695, 94 S. Ct. 3090, 3101, 41 L. Ed. 2d 1039 (1974),<sup>13</sup> when referring to the regulations that governed the Attorney General's appointment of a Special Counsel: "So long as this regulation is extant it has the force of law." The Court went on to discuss the most analogous precedent:

In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that **so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the**

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<sup>12</sup> See also, Eliana Johnson, *Defending the IRS: A Man Who Once Worked for Lois Lerner Is Representing the Agency in Court*, <http://www.nationalreview.com/article/383336/defending-irs-eliana-johnson> (July 22, 2014).

<sup>13</sup> See discussion in 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 9.6(e) (West Thomson Reuters, 5<sup>th</sup> ed. 2012 (6-volume Treatise)).

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**discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations.** *Service v. Dulles*, 354 U.S. 363, 388, 77 S.Ct. 1152, 1165, 1 L.Ed.2d 1403 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959), reaffirmed the basic holding of *Accardi*.

*United States v. Nixon*, 418 U.S. 683, 695-96, 94 S. Ct. 3090, 3101, 41 L. Ed. 2d 1039 (1974) (bold emphasis added).

Government officials require us to turn square corners with dealing with them. They should turn square corners when they deal with us. The Attorney General should follow his own regulations, because by those regulations he denied himself the authority to exercise discretion to refuse to appoint a Special Counsel.

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Mr. JORDAN. Thank you, Professor.  
Professor Tiefer.

**TESTIMONY OF CHARLES TEIFER, PROFESSOR,  
UNIVERSITY OF BALTIMORE SCHOOL OF LAW**

Mr. TIEFER. I'm Charles Tiefer. I was in the Senate Legal Counsel's Office from 1979 to 1984 and in the House General Counsel's Office 1984 to 1995, rising to be acting general counsel. I had more years than anyone else in the House of Representatives looking at this issue, working with the Justice Department special and independent counsels. I'm now a professor at the University of Baltimore Law School.

The regulation at issue here gives the Attorney General broad and total discretion. It says, "the Attorney General will appoint a special counsel when he or she determines that investigation and prosecution would present a conflict of interest for the department." And I think it has been agreed by all the witnesses here today, certainly clearly by Mr. Sekulow in his testimony, that the Attorney General has that discretion.

Moreover, he's supposed to look at conflicts of interest in the Department of Justice in exercising his discretion. It doesn't matter what problems there are at Treasury, at the IRS, at the White House. Their problems are their problems. His only consideration is what's going on at the Department of Justice.

Now, since this 1999 regulation, we had the entire two terms of the Bush administration to see what the experience is under this regulation. There were very, very few special counsels. Patrick Fitzgerald is one, and he is the only regular special counsel I know of in the Bush administration. Even though the applications, the quests from the Congress for special counsels included two times where the person being charged was Attorney General Gonzalez himself. Now, they didn't have special counsels even though the person being charged for perjury and in connection with authorizing alleged torture was the Attorney General himself.

Now, if it doesn't do it to get a special counsel when the Attorney General is the target, the effort here today is about as realistic as a fishing expedition for the Loch Ness monster.

Now, the arguments that have been made as to why the Department of Justice is conflicted, Professor Rotunda has noted that the President said there was no corruption, but as the Members here have already noted, Attorney General Holder testified that they're investigating. Jim Comey, who is the head of the FBI and was a Republican, was an appointee as Deputy Attorney General of the Bush administration says they're investigating. Within the Public Integrity Section, Jack Smith and Mr. Pilger, who are respectively the head of the section and the head of the Elections Branch that's doing this, both submitted to questioning by staff, House Committee staff, which is unheard of. I wish they had been willing to do it in my time, but they did it, and they said they're investigating seriously. So they're doing it. What more assurance do you want that they're doing it?

And, finally, there's been some fuss made that Barbara Bosserman, who was said in Mr. Sekulow's testimony to be the leading attorney in this investigation, gave donations to a political

party. She's not the leading attorney. Even the greatest, the most intense accusations have admitted in H. Res. 565, she's just an attorney from the Civil Rights Division. This is a Criminal Division Public Integrity Section investigation, and her role is, she's sort of visiting from the Voting Rights Section I think of the Civil Rights Division. So to believe that the Public Integrity Section, contrary to its mission, its history, its very reason for existence, the pride of its career prosecutors, and all my experience with them is not doing its job, that we've caught them in a conflict of interest here is like, we're like a hunter who catches a squirrel and says, look, I've caught bigfoot here. I thank you for allowing me to present this.

Mr. JORDAN. I thank the gentleman for his testimony.  
[The prepared statement of Mr. Tiefer follows:]



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TESTIMONY BEFORE  
 THE HOUSE COMMITTEE ON THE JUDICIARY

by Professor Charles Tiefer

**The Attorney General, not the House, "Determines" If There is a  
 Conflict of Interest, And When to Appoint Special Counsels**

Thank you for the opportunity to testify as a live witness. I served in the House General Counsel's office in 1984-1995, becoming General Counsel (Acting). (Since 1995, I have been Professor at the University of Baltimore School of Law.) So, I have lengthy full-time experience, including many, many experiences working with Congressional committees on special (including independent) counsels. This work takes in whether the House may seriously ask the Attorney General to initiate one. I have had more years of experience than anyone else in House history focused on this subject.

In 1987 I was Special Deputy Chief Counsel of the House Iran-Contra Committee and worked extensively with that Independent Counsel. Since becoming Professor I have written extensively on special counsel issues. Charles Tiefer, *The Specially Investigated President*, 5 Univ. of Chicago Roundtable 143-204 (1998). I also wrote a leading article defending the constitutionality of independent counsels and my office filed on behalf of the House one of the winning briefs on independent counsel constitutionality.<sup>1</sup>

I might note that I have kept my hand in, in a bipartisan way, in hearings involving matters like those here. Chairman Sensenbrenner's (R-Wis.) called me as lead witness at his hearing on the FBI raid on a Member's office.<sup>2</sup> I was Chairman Issa's (R-

<sup>1</sup> The article was Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 69 B.U.L. Rev. 59 (1983); the case was *Morrison v. Olson*, 487 US 654 (1988).

<sup>2</sup> "The Search Warrant Raid Was an Unnecessary and Radical Step," in *Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?*, Hearing Before the House Committee on the Judiciary (May 30, 2006)

Cal.) lead witness at his hearing on the demand for Justice Department materials that became the House's contempt case against Attorney General Holder.<sup>3</sup>

I testified vigorously in support of the House's right to obtain *closed* case materials from Attorney General Holder -- while carefully noting that there was no right to get *open* investigation materials, as is sought now. Let me say that again in the plainest terms: when you sought closed case materials, I was vigorously on your side, and you were glad to rely on me; when you seek open investigation materials, your position is absurd and purported support for it is bogus.

It is Absurd to Dispute That Attorney General Holder -- Not the House --  
Has Discretion to Decide For or Against a Special Counsel on the (House's )  
"Justice Department Conspiracy"

Since the expiration of the prior statute fifteen years ago, appointment of a special counsel is governed by regulations. These regulations provide for Attorney General Holder -- not the House -- to have full discretion to decide for or against a Special Counsel. 28 C.F.R. § 600.1. That section says, in full:

§ 600.1 Grounds for Appointing a Special Counsel

The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel **when he or she determines** that criminal investigation of a person or matter is warranted and --

(a) That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or extraordinary circumstances; and

(b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.

Source: Order No. 2232-99, 64 FR 37042, July 9, 1999, unless otherwise noted.

It is pure fantasy for the House to deny the Attorney General's having discretion under a regulation saying the Attorney General makes the appointment "when he or she **determines**" the factors as to the need for one. (Bold type added.) The Supreme Court has held many times that the wording that someone or something -- and specifically the

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<sup>3</sup> "Congressional Committee Conducting Oversight of ATF Program to Sell Weapons to Smugglers, Notwithstanding Pending Cases," in Hearing on Justice Department Response to Congressional Subpoenas: Hearing Before the House Committee on Government Oversight. June 13, 2011.

Attorney General -- "determines" something means that they have discretion, and that the discretion is theirs, not someone else's. *See, e.g., School Committee v. Department of Education*, 471 U.S. 359 (1985)("the meaning of the words 'grant such relief as the court determines is appropriate' confers broad discretion on the court"); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)("Section 208(a) provides that the Attorney General has discretion to grant asylum 'if the Attorney General determines that such alien is a refugee.'").

Note the careful parallelism of the regulation's wording. It does not say the Attorney General "determines" something and then go on to say that somebody else "determines" something else. On the contrary, it does not mention somebody else. Rather, the section is worded with the single verb "determines" followed by three parallel follow on clauses, each beginning with "that." This means the section reads that the "he or she determines that [abc], and --(a) That [def]; and (b) That [xyz]. These are all determinations for the Attorney General. And since "determines" connotes discretion, the Attorney General has discretion to determine each of them.

Within that careful parallelism of the regulation's wording, note how the regulation's wording treats the determination of "a conflict of interest." Namely, the regulation does not say that someone else comes along to decide about "a conflict of interest." Rather, the regulation says "he or she" -- meaning the Attorney General -- "determines . . . That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or extraordinary circumstances;" . . . It does not say that someone other than the Attorney General comes along to decide about "a conflict of interest." Rather, this is something the Attorney General "determines" and since "determines" connotes discretion, the Attorney General has "discretion" to decide about a conflict of interest.

This regulation goes back fifteen years, through three Presidents and half a dozen Attorneys General. In all that time, I m unaware of a single writing in which someone disputes that the Attorney General has discretion. This is not some kind of serious argument for which the House finds existing support. It is a convenient unheralded concoction of fanciful imagination.

The regulation's source further confirms the Attorney General's discretion and knocks down any chimerical notions to the contrary. As the regulation notes, its source is the publication on July 9, 1999, as a regulation about the "Office of Special Counsel" in 64 Fed. Reg. 37038 (July 9, 1999). In the explanatory section, it says:

The Attorney General is promulgating these regulations to replace the procedures set out in the Independent Counsel Reauthorization Act of 1994. These regulations seek to strike a balance between independence and accountability in certain sensitive investigations, recognizing that there is no perfect solution to the problem. The balance struck is one of day-to-day independence, with a Special Counsel appointed to investigate and if appropriate, prosecute matters **when the Attorney General concludes** that extraordinary circumstances exist such that the public interest would be served by removing a large degree of responsibility for the matter from the Department of Justice.

Thus the regulation's own background source says the action occurs when, and only "when the Attorney General concludes." Thus regulation's source further confirms the Attorney General's discretion. Again, the Supreme Court confirms that "concludes" and "discretion" go together. The Attorney General "shall" deport certain aliens "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. *INS v. Doherty*, 502 U.S. 314 (1992).

I suppose the House wishes that its resolution took away the Attorney General's discretion. A moment of reviewing this special counsel regulation shows the unreality of such a House interpretation. These regulations were devised by the Department of Justice itself. When it says the Attorney General has discretion, why would it simultaneously deny the Attorney General his discretion? 1999 was a perfect moment for the Department of Justice to codify the Attorney General's discretion. The independent counsel statute had expired. The (Republican) Congress showed no interest in renewing it, both because the country was extremely sick and tired of Ken Starr, and, because the Republican Congress (correctly) hoped the next president would be a Republican like George W. Bush and did not want to cramp him. So there was not going to be a statute, not the slightest chance. The Department of Justice had a clear field to shape its regulations in a way that gave the Attorney General discretion.

Moreover, how could the Department of Justice, in its regulations, set up a system in which the House of Representatives, a political body, could get special counsels? The entire classic stance of the Department of Justice before, during, and after the 1999 regulations has been firmly against, passionately opposed to, and intensely resistant to, dictation on law enforcement matters by the House of Representatives, a political body. So how could one possibly interpret a regulation based on which the Attorney General "determines," as meaning what kind of law enforcement the House, a political body, dictates?

Perhaps it will be urged, when the committee sees some chance of it, that the regulation says "the Attorney General [ ] will appoint a Special Counsel when he or she determines [etc].". That is, perhaps it will be urged, when the committee sees some chance of it, that the word "will" takes out the discretion of the Attorney General to "determine," and replaces discretion with mandatoriness. But look at the first two sentences in this paragraph, on the lines above, both of which begin with a phrase around "will" (it "will" be urged) and go on to "when the committee sees some chance of it." Each of those two sentences is contingent on "when the committee sees some chance of it." The word "when" is a synonym for "if" in this context.

Having the word "will" does not take out the contingency in those sentences on "when the committee sees some chance of it. Rather, the word "will" just describes what "will" ensue from that contingent, discretionary choice by the committee. Similarly, it remains discretionary with the Attorney General as to whether he determines that the Justice Department has a conflict of interest. It is his determination, not the House's. The word "will" does not take out the contingency. It just describes what "will" ensue from his determination -- a determination that is contingent and in his discretion, not the House's.

No doubt the House majority party thinks its own judgment about whether to have a special counsel is better than his. No doubt the House majority party would prefer that the phrase that "the Attorney General [] will appoint a Special Counsel when he or she determines [etc.]" meant that when it sees things its way, then, he has no discretion -- he "will" do what the House wants. Members and witnesses can always opine about what they would like the Attorney General to determine. But, the regulation does not bind him to what they would like. The regulation puts it up to his own determination -- his, the Attorney General's not the House's or its witnesses.

I may add that I became acquainted with the Attorney General's process during an investigation by the House Committee on the Judiciary itself, in the mid-1980s. This Committee asked Attorney General' Ed Meese to have a special prosecutor about the scandal involving the Justice Department blatantly covering up Superfund non-enforcement.<sup>4</sup> In the end, he did, although with narrow jurisdiction.

Why? The Justice Department had a process for the Attorney General's determination. Memos recommending what to do came up from the long-term, objective Justice Department civil service, particularly memos from the Criminal Division, up through layers of analysis, to the Attorney General. That kind of process underlies the Justice Department regulation on the Attorney General's discretionary determination. That kind of process, suited to the Attorney General's own determination, is quintessentially what a Justice Department regulation intends. Nothing could be further than to have the House, a political body, with its witnesses, who may be hand-picked to share its politics, to mandate what shall occur.

The Bush Administration Precedents Show Neither Support Nor Need for a Special Counsel on the House's "Justice Department Conspiracy"

Between the 1999 special counsel regulations, and the current administration, we have had the two-term Bush Administration. It provides, for comparison, a number of examples showing the hollowness of the claim for a special counsel on the House's "Justice Department Conspiracy."

In 2007, Senate Democrats sought, in a formal letter, a special counsel on Attorney General Alberto Gonzales lying to Congress about the NSA wiretapping program. Attorney General Gonzales testified in February 2006 that there "has not been any serious disagreement" about the "terrorist surveillance program."<sup>5</sup> It later emerged that Gonzales went to Ashcroft's hospital room for a pitched argument about renewing the program, leading (Acting) Attorney General James Comey to threaten to resign. Unlike today's Justice Department conspiracy, this was a potential very specific perjury charge against the Attorney General personally, making the conflict of interest patent and strong.

Yet there was no special counsel. Moreover, the lack of one did not preclude Congress from doing its job. Congress has held many hearings on NSA programs, and has dealt with them through the annual intelligence authorization and other vehicles.

<sup>4</sup> There are two articles in Wikipedia with the basic historic facts:  
[http://en.wikipedia.org/wiki/Reagan\\_administration\\_scandals#EPA\\_scandals](http://en.wikipedia.org/wiki/Reagan_administration_scandals#EPA_scandals)  
[http://en.wikipedia.org/wiki/Morrison\\_v.\\_Olson](http://en.wikipedia.org/wiki/Morrison_v._Olson)

<sup>5</sup> This account is from John Bresnahan, *Dems Seek Gonzales Special Counsel*, Politico (July 26, 2007).

Annually, Congress appropriates for the IRS, and it may put whatever riders it chooses on that vehicle. Indeed, it has slashed IRS appropriations that way. Whether that is a well-thought-out step may be debated, but in any event, no one doubts Congress may do it, and has no need for a special counsel in order to do it.

In 2006, Jan Schakowsky, along with Judiciary Committee and subcommittee chairs and a total of 53 House members, urged Attorney General Michael Mukasey to appoint a special counsel on whether the interrogation of detainees (using "enhanced interrogation techniques," i.e., torture) violated criminal laws. Unlike today's Justice Department conspiracy, then the Justice Department conflict of interest was patent and strong. The infamous "torture memo" blessing the practices had been written for Alberto Gonzales, then head of the Office of Legal Counsel in the Justice Department, notably by John Yoo.

Yet there was no special counsel. Moreover, the lack of one did not preclude Congress from doing its job. In the McCain Amendment and other measures, Congress moved against the torture policy. Conversely, Congress has found many vehicles for riders about the related subject of keeping detainees at Guantanamo. Whether those provisions are all wise may be debated, but, in any event, no one doubts Congress may do it, and, has no need for a special counsel in order to do it.

From the 2002 to the end of the Bush Administration, its war in Iraq was dogged by scandal. From Vice President Dick Cheney on down, the Administration misled Congress about the war being needed to deal with Iraq's nuclear and other "weapons of mass destruction." The Justice Department conspiracy is an unreal chimera; the government-wide conspiracy about WMD was real and very well documented.

Similarly, the contractors KBR and Blackwater had the highest-level connections, and faced criminal cases, from KBR's criminal kickbacks with its Kuwaiti subcontractor, to Blackwater's massacre in Nisur Square in 2007. There was serious questions as to whether the Justice Department undercharged in these matters; for example, it treated KBR fraud as civil rather than criminal. The Defense Contract Audit Agency had unmasked much KBR fraud that did not get charged as criminal.

I have some experience with these Iraq war contracting scandals. I was Commissioner, on the statutorily-chartered Commission on Wartime Contracting in Iraq and Afghanistan in 2008-2011. We held twenty-five televised hearings and I took three missions to Iraq and Afghanistan.

There was no special counsel in relation to the Iraq War. And, the lack of one did not preclude Congress from doing its job. Congress enacted many provisions about the war. One of them set up my Commission. Some of my Commission's recommendations were enacted into law. Iraq War provisions went on the annual defense authorization. Congress did try to deal with the Iraq War by the 2007 war supplemental appropriation. This drew a veto, but it did show, Congress doing its job, and without a need for a special counsel to do it.

Another example was the scandal of Jack Abramoff's lobbying, leading to his plea in 2006.<sup>6</sup> This involved extensive connections, primarily Republican during a Republican administration. Unlike the purely fabulous Justice Department conspiracy, this really did involve widespread political matters. John Ashcroft himself was on the lobbying practice "Team Abramoff," raising Justice

<sup>6</sup> [http://en.wikipedia.org/wiki/Jack\\_Abramoff\\_scandals](http://en.wikipedia.org/wiki/Jack_Abramoff_scandals)

Department questions. Yet there was no special counsel, and, Congress did its job without one, enacting some matters as earmarking prohibitions.

