

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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July 27, 2015

The President
The White House
Washington, DC 20500

Dear Mr. President:

On May 15, 2013, in reaction to the IRS's targeting of taxpayers on the basis of their political beliefs, you said it was, "inexcusable and Americans have the right to be angry about it." Additionally, you said, "[O]ur Administration has to make sure that we are working hand in hand with Congress to get this thing fixed." This acknowledgement came five days after Lois Lerner, the Director of the Exempt Organizations Division, stated about the targeting, "that was wrong, that was absolutely incorrect, insensitive and inappropriate." For the past two years Congress has been investigating the IRS's targeting of conservative groups.

Throughout his tenure, Commissioner Koskinen obstructed these Congressional investigations. His obstruction takes the form of failure to comply with a congressional subpoena, failure to testify truthfully, and failure to preserve and produce up to 24,000 emails relevant to the investigation. We ask that you exercise your authority under 26 U.S.C. Section 7803(a)(1)(D) to remove John Koskinen as Commissioner of the IRS.

As detailed below, Commissioner Koskinen bears responsibility for a number of actions that may have permanently deprived the American people of a complete understanding of the IRS targeting scandal. In the course of doing so, he misled Congress and acted with complete disregard for Congress's efforts to find out the truth.

Commissioner Koskinen was on notice from his earliest days in office regarding the need to preserve documents relevant to the IRS targeting scandal. The Committee had issued a subpoena on August 2, 2013, for "[a]ll communications sent or received by Lois Lerner, from January 1, 2009, to August 2, 2013."¹ The Committee reissued that subpoena on February 14, 2014, following Commissioner Koskinen's confirmation as head of the IRS.²

¹ H. Comm. on Oversight & Gov't Reform, Subpoena to Jacob Lew, Sec'y, Dep't of the Treasury (Aug. 2, 2013).

² H. Comm. on Oversight & Gov't Reform, Subpoena to John Koskinen, Comm'r, Internal Revenue Serv. (Feb. 14, 2014).

Commissioner Koskinen failed to take seriously his duty to respond to the subpoena and assist Congress in discovering the truth. Under his leadership, the IRS failed to look in five of the six places where Mr. Lerner's emails could potentially be recovered. TIGTA examined Ms. Lerner's blackberries, email server, backup email server, loaner laptop, the IRS's own backup tapes, and Ms. Lerner's hard drive. The IRS only examined the hard drive, which had apparently crashed in 2011.

The malfeasance of Commissioner Koskinen extends beyond investigative lassitude into destruction of evidence. The counselor to the Commissioner learned of gaps in the Lerner email production on February 2, 2014. Yet, a month later, on March 4, 2014, IRS employees in Martinsburg, West Virginia, on the midnight shift, magnetically erased 422 back-up tapes, destroying as many as 24,000 Lois Lerner emails responsive to the subpoenas. No one will ever know what was contained in those emails.

After that destruction, Commissioner Koskinen made a series of false statements to Congress while under oath. On June 20, 2014, Commissioner Koskinen testified: "since the start of this investigation, every email has been preserved. Nothing has been lost. Nothing has been destroyed."³ Not only was Commissioner Koskinen's statement false, he later testified that the backup tapes had never even been sent to a lab for professional forensic analysis. Despite the failure to examine all sources of emails or send the backup tapes for professional analysis, he testified that IRS had made a genuine effort to discover the emails.

Further support for the removal of Commissioner Koskinen is detailed below.

* * * * *

For over two years, the Committee on Oversight and Government Reform has been engaged in a comprehensive investigation of the IRS's inappropriate treatment of conservative applicants for tax-exempt status. As part of this investigation, the Committee reviewed more than 1,317,000 pages of documents, conducted more than 50 transcribed interviews, and held several public hearings. The Committee attempted to obtain the testimony of Lois Lerner—the former director of the Exempt Operations group at the center of the IRS's targeting efforts—but she refused to cooperate with the Committee. Instead of testifying, Lerner claimed to exercise her Fifth Amendment rights. Without Lerner's testimony, the Committee was forced to rely heavily on documents produced by the IRS and other agencies to determine how and why the IRS targeted conservative groups. At the end of the 113th Congress, the Committee released a comprehensive report describing the Committee's investigative findings to that point in time.⁴

³ *Recent Developments in the Committee's Investigation into the Internal Revenue Service's Use of Inappropriate Criteria to Process Applications of Tax-Exempt Organizations: Hearing Before the H. Comm. on Ways & Means, 113th Cong. (2014).*

⁴ *H. Comm. on Oversight & Gov't Reform, Staff Report: The Internal Revenue Services' Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress, 113th Cong. (Dec. 23, 2014).*

Late on a Friday afternoon on June 13, 2014, buried on page seven of the third attachment to a letter to the Senate Finance Committee, the IRS informed Congress for the first time that it had destroyed emails sent and received by Lois Lerner between January 2009 and April 2011.⁵ The IRS's acknowledgement stood in stark contrast to promises made by IRS Commissioner John Koskinen under oath in March 2014 that he would produce all of Lerner's emails to the Committee. Commissioner Koskinen made these promises without qualification or limitation. The IRS subsequently claimed to have lost Lerner's emails from this pivotal period in the targeting timeline. Then, in November 2014, the Treasury Inspector General for Tax Administration ("TIGTA" or the "IG") told the Committee it found a significant number of the emails the IRS claimed were permanently missing. This chain of events undercut public confidence in Commissioner Koskinen and delayed the Committee's effort to fully analyze all facets of the IRS targeting program. Lerner's missing emails also spotlights a serious problem within the IRS about record retention and willful efforts to shield communications to avoid congressional scrutiny.

In the 114th Congress, new information came to light about how management failures and incompetence at the IRS directly led to the destruction of emails relevant to the congressional investigation. When the IRS told Congress that Lois Lerner's emails from the most relevant time period were unrecoverable, TIGTA found that the agency simply had not looked. When the IRS realized that gaps existed in Lerner's emails, agency leadership failed to take action. Throughout, Commissioner Koskinen failed to present full and complete information to Congress about the missing emails.

The IRS's false claim that key evidence was lost or destroyed prolonged the investigation

On September 4, 2014, TIGTA advised the Committee the IRS destroyed emails sent and received by Lois Lerner and at least five other key figures in the IRS's targeting matter during the period under investigation.⁶ Moreover, in a June 30, 2015, report, TIGTA found that up to 24,000 Lerner emails destroyed on March 4, 2014, are now unrecoverable.⁷

According to the IRS, Lerner's laptop computer crashed in June 2011, causing the data on her hard drive to be deemed "unrecoverable" by computer professionals.⁸ The investigation by TIGTA concluded Lerner's hard drive most likely crashed on June 11, 2011, a Saturday. Efforts to determine who had access to Lerner's office at the time were unsuccessful as the security badge entry and exit logs from that timeframe were also destroyed.⁹ Aaron Signor, an

⁵ Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden & Hon. Orrin Hatch, S. Comm. on Finance (June 13, 2014).

⁶ Conference call between Treasury Inspector Gen. for Tax Admin. and Cong. Staff (Sept. 4, 2014).

⁷ Treasury Inspector General for Tax Administration, *Report of Investigation: Exempt Organizations Data Loss 2*, (June 30, 2015) (hereinafter "TIGTA report"); *IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 8 (2015) (written testimony of Hon. J. Russell George and Timothy P. Camus, TIGTA) (hereinafter "June 25 TIGTA testimony").

⁸ Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden & Hon. Orrin Hatch, S. Comm. on Finance (June 13, 2014).

⁹ TIGTA report, *supra* note 7, at 9.

