

## House Calendar No. 100

113TH CONGRESS }  
2d Session

HOUSE OF REPRESENTATIVES

{ REPORT  
113-415

RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND LOIS G. LERNER, FORMER DIRECTOR, EXEMPT ORGANIZATIONS, INTERNAL REVENUE SERVICE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY ISSUED BY THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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### REPORT

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT  
REFORM

HOUSE OF REPRESENTATIVES

together with

ADDITIONAL AND MINORITY VIEWS



APRIL 14, 2014.—Referred to the House Calendar and ordered to be printed

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Mr. ISSA, from the Committee on Oversight and Government Reform, submitted the following

### R E P O R T

together with

### ADDITIONAL AND MINORITY VIEWS

The Committee on Oversight and Government Reform, having considered this Report, report favorably thereon and recommend that the Report be approved.

The form of the resolution that the Committee on Oversight and Government Reform would recommend to the House of Representatives for citing Lois G. Lerner, former Director, Exempt Organizations, Internal Revenue Service, for contempt of Congress pursuant to this report is as follows:

*Resolved*, That because Lois G. Lerner, former Director, Exempt Organizations, Internal Revenue Service, offered a voluntary statement in testimony before the Committee, was found by the Committee to have waived her Fifth Amendment Privilege, was informed of the Committee's decision of waiver, and continued to refuse to testify before the Committee, Ms. Lerner shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

*Resolved*, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on Oversight and Government Reform, detailing the refusal of Ms. Lerner to testify before the Committee on Oversight and Government Reform as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Ms. Lerner be proceeded against in the manner and form provided by law.

*Resolved*, That the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena.

## I. EXECUTIVE SUMMARY

Lois G. Lerner has refused to comply with a congressional subpoena for testimony before the Committee on Oversight and Government Reform relating to her role in the Internal Revenue Service's treatment of certain applicants for tax-exempt status. Her testimony is vital to the Committee's investigation into this matter.

Ms. Lerner offered a voluntary statement in her appearance before the Committee. The Committee subsequently determined that she waived her Fifth Amendment privilege in making this statement, and it informed Ms. Lerner of its decision. Still, Ms. Lerner continued to refuse to testify before the Committee.

Accordingly, the Chairman of the Oversight and Government Reform Committee recommends that the House find Ms. Lerner in contempt for her failure to comply with the subpoena issued to her.

## II. AUTHORITY AND PURPOSE

An important corollary to the powers expressly granted to Congress by the Constitution is the responsibility to perform rigorous oversight of the Executive Branch. The U.S. Supreme Court has recognized this Congressional power and responsibility on numerous occasions. For example, in *McGrain v. Daugherty*, the Court held:

[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.”<sup>1</sup>

Further, in *Watkins v. United States*, Chief Justice Earl Warren wrote for the majority: “The power of Congress to conduct investigations is inherent in the legislative process. That power is broad.”<sup>2</sup>

Further, both the Legislative Reorganization Act of 1946 (P.L. 79–601), which directed House and Senate Committees to “exercise continuous watchfulness” over Executive Branch programs under their jurisdiction, and the Legislative Reorganization Act of 1970 (P.L. 91–510), which authorized committees to “review and study, on a continuing basis, the application, administration, and execution” of laws, codify the powers of Congress.

The Committee on Oversight and Government Reform is a standing committee of the House of Representatives, duly established pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the U.S. Constitution.<sup>3</sup> House Rule X grants to the Committee broad jurisdiction over federal “[g]overnment management” and reform, including the

<sup>1</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

<sup>2</sup> *Watkins v. United States*, 354 U.S. 178, 1887 (1957).

<sup>3</sup> U.S. CONST., art I, § 5, clause 2.

“[o]verall economy, efficiency, and management of government operations and activities,” the “[f]ederal civil service,” and “[r]eorganizations in the executive branch of the Government.”<sup>4</sup> House Rule X further grants the Committee particularly broad oversight jurisdiction, including authority to “conduct investigations of any matter without regard to clause 1, 2, 3, or this clause [of House Rule X] conferring jurisdiction over the matter to another standing committee.”<sup>5</sup> The rules direct the Committee to make available “the findings and recommendations of the committee . . . to any other standing committee having jurisdiction over the matter involved.”<sup>6</sup>

House Rule XI specifically authorizes the Committee to “require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary.”<sup>7</sup> The rule further provides that the “power to authorize and issue subpoenas” may be delegated to the Committee chairman.<sup>8</sup> The subpoena discussed in this report was issued pursuant to this authority.

The Committee has undertaken its investigation into the IRS’s inappropriate treatment of conservative tax-exempt organizations pursuant to the authority delegated to it under the House Rules, including as described above.

The oversight and legislative purposes of the investigation at issue here, described more fully immediately below, include (1) to evaluate decisions made by the Internal Revenue Service regarding the inappropriate treatment of conservative applicants for tax-exempt status; and (2) to assess, based on the findings of the investigation, whether the conduct uncovered may warrant additions or modifications to federal law, including, but not limited to, a possible restructuring of the Internal Revenue Service and the IRS Oversight Board.

### III. BACKGROUND ON THE COMMITTEE’S INVESTIGATION

In February 2012, the Committee received reports that the Internal Revenue Service inappropriately scrutinized certain applicants for 501(c)(4) tax-exempt status. Since that time, the Committee has reviewed nearly 500,000 pages of documents obtained from (i) the Department of the Treasury, including particular component entities, the IRS, the Treasury Inspector General for Tax Administration (TIGTA), and the IRS Oversight Board, (ii) former and current IRS employees, and (iii) other sources. In addition, the Committee has conducted 33 transcribed interviews of current and former IRS officials, ranging from front-line employees in the IRS’s Cincinnati office to the former Commissioner of the IRS.

Documents and testimony reveal that the IRS targeted conservative-aligned applicants for tax-exempt status by scrutinizing them in a manner distinct—and more intrusive—than other applicants. Critical questions remain regarding the extent of this targeting,

<sup>4</sup>House Rule X, clause (1)(n).

<sup>5</sup>House Rule X, clause (4)(c)(2).

<sup>6</sup>*Id.*

<sup>7</sup>House Rule XI, clause (2)(m)(1)(B).

<sup>8</sup>House Rule XI, clause 2(m)(3)(A)(1).

and how and why the IRS acted—and persisted in acting—in this manner.

#### A. IRS TARGETING OF TEA PARTY TAX-EXEMPT APPLICATIONS

In late February 2010, a screener in the IRS's Cincinnati office identified a 501(c)(4) application connected with the Tea Party. Due to “media attention” surrounding the Tea Party, the application was elevated to the Exempt Organizations Technical Unit in Washington, D.C.<sup>9</sup> When officials in the Cincinnati office discovered several similar applications in March 2010, the Washington, D.C. office asked for two “test” applications, and ordered the Cincinnati employees to “hold” the remainder of the applications.<sup>10</sup> A manager in the Cincinnati office asked his screeners to develop criteria for identifying other Tea Party applications so that the applications would not “go into the general inventory.”<sup>11</sup> By early April 2010, Cincinnati screeners began to identify and hold any applications meeting certain criteria. Applications that met the criteria were removed from the general inventory and assigned to a special group.

In late spring 2010, an individual recognized as an expert in 501(c)(4) applications in the Washington office was assigned to work on the test applications. The expert issued letters to the test applicants asking for additional information or clarification about information provided in their applications.<sup>12</sup> Meanwhile, through the summer and into fall 2010, applications from other conservative-aligned groups idled. As the Cincinnati office awaited guidance from Washington regarding those applications, a backlog developed. By fall 2010, the backlog of applications that had stalled in the Cincinnati office had grown to 60.

On February 1, 2011, Lois G. Lerner, who served as Director of Exempt Organizations (EO) at IRS from 2006 to 2013,<sup>13</sup> wrote an e-mail to Michael Seto, the manager of the Technical Office within the Exempt Organizations business division. The EO Technical Office was staffed by approximately 40 IRS lawyers who offered advice to IRS agents across the country. Ms. Lerner wrote, “Tea Party Matter very dangerous” and ordered the Office of Chief Counsel to get involved.<sup>14</sup> Ms. Lerner advocated for pulling the cases out of the Cincinnati office entirely. She advised Seto that “Cincy should probably NOT have these cases.”<sup>15</sup> Seto testified to the Committee that Ms. Lerner ordered a “multi-tier” review for the test applications, a process that involved her senior technical advisor and the Office of Chief Counsel.<sup>16</sup>

<sup>9</sup> E-mail from Cindy Thomas, Manager, Exempt Organizations Determinations, IRS, to Holly Paz, Manager, Exempt Organizations Technical Unit, IRS (Feb. 25, 2010) [IRSR 428451].

<sup>10</sup> Transcribed Interview of Elizabeth Hofacre, Revenue Agent, Exempt Orgs. Determinations Unit, IRS (May 31, 2013).

<sup>11</sup> Transcribed Interview of John Shafer, Group Manager, Exempt Orgs. Determinations Unit, IRS (June 6, 2013).

<sup>12</sup> IRS, Timeline for the 3 exemption applications that were referred to EOT from EOD. [IRSR 58346–49]

<sup>13</sup> See *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 22 (May 22, 2013) (H. Rpt. 113–33) (statement of Lois Lerner, Director, Exempt Orgs., IRS) (emphasis added).

<sup>14</sup> E-mail from Lois Lerner, Director, Exempt Orgs., IRS to Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS (Feb. 1, 2011) [IRSR 161810].

<sup>15</sup> *Id.*

<sup>16</sup> Transcribed Interview of Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS (July 11, 2013) [hereinafter Seto Interview].

On July 5, 2011, Ms. Lerner became aware that the backlog of Tea Party applications pending in Cincinnati had swelled to “over 100.”<sup>17</sup> Ms. Lerner also learned of the specific criteria that were used to screen the cases that were caught in the backlog.<sup>18</sup> She believed that the term “Tea Party”—which was a term that triggered additional scrutiny under the criteria developed by IRS personnel—was “pejorative.”<sup>19</sup> Ms. Lerner ordered her staff to adjust the criteria.<sup>20</sup> She also directed the Technical Unit to conduct a “triage” of the backlogged applications and to develop a guide sheet to assist agents in Cincinnati with processing the cases.<sup>21</sup>

In November 2011, the draft guide sheet for processing the backlogged applications was complete.<sup>22</sup> By this point, there were 160–170 pending applications in the backlog.<sup>23</sup> After the Cincinnati office received the guide sheet from Washington, officials there began to process the applications in January 2012. IRS employees drafted questions for the applicant organizations designed to solicit information mandated by the guide sheet. The questions asked for information about the applicant organizations’ donors, among other things.<sup>24</sup>

By early 2012, questions about the IRS’s treatment of these backlogged applications had attracted public attention. Staff from the Committee on Oversight and Government Reform met with Ms. Lerner in February 2012 regarding the IRS’s process for evaluating tax-exempt applications.<sup>25</sup> Committee staff then met with TIGTA representatives on March 8, 2012.<sup>26</sup> Shortly thereafter, TIGTA began an audit of the IRS’s process for evaluating tax-exempt applications.

In late February 2012, after Ms. Lerner briefed Committee staff, Steven Miller, then the IRS Deputy Commissioner, requested a meeting with her to discuss these applications. She informed him of the backlog of applications and that the IRS had asked applicant organizations about donor information.<sup>27</sup> Miller relayed this information to IRS Commissioner Douglas Schulman.<sup>28</sup> On March 23, 2012, Miller convened a meeting of his senior staff to discuss these applications. Miller launched an internal review of potential inappropriate treatment of Tea Party 501(c)(4) applications “to find out why the cases were there and what was going on.”<sup>29</sup>

The internal IRS review took place in April 2012. Miller realized there was a problem and that the application backlog needed to be

<sup>17</sup> Transcribed Interview of Justin Lowe, Technical Advisor to the Commissioner, Tax Exempt and Gov’t Entities Division, IRS (July 23, 2013).

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

<sup>19</sup> Transcribed Interview of Holly Paz, Director, Exempt Orgs., Rulings and Agreements, IRS (May 21, 2013).

<sup>20</sup> *Id.*

<sup>21</sup> Seto Interview, *supra* note 6.

<sup>22</sup> E-mail from Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS, to Cindy Thomas, Manager, Exempt Orgs. Determinations Unit, IRS (Nov. 6, 2011) [IRSR 69902].

<sup>23</sup> Transcribed Interview of Stephen Daejin Seok, Group Manager, Exempt Orgs. Determinations Unit, IRS (June 19, 2013).

<sup>24</sup> *Id.*

<sup>25</sup> Briefing by Lois Lerner, Director, Exempt Orgs., IRS, to H. Comm. on Oversight & Gov’t Reform Staff (Feb. 24, 2012).

<sup>26</sup> Treasury Inspector Gen. for Tax Admin., What is the timeline for TIGTA’s involvement with this tax-exempt issue? (provided to the Committee May 2013).

<sup>27</sup> Transcribed Interview of Steven Miller, Deputy Commissioner, IRS (Nov. 13, 2013) [hereinafter Miller Interview].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

addressed.<sup>30</sup> IRS officials designed a new system to process the backlog, and Miller received weekly updates on the progress of the backlog throughout the summer 2012.<sup>31</sup>

In May 2013, in advance of the release of TIGTA's audit report on the IRS's process for evaluating applications for tax-exempt status, the IRS sought to acknowledge publicly that certain tax-exempt applications had been inappropriately targeted.<sup>32</sup> On May 10, 2013, at an event sponsored by the American Bar Association, Ms. Lerner responded to a question she had planted with a member of the audience prior to the event. A veteran tax lawyer asked, "Lois, a few months ago there were some concerns about the IRS's review of 501(c)(4) organizations, of applications from tea party organizations. I was just wondering if you could provide an update."<sup>33</sup> In response, Ms. Lerner stated:

So our line people in Cincinnati who handled the applications did what we call centralization of these cases. They centralized work on these in one particular group. . . . 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 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.<sup>34</sup>

Ms. Lerner's statement during the ABA panel, entitled "News from the IRS and Treasury," was the first public acknowledgement that the IRS had inappropriately scrutinized the applications of conservative-aligned groups. Within days, the President and the Attorney General expressed serious concerns about the IRS's actions. The Attorney General announced a Justice Department investigation.<sup>35</sup>

#### B. LOIS LERNER'S TESTIMONY IS CRITICAL TO THE COMMITTEE'S INVESTIGATION

Lois Lerner's testimony is critical to the Committee's investigation. Without her testimony, the full extent of the IRS's targeting of Tea Party applications cannot be known, and the Committee will be unable to fully complete its work.

Ms. Lerner was, during the relevant time period, the Director of the Exempt Organizations business division of the IRS, where the targeting of these applications occurred. The Exempt Organizations business division contains the two IRS units that were responsible

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> E-mail from Nicole Flax, Chief of Staff to the Deputy Commissioner, IRS, to Lois Lerner, Director, Exempt Orgs., IRS (Apr. 23, 2013) [IRSR 189013]; Miller Interview, *supra* note 16; Transcribed Interview of Sharon Light, Senior Technical Advisor to the Director, Exempt Orgs., IRS (Sept. 5, 2013); E-mail from Nicole Flax, Chief of Staff to the Deputy Commissioner, IRS, to Adewale Adeyemo, Dept. of the Treasury (Apr. 22, 2013) [IRSR 466707].

<sup>33</sup> Eric Lach, *IRS Official's Admission Baffled Audience at Tax Panel*, TALKING POINTS MEMO, May 14, 2013.

<sup>34</sup> Rick Hasen, *Transcript of Lois Lerner's Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 a.m.), <http://electionlawblog.org/?p=50160>.

<sup>35</sup> *Holder launches probe into IRS targeting of Tea Party groups*, FOXNEWS.COM, May 14, 2013.



for executing the targeting program: the Exempt Organizations Determinations Unit in Cincinnati, and the Exempt Organizations Technical Unit in Washington, D.C.

Ms. Lerner has not provided the Committee with any testimony since the release of the TIGTA audit in May 2013. Although the Committee staff has conducted transcribed interviews of dozens of IRS officials in Cincinnati and Washington, D.C., the Committee will never be able to understand the IRS's actions fully without her testimony. She has unique, first-hand knowledge of how, and why, the IRS scrutinized applications for tax-exempt status from certain conservative-aligned groups.

The IRS sent letters to 501(c)(4) application organizations, signed by Ms. Lerner, that included questions about the organizations' donors. These letters went to applicant organizations that had met certain criteria. As noted, Ms. Lerner later described the selection of these applicant organizations as "wrong, [] absolutely incorrect, insensitive, and inappropriate."<sup>36</sup>

Documents and testimony from other witnesses show Ms. Lerner's testimony is critical to the Committee's investigation. She was at the epicenter of the targeting program. As the Director of the Exempt Organizations business division, she interacted with a wide array of IRS personnel, from low-level managers all the way up to the Deputy Commissioner. Only Ms. Lerner can resolve conflicting testimony about why the IRS delayed 501(c)(4) applications, and why the agency asked the applicant organizations inappropriate and invasive questions. Only she can answer important outstanding questions that are key to the Committee's investigation.

#### **IV. LOIS LERNER'S REFUSAL TO COMPLY WITH THE COMMITTEE'S SUBPOENA FOR TESTIMONY AT THE MAY 22, 2013 HEARING**

On May 14, 2013, Chairman Issa sent a letter to Ms. Lerner inviting her to testify at a hearing on May 22, 2013, about the IRS's handling of certain applications for tax-exempt status.<sup>37</sup> The letter requested that she "please contact the Committee by May 17, 2013," to confirm her attendance.<sup>38</sup> Ms. Lerner, through her attorney, confirmed that she would appear at the hearing.<sup>39</sup> Her attorney subsequently indicated that she would not answer questions during the hearing, and that she would invoke her Fifth Amendment rights.<sup>40</sup>

Because Ms. Lerner would not testify voluntarily at the May 22, 2013 hearing and because her testimony was critical to the Committee's investigation, Chairman Issa authorized a subpoena to compel the testimony. The subpoena was issued on May 20, 2013,

<sup>36</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>37</sup>Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Lois Lerner, Director, Exempt Orgs., IRS (May 14, 2013) (letter inviting Lerner to testify at May 22, 2013 hearing).

<sup>38</sup>*Id.*

<sup>39</sup>E-mail from William W. Taylor, III, Zuckerman Spaeder LLP, to H. Comm. on Oversight & Gov't Reform Majority Staff (May 17, 2013).

<sup>40</sup>Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 20, 2013).

and served on her the same day. Ms. Lerner's attorney accepted service on her behalf.<sup>41</sup>

#### A. CORRESPONDENCE LEADING UP TO THE HEARING

On May 20, 2013, Ms. Lerner's attorney sent a letter to Chairman Issa stating that she would be invoking her Fifth Amendment right not to answer any questions at the hearing. The letter stated, in relevant part:

You have requested that our client, Lois Lerner, appear at a public hearing on May 22, 2013, to testify regarding the Treasury Inspector General for Tax Administration's ("TIGTA") report on the Internal Revenue Service's ("IRS") processing of applications for tax-exempt status. As you know, the Department of Justice has launched a criminal investigation into the matters addressed in the TIGTA report, and your letter to Ms. Lerner dated May 14, 2013, alleges that she 'provided false or misleading information on four separate occasions last year in response to' the Committee's questions about the IRS's processing of applications for tax-exempt status. Accordingly, we are writing to inform you that, upon our advice, Ms. Lerner will exercise her constitutional right not to answer any questions related to the matters addressed in the TIGTA report or to the written and oral exchanges that she had with the Committee in 2012 regarding the IRS's processing of applications for tax-exempt status.

She has not committed any crimes or made any misrepresentation but under the circumstances she has no choice but to take this course. As the Supreme Court has "emphasized," one of the Fifth Amendment's "basic functions . . . is to protect *innocent* [individuals]." *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (quoting *Grunewald v. United States*, 353 U.S. 391, 421 (1957)).

Because Ms. Lerner is invoking her constitutional privilege, we respectfully request that you excuse her from appearing at the hearing. . . . Because Ms. Lerner will exercise her right not to answer questions related to the matters discussed in the TIGTA report or to her prior exchanges with the Committee, requiring her to appear at the hearing merely to assert her Fifth Amendment privilege would have no purpose other than to embarrass or burden her.<sup>42</sup>

The following day, after issuing the subpoena to compel Ms. Lerner to appear before the Committee, Chairman Issa responded to her attorney. Chairman Issa stated, in relevant part:

I write to advise you that the subpoena you accepted on Ms. Lerner's behalf remains in effect. The subpoena compels Ms. Lerner to appear before the Committee on May 22, 2013, at 9:30 a.m.

<sup>41</sup> E-mail from William W. Taylor, III, Zuckerman Spaeder LLP, to H. Comm. on Oversight & Gov't Reform Majority Staff (May 20, 2013).

<sup>42</sup> Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 20, 2013).

According to your May 20, 2013, letter, ‘requiring [Ms. Lerner] to appear at the hearing merely to assert her Fifth Amendment privilege would have no purpose other than to embarrass or burden her.’ That is not correct. As Director, Exempt Organizations, Tax Exempt and Government Entities Division, of the Internal Revenue Service, Ms. Lerner is uniquely qualified to answer questions about the issues raised in the aforementioned TIGTA report. The Committee invited her to appear with the expectation that her testimony will advance the Committee’s investigation, which seeks information about the IRS’s questionable practices in processing and approving applications for 501(c)(4) tax exempt status. *The Committee requires Ms. Lerner’s appearance because of, among other reasons, the possibility that she will waive or choose not to assert the privilege as to at least certain questions of interest to the Committee;* the possibility that the Committee will immunize her testimony pursuant to 8 U.S.C. § 16005; and the possibility that the Committee will agree to hear her testimony in executive session.<sup>43</sup>

#### B. LOIS LERNER’S OPENING STATEMENT

Chairman Issa’s letter to Ms. Lerner’s attorney on May 22, 2013 raised the possibility that she would waive or choose not to assert her privilege as to at least certain questions of interest to the Committee.<sup>44</sup> In fact, that is exactly what happened. At the hearing, Ms. Lerner made a voluntary opening statement, of which she had provided the Committee no advance notice, notwithstanding Committee rules requiring that she do so.<sup>45</sup> She stated, after swearing an oath to tell “the truth, the whole truth, and nothing but the truth”:

Good morning, Mr. Chairman and members of the Committee. My name is Lois Lerner, and I’m the Director of Exempt Organizations at the Internal Revenue Service.

I have been a government employee for over 34 years. I initially practiced law at the Department of Justice and later at the Federal Election Commission. In 2001, I became—I moved to the IRS to work in the Exempt Organizations office, and in 2006, I was promoted to be the Director of that office.

Exempt Organizations oversees about 1.6 million tax-exempt organizations and processes over 60,000 applications for tax exemption every year. As Director I’m responsible for about 900 employees nationwide, and administer a budget of almost \$100 million. My professional career has been devoted to fulfilling responsibilities of the agencies for which I have worked, and I am very proud of the work that I have done in government.

<sup>43</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform to William W. Taylor, III, Zuckerman Spaeder LLP (May 21, 2013) (emphasis added).

<sup>44</sup> *Id.*

<sup>45</sup> Rule 9(f), Rules of the H. Comm. on Oversight & Gov’t Reform, 113th Cong., available at <http://oversight.house.gov/wp-content/uploads/2013/12/OGR-Committee-Rules-113th-Congress.pdf> (last visited April 7, 2014).

On May 14th, the Treasury inspector general released a report finding that the Exempt Organizations field office in Cincinnati, Ohio, used inappropriate criteria to identify for further review applications for organizations that planned to engage in political activity which may mean that they did not qualify for tax exemption. On that same day, the Department of Justice launched an investigation into the matters described in the inspector general's report. In addition, members of this committee have accused me of providing false information when I responded to questions about the IRS processing of applications for tax exemption.

*I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee.*

And while I would very much like to answer the Committee's questions today, I've been advised by my counsel to assert my constitutional right not to testify or answer questions related to the subject matter of this hearing. After very careful consideration, I have decided to follow my counsel's advice and not testify or answer any of the questions today.

Because I'm asserting my right not to testify, I know that some people will assume that I've done something wrong. I have not. One of the basic functions of the Fifth Amendment is to protect innocent individuals, and that is the protection I'm invoking today. Thank you.<sup>46</sup>

After Ms. Lerner made this voluntary, self-selected opening statement—which included a proclamation that she had done nothing wrong and broken no laws, Chairman Issa explained that he believed she had waived her right to assert a Fifth Amendment privilege and asked her to reconsider her position on testifying.<sup>47</sup> In response, she stated:

I will not answer any questions or testify about the subject matter of this Committee's meeting.<sup>48</sup>

Upon Ms. Lerner's refusal to answer any questions, Congressman Trey Gowdy made a statement from the dais. He said:

Mr. Issa, Mr. Cummings just said we should run this like a courtroom, and I agree with him. She just testified. She just waived her Fifth Amendment right to privilege. *You don't get to tell your side of the story and then not be subjected to cross examination. That's not the way it works.* She waived her right of Fifth Amendment privilege by issuing an opening statement. *She ought to stay in here and answer our questions.*<sup>49</sup>

Shortly after Congressman Gowdy's statement, Chairman Issa excused Ms. Lerner from the panel and reserved the option to recall her as a witness at a later date. Specifically, Chairman Issa

<sup>46</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 22 (May 22, 2013) (H. Rpt. 113–33) (statement of Lois Lerner, Director, Exempt Orgs., IRS) (emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (emphasis added).

stated that she was excused “subject to recall after we seek specific counsel on the questions of whether or not the constitutional right of the Fifth Amendment has been properly waived.”<sup>50</sup>

Rather than adjourning the hearing on May 22, 2013, the Chairman recessed it, in order to reconvene at a later date after a thorough analysis of Ms. Lerner’s actions. He did so to avoid “mak[ing] a quick or uninformed decision” regarding what had transpired.<sup>51</sup>

#### C. THE COMMITTEE RESOLVED THAT LOIS LERNER WAIVED HER FIFTH AMENDMENT PRIVILEGE

On June 28, 2013, Chairman Issa convened a Committee business meeting to allow the Committee to determine whether Ms. Lerner had in fact waived her Fifth Amendment privilege. After reviewing during the intervening five weeks legal analysis provided by the Office of General Counsel, arguments presented by Ms. Lerner’s counsel, and other relevant legal precedent, Chairman Issa concluded that Ms. Lerner waived her constitutional privilege when she made a voluntary opening statement that involved several specific denials of various allegations.<sup>52</sup> Chairman Issa stated:

Having now considered the facts and arguments, I believe Lois Lerner waived her Fifth Amendment privileges. She did so when she chose to make a voluntary opening statement. Ms. Lerner’s opening statement referenced the Treasury IG report, and the Department of Justice investigation. . . and the assertions that she had previously provided false information to the committee. She made four specific denials. Those denials are at the core of the committee’s investigation in this matter. She stated that she had not done anything wrong, not broken any laws, not violated any IRS rules or regulations, and not provided false information to this or any other congressional committee regarding areas about which committee members would have liked to ask her questions. Indeed, committee members are still interested in hearing from her. Her statement covers almost the entire range of questions we wanted to ask when the hearing began on May 22.<sup>53</sup>

After a lengthy debate, the Committee approved a resolution, by a 22–17 vote, which stated as follows:

[T]he Committee on Oversight and Government Reform determines that the voluntary statement offered by Ms. Lerner constituted a waiver of her Fifth Amendment privilege against self-incrimination as to all questions within the subject matter of the Committee hearing that began on May 22, 2013, including questions relating to (i) Ms. Lerner’s knowledge of any targeting by the Internal Revenue Service of particular groups seeking tax exempt status, and (ii) questions relating to any facts or information that would support or refute her assertions that, in that regard, “she has not done anything wrong,” “not broken

<sup>50</sup>*Id.* at 24.

<sup>51</sup>*Business Meeting of the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. 4 (June 28, 2013).

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

any laws,” “not violated any IRS rules or regulations,” and/or “not provided false information to this or any other congressional committee.”<sup>54</sup>

#### D. LOIS LERNER CONTINUED TO DEFY THE COMMITTEE’S SUBPOENA

Following the Committee’s resolution that Ms. Lerner waived her Fifth Amendment privilege, Chairman Issa recalled her to testify before the Committee. On February 25, 2014, Chairman Issa sent a letter to Ms. Lerner’s attorney advising him that the May 22, 2013 hearing would reconvene on March 5, 2014.<sup>55</sup> The letter also advised that the subpoena that compelled her to appear on May 22, 2013 remained in effect.<sup>56</sup> The letter stated, in relevant part:

Ms. Lerner’s testimony remains critical to the Committee’s investigation . . . . Because Ms. Lerner’s testimony will advance the Committee’s investigation, the Committee is recalling her to a continuation of the May 22, 2013, hearing, on March 5, 2014, at 9:30 a.m. in room 2154 of the Rayburn House Office Building in Washington, D.C.

The subpoena you accepted on Ms. Lerner’s behalf remains in effect. In light of this fact, and because the Committee explicitly rejected her Fifth Amendment privilege claim, I expect her to provide answers when the hearing reconvenes on March 5.<sup>57</sup>

The next day, Ms. Lerner’s attorney responded to Chairman Issa. In a letter, he wrote:

I write in response to your letter of yesterday. I was surprised to receive it. I met with the majority staff of the Committee on January 24, 2014, at their request. At the meeting, I advised them that Ms. Lerner would continue to assert her Constitutional rights not to testify if she were recalled. . . . We understand that the Committee voted that she had waived her rights. . . . We therefore request that the Committee not require Ms. Lerner to attend a hearing solely for the purpose of once again invoking her rights.<sup>58</sup>

Because of the possibility that she would choose to answer some or all of the Committee’s questions, Chairman Issa required Ms. Lerner to appear in person on March 5, 2014. When the May 22, 2013, hearing, entitled “The IRS: Targeting Americans for Their Political Beliefs,” was reconvened, Chairman Issa noted that the Committee might recommend that the House hold Ms. Lerner in contempt if she continued to refuse to answer questions, based on the fact that the Committee had resolved that she had waived her Fifth Amendment privilege. He stated:

<sup>54</sup> Resolution of the H. Comm. on Oversight & Gov’t Reform (June 28, 2013), *available at* <http://oversight.house.gov/wp-content/uploads/2013/06/Resolution-of-the-Committee-on-Oversight-and-Government-Reform-6-28-131.pdf>.

<sup>55</sup> Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform to William W. Taylor, III, Zuckerman Spaeder LLP (Feb. 25, 2014).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Feb. 26, 2014).

At a business meeting on June 28, 2013, the Committee approved a resolution rejecting Ms. Lerner's claim of Fifth Amendment privilege based on her waiver at the May 22, 2013, hearing.

After that vote, having made the determination that Ms. Lerner waived her Fifth Amendment rights, the Committee recalled her to appear today to answer questions pursuant to rules. The Committee voted and found that Ms. Lerner waived her Fifth Amendment rights by making a statement on May 22, 2013, and additionally, by affirming documents after making a statement of Fifth Amendment rights.

If Ms. Lerner continues to refuse to answer questions from our Members while she's under subpoena, the Committee may proceed to consider whether she should be held in contempt.<sup>59</sup>

Despite the fact that Ms. Lerner was compelled by a duly issued subpoena and Chairman Issa had warned her of the possibility of contempt proceedings, and despite the Committee's resolution that she waived her Fifth Amendment privilege, Ms. Lerner continued to assert her Fifth Amendment privilege, and refused to answer any questions posed by Members of the Committee.

Specifically, Ms. Lerner asserted her Fifth Amendment privilege on eight separate occasions at the hearing. In response to questions from Chairman Issa, she stated:

Q. On October 10—on October—in October 2010, you told a Duke University group, and I quote, 'The Supreme Court dealt a huge blow overturning a 100-year-old precedent that basically corporations couldn't give directly to political campaigns. And everyone is up in arms because they don't like it. The Federal Election Commission can't do anything about it. They want the IRS to fix the problem.' Ms. Lerner, what exactly 'wanted to fix the problem caused by Citizens United,' what exactly does that mean?

A. My counsel has advised me that I have not—

Q. Would you please turn the mic on?

A. Sorry. I don't know how. My counsel has advised me that I have not waived my constitutional rights under the Fifth Amendment, and on his advice, I will decline to answer any question on the subject matter of this hearing.

Q. So, you are not going to tell us who wanted to fix the problem caused by Citizens United?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, in February 2011, you emailed your colleagues in the IRS the following: 'Tea Party matter, very dangerous. This could be the vehicle to go to court on the issue of whether Citizens United overturning the ban on corporate spending applies to tax-exempt rules. Counsel and Judy Kindell need to be on this one, please. Cincy

<sup>59</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov't Reform, 113th Cong. (Mar. 5, 2014).*

should probably NOT,' all in caps, 'have these cases.' What did you mean by 'Cincy should not have these cases'?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer the question.

Q. Ms. Lerner, why would you say Tea Party cases were very dangerous?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, in September 2010, you emailed your subordinates about initiating a, parenthesis, (c)(4) project and wrote, 'We need to be cautious so that it isn't a per se political project.' Why were you worried about this being perceived as a political project?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, Mike Seto, manager of EO Technical in Washington, testified that you ordered Tea Party cases to undergo a multi-tier review. He testified, and I quote, 'She sent me email saying that when these cases need to go through—I say again—'she sent me email saying that when these cases need to go through multi-tier review and they will eventually have to go to Ms. Kindell and the Chief Counsel's Office.' Why did you order Tea Party cases to undergo a multi-tier review?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, in June 2011, you requested that Holly Paz obtain a copy of the tax-exempt application filed by Crossroads GPS so that your senior technical advisor, Judy Kindell, could review it and summarize the issues for you. Ms. Lerner, why did you want to personally order that they pull Crossroads GPS, Karl Rove's organization's application?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, in June 2012, you were part of an email exchange that appeared to be about writing new regulations on political speech for 501(c)(4) groups, and in parenthesis, your quote, "off plan" in 2013. Ms. Lerner, what does "off plan" mean?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, in February of 2014, President Obama stated that there was not a smidgeon of corruption in the IRS targeting. Ms. Lerner, do you believe that there is not a smidgeon of corruption in the IRS targeting of conservatives?



A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.

Q. Ms. Lerner, on Saturday, our committee's general counsel sent an email to your attorney saying, "I understand that Ms. Lerner is willing to testify and she is requesting a 1 week delay. In talking—in talking to the chairman"—excuse me—"in talking to the chairman, wanted to make sure that was right." Your lawyer, in response to that question, gave a one word email response, "yes." Are you still seeking a 1 week delay in order to testify?

A. On the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.<sup>60</sup>

The hearing was subsequently adjourned and Ms. Lerner was excused from the hearing room.

#### E. LEGAL PRECEDENT STRONGLY SUPPORTS THE COMMITTEE'S POSITION TO PROCEED WITH HOLDING LOIS LERNER IN CONTEMPT

After Ms. Lerner's appearance before the Committee on March 5, 2014, her lawyer convened a press conference at which he apparently revealed that she had sat for an interview with Department of Justice prosecutors and TIGTA staff within the past six months.<sup>61</sup> According to reports, Ms. Lerner's lawyer described that interview as not under oath<sup>62</sup> and unconditional, i.e., provided under no grant of immunity.<sup>63</sup> Revelation of this interview calls into question the basis of Ms. Lerner's assertion of the Fifth Amendment privilege in the first place, her waiver of any such privilege notwithstanding.

Despite that fact, and the balance of the record, Ranking Member Elijah E. Cummings questioned the Committee's ability to proceed with a contempt citation for Ms. Lerner. On March 12, 2014, he sent a letter to Speaker Boehner arguing that the House of Representatives is barred "from successfully pursuing contempt proceedings against former IRS official Lois Lerner."<sup>64</sup> The Ranking Member's position was based on an allegedly "independent legal analysis" provided by his lawyer, Stanley M. Brand, and his "Legislative Consultant," Morton Rosenberg.<sup>65</sup>

Brand and Rosenberg claimed that the prospect of judicial contempt proceedings against Ms. Lerner has been compromised because, according to them, "at no stage in this proceeding did the witness receive the requisite clear rejections of her constitutional objections and direct demands for answers nor was it made un-

<sup>60</sup> *Id.*

<sup>61</sup> John D. McKinnon, *Former IRS Official Lerner Gave Interview to DOJ*, WALL ST. J., Mar. 6, 2014, <http://blogs.wsj.com/washwire/2014/03/06/former-irs-official-lerner-gave-interview-to-doj/>.

<sup>62</sup> Patrick Howley, *Oversight lawmaker: Holding Lois Lerner in Contempt Is 'Where We're Moving'*, DAILY CALLER, Mar. 6, 2014, <http://dailycaller.com/2014/03/06/oversight-lawmaker-holding-lois-lerner-in-contempt-the-right-thing-to-do/>.

<sup>63</sup> McKinnon, *supra* note 61.

<sup>64</sup> Letter from Hon. Elijah E. Cummings, Ranking Member, H. Comm. on Oversight & Gov't Reform, to Hon. John Boehner, Speaker, U.S. House of Representatives (Mar. 12, 2014), at 1 [hereinafter *Boehner Letter*], attaching Memorandum from Morton Rosenberg, Legislative Consultant, to Hon. Elijah E. Cummings, Ranking Member, H. Comm. on Oversight & Gov't Reform (Mar. 12, 2014) [hereinafter *Rosenberg Memo*].

<sup>65</sup> *Boehner Letter* at 1, Attachment at 1; Statement of Stanley M. Brand, *The Last Word with Lawrence O'Donnell*, MSNBC, Mar. 12, 2014, available at <http://www.msnbc.com/the-last-word/watch/the-fatal-error-of-issas-irs-blowup-193652803735> (last visited Mar. 14, 2014).

equivocally certain that her failure to respond would result in criminal contempt prosecution.”<sup>66</sup> The Ranking Member subsequently issued a press release that described “opinions from 25 legal experts across the country and the political spectrum”<sup>67</sup> regarding the Committee’s interactions with Ms. Lerner. The opinions released by Ranking Member Cummings largely relied on the same case law and analysis that Rosenberg and Brand provided, and are contrary to the opinion of the House Office of General Counsel.<sup>68</sup> The Ranking Member and his lawyers and consultants are wrong on the facts and the law.

1. *Ms. Lerner knew that the Committee had rejected her privilege objection and that, consequently, she risked contempt should she persist in refusing to answer the Committee’s questions*

At the March 5, 2014 proceeding, Chairman Issa specifically made Ms. Lerner and her counsel aware of developments that had occurred since the Committee first convened the hearing (on May 22, 2013): “These [developments] are important for the record and for Ms. Lerner to know and understand.”<sup>69</sup>

Chairman Issa emphasized one particular development: “At a business meeting on June 28, 2013, the committee approved a resolution **rejecting Ms. Lerner’s claim of Fifth Amendment privilege** based on her waiver.”<sup>70</sup> This, of course, was not news to Ms. Lerner or her counsel. The Committee had expressly notified her counsel of the Committee’s rejection of her Fifth Amendment claim, both orally and in writing. For example, in a letter to Ms. Lerner’s counsel on February 25, 2014, the Chairman wrote: “[B]ecause the Committee explicitly **rejected [Lerner’s] Fifth Amendment privilege claim**, I expect her to provide answers when the hearing reconvenes on March 5.”<sup>71</sup> Moreover, the press widely reported the fact that the Committee had formally rejected Ms. Lerner’s Fifth Amendment claim.<sup>72</sup>

Accordingly, it is facially unreasonable for Ranking Member Cummings and his lawyers and consultants to subsequently claim that “at no stage in this proceeding did the witness receive the requisite clear rejections of her constitutional objections.”<sup>73</sup>

The Committee’s rejection of Ms. Lerner’s privilege objection was not the only point that Chairman Issa emphasized before and during the March 5, 2014 proceeding. At the hearing, after several additional references to the Committee’s determination that she had waived her privilege objection, the Chairman *expressly* warned her

<sup>66</sup> Rosenberg Memo at 3.

<sup>67</sup> Press Release, Hon. Elijah E. Cummings, Ranking Member, H. Comm. on Oversight and Gov’t Reform (Mar. 26, 2014), available at <http://democrats.oversight.house.gov/press-releases/twenty-five-independent-legal-experts-now-agree-that-issa-botched-contempt/> (last visited Mar. 27, 2014).

<sup>68</sup> Memorandum, *Lois Lerner and the Rosenberg Memorandum*, Office of General Counsel, United States House of Representatives (Mar. 25, 2014), available at <http://oversight.house.gov/release/house-counsel-oversight-committee-can-hold-lerner-contempt/> (last visited Apr. 4, 2014).

<sup>69</sup> The IRS: *Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. (Mar. 5, 2014), Tr. at 3.

<sup>70</sup> *Id.* at 4 (emphasis added).

<sup>71</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to William W. Taylor, III, Esq., Zuckerman Spaeder LLP (Feb. 25, 2014), at 2 (emphasis added).

<sup>72</sup> See, e.g., *House panel finds IRS official waived Fifth Amendment right, can be forced to testify in targeting probe*, FOXNEWS.COM, June 28, 2013, available at <http://www.foxnews.com/politics/2013/06/28/republican-led-house-panel-challenges-irs-worker-who-took-fifth-amendment/> (last visited Mar. 14, 2014).

<sup>73</sup> Boehner Letter, at 1; Rosenberg Memo at 3.

that she remained under subpoena,<sup>74</sup> and thus that, if she should persist in refusing to answer the Committee’s questions, she risked contempt: “If Ms. Lerner continues to refuse to answer questions from our Members while she is under a subpoena, the Committee may proceed to consider whether she should be held in contempt.”<sup>75</sup>

Ranking Member Cummings and his lawyers and consultants state, repeatedly, that the Committee did not provide “certainty for the witness and her counsel that a contempt prosecution was inevitable.”<sup>76</sup> But, that is a certainty that no Member of the Committee can provide. From the Committee’s perspective (and Ms. Lerner’s), there is no guarantee that the Department of Justice will prosecute Ms. Lerner for her contumacious conduct, and there is no guarantee that the full House of Representatives will vote to hold her in contempt. In fact, there is no guarantee that the Committee will make such a recommendation. The collective votes of Members voting their consciences determine both a Committee recommendation and a full House vote on a contempt resolution. And, the Department of Justice, of course, is an agency of the Executive Branch of the federal government. All the Chairman can do is what he did: make abundantly clear to Ms. Lerner and her counsel that of which she already was aware, i.e., that if she chose not to answer the Committee’s questions after the Committee’s ruling that she had waived her privilege objection (exactly the choice that she ultimately made), she would risk contempt.

## 2. *The Law does not require magic words*

The Ranking Member and his lawyers and consultants also misunderstand the law. Contrary to their insistence, the courts do not require the invocation by the Committee of certain magic words. Rather, and sensibly, the courts have required only that congressional committees provide witnesses with a “fair appraisal of the committee’s ruling on an objection,” thereby leaving the witness with a choice: comply with the relevant committee’s demand for testimony, or risk contempt.<sup>77</sup>

The Ranking Member and his lawyers and consultants refer specifically to *Quinn v. United States* in support of their arguments. In that case, however, the Supreme Court held only that, because “[a]t no time did the committee [at issue there] specifically overrule [the witness’s] objection based on the Fifth Amendment,” the witness “was left to guess whether or not the committee had accepted his objection.”<sup>78</sup> Here, of course, the Committee expressly rejected Ms. Lerner’s objection, and specifically notified Ms. Lerner and her counsel of the same. She was left to guess at nothing.

The Ranking Member and his lawyers’ and consultants’ reliance on *Quinn* is odd for at least two additional reasons. First, in that

<sup>74</sup>The subpoena to Lerner “commanded” her “to be and appear” before the Committee and “to testify.” Subpoena, Issued by Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, to Lois G. Lerner (May 17, 2013) (emphasis in original).

<sup>75</sup>*The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. (Mar. 5, 2014), Tr. at 5.

<sup>76</sup>*Id.*; Rosenberg Memo at 3–4 (Committee did not make “unequivocally certain” that Lerner’s “failure to respond would result in [a] criminal contempt prosecution”); *id.* at 2 (Chairman did not pronounce that “refusal to respond would result” in a criminal contempt prosecution”) (emphasis added).

<sup>77</sup>*Quinn v. United States*, 349 U.S. 155, 170 (1955).

<sup>78</sup>*Id.* at 166.

case, the Supreme Court expressly noted that the congressional committee's failure to rule on the witness's objection mattered because it left the witness without "a clear-cut choice . . . between answering the question and **risking** prosecution for contempt."<sup>79</sup> In other words, the Supreme Court expressly rejected the Ranking Member's view that the Chairman should do the impossible by pronouncing on whether prosecution is "inevitable."<sup>80</sup> The Supreme Court required that the Committee do no more than what it did: advise Ms. Lerner that her objection had been overruled and thus that she risked contempt.

Second, *Quinn* expressly rejects the Ranking Member's insistence on the talismanic incantation by the Committee of certain magic words. The Supreme Court wrote that "the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee's ruling, he has no cause to complain."<sup>81</sup>

The other cases that the Ranking Member and his lawyers and consultants cite state the same law, and thus serve to confirm the propriety of the Committee's actions. In *Emspak v. United States*, the Supreme Court—just as in *Quinn*, and unlike here—noted that the congressional committee had failed to "overrule petitioner's objection based on the Fifth Amendment" and thus failed to provide the witness a fair opportunity to choose between answering the relevant question and "risking prosecution for contempt."<sup>82</sup> And in *Bart v. United States*, the Supreme Court pointedly distinguished the circumstances there from those here. The Court wrote: "Because of the consistent failure to advise the witness of the committee's position as to his objections, petitioner was left to speculate about the risk of possible prosecution for contempt; he was not given a clear choice between standing on his objection and compliance with a committee ruling."<sup>83</sup>

## V. CONCLUSION

For all these reasons, and others, Rosenberg's opinion that "the requisite legal foundation for a criminal contempt of Congress prosecution [against Ms. Lerner] . . . ha[ s] not been met and that such a proceeding against [her] under 2 U.S.C. [§] 19[2], if attempted, will be dismissed" is wrong.<sup>84</sup> There is no constitutional impediment to (i) the Committee approving a resolution recommending that the full House hold Ms. Lerner in contempt of Congress; (ii) the full House approving a resolution holding Ms. Lerner in contempt of Congress; (iii) if such resolutions are approved, the Speaker certifying the matter to the United States Attorney for the District of Columbia, pursuant to 2 U.S.C. § 194; and (iv) a grand jury indicting, and the United States Attorney prosecuting, Ms. Lerner under 2 U.S.C. § 192.

At this point, it is clear Ms. Lerner will not comply with the Committee's subpoena for testimony. On May 20, 2013, Chairman Issa issued the subpoena to compel Ms. Lerner's testimony. On

<sup>79</sup> *Id.* (emphasis added).

<sup>80</sup> Boehner Letter, Attachment at 4.

<sup>81</sup> 349 U.S. at 170 (emphasis added).

<sup>82</sup> 349 U.S. at 190, 202 (1955).

<sup>83</sup> 349 U.S. at 219, 223 (1955); *id.* at 222 (stating issue presented as: "whether petitioner was apprised of the committee's disposition of his objections").

<sup>84</sup> Rosenberg Memo at 4.

May 22, 2013, Ms. Lerner gave an opening statement and then refused to answer any of the Committee's questions and asserted her Fifth Amendment privilege. On June 28, 2013, the Committee voted that Ms. Lerner waived her Fifth Amendment privilege. Chairman Issa subsequently recalled her to answer the Committee's questions. When the May 22, 2013 hearing reconvened nine months later, on March 5, 2014, she again refused to answer any of the Committee's questions and invoked the Fifth Amendment.

In short, Ms. Lerner has refused to provide testimony in response to the Committee's duly issued subpoena.

## **VI. RULES REQUIREMENTS**

### **EXPLANATION OF AMENDMENTS**

No amendments were offered.

### **COMMITTEE CONSIDERATION**

On April 10, 2014, the Committee on Oversight and Government Reform met in open session with a quorum present to consider a report of contempt against Lois G. Lerner, former Director, Exempt Organizations, Internal Revenue Service, for failure to comply with a Congressional subpoena. The Committee approved the Report by a roll call vote of 21–12 and ordered the Report reported favorably to the House.

### **ROLL CALL VOTES**

The following recorded votes were taken during consideration of the contempt Report:

The Report was favorably reported to the House, a quorum being present, by a vote of 23 Yeas to 17 Nays.

Voting Yea: Issa, Mica, Turner, McHenry, Jordan, Chaffetz, Walberg, Lankford, Amash, Gosar, Meehan, DesJarlais, Gowdy, Farenthold, Hastings, Lummis, Massie, Collins, Meadows, Bentivolio, DeSantis.

Voting Nay: Cummings, Maloney, Clay, Lynch, Cooper, Connolly, Speier, Cartwright, Duckworth, Welch, Horsford, Lujan Grisham.

### **APPLICATION OF LAW TO THE LEGISLATIVE BRANCH**

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. The Report recommends that the House of Representatives find Lois G. Lerner, former Director, Exempt Organizations, Internal Revenue Service, in contempt of Congress for refusal to comply with a subpoena duly issued by the Committee on Oversight and Government Reform. As such, the Report does not relate to employment or access to public services and accommodations.

### **STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE**

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Commit-

tee's oversight findings and recommendations are reflected in the descriptive portions of this Report.

#### STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Report will assist the House of Representatives in considering whether to cite Lois G. Lerner for contempt for failing to comply with a valid congressional subpoena.

#### DUPLICATION OF FEDERAL PROGRAMS

No provision of the Report establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

#### DISCLOSURE OF DIRECTED RULE MAKINGS

The Report does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

#### CONSTITUTIONAL AUTHORITY STATEMENT

The Committee finds the authority for this Report in article 1, section 1 of the Constitution.

#### FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the Report does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

#### EARMARK IDENTIFICATION

The Report does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

#### UNFUNDED MANDATE STATEMENT, COMMITTEE ESTIMATE, BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee finds that clauses 3(c)(2), 3(c)(3), and 3(d)(1) of rule XIII of the Rules of the House of Representatives, sections 308(a) and 402 of the Congressional Budget Act of 1974, and section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104-4) are inapplicable to this Report. Therefore, the Committee did not request or receive a cost estimate from the Congressional Budget Office and makes no findings as to the budgetary impacts of this Report or costs incurred to carry out the report.

#### CHANGES IN EXISTING LAW MADE BY THE BILL AS REPORTED

This Report makes no changes in any existing federal statute.

## VII. ADDITIONAL VIEWS

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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
DARRELL ISSA, CHAIRMAN



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LOIS LERNER'S INVOLVEMENT  
IN THE  
IRS TARGETING OF TAX-EXEMPT ORGANIZATIONS

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STAFF REPORT  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES  
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## II. Executive Summary

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In February 2012, the Committee on Oversight and Government Reform began investigating allegations that the Internal Revenue Service inappropriately scrutinized certain applicants seeking tax-exempt status. Section 501(c)(4) of the Internal Revenue Code permits incorporation of organizations that meet certain criteria and focus on advancing “social welfare” goals.<sup>1</sup> With a 501(c)(4) designation, such organizations are not subject to federal income tax. Donations to these organizations are not tax deductible. Consistent with the Constitutionally protected right to free speech, these organizations – commonly referred to as “501(c)(4)s” – may engage in campaign-related activities provided that these activities do not comprise a majority of the organizations’ efforts.<sup>2</sup>

On May 12, 2013, the Treasury Inspector General for Tax Administration (TIGTA) released a report that found that the Exempt Organizations (EO) division of the IRS inappropriately targeted “Tea Party” and other conservative applicants for tax-exempt status and subjected them to heightened scrutiny.<sup>3</sup> This additional scrutiny resulted in extended delays that, in most cases, sidelined applicants during the 2012 election cycle, in spite of their Constitutional right to participate. Meanwhile, the majority of liberal and left-leaning 501(c)(4) applicants won approval.<sup>4</sup>

Documents and information obtained by the Committee since the release of the TIGTA report show that Lois G. Lerner, the now-retired Director of IRS Exempt Organizations (EO), was extensively involved in targeting conservative-oriented tax-exempt applicants for inappropriate scrutiny. This report details her role in the targeting of conservative-oriented organizations, which would later result in some level of increased scrutiny of applicants from across the political spectrum. It also outlines her obstruction of the Committee’s investigation.

Prior to joining the IRS, Lerner was the Associate General Counsel and Head of the Enforcement Office at the Federal Elections Commission (FEC).<sup>5</sup> During her tenure at the FEC, she also engaged in questionable tactics to target conservative groups seeking to expand their political involvement, often subjecting them to heightened scrutiny.<sup>6</sup> Her political ideology was evident to her FEC colleagues. She brazenly subjected Republican groups to rigorous investigations. Similar Democratic groups did not receive the same scrutiny.<sup>7</sup>

The Committee’s investigation of Lerner’s role in the IRS’s targeting of tax-exempt organizations found that she led efforts to scrutinize conservative groups while working to

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<sup>1</sup> I.R.C. § 501(c)(4).

<sup>2</sup> I.R.C. § 501(c)(4); Treas. Reg. § 1.501(c)(4)-1(a)(2).

<sup>3</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (May 14, 2013).

<sup>4</sup> Gregory Korte, *IRS Approved Liberal Groups while Tea Party in Limbo*, USA Today, May 15, 2013.

<sup>5</sup> Eliana Johnson, *Lois Lerner at the FEC*, NAT’L REVIEW (May 23, 2013) [hereinafter *Lois Lerner at the FEC*].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; Rebekah Metzler, *Lois Lerner: Career Gov’t Employee Under Fire*, U.S. NEWS & WORLD REP. (May 30, 2013), available at <http://www.usnews.com/news/articles/2013/05/30/lois-lerner-career-government-employee-under-fire> (last accessed Jan. 14, 2014).

maintain a veneer of objective enforcement. Following the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*, the IRS faced pressure from voices on the left to heighten scrutiny of applicants for tax-exempt status. IRS EO employees in Cincinnati identified the first Tea Party applicants and promptly forwarded these applications to IRS headquarters in Washington, D.C. for further guidance. Officials in Washington, D.C. directed IRS employees in Cincinnati to isolate Tea Party applicants even though the IRS had not developed a process for approving their applications.

While IRS employees were screening applications, documents show that Lerner and other senior officials contemplated concerns about the "hugely influential Koch brothers," and that Lerner advised her IRS colleagues that her unit should "do a c4 project next year" focusing on existing organizations.<sup>8</sup> Lerner even showed her recognition that such an effort would approach dangerous ground and would have to be engineered as not a "*per se* political project."<sup>9</sup> Underscoring a political bias against the lawful activity of such groups, Lerner referenced the political pressure on the IRS to "fix the problem" of 501(c)(4) groups engaging in political speech at an event sponsored by Duke University's Sanford School of Public Policy.<sup>10</sup>

Lerner not only proposed ways for the IRS to scrutinize groups with 501(c)(4) status, but also helped implement and manage hurdles that hindered and delayed the approval of groups applying for 501(c)(4) status. In early 2011, Lerner directed the manager of the IRS's EO Technical Unit to subject Tea Party cases to a "multi-tier review" system.<sup>11</sup> She characterized these Tea Party cases as "very dangerous," and believed that the Chief Counsel's office should "be in on" the review process.<sup>12</sup> Lerner was extensively involved in handling the Tea Party cases—from directing the review process to receiving periodic status updates.<sup>13</sup> Other IRS employees would later testify that the level of scrutiny Lerner ordered for the Tea Party cases was unprecedented.<sup>14</sup>

Eventually, Lerner became uncomfortable with the burgeoning number of conservative organizations facing immensely heightened scrutiny from a purportedly apolitical agency. Consistent with her past concerns that scrutiny could not be "*per se* political," she ordered the implementation of a new screening method. Without doing anything to inform applicants that they had been subject to inappropriate treatment, this sleight of hand added a level of deniability for the IRS that officials would eventually use to dismiss accusations of political motivations — she broadened the spectrum of groups that would be scrutinized going forward.

<sup>8</sup> E-mail from Paul Streckfus to Paul Streckfus (Sept. 15, 2010) (EO Tax Journal 2010-130); E-mail from Lois Lerner, IRS, to Cheryl Chasin et al., IRS (Sept. 15, 2010). [IRSR 191032-33].

<sup>9</sup> E-mail from Lois Lerner, IRS, to Cheryl Chasin et al., IRS (Sept. 16, 2010). [IRSR 191030]

<sup>10</sup> John Sexton, *Lois Lerner Discusses Political Pressure on the IRS in 2010*, BREITBART.COM, Aug. 6, 2013.

<sup>11</sup> Transcribed Interview of Michael Seto, IRS, in Wash., D.C., at 34 (July 11, 2013).

<sup>12</sup> E-mail from Lois Lerner, IRS, to Michael Seto, IRS (Feb. 1, 2011). [IRSR 161810-11]

<sup>13</sup> Justin Lowe, IRS, Increase in (c)(3)/(c)(4) Advocacy Org. Applications (June 27, 2011). [IRSR 2735]; E-mail from Judith Kindell, IRS, to Lois Lerner, IRS (July 18, 2012). [IRSR 179406]

<sup>14</sup> See, e.g., Transcribed interview of Carter Hull, IRS, in Wash., D.C. (June 14, 2013); Transcribed interview of Elizabeth Hofacre, IRS, in Wash., D.C. (May 31, 2013).

When Congress asked Lerner about a shift in criteria, she flatly denied it along with allegations about disparate treatment.<sup>15</sup> Even as targeting continued, Lerner engaged in a surreptitious discussion about an “off-plan” effort to restrict the right of existing 501(c)(4) applicants to participate in the political process through new regulations made outside established protocols for disclosing new regulatory action.<sup>16</sup> E-mails obtained by the Committee show she and other seemingly like-minded IRS employees even discussed how, if an aggrieved Tea Party applicant were to file suit, the IRS might get the chance to showcase the scrutiny it had applied to conservative applicants.<sup>17</sup> IRS officials seemed to envision a potential lawsuit as an expedient vehicle for bypassing federal laws that protect the anonymity of applicants denied tax exempt status.<sup>18</sup> Lerner surmised that Tea Party groups would indeed opt for litigation because, in her mind, they were “itching for a Constitutional challenge.”<sup>19</sup>

Through e-mails, documents, and the testimony of other IRS officials, the Committee has learned a great deal about Lois Lerner’s role in the IRS targeting scandal since the Committee first issued a subpoena for her testimony. She was keenly aware of acute political pressure to crack down on conservative-leaning organizations. Not only did she seek to convey her agreement with this sentiment publicly, she went so far as to engage in a wholly inappropriate effort to circumvent federal prohibitions in order to publicize her efforts to crack down on a particular Tea Party applicant. She created unprecedented roadblocks for Tea Party organizations, worked surreptitiously to advance new Obama Administration regulations that curtail the activities of existing 501(c)(4) organizations – all the while attempting to maintain an appearance that her efforts did not appear, in her own words, “*per se* political.”

Lerner’s testimony remains critical to the Committee’s investigation. E-mails dated shortly before the public disclosure of the targeting scandal show Lerner engaging with higher ranking officials behind the scenes in an attempt to spin the imminent release of the TIGTA report.<sup>20</sup> Documents and testimony provided by the IRS point to her as the instigator of the IRS’s efforts to crack down on 501(c)(4) organizations and the singularly most relevant official in the IRS targeting scandal. Her unwillingness to testify deprives Congress the opportunity to have her explain her conduct, hear her response to personal criticisms levied by her IRS coworkers, and provide vital context regarding the actions of other IRS officials. In a recent interview, President Obama broadly asserted that there is not even a “smidgeon of corruption” in the IRS targeting scandal.<sup>21</sup> If this is true, Lois Lerner should be willing to return to Congress to testify about her actions. The public needs a full accounting of what occurred and who was involved. Through its investigation, the Committee seeks to ensure that government officials are never in a position to abuse the public trust by depriving Americans of their Constitutional right to participate in our democracy, regardless of their political beliefs. This is the only way to restore confidence in the IRS.

<sup>15</sup> Briefing by IRS staff to Committee staff (Feb. 24, 2012); see Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov’t Reform, to Lois Lerner, IRS (May 14, 2013).

<sup>16</sup> E-mail from Ruth Madrigal, Dep’t of the Treasury, to Victoria Judson et al., IRS (June 14, 2012). [IRSR 305906]

<sup>17</sup> E-mail from Nancy Marks, IRS, to Lois Lerner, Holly Paz, & David Fish, IRS (Mar. 29, 2013). [IRSR 190611]

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

<sup>19</sup> E-mail from Lois Lerner, IRS, to Nancy Marks, Holly Paz, & David Fish, IRS (Apr. 1, 2013). [IRSR 190611]

<sup>20</sup> See, e.g., E-mail from Lois Lerner, IRS, to Michelle Eldridge et al., IRS (Apr. 23, 2013). [IRSR 196295]; E-mail from Nikole Flax, IRS, to Lois Lerner, IRS (Apr. 23, 2013). [IRSR 189013]

<sup>21</sup> “Not even a smidgeon of corruption”: Obama downplays IRS, other scandals, FOX NEWS, Feb. 3, 2014.

### III. Background: IRS Targeting and Lois Lerner's Involvement

In February 2012, the Committee received complaints from several congressional offices alleging that the IRS was delaying the approval of conservative-oriented organizations for tax-exempt status. On February 17, 2012, Committee staff requested a briefing from the IRS about this matter. On February 24, 2012, Lerner and other IRS officials provided the Committee staff with an informal briefing. The Committee continued to receive complaints of disparate treatment by the IRS EO office, and the matter continued to garner media attention.<sup>22</sup> On March 27, 2012, the Oversight and Government Reform Committee sent Lerner a joint letter requesting information about development letters that the IRS sent several applicants for tax-exempt status. In response, Lerner participated in a briefing with Committee staff on April 4, 2012. She also sent two letters to the Committee, dated April 26, 2012, and May 4, 2012, in response to the Committee's March 27, 2012 letter. Lerner's responses largely focused on rules, regulations, and IRS processes for evaluating applications for tax-exempt status. In the course of responding to the Committee's request for information, Lerner made several false statements, which are discussed below in greater detail.

#### A. Lerner's False Statements to the Committee

During the February 24, 2012, briefing, Committee staff asked Lerner whether the criteria for evaluating tax-exempt applications had changed at any point. Lerner responded that the criteria had not changed. In fact, they had. According to the Treasury Inspector General for Tax Administration (TIGTA), in late June 2011, Lerner directed that the criteria used to identify applications be changed.<sup>23</sup> **This was the first time Lerner made a false or misleading statement during the Committee's investigation.**

On March 1, 2012, the Committee requested that TIGTA begin investigating the IRS process for evaluating tax-exempt applications. Committee staff and TIGTA met on March 8, 2012 to discuss the scope of TIGTA's investigation. TIGTA's investigation commenced immediately and proceeded concurrently with the Committee's investigation.

During another briefing on April 4, 2012, Lerner told Committee staff that the information the IRS was requesting in follow-up letters to conservative-leaning groups—which, in some cases, included a complete list of donors and their respective contributions—was not out

<sup>22</sup> See, e.g., Janie Lorber, *IRS Oversight Reignites Tea Party Ire: Agency's Already Controversial Role is in Dispute After Questionnaires Sent to Conservative Groups*, ROLL CALL, Mar. 8, 2012, available at [http://www.rollcall.com/issues/57\\_106/IRS-Oversight-Reignites-Tea-Party-Ire-212969-1.html](http://www.rollcall.com/issues/57_106/IRS-Oversight-Reignites-Tea-Party-Ire-212969-1.html); Susan Jones, *IRS Accused of 'Intimidation Campaign' Against Tea Party Groups*, CNSNEWS.COM, Mar. 7, 2012, <http://cnsnews.com/news/article/irs-accused-intimidation-campaign-against-tea-party-groups>; Perry Chiaramonte, *Numerous Tea Party Chapters Claim IRS Attempts to Sabotage Nonprofit Status*, FOX NEWS, Feb. 28, 2012, <http://www.foxnews.com/politics/2012/02/28/numerous-tea-party-chapters-claim-irs-attempting-to-sabotage-non-profit-status/>.

<sup>23</sup> Briefing by IRS staff to Committee staff (May 13, 2013); Treasury Inspector Gen. for Tax Admin., *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 2013) (2013-10-053), at 7, available at <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf> [hereinafter TIGTA Audit Rpt.].

of the ordinary. Moreover, on April 26, 2012, in Lerner's first written response to the Committee's request for information, Lerner wrote that the follow-up letters to conservative applicants were "in the ordinary course of the application process to obtain the information as the IRS deems it necessary to make a determination whether the organization meets the legal requirements for tax-exempt status."<sup>24</sup>

In fact, the scope of the information that EO requested from conservative groups was extraordinary. At a briefing on May 13, 2013, IRS officials, including Nikole Flax, the IRS Commissioner's Chief of Staff, could not identify any other instance in the agency's history in which the IRS asked groups for a complete list of donors with corresponding amounts. **These marked the second and third times Lerner made a false or misleading statement during the Committee's investigation.**

On May 4, 2012, in her second written response to the Committee, Lerner justified the extraordinary requests for additional information from conservative applicants for tax-exempt status.<sup>25</sup> Among other things, Lerner stated, "the requests for information . . . are not beyond the scope of Form 1024 [the application for recognition under section 501(c)(4)]."<sup>26</sup>

According to TIGTA, however, at some point in May 2012, the IRS identified seven types of information, including requests for donor information, which it had inappropriately requested from conservative groups. In fact, according to the TIGTA report, Lerner had received a list of these unprecedented questions on April 25, 2012—more than one week before she sent a response letter to the Committee defending the additional scrutiny applied by EO to certain applicants. **Lerner's statement about the information requests was the fourth time she made a false or misleading statement during the Committee's investigation.**

During the May 10, 2013, American Bar Association (ABA) tax conference, Lerner revealed, through a question she planted with an audience member,<sup>27</sup> that the IRS knew that certain conservative groups had in fact been targeted for additional scrutiny.<sup>28</sup> She blamed the inappropriate actions of the IRS on "line people" in Cincinnati. She stated:

<sup>24</sup> Letter from Lois G. Lerner, Director, Exempt Orgs., IRS, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Apr. 26, 2012).

<sup>25</sup> Letter from Lois G. Lerner, Director, Exempt Orgs., IRS, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 4, 2012).

<sup>26</sup> *Id.* at 1.

<sup>27</sup> *Hearing on the IRS Targeting Conservative Groups: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013) (question and answer with Rep. Nunes); Bernie Becker, *Question that Revealed IRS Scandal was Planted. Chief Admits*, THE HILL, May 17, 2013, available at <http://thehill.com/blogs/on-the-money/domestic-taxes/150878-question-that-revealed-irs-scandal-was-planted-chief-admits>; Abby Phillip, *IRS Planted Question About Tax Exempt Groups*, ABC NEWS, May 17, 2013, <http://abcnews.go.com/blogs/politics/2013/05/irs-planted-question-about-tax-exempt-groups/>.

<sup>28</sup> John D. McKinnon & Corey Boles, *IRS Apologizes for Scrutiny of Conservative Groups*, WALL ST. J., May 10, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323744604578474983310370360>; Jonathan Weisman, *IRS Apologizes to Tea Party Groups Over Audits of Applications for Tax Exemption*, N.Y. TIMES, May 10, 2013; Abram Brown, *IRS, to Tea Party: Sorry We Targeted You & Your Tax Status*, FORBES, May 10, 2013, available at <http://www.forbes.com/sites/abrambrown/2013/05/10/irs-to-tea-party-were-sorry-we-targeted-your-taxes/>.

So our line people in Cincinnati who handled the applications did what we call centralization of these cases. They centralized work on these in one particular group. . . . 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 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.**<sup>29</sup>

This revelation occurred two days after members of the House Ways and Means Oversight Subcommittee on May 8, 2013, had asked Lerner for an update on the IRS's internal investigation into allegations of improper targeting at a hearing.<sup>30</sup> During the hearing, she declined to answer and directed Members to questionnaires on the IRS website. Lerner's failure to disclose relevant information to the House Ways and Means Committee—opting instead to leak the damaging information during an obscure conference—was the first in a series of attempts to obstruct the congressional investigation into targeting of conservative groups.

### ***B. The Events of May 14, 2013***

Three significant events occurred on May 14, 2013. First, TIGTA released its final audit report, finding that the IRS used inappropriate criteria and politicized the process to evaluate organizations for 501(c)(4) tax-exempt status.<sup>31</sup> Specifically, TIGTA found that beginning in early 2010, the IRS used inappropriate criteria to target certain groups based on their names and political positions.<sup>32</sup> According to the report, “ineffective management” allowed the development and use of inappropriate criteria for more than 18 months.<sup>33</sup> The IRS's actions also resulted in “substantial delays in processing certain applications.”<sup>34</sup> TIGTA found that the IRS delayed beginning work on a majority of targeted cases for 13 months.<sup>35</sup> The IRS also sent follow-up requests for additional information to targeted organizations. During its audit, TIGTA “determined [these follow-up requests] to be unnecessary for 98 (58 percent) of 170 organizations” that received the requests.<sup>36</sup>

Second, the Department of Justice announced that it had launched an FBI investigation into potential criminal violations in connection with the targeting of conservative tax-exempt

<sup>29</sup> Rick Hasen, *Transcript of Lois Lerner's Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37AM) <http://electionlawblog.org/?p=50160> (emphasis added).

<sup>30</sup> *Hearing on the Oversight of Tax-Exempt Orgs.: Hearing before the H. Comm. on Ways & Means, Subcomm. on Oversight*, 113th Cong. (2013).

<sup>31</sup> TIGTA Audit Rpt., *supra* note 23.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.* at 14.

<sup>36</sup> *Id.* at 18.



organizations.<sup>37</sup> Despite this announcement, FBI Director Robert Mueller was unable to provide even the most basic facts about the status of the FBI's investigation when he testified before Congress on June 13, 2013.<sup>38</sup> He testified a month after the Attorney General announced the FBI's investigation, calling the matter "outrageous and unacceptable."<sup>39</sup> Chairman Issa and Chairman Jordan wrote to incoming FBI Director James B. Comey on September 6, 2013, with questions about the Bureau's progress in undertaking its investigation into the findings of the May 14, 2013, TIGTA targeting report.<sup>40</sup> While the FBI responded to the Committee's request on October 31, 2013, it failed to produce any documents in response to the Committee's request and has refused to provide briefings on related issues. Chairman Issa and Chairman Jordan wrote to Director Comey again on December 2, requesting documents and information relating to the Bureau's response to the Committee's September 6 letter.<sup>41</sup> To date, the Bureau has responded with scant information, leaving open the possibility the Committee will have to explore other options to compel DOJ into providing the materials requested.<sup>42</sup>

Third, Chairman Issa and Chairman Jordan sent a letter to Lerner outlining each instance that she provided false or misleading information to the Committee. The letter also pointed out Lerner's failure to be candid and forthright regarding the IRS's internal review and subsequent findings related to targeting of conservative-oriented organizations. The Chairmen's letter stated:

Moreover, despite repeated questions from the Committee over a year ago and despite your intimate knowledge of the situation, you failed to inform the Committee of IRS's plan, developed in early 2010, to single out conservative groups and how that plan changed over time. You also failed to inform the Committee that IRS launched its own internal review of this matter in late March 2012, or that the internal review was completed on May 3, 2012, finding significant problems in the review process and a substantial bias against conservative groups. At no point did you or anyone else at IRS inform Congress of the results of these findings.<sup>43</sup>

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<sup>37</sup> *Transcript: Holder on IRS, AP, Civil Liberties, Boston*, WALL STREET J. BLOG (May 14, 2013, 4:51PM), <http://blogs.wsj.com/washwire/2013/05/14/transcript-holder-on-irs-ap-civil-liberties-boston/>; Rachel Weiner, *Holder Has Ordered IRS Investigation*, WASH. POST, May 14, 2013, available at <http://www.washingtonpost.com/blogs/post-politics/wp/2013/05/14/holder-has-ordered-irs-investigation/> [hereinafter Weiner].

<sup>38</sup> *Hearing on the Federal Bureau of Investigation: Hearing before the H. Comm. on the Judiciary*, 113th Cong. (2013) (question and answer with Rep. Jordan).

<sup>39</sup> Weiner, *supra* note 37.

<sup>40</sup> Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, & Hon. Jim Jordan, Chairman, Subcomm. on Econ. Growth, Job Creation & Reg. Affairs, to Hon. James B. Comey, Director, Federal Bureau of Investigation (Sept. 6, 2013).

<sup>41</sup> Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, & Hon. Jim Jordan, Chairman, Subcomm. on Econ. Growth, Job Creation & Reg. Affairs, to Hon. James B. Comey, Director, Federal Bureau of Investigation (Dec. 2, 2013).

<sup>42</sup> *See id.* at 3.

<sup>43</sup> Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, & Hon. Jim Jordan, Chairman, H. Subcomm. on Econ. Growth, Job Creation, & Regulatory Affairs, to Lois G. Lerner, Director, Exempt Orgs., IRS (May 14, 2013).

The letter requested additional documents and communications between Lerner and her colleagues, and urged the IRS and Lerner to cooperate with the Committee's efforts to uncover the extent of the targeting of conservative groups. Lerner did not cooperate.

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## **II. Lerner's Failed Assertion of her Fifth Amendment Privilege**

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In advance of a May 22, 2013 hearing regarding TIGTA's report, the Committee formally invited Lerner to testify. Other witnesses invited to appear were Neal S. Wolin, Deputy Treasury Secretary, Douglas Shulman, former IRS Commissioner, and J. Russell George, the Treasury Inspector General for Tax Administration. Wolin, Schulman, and George all agreed to appear voluntarily. Lerner's testimony was necessary to understand the rationale for and extent of the IRS's practice of targeting certain tax-exempt groups for heightened scrutiny. By then, it was well known that Lerner had extensive knowledge of the scheme to target conservative groups. In addition to the fact that she was director of the Exempt Organizations Division, the Committee believed, as set forth above, that Lerner made numerous misrepresentations of fact related to the targeting program. The Committee's hearing intended to answer important questions and set the record straight about the IRS's handling of tax-exempt applications.

However, prior to the hearing, Lerner's attorney informed Committee staff that she would assert her Fifth Amendment privilege<sup>44</sup>—a refusal to appear before the Committee voluntarily to answer questions. As a result, the Chairman issued a subpoena on May 17, 2013, to compel her testimony at the Committee hearing on May 22, 2013. On May 20, 2013, William Taylor III, representing Lerner, sent the Chairman a letter advising that Lerner intended to invoke her Fifth Amendment privilege against self incrimination.<sup>45</sup> For this reason, Taylor requested that Lerner be excused from appearing.<sup>46</sup> On May 21, 2013, the Chairman responded to Taylor's letter, informing him that her attendance at the hearing was necessary due to "the possibility that [Lerner] will waive or choose not to assert the privilege as to at least certain questions of interest to the Committee."<sup>47</sup> The subpoena that compelled her appearance remained in place.<sup>48</sup>

### ***A. Lerner Gave a Voluntary Statement at the May 22, 2013 Hearing***

On May 22, 2013, Lerner appeared with the other invited witnesses. The events that followed are now well known. Rather than properly asserting her Fifth Amendment privilege, Lerner, in the opinion of the Committee, the House General Counsel, and many legal scholars, waived her privilege by making a voluntary statement of innocence. Instead of remaining silent and declining to answer questions, with the exception of stating her name, Lerner read a lengthy statement professing her innocence:

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<sup>44</sup> Letter from Mr. William W. Taylor, Partner, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 20, 2013).

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

<sup>46</sup> *Id.*

<sup>47</sup> Letter from Hon. Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform to Mr. William W. Taylor, III, Zuckerman Spaeder, May 21, 2013.

<sup>48</sup> *Id.*

Good morning, Mr. Chairman and members of the Committee. My name is Lois Lerner, and I'm the Director of Exempt Organizations at the Internal Revenue Service.

I have been a government employee for over 34 years. I initially practiced law at the Department of Justice and later at the Federal Election Commission. In 2001, I became — I moved to the IRS to work in the Exempt Organizations office, and in 2006, I was promoted to be the Director of that office.

\* \* \*

On May 14th, the Treasury inspector general released a report finding that the Exempt Organizations field office in Cincinnati, Ohio, used inappropriate criteria to identify for further review applications for organizations that planned to engage in political activity which may mean that they did not qualify for tax exemption. On that same day, the Department of Justice launched an investigation into the matters described in the inspector general's report. In addition, members of this committee have accused me of providing false information when I responded to questions about the IRS processing of applications for tax exemption.

**I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee.**

And while I would very much like to answer the Committee's questions today, I've been advised by my counsel to assert my constitutional right not to testify or answer questions related to the subject matter of this hearing. After very careful consideration, I have decided to follow my counsel's advice and not testify or answer any of the questions today.

Because I'm asserting my right not to testify, I know that some people will assume that I've done something wrong. I have not. One of the basic functions of the Fifth Amendment is to protect innocent individuals, and that is the protection I'm invoking today. Thank you.<sup>49</sup>

### ***B. Lerner Authenticated a Document during the Hearing***

Prior to Lerner's statement, Ranking Member Elijah E. Cummings sought to introduce into the record a document containing Lerner's responses to questions posed by TIGTA. After

<sup>49</sup> *Hearing on the IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov't Reform, 113th Cong. 22 (2013) (H. Rept. 113-33) (statement of Lois Lerner, Director, Exempt Orgs., IRS) [hereinafter May 22, 2013 IRS Hearing] (emphasis added).*

her statement and at the request of the Chairman, Lerner reviewed and authenticated the document offered into the record by the Ranking Member.<sup>50</sup> In response to questions from Chairman Issa, she stated:

**Chairman Issa:** Ms. Lerner, earlier the ranking member made me aware of a response we have that is purported to come from you in regards to questions that the IG asked during his investigation. Can we have you authenticate simply the questions and answers previously given to the inspector general?

**Ms. Lerner:** I don't know what that is. I would have to look at it.

**Chairman Issa:** Okay. Would you please make it available to the witness?

**Ms. Lerner:** This appears to be my response.

**Chairman Issa:** So it's your testimony that as far as your recollection, that is your response?

**Ms. Lerner:** That's correct.<sup>51</sup>

Next, the Chairman asked Lerner to reconsider her position on testifying and stated that he believed she had waived her Fifth Amendment privilege by giving an opening statement and authenticating a document.<sup>52</sup> Lerner responded: "I will not answer any questions or testify about the subject matter of this Committee's meeting."<sup>53</sup>

### *C. Representative Gowdy's Statement Regarding Lerner's Waiver*

After Lerner refused to answer any questions, Representative Trey Gowdy sought recognition at the hearing. He stated:

Mr. Issa, Mr. Cummings just said we should run this like a courtroom, and I agree with him. She just testified. She just waived her Fifth Amendment right to privilege. You don't get to tell your side of the story and then not be subjected to cross examination. That's not the way it works. She waived her right of Fifth Amendment privilege by issuing an opening statement. She ought to stay in here and answer our questions.<sup>54</sup>

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<sup>50</sup> *Id.* at 23 (statement of Lois Lerner, Director, Exempt Orgs., IRS).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Shortly after Representative Gowdy's comments, Chairman Issa excused Lerner, reserving the option to recall her at a later date. Chairman Issa stated that Lerner was excused "subject to recall after we seek specific counsel on the questions of whether or not the constitutional right of the Fifth Amendment has been properly waived."<sup>55</sup> Rather than adjourning the hearing on May 22, 2013, the Chairman recessed it, in order to reconvene at a later date after a thorough analysis of Lerner's actions.

***D. Committee Business Meeting to Vote on Whether Lerner Waived Her Fifth Amendment Privilege***

On June 28, 2013, the Chairman convened a business meeting to allow the Committee to vote on whether Lerner waived her Fifth Amendment privilege. The Chairman made clear that he recessed the May 22, 2013 hearing so as not to "make a quick or uninformed decision."<sup>56</sup> He took more than five weeks to review the circumstances, facts, and legal arguments related to Lerner's voluntary statements.<sup>57</sup> The Chairman reviewed advice from the Office of General Counsel of the U.S. House of Representatives, arguments presented by Lerner's counsel, and the relevant legal precedent.<sup>58</sup> After much deliberation, he determined that Lerner waived her constitutional privilege when she made a voluntary opening statement that involved several specific denials of various allegations.<sup>59</sup> Chairman Issa stated:

**Having now considered the facts and arguments, I believe Lois Lerner waived her Fifth Amendment privileges. She did so when she chose to make a voluntary opening statement.** Ms. Lerner's opening statement referenced the Treasury IG report, and the Department of Justice investigation, and the assertions she previously had provided -- sorry -- and the assertions that she had previously provided false information to the committee. **She made four specific denials.** Those denials are at the core of the committee's investigation in this matter. She stated that she had not done anything wrong, not broken any laws, not violated any IRS rules or regulations, and not provided false information to this or any other congressional committee regarding areas about which committee members would have liked to ask her questions. Indeed, committee members are still interested in hearing from her. Her statement covers almost the entire range of questions we wanted to ask when the hearing began on May 22.<sup>60</sup>

Lerner's counsel disagreed with the Chairman's assessment that his client waived her constitutional privilege.<sup>61</sup> In a letter dated May 30, 2013, Lerner's counsel argued that she had

<sup>55</sup> *Id.* at 24.

<sup>56</sup> Business Meeting, H. Comm. on Oversight & Gov't Reform (June 28, 2013).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (emphasis added)

<sup>61</sup> Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 30, 2013) [hereinafter May 30, 2013 Letter].

not waived the privilege.<sup>62</sup> Specifically, he argued that a witness compelled to appear and answer questions does not waive her Fifth Amendment privilege by giving testimony proclaiming her innocence.<sup>63</sup> He cited the example of *Isaacs v. United States*, in which a witness subpoenaed to appear before a grand jury testified that he was not guilty of any crime while at the same time invoking his Fifth Amendment privilege.<sup>64</sup> The U.S. Court of Appeals for the Eighth Circuit rejected the government's waiver argument, holding that the witness's "claim of innocence . . . did not preclude him from relying upon his Constitutional privilege."<sup>65</sup>

Lerner's lawyer further argued that the law is no different for witnesses who proclaim their innocence before a congressional committee.<sup>66</sup> In *United States v. Haag*, a witness subpoenaed to appear before a Senate committee investigating links to the Communist Party testified that she had "never engaged in espionage," but invoked her Fifth Amendment privilege in declining to answer questions related to her alleged involvement with the Communist Party.<sup>67</sup> The U.S. District Court for the District of Columbia held that the witness did not waive her Fifth Amendment privilege.<sup>68</sup> In *United States v. Costello*, a witness subpoenaed to appear before a Senate committee investigating his involvement in a major crime syndicate testified that he had "always upheld the Constitution and the laws" and provided testimony on his assets, but invoked his Fifth Amendment privilege in declining to answer questions related to his net worth and indebtedness.<sup>69</sup> The U.S. Court of Appeals for the Second Circuit held that the witness did not waive his constitutional privilege.<sup>70</sup>

The cases cited by Lerner's lawyer do not apply to the facts in this matter. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."<sup>71</sup> By choosing to give an opening statement, Lerner cannot then claim the Fifth Amendment privilege to avoid answering questions on the subject matter contained in that statement.<sup>72</sup> It is well established that a witness "may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details."<sup>73</sup> In such a case, "[t]he privilege is waived for the matters to which the witness testifies. . . ."<sup>74</sup>

Furthermore, a witness may waive the privilege by voluntarily giving exculpatory testimony. In *Brown v. United States*, for example, the Supreme Court held that "a denial of any activities that might provide a basis for prosecution" waived the privilege.<sup>75</sup> The Court

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 256 F.2d 654, 656 (8th Cir. 1958).

<sup>65</sup> *Id.* at 661.

<sup>66</sup> May 30, 2013 Letter, *supra* note 61.

<sup>67</sup> 142 F. Supp. 667-669 (D.D.C. 1956).

<sup>68</sup> *Id.* at 671-72.

<sup>69</sup> 198 F.2d 200, 202 (2d Cir. 1952).

<sup>70</sup> *Id.* at 202-03.

<sup>71</sup> U.S. CONST., amend. V.

<sup>72</sup> See *Brown v. United States*, 356 U.S. 148 (1958).

<sup>73</sup> *Mitchell v. United States*, 526 U.S. 314, 321 (1999) ("A witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry.")

<sup>74</sup> *Id.*

<sup>75</sup> *Brown*, 356 U.S. at 154-55.

analogized the situation to one in which a criminal defendant takes the stand and testifies on his own behalf, and then attempts to invoke the Fifth Amendment on cross-examination.<sup>76</sup>

Even though the Committee's subpoena compelled her to appear at the hearing, Lerner made an entirely voluntary statement. She denied breaking any laws, she denied breaking any IRS rules, she denied providing false information to Congress—in fact, she denied any wrongdoing whatsoever. Then she refused to answer questions posed by the Committee Members and exited the hearing.