In the House's "Justice Department Conspiracy," the Assertions That Purport to Bear on the Justice Department's Supposed "Conflict of Interest" Are Without Merit

H. Res 565 is the resolution that calls for a special counsel. It passed with a vote of 250 to 168. The vote was largely partisan.

In its quest for a special counsel, the key part of the House case, in H. Res. 565, are assertions purporting to show conflict of interest in the Justice Department. But, these are few and do not stand up to scrutiny.

H. Res. 565 says "on May 8, 2013, Richard Pilger, Director of the Election Crimes Branch of the Department of Justice's Public Integrity Section, spoke to Lois G. Lerner about potential prosecution for false statements about political campaign intervention made by tax-exempt applicants."

But, the Justice Department made Pilger available for questioning by House staff, an extraordinary accommodation of the House-- I hardly remember that being done when I was House Counsel. And, he completely deflated the allegation. They were looking at an outside suggestion. She said there was no chance it would work. The suggestion was dismissed. The press has had no interest in this. H. Res. 565 said "on May 15, 2013, Attorney General Holder testified before the Judiciary Committee that the Department of Justice would conduct a 'dispassionate' investigation into the IRS matter, and [t]his will not be about parties \* \* \* this will not be about ideological persuasions \* \* \* anybody who has broken the law will be held accountable."

But, that is exactly what he should, rightly and correctly, say. This sends a powerful message within the department, against any partisan or ideological leanings. And as House committees have found by their own questioning, that is exactly the way the Public Integrity Section operates.

I had dealings with the Public Integrity Section from 1980 to the present, especially when I was House counsel. The personnel there have typically served through several administrations -- if they are senior it can add up to quite a number. They are absolutely career-oriented, and they do their same job through the succession of Democratic and Republican administrations alike. I never saw them show any favor when my dealings involved Democratic Members or Republican Members. Pilger explained this in a House interview on May 6, 2014:

"Since I joined the Public Integrity Section in 1992, I have never encountered politically motivated decisions. To the contrary, it has been my consistent experience this section has acted, without exception, on a strictly nonpartisan basis in all of its decisions and actions. In my experience politics plays no role in our work as prosecutors, period."

H. Res 565 says "the Civil Rights Division of the Department of Justice has a history of politicization, as evident in the report by the Department of Justice Office Inspector General entitled, "A Review of the Operations of the Voting Rights Section of the Civil Rights Division."

But, a problem in one section of the Civil Rights Division does not taint the whole Division. (Parenthetically, the DOJ IG review is mainly about events during the Bush Administration, not the current one.) The Division has nine sections plus working groups, special offices, etc. And, the Lois Lerner investigation is primarily under the Public Integrity Section of the Criminal Division, which is not the Voting Rights Section of the Civil Rights Division. I am before the House Judiciary Committee; you do know these things; you know, for example, that these two sections are so far apart that you have different subcommittees of the Judiciary Committee to oversee those two sections. H. Res. 565 says "Barbara Bosserman, a trial attorney in the Civil Rights Division who in the past several years has contributed nearly \$7,000 to the Democratic National Committee and President Barack Obama's political campaigns, is playing a leading role in the Department of Justice's investigation."

But, again, this investigation is primarily under the Public Integrity Section of the Criminal Division. The main allegations against Lois Lerner are those which the Public Integrity Section investigates. The Department has reviewed the matter and determined that it is not a violation of the ethics rules for her to make campaign contributions. Recall that every U.S. Attorney is a Presidential appointee, many of them of some prominence and assets. If every time a U.S. Attorney made a contribution, he was set up for the cry of conflict of interest, you would need a new Main Justice building to hold the overflowing of the special counsel offices. Federal regulations prohibit career employees from participating in a criminal investigation if they have a "political relationship" with an organization that has a substantial interest in the outcome of the investigation. (28 C.F.R. § 45.2.) That does not mean some campaign contributions, that means "service as a principal adviser" with the organization, which she never had.

H. Res. 565 says "on April 9, 2014, the House Committee on Ways and Means referred Lois G. Lerner to the Department of Justice for criminal prosecution."

But, the Justice Department says they are working on it. As House Counsel, I saw committee referrals. They were not in the least binding on the Justice Department. All you can ask is that they do what they are doing -- working on it. I may say, I always advised committees their referrals would be more worthy of respect if they were bipartisan.

H. Res. 565 says "former Department of Justice officials have testified before a subcommittee of the House Committee on Oversight and Government Reform that the circumstances of the Administration's investigation of the IRS's targeting of conservative tax-exempt applicants warrant the appointment of a special counsel"

But, there are a large, large number of former officials. What one or two think, is something that hardly matters apart from whatever specifics they discuss, which, presumably are somewhere in H. Res. 565. The resolution apparently refers to Hans von Spakovsky. He served as a Republican Party chairman, worked on the Bush team during the 2000 Florida recount, had a much-criticized time when appointed by Bush to head the Civil Rights Division, was nominated to the FEC (the nomination was withdrawn under criticism for partisanship), and is now at the Heritage Foundation. He has every right to his opinions, but it would be a stretch for H. Res. 565 to put him forth as a typical former Justice Department witness.

A better choice would be an official definitely in the loop of this Justice Department investigation, namely, the Director of the FBI, James Comey. Comey

testified before this committee that the investigation was proceeding properly. It may be noted that Comey was appointed as Deputy Attorney General in 2003-2005 during the Bush Administration, the second-highest post in the Justice Department, after being appointed as U.S. Attorney for the Southern District of New York in 2002-2003 during Bush Administration, one of the most responsible U.S. Attorney posts in the country. It is a shame that H. Res. 565 does not acknowledge him.

H. Res. 565 says "Department of Justice regulations counsel attorneys to avoid the 'appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution."

But, as previously discussed, the regulations on having a special counsel use the high standard of an actual conflict of interest, not a mere "appearance" of one. There has not been any showing of even an "appearance" of one, but even if there were, that would fall far, far short, of the "actual" one for the Attorney General to determine, in order to take the case away from the Department of Justice.

H. Res. 565 says "since May 15, 2013, the Department of Justice and the Federal Bureau of Investigation have refused to cooperate with congressional oversight of the Administration's investigation of the IRS's targeting of conservative tax-exempt applicants."

But, this is an open criminal investigation. The history of Congressional committees has been that they cannot piggy-back on open criminal investigations. I have been explaining this to Congressional committees for thirty years. H. Res. 565 says "on January 13, 2014, unnamed officials at the Department of Justice leaked to the media that no criminal charges would be appropriate for IRS officials who engaged in the targeting activity, which undermined the integrity of the Department of Justice's investigation."

But, that kind of statement is common and means nothing. Since then the Department of Justice has made very clear it is conducting a serious investigation.

H. Res. 565 says 'on April 16, 2014, electronic mail communications between the Department of Justice and the IRS were released showing that the Department of Justice considered prosecuting conservative nonprofit groups for engaging in political activity\

But, the question was whether the IRS wanted to refer cases Lois Lerner said, flatly, "no." So nothing ensued.

In conclusion: the House's quest for a special counsel is unrealistic. I think highly of the House of Representatives. Its committee investigations are wonders to behold, especially when conducted in a bipartisan fashion. But, it cannot replace the Attorney General's judgment, about special counsels, with its own.

Mr. JORDAN. I would recognize the gentleman from North Carolina, Mr. Coble, for his 5 minutes of questions.

Mr. COBLE. I thank the Chairman, and it's good to have you all with us today.

Mr. Sekulow, let me start with you.

Mr. SEKULOW. Yes, sir.

Mr. COBLE. Can you defend General Holder's decision not to appoint a special counsel to the IRS matter by regarding the investigations that took place under the Bush administration? Can you compare the two?

Mr. SEKULOW. Well, I think the difference here is, number one, acknowledging the discretion. There were special counsels under the Bush administration, Patrick Fitzgerald being one of them. The situation you have here, and I think this is what's significant in referring to the last witness, the comment, it's not what the IRS has done. I don't think any of us have the scope and understanding what the IRS has done. The problem is the agency investigating the IRS also does not know the scope of what the IRS has done—and it's not comforting to me as a litigant, to answer the question, lawyer representing clients, that the DOJ would come before Committees like this and say, we learned of the missing emails in the press, when they had been conducting a 1-year criminal investigation, and they learned in the press.

Granted, the Attorney General has the discretion here, but discretion is sometimes the better part of valor, and I think that in a situation like this you want to assure the American people and specifically those that have been targeted, that a real investigation is taking place. We had clients that were interviewed by the IRS. I will tell you the level of questioning was at the line agent level. And that was while, Congressman, I had the letters in my file from lawyers in Washington, not just Lois Lerner and others, but they were focusing on, did the agent keep you on hold too long, which is not a crime. It's impolite, but not a crime. So I think it's clearly within the discretion of the Attorney General. It was the Attorney General of the United States that said there may well be criminal violations here. He brought that up, talking about the civil rights statute. But when you've got an email from the IRS saying DOJ is basically colluding with us and saying, could we piece together—this is what, I remind you, piece together false claims statements for people that “lied,” and then what are we going to do, impanel a grand jury? This is why I believe the special counsel would be appropriate and would stop any of the serious questioning that a lot of us have on whether this investigation is real or not. By the way, it took them 9 months to get to us to even talk to our client.

Mr. COBLE. Let me elaborate on your conclusion that they found out in the media. Does this cast a shadow over their claim that they are engaged in an ongoing investigation, the fact that they obtained it through the media?

Mr. SEKULOW. Well, it certainly does, and how can they be conducting a thorough criminal investigation, and due respect to Professor Tiefer, I mean, and not any disrespect to Barbara Bosserman, but they loan her over to a group. She was the one that was in the meetings, but they did not know that the emails that were the key years involved in the investigation were missing?

And that is a criminal investigation? They should be fired then if that's what they did. If it wasn't criminal what they were doing, it wasn't, they just made a mistake, those agents should have been fired for that because that's not a real investigation. How do you not have the 9 months or 12 months or 14 months of the key time and the emails are gone, and that was not known by the FBI?

Mr. COBLE. I thank you, sir.

Mr. SEKULOW. Thank you.

Mr. COBLE. Professor Rotunda, in your view, did the President's statement about there not being a smidgen of corruption by itself create a conflict of interest?

Mr. ROTUNDA. I think it's a real problem because the chief law enforcement officer of the land has prejudged the conclusion of the investigation. So you're asking the DOJ—I mean, what are they supposed to do? If they find evidence of corruption, like the inspector general did, they're undercutting their boss. And I think what we're interested in is not only the emails at the time, it's what's going on now. There's a group called Z Street, they applied for tax-exempt status. They're a group that has the views of Israeli policy that they think are contrary to the Administration. They sued the IRS, the Department of Justice is representing them, and as we speak now, the Department of Justice is trying to stop all discovery in the case. The Wall Street Journal said slow walk the investigation. The Department of Justice seems to be defending the IRS in court while they also claim they're investigating the IRS. You can't serve two masters.

Mr. COBLE. And the Justice Department's apparent lack of interest in the investigation?

Mr. ROTUNDA. I'm sorry, the what?

Mr. COBLE. The Department of Justice's apparent lack of interest in the investigation?

Mr. ROTUNDA. Well, that's actually a polite term. In the Z Street case, they're doing more than nothing, they're trying to slow walk and prevent discovery. So think about it this way: If, in fact, IRS officials higher than Lois Lerner were involved and if, in fact, some DOJ officials were involved in trying to gin up something to harass political opponents, the DOJ, if that were the case, the DOJ would do exactly what it's doing now, slow walking investigations, claiming they're doing something without doing it, learning that there is a third party who got, who says under oath, I got information from—brags to people, I got information, I have a conduit in the IRS but refuses to tell us who, and not give them immunity, not try to find out. You would do exactly what you're doing now if you wanted to slow walk the investigation. I think that's active; more than lack of interest, it is the opposite, but it's not good interest.

Mr. COBLE. Mr. Chairman, I see that my red light is illuminated, so I yield back.

Mr. JORDAN. I thank the gentleman.

The gentleman from Michigan, the Ranking Member, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Professor Tiefer, I want to bring you in on this. As you noted in your testimony, where the regulations for special counsel are found, is it your opinion that these regulations give the Attorney General

sole discretion to appoint special counsel if, in his judgment, it is appropriate to do so?

Mr. TIEFER. Yes, exactly. I think they give the Attorney General sole discretion.

Mr. CONYERS. May I ask our distinguished witness, do you agree, sir?

Mr. SEKULOW. Yes, it's the discretion of the Attorney General.

Mr. CONYERS. And do you agree, sir?

Mr. ROTUNDA. Well, to be precise, it is discretion. Discretion can be abused. I don't think there's a way to legally enforce the Attorney General, but there are a lot of things that people have to do under the law that are difficult to enforce legally. There's President Nixon turned over the tapes, I don't know what we would have done if he just refused.

Mr. CONYERS. Okay.

Mr. ROTUNDA. The regulation says shall appoint.

Mr. CONYERS. I don't want to go into it. All I wanted to know is do you agree that the Attorney General has sole discretion to appoint special counsel.

Mr. ROTUNDA. No, I don't, because it doesn't use the word "sole discretion," it just says, shall appoint if he determines a criminal investigation is warranted and if there is a conflict of interest.

Mr. CONYERS. So your answer is no?

Mr. ROTUNDA. Yes, sir.

Mr. CONYERS. Okay. Now let me ask you three this question, starting with Professor Tiefer: Can the House compel the Attorney General to appoint special counsel?

Mr. TIEFER. It absolutely can't. Not only is it not given that power in the statute and it wouldn't be constitutional for the House to interfere in law enforcement, but Mr. Conyers, you and I go back to the old statute which had a role for the House Judiciary Committee. At least the statute said it could make a statement, and the old role that we used to have back then, we don't even have that under the regulation.

Mr. CONYERS. May I ask, Mr. Sekulow, your view?

Mr. SEKULOW. Well, I would take a little bit of an issue here. I think the House has the right to pass a resolution requesting or sending a letter requesting the Attorney General to exercise his authority.

Mr. CONYERS. But compel? Can we compel?

Mr. SEKULOW. No, not compel, but certainly allow him to—I think the House has a role to play. This idea that the House is inappropriate by moving this way I think is wrong. They do; the House certainly can bring it and request it. It can't compel it.

Mr. CONYERS. All right, thank you very much.

May I ask you that same question, Professor Rotunda?

Mr. ROTUNDA. Sure. Basically, Mr. Sekulow has summarized my position.

Mr. CONYERS. You agree with him?

Mr. ROTUNDA. For example, *Powell v. McCormack*, the Supreme Court ordered Congress to—

Mr. CONYERS. Okay, I don't need—

Mr. ROTUNDA. But I don't think a court will issue an order compelling the appointment of a special prosecutor, I agree with that.

Mr. SEKULOW. Correct.

Mr. CONYERS. It's been suggested, witnesses, in statements and testimony today that President Obama created a conflict of interest for the entire Federal Government when he suggested in a pre-Super Bowl interview on Fox News that he believed there was no evidence of corruption in the Internal Revenue Service. In your opinion, does the statement create a conflict of interest at the Department of Justice?

And I'll begin with you again, Professor Tiefer.

Mr. TIEFER. Positively not. Mr. Pilger and Mr. Smith and the others who actually as career prosecutors are the Justice Department on this matter, I can just imagine how little they care for what the President says in pre-Super Bowl hearings. They just blow it off.

Mr. CONYERS. All right. Let me just get to Professor Rotunda. What is your view, does the statement create a conflict of interest at the Department of Justice?

Mr. ROTUNDA. At the DOJ, yes, and I care what the President says. I would be shocked if the DOJ lawyers, including the people that serve at his pleasure, do not care. They should. He's the President of the United States. He's our President.

Mr. CONYERS. And Mr. Sekulow, I ask you finally.

Mr. SEKULOW. It does raise the conflict of interest without question, number one, and number two, the idea that the President of the United States could prejudice a case or if he did not prejudice it was given evidence that no one else has seen that there was no "smidgen of corruption" certainly presents a conflict of interest. He's the chief executive.

Mr. CONYERS. All right. Thank you very much.

My time has expired. I yield back.

Mr. JORDAN. I thank the gentleman.

Before yielding to the gentleman from Alabama, I would just make one comment. I read Mr. Tiefer's testimony last night, and he spent like five pages on discretion. No one up here on either side of the aisle I think, save to the former Chairman, thinks the Attorney General doesn't have discretion. Of course, he has. Plain reading of the resolution, it's a sense of the House Resolution. All we're saying is look at the fact pattern, and we think that cries out for a special counsel. And not just Republicans; 26 Democrats voted for that resolution. Recognize the gentleman from Alabama for 5 minutes.

Mr. BACHUS. Thank you.

Mr. NADLER. Mr. Chairman.

Mr. JORDAN. The gentleman from New York.

Mr. NADLER. Just to reply to you, I, too, agree this hearing is a total waste of time.

Mr. JORDAN. No, I didn't say that. I said that—

Mr. NADLER. You implied it.

Mr. JORDAN. I don't think I implied it at all, but the gentleman can have his editorial comment there, and we will move to the gentleman from Alabama.

Mr. BACHUS. Thank you.

One email was read, Mr. Sekulow, you read one of the emails, but another one I was just noting here is from Lois Lerner on

Wednesday, March 27, and said everyone is looking for a magic bullet.

Mr. SEKULOW. Right.

Mr. BACHUS. To prosecute these people. And that traffic included the DOJ.

Mr. SEKULOW. Right, and also several of the others included the FEC. I mean, there's no doubt that this is a multi-agency engagement. The question is, in a situation like this, when you have got a multi-agency engagement, has the DOJ's ability to impartially investigate this been compromised? No one is questioning that it is the authority of the Attorney General to determine whether a special counsel can be appointed, but it's certainly appropriate for this Committee to bring forward the facts that show why it would be prudent, and again, in this particular case, you're pointing to the March 27 email, there are emails going back even further. You've got the statements that Lois Lerner made at Duke University.

But it all started with the fake apology and a planted question in the ABA. That should have been the focus of the FBI's investigation, not questions to our clients about if they were on the phone calls too long or treated rudely.

Mr. BACHUS. Yeah, it's pretty clear here that they were looking for a way to prosecute these people.

Mr. SEKULOW. Oh, yeah. They say it.