IRS IT specialist, initially examined Lerner's hard drive.¹⁰ Signor provided computer-related assistance to the Exempt Organizations Division. Signor removed the computer from Lerner's office and conducted tests that determined a problem existed with the computer's hard drive.¹¹ Signor attempted unsuccessfully to retrieve data from the hard drive before discarding the hard drive in a cardboard box containing roughly 30 other crashed drives.¹² Signor closed the fix-it ticket on June 21, 2011.¹³

In July or August 2011, Signor received a phone call from Lillie Wilburn, an IT manager, asking whether he still had Lerner's hard drive.¹⁴ She asked Signor to ship the hard drive to another technician for additional examination.¹⁵ John Minsek, a senior investigative analyst in the IRS's Criminal Investigations (CI) unit, eventually received Lerner's hard drive.¹⁶ Minsek understood the hard drive was from "a computer of importance" and there was a "sense of urgency" to recover data.¹⁷ Using the CI unit's digital forensic facilities, Minsek opened the hard drive and conducted additional tests.¹⁸ Once he opened the hard drive, Minsek noticed "well-defined scoring creating a concentric circle in the proximity of the center of the disk."¹⁹ According to Minsek, the scoring covered less than one percent of the surface of the disk.²⁰

Following Minsek's examination, he returned the hard drive to the IRS's IT team after determining he was unable to recover data.²¹ In a subsequent conversation with IRS IT personnel, Minsek also raised the possibility the IRS could send Lerner's hard drive to a data recovery service, believing it was "possible that they had techniques, methods, perhaps proprietary tools that I did not have."²² Instead, Lerner's hard drive was sent to an IRS facility and recycled by an outside contractor.²³

The destruction of Lerner's hard drive in June 2011 occurred during a pivotal time in the IRS's targeting of conservatives. Just four months earlier, in February 2011, Lerner called the Tea Party applications "very dangerous" and ordered the cases undergo an unprecedented "multi-tier" review.²⁴ In early June 2011, Lerner requested a copy of the tax-exempt application filed

¹⁰ Transcribed interview of Aaron Signor, Internal Revenue Serv., in Wash., D.C. (Aug. 1, 2014).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Transcribed interview of John Minsek, Internal Revenue Serv., in Wash., D.C. (July 24, 2014).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Transcribed interview of John Minsek, Internal Revenue Serv., in Wash., D.C. (July 24, 2014).

²³ Transcribed interview of Thomas Kane, Internal Revenue Serv., in Wash., D.C. (July 17, 2014).

²⁴ Email from Lois Lerner, Internal Revenue Serv., to Michael Seto, Internal Revenue Serv. (Feb. 1, 2011) [IRS 161810].

by the prominent conservative group, Crossroads GPS, for review by her senior technical advisor.²⁵

Testimony indicated Lerner maintained a significant amount of information on her computer's hard drive. According to Signor, the IT technician who regularly serviced Lerner's computer, Lerner maintained a large volume of data on the hard drive of her computer.²⁶ Signor recommended Lerner back up her data on a network server, but he was told Lerner did not have the time or responsibility to save her data. Signor testified:

Q: Do you recommend your end users to save data onto the [network shared] drive?

A: Yes.

Q: That's something you do in the normal course of your work?

A: Yes.

Q: You stated at the onset of the last round that you would recommend to end users that they back up their work. Do you recall that?

A: Yes.

Q: Did you have occasion to make that recommendation to Ms. Lerner prior to working on her laptop in the summer of 2011?

A: Yes.

Q: When?

A: There were probably several occasions between 2007 and 2011. I couldn't say exactly when.

Q: Do you know in what context?

A: It would have been in the context of another ticket where I was working on her computer and maybe noticed the volume of data and suggested it.

²⁵ Email from Holly Paz, Internal Revenue Serv., to Cindy Thomas, Internal Revenue Serv. (June 1, 2011) [IRSR 69914-15].

²⁶ Transcribed interview of Aaron Signor, Internal Revenue Serv., in Wash., D.C. (Aug. 1, 2014).

Q: Do you have reason to know whether she followed your suggestion or not?

A: Yes.

Q: What do you know?

A: I was told that she didn't have backups at one point.

Q: And when you say you told her about backups, what exactly do you remember telling Ms. Lerner's assistant about backups?

A: There was one day where she and I were in Lois's office. I can't remember if Lois was present or not. But I had said, you know, "Lois has plenty of data. We really should get backups of her data." And her response was, "Well, I don't think that Lois has the time to do it, and it's not her responsibility." That's what was said, something – I'm not quoting exactly, but something like that would have been said.²⁷

On September 5, 2014, the IRS notified Congress it could not find emails from five other relevant custodians in addition to Lois Lerner.²⁸ The IRS lost emails sent and received by Judy Kindell, Lerner's senior technical advisor and expert on non-profit political speech; Ronald Shoemaker, a Washington manager who oversaw work on the applications; and Julie Chen and Nancy Heagney, two Cincinnati-based Determinations Specialists.²⁹ Some of the email loss occurred at significant points during the IRS's targeting of conservative tax-exempt applicants. For instance, Judy Kindell's email loss occurred in August 2010, as the IRS began to receive media inquiries related to the President's critical rhetoric of *Citizens United* and political speech by conservative non-profit groups. According to the IRS, Kindell was instructed to save old emails on her computer's hard drive and "when her hard drive failed, she lost email that resided on that drive."³⁰ While the IRS maintains it has recovered thousands of emails sent by these employees, it cannot guarantee it has produced all relevant emails to the Committee. It remains to be seen whether emails from these custodians can be restored by TIGTA.

In June 2011, after her emails were destroyed, Lerner wrote to David Fish, who also experienced a hard drive failure. "No one will ever believe," she wrote, "that both your hard

²⁷ *Id.*

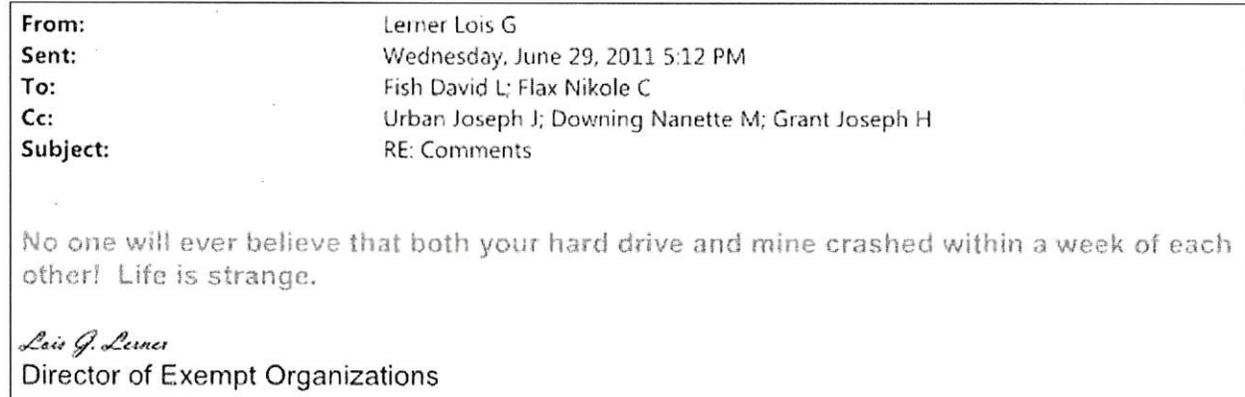
²⁸ Letter from Leonard Oursler, Internal Revenue Serv., to Dave Camp, H. Comm. on Ways & Means (Sept. 5, 2014) (carbon copy to Darrell Issa, H. Comm. on Oversight & Gov't Reform).

²⁹ *Id.*

³⁰ *Id.*

drive and mine crashed within a week of each other!”³¹ The hard drive failures and email losses have prevented the Committee from fully understanding how and why the IRS targeted conservative applicants for tax-exempt status.

Figure 1: Email from Lois Lerner to David Fish & Nikole Flax, June 29, 2011



IRS Commissioner John Koskinen misled Congress about the IRS’s destruction of Lois Lerner’s emails

IRS Commissioner John Koskinen’s continually evolving and misleading statements about the matter compounded the difficulties associated with Lois Lerner’s destroyed emails. For several months, Commissioner Koskinen’s unwillingness to present accurate and straightforward information about the missing emails unnecessarily delayed and hindered the Committee’s fact-finding efforts.