On the morning of June 28, 2013, the Committee convened a business meeting to consider a resolution finding that Lois Lerner waived her Fifth Amendment privilege against self-incrimination when she made a voluntary opening statement at the Committee's May 22, 2013, hearing entitled "The IRS: Targeting Americans for Their Political Beliefs."<sup>77</sup> After lengthy debate, the Committee approved the resolution by a vote of 22 ayes to 17 nays.<sup>78</sup>

### *E. Lois Lerner Continues to Defy the Committee's Subpoena*

Following the Committee's resolution that Lerner waived her Fifth Amendment privilege, Chairman Issa recalled her to testify before the Committee. On February 25, 2014, Chairman Issa sent a letter to Lerner's attorney advising him that the May 22, 2013 hearing would reconvene on March 5, 2014.<sup>79</sup> The letter also advised that the subpoena that compelled Lerner to appear on May 22, 2013 remained in effect.<sup>80</sup>

Because of the possibility that she would choose to answer some or all of the Committee's questions, Chairman Issa required Lerner to appear in person on March 5, 2014. When the May 22, 2013 hearing, entitled "The IRS: Targeting Americans for Their Political Beliefs," was reconvened, Chairman Issa noted that the Committee might hold Lois Lerner in contempt of Congress if she continued to refuse to answer questions, based on the fact that the Committee had resolved that Lerner waived her Fifth Amendment privilege.

Despite the fact that Lerner was compelled by a duly issued subpoena and had been warned by Chairman Issa of the possibility of contempt proceedings, and despite the Committee having previously voted that she waived her Fifth Amendment privilege, Lerner continued to assert her Fifth Amendment privilege, and refused to answer any questions posed by Members of the Committee. Chairman Issa subsequently adjourned the hearing and excused Lerner from the hearing room. At that point, it was clear Lerner would not comply with the Committee's subpoena for testimony.

<sup>76</sup> *Id.*

<sup>77</sup> Business Meeting, H. Comm. on Oversight & Gov't Reform (June 28, 2013).

<sup>78</sup> *Id.* at 65-66.

<sup>79</sup> Letter from Hon. Darrell E. Issa, Chairman, H. Comm. On Oversight & Gov't Reform to William W. Taylor III, Zuckerman Spaeder LLP (Feb. 25, 2014).

<sup>80</sup> *Id.*

Following Lerner's appearance before the Committee on March 5, 2014, her lawyer revealed during a press conference that she had sat for an interview with Department of Justice prosecutors and TIGTA staff within the past six months.<sup>81</sup> According to the lawyer, the interview was unconditional and not under oath, and prosecutors did not grant her immunity.<sup>82</sup> This interview weakens the credibility of her assertion of the Fifth Amendment privilege before the Committee. More broadly, it calls into question the basis for the assertion in the first place.

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### III. Lerner's Testimony Is Critical to the Committee's Investigation

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Prior to Lerner's attempted assertion of her Fifth Amendment privilege, the Committee believed her testimony would advance the investigation of the targeting of tax-exempt conservative-oriented organizations. The following facts supported the Committee's assessment of the probative value of Lerner's testimony:

- **Lerner was head of the IRS Exempt Organization's division, where the targeting of conservative groups occurred.** She managed the two IRS divisions most involved with the targeting – the EO Determinations Unit in Cincinnati and the EO Technical Unit in Washington, D.C.
- **Lerner has not provided any testimony since the release of TIGTA's audit.** Committee staff have conducted transcribed interviews of numerous IRS officials in Cincinnati and Washington. Without testimony from Lois Lerner, however, the Committee will never be able to fully understand the IRS's actions. Lerner has unique, first-hand knowledge of how and why the IRS decided to scrutinize conservative applicants.
- **Acting Commissioner Daniel Werfel did not interview Lerner as part of his ongoing internal review.** In finding no intentional wrongdoing associated with the targeting of conservative groups, Werfel never spoke to Lois Lerner. Furthermore, Werfel lacks the power to require Lerner to provide answers.
- **Lerner's signature appears on harassing letters the IRS sent to targeted groups.** As part of the "development" of the cases, the IRS sent harassing letters to the targeted organizations, asking intrusive questions consistent with guidance from senior IRS officials in Washington. Letters sent under Lois Lerner's signature included inappropriate questions, including requests for donor information.
- **Lerner appears to have edited the TIGTA report.** According to documents provided by the IRS, Lerner was the custodian of a draft version of the TIGTA report that contained tracked changes and written edits that became part of the final report.

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<sup>81</sup> John D. McKinnon, *Former IRS Official Lerner Gave Interview to DOJ*, WALL ST. J., Mar. 6, 2014, <http://blogs.wsj.com/washwire/2014/03/06/former-irs-official-lerner-gave-interview-to-doj/>.

<sup>82</sup> *Id.*



In addition, many of Lerner's voluntary statements from May 22, 2013, have been refuted by evidence obtained by the Committee. Contrary to her statement that she did not do "anything wrong," the Committee knows that Lerner was intrinsically involved in the IRS's inappropriate treatment of tax-exempt applicants. Contrary to Lerner's plea that she has not "violated any IRS rules or regulations," the Committee has learned that Lerner transmitted sensitive taxpayer information to her non-official e-mail account in breach of IRS rules. Contrary to Lerner's statement that she has not provided "false information to this or any other congressional committee," the Committee has confirmed that Lerner made four false and misleading statements about the IRS's screening criteria and information requests for tax-exempt applicants.

In the months following the May 22, 2013 hearing, and after the receipt of additional documents from IRS, it is clear that Lerner's testimony is *essential* to understanding the truth regarding the targeting of certain groups. Subsequent to Lois Lerner's Fifth Amendment waiver during a hearing before the Committee on May 22, 2013, Committee staff learned through both additional transcribed interviews and review of additional documents that she had a greater involvement in targeting tax-exempt organizations than was previously understood.

#### ***A. Lerner's Post-Citizens United Rhetoric***

After the Supreme Court decided the *Citizens United v. Federal Election Commission* case, holding that government of restrictions of corporations and associations' expenditures on political activities was unconstitutional,<sup>83</sup> the IRS faced mounting pressure from the public to heighten scrutiny of applications for tax-exempt status. IRS officials in Washington played a key role in the disparate treatment of conservative groups. E-mails obtained by the Committee show that senior-level IRS officials in Washington, including Lerner, were well aware of the pressure the agency faced, and actively sought to scrutinize applications from certain conservative-leaning groups in response to public pressure.

On the same day of the *Citizens United* decision, White House Press Secretary Robert Gibbs warned that Americans "should be worried that special interest groups that have already clouded the legislative process are soon going to get involved in an even more active way in doing the same thing in electing men and women to serve in Congress."<sup>84</sup> On January 23, 2010, President Obama proclaimed that the *Citizens United* "ruling strikes at our democracy itself" and "opens the floodgates for an unlimited amount of special interest money into our democracy."<sup>85</sup> Less than a week later, the President publicly criticized the decision during his State of the Union address. The President declared:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit

<sup>83</sup> *Citizens United v. Federal Election Comm.*, 558 U.S. 310 (2010).

<sup>84</sup> The White House, Briefing by White House Press Secretary Robert Gibbs and PERAB Chief Economist Austan Goolsbee (Jan. 21, 2010).

<sup>85</sup> The White House, Weekly Address: President Obama Vows to Continue Standing Up to the Special Interest on Behalf of the American People (Jan. 23, 2010).

in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse by foreign entities. They should be decided by the American people.<sup>86</sup>

Over the next several months, the President continued his public tirade against the decision, so-called "secret money" in politics, and the emergence of conservative grassroots groups. In a July 2010 White House Rose Garden speech, the President proclaimed:

Because of the Supreme Court's decision earlier this year in the *Citizens United* case, big corporations . . . can buy millions of dollars worth of TV ads – and worst of all, they don't even have to reveal who's actually paying for the ads. . . . These shadow groups are already forming and building war chests of tens of millions of dollars to influence the fall elections.<sup>87</sup>

During an August 2010 campaign event, the President declared:

Right now all around this country there are groups with harmless-sounding names like Americans for Prosperity, who are running millions of dollars of ads against Democratic candidates all across the country. And they don't have to say who exactly the Americans for Prosperity are. You don't know if it's a foreign-controlled corporation. You don't know if it's a big oil company, or a big bank. You don't know if it's a insurance [*sic*] company that wants to see some of the provisions in health reform repealed because it's good for their bottom line, even if it's not good for the American people.<sup>88</sup>

Similarly, while speaking at a September 2010 campaign event, the President stated:

Right now, all across this country, special interests are running millions of dollars of attack ads against Democratic candidates. And the reason for this is last year's Supreme Court decision in *Citizens United*, which basically says that special interests can gather up millions of dollars – they are now allowed to spend as much as they want without limit, and they don't have to ever reveal who's paying for these ads.<sup>89</sup>

These public statements criticizing conservative-leaning organizations in the aftermath of the Supreme Court's *Citizens United* opinion affected how the IRS identified and evaluated applications. In September 2010, *EO Tax Journal* published an article critical of certain tax-exempt organizations which purportedly engaged in political activity.<sup>90</sup> The article—published several months after the *Citizens United* opinion and during the President's tirade against the

<sup>86</sup> The White House, Remarks by the President in the State of the Union Address (Jan. 27, 2010).

<sup>87</sup> The White House, Remarks by the President on the DISCLOSE ACT (July 26, 2010).

<sup>88</sup> The White House, Remarks by the President at a DNC Finance Event in Austin, Texas (Aug. 9, 2010).

<sup>89</sup> The White House, Remarks by the President at Finance Reception for Congressman Sestak (Sept. 20, 2010).

<sup>90</sup> E-mail from Paul Streckfus to Paul Streckfus (Sept. 15, 2010) (EO Tax Journal 2010-130) [IRSR 191032-33].

decision—argued that tax-exempt groups, which participate in the political process, are abusing their status.<sup>91</sup> Lerner sent the article to several IRS officials, including her senior advisor, Judy Kindell. Lerner stated “I’m really thinking we need to do a c4 project next year.”<sup>92</sup>

Kindell agreed with Lerner that the IRS should focus special attention on certain tax-exempt groups.<sup>93</sup> Kindell conveyed her belief that tax-exempt groups participating in political activities should not qualify as 501(c)(4) groups.<sup>94</sup> Lerner agreed with her senior advisor, explaining in response that those tax-exempt groups which support political activity should be subject to scrutiny from the IRS.<sup>95</sup> Lerner wrote:<sup>96</sup>

**From:** Lerner Lois G  
**Sent:** Wednesday, September 15, 2010 1:51 PM  
**To:** Kindell Judith E; Chasin Cheryl D; Ghougasian Laurice A  
**Cc:** Lehman Sue; Kail Jason C; Downing Nanette M  
**Subject:** RE: EO Tax Journal 2010-130

I'm not saying this is correct--but there is a perception out there that that is what is happening. My guess is most who conduct political activity never pay the tax on the activity and we surely should be looking at that. Wouldn't that be a surprising turn of events. My object is not to look for political activity--more to see whether self-declared c4s are really acting like c4s. Then we'll move on to c5,c6,c7--it will fill up the work plan forever!

*Lois G. Lerner*  
 Director, Exempt Organizations

Soon thereafter, Cheryl Chasin, an IRS official within the Exempt Organizations division, replied to Lerner with the names of several organizations which, in Chasin’s opinion, were engaging in political activity.<sup>97</sup> In turn, Lerner replied that the IRS officials “need to have a plan” to handle the applications from certain tax-exempt groups.<sup>98</sup> Lerner wrote “We need to be cautious so it isn’t a *per se* political project.”<sup>99</sup>

<sup>91</sup> *Id.*

<sup>92</sup> E-mail from Lois Lerner, IRS, to Cheryl Chasin et al., IRS (Sept. 15, 2010). [IRSR 191032-33].

<sup>93</sup> E-mail from Judith Kindell, IRS, to Lois Lerner, Cheryl Chasin, & Laurice Ghougasian, IRS (Sept. 15, 2010) [IRSR 191032].

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> E-mail from Cheryl Chasin, IRS, to Lois Lerner, Judith Kindell, & Laurice Ghougasian, IRS (Sept. 15, 2010). [IRSR 191030]

<sup>98</sup> E-mail from Lois Lerner, IRS, to Cheryl Chasin, Judith Kindell, & Laurice Ghougasian, IRS (Sept. 16, 2010). [IRSR 191030]

<sup>99</sup> *Id.*

**From:** Lerner Lois G  
**Sent:** Thursday, September 16, 2010 9:58 AM  
**To:** Chasin Cheryl D; Kindell Judith E; Ghogasian Laurice A  
**Cc:** Lehman Sue; Kall Jason C; Downing Nanette M  
**Subject:** Re: EO Tax Journal 2010-130

Ok guys. We need to have a plan. We need to be cautious so it isn't a per se political project. More a c4 project that will look at levels of lobbying and pol. activity along with exempt activity. Cheryl- I assume none of those came in with a 1024?  
 Lois G. Lerner

In addition to her e-mails critical of applications from certain groups, Lerner publicly criticized the Supreme Court's *Citizens United* opinion.<sup>100</sup> On October 19, 2010, Lerner spoke at an event sponsored by Duke University's Sanford School of Public Policy. At the event, Lerner referenced the political pressure the IRS faced to "fix the problem" of 501(c)(4) groups engaging in political activity.<sup>101</sup> She stated:

What happened last year was the Supreme Court – the law kept getting chipped away, chipped away in the federal election arena. The Supreme Court dealt a huge blow, overturning a 100-year old precedent that basically corporations couldn't give directly to political campaigns. And everyone is up in arms because they don't like it. The Federal Election Commission can't do anything about it.

**They want the IRS to fix the problem.** The IRS laws are not set up to fix the problem: (c)(4)s can do straight political activity. They can go out and pay for an ad that says, "Vote for Joe Blow." That's something they can do as long as their primary activity is their (c)(4) activity, which is social welfare.

So everybody is screaming at us right now: 'Fix it now before the election. Can't you see how much these people are spending?' I won't know until I look at their 990s next year whether they have done more than their primary activity as political or not. So I can't do anything right now.<sup>102</sup>

Lerner reiterated her views to TIGTA investigators:

The *Citizens United* decision allows corporations to spend freely on elections. Last year, there was a lot of press on 501(c)(4)s being used to funnel money on elections and the IRS was urged to do something about it.<sup>103</sup>

<sup>100</sup> *Citizens United v. Federal Election Comm.*, 558 U.S. 310 (2010).

<sup>101</sup> John Sexton, *Lois Lerner Discusses Political Pressure on the IRS in 2010*, BREITBART.COM, Aug. 6, 2013.

<sup>102</sup> See "Lois Lerner Discusses Political Pressure on IRS in 2010," www.youtube.com (last visited Feb. 28, 2013) (transcription by authors).

<sup>103</sup> Treasury Inspector General for Tax Admin., Memo of Contact (Apr. 5, 2012).

Lerner openly shared her opinion that the Executive Branch needed to take steps to undermine the Supreme Court's decision. Her view was abundantly clear in many instances, including in one when Sharon Light, another senior advisor to Lerner, e-mailed Lerner an article about allegations that unknown conservative donors were influencing U.S. Senate races.<sup>104</sup> The article explained how outside money was making it increasingly difficult for Democrats to remain in the majority in the Senate.<sup>105</sup> Lerner replied: "Perhaps the FEC will save the day."<sup>106</sup>

In May 2011, Lerner again commented about her disdain for the *Citizens United* decision.<sup>107</sup> In her view, the decision had a major effect on election laws and, more broadly, the Constitution and democracy going forward.<sup>108</sup> She stated, "The constitutional issue is the big *Citizens United* issue. I'm guessing no one wants that going forward."<sup>109</sup>

<b>From:</b>	Lerner Lois G
<b>Sent:</b>	Tuesday, May 17, 2011 10:37 AM
<b>To:</b>	Urban Joseph J
<b>Subject:</b>	Re: BNA - IRS Answers Few Questions Regarding Audits Of Donors Giving to Section 501(c)(4) Groups

The constitutional issue is the big Citizens United issue. I'm guessing no one wants that going forward Lois G. Lerner-----

IRS officials, including Lerner, were acutely aware of criticisms of the political activities of conservative-leaning tax-exempt groups through electronic publications.<sup>110</sup> In October 2011, *EO Tax Journal* published a report regarding a letter sent by a group called "Democracy 21" to then-IRS Commissioner Doug Shulman and Lerner.<sup>111</sup> The letter called on the IRS to investigate certain conservative-leaning tax-exempt groups.<sup>112</sup> The IRS Deputy Division Counsel for the Tax Exempt Entities Division, Janine Cook, sent, via e-mail, the report and letter to the Division Counsel, Victoria Judson, calling the matter a "very hot button issue floating around."<sup>113</sup>

On several occasions, Lerner received articles from her colleagues that focused on discussions about conservative-leaning groups' political involvement. In March 2012, Cook e-mailed Lerner another *EO Tax Journal* article.<sup>114</sup> The article discussed congressional investigations and the IRS's treatment of tax-exempt applicants.<sup>115</sup> In response, Lerner stated, "we're going to get creamed."<sup>116</sup>

<sup>104</sup> Peter Overby, *Democrats Say Anonymous Donors Unfairly Influencing Senate Races*, NAT'L PUBLIC RADIO, July 10, 2012.

<sup>105</sup> *Id.*

<sup>106</sup> E-mail from Lois Lerner, IRS, to Sharon Light, IRS (July 10, 2010). [IRS 179093]

<sup>107</sup> E-mail from Lois Lerner, IRS, to Joseph Urban, IRS (May 17, 2011). [IRSR 196471]

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See, e.g., e-mail from Monice Rosenbaum, IRS, to Kenneth Griffin, IRS (Sept. 30, 2010). [IRSR 15430]

<sup>111</sup> E-mail from Paul Streckfus to Paul Streckfus (Oct. 3, 2011) (*EO Tax Journal* 2011-163) [IRSR 191032-33].

<sup>112</sup> *Id.*

<sup>113</sup> E-mail from Janine Cook, IRS, to Victoria Judson, IRS (Oct. 10, 2011). [IRSR 15433]

<sup>114</sup> E-mail from Janine Cook, IRS, to Lois Lerner, IRS (Mar. 2, 2012). [IRSR 56965]

<sup>115</sup> *Id.*

<sup>116</sup> E-mail from Lois Lerner, IRS, to Janine Cook, IRS (Mar. 2, 2012). [IRSR 56965]

**From:** Lerner Lois G <Lois.G.Lerner@irs.gov>  
**Sent:** Friday, March 02, 2012 9:20 AM  
**To:** Cook Janine  
**Subject:** RE: Advocacy orgs

**If only you could help--we're going to get creamed being able to provide the guidance piece ASAP will be the best--thanks**

*Lois G. Lerner*  
 Director of Exempt Organizations

In June 2012, Roberta Zarin, Director of the Tax-Exempt and Government Entities Communication and Liaison, forwarded an e-mail to Lerner and her senior advisor, Judy Kindell, about an article published by *Mother Jones* entitled "How Dark-Money Groups Sneak by the Taxman."<sup>117</sup> The article specifically named several conservative-leaning groups, including the American Action Network, Crossroads GPS, Americans for Prosperity, FreedomWorks and Citizens United, and commented negatively on specific methods conservative-leaning groups have purportedly used to influence the political process.<sup>118</sup>

The *Mother Jones* article caught Lerner's attention. She forwarded the article to the Director of Examinations, Nanette Downing.<sup>119</sup>

**From:** Lerner Lois G  
**Sent:** Wednesday, June 13, 2012 12:48 PM  
**To:** Downing Nanette M  
**Subject:** FW: Mother Jones on (c)(4)s

CONFIDENTIAL

*Lois G. Lerner*  
 Director of Exempt Organizations

Lerner's e-mail contained confidential tax return information, which was redacted pursuant to 26 U.S.C. § 6103, meaning that Lerner referenced a particular tax-exempt group in connection with the article.<sup>120</sup>

Not long after, in October 2012, Justin Lowe, a tax law specialist, alerted Lerner to yet another article critical of anonymous money allegedly donated to conservative-leaning groups.<sup>121</sup> The article, published by *Politico*, criticized the IRS's inability to restrain corporate money

<sup>117</sup> E-mail from Roberta Zarin, IRS, to Lois Lerner, Joseph Urban, Judith Kindell, Moises Medina, Joseph Grant, Sarah Hall Ingram, Melaney Partner, Holly Paz, David Fish, & Nancy Marks, IRS (June 13, 2012). [IRSR 177479]

<sup>118</sup> Gavin Aronsen, *How Dark-Money Groups Sneak by the Taxman*, MOTHER JONES, June 13, 2012, available at <http://www.motherjones.com/mojos/2012/06/dark-money-501c4-irs-social-welfare>.

<sup>119</sup> E-mail from Lois Lerner, IRS, to Nanette Downing, IRS (June 13, 2012). [IRSR 177479]

<sup>120</sup> *Id.*

<sup>121</sup> E-mail from Justin Lowe, IRS, to Roberta Zarin, Lois Lerner, Holly Paz, & Melaney Partner, IRS (Oct. 17, 2012). [IRSR 180728]

donated to conservative-leaning groups.<sup>122</sup> Lerner's response showed that she believed Congress ought to change the law to prohibit such activity.<sup>123</sup> She wrote, "I never understand why they don't go after Congress to change the law."<sup>124</sup>

<b>From:</b>	Lerner Lois G
<b>Sent:</b>	Wednesday, October 17, 2012 9:28 AM
<b>To:</b>	Lowe Justin; Zarin Roberta B; Paz Holly O; Partner Melaney J
<b>Subject:</b>	RE: Politico Article on the IRS, Disclosure, and (c)(4)s

**I never understand why they don't go after Congress to change the law!**

*Lois G. Lerner*

Director of Exempt Organizations

In the spring of 2013, the IRS was again facing mounting pressure from congressional leaders – largely on the Democratic side of the aisle – to crack down on certain organizations engaged in political activity. An official with the IRS Criminal Investigations Division testified before the Senate Judiciary Committee's Subcommittee on Crime and Terrorism at a hearing on campaign speech.<sup>125</sup> An e-mail discussion between Lerner and other IRS officials demonstrates that IRS officials believed that the purpose of the hearing was to discuss the extent to which certain tax-exempt organizations were participating in political activities.<sup>126</sup> In an e-mail to several top IRS officials, including Nikole Flax, the Chief of Staff to former Acting Commissioner Steve Miller, Lerner stated that the pressure from certain congressional leaders was completely focused on certain 501(c)(4) organizations.<sup>127</sup> She stated in part: "[D]on't be fooled about how this is being articulated—it is ALL about 501(c)(4) orgs and political activity."<sup>128</sup>

She also explained that her previous boss at the Federal Election Commission, Larry Noble, was now working as the President of Americans for Campaign Reform to "shut these [501(c)(4)s] down."<sup>129</sup>

Lerner's public statements, comments to TIGTA investigators, and candid e-mails to colleagues show that she was aware that Senate Democrats and certain Administration officials were not only aware of, but actively opposed to, the political activities of conservative-oriented groups. Further, she was well aware of the drumbeat that the IRS should crack down on applications from certain tax-exempt groups engaging in political activity.

<sup>122</sup> Kenneth Vogel & Tarini Parti, *The IRS's 'Feeble' Grip on Political Cash*, POLITICO, Oct. 15, 2012.

<sup>123</sup> E-mail from Lois Lerner, IRS, to Justin Lowe, Roberta Zarin, Holly Paz, & Melaney Partner, IRS (Oct. 17, 2012). [IRS 180728]

<sup>124</sup> *Id.*

<sup>125</sup> *Hearing on the Current Issues in Campaign Finance Law Enforcement: Hearing before the S. Comm. on the Judiciary, Subcomm. on Crime & Terrorism*, 113th Cong. (2013).

<sup>126</sup> E-mail from Lois Lerner, IRS, to Nikole Flax, Suzanne Sinno, Catherine Barre, Scott Landes, Amy Amato, & Jennifer Vozne, IRS (Mar. 27, 2013) [IRS 188329]

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

### ***B. Lerner's Involvement in the Delay and Scrutiny of Tea Party Applicants***

Lerner, along with several senior officials, subjected applications from conservative leaning groups to heightened scrutiny. She established a "multi-tier review" system, which resulted in long delays for certain applications.<sup>130</sup> Furthermore, according to testimony from Carter Hull, a tax law specialist who retired in the summer of 2013, the IRS still has not approved certain applications.<sup>131</sup>

#### **1. "Multi-Tier Review" System**

Lerner and her senior advisors closely monitored and actively assisted in evaluating Tea Party cases. In April 2010, Steve Grodnitzky, then-acting manager of EO Technical Group in Washington, directed subordinates to prepare "sensitive case reports" for the Tea Party cases.<sup>132</sup> These reports summarized the status and progress of the Tea Party test cases, and were eventually presented to Lerner and her senior advisors.

In early 2011, Lerner directed Michael Seto, manager of EO Technical, to place the Tea Party cases through a "multi-tier review."<sup>133</sup> He testified that Lerner "sent [him an] e-mail saying that when these cases need to go through multi-tier review and they will eventually have to go to [Judy Kindell, Lerner's senior technical advisor] and the Chief Counsel's office."<sup>134</sup>

In February 2011, Lerner sent an e-mail to her staff advising them that cases involving Tea Party applicants were "very dangerous," and something "Counsel and Judy Kindell need to be in on."<sup>135</sup> Further, Lerner explained that "Cincy should probably NOT have these cases."<sup>136</sup> Holly Paz, Director of the Office of Rulings and Agreements, also wrote to Lerner stating that "He [Carter Hull] reviews info from TPs [taxpayers] correspondence to TPs etc. No decisions are going out of Cincy until we go all the way through the process with the c3 and c4 cases here."<sup>137</sup>

In a transcribed interview with Committee staff, Carter Hull testified that during the winter of 2010-2011, Lerner's senior advisor told him the Chief Counsel's office would need to review the Tea Party applications.<sup>138</sup> This review process was an unusual departure from standard procedure.<sup>139</sup> He told Committee staff that during his 48 years with the IRS, he never

<sup>130</sup> Transcribed Interview of Michael Seto, IRS, in Wash., D.C., at 34 (July 11, 2013).

<sup>131</sup> Transcribed Interview of Carter Hull, IRS, in Wash., D.C., at 53 (June 14, 2013).

<sup>132</sup> Email from Steven Grodnitzky, IRS, to Ronald J. Shoemaker & Cindy M. Thomas, IRS (Apr. 5, 2010). [Muthert 6]

<sup>133</sup> Transcribed Interview of Michael Seto, IRS, in Wash., D.C., at 34 (July 11, 2013).

<sup>134</sup> *Id.*

<sup>135</sup> E-mail from Lois Lerner, IRS, to Michael Seto, IRS (Feb. 1, 2011). [IRSR 161810-11]

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Transcribed Interview of Carter Hull, IRS, at 44-45 (June 14, 2013).

<sup>139</sup> *Id.*



previously sent a case to Lerner's senior advisor and did not remember ever sending a case to the Chief Counsel for review.<sup>140</sup>

In April 2011, Lerner's senior advisor, Kindell, wrote to Lerner and Holly Paz explaining that she instructed tax law specialists Carter Hull and Elizabeth Kastenberg to coordinate with the Chief Counsel's office to work through two specific Tea Party cases.<sup>141</sup> Kindell thought it would be beneficial to request that all Tea Party cases be sent to Washington. She stated "there are a number of other (c)(3) and (c)(4) applications of orgs related to the Tea Party that are currently in Cincinnati. Apparently the plan had been to send one of each to DC to develop a position to be applied to others."<sup>142</sup>

**From:** Kindell Judith E  
**Sent:** Thursday, April 07, 2011 10:16 AM  
**To:** Lerner Lois G; Paz Holly O  
**Cc:** Light Sharon P; Letourneau Diane L; Neuhart Paige  
**Subject:** sensitive (c)(3) and (c)(4) applications

I just spoke with Chip Hull and Elizabeth Kastenberg about two cases they have that are related to the Tea Party - one a (c)(3) application and the other a (c)(4) application. I recommended that they develop the private benefit argument further and that they coordinate with Counsel. They also mentioned that there are a number of other (c)(3) and (c)(4) applications of orgs related to the Tea Party that are currently in Cincinnati. Apparently the plan had been to send one of each to DC to develop a position to be applied to the others. Given the sensitivity of the issue and the need (I believe) to coordinate with Counsel, I think it would be beneficial to have the other cases worked in DC as well. I understand that there may be TAS inquiries on some of the cases.

In response, Holly Paz expressed her reservations about sending all of the Tea Party cases to Washington.<sup>143</sup> She explained that because of the IRS's considerable responsibilities in overseeing the implementation of the Affordable Care Act, as well as the approximately 40 Tea Party cases that were already pending, she was doubtful Washington would be able to handle all of the cases.<sup>144</sup>

## 2. Lerner's Briefing on the "Advocacy Cases"

During the summer of 2011, Lerner ordered her subordinates to reclassify the Tea Party cases as "advocacy cases."<sup>145</sup> She told subordinates she ordered this reclassification because she thought the term "Tea Party" was "just too pejorative."<sup>146</sup> Consistent with her earlier concern that scrutiny could not be "*per se* political," she also ordered the implementation of a new screening method. This change occurred without informing applicants selected for enhanced scrutiny that they had been selected through inappropriate criteria. This sleight-of-hand change

<sup>140</sup> *Id.* at 44, 47.

<sup>141</sup> E-mail from Judith Kindell, IRS, to Lois Lerner & Holly Paz, IRS (Apr. 7, 2011). [IRSR 69898]

<sup>142</sup> *Id.*

<sup>143</sup> E-mail from Holly Paz, IRS, to Judith Kindell & Lois Lerner, IRS (Apr. 7, 2011). [IRSR 69898]

<sup>144</sup> *Id.*

<sup>145</sup> Transcribed Interview of Carter Hull, IRS, in Wash., D.C., at 132 (June 14, 2013).

<sup>146</sup> *Id.*

added a level of deniability for the IRS, which officials would eventually use to dismiss accusations of political motivations.

According to testimony from Cindy Thomas, the IRS official in charge of the Cincinnati office, Lerner “cares about power and that it’s important to her maybe to be more involved with what’s going on politically and to me we should be focusing on working the determinations cases . . . and it shouldn’t matter what type of organization it is.”<sup>147</sup>

In June 2011, Holly Paz contacted Cindy Thomas regarding the Tea Party cases.<sup>148</sup> Paz explained that Lerner wanted a briefing on the cases.<sup>149</sup>

**From:** Paz Holly O  
**Sent:** Wednesday, June 01, 2011 2:21 PM  
**To:** Thomas Cindy M  
**Cc:** Melahn Brenda  
**Subject:** group of cases

re: Tea Party cases

Two things re: these cases:

1. Can you please send me a copy of the Crossroads Grassroots Policy Strategies (EIN 27-2753378) application? Lois wants Judy to take a look at it so she can summarize the issues for Lois.
2. What criteria are being used to label a case a "Tea Party case"? We want to think about whether those criteria are resulting in over-inclusion.

Lois wants a briefing on these cases. We'll take the lead but would like you to participate. We're aiming for the week of 6/27.

Thanks!

Holly

In late June 2011, Justin Lowe, a tax law specialist with EO Technical, prepared a briefing paper for Lerner summarizing the test cases sent from Cincinnati.<sup>150</sup> The paper described the groups as “organizations [that] are advocating on issues related to government spending, taxes, and similar matters.”<sup>151</sup> The paper listed several criteria, which were used to identify Tea Party cases, including the phrases “Tea Party,” “Patriots,” or “9/12 Project” or “[s]tatements in the case file [that] criticize how the country is being run.”<sup>152</sup>

<sup>147</sup> Transcribed Interview of Lucinda Thomas, IRS, in Wash., D.C., at 212 (June 28, 2013).

<sup>148</sup> E-mail from Holly Paz, IRS, to Cindy Thomas, IRS (June 1, 2011). [IRS 69915]

<sup>149</sup> *Id.*

<sup>150</sup> Justin Lowe, IRS, Increase in (c)(3)/(c)(4) Advocacy Org. Applications (June 27, 2011). [IRS 2735]

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

The briefing paper prepared for Lerner further stated that the applicant for 501(c)(4) status “stated it will conduct advocacy and political campaign intervention, but political campaign intervention will account for 20% or less of activities. A proposed favorable letter has been sent to Counsel for review.”<sup>153</sup> Although the applicant planned to engage in minimal campaign activities, the IRS did not immediately approve the application. Despite the fact that Hull recommended the application for approval, as of June 2013, the application was still pending.<sup>154</sup>

In July 2011, Holly Paz wrote to an attorney in the IRS Chief Counsel’s office expressing her reluctance to approve the Tea Party applications and noting Lerner’s involvement in handling the cases. She wrote: “Lois would like to discuss our planned approach for dealing with these cases. We suspect we will have to approve the majority of the c4 applications.”<sup>155</sup>

In August 2011, the Chief Counsel’s office held a meeting with Carter Hull, Lerner’s senior advisor, and other Washington officials to discuss the test cases.<sup>156</sup> For the next few months, however, these test cases were still pending. Later, the Chief Counsel’s office told Hull that the office required updated information to evaluate the applications.<sup>157</sup> The request for updated information was unusual since the applications had been up-to-date as of a few months earlier.<sup>158</sup> In addition, the Chief Counsel’s office discussed the possibility of creating a template letter for all Tea Party applications, including those which had remained in Cincinnati.<sup>159</sup> Hull testified that the template letter plan was impractical since each application was different.<sup>160</sup>

### 3. The IRS’s Internal Review

Despite Lerner’s substantial involvement in delaying the approval of Tea Party applications, IRS leadership excluded Lerner from an internal review of allegations of inappropriate treatment of the Tea Party applications.<sup>161</sup> Steve Miller, then-Deputy Commissioner, testified during a transcribed interview that he asked Nan Marks, a veteran IRS official, to conduct the review because he wanted someone independent to examine the allegations.<sup>162</sup> Lerner contacted Miller, expressing her confusion and a lack of direction on the IRS’s review. She asked, “What are your expectations as to who is implementing the plan?”<sup>163</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> Transcribed Interview of Carter Hull, IRS, in Wash., D.C., at 53 (June 14, 2013).

<sup>155</sup> E-mail from Holly Paz, IRS, to Janine Cook, IRS (July 19, 2011). [IRS 14372-73]

<sup>156</sup> Transcribed Interview of Carter Hull, IRS, in Wash., D.C., at 47-49 (June 14, 2013).

<sup>157</sup> *Id.* at 50-51.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 51-52.

<sup>160</sup> *Id.* at 50-51.

<sup>161</sup> E-mail from Lois Lerner, IRS, to Steven Miller, IRS (May 2, 2012). [IRS 198685]

<sup>162</sup> Transcribed interview of Steven Miller, IRS, in Wash., D.C., at 32-33 (Nov. 13, 2013).

<sup>163</sup> *Id.*

From: Lerner Lois G  
 Sent: Wednesday, May 02, 2012 9:40 AM  
 To: Miller Steven T  
 Subject: A Question

I'm wondering if

you might be able to give me a better sense of your expectations regarding roles and responsibilities for the c4 matters. I understand you have asked Nan to take a deep look at the what is going on and make recommendations. I'm fine with that. Then there was the discussion yesterday about how we plan to approach the issues going forward. That is where the confusion lies. What are your expectations as to who is implementing the plan?

Prior to that

meeting, unbeknownst to me, Cathy had made comments regarding the guidance—which Nan knew about. Nan then directed one of my staff to meet with Cathy and start moving in a new direction. The staff person came to me and I talked to Nan, suggesting before we moved, we needed to hear from you, which is where we are now.

We're all on good

terms and we all want to do the best, but I fear that unless there's a better understanding of roles, we may step on each others toes without intending to.

Your thoughts

please. Thanks

*Lois G. Lerner*

Director of Exempt Organizations

Once Marks's internal review confirmed that the IRS had inappropriately treated conservative applications, Lerner was personally involved in the aftermath. Echoing Lerner's

early 2011 orders to create a multi-layer review system for the Tea Party cases, Seto, manager of EO Technical, explained in June 2012 the new procedures for certain cases with “advocacy issues.”<sup>164</sup> Seto advised staff that reviewers required the approval of senior managers, including Seto himself, before approving any cases with “advocacy issues.”<sup>165</sup>

**From:** Seto Michael C  
**Sent:** Wednesday, June 20, 2012 2:11 PM  
**To:** McNaughton Mackenzie P; Salins Mary J; Shoemaker Ronald J; Lieber Theodore R  
**Cc:** Grodnitzky Steven; Megosh  
**And:** Giuliano Matthew L; Fish David L; Paz Holly O  
**Subject:**  
 Additional procedures on cases with advocacy issues - before issuing any favorable or initial denial ruling

Please

Inform the reviewers and staff in your groups that before issuing any favorable or initial denial rulings on any cases with advocacy issues, the reviewers must notify me and you via e-mail and get our approval. No favorable or initial denial rulings can be issued without your and my approval. The e-mail notification includes the name of the case, and a synopsis of facts and denial rationale. I may require a short briefing depending on the facts and circumstances of the particular case.

If you have any questions, please let me know.

Thanks, \_\_\_\_\_

Mike

<sup>164</sup> E-mail from Michael Seto, IRS, to Mackenzie McNaughton, Mary Salins, Ronald Shoemaker, & Theodore Lieber, IRS (June 20, 2012). [IRSR 199229]

<sup>165</sup> *Id.*

These new procedures again delayed applications because reviewers were unable to issue any rulings on their own. Paz forwarded the e-mail to Lerner, ensuring Lerner was aware of the additional review procedures.<sup>166</sup>

Lerner's e-mails show she was well-aware that IRS officials had set aside numerous Tea Party cases for further review.<sup>167</sup> In July 2012, her senior advisor, Judy Kindell, explained what percentage of both (c)(3) and (c)(4) cases officials had set aside.<sup>168</sup> Kindell estimated that half of the (c)(3) applicants and three-quarters of the (c)(4) applicants appeared to be conservative leaning "based solely on the name."<sup>169</sup> Kindell also noted that the number of conservative-leaning applications set aside was much larger than that of applications set aside for liberal or progressive groups.<sup>170</sup>

<b>From:</b>	Kindell Judith E
<b>Sent:</b>	Wednesday, July 18, 2012 10:54 AM
<b>To:</b>	Lerner Lois G
<b>Cc:</b>	Light Sharon P
<b>Subject:</b>	Bucketed cases

Of the 84 (c)(3) cases, slightly over half appear to be conservative leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum.

Of the 199 (c)(4) cases, approximately 3/4 appear to be conservative leaning while fewer than 10 appear to be liberal/progressive leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum.

The multi-tier review process in Washington and requests for additional information sent to applicants led to the delay of the test cases as well as other Tea Party applications pending in Cincinnati. The Chief Counsel's office also directed Lerner's staff to request additional information from Tea Party applicants, including information about political activities leading up to the 2010 election. In fact, it appears the IRS never resolved the test applications.<sup>171</sup>

<sup>166</sup> E-mail from Holly Paz, IRS, to Lois Lerner, IRS (June 20, 2012). [IRS 199229]

<sup>167</sup> E-mail from Judith Kindell, IRS, to Lois Lerner, IRS (July 18, 2012). [IRS 179406]

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Transcribed Interview of Carter Hull, IRS, at 53 (June 14, 2013).

### *C. Lerner's Involvement in Regulating 501(c)(4) groups "off-plan"*

According to information available to the Committee, the IRS and the Treasury Department considered regulating political speech of § 501(c)(4) social welfare organizations well before 2013.<sup>172</sup> The IRS and Treasury Department worked on these regulations in secret without noticing its work on the IRS's Priority Guidance Plan. Lois Lerner played a role in the this "off-plan" regulation of § 501(c)(4) organizations.

In June 2012, Ruth Madrigal of the Treasury Department's Office of Tax Policy wrote to Lerner and other IRS leaders about potential § 501(c)(4) regulations. She wrote: "Don't know who in your organization is keeping tabs on c4s, but since we mentioned potentially addressing them (off-plan) in 2013, I've got my radar up and this seemed interesting."<sup>173</sup> Madrigal forwarded a short article about a court decision with "potentially major ramifications for politically active section 501(c)(4) organizations."<sup>174</sup>

<b>From:</b>	Ruth.Madrigal [REDACTED]
<b>Sent:</b>	Thursday, June 14, 2012 3:10 PM
<b>To:</b>	Judson Victoria A; Cook Janine; Lerner Lois G; Marks Nancy J
<b>Subject:</b>	501(c)(4)s - From the Nonprofit Law Prof Blog

Don't know who in your organizations is keeping tabs on c4s, but since we mentioned potentially addressing them (off-plan) in 2013, I've got my radar up and this seemed interesting...

In a transcribed interview with Committee staff, Madrigal discussed her e-mail. She explained that the Department worked with Lerner and her IRS colleagues to develop the § 501(c)(4) regulation "off-plan." She testified:

- Q And ma'am, you wrote, "potentially addressing them." Do you know what you meant by, quote, "potentially addressing them?"
- A Well, at this time, we would have gotten the request to do guidance of general applicability relating to (c)(4)s. And while I can't – I don't know exactly what was in my mind at the time I wrote this, the "them" seems to refer back to the (c)(4)s. And the communications between our offices would have had to do with guidance of general applicability.
- Q So, sitting here today, you take the phrase, "potentially addressing them" to mean issuing guidance of general applicability of 501(c)(4)s?

<sup>172</sup> See Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov't Reform, to John Koskinen, IRS (Feb. 4, 2014).

<sup>173</sup> E-mail from Ruth Madrigal, Dep't of the Treasury, to Victoria Judson et al., IRS (June 14, 2012). [IRSR 305906]

<sup>174</sup> *Id.*

A I don't know exactly what was in my head at the time when I wrote this, but to the extent that my office collaborates with the IRS, it's on guidance of general applicability.

Q And the recipients of this email, Ms. Judson and Ms. Cook are in the Chief Counsel's Office, is that correct?

A That's correct.

Q And Ms. Lerner and Ms. Marks are from the Commissioner side of the IRS?

A At the time of this email, I believe that Nan Marks was on the Commissioner's side, and Ms. Lerner would have been as well, yes.

Q So those are the two entities involved in rulemaking process or the guidance process for tax exempt organizations, is that right?

A Correct.

\*\*\*

Q What did the term "off plan" mean in your email?

A Again, I don't have a recollection of doing -- of writing this email at the time. I can't say with certainty what was meant at the time.

Q Sitting here today, what do you take the term "off plan" to mean?

A Generally speaking, off plan would refer to guidance that is not on -- or the plan that is mentioned there would refer to the priority guidance plan. And so off plan would be not on the priority guidance plan.

Q And had you had discussions with the IRS about issuing guidance on 501(c)(4)s that was not placed on the priority guidance plan?

A In 2012, we -- yes, in 2012, there were conversations between my office, Office of Tax Policy, and the IRS regarding guidance relating to qualifications for tax exemption under (c)(4).

Q And this guidance was in response to requests from outside parties to issue guidance?



Q. A. Yes. Generally speaking, our priority guidance plan process starts with – includes gathering suggestions from the public and evaluating suggestions from the public regarding guidance, potential guidance topics, and by this point, to the best of my recollection, we had had requests to do guidance on this topic.<sup>175</sup>

Similarly, IRS attorney Janine Cook explained in a transcribed interview how the IRS and Treasury Department develop a regulation “off-plan.” She testified that “it’s a coined term, the term means the idea of spending some resources on working it, getting legal issues together, things like that, but not listing it on the published plan as an item we are working. That’s what the term off plan means.”<sup>176</sup> In a separate transcribed interview, IRS Division Counsel Victoria Judson explained that the IRS develops regulations “off-plan” when it seeks to “stop behavior that we feel is inappropriate under the tax law.” She testified:

We also have items we work on that are off-plan, and there are reasons we don’t want to solicit comments. For example, if they might relate to a desire to stop behavior that we feel is inappropriate under the tax law, we might not want to publicize that we are working on that before we come out with the guidance.<sup>177</sup>

Information available to the Committee indicates that Lerner played some role in the IRS’s and the Treasury Department’s secret “off-plan” work to regulate § 501(c)(4) groups. Because the Committee has not obtained Lerner’s testimony, it is unclear as to the nature and extent of her role in this “off-plan” regulatory work.

#### ***D. IRS Discussions about Regulatory Reform***

In 2012, the IRS received letters from Members of Congress and certain public interest groups about regulatory reform for 501(c)(4) groups. The letters asked the IRS to change the regulations regarding how much political activity is permissible. As IRS officials were contemplating the possibility of changing the level of permissible political activity for 501(c)(4) groups, the press picked up their discussions. After learning that the press was aware of the discussions, Nikole Flax, the Chief of Staff to then-Acting Commissioner Steve Miller, instructed IRS officials that she wanted to delay sending any responses, and that all response letters would require her approval.<sup>178</sup> Flax alerted Lerner that the letters “created a ton of issues including from Treasury and [the] timing [is] not ideal.”<sup>179</sup> In response, Lerner wrote to Flax, explaining that she thought all the attention was “stupid.”<sup>180</sup>

<sup>175</sup> Transcribed interview of Ruth Madrigal, U.S. Dep’t of the Treasury, in Wash., D.C. (Feb. 3, 2014).

<sup>176</sup> Transcribed interview of Janine Cook, IRS, in Wash., D.C. (Aug. 23, 2013).

<sup>177</sup> Transcribed interview of Victoria Ann Judson, IRS, in Wash., D.C. (Aug. 29, 2013).

<sup>178</sup> E-mail from Nikole Flax, IRS, to Lois Lerner, Holly Paz, Andy Megosh, Nalee Park, & Joseph Urban, IRS (July 24, 2012). [IRS 179666]

<sup>179</sup> E-mail from Nikole Flax, IRS, to Lois Lerner, IRS (July 24, 2012). [IRS 179666]

<sup>180</sup> *Id.*

<b>From:</b>	Lerner Lois G
<b>Sent:</b>	Tuesday, July 24, 2012 10:36 AM
<b>To:</b>	Flax Nikole C
<b>Subject:</b>	Re: c4 letters

That is why I told them every letter had to go thru you. Don't know why this didn't, but have now told all involved, I hope! Sorry for all the noise. It is just stupid, but not welcome, I'm sure.

Lois G. Lerner

Lerner instructed IRS officials that Nikole Flax, one of the agency's most senior officials, would have to approve all response letters to Members of Congress and public interest groups regarding regulatory reform for 501(c)(4) groups.<sup>181</sup> She advised staff that "NO responses related to c4 stuff go out without an affirmative message, in writing from Nikole."<sup>182</sup>

<b>From:</b>	Lerner Lois G
<b>Sent:</b>	Tuesday, July 24, 2012 10:40 AM
<b>To:</b>	Paz Holly O; Megosh Andy; Fish David L; Park Nalee; Williams Melinda G
<b>Cc:</b>	Flax Nikole C
<b>Subject:</b>	C4

I know you all have received messages independently, but I wanted all to hear same message at same time. Regardless whether language has previously been approved, NO responses related to c4 stuff go out without an affirmative message, in writing from Nikole. Thanks Lois G. Lerner----- Sent from my BlackBerry Wireless Handheld

### *E. Lerner's Reckless Handling Section 6103 Information*

According to e-mails obtained by the Committee, Lerner recklessly treated taxpayer information covered by 26 U.S.C. § 6103.<sup>183</sup> Section 6103 of the Internal Revenue Code of 1986 generally prohibits the disclosure of "tax returns" and other "tax return information" outside the IRS. In February 2010, Lerner sent an e-mail to William Powers, a Federal Election Commission attorney, which contained confidential taxpayer information according to the IRS.<sup>184</sup>

<sup>181</sup> E-mail from Lois Lerner, IRS, to Holly Paz, Andy Megosh, David Fish, Nalee Park, & Melinda Williams, IRS (July 24, 2012). [IRSR 179669]

<sup>182</sup> *Id.*

<sup>183</sup> E-mail from Lois Lerner, IRS, to William Powers, Fed. Election Comm'n (Feb. 3, 2010, 11:25AM). [IRSR 123142]

<sup>184</sup> *Id.*

**From:** Lerner Lois G  
**Sent:** Wednesday, February 03, 2010 11:25 AM  
**To:** [REDACTED]  
**Cc:** Fish David L  
**Subject:** Your request

Per your request, we have checked our records and there are no additional filings at this time. [REDACTED]  
 [REDACTED] Hope that helps.

*Lois G. Lerner*  
 Director, Exempt Organizations

In addition, Lerner received confidential taxpayer information on her non-official e-mail account.<sup>185</sup> Her receipt of confidential taxpayer information on an unsecure, non-IRS computer system and e-mail account poses a substantial risk to the security of the taxpayer information. Her willingness to handle this information on a non-official e-mail account highlights her disregard for confidential taxpayer information. It also suggests a fundamental lack of respect for the organizations applying to the IRS for tax-exempt status.

**From:** Biss Meghan R  
**Sent:** Saturday, May 04, 2013 11:07 AM Eastern Standard Time  
**To:** Lerner Lois G; [REDACTED] Lerner's Non-official E-mail Address  
**Subject:** Summary of Application

Lois:

Attached is a summary of the entire application from [REDACTED]. It includes the information from their initial 1023, our development letter, and their May 3 response. In it, I also point out situations where the revenue rulings they cite aren't exactly on point. Additionally, where they reference other [REDACTED] I included the information we have on those [REDACTED] from Internet research.

As a note, the [REDACTED] may be an issue for the community foundation that made the payments. The [REDACTED]  
 [REDACTED] But we won't know anything for sure until their 2012 Form 990 is filed.

Also, this article re [REDACTED] is interesting:  
 [REDACTED]

After you have had a chance to look over this document, we can have a discussion about it and any questions prior to your meeting with Steve.

Thanks,  
 Meghan

Lerner's messages contained private tax return information, redacted pursuant to 26 U.S.C. § 6103 when the IRS reviewed the e-mails prior to production to the Committee.<sup>186</sup> Section 6103 is in place to prevent federal workers from disclosing confidential taxpayer

<sup>185</sup> E-mail from Meghan Biss, IRS, to Lois Lerner, IRS (May 4, 2013, 11:07 AM). [Lerner-ORG 1607]

<sup>186</sup> *Id.*

information.<sup>187</sup> Tax returns and return information, which meet the statutory definitions, must remain confidential.<sup>188</sup> Lerner's e-mails containing confidential return information therefore represent a disregard for the protections of the statute and present very serious privacy concerns. These reckless disclosures of such sensitive information also raise questions of whether they were isolated events.

### ***F. The Aftermath of the IRS's Scrutiny of Tea Party Groups***

As congressional committees and TIGTA began to examine more closely the IRS's treatment of applications from certain Tea Party groups, top officials within the agency were reluctant to disclose information. After Steve Miller, then Acting Commissioner of the IRS, testified at a House Committee on Ways and Means hearing in July 2012, Lerner stated in an e-mail a sense of relief that the hearing was more "boring" than anticipated.<sup>189</sup>

When Lerner learned about TIGTA's audit regarding the Tax Exempt Entities Division's treatment of applications from certain groups, she accepted the fact that the Division would be subject to a critical analysis from TIGTA officials.<sup>190</sup> Despite TIGTA and congressional scrutiny, Lerner's approach to the applications did not change. Documents show that, Lerner, along with several other IRS officials, were somehow emboldened and believed it was necessary to make their efforts known publicly, albeit not necessarily in a truthful manner. Specifically, they contemplated ways to make their denial of a 501(c)(4) group's application public knowledge.<sup>191</sup> The officials contemplated using the court system to do so.<sup>192</sup>

#### **1. Lerner's Opinion Regarding Congressional Oversight**

In July 2012, Lerner received an e-mail from Steve Miller soon after he testified at a House Ways and Means Committee hearing on charitable organizations.<sup>193</sup> Miller thanked Lerner and other IRS officials in Washington for their assistance in preparing for the hearing. In response, Lerner conveyed her relief that the hearing was less interesting than it could have been.<sup>194</sup> Because the Committee has not been able to speak with Lerner, it is uncertain what she meant by this e-mail.

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<sup>187</sup> 26 U.S.C. § 6103 (2012).

<sup>188</sup> *Id.*

<sup>189</sup> E-mail from Lois Lerner, IRS, to Steven Miller, IRS (July 25, 2012). [IRSR 179767]

<sup>190</sup> E-mail from Lois Lerner, IRS, to Richard Daly, Sarah Hall Ingram, Dawn Marx, Joseph Urban, Nancy Marks, Holly Paz, & David Fish, IRS (June 25, 2012). [IRSR 178166]

<sup>191</sup> E-mail from Lois Lerner, IRS, to Nancy Marks, Holly Paz, & David Fish, IRS (Apr. 1, 2013). [IRSR 190611]

<sup>192</sup> *Id.*

<sup>193</sup> E-mail from Steven Miller, IRS, to Justin Lowe, Joseph Urban, Christine Mistr, Nikole Flax, Catherine Barre, William Norton, Virginia Richardson, Richard Daly, Lois Lerner, & Holly Paz, IRS (July 25, 2012) [IRSR 179767]

<sup>194</sup> E-mail from Lois Lerner, IRS, to Steven Miller, IRS (July 25, 2012). [IRSR 179767]

<b>From:</b>	Lerner Lois G
<b>Sent:</b>	Wednesday, July 25, 2012 7:47 PM
<b>To:</b>	Miller Steven T
<b>Subject:</b>	Re: thank you
<p>Glad it turned out to be far more boring than it might have. Happy to be able to help.</p> <p>Lois G. Lerner</p>	

The Committee has sent numerous letters to the IRS requesting documents and information relating to the scrutiny of Tea Party applications. The IRS has often been evasive in its responses, and the Committee has encountered great difficulty in obtaining the agency's cooperation in conducting its investigation. In one instance in 2012, the Committee sent a letter to the IRS requesting information about the agency's treatment of Tea Party groups. Documents obtained by the Committee demonstrate that Lerner not only aware of the letter, but also reviewed the request, and approved the written response sent to the Committee.<sup>195</sup>

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<sup>195</sup> Action Routing Sheet, IRS (Apr. 25, 2012). [IRSR 14425]

Action Routing Sheet			
Request for Signature of Lois G. Lerner		e-trak Control Number 2012-30672	Due date 04/25/2012
Subject EO response to The Honorable Jim Jordan, Chairman, Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending.			
Reviewing Office	Support Staff Initial / Date	Reviewer Initial / Date	Comment
NatLee Park	RL 4/25/12		
Dawn Marx	DM 4/25/12		
Lois Lerner		LL 4/25/12	
Summary			
Prepared By Dawn Marx	Phone number 202-283-8861	Office Location / Building	Return to
Form 14074 (Rev. 9-2010) Catalog Number 53167M publish.irs.gov Department of the Treasury - Internal Revenue Service			

This IRS routing sheet, documenting which IRS offices reviewed and approved the letter, clearly shows Lerner's awareness of the Committee's investigation into the targeting of Tea Party-like groups. Still, Lerner failed to take the investigation seriously and was not forthright with the Committee. Instead, Lerner engaged in a pattern of concealment and making light of this serious misconduct by the IRS.

## 2. Tax Exempt Entities Division's Contacts with TIGTA

In January 2013, a TIGTA official contacted Holly Paz to inquire about an e-mail regarding Tea Party cases.<sup>196</sup> The official explained that during a recent briefing, he had mentioned TIGTA was seeking an e-mail from May 2010, which called for Tea Party applications to receive additional review.<sup>197</sup>

**From:** Peterson Troy D TIGTA [REDACTED]  
**Sent:** Thursday, January 24, 2013 8:51 AM  
**To:** Paz Holly O  
**Subject:** E-Mail Retention Question

Holly,

Good morning.

During a recent briefing, I mentioned that we do not have the original e-mail from May 2010 stating that "Tea Party" applications should be forwarded to a specific group for additional review. After thinking it through, I was wondering about the IRS's retention or backup policy regarding e-mails. Do you know who I could contact to find out if this e-mail may have been retained?

Troy

Lerner was aware of the request for the May 2010 Tea Party e-mail because Paz replied to the TIGTA official and copied Lerner on the response.<sup>198</sup> Paz wrote that she could not provide any assistance in retrieving the e-mail, but rather the Chief Counsel's office needed to handle the request.<sup>199</sup>

**From:** Paz Holly O  
**Sent:** Thursday, January 31, 2013 4:15 AM  
**To:** Peterson Troy D TIGTA  
**Cc:** Lerner Lois G  
**Subject:** RE: E-Mail Retention Question

Troy,

I'm sorry we won't get to see you today. We have reached out to determine the appropriate contact regarding your question below and have been told that, if this data request is part of e-Discovery, the coordination needs to go through Chief Counsel. The person to contact regarding e-Discovery requests is Glenn Melcher. His email address is [REDACTED] and his phone number is [REDACTED]

Holly

<sup>196</sup> E-mail from Troy Peterson, IRS, to Holly Paz, IRS (Jan. 24, 2013). [IRSR 202641]

<sup>197</sup> *Id.*

<sup>198</sup> E-mail from Holly Paz, IRS, to Troy Peterson, Treasury Inspector Gen. for Tax Admin. (Jan. 31, 2013). [IRSR 202641]

<sup>199</sup> *Id.*

The e-mails above show Lerner and her colleagues unnecessarily delayed TIGTA's audit. Rather than simply providing the documents and information requested by TIGTA, Paz, who reported to Lerner directly, instructed TIGTA to go through the Chief Counsel's office for certain information.

### **3. Lerner Anticipates Issues with TIGTA Audit**

Lerner anticipated blowback from TIGTA over the disparate treatment of certain applications for tax-exempt status. In June 2012, Lerner received an e-mail from Richard Daly, a technical executive assistant to the Tax Exempt and Government Entities Division Commissioner, informing her that TIGTA would be investigating how the tax-exempt division handles applications from § 501(c)(4) groups.<sup>200</sup>

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<sup>200</sup> E-mail from Richard Daly, IRS, to Sarah Hall Ingram, Lois Lerner, & Dawn Marx, IRS (June 22, 2012). [IRSR 178167].



**From:** Daly Richard M

**Sent:** Friday,

June 22, 2012 5:10 PM

**To:** Ingram Sarah H; Lerner Lois G; Marx Dawn R;

Urban Joseph J; Marks Nancy J

**Subject:** FW: 201210022 Engagement

Letter

**Importance:** High

TIGTA is going to look at how we deal with the

applications from (c)(4)s. Among other things they will look at our

consistency, and whether we had a reasonable basis for asking for information

~~from the applicants. The engagement letter bears a close~~

reading. To my mind, it has a more skeptical tone than

usual.

Among the documents they want to look at are the

following:

All

documents and correspondence (including e-mail) concerning the Exempt

Organizations function's response to and decision-making process for addressing

the increase in applications for tax-exempt status from organizations involving

potential political advocacy issues.

TIGTA expects to issue its report in the spring.

Daly recommended a "close reading" of TIGTA's engagement letter, noting that it had a "more skeptical tone than usual."<sup>201</sup>

Lerner accepted the fact that TIGTA would scrutinize the tax-exempt division. In reply, she stated, in part: "It is what it is . . . we will get dinged."<sup>202</sup>

<sup>201</sup> *Id.*

<sup>202</sup> E-mail from Lois Lerner, IRS, to Richard Daly, Sarah Hall Ingram, Dawn Marx, Joseph Urban, Nancy Marks, Holly Paz, & David Fish, IRS (June 25, 2012). [IRS 178166]

**From:** Lerner Lois G  
**Sent:** Monday, June 25, 2012 5:00 PM  
**To:** Daly Richard M; Ingram Sarah H; Marx Dawn R; Urban Joseph J; Marks Nancy J  
**Cc:** Paz Holly O; Fish David L  
**Subject:** RE: 201210022 Engagement Letter

It is what it is. Although the original story isn't as pretty as we'd like, once we learned this were off track, we have done what we can to change the process, better educate our staff and move the cases. So, we will get dinged, but we took steps before the "dinging" to make things better and we have written procedures. So, it is what what it is.

*Lois G.*  
*Lerner*  
 Director of Exempt Organizations

#### 4. Lerner Contemplates Retirement

By January 28, 2013, Lerner was considering retirement from the IRS.<sup>203</sup> She wrote to benefits specialist Richard Klein to request reports regarding the benefits she could expect to receive upon retirement.<sup>204</sup>

**From:** Klein Richard T  
**Sent:** Monday, January 28, 2013 5:23 AM  
**To:** Lerner Lois G  
**Subject:** personnel info  
**Importance:** Low

Here are your reports you requested.....set your sick leave at 1360 for the first report and bumped it up to 1700 for the second.....redeposit amount and hi three used are shown on the bottom right.....call or email if you need any thing else please.

*This e-mail and any attachments contain information intended solely for the use of the named recipient(s). This e-mail may contain privileged communications not suitable for forwarding to others. If you believe you have received this e-mail in error, please notify me immediately and permanently delete the e-mail, any attachments, and all copies thereof from any drives or storage media and destroy any printouts of the e-mail or attachments*

**Richard T. Klein**  
**Benefits Specialist**

<sup>203</sup> E-mail from Richard Klein, IRS, to Lois Lerner, IRS (Jan. 28, 2013). [IRSR 202597]

<sup>204</sup> *Id.*

The reports Klein sent prompted several questions from Lerner, including an estimate of the amount in benefits she would receive if she retired in October 2013:<sup>205</sup>

<b>From:</b>	Lerner Lois G
<b>Sent:</b>	Monday, January 28, 2013 10:06 AM
<b>To:</b>	Klein Richard T
<b>Subject:</b>	RE: personnel info

OK--questions already. I see at the bottom what my CSRS repayment amount would be should I decide to repay. It looks like the calculation at the tops assumes I am repaying--is that correct? Can I see what the numbers look like if I decide not to repay? Also, how do I go about repaying, if I choose to? Where would I find that information? Would you mind running a calculation for a retirement date of October 1, 2013? Also, the definition of monthly social security offset seems to say that at age 62(which I am) my monthly annuity will be offset by social security even if I don't apply. First--what the heck does that mean? Second, I don't see an offset on the chart--please explain. Thank you.

*Lois G. Lerner*  
Director of Exempt Organizations

## 5. The IRS's Plans to Make an Application Denial Public

IRS officials in Washington wanted to publicize the fact that the IRS had closely scrutinized applications from Tea Party groups. The officials wanted to make the denial of one specific Tea Party group's application public knowledge. At the end of March 2013, Lerner had a discussion with other IRS officials about how they could inform the public about the application denial.<sup>206</sup> IRS officials discussed the possibility of bringing the case through the court system, rather than an administrative hearing, to ensure that the denial became public.<sup>207</sup> Lerner assumed these groups would opt for litigation because, in her mind, they were "itching for a Constitutional challenge."<sup>208</sup>

### *G. Lerner's Role in Downplaying the IRS's Scrutiny of Tea Party Applications*

In the spring of 2013, senior IRS officials prepared a plan to acknowledge publicly yet downplay the scrutiny given to Tea Party applications. Although Lerner spoke on the subject at an ABA event in May 2013, the IRS had originally planned to have Lerner comment on it at a Georgetown University Law Center conference in April. Lerner e-mailed several of her

<sup>205</sup> E-mail from Lois Lerner, IRS, to Richard Klein, IRS (Jan. 28, 2013). [IRSR 202597]

<sup>206</sup> E-mail from Nancy Marks, IRS, to Lois Lerner, Holly Paz, & David Fish, IRS (Mar. 29, 2013). [IRSR 190611]

<sup>207</sup> *Id.*

<sup>208</sup> E-mail from Lois Lerner, IRS, to Nancy Marks, Holly Paz, & David Fish, IRS (Apr. 1, 2013). [IRSR 190611]

colleagues about the Georgetown speaking engagement, noting that she might add “remarks that are being discussed at a higher level.”<sup>209</sup>

<b>To:</b>	Eldridge Michelle L; Zarin Roberta B; Lemons Terry L; Burke Anthony
<b>Cc:</b>	Partner Melaney J; Marx Dawn R
<b>Subject:</b>	RE: Georgetown

I will now be speaking somewhere between 11-11:30 depending on when previous speaker finishes. I am or may not be adding some remarks that are being discussed at a higher level. If approved, I have not been told whether those remarks will be in the written speech, or I will simply give them orally. There may be a desire to get the speech up ASAP if the new proposed language is added to the draft—these are Nikole questions. Right now, though, we're simple on hold.

*Lois J. Lerner*  
Director of Exempt Organizations

Contemporaneously, Nikole Flax sent Lerner a draft set of remarks on 501(c)(4) activity.<sup>210</sup> The remarks stated in part:

Here's where a problem occurred. In centralizing the cases in Cincinnati, my review team placed too much reliance on the particular name of an organization; in this case, relying on names in organization titles like 'tea party' or 'patriot,' rather than looking deeper into the facts to determine the level of activity under c4 guidelines. Our Inspector General is looking at this situation, but I believe and the IRS leadership team believe[s] this to be an error – not a political vendetta.<sup>211</sup>

Although Lerner did not acknowledge the extra scrutiny given to Tea Party applications at the Georgetown conference, the officials in the Acting Commissioner's office made plans to have her speak on the subject at an ABA event using a question planted with an audience member. In May 2013, Flax contacted Lerner to inquire about the topic of her remarks at the event.<sup>212</sup> Flax's inquiry demonstrates that senior IRS officials were seeking a venue for Lerner to speak about the Tea Party scrutiny in order to downplay and gloss over the issue.<sup>213</sup> At the ABA event on May 10, 2013, Lerner did so.

<sup>209</sup> E-mail from Lois Lerner, IRS, to Michelle Eldridge, Roberta Zarin, Terry Lemons, & Anthony Burke, IRS (Apr. 23, 2013). [IRSR 196295]

<sup>210</sup> E-mail from Nikole Flax, IRS, to Lois Lerner, IRS (Apr. 23, 2013). [IRSR 189013]

<sup>211</sup> Preliminary Draft, Recent Section 501(c)(4) Activity, IRS (Apr. 22, 2013). [IRSR 189014]

<sup>212</sup> E-mail from Nikole Flax, IRS, to Lois Lerner, IRS (May 3, 2013). [IRSR 189445]

<sup>213</sup> *Id.*

### *H. Lerner's Management Style*

During transcribed interviews with Committee staff, several IRS officials testified that Lerner is a bad manager who is “unpredictable”<sup>214</sup> and “emotional.”<sup>215</sup> On October 22, 2013, during a transcribed interview, Nikole Flax, the former IRS Acting Commissioner’s Chief of Staff, discussed the July 2012 House Ways and Means Committee hearing on tax-exempt issues.<sup>216</sup> Steve Miller, then-Deputy Commissioner of the IRS, testified at the hearing. Lerner did not.<sup>217</sup> Committee staff asked Flax why the IRS did not choose Lerner as a witness.<sup>218</sup> Flax testified:

Q And you said before that [Acting Commissioner of Tax Exempt and Government Entities Joseph] Grant wasn’t the best witness at the hearing. Was there any discussion about having Ms. Lerner as a witness for that hearing?

A No.

Q Why not?

A **Lois is unpredictable. She’s emotional.** I have trouble talking negative about someone. I think in terms of a hearing witness, she was not the ideal selection.<sup>219</sup>

Further, during an interview with Cindy Thomas, the IRS official in charge of the Cincinnati office, Thomas stated that when she became aware of Lerner’s comments about the IRS’s treatment of Tea Party applications at the ABA event, she was extremely upset. Thomas wrote Lerner an e-mail on May 10, 2013, with “Low Level workers thrown under the Bus” in the subject line.<sup>220</sup> Thomas excoriated Lerner, noting that through Lerner’s remarks, **“Cincinnati wasn’t publicly ‘thrown under the bus’ (but) instead was hit by a convoy of Mack trucks.”**<sup>221</sup> Thomas explained Lerner’s statements at the event were “derogatory” to lower level employees working determinations cases.<sup>222</sup> She testified:

Q And what was your reaction to hearing the news?

A I was really, really mad.

Q Why?

<sup>214</sup> Transcribed Interview of Nikole Flax, IRS, at 153 (Oct. 22, 2013).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* (emphasis added).

<sup>220</sup> E-mail from Cindy M. Thomas to Lois G. Lerner, et al. (May 10, 2013). [IRSR 366782]

<sup>221</sup> *Id.* (emphasis added).

<sup>222</sup> Transcribed Interview of Lucinda Thomas, IRS, at 210 (June 28, 2013).

A **I feel as though Cincinnati employees and EO Determinations was basically thrown under a bus and that the Washington office wasn't taking any responsibility for knowing about these applications, having been involved in them and being the ones to basically delay processing of the cases.**<sup>223</sup>

Although Thomas admitted that the Cincinnati office made mistakes in handling tax-exempt applications, she explained that IRS officials in Washington were primarily responsible for the delay.<sup>224</sup> She stated: **[Y]es, there were mistakes made by folks in Cincinnati as well [as] D.C. but the D.C. office is the one who delayed the processing of the cases.**<sup>225</sup>

While Thomas found Lerner's reference to the culpability of lower level workers for the delay of the applications during her talk at the ABA event was upsetting and misguided, Thomas also stated in part: **"It's not the first time that she has used derogatory comments about the employees working determination cases and she has done it before."**<sup>226</sup>

Thomas testified that Lerner's statements about lower level employees in Cincinnati were just one example of offensive remarks she often made to other IRS employees. She explained that Lerner "referred to us as backwater before."<sup>227</sup> Thomas also noted the impact of Lerner's comments on employee morale. She stated in part: "[I]t's frustrating like how am I supposed to keep them motivated when our so-called leader is referring to people in that direction."<sup>228</sup> Thomas also stated: "She also makes comments like, well, you're not a lawyer."<sup>229</sup>

Lerner's comments reflect a startling attitude toward her subordinates. As the director of the Exempt Organizations Division, she was a powerful figure at IRS headquarters in Washington. It is evident from testimony that Lerner brazenly shifted blame to lower level employees for delaying the Tea Party applications. Instead of taking responsibility for the major role she played in the delay, she found fault with others, diminishing employee morale in the process.

### ***I. Lerner's Use of Unofficial E-mail***

As the Committee has continued to investigate Lerner's involvement in targeting Tea Party groups, Committee staff has also learned that she improperly used a non-official e-mail account to conduct official business. On several occasions, Lerner sent documents related to her official duties from her official IRS e-mail account to an msn.com e-mail account labeled "Lois Home."

<sup>223</sup> *Id.* (emphasis added).

<sup>224</sup> *Id.* at 211.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 210 (emphasis added).

<sup>227</sup> *Id.* at 213.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

Lerner's use of a non-official e-mail account to conduct official business not only implicates federal records requirements, but also frustrates congressional oversight obligations. Use of a non-official e-mail account raises the concern that official government e-mail archiving systems did not capture the records, as defined by the Federal Records Act.<sup>230</sup> Further, it creates difficulty for the agency when responding to Freedom of Information Act, congressional subpoenas, or litigation requests.

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#### IV. Conclusion

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Since Lois Lerner first publicly acknowledged the IRS's inappropriate treatment of conservative tax-exempt applicants during an American Bar Association speech on May 10, 2013, substantial debate has ensued over the nature of the IRS misconduct. While bureaucratic bumbling played an undeniable role in some delays and inappropriate treatment, questions have persisted. Could someone with a political agenda – or under instructions – and a sophisticated understanding of the IRS cause a partisan delay for organizations seeking to promote social welfare and exercise their Constitutionally guaranteed First Amendment right to participate in the political process?

From her days at the Federal Election Commission, Lerner's left-leaning politics were known and recognized.<sup>231</sup> Even at a supposedly apolitical agency like the IRS, her views should not have been an obstacle to fair and impartial judgment that would impair her job performance. But amidst a scandal in which her agency deprived Americans of their Constitutional rights, a relevant question is whether the actions she took in her job improperly reflected her political beliefs. Congressional investigators found evidence that this occurred.

Lerner's views on the *Citizens United* Supreme Court ruling, which struck down certain restrictions on election-related activities, showed a keen awareness of arguments that the Court's decision would be detrimental to Democratic Party candidates. As she explained in her own words to her agency's Inspector General:

The *Citizens United* decision allows corporations to spend freely on elections. Last year, there was a lot of press on 501(c)(4)s being used to funnel money on elections and the IRS was urged to do something about it.<sup>232</sup>

When a colleague sent her an article about allegations that unknown conservative donors were influencing U.S. Senate races, she responded hopefully: "Perhaps the FEC will save the day."<sup>233</sup>

Evidence indicates Lerner and her Exempt Organizations unit took a three pronged approach to "do something about it" to "fix the problem" of nonprofit political speech:

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<sup>230</sup> 44 U.S.C. § 3101.

<sup>231</sup> *Lois Lerner at the FEC*, *supra* note 5.

<sup>232</sup> Treasury Inspector Gen. for Tax Admin, Memo of Contact (Apr. 5, 2012) (memorandum of contact with Lois Lerner).

<sup>233</sup> E-mail from Lois Lerner, IRS, to Sharon Light, IRS (July 10, 2010). [IRS 179093]

- 1) Scrutiny of new applicants for tax-exempt status (which began as Tea Party targeting);
- 2) Plans to scrutinize organizations, like those supported by the “Koch Brothers,” that were already acting as 501(c)(4) organizations; and
- 3) “[O]ff plan” efforts to write new rules cracking down on political activity to replace those that had been in place since 1959.

Even without her full testimony, and despite the fact that the IRS has still not turned over many of her e-mails, a political agenda to crack down on tax-exempt organizations comes into focus. Lerner believed the political participation of tax-exempt organizations harmed Democratic candidates, she believed something needed to be done, and she directed action from her unit at the IRS. Compounding the egregiousness of the inappropriate actions, Lerner’s own e-mails showed recognition that she would need to be “cautious” so it would not be a “*per se* political project.”<sup>234</sup> She was involved in an “off-plan” effort to write new regulations in a manner that intentionally sought to undermine an existing framework for transparency.<sup>235</sup>

Most damning of all, even when she found that the actions of subordinates had not adhered to a standard that could be defended as not “*per se* political,” instead of immediately reporting this conduct to victims and appropriate authorities, Lerner engaged in efforts to cover it up. She falsely denied to Congress that criteria for scrutiny had changed and that disparate treatment had occurred. The actions she took to broaden scrutiny to non-conservative applicants were consistent with efforts to create plausible deniability for what had happened – a defense that the Administration and its most hardcore supporters have repeated once unified outrage eroded over one of the most divisive controversies in American politics today.

Bureaucratic bumbling and IRS employees who sincerely believed they were following the directions of superiors did occur. Even when Lerner directed what employees would characterize as “unprecedented” levels of scrutiny for Tea Party cases, they did not attribute this direction to a partisan agenda. Ironically, the bureaucratic bumbling that seems to have been behind many inappropriate requests for information from applicants and a screening criterion that could never pass as not “*per se* political” may have had a silver lining. Without it, Lois Lerner’s agenda to scrutinize tax-exempt organizations that exercised their First Amendment rights might not have ever been exposed.

The Committee continues to offer Lois Lerner the opportunity to testify. Many questions remain, including the identities of others at the IRS and elsewhere who may have known about key events and decisions she undertook. Americans, and particularly those Americans who faced mistreatment at the hands of the IRS, deserve the full documented truth that both Lois Lerner and the IRS have withheld from them.

<sup>234</sup> E-mail from Lois Lerner, IRS, to Cheryl Chasin et al., IRS (Sept. 16, 2010). [IRSR 191030]

<sup>235</sup> See E-mail from Ruth Madrigal, Dep’t of the Treasury, to Victoria Judson et al., IRS (June 14, 2012). [IRSR 305906]



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**To:** Eldridge Michelle L; Zarin Roberta B; Lemons Terry L; Burke Anthony  
**Cc:** Partner Melaney J; Marx Dawn R  
**Subject:** RE: Georgetown

I will now be speaking somewhere between 11-11:30 depending on when previous speaker finishes. I am or may not be adding some remarks that are being discussed at a higher level. If approved, I have not been told whether those remarks will be in the written speech, or I will simply give them orally. There may be a desire to get the speech up ASAP if the new proposed language is added to the draft--these are Nikole questions. Right now, though, we're simple on hold.

*Lois G. Lerner*  
 Director of Exempt Organizations

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**From:** Eldridge Michelle L  
**Sent:** Tuesday, April 23, 2013 9:55 AM  
**To:** Lerner Lois G; Zarin Roberta B; Lemons Terry L; Burke Anthony  
**Cc:** Partner Melaney J; Marx Dawn R  
**Subject:** RE: Georgetown

I'm sorry--I've lost track. What time is your speech? Given timing of other stuff that day--we may be looking at posting both in the afternoon. I'm sure this will continue to be discussed...as I hear more details, I will pass it along. Please let me know what you are hearing as well. Thanks. --Michelle

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**From:** Lerner Lois G  
**Sent:** Monday, April 22, 2013 6:49 PM  
**To:** Zarin Roberta B; Lemons Terry L; Eldridge Michelle L; Burke Anthony  
**Cc:** Partner Melaney J; Marx Dawn R  
**Subject:** RE: Georgetown  
**Importance:** High

Hmm--I was thinking the speech would go up right after I speak and the report would go up later in the afternoon. Will that work?

*Lois G. Lerner*  
 Director of Exempt Organizations

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**From:** Zarin Roberta B  
**Sent:** Monday, April 22, 2013 1:32 PM  
**To:** Lemons Terry L; Eldridge Michelle L; Burke Anthony  
**Cc:** Lerner Lois G; Partner Melaney J; Marx Dawn R  
**Subject:** RE: Georgetown

Thanks, but Melaney deserves credit for that one! We are planning to post Lois' speech, along with the report, Thursday afternoon

Bobby Zarin, Director  
Communications and Liaison  
Tax Exempt and Government Entities

**From:** Lemons Terry L  
**Sent:** Monday, April 22, 2013 1:10 PM  
**To:** Zarin Roberta B; Eldridge Michelle L; Burke Anthony  
**Cc:** Lerner Lois G; Partner Melaney J; Marx Dawn R  
**Subject:** RE: Georgetown

Bobby – good catch on the news release. Think we should try doing a short one since we did the interim one. Think text should track what we did before (below.) Anthony Burke will be reaching out to you. Think we need text by mid-day Tuesday so we can get through clearance channels on third floor and Treasury.

Also possible we may post text of Thursday speech on IRS.gov.

Thanks.

**From:** Zarin Roberta B  
**Sent:** Monday, April 22, 2013 11:09 AM  
**To:** Lemons Terry L; Eldridge Michelle L  
**Cc:** Lerner Lois G; Partner Melaney J; Marx Dawn R  
**Subject:** FW: Georgetown

Fun for the week:

Do you know if we have language Lois can use re: the furlough? (see below.) I'm sure other IRS speakers are facing the same issue.

Also, as you know, she'll be announcing that the College and University Report that afternoon. We never discussed a press release (you did one for the interim report), and it may be too late now, but should it be considered?

Bobby Zarin, Director  
Communications and Liaison  
Tax Exempt and Government Entities

**From:** Flax Nikole C  
**Sent:** Friday, April 19, 2013 11:44 AM  
**To:** Lerner Lois G; Lemons Terry L  
**Cc:** Grant Joseph H; Zarin Roberta B  
**Subject:** Re: Georgetown

We will pull something together - can you let me know when/if you are open later today to discuss other topics?

**From:** Lerner Lois G  
**Sent:** Friday, April 19, 2013 11:37 AM Eastern Standard Time  
**To:** Flax Nikole C; Lemons Terry L  
**Cc:** Grant Joseph H; Zarin Roberta B  
**Subject:** Georgetown

**We have numerous speakers over 2 days at the conference, starting on Wed. I am sure we will be asked about the furloughs. There is already press out there on the NTEU issue, so I don't**

think we can avoid saying something. I'm thinking it would be best for me to lead off with some statement at the beginning before I get into my formal written speech to respond before the question comes. That way, all that follow me can either say exactly what I say or refer the questioner back to my earlier remarks. Otherwise I fear we may have someone get nervous and say more than we planned. Does that sound like a plan? If so, can we get parameters of what my statement should look like? Sorry, but this isn't one we can skate by. Thanks

*Chris J. Benson*

Director of Exempt Organizations

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**From:** Rosenbaum Monice L  
**Sent:** Thursday, September 30, 2010 10:18 AM  
**To:** Griffin Kenneth M  
**Subject:** FW: EO Tax Journal 2010-139

Ken,  
 You may already be a subscriber to Mr. Streckfus's journal, but below is his brief summary of the DC Bar lunch meeting. He hopes a transcript will be available soon. Monice

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**From:** paul streckfus  
**Sent:** Thursday, September 30, 2010 11:07 AM  
**To:** paul streckfus  
**Subject:** EO Tax Journal 2010-139

*From the Desk of Paul Streckfus,  
 Editor, EO Tax Journal*

**Email Update 2010-139 (Thursday, September 30, 2010)**  
 Copyright 2010 Paul Streckfus

Two events occurred yesterday at about the same time. One was the release of a letter (reprinted below) by the Chairman of the Senate Finance Committee, Senator Max Baucus. The other was a panel discussion titled "Political Activities of Exempt Organizations This Election Cycle" sponsored by the D.C. Bar, from which I hope to have a transcript in the near future.

After reading Senator Baucus' letter and accompanying news release, my sense is that Senator Baucus should have been at the D.C. Bar discussion since he is concerned that political campaigns and individuals are manipulating 501(c)(4), (5), and (6) organizations to advance their own political agenda, and he wants the IRS to look into this situation.

At the D.C. Bar discussion, Marc Owens of Caplin & Drysdale, Washington, explained that there is little that the IRS can do on a current, real-time basis to regulate (c)(4)s for two reasons. First, a new (c)(4) does not have to apply for recognition of exemption. Second, a new (c)(4) formed this year would not have to file a Form 990 until next year at the earliest and the IRS would probably not do a substantive review of the filed Form 990 until 2012 at the earliest. By then, Owens joked, the winners are in office, and the losers are in another career.

At the same time that the IRS can do little to regulate new (c)(4)s, it is not even looking at existing (c)(4)s. According to Owens, the IRS has little interest in regulating exempt organizations beyond (c)(3)s. The IRS has "effectively abandoned the field" at a time of heightened political activity by all exempt organizations, including (c)(3)s. Owens added that "we seem to have a haphazard IRS enforcement system now breaking down completely." This results in a corrosive effect on the integrity of exempt organizations in general and a stimulus to evasion of their responsibilities by organizations and their tax advisors.

Karl Sandstrom of Perkins Coie, Washington, was equally negative. According to Sandstrom, the IRS is "a poor vehicle to regulate political activity," in that this is not their focus or interest. In defense of the IRS, he did say Congress was also guilty in foisting upon the IRS regulation of political activity, using section 527 as an example. At the same time, Sandstrom did not see an active IRS as an answer to current concerns. Section 501(c)(4) organizations are just the current vehicle *du jour*. If (c)(4)s are shut down, Sandstrom said many other vehicles remain.

*My guess:* I doubt if we'll see much of Owens' and Sandstrom's views in the IRS' report to Senator Baucus and the Finance Committee.

\*\*\*\*\*

**Senate Committee on Finance News Release**

For Immediate Release  
September 29, 2010

Contact: Scott Mulhauser/Erin Shields  
[REDACTED]

## **Baucus Calls On IRS to Investigate Use of Tax-Exempt Groups for Political Activity**

**Finance Chairman works to ensure special interests don't use tax-exempt groups to influence communities, spend secret donations**

**Washington, DC** – Senate Finance Committee Chairman Max Baucus (D-Mont.) today sent a letter to IRS Commissioner Doug Shulman requesting an investigation into the use of tax-exempt groups for political advocacy. Baucus asked for the investigation after recent media reports uncovered instances of political activity by nonprofit organizations secretly backed by individuals advancing personal interests and organizations supporting political campaigns. Under the tax code, political campaign activity cannot be the main purpose of a tax-exempt organization and limits exist on political campaign activities in which these organizations can participate. Tax-exempt organizations also cannot serve private interests. Baucus expressed serious concern that if political groups are able to take advantage of tax-exempt organizations, these groups could curtail transparency in America's elections because nonprofit organizations do not have to disclose any information regarding their donors.

**"Political campaigns and powerful individuals should not be able to use tax-exempt organizations as political pawns to serve their own special interests. The tax exemption given to nonprofit organizations comes with a responsibility to serve the public interest and Congress has an obligation to exercise the vigorous oversight necessary to ensure they do," said Baucus. "When political campaigns and individuals manipulate tax-exempt organizations to advance their own political agenda, they are able to raise and spend money without disclosing a dime, deceive the public and manipulate the entire political system. Special interests hiding behind the cloak of independent nonprofits threatens the transparency our democracy deserves and does a disservice to fair, honest and open elections."**

Baucus asked Shulman to review major 501(c)(4), (c)(5) and (c)(6) organizations involved in political campaign activity. He asked the Commissioner to determine if these organizations are operating for the organization's intended tax exempt purpose, to ensure that political activity is not the organization's primary activity and to determine if they are acting as conduits for major donors advancing their own private interests regarding legislation or political campaigns, or are providing major donors with excess benefits. Baucus instructed Shulman to produce a report for the Committee on the agency's findings as quickly as possible. Baucus' full letter to Commissioner Shulman follows here.

