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LEGISLATIVE TESTIMONY

**“ONGOING OVERSIGHT: MONITORING THE ACTIVITIES OF THE JUSTICE
DEPARTMENT’S CIVIL, TAX AND ENVIRONMENT AND NATURAL RESOURCES
DIVISIONS AND THE U.S. TRUSTEE PROGRAM”**

**Testimony before the Committee on the Judiciary, Subcommittee on
Regulatory Reform, Commercial and Antitrust Law**

U.S. House of Representatives

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

Prior to joining the Heritage Foundation, I was a Commissioner on the Federal Election Commission for two years. Before that I spent four years at the Department of Justice as a career civil service lawyer in the Civil Rights Division. I started as a trial attorney and was promoted to Counsel to the Assistant Attorney General for Civil Rights, where I helped coordinate the enforcement of federal laws that guarantee the right to vote. I was privileged to be involved in dozens of cases on behalf of Americans of all backgrounds to enforce their right to register and vote in our elections.²

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² I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia, a county that is almost half African-American. In Virginia, I was Vice Chairman of the Fairfax County Electoral Board for three years, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I have published extensively on elections, voting, civil rights and government reform issues, including the management of the Justice Department and its Civil Rights Division and the handling of its enforcement responsibilities. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.

I appreciate the invitation to be here today to discuss oversight of the conduct of the Justice Department. I want to highlight two cases in which Justice Department lawyers in the Civil and Tax Divisions failed in their ethical and professional duties of representing the best interests of the public and providing competent and diligent representation of their clients.

U.S. v. NorCal Tea Party Patriots, et al.

On March 22, 2016, a three-judge panel of the Sixth Circuit Court of Appeals issued a unanimous opinion in *U.S. v NorCal Tea Party Patriots*, castigating the IRS — and Justice Department lawyers in the Tax Division— for their misbehavior in a lawsuit filed by one of the Tea Party organizations that was targeted by Lois Lerner and the IRS.³ The court accused the IRS and its DOJ lawyers of doing everything they could to delay, avoid, and prevent revealing to the public the IRS’s abuse of taxpayers and its political targeting of citizens.

This case was before the Sixth Circuit on a writ of mandamus filed by the Justice Department over a discovery battle in a lawsuit filed by NorCal Tea Party Patriots in 2013. As the court’s opinion outlines, what happened to NorCal when it applied for tax-exempt status is typical of what happened to many other conservative organizations.

NorCal sent its application to the IRS in April 2010. In July, the IRS sent NorCal a letter requesting additional information. NorCal promptly sent the IRS an additional 120 pages of information.

Eighteen months went by with no further word from the IRS until January 2012, when the IRS suddenly demanded more information in a five-page, single-spaced letter with 19 separate requests, almost all of which had numerous subparts, with only three weeks to reply. Almost everything the IRS asked for was not needed to determine whether NorCal was entitled to tax-exempt status. NorCal provided the IRS with 3,000 more pages of material with no further response from the IRS.

One week after the Treasury Department Inspector General released his report in May 2013 about the IRS’s inappropriate targeting of organizations like NorCal, the Tea Party organization filed suit in federal district court.

NorCal then got into a discovery battle with the IRS, which refused to turn over basic information on the different conservative organizations that the IRS targeted, as well as the names of the IRS employees involved in improper targeting activities, for the purposes of determining whether a class action lawsuit would be appropriate. The response of the IRS and DOJ, according to the Sixth Circuit, has “been one of continuous resistance.”⁴

³ 817 F.3d 953 (6th Cir. 2016).

⁴ NorCal, 817 F.3d at 958.

In fact, the first page of the Sixth Circuit’s opinion provides a superb summary of the outrageousness of the targeting scandal itself and the administration’s subsequent delaying actions:

Among the most serious allegations a federal court can address are that an Executive agency has targeted citizens for mistreatment based on their political views. No citizen — Republican or Democrat, socialist or libertarian — should be targeted or even have to fear being targeted on those grounds. Yet those are the grounds on which the plaintiffs allege they were mistreated by the IRS here. The allegations are substantial: most are drawn from findings made by the Treasury Department’s own Inspector General for Tax Administration. Those findings include that the IRS used political criteria to round up applications for tax-exempt status filed by so-called tea party groups; that the IRS often took four times as long to process tea-party applications as other applications; and that the IRS served tea-party applicants with crushing demands for what the Inspector General called “unnecessary information.”