Following Lois Lerner’s staged apology at the ABA conference on May 10, 2013, the Committee requested relevant material necessary to begin investigating the IRS’s targeting of conservative tax-exempt applicants.³² These requests included the production of “all documents and communications sent by, received by, or copied to Lois Lerner” since January 1, 2009.³³ The IRS did not provide these materials voluntarily.³⁴ On August 2, 2013, the Committee issued a subpoena to Treasury Secretary Jacob Lew, as the custodian of IRS documents, for eight categories of IRS material – including “[a]ll communications sent or received by Lois Lerner, from January 1, 2009, to August 2, 2013.”³⁵ After the Senate confirmed John Koskinen as the

³¹ Email from Lois Lerner, Internal Revenue Serv., to David Fish & Nikole Flax, Internal Revenue Serv. (June 29, 2011) [IRSR 903314].

³² Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov’t Reform, to Lois Lerner, Internal Revenue Serv. (May 14, 2013); Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov’t Reform, to Daniel Werfel, Internal Revenue Serv. (June 4, 2013).

³³ Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov’t Reform, to Daniel Werfel, Internal Revenue Serv. (June 4, 2013).

³⁴ See Letter from Darrell Issa, H. Comm. on Oversight & Gov’t Reform, to Daniel Werfel, Internal Revenue Serv. (July 30, 2013).

³⁵ H. Comm. on Oversight & Gov’t Reform, Subpoena to Jacob Lew, Sec’y, Dep’t of the Treasury (Aug. 2, 2013).

permanent IRS Commissioner, the Committee reissued the subpoena to him on February 14, 2014.³⁶

On March 26, 2014, Commissioner Koskinen appeared before the Committee to testify about the IRS's compliance with congressional subpoenas and document requests.³⁷ During the hearing, Commissioner Koskinen was repeatedly asked whether he would commit to producing all of Lerner's emails. Commissioner Koskinen testified repeatedly that he would. In an exchange with Representative Jason Chaffetz, Commissioner Koskinen testified:

Rep. CHAFFETZ: Sir, are you or are you not going to provide this committee all of Lois Lerner's emails?

Mr. KOSKINEN: We are already starting –

Rep. CHAFFETZ: Yes or –

Mr. KOSKINEN: Yes, we will do that.³⁸

Additionally, in an exchange with Ranking Member Elijah Cummings, Commissioner Koskinen testified:

Rep. CUMMINGS: Well, reclaiming just for a second. I just want us to be clear. I mean, time is precious, money is precious. Just tell us. I mean, you talk about relevance. You said if a lawyer were to see this subpoena, they would have some concerns. I just want to be clear. I mean, it sounds like, again, I am saying what I said before, you seem to have an understanding and we seem to have an understanding, and they don't seem to be the same. So are you going to provide the documents for Lois Lerner?

Mr. KOSKINEN: Yes.

Rep. CUMMINGS: That were subpoenaed.

Mr. KOSKINEN: Yes.³⁹

³⁶ H. Comm. on Oversight & Gov't Reform, Subpoena to John Koskinen, Comm'r, Internal Revenue Serv. (Feb. 14, 2014).

³⁷ *Examining the IRS Response to the Targeting Scandal: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014).

³⁸ *Id.* (question and answer with Rep. Jason Chaffetz).

³⁹ *Id.* (question and answer with Ranking Member Elijah E. Cummings).

According to testimony later received by the Committee, the IRS knew at the time of Commissioner Koskinen's appearance in March 2014 that Lerner's emails had been destroyed. In particular, the IRS Deputy Associate Chief Counsel, Thomas Kane – who had responsibility for the IRS's document production process in response to congressional oversight – testified that senior IRS leadership became aware of problems with Lerner's emails in early February 2014.⁴⁰ Kane testified on February 2, 2014, Catherine Duval, Counselor to the Commissioner, noticed a discrepancy in the number emails gathered from Lerner's account.⁴¹ The IRS had gathered 16,000 emails from the period after April 2011 and "less than 100" from the period before April 2011.⁴²

After becoming aware of the discrepancy in the number of emails, Kane asked a subordinate, Paul Butler, to look into the cause of the discrepancy.⁴³ Two days later, on February 4, senior IRS leadership learned that Lerner's hard drive had crashed in 2011 from her former administrative assistant, Dawn Marx.⁴⁴ Kane testified:

Q: And so do you remember precisely when you became aware of the hard drive crash?

A: We were – Paul Butler had talked to someone who worked for Lois at about the time when the emails had a great discrepancy and was told by her that there had been a hard drive crash at that particular point in time.

Q: Do you know the name of the person that Mr. Butler spoke with?

A: Dawn Marx. Marx with an "x."

Q: Do you know, sir, when Ms. Marx informed Mr. Butler about the hard drive crash?

A: February 4th.

Q: Of 2014?

A: Correct.

Q: And why does that date stand out to you in your memory?

⁴⁰ Transcribed interview of Thomas Kane, Internal Revenue Serv., in Wash., D.C. (July 17, 2014).

⁴¹ *Id.*

⁴² *Id.*; Letter from Leonard Oursler, Internal Revenue Serv., to Ron Wyden & Orrin Hatch, S. Comm. on Finance encl. 3 at 6 (June 13, 2014).

⁴³ Transcribed interview of Thomas Kane, Internal Revenue Serv., in Wash., D.C. (July 17, 2014).

⁴⁴ *Id.*

A: The date stands out to me because we first found out about it on February 2nd, and it was only 2 days afterwards.

Q: So it didn't take long then for you to figure out what happened?

A: It didn't take us long to figure out that it was reported that there was a hard drive crash at or about the time that the discrepancy in the emails took place.

Q: And upon learning on February 4th of the hard drive crash, who did you communicate that to?

A: That was relayed to Kate [Duval].

Q: By who?

A: I would have been the one to do it, yes.⁴⁵

Kane also told the Committee that senior IRS leadership became aware in mid-February 2014 that Lerner's hard drive had been recycled and any emails on the hard drive were "unrecoverable."⁴⁶ He testified:

Q: And do you recall when Mr. Butler gave you that information, the hard drive had been recycled?

A: I don't recall a specific date or time period, or time, but it certainly would have been within the period of time when he was actively interacting with the IT people, in early to mid-February.

Q: Do you have an understanding now as to what that term, "recycled," means?

A: I do have some knowledge as to what happened to the hard drive.

Q: What happened to the hard drive?

⁴⁵ *Id.*

⁴⁶ *Id.*

A: After the CI forensic analysis determined that it was – that the material on it was unrecoverable, it was returned to the IT people, who at some point in time degaussed it to make sure that if there was anything else on it, particularly from a 6103 perspective, that it would not be recovered. It was then sent to New Carrollton again. A lot of our IT functions are housed out there, and they have a recycling function out there where material is eventually recycled to an outside contractor. And I have no idea what the outside contractor does with these materials.⁴⁷

From mid-February 2014 to April 2014, the IRS attempted to recover some of the missing Lois Lerner emails by other means.⁴⁸ However, it is clear from this testimony that the IRS knew no later than mid-February 2014 that a portion of Ms. Lerner’s emails were missing. In fact, Commissioner Koskinen acknowledged during a July 23, 2014, hearing: “If you told me now that Tom Kane said he knew in February, **I would henceforth say we, as the IRS, knew in February.**”⁴⁹ In addition to Mr. Kane knowing in February, Commissioner Koskinen himself stated that he personally knew in February. Commissioner Koskinen also testified:

Rep. DESANTIS: So if the senior IRS officials knew in mid-February that the emails could not be recovered off the hard drive, why did you tell this committee that you would produce them?

Mr. KOSKINEN: As I have testified before, when I testified at previous hearings, when I testified in March, I said we would provide all Lois Lerner emails, as I have also testified since then. I did not mean to imply that if they didn’t exist, we would somehow magically provide them. We have provided you all the Lois Lerner emails we have.