September 28, 2010

The Honorable Douglas H. Shulman  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

Via Electronic Transmission

Dear Commissioner Shulman:

The Senate Finance Committee has jurisdiction over revenue matters, and the Committee is responsible for conducting oversight of the administration of the federal tax system, including matters involving tax-exempt organizations. The Committee has focused extensively over the past decade on whether tax-exempt groups have been used for lobbying or other financial or political gain.

The central question examined by the Committee has been whether certain charitable or social welfare organizations qualify for the tax-exempt status provided under the Internal Revenue Code.

Recent media reports on various 501(c)(4) organizations engaged in political activity have raised serious questions about whether such organizations are operating in compliance with the Internal Revenue Code.

The law requires that political campaign activity by a 501(c)(4), (c)(5) or (c)(6) entity must not be the primary purpose of the organization.

If it is determined the primary purpose of the 501(c)(4), (c)(5) and (c)(6) organization is political campaign activity the tax exemption for that nonprofit can be terminated.

Even if political campaign activity is not the primary purpose of a 501(c)(4), (c)(5), and (c)(6) organization, it must notify its members of the portion of dues paid due to political activity or pay a proxy tax under Section 6033(e).

Also, tax-exempt organizations and their donors must not engage in private inurement or excess benefit transactions. These rules prevent private individuals or groups from using tax-exempt organizations to benefit their private interests or to profit from the tax-exempt organization's activities.

A September 23 New York Times article entitled "Hidden Under a Tax-Exempt Cloak, Private Dollars Flow" described the activities of the organization Americans for Job Security. An Alaska Public Office Commission investigation revealed that AJS, organized as an entity to promote social welfare under 501(c)(6), fought development in Alaska at the behest of a "local financier who paid for most of the referendum campaign." The Commission report said that "Americans for Job Security has no other purpose other than to cover money trails all over the country." The article also noted that "membership dues and assessments ... plunged to zero before rising to \$12.2 million for the presidential race."

A September 16 Time Magazine article examined the activities of Washington D.C. based 501(c)(4) groups planning a "\$300 million ... spending blitz" in the 2010 elections. The article describes a group transforming itself into a nonprofit under 501(c)(4) of the tax code, ensuring that they would not have to "publically disclose any information about its donors."

These media reports raise a basic question: Is the tax code being used to eliminate transparency in the funding of our elections -- elections that are the constitutional bedrock of our democracy? They also raise concerns about whether the tax benefits of nonprofits are being used to advance private interests.

With hundreds of millions of dollars being spent in election contests by tax-exempt entities, it is time to take a fresh look at current practices and how they comport with the Internal Revenue Code's rules for nonprofits.

I request that you and your agency survey major 501(c)(4), (c)(5) and (c)(6) organizations involved in political campaign activity to examine whether they are operated for the organization's intended tax-exempt purpose and to ensure that political campaign activity is not the organization's primary activity. Specifically you should examine if these political activities reach a primary purpose level -- the standard imposed by the federal tax code -- and if they do not, whether the organization is complying with the notice or proxy tax requirements of Section 6033(e). I also request that you or your agency survey major 501(c)(4), (c)(5), and (c)(6) organizations to determine whether they are acting as conduits for major donors advancing their own private interests regarding legislation or political campaigns, or are providing major donors with excess benefits.

Possible violation of tax laws should be identified as you conduct this study.

Please report back to the Finance Committee as soon as possible with your findings and recommended actions regarding this matter.

Based on your report I plan to ask the Committee to open its own investigation and/or to take appropriate legislative action.

Sincerely,

Max Baucus, Chairman  
Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510-6200

# Action Routing Sheet

*Issa/Jordan*

Request for Signature of Lois G. Lerner	e-trak Control Number 2012 [REDACTED]	Due date 04/25/2012
--------------------------------------------	------------------------------------------	------------------------

Subject

EO response to The Honorable Jim Jordan, Chairman, Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending.

Reviewing Office	Support Staff Initial / Date	Reviewer Initial / Date	Comment
NaLee Park	<i>NP</i> 4/25/12		
Dawn Marx	<i>DM</i> 4/25/12		
Lois Lerner		<i>LL</i> 4/25/12	

Summary

Prepared By Dawn Marx	Phone number [REDACTED]	Office Location / Building	Return to
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Form **14074** (Rev. 9-2010) Catalog Number 53167M publish.no.irs.gov Department of the Treasury - Internal Revenue Service

Appendix 7

3. Educate the public through advocacy/legislative activities to make America a better place to live.
4. Statements in the case file that are critical of the how the country is being run.

**John Shafer**  
**Group Manager**  
**SE:T:EO:RA:D:1:7838**

---

**From:** Thomas Cindy M  
**Sent:** Thursday, June 02, 2011 12:46 AM  
**To:** Shafer John H  
**Cc:** Esrig Bonnie A; Bowling Steven F  
**Subject:** Tea Party Cases - NEED CRITERIA  
**Importance:** High

John,

Could you send me an email that includes the criteria screeners use to label a case as a "tea party case?" BOLO spreadsheet includes the following:

Organizations involved with the Tea Party movement applying for exemption under 501(c)(3) or 501(c)(4).

Do the applications specify/state "tea party?" If not, how do we know applicant is involved with the tea party movement?

I need to forward to Holly per her request below. Thanks.

---

**From:** Melahn Brenda  
**Sent:** Wednesday, June 01, 2011 3:08 PM  
**To:** Paz Holly O; Thomas Cindy M  
**Subject:** RE: group of cases

Holly - we will UPS a copy of the case in #1 below to your attention tomorrow. It should be there Monday. I'm sure Cindy will respond to #2.

Brenda

---

**From:** Paz Holly O  
**Sent:** Wednesday, June 01, 2011 2:21 PM  
**To:** Thomas Cindy M



**Cc:** Melahn Brenda  
**Subject:** group of cases

re: Tea Party cases

Two things re: these cases:

1. Can you please send me a copy of the Crossroads Grassroots Policy Strategies (██████████) application? Lois wants Judy to take a look at it so she can summarize the issues for Lois.

2. What criteria are being used to label a case a "Tea Party case"? We want to think about whether those criteria are resulting in over-inclusion.

Lois wants a briefing on these cases. We'll take the lead but would like you to participate. We're aiming for the week of 6/27.

Thanks!

Holly

**From:** Paz Holly O  
**Sent:** Thursday, April 07, 2011 10:33 AM  
**To:** Seto Michael C  
**Subject:** FW: sensitive (c)(3) and (c)(4) applications  
FYI

---

**From:** Paz Holly O  
**Sent:** Thursday, April 07, 2011 10:26 AM  
**To:** Kindell Judith E; Lerner Lois G  
**Cc:** Light Sharon P; Letourneau Diane L; Neuhart Paige  
**Subject:** RE: sensitive (c)(3) and (c)(4) applications

The last information I have is that there are approx. 40 Tea Party cases in Determs. With so many EOT and Guidance folks tied up with ACA (cases and Guidance) and the possibility looming that we may have to work reinstatement cases up here to prevent a backlog in Determs, I have serious reservations about our ability to work all of the Tea Party cases out of this office.

---

**From:** Kindell Judith E  
**Sent:** Thursday, April 07, 2011 10:16 AM  
**To:** Lerner Lois G; Paz Holly O  
**Cc:** Light Sharon P; Letourneau Diane L; Neuhart Paige  
**Subject:** sensitive (c)(3) and (c)(4) applications

I just spoke with Chip Hull and Elizabeth Kastenbergl about two cases they have that are related to the Tea Party - one a (c)(3) application and the other a (c)(4) application. I recommended that they develop the private benefit argument further and that they coordinate with Counsel. They also mentioned that there are a number of other (c)(3) and (c)(4) applications of orgs related to the Tea Party that are currently in Cincinnati. Apparently the plan had been to send one of each to DC to develop a position to be applied to the others. Given the sensitivity of the issue and the need (I believe) to coordinate with Counsel, I think it would be beneficial to have the other cases worked in DC as well. I understand that there may be TAS inquiries on some of the cases.

---

**From:** Lerner Lois G [REDACTED]  
**Sent:** Friday, March 02, 2012 9:20 AM  
**To:** Cook Janine  
**Subject:** RE: Advocacy orgs

If only you could help--we're going to get creamed. being able to provide the guidance piece ASAP will be the best--thanks

*Lois G. Lerner*  
 Director of Exempt Organizations

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**From:** Cook Janine [REDACTED]  
**Sent:** Friday, March 02, 2012 8:58 AM  
**To:** Lerner Lois G  
**Subject:** FW: Advocacy orgs

Fun all around. (Streckfus email today). We're working diligently on reviewing the advocacy guide. Let us know if you want our assistance on anything else.

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**1 - House Oversight Chairman Seeks Additional Information from the IRS on Tax-Exempt Sector Compliance, as Reports of IRS Questioning Grassroots Political Groups Raises New Concerns**

March 1, 2012

Honorable Douglas H. Shulman  
 Commissioner  
 Internal Revenue Service  
 1111 Constitution Avenue, NW  
 Washington, DC 20224

Dear Commissioner Shulman:

On October 6, 2011, I wrote to you requesting information about the status of various IRS compliance efforts involving the tax-exempt sector and issues related to audits of tax-exempt organizations [for this letter, see email update 2011-166]. While awaiting a complete response to that letter, I have since heard the IRS has been questioning new tax-exempt applicants, including grassroots political entities such as Tea Party groups, about their operations and donors [for background, see email update 2012-38]. In addition to the unanswered questions from my October 6, 2011, letter, I have additional questions relating to the IRS' oversight of applications for tax exemption for new organizations.

In particular, I am seeking additional information as it relates to the IRS review of new applications for section 501(c)(3) and (c)(4) tax-exempt status, including answers to the questions detailed below. Please provide your responses no later than March 15, 2012.

1. How many new tax-exempt organizations has the IRS recognized each year since 2008?

2. How many new applications for 501(c)(3) and (c)(4) tax-exempt status have been received by the IRS since 2008? Provide a breakdown by year and type of organization.

3. What is the IRS process for reviewing each tax-exempt status application? Is this process the same for entities applying for section 501(c)(3) and (c)(4) tax-exempt status? Please describe the process for both section 501(c)(3) and (c)(4) applications in detail.

4. Your preliminary response in my October 6, 2011, letter stated that, "if the application is substantially complete, the IRS may retain the application and request additional information as needed." How does the IRS determine that an application for tax-exempt status is "substantially complete?" Please provide guidelines or any other materials used in this process.

5. Does the IRS have standard procedures or forms it uses to "request additional information as needed" from applicants seeking tax-exempt status? Please provide any forms and related materials used.

6. Does the IRS select applications for "follow-up" on an automated basis or is there an office or individual responsible for selecting incomplete applications? Please explain and provide details on any automated system used for these purposes. If decisions are made on an individual basis, please provide the guidelines and any related materials used.

7. How many tax-exempt applications since 2008 have been selected for "follow-up"? How many entities selected for follow-up were granted tax-exempt status?

Should you have any questions regarding this request, please contact \*\*\* or \*\*\* at [REDACTED].

Sincerely,

/s/ Charles Boustany, Jr., MD  
Chairman  
Subcommittee on Oversight  
Committee on Ways and Means  
House of Representatives  
Washington, D.C.

#### **IRS Battling Tea Party Groups Over Tax-Exempt Status**

By Alan Fram, *Huff Post Politics*. March 1, 2012

WASHINGTON -- The Internal Revenue Service is embroiled in battles with tea party and other conservative groups who claim the government is purposely frustrating their attempts to gain tax-exempt status. The fight features instances in which the IRS has asked for voluminous details about the groups' postings on social networking sites like Twitter and Facebook, information on donors and key members' relatives, and copies of all literature they have distributed to their members, according to documents provided by some organizations.

While refusing to comment on specific cases, IRS officials said they are merely trying to gather enough information to decide whether groups qualify for the tax exemption. Most organizations are applying under section 501(c)(4) of the federal tax code, which grants tax-exempt status to certain groups as long as they are not primarily involved in activity that could influence an election, a determination that is up to the IRS. The tax agency would seem a natural target for tea party groups, which espouse smaller and less intrusive government and lower taxes. Yet over the years, the IRS has periodically been accused of political vendettas by liberals and conservatives alike, usually without merit, tax experts say.

The latest dispute comes early in an election year in which the IRS is under pressure to monitor tax-exempt groups -- like the Republican-leaning Crossroads GPS and Democratic-leaning Priorities USA -- which can shovel unlimited amounts of money to allies to influence campaigns, even while not being required to disclose their donors.

Conservatives say dozens of groups around the country have recently had similar experiences with the IRS and say its information demands are intrusive and politically motivated. They complain that the sheer size and detail of material the agency wants is designed to prevent them from achieving the tax designations they seek. "It's intimidation," said Tom Zawistowski, president of the Ohio Liberty Council, a coalition of tea party groups in the state. "Stop doing what you're doing, or we'll make your life miserable."

Authorities on the laws governing tax-exempt organizations expressed surprise at some of the IRS's requests, such as the volume of detail it is seeking and the identity of donors. But they said it is the agency's job to learn what it can to help decide whether tax-exempt status is warranted. "These tea party groups, a lot of their material makes them look and sound like a political party," said Marcus S. Owens, a lawyer who advises tax-exempt organizations and who spent a decade heading the IRS division that oversees such groups. "I think the IRS is trying to get behind the rhetoric and figure out whether they are, at their core, a political party," or a group that would qualify for tax-exempt status.

The tea party was first widely emblazoned on the public's mind for their noisy opposition to President Barack Obama's health care overhaul at congressional town hall meetings in the summer of 2009. Support from its activist members has since helped nominate and elect conservative candidates around the country, though group leaders say they are chiefly educational organizations.

They say they mostly do things like invite guests to discuss issues and teach members about the Constitution and how to request government documents under the Freedom of Information Act. Some say they occasionally endorse candidates and seek to register voters. "We're doing nothing more than what the average citizen does in getting involved," said Phil Rapp, executive director of the Richmond Tea Party in Virginia. "We're not supporting candidates; we are supporting what we see as the issues."

One group, the Kentucky 9/12 Project, said it applied for tax-exempt status in December 2010. After getting a prompt IRS acknowledgement of its application, the organization heard nothing until it got an IRS letter two weeks ago requesting more information, said the project's director, Eric Wilson. That letter, which Wilson provided to the AP, asked 30 questions, many with multiple parts, and gave the group until March 6 to respond.

Information requested included "details regarding all of your activity on Facebook and Twitter" and whether top officials' relatives serve in other organizations or plan to run for elective office. The IRS also sought the political affiliation of every person who has provided the group with educational services and minutes of every board meeting "since your creation."

"This is a modern-day witch hunt," said Wilson, whose 9/12 group and others around the country were inspired by conservative activist Glenn Beck. Other conservative organizations described similar experiences.

A January IRS letter to the Richmond Tea Party requests the names of donors, the amounts each contributed / and details on how the funds were used. The Ohio Liberty Council received an IRS letter last month seeking the credentials of speakers at the group's public events. In a February letter, the IRS asked the Waco Tea Party of Texas whether its officials have a "close relationship" with any candidates for office or political parties, and was asked for events they plan this year. "The crystal ball I was issued can't predict the future," and future events will depend on factors like what Congress does this year, said Toby Marie Walker, president of the Waco group.

The IRS provided a five-paragraph written response to a reporter's questions about its actions. It noted that the tax code allows tax-exempt status to "social welfare" groups, which are supposed to promote the common good of the community. Groups can engage in some political activities "so long as, in the aggregate, these non-exempt activities are not its primary activities," the IRS statement said. "Career civil servants make all decisions on exemption applications in a fair, impartial manner and do so without regard to political affiliation or ideology," the agency said.

There were 139,000 groups in the U.S. with 501(c)(4) tax-exempt status in 2010, the latest year of available IRS data. More than 1,700 organizations applied for that designation in 2010 while over 1,400 were approved. Such volume means it might take months for the IRS to assign applications to agents, said Lloyd Hitoshi Mayer, a Notre Dame law professor who specializes in election and tax law.

Ever since a 2010 Supreme Court decision allowing outside groups to spend unlimited funds in elections, such organizations have been under scrutiny. Two nonpartisan campaign finance watchdogs called on the IRS last fall to strip some large groups of tax-exempt status, claiming they engage in so much political activity that they don't qualify for the designation. Last month, seven Democratic senators asked the IRS to investigate whether some groups were improperly using tax-exempt status -- they didn't name any organizations -- because those groups are "improperly engaged in a substantial or even a predominant amount of campaign activity."

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**From:** Ruth.Madrigan [REDACTED]  
**Sent:** Thursday, June 14, 2012 3:10 PM  
**To:** Judson Victoria A; Cook Janine; Lerner Lois G; Marks Nancy J  
**Subject:** 501(c)(4)s - From the Nonprofit Law Prof Blog

Don't know who in your organizations is keeping tabs on c4s, but since we mentioned potentially addressing them (off-plan) in 2013, I've got my radar up and this seemed interesting...

**Bad News for Political 501(c)(4)s: 4th Circuit Upholds "Major Purpose" Test for Political Committees**  
 In a case with potentially major ramifications for politically active section 501(c)(4) organizations, the U.S. Court of Appeals for the Fourth Circuit has upheld the Federal Election Commission's "major purpose" test for determining whether an organization is a political committee or PAC and so subject to extensive disclosure requirements. As described in the opinion, under the major purpose test "the Commission first considers a group's political activities, such as spending on a particular electoral or issue-advocacy campaign, and then it evaluates an organization's 'major purpose,' as revealed by that group's public statements, fundraising appeals, government filings, and organizational documents" (citations omitted). The FEC's summary of the litigation details the challenge made in this case:

A group or association that crosses the \$1,000 contribution or expenditure threshold will only be deemed a political committee if its "major purpose" is to engage in federal campaign activity. [The plaintiff] claims that the FEC set forth an enforcement policy regarding PAC status in a policy statement and that this enforcement policy is "based on an ad hoc, case-by-case, analysis of vague and impermissible factors applied to undefined facts derived through broad-ranging, intrusive, and burdensome investigations . . . that, in themselves, can often shut down an organization, without adequate bright lines to protect issue advocacy in this core First Amendment area." [The plaintiff] asks the court to find this "enforcement policy" unconstitutionally vague and overbroad and in excess of the FEC's statutory authority.

In a unanimous opinion, the court concluded that the FEC's current major purpose test is "a sensible approach to determining whether an organization qualifies for PAC status. And more importantly the Commission's multi-factor major-purpose test is consistent with Supreme Court precedent and does not unlawfully deter protected speech." In doing so, the court chose to apply the less stringent "exacting scrutiny" standard instead of the "strict scrutiny" standard because, in the wake of Citizens United, political committee status only imposes disclosure and organizational requirements but no other restrictions. While the plaintiff here (The Real Truth About Abortion, Inc., formerly known as The Real Truth About Obama, Inc.) is a section 527 organization for federal tax purposes, the same test would apply to other types of politically active organizations, including section 501(c)(4) entities.

Hat Tip: Election Law Blog

LHM

**M. Ruth M. Madrigal**  
 Office of Tax Policy  
 U.S. Department of the Treasury  
 1500 Pennsylvania Ave., N.W.  
 Washington, DC 20220

[REDACTED] (direct)  
 [REDACTED]

### Increase in (c)(3)/(c)(4) Advocacy Org. Applications

#### Background:

- EOD Screening has identified an increase in the number of (c)(3) and (c)(4) applications where organizations are advocating on issues related to government spending, taxes and similar matters. Often there is possible political intervention or excessive lobbying.
- EOD Screening identified this type of case as an emerging issue and began sending cases to a specific group if they meet any of the following criteria:
  - "Tea Party," "Patriots" or "9/12 Project" is referenced in the case file
  - Issues include government spending, government debt or taxes
  - Education of the public by advocacy/lobbying to "make America a better place to live"
  - Statements in the case file criticize how the country is being run
- Over 100 cases have been identified so far, a mix of (c)(3)s and (c)(4)s. Before this was identified as an emerging issue, two (c)(4) applications were approved.
- Two sample cases were transferred to EOT, a (c)(3) and a (c)(4).
  - The (c)(4) stated it will conduct advocacy and political intervention, but political intervention will be 20% or less of activities. A proposed favorable letter has been sent to Counsel for review.
  - The (c)(3) stated it will conduct "insubstantial" political intervention and it has ties to politically active (c)(4)s and 527s. A proposed denial is being revised by TLS to incorporate the org.'s response to the most recent development letter.
- EOT is assisting EOD by providing technical advice (limited review of application files and editing of development letters).

#### EOD Request:

- EOD requests guidance in working these cases in order to promote uniform handling and resolution of issues.

#### Options for Next Steps:

- Assign cases for full development to EOD agents experienced with cases involving possible political intervention. EOT provides guidance when EOD agents have specific questions.
- EOT composes a list of issues or political/lobbying indicators to look for when investigating potential political intervention and excessive lobbying, such as reviewing website content, getting copies of educational and fundraising materials, and close scrutiny of expenditures.
- Establish a formal process similar to that used in healthcare screening where EOT reviews each application on TEDS and highlights issues for development.
- Transfer cases to EOT to be worked.
- Include pattern paragraphs on the political intervention restrictions in all favorable letters.
- Refer the organizations that were granted exemption to the ROO for follow-up.

#### Cautions:

- These cases and issues receive significant media and congressional attention.
- The determinations process is representational, therefore it is extremely difficult to establish that an organization will intervene in political campaigns at that stage.



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**From:** Paz Holly O  
**Sent:** Thursday, January 31, 2013 4:15 AM  
**To:** Paterson Troy D TIGTA  
**Cc:** Lerner Lois G  
**Subject:** RE: E-Mail Retention Question

Troy,

I'm sorry we won't get to see you today. We have reached out to determine the appropriate contact regarding your question below and have been told that, if this data request is part of e-Discovery, the coordination needs to go through Chief Counsel. The person to contact regarding e-Discovery requests is Glenn Melcher. His email address is [REDACTED] and his phone number is [REDACTED]

Holly

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**From:** Paterson Troy D TIGTA [REDACTED]  
**Sent:** Thursday, January 24, 2013 8:51 AM  
**To:** Paz Holly O  
**Subject:** E-Mail Retention Question

Holly,

Good morning.

During a recent briefing, I mentioned that we do not have the original e-mail from May 2010 stating that "Tea Party" applications should be forwarded to a specific group for additional review. After thinking it through, I was wondering about the IRS's retention or backup policy regarding e-mails. Do you know who I could contact to find out if this e-mail may have been retained?

Troy  
[REDACTED]

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**From:** Paz Holly O  
**Sent:** Wednesday, June 20, 2012 1:14 PM  
**To:** Lerner Lois G  
**Subject:** FW: Additional procedures on cases with advocacy issues - before issuing any favorable or initial denial ruling

FYI

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**From:** Seto Michael C  
**Sent:** Wednesday,  
June 20, 2012 2:11 PM  
**To:** McNaughton Mackenzie P; Salins Mary J;  
Shoemaker Ronald J; Lieber Theodore R  
**Cc:** Grodnitzky Steven; Megosh  
**Subject:**

Additional procedures on cases with advocacy issues - before issuing any favorable or initial denial ruling

Please  
inform the reviewers and staff in your groups that before issuing any favorable or initial denial rulings on any cases with advocacy issues, the reviewers must notify me and you via e-mail and get our approval. No favorable or initial denial rulings can be issued without your and my approval. The e-mail notification includes the

name of the case, and a synopsis of facts and denial rationale. I may require a short briefing depending on the facts and circumstances of the particular case.

If you have any questions, please let me know.

Thanks,

Mike

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**From:** Lerner Lois G  
**Sent:** Wednesday, May 02, 2012 9:40 AM  
**To:** Miller Steven T  
**Subject:** A Question

I'm wondering if  
 you might be able to give me a better sense of your expectations regarding roles  
 and responsibilities for the c4 matters. I understand you have asked Nan  
 to take a deep look at the what is going on and make recommendations. I'm  
 fine with that. Then there was the discussion yesterday about how we plan  
 to approach the issues going forward. That is where the confusion  
 lies. What are your expectations as to who is implementing the  
 plan?

Prior to that  
 meeting, unbeknownst to me, Cathy had made comments regarding the  
 guidance--which Nan knew about. Nan then directed one of my staff to meet  
 with Cathy and start moving in a new direction. The staff person came to  
 me and I talked to Nan, suggesting before we moved, we needed to hear from you,  
 which is where we are now.

We're all on good  
 terms and we all want to do the best, but I fear that unless there's a better

understanding of roles, we may step on each others toes without intending to.

Your thoughts  
please. Thanks

*Luis J. Lerner*

Director of Exempt Organizations

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**From:** Lerner Lois G  
**Sent:** Tuesday, May 17, 2011 10:37 AM  
**To:** Urban Joseph J  
**Subject:** Re: BNA - IRS Answers Few Questions Regarding Audits Of Donors Giving to Section 501(c)(4) Groups

The constitutional issue is the big Citizens United issue. I'm guessing no one wants that going forward Lois G. Lerner-----  
----- Sent from my BlackBerry Wireless Handheld

-----Original Message-----  
**From:** Joseph Urban  
**To:** Lois Call in Number  
**Subject:** RE: BNA - IRS Answers Few Questions Regarding Audits Of Donors Giving to Section 501(c)(4) Groups  
**Sent:** May 17, 2011 10:39 AM

The Counsel function with jurisdiction over the gift tax, Passthroughs and Special Industries, is going to have to come up with a legal position on what type of transfers of money or property to a section 501(c)(4) organization are subject to the gift tax. There is also a constitutional angle that has been raised - whether imposing the tax on a contribution for political purposes is an infringement on donors' First Amendment free speech rights, as well as an attack on section 501(c)(4) organizations engaged in permissible political activities. The PS&I lawyers have called a meeting for Friday with their boss, and perhaps other higher-ups in Counsel. Judy, Justin and I are going. Susan Brown and Don Spellman will be there from TE/GE Counsel, as will Nan Marks. There are some tough issues for the gift tax people to work through, and I am sure they will be running their conclusions past the Chief Counsel, if not Treasury. It would certainly be an interesting result if a self-interested earmarked donation to a (c)(4) for a political campaign would not subject to the gift tax, but a donation for the selfless general support of a (c)(4)s public interest work would be. Stay tuned.

-----Original Message-----  
**From:** Lerner Lois G  
**Sent:** Tuesday, May 17, 2011 10:04 AM  
**To:** Urban Joseph J  
**Subject:** Re: BNA - IRS Answers Few Questions Regarding Audits Of Donors Giving to Section 501(c)(4) Groups

So. What's your take on where this will go? Reminds me of Marv's staff draft on governance

Lois G. Lerner-----

-----Original Message Truncated-----

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**To:** Eldridge Michelle L; Zarin Roberta B; Lemons Terry L; Burke Anthony  
**Cc:** Partner Melaney J; Marx Dawn R  
**Subject:** RE: Georgetown

I will now be speaking somewhere between 11-11:30 depending on when previous speaker finishes. I may or may not be adding some remarks that are being discussed at a higher level. If approved, I have not been told whether those remarks will be in the written speech, or I will simply give them orally. There may be a desire to get the speech up ASAP if the new proposed language is added to the draft--these are Nikole questions. Right now, though, we're simple on hold.

*Lois G. Lerner*

Director of Exempt Organizations

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**From:** Eldridge Michelle L  
**Sent:** Tuesday, April 23, 2013 9:55 AM  
**To:** Lerner Lois G; Zarin Roberta B; Lemons Terry L; Burke Anthony  
**Cc:** Partner Melaney J; Marx Dawn R  
**Subject:** RE: Georgetown

I'm sorry--I've lost track. What time is your speech? Given timing of other stuff that day--we may be looking at posting both in the afternoon. I'm sure this will continue to be discussed...as I hear more details, I will pass it along. Please let me know what you are hearing as well. Thanks. --Michelle

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**From:** Lerner Lois G  
**Sent:** Monday, April 22, 2013 6:49 PM  
**To:** Zarin Roberta B; Lemons Terry L; Eldridge Michelle L; Burke Anthony  
**Cc:** Partner Melaney J; Marx Dawn R  
**Subject:** RE: Georgetown  
**Importance:** High

Hmm--I was thinking the speech would go up right after I speak and the report would go up later in the afternoon. Will that work?

*Lois G. Lerner*

Director of Exempt Organizations

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**From:** Zarin Roberta B  
**Sent:** Monday, April 22, 2013 1:32 PM  
**To:** Lemons Terry L; Eldridge Michelle L; Burke Anthony  
**Cc:** Lerner Lois G; Partner Melaney J; Marx Dawn R  
**Subject:** RE: Georgetown

Thanks, but Melaney deserves credit for that one! We are planning to post Lois' speech, along with the report, Thursday afternoon

Bobby Zarin, Director  
Communications and Liaison  
Tax Exempt and Government Entities

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**From:** Lemons Terry L  
**Sent:** Monday, April 22, 2013 1:10 PM  
**To:** Zarin Roberta B; Eldridge Michelle L; Burke Anthony  
**Cc:** Lerner Lois G; Partner Melanie J; Marx Dawn R  
**Subject:** RE: Georgetown

Bobby – good catch on the news release. Think we should try doing a short one since we did the interim one. Think text should track what we did before (below.) Anthony Burke will be reaching out to you. Think we need text by mid-day Tuesday so we can get through clearance channels on third floor and Treasury.

Also possible we may post text of Thursday speech on IRS.gov.

Thanks.

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**From:** Zarin Roberta B  
**Sent:** Monday, April 22, 2013 11:09 AM  
**To:** Lemons Terry L; Eldridge Michelle L  
**Cc:** Lerner Lois G; Partner Melanie J; Marx Dawn R  
**Subject:** FW: Georgetown

Fun for the week:

Do you know if we have language Lois can use re: the furlough? (see below.) I'm sure other IRS speakers are facing the same issue.

Also, as you know, she'll be announcing that the College and University Report that afternoon. We never discussed a press release (you did one for the interim report), and it may be too late now, but should it be considered?

Bobby Zarin, Director  
Communications and Liaison  
Tax Exempt and Government Entities

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**From:** Flax Nikole C  
**Sent:** Friday, April 19, 2013 11:44 AM  
**To:** Lerner Lois G; Lemons Terry L  
**Cc:** Grant Joseph H; Zarin Roberta B  
**Subject:** Re: Georgetown

We will pull something together - can you let me know when/if you are open later today to discuss other topics?

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**From:** Lerner Lois G  
**Sent:** Friday, April 19, 2013 11:37 AM Eastern Standard Time  
**To:** Flax Nikole C; Lemons Terry L  
**Cc:** Grant Joseph H; Zarin Roberta B  
**Subject:** Georgetown

**We have numerous speakers over 2 days at the conference, starting on Wed. I am sure we will be asked about the furloughs. There is already press out there on the NTEU issue, so I don't**



think we can avoid saying something. I'm thinking it would be best for me to lead off with some statement at the beginning before I get into my formal written speech to respond before the question comes. That way, all that follow me can either say exactly what I say or refer the questioner back to my earlier remarks. Otherwise I fear we may have someone get nervous and say more than we planned. Does that sound like a plan? If so, can we get parameters of what my statement should look like? Sorry, but this isn't one we can skate by. Thanks

*Chris J. Lerner*

Director of Exempt Organizations

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**From:** Kall Jason C  
**Sent:** Tuesday, January 10, 2012 9:09 PM  
**To:** Lerner Lois G  
**Cc:** Ghogasian Laurice A; Fish David L; Paz Holly O; Downing Nanette M  
**Subject:** Workplan and background on how we started the self declarer project

Lois,

I found the string of e-mails that started us down the path of what has become the c-4, 5, 6 self declarer project. Our curiosity was not from looking at the 990 but rather data on c-4 self declarers.

*Jason Kall*

Manager, EO Compliance Strategies and Critical Initiatives

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**From:** Chasin Cheryl D  
**Sent:** Thursday, September 16, 2010 8:59 AM  
**To:** Lerner Lois G; Kindell Judith E; Ghogasian Laurice A  
**Cc:** Lehman Sue; Kall Jason C; Downing Nanette M  
**Subject:** RE: EO Tax Journal 2010-130

That's correct. These are all status 36 organizations, which means no application was filed.

Cheryl Chasin

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**From:** Lerner Lois G  
**Sent:** Thursday, September 16, 2010 9:58 AM  
**To:** Chasin Cheryl D; Kindell Judith E; Ghogasian Laurice A  
**Cc:** Lehman Sue; Kall Jason C; Downing Nanette M  
**Subject:** Re: EO Tax Journal 2010-130

Ok guys. We need to have a plan. We need to be cautious so it isn't a per se political project. More a c4 project that will look at levels of lobbying and pol. activity along with exempt activity. Cheryl- I assume none of those came in with a 1024?  
 Lois G. Lerner-----  
 Sent from my BlackBerry Wireless Handheld

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**From:** Chasin Cheryl D  
**To:** Lerner Lois G; Kindell Judith E; Ghogasian Laurice A  
**Cc:** Lehman Sue; Kall Jason C; Downing Nanette M  
**Sent:** Wed Sep 15 14:54:38 2010  
**Subject:** RE: EO Tax Journal 2010-130

It's definitely happening. Here are a few organizations (501(c)(4), status 36) that sure sound to me like they are engaging in political activity:

I've also found (so far) 94 homeowners and condominium associations, a VEBA, and legal defense funds set up to benefit specific individuals.

Cheryl Chasin

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**From:** Lerner Lois G  
**Sent:** Wednesday, September 15, 2010 1:51 PM  
**To:** Kindell Judith E; Chasin Cheryl D; Ghogasian Laurice A  
**Cc:** Lehman Sue; Kall Jason C; Downing Nanette M  
**Subject:** RE: EO Tax Journal 2010-130

I'm not saying this is correct--but there is a perception out there that that is what is happening. My guess is most who conduct political activity never pay the tax on the activity and we surely should be looking at that. Wouldn't that be a surprising turn of events. My object is not to look for political activity--more to see whether self-declared c4s are really acting like c4s. Then we'll move on to c5,c6,c7--it will fill up the work plan forever!

*Lois G. Lerner*  
 Director, Exempt Organizations

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**From:** Kindell Judith E  
**Sent:** Wednesday, September 15, 2010 1:03 PM  
**To:** Lerner Lois G; Chasin Cheryl D; Ghogasian Laurice A  
**Cc:** Lehman Sue  
**Subject:** RE: EO Tax Journal 2010-130

My big concern is the statement "some (c)(4)s are being set up to engage in political activity" - if they are being set up to engage in political campaign activity they are not (c)(4)s. I think that Cindy's people are keeping an eye out for (c)(4)s set up to influence political campaigns, but we might want to remind them. I also agree that it is about time to start looking at some of those organizations that file Form 990 without applying for recognition -whether or not they are involved in politics.

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**From:** Lerner Lois G  
**Sent:** Wednesday, September 15, 2010 12:27 PM

**To:** Chasin Cheryl D; Ghougasian Laurice A; Kindell Judith E  
**Cc:** Lehman Sue  
**Subject:** FW: EO Tax Journal 2010-130

Not sure you guys get this directly. I'm really thinking we do need a c4 project next year

*Leis J. Lerner*  
 Director, Exempt Organizations

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**From:** paul streckfus [REDACTED]  
**Sent:** Wednesday, September 15, 2010 12:20 PM  
**To:** paul streckfus  
**Subject:** EO Tax Journal 2010-130

*From the Desk of Paul Streckfus,  
 Editor, EO Tax Journal*

**Email Update 2010-130 (Wednesday, September 15, 2010)**  
 Copyright 2010 Paul Streckfus

Yesterday, I asked, "Is 501(c)(4) Status Being Abused?" I can hardly keep up with the questions and comments this query has generated. As noted yesterday, some (c)(4)s are being set up to engage in political activity, and donors like them because they remain anonymous. Some commenters are saying, "Why should we care?". Others say these organizations come and go with such rapidity that the IRS would be wasting its time to track them down, others say (c)(3) filing requirements should be imposed on (c)(4)s, and so it goes.

Former IRSer Conrad Rosenberg seems to be taking a leave them alone view:

"I have come, sadly, to the conclusion that attempts at revocation of these blatantly political organizations accomplish little, if anything, other than perhaps a bit of *in terrorem* effect on some other (usually much smaller) organizations that may be contemplating similar behavior. The big ones are like balloons – squeeze them in one place, and they just pop out somewhere else, largely unscathed and undaunted. The government expends enormous effort to win one of these cases (on very rare occasion), with little real-world consequence. The skein of interlocking "educational" organizations woven by the fabulously rich and hugely influential Koch brothers to foster their own financial interests by political means ought to be Exhibit One. Their creations operate with complete impunity, and I doubt that potential revocation of tax exemption enters into their calculations at all. That's particularly true where deductibility of contributions, as with (c)(4)s, is not an issue. Bust one, if you dare, and they'll just finance another with a different name. I feel for the IRS's dilemma, especially in this wildly polarized election year."

A number of individuals said the requirements for (c)(4)s to file the Form 1024 or the Form 990 are a bit of a muddle. My understanding is that (c)(4)s need not file a Form 1024, but generally the IRS won't accept a Form 990 without a Form 1024 being filed. The result is that attorneys can create new (c)(4)s every year to exist for a short time and never file a 1024 or 990. However, the IRS can claim the organization is subject to tax (assuming it becomes aware of its existence) and then the organization must prove it is exempt (by essentially filing the information required by Form 1024 and maybe 990). Not being sure of the correctness of my understanding, I went to the only person who may know more about EO tax law than Bruce Hopkins, and got this response from Marc Owens:

"You are sort of close. It's not quite accurate to state that a (c)(4) 'need not file a Form 1024.' A (c)(4) is not subject to IRC 508, hence it is not required to file an application for tax-exempt status within a particular period of time after its formation. Such an organization is subject, however, to Treas. Reg. Section 1.501(a)-1(a)(2) and (3) which set forth the general requirement that in order to be exempt, an organization must file an application, but for which no particular time period is specified. Once a would-be (c)(4) is formed and it has completed one fiscal year of life, and assuming that it had revenue during the fiscal year, it is required to file a tax return.

"There is no exemption from the return filing requirement for would-be (c)(4)s and failing to file anything is flirting with serious issues. Obviously, few, if any, organizations elect to file a Form 1120 and so file a Form 990 as an alternative and because it comports with the intended tax-exempt status. When such a Form 990 arrives in Ogden, it goes 'unpostable,' i.e., there is no pre-existing master file account to which to 'post' receipt of the return.

"Master file accounts for tax exempts are created by Cincinnati when an application is filed, hence no prior application, no master file account and no place for Ogden to record receipt of the subsequent 990. Such unpostable returns are kicked out of the processing system and sent to a resolution unit that analyzes the problem (there are many reasons a return might be unpostable, such as a typo in an EIN). The processing unit might create a 'dummy' master file account to which to post the return, it might correspond with the filing organization to ascertain the correct return to be filed, or it might refer the matter to TE/GE where it would be assigned to an agent to analyze, essentially instigating the process you describe."

*My query today:* So where are we? Should the IRS ignore the whole mess? Or should the IRS be concerned with the integrity of the tax exemption system?

I think the IRS needs to keep track of new (c)(4)s as they appear. I'm assuming most political ads identify who is bringing them to you. That's true of the ones I've seen. When the IRS can not identify on its master file a new organization engaged in politicking, it should send a letter of inquiry, saying "Who are you? What is your claimed tax status?" In other words, what I'm saying is that the IRS needs to be more pro-active, and not await the filing of a Form 1024 or 990. I recognize that most of these (c)(4)s may have little income if they spend what they take in, but the EO function has never been about generating revenue. If (c)(4) status is being abused, the IRS needs to take action. If the IRS does not have the tools to get at the problems, then we need for Congress to step in and strengthen the filing requirements.

My biggest concern is that these political (c)(4)s are operating in tandem with (c)(3)s so that donors can claim 170 deductions. Here the IRS needs to have an aggressive audit program in coordination with the Income Tax Division so that 170 deductions are disallowed if a (c)(3) is being used as a conduit to a (c)(4).

I've probably raised new issues, and I've said nothing about section 527. Anyone who wants to fill in some of the blanks, please do so.

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**From:** Marks Nancy J  
**Sent:** Monday, April 01, 2013 12:16 PM  
**To:** Lerner Lois G; Paz Holly O; Fish David L  
**Subject:** Re: HMMMM?

Well we'd all like to see some good solid light of day court resolution so hope so

Sent using BlackBerry

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**From:** Lerner Lois G  
**Sent:** Monday, April 01, 2013 12:34 PM Eastern Standard Time  
**To:** Marks Nancy J; Paz Holly O; Fish David L  
**Subject:** RE: HMMMM?

It's the one that will be next that is "the one."

*Lois G. Lerner*

Director of Exempt Organizations

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**From:** Marks Nancy J  
**Sent:** Monday, April 01, 2013 12:21 PM  
**To:** Lerner Lois G; Paz Holly O; Fish David L  
**Subject:** Re: HMMMM?

Some not all would be my guess

Sent using BlackBerry

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**From:** Lerner Lois G  
**Sent:** Monday, April 01, 2013 09:55 AM Eastern Standard Time  
**To:** Marks Nancy J; Paz Holly O; Fish David L  
**Subject:** Re: HMMMM?

Sorry. These guys are itching for a Constitutional challenge. Not you father's EO

Lois G. Lerner-----

Sent from my BlackBerry Wireless Handheld

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**From:** Marks Nancy J  
**Sent:** Friday, March 29, 2013 05:55 PM Eastern Standard Time  
**To:** Lerner Lois G; Paz Holly O; Fish David L  
**Subject:** Re: HMMMM?

I guess I'd never assume that. Court is an expensive crap shoot with the potential for a public record the org might not want. This changes the odds some not sure it is a lot (unless most have no liability)

Sent using BlackBerry

**From:** Lerner Lois G  
**Sent:** Friday, March 29, 2013 05:43 PM Eastern Standard Time  
**To:** Marks Nancy J; Paz Holly O; Fish David L  
**Subject:** RE: HMMMM?

When we were talking, we were thinking they would all want to go to court--so we figured, why not get there sooner and save Appeals some time--they will be dying with these cases. We were thinking c3 rules. As to taxes owed--if IRS hasn't assessed, it's hard to get to court without paying yourself and making a claim

*Lois G. Lerner*  
 Director of Exempt Organizations

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**From:** Marks Nancy J  
**Sent:** Friday, March 29, 2013 5:37 PM  
**To:** Lerner Lois G; Paz Holly O; Fish David L  
**Subject:** RE: HMMMM?

I may be missing something. Designating them would not guarantee litigation because no one can force the taxpayer into court but assuming they have some tax liability resulting from the loss of exempt status litigation is certainly possible and the designation would have cut off appeals time right? (I'll admit I have not looked at designation procedures in some time). I agree release of denials is unlikely to create a public record because of redaction; there will probably be some record arising from taxpayers self disclosing but that issue is no different here than in many places.

**From:** Lerner Lois G  
**Sent:** Friday, March 29, 2013 5:16 PM  
**To:** Marks Nancy J; Paz Holly O; Fish David L  
**Subject:** HMMMM?

I was talking to Tom Miller about the redaction process in an effort to give Nikole a feel for how long it takes form a proposed denial to something being public with regard to the denial--a long time. As we talked I had been thinking of ways to shorten things up--such as designating the case for litigation and cutting out the Appeals time. It occurred to me though, that these are c4s, not c3s, so they have no right to go to court unless they owe tax. Without an exam, we can't tell whether they owe tax, and once we deny them, we don't have any ability to examine them--they are on the other side of the IRS. If they want to go to court, I guess they could file and pay taxes for previous years and then claim a refund(maybe?)

Bottom line, am I right that designating a c4 for court doesn't work and that we probably won't see any of these denials publicly other than the redacted copies of the denials when the process is complete? That really won't be helpful as I'm guessing many of these will have to be redacted so heavily that they won't have much information left once that is done.

Am I correct?

*Lois G. Lerner*

Director of Exempt Organizations

10/1/10



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**From:** Lerner Lois G  
**Sent:** Friday, May 03, 2013 9:30 AM  
**To:** Flax Nikole C  
**Subject:** RE: Aba

It's just the plain vanilla "what's new from the IRS?" with Ruth and Janine---ordinarily, I'd give snippets of several topics-- status of auto-rev, the 2 questionnaire projects, the interactive 1023--stuff we talked about at Georgetown. May 10, 9-10--immediately followed by me on a panel re C & U Report with Lorry Spitzer and someone else--maybe Suzie McDowell.

Lois G. Lerner  
 Director of Exempt Organizations

-----Original Message-----  
**From:** Flax Nikole C  
**Sent:** Friday, May 03, 2013 9:42 AM  
**To:** Lerner Lois G  
**Subject:** Aba

What time is your panel friday and what are the topics?

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**From:** Flax Nikole C  
**Sent:** Tuesday, April 23, 2013 11:59 AM  
**To:** Lerner Lois G  
**Subject:** FW: Draft remarks  
**Attachments:** draft c4 comments 4-22-13.doc

see what you think.

**Recent section 501(c)(4) activity**  
**PRELIMINARY DRAFT 4-22-13**

So I think it's important to bring up a matter that came up over the last year or so concerning our determination letter process, some section 501(c)(4) organizations and their political activity. Some of this has been discussed publicly already. But I thought it would make sense to do just a couple of minutes on what we did, what we didn't do, and where we are today on the grouping of advocacy organizations in our determination letter inventory.

I will start with a summary. As you know, the number of c4 applications increased significantly starting after 2010. In particular, we saw a large increase in the volume of applications from organizations that appeared to be engaged or planning to engage in advocacy activities. At that time, we did not have good enough procedures or guidance in place to effectively work these cases. We also have the factual difficulty of separating politics from education in these cases -- it's not always clear. Complicating matters is the sensitivity of these cases. Before I get into more detail, let me say that the IRS should have done a better job of handling the review of the c4 applications. We made mistakes, for which we apologize. But these mistakes were not due to any political or partisan reason. They were made because of missteps in our process and insufficient sensitivity to the implications of some of our decisions. We believe we have fixed these issues, and our entire team will do a much better job going forward in this area. And I want to stress that our team -- all career civil servants -- will continue to do their work in a fair, non-partisan manner.

So let me start again and provide more detail. Centralizing advocacy cases for review in the determination letter process made sense. Some of the ways we centralized did not make sense. But we have taken actions to fix the errors. What we did here, along with other mistakes that were made along the way, resulted in some cases being in inventory far longer than they should have.

Our front-line people in Cincinnati -- who do the reviews -- took steps to coordinate the handling of the uptick in cases to ensure consistency. We take this approach in areas where we want to promote consistency. Cases involving credit counseling are the best example of this sort of situation.

Here's where a problem occurred. In centralizing the cases in Cincinnati, my review team placed too much reliance on the particular name of an organization; in this case, relying on names in organization titles like "tea party" or "patriot," rather than looking deeper into the facts to determine the level of activity under the c4 guidelines. Our Inspector General is looking at this situation, but I believe and the IRS leadership team believe this to be an error -- not a political vendetta. The error was of a mistaken desire for too much efficiency on the applications without sufficient sensitivity to the situation.

We also made some errors in our development letters, asking for more than was needed. You may recall the publicity around donor lists. That resulted from insufficient

guidance being provided to our people working these cases. There was also an issue about whether we could do a guidesheet for these cases, an effort that took too long before we realized the diversity of the cases prevented success on such a document.

Now, we have remedied this situation – both systemically for the IRS and for the taxpayers who were impacted. I think we have done a good job of turning the situation around to help prevent this from occurring again.

Let me walk you through the steps we have taken.

Systemically, decisions with respect to the centralized collection of cases must be made at a higher level. So what happened here will not happen again.

With respect to the specific c4 cases in inventory, we took a number of steps to move things along. First, we had a team review the cases to determine the necessary scope of our review. Now make no mistake, some need that review, some have or had endorsements in public materials, for example. But many did not.

We worked to move the inventory. We closed those cases that were clear and are working on those that are less certain.

With respect to what we agree may have been overbroad requests for information, we engaged in a process of an active back and forth with the taxpayer. With respect to donor names, we informed organizations that if they could provide information requested in an alternative manner, we would work with them. In cases in which the donor names were not used in making the determination, the donor information was expunged from the file.

We now have a process where each revenue agent assigned these cases works in coordination with a specific technical expert.

And we have made significant progress on these cases. Of the nearly 300 c4 advocacy cases, we have approved more than 120 to date. We have had more than 30 (?) withdrawals. And obviously some cases take longer than others depending on the issues raised, including the level of political activity compared with social welfare activity. Let me make another important point that shouldn't be lost in all of this. We remain committed to making sure that we properly review determinations where there are questions. We hope to wrap the remaining cases up relatively soon.

So I wanted to raise this situation today with you. You and I know the IRS does make mistakes. And I also think you agree that our track record shows that our decisions are based on the law – not political affiliation. When we do make mistakes, we need to acknowledge it and work toward a better result. We also need to put in place safeguards to ensure the errors do not happen again. I think we have tried to do that here.

These cases will help us, along with the self-declarer questionnaire, to better understand the state of play on political activities in today's environment, the gaps in

guidance, and where we need to head into the future.

DRAFT

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**From:** Lerner Lois G  
**Sent:** Wednesday, March 27, 2013 12:39 PM  
**To:** Flax Nikole C; Sinno Suzanne; Barre Catherine M; Landes Scott S; Amato Amy; Vozne Jennifer L  
**Subject:** RE: UPDATE - FW: Hearing

As I mentioned yesterday--there 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.

So, don't be fooled about how this is being articulated--it is ALL about 501(c)(4) orgs and political activity

*Lois G. Lerner*  
 Director of Exempt Organizations

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**From:** Flax Nikole C  
**Sent:** Wednesday, March 27, 2013 1:31 PM  
**To:** Sinno Suzanne; Lerner Lois G; Barre Catherine M; Landes Scott S; Amato Amy; Vozne Jennifer L  
**Subject:** RE: UPDATE - FW: Hearing

thanks - this is helpful. Can we regroup internally before we get back to the Hill?

So sounds like their interest in 7206 is not 501c4 specific?

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**From:** Sinno Suzanne  
**Sent:** Wednesday, March 27, 2013 1:19 PM  
**To:** Flax Nikole C; Lerner Lois G; Barre Catherine M; Landes Scott S; Amato Amy  
**Subject:** UPDATE - FW: Hearing

I just spoke with Ayo. He told me that DOJ said the IRS does the initial investigations into violations of IRC section 7206 (fraud and false statements) and DOJ prosecutes IRS referrals. DOJ said they have not gotten any referrals from the IRS.

The Subcommittee is interested in an IRS witness to testify on:  
 - the process of an investigation before a case is turned over to DOJ  
 - how a determination is made  
 - how different elements of the offense are interpreted under IRC section 7206

Please let me know your thoughts.

Thanks,  
 Suzie

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**From:** Sinno Suzanne  
**Sent:** Wednesday, March 27, 2013 12:51 PM  
**To:** Griffin, Ayo (Judiciary-Dem)  
**Subject:** RE: Hearing

Ayo,

I do remember meeting with you on 501(c)(4)s last July and I hope you are well too.

Regarding the hearing, this is very short notice and I am not sure that we can properly prepare a witness in time and clear testimony. I will need to check with the subject matter experts and get back to you.

What would be most helpful is if you can tell me specifically what the Subcommittee wants the IRS to address, as we cannot comment on any specific cases/taxpayers. Are there questions that DOJ cannot answer that you want the IRS to answer instead?

Feel free to call me directly at [REDACTED] if you would like to discuss over the phone.

Thank you,  
 Suzie

Suzanne R. Sinno, J.D., LL.M. (Tax)  
 Legislative Counsel  
 Office of Legislative Affairs  
 Internal Revenue Service  
 [REDACTED] (fax)  
 [REDACTED]

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**From:** Griffin, Ayo (Judiciary-Dem) [REDACTED]  
**Sent:** Tuesday, March 26, 2013 7:44 PM  
**To:** Sinno Suzanne  
**Subject:** Hearing

Hi Suzanne,

I hope you're well. You may recall we met last summer during a couple of very helpful IRS briefings that you put together for staff for several Senators relating to political spending by 501(c)(4) groups.

I wanted to get in touch because Sen. Whitehouse is convening a hearing in the Judiciary Subcommittee on Crime and Terrorism on criminal enforcement of campaign finance law on April 9, which I think you may have already have heard about from Bill Erb at DOJ. One of the topics actually involves enforcement of tax law. Specifically, Sen. Whitehouse is interested in the investigation and prosecution of material false statements to the IRS regarding political activity by 501(c)(4) groups on forms 990 and 1024 under 26 U.S.C. § 7206.

Sen. Whitehouse would like to invite an IRS witness to testify on these issues. Could you please let me know if it would be possible for you to provide a witness?

I sincerely apologize for the late notice. We had been hoping that a DOJ witness could discuss all of the topics that Sen. Whitehouse was interested in covering at this hearing, but we were recently informed that they would not be able to speak about enforcement of § 7206 in this context.

I have attached an official invitation in case you require one two weeks prior to the hearing date (as DOJ does).

Perhaps we can discuss all of this on the phone tomorrow if you have time.

Thanks very much,

Ayo

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Ayo Griffin  
Counsel  
Subcommittee on Crime and Terrorism  
Senator Sheldon Whitehouse, Chair  
U.S. Senate Committee on the Judiciary  
[REDACTED]



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**From:** Lerner Lois G  
**Sent:** Wednesday, October 17, 2012 9:28 AM  
**To:** Lowe Justin; Zarin Roberta B; Paz Holly O; Partner Melaney J  
**Subject:** RE: Politico Article on the IRS, Disclosure, and (c)(4)s

I never understand why they don't go after Congress to change the law!

*Lois G. Lerner*  
Director of Exempt Organizations

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**From:** Lowe Justin  
**Sent:** Wednesday, October 17, 2012 10:21 AM  
**To:** Zarin Roberta B; Lerner Lois G; Paz Holly O; Partner Melaney J  
**Subject:** Politico Article on the IRS, Disclosure, and (c)(4)s

A fairly critical article from Politico on Monday, touching on (c)(4)s, responses to information requests, and application processing: <http://www.politico.com/news/stories/1012/82387.html>

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**From:** Lerner Lois G  
**Sent:** Wednesday, July 25, 2012 7:47 PM  
**To:** Miller Steven T  
**Subject:** Re: thank you

Glad it turned out to be far more boring than it might have. Happy to be able to help.  
 Lois G. Lerner-----  
 Sent from my BlackBerry Wireless Handheld

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**From:** Miller Steven T  
**Sent:** Wednesday, July 25, 2012 11:16 AM  
**To:** Lowe Justin; Urban Joseph J; Mistr Christine R; Flax Nikole C; Barre Catherine M; Norton William G Jr; Richardson Virginia G; Daly Richard M; Lerner Lois G; Paz Holly O  
**Subject:** thank you

**For all the help on**  
**the hearing. Please thank others who were involved in what I know was a**  
**time consuming effort to quench my thirst for details.**

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**From:** Lerner Lois G  
**Sent:** Tuesday, July 24, 2012 10:40 AM  
**To:** Paz Holly O; Megosh Andy; Fish David L; Park Nalee; Williams Melinda G  
**Cc:** Flax Nikole C  
**Subject:** C4

I know you all have received messages independently, but I wanted all to hear same message at same time. Regardless whether language has previously been approved, NO responses related to c4 stuff go out without an affirmative message, in writing from Nikole. Thanks Lois G. Lerner----- Sent from my BlackBerry Wireless Handheld

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**From:** Lerner Lois G  
**Sent:** Tuesday, July 24, 2012 10:36 AM  
**To:** Flax Nikole C  
**Subject:** Re: c4 letters

That is why I told them every letter had to go thru you. Don't know why this didn't, but have now told all involved, I hope! Sorry for all the noise. It is just stupid, but not welcome, I'm sure.  
 Lois G. Lerner-----  
 Sent from my BlackBerry Wireless Handheld

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**From:** Flax Nikole C  
**Sent:** Tuesday, July 24, 2012 11:13 AM  
**To:** Lerner Lois G  
**Subject:** RE: c4 letters

I know it is the same language, but this one has created a ton of issues including from Treasury and timing not ideal.

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**From:** Lerner Lois G  
**Sent:** Tuesday, July 24, 2012 11:07 AM  
**To:** Flax Nikole C  
**Subject:** Re: c4 letters

Sorry for that. I previously told the\$ everything on c4 had to go to you first for approval.  
 Lois G. Lerner-----  
 Sent from my BlackBerry Wireless Handheld

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**From:** Flax Nikole C  
**Sent:** Tuesday, July 24, 2012 10:08 AM  
**To:** Lerner Lois G; Paz Holly O; Megosh Andy; Park Nalee; Urban Joseph J  
**Subject:** c4 letters

We need to hold up on sending any more responses to any public/congressional letters until we all talk. Thanks

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**From:** Kindell Judith E  
**Sent:** Wednesday, July 18, 2012 10:54 AM  
**To:** Lerner Lois G  
**Cc:** Light Sharon P  
**Subject:** Bucketed cases

Of the 84 (c)(3)

cases, slightly over half appear to be conservative leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum.

Of the 199 (c)(4)

cases, approximately 3/4 appear to be conservative leaning while fewer than 10 appear to be liberal/progressive leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum.

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**From:** Lerner Lois G  
**Sent:** Tuesday, July 10, 2012 9:31 AM  
**To:** Light Sharon P  
**Subject:** Re: this morning on NPR

Perhaps the FEC will save the day  
 Lois G. Lerner-----  
 Sent from my BlackBerry Wireless Handheld

**From:** Light Sharon P  
**Sent:** Tuesday, July 10, 2012 08:44 AM  
**To:** Paz Holly O; Lerner Lois G  
**Subject:** this morning on NPR

Democrats Say Anonymous Donors Unfairly Influencing Senate Races

Karen Bleier /AFP/Getty Images

In Senate races, Democrats are fighting to preserve their thin majority. Their party campaign committee wants the Federal Election Commission to crack down on some of the Republicans' wealthiest allies — outside money groups that are using anonymous contributions to finance a multimillion-dollar onslaught of attack ads.

At the Democratic Senatorial Campaign Committee, Director Matt Canter says the pro-Republican groups aren't playing by the rules. The committee plans to file a [complaint](#) with the FEC accusing a trio of "social welfare" groups of actually being political committees, abusing the rules to hide the identities of their donors.

"These are organizations that are allowing right-wing billionaires and corporations to essentially get special treatment," says Canter.

Democrats don't have high-roller groups like these. Canter says that while ordinary donors in politics have to disclose their contributions, "these right-wing billionaires and corporations that are likely behind the ads that these organizations are running don't have to adhere to any of those laws."

The complaint cites Crossroads GPS, co-founded by Republican strategist Karl Rove; Americans For Prosperity, supported by the billionaire industrialists David and Charles Koch; and 60 Plus, which bills itself as the senior citizens' conservative alternative to AARP.

The three groups have all told the IRS they are social welfare organizations, just like thousands of local civic groups and definitely not political committees.

Canter said they've collectively spent about \$22 million attacking Democrats in Senate races this cycle.

The Obama campaign [filed a similar complaint](#) against Crossroads GPS last month. Watchdog groups have also repeatedly complained to the FEC and IRS.

At Crossroads GPS, spokesman Jonathan Collegio said their ads talk about things like unemployment and government overspending. "Those are all issues and advertising that's protected by the First Amendment, and it would ... be de facto censorship for the government to stop that type of advocacy from taking place," says Collegio.

And on Fox News recently, Rove said the Crossroads organization is prepared to defend itself and its donors' anonymity.

"We have some of the best lawyers in the country, both on the tax side and on the political side, political election law, to make certain that we never get close to the line that would push us into making GPS a political group as opposed to a social welfare organization," says Rove.

But it's possible that the legal ground may be shifting slowly beneath the social welfare organizations.

They've been a political vehicle of choice for big donors who want to stay private, especially as the Supreme Court loosened the rules for unlimited money.

But last month, a federal appeals court in Richmond, Va., said the FEC has the power to tell a social welfare organization that it's advertising like a political committee and it has to play by those rules.

Campaign finance lawyer Larry Noble used to be the FEC's chief counsel. He says that court ruling won't put anyone out of business this year.

"But it will have a chilling effect on these groups of billionaire-raised contributions, because it will call into question whether or not they're really going to be able to keep their donors confidential," says Noble.

The first obstacle to that kind of enforcement is the FEC itself, a place where controversial issues routinely end in a partisan deadlock.

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**From:** Lerner Lois G  
**Sent:** Monday, June 25, 2012 5:00 PM  
**To:** Daly Richard M; Ingram Sarah H; Marx Dawn R; Urban Joseph J; Marks Nancy J  
**Cc:** Paz Holly O; Fish David L  
**Subject:** RE: 201210022 Engagement Letter

It is what it is. Although the original story isn't as pretty as we'd like, once we learned this were off track, we have done what we can to change the process, better educate our staff and move the cases. So, we will get dinged, but we took steps before the "dinging" to make things better and we have written procedures. So, it is what what it is.

*Lois G*

*Lois*

Director of Exempt Organizations

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**From:** Daly Richard M  
**Sent:** Friday, June 22, 2012 5:10 PM  
**To:** Ingram Sarah H; Lerner Lois G; Marx Dawn R;



Urban Joseph J; Marks Nancy J  
**Subject:** FW: 201210022 Engagement

Letter  
**Importance:** High

TIGTA is going to look at how we deal with the applications from (c)(4)s. Among other things they will look at our consistency, and whether we had a reasonable basis for asking for information from the applicants. The engagement letter bears a close reading. To my mind, it has a more skeptical tone than usual.

Among the documents they want to look at are the following:

- 

All documents and correspondence (including e-mail) concerning the Exempt Organizations function's response to and decision-making process for addressing the increase in applications for tax-exempt status from organizations involving potential political advocacy issues.

TIGTA expects to issue its report in the spring.

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**From:** Rutstein Joel S  
**Sent:** Friday,

June 22, 2012 3:01 PM  
**To:** Daly Richard M  
**Subject:** FW:

201210022 Engagement Letter  
**Importance:** High

Mike, please see below and attached. Given that  
 TIGTA sent this to Joseph Grant and cc'ed Lois and Moises, do you still need me  
 to circulate this under a cover memo and distribute it to all my liaisons  
 including you? Thanks, Joel

*Joel S. Rutstein, Esq.*

Program Manager,  
 GAO/TIGTA Audits  
 Legislation and  
 Reports Branch  
 Office of  
 Legislative Affairs

[REDACTED]

[REDACTED]

[REDACTED]

(fax)

Email: [REDACTED]

Web: <http://irweb.irs.gov/AboutIRS/bu/ci/la/laqt/default.aspx>

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**From:** Price Emma W TIGTA

[REDACTED]

**Sent:** Friday, June 22, 2012 2:56

PM

**To:** Grant Joseph H

**Cc:** Davis Jonathan M (Wash DC); Miller

3

Appendix 50

Steven T; Medina Moises C; Lerner Lois G; Rutstein Joel S; Holmgren R David

TIGTA; Denton Murray B TIGTA; Coleman Amy L TIGTA; McKenney Michael E TIGTA;

Stephens Dorothy A TIGTA

**Subject:** 201210022 Engagement

Letter

**Importance:** High

FYI – Engagement Letter – *Consistency in Identifying and*

*Reviewing Applications for Tax-Exempt Status Involving Political Advocacy*

*Issues.*

Thanks,

Emma Price

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**From:** Lerner Lois G  
**Sent:** Wednesday, June 13, 2012 12:48 PM  
**To:** Downing Nanette M  
**Subject:** FW: Mother Jones on (c)(4)s

[REDACTED]

*Lois G. Lerner*  
 Director of Exempt Organizations

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**From:** Zarin Roberta B  
**Sent:** Wednesday, June 13, 2012 8:34 AM  
**To:** Lerner Lois G; Urban Joseph J; Kindell Judith E; Medina Moises C; Grant Joseph H; Ingram Sarah H; Partner Melaney J; Paz Holly O; Fish David L; Marks Nancy J  
**Cc:** Marx Dawn R  
**Subject:** FW: Mother Jones on (c)(4)s

very interesting reading.

Bobby Zarin, Director  
 Communications and Liaison  
 Tax Exempt and Government Entities

[REDACTED]

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**From:** Burke Anthony  
**Sent:** Wednesday, June 13, 2012 7:35 AM  
**To:** Zarin Roberta B  
**Cc:** Lemons Terry L  
**Subject:** Mother Jones on (c)(4)s

I don't think we'll include this in the clips, but I thought you might be interested:

**Mother Jones**

**How Dark-Money Groups Sneak By the Taxman**

**Gavin Aronsen**

**June 13, 2012**

Here at Mother Jones we talk about "dark money" to broadly describe the flood of unlimited spending behind this year's election. But the truly dark money in 2012 is being raised and spent by tax-exempt groups that aren't required to disclose their financial backers even as they funnel anonymous cash to super-PACs and run election ads.

By Internal Revenue Service rules, these 501(c)(4)s exist as nonpartisan "social welfare" organizations. They can engage in political activity so long as that's not their primary purpose, but skirt that rule by running issue-based "electioneering communications" that can mention candidates so long as they don't directly tell you to vote for or against them (wink, wink), or by giving grants to other politically active 501(c)(4)s. (Super-PACs, on the other hand, can spend all their money endorsing or attacking candidates, but must disclose their donors.)

Some overtly partisan dark-money groups are better at dancing around these rules than others. Last month, the IRS stripped an organization called Emerge America of its 501(c)(4) status. As it informed the group, which explicitly works to elect Democratic women, "You are not operated primarily to promote social welfare because your activities are conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole." Sure enough, Emerge America's mission statement on its 2010 tax form made no attempt to hide this fact: "By providing women across America with a top-notch training and a powerful, political network, we are getting more Democrats into office and changing the leadership-and politics-of America." D'oh!

Emerge America certainly isn't the only 501(c)(4) to walk the line between promoting social welfare and promoting a political party. It just wasn't savvy or subtle enough to not get busted. Other dark-money groups tend to describe their missions in broad terms that are unlikely to raise an auditor's eyebrows. But how they spend their money suggests their actual agendas. A few examples:

#### American Action Network

What it is: Conservative dark-money group cofounded by former Sen. Norm Coleman (R-Minn.).

Mission statement (as stated on tax forms): "The American Action Network is a 501(c)(4) 'action tank' that will create, encourage, and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national policy."

How it walks the line: AAN spent \$20 million in the 2010 election cycle targeting Democrats, including producing ads that were pulled from local airwaves for making "unsubstantiated" claims, but \$15 million of that went toward issue ads. Last week, Citizens for Responsibility and Ethics in Washington claimed that from July 2009 through June 2011 AAN spent 66.8 percent of its budget on political activity, an apparent violation of its tax-exempt status. CREW is calling for an investigation, suggesting that "significant financial penalties might prod AAN to learn the math."

## Crossroads GPS

What it is: The 501(c)(4) of Karl Rove's American Crossroads super-PAC

Mission statement: "Crossroads Grassroots Policy Strategies is a non-profit public policy advocacy organization that is dedicated to educating, equipping, and engaging American citizens to take action on important economic and legislative issues that will shape our nation's future. The vision of Crossroads GPS is to empower private citizens to determine the direction of government policymaking rather than being the disenfranchised victims of it. Through issue research, public communications, events with policymakers, and outreach to interested citizens, Crossroads GPS seeks to elevate understanding of consequential national policy issues, and to build grassroots support for legislative and policy changes that promote private sector economic growth, reduce needless government regulations, impose stronger financial discipline and accountability on government, and strengthen America's national security."

How it walks the line: The campaign-finance reform group Democracy 21 has called Crossroad GPS' tax-exempt status a "farce," pointing to \$10 million anonymously donated to finance GPS' anti-Obama ads. Likewise, the Campaign Legal Center wants the IRS to audit GPS. According to its tax filings, between June 2010 and December 2011 GPS spent \$17.1 million on "direct political spending"-just 15 percent of its total spending. Yet it also spent another 42 percent of its total spending, or \$27.1 million, on "grassroots issue advocacy," which included issue ads.

## Americans for Prosperity

What it is: Dark-money group of the Americans for Prosperity Foundation (which was founded by David Koch).

Mission statement: "Educate U.S. citizens about the impact of sound economic policy on the nation's economy and social structure, and mobilize citizens to be involved in fiscal matters."

How it walks the line: Since 2010, Americans for Prosperity has officially spent about \$1.4 million on election ads. However, the group's 2010 tax filing shows that \$11.2 million of its \$24 million in expenses went toward "communications, ads, [and] media." In May, an anonymous donor gave AFP \$6.1 million to spend on an issue ad attacking the president's energy policy. Just before Wisconsin's recent recall election, AFP sponsored a bus tour to rally conservative voters. But its state director said the tour had nothing to do the recall: "We're not dealing with any candidates, political parties, or ongoing races. We're just educating folks on the importance of [Gov. Scott Walker's] reforms."

## FreedomWorks

**What it is:** Dark-money arm of former House Majority Leader Dick Armey's Tea Party-aligned super-PAC of the same name

**Mission statement:** "Public policy, advocacy, and educational organization that focuses on fiscal on economic issues."

**How it walks the line:** FreedomWorks' 501(c)(4) hasn't spent any money on electioneering this election, but it has funneled \$1.7 million into its super-PAC, which has spent \$2.4 million supporting Republican campaigns. FreedomWorks has focused its past efforts on organizing anti-Obama Tea Party protests and encouraging conservatives to disrupt Democratic town hall meetings to protest the party's health care and renewable energy policies.

## Citizens United

**What it is:** Conservative nonprofit that sued the Federal Election Commission in 2008, resulting in the Supreme Court's infamous Citizens United ruling.

**Mission statement:** "Citizens United is dedicated to restoring our government to citizens [sic] control. Through a combination of education, advocacy, and grass roots organization, the organization seeks to reassert the traditional American values of limited government, freedom of enterprises, strong families, and national sovereignty and security. The organization's goal is to restore the founding fathers [sic] vision of a free nation, guided by honesty, common sense, and goodwill of its citizens."

**How it walks the line:** Since its formation in 1988, the nonprofit has released 19 right-wing political documentaries, including films narrated by Newt Gingrich and Mike Huckabee, a rebuttal to Michael Moore's Fahrenheit 9/11, and a pro-Ronald Reagan production (plus the upcoming Occupy Unmasked). On its 2010 tax filing, Citizens United reported spending more than half of its \$15.2 million budget on "publications and film" and "advertising and promotion."

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**From:** Seto Michael C  
**Sent:** Wednesday, February 02, 2011 12:39 PM  
**To:** Lieber Theodore R; Salins Mary J; Seto Michael C; Shoemaker Ronald J; Smith Danny D  
**Subject:** FW: SCR Table for Jan. 2011 & SCR items  
**Attachments:** SCR table Jan 2011.doc; SCR Jan 2011 [REDACTED] MD.doc; SCR Jan 2011 [REDACTED] MD.doc;  
 SCR Jan 2011 [REDACTED] MD.doc; SCR Jan 2011 [REDACTED] doc; SCR Jan 2011 [REDACTED]  
 MD.doc; SCR Jan 2011 Newspaper Cases Update MD.DOC; SCR Jan 2011 [REDACTED]  
 MD.DOC; SCR Jan 2011 Medical Marijuana.doc; SCR Jan 2011 Mortgage  
 Foreclosure.doc; SCR Jan 2011 Foreign Lobby Cases.doc; SCR Jan 2011 [REDACTED]  
 [REDACTED].doc; SCR Jan 2011 [REDACTED].doc

Below is Lois' and Holly's directions on certain technical areas, such as newspapers, health care case, etc. Please do not allow any cases to go out before we have brief Lois and Holly.

Attached is the SCR table and the SCRs. The SCRs that went to Mike Daly ends with "MD." I will forward the other SCRs that didn't went Mike as ly.

These reports are for your eyes only . . . not to be distributed.

Thanks,

Mike

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**From:** Lerner Lois G  
**Sent:** Wednesday, February 02, 2011 11:17 AM  
**To:** Paz Holly O; Seto Michael C  
**Cc:** Trilli Daria J; Douglas Akaisha; Letourneau Diane L; Kindell Judith E; Light Sharon P  
**Subject:** RE: SCR Table for Jan. 2011

Thanks--even if we go with a 4 on the Tea Party cases, they may want to argue they should be 3s, so it would be great if we can get there without saying the only reason they don't get a 3 is political activity.

I'll get with Nan Marks on the [REDACTED] piece.

I'm just antsy on the churchy stuff--Judy--thoughts on whether we should go to Counsel early on this--seems to me we may want to answer all questions they may have earlier rather than later, but I may be being too touchy. I'll defer to you and Judy.

[REDACTED]--I thought the elevated to TEGE Commish related to whether we ever had--that's why I asked. Perhaps the block is wrong--maybe what we need is some notation that the issue is one we would elevate?

I hear you about you and Mike keeping track, but I would like a running history. that's the only way I can speak to what we're doing and progress in a larger way. Plus we've learned from Exam--if they know I'm looking, they don't want to have to explain--so they



move things along. the 'clean" sheet doesn't give me any sense unless I go back to previous SCRs.

I've added Sharon so she can see what kinds of things I'm interested in.

*Lois G. Lerner*

Director, Exempt Organizations

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**From:** Paz Holly O  
**Sent:** Wednesday, February 02, 2011 11:02 AM  
**To:** Lerner Lois G; Seto Michael C  
**Cc:** Trilli Darla J; Douglas Akaisha; Letourneau Diane L; Kindell Judith E  
**Subject:** RE: SCR Table for Jan. 2011

Tea Party - Cases in Determs are being supervised by Chip Hull at each step - he reviews info from TPs, correspondence to TPs, etc. No decisions are going out of Cincy until we go all the way through the process with the c3 and c4 cases here. I believe the c4 will be ready to go over to Judy soon.

HMO case (██████████) - When you say to push for the next Counsel meeting, with whom in Counsel are you referring? The plan had been for Sarah to meet with Wilkins and Nan on this. We think this has not happened but have not heard directly (unless Sarah has responded to your recent email on this case). I don't know that we at this level can drive that meeting.

██████████-I will reach out to Phil to see if Nan has seen it. She was involved in the past but I don't know about recently.

On ██████████ (religious order), proposed denials typically do not go to Counsel. Proposed denial goes out, we have conference, then final adverse goes to Counsel before that goes out. We can alter that in this case and brief you after we have Counsel's thoughts.

██████████ was not elevated at Mike Daly's direction. He had us elevate it twice after the litigation commenced but said not to continue after that unless we are changing course on the application front and going forward with processing it.

██████████ - Our general criteria as to whether or not to elevate an SCR to Sarah/Joseph and on up is to only elevate when there has been action. ██████████ was elevated this month because it was just received. We will now begin to review the 1023 but won't have anything to report for sometime. We will elevate again once we have staked out a position and are seeking executive concurrence.

We (Mike and I) keep track of whether estimated completion dates are being moved by means of a track changes version of the spread sheet. When next steps are not reflected as met by the estimated time, we follow up with the appropriate managers or Counsel to determine the cause for the delay and agree on a due date.

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**From:** Lerner Lois G  
**Sent:** Tuesday, February 01, 2011 6:28 PM  
**To:** Seto Michael C  
**Cc:** Paz Holly O; Trilli Darla J; Douglas Akaisha; Letourneau Diane L; Kindell Judith E  
**Subject:** RE: SCR Table for Jan. 2011

Thanks--a couple comments

1. Tea Party Matter very dangerous. This could be the vehicle to go to court on the issue of whether Citizen's United overturning the ban on corporate spending applies to tax exempt rules. Counsel and Judy Kindell need to be in on this one please needs to be in this. Cincy should probably NOT have these cases--Holly please see what exactly they have please.
2. We need to push for the next Counsel meeting re: the HMO case Justin has. Reach out and see if we can set it up.
3. [REDACTED]--has that gone to Nan Marks? It says Counsel, but we'll need her on board. In all cases where it says Counsel, I need to know at what level please.
4. I assume the proposed denial of the religious or will go to Counsel before it goes out and I will be briefed?
5. I think no should be yes on the elevated to TEGE Commissioner slot for the Jon Waddel case that's in litigation--she is well aware.
6. Case involving healthcare reconciliation Act needs to be briefed up to my level please.
7. SAME WITH THE NEWSPAPER CASES--NO GOING OUT WITHOUT BRIEFING UP PLEASE.
8. The 3 cases involving [REDACTED] should be briefed up also.
9. [REDACTED] case--why "yes-for this month only" in TEGE Commissioner block?

Also, please make sure estimated due dates and next step dates are after the date you send these. On a couple of these I can't tell whether stuff happened recently or not.

Question--if you have an estimated due date and the person doesn't make it, how is that reflected? My concern is that when Exam first did these, they just changed the date so we always looked current, rather than providing a history of what occurred. perhaps it would help to sit down with me and Sue Lehman--she helped develop the report they now use.

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**From:** Seto Michael C  
**Sent:** Tuesday, February 01, 2011 5:33 PM  
**To:** Lerner Lois G  
**Cc:** Paz Holly O; Trilli Darla J; Douglas Akaiasha; Letourneau Diane L  
**Subject:** SCR Table for Jan. 2011

Here is the Jan. SCR summary.

*Lois G. Lerner*  
Director of Exempt Organizations

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**From:** Flax Nikole C  
**Sent:** Tuesday, February 28, 2012 3:26 PM  
**To:** Lerner Lois G  
**Subject:** RE: 501c4 response for AP

please hold off. Steve had some suggestions on that. I am in a meeting, but can get back to you soon.

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**From:** Lerner Lois G  
**Sent:** Tuesday, February 28, 2012 3:04 PM  
**To:** Flax Nikole C; Eldridge Michelle L; Miller Steven T; Lemons Terry L; Davis Jonathan M (Wash DC); Keith Frank; Lemons Terry L  
**Cc:** Burke Anthony; Patterson Dean J  
**Subject:** RE: 501c4 response for AP

Thanks--I want to use it to respond to the Congressional/TAS inquiry so I will-

*Lois G. Lerner*  
Director of Exempt Organizations

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**From:** Flax Nikole C  
**Sent:** Tuesday, February 28, 2012 3:01 PM  
**To:** Eldridge Michelle L; Lerner Lois G; Miller Steven T; Lemons Terry L; Davis Jonathan M (Wash DC); Keith Frank; Lemons Terry L  
**Cc:** Burke Anthony; Patterson Dean J  
**Subject:** RE: 501c4 response for AP

The change is fine, but I don't think we need to update the response just for the one addition. Just include it next time we use it.

---

**From:** Eldridge Michelle L  
**Sent:** Tuesday, February 28, 2012 1:22 PM  
**To:** Lerner Lois G; Miller Steven T; Lemons Terry L; Davis Jonathan M (Wash DC); Flax Nikole C; Keith Frank; Lemons Terry L  
**Cc:** Burke Anthony; Patterson Dean J  
**Subject:** RE: 501c4 response for AP

Yes--I think that is better. Works for us if it works for you. Thanks --Michelle

---

**From:** Lerner Lois G  
**Sent:** Tuesday, February 28, 2012 12:29 PM  
**To:** Eldridge Michelle L; Miller Steven T; Lemons Terry L; Davis Jonathan M (Wash DC); Flax Nikole C; Keith Frank; Lemons Terry L  
**Cc:** Burke Anthony; Patterson Dean J  
**Subject:** RE: 501c4 response for AP

2/29/2012  
Appendix 59

IRS0000001606

I think the point Steve was trying to make is--it doesn't harm you that we take a long time. You don't get that unless you add the red language.. I don't think the rest of the paragraph does go to this. Is says you can hold yourself out if you meet all the requirements. If you aren't sure you do meet them, you may want the IRS letter. would you be more comfortable if we say:

**While the application is pending, the organization must file a Form 990, like any other tax-exempt organization, and is otherwise able to operate.**

*Lois G. Lerner*  
Director of Exempt Organizations

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**From:** Eldridge Michelle L  
**Sent:** Tuesday, February 28, 2012 12:23 PM  
**To:** Lerner Lois G; Miller Steven T; Lemons Terry L; Davis Jonathan M (Wash DC); Flax Nikole C; Keith Frank; Lemons Terry L  
**Cc:** Burke Anthony; Patterson Dean J  
**Subject:** RE: 501c4 response for AP

Any chance that we can delete the language at the end -- and just say: While the application is pending, the organization must file a Form 990, like any other tax-exempt organization. I am concerned that the phrase "operate without material barrier" is a bit challenging for a statement. Given the context of the rest of the paragraph, I think the message gets across without it.

**While the application is pending, the organization must file a Form 990, like any other tax-exempt organization, and is otherwise able to operate without material barrier.**

---

**From:** Lerner Lois G  
**Sent:** Tuesday, February 28, 2012 12:02 PM  
**To:** Eldridge Michelle L; Miller Steven T; Lemons Terry L; Davis Jonathan M (Wash DC); Flax Nikole C; Keith Frank; Lemons Terry L  
**Subject:** FW: 501c4 response for AP  
**Importance:** High

Let me know if the addition (in bold red) does what you want. I'd like to share this with doc. on a Congressional coming in through TAS.

*Lois G. Lerner*  
Director of Exempt Organizations

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**From:** Eldridge Michelle L  
**Sent:** Monday, February 27, 2012 06:17 PM  
**To:** Miller Steven T; Davis Jonathan M (Wash DC); Lerner Lois G; Grant Joseph H; Flax Nikole C; Keith Frank; Lemons Terry L; Zarin Roberta B

**Subject:** FW: 501c4 response for AP

OK--Here is final I'm using. Edits were incorporated. Thanks. --Michelle

By law, the IRS cannot discuss any specific taxpayer situation or case. Generally however, when determining whether an organization is eligible for tax-exempt status, including 501(c)(4) social welfare organizations, all the facts and circumstances of that specific organization must be considered to determine whether it is eligible for tax-exempt status. To be tax-exempt as a social welfare organization described in Internal Revenue Code (IRC) section 501(c)(4), an organization must be primarily engaged in the promotion of social welfare.

The promotion of social welfare does not include any unrelated business activities or intervention in political campaigns on behalf of or in opposition to any candidate for public office. However, the law allows a section 501(c)(4) social welfare organization to engage in some political activities and some business activities, so long as, in the aggregate, these non-exempt activities are not its primary activities. Even where the non-exempt activities are not the primary activities, they may be taxed. Unrelated business income may be subject to tax under section 511-514, and expenditures for political activities may be subject to tax under section 527(f). For further information regarding political campaign intervention by section 501(c) organizations, see Election Year Issues, Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations, and Revenue Ruling 2004-6.

Unlike 501(c)(3) organizations, 501(c)(4) organizations are not required to apply to the IRS for recognition of their tax-exempt status. Organizations may self-declare and if they meet the statutory and regulatory requirements they will be treated as tax-exempt. If they do want reliance on an IRS determination of their status, they can file an application for exemption. **While the application is pending, the organization must file a Form 990, like any other tax-exempt organization, and is otherwise able to operate without material barrier.**

In cases where an application for exemption under 501 (c)(4) present issues that require further development before a determination can be made, the IRS engages in a back and forth dialogue with the applicant. For example, if an application appears to indicate that the organization has engaged in political activities or may engage in political activities, the IRS will request additional information about those activities to determine whether they, in fact, constitute political activity. If so, the IRS will look at the rest of the organization's activities to determine whether the primary activities are social welfare activities or whether they are non-exempt activities. In order to make this determination, the IRS must build an administrative record of the case. That record could include answers to questions, copies of documents, copies of web pages and any other relevant information.

Career civil servants make all decisions on exemption applications in a fair, impartial manner and do so without regard to political party affiliation or ideology.

---

**From:** Cook Janine  
**Sent:** Tuesday, July 19, 2011 3:06 PM  
**To:** Spellmann Don R  
**Cc:** Griffin Kenneth M  
**Subject:** RE: Advocacy orgs

**Categories:** NUUU

**T hanks Don. Can you get updates on these 2 cases just so we know where we are on them before we meet with Lois and Holly? Thanks**

---

**From:** Spellmann Don R  
**Sent:** Tuesday, July 19, 2011 4:05 PM  
**To:** Cook Janine  
**Subject:** RE: Advocacy orgs

I believe Amy (with Ken and David) have the 2 cases, [REDACTED] and [REDACTED].

---

**From:** Cook Janine  
**Sent:** Tuesday, July 19, 2011 3:53 PM  
**To:** Paz Holly O  
**Cc:** Marks Nancy J; Spellmann Don R  
**Subject:** RE: Advocacy orgs

Thanks Holly. Do you know who in counsel has the one (c)(4) below? (Or if you give me TP name, I'll check on our end).