Yet in this lawsuit the IRS has only compounded the conduct that gave rise to it. The plaintiffs seek damages on behalf of themselves and other groups whose applications the IRS treated in the manner described by the Inspector General. The lawsuit has progressed as slowly as the underlying applications themselves: at every turn the IRS has resisted the plaintiffs’ requests for information regarding the IRS’s treatment of the plaintiff class, eventually to the open frustration of the district court. At issue here are IRS “Be On the Lookout” lists of organizations allegedly targeted for unfavorable treatment because of their political beliefs. Those organizations in turn make up the plaintiff class. The district court ordered production of those lists, and did so again over an IRS motion to reconsider. Yet, almost a year later, the IRS still has not complied with the court’s orders. Instead, the IRS now seeks from this court a writ of mandamus, an extraordinary remedy reserved to correct only the clearest abuses of power by a district court. We deny the petition.⁵

In its 17-page opinion, the Sixth Circuit detailed how the IRS and DOJ lawyers misinterpreted the law and constantly fought having to produce any materials, documents, or information to the district court. The Sixth Circuit derided the IRS for having claimed at one point that “it would be unduly burdensome” for the agency to collect the names of the employees who worked on the applications of the tax-exempt groups — this “in a case where the IRS forced the lead plaintiff to produce 3,000 pages of what the Inspector General called ‘unnecessary information.’”⁶

⁵ NorCal, 817 F.3d at 955.

⁶ NorCal, 817 F.3d at 959.

At one point early in the litigation, the Justice Department made the frivolous claim that federal law (26 U.S.C. § 6103) barred Justice Department lawyers from reviewing the taxpayer information being sought by the plaintiffs that the district court was ordering the IRS to produce. This claim was asserted despite the fact that the statute “expressly allows the [Justice] Department’s attorneys to review a taxpayer’s return information to the extent the taxpayer ‘is or may be a party to’ a judicial proceeding.”⁷ Most crucial in any evaluation of the conduct of the Tax Division of the Justice Department is the conclusion of the district court, upheld by the Sixth Circuit, that the constant objections made by the IRS and DOJ lawyers were “meritless.”⁸ Making “meritless” and frivolous claims is a direct violation of Rule 3.1 of the American Bar Association’s Model Rules of Professional Conduct.

As the Sixth Circuit’s opinion explained, the district court judge grew very angry over this behavior. At a discovery conference in December 2014, the district court judge said that “everything in this case seems to be turning into an argument on discovery.” He accused the IRS of “running around in circles and not answering the questions.” In October, the judge again admonished the IRS and DOJ lawyers saying that the “government is doing everything it possibly can to make this as complicated as it possibly can, to last as long as it possibly can, so that by the time there is a result, nobody is going to care except the plaintiffs... *I question whether or not the Department of Justice is doing justice.*”⁹

DOJ filed a writ of mandamus with the Sixth Circuit, asking it to overturn two discovery orders that the district court had entered against the IRS. The Sixth Circuit quickly denied the writ, criticizing DOJ for trying to misuse federal statutes that protect taxpayer privacy. Those provisions do “not entitle the IRS to keep secret (in the name of ‘taxpayer privacy,’ no less) every internal IRS document that reveals IRS mistreatment of a taxpayer or applicant organization — in this case or future ones. [Federal law] was enacted to protect taxpayers from the IRS, not the IRS from taxpayers.”

The Sixth Circuit ordered the IRS to immediately comply with the district court’s discovery orders “without redactions, and without further delay.” In closing, the Sixth Circuit “echoed” the district court’s reprimand of the Justice Department lawyers who aided, abetted, and facilitated the recalcitrant and defiant behavior of the IRS in refusing to turn over evidence in this case:

⁷ NorCal, 817 F.3d at 958-959.

⁸ NorCal, 817 F.3d at 959.

⁹ NorCal, 817 F.3d at 959 (emphasis added).

The lawyers in the Department of Justice have a long and storied tradition of defending the nation's interests and enforcing its laws – all of them, not just selective ones – in a manner worthy of the Department's name. *The conduct of the IRS's attorneys in the district court falls outside that tradition.*¹⁰

Rule 3.4 of the ABA Model Rules of Professional Conduct prohibits a lawyer from obstructing “another party’s access to evidence” and a lawyer “shall not counsel or assist another person to do any such act.” There seems little question that the lawyers in the Tax Division of the Justice Department violated this rule of ethical conduct in their representation of the IRS in this case.