With regard to when officials at the IRS knew the impact of the hard drive crash, as I have testified several times in the 11 hours of hearings since June 13th, what I was advised and knew in February was that when you took the emails that had already been provided to this committee and other investigators, and, instead of looking at them by search terms, looked at them by date, it was clear that there were fewer emails in the period up through 2011 and

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *An Update on the IRS Response to Its Targeting Scandal: Hearing Before the Subcomm. on Econ. Growth, Job Creation & Reg. Affairs of the H. Comm. on Oversight & Gov’t Reform, 113th Cong. (2014) (emphasis added).*

subsequently. And there was also, I was told, there had been a problem with Ms. Lerner's computer. It was not described to me in any greater detail than that.⁵⁰

Despite knowing about the missing emails in February, Commissioner Koskinen failed to mention anything about the email problems during his sworn testimony on March 26, 2014. Instead, he affirmatively promised the Committee the IRS would produce all of Lerner's emails. In addition, Counselor to the Commissioner, Catherine Duval, and the IRS's National Director for Legislative Affairs, Leonard Oursler, failed to mention any problems with Lerner's emails during a meeting with bipartisan Committee staff on April 4, 2014.⁵¹ Duval requested this meeting specifically to discuss how the IRS would execute the Commissioner's promise to produce the subpoenaed Lerner emails, but did not use this opportunity to inform the Committee of any issues related to Lerner's emails.

Even when the IRS finally acknowledged the missing emails on June 13, 2014, it failed to provide full and complete information to the Committee. First, the IRS stated it "confirmed" that back-up tapes from the relevant period had been destroyed.⁵² Commissioner Koskinen repeated this information during his sworn testimony to the House Ways and Means Committee on June 20, 2014. He testified:

In light of the hard-drive issue, the IRS took multiple steps over the past months to assess the situation and produce as much email as possible for which Ms. Lerner was an author or recipient. We retraced the collection process for her emails. We located, processed and included email from an unrelated 2011 data collection for Ms. Lerner. **We confirmed that backup tapes from 2011 no longer existed because they have been recycled, pursuant to the IRS normal policy.** We searched email from other custodians for material on which Ms. Lerner appears as author or recipient.⁵³

Commissioner Koskinen later defended his claim that he confirmed these backup tapes were destroyed. In the July 2014 hearing before this Committee, he testified:

Rep. GOWDY: What does the word "confirmed" mean to you?

⁵⁰ *Id.*

⁵¹ Meeting between Committee staff and Catherine Duval & Leonard Oursler, Internal Revenue Serv. (Apr. 4, 2014).

⁵² Letter from Leonard Oursler, Internal Revenue Serv., to Ron Wyden & Orrin Hatch, S. Comm. on Finance encl. 3 (June 13, 2014).

⁵³ *Recent Developments in the Committee's Investigation into the Internal Revenue Service's Use of Inappropriate Criteria to Process Applications of Tax-Exempt Organizations: Hearing Before the H. Comm. on Ways & Means, 113th Cong. (2014)* (statement of John Koskinen, IRS Commissioner) (emphasis added).

Mr. KOSKINEN: Confirmed means that somebody went back and looked and made sure that in fact any backup tapes that had existed had been recycled.⁵⁴

This was not true. The IG was able to establish that several backup tapes from this timeframe were not, in fact, recycled. Moreover, Commissioner Koskinen did not divulge in June 2014 that the normal policy had not applied since May 22, 2013. In fact, Koskinen withheld from Congress that a notice instructing preservation of backup tapes had been in place for over a year and that the IRS had deleted backup tapes containing as many as 24,000 emails during that time.⁵⁵

Koskinen also testified the IRS went to “great lengths” to recover Lerner’s emails:

Rep. MCDERMOTT: Is there anything you can see in the time that you’ve been there that they didn’t –that the IRS did not do to try and get all?

Mr. KOSKINEN: There’s no indication. I have said, we’ve gone to great lengths. We’ve retraced the process for producing her email twice just to make sure that no email was missing. We understand the importance of this investigation. We’ve gone to great lengths to spend a significant amount of money trying to make sure that there is no email that is required that has not been produced.⁵⁶

Subsequently, the Committee learned that contrary to Commissioner Koskinen’s assertions, some back-up material did exist. The IRS’s inspector general informed the Committee on July 29, 2014, that at least some back-up tapes were not overwritten by the IRS.⁵⁷ The inspector general also told the Committee it located Microsoft Exchange server drives from the relevant period the IRS had not searched because it was under the mistaken belief the drives had been destroyed.⁵⁸ The IRS never bothered to confirm the accuracy of this belief. Additionally, Steven Manning, the Deputy Chief Information Officer at the IRS from 2009 until March 2015, stated that attempts to recover information from the back-up tapes were not undertaken. Manning was the point person on issues related to the IT component of e-discovery. He testified:

⁵⁴ *An Update on the IRS Response to Its Targeting Scandal: Hearing Before the Subcomm. on Econ. Growth, Job Creation & Reg. Affairs of the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (2014) (emphasis added).

⁵⁵ Email from Terrance Milholland, Internal Revenue Serv. to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv. (May 22, 2013).

⁵⁶ *IRS Commissioner John Koskinen: Hearing Before the H. Comm on Ways and Means*, 113th Cong. (2014).

⁵⁷ Conference call between Treasury Inspector Gen. for Tax Admin. and Cong. Staff (July 29, 2014).

⁵⁸ *Id.*

Q: Did the Commissioner ever ask for the back-up tapes to be forensically examined?

A: Not to me. Not that I recall –not to me.⁵⁹

For four months, from February 2014 to June 2014, Commissioner Koskinen withheld vital information about the IRS's ability to comply with the Committee's subpoena for all of Lois Lerner's emails. Even after claiming Lerner's emails were missing, Koskinen continued to provide incomplete and misleading information about the IRS's efforts to recover them. As recently as September 12, 2014, Koskinen insisted Lerner's emails were permanently missing. In a letter to Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs Chairman Jim Jordan regarding whether Lerner's emails might be recoverable from back-up tapes maintained by the IRS, Koskinen wrote: "We have seen no indication that any email data from the June 2011 timeline exists or is accessible on these [back-up] tapes."⁶⁰

This statement by Commissioner Koskinen was false. On November 21, 2014, TIGTA notified congressional investigators that it located a significant portion of Lerner's "missing" emails.⁶¹ The IG found the emails among hundreds of "disaster recovery tapes" that were used to back up the IRS email system.⁶²

Commissioner Koskinen's posture with respect to the Committee's efforts to obtain Lerner's emails delayed the Committee's investigation. Commissioner Koskinen's credibility was further damaged when TIGTA found approximately 1,000 missing Lerner emails that Koskinen previously claimed were permanently lost. Moreover, TIGTA uncovered evidence that up to 24,000 additional emails would have been recoverable before March 4, 2014, when they were improperly destroyed in contravention of a specific preservation notice sent out by the IRS on May 22, 2013.

In fact, TIGTA located a number of back-up tapes that yielded some emails within 15 days. Timothy Camus, the TIGTA Deputy Inspector General for Investigations testified:

Rep. CHAFFETZ: Start to finish, how long did it take for you to find the tapes when you started in June? I believe it was June of 2014.

Mr. CAMUS: Correct. We took possession of—740 – the initial set of backup tapes on July 1, roughly 15 days after we started our investigation.⁶³

⁵⁹ Transcribed interview of Steven Manning, Internal Revenue Serv., in Wash., D.C. (April 6, 2015).

⁶⁰ Letter from John Koskinen, Internal Revenue Serv., to Rep. Jim Jordan, Chairman, Subcomm. on Economic Growth, Job Creation, and Regulatory Affairs (Sep. 12, 2014).

⁶¹ Rachel Bade, *Thousands of lost Lois Lerner IRS emails found by IG*, POLITICO, Nov. 23, 2014.

⁶² Susan Ferrechio, *30,000 missing emails from IRS' Lerner recovered*, WASH. EXAMINER, Nov. 22, 2014.

⁶³ IRS: TIGTA Update Part II: Hearing Before the H. Comm on Oversight and Gov. Reform, 114th Cong. (2015).

