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# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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### MEMORANDUM

July 16, 2014

**To: Democratic Members of the Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs**

**Fr: Democratic Staff**

**Re: Hearing on “Examining the Justice Department’s Response to the IRS Targeting Scandal”**

On Thursday, July 17, 2014 at 9:00 a.m., in Room 2154 of the Rayburn House Office Building, the Subcommittee will hold a hearing with James M. Cole, the Deputy Attorney General of the United States, about the Justice Department’s ongoing criminal investigation into the treatment of applications for tax-exempt status by the Internal Revenue Service (IRS).

Chairman Darrell Issa and other Republican Committee Members have made a wide range of very serious accusations against numerous Justice Department officials, claiming that they are not adequately pursuing the investigation, that they have multiple conflicts of interest, that they are criminally obstructing the Committee’s investigation, and that they have joined with the White House, the IRS, and other agencies in a government-wide conspiracy to target conservative organizations. This memorandum addresses the top ten Republican allegations relating to the Department of Justice:

1.	Claim That Justice Department Already Concluded Investigation .....	4
2.	Claim That Justice Department Obstructing Committee Investigation .....	5
3.	Claim That Lead Attorney Has Conflict of Interest .....	9
4.	Claim That Justice Department Created “Illicit Registry” .....	12
5.	Claim That Special Counsel Needed .....	15
6.	Claim That Justice Department Ignoring Ways and Means Referral .....	16
7.	Claim That Justice Department Ignoring Deliberate Computer Crash .....	18
8.	Claim That Justice Department Motivated by Politics .....	22
9.	Claim That Prominent Democrats Prompted Targeting .....	24
10.	Claim That <i>Citizens United</i> Prompted Targeting .....	27

## SUMMARY OF REPUBLICAN CLAIMS

1. **Claim That Justice Department Already Concluded Investigation:**  
Republicans have accused the Department of closing the criminal investigation prematurely for political reasons, but their claims are based on anonymous sources in a single press account, and Department officials have stated repeatedly that the criminal investigation remains open and active.
2. **Claim That Justice Department Obstructing Committee Investigation:**  
Republicans have accused the Department of obstructing the Committee's investigation by refusing to provide more information about the status of its investigation, but the Department has explained that both Republican and Democratic administrations have followed the longstanding Executive Branch policy of not disclosing detailed information about ongoing criminal investigations.
3. **Claim That Lead Attorney Has Conflict of Interest:**  
Republicans have accused the Department of compromising the investigation by assigning a lead attorney who previously made donations to President Obama's campaigns, but the Department has explained that she is not the lead attorney and that she is in full compliance with all laws and ethics rules governing Department employees.
4. **Claim That Justice Department Created Illicit Registry:**  
Republicans have accused the Department of conspiring with the IRS to create a massive and illicit database of confidential taxpayer information as part of an effort to target conservative organizations, but these claims are wildly inaccurate because information provided to the Department by the IRS was predominantly publicly available and was never actually reviewed or used for any investigations or prosecutions.
5. **Claim That Special Counsel Needed:**  
Republicans passed a Resolution on the House floor calling on the Attorney General to appoint a special counsel to conduct the criminal investigation, but it relies on many of the same Republican claims that have already been debunked, and the Department has explained why a special counsel is not warranted in this case.
6. **Claim That Justice Department Ignoring Ways and Means Referral:**  
Republicans have accused the Department of ignoring a referral letter sent by the Chairman of the House Committee on Ways and Means alleging criminal violations by Lois Lerner, but despite major factual errors and unsubstantiated claims in the letter, the Department has pledged to carefully consider it as part of its ongoing investigation.
7. **Claim That Justice Department Ignoring Deliberate Computer Crash:**  
Republicans have accused the Department of ignoring what they allege is the intentional destruction of Lois Lerner's computer hard drive in an effort to conceal her emails, but contemporaneous documents and other evidence obtained by the Committee indicate that her computer crash was not deliberate, but rather was caused by a technological malfunction.

8. **Claim That Justice Department Motivated by Politics:**  
Republicans have accused the Department of failing to actively pursue the criminal investigation because of political motivations, but the Committee has obtained no evidence to support these claims.
9. **Claim That Prominent Democrats Prompted Targeting:**  
Republicans have accused the Department of conspiring with the IRS to single out conservative groups for potential prosecution in response to pressure from prominent Democrats, but these claims have been refuted during transcribed interviews conducted by Committee staff.
10. **Claim That *Citizens United* Prompted Targeting:**  
Republicans claim that the targeting of conservative groups is a government-wide conspiracy initiated after the Supreme Court's 2010 decision in *Citizens United* involving the President, the IRS, the Department of Justice, the Securities and Exchange Commission, the Federal Elections Commission, and other agencies, but the Committee has obtained no evidence linking these claims to the inappropriate criteria used by IRS employees in Cincinnati to screen applications for tax-exempt status, which was the basis for the Inspector General's report.