League of Women Voters, et al. v. Newby and U.S. Election Assistance Commission

League of Women Voters v. Newby and U.S. Election Assistance Commission is a lawsuit that was filed on February 12, 2016, in the U.S. District Court for the District of Columbia against the federal Election Assistance Commission (EAC) and its executive director, Brian Newby.¹¹ Under federal law, the EAC is responsible for the federal voter-registration form authorized by the National Voter Registration Act (NVRA). While states must register voters who use the federal form, states can ask the EAC to include instructions with the federal form about applicable state registration requirements.

A number of states, such as Kansas, Alabama, Arizona, and Georgia, have passed laws that require applicants to submit satisfactory proof of U.S. citizenship to ensure that only citizens register to vote. The lawsuit sought to overturn a routine decision by the EAC to list those state-specific instructions on its website as requested by some states, including Kansas, for anyone using the federal voter registration form to register to vote in those states. In 2013 in *Arizona v. Inter Tribal Council of Arizona*, the U.S. Supreme Court said that Arizona could not implement such a requirement for anyone using the federal registration form until the EAC agreed to change the instructions for use of the federal form to include the Arizona requirements.¹²

The EAC's executive director, Brian Newby, granted Kansas's request to modify the instructions. This action set aside an earlier 2014 decision of the former acting director, Alice Miller, in which she refused to change the instructions to include these state proof-of-citizenship requirements. At the time she made this decision, all four of the commission seats on the EAC were empty. According to evidence produced in the case, when Brian Newby asked Ms. Miller the basis for her earlier decision, she “suggested I talk to the Department of Justice attorneys who she said could explain to me what our position was...[S]he could not articulate the

¹⁰ NorCal, 817 F.3d at 965 (emphasis added).

¹¹ Case No. 2:16-00236 (D.D.C.).

¹² 133 S.Ct 2247 (2013).

substance of the final agency decision that was previously released by her, and which had been written by the Department of Justice attorneys.”

In other words, the 2014 decision of the EAC that was reversed in 2016 was not the independent decision of a bipartisan independent federal agency headed by four commissioners nominated by the president and confirmed by the Senate. Instead, the decision was made by the Justice Department, which, in essence, commandeered the authority of the EAC. The lawyers of the Civil Division of the Justice Department failed to acknowledge this involvement of DOJ lawyers in the agency’s actions when they first assumed the “defense” of the lawsuit. DOJ was apparently so concerned about evidence of its involvement becoming known that it took the astonishing step of asking U.S. District Court Judge Richard Leon to seal the deposition of EAC Commissioner Christy McCormick and claimed that only DOJ – not the EAC, the client – could waive the attorney/client privilege over what had occurred, a complete reversal of the actual rule governing the attorney/client privilege.¹³

DOJ lawyers refused to acknowledge their obvious conflict of interest in taking on the defense of a case in which DOJ lawyers were potential witnesses and decision-makers. They then proceeded to take the extraordinary action of colluding with the plaintiffs in the case who had challenged the EAC’s decision to grant Kansas’s request to modify the form. Judge Leon noted the Justice Department had “ample opportunity to submit a written opposition to the plaintiffs’” request. Instead, DOJ submitted a “short brief taking the extraordinary step of consenting to plaintiffs’ request – not for TRO but for a *preliminary injunction!*”¹⁴ Judge Leon issued an order on February 23, 2016 denying the plaintiffs’ request for a temporary restraining order against the EAC.

Civil Division lawyers – instead of defending the EAC – eventually filed a motion for summary judgment *against* their own client – the EAC! The lawyers of the Civil Division clearly appear to have violated Rule 1.3 of the ABA Model Rules of Professional Conduct, which requires a lawyer to diligently represent his client. As the comment to that rule states, this requires that a lawyer must “act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf.” Colluding with an opposing party and actively working against the interests of the lawyer’s client is one of the most unethical, unprofessional actions that a lawyer can take.

The chairwoman of the EAC was so disturbed by the conduct of the Civil Division lawyers that she sent a letter to Judge Leon on February 23, 2016, making him aware of her “grave concerns regarding the potential conflict of interest and failure of the Department of Justice (DOJ) to provide the defendants representation.” As ultimately proved to be the case, she

¹³ Rule 1.6, Confidentiality of Information, ABA Model Rules of Professional Conduct.