---

**From:** Paz Holly O [REDACTED]  
**Sent:** Tuesday, July 19, 2011 10:25 AM  
**To:** Cook Janine  
**Cc:** Marks Nancy J  
**Subject:** RE: Advocacy orgs

Below is some background on what we are seeing:

**Background:**

- o EOD Screening has identified an increase in the number of (c)(3) and (c)(4) applications where organizations are advocating on issues related to government spending, taxes and similar matters. Often there is possible political intervention or excessive lobbying.
  - o Over 100 cases have been identified so far, a mix of (c)(3)s and (c)(4)s. Before this was identified as an emerging issue, two (c)(4) applications were approved.
- Two sample cases were transferred to EOT, a (c)(3) and a (c)(4).
  - The (c)(4) stated it will conduct advocacy and political intervention, but political intervention will be 20% or less of activities. A proposed favorable letter has been sent to Counsel for review.

1 The (c)(3) stated it will conduct "insubstantial" political intervention and it has ties to politically active (c)(4)s and 527s. A proposed denial is being revised by TLS to incorporate the org.'s response to the most recent development letter.

Lois would like to discuss our planned approach for dealing with these cases. We suspect we will have to approve the majority of the c4 applications. Given the volume of applications and the fact that this is not a new issue (just an increase in frequency of the issue), we plan to EO Determinations work the cases. However, we plan to have EO Technical compose some informal guidance re: development of these cases (e.g., review websites, check to see whether org is registered with FEC, get representations re: the amount of political activity, etc.). EO Technical will also designate point people for Determs to consult with questions. We will also refer these organizations to the Review of operations for follow-up in a later year.

**From:** Cook, Janine  
**Sent:** Monday, July 18, 2011 3:08 PM  
**To:** Paz Holly O  
**Subject:** Advocacy orgs

Holly,

Do you have any additional background for meeting next week with Lois and Nan about increase in exemption requests from advocacy orgs? Thanks!

Janine

---

**From:** Lerner Lois G  
**Sent:** Wednesday, February 03, 2010 11:25 AM  
**To:** [REDACTED]@fec.gov  
**Cc:** Fish David L  
**Subject:** Your request

Per your request, we have checked our records and there are no additional filings at this time. [REDACTED]  
[REDACTED] Hope that helps.

*Lois G. Lerner*  
Director, Exempt Organizations



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**From:** Thomas Cindy M  
**Sent:** Monday, April 05, 2010 12:26 PM  
**To:** Muthert Gary A  
**Cc:** Shafer John H; Camarillo Sharon L; Shoemaker Ronald J; Grodnitzky Steven  
**Subject:** Tea Party Cases -- ACTION  
**Importance:** High

Gary,

Since you are acting for John and I believe the tea party cases are being held in your group, would you be able to gather information, as requested in the email below, and provide it to Ron Shoemaker so that EO Technical can prepare a Sensitive Case Report for these cases? Thanks in advance.

---

**From:** Grodnitzky Steven  
**Sent:** Monday, April 05, 2010 12:14 PM  
**To:** Thomas Cindy M  
**Cc:** Shoemaker Ronald J; Shafer John H  
**Subject:** RE: two cases

Cindy,

Information would be the number of cases and the code sections in which they filed under. Also, if there is anything that makes one stand out over the other, like a high profile Board member, etc., then that would be helpful. Really thinking about possible media attention on a particular case. Just want to make sure that Lois and Rob are aware that there are other cases out there, etc.....

I think once the cases are assigned here in EOT and we have drafted a development letter, we should coordinate with you guys so that you can at least start developing them. However, we would still need to let Rob know before we resolve any of these cases as this is a potential high media area and we are including them on an SCR.

Ron-- once you assign the cases and we have drafted a development letter, please let me know so that we can coordinate with Cindy's folks.

Thanks.

Steve

---

**From:** Thomas Cindy M  
**Sent:** Monday, April 05, 2010 11:59 AM  
**To:** Grodnitzky Steven  
**Cc:** Shoemaker Ronald J; Shafer John H  
**Subject:** RE: two cases

What information would you like? We are "holding" the cases pending guidance from EO Technical because Holly Paz didn't want all of the cases sent to D.C.

---

**From:** Grodnitzky Steven  
**Sent:** Monday, April 05, 2010 11:56 AM  
**To:** Shoemaker Ronald J; Thomas Cindy M  
**Subject:** RE: two cases

Thanks. Can you assign the cases to one person and start an SCR for this month on the cases? Also, need to coordinate with Cindy as they have a number of Tea Party cases as well.

Cindy -- Could someone provide information on the Tea Party cases in Cincy to Ron so that he can include in the SCR each month? Thanks.

---

**From:** Shoemaker Ronald J  
**Sent:** Monday, April 05, 2010 11:30 AM  
**To:** Elliot-Moore Donna; Grodnitzky Steven  
**Subject:** RE: two cases

One is a c4 and one is a c3.

---

**From:** Elliot-Moore Donna  
**Sent:** Friday, April 02, 2010 8:38 AM  
**To:** Grodnitzky Steven; Shoemaker Ronald J  
**Subject:** RE: two cases

The Tea Party movement is covered in the Post almost daily. I expect to see more applications.

---

**From:** Grodnitzky Steven  
**Sent:** Thursday, April 01, 2010 4:04 PM  
**To:** Elliot-Moore Donna; Shoemaker Ronald J  
**Subject:** RE: two cases

These are high profile cases as they deal with the Tea Party so there may be media attention. May need to do an SCR on them.

---

**From:** Elliot-Moore Donna  
**Sent:** Thursday, April 01, 2010 7:43 AM  
**To:** Grodnitzky Steven; Shoemaker Ronald J  
**Subject:** RE: two cases

I looked briefly and it looks more educational but with a republican slant obviously. Since they're applying under (c)(4) they may qualify.

---

**From:** Grodnitzky Steven  
**Sent:** Wednesday, March 31, 2010 5:30 PM  
**To:** Elliot-Moore Donna; Shoemaker Ronald J  
**Subject:** RE: two cases

Thanks. Just want to be clear -- what are the specific activities of these organizations? Are they engaging in political activities, education, or what?

Ron -- can you let me know who is getting these cases?

---

**From:** Elliot-Moore Donna  
**Sent:** Wednesday, March 31, 2010 10:30 AM  
**To:** Grodnitzky Steven  
**Subject:** two cases

Steve:

As you can imagine, employees and managers in EO Determinations are furious. I've been receiving comments about the use of your words from all parts of TEGE and from IRS employees outside of TEGE (as far away as Seattle, WA).

Was it also communicated at that conference in Washington that the low-level workers in Cincinnati asked the Washington Office for assistance and the Washington Office took no action to provide guidance to the low-level workers?

How am I supposed to keep the low-level workers motivated when the public believes they are nothing more than low-level and now will have no respect for how they are working cases? The attitude/morale of employees is the lowest it has ever been. We have employees leaving for the day and making comments to managers that "this low-level worker is leaving for the day." Other employees are making sarcastic comments about not being thrown under the bus. And still other employees are upset about how their family and friends are going to react to these comments and how it portrays the quality of their work.

If reference to low-level workers wasn't made and/or blame wasn't placed on Cincinnati, please let me know ASAP and indicate what exactly was stated so that I can communicate that message to employees.

<http://www.usatojay.com/gundownspikes-2013/05/19/a-ecology-conservative-group-2012-election/?149939>

<http://www.wtsp.com/news/local-news/cincinnati/cincinnati-workers-sighted-out-of-conservative-groups-for-review-13549970/20090270/#amp;ed=Index.html>

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**From:** Lerner Lois G  
**Sent:** Monday, January 28, 2013 10:06 AM  
**To:** Klein Richard T  
**Subject:** RE: personnel info

OK--questions already. I see at the bottom what my CSRS repayment amount would be should I decide to repay. It looks like the calculation at the top assumes I am repaying--is that correct? Can I see what the numbers look like if I decide not to repay? Also, how do I go about repaying, if I choose to? Where would I find that information? Would you mind running a calculation for a retirement date of October 1, 2013? Also, the definition of monthly social security offset seems to say that at age 62(which I am) my monthly annuity will be offset by social security even if I don't apply. First--what the heck does that mean? Second, I don't see an offset on the chart--please explain. Thank you.

*Lois G. Lerner*

Director of Exempt Organizations

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**From:** Klein Richard T  
**Sent:** Monday, January 28, 2013 6:23 AM  
**To:** Lerner Lois G  
**Subject:** personnel info  
**Importance:** Low

Here are your reports you requested.....set your sick leave at 1360 for the first report and bumped it up to 1700 for the second.....redeposit amount and hi three used are shown on the bottom right.....call or email if you need anything else please.

*This e-mail and any attachments contain information intended solely for the use of the named recipient(s). This e-mail may contain privileged communications not suitable for forwarding to others. If you believe you have received this e-mail in error, please notify me immediately and permanently delete the e-mail, any attachments, and all copies thereof from any drives or storage media and destroy any printouts of the e-mail or attachments*

**Richard T. Klein**  
**Benefits Specialist**

**TOD 6:30 am to 3:15 EST**

**Address:**  
**IRS Cincinnati BeST**  
**Cincinnati, OH 45202**

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**From:** Cook Janine  
**Sent:** Monday, October 10, 2011 2:58 PM  
**To:** Judson Victoria (Vicki)  
**Subject:** Letter illustrating 501(c)(4) issue and elections

Vicki, you have probably heard of this very hot button issue floating around.  
 I Wanted to share the recent letter to Commissioner and Lois, copied below. I haven't gotten it formally.

The only things pending here with us in counsel is being on standby to assist EO as they work through background of c4s and gift tax issue and general exempt status AND helping them come up with uniform questions/guidance for the determinations function in processing the uptick in c4 and c3 applications tied to election season.

Joe Urban in EO is key technician on these issues and I just checked in with him for updates and will let you know if any interesting developments  
 Sent by my Blackberry

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**From:** paul streckfus [REDACTED]  
**To:** paul streckfus [REDACTED]  
**Sent:** Mon Oct 03 04:32:00 2011  
**Subject:** EO Tax Journal 2011-163

*From the Desk of Paul Streckfus,  
 Editor, EO Tax Journal*

**Email Update 2011-163 (Monday, October 3, 2011)**  
 Copyright 2011 Paul Streckfus

#### 1 - IRS Phone Numbers

Please toss last Thursday's list of IRS phone numbers for the enclosed list. A number of the Office of Chief Counsel phone numbers were incorrect, as that office has combined its two former EO branches into one. Now they all have the same phone number, so you can't possible dial the wrong number!

#### 2 - Section 501(c)(4) Status of Groups Questioned

Will the persistence of Democracy 21 and the Campaign Legal Center pay off? (See their latest letter, reprinted *infra*.) Will the IRS even look at these suspect 501(c)(4) organizations? Did the regulations make a grievous error in redefining "exclusively" to mean "primarily"? (My answers: probably not, probably not, yes)

Rick Cohen, in *The Nonprofit Quarterly Newswire*, asks: "Do you think that Karl Rove is operating his organization Crossroads GPS 'primarily to further the common good and general welfare' rather than as a way to collect and spend money to help elect his favorite politicians? Do you believe that Bill Burton and the other former Obama aides who created Priorities USA are engaged only secondarily in political activities while its primary program is devoted to 'civic betterment and social improvements'?" If so, are you up for buying a bridge that spans the East River in New York City between Brooklyn and Manhattan? ... Why are these organizations choosing to organize as 501(c)(4)s instead of as political organizations under section 527? The most likely explanation is because 527s have to disclose their donors, while 'social welfare' 501(c)(4)s, like 501(c)(3) public charities, can keep the sources of their money secret.... Do you think that Rove's Crossroads GPS has some sort of hidden social welfare purpose beyond what every sentient person knows is its first and foremost purpose: to elect candidates that Rove supports (and to oppose candidates Rove opposes)? The same goes for Burton's Priorities USA. The [Democracy 21] letter to the IRS isn't news. What is news is why the IRS and the Federal Elections Commission haven't been more diligent about going after these (c)(4)s that camouflage their intensely political activity behind some inchoate definition of 'social welfare.' The skilled nonprofit lawyers for these (c)(4)s will surely gin up some folderol about their social welfare activities. They'll say that they don't specifically endorse candidates. They'll work in some arcane calculation to show that their political activities are 'insubstantial' (defined as comprising no more than 49 percent of their activities).

Testimony of Michael Seto  
Manager of EO Technical Unit  
July 11, 2013

- A. She sent me email saying that when these cases need to go through multi-tier review and they will eventually have to go to Miss Kindell and the chief counsel's office.
- Q. Miss Lerner told you this in an email?
- A. That's my recollection.

Testimony of Carter Hull  
Tax Law Specialist in EO Technical Unit  
June 14, 2013

Q. Have you ever sent a case to Ms. Kindell before?

A. Not to my knowledge.

Q. This is the only case you remember?

A. Uh-huh.

Q. Correct?

A. This is the only case I remember sending directly to Judy.

Q. And did you send her the whole case file as well?

A. Yes.

\*\*\*

Q. Did Ms. Kindell indicate to you whether she agreed with your recommendations?

A. She did not say whether she agreed or not. She said it should go to Chief Counsel.

Q. The IRS Chief Counsel?

A. The IRS Chief Counsel.

Testimony of Elizabeth Hofacre  
Revenue Agent in EO Determinations Unit  
May 31, 2013

- Q. Okay. Do you always need to go through EO Technical to get assistance on how to draft these kind of letters?
- A. No, it was demeaning.
- Q. What do you mean by "demeaning"?
- A. Well, I might be jumping ahead of myself, but essentially -- typically, no. As a grade 13, one of the criteria is to work independently and do research and make decisions based on your experience and education, whereas in this case, I had no autonomy at all through the process.
- Q. So it was unusual for you to have to go through EO Technical to get these letters?
- A. Exactly. I mean, exactly, because once he provided me with his letters I used his letters and his questions as a basis for my letters. I didn't cut and paste or cookie cut. So then once I developed my letters from the information in the application, I would email him the letters. And at the same time he instructed me to fax copies of the 1024 so he could review my letters to make sure that they were consistent with the 1024 application.
- Q. Was that practice consistent with any other Emerging Issue?
- A. I never have done that before or since then.
- Q. So even for other Emerging Issues or difficult or challenging applications, you would still have discretion in terms of how to handle them?
- A. Yes. Typically, yes.



Testimony of Carter Hull  
Tax Law Specialist in EO Technical Unit  
June 14, 2013

- Q. Sir, as you sit here today, do you know the status of those two test cases?
- A. Only from hearsay, sir.
- Q. What do you know?
- A. That the (c)(3) dropped, they decided they didn't want to go any further, and the (c)(4) is still open.
- Q. Still open as far as today?
- A. As far as I know. I do not know for certain.
- Q. So for 3 years since they filed application?
- A. Yes, sir.

Testimony of Carter Hull  
Tax Law Specialist in EO Technical Unit  
June 14, 2013

- Q. What did you understand the meeting to be about when you were invited to the meeting?
- A. The one thing I remember was Lois Lerner saying someone mentioned Tea Party, and she said no, we are not referring to Tea Parties anymore. They are all now advocacy organizations.
- Q. Who called them Tea Party cases?
- A. I'm not sure who mentioned Tea Party, but at that point Lois I remember breaking in and saying no, no, we don't refer to those as Tea Parties anymore. They are advocacy organizations.
- Q. And what was her tone when saying that?
- A. Very firm.
- Q. Did she explain why she wanted to change the reference?
- A. She said that the Tea Party was just too pejorative.
- Q. So she felt the term Tea Party was a pejorative term?
- A. Yes. Let me put it this way: I may be – the way she didn't say that's a pejorative term that should not be used. She said no, we will use advocacy organizations. But pejorative is more my word than hers.

Testimony of Lucinda Thomas  
Manager of EO Determinations Unit  
June 28, 2013

Q. Do you think Lois Lerner is a political person?

A. Is she apolitical person?

Q. A, space, political person?

A. I believe that she cares about power and that it's important to her maybe to be more involved with what's going on politically and to me we should be focusing on working the determination cases and closing the cases and it shouldn't matter what type of organization it is. We should be looking at the merits of that case. And it's my understanding that the Washington office has made comments like they would like for – Cincinnati is not as politically sensitive as they would like us to be, and frankly I think that maybe they need to be not so politically sensitive and focus on the cases that we have and working a case based on the merits of those cases.

Testimony of Carter Hull  
Tax Law Specialist in EO Technical Unit  
June 14, 2013

Q. Did you meet with Ms. Franklin about the cases?

A. We met after she had made her determinations.

Q. After she reviewed the case files?

A. Yes.

Q. And when was this meeting, do you recall?

A. No, I am not sure.

Q. Was it still in 2010?

A. Probably in 2011.

Q. Okay. At some point in 2011?

A. Yes.

Q. Do you recall if it was early 2011, mid-2011?

A. Early-mid.

Q. Okay.

\*\*\*

A. Maybe in July.

Q. Of 2011.

A. Of 2011. July or August.

\*\*\*

- Q. Okay. And was this meeting just with you and Ms. Franklin?
- A. No, there were other people present.
- Q. Others in the counsel's office?
- A. Two others from the counsel's office.
- Q. Anyone else present?
- A. Ms. Kastenbergh was there. I believe Ms. Goehausen was there. I think there was another TLS there –
- Q. I am sorry, another –
- A. Another tax law specialist.
- Q. Okay.
- A. And I can't recall other people that may have been there.
- Q. Lois Lerner?
- A. I don't think Lois was there.
- Q. Holly Paz?
- A. I don't think Holly was there. I think Judy was there.
- Q. Judy Kindell.
- A. Yes.
- Q. Do you recall who the two others were from the Chief Counsel's office?
- A. One was a manager of Ms. Franklin, and the other guy had been there for years and I keep forgetting his name. I don't know why. I

have a block against his name. . . . Yes, he was there. There was another tax law specialist there, Justin Lowe.

Q. Justin Lowe. He is in EO Technical?

A. He was representing the Commissioner, Assistant Commissioner.

Q. Who was at the time Mr. Miller?

A. I think it was Mr. Grant.

Q. Joseph Grant.

A. Yes.

Testimony of Carter Hull  
Tax Law Specialist in EO Technical Unit  
June 14, 2013

- Q. Do you know how long the Chief Counsel's office had the case before it made its recommendation?
- A. I am not sure of the timeframe at this point.
- Q. Okay. Did they give you any feedback on these two cases?
- A. Yes, they did.
- Q. What did they say?
- A. I needed more information. I needed more current information.
- Q. What do you mean, more current information?
- A. They had it for a while and the information wasn't as current as it should be. They wanted more current information.
- Q. So because the cases had been going up this chain for the last year, they needed more current information?
- A. Yes, sir.
- Q. And what does that mean practically for you?
- A. That means that probably I should send out another development letter.
- Q. A second development letter?
- A. A second development letter. I think also at that time there was a discussion of having a template made up so that all the cases could be worked in the same manner. And my reviewer and I both said a template makes absolutely no difference because these organizations, all of them are different. A template would not work.

- Q. You and Ms. Kastenbergr agreed that a template wouldn't help?
- A. But Mr. Justin Lowe said he would prepare it, along with Don Spellman and whoever else was from Chief Counsel. I never saw it.



Testimony of Steven Miller  
Acting Commissioner  
November 13, 2013

- Q. So, sir, just to get the timeline right, you had a meeting with Ms. Lerner and her staff in or around February 2012?
- A. One or more meetings.
- Q. One or more meetings. Thank you. And then in mid-March you sit down with your staff and decide that something more needs to be done?
- A. Wanted to find out why the cases were there and what was going on.
- Q. And did you bat around ideas with your staff about how to find out that information?
- A. Yeah, we talked about, okay, who should go out, and the suggestions were, you know, they could have been from the deputy's staff, they could have been from Joseph's staff, they could have been from Lois' staff, and how would we do that.
- Q. I see. And who were the candidates to go out there and do the investigation?
- A. Really, it came down to Nan Marks, who I had tremendous respect and comfort with. She was – she had been my lawyer in TEGE Counsel, and she knew the area well. She had a wonderful way with talking to people, and she was a natural. And she was out of Joseph's shop, and we thought that it should be outside of Lois' shop, and Nan was the perfect person to lead that.
- Q. And, sir, why did you think it should be outside of Ms. Lerner's shop?
- A. Just in terms of perception. I didn't think she would whitewash it, but I didn't want any thought that that could happen.
- Q. So you wanted to have someone more independent –

A. Right.

Q. – to do the review?

A. Right.

Q. When you say you didn't want any thought that that would happen, who were you worried would think that it was –

A. It doesn't matter. It's just the way we operated.

Testimony of Ruth Madrigal  
Attorney Advisor in Treasury Department  
February 3, 2014

- Q. And ma'am, you wrote, "potentially addressing them." Do you know what you meant by, quote, "potentially addressing them?"
- A. Well, at this time, we would have gotten the request to do guidance of general applicability relating to (c)(4)s. And while I can't – I don't know exactly what was in my mind at the time I wrote this, the "them" seems to refer back to the (c)(4)s. And the communications between our offices would have had to do with guidance of general applicability.
- Q. So, sitting here today, you take the phrase, "potentially addressing them" to mean issuing guidance of general applicability of 501(c)(4)s?
- A. I don't know exactly what was in my head at the time when I wrote this, but to the extent that my office collaborates with the IRS, it's on guidance of general applicability.
- Q. And the recipients of this email, Ms. Judson and Ms. Cook are in the Chief Counsel's Office, is that correct?
- A. That's correct.
- Q. And Ms. Lerner and Ms. Marks are from the Commissioner side of the IRS?
- A. At the time of this email, I believe that Nan Marks was on the Commissioner's side, and Ms. Lerner would have been as well, yes.
- Q. So those are the two entities involved in rulemaking process or the guidance process for tax exempt organizations, is that right?
- A. Correct.
- Q. Did you review this document in preparation for appearing here today?

- A. I reviewed it briefly, yes.
- Q. What did the term “off plan” mean in your email?
- A. Again, I don’t have a recollection of doing – of writing this email at the time. I can’t say with certainty what was meant at the time.
- Q. Sitting here today, what do you take the term “off plan” to mean?
- A. Generally speaking, off plan would refer to guidance that is not on – or the plan that is mentioned there would refer to the priority guidance plan. And so off plan would be not on the priority guidance plan.
- Q. And had you had discussions with the IRS about issuing guidance on 501(c)(4)s that was not placed on the priority guidance plan?
- A. In 2012, we – yes, in 2012, there were conversations between my office, Office of Tax Policy, and the IRS regarding guidance relating to qualifications for tax exemption under (c)(4).
- Q. And this guidance was in response to requests from outside parties to issue guidance?
- A. Yes. Generally speaking, our priority guidance plan process starts with – includes gathering suggestions from the public and evaluating suggestions from the public regarding guidance, potential guidance topics, and by this point, to the best of my recollection, we had had requests to do guidance on this topic.

Testimony of Janine Cook  
Deputy Division Counsel/Deputy Associate Chief Counsel  
August 23, 2013

- Q. I think part of my question comes to the fact that by reading the face of the email, it doesn't appear that it's actually an explicit email about having a conversation about it being on plan or off plan. It just looks like it's a conversation where someone says since we mentioned potentially addressing this, and then in parentheses off plan, because it at that time would have been off plan in 2013, I have got my radar up and look at this. Am I misunderstanding that? Is that accurate or —
- A. I think in fairness, again, to understand the term, when it says off plan, it means working it. Working on it, but not listing it on the plan. It doesn't mean that we are not in a plan — you are looking at a timing question I think. That's not what the term means. The term — I mean it's a loose term, obviously, it's a coined term, the term means the idea of spending some resources on working it, getting legal issues together, things like that, but not listing it on the published plan as an item we are working. That's what the term off plan means. It's not a timing of the conversation.

Testimony of Victoria Ann Judson  
Division Counsel/ Associate Chief Counsel  
August 29, 2013

Q. You mentioned a little while ago the Treasury Department. Could you explain the relationship between your position and the Treasury Department?

A. I don't understand that question.

Q. I believe you mentioned that you work with Treasury on guidance, guidance projects?

A. Yes, we do.

Q. Could you explain how that working relationship –

A. Well, when we are working on guidance, first, there is often work at the beginning of each plan year to develop a guidance plan, in which you help decide what your priorities are and what projects you would like to work on during the year. Unfortunately, there is a lot more that we need to do than we can possibly accomplish in a year, so we try to prioritize and talk about what items would be useful to work on and most needed.

We also have items we work on that are off-plan, and there are reasons we don't want to solicit comments. For example, if they might relate to a desire to stop behavior that we feel is inappropriate under the tax law, we might not want to publicize that we are working on that before we come out with the guidance.

So we have a plan, and in developing that plan we will reach out to the field to see if there is guidance they think we need. We solicit comments from practitioners. We talk amongst ourselves and with Treasury. And then we have long lists and everyone goes through them and analyzes them, and then we have meetings to discuss which ones to have on. And often we have meetings with our colleagues at Treasury to do that and then come up with a guidance plan.

When we have items, we then formulate working groups to work on the guidance. And so then we will have staff attorneys from different offices, from the Treasury Department, from my office, with my team, and from people on the Commissioner's side, as well. And they will work together on the guidance. They will discuss issues, hypotheticals, how to structure it.

If they find questions that they think are particularly challenging or they need a call on how to go in their different directions, they will often formulate a briefing paper. Or, in the qualified plan area, we have a weekly time slot set for what we call large group. And in health care, we also have a large group meeting set. And so the staff can present those issues to the large group, often with papers identifying issues and calls that need to be made.

And then individuals, executives from the different areas, both Treasury, the Commissioner's side, and Chief Counsel, will all attend those meetings. We will discuss the issues, often hear a presentation from the working group, and talk about the issues, and decide on the calls or decide that we need more information or analysis, ask questions. So sometimes a decision will be made at that meeting, and sometimes a decision will be made for the working group to do more work and come back again at a subsequent meeting.

Testimony of Nikole Flax  
Chief of Staff to Steven Miller  
October 22, 2013

- Q. And you said before that Mr. Grant wasn't the best witness for that hearing. Was there any discussion about having Ms. Lerner be a witness for that hearing?
- A. No.
- Q. Why not?
- A. Lois is unpredictable. She's emotional. I have trouble talking negative about someone. I think in terms of a hearing witness, she's not the ideal selection.



Testimony of Lucinda Thomas  
Manager of EO Determinations Unit  
June 28, 2013

Q. And what was your reaction to hearing the news?

A. I was really, really mad.

Q. Why?

A. I feel as though Cincinnati employees and EO Determinations was basically thrown under a bus and that the Washington office wasn't taking any responsibility for knowing about these applications, having been involved in them and being the ones to basically delay processing of the cases.

Q. And that's why you took Ms. Lerner to say at that panel event?

A. When, well, my understanding was that she referred to Cincinnati employees as low level workers and that really makes me mad. It's not the first time that she has used derogatory comments about the employees working determination cases and she has done it before. It really makes me mad because the employees in Cincinnati – first of all we haven't gotten that many other, 2009 was our basic last year of hiring any revenue agents except for I believe it was 2012 we were given five revenue agents. And over 400 some thousand organizations have had their exemption revoked and we were given – have been given five revenue agents and we have received I think it's like over 40,000 applications coming in as a result of the audit revocation. There's no way five people are going to be able to handle that, and that's not to mention all of the employees that we've lost because of attrition.

Q. Sure.

A. So we are given no employees to work this. Our employees in EO Determinations are, they are so flexible in doing what is asked of them and working cases and being flexible and moving and doing whatever they're asked to do to try to get more cases closed with no

additional resources and not getting guidance. And it makes me really mad that she would refer to our employees as low level workers.

And also when the folks from D.C. have been in Cincinnati in April of 2012 and when the team met with our folks involved and they were basically reassured that there were mistakes that were made, yes, there were mistakes that were made by folks in Cincinnati as well D.C. but the D.C. office is the one who delayed the processing of the cases. And so they said we're a team, we're in this together. Nobody is going to be thrown under the bus because there were mistakes at all different angles. And then Joseph Grant had a town hall meeting on I believe it was May the 1st or May the 2nd with all of the determinations employees and then he met with a managers and again reassuring everybody that we're not, we're not using any scapegoats here, we're not throwing anybody under the bus, we're a team, there were mistakes made by a lot of different folks.

And then when this information came out on May the 10th, it's like, you weren't going to throw us under the bus?

Testimony of Lucinda Thomas  
Manager of EO Determinations Unit  
June 28, 2013

Q. And you said that this was not the first time that you had heard Ms. Lerner use derogatory terms to refer to Cincinnati employees, is that correct?

A. Yes.

Q. Can you tell us about the other times that she referred to Cincinnati employees in a derogatory manner?

A. I know she referred to us as backwater before. I don't remember when that was. But it's like, there is information when she speaks, there is an individual who writes to EO Issues and puts information in an EO tax journal, it's like a daily release that comes out, and so all of our specialists have access to that. So when she goes out and speaks and then that information is sent through email to all of our employees then people in the office start getting all worked up over these comments.

And here I have employees trying to you know do what they can to help our operation to move forward, and I've got somebody referring to workers in that way when they're trying really hard to close cases, and it's frustrating like how am I supposed to keep them motivated when our so-called leader is referring to people in that direction.

She also makes comments like, well, you're not a lawyer. And excuse me, I'm not a lawyer but that doesn't mean that I don't have something to bring to the table. I know a lot more about IRS operations than she ever will. And just because I'm not a lawyer doesn't mean I'm any less of a person or not as good a worker.



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

November 19, 2013

The Honorable Darrell Issa  
Chairman  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Attention: Katy Rother

Dear Mr. Chairman:

I am responding to your letter dated September 30, 2013. You asked about our plans to evaluate our policy on IRS employee use of non-official email accounts to conduct official business. You also requested a briefing and asked for specific documents.

While the Privacy Act ordinarily protects from disclosure some of the information we are providing in this letter, we are providing you with the requested information under Title 5 of the United States Code section 552a(b)(9). This provision authorizes disclosures of Privacy Act protected information to either house of the Congress or a congressional committee or subcommittee acting under its oversight authority. The enclosed information covers the period of January 1, 2009, through present. Due to employee safety and security concerns, we would appreciate it if you would withhold employee names and, for sensitive positions, position descriptions, if you distribute this information further. We are happy to work with your staff on appropriate redactions if you decide to distribute the information.

Regarding the use of email accounts, the IRS prohibits using non-official email accounts for any government or official purposes (See relevant portions of the enclosed Internal Revenue Manual (IRM) 10.8.1 and 1.10.3, Enclosure 1a and 1b). We teach and reinforce this policy in new employee orientation, core training classes, annual mandatory briefings for managers and employees, and continual service wide communications (see Enclosures 1e, 1f, 1g, 1h for policies and training information). We do not permit IRS officials to send taxpayer information to their personal email addresses. **An IRS employee should not send taxpayer information to his or her personal email address in any form, including redacted.**

IRS employees use their agency email accounts to transmit sensitive but unclassified (SBU) and they use the IRS Secure Messaging (SM) system to encrypt such emails.

(See IRM 11.3.1.14.2, Enclosure 1c). SBU information includes taxpayer data, Privacy Act protected information, some law enforcement information, and other information protected by statute or regulation.

If an employee violates the policy prohibiting the use of non-official email accounts for any government or official purpose, the penalty ranges from a written reprimand to a 5-day suspension on first offense and up to removal depending on prior offenses. (See *IRS Manager's Guide to Penalty Determinations: Failure to observe written regulations, orders, rules, or IRS procedures* and *Misuse/abuse/loss or damage to government property or vehicle*, Enclosure 1d). We identified three past disciplinary actions involving employee misuse of personal email to conduct official business. (See Enclosures 2a, 2b, and 2c.)

You also discuss use of non-official email accounts by four senior IRS officials. The IRS Accountability Review Board, charged with determining potential personnel action based on employee conduct, continues to research potential misuse of personal email by those still employed at the IRS.

The IRS is working diligently to respond to requests for documents for your ongoing investigation. As we have come across official documents sent to non-official email accounts, we have produced them to you and will continue to do so. Additionally, we are happy to arrange a briefing on this subject if you have further questions.

I hope this information is helpful. I am also writing Congressman Jordan. If you have any questions, please contact me, or a member of your staff may contact Scott Landes, Acting Director, Legislative Affairs, at (202) 622-3720.

Sincerely,



Daniel I. Werfel  
Acting Commissioner

Enclosures (11)



**U.S. House of Representatives**  
**Committee on Oversight and Government Reform**  
Darrell Issa (CA-49), Chairman



**Debunking the Myth that the IRS Targeted Progressives:**  
**How the IRS and Congressional Democrats Misled America about**  
**Disparate Treatment**

Staff Report  
113th Congress

April 7, 2014

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## Executive Summary

In the immediate aftermath of Lois Lerner's public apology for the targeting of conservative tax-exempt applicants, President Obama and congressional Democrats quickly denounced the IRS misconduct.<sup>1</sup> But later, some of the same voices that initially decried the targeting changed their tune. Less than a month after the wrongdoing was exposed, prominent Democrats declared the "case is solved" and, later, the whole incident to be a "phony scandal."<sup>2</sup> As recently as February 2014, the President explained away the targeting as the result of "bone-headed" decisions by employees of an IRS "local office" without "even a smidgeon of corruption."<sup>3</sup>

To support this false narrative, the Administration and congressional Democrats have seized upon the notion that the IRS's targeting was not just limited to conservative applicants. Time and again, they have claimed that the IRS targeted liberal- and progressive-oriented groups as well – and that, therefore, there was no political animus to the IRS's actions.<sup>4</sup> These Democratic claims are flat-out wrong and have no basis in any thorough examination of the facts. Yet, the Administration's chief defenders continue to make these assertions in a concerted effort to deflect and distract from the truth about the IRS's targeting of tax-exempt applicants.

The Committee's investigation demonstrates that the IRS engaged in disparate treatment of conservative-oriented tax-exempt applicants. Documents produced to the Committee show that initial applications transferred from Cincinnati to Washington were filed by Tea Party groups. Other documents and testimony show that the initial criteria used to identify and hold Tea Party applications captured conservative organizations. After the criteria were broadened in July 2012 to be cosmetically neutral, material provided to the Committee indicates that the IRS still intended to target only conservative applications.

A central plank in the Democratic argument is the claim that liberal-leaning groups were identified on versions of the IRS's "Be on the Look Out" (BOLO) lists.<sup>5</sup> This claim ignores significant differences in the placement of the conservative and liberal entries on the BOLO lists

<sup>1</sup> See, e.g., The White House, Statement by the President (May 15, 2013) (calling the IRS targeting "inexcusable"); "The IRS: Targeting Americans for their Political Beliefs": Hearing before the H. Comm. on Oversight & Gov't, 113th Cong. (2013) (statement of Ranking Member Elijah E. Cummings) ("The inspector general has called the action by IRS employees in Cincinnati, quote, 'inappropriate,' unquote, but after reading the IG's report, I think it goes well beyond that. I believe that there was gross incompetence and mismanagement in how the IRS determined which organizations qualified for tax-exempt status."); Press Release, Rep. Nancy Pelosi, Pelosi Statement on Reports of Inappropriate Activities at the IRS (May 13, 2013) ("While we look forward to reviewing the Inspector General's report this week, it is clear that the actions taken by some at the IRS must be condemned. Those who engaged in this behavior were wrong and must be held accountable for their actions.").

<sup>2</sup> *State of the Union with Candy Crowley* (CNN television broadcast June 9, 2013) (interview with Rep. Elijah E. Cummings); *Fox News Sunday* (Fox News television broadcast July 28, 2013) (interview with Treasury Secretary Jacob Lew).

<sup>3</sup> "Not even a smidgeon of corruption": Obama downplays IRS, other scandals, FOX NEWS, Feb. 3, 2014.

<sup>4</sup> See, e.g., Lauren French & Rachael Bade, *Democratic Memo: IRS Targeting Was Not Political*, POLITICO, July 17, 2013.

<sup>5</sup> See *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013).

and how the IRS used the BOLO lists in practice. The Democratic claims are further undercut by testimony from IRS employees who told the Committee that liberal groups were not subject to the same systematic scrutiny and delay as conservative organizations.<sup>6</sup>

The IRS's independent watchdog, the Treasury Inspector General for Tax Administration (TIGTA), confirms that the IRS treated conservative applicants differently from liberal groups. The inspector general, J. Russell George, wrote that while TIGTA found indications that the IRS had improperly identified Tea Party groups, it "did not find evidence that the criteria [Democrats] identified, labeled 'Progressives,' were used by the IRS to select potential political cases during the 2010 to 2012 timeframe we audited."<sup>7</sup> He concluded that TIGTA "found no indication in any of these other materials that 'Progressives' was a term used to refer cases for scrutiny for political campaign intervention."<sup>8</sup>

An analysis performed by the House Committee on Ways and Means buttresses the Committee's findings of disparate treatment. The Ways and Means Committee's review of the confidential tax-exempt applications proves that the IRS systematically targeted conservative organizations. Although a small number of progressive and liberal groups were caught up in the application backlog, the Ways and Means Committee's review shows that the backlog was 83 percent conservative and only 10 percent were liberal-oriented.<sup>9</sup> Moreover, the IRS approved 70 percent of the liberal-leaning groups and only 45 percent of the conservative groups.<sup>10</sup> The IRS approved every group with the word "progressive" in its name.<sup>11</sup>

In addition, other publicly available information supports the analysis of the Ways and Means Committee. In September 2013, *USA Today* published an independent analysis of a list of about 160 applications in the IRS backlog.<sup>12</sup> This analysis showed that 80 percent of the applications in the backlog were filed by conservative groups while less than seven percent were filed by liberal groups.<sup>13</sup> A separate assessment from *USA Today* in May 2013 showed that for 27 months beginning in February 2010, the IRS did not approve a single tax-exempt application filed by a Tea Party group.<sup>14</sup> During that same period, the IRS approved "perhaps dozens of applications from similar liberal and progressive groups."<sup>15</sup>

The IRS, over many years, has undoubtedly scrutinized organizations that embrace different political views for varying reasons – in many cases, a just and neutral criteria may have

<sup>6</sup> See, e.g., Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013); Transcribed interview of Stephen Daejin Seok, Internal Revenue Serv., in Wash., D.C. (June 19, 2013); Transcribed interview of Lucinda Thomas, Internal Revenue Serv., in Wash., D.C. (June 28, 2013).

<sup>7</sup> Letter from J. Russell George, Treasury Inspector Gen. for Tax Admin., to Sander M. Levin, H. Comm. on Ways & Means (June 26, 2013).

<sup>8</sup> *Id.*

<sup>9</sup> *Hearing on the Internal Revenue Service's Exempt Organizations Division Post-TIGTA Audit: Hearing before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 113th Con. (2013) (opening statement of Chairman Charles Boustany) [hereinafter "Ways and Means Committee September 18th Hearing"].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Gregory Korte, *IRS List Reveals Concerns over Tea Party 'Propaganda'*, USA TODAY, Sept. 18, 2013.

<sup>13</sup> *Id.*

<sup>14</sup> Gregory Korte, *IRS Approved Liberal Groups while Tea Party in Limbo*, USA TODAY, May 15, 2013.

<sup>15</sup> *Id.*

been fairly utilized. This includes the time period when Tea Party organizations were systematically screened for enhanced and inappropriate scrutiny. But the concept of *targeting*, when defined as a systematic effort to select applicants for scrutiny simply because their applications reflected the organizations' political views, only applied to Tea Party and similar conservative organizations. While use of term "targeting" in the IRS scandal may not always follow this definition, the reality remains that there is simply no evidence that any liberal or progressive group received enhanced scrutiny because its application reflected the organization's political views.

For months, the Administration and congressional Democrats have attempted to downplay the IRS's misconduct. First, the Administration sought to minimize the fallout by preemptively acknowledging the misconduct in response to a planted question at an obscure Friday morning tax-law conference. When that strategy failed, the Administration shifted to blaming "rogue agents" and "line-level" employees for the targeting. When those assertions proved false, congressional Democrats baselessly attacked the character and integrity of the inspector general. Their attempt to allege bipartisan targeting is just another effort to distract from the fact that the Obama IRS systematically targeted and delayed conservative tax-exempt applicants.

## Findings

- The IRS treated Tea Party applications distinctly different from other tax-exempt applications.
- The IRS selectively prioritized and produced documents to the Committee to support misleading claims about bipartisan targeting.
- Democratic Members of Congress, including Ranking Member Elijah Cummings, Ranking Member Sander Levin, and Representative Gerry Connolly, made misleading claims that the IRS targeted liberal-oriented groups based on documents selectively produced by the IRS.
- The IRS's "test" cases transferred from Cincinnati to Washington were exclusively filed by Tea Party applicants: the Prescott Tea Party, the American Junto, and the Albuquerque Tea Party.
- The IRS's initial screening criteria captured exclusively Tea Party applications.
- Even after Lois Lerner broadened the screening criteria to maintain a veneer of objectivity, the IRS still sought to target and scrutinize Tea Party applications.
- The IRS targeting captured predominantly conservative-oriented applications for tax-exempt status.
- Myth: IRS "Be on the Lookout" (BOLO) entries for liberal groups meant that the IRS targeted liberal and progressive groups. Fact: Only Tea Party groups on the BOLO list experienced systematic scrutiny and delay.
- Myth: The IRS targeted "progressive" groups in a similar manner to Tea Party applicants. Fact: The IRS treated "progressive" groups differently than Tea Party applicants. Only seven applications in the IRS backlog contained the word "progressive," all of which were approved by the IRS. The IRS processed progressive applications like any other tax-exempt application.
- Myth: The IRS targeted ACORN successor groups in a similar manner to Tea Party applicants. Fact: The IRS treated ACORN successor groups differently than Tea Party applicants. ACORN successor groups were not subject to a "sensitive case report" or reviewed by the IRS Chief Counsel's office. The central issue for the ACORN successor groups was whether the groups were legitimate new entities or part of an "abusive" scheme to continue an old entity under a new name.
- Myth: The IRS targeted Emerge affiliate groups in a similar manner to Tea Party applicants. Fact: The IRS treated Emerge affiliate groups differently than Tea Party

applicants. Emerge applications were not subjected to secondary screening like the Tea Party cases. The central issue in the Emerge applications was private benefit, not political speech.

- Myth: The IRS targeted Occupy groups in a similar manner to Tea Party applicants.  
Fact: The IRS treated Occupy groups differently than Tea Party applicants. No applications in the IRS backlog contained the words "Occupy." IRS employees testified that they were not even aware of an Occupy entry on the BOLO list.

### **Coordinated and misleading Democratic claims of bipartisan IRS targeting**

As the IRS targeting scandal grew, the Administration and congressional Democrats began peddling the allegation that the IRS targeting was not just limited to conservative tax-exempt application, but that the IRS had targeted liberal-leaning groups as well. These assertions kick-started when Acting IRS Commissioner Daniel Werfel told reporters that IRS “Be on the Look Out” lists included entries for liberal-oriented groups. Congressional Democrats seized upon his announcement and immediately began feeding the false narrative that liberal groups received the same systematic scrutiny and delay as conservative applicants. In the ensuing months, the IRS even reconsidered its previous redactions to provide congressional Democrats with additional fodder to support their assertions. Although TIGTA and others have rebuffed the Democratic argument, senior members of the Administration and in Congress continue this coordinated narrative that the IRS targeting was broader than conservative applicants.

### ***The IRS acknowledges that portions of its BOLO lists included liberal-oriented entries***

On June 24, 2013, Acting IRS Commissioner Daniel Werfel asserted during a conference call with reporters that the IRS’s misconduct was broader than just conservative applicants.<sup>16</sup> Werfel told reporters that “[t]here was a wide-ranging set of categories and cases that spanned a broad spectrum.”<sup>17</sup> Although Mr. Werfel refused to discuss details about the “inappropriate criteria that was [*sic*] in use,” the IRS produced to Congress hundreds of pages of self-selected documents that supported his assertion.<sup>18</sup> The IRS prioritized producing these documents over other material, producing them when the Committee had received less than 2,000 total pages of IRS material. Congressional Democrats had no qualms in putting these self-selected documents to use.

Virtually simultaneous with Mr. Werfel’s conference call, Democrats on the House Ways and Means Committee trumpeted the assertion that the IRS targeted liberal groups similarly to conservative organizations.<sup>19</sup> Ranking Member Sander Levin (D-MI) released several versions of the IRS BOLO list.<sup>20</sup> Because these versions included an entry labeled “progressives,” Ranking Member Levin alleged that “[t]he [TIGTA] audit served as the basis and impetus for a wide range of Congressional investigations and **this new information shows that the**

<sup>16</sup> See Alan Fram, *Documents show IRS also screened liberal groups*, ASSOC. PRESS, June 24, 2013.

<sup>17</sup> *Id.*

<sup>18</sup> See Letter from Leonard Oursler, Internal Revenue Serv., to Darrell Edward Issa, H. Comm. on Oversight & Gov’t Reform (June 24, 2013).

<sup>19</sup> Press Release, H. Comm. on Ways & Means Democrats, New IRS Information Shows “Progressives” Included on BOLO Screening List (June 24, 2013).

<sup>20</sup> *Id.*

**foundation of those investigations is flawed in a fundamental way.”<sup>21</sup>** (emphasis added). These documents would initiate a sustained campaign designed to falsely allege that the IRS engaged in bipartisan targeting.

### ***Ways and Means Committee Democrats allege bipartisan IRS targeting***

During a hearing of the Ways and Means Committee on June 27, 2013, Democrats continued to spin this false narrative, arguing that liberal groups were mistreated similarly to conservative groups. Ranking Member Levin proclaimed during his opening statement:

This week we learned for the first time the three key items, one, the screening list used by the IRS included the term “progressives.” Two, progressive groups were among the 298 applications that TIGTA reviewed in their audit and received heightened scrutiny. And, three, the inspector general did not research how the term “progressives” was added to the screening list or how those cases were handled by a different group of specialists in the IRS. The failure of the I.G.’s audit to acknowledge these facts is a fundamental flaw in the foundation of the investigation and the public’s perception of this issue.<sup>22</sup>

Other Democratic Members picked up this thread. While questioning the hearing’s only witness, Acting IRS Commissioner Werfel, Representative Charlie Rangel (D-NY) raised the specter of bipartisan targeting. He stated:

Mr. RANGEL: You said there’s diversity in the BOLO lists. And you admit that conservative groups were on the BOLO list. Why is it that we don’t know whether or not there were progressive groups on the BOLO list?

Mr. WERFEL: Well, we do know that – that the word “progressive” did appear on a set of BOLO lists. We do know that. When I was articulating the point about diversity, I was trying to capture that the types of political organizations that are on these BOLO lists are wide ranging. But they do include progressives.<sup>23</sup>

Similarly, Representative Joseph Crowley (D-NY) alleged that the IRS mistreated progressive groups identically to Tea Party groups. He said:

As the weeks have gone on, we have seen that there is a culture of intimidation, but not from the White House, but rather from my Republican colleagues. **We know for a fact that there has been targeting of both tea party and**

<sup>21</sup> *Id.*

<sup>22</sup> *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013) (statement of Ranking Member Sander Levin).

<sup>23</sup> *Id.* (question and answer with Representative Charlie Rangel).

progressive groups by the IRS. . . . Then, as we see, the progressive groups were targeted side by side with their tea party counterpart groups.<sup>24</sup> (emphasis added).

***Acting IRS Commissioner volunteers to testify at the Oversight Committee's July 17, 2013 subcommittee hearing***

On July 17, 2013, the Oversight Committee convened a joint subcommittee hearing on ObamaCare security concerns, featuring witnesses from the federal agencies involved in the law's implementation.<sup>25</sup> The Chairmen invited Sarah Hall Ingram, the Director of the IRS ObamaCare office, to testify.<sup>26</sup> Prior to the hearing, however, Acting IRS Commissioner Werfel personally intervened and volunteered himself to testify as the IRS witness in Ms. Ingram's place. Committee Democrats used Mr. Werfel's appearance as an opportunity to continue pushing their false narrative of bipartisan IRS targeting.

During the hearing, Ranking Member Elijah Cummings (D-MD) used the majority of his five-minute period to question Mr. Werfel not on the subject matter of the hearing, but rather on the IRS's treatment of liberal tax-exempt applicants. They engaged in the following exchange:

- |               |                                                                                                                                                                                                                                                                                                                                                                                                                             |
|---------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Mr. CUMMINGS. | I would like to ask you about the ongoing investigation into the treatment of Tea Party applicants for tax exempt status. During our interviews, we have been told by more than one IRS employee that there were progressive or left-leaning groups that received treatment similar to the Tea Party applicants. As part of your internal review, have you identified non-Tea Party groups that received similar treatment? |
| Mr. WERFEL.   | Yes.                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Mr. CUMMINGS. | We were told that one category of applicants had their applications denied by the IRS after a 3-year review; is that right?                                                                                                                                                                                                                                                                                                 |
| Mr. WERFEL.   | Yes, that's my understanding that there is a group or seven groups that had that experience, yes. <sup>27</sup>                                                                                                                                                                                                                                                                                                             |

<sup>24</sup> *Id.* (question and answer with Representative Joseph Crowley).

<sup>25</sup> "Evaluating Privacy, Security, and Fraud Concerns with ObamaCare's Information Sharing Apparatus": *J. Hearing before the Subcomm. on Energy Policy, Health Care and Entitlements of the H. Comm. on Oversight and Gov't Reform and the Subcomm. on Cybersecurity, Infrastructure Protection, and Security Technologies of the H. Comm. on Homeland Security*, 113th Cong. (2013) [hereinafter "July 17th Hearing"].

<sup>26</sup> See Letter from James Lankford, H. Comm. on Oversight & Gov't Reform, & Patrick Meehan, H. Comm. on Homeland Security, to Sarah Hall Ingram, Internal Revenue Serv. (July 10, 2013).

<sup>27</sup> July 17th Hearing, *supra* note 25.



It is certain that Ranking Member Cummings would not have had the opportunity to ask these questions had Ms. Ingram testified as originally requested.

The circumstances of Mr. Werfel's statements are striking. He volunteered to replace the undisputed IRS expert on ObamaCare at a hearing focusing on ObamaCare security, after being at the IRS for less than two months. He volunteered to testify at a subcommittee the day before the Committee convened a hearing that would feature testimony about the IRS's targeting of conservative applicants. By all indications, Mr. Werfel's testimony allowed congressional Democrats to continue to perpetuate the myth of bipartisan IRS targeting.

***Democrats attack the Inspector General during the Oversight Committee's July 18, 2013 hearing***

Unsurprisingly, Democrats on the Oversight Committee highlighted Mr. Werfel's assertions as their main narrative during a Committee hearing on the IRS targeting the following day. During his opening statement, Ranking Member Cummings criticized Treasury Inspector General for Tax Administration J. Russell George, accusing him of ignoring liberal groups targeted by the IRS.<sup>28</sup> Ranking Member Cummings stated:

I also want to ask the Inspector General why he was unaware of documents we have now obtained showing that the IRS employees were also instructed to screen for progressive applicants and why his office did not look into the treatment of left-leaning organizations, such as Occupy groups. I want to know how he plans to address these new documents. Again, we represent conservative groups on both sides of the aisle, and progressives and others, and so all of them must be treated fairly.<sup>29</sup>

Representative Danny Davis (D-IL) utilized Mr. Werfel's testimony from the day before to also criticize the inspector general. Representative Davis said:

**Yesterday, the principal deputy commissioner of the Internal Revenue Service, Danny Werfel, testified before this committee that progressive groups received treatment from the IRS that was similar to Tea Party groups when they applied for tax exempt status.** In fact, Congressman Sandy Levin, who is the ranking member of the Ways and Means Committee, explained these similarities in more detail. He said the IRS took years to resolve these cases, just like the Tea Party cases. And he said the IRS, one, screened for these groups, transferred them to the Exempt Organizations Technical Unit, made them the subject of a sensitive case report, and had them reviewed by the Office of Chief Counsel. According to the information provided to the Committee on Ways and Means, some of these progressive groups actually had their applications denied

<sup>28</sup> "The IRS's Systematic Delay and Scrutiny of Tea Party Applications": Hearing before the H. Comm. on Oversight & Gov't Reform, 113th Cong. (2013) (statement of Ranking Member Elijah E. Cummings) [hereinafter "July 18th Hearing"].

<sup>29</sup> *Id.*

after a 3-year wait, and the resolution of these cases happened during the time period that the inspector general reviewed for its audit.<sup>30</sup> (emphasis added).

Inspector General George testified at the hearing to defend his work and debunk Democratic myths of bipartisan targeting. Committee Democrats took the opportunity to harshly interrogate Mr. George, using Mr. Werfel's testimony. Representative Gerry Connolly (D-VA) said to him:

Well, so I want to make sure—you're under oath, again—it is your testimony today, as it was in May, but let's limit it to today, that at the time you testified here in May you had absolutely no knowledge of the fact that in any screening, BOLOs or otherwise, the words "Progressive," "Democrat," "MoveOn," never came up. You were only looking at "Tea Party" and conservative-related labels. You were unaware of any flag that could be seen as a progressive—the progressive side of things.<sup>31</sup>

Similarly, Representative Jackie Speier (D-CA) told Mr. George:

Now, that seems completely skewed, Mr. George, if you are indeed an unbiased, impartial watch dog. It's as if you only want to find emails about Tea Party cases. These search terms do not include any progressive or liberal or left-leaning terms at all. Why didn't you search for the term "progressive"? It was specifically mentioned in the same BOLO that listed Tea Party groups.<sup>32</sup>

Representative Carolyn Maloney (D-NY) said:

How in the world did you get to the point that you only looked at Tea Party when liberals and progressives and Occupy Wall Street and conservatives are just as active, if not more active, and would certainly be under consideration. That is just common plain sense. And I think that some of your statements have not been—it defies—it defies logic, it defies belief that you would so limit your statements and write to Mr. Levin and write to Mr. Connolly that of course no one was looking at any other area.<sup>33</sup>

Armed with self-selected IRS documents and Mr. Werfel's testimony, congressional Democrats vehemently attacked TIGTA in an attempt to undercut its findings that the IRS had targeted conservative tax-exempt applicants. Their *ad hominem* attacks on an independent inspector general sought to distract and deflect from the real misconduct perpetrated by the IRS.

<sup>30</sup> *Id.* (question and answer with Representative Danny Davis).

<sup>31</sup> *Id.* (question and answer with Representative Gerry Connolly).

<sup>32</sup> *Id.* (question and answer with Representative Jackie Speier).

<sup>33</sup> *Id.* (question and answer with Representative Carolyn Maloney).

***The IRS reinterprets legal protections for taxpayer information to bolster Democratic allegations***

The IRS was not an unwilling participant in spinning this false narrative. Section 6103 of federal tax law protects confidential taxpayer information from public dissemination.<sup>34</sup> Under the tax code, however, the IRS may release confidential taxpayer information to the House Ways and Means Committee and the Senate Finance Committee.<sup>35</sup> The IRS cited this provision of law to withhold vital details about the targeting scandal from the American public. The prohibition did not stop the IRS from releasing information helpful to its cause.

In August 2013, the IRS suddenly reversed its interpretation of the law. In a letter to Ways and Means Ranking Member Levin – who already had access to confidential taxpayer information – Acting IRS Commissioner Werfel wrote: “Consistent with our continuing efforts to provide your Committee and the public with as much information as possible regarding the Service’s treatment of tax exempt advocacy organizations, we are re-releasing certain redacted documents that had been previously provided to your Committee.”<sup>36</sup> Mr. Werfel explained the reversal as the result of “our continuing review of the documents” and “a thorough section 6103 analysis.”<sup>37</sup> The reinterpretation allowed the IRS to release information related to “ACORN Successors” and “Emerge” groups.<sup>38</sup>

Congressional Democrats embraced the IRS’s sudden reversal. Releasing new IRS documents, Ranking Member Levin and Ranking Member Cummings issued a joint press release announcing that “**new information from the IRS that provides further evidence that progressive groups were singled out for scrutiny in the same manner as conservative groups.**”<sup>39</sup> (emphasis added). Ranking Member Levin proclaimed: “These new documents make it clear the IRS scrutiny of the political activity of 501(c)(4) organizations covered a broad spectrum of political ideology and was not politically motivated.”<sup>40</sup> Ranking Member Cummings similarly intoned: “This new information should put a nail in the coffin of the Republican claims that the IRS’s actions were politically motivated or were targeted at only one side of the political spectrum.”<sup>41</sup>

The IRS’s sudden reinterpretation of section 6103 allowed congressional Democrats to continue their assault on the truth. Again using documents self-selected by the IRS, these defenders of the Administration carried on their rhetorical campaign to convince Americans that the IRS treated liberal applicants identically to Tea Party applicants.

<sup>34</sup> I.R.C. § 6103.

<sup>35</sup> *Id.* § 6103(f).

<sup>36</sup> Letter from Daniel I. Werfel, Internal Revenue Serv., to Sander Levin, H. Comm. on Ways & Means (Aug. 19, 2013), *available at* <http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/IRS%20Letter%20to%20Levin%20August%2019%2C%202013.pdf>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov’t Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

***Recent Democratic efforts to perpetuate the myth of bipartisan IRS targeting***

Democratic efforts to spin the IRS targeting continue through the present. On January 29, 2014, Senator Chris Coons raised the allegation while questioning Attorney General Eric Holder about the Administration's investigation into the IRS's targeting. Senator Coons stated:

Well, thank you, Mr. Attorney General. I -- I join a number of colleagues in urging and hoping that the investigation into IRS actions is done in a balanced and professional and appropriate way. And I assume it is, unless demonstrated otherwise. **And what I've heard is that there were progressive groups, as well as tea party groups, that were perhaps allegedly on the receiving end of reviews of the 501(c)(3) applications.** And it's my expectation that we'll hear more in an appropriate and timely way about the conduct of this investigation.<sup>42</sup> (emphasis added).

On February 3, 2014, during his daily briefing, White House Press Secretary Jay Carney echoed the Democratic line that the IRS targeted liberal groups in the same manner in which it targeted conservative groups. In defending the President's comments about "not even a smidgen of corruption," Mr. Carney said:

Q Jay, in the President's interview with Bill O'Reilly last night, he said that there was "not even a smidgen of corruption," regarding the IRS targeting conservative groups. Did the President misspeak?

A No, he didn't. But I can cite -- I think have about 20 different news organizations that cite the variety of ways that that was established, including by the independent IG, who testified in May and, as his report said, that **he found no evidence that anyone outside of the IRS had any involvement in the inappropriate targeting of conservative -- or progressive, for that matter -- groups in their applications for tax-exempt status.** So, again, I think that this is something --<sup>43</sup> (emphasis added).

During debate on the House floor on H.R. 3865, the Stop Targeting of Political Beliefs by the IRS Act of 2014, Ways and Means Committee Ranking Member Levin spoke in opposition to the bill. He said:

On a day when the Chairman of the Ways and Means Committee, Mr. Camp, is unveiling a tax measure that requires serious bipartisanship to be successful, we are here on the floor considering a totally political bill in an attempt to resurrect an alleged scandal that never existed. . . . **And what have we learned? That**

<sup>42</sup> "Oversight of the U.S. Department of Justice": Hearing before the S. Comm. on the Judiciary, 113th Cong. (2014) (question and answer with Senator Chris Coons).

<sup>43</sup> The White House, Press Briefing by Press Secretary Jay Carney, 2/3/14, <http://www.whitehouse.gov/photos-and-video/video/2014/02/03/press-briefing#transcript>.

**both progressive and conservative groups were inappropriately screened out by name and not by activity.**<sup>44</sup> (emphasis added).

As recently as early March 2014, Democrats have been spreading the myth that liberal-oriented groups were targeted in the same manner as conservative organizations. Appearing on *The Last Word with Lawrence O'Donnell*, Representative Gerry Connolly continued the Democratic allegations of bipartisan targeting. Representative Connolly said:

You know, that's true, but I think we need to back up. This is not an honest inquiry. This is a Star Chamber operation. **This is cherry picking information, deliberately colluding with a Republican idea in the IRS to make sure the investigation is solely about tea party and conservative groups even though we know that the tilt is included progressive titles as well as conservative titles and that they were equally stringent.** It was a foolish thing to do. And it's wrong, but it was not just targeted at conservatives. But Darrell Issa wants to make sure that information does not get out.<sup>45</sup> (emphasis added).

The Democratic myth of bipartisan IRS targeting simply will not die. Working hand in hand with the Obama Administration's IRS, congressional Democrats vigorously asserted that the IRS mistreated liberal tax-exempt applicants in a manner identical to Tea Party groups. The IRS – the very same agency under fire for its actions – assisted these efforts by producing self-selected documents and volunteering helpful information. The result has been a fundamental misunderstanding of the truth about the IRS's targeting of conservative tax-exempt applicants.

### **The Truth: The IRS engaged in disparate treatment of conservative applicants**

Contrary to Democratic claims, substantial documentary and testimonial evidence shows that the IRS systematically engaged in disparate treatment of conservative tax-exempt applicants. The Committee's investigation shows that the initial applications sent to the Washington as "test" cases were all filed by Tea Party-affiliated groups. The IRS screening criteria used to identify and separate additional applications also initially captured exclusively Tea Party organizations. Even after the criteria were changed, documents show the IRS intended to identify and separate Tea Party applications for review.

No matter how hard the Administration and congressional Democrats try to spin the facts about the IRS targeting, it remains clear that the IRS treated conservative tax-exempt applicants differently. As detailed below, the IRS treated Tea Party and other conservative tax-exempt applicants unlike liberal or progressive applicants.

<sup>44</sup> Press Release, H. Comm. on Ways & Means Democrats, Levin Floor Statement on H.R. 3865 (Feb. 26, 2014).

<sup>45</sup> *The Last Word with Lawrence O'Donnell* (MSNBC television broadcast Mar. 5, 2014) (interview with Representative Gerry Connolly).

***The Committee's evidence shows the IRS sought to identify and scrutinize Tea Party applications***

To date, the Committee has reviewed over 400,000 pages of documents produced by the IRS, TIGTA, the IRS Oversight Board, and others. The Committee has conducted transcribed interviews of 33 IRS employees, totaling over 217 hours. From this exhaustive undertaking, one fundamental finding is certain: the IRS sought to identify and scrutinize Tea Party applications separate and apart from any other tax-exempt applications, including liberal or progressive applications.

**The initial "test" cases were exclusively Tea Party applications**

From documents produced by the IRS, the Committee is aware that the initial test cases transferred to Washington in spring 2010 to be developed as templates were applications filed by Tea Party-affiliated organizations. According to one document entitled "Timeline for the 3 exemption applications that were referred to [EO Technical] from [EO Determinations]," the Washington office received the 501(c)(3) application filed by the Prescott Tea Party, LLC on April 2, 2010.<sup>46</sup> The same day, the Washington office received the 501(c)(4) application filed by the Albuquerque Tea Party, Inc.<sup>47</sup> After Prescott Tea Party did not respond to an IRS information request, the IRS closed the application "FTE" or "failure to establish." The Washington office asked for a new 501(c)(3) application, and it received the application filed by American Junto, Inc., on June 30, 2010.<sup>48</sup>

Testimony provided by veteran IRS tax law specialist Carter Hull, who was assigned to work the test cases in Washington, confirms that they were exclusively Tea Party applications. He testified:

Q Now, sir, in this period, roughly March of 2010, was there a time when someone in the IRS told you that you would be assigned to work on two Tea Party cases?

A Yes.

\*\*\*

Q Do you recall when precisely you were told that you would be assigned two Tea Party cases?

A When precisely, no.

Q Sometime in --

<sup>46</sup> Internal Revenue Serv., Timeline from the 3 exemption applications that were referred to EOT from EOD. [IRSR 58346-49]

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

A Sometime in the area, but I did get, they were assigned to me in April.

\*\*\*

Q Okay, and just to be clear, April of 2010?

A Yes.

\*\*\*

Q And sir, were they cases 501(c)(3)s, or 501(c)(4)s?

A One was a 501(c)(3), and one was a 501(c)(4).

Q So one of each?

A One of each.

Q What, to your knowledge, was it intentional that you were sent one of each?

A Yes.

Q Why was that?

A I'm not sure exactly why. I can only make assumptions, but those are the two areas that usually had political possibilities.

\*\*\*

Q The point of my question was, no one ever explained to you that you were to understand and work these cases for the purpose of working similar cases in the future?

\*\*\*

A All right, I -- I was given -- they were going to be test cases to find out how we approached (c)(4), and (c)(3) with regards to political activities.

\*\*\*

Q Mr. Hull, before we broke, you were talking about these two cases being test cases, is that right? Do you recall that?

A I realized that there were other cases. I had no idea how many, but there were other cases. And they were trying to find out how we should approach these organizations, and how we should handle them.

\*\*\*

Q And when you say these organizations, you mean Tea Party organizations?

A The two organizations that I had.<sup>49</sup>

Hull's testimony also confirms that the Washington IRS office requested a similar 501(c)(3) application to replace the Prescott Tea Party's application. He testified:

Q Did you send out letters to both organizations the 501(c)(3) and 501(c)(4)?

A I did.

Q Did you get responses from both organizations?

A I got response from only one organization.

Q Which one?

A The (c)(4).

Q (C)(4). What did you do with the case that did not respond?

A I tried to contact them to find out whether they were going to submit anything.

Q By telephone?

A By telephone. And I never got a reply.

Q Then what did you do with the case?

A I closed it, failure to establish.

\*\*\*

Q So at this time, when the (c)(3) became the FTE, did you begin to work only on the (c)(4)?

---

<sup>49</sup> Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013).



A I notified my supervisor that I would need another (c)(3) if they wanted me to work one of each.

\*\*\*

Q How did you phrase the request to Ms. Hofacre? Was it -- were you asking for another (c)(3) Tea Party application?

A I was asking for another (c)(3) application in the lines of the first one that she had sent up. I'm not sure if I asked her for a particular organization or a particular type of organization. I needed a (c)(3) that was maybe involved in political activities.

Q And the first (c)(3), it was a Tea Party application?

A Yes, it was.<sup>50</sup>

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<sup>50</sup> Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013).

Fig. 1: IRS Timeline of Tea Party “test” cases<sup>51</sup>

A. Timeline for the 3 exemption applications that were referred to EOT from EOD		
<b>1. Prescott Tea Party, LLC</b>  The Applicant sought exemption under §501(c)(3) formed to educate the public on current political issues, constitutional rights, fiscal responsibility, and support for a limited government. It planned to undertake this educational activity through rallies, protests, educational videos and through its website. The organization also intended to engage in legislative activities. The case was closed FTE on May 26, 2010.	<b>2. American Junto, Inc.</b>  The organization applied for exemption under §501(c)(3), stating it was formed to educate voters on current social and political issues, the political process, limited government, and free enterprise. It also indicated it would be involved in political campaign intervention and legislative activities. The case was closed FTE on January 4, 2012.	<b>3. Albuquerque Tea Party, Inc.</b>  The organization applied for exemption under §501(c)(4) as a social welfare organization for purposes of issue advocacy and education. A proposed adverse is being prepared on the basis that the organization's primary activity is political campaign intervention supporting candidates associated with a certain political faction, its educational activities are partisan in nature, and its activities are intended to benefit candidates associated with a specific political faction as opposed to benefiting the community as a whole.
<b>Timeline:</b>  <b>2009</b> <ul style="list-style-type: none"> <li>11/09/2009 → Application received by EOD.</li> <li>12/18/2009 → Case assigned to EOD specialist.</li> </ul> <b>2010</b> <ul style="list-style-type: none"> <li>3/08/2010 → <u>Date the case was referred to EOT</u>. Case pulled from</li> </ul>	<b>Timeline:</b>  <b>2010</b> <ul style="list-style-type: none"> <li>2/11/2010 → Application was received by EOD.</li> </ul>	<b>Timeline:</b>  <b>2010</b> <ul style="list-style-type: none"> <li>1/4/2010 → Application was received by EOD.</li> </ul>
EOD files to send to EOT for review. <ul style="list-style-type: none"> <li>3/11/2010 → EOD prepared a memo to transfer the case to EOT as part of EOT's review of some of the "advocacy organization" cases being received in EOD.</li> <li>4/02/2010 → Case assigned to EOT.</li> <li>4/14/2010 → 1<sup>st</sup> development letter mailed to Taxpayer (Response due by 5/06/2010).</li> <li>5/26/2010 → Case closed FTE (90-day suspense date ended on 8/26/2010).</li> </ul>	<ul style="list-style-type: none"> <li>4/11/2010 → Case assigned to a specialist in EOD.</li> <li>4/25/2010 → EOD emailed EOT (Manager Steve Grodnitzky) regarding who EOD should contact for help on "advocacy organization" cases being held in screening.</li> <li>5/25/2010 → EOT requested a §501(c)(3) "advocacy organization" case be transferred from EOD to replace Prescott Tea Party, LLC, a §501(c)(3) advocacy organization applicant that had been closed FTE.</li> <li>6/25/2010 → Memo proposing to transfer the case to EOT was prepared by EOD specialist.</li> <li>6/30/2010 → <u>Date the case was referred to EOT</u>.</li> <li>7/7/2010 → 1<sup>st</sup> development letter sent (Response due by 7/28/2010).</li> <li>7/28/2010 → EOT received Taxpayer's response to 1<sup>st</sup> development letter.</li> </ul>	<ul style="list-style-type: none"> <li>2/22/2010 → Case assigned to EOD specialist.</li> <li>3/11/2010 → EOD prepared memo to transfer the case to EOT as part of EOT's help reviewing the "advocacy organization" cases received in EOD.</li> <li>4/02/2010 → Case assigned to EOT.</li> <li>4/21/2010 → 1<sup>st</sup> development letter sent (Response due by 5/12/2010).</li> <li>4/29/2010 → Taxpayer requested extension for time to respond to 1<sup>st</sup> development letter. TLS granted extension until 6/11/2010.</li> <li>6/8/2010 → EOT received the Taxpayer's response to 1<sup>st</sup> development letter.</li> </ul>

<sup>51</sup> Internal Revenue Serv., Timeline from the 3 exemption applications that were referred to EOT from EOD. [IRS 58346-49]

### The initial screening criteria captured exclusively Tea Party applications

Documents and testimony provided to the Committee show that the IRS's initial screening criteria captured only conservative organizations. According to a briefing paper prepared for Exempt Organizations Director Lois Lerner in July 2011, the IRS identified applications and held them if they met any of the following criteria:

- "Tea Party," "Patriots" or "9/12 Project" is referenced in the case file
- Issues include government spending, government debt or taxes
- Education of the public by advocacy/lobbying to "make America a better place to live"
- Statements in the case file criticize how the country is being run.<sup>52</sup>

Based on these criteria, which skew toward conservative ideologies, the IRS sent applications to a specific group in Cincinnati.

**Fig. 2: IRS Briefing Document Prepared for Lois Lerner<sup>53</sup>**

**Background:**

- EOD Screening has identified an increase in the number of (c)(3) and (c)(4) applications where organizations are advocating on issues related to government spending, taxes and similar matters. Often there is possible political intervention or excessive lobbying.
- EOD Screening identified this type of case as an emerging issue and began sending cases to a specific group if they meet any of the following criteria:
  - "Tea Party," "Patriots" or "9/12 Project" is referenced in the case file
  - Issues include government spending, government debt or taxes
  - Education of the public by advocacy/lobbying to "make America a better place to live"
  - Statements in the case file criticize how the country is being run

Testimony presented by the two Cincinnati employees shows that the initial applications in the growing IRS backlog were exclusive Tea Party applications. Elizabeth Hofacre, who oversaw the cases from April 2010 to October 2010, testified during her transcribed interview that "we were looking at Tea Parties." She testified:

- Q And you mentioned the Tea Party cases. Do you have an understanding of whether the Tea Party cases were part of that grouping of organizations with political activity, or were they separate?
- A That was the group of political cases.
- Q So why do you call them Tea Parties if it includes more than --

<sup>52</sup> Justin Lowe, Internal Revenue Serv., Increase in (c)(3)/(c)(4) Advocacy Org. Applications (2011). [IRSR 2735]

<sup>53</sup> *Id.*

A Well, at that time that's all they were. That's all that we were -- that's how we were classifying them.

Q In 2010, you were classifying any organization that had political activity as a Tea Party?

A No, it's the latter. I mean, we were looking at Tea Parties. I mean, political is too broad.

Q What do you mean when you say political is too broad?

A No, because when -- what do you mean by "political"?

Q Political activity -- if an application has an indication of political activity in it.

A **I mean, I was tasked with Tea Party, so that's all I'm aware of. So I wasn't tasked with political in general.**

Q **Was there somebody who was tasked with political in general?**

A **Not that I'm aware of.**<sup>54</sup> (emphasis added).

During the Committee's July 2013 hearing about the IRS's systematic scrutiny of Tea Party applications, Hofacre specifically rejected claims that liberal-oriented groups were part of the IRS backlog. She testified:

Mr. MICA. Okay, the beginning of 2010. And you—this wasn't a targeting by a group of your colleagues in Cincinnati that decided we're going to go after folks. And most of the cases you got, were they "Tea Party" or "Patriot" cases?

Ms. HOFACRE. Sir, they were all "Tea Party" or "Patriot" cases.

Mr. MICA. Were there progressive cases? How were they handled?

Ms. HOFACRE. **Sir, I was on this project until October of 2010, and I was only instructed to work "Tea Party"/"Patriot"/"9/12" organizations.**<sup>55</sup> (emphasis added)

Ron Bell, who replaced Hofacre in overseeing the growing backlog of applications in Cincinnati, similarly testified during a transcribed interview that he only received Tea Party applications from October 2010 until July 2011. He testified:

<sup>54</sup> Transcribed interview of Elizabeth Hofacre, Internal Revenue Serv., in Wash., D.C. (May 31, 2013).

<sup>55</sup> July 18th Hearing, *supra* note 28.

Q Okay. So at this point between October 2010 and July 2011, were all the Tea Party cases going to you?

A Correct.

Q And to your knowledge, during this same time period, was it only Tea Party cases that were being assigned to you or were there other advocacy cases that were part of this group?

\*\*\*

A Does that include 9/12 and Patriot?

Q Yes, yes.

A Yes.

Q Okay. So it was just those type of cases, not other type of advocacy cases that maybe had a different -- a different political -- a liberal or progressive case?

A Correct.

\*\*\*

Q Okay. And to your knowledge, when you were first assigned these cases in October 2010 and through July 2011, do you know what criteria the screening unit was using to identify the cases to send to you?

A Yes.

Q And what was that criteria?

A It was solicited on the Emerging Issues tab of the BOLO report.

Q And what did that say? What did that Emerging Issue tab on the BOLO say?

A In July 20 --

Q In October 2010 we'll start.

A I don't know exactly what it said, but it just -- Tea Party cases, 9/12, Patriot.

Q And do you recall how many cases you inherited from Ms. Hofacre?

A 50 to 100.

Q And were those only Tea Party-type cases as well?

A To the best of my knowledge.<sup>56</sup>

### **The IRS continued to target Tea Party groups after the BOLO criteria were broadened**

From material produced to the Committee, it is apparent that Exempt Organizations Director Lois Lerner began orchestrating in late 2010 a “c4 project that will look at levels of lobbying and pol[itical] activity” of nonprofits, careful that the effort was not a “*per se* political project.”<sup>57</sup> Consistent with this goal, Lerner ordered the implementation of new screening criteria for the Tea Party cases in summer 2011, broadening the BOLO language to “advocacy organizations.” According to testimony received by the Committee, Lerner ordered the language changed from “Tea Party” because she viewed the term to be “too pejorative.”<sup>58</sup> While avoiding *per se* political scrutiny, other documents obtained by the Committee suggest that Lerner’s change was merely cosmetic. These documents show that the IRS still intended to target and scrutinize Tea Party applications, despite the facial changes to the BOLO criteria.

An internal “Significant Case Report” summary chart prepared in August 2011 illustrates that Lerner’s change was merely cosmetic (figures 3A and 3B). While the name of entry was changed “political advocacy organizations,” the description of the issue continued to reference the Tea Party movement.<sup>59</sup> The issue description read: “Whether a tea party organization meets the requirements under section 501(c)(3) and is not involved in political intervention. Whether organization is conducting excessive political activity to deny exemption under section 501(c)(4).”<sup>60</sup>

<sup>56</sup> Transcribed interview of Ronald Bell, Internal Revenue Serv., in Wash., D.C. (June 13, 2013).

<sup>57</sup> E-mail from Lois Lerner, Internal Revenue Serv., to Cheryl Chasin et al., Internal Revenue Serv. (Sept. 16, 2010). [IRSR 191030]

<sup>58</sup> Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013).

<sup>59</sup> Internal Revenue Serv., Significant Case Report (Aug. 31, 2011). [IRSR 151653]

<sup>60</sup> *Id.*

Fig. 3A: IRS Significant Case Report Summary, August 2011<sup>61</sup>

A. Open SCs:									
Name of Org/Group	Group #/Manager	EIN	Received	Issue	Tax Law Specialist	Estimated Completion Date	Status/Next action	Being Elevated to TEGE Commissioner This Month	
Political Advocacy Organizations	T2/Ron Shoemaker	<b>E</b>	4/2/2010	Whether a tea party organization meets the requirements under section 501(c)(3) and is not involved in political intervention. Whether organization is conducting excessive political activity to deny exemption under section 501(c)(4).	Chris Hall & Mary Gertelsohn	3/31/2011 (Orig) 02/24/2011 (Rev) 07/24/2011 (Rev) 10/26/2011 (Rev) 12/23/2011 (Rev)	Developing both a (c)(3) and (c)(4) case. Proposed (c)(4) treatment is currently being reviewed. Proposed denial currently being reviewed or (c)(3). Cases were discussed with Judy Knapp on 04/06/11. Judy requested staff to get additional information from taxpayers regarding certain activities. Development letters were sent. Proposed increase (c)(4) ruling forwarded to Chief Counsel for comments on 02/09/11. Information from (c)(3) organizations regarding activities due on 05/10/2011. Waiting on taxpayer response. Met with Director EO on June 29, 2011. Met with Counsel on 8/10/11 to discuss the cases. Counsel recommended further development of the cases by getting information on the organizations 2010 activities. Counsel plans to discuss on the basis of information needed.	No	
Next Action: [REDACTED]									

Fig. 3B: IRS Significant Case Report Summary, August 2011 (enlarged)<sup>62</sup>

	Name of Org/Group	Group #/Manager	EIN	Received	Issue
1.	Political Advocacy Organizations	T2/Ron Shoemaker	<b>E</b>	4/2/2010	Whether a tea party organization meets the requirements under section 501(c)(3) and is not involved in political intervention. Whether organization is conducting excessive political activity to deny exemption under section 501(c)(4)

Likewise, in comparing the individual sensitive case report prepared for the Tea Party cases in June 2011 with the report prepared in September 2012, it is apparent that the BOLO criteria changed was superficial. The reports' issue summaries are nearly identical, except for replacing "Tea Party" with "advocacy organizations."<sup>63</sup> The June 2011 sensitive case report (figure 4A) identified the issue as: "The various 'tea party' organizations are separately organized, but appear to be a part of a national political movement that may be involved in political activities. The 'tea party' organizations are being followed closely in national newspapers (such as The Washington Post) almost on a regular basis."<sup>64</sup>

<sup>61</sup> *Id.*<sup>62</sup> *Id.*<sup>63</sup> Compare Internal Revenue Serv., Sensitive Case Report (June 17, 2011) [IRSR 151687-88], with Internal Revenue Serv., Sensitive Case Report (Sept. 18, 2012). [IRSR 150608-09]<sup>64</sup> Internal Revenue Serv., Sensitive Case Report (June 17, 2011). [IRSR 151687-88]

**Fig. 4A: IRS Sensitive Case Report for Tea Party cases, June 17, 2011**<sup>65</sup>**CASE OR ISSUE SUMMARY:**

The various "tea party" organizations are separately organized, but appear to be a part of a national political movement that may be involved in political activities. The "tea party" organizations are being followed closely in national newspapers (such as The Washington Post) almost on a regular basis. Cincinnati is holding three applications from organizations which have applied for recognition of exemption under section 501(c)(3) of the Code as educational organizations and approximately twenty-two applications from organizations which have applied for recognition of exemption under section 501(c)(4) as social welfare organizations. Two organizations that we believe may be "tea party" organizations already have been recognized as exempt under section 501(c)(4). EOT has not seen the case files, but are requesting copies of them. The issue is whether these organizations are involved in campaign intervention or, alternatively, in nonexempt political activity.

The September 2012 sensitive case report (figure 4B) identified the issue as: "These organizations are 'advocacy organizations,' and although are separately organized, they appear to be part of a larger national political movement that may be involved in political activities. These types of advocacy organizations are followed closely in national newspapers (such as The Washington Post) almost on a regular basis."<sup>66</sup>

**Fig. 4B: IRS Sensitive Case Report for "Advocacy Organizations," Sept. 18, 2012**<sup>67</sup>**CASE OR ISSUE SUMMARY:**

These organizations are "advocacy organizations," and although are separately organized, they appear to be part of a larger national political movement that may be involved in political activities. These types of advocacy organizations are followed closely in national newspapers (such as The Washington Post) almost on a regular basis. Cincinnati has in its inventory a number of applications from these types of organizations that applied for recognition of exemption under section 501(c)(3) of the Code as educational organizations and from organizations that applied for recognition of exemption under section 501(c)(4) as social welfare organizations.

Reading these items together, it is clear that although the BOLO language was changed to broader "political advocacy organizations," the IRS still intended to identify and single out Tea Party applications for scrutiny. Ron Bell testified that after the BOLO change in July 2011, he received more applications than just Tea Party cases. He testified:

- Q And do you recall when that – when the BOLO was changed after – you said it was after the meeting [with Lerner], they changed the BOLO after the meeting, do you recall when?
- A July.
- Q Of 2011?
- A Yes, sir.

<sup>65</sup> *Id.*<sup>66</sup> Internal Revenue Serv., Sensitive Case Report (Sept. 18, 2012). [IRSR 150608-09]<sup>67</sup> *Id.*



Q And you were going to say the BOLO became more, and then you were cut off. What were you going to say?

A It became more – they had more the advocacy, more organizations to the advocacy, like I mentioned about maybe a cat rescue that's advocating for let's not kill the cats that get picked up by the local government in whatever cities.<sup>68</sup>

Bell also stated that while he could not process the Tea Party applications because he was awaiting guidance from Washington, he could process the non-Tea Party applications. He testified:

Q Mr. Bell, in July 2011, when the BOLO was changed where they chose broad language, after that point, did you conduct secondary screening on any of the cases that were being held by you?

A You mean the cases that I inherited from Liz are the ones that had already been put into the whatever timeframe, Tea Party advocacy, slash advocacy?

Q Other type, yes.

A No, these were new ones coming in that someone thought that they perhaps should be in the advocacy, slash, Tea Party inventory.

Q Okay.

A They were assigned to Group 7822, and I reviewed them, and you know, maybe some were, but a vast majority was like outside the realm we were looking for.

Q And so they were like the . . . cat type cases you were discussing earlier?

A Yes.

\*\*\*

Q After the July 2011 change to the BOLO, how long did you perform the secondary screening?

A Up until July 2012.

Q So, for a whole year?

A Yeah.

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<sup>68</sup> Transcribed interview of Ronald Bell, Internal Revenue Serv., in Wash., D.C. (June 13, 2013).

- Q And you would look at the cases and see if they were not a Tea Party case, you would move that either to closing or to further development?
- A Yeah, and then the BOLO changed about midway through that timeframe.
- Q Okay.
- A To make it where we put the note on there that we don't need the general advocacy.
- Q And after the BOLO changed in January 2012, did that affect your secondary screening process?
- A There was less cases to be reviewed.
- Q Okay. **So during this whole year, the Tea Party cases remained on hold pending guidance from Washington while the other cases that you identified as non-Tea Party cases were moved to either closure or further development; is that right?**
- A **Correct.**<sup>69</sup> (emphasis added).

**The IRS's own retrospective review shows the targeted applications were predominantly conservative-oriented**

In July 2012, Lerner asked her senior technical advisor, Judith Kindell, to conduct an assessment of the political affiliation of the applications in the IRS backlog. On July 18, Kindell reported back to Lerner that of all the 501(c)(4) applications, having been flagged for additional scrutiny, at least 75 percent were conservative, "while fewer than 10 [applications, or 5 percent] appear to be liberal/progressive leaning groups based solely on the name."<sup>70</sup> Of the 501(c)(3) applications, Kindell informed Lerner that "slightly over half appear to be conservative leaning groups based solely on the name."<sup>71</sup> Unlike Tea Party cases, the Oversight Committee's review has received no testimony from IRS employees that any progressive groups were scrutinized because of their organization's expressed political beliefs.