Mr. BACHUS. And the Justice Department was involved in this. I mean, if that's not a conflict, to investigate yourself—

Mr. SEKULOW. Well, Congressman—

Mr. BACHUS. And we're talking about, but if part of the issue you're talking about to whether to have a special counsel is to investigate wrongdoing, and the wrongdoing is in your very department, how can you investigate yourself? That would be my question, Professor Rotunda or Sekulow or maybe Tiefer.

Mr. ROTUNDA. Yeah, and of course you can't, at least not objectively, and the problem is not only what happened a year or two ago; it's what's happening as we speak today, that is the Z Street group is in litigation, the DOJ is defending the IRS and slow walking the discovery. The IRS, to settle litigation against the IRS, the DOJ approves this \$50,000 settlement. The IRS is not in the habit of handing out money. They're there to collect money. And to say that there's not a smidgen of corruption and then pay a \$50,000 check to make the case go away because of the corruption area, that's inconsistent, and what I would like, I think the advantage of the special counsel is if he tells us in fact it went no further than Lois Lerner, maybe Lois Lerner and the IRS commissioner, somebody else, we could believe that. When this Administration, when the people are investigating themselves, it's very hard to believe that.

Mr. BACHUS. Well, and let me ask you this. Let's assume the Justice Department is investigating Lois Lerner. They say they are. And to investigate someone, the first thing you do is you ask for all the documents. Emails now—

Mr. ROTUNDA. Right.

Mr. BACHUS [continuing]. Are probably the central thing, phone records. How is it, and I'll ask any of you, how is it conceivable that

if they're investigating or asking her for emails, there could have been all these emails destroyed and they didn't know it?

Mr. ROTUNDA. How can the IRS commissioner testify to the House under oath that the emails have been destroyed and then the inspector general says actually they're there? Why did the IRS commissioner say that? Somebody lied to him? Somebody was incompetent? Certainly somebody wasn't looking very hard because the inspector general, the nonpartisan official, signed it. There are a lot of things here that are, shall we say, eyebrow raisers.

Mr. BACHUS. Professor Tiefer, go ahead.

Mr. TIEFER. You may think they're too slow, okay? I won't argue; I don't know enough to argue. It took them a while in the investigation to find this out, point taken that they may have been slow. The scale of what it takes to find that the Justice Department has a conflict of interest such that they can't do this investigation, that it's taken away from them, if you did that every time they did a slow investigation, you would have to build a new Main Justice building just for the special counsels.

Mr. BACHUS. Well, you realize, there's 70 percent of the American people say they're covering up and they're guilty of misconduct. Now, that's just their opinion. But isn't that enough, when 70 percent of the people think their government is lying to them and covering up and destroying evidence, isn't that reason enough?

Mr. SEKULOW. They didn't find it slow, Congressman.

With due respect, Professor, they didn't find it slow. They didn't find it at all. It was only public after a Freedom of Information Act request. That's the problem. The FBI investigation did not uncover the missing emails from the key period and, apparently, from people that also received them.

Mr. ROTUNDA. Yeah, third parties without a subpoena get more information than the Department of Justice with a subpoena.

Mr. BACHUS. Another word you used, slow walking, if nothing else, this is a case of slow walking.

Mr. JORDAN. The gentleman from New York is recognized.

Mr. NADLER. Mr. Chairman, before I'm recognized, can Professor Tiefer answer Mr. Bachus's question about the 70 percent?

Mr. TIEFER. I'll refer back, if the regulation said anytime the public puts thumbs down about their government, now we have twice as many special counsels as I was worried about before, but I'll just note that the instances I talked about in the Bush administration involving Attorney General Gonzalez, I don't know the exact poll figures, but I know there were times during the Bush administration that there was grave public doubt about either Attorney General Ashcroft or Attorney General Gonzalez, and we didn't get special counsels.

Mr. BACHUS. But that doesn't make it right, does it?

Mr. JORDAN. No, it doesn't make it right that the Justice Department learned of the missing emails from the press accounts when the IRS wrote the letter.

The gentleman from New York is recognized.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. BACHUS. I just don't think a defense that someone else did something just as bad is a defense.

Mr. JORDAN. I hear you.

The gentleman from New York is recognized.

Mr. NADLER. Thank you.

Professor Rotunda, in your written testimony, you state, “We also know that the Department of Justice is in a conflict of interest in continuing that investigation because the President has compromised it.” That occurred when the President, the chief law enforcement officer of the United States, announced last February that there has not been a “smidgen of corruption.” You’re referring, and I think you did today earlier, to the President’s comments in an interview with Bill O’Reilly on February 2, are you not?

Mr. ROTUNDA. Yes, sir.

Mr. NADLER. Thank you. In your view, the President has created a conflict of interest for the entire Federal Government because he gave his opinion based on the facts of a case as he understood that at the time?

Mr. ROTUNDA. Not for the entire Federal Government, but for the Department of Justice, and he’s never gone back on his remarks.

Mr. NADLER. Well, whether he’s gone back on his remarks or not, that’s not the question. By saying that he’s created a Federal conflict of interest for the entire Department of Justice although not the Department of Agriculture is what you’re saying?

Mr. ROTUNDA. That’s right. Command influence we call it in the military.

Mr. NADLER. December 6, 2005, you wrote a column in The Washington Post titled, “A Shaky Ethics Charge.” Reports show that John Roberts then on the D.C. Circuit had interviewed with senior White House officials, including Alberto Gonzalez, then the Attorney General, Dick Cheney, then the Vice President, Karl Rove, I presume then the politician in chief, while sitting as a member of the three-judge panel considering *Hamdan v. Rumsfeld*. A number of people called for his recusal from that case. You argued that, “Roberts had no obligation to withdraw from the case” and concluded that conflict of interest charges should not be raised lightly.

There a sitting judge consulted with the White House, presumably for appointment, possibility of appointment as the chief justice while hearing a case that tested a central theory of the White House’s war on terror, but there was no conflict of interest. Here the President gave his opinion on a case far removed from the White House, but there is a conflict of interest. How is that consistent?

Mr. ROTUNDA. Well, as I pointed out then, we had a lot of case law that fit under Roberts. And Justice Breyer, for example, was deciding cases as a First Circuit judge and then appointed to the Supreme Court and talking to the Supreme Court—or talking to the Department of Justice about positions. There’s a lot of case law on this. We have in the executive branch—

Mr. NADLER. But that doesn’t apply to an off-the-cuff expression of opinion by the President.

Mr. ROTUNDA. The President’s never said it was off-the-cuff. I don’t think it was off-the-cuff.

Mr. NADLER. Well—

Mr. ROTUNDA. I’ve never heard that one before.

Mr. NADLER. It was an expression of opinion on a TV show, not in a legal brief or anything else.

Mr. ROTUNDA. He was command influence, he was telling us what the investigation shows is there's not a smidgeon of corruption. What was the basis for that? That somebody may have misrepresented to him? Somebody may have been incompetent, but it's little difficult for the Department of Justice to show—

Mr. NADLER. And yet—

Mr. ROTUNDA [continuing]. But argue the President was incorrect.

Mr. NADLER. Well, that's a different question, whether he was correct or incorrect. Yet you published an article in the Hofstra Law Review, titled, "Alleged Conflicts of Interest Because of the Appearance of Impropriety." In it you discuss the situation where a lawyer openly takes a position on a controversial issue. You conclude, "Those who claim that there is some sort of conflict of interest in public statements about policy matters do not refer to any rules, regulations, case law or ethics opinions to support their charge; that is because the law on this subject all points the other way."

Can you point to any precedent, any rule, regulation, case law or ethics opinion that suggests the President's unscripted remarks from a pre-Super Bowl interview compelled the Department of Justice to recuse itself from a criminal investigation?

Mr. ROTUNDA. I referred to them briefly earlier. In the military, it's called command influence. If the general says—

Mr. NADLER. Wait a minute. This is not the military.

Mr. ROTUNDA. I'd like to finish my sentence if I could. All right? The President is not in the military, but he can't prejudge that as well. I objected to that article talking about the appearance of impropriety, because we never define what is not an impropriety but appears to be. We ought to have stricter rules.

Mr. NADLER. Can you point—and I'll repeat the question. Can you point to any rule, regulation, case law or ethics opinion to support the charge that the President sets up a conflict of interest for the entire Justice Department by expressing his opinion?

Mr. ROTUNDA. Yeah.

Mr. NADLER. Question mark.

Mr. ROTUNDA. All the cases on command influence that cover even the President, who's not—

Mr. NADLER. Command influence—

Mr. ROTUNDA [continuing]. Military.

Mr. NADLER [continuing]. Is within the military structure, which is a very different thing, where the President is on top of the—not only the prosecution but the judicial chain.

Mr. ROTUNDA. Yeah. The President is the chief law enforcement agent of the land.

Mr. NADLER. He's not the chief judge, as he is in the military, in effect.

Mr. ROTUNDA. He's not the chief judge, no. That's why he can't exercise command influence.

Mr. NADLER. Cannot exercise command influence. In the military, he exercised command influence. That's what you were saying, otherwise, why did you mention it?

Mr. ROTUNDA. I'm sorry. I guess I don't understand.

Mr. NADLER. I asked if there was any case, rule, regulation or anything, and you cite the military because of command influence. This is not the military. There is no command influence.

Mr. ROTUNDA. Even though the case will be decided by a military judge or prosecuted by the military attorneys and the President has no direct rule, he's still not allowed to tell people how the case is supposed to come out. And we'd like to know, since I think part of the investigation here is whether the DOJ is involved in the coverup, why did the President say that? Was it about—

Mr. NADLER. The President—

Mr. ROTUNDA [continuing]. Off-the-cuff remark—

Mr. NADLER. The President—

Mr. ROTUNDA. Was it because the DOJ—

Mr. NADLER. Hold on.

Mr. ROTUNDA [continuing]. Gave him information?

Mr. NADLER. The President is not the subject of the investigation. There is no evidence whatsoever to tie senior Administration officials to the case, and yet it's your position that the President's expression of opinion creates a government-wide or at least a department-wide conflict of interest. This seems to go against everything else you've ever written on the subject.

Mr. ROTUNDA. I don't think so.

Mr. GOODLATTE [presiding]. The time of the gentleman has expired, but the gentleman will be allowed to answer the question.

Mr. ROTUNDA. Yeah. I don't think so. That's why I got footnotes. I cite the various authorities. Now, I will add—

Mr. NADLER. But you can't cite a single—

Mr. GOODLATTE. The time of the gentleman has expired.

The Chair recognizes the gentleman from Virginia, Mr. Forbes.

Mr. NADLER. A point of order, Mr. Chairman.

Mr. GOODLATTE. The gentleman will state his point of order.

Mr. NADLER. Yeah. Before you came in, the gentleman who was seated in the Chair was commenting after every question and every witness, and took a minute or two or three to make his comments. I think I can ask one more question of the professor.

Mr. GOODLATTE. Without objection, the gentleman will have 1 more minute.

Mr. NADLER. Thank you.

And yet when I asked you whether you can cite any regulation, rule, case law or ethics opinion to support the charge, all you can come up with is military stuff, command influence, nothing civilian. Is that correct?

Mr. ROTUNDA. Well, in my written testimony, that's correct.

Mr. NADLER. Thank you.

Mr. ROTUNDA. What I tried to point out today, because the email just came out, we now learn that the Department of Justice is slow walking the discovery in cases defending the IRS, and that is also creating a conflict, much more serious, because it is the Department of Justice officials defending the IRS while they're supposed to be investigating the IRS.

Mr. NADLER. So nothing outside the military. Thank you.

Mr. GOODLATTE. The Chair recognizes the gentleman from Virginia, Mr. Forbes, for 5 minutes.

Mr. FORBES. Thank you, Mr. Chairman.

I want to try to get back to the essence of this hearing, which is basically, it's not the credibility of one particular individual, but would all of the witnesses, would any of you disagree that currently the credibility of the Internal Revenue Service is a major question now with a vast majority of the American people? Would any of our witnesses disagree with that?

Mr. Tiefer would, I take it.

Mr. TIEFER. I would just say it's nothing new. The public has always hated the IRS.

Mr. FORBES. Well, it's a difference between hating them.

Mr. SEKULOW, have you seen any difference in actually with the American public in terms of the credibility of the Internal Revenue Service?

Mr. SEKULOW. I can give you actual evidence of the concern, and generally, the IRS doesn't win—when I used to get introduced and you said you were chief counsel of the IRS, that usually didn't get applause in the early days, but the reality is now, I've been literally inundated with cases, requests for assistance from people that are simply getting notices of deficiency, wondering if they have been targeted for something, because it's coming out of nowhere.

So there is this palpable general distrust, and what counters that is the reality of it is it's not just one person, this is happening time and time again. And then you had, which has not been brought up, you know there were a series of audits conducted by the IRS against adoptive parents because of the adoption tax credit. They recovered less than 1 percent of the revenue that was of the credit that was actually taken. These kind of actions lead to an increased concern by the American people.

Mr. FORBES. Would you not agree that the IRS is not just any agency. It's a core agency in terms of both the overreaching power that they have on the American people and also the core of its capability of raising revenue for this country, and then the other part of that is it depends on the voluntary—

Mr. SEKULOW. Right.

Mr. FORBES [continuing]. Compliance of the American people.

Now, having said that, I want to go back to this question that most of you agree that this is a discretionary issue for the Attorney General, but if you take Mr. Tiefer's response that any time anybody comes in here and just says, we're doing an investigation, then this Committee should just go home and not do anything, then I will tell you, we wouldn't do any of our oversight roles, because time and time again, this Administration's come in and said, oh, yeah, we got into look that, we're going to get back to you, we're doing an investigation, and we don't hear anything.

And then when you look at the other comment, Mr. Tiefer, that you said about the people in the Justice Department not paying any attention to what the President of the United States says, I know it's a different role, but look at the generals and admirals who have lost their jobs at the Pentagon because they disagree with this Administration. They've issued gag orders on them. They've fired them because they disagree, and you tell me if I'm in an agency and the President of the United States, who's my boss

and I serve at will, comes out and says there's no evidence here, I'm sending that message, I'm not going to pay attention to it?

Mr. SEKULOW. I was just going to say, Congressman Forbes, and this goes to what Congressman Nadler was talking about, this was not just an off-the-cuff statement. It was a statement by the President of the United States that there was not a smidgeon of corruption on what was purportedly an ongoing criminal investigation.

Now, if an attorney was involved in a case and made that kind of statement, they would be reprimanded by the court. An ongoing criminal investigation, and the President of the United States has prejudged it, and there's an executive function within the Department of Justice, that is very troubling. Again, it's discretionary to the Attorney General what he wants to do with that, but to say that doesn't raise an issue, I think, is—

Mr. FORBES. Mr. Sekulow, let me come back to this question. The essence of this case, to me, comes down to this, whether you appoint this special counsel. Mr. Rotunda, you talked about the Nixon tapes, and he probably didn't have to turn them over. If you had it to go over now and it wasn't a worry about impeachment, he wasn't worried about the politics of it, and you had to advise him, and he had two questions to ask: Do you want to make sure you're restoring the credibility of the Internal Revenue Service, or do you want to make sure that your agencies aren't held accountable for perhaps some misconduct that took place there, what would you have advised him to do, turn over that information or not turn it over?

Mr. ROTUNDA. Turn it over, that is, comply with the law, even though it can't be enforced.

And by the way, this is not Super Bowl Monday. That is, we're not talking about asking for a special prosecutor an hour after the President issued his remark. We have that remark, which raised my eyebrows, what does he know that we don't know, and we've had a whole series of things after that, including the DOJ attitude and actions in the lawsuit involving the Z Street Corporation, the \$50,000 settlement in the National Organization of Marriage, the refusal of the DOJ to give immunity to this individual who could tell us who gave him the information from the IRS.

Mr. FORBES. Thank you.

My time's expired. I'm not going to take more time.

And, Mr. Chairman, with that, I yield back.

Mr. GOODLATTE. I thank the gentleman.

The Chair recognizes the gentleman from Virginia, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

As the Ranking Member has indicated, this is the last full working day before we go on a 5-week recess. We've still got pending, and apparently not enough time to consider voting rights legislation to improve voting rights generally or the voting rights bill that would respond to the Shelby decision. We haven't passed immigration reform or done anything about gun violence and a host of other issues, but here we are with a hearing, and you wonder about the purpose of the hearing generally, but the House has already passed H. Res. 565, demanding that the Attorney General appoint a counsel. This hearing might have made sense before we consid-

ered that resolution, but after we passed it, it wonders what this is all about, but let me get to a—we've been talking about a lot of regulations.

The code of the United States under 501(c)(4) says that those organizations that could get that tax-exempt status are civic league organizations not organized for profit but operated exclusively for the promotion of social welfare.

The regulations say that to qualify as a social welfare organization under 501(c)(4), an organization must be operated exclusively for the promotion of social welfare. An organization is considered to be operated exclusively for the promotion of social welfare if it is primarily engaged in activities which in some way promote the common good and general welfare of the community. They say that political activities are not considered to be activities for the promotion of social welfare.

Then they go on to talk about attempts to influence legislation are considered to be activities that further Section 501(c)(4) social welfare purposes so long as such legislation is germane to the accomplishment of its social welfare purposes.

Promotion of social welfare does not include participation or intervention in political campaigns, but 501(c)(4) organizations may intervene in political campaigns without jeopardizing its tax-exempt status provided it is primarily engaged in other activities which further the promotion of social welfare.

Those are the regulations. Let me get back to the code. Organized not-for-profit but operated exclusively for the promotion of social welfare. Aren't these regulations that essentially changed the law? Isn't this the problem we're confronted with?

Mr. SEKULOW. Well, the issue under 501(c)(4), Congressman Scott, is the test that the IRS has been applying for over 50 years was the primary test. It was primary. The word does say "exclusive," and then the regulations define "exclusive" to be primary.

However, there has been a 50-year history of how (c)(4)s are allowed to operate, what they can and cannot do. And, frankly, as someone that's been involved in tax work since 1980, there has not been a significant issue here. There's been very few revocations of tax-exempt status of (c)(3)s or (c)(4)s. There's been some, but it has been very rare. The applications actually during the years in question here were down from the previous year.

What you have is the regulations are not clear. You'll remember, they were trying to do a quick fix to this problem. The acting commissioner said, what we're going to do is if you'll agree to expend no more than 40 percent of your activity for political expenditures, we will automatically grant you—which is different than the standard they even set in their regulation. So it's fair to say that the rules and regulations are complex. However, they've been administered for 50 years pretty consistently.

Mr. SCOTT. They essentially amend the law by regulation exclusively as meaning in the English language that would not include significant political activities.

Mr. SEKULOW. Unless that was social welfare. Social welfare could include political engagement.

