



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 investigation¹ 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.² 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.³

¹ H.R. Res. 565, 113th Cong. (2014).

² 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.

³ 28 C.F.R. § 600.1 (1999).

**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.⁴

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.⁵ 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.

⁴ 28 C.F.R. § 600.2 (1999).

⁵ 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>.

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 1st 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.⁶ *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.⁷

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.⁸

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

⁶ Matthew Clark, *More IRS Offices than Single Cincinnati Office Sent Inquiry Demands to Targeted Tea Party Groups*, AM. CTR. 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>.

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

⁸ 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/>.

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

Wednesday, July 30, 2014

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 . . .⁹

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.¹⁰

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.

. . . .

⁹ 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>.

¹⁰ 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/>.

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

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.¹¹

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.”¹²

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.¹³

¹¹ 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-f7aa-4e47-8668-615a2b44b0f6/113-43-80973.pdf; Accessed: 7/28/14.

¹² 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>.

¹³ 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>.

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

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.¹⁴

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.¹⁵

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

¹⁴ 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>.

¹⁵ 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).

¹⁶ 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).

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

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

Wednesday, July 30, 2014

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.”¹⁸ 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.¹⁹

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.²⁰

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.²¹ These emails also show that the DOJ is not impartial; rather the DOJ was complicit

¹⁸ *Id.*

¹⁹ 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).

²⁰ E-mail from Lois Lerner, *supra* note 13, at 4.

²¹ *See* E-mail from Ayo Griffin, *supra* note 14.

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

Wednesday, July 30, 2014

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.²² 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.

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

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

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.²³ The DOJ has been compromised.

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

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.²⁶ Both H.Res. 565 and the joint letter sent to Attorney General Holder accurately state the standards for the appointment of a Special Counsel.²⁷ 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.²⁸

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.²⁹ As I have already stated, multiple conflicts exist.

²³ See E-mail from Lois Lerner, *supra* note 18.

²⁴ 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>.

²⁵ Cf. Letter from Bob Goodlatte & Dave Camp, *supra* note 2.

²⁶ 28 C.F.R. § 600.2 (c) (1999).

²⁷ See Letter from Bob Goodlatte & Dave Camp, *supra* note 2.

²⁸ 28 C.F.R. § 600.1 (1999).

²⁹ See *id.*

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

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,”³⁰ 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.”³¹ 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.³²

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.”³³

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.³⁴ 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

³⁰26 U.S.C. § 7206 (2010).

³¹E-mail from Lois Lerner, *supra* note 13, at 4.

³²26 U.S.C. § 7206 (2012).

³³18 U.S.C. § 241.

³⁴28 C.F.R. § 45.2(a)(1)–(2) (2006).

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

Wednesday, July 30, 2014

- (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.³⁵

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.³⁶ 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.³⁷ 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.”³⁸ 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.”³⁹ 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.”⁴⁰

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.⁴¹

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,”⁴² 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.”⁴³

³⁵ *Id.*

³⁶ *Id.*

³⁷ 28 C.F.R. § 45.2(b) (2006).

³⁸ 28 C.F.R. § 45.2(b)(2) (2006).

³⁹ DEP’T OF JUSTICE, DEP’T ETHICS OFFICE, ETHICS HANDBOOK (2010), *available at* http://www.justice.gov/jmd/ethics/ethics_handbook.pdf (emphasis added).

⁴⁰ 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>.

⁴¹ *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 (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.’”).

⁴² 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>.

⁴³ *Id.*

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

Wednesday, July 30, 2014

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.”⁴⁴ 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.”⁴⁵ Neither the Justice Department’s previous actions nor their written policy support Ms. Iverson’s statement.⁴⁶ 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.

⁴⁴ 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/2014/01/09/980c010a-796a-11e3-8963-b4b654bcc9b2_story.html.

⁴⁵ *Id.*

⁴⁶ See 28 C.F.R. § 45.2(a)(1)–(2) (2006).