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<sup>69</sup> *Id.*

<sup>70</sup> E-mail from Judith Kindell, Internal Revenue Serv., to Lois Lerner, Internal Revenue Serv. (July 18, 2012). [IRSR 179406]

<sup>71</sup> *Id.*

**Fig. 5: E-mail from Judith Kindell to Lois Lerner, July 18, 2012**<sup>72</sup>

<b>From:</b>	Kindell Judith E
<b>Sent:</b>	Wednesday, July 18, 2012 10:54 AM
<b>To:</b>	Lerner Lois G
<b>Cc:</b>	Light Sharon P
<b>Subject:</b>	Bucketed cases

Of the 84 (c)(3) cases, slightly over half appear to be conservative leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum.

Of the 199 (c)(4) cases, approximately 3/4 appear to be conservative leaning while fewer than 10 appear to be liberal/progressive leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum.

Documents and testimony obtained by the Committee demonstrate that the IRS sought to identify and scrutinize Tea Party applications. For fifteen months beginning in February 2010, the IRS systematically identified, separated, and delayed Tea Party applications – and only Tea Party applications. Even after the IRS broadened the screening criteria in the summer of 2011, internal documents confirm that that agency continued to target Tea Party groups.

### ***The IRS treated Tea Party applications differently from other applications***

Evidence obtained by the Committee in the course of its investigation proves that the IRS handled conservative applications distinctly from other tax-exempt applications. In February 2011, Lerner directed Michael Seto, the manager of Exempt Organizations Technical Unit, to put the Tea Party test cases through a “multi-tier” review.<sup>73</sup> Lerner wrote to Seto: “This could be the vehicle to go to court on the issue of whether Citizen’s [sic] United overturning ban on corporate

<sup>72</sup> *Id.*

<sup>73</sup> Transcribed interview of Michael Seto, Internal Revenue Serv., in Wash., D.C. (July 11, 2013).

pending applies to tax exempt rule. Counsel and Judy Kindell need to be in on this one please.”<sup>74</sup>

Carter Hull, an IRS specialist with almost 50 years of experience, testified that this multi-tier level of review was unusual. He testified:

Q Have you ever sent a case to Ms. Kindell before?

A Not to my knowledge.

Q This is the only case you remember?

A Uh-huh.

Q Correct?

A This is the only case I remember sending directly to Judy.

\*\*\*

Q Had you ever sent a case to the Chief Counsel’s office before?

A I can’t recall offhand.

Q You can’t recall. So in your 48 years of experience with the IRS, you don’t recall sending a case to Ms. Kindell or a case to IRS Chief Counsel’s office?

A To Ms. Kindell, I don’t recall ever sending a case before. To Chief Counsel, I am sure some cases went up there, but I can’t give you those.

Q Sitting here today you don’t remember?

A I don’t remember.<sup>75</sup>

Similarly, Elizabeth Hofacre, the Cincinnati-based revenue agent initially assigned to develop cases, told the Committee during a July 2013 hearing that the involvement of Washington was “unusual.”<sup>76</sup> She testified:

I never before had to send development letters that I had drafted to EO

<sup>74</sup> E-mail from Lois Lerner, Internal Revenue Serv., to Michael Seto, Internal Revenue Serv. (Feb. 1, 2011). [IRSR 161810]

<sup>75</sup> Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013).

<sup>76</sup> “*The IRS’s Systematic Delay and Scrutiny of Tea Party Applications*”: *Hearing before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (2013) (statement of Elizabeth Hofacre).

Technical for review, and I never before had to send copies of applications and responses that were assigned to me to EO Technical for review. I was frustrated because of what I perceived as micromanagement with respect to these applications.<sup>77</sup>

Hofacre's successor on the cases, Ron Bell, also told the Committee that it was "unusual" to have to wait on Washington to move forward with an application.<sup>78</sup> He testified:

Q So did you see something different in these Tea Party cases applying for 501(c)(4) status that was different from other organizations that had political activity, political engagement applying for 501(c)(4) status in the past?

A I'm not sure if I understand that.

Q I guess what I'm getting at is you said you had seen previous applications from an organization applying for 501(c)(4) status that had some level of political engagement, and these Tea Party groups are also applying for 501(c)(4) status and they have some level of political engagement. Was there any difference in your mind between the Tea Party groups and the other groups that you'd seen in your experience at the IRS?

A No.

Q So, do you think that Tea Party groups are treated the same as these other groups from your previous experience?

A No.

\*\*\*

Q In your experience, was there anything different about the way that the Tea Party 501(c)(4) cases were treated that was as opposed to the previous 501(c)(4) applications that had some level of political engagement?

A Yes.

Q And what was different?

A Well, they were segregated. They seemed to have been more scrutinized. I hadn't interacted with EO technical [in] Washington on cases really before.

Q You had not?

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<sup>77</sup> *Id.*

<sup>78</sup> Transcribed interview of Ronald Bell, Internal Revenue Serv., in Wash., D.C. (June 13, 2013).

A Well, not a whole group of cases.<sup>79</sup>

Another Cincinnati employee, Stephen Seok, testified that the type of activities that the conservative applicants conducted made them different from other similar applications he had worked in the past. He testified:

Q And to your knowledge, the cases that you worked on, was there anything different or novel about the activities of the Tea Party cases compared to other (c)(4) cases you had seen before?

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A **Normal (c)(4) cases we must develop the concept of social welfare, such as the community newspapers, or the poor, that types. These organizations mostly concentrate on their activities on the limiting government, limiting government role, or reducing government size, or paying less tax. I think it['s] different from the other social welfare organizations which are (c)(4).**

\*\*\*

Q **So the difference between the applications that you just described, the applications for folks that wanted to limit government, limit the role of government, the difference between those applications and the (c)(4) applications with political activity that you had worked in the past, was the nature of their ideology, or perspective, is that right?**

A **Yeah, I think that's a fair statement.** But still, previously, I could work, I could work this type of organization, applied as a (c)(4), that's possible, though. Not exactly Tea Party, or 9-12, but dealing with the political ideology, that's possible, yes.

Q **So you may have in the past worked on applications from (c)(4), applicants seeking (c)(4) status that expressed a concern in ideology, but those applications were not treated or processed the same way that the Tea Party cases that we have been talking about today were processed, is that right?**

A **Right.** Because that [was] way before these – these organizations were put together. So that's way before. If I worked those cases, way before this list is on.<sup>80</sup> (emphases added).

<sup>79</sup> *Id.*

<sup>80</sup> Transcribed interview of Stephen Daejin Seok, Internal Revenue Serv., in Wash., D.C. (June 19, 2013).

This evidence shows that the IRS treated conservative-oriented Tea Party applications differently from other tax-exempt applications, including those filed by liberal-oriented organizations. Testimony indicates that the IRS instituted new procedures and different hurdles for the review of Tea Party applications. What would otherwise be a routine review of an application became unprecedented scrutiny and delays for these Tea Party groups.

### **Myth versus fact: How Democrats' claims of bipartisan targeting are not supported by the evidence**

In light of the evidence available to the Committee and under close examination, each Democratic argument fails. Despite their claims that liberal-leaning groups were targeted in the same manner as conservative applicants, the facts do not bear out their assertions. Instead, the Committee's investigation and public information shows the following:

- IRS BOLO entries for liberal groups and terms only appear on lists used for awareness and were never used as a litmus test for enhanced scrutiny;
- Some liberal-oriented organizations were identified for scrutiny because of objective, non-political concerns, but not because of their political beliefs;
- Substantially more conservative-leaning applicants than liberal-oriented applicants were caught in the IRS's backlog;
- The IRS treated Tea Party applicants differently from "progressive" groups;
- The IRS treated Tea Party applicants differently from ACORN successor groups;
- The IRS treated Tea Party applicants differently from Emerge affiliate groups; and
- The IRS treated Tea Party applicants differently from Occupy groups.

When carefully examined, these facts refute the myths perpetrated by congressional Democrats and the Administration that the IRS engaged in bipartisan targeting. The facts show, instead, that the IRS targeted Tea Party groups for systematic scrutiny and delay.

Perhaps most telling is the IRS's own actions. When Lois Lerner publicly apologized for the IRS's targeting of Tea Party applicants, she offered no such apology for its targeting of any liberal groups. When asked if the IRS had treated liberal groups inappropriately, Lerner responded: "I don't have any information on that."<sup>81</sup> This admission severely undercuts Democratic *ex post* allegations of bipartisan targeting.

### ***BOLO entries for liberal groups and terms only appear on lists used for awareness and were never used as a litmus test for enhanced scrutiny***

Congressional Democrats and some in the Administration claim that the IRS targeted liberal groups because some liberal-oriented organizations appeared on entries of the IRS BOLO

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<sup>81</sup> Aaron Blake, 'I'm not good at math': The IRS's public relations disaster, WASH. POST, May 10, 2013.

lists.<sup>82</sup> This claim is not supported by the facts. The presence of an organization or a group of organizations on the IRS BOLO list did not necessarily mean that the IRS targeted those groups. As the Ways and Means Committee phrased it, “being on a BOLO is different from being targeted and abused by the IRS.”<sup>83</sup> A careful examination of the evidence demonstrates that only conservative groups on the IRS BOLO lists experienced systematic scrutiny and delay.

The Democratic falsehood rests on a fundamental misunderstanding of the structure of the BOLO list. The BOLO list was a comprehensive spreadsheet document with separate tabs designed for information intended for different uses. For example, the “Watch List” tab on the BOLO document was designed to notify screeners of potential applications that the IRS has not yet received.<sup>84</sup> The “TAG Issues” tab listed groups with potentially fraudulent applications. The “Emerging Issues” tab, contrarily, was designed to alert screeners to groups of applications that the IRS has *already received* and that presented special problems.<sup>85</sup> Therefore, whereas the Watch List tab noted hypothetical applications that could be received and TAG Issues tab noted fraudulent applications, the Emerging Issues tab highlighted non-fraudulent applications that the IRS was actively processing.

The Tea Party entry on the IRS BOLO appears on the “Emerging Issues” tab, meaning that the IRS had already received Tea Party applications. The liberal-oriented groups on the BOLO list appear on either the Watch List tab, meaning that the IRS was merely notifying its screeners of the potential for those groups to apply, or the TAG Issues tab, indicating a concern for fraud. In effect, then, whereas the appearance of Tea Party groups on the BOLO signifies the *actuality* of review and subsequent delay, the appearance of the liberal groups on the BOLO signifies either the *possibility* that some group may apply in the future or the potential for fraud in a group’s application.

The differences in where the entries appear on the BOLO document manifests in the IRS’s differential treatment of the groups. According to evidence known to the Committee, only Tea Party applications appearing on the Emerging Issues tab resulted in systematic scrutiny and delay. Although some liberal groups appeared on versions of the BOLO, their mere presence on the document did not result in systematic scrutiny and delay – contrary to Democratic claims of bipartisan IRS targeting.

### ***The IRS identified some liberal-oriented groups due to objective, non-political concerns, but not because of their political beliefs***

Where the IRS identified liberal-oriented groups for scrutiny, evidence shows that it did so for objective, non-political reasons and not because of the groups’ political beliefs. For

<sup>82</sup> See, e.g., *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013); The White House, Press Briefing by Press Secretary Jay Carney, 2/3/14, <http://www.whitehouse.gov/photos-and-video/video/2014/02/03/press-briefing#transcript>.

<sup>83</sup> H. Comm. on Ways & Means, *Being on a BOLO is Different from Being Targeted and Abused by the IRS* (June 24, 2013), <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=340314>.

<sup>84</sup> Internal Revenue Serv., Heightened Awareness Issues. [IRSR 6655-72]

<sup>85</sup> *Id.*



instance, the IRS scrutinized Emerge America applications for conveying impermissible benefits to a private entity, which is prohibited for nonprofit groups.<sup>86</sup> The IRS scrutinized ACORN successor groups due to concerns that the organizations were engaged in an abusive scheme to rebrand themselves under a new name.<sup>87</sup> Likewise, the IRS included an entry for “progressive” on its BOLO list out of concern that the groups’ partisan campaign activity “may not be appropriate” for 501(c)(3) status, under which there is an absolute prohibition on campaign intervention.<sup>88</sup> Unlike the Tea Party applications, which the IRS scrutinized for their social-welfare activities, the Committee has received no indication that the IRS systematically scrutinized liberal-oriented groups because of their political beliefs.

### ***Substantially more conservative groups were caught in the IRS application backlog***

Another familiar refrain from the Administration and congressional Democrats is that the IRS targeted liberal groups because left-wing groups were included in the IRS backlog along with conservative groups. Ways and Means Ranking Member Sander Levin (D-MI) alleged that the IRS engaged in bipartisan targeting because some “progressive groups were among the 298 applications that TIGTA reviewed in their audit and received heightened scrutiny.”<sup>89</sup> Similarly, Representative Gerry Connolly (D-VA) said that “the tilt . . . included progressive titles as well as conservative titles and that they were equally stringent.”<sup>90</sup> These allegations are misleading. Several separate assessments of the IRS backlog prove that substantially more conservative groups than liberal groups were caught in the IRS backlog.

An internal IRS analysis conducted for Lois Lerner in July 2012 found that 75 percent of the 501(c)(4) applications in the backlog were conservative, “while fewer than 10 [applications] appear to be liberal/progressive leaning groups based solely on the name.”<sup>91</sup> The same analysis found that “slightly over half [of the 501(c)(3) applications] appear to be conservative leaning groups based solely on the name.”<sup>92</sup> A Ways and Means examination conducted in 2013 similar found that the backlog was overwhelmingly conservative: 83 percent conservative and only 10 percent liberal.<sup>93</sup>

In September 2013, *USA Today* independently analyzed a list of about 160 applications in the IRS backlog.<sup>94</sup> This review showed that conservative groups filed 80 percent of the

<sup>86</sup> Transcribed interview of Amy Franklin Giuliano, Internal Revenue Serv., in Wash., D.C. (Aug. 9, 2013).

<sup>87</sup> Transcribed interview of Robert Choi, Internal Revenue Serv., in Wash., D.C. (Aug. 21, 2013).

<sup>88</sup> See, e.g., Internal Revenue Serv., Be on the Look Out List (Nov. 9, 2010). [IRS 1349-64]

<sup>89</sup> *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013) (statement of Ranking Member Sander Levin).

<sup>90</sup> *The Last Word with Lawrence O'Donnell* (MSNBC television broadcast Mar. 5, 2014) (interview with Representative Gerry Connolly).

<sup>91</sup> E-mail from Judith Kindell, Internal Revenue Serv., to Lois Lerner, Internal Revenue Serv. (July 18, 2012). [IRSR 179406]

<sup>92</sup> *Id.*

<sup>93</sup> Ways and Means Committee September 18th Hearing, *supra* note 9.

<sup>94</sup> See Gregory Korte, *IRS List Reveals Concerns over Tea Party 'Propaganda'*, USA TODAY, Sept. 18, 2013.

applications in the backlog while liberal groups filed less than seven percent.<sup>95</sup> An earlier analysis from *USA Today* in May 2013 showed that for 27 months beginning in February 2010, the IRS did not approve any tax-exempt applications filed by Tea Party groups.<sup>96</sup> During that same period, the IRS approved “perhaps dozens of applications from similar liberal and progressive groups.”<sup>97</sup>

Testimony received by the Committee supports this conclusion. During a hearing of the Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs, Jay Sekulow – a lawyer representing 41 groups targeted by the IRS – testified that substantially more conservative groups were targeted and that all liberal groups targeted eventually received approval.<sup>98</sup> In an exchange with Representative Matt Cartwright (D-PA), Sekulow testified:

Mr. CARTWRIGHT. And Mr. Sekulow, you were helpful with some statistics this morning, and I wanted to ask you about that. **You mentioned 104 conservative groups targeted. Was that the number?**

Mr. SEKULOW. This is from the report of the IRS dated through July 29th of 2013 – **104 conservative organizations in that report were targeted.**

Mr. CARTWRIGHT. Thank you. **And then seven progressive targeted groups?**

Mr. SEKULOW. **Seven progressive targeted groups, all of which received their tax exemption.**

Mr. CARTWRIGHT. Does it give the total number of applications? In other words, 104 conservative groups targeted. How many – how many applied? How many conservative groups applied?

Mr. SEKULOW. In the TIGTA report there was – I think the number was 283 that they had become part of the target. But actually, applications, a lot of the IRS justification for this, at least purportedly, was an increase in applications, and there was actually a decrease in the number.

Mr. CARTWRIGHT. Right. And does it give the number of progressive groups that applied for tax-exempt status?

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<sup>95</sup> *Id.*

<sup>96</sup> Gregory Korte, *IRS Approved Liberal Groups while Tea Party in Limbo*, USA TODAY, May 15, 2013.

<sup>97</sup> *Id.*

<sup>98</sup> “*The IRS Targeting Investigation: What Is the Administration Doing?*”: Hearing before the Subcomm. on Economic Growth, Job Creation, and Regulatory Affairs of the H. Comm. on Oversight & Gov’t Reform, 113th Cong. (2014) (question and answer with Rep. Matt Cartwright).

Mr. SEKULOW. No, the only report that has the progressive –

Mr. CARTWRIGHT. No, no?

Mr. SEKULOW. The one that I have just is the – the report I have in front of me is the one through the – which just has the seven.

Mr. CARTWRIGHT. OK. All right, thank you.

MR. SEKULOW. None of those have been denied, though.<sup>99</sup> (emphases added).

Contrary to the Democratic claim that the IRS targeting of liberal groups was “equally stringent” to conservative groups,<sup>100</sup> the overwhelming majority of applications in the IRS backlog were filed by conservative-leaning organizations. This evidence further demonstrates that the IRS did not engage in bipartisan targeting.

### ***The IRS treated Tea Party applicants differently than “progressive” groups***

Democrats in Congress and the Administration argue that the IRS treated “progressive” groups in a manner similar to Tea Party applicants. Because the IRS BOLO list had an entry for “progressives,” Democrats allege that “progressive groups were singled out for scrutiny in the same manner as conservative groups,”<sup>101</sup> and that “the progressive groups were targeted side by side with their tea party counterpart groups.”<sup>102</sup> Again, the evidence available to the Committee does not support these Democratic assertions. Rather, the evidence clearly shows that the IRS did not subject “progressive” groups to the same type of systematic scrutiny and delay as conservative applicants.

Perhaps the most significant difference between the IRS’s treatment of Tea Party applicants and “progressive” groups is reflected in the IRS BOLO lists. The Tea Party entry was located on the tab labeled, “Emerging Issues,” meaning that the IRS was actively screening for similar cases.<sup>103</sup> The “progressive” entry, however, was located on a tab labeled “TAG historical,” meaning that the IRS interest in those cases was dormant.<sup>104</sup> Cindy Thomas, the manager of the IRS Cincinnati office, explained this difference during a transcribed interview with Committee staff.<sup>105</sup> She told the Committee that unlike the systematic scrutiny given to the

<sup>99</sup> *Id.*

<sup>100</sup> *The Last Word with Lawrence O’Donnell* (MSNBC television broadcast Mar. 5, 2014) (interview with Representative Gerry Connolly).

<sup>101</sup> Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov’t Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).

<sup>102</sup> *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013) (question and answer with Representative Joseph Crowley).

<sup>103</sup> See Internal Revenue Serv., Heightened Awareness Issues. [IRSR 6655-72]

<sup>104</sup> *Id.*

<sup>105</sup> Transcribed interview of Lucinda Thomas, Internal Revenue Serv., in Wash., D.C. (June 28, 2013).

conservative-oriented applications as a result of the BOLO, "progressive" cases were never automatically elevated to the Washington office as a whole. She testified:

Q Ms. Thomas, is this an example of the BOLO from looks like November 2010?

A I don't know if it was from November of 2010, but --

Q This is an example of the BOLO, though?

A Yes.

Q Okay. And, ma'am, under what has been labeled as tab 2, TAG Historical?

A Yes.

\*\*\*

Q Let's turn to page 1354.

A Okay.

Q Do you see that, it says -- the entry says progressive?

A Yes.

Q This is under TAG Historical, is that right?

A Yes.

Q So this is an issue that hadn't come up for a while, is that right?

A Right.

Q And it doesn't note that these were referred anywhere, is that correct? What happened with these cases?

A This would have been on our group as -- because of -- remember I was saying it was consistency-type cases, so it's not necessarily a potential fraud or abuse or terrorist issue, but any cases that were dealing with these types of issues would have been worked by our TAG group.

Q **Okay. And were they worked any different from any other cases that EO Determinations had?**

A **No. They would have just been worked consistently by one group of agents.**

Q Okay. And were they cases sent to Washington?

A I'm not – I don't know.

Q Not that you are aware?

A I'm not aware of that.

Q As the head of the Cincinnati office you were never aware that these cases were sent to Washington?

A There could be cases that are transferred to the Washington office according to, like, our [Internal Revenue Manual] section. I mean, there's a lot of cases that are processed, and I don't know what happens to every one of them.

Q Sure. But these cases identified as progressive as a whole were never sent to Washington?

A Not as a whole.<sup>106</sup>

The difference in where the entries appeared in the BOLO list resulted in disparate treatment of Tea Party and "progressive" groups. Unlike the systematic scrutiny given to Tea Party applicants, "progressive" cases were never similarly scrutinized.

The House Ways and Means Committee, with statutory authority to review confidential taxpayer information, concluded that the IRS treated conservative tax-exempt applicants differently than "progressive" groups. The Ways and Means Committee's review found that while the IRS approved only 45 percent of conservative applicants, it approved 100 percent of groups with "progressive" in their name.<sup>107</sup> Likewise, Acting IRS Commissioner Daniel Werfel testified before the Ways and Means Committee:

Mr. REICHERT. Mr. Werfel, isn't it true that 100 percent of tea party applications were flagged for extra scrutiny?

Mr. WERFEL. I think that – yes. The framework from the BOLO. It's my understanding, the way the process worked is if there's "tea party" in the application it was automatically moved into -- into this area of further review, yes.

<sup>106</sup> *Id.*

<sup>107</sup> *Hearing on the Internal Revenue Service's Exempt Organizations Division Post-TIGTA Audit: Hearing before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 113th Con. (2013) (opening statement of Chairman Boustany).

Mr. REICHERT. OK, and you – you know how many progressive groups were flagged?

Mr. WERFEL. I do not have that number.

Mr. REICHERT. I do.

Mr. WERFEL. OK.

Mr. REICHERT. Our investigation shows that there were seven flagged. Do you know how many were approved?

Mr. WERFEL. I do not have that number at my fingertips.

Mr. REICHERT. All of those applications were approved.<sup>108</sup>

The IRS's independent inspector general has repeatedly confirmed the Ways and Means Committee's assessment. During the Oversight Committee's July 2013 hearing, TIGTA J. Russell George told Members that "progressive" groups were not subjected to the same systematic treatment as Tea Party applicants. He testified:

With respect to the 298 cases that the IRS selected for political review, as of the end of May 2012, three have the word "progressive" in the organization's name; another four were used—are used, "progress," none of the 298 cases selected by the IRS, as of May 2012, used the name "Occupy."<sup>109</sup>

Mr. George also informed Congress that at least 14 organizations with "progressive" in their name were not held up and scrutinized by the IRS.<sup>110</sup> "In total," Mr. George wrote, **"30 percent of the organizations we identified with the words 'progress' or 'progressive' in their names were process as potential political cases. In comparison, our audit found that 100 percent of the tax-exempt applications with Tea Party, Patriots, or 9/12 in their names were processed as potential political cases during the timeframe of our audit."**<sup>111</sup> (emphasis added).

Documents produced by the IRS support the finding of disparate treatment toward Tea Party groups. Notes from one training session in July 2010 reflect that the IRS ordered screeners to transfer Tea Party applications to a special group for "secondary screening."<sup>112</sup> The same notes show that the screeners were asked to "flag" progressive groups.<sup>113</sup> But multiple

<sup>108</sup> *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013) (question and answer with Representative Dave Reichert).

<sup>109</sup> "The IRS's Systematic Delay and Scrutiny of Tea Party Applications": *Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013) (statement of J. Russell George).

<sup>110</sup> Letter from J. Russell George, Treasury Inspector Gen. for Tax Admin., to Sander M. Levin, H. Comm. on Ways & Means (June 26, 2013).

<sup>111</sup> *Id.*

<sup>112</sup> Internal Revenue Serv., Screening Workshop Notes (July 28, 2010). [IRSR 6703-04]

<sup>113</sup> *Id.*

interviews with IRS employees who worked individual cases have yielded no evidence that these “flags” or frontline reviews for political activity led to enhanced scrutiny – except for Tea Party organizations. One sentence on the notes explicitly reminds screeners that “progressive” applications are not considered “Tea Parties.”<sup>114</sup> These notes confirm testimony from Elizabeth Hofacre, the “Tea Party Coordinator/Reviewer,” who told the Committee that she only worked Tea Party cases.<sup>115</sup>

**Fig. 6: IRS Screening Workshop Notes, July 28, 2010**<sup>116</sup>

<p><b>Screening Workshop Notes - July 28, 2010</b></p> <ul style="list-style-type: none"> <li>• The emailed attachment outlines the overall process.</li> <li>• Glenn deferred additional statements and/or questions to John Shafer on yesterday's developments; how they affect the screening process and timeline.</li> <li>• Concerns can be directed to Glenn for additional research if necessary.</li> </ul> <p><b>Current/Political Activities: Gary Muthert</b></p> <ul style="list-style-type: none"> <li>• Discussion focused on the political activities of Tea Parties and the like—regardless of the type of application.</li> <li>• If in doubt Err on the Side of Caution and transfer to 7822.</li> <li>• Indicated the following names and/or titles were of interest and should be flagged for review:             <ul style="list-style-type: none"> <li>○ 9/12 Project.</li> <li>○ Emerge.</li> <li>○ Progressive</li> <li>○ We The People.</li> <li>○ Rally Patriots. and</li> <li>○ Pink-Slip Program.</li> </ul> </li> <li>• Elizabeth Hofacre, Tea Party Coordinator/Reviewer             <ul style="list-style-type: none"> <li>▪ Re-empathize that applications with Key Names and/or Subjects should be transferred to 7822 for Secondary Screening. Activities must be primary.</li> <li>▪ “Progressive” applications are not considered “Tea Parties”</li> </ul> </li> </ul>	2
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Despite creative interpretations of this individual document, the full evidence rebuts the Democratic claim that the IRS targeted “progressive” groups alongside Tea Party applicants. Although “progressive” groups were referenced in the IRS BOLO lists and internal training documents, Democrats in Congress and the Administration have repeatedly ignored critical distinctions that qualify their meaning. A careful evaluation of facts in context reveals one conclusion: the IRS treated Tea Party groups differently than “progressive” groups.

<sup>114</sup> *Id.*

<sup>115</sup> Transcribed interview of Elizabeth Hofacre, Internal Revenue Serv., in Wash., D.C. (May 31, 2013).

<sup>116</sup> Internal Revenue Serv., Screening Workshop Notes (July 28, 2010). [IRSR 6703-04]

***The IRS treated Tea Party applicants differently than ACORN successor groups***

Democratic defenders of the IRS misconduct also argue that the IRS treated Tea Party applicants similar to ACORN successor groups. ACORN endorsed President Barack Obama in his election campaign and had established deep political ties before its network of affiliates delinked and rebranded themselves following scandalous revelations about the organization in 2009.<sup>117</sup> To support allegations about ACORN being targeted, Democrats have pointed to BOLO lists and training documents that “instructed [IRS] screeners to single out for heightened scrutiny . . . ACORN successors.”<sup>118</sup>

But allegations of targeting fall flat. First, ACORN successor groups appear on the “Watch List” tab of the BOLO list, unlike Tea Party groups, which appear on the “Emerging Issues” tab.<sup>119</sup> According to IRS documents, the Watch List tab was intended to include applications “not yet received,” or “issues [that] are the result of significant world events,” or “organizations formed as a result of controversy.”<sup>120</sup> The Emerging Issue tab was created to spot groups of applications *already* received by the IRS. An internal IRS training document specifically cites “Tea Party cases” as an example of an emerging issue; it does not similarly cite ACORN successor groups.

Second, Robert Choi, the director of EO Rulings and Agreements until December 2010, testified to several differences between how the IRS treated ACORN successors and how the IRS treated Tea Party applicants. He told the Committee that unlike the Tea Party “test” cases, he did not recall the ACORN successor applications being subject to a “sensitive case report” or worked by the IRS Chief Counsel’s office.<sup>121</sup> Most importantly, he explained that the IRS had objective concerns about rebranded ACORN affiliates that had nothing to do with the organization’s political views. The primary concern about the ACORN successor groups, according to Choi, was whether the groups were legitimate new entities or part of an “abusive” scheme to continue an old entity under a new name.<sup>122</sup> Mr. Choi testified:

Q You said earlier in the last hour there was email traffic about the ACORN successor groups in 2010; is that right?

A That’s correct, yes.

Q But the ACORN successor groups were not subject to a sensitive case report; is that right?

<sup>117</sup> Stephanie Strom, *On Obama, Acorn and Voter Registration*, N.Y. TIMES, Oct. 10, 2008; Stanley Kurtz, *Inside Obama’s Acorn*, NAT’L REVIEW ONLINE, May 29, 2008.

<sup>118</sup> Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov’t Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).

<sup>119</sup> See Internal Revenue Serv., Be on the Look Out list, “Filed 112310 Tab 5 – Watch List.” [IRSR 2562-63]

<sup>120</sup> Internal Revenue Serv., Heightened Awareness Issues. [IRSR 6655-72]

<sup>121</sup> Transcribed interview of Robert Choi, Internal Revenue Serv., in Wash., D.C. (Aug. 21, 2013).

<sup>122</sup> *Id.*



- A I don't recall if they were listed in there, in the sensitive case report.
- Q So you don't recall them being part of a sensitive case report?
- A I think what I'm saying is they may be part of a sensitive case report. I do not have a specific recollection that they were listed in a sensitive case report.
- Q But you do have a specific recollection that the Tea Party cases were on sensitive case reports in 2010.
- A Yes.
- Q To your knowledge, did any ACORN successor application go to the Chief Counsel's Office?
- A I am not aware of it.
- Q Are you aware of any ACORN successor groups facing application delays?
- A I do not know if -- well, when you say "delays," how do you --
- Q Well --
- A I mean, I'm aware of successor ACORN applications coming in, and I am aware of email traffic that talked about my concern of delays on those cases and, you know, that there was discussion about seeing an influx of these applications which appear to be related to the previous organization.
- \*\*\*
- Q And the concern behind the reason that they weren't being processed was that they were potentially the same organization that had been denied previously?
- A Not that they were denied previously. **These appeared to be successor organizations, meaning these were newly formed organizations with a new EIN, employer identification number, located at the same address as the previous organization and, in some instances, with the same officers. And it was an issue of concern as to whether or not these were, in fact, the same organizations just coming in under a new name;** whether, in fact, the previous organizations, if they were, for example, 501(c)(3) organizations, properly disposed of their assets. Did they transfer it to this new organization? Was this perhaps an abusive

scheme by these organizations to say that they went out of business and then not really but they just carried on under a different name?

Q And that's the reason they were held up?

A Yes.<sup>123</sup> (emphasis added).

Choi's testimony shows that the inclusion of ACORN successor groups on the BOLO list centered on a concern for whether the new groups were improperly standing in the shoes of the old groups. As the Committee has documented previously, ACORN groups received substantial attention in 2009 and 2010 for misuse of taxpayer funds and other fraudulent endeavors.<sup>124</sup> In fact, Congress even cut off funding for ACORN groups given widespread concerns about the groups' activities.<sup>125</sup> Six Democratic current members of the Oversight Committee and seven Democratic current members of the Ways and Means Committee voted to stop ACORN funding.<sup>126</sup> The IRS included ACORN successor groups on a special watch list, according to Choi, due to concern "as to whether or not these were, in fact, the same organizations just coming in under a new name."<sup>127</sup>

This information undercuts allegations by congressional Democrats that the IRS's placement of ACORN successor groups on the BOLO list signified that those groups were targeted by the IRS in the same manner as Tea Party cases. Unlike the Tea Party applicants, ACORN successor groups were placed on the IRS BOLO out of specific and unique concern for potentially fraudulent or abusive schemes and not because of their political beliefs. Once identified, even ACORN successor groups were apparently not subjected to the same systematic scrutiny and delay as Tea Party applicants.

### ***The IRS treated Tea Party applicants differently than Emerge affiliate groups***

Congressional Democrats attempt to minimize the IRS's targeting of Tea Party applicants by alleging a false analogy to the IRS's treatment of Emerge affiliate groups. Emerge touts itself as the "premier training program for Democratic women" and states as a goal, "to increase the number of Democratic women in public office."<sup>128</sup> In particular, citing IRS training documents, Ranking Member Sander Levin and Ranking Member Elijah Cummings argued that "the IRS

<sup>123</sup> *Id.*

<sup>124</sup> See H. COMM. ON OVERSIGHT & GOV'T REFORM MINORITY STAFF, IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE? (July 23, 2009).

<sup>125</sup> See H. COMM. ON OVERSIGHT & GOV'T REFORM MINORITY STAFF, FOLLOW THE MONEY: ACORN, SEIU AND THEIR POLITICAL ALLIES (Feb. 18, 2010).

<sup>126</sup> See 155 Cong. Rec. H9700-01 (Sept. 17, 2009). The Democratic Members who opposed ACORN funding were Representatives Maloney (D-NY); Tierney (D-MA); Clay (D-MO); Cooper (D-TN); Speier (D-CA); Welch (D-VT); Levin (D-MI); Doggett (D-TX); Thompson (D-CA); Larson (D-CT); Blumenauer (D-OR); Kind (D-WI); and Schwartz (D-PA). *Id.*

<sup>127</sup> Transcribed interview of Robert Choi, Internal Revenue Serv., in Wash., D.C. (Aug. 21, 2013).

<sup>128</sup> Emerge America, [www.emergeamerica.org](http://www.emergeamerica.org) (last visited Apr. 2, 2014).

instructed its screeners to single out for heightened scrutiny ‘Emerge’ organizations.”<sup>129</sup> The evidence, once more, fails to support their contention. The IRS did not target Emerge affiliate groups in any similar manner to Tea Party applicants.

The same training documents cited by congressional Democrats as proof of bipartisan IRS targeting clearly show differences between the treatment of Tea Party applications and those filed by Emerge affiliate. The IRS ordered its screeners to transfer Tea Party applications to a special group for “secondary screening,” but it asked the screeners to merely “flag” Emerge groups.<sup>130</sup> While another training document specifically offers the Tea Party as an example of an emerging issue, the Emerge affiliate groups were not referenced on the document.<sup>131</sup>

Democrats cite testimony from IRS employee Steven Grodnitzky to support their argument that the IRS engaged in bipartisan targeting. Ranking Member Cummings referenced this testimony when questioning Acting IRS Commissioner Daniel Werfel during his unsolicited testimony before the Committee on July 17, 2013.<sup>132</sup> Although Grodnitzky did testify that some liberal applications experienced a three-year delay,<sup>133</sup> he also gave testimony that contradicts the Democrats’ manufactured narrative. Grodnitzky testified that unlike the Tea Party cases, which were filed by unaffiliated groups with similar ideologies, the Emerge cases were affiliated entities with different “posts” in each state.<sup>134</sup> He also testified that unlike the Tea Party applications, where the IRS was focused on political speech, the central issue in the Emerge applications was that the groups were conveying an impermissible private benefit upon the Democratic Party.<sup>135</sup> Finally, Grodnitzky testified that there were far fewer Emerge cases than Tea Party applications.<sup>136</sup> While Grodnitzky’s testimony supports a conclusion that specific and objective concerns at the IRS led to scrutiny and delayed applications from Emerge affiliates, it does not support a parallel between these organizations and what the IRS did to Tea Party applicants.

Emerge existed as a series of affiliated organizations. One IRS employee testified that whereas the Tea Party applicants waited years for IRS action, some of the Emerge applications were approved by Cincinnati IRS employees in a “matter of hours.”<sup>137</sup> But the IRS eventually reversed course, out of concern about impermissible private benefit. Because Emerge affiliates were seen as essentially the same organization, the IRS wanted to flag new affiliates to ensure that these new applications were considered in a consistent manner. Testimony from IRS employee, Amy Franklin Giuliano, explains why the Emerge applicants “were essentially the same organization.”<sup>138</sup> She testified:

<sup>129</sup> Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov’t Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).

<sup>130</sup> Internal Revenue Serv., Screening Workshop Notes (July 28, 2010). [IRSR 6703-04]

<sup>131</sup> Internal Revenue Serv., Heightened Awareness Issues. [IRSR 6655-72]

<sup>132</sup> See July 17th Hearing, *supra* note 25.

<sup>133</sup> Transcribed interview of Steven Grodnitzky, Internal Revenue Serv., in Wash., D.C. (July 16, 2013).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Transcribed interview of Amy Franklin Giuliano, Internal Revenue Serv., in Wash., D.C. (Aug. 9, 2013).

<sup>138</sup> Transcribed interview of Amy Franklin Giuliano, Internal Revenue Serv., in Wash., D.C. (Aug. 9, 2013).

Q The reason that the other five cases would be revoked if that case the Counsel's Office had was denied, was that because they were affiliated entities?

A It is because they were essentially the same organization. I mean, every – the applications all presented basically identical facts and basically identical activities.

Q And the groups themselves were affiliated.

A And the groups themselves were affiliated, yes.<sup>139</sup>

Giuliano also told the Committee that the central issue in these cases was not impermissible political speech activity – as it was with the Tea Party applications – but instead private benefit. She testified:

Q The issue in the case you reviewed in May of 2010 was private benefit.

A Yes.

Q As opposed to campaign intervention.

A We considered whether political campaign intervention would apply, and we decided it did not.<sup>140</sup>

Most striking, Giuliano told the Committee that the career IRS experts recommended *denying* an Emerge application, whereas the experts recommended *approving* the Tea Party application.<sup>141</sup> Even then, despite the recommended approval, the Tea Party applications still sat unprocessed in the IRS backlog.

Documents and testimony received by the Committee demonstrate that the IRS never engaged in systematic targeting of Emerge applicants as it did with Tea Party groups. IRS scrutiny of Emerge affiliates appears to have been based on objective and non-controversial concerns about impermissible private benefit. Taken together, this evidence strongly rebuts any Democratic claims that the IRS treated Emerge affiliates similarly to Tea Party applicants.

### ***The IRS treated Tea Party applicants differently than Occupy groups***

Finally, congressional Democrats defend the IRS targeting of Tea Party organization by arguing that liberal-oriented Occupy groups were similarly targeted.<sup>142</sup> Contrary to these claims, evidence available to the Committee indicates that the IRS did not target Occupy groups.

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> July 18th Hearing, *supra* note 28

TIGTA found that none of the applications in the IRS backlog were filed by groups with “Occupy” in their names.<sup>143</sup> Several IRS employees interviewed by the Committee testified that they were not even aware of any Occupy entry on the BOLO list until after congressional Democrats released the information in June 2013.<sup>144</sup> Further, there is no indication that the IRS systematically scrutinized and delay Occupy applications, or that the IRS subjected Occupy applicants to burdensome and intrusive information requests. To date, the Committee has not received evidence that “Occupy Wall Street” or an affiliate organization even applied to the IRS for non-profit status.

## Conclusion

Democrats in Congress and the Administration have perpetrated a myth that the IRS targeted both conservative and liberal tax-exempt applicants. The targeting is a “phony scandal,” they say, because the IRS did not just target Tea Party groups, but it targeted liberal and progressive groups as well. Month after month, in public hearings and televised interviews, Democrats have repeatedly claimed that progressive groups were scrutinized in the same manner as conservative groups.<sup>145</sup> Because of this bipartisan targeting, they conclude, there is not a “smidgeon of corruption” at the IRS.

The problem with these assertions is that they are simply not accurate. The Committee’s investigation shows that the IRS sought to identify and single out Tea Party applications. The facts bear this out. The initial “test” applications were filed by Tea Party groups. The initial screening criteria identified only Tea Party applications. The revised criteria still intended to identify Tea Party activities. The IRS’s internal review revealed that a substantial majority of applications were conservative. In short, the IRS treated conservative tax-exempt applications in a manner distinct from other applications, including those filed by liberal groups.

Evidence available to the Committee contradicts Democrats’ claims about bipartisan targeting. Although the IRS’s BOLO list included entries for liberal-oriented groups, only Tea Party applicants received systematic scrutiny because of their political beliefs. Public and nonpublic analyses of IRS data show that the IRS routinely approved liberal applications while holding and scrutinizing conservative applications. Even training documents produced by the IRS indicate stark differences between liberal and conservative applications: “‘progressive’ applications are not considered ‘Tea Parties.’”<sup>146</sup> These facts show one unyielding truth: Tea Party groups were target because of their political beliefs, liberal groups were not.

<sup>143</sup> “*The IRS’s Systematic Delay and Scrutiny of Tea Party Applications*”: Hearing before the H. Comm. on Oversight & Gov’t Reform, 113th Cong. (2013) (statement of J. Russell George).

<sup>144</sup> See, e.g., Transcribed interview of Elizabeth Kastenber, Internal Revenue Serv., in Wash., D.C. (July 31, 2013); Transcribed interview of Sharon Light, Internal Revenue Serv., in Wash., D.C. (Sept. 5, 2013); Transcribed interview of Joseph Grant, Internal Revenue Serv., in Wash., D.C. (Sept. 25, 2013); Transcribed interview of Nancy Marks, Internal Revenue Serv., in Wash., D.C. (Oct. 8, 2013); Transcribed interview of Justin Lowe, Internal Revenue Serv., in Wash., D.C. (July 23, 2013).

<sup>145</sup> Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov’t Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).

<sup>146</sup> Internal Revenue Serv., Screening Workshop Notes (July 28, 2010). [IRSR 6703-04]

**A. Timeline for the 3 exemption applications that were referred to EOT from EOD**

<p><b>1. Prescott Tea Party, LLC</b></p> <p>The Applicant sought exemption under §501(c)(3) formed to educate the public on current political issues, constitutional rights, fiscal responsibility, and support for a limited government. It planned to undertake this educational activity through rallies, protests, educational videos and through its website. The organization also intended to engage in legislative activities. The case was closed FTE on May 26, 2010.</p>	<p><b>2. American Junto, Inc.</b></p> <p>The organization applied for exemption under §501(c)(3), stating it was formed to educate voters on current social and political issues, the political process, limited government, and free enterprise. It also indicated it would be involved in political campaign intervention and legislative activities. The case was closed FTE on January 4, 2012.</p>	<p><b>3. Albuquerque Tea Party, Inc.</b></p> <p>The organization applied for exemption under §501(c)(4) as a social welfare organization for purposes of issue advocacy and education. A proposed adverse is being prepared on the basis that the organization's primary activity is political campaign intervention supporting candidates associated with a certain political faction, its educational activities are partisan in nature, and its activities are intended to benefit candidates associated with a specific political faction as opposed to benefiting the community as a whole.</p>
<p><b><u>Timeline:</u></b></p> <p><b>2009</b></p> <ul style="list-style-type: none"> <li>• 11/09/2009 → Application received by EOD.</li> <li>• 12/18/2009 → Case assigned to EOD specialist.</li> </ul> <p><b>2010</b></p> <ul style="list-style-type: none"> <li>• 3/08/2010 → <b>Date the case was referred to EOT.</b> Case pulled from</li> </ul>	<p><b><u>Timeline:</u></b></p> <p><b>2010</b></p> <ul style="list-style-type: none"> <li>• 2/11/2010 → Application was received by EOD.</li> </ul>	<p><b><u>Timeline:</u></b></p> <p><b>2010</b></p> <ul style="list-style-type: none"> <li>• 1/4/2010 → Application was received by EOD.</li> </ul>

<p>EOD files to send to EOT for review.</p> <ul style="list-style-type: none"> <li>• <b>3/11/2010</b> → EOD prepared a memo to transfer the case to EOT as part of EOT's review of some of the "advocacy organization" cases being received in EOD.</li> <li>• <b>4/02/2010</b> → Case assigned to EOT.</li> <li>• <b>4/14/2010</b> → 1<sup>st</sup> development letter mailed to Taxpayer (Response due by 5/06/2010).</li> <li>• <b>5/26/2010</b> → Case closed FTE (90-day suspense date ended on 8/26/2010).</li> </ul>	<ul style="list-style-type: none"> <li>• <b>4/11/2010</b> → Case assigned to a specialist in EOD.</li> <li>• <b>4/25/2010</b> → EOD emailed EOT (Manager Steve Grodnitzky) regarding who EOD should contact for help on "advocacy organization" cases being held in screening.</li> <li>• <b>5/25/2010</b> → EOT requested a §501(c)(3) "advocacy organization" case be transferred from EOD to replace Prescott Tea Party, LLC, a §501(c)(3) advocacy organization applicant that had been closed FTE.</li> <li>• <b>6/25/2010</b> → Memo proposing to transfer the case to EOT was prepared by EOD specialist.</li> <li>• <b>6/30/2010</b> → <u>Date the case was referred to EOT.</u></li> <li>• <b>7/7/2010</b> → 1<sup>st</sup> development letter sent (Response due by 7/28/2010).</li> <li>• <b>7/28/2010</b> → EOT received Taxpayer's response to 1<sup>st</sup> development letter.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>2/22/2010</b> → Case assigned to EOD specialist.</li> <li>• <b>3/11/2010</b> → EOD prepared memo to transfer the case to EOT as part of EOT's help reviewing the "advocacy organization" cases received in EOD.</li> <li>• <b>4/02/2010</b> → Case assigned to EOT.</li> <li>• <b>4/21/2010</b> → 1<sup>st</sup> development letter sent (Response due by 5/12/2010).</li> <li>• <b>4/29/2010</b> → Taxpayer requested extension for time to respond to 1<sup>st</sup> development letter. TLS granted extension until 6/11/2010.</li> <li>• <b>6/8/2010</b> → EOT received the Taxpayer's response to 1<sup>st</sup> development letter.</li> </ul>
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	<p><b>2011</b></p> <ul style="list-style-type: none"> <li>• <b>4/27/2011</b> → 2<sup>nd</sup> development letter sent (Response due by 5/18/2011).</li> <li>• <b>5/18/2011</b> → EOT received Taxpayer's response to 2<sup>nd</sup> development letter.</li> <li>• <b>8/10/2011</b> → EOT met with Chief Counsel to discuss the "advocacy organization" cases pending in EOT, including American Junto (and Albuquerque Tea Party, discussed next). EOT and Counsel determined that additional development should be conducted on both.</li> <li>• <b>11/18/2011</b> → 3<sup>rd</sup> development letter sent (Response due by 12/9/2011).</li> <li>• <b>12/16/2011</b> → TLS left voicemail with Taxpayer to determine if the organization had responded or planned to respond to 3<sup>rd</sup> development letter.</li> <li>• <b>12/22/2011</b> → TLS again contacted the Taxpayer to determine if the organization was going to respond to 3<sup>rd</sup> development letter. The Taxpayer indicated it was not going to respond and that the organization had</li> </ul>	<p><b>2011</b></p> <ul style="list-style-type: none"> <li>• <b>5/13/2011</b> → File memo forwarded to Guidance for review.</li> <li>• <b>6/27/2011</b> → The case file and file memo were forwarded to Chief Counsel for review and comments regarding EOT's proposed recognition of exemption.</li> <li>• <b>8/10/2011</b> → EOT met with Chief Counsel to discuss the "advocacy organization" cases pending in EOT, including Albuquerque Tea Party (and American Junto, discussed previously). EOT and Counsel determined additional development should be conducted on both.</li> <li>• <b>11/16/2011</b> → 2<sup>nd</sup> development letter sent to the Taxpayer (Response due by 12/7/2011).</li> <li>• <b>11/30/2011</b> → TLS spoke with Taxpayer and granted a 30-day extension to respond to the 2<sup>nd</sup> development letter. Extension was granted until 1/6/2012.</li> </ul>
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	dissolved. An FTE letter was prepared.	
	<u>2012</u> <ul style="list-style-type: none"> <li>1/4/2012 → FTE letter mailed to the Taxpayer (90-day suspense date ends 4/4/2012).</li> </ul>	<u>2012</u> <ul style="list-style-type: none"> <li>1/11/2012 → EOT received Taxpayer's response to 2<sup>nd</sup> development letter.</li> <li>1/24/2012 → After review of file, TLS recommended a proposed denial. The TLS is currently drafting a proposed denial.</li> </ul>

**B. Timeline for informal technical assistance which was provided by EOT Personnel to EOD between May 2010 to October 2010**

- 5/17/2010 → EOD personnel (Liz Hofacre) contacted and referred 2 proposed development letters to an EOT personnel (Chip Hull) for informal review.
- Between May, 2010 to October 2010, EOT personnel (Chip Hull) informally reviewed approximately 26 case exemption applications and development letters on behalf of EOD. Mr. Hull provided feedback on most of the 26 exemption applications.

**C. Timeline for preparation of the Advocacy Organization Guide sheet**

- Late July 2011 - started drafting the guide sheet to help EOD personnel working advocacy organization cases in differentiating between the different types of advocacy and explaining the advocacy rules pertaining to various exempt organizations.
- Early November 2011 - forwarded to EOD for comments. No comments were received.

### Increase in (c)(3)/(c)(4) Advocacy Org. Applications

#### Background:

- EOD Screening has identified an increase in the number of (c)(3) and (c)(4) applications where organizations are advocating on issues related to government spending, taxes and similar matters. Often there is possible political intervention or excessive lobbying.
- EOD Screening identified this type of case as an emerging issue and began sending cases to a specific group if they meet any of the following criteria:
  - "Tea Party," "Patriots" or "9/12 Project" is referenced in the case file
  - Issues include government spending, government debt or taxes
  - Education of the public by advocacy/lobbying to "make America a better place to live"
  - Statements in the case file criticize how the country is being run
- Over 100 cases have been identified so far, a mix of (c)(3)s and (c)(4)s. Before this was identified as an emerging issue, two (c)(4) applications were approved.
- Two sample cases were transferred to EOT, a (c)(3) and a (c)(4).
  - The (c)(4) stated it will conduct advocacy and political intervention, but political intervention will be 20% or less of activities. A proposed favorable letter has been sent to Counsel for review.
  - The (c)(3) stated it will conduct "insubstantial" political intervention and it has ties to politically active (c)(4)s and 527s. A proposed denial is being revised by TLS to incorporate the org.'s response to the most recent development letter.
- EOT is assisting EOD by providing technical advice (limited review of application files and editing of development letters).

#### EOD Request:

- EOD requests guidance in working these cases in order to promote uniform handling and resolution of issues.

#### Options for Next Steps:

- Assign cases for full development to EOD agents experienced with cases involving possible political intervention. EOT provides guidance when EOD agents have specific questions.
- EOT composes a list of issues or political/lobbying indicators to look for when investigating potential political intervention and excessive lobbying, such as reviewing website content, getting copies of educational and fundraising materials, and close scrutiny of expenditures.
- Establish a formal process similar to that used in healthcare screening where EOT reviews each application on TEDS and highlights issues for development.
- Transfer cases to EOT to be worked.
- Include pattern paragraphs on the political intervention restrictions in all favorable letters.
- Refer the organizations that were granted exemption to the ROO for follow-up.

#### Cautions:

- These cases and issues receive significant media and congressional attention.
- The determinations process is representational, therefore it is extremely difficult to establish that an organization will intervene in political campaigns at that stage.

**EO Technical  
Significant Case Report  
( August 31, 2011)**

• 21 open SCs

**A. Open SCs:**

	Name of Org/Group	Group #/Manager	EIN	Received	Issue	Tax Law Specialist	Estimated Completion Date	Status/Next action	Being Elevated to TEGE Commissioner This Month
1.	Political Advocacy Organizations	T2/Ron Shoemaker	██████████	4/2/2010	Whether a tea party organization meets the requirements under section 501(c)(3) and is not involved in political intervention. Whether organization is conducting excessive political activity to deny exemption under section 501(c)(4).	Chp. Hui & Henry Goehausen	3/31/2011 (Orig) 05/31/2011 (Rev) 07/31/2011 (Rev) 10/30/2011 (Rev) 12/31/2011 (Rev)	Developing both a (c)(3) and (c)(4) cases. Proposed (c)(4) favorable is currently being reviewed. Proposed denial currently being reviewed on (c)(3). Cases were discussed with Judy Kindel on 04/06/11. Judy requested staff to get additional information from taxpayers regarding certain activities. Development letters were sent. Proposed favorable (c)(4) ruling forwarded to Chief Counsel for comments on 05/04/11. Information from (c)(3) organization regarding activities due on 05/19/2011. Waiting on taxpayer response. Met with Director EO on June 29, 2011. Met with Counsel on 9/13/11 to discuss the cases. Counsel recommended further development of the cases by getting information on the organizations 2010 activities. Counsel gave us directions on the type of information needed. ██████████  Next Action: ██████████	No

<b>CASE NAME:</b> (1) [REDACTED] (501(c)(3) applicant), (2) [REDACTED] (501(c)(4) applicant), (3) [REDACTED] (501(c)(3) applicant)		<b>TAX PERIODS:</b> [REDACTED]
<b>TIN/EIN:</b> [REDACTED] and [REDACTED] <b>POA:</b> None		<b>EARLIEST STATUTE DATE:</b>
<b>FUNCTION REPORTING:</b> <b>POD:</b> Washington, D.C.		<b>INITIAL REPORT</b> <b>X FOLLOW-UP REPORT</b> <b>FINAL REPORT</b>
<b>SENSITIVE CASE CRITERIA:</b> Likely to attract media or Congressional attention Unique or novel issue Affects large number of taxpayers		
Potentially involves large dollars (\$10M or greater) Other (explain in Case Summary)		
<b>FORM TYPE(S):</b> (1) Form 1023. (2) Form 1024		<b>START DATE:</b> 04/02/2010
<b>POTENTIAL DOLLARS INVOLVED (If &gt; \$10M):</b> Unknown		<b>CRIMINAL REFERRAL?</b> Unknown If YES, WHEN? <b>Freeze Code TC 914 ( Yes or No)</b>
<b>CASE OR ISSUE SUMMARY:</b> The various "tea party" organizations are separately organized, but appear to be a part of a national political movement that may be involved in political activities. The "tea party" organizations are being followed closely in national newspapers (such as The Washington Post) almost on a regular basis. Cincinnati is holding three applications from organizations which have applied for recognition of exemption under section 501(c)(3) of the Code as educational organizations and approximately twenty-two applications from organizations which have applied for recognition of exemption under section 501(c)(4) as social welfare organizations. Two organizations that we believe may be "tea party" organizations already have been recognized as exempt under section 501(c)(4). EOT has not seen the case files, but are requesting copies of them. The issue is whether these organizations are involved in campaign intervention or, alternatively, in nonexempt political activity.		
<b>CURRENT SIGNIFICANT ACTIONS ON CASE:</b> Met with J. Kindell to discuss organizations (2) and (3) and Service position. Ms. Kindell recommended additional development re: activities, then forward to Chief Council.  Organization (1) – closed FTE for failure to respond to a development letter. Organization (2) – proposed favorable 501(c)(4) ruling forwarded to Chief Council for comment on 06/16/2011. Organization (3) – additional information was received. Proposed denial was revised and forwarded for review 07/19/2011. Coordination between HQ and Cincinnati is continuing regarding information letters to applicants for exemption under 501(c)(3) and 501(c)(4).		

<b>SIGNIFICANT NEXT STEPS, IF ANY:</b> Organization (2) – Wait on comments from Counsel. Organization (3) Await the results of review on the revised proposed denial. .Continue coordinated review of applications in EO Determinations.	<b>ESTIMATED CLOSURE DATE:</b> July 31 , 2011
<b>BARRIERS TO RESOLUTION, IF ANY:</b> Concerns whether the organizations are involved in political activities.	
<b>SUBMITTED BY:</b> Carter C. Hull, SE:T:EO:RA:T:2	<b>MANAGER:</b> RONALD SHOEMAKER, SE:T:EO:RA:T:2
<b>DATE:</b> June 17, 2011	

<b>CASE NAME:</b> (1) [REDACTED] 6103 (501)(c)(3) applicant, Closed FTE (2) [REDACTED] 6103 (501)(c)(4) applicant Open (3) [REDACTED] 6103 (501)(c)(3) applicant Closed FTE  <b>TIN/EIN:</b> [REDACTED] 6103 and [REDACTED] 6103 <b>POA:</b> None	<b>TAX PERIODS:</b> 2009 and forward  <b>EARLIEST STATUTE DATE:</b>
<b>FUNCTION REPORTING:</b>  <b>POD:</b> Washington, D.C.	<b>INITIAL REPORT</b> <b>X FOLLOW-UP REPORT</b> <b>FINAL REPORT</b>
<b>SENSITIVE CASE CRITERIA:</b> Likely to attract media or Congressional attention Unique or novel issue Affects large number of taxpayers Potentially involves large dollars (\$10M or greater) Other (explain in Case Summary)	
<b>FORM TYPE(S):</b> (1) Form 1023 (2) Form 1024	<b>START DATE:</b> 04/02/2010
<b>POTENTIAL DOLLARS INVOLVED (If &gt; \$10M):</b> Unknown	<b>CRIMINAL REFERRAL? Unknown IF YES, WHEN?</b>  <b>Freeze Code TC 914 ( Yes or No)</b>
<b>CASE OR ISSUE SUMMARY:</b> These organizations are "advocacy organizations," and although are separately organized, they appear to be part of a larger national political movement that may be involved in political activities. These types of advocacy organizations are followed closely in national newspapers (such as The Washington Post) almost on a regular basis. Cincinnati has in its inventory a number of applications from these types of organizations that applied for recognition of exemption under section 501(c)(3) of the Code as educational organizations and from organizations that applied for recognition of exemption under section 501(c)(4) as social welfare organizations.	
<b>CURRENT SIGNIFICANT ACTIONS ON CASE:</b> Organization (1) – [REDACTED] 6103 – [REDACTED]  Organization (2) – [REDACTED] 6103 [REDACTED] 501(c)(4) [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	

<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>	
<b>SIGNIFICANT NEXT STEPS, IF ANY:</b> Organization (2): [REDACTED] 6103 - 501(c)(4) - [REDACTED] [REDACTED]	<b>ESTIMATED CLOSURE DATE:</b> December 31, 2012
<b>BARRIERS TO RESOLUTION, IF ANY:</b> Concerns are whether the organizations are primarily involved in political activities and whether substantial private benefit exists.	
<b>SUBMITTED BY:</b> Hilary Goehausen, SE:T:EO:RA:T:1	<b>MANAGER:</b> LIZ KASTENBERG, SE:T:EO:RA:T:2
<b>DATE:</b> September 18, 2012	

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**From:** Kall Jason C  
**Sent:** Tuesday, January 10, 2012 9:09 PM  
**To:** Lerner Lois G  
**Cc:** Ghougasian Laurice A; Fish David L; Paz Holly O; Downing Nanette M  
**Subject:** Workplan and background on how we started the self declarer project

Lois,

I found the string of e-mails that started us down the path of what has become the c-4, 5, 6 self declarer project. Our curiosity was not from looking at the 990 but rather data on c-4 self declarers.

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*Jason Kall*

Manager, EO Compliance Strategies and Critical Initiatives

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**From:** Chasin Cheryl D  
**Sent:** Thursday, September 16, 2010 8:59 AM  
**To:** Lerner Lois G; Kindell Judith E; Ghougasian Laurice A  
**Cc:** Lehman Sue; Kall Jason C; Downing Nanette M  
**Subject:** RE: EO Tax Journal 2010-130

That's correct. These are all status 36 organizations, which means no application was filed.

Cheryl Chasin

(phone)  
 (fax)

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**From:** Lerner Lois G  
**Sent:** Thursday, September 16, 2010 9:58 AM  
**To:** Chasin Cheryl D; Kindell Judith E; Ghougasian Laurice A  
**Cc:** Lehman Sue; Kall Jason C; Downing Nanette M  
**Subject:** Re: EO Tax Journal 2010-130

Ok guys. We need to have a plan. We need to be cautious so it isn't a per se political project. More a c4 project that will look at levels of lobbying and pol. activity along with exempt activity. Cheryl- I assume none of those came in with a 1024?  
 Lois G. Lerner-----  
 Sent from my BlackBerry Wireless Handheld

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**From:** Chasin Cheryl D  
**To:** Lerner Lois G; Kindell Judith E; Ghougasian Laurice A  
**Cc:** Lehman Sue; Kall Jason C; Downing Nanette M  
**Sent:** Wed Sep 15 14:54:38 2010  
**Subject:** RE: EO Tax Journal 2010-130

It's definitely happening. Here are a few organizations (501(c)(4), status 36) that sure sound to me like they are engaging in political activity:



Cheryl Chasin

(fax)

I'm not saying this is correct—but there is a perception out there that that is what is happening. My guess is most who conduct political activity never pay the tax on the activity and we surely should be looking at that. Wouldn't that be a surprising turn of events. My object is not to look for political activity—more to see whether self-declared c4s are really acting like c4s. Then we'll move on to c5,c6,c7—it will fill up the work plan forever!

**From:** Kindell Judith E  
**Sent:** Wednesday, September 15, 2010 1:03 PM  
**To:** Lerner Lois G; Chasin Cheryl D; Ghougasian Laurice A  
**Cc:** Lehman Sue  
**Subject:** RE: EO Tax Journal 2010-130

My big concern is the statement "some (c)(4)s are being set up to engage in political activity" - if they are being set up to engage in political campaign activity they are not (c)(4)s. I think that Cindy's people are keeping an eye out for (c)(4)s set up to influence political campaigns, but we might want to remind them. I also agree that it is about time to start looking at some of those organizations that file Form 990 without applying for recognition -whether or not they are involved in politics.

**From:** Lerner Lois G  
**Sent:** Wednesday, September 15, 2010 12:27 PM

**To:** Chasin Cheryl D; Ghougasian Laurie A; Kindell Judith E  
**Cc:** Lehman Sue  
**Subject:** FW: EO Tax Journal 2010-130

Not sure you guys get this directly. I'm really thinking we do need a c4 project next year

*Leah J. Lerner*  
 Director, Exempt Organizations

**From:** paul streckfus  
**Sent:** Wednesday, September 15, 2010 12:20 PM  
**To:** paul streckfus  
**Subject:** EO Tax Journal 2010-130

*From the Desk of Paul Streckfus,  
 Editor, EO Tax Journal*

Email Update 2010-130 (Wednesday, September 15, 2010)  
 Copyright 2010 Paul Streckfus

Yesterday, I asked, "Is 501(c)(4) Status Being Abused?" I can hardly keep up with the questions and comments this query has generated. As noted yesterday, some (c)(4)s are being set up to engage in political activity, and donors like them because they remain anonymous. Some commentators are saying, "Why should we care?", others say these organizations come and go with such rapidity that the IRS would be wasting its time to track them down, others say (c)(3) filing requirements should be imposed on (c)(4)s, and so it goes.

Former IRSer Conrad Rosenberg seems to be taking a leave them alone view:

"I have come, sadly, to the conclusion that attempts at revocation of these blatantly political organizations accomplish little, if anything, other than perhaps a bit of *in terrorem* effect on some other (usually much smaller) organizations that may be contemplating similar behavior. The big ones are like balloons – squeeze them in one place, and they just pop out somewhere else, largely unscathed and undaunted. The government expends enormous effort to win one of these cases (on very rare occasion), with little real-world consequence. The skein of interlocking 'educational' organizations woven by the fabulously rich and hugely influential Koch brothers to foster their own financial interests by political means ought to be Exhibit One. Their creations operate with complete impunity, and I doubt that potential revocation of tax exemption enters into their calculations at all. That's particularly true where deductibility of contributions, as with (c)(4)s, is not an issue. Bust one, if you dare, and they'll just finance another with a different name. I feel for the IRS's dilemma, especially in this wildly polarized election year."

A number of individuals said the requirements for (c)(4)s to file the Form 1024 or the Form 990 are a bit of a muddle. My understanding is that (c)(4)s need not file a Form 1024, but generally the IRS won't accept a Form 990 without a Form 1024 being filed. The result is that attorneys can create new (c)(4)s every year to exist for a short time and never file a 1024 or 990. However, the IRS can claim the organization is subject to tax (assuming it becomes aware of its existence) and then the organization must prove it is exempt (by essentially filing the information required by Form 1024 and maybe 990). Not being sure of the correctness of my understanding, I went to the only person who may know more about EO tax law than Bruce Hopkins, and got this response from Marc Owens:

"You are sort of close. It's not quite accurate to state that a (c)(4) 'need not file a Form 1024.' A (c)(4) is not subject to IRC 508, hence it is not required to file an application for tax-exempt status within a particular period of time after its formation. Such an organization is subject, however, to Treas. Reg. Section 1.501(a)-1(a)(2) and (3) which set forth the general requirement that in order to be exempt, an organization must file an application, but for which no particular time period is specified. Once a would-be (c)(4) is formed and it has completed one fiscal year of life, and assuming that it had revenue during the fiscal year, it is required to file a tax return.

move things along. the 'clean' sheet doesn't give me any sense unless I go back to previous SCRs.

I've added Sharon so she can see what kinds of things I'm interested in.

*Lois G. Lerner*

Director, Exempt Organizations

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**From:** Paz Holly O  
**Sent:** Wednesday, February 02, 2011 11:02 AM  
**To:** Lerner Lois G; Seto Michael C  
**Cc:** Trilli Darla J; Douglas Akaisha; Letourneau Diane L; Kindell Judith E  
**Subject:** RE: SCR Table for Jan. 2011

Tea Party - Cases in Determs are being supervised by Chip Hull at each step - he reviews info from TPs, correspondence to TPs, etc. No decisions are going out of Cincy until we go all the way through the process with the c3 and c4 cases here. I believe the c4 will be ready to go over to Judy soon.

HMO case [REDACTED] - When you say to push for the next Counsel meeting, with whom in Counsel are you referring? The plan had been for Sarah to meet with Wilkins and Nan on this. We think this has not happened but have not heard directly (unless Sarah has responded to your recent email on this case). I don't know that we at this level can drive that meeting.

[REDACTED] - I will reach out to Phil to see if Nan has seen it. She was involved in the past but I don't know about recently.

On [REDACTED] (religious order), proposed denials typically do not go to Counsel. Proposed denial goes out, we have conference, then final adverse goes to Counsel before that goes out. We can alter that in this case and brief you after we have Counsel's thoughts.

[REDACTED] was not elevated at Mike Daly's direction. He had us elevate it twice after the litigation commenced but said not to continue after that unless we are changing course on the application front and going forward with processing it.

[REDACTED] - Our general criteria as to whether or not to elevate an SCR to Sarah/Joseph and on up is to only elevate when there has been action. [REDACTED] was elevated this month because it was just received. We will now begin to review the 1023 but won't have anything to report for sometime. We will elevate again once we have staked out a position and are seeking executive concurrence.

We (Mike and I) keep track of whether estimated completion dates are being moved by means of a track changes version of the spread sheet. When next steps are not reflected as met by the estimated time, we follow up with the appropriate managers or Counsel to determine the cause for the delay and agree on a due date.

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**From:** Lerner Lois G  
**Sent:** Tuesday, February 01, 2011 6:28 PM  
**To:** Seto Michael C  
**Cc:** Paz Holly O; Trilli Darla J; Douglas Akaisha; Letourneau Diane L; Kindell Judith E  
**Subject:** RE: SCR Table for Jan. 2011

Thanks--a couple comments

1. Tea Party Matter very dangerous. This could be the vehicle to go to court on the issue of whether Citizen's United overturning the ban on corporate spending applies to tax exempt rules. Counsel and Judy Kindell need to be in on this one please needs to be in this. Cincy should probably NOT have these cases--Holly please see what exactly they have please.
2. We need to push for the next Counsel meeting re: the HMO case Justin has. Reach out and see if we can set it up.
3. [REDACTED]--has that gone to Nan Marks? It says Counsel, but we'll need her on board. In all cases where it says Counsel, I need to know at what level please.
4. I assume the proposed denial of the religious or will go to Counsel before it goes out and I will be briefed?
5. I think no should be yes on the elevated to TEGE Commissioner slot for the Jon Waddel case that's in litigation--she is well aware.
6. Case involving healthcare reconciliation Act needs to be briefed up to my level please.
7. SAME WITH THE NEWSPAPER CASES--NO GOING OUT WITHOUT BRIEFING UP PLEASE.
8. The 3 cases involving [REDACTED] should be briefed up also.
9. [REDACTED] case--why "yes-for this month only" in TEGE Commissioner block?

Also, please make sure estimated due dates and next step dates are after the date you send these. On a couple of these I can't tell whether stuff happened recently or not.

Question--if you have an estimated due date and the person doesn't make it, how is that reflected? My concern is that when Exam first did these, they just changed the date so we always looked current, rather than providing a history of what occurred. perhaps it would help to sit down with me and Sue Lehman--she helped develop the report they now use.

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**From:** Seto Michael C  
**Sent:** Tuesday, February 01, 2011 5:33 PM  
**To:** Lerner Lois G  
**Cc:** Paz Holly O; Trilli Darla J; Douglas Akaisha; Letourneau Diane L  
**Subject:** SCR Table for Jan. 2011

Here is the Jan. SCR summary.

## Heightened Awareness Issues

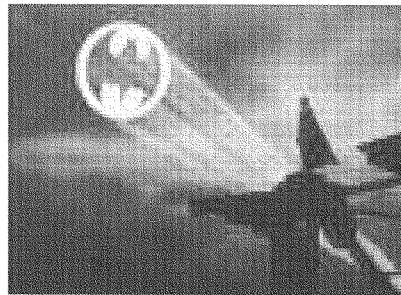


## OBJECTIVES

- What Are The Heightened Awareness Issues
- Definition and Examples of Each
- Issue Tracking and Notification
- What Happens When You See One?

## What are Heightened Awareness Issues?

- TAG
- Emerging Issues
- Coordinated Issues
- Watch For Issues



## Your Role

- Per IRM 1.54.1.6.1, a Front Line Employee Should Elevate the Following Matters Concerning Their Work:
  1. Unusual Issues that Prevent them from Completing Their Work.
  2. Issues Beyond Their Current Level of Training.
  3. Issues that Require Elevation in Accordance with Statute, Revenue Procedure, or Field Directive.



## What are TAG Issues ?:

- Involves Abusive Tax Avoidance Transactions:
  1. Abusive Promoters
  2. Fake Determination Letters
- Activities are Fraudulent In Nature:
  1. Materially Misrepresented Operations or Finances.
  2. Conducting Activities Contrary to Tax Law (e.g. Foreign Conduits).
- Issues Involving Applicants with Potential Terrorist Connections:
  1. Cases with Direct Hits on OFAC
  2. Substantial Foreign Operations in Sanctioned Countries
- Processing is Governed by IRM 7.20.6

## What Are Emerging Issues?

- Groups of Cases where No Established Tax Law or Precedent has been Established.
- Issues Arising from Significant Current Events (Doesn't Include Disaster Relief)
- Issues Arising from Changes to Tax Law
- Other Significant World Events

## Emerging Issue Examples

- Tea Party Cases:
  1. High Profile Applicants
  2. Relevant Subject in Today's Media
  3. Inconsistent Requests for 501(c)(3) and 501(c)(4).
  4. Potential for Political/Legislative Activity
  5. Rulings Could be Impactful

## Emerging Issue Examples Continued:

- Pension Trust 501(c )(2):
  1. Cases Involved the Same Law Firm
  2. High Dollar Amounts
  3. Presence of an Unusual Note Receivable



## Emerging Issues Examples Continued

- Historical Examples:
  1. Foreclosure Assistance
  2. Carbon Credits
  3. Pension Protection Act
  4. Credit Counseling
  5. Partnership/Tax Credits
  6. Hedge Funds

## What Are Coordinated Processing Issues?

- Cases with Issues Organized for Uniform Handling
- Involves Multiple Cases
- Existing Precedent or Guidance Does Exist



## Coordinated Examples

- Break-up of a Large Group Ruling Where Subordinates are Seeking Individual Exemption.
- Multiple Entities Related Through a Complex Business Structure (e.g. Housing and Management Companies)
- Current Specialized Inventories

## What is a Watch For Issue?

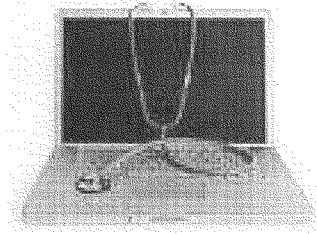




## Watch For Issues:

- Typically Applications Not Yet Received
- Issues are the Result of Significant Changes in Tax Law
- Issues are the Result of Significant World Events
- Special Handling is Required when Applications are Received

## Watch For Examples



## Watch For Examples Continued

- Successors to Acorn
- Electronic Medical Records
- Regional Health Information Organizations
- Organizations Formed as a Result of Controversy---- Arizona Immigration Law
- Other World Events that **Could** Result in an Influx of Applications

## Tracking and Notification



## Combined Excel Workbook

- Will Include Tabs for TAG, TAG Historical, Emerging Issues, Coordinated, and Watch For
- Tabs Will Include the Various Issues, Descriptions, and Guidance.
- A Designated Coordinator Will Maintain the Workbook and Disseminate Alerts in One Standard E-Mail.
- Mailbox: \*TE/GE-EO-Determinations Questions

## When You Spot Heightened Awareness Issues

- If a TAG Issue, follow IRM 7.20.6.
- If an Emerging Issue or Coordinated Processing Case, Complete the Required Referral Form and Submit to your Manager
- Watch For Issue Cases are Referred to your Manager

File 11 9 10

Tab 1 - TAG

Case No.	Case Name	Case Address	Case City	Case State	Case Zip	Case Date	Case Status	Case Notes
100-100000	John Doe	123 Main St	New York	NY	10001	10/1/19	Open	Initial investigation complete. No further action required.
100-100001	Jane Smith	456 Elm St	Los Angeles	CA	90001	10/2/19	Open	Investigation ongoing. Additional information being gathered.
100-100002	Robert Johnson	789 Oak St	Chicago	IL	60601	10/3/19	Open	Investigation ongoing. No further action required.
100-100003	Mary White	101 Pine St	San Francisco	CA	94101	10/4/19	Open	Investigation ongoing. No further action required.
100-100004	David Brown	202 Maple St	Phoenix	AZ	85001	10/5/19	Open	Investigation ongoing. No further action required.
100-100005	Sarah Green	303 Cedar St	Philadelphia	PA	19101	10/6/19	Open	Investigation ongoing. No further action required.
100-100006	Michael Black	404 Birch St	San Diego	CA	92101	10/7/19	Open	Investigation ongoing. No further action required.
100-100007	Emily Gold	505 Walnut St	Seattle	WA	98101	10/8/19	Open	Investigation ongoing. No further action required.
100-100008	James Silver	606 Spruce St	Portland	OR	97201	10/9/19	Open	Investigation ongoing. No further action required.
100-100009	Patricia Copper	707 Ash St	Denver	CO	80201	10/10/19	Open	Investigation ongoing. No further action required.
100-100010	Christopher Iron	808 Hickory St	San Jose	CA	95101	10/11/19	Open	Investigation ongoing. No further action required.
100-100011	Michelle Lead	909 Cypress St	San Antonio	TX	78201	10/12/19	Open	Investigation ongoing. No further action required.
100-100012	Andrew Zinc	1010 Dogwood St	Fort Worth	TX	76101	10/13/19	Open	Investigation ongoing. No further action required.
100-100013	Stephanie Nickel	1011 Redwood St	Columbus	GA	31901	10/14/19	Open	Investigation ongoing. No further action required.
100-100014	Benjamin Tin	1012 Sycamore St	Indianapolis	IN	46201	10/15/19	Open	Investigation ongoing. No further action required.
100-100015	Rebecca Platinum	1013 Magnolia St	San Luis Obispo	CA	93401	10/16/19	Open	Investigation ongoing. No further action required.
100-100016	Gregory Silver	1014 Peach St	San Jose	CA	95101	10/17/19	Open	Investigation ongoing. No further action required.
100-100017	Christina Gold	1015 Cherry St	San Jose	CA	95101	10/18/19	Open	Investigation ongoing. No further action required.
100-100018	Jonathan Copper	1016 Elm St	San Jose	CA	95101	10/19/19	Open	Investigation ongoing. No further action required.
100-100019	Kimberly Iron	1017 Oak St	San Jose	CA	95101	10/20/19	Open	Investigation ongoing. No further action required.
100-100020	Timothy Lead	1018 Pine St	San Jose	CA	95101	10/21/19	Open	Investigation ongoing. No further action required.
100-100021	Angela Zinc	1019 Maple St	San Jose	CA	95101	10/22/19	Open	Investigation ongoing. No further action required.
100-100022	Christopher Nickel	1020 Cedar St	San Jose	CA	95101	10/23/19	Open	Investigation ongoing. No further action required.
100-100023	Michelle Tin	1021 Birch St	San Jose	CA	95101	10/24/19	Open	Investigation ongoing. No further action required.
100-100024	Benjamin Silver	1022 Walnut St	San Jose	CA	95101	10/25/19	Open	Investigation ongoing. No further action required.
100-100025	Stephanie Gold	1023 Spruce St	San Jose	CA	95101	10/26/19	Open	Investigation ongoing. No further action required.
100-100026	Gregory Copper	1024 Ash St	San Jose	CA	95101	10/27/19	Open	Investigation ongoing. No further action required.
100-100027	Christina Iron	1025 Hickory St	San Jose	CA	95101	10/28/19	Open	Investigation ongoing. No further action required.
100-100028	Jonathan Lead	1026 Dogwood St	San Jose	CA	95101	10/29/19	Open	Investigation ongoing. No further action required.
100-100029	Kimberly Zinc	1027 Magnolia St	San Jose	CA	95101	10/30/19	Open	Investigation ongoing. No further action required.
100-100030	Timothy Nickel	1028 Peach St	San Jose	CA	95101	10/31/19	Open	Investigation ongoing. No further action required.
100-100031	Angela Silver	1029 Cherry St	San Jose	CA	95101	11/1/19	Open	Investigation ongoing. No further action required.
100-100032	Christopher Gold	1030 Elm St	San Jose	CA	95101	11/2/19	Open	Investigation ongoing. No further action required.
100-100033	Michelle Copper	1031 Oak St	San Jose	CA	95101	11/3/19	Open	Investigation ongoing. No further action required.
100-100034	Benjamin Iron	1032 Pine St	San Jose	CA	95101	11/4/19	Open	Investigation ongoing. No further action required.
100-100035	Stephanie Lead	1033 Maple St	San Jose	CA	95101	11/5/19	Open	Investigation ongoing. No further action required.
100-100036	Gregory Zinc	1034 Cedar St	San Jose	CA	95101	11/6/19	Open	Investigation ongoing. No further action required.
100-100037	Christina Nickel	1035 Birch St	San Jose	CA	95101	11/7/19	Open	Investigation ongoing. No further action required.
100-100038	Jonathan Tin	1036 Walnut St	San Jose					



File 11 9 10

Tab 2 – TAG Historical



IRS0000001352

[illegible]

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
1																	
11																	
12																	
13																	
14																	
15																	
16																	
17																	
18																	
19																	

[illegible]

File 11 9 10

Tab 3 – Emerging Issues

	A	B	C	D	E	F	G	H
1								
2	501(c)(2)	These cases involve a commingled pension trust holding title to a high dollar note receivable secured by real estate. The application appear to be prepared from a template. The fund manager is usually [REDACTED]	x	x		Any future cases may be closed on merit if applicable. EOT determined these applications qualify under 501(c)(2). A referral was completed to address any EP concerns.	Closed	
3	Tea Party	These case involve various local organizations in the Tea Party movement are applying for exemption under 501(c)(3) or 501(c)(4).	El-1	x		Any cases should be sent to Group 7822. Liz Hofacre is coordinating. These cases are currently being coordinated with EOT.	Open	

File 11 9 10

Tab 4 -- Coordinated Processing



IRS0000001359

	A	B	C	D	E	F	G
1							
2							
3							

File 11 9 10

Tab 5 – Watch List

	A	B	C	D	E	F	G	H
1								
2	Open Source Software	These organizations are requesting either 501(c)(3) or 501(c)(6) exemption in order to collaboratively develop new software. The members of these organizations are usually the for-profit business or for-profit support technicians of the software.		1 x		The is no specific guidance at this point. If you see a case, elevate it to your manager.	Open	
3	RHIO's	Organization's setup to electronically exchange healthcare data, called Regional Health Information Organizations (RHIOs), are requesting exemption under 501(c)(3).		2 x		These cases should be transferred to EOT.	Open	
4								
5	Healthcare legislation	Per Rob Choi email dated April 20, 2010, cases impacted by the Patient Protection and Affordable Care Act (Public Law 111-148) (PPACA) and the Health Care and Education Reconciliation Act of 2010 (Public Law 111-152) (HCERA) are being coordinated with EOT.		4 2010 - #1		New applications are subject to secondary screening in Group 7821. Wayne Bothe is the coordinator.	Open-4/20/10	
6								

	A	B	C	D	E	F	G	H
1								
7								
8	Medical Marijuana	Email dated 7/15/10. Look for cases involving Medical Marijuana		7/2010 - #1	Forward cases to processing who will forward the cases to Denise Tamayo, group 7888	Open-7-15-10		
9								
10								
11								

	A	B	C	D	E	F	G	H
1								
12	Occupied Territory Advocacy	Email dated 8/6/10. Applications deal with disputed territories in the Middle East. Examples may be organizations named or connected with XXXX (XXXX = a particular city). Applications may be inflammatory, advocate a one sided point of view and promotional materials may signify propaganda.		11/2010 - #1		If you see these cases, please forward to the TAG Group, 7830.	Open- 8/6/10	
13								
14	Accountable Care Organization (ACO)	Email dated 8/12/10. An ACO is a an entity created by the Affordable Care Act. These consist of groups of healthcare providers (hospitals and doctors) who have entered into an agreement with Medicare to have Medicare patients assigned to them. The amounts charged to Medicare for the ACO's patients are compared to certain benchmark levels set by Medicare. Medicare pays the ACO a percentage difference of the difference as incentive to cost savings. ACO's are not required to be tax exempt.		13/2010 - #1		These cases should be forwarded to Group 7821	Open- 8/12/10	
15								
16								

	A	B	C	D	E	F	G	H
1	[REDACTED]							
17	[REDACTED]		[REDACTED]		[REDACTED]		[REDACTED]	
18	[REDACTED]		[REDACTED]		[REDACTED]		[REDACTED]	

---

**From:** Kindell Judith E  
**Sent:** Wednesday, July 18, 2012 10:54 AM  
**To:** Lerner Lois G  
**Cc:** Light Sharon P  
**Subject:** Bucketed cases

Of the 84 (c)(3)

cases, slightly over half appear to be conservative leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum.

Of the 199 (c)(4)

cases, approximately 3/4 appear to be conservative leaning while fewer than 10 appear to be liberal/progressive leaning groups based solely on the name. The remainder do not obviously lean to either side of the political spectrum.

File 112310  
Tab 5 – Watch List



20101123

A	B	C	D	E	F	G	H
Issue Name	Watch Issue Description	Issue Number	Alerts (Yes/No)	Disposition of Watch Issue	Current Status (Open or closed)		
1. Open Source Software	These organizations are requesting either 501(c)(3) or 501(c)(6) exemption in order to collaboratively develop new software. The members of these organizations are usually the for-profit business or for-profit support technicians of the software.		1x	The is no specific guidance at this point. If you see a case, elevate it to your manager.	Open		
3. RHIO's	Organization's setup to electronically exchange healthcare data, called Regional Health Information Organizations (RHIOs), are requesting exemption under 501(c)(3).		2x	These cases should be transferred to EOT.	Open		
4. Healthcare legislation	Per Rob Choi email dated April 20, 2010, cases impacted by the Patient Protection and Affordable Care Act (Public Law 111-148) (PPACA) and the Health Care and Education Reconciliation Act of 2010 (Public Law 111-152) (HCERA) are being coordinated with EOT.		4 2010 - #1	New applications are subject to secondary screening in Group 7821. Wayne Bolte is the coordinator.	Open-4/20/10		
6. Medical Marijuana			7 2010 - #1	Forward cases to processing who will forward the cases to Denise Tamayo, group 7888	Open-7-15-10		

IRS0000002563

## Screening Workshop Notes - July 28, 2010

2

- The emailed attachment outlines the overall process.
- Glenn deferred additional statements and/or questions to John Shafer on yesterday's developments; how they affect the screening process and timeline.
- Concerns can be directed to Glenn for additional research if necessary.