Had the IRS taken immediate steps to locate back-up tapes concurrent with the discovery of the gap in Lerner emails in February 2014, tapes containing up to an additional 24,000 emails may not have been destroyed on March 4, 2014.

Poor IRS leadership resulted in the failure to preserve key documents

The IRS information technology department records backups incrementally on a daily basis, with a full backup performed weekly.⁶⁴ Before May 2013, the IRS reused and recycled backup tapes every six months as a cost saving measure.⁶⁵

On May 22, 2013, the IRS Chief Technology Officer Terence Milholland sent an email directive to senior staff ordering the preservation of electronic email media indefinitely.⁶⁶ That email, titled “Information Retention Policy Revision,” changed the previous policy of keeping backup tapes only for six months.⁶⁷ Milholland issued the following order:

Figure 2: Email from Terence Milholland, May 22, 2013

From: Milholland Terence V
Sent: Wednesday, May 22, 2013 2:37 PM
To: Buschor Lauren; Freeman Karen L; Chaddock Daniel B; Stender David W; Shepherd Anne
Cc: Manning Stephen (DCIO); Garza Gina; Babcock Tracey J; Walters Kathleen E
Subject: Information Retention Policy Revision

Given the current environment and ongoing investigations, until further notice, do not destroy/wipe/reuse any of the existing backup tapes for email, or archiving of other information from IRS personal computers. Further, do not reuse or refresh or wipe information from any personal computer that is being reclaimed/returned/refreshed/updated from any employee or contractor of the IRS. Finally, effective immediately, the email retention policy for backups is to be indefinite rather than 6 months.

In other words, retain everything to do with email or information that may have been stored locally on a personal computer.

Terry

⁶⁴ TIGTA report, *supra* note 7, at 12.

⁶⁵ *Id.* at 12.

⁶⁶ Email from Terrance Milholland, Internal Revenue Serv., to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv. (May 22, 2013).

⁶⁷ TIGTA report, *supra* note 7, at 4.

Milholland continued, “In other words, retain everything to do with email or information that may have been stored locally on a personal computer.”⁶⁸ In an interview with TIGTA, Milholland stated he had was “blown away” at the revelation that backup tapes were degaussed in March 2014, ten months after he issued this directive.⁶⁹

Despite the need to preserve documents for the ongoing investigations by Congress, Department of Justice, and TIGTA, IRS senior leadership made no effort to ensure the IRS IT department and lower level personnel understood the impact of, or complied with, the preservation order. Commissioner Koskinen was made aware of the existence of the preservation order in December 2013 or January 2014, shortly after his appointment as IRS Commissioner.⁷⁰ Yet, he did nothing to ensure its compliance. He neither reissued it nor sent out an email reminding IRS personnel of its importance. He also failed to inquire into compliance with the order. When asked by TIGTA if the email directive was sufficient, Koskinen acknowledged the matter “probably could have been handled differently.”⁷¹

The IRS failed to ensure compliance with the preservation order at each turn. The IRS failed to confirm compliance with the preservation order in February 2014, upon learning of the gap in emails; failed to ensure the Media Management Midnight Unit, the team that destroyed the backup tapes, properly understood the preservation order; and failed to make certain that individuals who ordered the destruction of the specific media, in this instance the backup tapes, properly understood the preservation order.⁷² Camus testified:

Rep. WALBERG: So based on your investigation, what efforts did the IRS, Terry Milholland or anyone else, make to ensure that the CTO’s email notice to cease routine destruction of electronic records was actually followed by low-level employees?

Mr. CAMUS: There is very much confusion, and I’m not certain that there was appropriate management oversight of that directive.⁷³

Because the IRS failed in its management of the response to the investigation, Congress and the American people will never know the full extent of the targeting of conservative groups by Lois Lerner and the Exempt Organizations group.

In February 2014, upon learning of the gap in the emails, the IRS should have undertaken an investigation to determine not only whether backup tapes existed, but whether the instruction not to destroy documents was properly executed. Counselor to the Commissioner, Kate Duval,

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1272.

⁷¹ *Id.*

⁷² *Id.* at 16.

⁷³ *IRS: TIGTA Update Part II: Hearing Before the H. Comm on Oversight and Gov. Reform*, 114th Cong. (2015).

testified her first reaction upon discovering the gap in the Lerner production on February 2, 2014, was to revisit the preservation order. During a transcribed interview, Ms. Duval explained:⁷⁴

Q: Now, Mr. Kane testified before us that you first noticed a discrepancy in the number of Lois Lerner emails in early February 2014. Is that right?

A: I came into the office, confess something now. I came into the office on Super Bowl Sunday instead of watching the Super Bowl. That's my confession. At that time, I looked at a list of the Lois Lerner emails that had been produced to Congress. And in looking at that, I saw a disproportionate distribution of dates.

Q: Okay. What was your reaction?

A: My reaction was the next day I talked to the IT people and other folks in the Office of Chief Counsel about the need to look for back-up tapes from the relevant time period, to secure Ms. Lerner's laptop, **to do a quality control check on the document preservation and collection process.** And to learn what we could learn about that.

Despite her initial reaction to confirm compliance with the document preservation order, it does not appear that confirmation occurred. Had Duvall taken action, the destruction of the backup tapes would have halted. However, only when TIGTA undertook its investigation into the missing emails did the gross mismanagement of the preservation notice come to light. The IG found a breakdown in communications following Milholland's email directive resulted in the failure to preserve backup tapes. Had IRS managers taken simple steps to ensure compliance with the order, the tapes likely would not have been destroyed.

At any point between May 2013 and March 4, 2014, IRS leadership could have confirmed the preservation order was properly distributed to those whose job it is to destroy backup tapes, hard drives, and other media. The Media Management Midnight Unit, the team that destroyed the backup tapes, failed to understand the scope of the preservation order. IRS leadership should have ensured these individuals in particular knew that backup tapes were not to be destroyed.

Robert Lyewsang, an IT specialist at the IRS, told TIGTA he never received a copy of the preservation order, nor did anyone in his chain of command explain the need to preserve the backup tapes. Because of this, he sent the Form 3210 to the Media Management Midnight Team authorizing the destruction of the backup tapes.⁷⁵

⁷⁴ Transcribed interview of Catherine Duval, Internal Revenue Service, in Wash., D.C. (July 31, 2014).

⁷⁵ *Id.* at 964, 967.

Lyewsang authorized the destruction of the tapes because Steve Warren, the manager of IT backup equipment nationwide, told him the tapes were not needed and the room where they were located needed to be cleaned out. Warren told Lyewsang the agency no longer needed the backup tapes sometime in the fall of 2013.⁷⁶ Lyewsang told TIGTA that the IRS wanted to remodel the space to house a new network operations center, and he was being pressured to move the backup tapes.⁷⁷ Lyewsang's intern testified under oath about the disorganized cleaning process, specifically that the room in question had been a year overdue for clearing out to reduce computer space.⁷⁸

As Koskinen acknowledged, verifying that IRS employees understood the directive to preserve all backup tapes could, and should, have been done differently. Upon becoming commissioner, Koskinen should have taken steps to ensure that IRS employees knew of and were properly following the preservation order. At a minimum, after learning about the missing emails, Koskinen should have directed his subordinates to make sure the people on the ground—the people who most needed to know about the preservation directive—were aware of the need to preserve backup tapes. Instead, IRS employees did not understand the preservation order and failed to preserve relevant backup tapes.

IRS failed to comply with a congressional subpoena and recover Lois Lerner's emails from the backup tapes

In June 2014, after the IRS acknowledged the missing Lois Lerner emails, the agency stated that it “confirmed that back-up tapes from 2011 no longer exist because they have been recycled” but failed to disclose when this occurred.⁷⁹ Commissioner Koskinen repeated this information during his sworn testimony to the House Ways and Means Committee on June 20, 2014, and testified the IRS went to “great lengths” to recover Lerner's emails. The Committee has since learned these statements were false. Not only did the IRS fail to “confirm” the tapes had been destroyed, the back-up tapes were swiftly recovered by TIGTA when it became aware of the issue in June 2014. Further, had the IRS either abided by its preservation notice of May 22, 2013 or looked for backup tapes upon learning of the problems in the email production in February 2014, up to 24,000 additional Lerner emails may have been recovered. The IRS, however, failed on both accounts.