Mr. ROTUNDA. Yeah. I think we add something else, and that is the inspector general said there was inappropriate criteria. Lois

Lerner in her full apology acknowledged it was inappropriate criteria. So it's a little late for the IRS to argue that what they did was appropriate, when the head of the decision and the IRS independent inspector general says that it is inappropriate. And the reason it was inappropriate is because it focused on the political views of the people, of the people involved.

Mr. SCOTT. Well, now, there's no evidence to that. There are liberal groups that were also—had their—

Mr. ROTUNDA. Well, actually—

Mr. SEKULOW. None denied.

Mr. ROTUNDA [continuing]. There's lots of evidence to that.

Mr. SEKULOW. None of those denied. There were seven groups picked up, Congressman, but none denied their exempt status.

Mr. SCOTT. Well—

Mr. TIEFER. Mr. Scott, I think they were caught in the problem you're talking about, but they had outdated criteria. And the decisions on how to handle it, which were not to deny, not to deny Tea Party applications, but just trying to figure out what to do with them, were made at the lower level of the bureaucracy, passed back and forth between the unit that gives advice, technical unit, and the people who have the frontline roles.

Mr. SEKULOW. That is absolutely incorrect.

Mr. ROTUNDA. And it doesn't justify a \$50,000 settlement, because you don't act that way if you've got nothing to worry about.

Mr. GOODLATTE. The time of the gentleman has expired.

The Chair recognizes the gentleman from California, Mr. Issa, for 5 minutes.

Mr. ISSA. I thank the Chairman.

You know, I don't want to get too far into the weeds on the last colloquy we just heard, but during those 50 years, more or less, weren't we living with the decision in the *NAACP v. Alabama*?

Mr. SEKULOW. Yes.

Mr. ISSA. Weren't we living with the recognition that a state, Alabama, had tried to get the records of people who gave to the NAACP, because the NAACP, a not-for-profit, on their behalf was trying to do voter registration, was trying to do political things as a social service, and the Supreme Court held very much that they had an anonymous right. And wasn't one of the situations in this targeting demanding that these 501(c)(4)s turn over their contributor list?

Mr. SEKULOW. Their donor records, contributor lists. In fact, in our response back, Congressman, to the IRS, we cited all the—there's a lot of NAACP cases on this, and we cited—

Mr. ISSA. There's a great history.

Mr. SEKULOW. A really rich history, and it's a fascinating study, but the end result is what the IRS was asking for was outside of the scope of legitimate inquiry and was protected by the First Amendment. Ultimately, they backed down, but, Congressman, it took months for them back down.

Mr. ISSA. But of course, it's a very powerful agency against—

Mr. SEKULOW. Yep.

Mr. ISSA [continuing]. A small startup in the case of a Tea Party group.

Aren't the other cases that you often see—hear about anonymous free speech, union cases where time after time, people wanted to identify the union element so they could be targeted? It is amazing that we're relitigating something that was so settled during the civil rights era.

Well, let me go to the special counsel, because that's what—

Mr. ROTUNDA. The decision in the Social Workers *Party v. Ohio*, it's not just civil rights cases. The court said if you release the names of the political contributors in the Social Workers Party, they're afraid of harassment of the donors. That's what happened in the National Organization for Marriage.

Mr. ISSA. I think you're exactly right. And so one of the key tenets here is, in fact, your ability to take your after-tax money, you've already paid your taxes, and give it to a group that's considered "tax exempt," but 501(c)(4)s, they only pay tax on retained money. The reality is if they spend all the money that people give them with their after-tax money, there's no tax consequences anyway.

Mr. SEKULOW. Right.

Mr. ISSA. So the major part of the harassment, these endless questions of delay, but a major part of it was asking for information that the IRS clearly should have known was inappropriate to ask for. So when we have an investigation into this wrongful act, when we have a clear wrong act, Lois Lerner went before the American Bar Association, planted a question so she would be asked about a TIGTA investigation that was coming out, and she could then spring it as a release, when in fact what she was really doing was sending something out so she could spin a false narrative. Now, that happens to be a crime.

So when you have that and then you have the President following up with there's not a smidgeon of evidence, pre-determining the case, does it fit any of these criteria, one, conflict of interest, I'll set that aside, it has been talked about a lot. The "or" in the first test is extraordinary circumstances. Is, in fact, the series of events pretty extraordinary for the American people to digest? Lastly, is there a public interest?

So I'll ask the question, leaving the first one out for a moment, even though the Attorney General sat before this Committee and told us he wore two hats, one, the highest law enforcement office and the other a political appointee, and he said that sitting right in that middle chair, but leaving that aside, the conflict of interest, isn't it pretty extraordinary to have a President taint a jury pool, so to speak, by saying there isn't a smidgeon of evidence while there is, in fact, an ongoing investigation?

And isn't there a public interest in the American people believing that anyone who was involved in this now known to be wrongful activity at the IRS has been held accountable? And I would take them in reverse order if possible, public interest, extraordinary circumstances.

Mr. SEKULOW. Well, the public interest is clear, because the integrity of the IRS right now is in complete disarray, and, in fact, there are some that question whether they're institutionally capable of self-correcting this. That's one.

With regard to the nature of what's happened here and the impact that that has on the conflict—not even the conflict, but the standards or review for a special counsel, it's unprecedented that you had the President pre-judge the case while the evidence was lost, and the IRS lost it, allegedly, and the FBI doesn't find out about that during the scope of their investigation. They find that from media reports. When you put all of that together, it would be an easy justification for a special counsel, that is for sure.

Mr. ISSA. Mr. Chairman, at this time, I'd like to ask unanimous consent that the Oversight report authored that says, "Debunking the Myth the IRS Targeted Progressives," be placed in the record so that Members could resolve those conflicts that seem to be unresolved by our panel.\*\*

Mr. GOODLATTE. Without objection, it will be made a part of the record.

Mr. ISSA. I thank you, Mr. Chairman.

Yield back.

Mr. SCOTT. Mr. Chairman.

Mr. GOODLATTE. For what purpose does the gentleman from Virginia seek recognition?

Mr. SCOTT. Unanimous consent request.

Mr. GOODLATTE. The gentleman will state his request.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that two articles be admitted into the record, one entitled, "Meet the Group the IRS Actually Denied: Democrats," and the other, the "IRS Sent Same Letter to Democrats That Fed Tea Party Row," and it outlines the fact that the Democratic-leaning group actually saw its tax-exempt status denied, forcing it to disclose its donors and pay some taxes.

Mr. GOODLATTE. Without objection, the articles will be made a part of the record.

[The information referred to follows:]

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\*\*The information referred to is not printed in this hearing record but is on file with the Committee and can be accessed at <http://oversight.house.gov/wp-content/uploads/2014/04/4-7-2014-IRS-Staff-Report-w-appendix.pdf>.

Scott

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Although Tea Party applicants got unfair IRS scrutiny, only one known group had status revoked. They're Democrats

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EmERGE America (Credit: Flickr)

Everyone agrees that the IRS shouldn't have targeted groups with "Tea Party" or "Patriot" in their names for special scrutiny in awarding tax-exempt status. NBC News reports two agents have been disciplined for doing so, and the Justice Department announced a criminal probe. But so far no one has identified a single conservative group that was denied status in the controversial review, though some faced bureaucratic hurdles and had their tax-exempt status delayed.

In fact, the only known 501(c)(4) applicant to have its status denied happens to be a progressive group: the Maine chapter of EmERGE America, which trains Democratic women to run for office. Although the group did no electoral work, and didn't participate in independent expenditure campaign activity either, its partisan status apparently disqualified it from being categorized as working for the "common good."

Ironically, the national organization and its earlier chapters had gotten tax-exempt status by the IRS during the Bush administration in 2006. But it appears as though the Maine

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decisions at the bottom of this post.

Here's what director Karen Middleton has to say:

Emerge America and its initial state programs were granted 501(c)(4) status by the IRS several years ago. Later, when a new state program applied for the same status, it was denied because Emmerge works only with women who are in the Democratic Party, so the IRS determined this did not meet the definition of "social welfare" for the common good. We believed this denial triggered a review of the Emmerge programs that had already been granted 501(c)(4) status, and consequently those statuses were revoked. Becoming 527 organizations has not hurt our fundraising or organizational expansion - we report our finances and continue our work fully transparently.

Again, the focus on Tea Party groups is wrong, but two-thirds of the groups reviewed had no Tea Party ties - and only a Democratic group had its status denied. This story is more politically complicated than the right lets on.

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Joan Walsh is Salon's editor at large and the author of "What's the Matter With White People: Finding Our Way in the Next America."

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## Bloomberg

### IRS Sent Same Letter to Democrats That Fed Tea Party Row

By Julie Bykowitz and Jonathan D. Salant - May 14, 2013

The Internal Revenue Service, under pressure after admitting it targeted anti-tax Tea Party groups for scrutiny in recent years, also had its eye on at least three Democratic-leaning organizations seeking nonprofit status.

One of those groups, Emerge America, saw its tax-exempt status denied, forcing it to disclose its donors and pay some taxes. None of the Republican groups have said their applications were rejected.

Progress Texas, another of the organizations, faced the same lines of questioning as the Tea Party groups from the same IRS office that issued letters to the Republican-friendly applicants. A third group, Clean Elections Texas, which supports public funding of campaigns, also received IRS inquiries.

In a statement late yesterday, the tax agency said it had pooled together the politically active nonpartisan applicants -- including a "minority" that were identified because of their names. "It is also important to understand that the group of centralized cases included organizations of all political views," the IRS said in its statement.

President Barack Obama, in a statement last night, called the IRS employees' actions "intolerable" and directed Treasury Secretary Jacob J. Lew to hold "those responsible for these failures accountable."

Tax agency officials told lawmakers in a briefing yesterday that 471 groups received additional scrutiny, a total that indicates a crackdown on politically active nonprofit groups that extends beyond the Tea Party outfits.

#### Broader Hearings

Some lawmakers on Capitol Hill and campaign finance watchdog groups are pressing to expand congressional hearings to encompass everything the IRS is doing concerning nonprofits, including whether such groups should be allowed to spend money on political efforts at all.

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Ron Wyden, an Oregon Democrat who sits on the Senate Finance Committee, which is conducting its own IRS investigation, has introduced legislation with Alaska Republican Senator Lisa Murkowski to require all groups spending money on politics to disclose their donors.

"These problems will continue as long as there is an absence of clear and enforceable rules," Wyden told reporters yesterday. "In the absence of clear and enforceable rules the bureaucracy pretty much makes it up as they go along."

Political spending by nonprofits incorporated under Section 501(c)(4) of the tax code has increased since the U.S. Supreme Court in 2010 removed limits on independent corporate and union spending and other court rulings paved the way for wealthy individuals to spend unlimited sums in elections.

### **\$1 Billion**

Outside groups -- including nonprofit social-welfare groups that don't disclose their donors -- spent \$1 billion in the 2012 elections, three times as much as they did four years earlier, according to the Center for Responsive Politics, based in Washington.

"The real problem is that phony 501(c)(4) groups are exploiting the tax laws to protect donors who don't want to be held accountable for vicious, deceitful political ads," said Melanie Sloan, executive director of Citizens for Responsibility and Ethics in Washington.

In early 2011, the IRS denied the tax-exempt status of an affiliate of the San Francisco-based Emerge America, which trains Democratic women to run for office. The agency said it was disqualified because the group's activities were "conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole."

### **Approvals Revoked**

The decision was a surprise because four of Emerge America's affiliates and its main headquarters already had been approved as nonprofits.

The tax agency on Oct. 21, 2011, revoked those approvals. The national organization and its state affiliates are now incorporated under Section 527 of the tax code.

"We didn't even get the opportunity to answer questions," said Karen Middleton, president of Emerge America. "We would have welcomed the opportunity to respond to a questionnaire."

An Austin, Texas-based group, Progress Texas, received a letter from the IRS in February 2013 when it sought nonprofit status. The letter came from the agency's Laguna Niguel, California,

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office, which sent essentially the same queries to Republican-leaning groups.

As with the Tea Party groups, the IRS sought copies of promotional materials, backgrounds of officers, meeting minutes and specifics about activities, such as get-out-the-vote drives, that the organization said it would conduct.

### Due Diligence

Matt Glazer, former executive director, said the questionnaire was time-consuming though not intrusive.

"It is up to the IRS and the government to do the due diligence necessary," Glazer said in a telephone interview yesterday. "I'm not saying it was fun but it was important."

His group was approved.

Clean Elections Texas, a Dallas-based group that backs taxpayer funding of elections -- a position that aligns with many Democrats -- also had to answer queries.

"The IRS is finally doing its work, that was my feeling about it," Liz Wally, the group's executive director, said yesterday in a telephone interview. Her group was also approved for nonprofit status.

Two law firms that represent 33 Republican-leaning organizations that say they were targeted by the IRS have said none of their clients was rejected for tax-exempt status.

### Long Delays

Two of the groups gave up after long delays, said Gene Kapp, a spokesman for American Center for Law and Justice. Of the 27 groups the Washington-based firm represents, 15 have been approved and the other 10 are awaiting word from the IRS, Kapp said.

Documents made public by lawyers for the Tea Party groups showed that they received letters from three other IRS offices besides Cincinnati -- Washington D.C. and two in California, El Monte and Laguna Niguel.

Dan Backer, a Washington-based attorney who represents six Tea Party organizations, said it is "laughable" that low-level employees targeted the Republican-friendly groups.

"That's just not how government works," he said in a telephone interview. "There's a boss who said, 'Here is who we are targeting and here is what we are going to ask them.'"

The IRS controversy reared up last week when Lois Lerner, the official in charge of overseeing

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tax-exempt groups, said the agency was wrong to pay special attention to organizations that used key words such as "tea party" or "patriot" or had policy positions on smaller government.

Her May 10 disclosure came ahead the Inspector General's report out yesterday. The report concluded that "ineffective management" allowed the inappropriate criteria to be developed and kept in place for more than 18 months.

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Mr. ISSA. Mr. Chairman, one more unanimous consent, since we are on a roll. I'd also like to also put in, "How Politics Led the IRS to target Conservative Tax-Exempt Applications for Their Political Beliefs."\*\*\*

Mr. GOODLATTE. Without objection—

Mr. ISSA. I thank the Chairman.

Mr. GOODLATTE [continuing]. It'll be made part of the record.

Mr. TIEFER. If I can respond to Mr. Issa's last question.

Mr. GOODLATTE. Without objection, you may respond to the question.

Mr. TIEFER. Okay. When we go back to look at the special counsel's regulations in 1999, when it was adopted in the Federal Register, it says that you have a special counsel when the Attorney General concludes that extraordinary circumstances exist. And here's what he has to decide—it isn't whether you want to restore the IRS, it has nothing to do with anybody outside the Department of Justice, as we were talking about on both sides of the aisle, the questioning so far until now. When the Attorney General would be served by removing a large degree of responsibility for the matter from the Department of Justice.

You don't get away from the criterion. Are you going to say, Oh, Public Integrity Section, you're conflicted; oh, FBI, you're conflicted. We've got to take it out of your hands?

Even if the head of the FBI is a Republican, I don't think that this criterion is met here.

Mr. GOODLATTE. Thank you.

Mr. BACHUS. Mr. Chairman.

Mr. GOODLATTE. For what purpose does the gentleman from Alabama seek recognition?

Mr. BACHUS. You know, I recall reading somewhere, and maybe somebody can pursue this—

Mr. GOODLATTE. If I may, I think the gentleman needs to get someone else to yield time to him, and then he can make the point at the appropriate time.

At this time, I—

Mr. BACHUS. Ten seconds. Thank you.

Mr. GOODLATTE. I will make sure you get that time yielded to you, but now it's the time of the gentleman from Rhode Island, Mr. Cicilline. He's recognized for 5 minutes for his questions.

Mr. CICILLINE. Thank you, Mr. Chairman.

Mr. Tiefer, are you aware of any serious argument that has been made in the 15 years since this regulation existed, any serious claim that disputes the Attorney General has discretion for this appointment?

Mr. SEKULOW. You're asking—

Mr. CICILLINE. No. I'm asking the gentleman on the end. Professor Tiefer, I believe.

Mr. TIEFER. I'm sorry.

Mr. CICILLINE. Are you aware of any serious argument that has been made in the last 15 years or any serious claim that the Attor-

\*\*\*The information referred to is not printed in this hearing record but is on file with the Committee and can be accessed at <http://oversight.house.gov/wp-content/uploads/2014/06/How-Politics-Led-to-the-IRS-Targeting-Staff-Report-6.16.14.pdf>.

ney General does not have discretion for the appointment of a special counsel?

Mr. TIEFER. There has never been, I guess I just heard a couple of words today, never been until now an argument that he lacks discretion.

Mr. CICILLINE. And in fact, in your written testimony, you describe claims to the contrary as a, and I quote you, "a convenient, unheralded concoction of fanciful imagination." What do you mean by that?

Mr. TIEFER. I don't think there's a lot of reality to it.

Mr. CICILLINE. And there is an ongoing investigation by both the Department of Justice and the Federal Bureau of Investigation on this matter, correct?

Mr. TIEFER. Correct.

Mr. CICILLINE. And has it been the practice of the Congress to engage in hearings, to sort of piggyback on ongoing criminal investigations?

Mr. TIEFER. Absolutely not.

Mr. CICILLINE. And why is that?

Mr. TIEFER. Because the Department has a very firm stance that it will not provide material from open investigations. I worked with not only with House Committees during my time as general counsel; I testified in favor of Mr. Issa's investigation of Fast and Furious. I was the lead witness at his hearing. I said, as long as you're going after closed stuff, you can get it; but open investigations, you can't.

Mr. CICILLINE. Thank you. I think in light of that, as the gentleman from Virginia just mentioned, with all of the work that we have unfinished, the Voting Rights Act, immigration reform, enacting responsible gun safety legislation, it's hard to understand what we're doing here today.

But I'd like now to go to Mr. Sekulow. In your written testimony accusing the Department of Justice and the IRS of collusion, you cite Criminal Statute 18 USC 241, which makes it illegal for two or more persons to conspire to injure, oppress, threaten or intimidate any person in any State in the free exercise or in enjoyment of any right or privilege secured to them by the United States or laws of the United States.

You conclude that the targeting of any American based upon their personal beliefs or freedom of association is repugnant to the Constitution. And while you uphold principles of anti-discrimination in the U.S. Code and constitution, Human Rights Watch named the organization which you head, the American Center for Law and Justice, to their LGBT Rights Hall of Shame for their active support of discriminatory policies in Africa, for example, the East African Center for Law and Justice, an offshoot of your organization, and I quote, "lobbied against Kenya's progressive new constitution" in 2010 solely on the basis that the constitution's anti-discrimination clause would eventually be used to advance LGBT equality, according to Human Rights Watch.