## DETAILED REVIEW OF REPUBLICAN CLAIMS

### 1. Claim That Justice Department Already Concluded Investigation

Republicans have accused the Department of closing the criminal investigation prematurely for political reasons, but their claims are based on anonymous sources in a single press account, and Department officials have stated repeatedly that the criminal investigation remains open and active.

On May 14, 2013, the Treasury Inspector General for Tax Administration issued an audit report concluding that IRS employees in Cincinnati used “inappropriate” criteria to screen applications for tax-exempt status.<sup>1</sup> The same day, Attorney General Eric H. Holder, Jr. announced that the Department was opening a criminal investigation to determine whether “any laws were broken in connection with those matters related to the IRS.”<sup>2</sup>

On January 13, 2014, a press report cited anonymous sources suggesting that the Department “doesn’t plan to file criminal charges” because investigators have not identified what “would amount to a violation of criminal law.” The report stated: “Instead, what emerged during the probe was evidence of a mismanaged bureaucracy enforcing rules about tax-exemption applications it didn’t understand.”<sup>3</sup>

In response to this press report, Chairman Issa and Chairman Jordan issued the following statement on January 13, 2014:

Anonymous—and apparently politically motivated—leaks from unnamed law enforcement officials further undermine public assurances by the current and former FBI directors that this is a legitimate investigation. ... These revelations further undermine the credibility of the Attorney General Holder and the Justice Department under his leadership. Given the circumstances, there is little reason for the American people to have confidence in this investigation.<sup>4</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> *FBI to Investigate Tea Party Tax Affair*, USA Today (May 14, 2013) (online at [www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-investigation/2158899/](http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-investigation/2158899/)).

<sup>3</sup> *Criminal Charges Not Expected in IRS Probe*, Wall Street Journal (Jan. 13, 2014) (online at <http://online.wsj.com/news/articles/SB10001424052702303819704579318983271821584>).

<sup>4</sup> House Committee on Oversight and Government Reform, *Issa and Jordan Respond to Report that FBI Does Not Expect Criminal Charges in IRS Targeting Investigation* (Jan. 13, 2014) (online at <http://oversight.house.gov/release/issa-jordan-respond-report-fbi-expect-criminal-charges-irs-targeting-investigation/>).

Since this press report first appeared, Department officials have stated explicitly and repeatedly that the criminal investigation remains open and active.

On January 29, 2014, Attorney General Holder testified before the Senate Judiciary Committee: “This is a matter that is presently being investigated. Interviews are being done, analysis is being conducted.” He added that it is not unusual for complex investigations to take time, explaining that “we want to make sure that what we do is comprehensive and that at the end of the day, we get it right.”<sup>5</sup>

On April 8, 2014, the Attorney General testified before the House Judiciary Committee that the criminal investigation is “an ongoing matter that the Justice Department is actively pursuing.”<sup>6</sup>

On May 27, 2014, the Deputy Attorney General wrote to Chairman Issa reiterating that the Department’s investigation is ongoing. He stated that the Department of Justice, along with the Federal Bureau of Investigation (FBI) and the Treasury Inspector General for Tax Administration, “is continuing to investigate.”<sup>7</sup>

On June 11, 2014, FBI Director James Comey testified before the House Judiciary Committee that the agency is conducting a “very active investigation.”<sup>8</sup>

## 2. Claim That Justice Department Obstructing Committee Investigation

Republicans have accused the Department of obstructing the Committee’s investigation by refusing to provide more information about the status of its investigation, but the Department has explained that both Republican and Democratic administrations have followed the longstanding Executive Branch policy of not disclosing detailed information about ongoing criminal investigations.

On September 6, 2013, Chairman Issa and Chairman Jordan sent a letter to FBI Director Comey seeking investigative documents, alleging that the FBI “failed to provide sufficient information about the status of the investigation,” and claiming that the FBI demonstrated “apathy toward the IRS’s activities.”<sup>9</sup>

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<sup>5</sup> Senate Committee on the Judiciary, *Hearing on Department of Justice Oversight* (Jan. 29, 2014).