¹⁴ League of Women Voters v. Newby, Case No. 16-236 (D.D.C. Memorandum Order of Feb. 23, 2016), page 4, footnote 1.

did “not believe that the agency will receive the full and zealous representation it deserves” from the Justice Department lawyers.¹⁵ She notified the judge that she had sent U.S. Attorney General Loretta Lynch a letter at the same time asking her to give the EAC, which does not have independent litigating authority, permission to hire its own independent, outside counsel to provide the EAC with adequate representation.¹⁶ DOJ refused that request on February 26, 2016.¹⁷

Judge Leon was so dismayed at the behavior of the Justice Department that he allowed the Public Interest Legal Foundation and Kansas Secretary of State Kris Kobach to intervene in the case in order to defend the EAC’s action. The Justice Department’s claim that it had no legal basis on which to defend the EAC was obviously without merit; both of the intervenors provided a legal defense for the EAC. In fact, based on that defense, Judge Leon not only refused to grant the temporary injunction DOJ wanted to consent to, he also refused to grant the preliminary injunction requested by the plaintiffs and DOJ. In an order issued on June 29, 2016, he said, “in the final analysis, what lies at the heart of this case are the scope of the authority and legality of the actions of an *independent* federal agency that is represented here by Executive Branch counsel who, for the most part decline to defend it.”

When this case was appealed to the U.S. Court of Appeals for the District of Columbia, a three-judge panel in a two-to-one decision reversed Judge Leon and granted the preliminary injunction while the merits of the case are being resolved by the district court.¹⁸ The case remains pending and summary judgment arguments are next to be heard. That decision does not change the point that the EAC had a legally defensible position that warranted a defense by the Justice Department. Two federal judges, one at the district court and a second at the Court of Appeals, believed that the actions of the EAC were legal. Under Rule 3.1 of the model code, DOJ had an obligation to defend the EAC unless there was no “basis in law or fact for doing so that is not frivolous.” The pleadings in the case filed by the intervenors and the judgments of two federal judges make it clear that DOJ was wrong in claiming that it could not defend the agency.

In any event, if DOJ believed it ethically could not defend the agency, the proper course of action under ABA Model Rule 1.16 was for it to withdraw from representation and allow the agency to hire competent counsel that would represent the EAC zealously. In fact, the rule

¹⁵ Letter of February 23, 2016, from Christy A. McCormick, Chairwoman, U.S. Election Assistance Commission to Honorable Richard J. Leon, District Court for the District of Columbia.

¹⁶ Letter of February 23, 2016, from Christy A. McCormick, Chairwoman, U.S. Election Assistance Commission to Honorable Loretta Lynch, Attorney General of the United State.

¹⁷ Letter of February 26, 2016, from Benjamin Mizer, Principal Deputy Assistant Attorney General, to Honorable Richard J. Leon, District Court for the District of Columbia.

¹⁸ League of Women Voters v. Newby, Case No. 16-5196 (D.C. Cir. Sept.26, 2016) (dissent by Judge Raymond Randolph).

mandates that DOJ should have taken “steps to the extent reasonably practicable to protect” its client’s interests, including giving the client “time for employment of other counsel.” Its actions were the same as if a defense attorney in a criminal case marched over to the prosecution table and offered to help the prosecutor win a conviction against the defendants. Such behavior would subject that attorney to possible disbarment and yet that is, in essence, exactly what Civil Division lawyers did in this case.

Conclusion

As the Sixth Circuit said in the *NorCal* decision, the behavior of Justice Department lawyers from the Tax and Civil Divisions in these two cases “fall outside” the professional traditions of the Department. DOJ lawyers acted unethically in these cases, from filing meritless objections to discovery requests to failing their most important duty – providing zealous representation to a federal agency.

In both cases, nothing has been done – as far as I am aware – by the Office of Professional Responsibility at the Justice Department to investigate the behavior of the attorneys in either of these cases. No disciplinary actions have been taken against the supervising managers that approved this course of behavior. In fact, it seems that in regard to the EAC case, the ethical violation of failing to defend the agency was approved at the high levels of the Justice Department, given the Feb. 26, 2016 letter referenced earlier from Principal Deputy Assistant Attorney General Benjamin C. Mizer refusing the request for independent counsel.

Furthermore, the Civil Division had the deposition of the chairwoman of the agency – which could reveal DOJ’s conflict of interest in the case – sealed to prevent public disclosure of its professional misbehavior. This is reprehensible and troubling behavior by lawyers at the most important and most powerful federal law enforcement agency in the nation, and should not be tolerated.