⁷⁶ *Id.* at 963.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1202.

⁷⁹ Letter from Leonard Oursler, Internal Revenue Serv., to Ron Wyden & Orrin Hatch, S. Comm. on Finance, encl. 3 (June 13, 2014).

The Current IRS Email System Backup Tapes

In May 2011, the IRS migrated its email backup system from New Carrollton, Maryland, to Martinsburg, West Virginia.⁸⁰ At that time, and until May 22, 2013, IRS policy was to recycle the backup tapes every six months.⁸¹ On May 22, 2013, IRS Chief Technology Officer Terrance Milholland issued a policy directive via email titled “Information Retention Policy Revision,” changing the backup tape recycle policy to an indefinite retention period.⁸²

The IG learned about Lois Lerner’s hard drive crash and resulting gaps in the IRS’s production on June 13, 2014, the same day Congress and the American public learned of the problem, but months after the IRS discovered the missing emails.⁸³ The IG promptly opened an investigation to determine whether the emails the IRS reported as lost could be recovered.

Two weeks later, on June 30, 2014, TIGTA requested the IRS provide any backup tapes that could contain Lerner’s emails from January 1, 2008, through December 31, 2011.⁸⁴ In response to this request, the IRS provided 744 tapes that may have been used to back up Lerner’s email account.⁸⁵ From these tapes, TIGTA found five sets of weekly backups of Lerner’s email beginning on November 20, 2012, approximately six months before Milholland’s backup tape retention policy directive took effect.⁸⁶ According to TIGTA, these tapes are the oldest known Lerner email account backups available.⁸⁷

The IG compared the Lerner emails it recovered from these backup tapes to the IRS’s production to Congress and found over 1,000 new emails the IRS never produced.⁸⁸

Timothy Camus explained to the Committee how TIGTA found the backup tapes for the current IRS email system: “To the best we can determine through the investigation, they just – **they simply didn’t look for those emails.** So for the 1,000—over 1,000 emails that we found on the backup tapes—**we found them because we looked for them.**”⁸⁹ In fact, the IG determined the agency failed to look in five of the six possible sources of “electronic media, all of which the IRS had in their possession.”

⁸⁰ *IRS: TIGTA Update Part II, Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. 4 (2015) (written testimony of Hon. J. Russell George and Timothy P. Camus, TIGTA) (hereinafter “June 25 TIGTA testimony”).

⁸¹ TIGTA report, *supra* note 7, at 4.

⁸² Email from Terrance Milholland, Internal Revenue Serv. to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv. (May 22, 2013).

⁸³ TIGTA report, *supra* note 7, at 1.

⁸⁴ *Id.* at 13.

⁸⁵ *Id.*

⁸⁶ *Id.* at 14.

⁸⁷ *Id.* at 14.

⁸⁸ *Id.* at 15.

⁸⁹ *IRS: TIGTA Update Part II, Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (2015) (emphasis added).

The Decommissioned Email Server Backup Tapes

When the IRS moved the email server from New Carrollton, Maryland to Martinsburg, West Virginia, it turned off the old email server but left it in place.⁹⁰ In December 2011, IRS IT employees disassembled the server and treated the server hard drives and backup tapes as junk.⁹¹ In April 2012, most, but not all, of these parts were destroyed by an IRS contractor. In December 2013, months after the preservation order was issued, the remaining servers and backup tapes were shipped to Martinsburg for destruction.⁹² These servers and tapes remained in Martinsburg until March 2014 until Lyewsang sent the proper paperwork to destroy the hard drives and backup tapes.⁹³

On or about March 4, 2014, one month after the IRS realized it did not have all of Lerner's emails, IRS employees on the Media Management Midnight Unit in Martinsburg, West Virginia, magnetically erased, or degaussed, 422 backup tapes that likely contained full, weekly backups of Lerner's email account dating back to late November or December 2010.⁹⁴ During its investigation, TIGTA found and examined these tapes, but they contained no recoverable data.⁹⁵ As discussed above, the employees did not destroy the server hard drives shipped with the backup tapes because they incorrectly believed the preservation order only applied to hard drives.⁹⁶

Notwithstanding Milholland's May 2013 directive not to destroy any of the backup tapes for email, the IRS continued to degauss backup tapes until approximately June 2014.⁹⁷ The IG estimates the IRS's failure to comply with the May 2013 preservation order and congressional subpoenas resulted in the loss of up to 24,000 Lerner emails.⁹⁸ Camus testified before the Committee about the destruction of these tapes:

Rep. JORDAN: How in the world, with the preservation order and the subpoena did they destroy 422 tapes, containing, according to your investigation, potentially 24,000 emails? How does that happen, Mr. Camus?

Mr. CAMUS: **It's an unbelievable set of circumstances that would allow that to happen.**⁹⁹

⁹⁰ June 25 TIGTA testimony, *supra* note 79, at 4.

⁹¹ TIGTA report, *supra* note 7, at 3.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 17.

⁹⁵ June 25 TIGTA testimony, *supra* note 79, at 7.

⁹⁶ TIGTA report, *supra* note 7, at 17.

⁹⁷ *Id.* at 17.

⁹⁸ June 25 TIGTA testimony, *supra* note 79, at 8.

⁹⁹ *IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015) (emphasis added).

Despite the known gaps in Lerner's emails identified in February 2014, the IRS never asked any of the employees in question to look for backup tapes or the server hard drives associated with the decommissioned server.¹⁰⁰ The IG made the first request for these tapes in June 2014. TIGTA found, if the IRS had actually conducted a search for backup tapes for Lerner's email account, the agency would have likely found the necessary backup tapes before they were degaussed in March 2014.¹⁰¹

Though Koskinen testified the IRS made "extraordinary efforts" to recover Lerner's emails, TIGTA's investigation shows this is not the case. Camus testified:

Rep. WALBERG: Given the IRS's failure to attempt the methods TIGTA used to recover the missing emails, would you characterize the IRS efforts as extraordinary?

Mr. CAMUS: I would not.¹⁰²

In fact, TIGTA found IRS's lack of due diligence extended beyond the back-up tapes. Camus testified that the IRS failed to search five of six potential sources for Lerner emails:

Rep. WALBERG: How many potential sources for recovering Ms. Lerner's emails existed for the IRS?

Mr. CAMUS: We believe there were six.

Rep. WALBERG: Namely?

Mr. CAMUS: The hard drive would have been a source, Blackberry source, backup tapes a source, server drives a source, the backup tapes for the server drives, and then finally the loaner lap tops.

Rep. WALBERG: How many of these six did the IRS search?

Mr. CAMUS: We're not aware that they searched any one in particular. They did—it appears they did look into initially whether or not the hard drive had been destroyed, but they didn't go much further than that.¹⁰³

¹⁰⁰ TIGTA report, *supra* note 7, at 18.

¹⁰¹ *Id.*

¹⁰² IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform, 114th Cong. (2015).

¹⁰³ IRS: TIGTA Update Part II: Hearing Before the H. Comm on Oversight and Gov. Reform, 114th Cong. (2015).

The lack of due-diligence is compounded by the fact that on June 20, 2014, after the emails problems became public, the Commissioner testified he was not even aware as to whether or not Lerner had a Blackberry:

Rep. PRICE: Do you [know] –if Lois Lerner had a Blackberry or an iPhone?

Mr. KOSKINEN: I do not know.

Rep. PRICE: Can you find out if Lois Lerner had an –had an iPhone or a Blackberry for us?

Mr. KOSKINEN: I can find that out and be happy to let you know.¹⁰⁴

Yet, TIGTA’s investigation found, despite the public attention and importance of understanding how conservative groups were targeted, the IRS response was inadequate:

Rep. CHAFFETZ: Mr. Camus, the IRS had these emails. And you said they didn’t purposely destroy them, but what did they do with these emails?