**Current/Political Activities:** Gary Muthert

- Discussion focused on the political activities of Tea Parties and the like- regardless of the type of application.
- If in doubt Err on the Side of Caution and transfer to 7822.
- Indicated the following names and/or titles were of interest and should be flagged for review:
  - 9/12 Project,
  - 6103
  - Progressive
  - 6103
  - Pink-Slip Program.
- Elizabeth Hofacre, Tea Party Coordinator/Reviewer
  - Re-empathize that applications with Key Names and/or Subjects should be transferred to 7822 for Secondary Screening. Activities must be primary.
  - "Progressive" applications are not considered "Tea Parties"

**Disaster Relief:** Renee Norton/Joan Kiser

- Advise audience that buzz words or phrases include:
  - "X" Rescue
  - References to the Gulf Coast, Oil Spills,
- Reminded screeners that Disaster Relief is controlled by 7838, and then forwarded to Group 7827, for Secondary Screening.
- Denied Expedites worked by initial screener:
  - Complete Expedite Denial CCR, place on left side of file.
  - Email Renee or Joan with specific reason why expedite was denied and disposition (i.e. AP, IP, 51).
  - Place Post-It on Orange Folder advising Karl
    - "Denied Expedite / Fwd to M Flammer."

**Power of Attorneys:** Nancy Heagney

- Form 2848 that references 990, 941 or the like should be
  - Printed and annotate on the bottom per procedures
  - Documentation on TEDS should be made.
    - See Interim Guidance located on Public Folders.

**Closing Sheets:** Gary Muthert

- Closing Sheets should not cover pertinent info on the AIS sheet or EDS' 8327.
- Case Grade and Data (e.g. NTEEs) must be correctly presented and accurately depict the case's complexity and purpose.
  - Inaccurate presentations create processing delays.
  - Steve Bowling, Mgr 7822 "Volumes of cases are graded incorrectly."
  - EDS and TEDS must Agree to achieve desired business results

**Credit Counseling (CC)**

Stephen Seok

- Re-stressed impact that section 501(q) had on purely educational cases.
  - Cases are fully developed as 501(q) Credit Counseling Cases.
  - Key analysis is whether financial education and/or counseling activities are "substantial".
  - Cases with financial education and/or financial counseling- substantial or insubstantial are still subject to Secondary Screening until further notice.
  - Continue to document the analysis as "Substantial" or "Insubstantial" on the CC Check-sheet.
  - Feedback on cases received is in process.

**TAG**

Jon Waddell

- The New List will be completed and issued this week- approximately 7/30/10.
  - Sharing a Drive on the Server has created the delay/dilemma.
  - Monthly Emails will restart shortly after the List's distribution.
  - Listing will include the following:
    - Touch and Go, Emerging Issues and Issues to Watch For.
    - 6103 Cases\* (Puerto Rico based low-income housing) are considered "Potential Abusive Cases".
    - 6103 Cases (Las Vegas, NV) should continue to be sent to TAG Group for re-screening
- \*LCD referrals are in process since both have questionable practices.



INSPECTOR GENERAL  
FOR TAX  
ADMINISTRATION

DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20005

June 26, 2013

The Honorable Sander M. Levin  
Ranking Member  
Committee on Ways and Means  
U.S. House of Representatives  
Washington, D.C. 20515-6348

Dear Representative Levin:

This letter is in response to letters dated June 24, 2013 and June 26, 2013 regarding our recent audit report entitled "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review." We appreciate the opportunity to clarify our recent report in response to your questions.

TIGTA's audit report focused on criteria being used by the Internal Revenue Service (IRS) during the period of May 2010 through May 2012 regarding allegations that certain groups applying for tax-exempt status were being targeted. We reviewed all cases that the IRS identified as potential political cases and did not limit our audit to allegations related to the Tea Party. TIGTA concluded that inappropriate criteria were used to identify potential political cases for extra scrutiny – specifically, the criteria listed in our audit report. From our audit work, we did not find evidence that the criteria you identified, labeled "Progressives," were used by the IRS to select potential political cases during the 2010 to 2012 timeframe we audited. The "Progressives" criteria appeared on a section of the "Be On the Look Out" (BOLO) spreadsheet labeled "Historical," and, unlike other BOLO entries, did not include instructions on how to refer cases that met the criteria. While we have multiple sources of information corroborating the use of Tea Party and other related criteria we described in our report, including employee interviews, e-mails, and other documents, we found no indication in any of these other materials that "Progressives" was a term used to refer cases for scrutiny for political campaign intervention.

Based on the information you flagged regarding the existence of a "Progressives" entry on BOLO lists, TIGTA performed additional research which determined that six tax-exempt applications filed between May 2010 and May 2012 having the words "progress" or "progressive" in their names were included in the 298 cases the IRS identified as potential political cases. We also determined that 14 tax-exempt applications filed between May 2010 and May 2012 using the words "progress" or "progressive" in their names were not referred for added scrutiny as potential political cases. In total, 30 percent of the organizations we identified with the words "progress" or "progressive" in their names were processed as potential political cases. In

comparison, our audit found that 100 percent of the tax-exempt applications with Tea Party, Patriots, or 9/12 in their names were processed as potential political cases during the timeframe of our audit.

The following addresses the specific questions presented in your June 24, 2013 letter:

- Please describe in detail why your report dated May 14, 2013 omitted the fact that "Progressives" was used.

Our audit did not find evidence that the IRS used the "Progressives" identifier as selection criteria for potential political cases between May 2010 and May 2012. The focus of our audit was on whether the IRS: 1) targeted specific groups applying for tax-exempt status, 2) delayed processing of targeted groups' applications, and 3) requested unnecessary information from targeted groups. We determined the IRS developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names. In addition, we found other inappropriate criteria that were used (e.g., 9/12, Patriots) to select potential political cases that were not included in any BOLO listings. The inappropriate criteria used to select potential political cases for review did not include the term "Progressives." The term "Progressives" appears, beginning in August 2010, in a separate section of the BOLO listings that was labeled "TAG [Touch and Go] Historical" or "Potential Abusive Historical." The Touch and Go group within the Exempt Organizations function Determinations Unit is a different group of specialists than the team of specialists that was processing potential political cases related to the allegations we audited.

- Did you investigate whether the criteria "Progressives" in the BOLO lists was developed in the same manner as you did for "Tea Party"? If not, why?

TIGTA did not audit how the criteria for the "Progressives" identifier were developed in the BOLO listings. We did not audit these criteria because it appeared in a separate section of the BOLO listings labeled as "Historical" (as described above) and we did not have indications or other evidence that it was in use for selecting potential political cases from May 2010 to May 2012.

- Please also explain why footnote 16 on page 6 was included in the audit report.

Footnote 16 was included in our report because TIGTA was aware of other named organizations being on BOLO listings that were not used for selecting cases related to political campaign intervention. TIGTA added this footnote to disclose that we did not audit whether the use of the other named organizations was appropriate. Following the publication of our audit report, we communicated information

regarding other names on the BOLO listings to Acting Commissioner Daniel Werfel, and, to the extent authorized by Title 26 U.S.C. § 6103, the Senate Committee on Finance and the House Committee on Ways and Means.

- If your organization overlooked the existence of the "Progressives" identifier, please describe in detail the process by which your organization investigated the BOLO lists created and circulated by the EO Determinations Unit.

As part of our audit, we reviewed the section of the BOLO listings that related to the specific criteria that the IRS stated were used to identify potential political cases for additional scrutiny. TIGTA also found that certain criteria (e.g., Patriots, 9/12, education of the public by advocacy/lobbying to "make America a better place to live," etc.) used to select potential political cases were not in any BOLO listings.

- Your report states that TIGTA "reviewed all 298 applications that had been identified as potential political cases as of May 31, 2012." (See page 10 of your report.) Your report includes the following breakdown of the potential political cases by organization name: (1) 96 were "Tea Party," "9/12," or "Patriots" organizations; and (2) 202 were "Other." Why did your report not identify that liberal organizations were also included among the 298 applications you reviewed?

TIGTA did not make any characterizations of any organizations in its audit report as conservative or liberal and believes it would be inappropriate for a nonpartisan Inspector General to make such judgments. Instead, our audit focused on the testing of 296 of the 298 potential political cases (two case files were incomplete) to determine if they were selected using the actual criteria that should have been used by the IRS from the beginning to screen potential political cases. Those criteria were whether the specific applications had indications of significant amounts of political campaign intervention (a term used in Treasury's Regulations). For 69 percent of the 296 cases, TIGTA found that there were indications of significant political campaign intervention, while 31 percent of the cases did not have that evidence. We also reviewed samples of 501 (c)(4) cases that were not identified as potential political cases to determine if they should have been. We estimate that more than 175 applications were not appropriately identified as potential political cases.

TIGTA's audit report determined that certain cases were referred for potential political review because their names used terms in the IRS selection criteria. We could not tell why other organizations were selected for additional scrutiny because the IRS did not document specifically why the cases were forwarded to a team of specialists. TIGTA recommended that the IRS do so in the future.

- Why did your testimony before the Committee on Ways and Means, the Oversight and Government Reform Committee, and the Senate Finance Committee not include a discussion of this aspect of the 298 applications?

When I testified, I attempted to convey that our report did not characterize organizations as conservative or liberal and I believe it would be inappropriate for a nonpartisan Inspector General to make such judgments.

- In the course of your audit, what did you discover about the processing of cases with the "Progressives" identifier? Were the cases processed in the same manner as the cases with the "Tea Party" and associated terms identifiers? Or were they processed differently?

TIGTA's audit did not review how TAG Historical cases (including the "Progressives" identifier) were processed because we did not find evidence that the IRS used the TAG Historical section of the BOLO listings as selection criteria for potential political cases between May 2010 and May 2012.

- If you are now auditing or investigating the processing of tax-exemption applications with the "Progressives" identifier, please provide the date that you started the audit or investigation and documentation to support this assertion. We also would like to know if you have briefed and alerted anyone at the IRS or Department of Treasury of such audit or investigation.

TIGTA's Office of Audit made a referral to our Office of Investigations on May 28, 2013 stating that our recently issued audit report noted the use of other named organizations on the BOLO listings that were not related to potential political cases reviewed as part of our audit. TIGTA's Office of Audit requested the Office of Investigations investigate to determine: 1) whether cases meeting the criteria on the "watch list" [a particular section of the BOLO listings] were routed for any additional or specialized review, or were simply referred to the same group for coordinated processing; 2) how many (if any) applications were affected by use of these criteria; 3) who was responsible for the inclusion of these criteria on the BOLO lists; and 4) whether these criteria were added to the BOLO for an improper purpose.

TIGTA also discussed the BOLO listings with the Acting Commissioner of the IRS on May 28, 2013, and expressed our concerns and the importance of the IRS following up on this matter. We notified the Acting Commissioner of our review of this matter on that date. In addition, I informed the Department of the Treasury's Chief of Staff and General Counsel about this matter.

Pursuant to authorization under Title 26 U.S.C. § 6103, we also provided these BOLO listings to House Ways and Means Committee Majority staff and the Senate Finance Committee Majority and Minority staff on June 7, 2013. We spoke to staff from House Ways and Means Committee Majority staff on the BOLOs on June 6 and June 11, 2013, and Senate Finance Committee Majority and Minority staff on June 10, 2013. We informed the staff we met with of our ongoing review of this matter.

Because of Privacy Act and Title 26 U.S.C. § 6103 restrictions, TIGTA cannot comment specifically on the status of any ongoing investigation. TIGTA will continue its efforts to provide independent oversight of IRS activities and accomplish its statutory mission through audits, inspections and evaluations, and investigations of criminal and administrative misconduct.

In your June 26, 2013 letter, you raised concerns about statements attributed to TIGTA sources by members of the media. Many of the press reports are not accurate. Please rely on our statements in this letter, my testimony, and our published materials for an accurate portrayal of our position.

We hope this information is helpful. If you or your staff has any questions, please contact me at 202-[REDACTED] or Acting Deputy Inspector General for Audit Michael E. McKenney at 202-[REDACTED].

Sincerely,

A handwritten signature in black ink that reads "J. Russell George". The signature is written in a cursive, flowing style.

J. Russell George  
Inspector General





DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

JUN 24 2013

June 24, 2013

The Honorable Darrell Edward Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

I am responding to your request for documents relating to the screening and review process for applicants for tax-exempt status. I am providing copies of "Be on the Lookout" (BOLO) spreadsheets from which IRC section 6103 information has been redacted.

We are committed to providing you with as full a response as possible and to full cooperation with you and your staff to address this matter.

Our efforts to gather documents related to the TIGTA report 2013-10-053, dated May 14, 2013, are ongoing. These documents are being produced from the set that been reviewed to date. To the extent our continuing searches reveal additional BOLO lists responsive to your request, we will provide them.

The attached documents are indexed by Bates stamped numbers IRS0000001349 to IRS0000001537 and numbers IRS0000002479-IRS0000002591 and numbers IRS0000002705 to IRS0000002717.

I hope this information is helpful. If you have questions, please contact me or have your staff contact me at 202-[REDACTED].

Sincerely,

A handwritten signature in dark ink, appearing to read "Leonard Oursler".

Leonard Oursler  
Area Director

Testimony of Carter Hull  
Tax Law Specialist in EO Technical Unit  
June 14, 2013

Q. Okay. Now, sir, in this period, roughly March of 2010, was there a time when someone in the IRS told you that you would be assigned to work on two Tea Party cases? 23

A. Yes.

\*\*\*

Q. Do you recall when precisely you were told that you would be assigned two Tea Party cases?

A. When precisely, no.

Q. Sometime in –

A. Sometime in the area, but I did get, they were assigned to me in April.

\*\*\*

Q. Okay, and just to be clear, April of 2010?

A. Yes.

\*\*\*

Q. And sir, were they cases 501(c)(3)s, or 501(c)(4)s?

A. One was a 501(c)(3), and one was a 501(c)(4).

Q. So one of each?

A. One of each.

Q. What, to your knowledge, was it intentional that you were sent one of each?

A. Yes.

Q. Why was that?

A. I'm not sure exactly why. I can only make assumptions, but those are the two areas that usually had political possibilities.

\*\*\*

Q. The point of my question was, no one ever explained to you that you were to understand and work these cases for the purpose of working similar cases in the future?

\*\*\*

A. All right, I -- I was given -- they were going to be test cases to find out how we approached (c)(4), and (c)(3) with regards to political activities.

\*\*\*

Q. Mr. Hull, before we broke, you were talking about these two cases being test cases, is that right? Do you recall that?

A. I realized that there were other cases. I had no idea how many, but there were other cases. And they were trying to find out how we should approach these organizations, and how we should handle them.

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Q. And when you say these organizations, you mean Tea Party organizations?

A. The two organizations that I had.

Testimony of Carter Hull  
Tax Law Specialist in EO Technical Unit  
June 14, 2013

Q. Did you send out letters to both organizations the 501(c)(3) and 501(c)(4)?

A. I did.

Q. Did you get responses from both organizations?

A. I got response from only one organization.

Q. Which one?

A. The (c)(4).

Q. (C)(4). What did you do with the case that did not respond?

A. I tried to contact them to find out whether they were going to submit anything.

Q. By telephone?

A. By telephone. And I never got a reply.

Q. Then what did you do with the case?

A. I closed it, failure to establish.

\*\*\*

Q. So at this time, when the (c)(3) became the FTE, did you begin to work only on the (c)(4)?

A. I notified my supervisor that I would need another (c)(3) if they wanted me to work one of each.

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Q. How did you phrase the request to Ms. Hofacre? Was it -- were you asking for another (c)(3) Tea Party application?

A. I was asking for another (c)(3) application in the lines of the first one that she had sent up. I'm not sure if I asked her for a particular organization or a particular type of organization. I needed a (c)(3) that was maybe involved in political activities.

Q. And the first (c)(3), it was a Tea Party application?

A. Yes, it was.

Testimony of Elizabeth Hofacre  
Revenue Agent in Determinations Unit  
May 31, 2013

- Q. And you mentioned the Tea Party cases. Do you have an understanding of whether the Tea Party cases were part of that grouping of organizations with political activity, or were they separate?
- A. That was the group of political cases.
- Q. So why do you call them Tea Parties if it includes more than --
- A. Well, at that time that's all they were. That's all that we were -- that's how we were classifying them.
- Q. In 2010, you were classifying any organization that had political activity as a Tea Party?
- A. No, it's the latter. I mean, we were looking at Tea Parties. I mean, political is too broad.
- Q. What do you mean when you say political is too broad?
- A. No, because when -- what do you mean by "political"?
- Q. Political activity -- if an application has an indication of political activity in it.
- A. I mean, I was tasked with Tea Party, so that's all I'm aware of. So I wasn't tasked with political in general.
- Q. Was there somebody who was tasked with political in general?
- A. Not that I'm aware of.

Testimony of Ron Bell  
Exempt Organizations Specialist in Determinations Unit  
June 13, 2013

Q. Okay. So at this point between October 2010 and July 2011, were all the Tea Party cases going to you?

A. Correct.

Q. And to your knowledge, during this same time period, was it only Tea Party cases that were being assigned to you or were there other advocacy cases that were part of this group?

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A. Does that include 9/12 and Patriot?

Q. Yes, yes.

A. Yes.

Q. Okay. So it was just those type of cases, not other type of advocacy cases that maybe had a different -- a different political -- a liberal or progressive case?

A. Correct.

\*\*\*

Q. Okay. And to your knowledge, when you were first assigned these cases in October 2010 and through July 2011, do you know what criteria the screening unit was using to identify the cases to send to you?

A. Yes.

Q. And what was that criteria?

A. It was solicited on the Emerging Issues tab of the BOLO report.

Q. And what did that say? What did that Emerging Issue tab on the BOLO say?

A. In July 20 –

Q. In October 2010 we'll start.

A. I don't know exactly what it said, but it just -- Tea Party cases, 9/12, Patriot.

Q. And do you recall how many cases you inherited from Ms. Hofacre?

A. 50 to 100.

Q. And were those only Tea Party-type cases as well?

A. To the best of my knowledge.



Testimony of Carter Hull  
Tax Law Specialist in EO Technical Unit  
June 14, 2013

- A. I'm not sure who mentioned Tea Party, but at that point Lois I remember breaking in and saying no, no, we don't refer to those as Tea Parties anymore. They are advocacy organizations.
- Q. And what was her tone when saying that?
- A. Very firm.
- Q. Did she explain why she wanted to change the reference?
- A. She said that the Tea Party was just too pejorative.

Testimony of Ron Bell  
Exempt Organizations Specialist in Determinations Unit  
June 13, 2013

- Q. And do you recall when that – when the BOLO was changed after – you said it was after the meeting [with Lerner], they changed the BOLO after the meeting, do you recall when?
- A. July.
- Q. Of 2011?
- A. Yes, sir.
- Q. And you were going to say the BOLO became more, and then you were cut off. What were you going to say?
- A. It became more – they had more the advocacy, more organizations to the advocacy, like I mentioned about maybe a cat rescue that's advocating for let's not kill the cats that get picked up by the local government in whatever cities.

Testimony of Ron Bell  
Exempt Organizations Specialist in Determinations Unit  
June 13, 2013

- Q. Mr. Bell, in July 2011, when the BOLO was changed where they chose broad language, after that point, did you conduct secondary screening on any of the cases that were being held by you?
- A. You mean the cases that I inherited from Liz are the ones that had already been put into the whatever timeframe, Tea Party advocacy, slash advocacy?
- Q. Other type, yes.
- A. No, these were new ones coming in that someone thought that they perhaps should be in the advocacy, slash, Tea Party inventory.
- Q. Okay.
- A. They were assigned to Group 7822, and I reviewed them, and you know, maybe some were, but a vast majority was like outside the realm we were looking for.
- Q. And so they were like the . . . cat type cases you were discussing earlier?
- A. Yes.
- \*\*\*
- Q. After the July 2011 change to the BOLO, how long did you perform the secondary screening?
- A. Up until July 2012.
- Q. So, for a whole year?

A. Yeah.

Q. And you would look at the cases and see if they were not a Tea Party case, you would move that either to closing or to further development?

A. Yeah, and then the BOLO changed about midway through that timeframe.

Q. Okay.

A. To make it where we put the note on there that we don't need the general advocacy.

Q. And after the BOLO changed in January 2012, did that affect your secondary screening process?

A. There was less cases to be reviewed.

Q. Okay. So during this whole year, the Tea Party cases remained on hold pending guidance from Washington while the other cases that you identified as non-Tea Party cases were moved to either closure or further development; is that right?

A. Correct.

Testimony of Michael Seto  
Manager of EO Technical Unit  
July 11, 2013

- Q. -- about the cases? What about Miss Lerner, did you ever talk to Miss Lois Lerner about the cases at this point in time, January-February 2011?
- A. No, I have not talked to her verbally about it.
- Q. But did you talk to her nonverbally about these cases in that period of time?
- A. She sent me email saying that when these cases need to go through multi-tier review and they will eventually have to go to Miss Kindell and the chief counsel's office.
- Q. Miss Lerner told you this in an email?
- A. That's my recollection.

Testimony of Carter Hull  
Tax Law Specialist in EO Technical Unit  
June 14, 2013

Q. Have you ever sent a case to Ms. Kindell before?

A. Not to my knowledge.

Q. This is the only case you remember?

A. Uh-huh.

Q. Correct?

A. This is the only case I remember sending directly to Judy.

\*\*\*

Q. Had you ever sent a case to the Chief Counsel's office before?

A. I can't recall offhand.

Q. You can't recall. So in your 48 years of experience with the IRS, you don't recall sending a case to Ms. Kindell or a case to IRS Chief Counsel's office?

A. To Ms. Kindell, I don't recall ever sending a case before. To Chief Counsel, I am sure some cases went up there, but I can't give you those.

Q. Sitting here today you don't remember?

A. I don't remember.

Testimony of Ron Bell  
Exempt Organizations Specialist in Determinations Unit  
June 13, 2013

Q. So did you see something different in these Tea Party cases applying for 501(c)(4) status that was different from other organizations that had political activity, political engagement applying for 501(c)(4) status in the past?

A. I'm not sure if I understand that.

Q. I guess what I'm getting at is you said you had seen previous applications from an organization applying for 501(c)(4) status that had some level of political engagement, and these Tea Party groups are also applying for 501(c)(4) status and they have some level of political engagement. Was there any difference in your mind between the Tea Party groups and the other groups that you'd seen in your experience at the IRS?

A. No.

Q. So, do you think that Tea Party groups are treated the same as these other groups from your previous experience?

A. No.

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Q. In your experience, was there anything different about the way that the Tea Party 501(c)(4) cases were treated that was as opposed to the previous 501(c)(4) applications that had some level of political engagement?

A. Yes.

Q. And what was different?

A. Well, they were segregated. They seemed to have been more scrutinized. I hadn't interacted with EO technical [in] Washington on cases really before.

Q. You had not?

A. Well, not a whole group of cases.



Testimony of Stephen Seok  
Group Manager of EO Determinations Unit  
June 19, 2013

Q. And to your knowledge, the cases that you worked on, was there anything different or novel about the activities of the Tea Party cases compared to other (c)(4) cases you had seen before?

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A. Normal (c)(4) cases we must develop the concept of social welfare, such as the community newspapers, or the poor, that types. These organizations mostly concentrate on their activities on the limiting government, limiting government role, or reducing government size, or paying less tax. I think it[']s different from the other social welfare organizations which are (c)(4).

\*\*\*

Q. So the difference between the applications that you just described, the applications for folks that wanted to limit government, limit the role of government, the difference between those applications and the (c)(4) applications with political activity that you had worked in the past, was the nature of their ideology, or perspective, is that right?

A. Yeah, I think that's a fair statement. But still, previously, I could work, I could work this type of organization, applied as a (c)(4), that's possible, though. Not exactly Tea Party, or 9-12, but dealing with the political ideology, that's possible, yes.

Q. So you may have in the past worked on applications from (c)(4), applicants seeking (c)(4) status that expressed a concern in ideology, but those applications were not treated or processed the same way that the Tea Party cases that we have been talking about today were processed, is that right?

- A. Right. Because that [was] way before these – these organizations were put together. So that's way before. If I worked those cases, way before this list is on.

Testimony of Robert Choi  
Former Director of IRS Rulings and Agreements  
August 21, 2013

- Q. You said earlier in the last hour there was email traffic about the ACORN successor groups in 2010; is that right?
- A. That's correct, yes.
- Q. But the ACORN successor groups were not subject to a sensitive case report; is that right?
- A. I don't recall if they were listed in there, in the sensitive case report.
- Q. So you don't recall them being part of a sensitive case report?
- A. I think what I'm saying is they may be part of a sensitive case report. I do not have a specific recollection that they were listed in a sensitive case report.
- Q. But you do have a specific recollection that the Tea Party cases were on sensitive case reports in 2010.
- A. Yes.
- Q. To your knowledge, did any ACORN successor application go to the Chief Counsel's Office?
- A. I am not aware of it.
- Q. Are you aware of any ACORN successor groups facing application delays?
- A. I do not know if – well, when you say "delays," how do you –
- Q. Well –

- A. I mean, I'm aware of successor ACORN applications coming in, and I am aware of email traffic that talked about my concern of delays on those cases and, you know, that there was discussion about seeing an influx of these applications which appear to be related to the previous organization.

\*\*\*

- Q. And the concern behind the reason that they weren't being processed was that they were potentially the same organization that had been denied previously?

- A. Not that they were denied previously. These appeared to be successor organizations, meaning these were newly formed organizations with a new EIN, employer identification number, located at the same address as the previous organization and, in some instances, with the same officers.

And it was an issue of concern as to whether or not these were, in fact, the same organizations just coming in under a new name; whether, in fact, the previous organizations, if they were, for example, 501(c)(3) organizations, properly disposed of their assets. Did they transfer it to this new organization? Was this perhaps an abusive scheme by these organizations to say that they went out of business and then not really but they just carried on under a different name?

- Q. And that's the reason they were held up?

- A. Yes.

Testimony of Lucinda Thomas  
Program Manager of EO Determinations Unit  
June 28, 2013

Q. Ms. Thomas, is this an example of the BOLO from looks like November 2010?

A. I don't know if it was from November of 2010, but –

Q. This is an example of the BOLO, though?

A. Yes.

Q. Okay. And, ma'am, under what has been labeled as tab 2, TAG Historical?

A. Yes.

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Q. Let's turn to page 1354.

A. Okay.

Q. Do you see that, it says -- the entry says progressive?

A. Yes.

Q. This is under TAG Historical, is that right?

A. Yes.

Q. So this is an issue that hadn't come up for a while, is that right?

A. Right.

Q. And it doesn't note that these were referred anywhere, is that correct? What happened with these cases?

- A. This would have been on our group as – because of – remember I was saying it was consistency-type cases, so it's not necessarily a potential fraud or abuse or terrorist issue, but any cases that were dealing with these types of issues would have been worked by our TAG group.
- Q. Okay. And were they worked any different from any other cases that EO Determinations had?
- A. No. They would have just been worked consistently by one group of agents.
- Q. Okay. And were they cases sent to Washington?
- A. I'm not – I don't know.
- Q. Not that you are aware?
- A. I'm not aware of that.
- Q. As the head of the Cincinnati office you were never aware that these cases were sent to Washington?
- A. There could be cases that are transferred to the Washington office according to, like, our [Internal Revenue Manual] section. I mean, there's a lot of cases that are processed, and I don't know what happens to every one of them.
- Q. Sure. But these cases identified as progressive as a whole were never sent to Washington?
- A. Not as a whole.

Testimony of Elizabeth Hofacre  
Revenue Agent in EO Determinations Unit  
May 31, 2013

- Q. In 2010, you were classifying any organization that had political activity as a Tea Party?
- A. No, it's the latter. I mean, we were looking at Tea Parties. I mean, political is too broad.
- Q. What do you mean when you say political is too broad?
- A. No, because when -- what do you mean by "political"?
- Q. Political activity -- if an application has an indication of political activity in it.
- A. I mean, I was tasked with Tea Party, so that's all I'm aware of. So I wasn't tasked with political in general.
- Q. Was there somebody who was tasked with political in general?
- A. Not that I'm aware of.

Testimony of Steven Grodnitzky  
Manager in EO Technical Unit  
July 16, 2013

Q. So these Democratic-leaning organizations, their applications took approximately 3 years to process?

A. On or around. I mean, if they came in at the end of 2008, for example, and were resolved in the beginning of 2011, it may be a little over 2 years. But I mean, on or around that time period.

\*\*\*

Q. Did those 2008 Democratic-leaning applications involve potential political campaign activity as well?

A. Yes, we had -- the organizations were related in the sense that they were -- how can I say this? -- sort of like an -- I am going to call it, for lack of a better term, like when you have in a veterans-type organization, you have posts, and there is one in each State. And that is sort of what it was like. So they were very similar in the sense that the main difference that I recall was that they were just from one State to the next. And we found in those particular cases that the organization was benefiting the Democratic Party, and there was too much private benefit to that particular party. And the organization was denied.



Testimony of Amy Franklin Giuliano  
Attorney Advisor in IRS Chief Counsel's Office  
August 9, 2013

Q. And you said that some of those five progressive applications were approved in a matter of hours; is that right?

A. Yes.

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Q. The reason that the other five cases would be revoked if that case the Counsel's Office had was denied, was that because they were affiliated entities?

A. It is because they were essentially the same organization. I mean, every – the applications all presented basically identical facts and basically identical activities.

Q. And the groups themselves were affiliated.

A. And the groups themselves were affiliated, yes.

\*\*\*

Q. The issue in the case you reviewed in May of 2010 was private benefit.

A. Yes.

Q. As opposed to campaign intervention.

A. We considered whether political campaign intervention would apply, and we decided it did not.

Testimony of Sharon Light  
Senior Technical Advisor  
September 5, 2013

Q Were you aware that there was an entry for Occupy organizations in the BOLO by the May 2012 time frame?

A I don't think I was. My understanding of Determinations at that point was if you saw an organization or issue that you thought Determinations should be on the watch for, you would -- I would send an email to Cindy and say, hey, can you tell your screeners to keep an eye out for this, so it didn't slip through and get approved without someone looking at it.

Q Did you become aware of the entry on the BOLO for Occupy organizations at a later date?

A Yes, I did at some point.

Q And why did you become aware of the entry on the BOLO for the Occupy organizations -- or, rather, how?

A I believe I became aware of it the summer after it hit the news that groups were -- well, I became aware of it after it was reported that only conservative groups were being singled out by the IRS.

Testimony of Joseph Grant  
Commissioner, Tax Exempt and Government Entities  
September 25, 2013

- Q Were you aware that for a period of time the IRS also specifically referenced "Occupy" on a BOLO?
- A I subsequently became aware of that. I was not aware of that at the time.

Testimony of Nancy Marks  
Senior Technical Advisor to the Commissioner, Tax  
Exempt and Government Entities  
October 8, 2013

- Q Were you aware in the spring 2012 timeframe that there was a "Be on the Look Out" list entry specifically identifying Occupy groups by name?
- A I don't think I knew that in the spring of 2012. At some point, I became aware that that was one of the things on the "Be on the Look Out" list.

Testimony of Elizabeth Kastenburger  
Tax Law Specialist in EO Technical Unit  
July 31, 2013

- Q. Do you recall if progressive or Occupy groups were among those listed on the BOLO?
- A. No, I don't know.
- Q. Do you know how Occupy groups, as in Occupy Wall Street groups, were processed by the IRS?
- A. No, I do not know.

Testimony of Justin Lowe  
Technical Advisor, Tax Exempt and Government Entities  
July 23, 2013

- Q. ...Do you recall whether as a tax law specialist in EO Guidance you referred cases related to Occupy organizations?
- A. It's a pretty broad descriptor, so I don't know exactly.  
I don't think so, but I couldn't tell you definitively one way or the other...

Testimony of Ron Bell  
Exempt Organizations Specialist in Determinations Unit  
June 13, 2013

- Q. Okay. And is it normal procedure for EO Technical to have to -- for you -- for you to have to wait for approval from EO Technical to move these cases?
- A. Not in my personal experience.
- Q. Okay. So this was something that was unusual that you were having to wait on Washington?
- A. In -- from -- in my experience.
- Q. In your experience. Okay.

Testimony of Steven Grodnitzky  
Manager in EO Technical Unit  
July 16, 2013

- Q. Is it fair to say that those Democratic organizations that were grouped together in the 2008 time frame were treated similarly to the Tea Party cases that you saw in the 2010 time frame?
- A. Sure. I mean, it is fair to say that they were treated similarly. It is -- there were fewer of them. Unlike the Tea Party, my understanding is that there are more -- as far as quantity there is more of them.



Testimony of Amy Franklin Giuliano  
Attorney Advisor in IRS Chief Counsel's Office  
August 9, 2013

- Q. Did you ever speak to Mr. Griffin about these cases around the time they were assigned to you, or the one assigned to you?
- A. Yes. He handed the case that was assigned to me to me directly.
- Q. And what did he say to you?
- A. He said, "This is a (c)(4) case that presents the question of political advocacy. It seems to be conservative-leaning."

\*\*\*

- Q. Prior to you receiving this case in June of 2011, do you know if it was worked by IRS officials in Washington?
- A. Yes. On top of the case file were three memos, all by D.C. employees.
- Q. Who were the memos from?
- A. Janet Gitterman, Siri Buller, and Justin Lowe.
- Q. And what was the substance of these memos?
- A. The memo from Janet was first because I believe she was, sort of, their docket attorney. I don't know what they call it. And she explained that she had looked through the file, that some of the ads seemed to verge on political campaign intervention, and it wasn't an election year. She raised that the group leased space from a Republican group. But she said that it seemed that the amount of political activity did not preclude exemption.

There was a memo from Siri Buller as sort of a concurring -- I think she was kind of asked to review what Janet had done. And Siri's

memo is much longer and listed about 15 instances of what could be considered political campaign intervention and said that there is political campaign intervention here but maybe not enough to preclude exemption.

And then Justin Lowe had about a one-page memo that sort of said, you know, the ads seem to be propaganda, they don't seem to be informative, but not sure that that's a reason to deny, so I concur.

Q. So all three of them, Ms. Gitterman, Ms. Buller, and Mr. Lowe, all concurred in the recommendation to approve exemption?

A. Yes.

Q. And Ms. Gitterman and Ms. Buller, are they in EO Technical, do you know?

A. I don't know. It's either Technical or Guidance, and I don't really understand the difference.

\*\*\*

Q. So, you're aware of some coordination between EO Technical or EO Guidance and Cincinnati regarding the treatment of this group of progressive cases?

A. Yes. I mean, I was aware of it because I knew that enough communication had happened to get three like cases to one person in D.C.

Q. And it sounded like there was concern about the way the cases had been developed in Cincinnati; is that fair?

A. I think there was concern that -- that a -- yeah. That it looked like maybe they should be denials, yet already the five favorables had gone out. There was a concern that we were going to be treating the taxpayers inconsistently.

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Q. In this case, the -- did you state that the ultimate outcome was a recommendation for denial?

A. Yes, that was our recommendation.

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MEMORANDUM

**TO:** Honorable Darrell E. Issa, Chairman  
Committee on Oversight and Government Reform

Stephen Castor, General Counsel  
Committee on Oversight and Government Reform

**FROM:** Office of General Counsel  
United States House of Representatives

**DATE:** March 25, 2014

**RE:** Lois Lerner and the Rosenberg Memorandum

You advised us that the Committee on Oversight and Government Reform (“Oversight Committee” or “Committee”) may consider a resolution recommending that the full House hold former Internal Revenue Service (“IRS”) employee Lois G. Lerner in contempt of Congress for refusing to answer questions at a Committee hearing that began on May 22, 2013, and continued on March 5, 2014.

To assist you in determining whether the Committee should take up such a resolution, and to assist Committee Members (who, we understand, will be privy to the contents of this memorandum) in determining how to proceed if such a resolution is taken up, you asked that we analyze a March 12, 2014 memorandum, prepared by former Congressional Research Service (“CRS”) attorney Morton Rosenberg. That memorandum concludes that “the requisite legal foundation for a criminal contempt of Congress prosecution mandated by the Supreme Court

rulings in [*Quinn v. United States*, 349 U.S. 155 (1955), *Emspak v. United States*, 349 U.S. 190 (1955), and *Bart v. United States*, 349 U.S. 219 (1955)] ha[s] not been met” as to Ms. Lerner. Mem. from Morton Rosenberg, Leg. Consultant, to Hon. Elijah E. Cummings, Ranking Member, H. Comm. on Oversight & Gov’t Reform at 4 (Mar. 12, 2014) (“Rosenberg Memorandum”), attached to Letter from Hon. Elijah E. Cummings, Ranking Member, H. Comm. on Oversight & Gov’t Reform, to Hon. John Boehner, Speaker (Mar. 12, 2014).

By “criminal contempt of Congress prosecution,” Mr. Rosenberg presumably means the approval of a resolution of contempt by the full House, followed by a referral to the United States Attorney for the District of Columbia pursuant to 2 U.S.C. § 194, followed by an indictment and prosecution pursuant to 2 U.S.C. § 192 for “refus[al] to answer . . . question[s] pertinent to the” Committee’s investigation. If so, we agree with Mr. Rosenberg that the *Quinn* trilogy of cases articulates a key legal standard that underlies the viability of such a prosecution. However, we disagree with his conclusion that that standard has not been satisfied here.

The question, in brief, is whether Ms. Lerner was “clearly apprised that the [C]ommittee demand[ed] [her] answer[s] [to its questions] notwithstanding h[er] Fifth Amendment] objections.” *Quinn*, 349 U.S. at 166. Based on our review of the record, we believe Ms. Lerner clearly was so apprised for two independent reasons. *First*, the Committee formally rejected her Fifth Amendment claims and expressly advised her of its determination (a fact that she, through her attorney, acknowledged prior to her appearance at the reconvened hearing on March 5, 2014). *Second*, the Committee Chairman thereafter advised Ms. Lerner in writing that the Committee expected her to answer its questions, and advised her orally, at the reconvened hearing on March 5, 2014, that she faced the possibility of being held in contempt of Congress if she continued to decline to provide answers.

We now explain our reasoning in more detail.

#### **PERTINENT FACTUAL BACKGROUND**

The underlying Oversight Committee investigation concerns allegations that the IRS subjected organizations applying for tax-exempt status to differing degrees of scrutiny, and/or applied to them differing standards of approval, depending on the political orientation of the organizations. From the outset, Ms. Lerner, who at all pertinent times was the Director of the Exempt Organizations Division of the IRS' Tax Exempt and Government Entities Division, was a central figure in the investigation.<sup>1</sup>

Ms. Lerner, accompanied by her experienced personal counsel,<sup>2</sup> appeared at the Oversight Committee's May 22, 2013 hearing session pursuant to a Committee subpoena which commanded her to "appear" and "to testify." Subpoena to Lois Lerner (May 17, 2013) ("Subpoena"). After being sworn, Ms. Lerner voluntarily made a lengthy statement in which she effectively testified about a number of matters, including (i) the fact that she was a lawyer and had practiced law at the Department of Justice ("DOJ") and the Federal Election Commission; (ii) her experience with the IRS, including, in particular, the Exempt Organizations Division; (iii) a May 14, 2013 Treasury Inspector General for Tax Administration ("TIGTA") report which concerned issues similar to those being investigated by the Committee and which criticized the Exempt Organizations Division headed by Ms. Lerner, *see* Treasury Inspector Gen. for Tax

<sup>1</sup> According to press reports, Ms. Lerner retired from government service, effective September 23, 2013. *See, e.g.,* John D. McKinnon, *Lois Lerner, at Center of IRS Investigation, Retires*, Wall St. J., Sept. 23, 2013, *available at* <http://online.wsj.com/news/articles/SB10001424052702304713704579093461064758006>.

<sup>2</sup> Ms. Lerner's counsel, William W. Taylor, III, is a senior partner with Zuckerman Spaeder, a Washington, D.C.-based law firm. He is a seasoned white-collar criminal defense attorney and has prior experience, dating back to the 1980s, representing clients before congressional committees. *See* Zuckerman Spaeder LLP, William W. Taylor, III, [http://www.zuckerman.com/william\\_taylor](http://www.zuckerman.com/william_taylor) (last visited Mar. 25, 2014).

Admin., *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, Ref. No. 2013-10-053 (May 14, 2013), available at <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>; (iv) DOJ's investigation into the same matters being investigated by TIGTA; and (v) her asserted innocence: "I have done nothing wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee." *The IRS: Targeting Americans for Their Political Beliefs: Hr'g Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 22 (May 22, 2013) (statement of Lois Lerner). In addition, in conjunction with her statement, Ms. Lerner authenticated a collection of her written responses to questions asked of her by TIGTA in the course of its investigation. See *id.* at 22-23.

After Ms. Lerner completed her statement, and after she had authenticated the collection of her written responses, the following exchange occurred:

**CHAIRMAN ISSA.** Ms. Lerner, the topic of today's hearing is the IRS' improper targeting of certain groups for additional scrutiny regarding their application for tax-exempt status. As Director of Exempt Organizations of the Tax-Exempt and Government Entities Division of the IRS, you were uniquely positioned to provide testimony to help this committee better understand how and why the IRS targeted these groups. *To that end, I must ask you to reconsider, particularly in light of the fact that you have given not once, but twice testimony before this committee under oath this morning.* You have made an opening statement in which you made assertions of your innocence, assertions you did nothing wrong, assertions you broke no laws or rules. Additionally, you authenticated earlier answers to the IG.

*At this point I believe you have not asserted your rights, but, in fact, have effectively waived your rights. Would you please seek [counsel] for further guidance on this matter while we wait?*

**MS. LERNER.** I will not answer any questions or testify about the subject matter of this committee's meeting.

**CHAIRMAN ISSA.** We will take your refusal as a refusal to testify.

*Id.* at 23 (emphases added); *see also id.* (statement of Rep. Gowdy) (“She just testified. She just waived her Fifth Amendment right to privilege. You don’t get to tell your side of the story and then not be subjected to cross examination. That’s not the way it works. She waived her right of Fifth Amendment privilege by issuing an opening statement. She ought to stay in here and answer our questions.”).

After hearing testimony from the remaining witnesses, the Chairman recessed the May 22, 2013 hearing session with the following remarks:

And, with that, at the beginning of this hearing, I called four witnesses. Pursuant to a subpoena, Ms. Lois Lerner arrived. We had been previously communicated by her counsel – and she was represented by her own independent counsel – that she may invoke her Fifth Amendment privileges.

Out of respect for this constitutional right and on advice of committee counsel, we, in fact, went through a process that included the assumption which was – which I did, which was that she would not make an opening statement. She chose to make an opening statement.

In her opening statement, she made assertions under oath in the form of testimony. Additionally, faced with the interview notes that we received at the beginning of the hearing, I asked her if they were correct, and she answered yes.

It is – and it was brought up by Mr. Gowdy that, in fact, in his opinion as a longtime district attorney, Ms. Lerner may have waived her Fifth Amendment rights by addressing core issues in her opening statement and authentication afterwards.

I must consider this. *So, although I excused Ms. Lerner, subject to a recall, I am looking into the possibility of recalling her and insisting that she answer questions in light of a waiver.*

For that reason and with your understanding and indulgence, this hearing stands in recess, not adjourned.



*Id.* at 124 (statement of Chairman Issa) (emphasis added).

On June 28, 2013, the Committee met in public to consider whether Ms. Lerner had waived her Fifth Amendment privilege by making her voluntarily statement. The Chairman noted that, while he could have ruled on the waiver issue himself during the course of the May 22, 2013 hearing session, he had chosen the more deliberate course of putting the issue to a Committee vote. *See Tr. of Bus. Meeting of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 4 (June 28, 2013) ("June 28, 2013 Business Meeting Transcript") (statement of Chairman Issa), *video record available at* <http://oversight.house.gov/markup/full-committee-business-meeting-15>. During the intervening 37 days, the Committee had received and considered, among other things, Ms. Lerner's views on the waiver issue, as expressed in writing by her counsel on her behalf. *See id.* at 5 (entering Ms. Lerner's views into the record).

The Chairman then expressed his views as follows:

Having now considered the facts and arguments, I believe Lois Lerner waived her Fifth Amendment privileges. She did so when she chose to make a voluntary opening statement.

Ms. Lerner's opening statement referenced the Treasury IG report, and the Department of Justice investigation . . . and the assertions that she had previously provided false information to the committee. She made four specific denials. Those denials are at the core of the committee's investigation in this matter. She stated that she had not done anything wrong, not broken any laws, not violated any IRS rules or regulations, and not provided false information to this or any other congressional committee regarding areas about which committee members would have liked to ask her questions. Indeed, committee members are still interested in hearing from her. Her statement covers almost the entire range of questions we wanted to ask when the hearing began on May 22.

*Id.*

After a vigorous debate, the Committee approved, by a 22-17 vote, a resolution which states in pertinent part as follows:

Resolved, That the Committee on Oversight and Government Reform determines that the voluntary statement offered by Ms. Lerner constituted a waiver of her Fifth Amendment privilege against self-incrimination as to all questions within the subject matter of the Committee hearing that began on May 22, 2013, including questions relating to (i) Ms. Lerner's knowledge of any targeting by the Internal Revenue Service of particular groups seeking tax exempt status, and (ii) questions relating to any facts or information that would support or refute her assertions that, in that regard, "she has not done anything wrong," "not broken any laws," "not violated any IRS rules or regulations," and/or "not provided false information to this or any other congressional committee."

*Res. of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (June 28, 2013) ("June 28, 2013 Resolution"), available at <http://oversight.house.gov/wp-content/uploads/2013/06/Resolution-of-the-Committee-on-Oversight-and-Government-Reform-6-28-131.pdf>; see also June 28, 2013 Bus. Meeting Tr. at 65-66 (recording vote).

On February 25, 2014, the Chairman wrote to Ms. Lerner's counsel as follows:

At [the May 22, 2013 session of] the hearing, Ms. Lerner gave a voluntary opening statement, under oath, discussing her position at the IRS and professing her innocence. After that opening statement, during which she spoke in detail about the core issues under consideration at the hearing, Ms. Lerner invoked the Fifth Amendment and declined to answer questions from Committee Members . . . . I temporarily excused Ms. Lerner from, and later recessed, the hearing to allow the Committee to determine whether she had waived her asserted Fifth Amendment right. The Committee subsequently determined that Ms. Lerner in fact had waived that right.

\* \* \*

*[B]ecause the Committee explicitly rejected [Ms. Lerner's] Fifth Amendment privilege claim, I expect her to provide answers when the hearing reconvenes on March 5.*

Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to William W. Taylor, III, Esq., at 1-2 (Feb. 25, 2014) ("Issa February 25, 2014 Letter") (emphasis added). Ms. Lerner's counsel responded the next day that "[w]e understand that the Committee

voted that she had waived her rights.” Letter from William W. Taylor, III, Esq., to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, at 1 (Feb. 26, 2014) (“Taylor February 26, 2014 Letter”).

Finally, on March 5, 2014, while still subject to the Subpoena and again accompanied by her counsel, Ms. Lerner appeared at the reconvened session of the Committee hearing that originally began on May 22, 2013. At the outset of the reconvened session, the Chairman stated as follows:

Today, we have recalled Ms. Lois Lerner, the former director of Exempt Organizations at the IRS. Ms. Lerner appeared for the May 22nd, 2013, hearing under a subpoena, and that subpoena remains in effect.

Before we resume our questioning, I am going to briefly state for the record a few developments that have occurred since the hearing began 9 months ago. *These are important for the record and for Ms. Lerner to know and understand.*

On May 22nd, 2013, after being sworn in at the start of the hearing, Ms. Lerner made a voluntary statement under oath discussing her position at the IRS and professing her innocence.

Ms. Lerner did not provide the committee with any advance notification of her intention to make such a statement.

During her self-selected and entirely voluntary statement, Ms. Lerner spoke in detail about core issues under consideration at the hearing when she stated, “I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee.”

\* \* \*

At that hearing, a member of the committee, Mr. Gowdy, stated that Ms. Lerner had waived her right to invoke the Fifth Amendment because she had given a voluntary statement professing her innocence.

I temporarily excused Ms. Lerner from the hearing and subsequently recessed the hearing to consider whether Ms. Lerner had in fact waived her Fifth Amendment rights.

\* \* \*

At a business meeting on June 28, 2013, the committee approved a resolution rejecting Ms. Lerner's claim of Fifth Amendment privilege based on her waiver . . . .

After that vote, having made the determination that Ms. Lerner waived her Fifth Amendment rights, the committee recalled her to appear today to answer questions pursuant to rules. *The committee voted and found that Ms. Lerner waived her Fifth Amendment rights by making a statement on May 22nd, 2013, and additionally, by affirming documents after making a statement of [her] Fifth Amendment rights.*

*If Ms. Lerner continues to refuse to answer questions from our members while she is under a subpoena, the committee may proceed to consider whether she should be held in contempt.*

*The IRS: Targeting Americans for Their Political Beliefs: Hr'g before the H. Comm. on Oversight & Gov't Reform, 113th Cong. 3-5 (Mar. 5, 2014) ("March 5, 2014 Hearing Session")*  
(statement of Chairman Issa) (emphases added).

As the March 5, 2014 Hearing Session proceeded, Ms. Lerner did exactly what the Chairman warned her against: She continued to assert the Fifth Amendment and refused to answer any questions put to her by the Oversight Committee.

## ANALYSIS

### Part I: The Legal Framework – the *Quinn* Trilogy

On May 23, 1955, the Supreme Court released three opinions: *Quinn*, 349 U.S. 155; *Emspak*, 349 U.S. 190; and *Bart*, 349 U.S. 219. All three opinions concerned witnesses who refused to answer questions put to them by a House investigative committee, and all of whom then were prosecuted for, and convicted of, violating 2 U.S.C. § 192 for their refusal to answer that committee's questions. Section 192 provided then, as it provides now, that:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony . . . under inquiry before . . . any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

In each of the three cases (the principal cases on which Mr. Rosenberg relies in opining as he does), the Supreme Court considered whether the requisite criminal intent – i.e., “a deliberate, intentional refusal to answer,” *Quinn*, 349 U.S. at 165 – could be proved beyond a reasonable doubt. The Court articulated the legal standard for resolving that question as follows: “[U]nless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question.” *Id.* at 166; *see also id.* at 167 (all that is required is “a clear disposition of the witness’ objection”); *Emspak*, 349 U.S. at 202 (witness must be “confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt”); *Bart*, 349 U.S. at 222-23 (“Without such a [clear-cut] ruling [on the witness’ objection], evidence of the requisite criminal intent to violate § 192 is lacking.”).

The Supreme Court went on to say that the prosecution could establish that the “witness [had been] clearly apprised that the committee demands his answer notwithstanding his objections,” *Quinn*, 349 U.S. at 166 – and thereby defeat a motion to dismiss a section 192 indictment – in one of two ways:

- directly, by demonstrating that the congressional entity – here, the Oversight Committee – specifically overruled the witness’ objection; *or*

- indirectly, by demonstrating that the congressional entity specifically directed the witness to answer.<sup>3</sup>

In *Quinn*, *Emspak* and *Bart*, the Court determined that the House investigative committee had done neither (and, as a result, concluded that the witnesses could not be prosecuted under section 192):

At no time did the committee specifically overrule [the witness'] objection based on the Fifth Amendment; *nor* did the committee indicate its overruling of the objection by specifically directing [the witness] to answer. In the absence of such committee action, [the witness] was never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt. At best he was left to guess whether or not the committee had accepted his objection.

*Quinn*, 349 U.S. at 166 (emphasis added).

At no time did the committee specifically overrule [the witness'] objection based on the Fifth Amendment, *nor* did the committee indicate its overruling of the objection by specifically directing [the witness] to answer. In the absence of such committee action, [the witness] was never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt.

*Emspak*, 349 U.S. at 202 (emphasis added).

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<sup>3</sup> See also *Presser v. United States*, 284 F.2d 233, 235-36 (D.C. Cir. 1960) (affirming conviction upon determining that witness sufficiently apprised of requirement that he testify based on Chairman's directing that he do so, notwithstanding absence of any express overruling of witness' Fifth Amendment objection); *Grossman v. United States*, 229 F.2d 775, 776 (D.C. Cir. 1956) (noting, in discussing *Quinn* trilogy, that Supreme Court "held that the Committee must either specifically overrule the objection or specifically direct the witness to answer despite his objection" (emphases added)); *United States v. Singer*, 139 F. Supp. 847, 848, 853 n.6 (D.D.C. 1956) ("To lay the necessary foundation for a prosecution under Section 192 . . . a congressional investigating committee before whom a witness appears must specifically overrule the objections of the witness or specifically direct him to answer despite his objections"; "Committee must either specifically overrule the objection or specifically direct the witness to answer despite his objection." (emphases added)), *aff'd sub nom. Singer v. United States*, 244 F.2d 349 (D.C. Cir.), *vacated & rev'd on other grounds*, 247 F.2d 535 (D.C. Cir. 1957).

At no time did the committee directly overrule [the witness'] claims of self-incrimination or lack of pertinency. *Nor* was [the witness] indirectly informed of the committee's position through a specific direction to answer. . . .

Because of the consistent failure to advise the witness of the committee's position as to his objections, [the witness] was left to speculate about the risk of possible prosecution for contempt; he was not given a clear choice between standing on his objection and compliance with a committee ruling.

*Bart*, 349 U.S. at 222-23 (emphasis added).

In ruling as it did, the Supreme Court made clear that the notice to a witness of the rejection of his or her objection need not follow "any fixed verbal formula." *Quinn*, 349 U.S. at 170; *see also Flaxer v. United States*, 358 U.S. 147, 152 (1958) ("[T]he committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection." (quoting *Quinn*, 349 U.S. at 170)). Rather, "[s]o long as the witness is not forced to guess the committee's ruling, he has no cause to complain." *Quinn*, 349 U.S. at 170; *accord Flaxer*, 358 U.S. at 152.

## **Part II: Application of the Legal Framework Here**

Here, the factual record overwhelmingly supports the conclusion that Ms. Lerner would "ha[ve] no cause to complain" if she were to be indicted and prosecuted under 2 U.S.C. § 192 because she was "not forced to guess the [C]ommittee's ruling" on her Fifth Amendment claim. *Quinn*, 349 U.S. at 170. This is so for two reasons.

*First*, unlike in *Quinn*, *Emspak* and *Bart*, the Oversight Committee specifically overruled Ms. Lerner's Fifth Amendment objection (and then advised her that it had done so):

- By virtue of its June 28, 2013 Resolution, the Committee formally "determine[d] that the voluntary statement offered by Ms. Lerner constituted a waiver of her Fifth Amendment privilege against self-incrimination as to all questions within

the subject matter of the Committee hearing that began on May 22, 2013.” June 28, 2013 Res.

- The Chairman then stated in his February 25, 2014 letter to Ms. Lerner’s counsel that “[t]he Committee . . . determined that Ms. Lerner in fact had waived [her Fifth Amendment] right,” Issa Feb. 25, 2014 Letter at 1, and that “the Committee explicitly rejected [Ms. Lerner’s] Fifth Amendment privilege claim,” *id.* at 2.
- The Chairman then reiterated during the reconvened hearing session on March 5, 2014 – at which Ms. Lerner physically was present with her counsel – that “[a]t a business meeting on June 28, 2013, the committee approved a resolution rejecting Ms. Lerner’s claim of Fifth Amendment privilege based on her waiver,” and that “[t]he committee voted and found that Ms. Lerner waived her Fifth Amendment rights by making a statement on May 22nd, 2013, and additionally, by affirming documents after making a statement of Fifth Amendment rights.” Mar. 5, 2014 Hr’g Session at 4-5.

It is hard to imagine “a clear[er] disposition of [Ms. Lerner’s] objection,” *Quinn*, 349 U.S. at 167, and plainly she was “left to guess” at nothing, *id.* at 166. Through her counsel, she acknowledged that she “underst[oo]d that the Committee voted that she had waived her rights,” Taylor Feb. 26, 2014 Letter at 1, and even Mr. Rosenberg admits that the Committee “on June 28, 2013 . . . reject[ed] Ms. Lerner’s privilege claim,” Rosenberg Mem. at 2.<sup>4</sup>

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<sup>4</sup> Given Mr. Rosenberg’s explicit acknowledgement of what occurred on June 28, 2013, we are at a loss to understand the significance he attaches to the fact that the “Chair [did not] . . . expressly overrule [Ms. Lerner’s] claim of privilege” on March 5, 2014. Rosenberg Mem. at 2. The Chairman did not need to rule on Ms. Lerner’s Fifth Amendment claim at the March 5, 2014 reconvened hearing because the Committee already formally had rejected her claim more than eight months earlier. To the extent Mr. Rosenberg implies that the Committee had to re-reject Ms. Lerner’s Fifth Amendment claim on March 5, 2014, we are aware of no authority that



*Second*, although it was not required to do so (in light of its express rejection of Ms. Lerner’s Fifth Amendment claim on June 28, 2013, and its communication of that determination to her), the Oversight Committee also specifically directed Ms. Lerner to answer its questions, and then reinforced that direction by making clear that she risked being held in contempt if she did not comply (again, unlike in *Quinn*, *Emspak* and *Bart*). In particular:

- The Chairman stated in his February 25, 2014 letter to Ms. Lerner’s counsel that “because the Committee explicitly rejected [Ms. Lerner’s] Fifth Amendment privilege claim, I expect her to provide answers when the hearing reconvenes on March 5.” Issa Feb. 25, 2014 Letter at 2.<sup>5</sup>
- The Chairman’s February 25, 2014 letter was preceded by extensive discussion at the Committee’s June 28, 2013 public business meeting of the possibility that Ms. Lerner could be held in contempt. *See, e.g.*, June 28, 2013 Bus. Meeting Tr. at 24 (statement of Rep. Mica) (“And the ranking member is correct, she may be held in contempt in the future.”); *id.* at 45 (statement of Rep. Meehan) (“To the extent that she will invoke the Fifth Amendment privilege, and we would hold her in contempt, it will go before ultimately a qualified court of law.”); *id.* at 53 (statement of Rep. Lynch) (“[W]e assume that there will be a contempt citation issued by this Congress.”).
- And, the Chairman’s February 25, 2014 letter was succeeded, during the reconvened hearing session on March 5, 2014, by this verbal warning: “If Ms.

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supports such a suggestion, nor has Mr. Rosenberg cited any. Moreover, and in any event, the Chairman did reiterate at the March 5, 2014 reconvened hearing, after specifically drawing Ms. Lerner’s attention to these developments, that, “[a]t a business meeting on June 28, 2013, the [C]ommittee approved a resolution rejecting Ms. Lerner’s claim of Fifth Amendment privilege based on her waiver.” Mar. 5, 2014 Hr’g Session at 4-5.

<sup>5</sup> The Rosenberg Memorandum does not mention the Chairman’s February 25, 2014 letter.

Lerner continues to refuse to answer questions from our members while she is under a subpoena, the [C]ommittee may proceed to consider whether she should be held in contempt.” Mar. 5, 2014 Hr’g Session at 5.<sup>6</sup>

For all these reasons, we do not agree with Mr. Rosenberg that “the requisite legal foundation for a criminal contempt of Congress prosecution [against Ms. Lerner] . . . ha[s] not been met and that such a proceeding against [her] under 2 U.S.C. [§] 19[2], if attempted, will be dismissed.” Rosenberg Mem. at 4. In this Office’s opinion, there is no constitutional impediment to (i) the Committee approving a resolution recommending that the full House hold Ms. Lerner in contempt of Congress; (ii) the full House approving a resolution holding Ms. Lerner in contempt of Congress; (iii) if such resolutions are approved, the Speaker certifying the matter to the United States Attorney for the District of Columbia, pursuant to 2 U.S.C. § 194; and (iv) a grand jury indicting, and the United States Attorney prosecuting, Ms. Lerner under 2 U.S.C. § 192.

In other words, contrary to Mr. Rosenberg’s conclusion, we think it highly unlikely a district court would dismiss a section 192 indictment of Ms. Lerner on the ground that she was insufficiently apprised that the Committee demanded her answers to its questions, notwithstanding her Fifth Amendment objection.

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<sup>6</sup> This is in sharp contrast to *Bart* – to which Mr. Rosenberg attaches substantial significance, see Rosenberg Mem. at 3 – where a committee Member “suggest[ed] to the chairman that the witness ‘be advised of the possibilities of contempt’ for failure to respond, but the suggestion was rejected [by the chairman].” *Bart*, 349 U.S. at 222 (footnote omitted). Here, the Chairman expressly advised Ms. Lerner that she risked being held in contempt of Congress if she continued to refuse to answer the Committee’s questions.

### Part III: Response to Other Rosenberg Conclusions/Theories

We discuss here four other respects in which Mr. Rosenberg's legal analysis is flawed.

1. Mr. Rosenberg appears to contend that the Committee was obligated to warrant in some fashion to Ms. Lerner that she would *in fact* be prosecuted if she did not answer its questions. *See* Rosenberg Mem. at 2 ("At no time during his questioning [during the March 5, 2014 reconvened hearing] did the Chair . . . make it clear that [Ms. Lerner's] refusal to respond would result in a criminal contempt prosecution."); *id.* at 3 ("[I]t [was not] made unequivocally certain that [Ms. Lerner's] failure to respond [to the Committee's questions] would result in criminal contempt prosecution."); *id.* at 4 ("[T]here could be no certainty for the witness and her counsel that a contempt prosecution was inevitable."). But Mr. Rosenberg cites no authority to support this "inevitability" proposition, and indeed there is none. *Cf. Quinn*, 349 U.S. at 166 (standard is whether witness clearly apprised that committee demands his answer notwithstanding his objections; emphasizing that standard requires only that witness be presented choice "between answering the question and *risking* prosecution for contempt" (emphasis added)); *Emspak*, 349 U.S. at 202 (same); *Bart*, 349 U.S. at 221-22 (same).

Indeed, there could be no such guarantee because a section 192 prosecution of Ms. Lerner would be a multi-step process, involving many different actors, none of whose conduct or decisions could be guaranteed in advance.

- The process would begin with a Committee vote on a resolution recommending to the full House that Ms. Lerner be held in contempt – and the outcome of that vote could not be guaranteed in advance.

- Assuming the Committee approved such a resolution, a vote in the full House on a resolution of contempt would follow – and the outcome of that vote also could not be guaranteed in advance.
- Assuming the full House approved such a resolution, the Speaker would be statutorily obligated to refer the matter to the United States Attorney (an officer of a separate branch of the federal government) who would be statutorily obligated to present the matter to a grand jury.
- Assuming the United States Attorney carried out his statutory obligation – again, something that could not be guaranteed in advance – a section 192 prosecution of Ms. Lerner still would require the return of an indictment by a grand jury that does not yet even exist, and whose actions also could not be guaranteed in advance.

In short, if Mr. Rosenberg were correct, no witness before a congressional committee *ever* could be prosecuted for violating section 192, no matter how contumacious his/her conduct.

2. Mr. Rosenberg also appears to contend that the *Quinn* trilogy required the Committee *both* to overrule Ms. Lerner's Fifth Amendment objection *and* to direct her to answer its questions. See Rosenberg Mem. at 3. But this is an incorrect reading of the Supreme Court's reasoning in the *Quinn* trilogy, *see supra* Analysis, Part I, as confirmed by the D.C. Circuit, both in its holding in *Presser* and in *Grossman*, *see id.* at n.3. We are not aware of any case that holds otherwise, and Mr. Rosenberg has not cited one.<sup>7</sup> Moreover, Mr. Rosenberg's contention is

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<sup>7</sup> Aside from the *Quinn* trilogy, Mr. Rosenberg cites no authority on the notice issue other than *Fagerhaugh v. United States*, 232 F.2d 803 (9th Cir. 1956), and *Jackins v. United States*, 231 F.2d 405 (9th Cir. 1956), neither of which he discusses. Those cases are inapposite here for at least two reasons. *First*, the statements in those cases upon which Mr. Rosenberg presumably would rely are dicta. In *Fagerhaugh*, the House committee neither overruled the witness' Fifth

beside the point because the Oversight Committee *both* overruled Ms. Lerner's Fifth Amendment objection, *and* directed her to answer its questions. *See supra* Analysis, Part II.

3. Mr. Rosenberg also states, immediately after asserting that "a proceeding against Ms. Lerner under 2 U.S.C. [§] 19[2], if attempted, will be dismissed," Rosenberg Mem. at 4, that "[s]uch a dismissal will likely also occur if the House seeks civil contempt enforcement," *id.* By "civil contempt enforcement," Mr. Rosenberg presumably means a subpoena enforcement action – like the Committee's subpoena enforcement action against Attorney General Holder in the Fast and Furious matter – pursuant to a House resolution authorizing the Oversight Committee to initiate such an action against Ms. Lerner.<sup>8</sup>

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Amendment objection nor directed the witness to answer after he had asserted his Fifth Amendment objection. *See* 232 F.2d at 804. In fact, after the witness asserted his Fifth Amendment objection, "the Committee seem[ed] to abandon the question and proceed[ed] to inquire about other matters." *Id.* at 805. Similarly, in *Jackins*, the House committee did not direct the witness to answer the relevant questions and, as far as the record reveals, also did not overrule the witness' objection. *See* 231 F.2d at 406-07. In short, neither case actually held that a section 192 prosecution requires that a witness' objection be overruled *and* that she be directed to answer – because neither court had occasion to actually decide that issue.

*Second*, *Fagerhaugh* and *Jackins* are not the law in the District of Columbia, where Ms. Lerner would be prosecuted if she were indicted for violating section 192. *See* Fed. R. Crim. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."); 2 U.S.C. § 192 (not providing for different venue). *Presser* and *Grossman*, on the other hand, are the law in the District of Columbia, and both say that a section 192 prosecution can proceed if a committee *either* specifically overrules a witness' objection *or* specifically directs the witness to answer despite her objection.

Other circuits that have considered this issue agree with the D.C. Circuit that a committee may apprise a witness of the necessity of choosing between answering a question and risking contempt *either* by overruling her objection *or* by directing her to answer. *See Braden v. United States*, 272 F.2d 653, 661 (5th Cir. 1959) (affirming section 192 conviction after inquiring only whether committee provided direction to answer; no inquiry into whether objection expressly overruled); *Davis v. United States*, 269 F.2d 357, 362-63 (6th Cir. 1959) (same; emphasizing *Quinn*'s admonition that, "[s]o long as the witness is not forced to guess the committee's ruling, [the witness] has no cause to complain"; "[T]he committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection." (quoting *Quinn*, 349 U.S. at 170)).

<sup>8</sup> *See* H. Res. 706, 112th Cong. (June 28, 2012) (enacted) (authorizing Oversight Committee to initiate civil subpoena enforcement action against Attorney General); *cf.* H. Res. 711, 112th

Such a subpoena enforcement action would be a civil suit and would not arise under section 192, which means that criminal intent would not be at issue, and the *Quinn* trilogy would not apply. *Cf. supra* Analysis, Part I. Accordingly, the assertion that “civil contempt enforcement” likely would be dismissed is simply that: a bare assertion that is unsupported by any analysis or case law in the Rosenberg Memorandum.

4. Lastly, we note that Mr. Rosenberg more recently suggested that the Chairman’s “last question to [Ms.] Lerner [on March 5, 2014] further reflects the uncertainty of what the [C]ommittee intended. He asked her whether she still wanted to ‘testify’ with a week[']s delay, referencing communications between the [C]ommittee and her attorney.” Michael Stern, *Can Lois Lerner Skate on a Technicality?*, Point of Order (Mar. 20, 2014, 11:46 AM), <http://www.pointoforder.com/2014/03/20/can-lois-lerner-skate-on-a-technicality/#more-5510> (scroll down to “Mort Rosenberg responds”); *see also* Mem. from Louis Fisher to H. Comm. on Oversight & Gov’t Reform at 2 (Mar. 16, 2014) (suggesting, in similar vein, that (i) Ms. Lerner might have been willing to testify had the Committee recalled her one week later, and (ii) because Committee did not wait that week, it “has not made the case that [Ms. Lerner] acted in contempt . . . [and, i]f litigation resulted, courts are likely to reach the same conclusion”). The factual backdrop for these incorrect notions is as follows.

On March 1, 2014, Ms. Lerner’s counsel suggested to a Committee staffer that she might testify if there was a one week delay in the reconvening of the hearing. The Committee’s General Counsel promptly sought clarification: “I understand . . . that Ms. Lerner is willing to testify, and she is requesting a one week delay. In talking . . . to the Chairman, wanted to make sure we had this right.” E-mail from Stephen Castor, Gen. Counsel, H. Comm. on Oversight &

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Cong. (June 28, 2012) (enacted) (holding Attorney General Eric H. Holder, Jr. in contempt of Congress for failure to comply with Oversight Committee subpoena).

Gov't Reform, to William W. Taylor, III, Esq. (Mar. 1, 2014, 2:11 PM EST). One hour later, Ms. Lerner's counsel responded "[y]es." E-mail from William W. Taylor, III, Esq. to Stephen Castor, Gen. Counsel, H. Comm. on Oversight & Gov't Reform (Mar. 1, 2014, 3:10 PM EST).

Two days later, Ms. Lerner's offer, if that is what it was, was off the table. Specifically, the Committee's General Counsel emailed Ms. Lerner's counsel, on March 3, 2014, as follows:

We are getting some mixed messages from reporters about your current position. . . . You said your client was going to testify and requested a one week delay. On Sat[urday, March 1, 2014,] I indicated the Chairman would be in a position to confer with his members on that request on Monday [March 3, 2014]. Do you have a current ask that you want us to take back? If so please state it.

E-mail from Stephen Castor, Gen. Counsel, H. Comm. on Oversight & Gov't Reform, to William W. Taylor, III, Esq. (Mar. 3, 2014, 11:01 AM EST). Three hours later, Ms. Lerner's counsel responded, "*I have no ask. She will appear Wednesday* [March 5, 2014]." E-mail from William W. Taylor, III, Esq., to Stephen Castor, Gen. Counsel, H. Comm. on Oversight & Gov't Reform (Mar. 3, 2014, 2:07 PM EST) (emphasis added).

At the reconvened hearing on March 5, 2014, the Chairman's final question to Ms. Lerner – which Messrs. Rosenberg and Fisher both reference – appears to reflect nothing more than the Chairman's effort to ascertain for certain Ms. Lerner's position on this issue:

Ms. Lerner, on Saturday [March 1, 2014], our committee's general counsel sent an email to your attorney saying, "I understand that Ms. Lerner is willing to testify and she is requesting a 1 week delay. In talking . . . to the chairman, wanted to make sure that was right." Your lawyer, in response to that question, gave a one word email response, "yes." Are you still seeking a 1 week delay in order to testify?

Mar. 5, 2014 Hr'g Session at 8 (statement of Chairman Issa). Ms. Lerner responded that, “[o]n the advice of my counsel, I respectfully exercise my Fifth Amendment right and decline to answer that question.” *Id.* (statement of Lois Lerner).

Accordingly, at the time the March 5, 2014 reconvened hearing closed, there was, as a matter of fact, no offer on the table by Ms. Lerner to testify in exchange for a one-week delay (and no basis for confusion on the part of anyone with access to the facts). Her attorney had nixed that idea on March 3, 2014, and Ms. Lerner’s final Fifth Amendment assertion confirmed that she was not willing to testify before the Committee – period.

In addition, as a legal matter, a witness before a congressional committee who has been subpoenaed to testify, as Ms. Lerner was, does not get to choose when to comply. While the Committee could have agreed to reschedule Ms. Lerner’s testimony, it was not obliged to do so. Indeed, if the law were otherwise, a congressional subpoena would have no force at all because a witness always could promise to testify “tomorrow.” *See, e.g., United States v. Bryan*, 339 U.S. 323, 331 (1950) (“A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity.”); *Eisler v. United States*, 170 F.2d 273, 279 (D.C. Cir. 1948) (“Having been summoned by lawful authority, [the witness] was bound to conform to the procedure of the Committee.”); *Comm. on the Judic., U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 99 (D.D.C. 2008) (“The Supreme Court has made it abundantly clear that compliance with a congressional subpoena is a legal requirement.”); *United States v. Brewster*, 154 F. Supp. 126, 134 (D.D.C. 1957) (“[A] witness has no right to set his own conditions for testifying or to force the committee to depart from its settled



procedures.”), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir. 1958); *accord United States v. Orman*, 207 F.2d 148, 158 (3d Cir. 1953) (“In general a witness before a congressional committee must abide by the committee’s procedures and has no right to vary them or to impose conditions upon his willingness to testify.”). Neither Mr. Rosenberg nor Mr. Fisher has cited any case law or other authority to the contrary.

#### CONCLUSION

For all the reasons stated above, it is this Office’s considered opinion that Mr. Rosenberg is wrong in concluding that “the requisite legal foundation for a criminal contempt of Congress prosecution [of Ms. Lerner] . . . ha[s] not been met and that such a proceeding against [her] under 2 U.S.C. [§] 19[2], if attempted, will be dismissed.” Rosenberg Mem. at 4.

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

JOHN L. MICA, FLORIDA  
MICHAEL R. TURNER, OHIO  
JOHN J. DUNCAN, JR., TENNESSEE  
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LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED THIRTEENTH CONGRESS

## Congress of the United States

### House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Majority (205) 225-5074  
Facsimile (202) 225-5074  
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ELIJAH E. CUMMINGS, MARYLAND  
RANKING MINORITY MEMBER

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VACANCY

April 9, 2014

The Honorable Elijah E. Cummings  
Ranking Member  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Ranking Member Cummings:

The Committee has engaged in a comprehensive and thorough examination of the IRS targeting of tax-exempt applicants. From the very outset, you have worked to obstruct the investigation, even declaring on national television after only a few weeks of fact-finding that the “case is solved.”<sup>1</sup> New IRS documents identified by the Committee raise disturbing concerns about your possible motivations for opposing this investigation and unwillingness to lend your support to efforts to obtain the testimony of former IRS Exempt Organizations Director Lois G. Lerner.

Although you have previously denied that your staff made inquiries to the IRS about conservative organization True the Vote that may have led to additional agency scrutiny, records of communication between your staff and IRS officials – which you did not disclose to Majority Members or staff – indicate otherwise. As the Committee is scheduled to consider a resolution holding Ms. Lerner, a participant in responding to your communications that you failed to disclose, in contempt of Congress, you have an obligation to fully explain your staff’s undisclosed contacts with the IRS.

Ms. Catherine Engelbrecht, the founder and President of True the Vote, an organization that had applied for tax-exempt status with the IRS, testified before the Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs about the IRS targeting of True the Vote.<sup>2</sup> During this proceeding, she alleged that you targeted her group in the same manner as the IRS. She testified: “Three times, Representative Elijah Cummings sent letters to True the Vote, demanding much of the same information that the IRS had requested. Hours after sending

<sup>1</sup> *State of the Union with Candy Crowley* (CNN television broadcast June 9, 2013) (interview with Ranking Member Elijah E. Cummings).

<sup>2</sup> “*The IRS Targeting Investigation: What Is the Administration Doing?*”: Hearing before the Subcomm. on Economic Growth, Job Creation, and Regulatory Affairs of the H. Comm. on Oversight & Gov’t & Reform, 113th Cong. (2014).

The Honorable Elijah E. Cummings  
 April 9, 2014  
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letters, he would appear on cable news and publicly defame me and my organization. Such tactics are unacceptable.”<sup>3</sup>

During the hearing, Ms. Engelbrecht’s attorney, Cleta Mitchell, raised the possibility that your staff had coordinated with the IRS in targeting True the Vote. Your exchange with Ms. Mitchell was as follows:

Ms. Mitchell: **We want to get to the bottom of how these coincidences happened, and we’re going to try to figure out whether any – if there was any staff of this committee that might have been involved in putting True the Vote on the radar screen of some of these Federal agencies. We don’t know that, but we – we’re going to do everything we can do to try to get to the bottom of how did this all happen.**

Mr. Cummings: Will the gentleman yield?

Mr. Meadows: Yes.

Mr. Cummings: I want to thank the gentleman for his courtesy. **What she just said is absolutely incorrect and not true.**<sup>4</sup>

Beginning in 2010, congressional Democrats publicly and aggressively lobbied the IRS to crack down on 501(c)(4) organizations involved in political speech. Senator Dick Durbin urged the IRS to “quickly investigate the tax-exempt status of Crossroads GPS,”<sup>5</sup> and Senator Max Baucus implored the IRS to “survey major” nonprofit groups.<sup>6</sup> In March 2012, Representative Peter Welch and 31 other Democrats urged the IRS to “investigate whether any groups qualifying as social welfare organizations under 501(c)(4) . . . are improperly engaged in political campaign activity.”<sup>7</sup>

New IRS e-mails obtained in the Committee’s investigation of IRS targeting indicate that in late August 2012, your staff contacted the IRS to notify them that you “are about to launch an investigation similar to the one launched by Cong. Welch’s office.”<sup>8</sup> In October 2012, you sent the first of a series of letters to Ms. Engelbrecht, President of True the Vote, an organization that had applied for tax-exempt status with the IRS.<sup>9</sup> Your letter requested various categories of

<sup>3</sup> *Id.* (written testimony of Catherine Engelbrecht, True the Vote).

<sup>4</sup> *Id.*

<sup>5</sup> Press Release, Senator Dick Durbin, Durbin urges IRS to investigate spending by Crossroads GPS (Oct. 12, 2010).

<sup>6</sup> Letter from Max Baucus, S. Comm. on Finance, to Douglas H. Shulman, Internal Revenue Serv. (Sept. 28, 2010).

<sup>7</sup> Letter from Peter Welch et al., U.S. House of Representatives, to Douglas Shulman, Internal Revenue Serv. (Mar. 28, 2012).

<sup>8</sup> E-mail from Catherine Williams, Internal Revenue Serv., to Ross Kiser & Kevin Smith, Internal Revenue Serv. (Aug. 31, 2012). [IRS 563026]

<sup>9</sup> Letter from Elijah E. Cummings, H. Comm. on Oversight & Gov’t Reform, to Catherine Engelbrecht, True the Vote (Oct. 4, 2012) [hereinafter “Ranking Member Cummings Letter”].

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information from Ms. Engelbrecht.<sup>10</sup> Several of your requests are virtually identical to the information requests sent by the IRS to True the Vote in February 2012.<sup>11</sup> For example:

- The IRS asked True the Vote “how many jurisdictions have you presented your review of voter rolls to election administration?”<sup>12</sup> You similarly requested “a list of voter registration rolls by state, county, and precinct that True the Vote is currently reviewing for potential challenges”; “a list of all individual voter registration challenges by state, county, and precinct submitted to government entities”; and “copies of all letters sent to states, counties, or other entities alleging non-compliance with the National Voter Registration Act for failing to conduct voter registrations list maintenance prior to the November elections.”<sup>13</sup>
- The IRS inquired about the intellectual property rights associated with True the Vote’s voter registration software.<sup>14</sup> You requested “copies of computer programs, research software, and databases used by True the Vote to review voter registration”; all contracts, agreements, and memoranda of understanding between True the Vote and affiliates or other entities relating to the terms of use of True the Vote research software and databases”; and “a list of all organizations and volunteer groups that currently have access to True the Vote computer programs, research software, and databases.”<sup>15</sup>
- The IRS asked True the Vote for information describing “the training process used by the organization” and for a copy of “any training materials used.”<sup>16</sup> You, likewise, requested “copies of all training materials used for volunteers, affiliates, or other entities.”<sup>17</sup>
- The IRS requested information about any for-profit organizations associated with True the Vote.<sup>18</sup> You similarly requested “a list of vendors of voter information, voter registration lists, and other databases used by True the Vote, its volunteers, and its affiliates.”<sup>19</sup>

This timeline and pattern of inquiries raises concerns that the IRS improperly shared protected taxpayer information with your staff.

<sup>10</sup> *Id.*

<sup>11</sup> Letter from Janine L. Estes, Internal Revenue Serv., to True the Vote, c/o Clea Mitchell, Foley & Lardner LLP (Feb. 8, 2012) [hereinafter “IRS Letter”].

<sup>12</sup> *Id.*

<sup>13</sup> Ranking Member Cummings Letter, *supra* note 9.

<sup>14</sup> IRS Letter, *supra* note 11.

<sup>15</sup> Ranking Member Cummings Letter, *supra* note 9.

<sup>16</sup> IRS Letter, *supra* note 11.

<sup>17</sup> Ranking Member Cummings Letter, *supra* note 9.

<sup>18</sup> IRS Letter, *supra* note 11.

<sup>19</sup> Ranking Member Cummings Letter, *supra* note 9.

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According to Ms. Engelbrecht, following your initial document request to her,<sup>20</sup> she faced additional scrutiny by multiple agencies and outside groups, including the IRS and the Bureau of Alcohol, Tobacco, Firearms and Explosives. For example, five days after your initial document request to Ms. Engelbrecht, in which you requested, among other things, “copies of all training materials used for volunteers, affiliates, or other entities,”<sup>21</sup> the IRS requested that Ms. Engelbrecht provide “a copy of [True the Vote’s] volunteer registration form,” “...the process you use to assign volunteers,” “how you keep your volunteers in teams,” and “how your volunteers are deployed ... following the training they receive by you.”<sup>22</sup> Less than two weeks after your initial document request to Ms. Engelbrecht, the Service Employees International Union (SEIU) urged Lois Lerner to deny True the Vote’s application for tax exempt status.<sup>23</sup> The following day, you sent a second request for documents to Ms. Engelbrecht, which you publicly described as “Ramp[ing] Up” your “Investigation” of True the Vote.<sup>24</sup>

In January 2013, your staff requested information from the IRS about True the Vote.<sup>25</sup> The head of the IRS Legislative Affairs office e-mailed several IRS officials, including former Exempt Organizations Director Lois Lerner, that “House Oversight Committee Minority staff” sought information about True the Vote.<sup>26</sup> The e-mail shows that your staff requested tax returns filed by True the Vote as well as any other IRS material about True the Vote’s tax-exempt status.

**From:** Barre Catherine M  
**Sent:** Friday, January 25, 2013 02:58 PM Eastern Standard Time  
**To:** Lerner Lois G; Paz Holly O; Marks Nancy J  
**Subject:** House Oversight Committee Minority Staff

The house oversight committee (not the subcommittee of ways and means) has requested any publicly available information on an entity that they believe has filed for c3 status.

They do not have a waiver.

The entity is KSP True the Vote EIN [REDACTED]

They believe the entity has filed tax returns in the past and would like copies of those if they are publicly available in addition to any other information that is publicly available about the entity's tax-exempt status.

In response to your staff’s request, Lerner’s subordinate Holly Paz – who has since been placed on administrative leave for her role in the targeting of conservative groups<sup>27</sup> – asked an

<sup>20</sup> Letter from Hon. Elijah Cummings, Ranking Member, House Comm. on Oversight and Govt. Reform, to Ms. Catherine Engelbrecht, Oct. 4, 2012.

<sup>21</sup> *Id.*

<sup>22</sup> Letter from IRS to True the Vote, Inc., October 9, 2012.

<sup>23</sup> Letter from Judith A. Scott, General Counsel, Service Employees International Union, to Douglas Shulman and Lois Lerner, Oct. 17, 2012.

<sup>24</sup> Press Release, Hon. Elijah Cummings, Ranking Member, House Comm. on Oversight and Govt. Reform, Oct. 18, 2012, available at <http://democrats.oversight.house.gov/press-releases/cummings-ramps-up-investigation-of-voter-suppression-allegations/>.

<sup>25</sup> E-mail from Catherine Barre, Internal Revenue Serv., to Lois Lerner et al., Internal Revenue Serv. (Jan. 25, 2013). [IRSR 180906]

<sup>26</sup> *Id.*

<sup>27</sup> See Eliana Johnson, *Did the IRS fire Holly Paz*, NAT’L REVIEW ONLINE, June 13, 2013.

The Honorable Elijah E. Cummings  
 April 9, 2014  
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IRS employee to look for material about True the Vote.<sup>28</sup> This e-mail included material redacted as confidential taxpayer information covered by I.R.C. § 6103, suggesting that the IRS discussed particular sensitivities about True the Vote's tax information as a result of your request. It is unclear how the IRS responded to your request or what information you received from the IRS.

<b>From:</b>	Paz Holly O
<b>Sent:</b>	Friday, January 25, 2013 3:53 PM
<b>To:</b>	Megosh Andy
<b>Subject:</b>	Fw: House Oversight Committee Minority Staff

Can you please have them look and see what publicly available docs (apps, 990s) we have on this one? [REDACTED]

[REDACTED] 6103 [REDACTED] Thanks good

IRS e-mails indicate that Lois Lerner appeared personally interested in fulfilling your request for information about True the Vote. Your staff requested the information on Friday, January 25, 2013. The following Monday, January 28, Lerner wrote to Paz: "Did we find anything?"<sup>29</sup> When Paz informed her minutes later that she had not heard back about True the Vote's information, Lerner replied: "thanks – check tomorrow please."<sup>30</sup>

<sup>28</sup> E-mail from Holly Paz, Internal Revenue Serv., to Andy Megosh, Internal Revenue Serv. (Jan. 25, 2013). [IRSR 180906]

<sup>29</sup> E-mail from Lois Lerner, Internal Revenue Serv., to Holly Paz, Internal Revenue Serv. (Jan. 28, 2013). [IRSR 557133]

<sup>30</sup> E-mail from Lois Lerner, Internal Revenue Serv., to Holly Paz, Internal Revenue Serv. (Jan. 28, 2013). [IRSR 557133]

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**From:** Lerner Lois G  
**Sent:** Monday, January 28, 2013 5:57 PM  
**To:** Paz Holly O  
**Subject:** RE: House Oversight Committee Minority Staff

thanks--check tomorrow please

*Lois G. Lerner*  
 Director of Exempt Organizations

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**From:** Paz Holly O  
**Sent:** Monday, January 28, 2013 4:04 PM  
**To:** Lerner Lois G  
**Subject:** RE: House Oversight Committee Minority Staff

Have not heard yet. We didn't get the request until people had left on Friday and people were in late or on unscheduled leave today.