You then opened a Zimbabwe chapter, and your organization's chairman led a prayer march with President Mugabe, who is a notorious homophobic dictator, who has referred to gays and lesbians as dogs and pigs and said, and I quote, "they should rot in jail."

A State Department spokesman, Victoria Nuland, said, we are deeply concerned when security forces have become an instrument of political violence used against citizens exercising their democratic rights.

And so my question to you, sir, is how do you reconcile your support for civil rights under the Constitution and U.S. law while your organization is actively promoting discriminatory policies abroad? And don't we have a right, as Members of this Committee, to consider this hypocrisy in evaluating what weight to give your testimony?

Mr. SEKULOW. Well, you're conflating, Congressman, with due respect, an issue where there is a discussion or a debate within a culture about a constitutional referendum. You certainly wouldn't deny, Congressman, that individual citizens would have the right to object to a provision of a constitution, at least vocally through free speech rights, to engage in the process. That's what they were doing down there.

Mr. CICILLINE. I—

Mr. SEKULOW. Let me—

Mr. CICILLINE. I would not agree with that. I do not—

Mr. SEKULOW. Oh, you think if there's a discussion between—

Mr. CICILLINE. No. I don't think there is a discussion that can be had in the context of recognizing basic human rights that would authorize the discrimination, imprisonment and acts of violence against people because of sexual orientation, period. So my question really is—

Mr. SEKULOW. Well, you're conflating the two again.

Mr. CICILLINE [continuing]. Your organization is actively engaged in promoting discriminatory policies, and you claim in your written testimony that you're here trying to vindicate free expression. The two seem to be in direct contradiction.

Mr. SEKULOW. Well Congressman, you needed to do some more reading, with due respect, because you'd find out I've represented the ACLU before the Supreme Court of the United States.

Mr. CICILLINE. I'm asking you about your representation promoting—

Mr. SEKULOW. Why don't—we also have offices in Russia—

Mr. CICILLINE [continuing]. Policies that—

Mr. SEKULOW [continuing]. In Jerusalem, in Pakistan.

Mr. CICILLINE [continuing]. And criminalize behavior of people in the LGBT community and your claim today—

Mr. SEKULOW. We've never taken that position in the United States. And these are different issues—

Mr. CICILLINE. Oh, not in the United States, but internationally.

Mr. SEKULOW. You're making a very serious accusation, but you're conflating a group's ability to organize to say, we don't like the direction of a law in a country: We think that it should be X; you think it should be Y. The people have the right to say that, and that's why you have free discourse.

Mr. CICILLINE. Reclaiming my time.

Mr. NADLER. Would the gentleman yield?

Mr. CICILLINE. Certainly.

Mr. NADLER. Thank you. Would it be more—

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. NADLER. Would it be more of a—

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. NADLER. I ask unanimous consent for one additional minute.

Mr. GOODLATTE. I object. This is not the appropriate time for asking for unanimous consent, when I just denied the gentleman from Alabama's request to speak out of order. We have a number of people who wish to ask questions, and the time now turns, as it happens, to me. And after that, I'll ask someone else to take the chair, and if there is a unanimous consent request or if another Member wishes to yield to you, that would be the appropriate thing to do, but we are here to talk about this issue, and I'd like to return to a focus on the issue of whether or not the Attorney General should appoint a special counsel.

So, first of all, let me ask Professor Rotunda, your testimony highlights that in discussing the special counsel regulations, the regulations call for appointment of a special counsel when investigation or prosecution of that person or matter by the United States Attorney's Office or litigating division of the Justice Department would present a conflict of interest.

Now, would you like to respond to Professor Tiefer's argument that there is no conflict of interest within the Justice Department on this issue?

Mr. ROTUNDA. Yeah. I think there is; that is, the Justice Department is defending the IRS in court today opposing the discovery of these documents. They're slow walking it, the cases involving, what is it, the Z Street, their tax-exempt status. They're supposed to be investigating the IRS at the same time they're defending the IRS. Now, Professor Tiefer said that the person in charge of this investigation is, what, on loan, if I heard you right, it's on loan from Civil Rights to Office of Public Integrity. Is that what you said?

Mr. TIEFER. Barbara Bosserman. I said she's not in charge, but she is on loan.

Mr. ROTUNDA. Yeah. I find that bizarre, because the whole idea of the Office of Public Integrity is they're supposed to be non-partisan and separate. So what do we do? We bring somebody from another part of the Justice Department to be involved, either in charge or involved with the investigation in Public Integrity. That's like shifting it away from Public Integrity. That's another part of the conflict.

Mr. GOODLATTE. Would you say that the investigation was being slow walked if over a year after the investigation supposedly began, the Justice Department did not even know that emails that would seem to me to be a core part of the investigation were not even available, making it apparent that they had not even asked for those documents?

Mr. ROTUNDA. "Slow" is an adverb that is not slow enough to describe what they've been going. It's just very slow. And when NOM, the National Organization for Marriage, finds somebody who actually got information illegally from the IRS, the Department of Justice reaction is let's pay the \$50,000, get rid of the lawsuit, and not put that person under oath, give them immunity to find out who in the IRS violated the law. So that "slow" is—if I had a thesaurus, I think maybe I'd find a better word, but it is very slow.

Mr. GOODLATTE. Professor Tiefer, you dismiss as absurd a claim that the House of Representatives possess the authority to appoint a special counsel; in fact, you say it is pure fantasy for the House to deny that the Attorney General has discretion to appoint a special counsel. Where was the claim made that the House has this authority and who made it?

Mr. TIEFER. I was kind of stumped to understand what H. Res. 565 was. I don't remember another time. I really don't remember another time.

Mr. GOODLATTE. Let me read you the specific language from H. Res. 565. It says, "it is the sense of the House of Representatives that Attorney General Holder should appoint a special counsel without further delay to investigate the IRS's targeting of conservative nonprofit advocacy groups."

Is it not within the authority of Congress to urge an executive branch official to act on a matter, however discretionary, that the House deems to be important?

Mr. TIEFER. Well, I am glad it was the sense of resolution, I'll say that, instead of a—

Mr. GOODLATTE. That would make a big difference, wouldn't it? No one's denying that the Attorney General has the discretion. What we're asking is, why hasn't he exercised that discretion? That's the subject of this hearing today.

Mr. TIEFER. I am glad that there is agreement here that he has the discretion, because I think after this, that will calm people down who are wondering what's going on.

Mr. GOODLATTE. Good. Thank you. I like that answer.

Mr. SEKULOW, when the Justice Department first launched its supposed investigation against the IRS, the groups you represent were cooperating with that investigation, however, you explain in your testimony that your clients are no longer cooperating in that investigation. Can you tell us why?

Mr. SEKULOW. Well, when the emails came out from Lois Lerner that stated—and the one in particular is the one dated May 9, 2013, which we just received this summer back in early June, it's the email that says that the call took place between the director of Election Crimes at DOJ, talked about "piecing together false claims statements about applicants who lied," saying they were planning on doing political activity and then turning around and not doing it. DOJ feels like they need to respond.

Well, we were assured initially that our clients were never the subject to an ongoing criminal investigation, they were just being produced as witness. Then I get this email that says, in fact, they were looking at piecing together evidence and cases against our client. Piecing together. No evidence of anything.

And, by the way, that letter that we sent to J.P. Cooney, the trial attorney at the United States Department of Justice, it was the lawyer that the letter was addressed to, that letter from the ACLJ, which is part of the record, was dated June 18, 2014, and has never been responded to.

Mr. GOODLATTE. Thank you.

My time has expired. The Chair recognizes the gentlewoman from Texas, Ms. Jackson Lee, for 5 minutes, and would advise the gentlewoman that, while you were not present, the gentleman from

New York asked unanimous consent to speak out of order, and I suggested to him, as I did the gentleman from Alabama, that perhaps some time might be yielded to him.

And I would ask whoever takes the chair here in a moment, since I need to leave for a few minutes, be generous in the granting of the amount of time so people can yield.

Mr. BACHUS. Mr. Chairman, I only would like that time after every other Member has had—

Mr. GOODLATTE. Well, I'll ask if other Members would have the forbearance to yield the gentleman time.

At this time, the gentlewoman from Texas is recognized for her time.

Ms. JACKSON LEE. Just a point of clarification. I'm always eager to be gracious to colleagues. Someone explain, what did the Chairman say? Someone needing time? Okay.

Then Mr. Gowdy is taking the chair—pardon me? All right. After Mr. Gowdy has taken the chair, if I can continue to a period of time, I may be happy to have my extra time yielded to Mr. Nadler if that be the case.

Let me thank the witnesses for their presence here today. The title of this hearing is, "The IRS Targeting Scandal: The Need for a Special Counsel." I want to be very clear that as I read the particular section in the Federal Register articulating the provision, 600.1—600.2, clearly there is a section, Professor Tiefer, that indicates alternatives, because at least this particular hearing does say, "the need for a special counsel."

Just a little background. I want to make it very clear, what I understood when this first came forward, the President had a very stern representation of wanting to get to the bottom of it, speaking directly to the American people, as I am suggesting, that no one wants to tolerate targeting, it is abhorrent, and that whatever laws need to be applied should be applied. As I understand, there have been a number of investigatory hearings. There is certainly an individual in the eye of the storm at this point, a Ms. Lerner, there are suggestions of looking for additional emails and other resources, but I think this hearing on the Judiciary Committee should be very clear. We are not commenting on the issue of whether there should be an investigation. There is one going on. There is a question for the need for a special counsel. Now, that's an interesting terminology, because maybe the underbelly of that is, Mr. Attorney General, we are telling you to appoint a special counsel.

So my question to you, as I look at 600.2, it says the Attorney General may appoint a special counsel or direct that an initial investigation consisting of such factual inquiry or legal research as the Attorney General deemed appropriate be conducted in order to better inform the decision.

How do you characterize the question "need?" And in the backdrop of what I've just said, do you not see a framework where the Attorney General can do many things?

Mr. TIEFER. I have not only read the regulation, as in the way you read it, but I went to look at the background of the regulation, and the background says very strongly that the regulation is set up to give him many ways to go. And the specific background, which

we may remember is, under the old statute, there hadn't been that kind of choice of ways and alternatives, it was inflexible, and during the Reagan administration, it drove people crazy that there had to be five special counsels on Ed Meese, and then during the Clinton administration, it drove people crazy that so much jurisdiction had to get handed over again and again to Ken Starr. And the regulation in contrast with the statute gave flexibility to avoid that, and has avoided that. I read it the way you do, Ms. Lee.

Ms. JACKSON LEE. And can you just go into the regulation, I think you've done it well, but the discretion that the Attorney General has? And you said something very valuable. The burden that the American people feel: how many more are we going to have and pay for? I should have had the numbers for what Ken Starr spent for an ultimate nonconviction. But this discretion is an important element on behalf of the American people. It takes into the seriousness of the question, or can, takes into an elongated, expensive process with dollars being spent. Could you comment on the word "discretion"?

Mr. TIEFER. Exactly. That once you remove the Department of Justice from the investigation, in effect, you have to set up a parallel Department of Justice, pay all the salaries, pay all the stuff, and then you end up—if I can answer—by the way, one technical point that was said earlier: Oh, there are civil suits that the Department of Justice is handling at the same time it's doing this criminal investigation, so we have to remove the criminal work from the Department of Justice, we have to have a special counsel. The Department of Justice has had many, many times where they're handling civil in the Civil Division and criminal in the Criminal Division. You look at the papers these days, and they're having the criminal trial from Nisour Square of the guards for alleged homicide at the same time they've had civil suits on the same matter. They do it all the time. That's why they have different divisions.

Ms. JACKSON LEE. Let me thank you.

Mr. Sekulow, are you—I'm sorry. Give me how to pronounce your—

Mr. SEKULOW. Sekulow.

Ms. JACKSON LEE. Thank you so very much. Are you here testifying that the AG must appoint a special counsel?

Mr. SEKULOW. No. We clearly have stated in my written testimony and in our testimony today, it's discretionary. What we're asking is that the Attorney General utilize that discretion to appoint a special prosecutor.

Ms. JACKSON LEE. And your reasoning is?

Mr. SEKULOW. That the Department of Justice has been compromised in the investigation, particularly because they were, in coordination with the IRS, in manufacturing, as they said, piecing together criminal cases against clients like mine. And that in and of itself raises a significant conflict, in fact, puts the whole investigation in a taint, because the Department of Justice is investigating itself for potentially involving themselves in violation of criminal laws. And I'd just like to add for the record that it was the Attorney General of the United States, and it might have been in this very room, who was the one who brought up the code sec-

tions, 242, of the criminal code that could well have been violated if, in fact, the evidence showed it. And now we've got the email saying his department—

Ms. JACKSON LEE. Thank you. Mr. Gowdy, if the—

Mr. GOWDY [presiding]. The gentlelady—

Ms. JACKSON LEE. I was asked a little general time here, if Mr. Gowdy would just allow me to ask—

Mr. GOWDY. You mean—

Ms. JACKSON LEE. [continuing]. Mr. Tiefer—

Mr. GOWDY [continuing]. In addition to the 53 seconds already allotted for additional time?

Ms. JACKSON LEE. Your kindness, Mr. Chairman, so I can have Mr. Tiefer respond to that very quickly, and I would appreciate your indulgence.

Mr. Tiefer, if an investigation by the DOJ is not yet finished, can we cede the point that there is conflict and that they're not fully investigating as professional staff members of the DOJ? Can we make that judgment? I think we cannot. What is your assessment?

Mr. GOWDY. Professor, you may answer the question with all deliberate speed.

Ms. JACKSON LEE. I thank you. So to avoid the \$80 million that have been spent on special counsels.

Thank you, Mr. Chairman.

Mr. TIEFER. There is an investigation going on. We can't decide they're not doing their job, because they're doing their job.

Mr. GOWDY. I thank the gentlelady—

Ms. JACKSON LEE. Thank you.

I yield back.

Mr. GOWDY. Thank the gentlelady from Texas and now recognize the gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Sekulow, a lot of the questions that we've had here prepared, some other person on the Committee has stolen. I'm thinking about filing some sort of deliberate inquiry as to how that always happens to me. So I'm going to, if I can, just back up and take a broad look at this.

We've heard the central talking point of our friends on the left here is that this is the last full day before the break, that we shouldn't be dealing with such a miniscule issue. And I would just suggest to you that I think the issue that we deal with here is one of profound significance, in that the entire basis of a government that is essentially predicated on the rule of law is that somehow we can trust our government to treat us all equal under the law, and I think that's the central point here.

And if indeed the IRS is guilty of using the power of the Federal Government to discriminate against people on the basis of political motivation, then the entire rule of law here is at stake. And this Committee, being the Judiciary Committee, should be first and foremost committed to protecting the constitutional rights of the American citizens and to do everything that we can to further this notion of the rule of law. So I think it's a really big issue here that we're dealing with, and I guess I'm going to ask you to put it in your own words. Why do you think this is such a big deal?

Mr. SEKULOW. Because fundamentally, when you look at the tax code as it exists, it's a voluntary compliance. The idea that if a conflict were to arise during the course of an investigation, that you have to wait for the investigation to be completed, is absurd. If the rule of law means anything, and with due respect to the Congresswoman, if the rule of law means anything, when you've got an agency with this amount of authority, both the Department of Justice and the IRS, and there is evidence in writing, not denied, that there was activity going on between two agencies while there is a criminal investigation going, if the rule of law means anything, if that conflict becomes known, it should be actionable.

Now, that action rests with the Attorney General, but to say that we shouldn't be able to bring it up or discuss it or that it's not as significant as these other issues that the Congress is dealing with right now, I beg to differ. The freedom of speech, the freedom of press, the freedom of assembly, the freedom to petition your government for redress of a grievance is at the very core of who we are. And when that is tampered by two agencies, and one in particular that controls the lives of every American citizen, I don't think it's insignificant that this work is going on today. No disrespect to any other piece of legislation you're dealing with, but this is a very significant burden placed on American people for simply exercising their free speech rights. And when an agency has violated that trust and there is notification that in fact there is a conflict, you do not have to wait for the investigation to be completed. Because you want to talk about a waste of money? Know about a conflict, don't react on that conflict—in the law, if you do that, it's malpractice—and you know what ends up happening? You've got to do the investigation all over again, and, Congresswoman, that becomes a lot more expensive.

Mr. FRANKS. Well, obviously, I couldn't agree with you more. I would suggest to you that we're in violent agreement on that subject.

The notion that we all pay our taxes voluntarily, is something that you brought up in your response. It seems to me that if people believe that the IRS will arbitrarily begin to persecute particular groups, that people begin to wonder why do we even pay taxes, and the entire process, the entire hope of our government is based on a fundamental intrinsic trust of the American people that somehow that this thing called law is going to prevail, that everybody's going to be treated fairly under it. And if it isn't, then it's time for us to go ahead and give our apology to England for being so recalcitrant in the revolutionary days, and to board this place up and go home and wait for the end patiently. So this is not a small issue that my friends on the left would try to suggest.

So my last question to you, Mr. Sekulow, is this: What do you think is the most significant—I know we've got, you know, the conflict of interest. I know we've got the President saying that there's not a smidgeon of corruption here. All of those things bear thought, but what do you think, in your opinion, is the most significant legal or glaring piece of evidence that shows that the IRS has deliberately used its power in an untoward and an unfair and outside the rule of law?

Mr. SEKULOW. Besides their own admission, Congressman, of that—

Mr. FRANKS. That's a detail.

Mr. SEKULOW. That's right.

Mr. FRANKS. Yeah.

Mr. SEKULOW. If you look at the email exchange from Lois Lerner to other officials within the IRS referencing her conversation with the director of the Election Crimes Branch of the Department of Justice and uses the words, piece together false statement cases to see if they "lied," to impanel a grand jury—that would be the next thing. Of course, no evidence of any criminal wrongdoing here. That is a government that is out of control, out of check, and needs to be put back in balance. And that's why a special counsel would be a good move, not mandated, but a good move for the Department of Justice to make here. They themselves are part of the problem, and it's in emails right here.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. GOWDY. I thank the gentleman from Arizona and now recognize my friend from Louisiana, Mr. Richmond.

Mr. RICHMOND. Thank you, Mr. Chairman.

Mr. SEKULOW.

Mr. SEKULOW. Yes, sir.

Mr. RICHMOND. I'll pick up right where you left off. And you're mentioning this sentence where she—where it says, could piece together false statements about applicants who lied on their 1024s.

Mr. SEKULOW. Uh-huh.

Mr. RICHMOND. And the "piece together" is whether you can piece together a hearing, right, because—

Mr. SEKULOW. No, no, no. The hearing already took place. It's piece together false claim cases about applicants.