Mr. CAMUS: To the best we can determine through the investigation, **they just simply didn’t look for those emails.** So for the 1,000—over 1,000 emails that we found on the backup tapes—we found them because we looked for them.¹⁰⁵

IRS employees openly sought to avoid congressional scrutiny by shielding email communications

In the course of the Committee’s investigation, it became apparent the IRS tacitly condoned an environment in which IRS employees sought to evade congressional oversight of their official business. Not only did senior IRS employees regularly utilize their private, non-official email accounts to conduct official IRS business, but Lois Lerner even warned her colleagues to “be cautious about what we say in emails.”¹⁰⁶ These actions not only potentially violate federal law, but they frustrate congressional oversight of the executive branch. Moreover, the Committee found IRS employees sent confidential taxpayer information using non-official email accounts, which potentially compromised the security of this information.

¹⁰⁴ *IRS Commissioner John Koskinen: Hearing Before the H. Comm on Ways and Means*, 113th Cong. (2014).

¹⁰⁵ *IRS: TIGTA Update Part II: Hearing Before the H. Comm on Oversight and Gov. Reform*, 114th Cong. (2015).

¹⁰⁶ Email from Lois Lerner, Internal Revenue Serv., to Maria Hooke, Internal Revenue Serv. (Ap. 9, 2013) [IRSR 726247].

Although the IRS provides senior employees with portable official laptops,¹⁰⁷ the use of non-official email accounts to conduct official business within the IRS is prevalent and reoccurring.

The Federal Records Act requires the preservation of all communications connected to official government business, including the use of official email accounts.¹⁰⁸ The IRS maintains a records-retention policy that specifically prohibits the use of a non-official email account to conduct official IRS business.¹⁰⁹ The IRS considers emails to be official records when “they are created or received in the transaction of agency business, appropriate for preservation as evidence of the government’s function and activities, or valuable because of the information they contain.”¹¹⁰

The Committee’s investigation found several IRS employees – including former Commissioner Doug Shulman and former Exempt Organizations Director Lois Lerner – sent or received material relating to official IRS business on their non-official email accounts. For example, material produced to the Committee included draft IRS documents that Lerner sent to a non-official msn.com email account from her official IRS account.¹¹¹ Lerner’s use of her non-official email account was saved in her IRS email with the shorthand label, “Lois Home.”¹¹²

Judith Kindell, Lerner’s former senior technical advisor, also used her non-official email account to conduct official IRS business.¹¹³ Documents produced to the Committee show Kindell transmitted confidential taxpayer information, redacted by the IRS for 26 U.S.C. Section 6103 purposes, from her official email account to her non-official Verizon.net email account and to Lerner’s non-official msn.com email account.¹¹⁴ The transmission of this material over non-governmental email channels threatened the security of the information and may have compromised sensitive taxpayer information.

In August 2013, Chairman Issa wrote to Treasury Secretary Lew to remind him of his obligation to ensure all emails related to official business are preserved for congressional oversight.¹¹⁵ Then-acting IRS Commissioner Daniel Werfel responded, assuring the Committee the IRS had taken all “necessary steps to preserve emails” and evaluated any personnel actions for the use of non-official email accounts.¹¹⁶ The Committee, however, is not aware of any IRS disciplinary action on the violations of federal law and IRS policy uncovered by the Committee.

¹⁰⁷ See Transcribed interview of Sarah Hall Ingram, Internal Revenue Serv., in Wash., D.C. (Sept. 23, 2013).

¹⁰⁸ 44 U.S.C. ch. 31.

¹⁰⁹ See I.R.M. § 10.8.1.4.6.3.1; see also Letter from Daniel Werfel, Internal Revenue Serv., to Darrell Issa, H. Comm. on Oversight & Gov’t Reform (Sept. 16, 2013).

¹¹⁰ I.R.M. § 1.10.3.2.3.

¹¹¹ See Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov’t Reform, to Lois G. Lerner, Internal Revenue Serv. (Aug. 13, 2013).

¹¹² *Id.*

¹¹³ See Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov’t Reform, to Judith Kindell, Internal Revenue Serv. (Sept. 30, 2013).

¹¹⁴ See, e.g., Email from Judith Kindell to Lois Lerner (Aug. 23, 2011) [LERNER-OGR205 – 224].

¹¹⁵ Letter from Darrell Issa, H. Comm. on Oversight & Gov’t Reform, to Jacob Lew, U.S. Dep’t of the Treasury (Aug. 15, 2013).

¹¹⁶ Letter from Daniel Werfel, Internal Revenue Serv., to Darrell Issa, H. Comm. on Oversight & Gov’t Reform (Sept. 16, 2013).

The Committee also learned in the course of its investigation the IRS maintained a wholly separate instant-messaging communication system it did not regularly archive.¹¹⁷ According to one IRS employees, the system – known as “Office Communication Server,” or OCS – is “not set to automatically save as the standard; however, that functionality exists within the software.”¹¹⁸ The fact the IRS did not automatically archive these messages as a matter of course raises questions regarding the agency’s commitment to preserving communications and records for congressional oversight or other needs.

Documents obtained by the Committee suggest that Lois Lerner actively sought to hide information from Congress. In one email, Lerner spoke of counseling her colleagues “to be cautious about” what they write in email due to congressional oversight interests in the subject matter. She wrote:

I was cautioning folks about email and how we have had several occasions where Congress has asked for emails and there has been an electronic search for responsive emails – so we need to be cautious about what we say in emails.¹¹⁹

In the same email, Lerner went on to ask whether the IRS’s internal instant-messaging OCS system was automatically archived. When told it was not, Lerner responded in one word: “Perfect.”¹²⁰

The IRS failed to meet its requirements regarding record retention. The Archivist of the United States, David Ferriero, testified to the Committee that the IRS did not follow the law in retaining Lois Lerner’s destroyed emails.¹²¹ The IRS fostered an atmosphere that allowed senior employees, such as Lerner, to encourage colleagues to avoid written records for fear of public scrutiny. This work environment allowed employees to use personal email accounts for official business, including the transmittal of confidential taxpayer information. The failure of the IRS to properly preserve email and other records, coupled with its apparent institutional disregard for federal records laws, frustrates congressional oversight and prevents the American people from learning the full truth about the IRS’s targeting.

¹¹⁷ Email from Maria Hooke, Internal Revenue Serv., to Lois Lerner, Internal Revenue Serv. (Apr. 9, 2013) [IRSR 726247].

¹¹⁸ *Id.*

¹¹⁹ Email from Lois Lerner, Internal Revenue Serv., to Maria Hooke, Internal Revenue Serv. (Apr. 9, 2013) [IRSR 726247].

¹²⁰ Email from Lois Lerner, Internal Revenue Serv., to Maria Hooke, Internal Revenue Serv. (Apr. 9, 2013). [IRSR 726247].

¹²¹ See *IRS Obstruction: Lois Lerner's Missing Emails, Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014).

IRS Created a Special Project Team to Handle Requests for Information about Lerner and 501(c)(4) matters

On June 3, 2015, Mary Howard, Director of the Privacy, Governmental Liaison and Disclosure section at the IRS, testified to the Committee that the agency created a “special project team” specifically for responding to congressional subpoenas and requests for information relating to Lois Lerner and other 501(c)(4) matters. Howard testified:

Rep. CHAFFETZ: So they are solely responsible for the fulfillment of that request and for the subpoenas, correct? I mean, if it doesn't go to you, you're the Director of Privacy, Governmental Liaison, and Disclosure, and you're telling me that your department, your group doesn't get that because it came from Congress, right?

Ms. HOWARD: No, no, because we made a business decision that because of the scope of that request we would set up a special project team, and that special project team—¹²²

While Howard ordinarily received congressional requests for information, the requests for information for Lois Lerner's emails “did not land on [her] desk.” Instead, the Commissioner and the Chief Counsel received them directly as the individuals primarily responsible for responding to those requests. Howard testified:

Rep. CHAFFETZ: Your title, correct, Director, Privacy, Governmental Liaison, and Disclosure.