<sup>6</sup> House Committee on the Judiciary, *Hearing on Oversight of the U.S. Department of Justice* (Apr. 8, 2014).

<sup>7</sup> Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 27, 2014).

<sup>8</sup> House Committee on the Judiciary, *Hearing on Oversight of the Federal Bureau of Investigation* (June 11, 2014).

<sup>9</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.*, to Director James B. Comey, Federal Bureau of Investigation (Sept. 6, 2013).

On October 31, 2013, the FBI sent a letter in response, stating:

The documents you have requested are evidence in an ongoing investigation and, as such, cannot be released at this time. I know you share my commitment to maintaining the integrity of our criminal justice system and would like to reassure you that we are carefully evaluating the evidence generated during our investigative efforts. Further, we will be working closely with federal prosecutors to determine whether the evidence reveals a prosecutable violation of any of the statutes within our jurisdiction.<sup>10</sup>

On December 2, 2013, Chairman Issa and Chairman Jordan wrote to the FBI Director again, stating:

[T]he recent actions of FBI employees suggest that the Bureau and possibly political appointees within the Department of Justice are intentionally obstructing the Committee's oversight efforts. ... The Department's tactics have impeded a congressional investigation and interfered with the Committee's access to documents and information. Obstructing a congressional investigation is a crime. Making false statements to congressional staff is also a crime. Please ensure that all Bureau employees are aware of the consequences for obstruction and misleading Congress, and that they cooperate fully with the Committee's requests.<sup>11</sup>

On December 31, 2013, the FBI responded by rejecting these accusations:

It is important that the investigators be permitted to conduct their investigation in a fair and impartial manner and use any documents or communications obtained to conduct interviews and to obtain additional evidence in order to pursue all the facts in the case. Maintaining the integrity of an ongoing criminal investigation has been a longstanding policy of the Department of Justice, and requests to disclose all documents and communications from an investigative file are generally deferred until the investigation has concluded.<sup>12</sup>

On January 8, 2014, Chairman Issa and Chairman Jordan wrote to the Attorney General accusing the Department of "obstruction" and asserting that "the FBI's blatant lack of

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<sup>10</sup> Letter from Stephen D. Kelly, Assistant Director, Office of Congressional Affairs, Federal Bureau of Investigation, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Oct. 31, 2013).

<sup>11</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.*, to Director James B. Comey, Federal Bureau of Investigation (Dec. 2, 2013).

<sup>12</sup> Letter from Stephen D. Kelly, Assistant Director, Office of Congressional Affairs, Federal Bureau of Investigation, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.* (Dec. 31, 2013).

cooperation with the Committee may rise to the level of criminal obstruction of a congressional investigation.”<sup>13</sup>

On January 24, 2014, the Department sent a letter rejecting these accusations: “Your assertion that the FBI has demonstrated a ‘blatant lack of cooperation with the Committee’ that ‘may rise to the level of criminal obstruction’ is misleading and wrong.”<sup>14</sup>

On January 28, 2014, Chairman Jordan sent a letter to the Department asserting: “The Justice Department has flatly and unjustifiably refused to cooperate with the Committee’s oversight.”<sup>15</sup> Chairman Jordan’s letter sought the testimony of Barbara Bosserman, a career-DOJ attorney working on the investigation for an upcoming subcommittee hearing.

On January 30, 2014, Deputy Attorney General James Cole sent a letter declining Chairman Jordan’s request for the career attorney’s testimony. He wrote:

The Department’s longstanding policy, applied across Administrations, is to decline to provide Congress with non-public information about ongoing criminal investigations. This policy is intended to protect the effectiveness and integrity of the criminal justice process, as well as the privacy interests of third parties. It also is founded upon our commitment to avoiding any perception that our law enforcement efforts are subject to undue influence from elected officials.<sup>16</sup>

The Deputy Attorney General also wrote:

Members of Congress have long understood and respected the Department’s strongly-held concern that subjecting line prosecutors to congressional questioning poses significant risks to the Department’s law enforcement efforts and would have a chilling effect on Department attorneys.<sup>17</sup>

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<sup>13</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.*, to Attorney General Eric H. Holder Jr., Department of Justice (Jan. 8, 2014).

<sup>14</sup> Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.* (Jan. 24, 2014).

<sup>15</sup> Letter from Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, to Barbara Bosserman, Civil Rights Division, Department of Justice (Jan. 28, 2014).

<sup>16</sup> Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (Jan. 30, 2014).