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**From:** Lerner Lois G  
**Sent:** Monday, January 28, 2013 4:01 PM  
**To:** Paz Holly O  
**Subject:** RE: House Oversight Committee Minority Staff

Did we find anything?

*Lois G. Lerner*  
 Director of Exempt Organizations

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**From:** Paz Holly O  
**Sent:** Friday, January 25, 2013 4:51 PM  
**To:** Barre Catherine M; Lerner Lois G; Marks Nancy J  
**Subject:** Re: House Oversight Committee Minority Staff

I will see what we have: as far as publicly available info and get back to you asap.

Sent from my BlackBerry Wireless Device

---

**From:** Barre Catherine M  
**Sent:** Friday, January 25, 2013 02:58 PM Eastern Standard Time  
**To:** Lerner Lois G; Paz Holly O; Marks Nancy J  
**Subject:** House Oversight Committee Minority Staff

The house oversight committee (not the subcommittee of ways and means) has requested any publicly available information on an entity that they believe has filed for c3 status.

Subsequently, on January 31, 2013, Holly Paz informed the IRS Legislative Affairs office that True the Vote had not been recognized for exempt status.<sup>31</sup> Paz attached True the Vote's form 990s, which she authorized the IRS to share with your staff.<sup>32</sup> Paz's e-mail also

<sup>31</sup> E-mail from Holly Paz, Internal Revenue Serv., to Catherine Barre, Internal Revenue Serv. (Jan. 31, 2013). [IRS 557181]

<sup>32</sup> *Id.*

The Honorable Elijah E. Cummings  
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included information redacted as confidential taxpayer information.<sup>33</sup> It is unclear whether the IRS shared True the Vote's confidential taxpayer information with you or your staff through either official or unofficial channels. The IRS certainly did not share these documents or others related to True the Vote at the time nor did they inform the Majority of your staff's request for information.

<b>From:</b>	Paz Holy O
<b>Sent:</b>	Thursday, January 31, 2013 4:40 AM
<b>To:</b>	Barre Catherine M
<b>Cc:</b>	Lerner Lois G; Marks Nancy J
<b>Subject:</b>	FW: House Oversight Committee Minority Staff
<b>Attachments:</b>	27-2860095 67 201112.pdf; 27-2860095 67 2010 .pdf
<b>Importance:</b>	High

Cathy,

We have no record that this organization is recognized as a tax-exempt organization by virtue of an approved application. As you know, 6103 only permits us to talk about or provide copies of approved applications. [REDACTED]

[REDACTED] The organization has filed two Forms 990-EZ (attached) that we can share with the staffers.

Please let me know if you would like to discuss.

Thanks,

Holly

These documents, indicating the involvement of IRS officials at the center of the targeting scandal responding to your requests, raise serious questions about your actions and motivations for trying to bring this investigation to a premature end. If the Committee, as you publicly suggested in June 2013, "wrap[ped] this case up and moved on" at that time,<sup>34</sup> the Committee may have never seen documents raising questions about your possible coordination with the IRS in communications that excluded the Committee Majority. Your frequent complaints about the Committee Majority contacting individuals on official matters without the involvement of Minority staff make the reasons for your staff's secretive correspondence with the IRS even more mysterious.<sup>35</sup>

As the Committee continues to investigate the IRS's wrongdoing and to gather all relevant testimonial and documentary evidence, the American people deserve to know the full truth. They deserve to know why the Ranking Member and Minority staff of the House Committee on Oversight and Government Reform surreptitiously contacted the IRS about an

<sup>33</sup> *Id.*

<sup>34</sup> *State of the Union with Candy Crowley* (CNN television broadcast June 9, 2013) (interview with Ranking Member Elijah E. Cummings).

<sup>35</sup> See, e.g., letter from Hon. Elijah Cummings, Ranking Member, House Comm. on Oversight and Govt. Reform, and Hon. Gerald Connolly, Ranking Member, Subcommittee on Government Operations, to Hon. J. Russell George, Treasury Inspector General for Tax Administration, Feb. 4, 2012.




The Honorable Elijah E. Cummings  
April 9, 2014  
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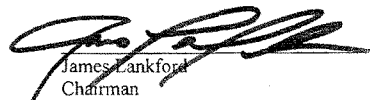
individual organization without informing the Majority Staff and even failed to disclose the contact after it became an issue during a subcommittee proceeding.

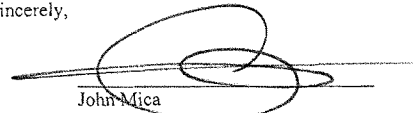
The public deserves a full and truthful explanation for these actions. We ask that you explain the full extent of you and your staff's communications with the IRS and why you chose to keep communications with the IRS from Majority Members and staff even after it became a subject of controversy.

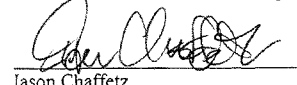
Sincerely,


  
Darrell Issa  
Chairman

  
Jim Jordan  
Chairman  
Subcommittee on Economic Growth,  
Job Creation, and Regulatory Affairs

  
James Lankford  
Chairman  
Subcommittee on Energy Policy,  
Health Care and Entitlements

  
John Mica  
Chairman  
Subcommittee on Government Operations

  
Jason Chaffetz  
Chairman  
Subcommittee on National Security

  
Blake Farenthold  
Chairman  
Subcommittee on Federal Workforce,  
U.S. Postal Service and the Census



## **VIII. MINORITY VIEWS**

**Democratic Members of the  
Committee on Oversight and Government Reform**



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**OPPOSITION TO RESOLUTION BY CHAIRMAN DARRELL ISSA  
PROPOSING THAT THE HOUSE OF REPRESENTATIVES HOLD  
LOIS LERNER IN CONTEMPT OF CONGRESS**

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**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES  
113TH CONGRESS  
APRIL 10, 2014**

## **EXECUTIVE SUMMARY**

These Minority Views are the opinions of Democratic Members of the Committee on Oversight and Government Reform in opposition to Chairman Darrell Issa's resolution proposing that the House of Representatives hold former Internal Revenue Service (IRS) employee Lois Lerner in contempt of Congress despite the fact that she exercised her rights under the Fifth Amendment of the Constitution.

We oppose the resolution because Chairman Issa fundamentally mishandled this investigation and this contempt proceeding. During this investigation, Chairman Issa has made reckless accusations with no evidence to back them up, routinely leaked partial excerpts of interview transcripts to promote misleading allegations, repeatedly ignored opposing viewpoints that are inconsistent with his political narrative, inconceivably rejected an offer by Ms. Lerner's attorney for her to testify with a simple one-week extension, and—in his rush to silence a fellow Committee Member—botched the contempt proceedings by disregarding key due process protections that are required by the Constitution, according to the Supreme Court.

### **McCarthy Era Precedent for Chairman Issa's Actions**

Chairman Issa has identified virtually no historical precedent for successfully convicting an American citizen of contempt after that person has asserted his or her Fifth Amendment right not to testify before Congress. The only era in recent memory when Congress attempted to do this was a disgraceful stain on our nation's history.

We asked the nonpartisan Congressional Research Service (CRS) to identify the last time Congress disregarded an individual's Fifth Amendment rights, held that person in contempt, and pursued a criminal prosecution. CRS went back more than four decades to identify a series of cases spanning from 1951 to 1968. In these cases, the Senate Committee on Government Operations led by Senator Joseph McCarthy, the House Un-American Activities Committee, and other committees attempted to hold individuals in contempt even after they asserted their Fifth Amendment rights. In almost every case, juries refused to convict these individuals or Federal courts overturned their convictions.

We oppose Chairman Issa's efforts to re-create the Oversight Committee in Joe McCarthy's image, and we reject his attempts to drag us back to that shameful era in which Congress tried to strip away the Constitutional rights of American citizens under the bright lights of hearings that had nothing to do with responsible oversight and everything to do with the most dishonorable kind of partisan politics.

### **Chairman Issa Could Have Obtained Lerner's Testimony**

The unfortunate irony of Chairman Issa's contempt resolution is that the Committee could have obtained Ms. Lerner's testimony if the Chairman had accepted a reasonable request by her attorney for a simple one-week extension.

When Chairman Issa demanded—with only a week’s notice—that Ms. Lerner appear before the Committee on March 5, her attorney had obligations out of town, so he requested an additional seven days to prepare his client to testify. If Chairman Issa had sought our input on this request, every one of us would have accepted it without a moment’s hesitation. Anyone actually interested in obtaining Ms. Lerner’s testimony would have done the same.

We wanted to question Ms. Lerner about the Inspector General’s finding that she failed to conduct sufficient oversight of IRS employees in Cincinnati who developed inappropriate terms to screen tax-exempt applicants. We wanted to know why she did not discover the use of these terms for more than a year, as the Inspector General reported, and how new inappropriate terms were put in place after she had directed employees to stop using them. We also wanted to know why she did not inform Congress sooner about the use of these inappropriate terms.

Instead, Chairman Issa rejected this request without consulting any of us. Even worse, he went on national television and stated—inaccurately—that Ms. Lerner had agreed to testify without the extension, scuttling the offer from Ms. Lerner’s attorney. This counterproductive action deprived the Committee of Ms. Lerner’s testimony, deprived us of the opportunity to question her, and deprived the American people of information important to our inquiry.

#### **Independent Experts Conclude That Chairman Issa Botched Contempt Proceedings**

Based on an overwhelming number of legal assessments from Constitutional law experts across the country—and across the political spectrum—we believe that pressing forward with contempt based on the fatally flawed record compiled by Chairman Issa would undermine the credibility of the Committee and the integrity of the House of Representatives.

We do not believe that Ms. Lerner “waived” her Fifth Amendment rights during the Committee’s hearing on May 22, 2013, when she gave a brief statement professing her innocence. Ms. Lerner’s attorney wrote to the Committee before the hearing making clear her plan to exercise her Fifth Amendment right not to testify, yet Chairman Issa compelled her to appear in person anyway. Ms. Lerner relied on her attorney’s advice at every stage of the proceeding, and there is no doubt about her intent. As the Supreme Court held in 1949, “testimonial waiver is not to be lightly inferred and the courts accordingly indulge every reasonable presumption against finding a testimonial waiver.”

In addition, 31 independent legal experts have now come forward to conclude that Chairman Issa botched the contempt proceeding when he abruptly adjourned the Committee’s hearing on March 5, 2014. In an effort to prevent Ranking Member Cummings from speaking, Chairman Issa rushed to end the hearing, ignored the Ranking Member’s repeated requests for recognition, silenced the Ranking Member’s microphone, and drew his hand across his neck while ordering Republican staff to “close it down.”

According to more than two dozen Constitutional law experts who have reviewed the record before the Committee, the legal byproduct of Chairman Issa’s actions on March 5 was that—in his rush to silence the Ranking Member—he failed to take key steps required by the Constitution, according to the Supreme Court. Specifically, these experts found that the

Chairman did not give Ms. Lerner a clear, unambiguous choice between answering his questions or being held in contempt because he failed to overrule Ms. Lerner's assertion of her Fifth Amendment rights and direct her to answer notwithstanding the invocation of those protections.

Chairman Issa has tried to minimize the significance of these independent experts, but their qualifications speak for themselves. They include two former House Counsels, three former clerks to Supreme Court justices, six former federal prosecutors, several attorneys in private practice, and law professors from Yale, Stanford, Harvard, Duke, and Georgetown, as well as the law schools of several Republican Committee Members, including Temple, University of Michigan, University of South Carolina, George Washington, University of Georgia, and John Marshall. They also include both Democrats and Republicans. For example:

- Morton Rosenberg, who served for 35 years as an expert in Constitutional law and contempt at CRS, concluded that "the requisite due process protections have not been met."
- Stanley M. Brand, who served as House Counsel from 1976 to 1983, concluded that Chairman Issa's failure to comply with Constitutional due process requirements "is fatal to any subsequent prosecution."
- Thomas J. Spulak, who served as House Counsel from 1994 to 1995, concluded that "I do not believe that the proper basis for a contempt of Congress charge has been established."
- J. Richard Broughton, a Professor at the University of Detroit Mercy School of Law and a member of the Republican National Lawyers Association, concluded that Ms. Lerner "would likely have a defense to any ensuing criminal prosecution for contempt, pursuant to the existing Supreme Court precedent."

After independent experts raised concerns about these Constitutional deficiencies, Chairman Issa asked the House Counsel's office to draft a memo justifying his actions. We have great respect for the dedicated attorneys in this office, and we recognize their obligation to represent their client, Chairman Issa. However, their memo must be understood for what it is—a legal brief written in preparation for defending Chairman Issa's actions in court.

Because of the gravity of these Constitutional issues and their implications for all American citizens, on June 26, 2013, Ranking Member Cummings asked Chairman Issa to hold a hearing with legal experts from all sides. He wrote: "I believe every Committee Member should have the benefit of testimony from legal experts—on both sides of this issue—to present and discuss the applicable legal standards and historical precedents regarding Fifth Amendment protections for witnesses appearing before Congress." He added: "rushing to vote on a motion or resolution without the benefit of even a single hearing with expert testimony would risk undercutting the legitimacy of the motion or resolution itself."

More than nine months later, Chairman Issa has still refused to hold a hearing with any legal experts, demonstrating again that he simply does not want to hear from anyone who disagrees with his position.

### **Democrats Call for Full Release of All Committee Interview Transcripts**

Rather than jeopardizing Constitutional protections and continuing to waste taxpayer funds in pursuit of deficient contempt litigation, we call on the Committee to release copies of the full transcripts of all 38 interviews conducted during this investigation that have not been released to date.

For the past year, Chairman Issa's central accusation in this investigation has been that the IRS engaged in political collusion directed by—or on behalf of—the White House. Before the Committee received a single document or interviewed one witness, Chairman Issa went on national television and stated: "This was the targeting of the President's political enemies effectively and lies about it during the election year."

The full transcripts show definitively that the Chairman's accusations are baseless. They demonstrate that the White House played no role in directing IRS employees to use inappropriate terms to screen tax-exempt applicants, they show that there was no political bias behind those actions, and they explain in detail how the inappropriate terms were first developed and used.

Until now, Chairman Issa has chosen to leak selected excerpts from interview transcripts and withhold portions that directly contradict his public accusations. For example, Chairman Issa leaked cherry-picked transcript excerpts prior to an appearance on national television on June 2, 2013. When pressed on why he provided only portions instead of the full transcripts, he responded: "these transcripts will all be made public."

On June 9, 2013, Ranking Member Cummings asked Chairman Issa to "release publicly the transcripts of all interviews conducted by Committee staff."

This request included, for example, the full transcript of an interview conducted with a Screening Group Manager in Cincinnati who identified himself as a "conservative Republican." This official explained how one of his own employees first developed the inappropriate terms, and he explained that he knew of no White House involvement or political motivation. As he told us: "I do not believe that the screening of these cases had anything to do other than consistency and identifying issues that needed to have further development."

Although Chairman Issa had promised to release the transcripts, he responded to this request by calling the Ranking Member "reckless" and claiming that releasing the full transcripts would "undermine the integrity of the Committee's investigation." The Ranking Member asked Chairman Issa to "identify the specific text of the transcripts you believe should be withheld from the American public," but he refused. As a result, the Ranking Member released the full transcript of the Screening Group Manager, while deferring to the Chairman on the others.

It has been more than nine months since Chairman Issa promised on national television to release the full transcripts, and we believe it is now time for the Chairman to make good on his promise.

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## I. BACKGROUND

On May 14, 2013, the Treasury Inspector General for Tax Administration issued a report concluding that IRS employees used “inappropriate criteria” to screen applications for tax-exempt status.<sup>1</sup> The first line of the “results” section of the report found that this activity began in 2010 with employees in the Determinations Unit of the IRS office in Cincinnati.<sup>2</sup> The report stated that these employees “developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names.”<sup>3</sup> The report also stated that these employees “developed and implemented inappropriate criteria in part due to insufficient oversight provided by management.”<sup>4</sup>

The Inspector General’s report found that Lois Lerner, the former Director of Exempt Organizations at the IRS, did not discover the use of these inappropriate criteria until a year later—in June 2011—after which she “immediately” ordered the practice to stop.<sup>5</sup> Despite this direction, the Inspector General’s report found that employees subsequently began using different inappropriate criteria “without management knowledge.”<sup>6</sup> The Inspector General reported that “the criteria were not influenced by any individual or organization outside the IRS.”<sup>7</sup>

After announcing that the Committee would be investigating this matter—but before the Committee received a single document or interviewed one witness—Chairman Issa went on national television and stated: “This was the targeting of the President’s political enemies effectively and lies about it during the election year.”<sup>8</sup>

To date, the IRS has produced more than 450,000 pages of documents, Committee staff have conducted 39 transcribed interviews of IRS and Department of the Treasury personnel, and the Committee has held five hearings. The IRS estimates that it has spent between \$14 million and \$16 million responding to Congressional investigations on this topic.<sup>9</sup>

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<sup>1</sup> Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013) (2013-10-053).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Issa on IRS Scandal: “Deliberate” Ideological Attacks*, CBS News (May 14, 2013) (online at [www.cbsnews.com/videos/issa-on-irs-scandal-deliberate-ideological-attacks/](http://www.cbsnews.com/videos/issa-on-irs-scandal-deliberate-ideological-attacks/)).

<sup>9</sup> Letter from Commissioner John Koskinen, Internal Revenue Service, to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Feb. 25, 2014).

On May 14, 2013, Chairman Issa invited Ms. Lerner to testify before the Committee on May 22, 2013.<sup>10</sup> On the same day, Chairman Issa and Chairman Jordan sent a second letter to Ms. Lerner accusing her of providing “false or misleading information” to the Committee, noting that her actions carry “potential criminal liability,” and citing Section 1001 of Title 18 of the United States Code providing criminal penalties of up to five years in prison.<sup>11</sup>

The same week, House Speaker John Boehner also raised the specter of criminal prosecution, stating at a press conference: “Now, my question isn’t about who’s going to resign. My question is who’s going to jail over this scandal?” He added: “Clearly someone violated the law.”<sup>12</sup>

Based on these accusations of criminal conduct, Ms. Lerner’s attorney wrote a letter on May 20, 2013, informing Chairman Issa that he had advised his client to exercise her Fifth Amendment right not to testify and requesting that she not be compelled to appear in person:

Because Ms. Lerner is invoking her constitutional privilege, we respectfully request that you excuse her from appearing at the hearing. Congress has a longstanding practice of permitting a witness to assert the Fifth Amendment by affidavit or through counsel in lieu of appearing at a public hearing to do so. In addition, the District of Columbia Bar’s Legal Ethics Committee has opined that it is a violation of the Bar’s ethics rule to require a witness to testify before a congressional committee when it is known in advance that the witness will invoke the Fifth Amendment, and the witness’s appearance will serve “no substantial purpose ‘other than to embarrass, delay, or burden’ the witness.” D.C. Legal Ethics Opinion No. 358 (2011); see also D.C. Legal Ethics Opinion No. 31 (1977). Because Ms. Lerner will exercise her right not to answer questions related to the matters discussed in the TIGTA report or to her prior exchanges with the Committee, requiring her to appear at the hearing merely to assert her Fifth Amendment privilege would have no purpose other than to embarrass or burden her.<sup>13</sup>

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<sup>10</sup> Letter from Chairman Darrell Issa, House Committee on Oversight and Government Reform, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service (May 14, 2013).

<sup>11</sup> Letter from Chairman Darrell Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, House Committee on Oversight and Government Reform, to Lois Lerner, Director, Exempt Organizations Division, Internal Revenue Service (May 14, 2013).

<sup>12</sup> *Boehner on IRS Scandal: “Who Is Going to Jail?”*, CNN.com (May 15, 2013) (online at <http://politicalticker.blogs.cnn.com/2013/05/15/boehner-on-irs-scandal-who-is-going-to-jail/>).

<sup>13</sup> Letter from William W. Taylor, III, Counsel to Lois Lerner, to Chairman Darrell Issa, House Committee on Oversight and Government Reform (May 20, 2013).

Rather than accepting the letter from Ms. Lerner's counsel as proof of her intention to invoke her Fifth Amendment right not to testify, Chairman Issa demanded that Ms. Lerner appear before the Committee on May 22, 2013, pursuant to his unilateral subpoena.<sup>14</sup>

On the advice of counsel, Ms. Lerner complied with the subpoena by attending the hearing and invoking her Fifth Amendment rights in a brief statement professing her innocence:

[M]embers of this committee have accused me of providing false information when I responded to questions about the IRS processing of applications for tax exemption.

I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee. And while I would very much like to answer the committee's questions today, I've been advised by my counsel to assert my constitutional right not to testify or answer questions related to the subject matter of this hearing. After very careful consideration, I have decided to follow my counsel's advice and not testify or answer any of the questions today.

Because I'm asserting my right not to testify, I know that some people will assume that I've done something wrong. I have not. One of the basic functions of the Fifth Amendment is to protect innocent individuals, and that is the protection I'm invoking today. Thank you.<sup>15</sup>

After she delivered her statement, Committee Member Trey Gowdy stated:

She just testified. She just waived her Fifth Amendment right to privilege. You don't get to tell your side of the story and then not be subjected to cross examination. That's not the way it works. She waived her right of Fifth Amendment privilege by issuing an opening statement. She ought to stay in here and answer our questions.<sup>16</sup>

Later in the hearing, Chairman Issa agreed, telling Ms. Lerner:

You have made an opening statement in which you made assertions of your innocence, assertions you did nothing wrong, assertions you broke no laws or rules. Additionally, you authenticated earlier answers to the IG. At this point I believe you have not asserted your rights, but, in fact, have effectively waived your rights.<sup>17</sup>

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<sup>14</sup> House Committee on Oversight and Government Reform, Subpoena to Lois Lerner (May 17, 2013); Letter from William Taylor, III, Counsel to Lois Lerner, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 20, 2013).

<sup>15</sup> House Committee on Oversight and Government Reform, *Hearing on The IRS: Targeting Americans for their Political Beliefs* (May 22, 2013).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Chairman Issa then stated:

For this reason, I have no choice but to excuse the witness subject to recall after we seek specific counsel on the questions of whether or not the constitutional right of the Fifth Amendment has been properly waived. Notwithstanding that, in consultation with the Department of Justice as to whether or not limited or use immunity could be negotiated, the witness and counsel are dismissed.<sup>18</sup>

Chairman Issa recessed the hearing instead of adjourning it, explaining:

[I]t was brought up by Mr. Gowdy that, in fact, in his opinion as a longtime district attorney, Ms. Lerner may have waived her Fifth Amendment rights by addressing core issues in her opening statement and the authentication afterwards. I must consider this. So, although I excused Ms. Lerner, subject to a recall, I am looking into the possibility of recalling her and insisting that she answer questions in light of a waiver. For that reason and with your understanding and indulgence, this hearing stands in recess, not adjourned.<sup>19</sup>

On June 25, 2013, Chairman Issa announced that the Committee would hold a business meeting three days later to “consider a motion or resolution concerning whether Lois Lerner, the Director of Exempt Organizations at the Internal Revenue Service, waived her Fifth Amendment privilege against self-incrimination when she made a statement at the Committee hearing on May 22, 2013.”<sup>20</sup>

On June 26, 2013, Ranking Member Cummings sent a letter to Chairman Issa requesting that the Committee first hold a hearing with Constitutional law experts who could testify about the legal issues involved with Fifth Amendment waivers. He wrote:

[E]very Committee Member should have the benefit of testimony from legal experts—on both sides of this issue—to present and discuss the applicable legal standards and historical precedents regarding Fifth Amendment protections for witnesses appearing before Congress.<sup>21</sup>

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

<sup>19</sup> *Id.*

<sup>20</sup> House Committee on Oversight and Government Reform, *Oversight Committee to Vote on Lois Lerner’s Potential Waiver of Fifth Amendment Right* (June 25, 2013) (online at <http://oversight.house.gov/release/oversight-committee-to-vote-on-lois-lerners-potential-waiver-of-fifth-amendment-right/>).

<sup>21</sup> Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 26, 2013) (online at: <http://democrats.oversight.house.gov/press-releases/cummings-asks-issa-for-testimony-from-legal-experts-before-committee-vote-on-lerners-5th-amendment-rights/>).

Chairman Issa disregarded this request, and the Committee voted on June 28, 2013, on a partisan basis to adopt a resolution concluding that Ms. Lerner waived her Fifth Amendment rights.<sup>22</sup>

On February 25, 2014, Chairman Issa wrote a letter to Ms. Lerner's attorney recalling her to appear before the Committee on March 5, 2014, pursuant to the subpoena that remained in effect.<sup>23</sup>

On February 26, 2014, Ms. Lerner's attorney wrote to the Committee stating that Ms. Lerner did not waive her Fifth Amendment rights when she appeared before the Committee in 2013, reaffirming that she would continue to decline to answer questions, and requesting that the Committee not require her to appear solely for the purpose of again invoking her Fifth Amendment rights.<sup>24</sup>

Again, Chairman Issa insisted that Ms. Lerner appear in person, and, on March 5, 2014, he asked Ms. Lerner a series of questions. She again asserted her right under the Fifth Amendment not to answer his questions.<sup>25</sup> When the Chairman finished asking questions, he adjourned the hearing without overruling Ms. Lerner's invocation of her Fifth Amendment rights or ordering her to answer his questions notwithstanding her assertion. As Chairman Issa rushed to end the hearing, he disregarded repeated requests for recognition by Ranking Member Cummings, silenced the Ranking Member's microphone, and drew his hand across his neck while ordering Republican staff to "close it down."<sup>26</sup>

## II. LACK OF HISTORICAL PRECEDENT FOR CHAIRMAN ISSA'S ACTIONS

Chairman Issa has cited virtually no historical precedent for successfully convicting an American citizen of contempt after that person asserts his or her Fifth Amendment right not to testify before Congress.

On March 20, 2014, the nonpartisan Congressional Research Service (CRS) issued a memorandum reviewing "previous instances in which a witness before a congressional committee was voted in contempt of Congress and then prosecuted for refusing to answer the committee's questions or produce documents pursuant to a subpoena after invoking the Fifth

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<sup>22</sup> House Committee on Oversight and Government Reform, Business Meeting, Resolution of the Committee on Oversight and Government Reform (June 28, 2013) (22 yeas, 17 nays).

<sup>23</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to William Taylor, III, Counsel to Lois Lerner (Feb. 25, 2014).

<sup>24</sup> Letter from William W. Taylor, III, Counsel to Lois Lerner, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Feb. 26, 2014).

<sup>25</sup> House Committee on Oversight and Government Reform, *Resumption of Hearing on The IRS: Targeting Americans for their Political Beliefs* (Mar. 5, 2014).

<sup>26</sup> *Id.*

Amendment privilege against self-incrimination.”<sup>27</sup> The memo also analyzed whether any subsequent convictions for contempt of Congress under 2 U.S.C. §§ 192, 194 were upheld or overturned.<sup>28</sup> The CRS memorandum is included as Attachment A to these Minority Views.

The CRS memo identified 11 cases spanning from 1951 to 1968 in which congressional committees held individuals in contempt even after they asserted their Fifth Amendment rights. These include seven individuals held in contempt by the House Committee on Un-American Activities, two by the Special Committee on Organized Crime in Interstate Commerce, one by the Senate Committee on Foreign Relations, and one by the Senate Committee on Government Operations.<sup>29</sup> The vast majority of those congressional investigations involved alleged communist activities.

In almost every case, the witnesses were either acquitted or their convictions were overturned on appeal. According to the CRS memo, three of these individuals were not convicted of criminal contempt, and Federal courts overturned the convictions of six more individuals. In three cases, the Supreme Court itself overturned the convictions despite the findings of the congressional committees. In each case, the Court found that the committee had failed to establish a record sufficient to prove the elements of contempt of Congress.<sup>30</sup>

For example, in the case of *Quinn v. United States*, the defendant was held in contempt by the House Committee on Un-American Activities and convicted criminally. The Supreme Court overturned this conviction, finding that “the court below erred in failing to direct a judgment of acquittal.”<sup>31</sup> The Court held that a committee must enable a witness to determine “with a reasonable certainty that the committee demanded his answer despite his objection.”<sup>32</sup> The Court wrote: “Since the enactment of § 192, the practice of specifically directing a recalcitrant witness to answer has continued to prevail.”<sup>33</sup>

In another example highlighted by CRS, *United States v. Hoag*, there are striking similarities between the actions of Senator Joseph McCarthy in 1954 and those of Chairman Issa in the present case. Senator McCarthy chaired the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. During a hearing on August 6, 1954, Senator

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<sup>27</sup> Congressional Research Service, *Prosecutions for Contempt of Congress and the Fifth Amendment* (Mar. 20, 2014) (online at <http://democrats.oversight.house.gov/uploads/CRS%20Contempt%20Report%20--%20Redacted.pdf>) (noting the possibility that unpublished cases might not be included in its review).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Quinn v. United States*, 349 U.S. 155, 167 (1955).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 169.

McCarthy repeatedly questioned a woman named Diantha Hoag despite the fact that she had asserted her Fifth Amendment rights. The witness was a coil winder at the Westinghouse Company in Cheektowaga who made \$1.71 an hour.<sup>34</sup>

Like Ms. Lerner, Ms. Hoag professed her innocence and then declined to answer subsequent questions. In response to questioning from Senator McCarthy, for example, Ms. Hoag stated: "I have never engaged in espionage nor sabotage. I am not so engaged. I will not so engage in the future. I am not a spy nor a saboteur."<sup>35</sup>

Like Chairman Issa, Senator McCarthy concluded that his witness had waived her Fifth Amendment rights without citing any independent legal opinions or experts. He explained to her at the time:

For your benefit, you have waived any right as far as espionage is concerned by your volunteering the information you have never engaged in espionage. ... My position is, just for counsel's benefit, when the witness says she never engaged in espionage, then she waived the Fifth Amendment, not merely as to that question, but the entire field of espionage. Giving out information about Government work would be in that field.<sup>36</sup>

The Senate pursued criminal charges, Ms. Hoag was indicted, and she opted for a federal judge to preside over her case instead of a jury. The judge explained the issue before the court:

The issue, therefore, is whether, by giving that answer, she waived her rights, under the Fifth Amendment, to the questions subsequently propounded. These, generally speaking, had to do with whether she had given information about her work to members of the Communist Party, whether she had discussed at a Communist Party meeting classified Government work, whether she received any clearance before 1947 to work on classified work, whether she did some espionage for the Communist Party seven and one-half years before, the character of work she was doing before 1947, and the city where she worked before her present job.<sup>37</sup>

The judge rejected Senator McCarthy's claims, found no Fifth Amendment waiver, and acquitted the witness of all charges, writing in an opinion in 1956:

Having in mind the admonition in the recent case of *Emspak v. United States*, 1955, 349 U.S. 190, 196, 75 S.Ct. 687, 691, 99 L.Ed. 997, quoting from *Smith v. United States*, 337

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<sup>34</sup> Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, *Hearing on Subversion and Espionage in Defense Establishments and Industry* (Aug. 6, 1954) (online at <http://democrats.oversight.house.gov/uploads/McCarthy%20Hearing%2008-06-1954.pdf>).

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

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

<sup>37</sup> *U.S. v. Hoag*, 142 F. Supp. 667, 668 (D.D.C. 1956) (online at [www.courtlistener.com/dcd/cAQM/united-states-v-hoag/](http://www.courtlistener.com/dcd/cAQM/united-states-v-hoag/)).

U.S. 137, 150, 69 S.Ct. 1000, 93 L.Ed. 1264, that “Waiver of constitutional rights \* \* \* is not lightly to be inferred”, and in the light of the controlling decisions of the Supreme Court and the Court of Appeals for this circuit, above referred to, I reach the conclusion that the defendant did not waive her privilege under the Fifth Amendment and therefore did not violate the statute in question in refusing to answer the questions propounded to her. Therefore, I find that she is entitled to a judgment of acquittal on all counts, and judgment will be entered accordingly.<sup>38</sup>

In addition to the cases cited by CRS, Committee staff identified additional cases from the same time period. In four of those cases, federal appellate courts overturned the convictions.<sup>39</sup> In one case, the federal appellate court affirmed the conviction. Unlike in the present case, however, the Chairman in that case gave the witness a direct, unequivocal order to answer the question: “You are ordered—with the permission of the committee the Chair orders and directs you to answer that question.”<sup>40</sup>

### III. CHAIRMAN ISSA COULD HAVE OBTAINED LERNER’S TESTIMONY

The Committee could have obtained Ms. Lerner’s testimony if Chairman Issa had accepted a request by her attorney for a simple one-week extension.

On February 25, 2014, Chairman Issa wrote a letter to Ms. Lerner’s attorney recalling her to appear before the Committee on March 5, 2014, pursuant to the subpoena that remained in effect.<sup>41</sup> The next day, Ms. Lerner’s attorney wrote to the Committee stating that Ms. Lerner did not waive her Fifth Amendment rights when she appeared before the Committee in 2013, that she would continue to decline to answer questions, and that the Committee should not require her to appear solely for the purpose of again invoking her Fifth Amendment rights.<sup>42</sup>

In the days that followed, Chairman Issa’s staff communicated frequently with Ms. Lerner’s attorney via email and telephone about various options, including potential hearing testimony. Ultimately, Ms. Lerner’s attorney explained that Ms. Lerner was willing to testify if she could obtain a one-week extension to March 12. That extension would have allowed him to adequately prepare his client for the hearing since he had obligations out of town.

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<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., *Singer v. United States*, 247 F.2d 535 (1957); *U.S. v. Doto*, 205 F.2d 416 (2d Cir. 1953); *Poretto v. U.S.*, 196 F.2d 392 (5th Cir. 1952); *Starkovich v. U.S.*, 231 F.2d 411 (9th Cir. 1956); *Aiuppa v. U.S.*, 201 F. 2d 287 (6th Cir. 1952).

<sup>40</sup> *Presser v. U.S.*, 284 F.2d 233 (D.C. Cir. 1960).

<sup>41</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to William W. Taylor, III, Counsel to Lois Lerner (Feb. 25, 2014).

<sup>42</sup> Letter from William W. Taylor, III, Counsel to Lois Lerner, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Feb. 26, 2014).



On Saturday, March 1, 2014, a staff member working for Chairman Issa wrote an email to Ms. Lerner's counsel stating: "I understand from [another Republican staffer] that Ms. Lerner is willing [sic] testify, and she is requesting a one week delay. In talking to the Chairman, wanted to make sure we had this right."<sup>43</sup> In response, Ms. Lerner's counsel wrote: "Yes."<sup>44</sup>

In a subsequent email, Chairman Issa's staffer memorialized a telephone conversation he had with Ms. Lerner's counsel, writing: "On Sat I indicated the Chairman would be in a position to confer with his members on that request on Monday."<sup>45</sup> It is unclear whether Chairman Issa ever discussed this offer with his Republican colleagues or Speaker Boehner, but he certainly did not discuss it with any Democratic Committee Members, who would have accepted it immediately.

Instead of consulting with Committee Members on the following Monday, Chairman Issa went on national television a day earlier, on Sunday, March 2, 2014, to announce—inaccurately—the "late breaking news" that Ms. Lerner would testify on March 5, 2014. He stated: "Quite frankly, we believe the evidence we've gathered causes her, in her best interest, to be someone who should testify."<sup>46</sup>

As a result of Chairman Issa's actions, the Committee lost the opportunity to obtain Ms. Lerner's testimony. Following Chairman Issa's interview and his inaccurate statements, Ms. Lerner's attorney, William W. Taylor III, explained why he advised Ms. Lerner against testifying:

We lost confidence in the fairness and the impartiality of the forum. It is completely partisan. There was no possibility in my view that Ms. Lerner would be given a fair opportunity to speak or to answer questions or to tell the truth.<sup>47</sup>

Chairman Issa's staff subsequently claimed that they "didn't realize at the time that Taylor's offer was contingent on the delay."<sup>48</sup>

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<sup>43</sup> Email from Majority Staff, House Committee on Oversight and Government Reform, to William W. Taylor III, Counsel to Lois Lerner (Mar. 1, 2014). *See also Lawyer for IRS Official Denies Issa Claim Client Will Testify*, Washington Times (Mar. 3, 2014).

<sup>44</sup> Email from William W. Taylor, III, Counsel to Lois Lerner, to Majority Staff, House Committee on Oversight and Government Reform (Mar. 1, 2014)

<sup>45</sup> Email from Majority Staff, House Committee on Oversight and Government Reform, to William W. Taylor, III, Counsel to Lois Lerner (Mar. 3, 2014).

<sup>46</sup> *Fox News Sunday*, Fox News (Mar. 2, 2014) (online at [www.foxnews.com/on-air/fox-news-sunday-chris-wallace/2014/03/02/rep-mike-rogers-deepening-crisis-ukraine-rep-darrell-issa-talks-irs-investigation-sen-rob#p/v/3281439472001](http://www.foxnews.com/on-air/fox-news-sunday-chris-wallace/2014/03/02/rep-mike-rogers-deepening-crisis-ukraine-rep-darrell-issa-talks-irs-investigation-sen-rob#p/v/3281439472001)).

<sup>47</sup> *Lerner Again Takes the Fifth in Tea Party Scandal*, USA Today (Mar. 5, 2014) (online at [www.usatoday.com/story/news/politics/2014/03/05/lois-lerner-oversight-issa-irs/6070401/](http://www.usatoday.com/story/news/politics/2014/03/05/lois-lerner-oversight-issa-irs/6070401/)).

#### IV. INDEPENDENT EXPERTS CONCLUDE THAT CHAIRMAN ISSA BOTCHED CONTEMPT PROCEEDINGS

Independent experts conclude that Ms. Lerner did not waive her Fifth Amendment rights by professing her innocence and that Chairman Issa botched the contempt proceeding when he abruptly adjourned the Committee's hearing on March 5 without taking key steps required by the Constitution. Chairman Issa has steadfastly refused to hold a hearing with any legal experts on these issues.

##### A. No Waiver of Fifth Amendment Rights

Contrary to Chairman Issa's theory that Ms. Lerner waived her Fifth Amendment rights when she gave a brief statement professing her innocence, numerous legal experts have concluded that no Fifth Amendment waiver occurred.

On June 26, 2013, Ranking Member Cummings requested that the Chairman hold a hearing so Committee Members could hear directly from independent experts in Constitutional law before voting on a resolution offered by Chairman Issa concluding that Ms. Lerner waived her Fifth Amendment rights. Ranking Member Cummings wrote:

I believe every Committee Member should have the benefit of testimony from legal experts—on both sides of this issue—to present and discuss the applicable legal standards and historical precedents regarding Fifth Amendment protections for witnesses appearing before Congress.<sup>49</sup>

His letter cited three noted experts who concluded, after reviewing the record before the Committee, that Ms. Lerner did not waive her Fifth Amendment rights:

- Stan Brand, the Counsel of the House of Representatives from 1976 to 1983, stated that Ms. Lerner was “not giving an account of what happened. She's saying, I'm innocent.”
- Yale Kamisar, a former University of Michigan law professor and expert on criminal procedure, stated: “A denial is different than disclosing incriminating facts. You ought to be able to make a general denial, and then say I don't want to discuss it further.”

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<sup>48</sup> *Darrell Issa Rankles Some Republicans in Handling IRS Tea Party Probe*, Politico (Mar. 27, 2014) (online at [www.politico.com/story/2014/03/darrell-issa-irs-tea-party-investigation-105119.html](http://www.politico.com/story/2014/03/darrell-issa-irs-tea-party-investigation-105119.html)).

<sup>49</sup> Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 26, 2013) (online at [http://democrats.oversight.house.gov/images/user\\_images/gt/stories/EEC%20to%20Issa.Business%20Mtg.LLerner.pdf](http://democrats.oversight.house.gov/images/user_images/gt/stories/EEC%20to%20Issa.Business%20Mtg.LLerner.pdf)).

- James Duane, a professor at Regent University School of Law, stated: “it is well settled that they have a right to make a ‘selective invocation,’ as it’s called, with respect to questions that they think might raise a meaningful risk of incriminating themselves.”<sup>50</sup>

The Ranking Member concluded his request by writing:

[A] hearing to obtain testimony from legal experts would help Committee Members consider this issue in a reasoned, informed, and responsible manner. In contrast, rushing to vote on a motion or resolution without the benefit of even a single hearing with expert testimony would risk undercutting the legitimacy of the motion or resolution itself.<sup>51</sup>

The Chairman disregarded this request and proceeded with the Committee’s business meeting to consider his resolution. During debate on the resolution, Ranking Member Cummings introduced into the official record numerous opinions from legal experts addressing the issue.<sup>52</sup> In addition to the experts described above, Ranking Member Cummings entered into the record a statement from Daniel Richman, a law professor who served as the Chief Appellate Attorney in the U.S. Attorney’s Office for the Southern District of New York, stating: “as a matter of law, Ms. Lerner did not waive her privilege and would not be found to have done so by a competent federal court.”<sup>53</sup>

In contrast, Chairman Issa did not enter into the Committee’s official record any legal opinions supporting his position. Although he referred to a confidential memorandum from House Counsel, he shared it with Committee Members only on condition that it not be disclosed to the public or entered into the record. Without disclosing the details of that opinion, it did not conclude that Ms. Lerner waived her Fifth Amendment rights beyond a reasonable doubt—the standard that is required for criminal contempt.

#### **B. Chairman’s Offensive Conduct in Silencing Ranking Member**

To date, 31 independent experts in Constitutional and criminal law have now come forward to conclude that Chairman Issa botched the contempt proceeding when he abruptly adjourned the Committee’s hearing on March 5. In an effort to prevent Ranking Member Cummings from speaking, Chairman Issa rushed to end the hearing, ignored the Ranking

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Opening Statement of Ranking Member Elijah E. Cummings, Business Meeting, Resolution of the Committee on Oversight and Government Reform (June 28, 2013) (online at <http://democrats.oversight.house.gov/press-releases/opening-statement-of-ranking-member-elijah-e-cummings-full-committee-business-meeting/>).

<sup>53</sup> Statement of Professor Daniel Richman, *Regarding Validity of Fifth Amendment Privilege Assertion by Lois Lerner* (June 27, 2013).

Member's repeated requests for recognition, silenced the Ranking Member's microphone, and drew his hand across his neck while ordering Republican staff to "close it down."<sup>54</sup>

Ranking Member Cummings intended to pose a procedural question concerning a potential proffer Ms. Lerner's counsel agreed to provide in response to a request from Chairman Issa's staff. Although Ranking Member Cummings was attempting to help the Committee obtain this information, Republican Committee Members left the room while the Ranking Member was attempting to speak.<sup>55</sup>

Chairman Issa's actions were so egregious that within hours of the hearing, the Democratic Members of the Committee sent a letter criticizing the Chairman's actions and insisting that he "apologize immediately to Ranking Member Cummings as a first step to begin the process of restoring the credibility and integrity of our Committee."<sup>56</sup>

Republicans also criticized Chairman Issa's actions. One senior Republican lawmaker stated: "You can be firm without being nasty; you can be effective without being snide—this is Darrell's personality. He is not the guy that you'd move next door to."<sup>57</sup> Similarly, Republican commentator Joe Scarborough stated: "It seemed like a bush league move to me."<sup>58</sup>

In addition, David Firestone, the Projects Director for the *New York Times* Editorial Board, wrote:

For Mr. Issa, the fear of again being exposed as a fraud was greater than his fear of being accused of trampling on minority rights. When politicians reach for the microphone switch, you know they've lost the argument.<sup>59</sup>

Dana Milbank of the *Washington Post* wrote:

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<sup>54</sup> House Committee on Oversight and Government Reform, *Resumption of the Hearing on The IRS: Targeting Americans for Their Political Beliefs* (Mar. 5, 2014).

<sup>55</sup> Statement of Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, *Resumption of the Hearing on The IRS: Targeting Americans for Their Political Beliefs* (Mar. 5, 2014) (online at <http://democrats.oversight.house.gov/press-releases/issa-turns-off-mic-tries-to-silence-cummings-and-democrats-at-irs-hearing/>).

<sup>56</sup> Letter from Democratic Members to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Mar. 5, 2014) (online at <http://democrats.oversight.house.gov/press-releases/oversight-committee-democrats-unanimously-condemn-chairman-issas-actions-at-todays-irs-hearing/>).

<sup>57</sup> *Issa Hands Dems the Mic*, The Hill (Mar. 6, 2014) (online at <http://thehill.com/homenews/house/200162-issa-hands-dems-the-mic#ixzz2vJSTVh2e>).

<sup>58</sup> *Morning Joe*, MSNBC (Mar. 6, 2014) (online at [www.msnbc.com/morning-joe/watch/rep-cummings-please-do-not-shut-my-mic-down-184217155964](http://www.msnbc.com/morning-joe/watch/rep-cummings-please-do-not-shut-my-mic-down-184217155964)).

<sup>59</sup> David Firestone, *Why Darrell Issa Turned Off the Mic*, New York Times (Mar. 6, 2014).

Even by today's low standard of civility in Congress, calling a hearing and then not allowing minority lawmakers to utter a single word is rather unusual. But Issa, now in the fourth and final year of his chairmanship, is an unusual man.<sup>60</sup>

The day after Chairman Issa's actions, Rep. Marcia Fudge offered a Privileged Resolution on the House floor, which stated:

That the House of Representatives strongly condemns the offensive and disrespectful manner in which Chairman Darrell E. Issa conducted the hearing of the House Committee on Oversight and Government Reform on March 5, 2014, during which he turned off the microphones of the Ranking Member while he was speaking and adjourned the hearing without a vote or a unanimous consent agreement.<sup>61</sup>

On March 6, 2014, the House tabled the resolution by a vote of 211 to 186.<sup>62</sup> That evening, Chairman Issa telephoned Ranking Member Cummings and apologized for his conduct.<sup>63</sup>

On March 14, 2014, Congressman Dan Kildee offered another Privileged Resolution on the House floor condemning the Chairman's "offensive and disrespectful behavior" and calling on Chairman Issa to issue a public apology from the well of the House.<sup>64</sup> That resolution was also tabled.<sup>65</sup>

### C. "Fatal" Constitutional Defect in Rushed Adjournment

According to more than two dozen Constitutional law experts who have now reviewed the record before the Committee, the legal byproduct of Chairman Issa's actions on March 5 was

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<sup>60</sup> Dana Milbank, *Darrell Issa Silences Democrats and Hits a New Low*, Washington Post (Mar. 5, 2014).

<sup>61</sup> Privileged Resolution Against the Offensive Actions of Chairman Darrell E. Issa (Mar. 6, 2014).

<sup>62</sup> Vote to Table Privileged Resolution Against the Offensive Actions of Chairman Darrell E. Issa (Mar. 6, 2014).

<sup>63</sup> House Committee on Oversight and Government Reform Democrats, *Cummings Responds to Issa's Apology* (Mar. 6, 2014) (online at <http://democrats.oversight.house.gov/press-releases/cummings-responds-to-issas-apology1/>).

<sup>64</sup> Office of Rep. Dan Kildee, *Congressman Dan Kildee Introduces Privileged Resolution in House to Condemn Repeated Offensive Behavior by Chairman Darrell Issa* (Mar. 14, 2014) (online at <http://dankildee.house.gov/media-center/press-releases/congressman-dan-kildee-introduces-privileged-resolution-in-house-to>).

<sup>65</sup> *Dems Hold Up Pictures on House Floor to Protest Issa*, The Hill (Mar. 13, 2014) (online at <http://thehill.com/blogs/floor-action/votes/200779-house-rejects-dem-resolution-to-force-issa-apology#ixzz2y9SOBYL6>).

that—in his rush to silence the Ranking Member—he failed to take key steps required by the Constitution, according to the Supreme Court.

Specifically, these experts found that the Chairman did not give Ms. Lerner a clear, unambiguous choice between answering the Committee’s questions or being held in contempt because he failed to overrule Ms. Lerner’s assertion of her Fifth Amendment rights and failed to direct her to answer notwithstanding the invocation of those protections.

In an independent analysis provided to the Committee, Morton Rosenberg, who spent 35 years as a Specialist in American Public Law with CRS, stated:

I conclude that the requisite legal foundation for a criminal contempt of Congress prosecution mandated by the Supreme Court rulings in *Quinn, Emspak and Bart* have not been met and that such a proceeding against Ms. Lerner under 2 U.S.C. 194, if attempted, will be dismissed.<sup>66</sup>

Mr. Rosenberg stated that because Chairman Issa did not reject Ms. Lerner’s invocation of her Fifth Amendment rights and did not direct her to answer notwithstanding her assertion, the foundation for holding her in contempt of Congress has not been met. He explained:

More significantly, the Chairman’s opening remarks were equivocal about the consequence of a failure by Ms. Lerner to respond to his questions. As indicated above, he simply stated that “the Committee *may proceed to consider* whether she will be held in contempt.” Combined with his closing remarks in the May 2013 hearing, where he indicated he would be discussing the possibility of granting the witness statutory immunity with the Justice Department to compel her testimony, there could be no certainty for the witness and her counsel that a contempt prosecution was inevitable.<sup>67</sup>

Stan Brand, who served as House Counsel from 1976 to 1983, joined in Mr. Rosenberg’s analysis, stating:

[A] review of the record from last week’s hearing reveals that at no time did the Chair expressly overrule the objection and order Ms. Lerner to answer on pain of contempt. Making it clear to the witness that she has a clear cut choice between compliance and assertion of the privilege is an essential element of the offense and the absence of such a demand is fatal to any subsequent prosecution.<sup>68</sup>

After independent legal experts raised concerns regarding Chairman Issa’s procedural errors in the March 5 hearing, the Chairman asked the House Counsel’s office to draft a memo justifying his actions. On March 26, 2014, Chairman Issa released an opinion issued by House

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<sup>66</sup> Statement of Morton Rosenberg, *Constitutional Due Process Prerequisites for Contempt of Congress Citations and prosecutions* (Mar. 9, 2014).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Counsel a day earlier stating that “it is this Office’s considered opinion that Mr. Rosenberg is wrong that ‘the requisite legal foundation for a criminal contempt of Congress prosecution [of Ms. Lerner] ... ha[s] not been met and that such a proceeding against [her] under 2 U.S.C. [§] 19[2], if attempted, will be dismissed.’”<sup>69</sup>

In addition, Chairman Issa and other Committee members attempted to minimize the significance of these expert opinions. For example, in a letter to Ranking Member Cummings on March 14, 2014, Chairman Issa suggested that Mr. Rosenberg and Mr. Brand were not independent. He wrote: “Your position was based on an allegedly ‘independent legal analysis’ provided by your lawyer, Stanley M. Brand, and your ‘Legislative Consultant,’ Morton Rosenberg.”<sup>70</sup> Similarly, Committee Member Trey Gowdy stated: “I am not persuaded by the legal musings of two attorneys.”<sup>71</sup>

Despite these claims, the number of independent legal experts who have now come forward with opinions concluding that Chairman Issa’s contempt case is deficient has increased dramatically to 31. They include two former House Counsels, three former clerks to Supreme Court justices, six former federal prosecutors, several attorneys in private practice, and law professors from Yale, Stanford, Harvard, Duke, and Georgetown, as well as the law schools of several Republican Committee Members, including Temple, University of Michigan, University of South Carolina, George Washington, University of Georgia, and John Marshall. They also include both Democrats and Republicans.

For example, Thomas J. Spulak, who served as House Counsel from 1994 to 1995, concluded that “I do not believe that the proper basis for a contempt of Congress charge has been established.” He explained: “I have deep respect for Chairman Darrell Issa and his leadership of the Committee. But the matter before the Committee is a relatively rare occurrence and must be dispatched in a constitutionally required manner for the good of this and future Congresses.” He provided his opinion “out of my deep concerns for the constitutional integrity of the U.S. House of Representatives, its procedures and its future precedents.”<sup>72</sup>

J. Richard Broughton, a former federal prosecutor and now a Professor at the University of Detroit Mercy Law School and member of the Republican National Lawyers Association, concluded:

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<sup>69</sup> Memorandum from Office of General Counsel, United States House of Representatives, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Mar. 25, 2014) (bracketed text and ellipse in original).

<sup>70</sup> Letter from Chairman Darrell E. Issa to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Mar. 14, 2014).

<sup>71</sup> *Democrats: Darrell Issa Botches Rules in Run-up to IRS Contempt Vote*, Politico (Mar. 12, 2014) (online at [www.politico.com/story/2014/03/darrell-issa-irs-contempt-vote-lois-lerner-democrats-104611.html](http://www.politico.com/story/2014/03/darrell-issa-irs-contempt-vote-lois-lerner-democrats-104611.html)).

<sup>72</sup> Letter from Thomas Spulak, former General Counsel to the House of Representatives, to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Mar. 14, 2014).

Like any other criminal sanction, however, the contempt power must be used prudently, not for petty revenge or partisan gain. It should also be used with appropriate respect for countervailing constitutional rights and with proof that the accused contemnor possessed the requisite level of culpability in failing to answer questions. . . . Absent such a formal rejection and subsequent directive, the witness—here, Ms. Lerner—would likely have a defense to any ensuing criminal prosecution for contempt, pursuant to the existing Supreme Court precedent. Those who are concerned about the reach of federal power should desire legally sufficient proof of a person’s culpable mental state before permitting the United States to seek and impose criminal punishment.<sup>73</sup>

Robert Muse, a partner at Stein, Mitchell, Muse & Cipollone, LLP, Adjunct Professor of Congressional Investigations at Georgetown University Law Center, and formerly the General Counsel to the Special Senate Committee to Investigate Hurricane Katrina, concluded: “Procedures and rules exist to provide justice and fairness. In his rush to judgment, Issa forgot to play by the rules.”<sup>74</sup>

Louis Fisher, a former Senior Specialist in Separation of Powers at CRS, Adjunct Scholar at the CATO Institute, and Scholar in Residence at the Constitution Project, concluded:

Why would a delay of one week interfere with the committee’s investigation that has thus far taken nine and a half months? Why not, in pursuit of facts and evidence, probe this opportunity to obtain information from her, particularly when Chairman Issa and the committee have explained that she has important information that is probably not available from any other witness? With his last question, Chairman Issa raised the “expectation” that she would cooperate with the committee if given an additional week. Under these conditions, I think the committee has not made the case that she acted in contempt. If litigation resulted, courts are likely to reach the same conclusion.<sup>75</sup>

Julie Rose O’Sullivan, a former federal prosecutor and law clerk to Supreme Court Justice Sandra Day O’Connor and current Professor at the Georgetown University Law Center, concluded:

The Supreme Court has spoken—repeatedly—on point. Before a witness may be held in contempt under 18 U.S.C. sec. 192, the government bears the burden of showing “criminal intent—in this instance, a deliberate, intentional refusal to answer.” *Quinn v. United States*, 349 U.S. 155, 165 (1955). This intent is lacking where the witness is not faced with an order to comply or face the consequences. Thus, the government must show that the Committee “clearly apprised [the witness] that the committee demands his

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<sup>73</sup> Statement of Professor J. Richard Broughton, *Regarding Legal Issues Related to Possible Contempt of Congress Prosecution* (Mar. 17, 2014).

<sup>74</sup> Statement of Robert Muse (Mar. 13, 2014).

<sup>75</sup> Statement of Louis Fisher, *Regarding Possible Contempt of Lois Lerner* (Mar. 14, 2014).



answer notwithstanding his objections” or “there can be no conviction under [sec.] 192 for refusal to answer that question.” *Id.* at 166. Here, the Committee at no point directed the witness to answer; accordingly, no prosecution will lie. This is a result demanded by common sense as well as the case law. “Contempt” citations are generally reserved for violations of court or congressional orders. One cannot commit contempt without a qualifying “order.”<sup>76</sup>

Joshua Levy, a partner at Cunningham & Levy who teaches Congressional Investigations at Georgetown University Law Center, concluded: “Contempt cannot be born from a game of gotcha. Supreme Court precedents that helped put an end to the McCarthy era ruled that Congress cannot initiate contempt proceedings without first giving the witness due process.”<sup>77</sup>

Samuel W. Buell, a former federal prosecutor who teaches at Duke University Law School, concluded: “Seeking contempt now on this record thus could accomplish nothing but making the Committee look petty and uninterested in getting to the merits of the matter under investigation.”<sup>78</sup>

A full set of the independent legal opinions from all of these Constitutional law experts is included as Attachment B to these Minority Views.

#### **D. House Counsel’s Retroactive Defense of Chairman’s Actions**

After Ranking Member Cummings warned that independent legal experts had identified Constitutional deficiencies with Chairman Issa’s actions at the May 5 hearing, House Speaker John Boehner stated: “I and the House Counsel reject the premise of Mr. Cummings’s letter.”<sup>79</sup> When asked if he would provide a copy of the House Counsel opinion he referenced, Speaker Boehner first directed reporters to ask “the appropriate people.” When they explained that he was the appropriate person, he answered: “I am sure that we will see an opinion at some point.”<sup>80</sup>

It appears that, at the time Speaker Boehner made these statements, the House Counsel had not issued any written opinion. To date, no House Counsel opinion prepared before the March 5 hearing has been made available to the members of the Committee, particularly one stating that Ms. Lerner could be successfully prosecuted for contempt if Chairman Issa did not overrule her assertion of Fifth Amendment rights and order her to answer his questions

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<sup>76</sup> Statement of Julie Rose O’Sullivan (Mar. 12, 2014).

<sup>77</sup> Statement of Joshua Levy (Mar. 12, 2014).

<sup>78</sup> Statement of Samuel Buell (Mar. 12, 2014).

<sup>79</sup> Letter from Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Speaker of the House John Boehner (Mar. 14, 2014) (online at <http://democrats.oversight.house.gov/press-releases/cummings-asks-speaker-boehner-for-copy-of-counsel-opinion-on-lerner-contempt-proceedings/#sthash.jpaw602R.dpuf>).

<sup>80</sup> *Id.*

notwithstanding her assertion. Instead, it appears that Chairman Issa sought an opinion justifying his actions only after the March 5 hearing when independent legal experts raised concerns about these Constitutional deficiencies.<sup>81</sup>

Independent legal experts have rejected the arguments raised by House Counsel in defense of Chairman Issa's actions. The House Counsel memo stated that contempt charges could be brought against Ms. Lerner because the Chairman had ensured that Ms. Lerner was "clearly apprised that the [C]ommittee demand[ed] [her] answer[s] [to its questions] notwithstanding h[er] Fifth Amendment objections." *Quinn*, 349 U.S. at 166." The House Counsel's memo cited two reasons for this opinion:

First, the Committee formally rejected her Fifth Amendment claims and expressly advised her of its determination (a fact that she, through her attorney, acknowledged prior to her appearance at the reconvened hearing on March 5, 2014).

Second, the Committee Chairman thereafter advised Ms. Lerner in writing that the Committee expected her to answer its questions, and advised her orally, at the reconvened hearing on March 5, 2014, that she faced the possibility of being held in contempt of Congress if she continued to decline to provide answers.<sup>82</sup>

According to Mr. Rosenberg, "both assertions are meritless." Regarding the Committee's June 28, 2013, partisan vote that Ms. Lerner waived her Fifth Amendment right, Mr. Rosenberg explained:

Nothing in the language of the Committee's June 28, 2013 resolution can be even be remotely construed as an *explicit* rejection of Ms. Lerner's Fifth Amendment privilege at the May 22 hearing. It is solely and exclusively concerned with the question whether Ms. Lerner voluntarily waived her privilege at that hearing. A rejection of a future claim in a resumed hearing may be implicit in the resolution's language, but that rejection, under *Quinn*, *Emspak*, and *Bart*, would have had to have been expressly directed at the particular claim when raised by the witness.<sup>83</sup>

Mr. Rosenberg also addressed the second argument in the House Counsel memorandum:

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<sup>81</sup> Memo from the Office of General Counsel, United States House of Representatives, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Mar. 25, 2014) (explaining that Chairman Issa requested that the office "analyze a March 12, 2014 memorandum, prepared by former Congressional Research Service ('CRS') attorney Morton Rosenberg.")).

<sup>82</sup> Memo from the Office of General Counsel, United States House of Representatives, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Mar. 25, 2014).

<sup>83</sup> Statement of Morton Rosenberg, *Comments on House General Counsel Opinion* (Apr. 6, 2014).

[T]he Chairman’s verbal observation at the end of his opening remarks at the March 5 hearing that if she continued to refuse to answer questions, “the [C]ommittee may proceed to consider whether she should be held in contempt.” Thus the “indirect” support relies predominantly on the incorrect factual and legal premise that the Committee had communicated a rejection of her privilege claims in its waiver resolution and ambiguous statements by members and the Chairman about the risk of contempt. But, again, when the March 5 questioning took place, the Chairman never expressly overruled her objections or demanded a response.<sup>84</sup>

Former House Counsel Tom Spulak also “fully” agreed with Mr. Rosenberg’s opinion that Chairman Issa failed to establish a record to support contempt charges. He explained:

The fact of the matter, however, is that based on relevant Supreme Court rulings, the pronouncement must occur with the witness present so that he or she can understand the finality of the decision, appreciate the consequences of his or her continued silence, and have an opportunity to decide otherwise at that time.<sup>85</sup>

Mr. Spulak also explained that, although he agreed that there is no “fixed verbal formula” to convey to a witness the Committee’s decision regarding questioning, Chairman Issa’s equivocal statements to Ms. Lerner on March 5 did not meet the standard of “specifically directing a recalcitrant witness to answer” outlined by the Supreme Court.<sup>86</sup> He wrote:

I believe that the Court does require that whatever words are used be delivered to the witness in a direct, unequivocal manner in a setting that allows the witness to understand the seriousness of the decision and the opportunity to continue to insist on invoking the privilege or revoke it and respond to the Committee’s questioning. That, as I understand the facts, did not occur.<sup>87</sup>

#### **V. DEMOCRATS CALL FOR FULL RELEASE OF ALL COMMITTEE INTERVIEW TRANSCRIPTS**

Instead of pursuing deficient contempt litigation that will continue to waste taxpayer funds, Democratic Members of the Oversight Committee now call on the Committee to officially release copies of the full transcripts of all 38 interviews conducted by Committee staff during this investigation that have not been released to date.

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<sup>84</sup> *Id.*

<sup>85</sup> Letter from Thomas Spulak, former General Counsel to the House of Representatives, to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Mar. 14, 2014).

<sup>86</sup> *Quinn v. United States*, 349 U.S. 155, 169 (1955).

<sup>87</sup> Letter from Thomas Spulak, former General Counsel to the House of Representatives, to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Mar. 14, 2014).

For the past year, Chairman Issa's central accusation in this investigation has been that the IRS engaged in political collusion directed by—or on behalf of—the White House. Before the Committee received a single document or interviewed one witness, Chairman Issa went on national television and stated: "This was the targeting of the President's political enemies effectively and lies about it during the election year."<sup>88</sup>

Until now, Chairman Issa has chosen to leak selected excerpts from the Committee's interviews and withhold portions that directly contradict his public accusations. The interview transcripts show definitively that the Chairman's accusations are baseless and that the White House played absolutely no role in directing IRS employees to use inappropriate terms to screen applicants for tax exempt status.

For example, on June 6, 2013, Committee staff interviewed the Screening Group Manager in the Cincinnati Determinations Unit who worked at the IRS for 21 years as a civil servant and supervised a team of several Screening Agents in that office. He answered questions from Committee staff directly and candidly for more than five hours. When asked by Republican Committee staff about his political affiliation, he answered that he is a "conservative Republican."<sup>89</sup>

The Screening Group Manager stated that there was no political motivation in the decision to screen and centralize the review of the Tea Party cases:

Q: In your opinion, was the decision to screen and centralize the review of Tea Party cases the targeting of the President's political enemies?

A: I do not believe that the screening of these cases had anything to do other than consistency and identifying issues that needed to have further development.<sup>90</sup>

The Screening Group Manager also explained that he had no reason to believe that any officials from the White House were involved in any way:

Q: Do you have any reason to believe that anyone in the White House was involved in the decision to screen Tea Party cases?

A: I have no reason to believe that.

Q: Do you have any reason to believe that anyone in the White House was involved in the decision to centralize the review of Tea Party cases?

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<sup>88</sup> *Issa on IRS Scandal: "Deliberate" Ideological Attacks*, CBS News (May 14, 2013) (online at [www.cbsnews.com/videos/issa-on-irs-scandal-deliberate-ideological-attacks/](http://www.cbsnews.com/videos/issa-on-irs-scandal-deliberate-ideological-attacks/)).

<sup>89</sup> House Committee on Oversight and Government Reform, Interview of Screening Group Manager, at 28-29 (June 6, 2013).

<sup>90</sup> *Id.* at 139-140.

A: I have no reason to believe that.<sup>91</sup>

Instead, the Screening Group Manager explained how one of his own employees flagged the first “Tea Party” case for additional review because it needed further development, and that he elevated the case to his management because it was “high-profile” and to ensure consistent review:

We would need to know how frequently or—of the total activities, 100 percent of the activities, what portion of those total activities would you be dedicating to political activities. And in this particular case, it wasn’t addressed, it was just mentioned, and, to me, that says it needs to have further development, and it could be good, you know. Once the information is all received, it could be fine.<sup>92</sup>

After elevating the original case to his management, the Screening Group Manager explained that he made the decision on his own to instruct his Screening Agents to identify additional similar cases. He said: “There was no—there was no—no one said to make a search.”<sup>93</sup> He explained that he did this to ensure “consistency” in the treatment of applications with similar fact patterns.<sup>94</sup>

The Screening Group Manager informed Committee staff that he did not discover that his employee had used inappropriate search terms until June 2, 2011, and he did not provide that information to his superiors before June of 2011. The Inspector General’s report confirmed that Ms. Lerner did not learn of the use of the inappropriate criteria until June of 2011, a fact that also was corroborated by Committee interviews.<sup>95</sup>

On June 2, 2013, Chairman Issa leaked selected excerpts of transcribed interviews with IRS employees prior to an appearance on CNN’s “State of the Union” with Candy Crowley. When pressed to release the full the transcripts, Chairman Issa promised to do so:

ISSA: These transcripts will all be made public. The killer about this thing is—

CROWLEY: Why don’t you put the whole thing out? Because you know our problem really here is—and you know that your critics say that Republicans and you in particular sort of cherry pick information that go to your foregone conclusion, and so it worries us to kind of to put this kind of stuff out. Can you not put the whole transcript out?

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<sup>91</sup> *Id.* at 141.

<sup>92</sup> *Id.* at 146.

<sup>93</sup> *Id.* at 63.

<sup>94</sup> *Id.*

<sup>95</sup> Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013); House Committee on Oversight and Government Reform, Interview of Acting Director of Rulings and Agreements (May 21, 2013).

ISSA: The whole transcript will be put out. We understand—these are in real time. And the administration is still—they're paid liar, their spokesperson, picture behind, he's still making up things about what happens in calling this local rogue. There's no indication—the reason that Lois Lerner tried to take the fifth is not because there is a rogue in Cincinnati, it's because this is a problem that was coordinated in all likelihood right out of Washington headquarters and we're getting to proving it.<sup>96</sup>

On June 9, 2013, Ranking Member Cummings wrote to Chairman Issa requesting that the Committee “release publicly the transcripts of all interviews conducted by Committee staff.”<sup>97</sup> This request included the transcripts of the “conservative Republican” Screening Group Manager as well as all other officials interviewed by the Committee.

On June 11, 2013, Chairman Issa wrote to Ranking Member Cummings reversing his previous position and arguing instead that releasing the transcripts publicly would be “reckless” and “undermine the integrity of the Committee’s investigation.”<sup>98</sup>

On June 13, 2013, Ranking Member Cummings wrote to Chairman Issa seeking clarification about his reversal and asking him to “identify the specific text of the transcripts you believe should be withheld from the American public.”<sup>99</sup>

Over the following week, Chairman Issa reversed his position again and allowed select reporters to come into the Committee’s offices to review full, unredacted transcripts from several interviews with employees other than the Screening Group Manager. For example:

- *USA Today* reported that Chairman Issa allowed its reporters to review the full transcript of IRS official Holly Paz: “USA TODAY reviewed all 222 pages of the transcript of her interview.”

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<sup>96</sup> *State of the Union*, CNN (June 2, 2013) (online at <http://www.youtube.com/watch?v=9zuQU-Mqll4&feature=youtu.be>).

<sup>97</sup> Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 9, 2013) (online at <http://democrats.oversight.house.gov/press-releases/conservative-republican-manager-in-charge-of-irs-screeners-in-cincinnati-denies-any-white-house-involvement-or-political-influence-in-screening-tea-party-cases/>).

<sup>98</sup> Letter from Chairman Darrell E. Issa to Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (June 11, 2013).

<sup>99</sup> Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 13, 2013) (online at <http://democrats.oversight.house.gov/press-releases/new-cummings-letter-to-issa-identify-specific-transcript-text-you-want-withheld-from-public/>).

- The *Wall Street Journal* reported that he allowed its reporters to review the full Paz transcript: “The Wall Street Journal reviewed the transcript of her interview in recent days.”
- *Reuters* reported that he allowed its reporters to review the full Paz transcript as well: “Reuters has reviewed the interview transcript.”
- The *Associated Press* reported that he allowed its reporters to review not only the full Paz transcript, but also transcripts of interviews with two other IRS officials: “The Associated Press has reviewed transcripts from three interviews—with Paz and with two agents, Gary Muthert and Elizabeth Hofacre.”
- *Politico* also reported that its reporters were given access to full transcripts of interviews “conducted by the House Oversight and Government Reform Committee and reviewed by POLITICO.”<sup>100</sup>

In light of the Chairman’s actions, Ranking Member Cummings publicly released the full transcript of the Screening Group Manager on June 18, 2013, explaining:

This interview transcript provides a detailed first-hand account of how these practices first originated, and it debunks conspiracy theories about how the IRS first started reviewing these cases. Answering questions from Committee staff for more than five hours, this official—who identified himself as a “conservative Republican”—denied that he or anyone on his team was directed by the White House to take these actions or that they were politically motivated.<sup>101</sup>

Democratic Committee Members have been asking for more than nine months for the public release of all of the Committee’s interview transcripts and believe it is now time for the Chairman to make good on his promise to do so.

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<sup>100</sup> Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 18, 2013) (online at [http://democrats.oversight.house.gov/images/user\\_images/gt/stories/2013-06-18.EEC%20to%20Issa.pdf](http://democrats.oversight.house.gov/images/user_images/gt/stories/2013-06-18.EEC%20to%20Issa.pdf)).

<sup>101</sup> *Id.*

**ATTACHMENT A**

**MEMORANDUM FROM THE NONPARTISAN  
CONGRESSIONAL RESEARCH SERVICE  
ON McCARTHY ERA PRECEDENT**





**Congressional  
Research Service**  
Informing the legislative debate since 1914

**MEMORANDUM**

March 20, 2014

**To:** House Committee on Oversight and Government Reform  
Attention: [REDACTED]

**From:** [REDACTED] Legislative Attorney, [REDACTED]

**Subject:** Prosecutions for Contempt of Congress and the Fifth Amendment

This memorandum responds to your request for information about invocation of the Fifth Amendment privilege against self-incrimination in congressional hearings and contempt of Congress. Specifically, you asked for previous instances in which a witness before a congressional committee was voted in contempt of Congress and then prosecuted for refusing to answer the committee's questions or produce documents pursuant to a subpoena after invoking the Fifth Amendment privilege against self-incrimination. Additionally, you asked for information on whether any subsequent convictions for contempt of Congress under 2 U.S.C. §§ 192, 194 were upheld or overturned.

The table below provides the requested information based on searches of federal court cases in the LexisNexis database.<sup>1</sup> Although a number of search terms were used, it is possible that some relevant cases were missed. Additionally, other relevant cases may be unpublished, and therefore, not searchable in an available database. Cases involving witnesses who asserted other constitutional privileges, not including the Fifth Amendment privilege against self-incrimination, and were subsequently held in contempt of Congress are not included in the table. The cases are organized first by court authority (Supreme Court, followed by circuit courts and district courts) and then in chronological order.

<sup>1</sup> Several searches using different combinations of the following search terms were conducted: "2 U.S.C. 192," 192, committee, contempt, "contempt of Congress," "Fifth Amendment," subpoena, and subpoena. Additionally, relevant cases appearing on the Shepard's report for 2 U.S.C. § 192 were searched.

Table 1. Published Cases of Prosecutions for Contempt of Congress Following a Fifth Amendment Privilege Assertion

Case	Court and Date	Congressional Committee	Was the Witness Convicted?	Disposition of Convictions	Case Excerpt
Quinn v. United States, 349 U.S. 155 (1955).	Supreme Court May 23, 1955	Comm. on Un-American Activities	Yes	Overturned	"...we must hold that petitioner's references to the Fifth Amendment were sufficient to invoke the privilege and that the court below erred in failing to direct a judgment of acquittal." <i>Quinn</i> , 349 U.S. at 165.
Emspak v. United States, 349 U.S. 190 (1955).	Supreme Court May 23, 1955	Comm. on Un-American Activities	Yes	Overturned	"...in the instant case, we do not think that petitioner's 'No' answer can be treated as a waiver of his previous express claim under the Fifth Amendment." <i>Emspak</i> , 349 U.S. at 197.
Bart v. United States, 349 U.S. 219 (1955).	Supreme Court May 23, 1955	Comm. on Un-American Activities	Yes	Overturned	"Because of the consistent failure to advise the witness of the committee's position as to his objections, petitioner was left to speculate about the risk of possible prosecution for contempt; he was not given a clear choice between standing on his objection and compliance with a committee ruling. Because of this defect in laying the necessary foundation for a prosecution under § 192, petitioner's conviction cannot stand under the criteria set forth more fully in <i>Quinn v. United States</i> ..." <i>Bart</i> , 349 U.S. at 223.
McPhaul v. United States, 364 U.S. 372 (1960).	Supreme Court Nov. 14, 1960	Comm. on Un-American Activities	Yes	Upheld	"The Fifth Amendment did not excuse petitioner from producing the records of the Civil Rights Congress, for it is well settled that 'books and records kept in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally.'" <i>McPhaul</i> , 364 U.S. at 380.

Case	Court and Date	Congressional Committee	Was the Witness Convicted?	Disposition of Convictions	Case Excerpt
<i>Marcello v. United States</i> , 196 F.2d 437 (1952).	Fifth Circuit April 22, 1952	Special Committee on Organized Crime in Interstate Commerce (The Kefauver Committee)	Yes	Overturned	"We are clear that there was no waiver by the appellant of the privilege against self-incrimination in this case. The judgment appealed from is reversed, and a judgment of acquittal here rendered." <i>Marcello</i> , 196 F.2d at 445.
<i>Jackins v. United States</i> , 231 F.2d 405 (1956).	Ninth Circuit March 8, 1956	Comm. on Un-American Activities	Yes	Overturned	"Jackins' claim of privilege must be sustained since in the setting here described 'it was not' perfectly clear, from a careful consideration of all the circumstances in the case, that the witness (was) mistaken, and that the answer(s) cannot possibly have such tendency' to incriminate.'... The judgment is reversed with directions to enter a judgment of acquittal upon all counts." <i>Jackins</i> , 231 F.2d at 410.
<i>Fogerhaugh v. United States</i> , 232 F.2d 803 (1956).	Ninth Circuit April 24, 1956	Comm. on Un-American Activities	Yes	Overturned	"We believe that Quinn v. United States requires a reversal of this conviction as it appears that the Committee did not indicate its refusal to accept the claim of privilege against self-incrimination, and did not 'demand' that the witness answer the question... The judgment is reversed with directions to enter a judgment of acquittal." <i>Fogerhaugh</i> , 232 F.2d at 805.
<i>Shelton v. United States</i> , 404 F.2d 1292 (1968).	D.C. Circuit August 14, 1968	Comm. on Un-American Activities	Yes	Upheld	"...the subpoena did not call upon Mr. Shelton to produce any personal papers, but only those of Klan organizations... The privilege accordingly was not available to him as a basis for refusing to produce." <i>Shelton</i> , 404 F.2d at 1301.

Case	Court and Date	Congressional Committee	Was the Witness Convicted?	Disposition of Convictions	Case Excerpt
United States v. Jaffe, 98 F. Supp. 191 (1951).	District Court for the D.C. Circuit May 28, 1951	Senate Comm. on Foreign Relations	No	n/a	"...having claimed the privilege granted to him by the Fifth Amendment to the Constitution, he should not have been required to give such testimony, and, therefore, it is the judgment of the Court that, in refusing to do so, he is not guilty of contempt." <i>Jaffe</i> , 98 F. Supp. at 198.
United States v. Fischetti, 103 F. Supp. 796 (1952).	District Court for the D.C. Circuit March 11, 1952	Senate Special Comm. to Investigate Organized Crime in Interstate Commerce (The Kefauver Committee)	No	n/a	"...the Court is of the opinion that it is required to grant the defendant's motion for judgment of acquittal." <i>Fischetti</i> , 103 F. Supp. at 799.
United States v. Hoag, 142 F. Supp. 667 (1956).	District Court for the D.C. Circuit July 6, 1956	Senate Committee on Government Operations	No	n/a	"...I reach the conclusion that the defendant did not waive her privilege under the Fifth Amendment and therefore did not violate the statute in question in refusing to answer the questions propounded to her. Therefore, I find that she is entitled to a judgment of acquittal on all counts." <i>Hoag</i> , 142 F. Supp. at 673.

Source: Searches of LexisNexis database

**ATTACHMENT B**

**OPINIONS FROM 31 INDEPENDENT LEGAL  
EXPERTS IDENTIFYING CONSTITUTIONAL  
DEFICIENCIES IN CONTEMPT PROCEEDINGS**

**Experts Opinions on Lois Lerner Contempt Proceedings**

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2	Statement of Stanley Brand, former House Counsel	<b><u>Page 3</u></b>
3	Statement of Joshua Levy, Esq.	<b><u>Page 9</u></b>
4	Statement of Professor Julie Rose O'Sullivan	<b><u>Page 10</u></b>
5	Statement of Professor Samuel Buell	<b><u>Page 11</u></b>
6	Statement of Robert Muse, Esq.	<b><u>Page 12</u></b>
7	Statement of Professor Lance Cole	<b><u>Page 13</u></b>
8	Statement of Professor Renée Hutchins	<b><u>Page 14</u></b>
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27	Statement of Glenn Ivey, Esq.	<u>Page 54</u>
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31	Statement of Professor Alex Whiting	<u>Page 58</u>
	Additional Statement of Morton Rosenberg, Esq. Addressing Chairman Issa’s House Counsel Memo	<u>Page 59</u>

1. **Morton Rosenberg spent 35 years as a former Specialist in American Public Law at the non-partisan Congressional Research Service and is a former Fellow at the Constitution Project.**
2. **Stanley M. Brand, who served as General Counsel for the House of Representatives from 1976 to 1983, wrote that he agreed with Mr. Rosenberg's analysis.**



**March 12, 2014**

**To:     Honorable Elijah E. Cummings  
          Ranking Minority Member,  
          House Committee on Oversight  
          And Government Reform**

**From:   Morton Rosenberg  
          Legislative Consultant**

**Re:     Constitutional Due Process Prerequisites for Contempt of Congress  
          Citations and Prosecutions**

**You have asked that I discuss whether, at this point in the questioning of Ms. Lois Lerner, a witness in the Committee's ongoing investigation of alleged irregularities by the Internal Revenue Service (IRS) in the processing of applications by certain organizations for tax-exempt status, the appropriate constitutional foundation has been established for the Committee to initiate the process that would lead to her prosecution for contempt of Congress. My understanding of the requirements of the law in this area leads me to conclude that the requisite due process protections have not been met.**

**My views in this matter have been informed by my 35 years of work as a Specialist in American Public Law with the American Law Division of the Congressional Research Service, during which time I concentrated particularly on constitutional and practice issues arising from interbranch conflicts over information disclosures in the course of congressional oversight and investigations of executive agency implementation of their statutory missions. My understandings have been further refined by my preparation for testimony on investigative matters before many committees, including your Committee, and by the research involved in the writing and publication by the Constitution Project in 2009 of a monograph entitled "When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry."**

**Briefly, the pertinent background of the situation is as follows. Ms. Lerner, who was formerly the Director of Exempt Organizations of the Tax-Exempt and Government Entities Division of IRS, was subpoenaed to testify**

before the Committee on May 22, 2013. She appeared and after taking the oath presented an opening statement but thereafter refused to answer questions by Members, invoking her Fifth Amendment right against self-incrimination. The question was raised whether Ms. Lerner had effectively waived the privilege by her voluntary statements. On advice of counsel she continued to assert the privilege. Afterward, on dismissing Ms. Lerner and her counsel, Chairman Issa remarked "For this reason I have no choice but to excuse this witness subject to recall after we seek specific counsel on the question whether or not the constitutional right of the Fifth Amendment has been properly waived. Notwithstanding that, in consultation with the Department of Justice as to whether or not limited or use of unity [sic: immunity] could be negotiated, the witness and counsel are dismissed." Thus at the end of her initial testimony, there had been no express Committee determination rejecting her privilege claim nor an advisement that she could be subject to a criminal contempt proceeding. There was, however, some hint of granting statutory use immunity that would compel her testimony. On June 28, 2013, the Committee approved a resolution rejecting Ms. Lerner's privilege claim on the ground that she had waived it by her voluntary statements.

Still subject to the original subpoena, Ms. Lerner was recalled by the Committee on March 5, 2014. Chairman Issa's opening statement recounted the events of the May 22, 2013 hearing and the fact of the Committee's finding that she had waived her privilege. He then stated that "if she continues to refuse to answer questions from Members while under subpoena, the Committee may proceed to consider whether she will be held in contempt." In answer to the first question posed by Chairman Issa, Ms. Lerner expressly stated in response that she had been advised by counsel that she had not waived her privilege and would continue to invoke her privilege, which she did in response to all the Chair's further questions. After his final question Chairman Issa adjourned the hearing without allowing further questions or remarks by Committee members, and granted her "leave of said Committee," stating, "Ms. Lerner, you're released." At no time during his questioning did the Chair explicitly demand an answer to his questions, expressly overrule her claim of privilege, or make it clear that her refusal to respond would result in a criminal contempt prosecution.

In 1955 the Supreme Court announced in a trilogy of rulings that in order to establish a proper legal foundation for a contempt prosecution, a jurisdictional committee must disallow the constitutional privilege objection and clearly apprise the witness that an answer is demanded. A witness will not be forced to guess whether or not a committee has accepted his or her objection. If the witness is not able to determine “with a reasonable degree of certainty that the committee demanded his answer despite his objection,” and thus is not presented with a “clear-cut choice between compliance and non-compliance, between answering the question and risking the prosecution for contempt,” no prosecution for contempt may lie. *Quinn v. United States*, 349 U.S. 155, 166, 167 (1955); *Empsak v. United States*, 349 U.S. 190, 202 (1955). In *Bart v. United States*, 349 U.S. 219 (1955), the Court found that at no time did the committee overrule petitioner’s claim of self-incrimination or lack of pertinency, nor was he indirectly informed of the committee’s position through a specific direction to answer. A committee member’s suggestion that the chairman advise the witness of the possibility of contempt was rejected. The Court concluded that the consistent failure to advise the witness of the committee’s position as to his objections left him to speculate about this risk of possible prosecution for contempt and did not give him a clear choice between standing with his objection and compliance with a committee ruling. Citing *Quinn*, the Court held that this defect in laying the necessary constitutional foundation for a contempt prosecution required reversal of the petitioner’s conviction. 349 U.S. at 221-23. Subsequent appellate court rulings have adhered to the High Court’s guidance. See, e.g., *Jackins v. United States*, 231 F. 2d 405 (9<sup>th</sup> Cir. 1959); *Fagerhaugh v. United States*, 232 F. 2d 803 (9<sup>th</sup> Cir. 1959).

In sum, at no stage in this proceeding did the witness receive the requisite clear rejections of her constitutional objections and direct demands for answers nor was it made unequivocally certain that her failure to respond would result in criminal contempt prosecution. The problematic Committee determination that Ms. Lerner had waived her privilege, see, e.g., *McCarthy v. Arndstein*, 262 U.S. 355, 359 (1926) and *In re Hitchings*, 850 F. 2d 180 (4<sup>th</sup> Cir. 1980), occurred after the May 2013 hearing. Chairman Issa’s opening statement at the March 5, 2014 hearing, while referencing the waiver decision did not make it a substantive element of the Committee’s current concern and was never mentioned again during his interrogation of the witness. More significantly, the Chairman’s opening remarks were equivocal about the consequence of a failure

by Ms. Lerner to respond to his questions. As indicated above, he simply stated that “the Committee *may proceed to consider* whether she will be held in contempt.” Combined with his closing remarks in the May 2013 hearing, where he indicated he would be discussing the possibility of granting the witness statutory immunity with the Justice Department to compel her testimony, there could be no certainty for the witness and her counsel that a contempt prosecution was inevitable. Finally, it may be reiterated that the Chairman during the course of his most recent questioning never expressly rejected Ms. Lerner’s objections nor demanded that she respond.