Mr. RICHMOND. Right. But it doesn't say manufacture false claim statements. Wait. Does it say "manufacture"? Does it say "create"?

Mr. SEKULOW. No. It says piece together false cases. They have no evidence of any wrongdoing.

Mr. RICHMOND. Well, wait, wait. I don't think—

Mr. SEKULOW. I didn't write this. Lois Lerner did.

Mr. RICHMOND. Right. I don't think you know what they have evidence of, but—

Mr. SEKULOW. Right. Evidently none of is do.

Mr. RICHMOND. But they're not saying, let's manufacture, let's create it, let's make it up. They're not saying that. So I think we're taking small things to get to where we want to go. But let me ask you another question. Part of what you said, and I want to use your words, I didn't find it in your testimony, part of what you said was part of the reason why we need special prosecutor, the Department should appoint one, is because the President said, and I want to use what you quoted, and was it not even a smidgeon of evidence?

Mr. SEKULOW. Of corruption.

Mr. RICHMOND. Oh. Not even a smidgeon of—

Mr. SEKULOW. Corruption.

Mr. RICHMOND [continuing]. Corruption?

Mr. SEKULOW. Right.

Mr. RICHMOND. Which would mean not a smidgeon of evidence of corruption. Would you agree with that?

Mr. SEKULOW. Sure.

Mr. RICHMOND. What if he said, I have evidence of whatever? Would that make it just as a potential conflict?

Mr. SEKULOW. No. I would want to get the President's evidence, get him under oath, find out what he knows that the Department of Justice haven't had. So you're conflating, though, the issue of when you would have a pre-judgment of guilt, not a smidgeon of corruption, so there's no guilt—

Mr. RICHMOND. Right.

Mr. SEKULOW [continuing]. On an ongoing criminal investigation by the Internal Revenue Service, and it's not just—

Mr. RICHMOND. But wait. That's exactly what I'm asking. So what if there's a pre-determination of guilt? Does it matter?

Mr. SEKULOW. Well, sure it would matter if there was a pre-determination of no guilt on behalf of the IRS.

Mr. RICHMOND. The question is about whether the guy at the top, the President or the AG, and their departments can be impartial. You're saying they can't be impartial, because his statement was there's not a smidgeon of corruption. And I'm saying if he said, I have evidence of corruption, should he still be this impartial guy that heads up the investigation?

Mr. SEKULOW. Well, if he had evidence of corruption, he would—if he had evidence, he shouldn't be talking about it on a television show. Okay. Now, let's put this in the real context of what happened here, Congressman.

Mr. RICHMOND. That's what I'm trying to do.

Mr. SEKULOW. The President of the United States is asked a question.

Mr. RICHMOND. And he said there was no evidence.

Mr. SEKULOW. The question is, exactly from Bill O'Reilly, let's talk about the IRS scandal.

Mr. RICHMOND. Yes.

Mr. SEKULOW. You're concerned about that, and then he gets into the dialogue of boneheaded decision, you know, not a smidgeon of corruption. Now, there is an ongoing criminal investigation, and who told the President there was not a smidgeon of corruption? And this, of course, is before he learned of—

Mr. RICHMOND. So—

Mr. SEKULOW [continuing]. The IRS emails.

Mr. RICHMOND [continuing]. We're bothered because—

Mr. SEKULOW. So the President—

Mr. RICHMOND. We're both—hold on. Wait. Stop.

We're bothered because the President is saying he has not seen anything that suggests a smidgeon of corruption. Now, let's switch over to the same parallel, because we now have this select Benghazi committee where a very capable, intelligent person is heading that Benghazi committee—

Mr. SEKULOW. Right.

Mr. RICHMOND [continuing]. And his statement before we even started is, I have evidence of guilt, that before I even start the investigation, I know where I'm going to end. What's the difference? I still think—

Mr. SEKULOW. I don't believe the Chairman said he knows where it's going to end.

Mr. RICHMOND. Well, I think——

Mr. SEKULOW. You just said he said he knows where it's going to end.

Mr. RICHMOND. Well, no. That was the conclusion. The words was he has evidence of a systematic intentional effort to break the law. So——

Mr. SEKULOW. Okay. Well, I have evidence of a systematic attempt——

Mr. RICHMOND. So I think——

Mr. SEKULOW [continuing]. To break——

Mr. RICHMOND. Hold on. Wait.

Mr. SEKULOW [continuing]. The law here, too, but, I mean——

Mr. RICHMOND. We're going to do this——

Mr. SEKULOW. I don't think——

Mr. RICHMOND [continuing]. One of us is going to talk at a time.

Mr. SEKULOW. I'm sorry.

Mr. RICHMOND. And I promise you it's going to be me when I'm talking and it'll be you——

Mr. SEKULOW. Go ahead.

Mr. RICHMOND [continuing]. When you're talking.

Mr. SEKULOW. Please.

Mr. RICHMOND. So in an effort to break the law. So that is almost a conclusion, but——

Mr. SEKULOW. That's the opposite.

Mr. RICHMOND. But let me just say this. I think that we are trying too hard to get to where we want to go without listening or looking at the process to get there. You just can't make it up to get there.

And the frustration that I really have is that I just defied the greatest advice I ever got from my grandmother, was that if you see a circus going on, don't jump in the middle of it and think people won't see you with a red nose and a wig and big shoes and looking like a clown, and I have jumped right into this circus. I think we're going on wasting time on something when we can be doing more important things, because there is an investigation going on, there are people looking at this, and for some reason, because we're not in charge or someone's not in charge of the White House, we decide that we will have a full circus.

And with that, I'll yield back my time and try to heed the advice that I already broke.

Mr. GOWDY. I thank the gentleman from Louisiana.

And the Chair would now recognize the gentleman from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

And thank each of the witnesses for being here.

I want to go to the comment about "smidgeon," but before that, just a comment. I'm going to go back, as I used to as a judge and chief justice, and look at exactly what was said in the record, but I think I heard a very amusing answer, Professor Tiefer, when—if I understood correct, you said—you said that we couldn't assess the investigation, but it's doing a good job. But I'll go back and see exactly what you said. I'm not asking for comment.

But let's go back to what the President said about there not being a smidgeon of evidence. Now, if someone has influence over an investigator and tells the world, where the investigator can hear, that as your boss, I'm saying, I don't see a smidgeon of evidence, then if that person were an attorney, hypothetically, say, this was an attorney, then that would be a potential breach of ethics. And, in fact, as a judge, I have called lawyers in and warned them, one more comment, and you're going to jail for contempt of court for breaching our canon of ethics and commenting on an ongoing case about the evidence.

There is no such citation available for a President, but hypothetically, I think we've got to give this President a pass, because to really be culpable in making a statement like that, you'd have to be a lawyer, you'd have to be a professor of constitutional law, maybe, to know the complexities of that kind of comment, and so we've got to give this President a pass.

But, Professor Rotunda, you were talking earlier about how tough it is for the Department of Justice that's currently defending the IRS to do a criminal investigation, and that triggered in my mind a line of questions that I think needs to be followed up. If you are defending a person or an entity in court, the communications between you as the Attorney General and your client, the defendant, the IRS in this case, they're privileged, aren't they?

Mr. ROTUNDA. Yes.

Mr. GOHMERT. And they have to be privileged in order for you to do a decent job as their attorney.

Mr. ROTUNDA. Yes.

Mr. GOHMERT. And they have to know, the client does, in this case the IRS, that anything they say to their own attorney will be used to help them and will not ever be used to prosecute them. Isn't that right?

Mr. ROTUNDA. Yeah. That's the theory. That's what the—

Mr. GOHMERT. Well, I hadn't really thought about it until you brought this up, but it seems to bring to the forefront just how critical it is that there be an independent look at what the Department of Justice and the IRS has done. There is a relationship established when DOJ represents the IRS in matters that is an absolute conflict. Would you elaborate?

Mr. ROTUNDA. Yes. They get information from the IRS official that they're defending. They're deciding whether or not to approve a \$50,000 settlement or whether or not to slow up discovery, and then they discover things that look bad, usually that's why you settle a case, but the DOJ is not supposed to release that information to other DOJ attorneys because of the privilege. I mean, you can't have it both ways. You can't tell the client, the IRS, you can be candid with me, because this is all protected by the privilege, and then say, I'm going to use the information against you. Of course, if they don't use the information against them, they're not doing their job as a prosecutor.

Mr. GOHMERT. Well, Mr. Sekulow, let me ask—my time I see is running out, the light turned yellow, but with regard to John Mitchell, he went to prison.

Mr. ROTUNDA. Yes.

Mr. GOHMERT. Let's say hypothetically John Mitchell and Richard Nixon decide, you know what, if we don't appoint a special counsel, nobody can touch us. Wouldn't that have been true?

Mr. ROTUNDA. I think that's right.

Mr. GOHMERT. Mr. Sekulow, your thoughts.

Mr. SEKULOW. Sure, I mean, I agree with Professor Rotunda on that. I think that the need for a special counsel becomes evident when the Department of Justice has been compromised. It's the call of the Attorney General, but when the Department of Justice is compromised, you put in a special counsel to restore trust and the law.

Mr. GOHMERT. So historically speaking, you could learn the lesson that Richard Nixon—

Mr. SEKULOW. I would think.

Mr. GOHMERT [continuing]. Don't appoint a special counsel and nobody in the Administration goes to jail.

Thank you, I yield back.

Mr. GOWDY. The gentleman from Texas yields back.

The Chair will now recognize the gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank the distinguished gentleman from the Palmetto State for yielding.

And Professor Rotunda, let me try and get an understanding of why you believe that a special prosecutor is merited in this case, notwithstanding the fact that no senior Administration official is even alleged to be part of the wrongdoing. And so I just want to walk you through—I just want to walk you—I still have the floor.

Mr. ROTUNDA. I mean, I don't know if there's a factual precedent.

Mr. JEFFRIES. Sir, sir, sir.

Mr. ROTUNDA. Go on.

Mr. JEFFRIES. Sir, I still have the floor. I just want to walk you through your testimony here. Now, on page 2, you stated, we should all be happy if the President is correct when he assured us that there is not even a smidgen of corruption regarding Lois Lerner and the IRS targeting of Tea Party groups, correct?

Mr. ROTUNDA. Uh-huh.

Mr. JEFFRIES. And then you stated that the problem is that there are many suggestions of much more than a smidgen of evidence, correct?

Mr. ROTUNDA. Yes, sir.

Mr. JEFFRIES. And then you make the point that because, apparently, the information that exists out there has not been forthcoming is the word that you use, we've got to have a special prosecutor, right? That's the conclusion that you draw on page 3 of your testimony, correct?

Mr. ROTUNDA. It's not just not forthcoming; I give examples on pages 3 to 4.

Mr. JEFFRIES. I appreciate that because we're going—

Mr. ROTUNDA. To 5, what is the evidence.

Mr. JEFFRIES. I appreciate that because we're going to get—

Mr. ROTUNDA. I'm in the middle of a sentence.

Mr. JEFFRIES. We're going to get into those examples, okay?

Mr. ROTUNDA. I'm sorry, what?

Mr. JEFFRIES. You answered the question. We're going to get into those examples.

Mr. ROTUNDA. All right.

Mr. JEFFRIES. Now, you believe in the sanctity of the United States Constitution, correct?

Mr. ROTUNDA. Yes.

Mr. JEFFRIES. And within the United States Constitution there's a Bill of Rights incorporated in that document, correct?

Mr. ROTUNDA. Yes.

Mr. JEFFRIES. And as part of that Bill of Rights there's a Fifth Amendment, correct?

Mr. ROTUNDA. Yes.

Mr. JEFFRIES. Now, the Fifth Amendment of the United States Constitution in part states no person shall be compelled in any criminal case to be a witness against himself, and that's been broadly interpreted to imply as well to a congressional proceeding, correct?

Mr. ROTUNDA. Civil cases, too, sure.

Mr. JEFFRIES. Okay. So you just mentioned this whole list of things that trouble you, that suggest that we take the extraordinary step of a special prosecutor, and I just for the life of me am flummoxed. I can't understand. At the top of that list, presumably because you believe it's the most significant piece of evidence, you say Ms. Lerner pled the Fifth Amendment and refused to testify before Congress, oddly enough, after assuring us under oath that she did nothing wrong. That's your point, correct?

Mr. ROTUNDA. My list is chronological, but that's correct, that's what I said.

Mr. JEFFRIES. Okay. So because she exercised her Fifth Amendment right under the United States Constitution, a document that you just said you believed in its sanctity, that provides evidence, in your view—that's not my interpretation, that's your testimony—that provides evidence of wrongdoing here?

Mr. ROTUNDA. No, not at all, that's not what I said.

Mr. JEFFRIES. So why is that here?

Mr. ROTUNDA. Look, I think you're putting words in my mouth, and that's not fair.

Mr. JEFFRIES. No, this is your testimony, sir.

Mr. ROTUNDA. No, what I said is that she pled, first of all, she swears under oath that she did nothing wrong, and then, 30 seconds later, she says she's taking the Fifth. That's inconsistent. In fact, there's a lot of cases say you've waived the Fifth Amendment—

Mr. JEFFRIES. Does she have a constitutional right to plead the Fifth Amendment?

Mr. ROTUNDA. Absolutely—

Mr. JEFFRIES. Is that consistent with the great tradition of our founders. Why would you possibly include that as evidence, suggesting you're on a fishing expedition?

Mr. ROTUNDA. You're absolutely right, she has a right to plead the Fifth Amendment, but you can't open the door a crack, that's what the cases say. And this woman says under oath two things: I've done nothing wrong; I plead the Fifth Amendment. They're in-

consistent, and that's a bit of a smidgen. We find after that is that she interviewed for a long time with the DOJ without immunity.

Mr. JEFFRIES. Right. Is she a high level government official, sir?

Mr. ROTUNDA. Is she high level? She's head of the not-for-profit section, yeah, I thought she was high—

Mr. JEFFRIES. Is she the commissioner of the IRS?

Mr. ROTUNDA. Was she commissioner? No.

Mr. JEFFRIES. The commissioner of the IRS at the time actually was a Republican appointed by George Bush, correct?

Mr. ROTUNDA. Maybe. The IRS is supposed to be nonpartisan.

Mr. JEFFRIES. Okay. And now she's not the Secretary of the Treasury, correct?

Mr. ROTUNDA. No.

Mr. JEFFRIES. She didn't have any high level position in the White House, correct?

Mr. ROTUNDA. She was with the IRS.

Mr. JEFFRIES. Okay. Her position required congressional approval in the Senate?

Mr. ROTUNDA. Was she subject to confirmation? I don't know.

Mr. JEFFRIES. Okay. So you have no real evidence, no basis for making an argument that she was a high level official subjected to this statute, do you, sir?

Mr. ROTUNDA. Actually, I thought I did. She's making policy. She's making these decisions. I mean, she's not an auditor. She's making policy as head of the not-for-profit section, and it turned out, under her own words, they were using inappropriate criteria, and she apologized.

Mr. JEFFRIES. You expressed respect for the sanctity of the Constitution and presumably congressional statutes, but you can't point to a single statute, you can't point to a single case, you can't point to a single provision of the Constitution that would subject Ms. Lerner to designation as a high-level official in this Administration, and I yield back.

Mr. ROTUNDA. To the contrary. She's making policy for this whole, for the whole section of not-for-profits. She's making policy that overturns 50 years of tradition. I think she's pretty high level.

Mr. GOWDY. The gentleman from New York's time has—

Mr. ROTUNDA. Senior Executive Service.

Mr. GOWDY. The gentleman from New York's time has expired.

The Chair will now recognize the gentleman from Ohio, Mr. Jordan.

Mr. JORDAN. I thank the Chairman.

There's the three key facts. There's the fact that on January 13 of this year, Justice Department leaks to the Wall Street Journal, no one is going to be prosecuted. There is the now famous statement from the President of the United States where he prejudices the outcome of the case and says there's no corruption, not even a smidgen. And then, of course, there's the fact that the lead attorney, and let's be clear, she's the lead attorney because she's the one asking all the questions when they interview the witnesses. We talked to some of the same witnesses when we do our congressional investigation, congressional interviews and depositions, and it's Barbara Bosserman who is doing it, the lead attorney, the maxed-out contributor to the President's campaign. She's got a financial

stake and a beneficial outcome to the President and his administration; that's the lead attorney. So you've got those three key facts, but the one that gets me is the one that's been cited already, it's when James Cole, the number two guy at the Justice Department, sat at a table just like this in the room next door in the Oversight Committee and told us he learned of the lost emails from the press. Now, it's not just that fact that he learned from the press; it's the fact that he learned from the press but when also the IRS knew that they had lost the emails. So the IRS knew, according to John Koskinen's testimony, he knew that they were lost in April, his Chief Counsel's Office knew they were, the hard drive had crashed and was unrecoverable in February, so 4 months before the Deputy Attorney General in the Justice Department learns, the Chief Counsel's Office in the IRS office know. So it's those four key facts that underscore and warrant and cry out for a special prosecutor. And that's why you had a resolution with every single Republican House Member supporting and, more importantly, 26 Democrats supporting, including two Members from the Judiciary Committee.

Now, what I want to ask about is this, and I'll start with Mr. Sekulow. I think there's one other key fact. I think but for outside organizations doing FOIA requests, but for that fact, I'm not sure the IRS would have told us yet, and let me walk you through it. So we learn from a FOIA request from Judicial Watch that Richard Pilger and the Public Integrity Section Elections Division in the Justice Department is meeting with Lois Lerner, and it's an email that Mr. Sekulow started off today's hearing referencing, they met in 2013. So we say, wow, we probably should talk to Mr. Pilger. So we bring him in. Mr. Tiefer references in his opening statement; we bring him in, and we interview him, our staff at the Oversight Committee. We interview him, and we learn in that interview, frankly in his opening statement, where he says, you know what I didn't just talk to Ms. Lerner in 2013 looking for ways to make false claims, which, by the way, is unbelievable, this is the blind-folded lady equals the balanced scale, and they're trying to look at false claims at the tax—he says, I not only talked to her in 2013 just days before this thing went public, but we also met in 2010. And we were, like, wow, the Justice Department was interacting with Lois Lerner in 2010?

So you know what we did? We subpoenaed the Justice Department. We said, we want all the correspondence between the Justice Department, Lois Lerner, and the IRS, and we got a bunch of emails, talked about 1.1 million pieces of pages of information, 21 disks, 21 files, donor information, including in that confidential 6103 that the FBI had for 4 years that they got from the IRS. So we get those emails. We say, wow, we've had a subpoena at the IRS for over a year; why didn't the IRS give us these emails? So we sent a letter to the Internal Revenue Service and said, you know what, we got these emails from the Justice Department, why didn't you get them to us? And that was on June 9, and suddenly 4 days later they tell us, oh, you know what, we've lost Lois Lerner's emails.

