

**PREPARED STATEMENT OF
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BEFORE THE

**HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON ECONOMIC GROWTH, JOB CREATION AND REGULATORY AFFAIRS**

HEARING ON

**IS THE OBAMA ADMINISTRATION CONDUCTING A SERIOUS INVESTIGATION OF IRS
TARGETING?**

WEDNESDAY, FEBRUARY 26, 2014

**Prepared Statement of
Hon. George J. Terwilliger III
before the
House Committee on Oversight and Government Reform
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs
Wednesday, February 26, 2014**

Mr. Chairman, Ranking Member Cartwright, members of the Subcommittee:

Thank you for inviting me to express my views concerning the Justice Department's investigation of possible abuse of the examination power of the Internal Revenue Service ("IRS") for political purposes. I am not here today to opine on the merits of the underlying allegations of improper conduct involving the IRS. Rather, I agreed to speak to what is, in my experience and best judgment, the appropriate means for the Department of Justice to conduct the investigation into those allegations that it has already decided is required. My comments today are my own, based on my more than fifteen years of experience as a line and supervisory attorney in the Department of Justice, culminating in my service as the Deputy Attorney General during the George H.W. Bush administration, and I do not speak on behalf of my colleagues at Morgan, Lewis & Bockius LLP or any individuals or entities whom I represent.

I am aware that committees of the Congress and this House are looking into the matter.¹ The review of possible abuse of executive power is, of course, one of Congress's most important oversight responsibilities and a key check on our constitutional balance of power. But legislative oversight is not a substitute for—and was never intended to be a substitute for—a thorough and impartial law enforcement investigation. The public rightly demands that possible misconduct be investigated fairly and impartially. This is particularly true when the possible misconduct involves the Executive Branch.

Two fundamental points establish why questions need to be answered concerning how the matter is being addressed by the DOJ investigation. First, the IRS has unparalleled powers to deeply scrutinize the financial and related activities of individuals and organizations in America. Any credible allegation that these powers are being used in

¹ See, e.g., Memorandum from the Majority Staff, Committee on Oversight and Government Reform to the Members of the Committee on Oversight and Government Reform (Sept. 17, 2013).

furtherance of partisan political objectives is a matter of the utmost concern and needs to be investigated credibly and thoroughly. Second, and equally important, public confidence in the investigation is critical not just as to this specific matter, but more broadly to the Justice Department's institutional responsibility to secure the independent administration of justice.

Let me be clear—I oppose a witch hunt for culprits in the IRS. So long as we have a tax system that depends on voluntary payment by our citizens, we need a strong IRS capable of performing the tax examinations and tax enforcement that can render the tax system equal and fair for all. There are many good people doing what are often unpopular jobs in the IRS. But when questions arise about whether their good work may have been sullied by people within or outside the IRS directing or influencing its activities for improper political purpose, that needs to be investigated thoroughly and in such a way that gives the public confidence in its government.

These two very critical factors affecting public confidence in government—that of non-partisan administration of the laws and impartiality in law enforcement investigations—were captured in a clear and timeless observation by then-Attorney General, and later Supreme Court Justice, Robert Jackson in 1940, when he stated:

“It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.”²

Since the Treasury Inspector General for Tax Administration's (“TIGTA”) conclusion in May that the Determinations Unit, a branch of the IRS's Rulings and Agreements office, “developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names,”³ the Justice Department has announced its intention to investigate this conduct and the Attorney General has recently left open the possibility that

² Robert H. Jackson, Attorney General of the United States, Address at the Second Annual Conference of United States Attorneys (April 1, 1940).

³ Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053, Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review (May 2013).

criminal sanctions may be imposed against wrongful perpetrators in the IRS.⁴ It will take more than this statement, however, to assure the public that the investigation is thorough and unbiased. The Justice Department investigation in the IRS matter should be defined by the extent to which the public perceives that investigation to be impartial—that is, one driven by a determination to get the relevant facts without regard to any partisan or political effect disclosure of the facts may have. A combination of circumstances now give rise to legitimate questions concerning the level of confidence the public can have in the independence of the current DOJ investigation.

First, while that investigation has been pending, the President—the unitary head of the Executive Branch and thus the prosecutor’s superior—has publicly stated in a nationally televised interview that there was no corrupt abuse of IRS authority.⁵ I do not know what the President’s intent was in making that very public conclusion, but I know very well what the effect of it can be, even if unintended. How can the public have confidence that an investigation firmly under the control of his Attorney General and subordinates at DOJ will be vigorous in its pursuit of the truth and fair in its analysis of the facts when the President has already stated, in effect, that there is nothing to it?

This is not just any investigation of possible violations of law. Rather, it is one that, if done thoroughly, will examine whether partisan political considerations were involved in making decisions about searching examinations, done for tax purposes, of the activities of organizations and individuals involved in political activity protected from government interference by the First Amendment. Public reports state that the prosecutor leading the investigation has provided financial support to Democratic Party campaigns, including the President’s campaign.⁶ I do not believe such contributions should disqualify this lawyer from the assignment, nor do I believe that the lawyer assigned is, on account of such political contributions, incapable of conducting a vigorous and thorough investigation. Nor do I believe as a general proposition that the decision to whom to assign a case for investigation ought to turn on whether a given prosecutor has a particular political affiliation or association.