I conclude that the requisite legal foundation for a criminal contempt of Congress prosecution mandated by the Supreme Court rulings in *Quinn*, *Emspak* and *Bart* have not been met and that such a proceeding against Ms. Lerner under 2 U.S.C. 194, if attempted, will be dismissed. Such a dismissal will likely also occur if the House seeks civil contempt enforcement.

You also inquire whether the waiver claim raised in the May 2013 hearing can be raised in a subsequent hearing to which Ms. Lerner might be again subpoenaed and thereby prevent her from invoking her Fifth Amendment rights. The courts have long recognized that a witness may waive the Fifth Amendment right to self-incrimination in one proceeding, and then invoke it later at a different proceeding on the same subject. See, e.g., *United States v. Burch*, 490 F.2d 1300, 1303 (8<sup>th</sup> Cir. 1974); *United States v. Licavoli*, 604 F. 2d 613, 623 (9<sup>th</sup> Cir. 1979); *United States v. Cain*, 544 F. 2d 1113,1117 (1<sup>st</sup> Cir. 1976); *In re Neff*, 206 F. 2d 149, 152 (3d Cir. 1953). See also, *United States v. Allman*, 594 F. 3d 981 (8<sup>th</sup> Cir. 2010) (acknowledging the continued vitality of the “same proceeding” doctrine: “We recognize that there is ample precedent for the rule that the waiver of the Fifth Amendment privilege in one proceeding does not waive that privilege in a subsequent proceeding.”). Since Ms. Lerner was released from her subpoena obligations by the final adjournment of the Committee’s hearing, a compelled testimonial appearance at a subsequent hearing on the same subject would be a different proceeding.

In addition, Stanley M. Brand has reviewed this memorandum and fully subscribes to its contents and analysis.

Mr. Brand served as General Counsel for the House of Representatives from 1976 to 1983 and was the House's chief legal officer responsible for representing the House, its members, officers, and employees in connection with legal procedures and challenges to the conduct of their official activities. Mr. Brand represented the House and its committees before both federal district and appellate courts, including the U.S. Supreme Court, in actions arising from the subpoena of records by the House and in contempt proceedings in connection with congressional demands.

In addition to the analysis set forth above, Mr. Brand explained that a review of the record from last week's hearing reveals that at no time did the Chair expressly overrule the objection and order Ms. Lerner to answer on pain of contempt. Making it clear to the witness that she has a clear cut choice between compliance and assertion of the privilege is an essential element of the offense and the absence of such a demand is fatal to any subsequent prosecution.

3. **Joshua Levy, a partner in the firm of Cunningham and Levy and an Adjunct Professor of Law at the Georgetown University Law Center who teaches Congressional Investigations, said:**

“Contempt cannot be born from a game of gotcha. Supreme Court precedents that helped put an end to the McCarthy era ruled that Congress cannot initiate contempt proceedings without first giving the witness due process. For example, Congress cannot hold a witness in contempt without directing her to answer the questions being asked, overruling her objections and informing her, in clear terms, that her refusal to answer the questions will result in contempt. None of that occurred here.”

4. **Julie Rose O’Sullivan, a former federal prosecutor and law clerk to Supreme Court Justice Sandra Day O’Connor and current a Professor at the Georgetown University Law Center, said:**

“The Supreme Court has spoken—repeatedly—on point. Before a witness may be held in contempt under 18 U.S.C. sec. 192, the government bears the burden of showing ‘criminal intent—in this instance, a deliberate, intentional refusal to answer.’ *Quinn v. United States*, 349 U.S. 155, 165 (1955). This intent is lacking where the witness is not faced with an order to comply or face the consequences. Thus, the government must show that the Committee ‘clearly apprised [the witness] that the committee demands his answer notwithstanding his objections’ or ‘there can be no conviction under [sec.] 192 for refusal to answer that question.’ *Id.* at 166. Here, the Committee at no point directed the witness to answer; accordingly, no prosecution will lie. This is a result demanded by common sense as well as the case law. ‘Contempt’ citations are generally reserved for violations of court or congressional orders. One cannot commit contempt without a qualifying ‘order.’”

**5. Samuel W. Buell, a former federal prosecutor and current Professor of Law at Duke University Law School, said:**

“[T]he real issue for me is the pointlessness and narrow-mindedness of proceeding in this way. Contempt sanctions exist for the purpose of overcoming recalcitrance to testify. One would rarely if ever see this kind of procedural Javert-ism from a federal prosecutor and, if one did, one would expect it to be condemned by any federal judge before whom such a motion were made.

In federal court practice, contempt is not sought against grand jury witnesses as a kind of gotcha penalty for invocations of the Fifth Amendment privilege that might turn out to contain some arguable formal flaw. Contempt is used to compel witnesses who have asserted the privilege and then continued to refuse to testify after having been granted immunity. Skirmishing over the form of a privilege invocation is a wasteful sideshow. The only question that matters, and that would genuinely interest a judge, is whether the witness is in fact intending to assert the privilege and in fact has a legitimate basis to do so. The only questions of the witness that therefore need asking are the kind of questions (and a sufficient number of them) that will make the record clear that the witness is not going to testify. Usually even that process is not necessary and a representation from the witness’s counsel will do.

Again, contempt sanctions are on the books to serve a simple and necessary function in the operation of legal engines for finding the truth, and not for any other purpose. Any fair and level-headed judge is going to approach the problem from that perspective. Seeking contempt now on this record thus could accomplish nothing but making the Committee look petty and uninterested in getting to the merits of the matter under investigation.”



6. **Robert Muse, a partner at Stein, Mitchell, Muse & Cipollone, LLP, Adjunct Professor of Congressional Investigations at Georgetown Law, and formerly the General Counsel to the Special Senate Committee to Investigate Hurricane Katrina, said:**

“Procedures and rules exist to provide justice and fairness. In his rush to judgment, Issa forgot to play by the rules.”

**7. Professor Lance Cole of Penn State University's Dickinson School of Law, said:**

**"I agree with the analysis and conclusions of Mr. Rosenberg, and the additional comments by Mr. Brand. I also have a broader concern about seeking criminal contempt sanctions against Ms. Lerner. I do not believe criminal contempt proceedings should be utilized in a situation in which a witness is asserting a fundamental constitutional privilege and there is a legitimate, unresolved legal issue concerning whether or not the constitutional privilege has been waived. In that situation initiating a civil subpoena enforcement proceeding to obtain a definitive judicial resolution of the disputed waiver issue, prior to initiating criminal contempt proceedings, would be preferable to seeking criminal contempt sanctions when there is a legitimate issue as to whether the privilege has been waived and that legal issue inevitably will require resolution by the judiciary. Pursuing a criminal contempt prosecution in this situation, when the Committee has available to it the alternatives of either initiating a civil judicial proceeding to resolve the legal dispute on waiver or granting the witness statutory immunity, is unnecessary and could have a chilling effect on the constitutional rights of witnesses in congressional proceedings."**

8. Renée Hutchins is a former federal prosecutor, current appellate defense attorney, and Associate Professor of Law at the University of Maryland Carey School of Law. She said:

*"America is a great nation in no small part because it is governed by the rule of law. In a system such as ours, process is not a luxury to be afforded the favored or the fortunate. Process is essential to our notion of equal justice. In a contempt proceeding like the one being threatened the process envisions, at minimum, a witness who has refused to comply with a valid order. But a witness cannot refuse to comply if she has not yet been told what she must do. Our system demands more. Before the awesome powers of government are brought to bear against individual Americans we must be vigilant, now and always, to ensure that the process our fellow citizens confront is a fair one."*

**9. Colin Miller is an Associate Professor of Law at the University of South Carolina School of Law whose areas of expertise include Evidence, as well as Criminal Law and Procedure. He wrote:**

In this case, the witness invoked the Fifth Amendment privilege, the Committee Chairman recessed the hearing, and the Chairman now wants to hold the witness in contempt based upon the conclusion that she could not validly invoke the privilege. Under these circumstances, the witness cannot be held in contempt. Instead, the only way that the witness could be held in contempt is if the Committee Chairman officially ruled that the Fifth Amendment privilege was not available, instructed the witness to answer the question(s), and the witness refused.

As the United States District Court for the Northern District of Illinois noted in *United States ex rel. Berry v. Monahan*, 681 F.Supp. 490, 499 (N.D.Ill. 19988),

If the law were otherwise, a person with a meritorious fifth amendment objection might not assert the privilege at all simply because of fear that the judge would find the invocation erroneous and hold the person in contempt. In that scenario, the law would throw the person back on the horns of the "cruel trilemma" for in order to insure against the contempt sanction the person would have to either lie or incriminate himself.

The Northern District of Illinois is not alone in this conclusion. Instead, it cited as support:

*Traub v. United States*, 232 F.2d 43, 49 (D.C.Cir.1955) ("no contempt can lie unless the refusal to answer follows an adverse ruling by the court on the claim of the privilege or clear direction thereafter to answer" (*citation omitted*)); *Carlson v. United States*, 209 F.2d 209, 214 (1st Cir.1954) ("the claim of privilege calls upon the judge to make a ruling whether the privilege was available in the circumstances presented; and if the judge thinks not, then he instructs the witness to answer"). See also *Wolfe v. Coleman*, 681 F.2d 1302, 1308 (11th Cir.1982) (the petition for the writ in a contempt case failed because the court had found the petitioner's first amendment objection invalid before ordering him to answer); *In re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600, 608 (D.C.Cir.1976) (a witness is subject to contempt if the witness refuses to answer a grand jury question previously found not to implicate the privilege). Compare *Maness v. Meyers*, 419 U.S. 449, 459, 95 S.Ct. 584, 591, 42 L.Ed.2d 574 (1975) ("once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders" (emphasis added)); *United States v. Ryan*, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971) (after the court rejects a witness' objections, the witness is confronted with the decision to comply or be held in contempt if his objections to testifying are rejected again on appeal).

Most importantly, it cited the Supreme Court's opinion in *Quinn v. United States*, 349 U.S. 155 (1955), in support

The Supreme Court in *Quinn v. United States*, 349 U.S. 155, 75 S.Ct. 688, 99 L.Ed. 964 (1955) held that in congressional-committee hearings the committee must clearly dispose of the witness' fifth amendment claim and order that witness to answer before the committee invokes its contempt power. *Quinn v. United States*, 349 U.S. 155, 167-68, 75 S.Ct. 668, 675-76, 99 L.Ed.

964 (1955). According to *Quinn*, “unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections,” the witness’ refusal to answer is not contemptuous because the requisite intent element of the congressional-contempt statute is lacking. *Id.* at 165–66, 75 S.Ct. at 674–75 (discussing 2 U.S.C. § 192). The court further stated that “a clear disposition of the witness’ objection is a prerequisite to prosecution for contempt.”

Therefore, *Quinn* clearly stands for the proposition that the witness in this case cannot be held in contempt of Court.

Sincerely,

Colin Miller  
University of South Carolina School of Law

10. **Thomas Crocker is a Distinguished Professor of Law at the University of South Carolina School of Law who teaches courses in teaches Constitutional Law, Criminal Procedure, as well as seminars in Jurisprudence.**

21 March 2014

Honorable Elijah E. Cummings  
 Ranking Minority Member  
 House Committee on Oversight and Government Reform  
 2157 Rayburn House Office Building  
 Washington, DC 20515

Dear Honorable Cummings:

After reviewing materials relevant to the recent appearance of Ms. Lois Lerner as a witness before the Committee, I conclude that no legal basis exists for holding her in contempt. Specifically, I agree with the legal analysis and conclusions Morton Rosenberg reached in the memo provided to you. Let me add a few thoughts as to why I agree.

The Fifth Amendment privilege against self-incrimination has deep constitutional roots. As the Supreme Court explained, the privilege is “of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions.” *Quinn v. United States*, 349 U.S. 155, 161-62 (1955). Because of its importance, procedural safeguards exist to ensure that government officials respect “our fundamental values,” which “mark[] an important advance in the development of our liberty.” *Kastigar v. United States*, 406 U.S. 441, 444 (1972). As the Supreme Court made clear in a trio of cases brought in response to congressional contempt proceedings, before a witness can be held in contempt under 18 U.S.C. sec. 192, a committee must “directly overrule [a witness’s] claims of self incrimination.” *Bart v. United States*, 349 U.S. 219, 222 (1955). “[U]nless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under sec. 192 for refusal to answer that question.” *Quinn*, 349 U.S. at 166. Without this clear appraisal, and without a subsequent refusal, the statutory basis for violation of section 192 does not exist. This reading of the statutory requirements under section 192, required by the Supreme Court, serves the constitutional purpose of protecting the values reflected in the Fifth Amendment.

Reviewing the proceedings before the House Oversight Committee, it is clear that Chairman Darrell Issa did not overrule the witness’s assertion of her Fifth Amendment privilege. As a result, the witness was “never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt.” *Empsak v. United States*, 349 U.S. 190, 202 (1955). Without that choice, then under section 192, the witness lacks the relevant intent, and therefore does not meet an essential element necessary for a claim of contempt. This is not a close or appropriately debatable case.

In addition, I understand that arguments have been made that Ms. Lerner waived her Fifth Amendment privilege in making an opening statement to the Committee and in authenticating earlier answers to the Inspector General. Although I would conclude that Ms. Lerner did not waive her right to invoke a Fifth Amendment privilege against testifying, resolution of this legal question is not relevant to the question of whether the proper foundation exists for a contempt of Congress claim under section 192. Even if the witness had waived her privilege, Chairman Issa failed to follow the minimal procedural safeguards required by the Supreme Court as a prerequisite for a contempt charge.

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Sincerely,

Thomas P. Crocker, J.D., Ph.D.  
Distinguished Professor of Law



- 11. Thomas Spulak served as General Counsel of the House of Representatives from 1994-1995. He wrote in a statement to Ranking Member Cummings:**

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THOMAS J. SPULAK, ESQ.  
1700 PENNSYLVANIA AVENUE, N. W.  
202-661-7948

March 20, 2014

Honorable Elijah Cummings  
Ranking Member  
WASHINGTON, DC 20006  
Committee on Oversight and Government Reform  
U. S. House of Representatives  
2471 Rayburn Office Building  
Washington, DC 20515

Dear Representative Cummings:

I write to you in response to your request for my views on the matter involving Ms. Lois Lerner currently pending before the Committee on Oversight and Government Reform (the "Committee"). I do so out of my deep concerns for the constitutional integrity of the U.S. House of Representatives, its procedures and its future precedents. I have no association with the matter whatsoever.

I have read reports in the Washington Post regarding the current proceedings involving Ms. Lois Lerner and especially the question of whether an appropriate and adequate constitutional predicate has been laid to serve as the basis for a charge of contempt of Congress. In my opinion, it has not.

I have deep respect for Chairman Darrell Issa and his leadership of the Committee. But the matter before the Committee is a relatively rare occurrence and must be dispatched in a constitutionally required manner for the good of this and future

Congresses.

I have reviewed the memorandum that Mr. Morton Rosenberg presented to you on March 12<sup>th</sup> of this year. As you may know, Mr. Rosenberg is one of the leading scholars on the U.S. Congress, its procedures and the constitutional foundation. He has been relied upon by members and staff of both parties for over 30 years. I first met Mr. Rosenberg in the early 1980s when I was Staff Director and General Counsel of the House Rules Committee. He was an important advisor to the members of the Rules Committee then and has been for years after. While perhaps there have been times when some may have disagreed with his position, I know of no instance where his objectivity or commitment to the U.S. Congress has ever been questioned.

Based on my experience, knowledge and understanding of the facts, I fully agree with Mr. Rosenberg's March 12<sup>th</sup> memorandum.

I have also reviewed Chairman Issa's letter to you dated March 14<sup>th</sup> of this year. His letter is very compelling and clearly states the reasons that he believes a proper foundation for a charge of contempt of Congress has been laid. For example, he indicates that on occasions, Ms. Lerner knew or should have known that the Committee had rejected her Fifth Amendment privilege claim, either through the Chairman's letter to her attorney or to reports of the same that appeared in the media. The fact of the matter, however, is that based on relevant Supreme Court rulings, the pronouncement must occur with the witness present so that he or she can understand the finality of the decision, appreciate the consequences of his or her continued silence, and have an opportunity to decide otherwise at that time.

I agree with the Chairman's reading of *Quinn v. United States* in that there is no requirement to use any "fixed verbal formula" to convey to the witness the Committee's decision. But, I believe that the Court does require that whatever words are used be delivered to the witness in a direct, unequivocal manner in a setting that allows the

witness to understand the seriousness of the decision and the opportunity to continue to insist on invoking the privilege or revoke it and respond to the Committee's questioning. That, as I understand the facts, did not occur.

In conclusion, I quote from Mr. Rosenberg's memorandum and agree with him when he said-

... [A]t no stage in [the] proceeding did the witness receive the requisite clear rejections of her constitutional objections and direct demands for answers nor was it made unequivocally certain that her failure to respond would result in criminal contempt prosecution.

Accordingly, I do not believe that the proper basis for a contempt of Congress charge has been established. Ultimately, however, this will be determined by members of the Judicial Branch.

Sincerely,

Thomas J. Spulak

12. **J. Richard Broughton is a Professor of Law at the University of Detroit Mercy School of Law and a member of the Republican National Lawyers Association.**

## MEMORANDUM

**TO:** Donald K. Sherman, Counsel  
House Oversight & Government Reform Committee

**FROM:** J. Richard Broughton, Associate Professor of Law  
University of Detroit Mercy School of Law

**RE:** Legal Issues Related to Possible Contempt of Congress Prosecution

**DATE:** March 17, 2014

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You have asked for my thoughts regarding the possibility of a criminal contempt prosecution pursuant to 2 U.S.C. §§ 192 & 194 against Lois Lerner, in light of the assertion that the Committee violated the procedures necessary for permitting such a prosecution. My response here is intended to be objective and non-partisan, and is based on my own research and expertise. I am a full-time law professor, and my areas of expertise include Constitutional Law, Criminal Law, and Criminal Procedure, with a special focus on Federal Criminal Law. I previously served as an attorney in the Criminal Division of the United States Department of Justice during the Bush Administration. These views are my own and do not necessarily reflect the views of the University of Detroit Mercy or anyone associated with the University.

The power of Congress to hold a witness in contempt is an important tool for carrying out the constitutional functions of the legislative branch. Lawmaking and oversight of the other branches require effective fact-finding and the cooperation of those who are in a position to assist the Congress in gathering information that will help it to do its job. Like any other criminal sanction, however, the contempt power must be used prudently, not for petty revenge or partisan gain. It should also be used with appropriate respect for countervailing constitutional rights and with proof that the accused contemnor possessed the requisite level of culpability in failing to answer questions. The Supreme Court has held that a recalcitrant witness's culpable mental state can only be established after the Committee has unequivocally rejected a witness's objection to a question and then demanded an answer to that question, even where the witness asserts the Fifth Amendment privilege. Absent such a formal rejection and subsequent directive, the witness – here, Ms. Lerner – would likely have a defense to any ensuing criminal prosecution for contempt, pursuant to the existing Supreme Court precedent. Those who are concerned about the reach of federal power should desire legally sufficient proof of a person's culpable mental state before permitting the United States to seek and impose criminal punishment.

Whether the precedents are sound, or whether they require such formality, however, is another matter. As set forth in the Rosenberg memorandum of March 12, 2014, the relevant cases are *Quinn v. United States*, 349 U.S. 155 (1955), *Emspak v. United States*, 349 U.S. 190 (1955), and *Bart v. United States*, 349 U.S. 219 (1955). *Quinn* contains the most detailed explanation of the procedural requirements for using section 192. Mr. Rosenberg's thoughtful memo correctly describes the holding in these cases. Still, those cases are not a model of clarity and their application to the Lerner matter is subject to some greater exploration.

One could argue that the Committee satisfied the rejection-then-demand requirement here, when we view the May 22, 2013 and March 5, 2014 hearings in their totality. At the May 22, 2013 hearing, Chairman Issa indicated to Ms. Lerner that he believed she had waived the

privilege (a contention bolstered by Rep. Gowdy at that hearing). The Committee then voted 22 to 17 on June 28, 2013 in favor of a resolution stating that she had waived the privilege. The Chairman then referred to this resolution in his opening statement on March 5, 2014, in the presence of Ms. Lerner and her counsel. And at each hearing, Chairman Issa continued to ask questions of her even after she re-asserted the privilege, thus arguably further demonstrating to her that the chair did not accept her invocation. Consequently, it could be argued that these actions placed her on adequate notice that her assertion of the privilege was unacceptable and that she was required to answer the questions propounded to her, which is why the Chairman continued with his questioning on March 5. Her refusal to answer was therefore intentional.

This argument is problematic, however, particularly if we read the cases as imposing a strict requirement that the specific question initially propounded be repeated and a demand to answer *it* made after formally rejecting the witness's invocation of privilege *as to that question*. And that is a fair reading of the cases. Although the Court said that no fixed verbal formula is necessary when rejecting a witness's objection, the witness must nevertheless be "fairly apprised" that the Committee is disallowing it. *See Quinn*, 349 U.S. at 170. Even Justice Reed's *Quinn* dissent, which criticized the demand requirement, conceded that the requisite mens rea for contempt cannot be satisfied where the witness is led to believe that – or at least confused about whether – her invocation of the privilege is acceptable. *See id.* at 187 (Reed, J., dissenting). Here, the Committee appeared equivocal at the first hearing. Although Chairman Issa's original rejection on May 22, 2013 was likely satisfactory (and bolstered by Rep. Gowdy's argument), it was not followed by a demand to answer the specific question propounded. He then moved onto other questions. On March 5, 2014, the Committee's conduct was also equivocal, because even though the Committee had approved a resolution stating that she had waived the privilege, and the Chairman referred to that resolution in his opening statement, the Committee never formally overruled her assertion of the privilege upon her repeated invocations of it (though it could easily have done so, by telling her that the resolution of June 28, 2013 still applied to each question she would be asked on March 5, 2014). Nor did the Committee demand answers to those same questions. Ms. Lerner was then excused each time and was never compelled to answer.

The problem, then, is not that the Committee failed to notify Ms. Lerner generally that it rejected her earlier assertion of privilege. Rather, the problem is that the Committee did not specifically overrule *each* invocation on either May 22, 2013 or March 5, 2014 and then demand an answer to *each* question previously asked. This is a problem because the refusal to answer each question constitutes a distinct criminal offense for which the mens rea must be established. Therefore, Ms. Lerner could have been confused about whether her invocation of the privilege as to each question was now acceptable – the waiver resolution and the Chair's reference to it notwithstanding – especially after her attorney had assured her that she did *not* waive the privilege. A fresh ruling disputing her counsel's advice would have clarified the Committee's position, but did not occur. But even if she could not have been so confused, she would likely have a persuasive argument that this process was still not sufficient under *Quinn*, absent a ruling on *each* question propounded *and* a demand that she answer the question initially asked of her prior to her invocation of the privilege.

Of course, none of this is to say that the cases are not problematic. *Quinn* is not clear about whether a general rejection of a witness's previous assertion of the privilege – like the one we have here via resolution and reference in an opening statement – would suffice as a method

for overruling an invocation of privilege on each and every question asked (as opposed to informing the witness after each invocation that the invocation is unacceptable). The best reading of *Quinn* is that although it does not require a talisman, it does require that the witness be clearly apprised as to each question that her objection to it is unacceptable. And that would seem to require a separate rejection and demand upon each invocation. *Quinn* also specifically states that once the Committee reasonably concludes that the witness has invoked the Fifth Amendment privilege, the privilege “must be respected.” *Quinn*, 349 U.S. at 163. Yet *Quinn* later states that when a witness asserts the privilege, a contempt prosecution may lie only where the witness refuses the answer once the committee has disallowed the objection and demanded an answer. *Id.* at 166. This would often put the committee in an untenable position. If the committee must respect an assertion of the privilege, then it cannot overrule the invocation of the privilege and demand an answer. For if the committee must decide to overrule the objection and demand an answer, then the committee is not respecting the assertion of the privilege. Perhaps the Court meant something different by “respect;” but its choice of language is confusing.

Also, the cases base the demand requirement on the problem of proving mens rea. Although the statute does not explicitly set forth the “deliberate and intentional” mens rea, the Court has held that the statute requires this. See *Sinclair v. United States*, 279 U.S. 263, 299 (1929). Contrary to *Quinn*, it is possible to read the statute as saying that the offense is complete once the witness refuses to answer a question, especially once it is made clear that the Committee rejects the underlying objection to answering. That reading is made even more plausible if the witness already knows that she may face contempt if she asserts the privilege and refuses to answer. Justice Reed raised this problem, see *Quinn*, 349 U.S. at 187 (Reed, J., dissenting), as did Justice Harlan, who went even farther in his *Emspak* dissent by saying that the rejection-then-demand requirement has no bearing on the witness’s state of mind as of the time she initially refuses to answer. See *Emspak*, 349 U.S. at 214 (Harlan, J., dissenting). Here, Chairman Issa asked Ms. Lerner a series of questions that she did not answer, asserting the privilege instead. There remains a plausible argument that this, combined with the Chairman’s initial statement that she had waived the privilege and the subsequent resolution of June 28, 2013, is enough to prove that she acted intentionally in refusing, even without a subsequent demand. That argument, however, would require reconsideration of the holding in *Quinn*.

Third, the Rosenberg memo adds that the witness must be informed that failure to respond *will* result in a criminal contempt prosecution. That, however, also places the committee in an untenable position. A committee cannot assure such a prosecution. Pursuant to section 194 and congressional rules, the facts must first be certified by the Speaker of the House and the President of the Senate, the case must be referred to the United States Attorney, and the United States Attorney must bring the case before a grand jury (which could choose not to indict). Even if the committee believes the witness should be prosecuted, that result is not inevitable. Therefore, because the committee alone is not empowered to initiate a contempt prosecution, requiring the committee to inform the witness of the inevitability of a contempt prosecution would be inconsistent with federal law (section 194). Perhaps what Mr. Rosenberg meant was simply that the witness must be told that the committee would refer the case to the full Congress.

Even assuming the soundness of the rejection-and-demand requirement (which we should, as it is the prevailing law), and assuming it was not satisfied here, this does not necessarily preclude some future contempt prosecution against Ms. Lerner under section 192. If



the Committee were to recall Ms. Lerner, question her, overrule her assertion of privilege and demand an answer to the same question(s) at that time, then her failure to answer would apparently satisfy section 192. In the alternative, the Committee could argue that *Quinn, et al.* were wrong to require the formality of an explicit rejection and a subsequent demand for an answer in order to prove mens rea. That question would then have to be subject to litigation.

Finally, although beyond the scope of your precise inquiry, I continue to believe that any discussion of using the contempt of Congress statutes must consider that the procedure set forth in section 194 potentially raises serious constitutional concerns, in light of the separation of powers. See J. Richard Broughton, *Politics, Prosecutors, and the Presidency in the Shadows of Watergate*, 16 CHAPMAN L. REV. 161 (2012).

I hope you find these thoughts helpful. I am happy to continue assisting the Committee on this, or any other, matter.

- 13. Louis Fisher, Adjunct Scholar at the CATO Institute and Scholar in Residence at the Constitution Project.**

I am responding to your request for thoughts on holding former IRS official Lois Lerner in contempt. They reflect views developed working for the Library of Congress for four decades as Senior Specialist in Separation of Powers at Congressional Research Service and Specialist in Constitutional Law at the Law Library. I am author of a number of books and treatises on constitutional law. For access to my articles, congressional testimony, and books see <http://loufisher.org>. Email: [lfisher11@verizon.net](mailto:lfisher11@verizon.net). After retiring from government in August 2014, I joined the Constitution Project as Scholar in Residence and continue to teach courses at the William and Mary Law School.

I will focus primarily on your March 5, 2014 hearing to examine whether (1) Lerner waived her constitutional privilege under the Fifth Amendment self-incrimination clause, (2) there is no expectation that she will cooperate with the committee, and (3) the committee should therefore proceed to hold her in contempt. For reasons set forth below, I conclude that if the House decided to hold her in contempt and the issue litigated, courts would decide that the record indicated a willingness on her part to cooperate with the committee to provide the type of information it was seeking. Granted that she had complicated her Fifth Amendment privilege by making a voluntary statement on May 22, 2013 (that she had done nothing wrong, not broken any laws, not violated any IRS rules or regulations, and had not provided false information to House Oversight or any other committee), the March 5 hearing revealed an opportunity to have her provide facts and evidence to House Oversight to further its investigation.

The March 5 hearing began with Chairman Issa stating that the purpose of meeting that morning was “to gather facts about how and why the IRS improperly scrutinized certain organizations that applied for tax-exempt status.” He reviewed the committee’s inquiry after May 22, 2013, including 33 transcribed interviews of witnesses from the IRS. He then stated: “If Ms. Lerner continues to refuse to answer questions from our members while she is under a subpoena the committee may proceed to consider whether she should be held in contempt.” He asked her, under oath, whether her testimony would be the truth, the whole truth, and nothing but the truth. She replied in the affirmative. He proceeded to ask her nine questions. Each time she answered: “On the advice of my counsel I respectfully exercise my Fifth Amendment right and decline to answer that question.” With the initial warning from Chairman Issa, followed by nine responses taking the Fifth, the committee might have been in a position to consider holding her in contempt. However, the final question substantially weakens the committee’s ability to do that in a manner that courts will uphold.

Chairman Issa, after asking the eighth question, said the committee’s general counsel had sent an e-mail to Lerner’s attorney, saying “I understand that Ms. Lerner is willing to testify and she is requesting a week’s delay.” The committee checked to see if that information was correct and received a one-word response to that question from her attorney: “Yes.” Chairman Issa asked Ms. Lerner: “Are you still seeking a one-week delay in order to testify?” She took the Fifth, but might have been inclined to answer in the affirmative but decided to rely on the privilege out of concern that a positive answer could be interpreted as waiving her constitutional right. When she chose to make an opening statement on May 22, 2013, and later took the Fifth, she was openly challenged as having waived the privilege. The hearing on March 5 is unclear on her willingness to testify. For purposes of holding someone in contempt, the record should be clear without any ambiguity or uncertainty.

These are the final words from Chairman Issa: "Ladies and Gentlemen, seeking the truth is the obligation of this Committee. I can see no point in going further. I have no expectation that Ms. Lerner will cooperate with this committee. And therefore we stand adjourned."

If it is the committee's intent to seek the truth, why not fully explore the possibility that she would, supported by her attorney, be willing to testify after a short delay of one week? According to a news story, her attorney, William Taylor, agreed to a deposition that would satisfy "any obligation she has or would have to provide information in connection with this investigation."  
<http://www.usatoday.com/story/news/politics/2014/03/03/lois-lerner-testimony-lawyer-e-mails/5981967>.

Why would a delay of one week interfere with the committee's investigation that has thus far taken nine and a half months? Why not, in pursuit of facts and evidence, probe this opportunity to obtain information from her, particularly when Chairman Issa and the committee have explained that she has important information that is probably not available from any other witness? With his last question, Chairman Issa raised the "expectation" that she would cooperate with the committee if given an additional week. Under these conditions, I think the committee has not made the case that she acted in contempt. If litigation resulted, courts are likely to reach the same conclusion.

14. **Steven Duke, a former law clerk to Supreme Court Justice William O. Douglas and a current criminal procedure professor at Yale University Law School.**

March 20, 2014

To: Honorable Elijah E. Cummings, Ranking Minority Member, House Committee on Oversight and Government Reform

From: Steven B. Duke, Professor of Law, Yale Law School

Re: Prerequisites for Contempt of Congress Citations and Prosecutions

At the request of your Deputy Chief Counsel, Donald Sherman, I have reviewed video recordings of proceedings before the Committee regarding the testimony of Ms. Lois Lerner, including her claims of privilege and the remarks of Chairman Issa regarding those claims. I have also reviewed the March 12, 2014 report to you by Morton Rosenberg, legislative consultant, and the case law cited therein. I have also done some independent research on the matter. Based on those materials and my own experience as a teacher and scholar of evidence and criminal procedure for five decades, I concur entirely with the conclusions reached in Mr. Rosenberg's report that a proper basis has not been laid for a criminal contempt of Congress prosecution of Ms. Lerner.

I also agree with Mr. Rosenberg's conclusion that whether or not Ms. Lerner waived her Fifth Amendment privilege during the May, 2013 proceedings, any new efforts to subpoena and obtain testimony from Ms. Lerner will be accompanied by a restoration of her Fifth Amendment privilege, since that privilege may be waived or reasserted in separate proceedings without regard to what has previously occurred, that is, the privilege may be waived in one proceedings and lawfully reasserted in subsequent proceedings.

**15. Barbara Babcock, Emerita Professor of Law at Stanford University Law School has taught and written in the fields of civil and criminal procedure. She said:**

“I agree completely with the memo from Morton Rosenberg about the requirements for laying a foundation before a contempt citation can be issued: a minimal and long-standing requirement for due process. In addition, it is preposterous to think she waived her Fifth Amendment right with the short opening statement on her previous appearance.”

**16. Michael Davidson is a Visiting Lecturer at Georgetown University on National Security and the Constitution. He wrote:**

"I watched the tape of the March 5, 2014 hearing, by way of the link that you sent me. I also read Mort Rosenberg's memorandum to Ranking Member Cummings.

It seems to me the Committee is still midstream in its interaction with Ms. Lerner. Whatever may have occurred on May 22, 2013 (I have not watched that tape), the Chairman asked a series of questions on March 5, 2014, Ms. Lerner asserted privilege under the Fifth Amendment, but the Chairman did not rule with respect to his March 5 questions and Ms. Lerner's assertion of privilege with respect to them.

As Mr. Rosenberg's memorandum indicates, several Supreme Court decisions should be considered. It would be worthwhile, I believe, to focus on the discussion of 2 U.S.C. 192 in *Quinn v. United States*, 349 U.S. 155, 165-70 (1955). For a witness's refusal to testify to be punishable as a crime under Section 192, there must be a requisite criminal intent. Under the Supreme Court's decision in *Quinn*, "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under [section] 192 for refusal to answer that question." 349 U.S. at 166.

From the March 5 tape, it appears that the Chairman did not demand that Ms. Lerner answer, notwithstanding her assertion of privilege, any of the questions asked on March 5, and therefore in the words of *Quinn* there could be no conviction for refusal to answer "that question," meaning any of the questions asked on March 5.

The Committee could, of course, seek to complete the process begun on March 5. If I were counseling the Committee, which I realize I am not, I'd suggest the value of inviting Ms. Lerner's attorney to submit a memorandum of law on her assertion of privilege. That could include whether on May 22, 2013 she had waived her Fifth Amendment privilege for questions asked then and whether any waiver back then carried over to the questions asked on March 5, 2014. Knowing her attorney's argument, the Committee could then consider the analysis of its own counsel or any independent analysis it might wish to receive. If it then decided to overrule Ms. Lerner's assertion of privilege, she could be recalled, her assertion of privilege on March 5 overruled, and if so she could then be directed to respond."



17. **Robert Weisberg is the Edwin E. Huddleson, Jr. Professor of Law and Director of the Stanford Criminal Justice Center at Stanford University Law School.**

To: Rep. Elijah Cummings, Ranking Member  
Committee on Oversight & Government Reform  
United States House of Representatives

March 21, 2014

From: Robert Weisberg, Stanford Law School

Contempt Issue In Regard To Witness Lois Lerner

Dear Rep. Cummings:

You have asked my legal opinion as to whether Chairman Issa has laid the proper foundation for a contempt charge against Ms. Lerner. My opinion is that he has not.

I base this opinion on a review of what I believe to be the relevant case law. Let me note, however, that I have undertaken this review on a very tight time schedule and therefore (a) I cannot claim to have exhausted all possible avenues of research, and (b) the following remarks are more conclusory and informal than scholarly would call for.

The core of my opinion is that the sequence of colloquies at the May 22, 2013 hearing and the March 5, 2014 hearing do not establish the criteria required under 2 U.S.C. sec. 192, as interpreted by the Supreme Court in *Quinn v. United States*, 349 U.S. 155 (1956); *Empsak v. United States*, 349 U.S. 190 (1956), and *Bart v. United States*, 349 U.S. 219 (1956). The clear holding of these cases is that a contempt charge may not lie unless the witness has been presented "with a clear-cut-choice between compliance and non-compliance, between answering the question and risking the prosecution for contempt." *Quinn*, at 167. Put in traditional language of criminal law, the actus reus element of under section 192 is an express refusal to answer in the face of a categorical declaration that the refusal is legally unjustified..

I know that your focus is on the March 5, 2014 hearing, but I find it useful to first look at the earlier hearing. In my view, the Chairman essentially conceded that contempt had not occurred on May 22, 2013, because rather than frame the confrontation unequivocally as required by section 192, he excused the witness subject to recall, wanting to confirm with counsel whether the witness had waived the privilege by her remarks on that day. Moreover, as I understand it, the Chair at least considered the possibility offering the witness immunity after May 22. Under *Kastigar v. United States*, 406 US 441 (1972), use immunity is a means by which the government can simultaneously respect the witness's privilege and force her to testify. It makes little sense for the government to even consider immunity unless it believes it at least possible that the witness still holds the privilege. Thus, in my view, the government may effectively be estopped from alleging that the witness was in contempt at that point.

Nor, in my view, was the required confrontation framed at the March 5, 2014 hearing. Instead of directly confronting Ms. Lerner on her refusal to answer, the Chairman proceeded to ask a series of substantive questions, to each of which she responded with an invocation of her privilege. Ms. Lerner could have inferred that the Chair was starting the question/answer/invocation clock all over again, such that as long as she said nothing at this March 5 hearing that could be construed as a waiver, her privilege claim was intact. In my opinion, the Chairman's approach at this point could be viewed, in effect, as a waiver of the waiver issue, or as above, it would allow her to claim estoppel against the government.

Moreover, while the Chairman did lay out the position that Ms. Lerner had earlier waived the privilege, he did not do so in a way that set the necessary predicate for a contempt charge. In opening remarks, the Chairman alluded to Rep. Gowdy's belief that Ms. Lerner had earlier waived and said that the Committee had voted that she had waived. The former of these points is irrelevant. The latter is relevant, but not sufficient, if she was not directly confronted with a formal legal pronouncement upon demand for an answer. Apparently, the Chairman, the reference to the committee vote occurred after Ms. Lerner's first invocation on March 5, but before he continued on to a series of substantive questions and further invocations. Thus, even if reference to the committee view on waiver might have satisfied part of the *Quinn* requirement, Chairman Issa, yet again, arguably waived the waiver issue.

I recognize that by this view the elements of contempt are formalistic and that it puts a heavy burden of meeting those formalistic requirements on the questioner. But such a burden of formalism is exactly what the Supreme Court has demanded in *Quinn*, *Emspak*, and *Bart*. Indeed, it is precisely the formalism of the test that is decried by Justice Reed's dissent in those cases. See *Quinn*, at 171 ff.

Another, supplementary approach to the contempt issue is to consider what mens rea is required for a section 192 violation. This question requires me to turn to the waiver issue. I have not been asked for, nor am I am not offering, any ultimate opinion on whether Ms. Lerner's voluntary statements at the start of the May 22 hearing constituted a waiver. However, the possible dispute about waiver may be relevant to the contempt issue because it may bear whether Ms. Lerner had the required mental state for contempt, given that she may reasonably or at least honestly believed she had not waived.

The key question is whether the refusal to answer must be "willful." There is some syntactical ambiguity here. Section 192 says that a "default--by which I assume Congress means a failure to appear, must be willful to constitute contempt, and arguably the term "willfully" does not apply to the clause about refusal. But an equally good reading is that because contempt can hardly be a strict liability crime and so there must be some mens rea, Congress meant "willfully: to apply to the refusal as well. In any event, the word "refusal" surely suggests some level of defiance, not mere failure or declination.

So if the statute requires willfulness or its equivalent, federal case law would suggest that a misunderstanding or mistake of law can negate the required mens rea. The doctrine of mistake is very complex because of the varieties of misapprehension of law that call under this rubric. But this much is clear: While mistake about of the existence of substantive meaning of a criminal law with which is one charged normally is irrelevant to one's guilt, things are different under a federal statute requiring willfulness. See *Cheek v. United States*, 498 US 192 (1991) (allowing honest, even if unreasonable, misunderstanding of law to negate guilt).<sup>102</sup>

Showing that the predicate for willfulness has not been established involves repeating much of what I have said before, from slightly different angle. That is, one can define the actus reus term "refuse" so as to implicitly incorporate the mens rea concept of willfulness.

One possible factor bearing on willfulness involves the timing of Ms. Lerner's statements at the May 22 hearing. If Ms. Lerner's voluntary exculpatory statements at that hearing preceded any direct questioning by the committee, there is an argument that those statements did not waive the privilege because she was not yet facing any compulsion to answer, and thus the privilege was not in play yet. To retain her privilege a witness need not necessarily invoke it at the very start of a hearing. Thus in cases like *Jackins v. United States*, 231 F.405 (9<sup>th</sup> Cir. 1959), the witness was able to answer questions and then later invoke the privilege because it was only after a first set of questions that new questions probed into areas that raised a legitimate concern about criminal exposure. Under those cases, the witness has not waived the privilege because the concern about compelled self-incrimination has not arisen yet. This is, of course, a different situation, because the risk of criminal exposure was already apparent to Ms. Lerner when she made her exculpatory statements. But the situations are somewhat analogous under a general principle that waiver has not occurred until by virtue of both a compulsion to answer and a risk of criminal exposure the witness is facing the proverbial "cruel trilemma" that it is the purpose of the privilege to spare the witness.

Here is one other analogy. When a criminal defendant testifies in his own behalf, the prosecutor may seek to impeach him by reference to the defendant's earlier silence, so long as the

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<sup>102</sup> According to Prof. Sharon Davies:

"Knowledge of illegality" has ... been construed to be an element in a wide variety of [federal] statutory and regulatory criminal provisions. . . . These constructions establish that . . . ignorance or mistake of law has already become an acceptable [defense] in a number of regulatory and nonregulatory settings, particularly in prosecutions brought under statutes requiring proof of "willful" conduct on the part of the accused. Under the reasoning employed in these cases, at least 160 additional federal statutes . . . are at risk of similar treatment." *The Jurisprudence of Ignorance: An Evolving Theory of Excusable Ignorance*, 48 Duke L. J. 341, 344-47 (1998).

prosecutor is not by penalizing the defendant for exercising his privilege against self-incrimination. The prosecutor may do so where the silence occurred before arrest or before the *Miranda* warning, because until the warning is given, the court will not infer that he was exercising a constitutional right. *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Fletcher v. Weir*, 455 US 603 (1982). By inference here, the Fifth Amendment was not yet in legal play in at the May 22 hearing until Ms. Lerner was asked a direct question, even though she was under subpoena.

Second, I can imagine Ms. Lerner being under the impression that because her voluntary statement could not constitute a waiver because they chiefly amounted to a denial of guilt, not any details about the subject matter.<sup>103</sup> Again, I am not crediting such a view as a matter of law. Rather, I am allowing for the possibility that Ms. Lerner, perhaps on advice of counsel, had honestly believed this to be to be a correct legal inference. But it would probably require the questioner to confront the witness very specifically and expressly about the waiver and to make unmistakably clear to her that it was the official ruling of the committee that her grounds for belief that she had not waived were wrong. If she then still refused to answer, she might be in contempt. (Of course she could then argue to a trial or appellate court that she had not waived but if she lost on that point she would not then be able to undo her earlier refusal.

Most emphatically, I am *not* opining here that these arguments are valid and can defeat a waiver claim by the government. Rather, they are relevant to the extent that Ms. Lerner may have believed them to be valid arguments, and therefore may not have acted “willfully.” If so, at the very least her refusal at the March 5 hearing would not be willful unless the Chairman had categorically clarified for her that she had indeed waived, that she no longer had the privilege, and that if she immediately reasserted her purported privilege, she would be held in contempt. As discussed above, this the Chairman did not do.

One final analogy might be useful here, and that is perjury law. In *Bronston v. United States*,<sup>409</sup> U.S. 352 (1973), the Supreme Court held that even when a witness clearly intended to mislead the questioner, there was no perjury unless the witness’s statement was a literally a false factual statement.<sup>104</sup> While its reading of the law imposed a heavy burden on the prosecutor to arrange the phrasing of its questions so as to prevent the witness from finessing perjury as Bronston had done there, the Court made clear that just such a formalistic burden is what the law required to

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<sup>103</sup> The federal false statement statute 18 U.S.C. 1001, had allowed the defense that the false statement was merely an “exculpatory no.” That defense was overruled in *Brogan v. United States* 522 U.S. 398 (1998), but perhaps a witness or her lawyer might believe would advise a client that a parallel notion might apply in regard to waiver of her fifth amendment privilege.

<sup>104</sup> The perjury statute like the contempt statute, makes “willfulness” the required mens rea.

make a criminal of a witness.<sup>105</sup> “Ambiguities with respect to whether an answer is perjurious “are to be remedied through the questioner’s acuity.” *Bronston*, at 362.

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<sup>105</sup> “[I]f the questioner is aware of the unresponsiveness of the answer, with equal force it can be argued that the very unresponsiveness of the answer should alert counsel to press on for the information he desires. It does not matter that the unresponsive answer is stated in the affirmative, thereby implying the negative of the question actually posed; for again, by hypothesis, the examiner’s awareness of unresponsiveness should lead him to press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury.” *Bronston*, at 361-62.

**18. Gregory Gilchrist is an attorney with experience representing individuals in congressional investigations and currently an Associate Professor at the University of Toledo College of Law.**

Statement of Gregory M. Gilchrist, an attorney with experience representing individuals in congressional investigations and current Associate Professor at the University of Toledo College of Law:

The rule is clear, as is the reason for the rule, and neither supports a prosecution for contempt. The Supreme Court has consistently held that unless a witness is "confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt," the assertion of the Fifth Amendment privilege is devoid of the criminal intent required for a contempt prosecution. See *Quinn v. United States*, 349 U.S. 155, 166 (1955).

Criminal contempt is not a tool for punishing those whose legal analysis about asserting the privilege is eventually overruled by a governing body. Privilege law is hard, and reasonable minds can and will differ.

Contempt proceedings are reserved for those instances where a witness – fully and clearly apprised that her claim of privilege has been rejected by the governing body and ordered to answer under threat of contempt – nonetheless refuses to answer. In this case, the committee was clear only that it had not yet determined how to treat the continued assertion of the privilege. Prosecution for contempt under these circumstances would be inconsistent with rule and reason.

**19. Lisa Kern Griffin, Professor of Law at Duke University School of Law  
whose scholarship and teaching focuses on constitutional criminal  
procedure stated:**

"The Committee has an interest in pursuing its investigation into a matter of public concern and in getting at the truth. But the witness has rights, and there are well-established mechanisms for obtaining her testimony. If a claim of privilege is valid, then a grant of immunity can compel testimony. If a witness has waived the privilege, or continues to demur despite a grant of immunity, then contempt sanctions can result from the failure to respond. But the Supreme Court has made clear that those sanctions are reserved for defiant witnesses. Liability for contempt of Congress under section 192 requires a refusal to answer that is a 'deliberate' and 'intentional' violation of a congressional order. The record of this Committee hearing does not demonstrate the requisite intent because the witness was not presented with a clear choice between compliance and contempt."



**20. David Gray is a Professor of Law at the University of Maryland Francis King Carey School of Law with expertise in criminal law, criminal procedure, international criminal law, and jurisprudence. He said:**

“After reviewing the relevant portions of the May 22, 2013, and March 5, 2014, hearings, I concur in the views of Messrs. Rosenberg and Brand that a contempt charge filed against Ms. Lerner based on her invocation of her Fifth Amendment privilege and subsequent refusal to answer questions at the March 5, 2014, hearing would in all likelihood be dismissed. Two deficits stand out.

First, at no point during the hearing was Ms. Lerner advised by the Chairman that her invocation of her Fifth Amendment privilege at the March 5, 2014, hearing was improper. The Chairman instead read a lengthy narrative history “for the record,” the content of which he believed were “important . . . for Ms. Lerner to know and understand.” During that narrative, the Chairman reported a vote taken by his committee on June 28, 2013, expressing the committee’s view that Ms. Lerner waived her Fifth Amendment rights at the May 22, 2013, hearing and that her invocation of her Fifth Amendment rights at the May 22, 2012, hearing was therefore improper. During subsequent questioning at the March 5, 2014, hearing, Ms. Lerner declared that her counsel had advised her that she had not waived her Fifth Amendment rights and that she would therefore refuse to answer questions posed at the March 5, 2014, hearing. This exchange produced a wholly ambiguous record. Chairman Issa’s narrative history could quite reasonably have been interpreted by Ms. Lerner as precisely that: history. The committee’s view that her invocation of Fifth Amendment privilege at the May 22, 2013, hearing was improper may well have been “important . . . for Ms. Lerner to know and understand” as a matter of history, but did not inform her as to the committee’s views on her potential invocation of Fifth Amendment privilege at the March 5, 2014, hearing. Ms. Lerner’s statement regarding her counsel’s opinion that she had not waived her Fifth Amendment rights might have been in direct response to the committee’s June 28, 2013, resolution. Alternatively, it may have been a statement regarding the extension of any waiver made in May 2013 to a hearing conducted in March 2014. In either event, in order to lay a proper foundation for a potential contempt charge, Chairman Issa needed to respond directly to Ms. Lerner’s March 5, 2013, invocation at the March 5, 2013, hearing.

Second, Ms. Lerner was never directly informed by the Chairman at the March 5, 2014, hearing that her failure to answer direct questions posed at the March 5, 2014, would leave her subject to a contempt charge. During his narrative history, the Chairman did state that “if [Ms. Lerner] continues to refuse to answer questions from Members while under subpoena, the Committee may proceed to consider whether she will be held in contempt.” Messrs. Rosenberg and Brand are quite right to point out that, by using the word “may,” this statement fails to put Ms. Lerner on notice that her failure to answer questions posed at the March 5, 2014, hearing would leave her subject to a contempt charge. There is another problem, however. In context, the statement seems to be reported as part of the content of the June 28, 2013, resolution and then-contemporaneous discussions of the committee rather than a directed warning to Ms. Lerner as to the risks of her conduct in the March 5, 2014, hearing. In order to lay a proper foundation for a potential contempt charge, Chairman Issa therefore needed to inform Ms. Lerner in unambiguous terms that, pursuant to its June 28, 2013, resolution, the committee would pursue contempt charges against her should she refuse to answer questions posed by the committee on March 5, 2014.

Although it appears that Chairman Issa failed to lay a proper foundation for any contempt charges against Ms. Lerner based on her refusal to answer questions at the March 5, 2014, hearing, I cannot discern any malevolent intent on his part. To the contrary, it appears to me that, based on his exchanges with Ms. Lerner at the May 22, 2013, hearing and his manner and comportment at the March 5, 2014, hearing, that he is genuinely, and laudibly, concerned that he and his committee pay all due deference to Ms. Lerner's constitutional rights. It appears likely to me that his omissions here are the results of an abundance of caution and his choice to largely limit his engagement with Ms. Lerner to reading prepared statements and questions rather than initiating the more extemporaneous dialogue that is the hallmark of examinations conducted in court."

**21. JoAnne Epps, a former federal prosecutor and Dean of Temple University Beasley School of Law, said:**

“A key element of due process in this country is fairness. The ‘uninitiated’ are not expected to divine the thinking of the ‘initiated.’ In other words, witnesses can be expected to make decisions based on what they are told, but they are not expected to know – or guess – what might be in the minds of governmental questioners. In the context of criminal contempt for refusal to answer, fairness requires that a witness be made clearly aware that an answer is demanded, that the refusal to answer is not accepted, and further that the refusal to answer can have criminal consequences. It appears that the witness in this case received neither a demand to answer, a rejection of her refusal to do so, nor an explanation of the consequences of her refusal. These omissions render defective any future prosecution.”

- 22. Stephen Saltzburg, is a former law clerk to Supreme Court Justice Thurgood Marshall, and currently the Wallace and Beverley Woodbury University at the George Washington University School of Law with expertise in criminal law and procedure; trial advocacy; evidence; and congressional matters. He said:**

The Supreme Court has made clear that a witness may not be validly convicted of contempt of Congress unless the witness is directed by a committee to answer a question and the witness refuses. The three major cases are *Quinn v. United States*, 349 U.S. 155, *Emspak v. United States*, 349 U.S. 190, and *Bart v. United States*, 349 U.S. 219, all decided in 1955. They make clear that where a witness before a committee objects to answering a certain question, asserting his privilege against self-incrimination, the committee must overrule his or her objection based upon the Fifth Amendment *and* expressly direct him to answer before a foundation may be laid for a finding of criminal intent.

This is a common sense rule. When a witness invokes his or her privilege against self-incrimination, the witness is entitled to know whether or not the committee is willing to respect the invocation. Unless and until the committee rejects the claim and orders the witness to answer, the witness is entitled to operate on the assumption that the privilege claim entitles the witness not to answer.

There is another question that arises, which is whether the Chairman of a committee is delegated the power to unilaterally overrule a claim of privilege or whether the committee must vote on whether to overrule it. This is a matter as to which I have no knowledge. I note that the memorandum by Morton Rosenberg appears to assume that the Chairman may unilaterally overrule a privilege claim, but I did not see any authority cited for that proposition.

**23. Kami Chavis Simmons, a former federal prosecutor and Professor of Law at Wake Forest University School of Law with expertise in criminal procedure stated:**

I agree with the legal analysis provided by Mr. Rosenberg, as well the comments of other legal experts. The Supreme Court's holding in *Quinn v. U.S.*, is instructive here. In *Quinn*, the Supreme Court held that a conviction for criminal contempt cannot stand where a witness before a Congressional committee refuses to answer questions based on the assertion of his fifth-amendment privilege against self-incrimination "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections." *Quinn v. U.S.*, 349, U.S. 155, 165 (1955). Case law relying on *Quinn* similarly indicates that there can be no conviction where the witness was "never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt." *Emspak v. U.S.*, 349 U.S. 190, 202 (1955). Based on the record in this case, the witness was not confronted with a choice between compliance and non-compliance. Thus, the initiation of a contempt proceeding seems inappropriate here.

There are additional concerns related to the initiation of criminal contempt proceedings in the instant case. Here, the witness, who was *compelled* to appear before Congress, made statements declaring only her innocence and otherwise made no incriminating statements. Pursuing a contempt proceeding based on these facts, may set an interesting precedent for witnesses appearing before congressional committees, and could result in the unintended consequence of inhibiting future Congressional investigations.

**24. Patrice Fulcher is an Associate Professor at Atlanta's John Marshall Law School where she teaches Criminal Law and Criminal Procedure. She said:**

"American citizens expect, and the Constitution demands, that U.S. Congressional Committees adhere to procedural constraints when conducting hearings. Yet the proper required measures designed to provide due process of law were not followed during the May 22nd House Oversight Committee Hearing concerning Ms. Lerner. In *Quinn v. United States*, the Supreme Court clearly outlined practical safeguards to be followed to lay the foundation for contempt of Congress proceedings once a witness invokes the Fifth Amendment. 349 U.S. 155 (1955). To establish criminal intent, the committee has to demand the witness answer and upon refusal, expressly overrule her claim of privilege. This procedure assures that an accused is not forced to 'guess whether or not the committee has accepted [her] objection', but is provided with a choice between compliance and prosecution. *Id.* It is undeniable that the record shows that the committee did not expressly overrule Ms. Lerner's claim of privilege, but rather once Ms. Lerner invoked her 5<sup>th</sup> Amendment right, the Chairman subsequently excused her. The Chairman did not order her to answer or present her with the clear option to respond or suffer contempt charges. Therefore, launching a contempt prosecution against Ms. Lerner appears futile and superfluous due to the Committee's disregard for long standing traditions of procedure."

25. **Andrea Dennis is a tenured Associate Professor of Law at the University of Georgia Law School who teaches Criminal Law, Criminal Procedure, and Evidence, among other courses.**




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The University of Georgia

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School of Law

**MEMORANDUM**

**TO:** The Honorable Elijah E. Cummings  
Ranking Member  
House Committee on Oversight & Government Reform

**FROM:** Andrea L. Dennis  
Associate Professor of Law  
University of Georgia School of Law

**DATE:** March 25, 2014

You asked my opinion whether the public video record of the appearance of Ms. Lois Lerner, former Director of Exempt Organizations of the Tax-Exempt and Government Entities Division of the Internal Revenue Service (IRS), before the House Committee on Oversight & Government Reform, which was investigating alleged improprieties by the IRS concerning the tax exempt status of some organizations, sufficiently demonstrates that Ms. Lerner acted “willfully” to support a criminal contempt of Congress charge, pursuant to 2 U.S.C. Sec. 192.

Based on my understanding of the facts, legal research, and professional experience, I must answer in the negative. Accordingly, I join the conclusions that Messrs. Morton Rosenberg and Stanley M. Brand presented on March 12, 2014, to Congressman Cummings, and which since have been echoed by others.

I will not herein detail the facts giving rise to this matter or offer a fully fleshed out research report. Mr. Rosenberg’s statement of relevant facts in his memorandum is accurate, and he has cited the most pertinent caselaw. I am happy, however, to provide you with additional supporting citations if necessary.

In short, my research of criminal Congressional contempt charges and analogous legal issues leads me to interpret the term “willfully” in 2 U.S.C. Sec. 192 to require that Ms. Lerner have voluntarily and intentionally violated a specific and unequivocal order to answer the Committee’s questions. Moreover, I believe that Ms. Lerner must have been advised that she faced contempt charges and punishment if she continued to refuse to answer the Committee’s questions despite its clear order to do so. Collectively, these elemental requirements ensure that witnesses in Ms. Lerner’s position are fairly notified that they must choose between making self-incriminating statements, lying under oath, and facing punishment for failing to comply with an order. Witnesses who refuse to comply with such clear statements of expectations have little room to question the nature of the circumstances with which they are confronted. In this case, the record indicates that Ms. Lerner was not forced to make such a choice and therefore a contempt prosecution would be legally and factually unsupportable.



Review of the public video recordings of Ms. Lerner's appearances at the Committee's hearings on May 22, 2013, and March 5, 2014, reveals that at no time during the Committee's publicized proceedings did the Committee Chair explicitly order Ms. Lerner to respond to questions under penalty of contempt. At most, the Committee Chair equivocally stated that if Ms. Lerner refused to answer the Committee's questions, then the Committee may possibly investigate her for contempt. This statement by itself is filled with such uncertainty that it would be erroneous to conclude that Ms. Lerner was directly ordered to answer questions and advised that she would be subject to penalty if she did not. And when considered in connection with the Chair's earlier mentions of possibly offering her immunity or granting her an extension of time to respond, the statement regarding possible contempt charges becomes even more indefinite. For these reasons, I am hard-pressed to conclude that the legal pre-requisites for acting "willfully" in a Congressional criminal contempt prosecution were factually established in these circumstances.

And although you did not particularly inquire of my opinion as to whether Ms. Lerner waived her Fifth Amendment privilege against compelled testimonial self-incrimination at the Committee's hearings on May 22, 2013, I find it an issue worthy of comment. Notably, I am unconvinced that Ms. Lerner waived her privilege at the proceedings by either reading an opening statement briefly describing her professional background and claiming innocence, or authenticating her earlier answers to questions posed to her by the Inspector General. From the record it does not appear that Ms. Lerner voluntarily revealed incriminating information or offered testimony on the merits of the issue being investigated. To conclude otherwise on the waiver issue would suggest oddly that in order to validly assert the privilege individuals must claim the privilege for even non-incriminating information, as well as upend the accepted notion that the innocent may benefit from the privilege.

Before closing, let me explain a little of my background. I am a tenured Associate Professor of Law. I teach Criminal Law, Criminal Procedure, and Evidence, among other courses. I research in a number of areas including criminal adjudication. Prior to entering academia, I clerked for a federal district court judge, practiced as an associate with the law firm of Covington & Burling in Washington, D.C., and served as an Assistant Federal Public Defender in the District of Maryland. A fuller bio may be found at: <http://www.law.uga.edu/profile/andrea-l-dennis>.

Thank you for the opportunity to reflect on this very important matter. Please let me know if you would like me to elaborate further on my thoughts or answer additional questions. If need be, I may be reached via email at [aldennis@uga.edu](mailto:aldennis@uga.edu) or in my office at 706-542-3130.

**26. Katherine Hunt Federle is a Professor of Law at the Ohio State University Michael E. Moritz College of Law where she teaches Criminal Law and serves as Director, for the Center for Interdisciplinary Law & Policy Studies. She said:**

Constitutional rights do not end at the doors of Congress. Any witness who receives a subpoena to testify before Congress may nevertheless expect that constitutional protections extend to those proceedings. When that witness raises objections to the questions posed on the grounds of self-incrimination, due process entitles the witness to a clear ruling from the committee on those objections. *Bart v. United States*, 269 F.2d 357, 361 (1955). Only after the committee informs the witness that her objections are overruled, and she continues to assert her Fifth Amendment right, would it be possible to charge the witness with criminal contempt of Congress. *Quinn v. United States*, 349 U.S. 155, 165-166 (1955). However, without a clear statement from the committee overruling her objections, there can be no conviction for contempt of Congress based on her refusal to answer questions. *Id.*

Due process cannot stand for the proposition that a witness must guess whether her assertion of the privilege of self-incrimination has been accepted. In this case, there does not appear to be any statement by the members of the House Committee on Oversight and Government Reform during the hearings informing Ms. Lerner that her objections have been overruled. It would strain credulity to suggest that a witness must rely on news accounts or second-hand statements to divine the Committee's intentions on this matter. Moreover, insisting that a witness who has asserted her Fifth Amendment right appear before the Committee again would seem to serve only political ends in the absence of some intention either to accept the invocation of the privilege against self-incrimination or to offer the witness immunity in exchange for her testimony. Rather, in light of the suggestion that the Committee intends to seek contempt charges, recalling the witness suggests an opportunity for political theater.

The essence of due process is fairness. At the very least, due process requires a direct communication from the Committee to the witness stating in some way that the witness must answer the questions. Some idea that the Committee has disagreed with her objections is not enough, given the nature of the potential charge. Of course that also means that some questions must be posed. I remain unpersuaded that happened here since the Committee met and voted to overrule her objections after Ms. Lerner first appeared, and I cannot see that any questions were asked of Ms. Lerner that would have indicated to her that her objections were overruled. When Ms. Lerner appeared a second time and invoked the privilege against self-incrimination, the Committee then should have told her it was overruling her objections. Again, that did not happen.

- 27. Glenn F. Ivey is a former federal prosecutor and currently a Partner in the law firm of Leftwich & Ludaway, whose practice focuses on white collar criminal defense, as well as Congressional and grand jury investigations. He said:**

"I agree with Morton Rosenberg's statement that Chairman Issa has not laid the requisite legal foundation to bring contempt of Congress charges. Mr. Rosenberg raises important points that the Committee ought to consider, especially given the negative historic impact this decision could have on the institution. Protecting these procedures and precedents from the pressures of the moment is important. Rushing to judgment or trying to score political points is not in the best interest of the Committee, the Congress or the country."

**28. Jonathan Rapping is an Associate Professor of Law at the John Marshall School of Law where he teaches Criminal Law and Criminal Procedure. He said:**

Ours is a nation founded on the understanding that whenever government representatives are given power over the people, there is the potential for an abuse of that power. Our Bill of Rights enshrined protections meant to shield the individual from a government that fails to exercise restraint. At no time is the exercise of prudence and temperament more important than when a citizen's liberty is at stake. The United States Supreme Court begins its analysis in *Quinn v. United States*, 349 U.S. 155 (1955), with a discussion of the historical importance the Fifth Amendment privilege against self-incrimination holds in our democracy. The Court reminds us that this right serves as "a safeguard against heedless, unfounded or tyrannical prosecutions[.]" and that to treat it "as an historical relic, at most merely to be tolerated - is to ignore its development and purpose." *Id.* at 162.

In the instant case, zeal to charge into a criminal contempt prosecution appears to trump respect for process necessary to ensure this critical right is respected. The March 5<sup>th</sup> hearing opens with Representative Issa indicating that the Committee believes Ms. Lerner waived her Fifth Amendment privilege, and *suggesting* that if Ms. Lerner does not answer questions "the Committee may proceed to consider whether she should be held in contempt." Ms. Lerner subsequently makes clear that her lawyer disagrees with that assessment, and that she believes she retains her right to refuse to answer questions. Ms. Lerner proceeds to refuse to answer questions and Representative Issa appears to accept her refusal without ever again raising the specter of contempt. By the end of the hearing, the threat that contempt charges may be forthcoming is at best ambiguous.

But in our democracy, ambiguous is not good enough. The government has the burden, indeed the obligation, to make clear that refusal to answer questions will result in contempt, giving the individual a chance to comply with an unequivocal demand. There must be no ambiguity about whether the citizen is jeopardizing her liberty. The onus is on the government to dot all i's and cross all t's. Unwavering respect for this core constitutional principle demands no less.

**29. Eve Brensike Primus is a Professor of Law at the University of Michigan Law School with expertise in criminal law, criminal procedure, as well as constitutional law. She said:**

In order to be guilty of a criminal offense for refusing to testify or produce papers during a Congressional inquiry under 2 U.S.C. § 192, a subpoenaed witness must *willfully* refuse to answer any question pertinent to the question under inquiry. In a trilogy of cases in 1955, the Supreme Court made it clear that, “unless the witness is clearly apprised that the committee demands [her] answer notwithstanding [her] objections, there can be no conviction under § 192 for refusal to answer that question.” *Quinn v. United States*, 349 U.S. 155, 166 (1955); *see also Emspak v. United States*, 349 U.S. 190, 202 (1955); *Bart v. United States*, 349 U.S. 219, 222 (1955). Without such appraisal, “there is lacking the element of deliberateness necessary” to establish the willful mental state required by the statute. *Emspak v. United States*, 349 U.S. 190, 202 (1955).

The Supreme Court further emphasized that “[t]he burden is upon the presiding member to make clear the directions of the committee....” *Quinn v. United States*, 349 U.S. 155, 166 n.34 (1955) (quoting *United States v. Kamp*, 102 F. Supp. 757, 759 (D.D.C.)). The witness must be “confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt.” *Quinn v. United States*, 349 U.S. 155, 166 (1955); *see also Bart v. United States*, 349 U.S. 219, 222 (1955) (requiring that the committee give the witness a specific direction to answer before a conviction for contempt can lie).

In neither of the hearings at which Ms. Lerner testified did Chairman Issa expressly overrule her objections and explicitly direct her to answer the committee’s questions or face contempt proceedings. Having never been given an order to answer questions, Ms. Lerner could not *willfully* refuse to answer under § 192.

**30. David Jaros is an Assistant Professor of Law at the University of Baltimore School of Law who teaches courses in criminal law and procedure. He said:**

"A critical component of due process is that a defendant must have fair notice that their actions will expose them to criminal liability. To hold Ms. Lerner in contempt, the congressional committee must have done more than just inform Ms. Lerner that it had found that her voluntary statements waived her Fifth Amendment Rights. The Committee must have also clearly demanded that she respond to the questions notwithstanding her objections. Failing to do that is fatal to the charge."

- 31. Alex Whiting is a former criminal prosecutor at the International Criminal Court (ICC) in The Hague and a Professor at Harvard Law School with expertise in criminal law, criminal trials and appeals as well as prosecutorial ethics. He said:**

Proceeding with contempt against Lois Lerner on the basis of this record would be both unwise and unfair. Because of the risk of politicization in the congressional investigation and oversight process, it is particularly important that due process be scrupulously followed at all times and that the Committee take the maximum steps to ensure that witnesses are afforded all of their legal rights and protections. The record here falls short of meeting this standard. As others have noted, federal prosecutors would rarely if ever seek to deny a witness his or her Fifth Amendment privilege based on the arguments advanced here. Further, with regard to contempt, Congress should provide, as is the practice in courts, clear warnings to the witness that refusal to answer the questions will result in contempt proceedings and then give the witness every opportunity to answer the questions. That practice was not followed in this case. Fairness and a concern for the rights of witnesses who testify before Congress dictate that the Committee take great care in following the proper procedures before considering the drastic step of seeking a finding of contempt. Proceeding with contempt under these circumstances, and on this record, seriously risks eroding the Committee's legitimacy.

32. **On April 6, 2014, Morton Rosenberg sent a memo to the Oversight Committee Democratic staff based on his review of Chairman Issa's March 25, 2014 memo from House Counsel. This memo directly rebuts the arguments raised by House Counsel in defense of Chairman Issa's actions on March 5, 2014.**



April 6, 2014

To: [REDACTED]  
Deputy Chief Counsel, Minority  
House Committee on Oversight  
& Government Reform

From: Morton Rosenberg  
Legislative Consultant

Re: Comments on House General Counsel Opinion

This is in response to your request for my comments on the House General Counsel's (HGC) March 25 opinion critiquing my March 12 memo for Ranking Member Cummings. In that opinion the HGC readily concedes that the Supreme Court in *Quinn*, *Emspak*, and *Bart* requires that in order for a congressional committee to successfully prosecute a subpoenaed witness's refusal answer pertinent questions after he has invoked his Fifth Amendment rights, it must be shown that the "witness is clearly apprised that the committee demands his answer notwithstanding his objections", *Quinn*, 349 U.S. at 196; a committee must "directly overrule [a witness's] claims of self-incrimination," *Bart*, 349 at 222; and the witness must be "confronted with a clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt." *Emspak*, 349 U.S. at 202. HGC Op. at 10-12. The HGC asserts that the Committee followed the High Court's requirements by "directly" overruling Ms. Lerner's privilege claim by its passage of a resolution specifically determining that she had voluntarily waived her constitutional rights in her opening exculpatory statement at the May 22, 2013 hearing and subsequent authentication of a document, and by communicating that committee action to her; and, "indirectly", by "demonstrating" that it had "specifically directed the witness to answer." *Id.*, 10-11, 12-15.

Both assertions are meritless. The June 28, 2013 resolution stands alone as a committee opinion (which was resisted and challenged by the witness's counsel) and is without any immediate legal consequence until the question of its legal substantiality is considered and resolved as a threshold issue by a court in criminal contempt prosecution under 2 U.S.C. 192 or civil enforcement proceeding to require the withheld testimony. By itself, the resolution, and the communication of its existence, is not a demand for an answer to a propounded question recognized by the Supreme Court trilogy. In fact, a perusal of the record of events relied on by the HGC indicates that there never has been at any time during 10 month pendency of the subject hearing a specific committee overruling of any of Ms. Lerner's numerous invocations of constitutional privilege at the time they were made or thereafter, nor any effective direction to her to respond. As a consequence, she "was left to speculate about the risk of possible prosecution for contempt; [s]he was not given a clear choice between standing on [her] objection and compliance with a committee ruling." *Bart*, 349 U.S. at 223.

More, particularly, after making her controverted opening statement and authentication of a previous document submission to an IG, Chairman Issa advised Ms. Lerner that she had effectively waived her constitutional rights and asked her to obtain her counsel's advice. She then announced her refusal to respond to any further questions, thereby invoking her privilege, to which the Chairman responded that "we will take your refusal as a refusal to testify." It may be noted that Lerner's counsel had advised the committee before the hearing that she was likely to claim privilege. The hearing proceeded without further testimony from the witness. Before adjournment, Chairman Issa announced that the question had arisen whether Ms. Lerner had waived her rights and that he would consider that issue and "look into the possibility of recalling her and insisting that she answer questions in light of a waiver." The committee thereafter sought and received input on the waiver issue, including the written views of Lerner's counsel. On June 28, 2013, after debate amongst the members, a resolution, presumably prepared and vetted by House Counsel and/or committee counsel, was passed by a 22-17 vote. The text of the committee resolution reads as follows:

Resolved, That the Committee on Oversight and Government Reform determines that voluntary statement offered by Ms. Lerner constituted a waiver of her Fifth Amendment privilege against self-incrimination as to all questions within the subject matter of the Committee hearing that began on May 22, 2013, including questions relating to (i) Ms. Lerner's knowledge of any targeting by the Internal Revenue Service of particular groups seeking tax exempt status, and (ii) questions relating to any facts or information that would support or refute her assertions that, in that regard, "she has not done anything wrong," "not broken any laws," "not violated IRS rules or regulations," and/or "not provided false information to this or any other congressional committee."

Nothing in the language of the Committee's June 28, 2013 resolution can be even be remotely construed as an *explicit* rejection of Ms. Lerner's Fifth Amendment privilege at the May 22 hearing. It is solely and exclusively concerned with the question whether Ms. Lerner voluntarily waived her privilege at that hearing. A rejection of a future claim in a resumed hearing may be implicit in the resolution's language, but that rejection, under *Quinn*, *Emspak*, and *Bart*, would have had to have been expressly directed at the particular claim when raised by the witness.

After a lapse of eight months, the Chairman decided to resume his questioning of Ms. Lerner and reminded her attorney, by letter dated February 25, 2014, that he had recessed the earlier hearing "to allow the committee to determine whether she had waived her asserted Fifth Amendment right [and that] [t]he Committee subsequently determined that Ms. Lerner in fact had waived that right." The Chairman then, for the first time, asserted "[B]ecause the Committee explicitly rejected {Ms. Lerner's} Fifth amendment privilege claim , I expect her to provide answers when the hearing reconvenes on March 5." Lerner's counsel simply responded the next day that the "[w]e understand that the Committee voted that she had waived her rights," but with no acknowledgement that any express rejection of a

privilege claim had taken place. HGC Op. at 7-8. When the hearing resumed on March 5, the Chairman opened by detailing past events. He again erroneously described what had occurred at the June 28, 2012 committee business meeting: "...[T]he committee approved a resolution rejecting Ms. Lerner's claim of Fifth Amendment privilege based on her waiver...." He then inconsistently followed up by stating "After that vote, having made the determination that Ms. Lerner waived her Fifth Amendment rights, the Committee recalled her to appear today to answer questions pursuant to rules. The committee voted and found that Ms. Lerner waived her Fifth Amendment rights by making" a voluntary exculpatory statement and a document authentication. The Chairman concluded that if the witness continued to refuse to answer questions, "the committee may proceed to consider whether she should be held in contempt." HGC Op. at 9. After being recalled and sworn in, Ms. Lerner was asked a question to which she responded that she had not waived her Fifth Amendment right and then asserted her privilege in refusing to answer that question. She continued to invoke privilege with respect to every subsequent question until the Chairman abruptly adjourned the hearing. As was detailed in my March 12 statement, the Chairman never expressly rejected her privilege claims at that hearing, individually or collectively, and thus she was never confronted with the risk of not replying.

Whether a witness has waived her Fifth Amendment protections is a preliminary, threshold issue that must be resolved by a reviewing court prior to grappling with the efficacy of a charge of criminal contempt for refusal to answer. The Supreme Court has long recognized that "Although the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution....Waiver of constitutional rights... is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege...upon vague and uncertain evidence." *Smith v. United States*, 337 U.S. 137, 150 (1949). Here, again, the Court's 1955 trilogy is instructive. In *Emspak* the Court was confronted with a Government claim that the petitioner had waived his rights with respect to one count of his indictment. The Court rejected the claim, emphasizing the context of the situation and its sense of the need to protect the integrity of the constitutional protection at stake. The witness was being questioned about his associations and expressed apprehension that the committee was "trying to perhaps frame people for possible criminal prosecution" and that "I think I have the right to reserve whatever rights I have." He was then asked, "Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?" *Emspak* relied, "No. I don't think this committee has a right to pry into my associations. That is my own position."

Analogizing the situation to the one encountered in the *Smith* case, the Court held that "[I]n the instant case, we do not think that petitioner's 'No' answer can be treated as a waiver of his previous express claim under the Fifth Amendment. At most, as in the *Smith* case, petitioner's 'No' is equivocal. It may have merely represented a justifiable refusal to discuss the reasons underlying petitioner's assertion of the privilege; the privilege would be of little avail if a witness invoking it were required to disclose the precise hazard which he fears. And even if petitioner's answer were taken as responsive to the question, the answer would still be consistent with a claim of privilege. The protection of the Self-Incrimination

Clause is not limited admissions that 'would subject [a witness] to criminal prosecution'; for this Court has repeatedly held that 'Whether such admissions by themselves would support a conviction under a criminal statute is immaterial' and that the privilege extends to admissions that may only tend to incriminate. In any event, we cannot say that the colloquy between the committee and the petitioner was sufficiently unambiguous to warrant waiver here. To conclude otherwise would be to violate this Court's own oft-repeated admonition that the courts must 'indulge every reasonable presumption against waiver of fundamental rights.'" *Emspak*, 349 U.S. at 196. Then the Court turned to the question whether the committee appropriately rejected petitioner's privilege claims.

These passages from *Emspak* are presented not to argue about the validity of the Committee's waiver resolution but to demonstrate that its conclusion is preliminary, not yet legally binding, and subject to judicial review and does not constitute the express rejection of the privilege required by the Supreme Court. However, as was indicated in my March 12 memo, extant case law, in addition to *Emspak*, makes a finding of waiver problematic; and past congressional practice accepting similar voluntary exculpatory statements further undermines the efficacy of the Committee's June 28, 2013 resolution. See, Michael Stern, [www.pointoforder.com/2013/05/23/lois-lerner-and-waiver-of-fifth-amendment-privilege](http://www.pointoforder.com/2013/05/23/lois-lerner-and-waiver-of-fifth-amendment-privilege).

The consequence of the HGC's failure to "directly" establish "that the entity—here, the Oversight Committee—specifically overruled the witness' objection," HGC Op. at 10, is that it totally undermines the second prong of its argument: that "indirectly" it has "demonstrate[ed]" that the congressional entity specifically directed the witness to answer." Id. at 11. The HGC references three such purported directions. First, the Chairman's statement in his February 25, 2014 letter to Ms. Lerner's counsel that "because the Committee explicitly rejected [Ms. Lerner's] Fifth Amendment privilege claim, I expect her to provide answers when the hearing reconvenes on March 5." As has been demonstrated above, the Committee resolution in fact did not expressly reject an invocation of privilege; Lerner's counsel's immediate reply to that statement was to convey his understanding that the resolution dealt only with the question of waiver; and Ms. Lerner's immediate response to the Chairman's initial question to her at the March 5 hearing was to assert her belief that she had not waived her privilege rights and then to invoke her privilege. Second, the HGC quotes remarks by three members at the June 28, 2013 Committee meeting that issued the waiver determination that speculate that Ms. Lerner might be held in contempt. And, third, the Chairman's verbal observation at the end of his opening remarks at the March 5 hearing that if she continued to refuse to answer questions, "the [C]ommittee *may* proceed to consider whether she should be held in contempt." Thus the "indirect" support relies predominantly on the incorrect factual and legal premise that the Committee had communicated a rejection of her privilege claims in its waiver resolution and ambiguous statements by members and the Chairman about the risk of contempt. But, again, when the March 5 questioning took place, the Chairman never expressly overruled her objections or demanded a response.

The HGC's unsuccessful effort to demonstrate that the Committee has both "directly" overruled Ms. Lerner's claims of constitutional privilege and "indirectly...specifically directed the witness to answer," also belies, contradicts and undermines his argument that the Supreme Court's trilogy did not require the Committee to both reject Ms. Lerner's assertions of privilege and to direct her to answer. The rationale of the Court's establishment these foundational requirements for a contempt prosecution was to assure that a "witness is confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt." That would seem to clearly encompass both a rejection of a claim and a demand for an answer, with the latter containing some notion or sense of a prosecutorial risk. In most instances that I can think of, one without the other is simply insufficient to meet the bottom line of the Court's rationale. The great pains the HGC has unsuccessfully taken here to show that the Committee complied with both requirements raises serious doubts as to his reading of the Court's requirements.

The HGC opinion unfairly diminishes the historical and legal significance of the 1955 trilogy as well as the lessons of contempt practice since those rulings. The Court in those cases (and others subsequent to them) was attempting to send a strong message to Congress generally, and the House Un-American Activities Committee and its chairman in particular, that it would no longer countenance the McCarthyistic tactics evidenced in those proceedings. The Court in *Quinn* wrote a paean in support of the continued vitality of the privilege demanding a liberal application: "Such liberal construction is particularly warranted in a prosecution of a witness for refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose." The *Quinn* Court did observe that no specific verbal formula was required to protect its investigative prerogatives, but it did underline that the firm rules iterated and reiterated in all three cases—clear rejections of a witness's constitutional objections, demands for answers, and notice that refusals would risk criminal prosecution—belie any intent to allow palpable ambiguity. Together with later Court rulings condemning the absence or public unavailability of committee procedural rules, or the failure to abide by standing rules, and the uncertainty of the subject matter jurisdiction and authority of investigating committees, we today have an oversight and investigatory process that is broad and powerful but restrained by clear due process requirements.

My own Zelig-like experience with contempt proceedings was that committees that have faithfully adhered to the script propounded by the Court's trilogy have found it extraordinarily useful in achieving sought after information disclosures. Normally, the criminal contempt process is principally designed to punish noncompliance, not to force disclosure of withheld documents or testimony. That has been the role of inherent contempt or civil enforcement proceedings. But in the dozens of criminal contempt citations voted against cabinet-level officials and private parties by subcommittees, full committees or by a House since 1975 there has been an almost universal success in obtaining full or significant cooperation before actual criminal proceedings were commenced. See generally, [REDACTED]

██████████, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, CRS Report RL34097 (August 12, 2012). Two such inquiries involving private parties are useful examples for present purposes. In 1998 the Oversight subcommittee of the House Commerce Committee began investigating allegations of undue political influence by an office developer, Franklin Haney, in having the General Services Administration locate the Federal Communications Commission in one of his new buildings. Subpoenas were issued to the developer and his attorneys. Attorney-client privilege was asserted by the developer and the law firm. A contempt hearing was called at which the developer and the representative of the firm were again asked to comply and refused, claiming privilege. The chair rejected the claims and advised the witnesses that continued noncompliance would result in a committee vote of contempt. The witnesses continued their refusals and the committee voted them in contempt. At the conclusion of the vote, the representative of the law firm rose and offered immediate committee access to the documents if the contempt vote against the firm was rescinded. The committee agreed to rescind the citation. Six months later the District of Columbia Bar Association Ethics Committee ruled that the firm had not violated its obligation of client confidentiality in the face of a subcommittee contempt vote that put them legal jeopardy. See, *Contempt of Congress Against Franklin I. Haney*, H. Rept. 105-792, 105<sup>th</sup> Cong., 2d Sess. (1998).

A second illustrative inquiry involved the Asian and Pacific Affairs subcommittee of House Foreign Affairs' investigation looking into real estate investment work by two brothers, Ralph and Joseph Bernstein, a real property investor and lawyer respectively, on behalf of President Ferdinand Marcos of the Philippines and his wife Imelda. The subcommittee was pursuing allegations of vast holdings in the United States by the Marcoses (some \$10 billion) that emanated in large part from U.S. government development funding. The Bernsteins refused to answer any questions about their investment work or even whether they knew the Marcoses, claiming attorney-client privilege. The subcommittee following appropriate demands and rejections of the asserted privilege, voted to report a contempt resolution to the full committee, which in turn presented a report and resolution to the House that was adopted in February 1986. Shortly thereafter, and before an indictment was presented to a grand jury, the Bernsteins agreed to supply the subcommittee with information it required. See, H. Rept. 99-462 (1986) and 132 Cong. Rec. 3028—62 (1986).

I continue to believe a criminal contempt proceeding under the present circumstances would be found faulty by a reviewing court.

*Elijah E. Cummings*  
Rep. Elijah E. Cummings

*Eleanor Holmes Norton*  
Rep. Eleanor Holmes Norton

*Wm. Lacy Clay*  
Rep. Wm. Lacy Clay

*Jim Cooper*  
Rep. Jim Cooper

*Jackie Speier*  
Rep. Jackie Speier

*Lammy Duckworth*  
Rep. L. Lammy Duckworth

*Danny K. Davis*  
Rep. Danny K. Davis

*Tony Cardenas*  
Rep. Tony Cardenas

*Michelle Lujan Grisham*  
Rep. Michelle Lujan Grisham

*Carolyn B. Maloney*  
Rep. Carolyn B. Maloney

*John F. Tierney*  
Rep. John F. Tierney

*Stephen F. Lynch*  
Rep. Stephen F. Lynch

*Gerald E. Connolly*  
Rep. Gerald E. Connolly

*Matthew A. Cartwright*  
Rep. Matthew Cartwright

*Robin Kelly*  
Rep. Robin Kelly

*Peter Welch*  
Rep. Peter Welch

*Steven Horsford*  
Rep. Steven Horsford