Mr. SEKULOW. Right.

Mr. JORDAN. Mr. Sekulow, they may have waited, we still might not know that those emails had been lost because the investigation

seems that they're doing at the Justice Department sure isn't digging—and I'll quit giving a speech and let you guys respond, but let me say this: Why in the world when May 10, when Lois Lerner uses the planted question and makes the statement or, more importantly, May 24, the day after she came in front of our Committee and pled the Fifth, why didn't the Justice Department then go to her office with a warrant, with a court order, seize all the documents, and grab the computer then?

Mr. SEKULOW. Because it's a faux investigation. This isn't real. There was a Freedom of Information request from 2010 from an organization regarding documents related to the Tea Party, Tea Party's, training memos, emails, anything. You know what the response of the IRS was? The response of the Internal Revenue Service is, a year later, by the way, I found no documents specifically responsive to your request. Those documents would have never been produced. It's questionable whether we will ever see them, and the fact is that you go back to 2010, and there's a discussion between the Internal Revenue Service and a prosecutorial arm of the IRS, of the Department of Justice, and how can anybody with a straight face say this doesn't rise to the level of a situation where the Attorney General should exercise his discretion? It really is that simple. That in and of itself should end the inquiry.

Mr. JORDAN. Yeah, Mr. Tiefer, I would be curious your, with that fact pattern, obviously, you're still on the other side, but is there anything in that fact pattern which would cause you concern?

Mr. TIEFER. Well, a lot of this—I mean, you did your job in the other Committee and you've been writing reports and so forth, and I feel like I'm hearing an echo chamber, it's what I was reading about what you used to do and now we're hearing the same thing here now. Barbara Bosserman is not the head of this investigation.

Mr. JORDAN. Let me ask you a question. Did you represent one of the IRS employees in front of a congressional transcribed interview?

Mr. TIEFER. I was the pro bono person for him, yes.

Mr. JORDAN. So you represent one of the people who could potentially be targeted in a criminal investigation, and yet you're here telling us we don't need a special prosecutor because we like just the way this criminal investigation is going on?

Mr. JOHNSON. Mr. Chairman—

Mr. TIEFER. He was—

Mr. GOWDY. You may answer the gentleman's question. The gentleman is out of time, but you may answer the gentleman's question.

Mr. TIEFER. He was a witness. He was never considered a target. He was a low level guy, and I did pro bono for him, yes.

Mr. GOWDY. The gentleman from Ohio yields back.

The Chair will now recognize the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you.

Dr. Sekulow—

Mr. SEKULOW. Yes, sir.

Mr. JOHNSON. Your name will live in infamy as a litigator extraordinaire. Whether or not you agree with your positions or not, you have to tip your hat to a litigator, a man who uses the

courts as the courts should be used, and that is to rectify and redress harms that afflict his clients and so I take my hat off to you for that, sir.

Mr. SEKULOW. Thank you.

Mr. JOHNSON. And you're also from Georgia, are you not?

Mr. SEKULOW. Yes, sir.

Mr. JOHNSON. Yes, sir. I remember.

Mr. SEKULOW. Decatur.

Mr. JOHNSON. Decatur, Georgia, which is where I started practicing law back in 1980.

Mr. SEKULOW. Same here.

Mr. JOHNSON. Is that right?

Mr. SEKULOW. I did.

Mr. JOHNSON. Did you take the bar exam in 1979? February?

Mr. SEKULOW. I did. Probably sitting right there with you, whenever we took it in downtown.

Mr. JOHNSON. Is that so? We have more in common than I thought.

Mr. SEKULOW. There you go.

Mr. JOHNSON. But I'm going to tell you, Dr. Sekulow, you are aware that we've got a broken immigration system in this country, are you not?

Mr. SEKULOW. I am.

Mr. JOHNSON. And you are aware, are you not, of how many hearings that this Committee has held on that issue?

Mr. SEKULOW. I don't think immigration has been before the Judiciary Committee. I'm not sure.

Mr. JOHNSON. Isn't that a shame?

Mr. SEKULOW. Well, I think the immigration situation—to be honest, I worked on the immigration reform when President Bush was trying to get it through many years ago.

Mr. JOHNSON. It's a shame that this Congress has not had one hearing on comprehensive immigration reform.

Do you agree with that, Professor Rotunda?

Mr. ROTUNDA. I don't know about the hearings or even if this was the Committee to bring it before, I just didn't know about that, but I'll take your word for it.

Mr. JOHNSON. Well, you are aware of the gun violence that we've had in this country, you are certainly aware that over the last 18 months, there have been 74 school shootings in our country?

Mr. ROTUNDA. I didn't know the numbers.

Mr. JOHNSON. You did not know that?

Mr. ROTUNDA. But I lived south of Chicago.

Mr. JOHNSON. Is that because you do nothing but pay attention to a purported IRS scandal, and that's it? You've got blinders on?

Mr. ROTUNDA. Don't have blinders. I just think the IRS is a really big stage scandal, something Congress could do about.

Mr. JOHNSON. It's a big scandal.

Mr. ROTUNDA. Whereas a problem in Chicago is something that Chicago can work on.

Mr. JOHNSON. What about all of those gun deaths in Chicago?

Mr. ROTUNDA. Gun thefts?

Mr. JOHNSON. Gun deaths.

Mr. ROTUNDA. Deaths, yeah. Well, I think they ought to work on that. It's a problem.

Mr. JOHNSON. We've got a lot of things we could be working on in this Congress, I'm sure that you would agree.

Mr. ROTUNDA. What do I—

Mr. JOHNSON. We have a lot of things that we could be working on in this Congress, I'm sure that you would agree.

Mr. ROTUNDA. Well, I mean, we—

Mr. JOHNSON. Such as Section 5 of the Voting Rights Act invalidated by the U.S. Supreme Court last year. Do you know how many Judiciary Committee hearings have been held on the Voting Rights Act, the legislation that would protect people from discrimination at the polls? Do you know how many hearings we've held in this Committee on that issue?

Mr. SEKULOW. I don't know how many hearings you've held on the Voting Rights Act.

Mr. JOHNSON. I'll tell you.

Mr. SEKULOW. I'll assume it's zero.

Mr. JOHNSON. I'll tell you. It's zero.

Mr. SEKULOW. Having said that, though.

Mr. JOHNSON. Attorney Sekulow—

Mr. SEKULOW. I don't think that takes away from the significance of this. This is a constitutional issue, also.

Mr. JOHNSON. Attorney Sekulow—

Mr. SEKULOW. Yes.

Mr. JOHNSON. I mean, how many hearings are we going to have on this? We've had over three dozen hearings, and still no smoking gun.

Mr. SEKULOW. Well—

Mr. JOHNSON. No nothing.

Mr. SEKULOW. Can I give you one that just came out? Let me give you one that just came out.

Mr. JOHNSON. Please.

Mr. SEKULOW. Maybe this is a smoking gun.

Mr. JOHNSON. I know that we are trying—

Mr. SEKULOW. So we don't need to worry about alien terrorists; it's our own crazies that will take us down. Lois Lerner email just came out.

Mr. JOHNSON. I know we are trying to get everything on the record.

Mr. BACHUS. Mr. Sekulow, is that the one where she called conservatives assholes?

Mr. SEKULOW. Uh-huh, that's the one.

Mr. BACHUS. Okay.

Mr. JOHNSON. We are scraping the bottom of the barrel when it comes—

Mr. SEKULOW. A Senior Executive Service member of the IRS, by the way. I don't think you would say this either, Congressman, when you're talking about people's fundamental constitutional rights, even if you disagree with their politics, this is not insignificant, this Committee is not wasting its time. The American people have the right to be protected in those rights, and they have the right not to be targeted, and they have the right to a real investigation.

Mr. JOHNSON. Well, I know—

Mr. SEKULOW. So I think we agree on this.

Mr. JOHNSON. I know, Dr. Sekulow, that you take your work very seriously, and I respect that.

Mr. SEKULOW. I appreciate that.

Mr. JOHNSON. And we see things differently, but as a legislature, we have a job to do, and we haven't been doing it. That's why we will go down in history as being the most do-nothing Congress in the history of this great Nation, and we're doing ourselves a disservice by continuing to focus on what some call scandal but which, actually, when you look at it closely, errors were made, but it's not the kind of scandal that should replace the hard work on other issues that are before this Committee.

Mr. BACHUS. Would the gentleman yield?

Mr. JOHNSON. And with that—

Mr. BACHUS. Would the gentleman yield?

Mr. JOHNSON. Yes, I'll yield.

Mr. BACHUS. Do you—

Mr. GOWDY. The gentleman is out of time, but the gentleman from Alabama may have 30 seconds.

Mr. BACHUS. Do you consider Lois Lerner, head of the IRS investigating conservative groups and saying on her official email account with the IRS that conservatives are assholes who are crazies, who are going to take this country down, is that not a scandal?

Mr. JOHNSON. Well, some would say that she made a truthful comment, and others would say that in addition to making a truthful comment, she also erred in investigating groups other than Tea Party groups.

Mr. GOWDY. And I think everyone would say she lacks the objectivity that you should have if you're in a position like that.

And with that, I would now recognize the gentleman from Texas, Judge Poe.

Mr. BACHUS. All these groups they're investigating.

Mr. POE. Thank you, Mr. Chairman.

It concerns me that it appears that some even not in the Committee regard all of this with a flippant attitude, as no big deal. I agree, this is a constitutional issue. It involves real people. One of those is Kathryn Engelbrecht, a friend of mine in Texas, who, because she had the nerve to make sure that the voting booth was sacred and there weren't dead people voting and there wasn't other corruption, starts an organization called True the Vote. And immediately thereafter, here come the government officials. She was audited by the IRS, visited by the FBI terrorist squad. She was audited by the equivalent of EPA in Texas. OSHA investigated her, constantly under the surveillance of the IRS, questions after questions after questions. It's real people. Her constitutional rights were violated because she was persecuted, because she took a stand different than government. The Constitution protects that absolute right for all Americans.

And then here's a timetable. I'm sure you have it all memorized. Eric Holder hides information, misleads Congress in 2011. So, in June 2012, over 2 years ago, the House in a bipartisan vote holds him in contempt. April 2013, the D.C. District Court rejected the government's motion to dismiss. October 2013, the D.C. District

Court judge who is handling this case rejected the DOJ's claim that there was no standing. May 2014, the district judge took the DOJ motion for summary judgment under advisement. Two hearings since then. In July 25th, all the parties met with a mediator and still no resolution to the Attorney General of the United States being held in contempt.

Now, I look at a contempt of Congress similar to an indictment. Would you agree with that, Mr. Sekulow?

Mr. SEKULOW. The repercussions are very serious, yes.

Mr. POE. It's an indictment and then tried by the Senate if it ever gets that far.

Mr. SEKULOW. Right.

Mr. POE. We have a situation that is similar to a district attorney down in Texas or Louisiana or Chicago, wherever, pick one, getting indicted by a grand jury for corruption, but yet the DA decides whether or not there will be someone not in his office or her office to prosecute him. Isn't that the same situation we're in?

Mr. SEKULOW. It is, and that's why the discretion and the better part of discretion here would be for the Attorney General to appoint a special counsel.

Mr. POE. No kidding.

Mr. SEKULOW. Also, talking about judges.

Mr. POE. Just a second, Mr. Sekulow, I only have 5 minutes.

Mr. SEKULOW. Please, please.

Mr. POE. I'll let you talk when I'm through.

Mr. SEKULOW. No, no, no, your floor.

Mr. POE. Not only that, you've got the Justice Department, Eric Holder, representing Lois Lerner in court.

Mr. SEKULOW. That's what I was going to hold up.

Mr. POE. Where I come from, you cannot have lawyers for one law firm and the same lawyers on the other law firm representing opposing individuals. It's a violation of ethics. Is that not generally true, Mr. Sekulow?

Mr. SEKULOW. It is. Their argument is, Congressman, that it's different departments handling it.

Mr. POE. It's still the Justice Department.

Mr. SEKULOW. Of course, it is. It's still within the Justice Department.

Mr. POE. Just a second, just a second. I know you're talking. I'm like Mr. Johnson, I admire your passion.

Mr. SEKULOW. No, go, please.

Mr. POE. But Eric Holder is defended by the Justice Department—

Mr. SEKULOW. Right.

Mr. POE [continuing]. In the District Court here whether or not to uphold the contempt, so he's in court as a defendant, taxpayers are paying for his lawyer. I personally think he ought to get his own lawyer. Taxpayers shouldn't pay for his lawyer. He should get his own criminal defense lawyer. And yet they're on the other side as well or we have private lawyers on the other side trying to get the district judge to make a decision. Doesn't this seem a little bizarre, that you've got the government representing the accused individuals on one side and the prosecution on the other? My question is, maybe we should step back eventually and pass legislation

that the District or Circuit Court, like in D.C., should have jurisdiction to pick a special prosecutor when it's the Attorney General that is in trouble with Congress. What do you think about that?

Mr. SEKULOW. I think it's an interesting proposal. You would have to look at the ramifications and how it would affect the working of the Department of Justice, but you raise the right issue, and that is, I'm holding up the lawsuit. So, in this particular case, this is our amended complaint, you've got the Department of Justice representing the IRS and all the government officials, also the individuals, and the individuals also have outside counsel, which I believe are being paid for by taxpayer dollars. I'm not a hundred percent sure of that.

Mr. POE. With my analogy, if I might have one more question, with my analogy of the district attorney being indicted for corruption, it's like having the district attorney's office represent the district attorney in court?

Mr. SEKULOW. Right.

Mr. POE. Yet the district attorney has got to pick the prosecutor to prosecute him or her for corruption. That seems a little bizarre.

Mr. SEKULOW. Lack of incentive to get to the bottom line of the issue, that's the problem, yes.

Mr. POE. I yield back.

Thank you.

Mr. GOWDY. The gentleman from Texas yields back.

The Chair will now recognize himself for questioning.

Professor Tiefer, would you seat a juror who referred to your client as an obscene body part?

Mr. TIEFER. I'm sorry?

Mr. GOWDY. Would you seat a juror in a trial who referred to your client as an obscene body part?

Mr. TIEFER. I really have trouble giving you an answer, except it sounds like it's bad.

Mr. GOWDY. Well, then you would starve to death as a lawyer if you can't answer that question, Professor. You would seriously consider seating a juror in a trial, a criminal trial, where your client was accused of a crime if that juror had referred to your client as an obscene body part, you would struggle with whether or not to strike that juror?

Mr. TIEFER. Well, it doesn't sound too good.

Mr. GOWDY. No, it's not, and I'll give you some free litigation advice, you'll want to use one of your strikes on that juror.

How about if you were a prosecutor, and one of the potential jurors referred to the police as terrorists who were going to bring the country down, would you seat that juror in a criminal prosecution if you were the prosecutor?

Mr. TIEFER. I wish I saw the connection here, but—

Mr. GOWDY. I'll give you the connection. Lois Lerner just referred to conservatives as an obscene body part, and she said we were crazies and likened us to terrorists.

Mr. JOHNSON. Well, Mr. Chairman, if I—

Mr. GOWDY. You are not recognized. The gentleman from Georgia is not recognized.

Mr. JOHNSON. Well, would the gentleman yield?

Mr. GOWDY. No, sir, I will not.

Let's go to the regulation, Professor. Conflict of interest for the Department. People like standards, they like bright lines, so I thought it would be interesting to go find out what the Attorney General's standard is for recusal, and you know when he recuses himself? I'll quote him: "When there's the potential appearance of a conflict. He recused himself from a criminal prosecution when there's the potential appearance of a conflict." Those are his words, not mine.

So that's the standard for when there should be a conflict. I want us to analyze whether or not there could possibly be the potential appearance of a conflict. You have the President of the United States—when I ask a question, it will be very clear, Professor. The President of the United States in the most widely viewed television show in our country said there's not a smidgen of corruption. You don't think that is the potential appearance of a conflict?

Mr. TIEFER. For the issue of a special counsel, which is what I'm here for, I think—

Mr. GOWDY. How about giving me a yes or no, and then you can explain your answer.

Mr. TIEFER. I think it's irrelevant what the President says to whether there is a conflict of interest.

Mr. GOWDY. Well, what if a judge says let's go give this guilty bastard a trial, is that irrelevant? Would you want that judge? If he prejudged the outcome of a prosecution, said let's go give this guilty guy a fair trial.

Mr. TIEFER. Given the independence of the public integrity section for the last 30 years, I don't think it matters what the President says.

Mr. GOWDY. So you don't think it matters that the chief law enforcement officer for this country before there is an investigation, while there are emails missing, before he has analyzed one scintilla of evidence prejudices and says there's not a scintilla of corruption, you don't think that matters? You don't even think it creates the potential appearance of a conflict?

Mr. TIEFER. I absolutely reject that the standard here is the standard you're naming for recusal. If he recuses himself, it's still the same Justice Department without a special counsel who—I'm sorry.

Mr. GOWDY. How about when the Department of Justice trades emails with Lois Lerner seeking to implement an idea from a Democrat Senator? Do you know Senator Whitehouse?

Mr. TIEFER. My understanding is the idea was rejected after the meeting in question, that the idea was—

Mr. GOWDY. I'm simply saying, do you really want the Department of Justice and the IRS taking their prosecutorial advice from a Democrat Senator? I thought the Department of Justice was blindfolded.

Mr. TIEFER. I'm glad they rejected the idea.

Mr. GOWDY. I'm sad that they even discussed it. I'm sad that they even discussed pursuing because when the AG sits where Professor Rotunda is, all we hear about is how he doesn't have the resources to actually do his job, and now they're going to contemplate manufacturing false statement cases?

Mr. TIEFER. The standard is not a potential—

Mr. GOWDY. So you do not think there is even the potential appearance of a conflict?

Mr. TIEFER. That's not the standard. You're talking about recusal, which is whether it's the AG or the deputy AG who deals with the matter, that's recusal.

Mr. GOWDY. All right. Just so the record is clear, you don't—

Mr. TIEFER. This is special counsel, which is whether—

Mr. GOWDY. So you don't think there's even a potential appearance of a conflict?

We're not even going to get into Ms. Bosserman.

How about extraordinary circumstances? Do you think it is extraordinary when a government agency targets people based on their political ideology, do you think that that is extraordinary?

Mr. TIEFER. I think it's an issue with the Department of Justice, not the IRS. The IRS is much criticized, and I assume rightly so, but the Department of Justice under the special counsel regulation is the one we're talking about here.