⁴ Rachael Weiner, *Holder has ordered IRS investigation*, Wash. Post, May 14, 2013; Stephen Dinan, *Holder won’t rule out criminal charges for employees in IRS scandal*, Wash. Times, Jan. 29, 2014.

⁵ See Stephen Dinan, *Obama didn’t consult Justice before saying no corruption at IRS*, Wash. Times, Feb. 4, 2014.

⁶ Letter from Reps. Darrell Issa and Jim Jordan to Attorney General Eric H. Holder, Jr. (Jan. 8, 2014).

However, considering that this is an investigation of allegations of partisan political activity by government officials, that the prosecutor assigned has made political contributions to the President's party and the President's own campaign and that the President publicly stated his conclusion that there has been no wrongdoing, if the objective is to provide public confidence in the integrity of the inquiry, then this is a case where more investigative independence from the Administration and the Attorney General is needed.

In addition, credible reports show that IRS officials involved in aspects of the matter went to the White House on an unusual number of occasions.⁷ Public reports also disclose that since at least 2010, the White House's political operation has been concerned with conservative political organizations.⁸ A study conducted by scholars at the non-partisan American Enterprise Institute suggested that the IRS's targeting of Tea Party groups for additional scrutiny had an appreciable negative impact on their effectiveness in turning out voters during the 2012 election.⁹ Thus, because a thorough investigation will of necessity involve looking into the political operation within the administration—if to simply rule out any impropriety—this is one of those few, but critically important, instances where an administration should not be investigating itself. Perhaps there is no link between the White House and those IRS employees that scrutinized certain groups, and perhaps there are legitimate explanations for the number of White House-IRS interactions during this period, but such explanations need to be examined and tested by an independent investigation.

I am no fan of the now expired independent counsel statute, and nothing I say today should be construed as suggesting we put that law back on the books.¹⁰ It is not needed because the Attorney General already has wide authority in conducting investigations to make investigative assignments in a manner that can assure the public of the independence and integrity of an investigation. Indeed, existing law permits the Attorney General to appoint a special or independent counsel from within the Justice Department or from outside of it. Such counsels can be given all authority and have the final word on what should be

⁷ See, e.g., John Steele Gordon, *A Frequent Visitor to the White House*, Commentary Magazine, May 27, 2013; Susan Ferrechio, *Lawmakers zero in on IRS meetings at White House*, The Wash. Examiner, May 23, 2013; Editorial, *IRS Chief's 118 White House Visits Must Be Explained*, Investors.com, May 28, 2013.

⁸ See, John McCormack, *Koch Industries Lawyer to White House: How Did You Get Our Tax Information?*, The Weekly Standard, Sept. 20, 2010; Editorial, *Obama's IRS 'Confusion'*, The Wall Street Journal, Feb. 7, 2014.

⁹ Stan Veuger, *Yes, IRS harassment blunted the Tea Party ground game*, American Enterprise Institute (June 20, 2013), <http://www.aei.org/article/economics/yes-irs-harassment-blunted-the-tea-party-ground-game>.

¹⁰ See 28 U.S.C. § 591, *et seq.*, expired on June 30, 1999.

investigated or prosecuted, or the Attorney General or another official designated for that purpose can retain the such authority as may be deemed appropriate.¹¹ In short, the Attorney General has the legal authority to appoint someone to conduct an investigation with as much independence as sound judgment dictates that the circumstances require.

These appointments are not new. Examples of making such appointments abound in presidential administrations of both parties. Current FBI Director Comey, when serving as Acting Attorney General under President George W. Bush, directed a sitting U.S. Attorney to conduct an independent investigation and delegated all the Attorney General's authority to that special counsel. Attorney General Reno, acting in the Clinton administration, moved for appointment of an outside independent counsel under that now repealed statute. When I served as Deputy Attorney General and Acting Attorney General in the George H.W. Bush administration, we appointed special or independent counsels from within and outside the Justice Department and gave them various levels of final authority as we believed the circumstances warranted.

In each of these and many other such instances, the common factor in making such appointments is taking steps that assure the public that an investigation of unquestioned integrity will be conducted. In my view, it is past time for the Attorney General to act in this instance to use these authorities and appoint a lead counsel for the investigation of alleged IRS abuse who will have a charter of independence. Such an appointment is needed to provide assurances of the integrity of the investigation that the public deserves and that respect for venerable Justice Department practice requires.

I thank the Subcommittee again for inviting me to share my views on this matter and look forward to answering your questions.

¹¹ See 28 U.S.C. § 510 (authorizing the Attorney General to delegate any function of his office to any officer, employee, or agency of the Department of Justice).