Ms. HOWARD: Right.

Rep. CHAFFETZ: That's your title.

Ms. HOWARD: That is my title.

Rep. CHAFFETZ: And you're telling me you're not responsible for the governmental liaison and disclosure part of that?

Ms. HOWARD: Not in the context that you're asking me.

Rep. CHAFFETZ: Why? Because it's Lois Lerner?

Ms. HOWARD: No, I think because it was an unprecedented,

¹²² *Ensuring Agency Compliance with the Freedom of Information Act: Hearing Before the H. Comm. on Oversight & Gov't Reform, 114th Cong. at 50 (2015).*

voluminous –

Rep. CHAFFETZ: Wait. What was unprecedented about asking for information about Lois Lerner? What's unprecedented about that?

Ms. HOWARD: I think that Lois Lerner was the tip of the iceberg.

Rep. CHAFFETZ: Really? So do we.

Ms. HOWARD: I think that that request included far more than just one person.

Rep. CHAFFETZ: So what makes you think it's the tip of the iceberg?

Ms. HOWARD: In terms of the way the request was structured.

Rep. CHAFFETZ: What was so striking about it? It's pretty simply. I mean, in this electronic age, we're asking for all of her emails in a certain timeframe. How hard is that? I mean, that should take about 10 seconds, right? What's so hard about producing those documents? Why has it taken so long? It's taken years.

Ms. HOWARD: And, again, I cannot talk to the specific documents about Lois Lerner, but what I can give you is some insight into how we –

Rep. CHAFFETZ: Okay. So when the request came, both in a letter and then in a subpoena, who does that go to?

Ms. HOWARD: The Commissioner.

Rep. CHAFFETZ: It doesn't go to you?

Ms. HOWARD: No. Not first.

Rep. CHAFFETZ: But when we send these documents over, this doesn't land on your desk?

Ms. HOWARD: It does not land on my desk.

Rep. CHAFFETZ: Does it land on any of your staff's desks?

Ms. HOWARD: No. **It landed on the desk of the Commissioner and the Chief Counsel.**¹²³

Howard testified that IRS did not send the Lerner requests through the agency's normal process for responding to requests. Instead, a special project team handled these requests. Howard testified:

Rep. CHAFFETZ: Was the Lois Lerner case dealt with differently than anything else? You said it was unprecedented. I want to know why.

Ms. HOWARD: Well, I think because there were a lot of other 501 – 504(c)(3) – (c)(4) documents that were requested at the same time.

Rep. CHAFFETZ: So anything that had to deal with those documents, the (c)(4) documents –

Ms. HOWARD: Uh-huh.

Rep. CHAFFETZ: –went a different direction than normally?

Ms. HOWARD: It went into sort of a project team where we felt that we could handle–

Rep. CHAFFETZ: So there is a special project team that's set up?

Ms. HOWARD: There was at the time. I don't believe it's still functioning.

Rep. CHAFFETZ: Why was there a special team set up?

Ms. HOWARD: Because of the volume of the–

Rep. CHAFFETZ: It didn't have anything to do with volume. It had to do with the topic, didn't it?

Ms. HOWARD: I don't believe so, no. I think it was a business reason of how we would best use our resources. In actuality, looking back on it from my perspective, it was a very positive thing for the Disclosure Office because we could do all of our regular FOIA work, except for those particular topics.

¹²³ *Id.* at 48-50 (emphasis added).

Rep. CHAFFETZ: So, I mean, what you're telling me is, anything that came in on this topic, (c)(4), not just Lois Lerner, but (c)(4), went in a different route. It went to the Commissioner and it went to the General Counsel. There's only two political appointees in all of the IRS, the Commissioner and the General Counsel. Those are the only two out of 90,000. And you're telling me that those requests went a different route than normally anything else does, and it went to them, correct? That's exactly what you told me.

Ms. HOWARD: I don't want to go on record as saying that I know specifically where requests went to. My understanding is that requests from Congress are given a certain level of respect and concern so that they go to the Commissioner's office first and are parceled out as to who's going to work them after that.¹²⁴

Howard's testimony is notable in that it demonstrates the extraordinary way in which the IRS treated the congressional investigations into Lois Lerner and the IRS targeting of conservative groups. The Lerner matter was handled at the highest levels of the IRS through the Commissioner and the Chief Counsel. In fact, the IRS created an entirely separate structure to deal with these politically sensitive materials. More importantly, Howard's testimony provides insight into the interminable delays in the IRS's responses to the Lerner requests. The Committee first requested Lerner's emails more than two years ago and the IRS has still not confirmed that all responsive documents have been produced. The fact the IRS stripped the Privacy, Governmental Liaison and Disclosure team of its ordinary responsibility to respond to congressional requests with respect to Lerner's emails might never have come to light at all without Ms. Howard's testimony, which had to be compelled through the issuance of a subpoena. This serves as another example of the IRS failing to be forthcoming and insisting that the Committee take extraordinary measures to receive information from the organization.

* * * * *

More than two years have passed since Congress began investigating the IRS's treatment of conservative tax-exempt groups. After reviewing more than a million pages of documents, conducting more than 50 transcribed interviews, and holding numerous public hearings, the American people still do not have all of the answers about the IRS's mistreatment of American citizens.

¹²⁴ *Id.* at 51-52.

The IRS's destruction of up to 24,000 relevant emails in the face of a congressional subpoena and preservation order is inexcusable. Had the IRS taken the necessary steps to educate employees on the preservation notice, or undertaken any sort of investigation once the agency learned of the missing emails, it could have stopped the destruction of these important documents. In the absence of Lois Lerner's testimony, these documents are critical to the Committee's attempt to determine what went wrong at the IRS. Commissioner John Koskinen's misleading statements to Congress about the destruction of these emails has compounded the problem. His unwillingness to present accurate information about the missing emails has delayed and hindered the Committee's efforts, perhaps permanently so.

The IRS is one of the most powerful Federal agencies and must be trustworthy. It is not possible to move past the agency's willful targeting of conservative tax-exempt applications as long as the agency refuses to take responsibility for its actions. As leader of the IRS, Commissioner John Koskinen has repeatedly failed to take responsibility for the destruction of evidence by the agency and the numerous misstatements he made to Congress about this matter. Because of his actions, and the actions of others at the agency he leads, the American people may never know the truth about the IRS' targeting of conservative tax-exempt applications.

For these reasons, we request you immediately remove Commissioner Koskinen as head of the IRS.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jason Chaffetz", with a large, stylized flourish at the end.

Jason Chaffetz
Chairman

Walt Under _{TX-05}

Blake Fennell _{TX-27}

Sheldon _{WI-06}

Mark Meadows _{NC-11}

J. Jordan _{OH-4}

Jody Hice _{GA-10}

Bob O'Rourke _{FL-06}

Paul Blunt _{IA-01}

W. B. King _{TX-23}

Mark Walker _{NC-06}

[Signature] _{TN-04}

Gen L. 'Buddy' Carter _{GA-01}

Paul A. Gosar _{AZ-04}

[Signature] _{MI-03}

Steve Russell
OK-5

Thomas Massie KY-4

Gary Johnson
AL-06

Tim Walling MI-07

Cynthia D. Lummis
WY-00

Michael B. Jensen
OH-10

The President
July 27, 2015
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cc: The Honorable Elijah E. Cummings, Ranking Member

The Honorable Paul Ryan, Chairman
Committee on Ways and Means
U.S. House of Representatives

The Honorable Sander Levin, Ranking Member
Committee on Ways and Means
U.S. House of Representatives

The Honorable Peter Roskam, Chairman
Subcommittee on Oversight
Committee on Ways and Means
U.S. House of Representatives

The Honorable John Lewis, Ranking Member
Subcommittee on Oversight
Committee on Ways and Means
U.S. House of Representatives

The Honorable Hatch, Chairman
Committee on Finance
U.S. Senate

The Honorable Ron Wyden, Ranking Member
Committee on Finance
U.S. Senate