Mr. GOWDY. Well, I'll tell you what, let's go to the third element. How about whether it would be in the public interest to do so? Would you agree to let our fellow citizens decide whether or not they think a special prosecutor is warranted in this case? That's the third element.

And, by the way, the Attorney General drafted this regulation, this CFR. So I assume he put in there it would be in the public interest to do so. Would you agree to let our fellow citizens decide whether or not there should be a special prosecutor?

Mr. TIEFER. You mean by poll?

Mr. GOWDY. However. We elect Presidents that way.

Mr. TIEFER. No, I don't think polls should tell the Department of Justice what laws to enforce. No, I don't.

Mr. GOWDY. So you see no potential conflict of interest, you don't think this is an extraordinary fact pattern, and you don't trust your fellow citizens to make the call?

Mr. TIEFER. It's not a matter of trusting. You can't run the Department of Justice and decide extraordinary questions of the law by poll numbers. No, I would not.

Mr. GOWDY. Neither can you prejudge the outcome of an investigation that hasn't even started. You can't do that when you are the chief law enforcement officer for this country, and it wasn't a hot mike situation where he's whispering to Eric Holder. It's on the most watched television show in our culture, and he prejudices an investigation, and you want us to expect that the outcome of this is going to have any validity or credibility? It's not going to happen.

And with that, I would recognize the gentleman from Idaho.

Mr. LABRADOR. Thank you, Mr. Chairman.

I just have a couple questions.

Professor, you say in your testimony that Democrats requested special counsels to investigate accusations of torture by the Bush administration and possible perjury by the Attorney General Gonzalez. You also said that you didn't think in those cases there should be an appointment of a special counsel; is that correct?

Mr. TIEFER. I thought that it was within the discretion of the Attorney General. I'm not sure I said that it shouldn't be done.

Mr. LABRADOR. So do you think there should ever be a special counsel appointed?

Mr. TIEFER. I think that the one in the Bush administration, the one regular one we know of in the Bush administration, Patrick Fitzgerald, on the Libby Scooter matter, I think that was a good choice.

Mr. LABRADOR. So you're okay with special counsels being appointed, yes or no?

Mr. TIEFER. Yes.

Mr. LABRADOR. Yes, okay. Now, you also seem to think that the Congress has its authority in the future to stop whatever abuses of the executive authority. So what other tools do we have to stop any abuse of the executive authority?

Mr. TIEFER. Every year, the money has to be appropriated for them. You put on riders, and they don't have the money to do whatever it is you're saying is wrong.

Mr. LABRADOR. Okay, so just through the appropriations process?

Mr. TIEFER. Well, you also have the authorizing process here. That is, if you pass a statute and say the Department of Justice should no longer do this, that, and the other thing, this is the Committee on the Judiciary.

Mr. LABRADOR. Now, there seems to be some evidence suggesting that the DOJ colluded with the IRS regarding prosecution of conservative groups. If the DOJ colluded with the IRS to target organizations on the basis of their political beliefs, wouldn't that be a conflict of interest and require a special prosecutor?

Mr. TIEFER. Oh, I think that I'm a little unsure about the discussion here, but in any event, factually, the idea was rejected, and the question is from rejecting an idea, should there be a special counsel on it, do they have a conflict of interest?

Mr. LABRADOR. If they actually colluded and if they were actually working together to go after conservative groups, don't you think that's enough evidence of a conflict of interest? I'm not asking you to determine whether there was a collusion, but if there is an actual collusion, don't you think that's enough evidence?

Mr. TIEFER. It's one of those hypotheticals that I can't get my mind around because the Public Integrity Section I've known for 30 years wouldn't do such things.

Mr. LABRADOR. Okay. So your testimony today is that you trust the Public Integrity Section, that you think that they can make these decisions. But many of us trusted the IRS that they wouldn't make these kind of decisions. So at what point do we start thinking that there's an Administration that has just gone above and beyond what we have thought in the past? Most of us didn't like the IRS before because we don't like paying taxes, but we never assumed that they would go after different groups just because the leader of their group was somebody not to their liking.

Mr. TIEFER. I won't quarrel with you. I understand the parallel you're making.

Mr. LABRADOR. Okay.

Mr. Sekulow, can you tell me at what point—I'm having a hard time understanding from my friends on the other side if they have a bright line rule of when we actually need to have special counsel

because the professor seems to be arguing that it's the Attorney General who decides, and I agree with that.

Mr. SEKULOW. Right.

Mr. LABRADOR. I don't think we need to decide. I think the Attorney General decides. But at what point should we decide or should there be a bright line that that automatically goes to a special counsel, or should we even have that bright line?

Mr. SEKULOW. Well, there's been a continuing debate about the whole reinstatement of an independent counsel statute, and I think probably it's pretty overwhelming people don't want it. The integrity of the system rests on the ability of the Attorney General to make the decision, but it needs to be made on a decision where there is evidence being presented, which I think is what your House Resolution did, urging, which is the appropriate response, to take action. The inaction here is palpable. I mean, my team has been in these meetings with these FBI agents. This is a faux investigation, this is not a real investigation. I mean, they're talking about, you know, how long were you placed on hold in talking to a revenue agent instead of asking where in the world are Lois Lerner's emails, and how in the world did she write that my clients were A-holes, her words, okay, and worse than foreign terrorists. And she's a member of the Senior Executive Service at the IRS, which is a very high ranking position.

Mr. LABRADOR. That's outrageous.

Mr. SEKULOW. Yeah, outrageous, and what's the response? Well, the Department of Justice is investigating it. That's the problem. The Attorney General could end this himself. He's the one who raised the specter of criminality, I believe it was in this room or next door, he raised the specter when he said it could be violations of 242. He should now realize he's been compromised or his agency has been compromised, appoint somebody that will get to the bottom of this quickly.

Mr. LABRADOR. All right. Thank you.

I yield back my time.

Mr. KING [presiding]. The gentleman yields back.

The Chair would now recognize himself for his 5 minutes, and I turn first to Mr. Sekulow, and I would say that, you know, as I have listened to the dialogue that exchanged back and forth, it has been as rapid fire and fiery as anything I've heard in here in a while. I appreciate the intensity of that matter, and I think this has been sliced and diced with a significant focus, but to bring it back to the larger focus, I would pose this from the hypothetical part of this, and that is that let's just suppose that we had a President of the United States and inside the operation, he had a network of Cabinet members that were utilizing the assets and resources of the executive branch to advance the political interests of his political party and punish the political interests of the opposing political party and to whatever level of potential criminality that might be and however that network might lead its way up through the chain from, let's say, perhaps, an office out somewhere in the Midwest working its way up through the chain and to the White House itself, and if the Attorney General was part of that understanding, and if the Cabinet members were part of that understanding that they were going to lock together and resist, then

what would be the alternative for the United States Congress, and what would be the alternative for the American people to try to get justice if a relentless suppression of their liberty was being enacted in such a fashion?

Mr. SEKULOW. If a fortress mentality were to be utilized by the executive to protect itself and its team, and the Department of Justice becomes part of that, which is the situation here, nothing. There's nothing the American people other—short of the next election cycle, but a lot could happen to the country between that point—that's the reality. That's the problem. I'm not saying let's get an independent counsel statute back on the books, but I'm saying you're the Attorney General of the United States. This is a mess. You know it's a mess. We know it's a mess. Put somebody in charge to restore confidence of an agency, don't get into a fortress mentality, which is what they're in right now.

Mr. KING. Well, let me suggest that we've seen a response from the American people, and I draw the comparison of Obamacare, when tens of thousands of people came to this Capitol, surrounded the Capitol building for the first time in the history of America, and rose up in objection to their God-given liberty, the risk, the threat that it would be usurped by Obamacare itself. And the response of the American people was, as you mentioned the election, Mr. Sekulow, 87 freshmen Republicans came to the United States Congress as a result of that overreach, and all 87 pledged to repeal Obamacare. And every Republican since then has voted to repeal Obamacare, and still we have Obamacare, and still we're stuck in this place, so the quick response of the hot cup of coffee in the House of Representatives isn't adequate. Could you take that another step?

Mr. SEKULOW. Well, in a situation like that, which is the reality in the world we live in, the problem is, how do people seek recourse and redress? I mean, that's really what's at the bottom here, and where I think this is significant, and not to diminish in any way, Congressman Johnson, any other issues that you are compelled or you are passionate about in dealing with, but this isn't insignificant. This is really significant. This is the core of our freedom, this is the core of the republic, the ability to engage your government for a redress of a grievance, for freedom of speech and freedom of association, and when you get targeted by an agency and their answer, Congressman, is, we apologize for that, we have a serious problem, and that's when the Attorney General needs to take serious action, which he's refusing to do right now.

Mr. KING. Let me take another step. Another round of elections and perhaps then you see the same kind of fury that came about in 2010, and that's reflected within a change in the majority in the United States Senate.

Mr. SEKULOW. Yeah.

Mr. KING. Is that enough then to fix this problem with the IRS having software that targets people that say, I'm a patriot?

Mr. SEKULOW. No, because the bureaucracies are running the government.

Mr. KING. And so when I get criticism from my constituents that say, Why don't you do something about the IRS abuse of me and my neighbors and my friends, how do I respond to them?

Mr. SEKULOW. This is the real situation we live in, and I said this, and it could get you in a little bit of trouble. It's almost as if the Presidency doesn't matter. The government is being run by the bureaucrats. The bureaucrats have no accountability. You pass laws, they're signed by the President, and then the regulations overtake the law. That's the bureaucratic nonsense we're living in, and that's why they're able to put out emails with these kind of nasty—who even would think about writing an email like that on a government computer? And yet they do it with impunity, and that's the problem.

Mr. KING. And then if we continue with this, if there was a process to remove the obstructing bureaucrat, do you think that would change anything?

Mr. SEKULOW. I think that would—if there was a process to remove the obstructing bureaucrat, if there was a price to be paid by bureaucrats that do this, I think that would go a long way. Right now, the defense of the Department of Justice to our lawsuit is, sorry, you don't get to touch them because they're acting in their official capacity.

Mr. KING. And they will drag this out until this Administration leaves the White House, and I believe that there's a calculation that's been made, even if we have to sit under oath and lie to the United States Congress, the price for that is less than the price for admitting the truth. Would you agree with that?

Mr. SEKULOW. Well, I think that there is a serious argument to be made that the American people are not getting truthful answers, period.

Mr. KING. No question. I thank all the witnesses for your testimony here, and I appreciate the panel for the intensity you brought to this.

Mr. BACHUS. Mr. Chairman?

Mr. KING. This concludes today's hearing.

Mr. BACHUS. Mr. Chairman?

Mr. KING. Thank you to all of our witnesses, and I adjourn this hearing.

Mr. BACHUS. Mr. Chairman?

Mr. KING. Oh, excuse me, I would yield to the gentleman from Alabama.

Mr. BACHUS. Mr. Chairman, I would like to have an opportunity to follow up on some questions before he left.

Mr. KING. I temporarily recognize the gentleman from Alabama to follow up.

Mr. BACHUS. Professor Rotunda—

Mr. ROTUNDA. Uh-huh.

Mr. BACHUS [continuing]. You actually served, I note, as assistant majority counsel of the Senate Watergate Select Committee?

Mr. ROTUNDA. Yes.

Mr. BACHUS. This really has the makings of a Watergate. There the President was accused of basically taking down, attempting to take down his political opponents by using the IRS. The IRS resisted. In this case the IRS, it wasn't an attempt, the IRS is actually taking down their, you know, they're bringing action against their political enemies. So in the second count in the impeachment was that they attempted, that the President or the Administration

attempted to take down their opponents, but in this case, we have evidence that the IRS was being used for political purposes.

Mr. ROTUNDA. We hope it would not come to that, and that's why the advantage of an independent counsel is that we can rely on that, and if he tells us it doesn't go much further or maybe goes to Lois Lerner or the person just above her, we would be happier.

Mr. BACHUS. As opposed to the Attorney General, who is the chief political officer for the President, among other—he has political interests. He has personal interests, and he probably has financial interests, which are three of the definitions of conflict of interest. I looked at the statute, I think one thing that we really need to do is look at the statute, and all of a sudden, I'm wondering where it is.

Mr. ROTUNDA. Is this the special counsel regulation?

Mr. BACHUS. The special counsel.

Mr. ROTUNDA. Oh, yeah.

Mr. BACHUS. And we've talked about presenting a conflict of interest, but we also, what we didn't talk as much about is extraordinary circumstances. Now, when you have an email that says we are looking for a magic bullet to take down our political opponents, that's extraordinary.

Mr. ROTUNDA. It's scary.

Mr. BACHUS. It is.

Mr. KING. Could the gentleman expedite his inquiry?

Mr. BACHUS. Yes. Well, I'm just going to say it. It also says when it would be in the public interest, and you know, there was a bipartisan resolution, not a partisan, a bipartisan resolution of this Congress, including that was voted on by both Republicans and Democrats, and two Democrats on this Committee voted for a resolution urging the Attorney General, but and then, of course, we have George Will, and I'm going to close with this. This will be it.

Mr. KING. Okay.

Mr. BACHUS. He said he wished the Justice Department was interested in this investigation, but the trouble is that instead, the Justice Department is uninterested in this investigation, and I think we need to ask ourselves, why aren't they doing this? They have a duty under Section 3 of the special counsel thing to conduct an ably expeditious and thorough investigation. Now, that is part of the—

Mr. KING. The gentleman's time has expired.

Mr. BACHUS. And they're not doing any of those things.

Mr. KING. And—

Mr. JOHNSON. Mr. Chairman—

Mr. KING [continuing]. This concludes today's hearing. I want to thank all the witnesses for attending.

Mr. JOHNSON. Mr. Chairman.

Mr. KING. Without objection, all Members will have 5 legislative days—

Mr. JOHNSON. Mr. Chairman?

Mr. KING [continuing]. To submit additional written questions for the witnesses or additional materials—

Mr. JOHNSON. Mr. Chairman, I just have—

Mr. KING [continuing]. For the record, and I would point out to the gentleman from Georgia that there's a hearing upstairs that must commence exactly at 1.

Mr. JOHNSON. Just one statement.

Mr. KING. Thirty seconds.

Mr. JOHNSON. Thirty seconds?

Mr. KING. Yes.

Mr. KING. And I'm ready to adjourn.

Mr. JOHNSON. I just want everybody to know that should I ever have an issue with the First Amendment and my case needs to go all the way up to the U.S. Supreme Court, I'm going to call Jay Sekulow and the American Center for Law and Justice, regardless of whether or not it's a progressive or conservative issue. I just wanted to state that for the record.

Mr. KING. I thank the counsel, my friend from Georgia—

Mr. JOHNSON. Thank the Chairman.

Mr. KING. And this hearing is adjourned.

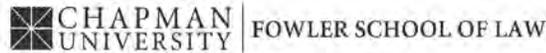
[Whereupon, at 1:01 p.m., the Committee was adjourned.]



A P P E N D I X

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RE: Testimony of July 30, 2014  
VIA: Federal Express

Dear Congressman Goodlatte:

Enclosed is a copy of my testimony with my typographical corrections at pp. 24,25,26,27, & 116.

In addition, I wish to append to my remarks. At p. 55, I was asked to list some authority for the proposition that the prosecutor or chief law enforcement officer is in a conflict if his duty to engage in the objective enforcement of the law conflicts with his prejudgment of the case. I mentioned the command influence cases that govern military justice and apply to the Commander-in-Chief.

I was asked to name others but I did not because I did not have access to my computer. Now, I do. What follows are a few of the other cases and authorities that support that same proposition:

The general rule is that a prosecutor or chief law enforcer officer (e.g., the President, who is the chief law enforcement officer of the United States) must not be in a conflict that results in him appearing to prejudge the case or prejudging the guilt or innocence of a prospective defendant. The conflict manifests itself in various ways. E.g., *People v. Rhodes*, 524 P.2d 363 (Cal.1974) (city attorney with prosecutorial responsibilities may not act as defense lawyer). Similarly, the Department of Justice may not act as defense counsel for the IRS while purportedly investigating the IRS on the

same matter. See also, *People v. Superior Court (Greer)*, 561 P.2d 1164 (Cal.1977). The court upheld the trial court's decision to disqualify the district attorney from prosecuting a murder case. A district attorney may prosecute vigorously, "but both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case." 561 P.2d at 1172.6 See ABA Model Rule 1.7(a)(2) ("personal interest of the lawyer"). *Lewis v. Superior Court*, 62 Cal.Rptr.2d 331 (Cal.Ct.App.1997), the defendant was the auditor-controller of Orange County whose alleged negligent supervision of the county treasurer's investment of county funds contributed to the county's need to seek bankruptcy protection. The prosecutor apparently took the case personally. The court ordered the entire county prosecutor's office disqualified from handling the case. *In re Appointment of Special Prosecutor*, 2002 WL 34491483 (Ill. Cir. 2002) dealt with an issue similar to the issues facing the Department of Justice purportedly investigating the IRS while simultaneously defending the IRS in various lawsuits all involving the same issue — the IRS targeting of organizations because of their beliefs. Petitioners argued that the presently elected Cook County State's Attorney should not be involved in prosecuting those he has defended for the same conduct. The court agreed and appointed a special prosecutor. As *Commonwealth v. Balenger*, 772 A.2d 86, 91, PA Super.2001, appeal denied 790 A.2d 1012, 567 Pa. 755 (1992), explained:

A true "conflict" of interest occurs when a party has competing professional and personal interests, each of which will be served by opposing results. If a prosecutor is asked to prosecute someone he would not wish to see convicted, a relative or friend, perhaps, or if the prosecution of someone will somehow have an adverse effect on the prosecutor's personal interests, he will be experiencing a "conflict" of interests. His professional obligation will be in conflict with his personal desire or feelings and thereby threaten, or at least call into question, the performance of his professional duties.

As the ABA points out, in Standard 3-1.3, "Conflicts of Interest," ABA Standards for Criminal Justice 3-1.3 (3d ed. 1993): "(f) A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests." Reprinted in, RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, THE LAWYERS DESKBOOK ON PROFESSIONAL RESPONSIBILITY *App. J* (2013-2014 ed.)

In short, a "conflict" exists, for purposes of determining whether recusal of a prosecutor is appropriate, if "the circumstances of a

case evidence a reasonable possibility that the district attorney's office may not exercise its discretionary function in an evenhanded manner." *People v. Sy*, 166 Cal.Rptr.3d 778, 797, 223 Cal.App.4th 44, 67 (App. 4 Dist. 2014), *review denied* (May 14, 2014).

Please append these remarks at the appropriate place in my testimony. Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ronald D. Rotunda".

Ronald D. Rotunda  
Doy & Dee Henley Chair and Distinguished Professor of  
Jurisprudence