<sup>17</sup> *Id.*

On February 3, 2014, the Deputy Attorney General wrote to Chairman Jordan again, stating that “we will be in a better position to provide Congress with information about our decisions in this matter when it is concluded.”<sup>18</sup>

On April 23, 2014, Republican Committee Members wrote to the Attorney General repeating claims that the Department was uncooperative, requesting a broad range of investigative documents, and seeking a transcribed interview of Richard Pilger, the Director of the Election Crimes Branch in the Department’s Public Integrity Section to discuss his interactions with Ms. Lerner.<sup>19</sup>

On May 6, 2014, the Department made Mr. Pilger available to the Committee for a transcribed interview with Chairman Jordan and Committee staff, which lasted more than five hours. As the Department explained in a letter the next day, the decision to make this attorney available was an “extraordinary effort to accommodate the Committee.”<sup>20</sup>

On May 20, 2014, Chairman Issa issued a unilateral subpoena to the Attorney General demanding the documents requested in his April 23, 2014, letter. The cover letter accompanying the subpoena stated:

Because you have failed to comply with this request for documents and because the Department has obstructed the Committee’s oversight, the Committee has no choice but to issue a subpoena compelling your cooperation with this important matter.<sup>21</sup>

The Deputy Attorney General responded to Chairman Issa’s unilateral subpoena on May 27, 2014, stating:

Despite the Department’s extraordinary efforts to date to accommodate the Committee, your letters unjustifiably claim that the Department is obstructing your oversight. Your unwillingness to respect the legitimacy of the Department’s law enforcement interests is reflected in your letter of May 20, in which you question the Department’s commitment “to cooperating with the Committee’s investigation on the Committee’s terms.” (Emphasis added.)

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<sup>18</sup> Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (Feb. 3, 2014).

<sup>19</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, *et al.*, to Attorney General Eric H. Holder Jr., Department of Justice (Apr. 23, 2014).

<sup>20</sup> Letter from to Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 7, 2014).

<sup>21</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to Attorney General Eric H. Holder Jr., Department of Justice (May 20, 2014).

To be clear, the Department is committed to cooperating in good faith with the Committee’s reasonable requests for information—and we are doing so—but to date, you have not reciprocated. Specifically, the Committee has refused to accept the fundamental principle that its efforts to obtain information related to an ongoing investigation run a significant risk of compromising the independence, integrity, and effectiveness of our law enforcement efforts. We cannot yield to pressure to disclose information to Congress where doing so would undermine our core mission as a law enforcement entity.<sup>22</sup>

On May 28, 2014, Department officials produced more than 200 pages of documents to the Committee, as they committed before Chairman Issa issued his subpoena.<sup>23</sup>

### **3. Claim That Lead Attorney Has Conflict of Interest**

Republicans have accused the Department of compromising the investigation by assigning a lead attorney who previously made donations to President Obama’s campaigns, but the Department has explained that she is not the lead attorney and that she is in full compliance with all laws and ethics rules governing Department employees.

On January 8, 2014, Chairman Issa and Subcommittee Chairman Jordan sent a letter to the Attorney General claiming that Civil Rights Division attorney Barbara Bosserman is the “lead” attorney on the investigation. They also asserted that the investigation had been “compromised” by “a startling conflict of interest” because Ms. Bosserman previously donated \$6,750 to President Obama’s campaigns and the Democratic National Committee, and because she attended a bill signing event at the White House.<sup>24</sup>

The Department has explained repeatedly that Ms. Bosserman is not the lead investigator in the investigation. On October 31, 2013, the FBI sent a letter to the Committee explaining that the investigative team includes “11 Special Agents and one Forensic Accountant assigned to the investigation,” and that additional personnel would be utilized if necessary to further the investigation. The FBI also stated that it “remains in close coordination with TIGTA.”<sup>25</sup>

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<sup>22</sup> Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 27, 2014).

<sup>23</sup> Letter from to Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 28, 2014).

<sup>24</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, to Attorney General Eric Holder Jr., Department of Justice (Jan. 8, 2014).

<sup>25</sup> Letter from Stephen D. Kelly, Office of Congressional Affairs, Federal Bureau of Investigation, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (Oct. 31, 2013).

On January 29, 2014, Attorney General Holder testified before the Senate Judiciary Committee that Ms. Bosserman is not, in fact, the “lead” attorney in the investigation.<sup>26</sup> He explained:

[T]he characterization of this lawyer as the lead lawyer on the case, I think, is not correct. This is an investigation being done by the Civil Rights Division as well as by the Criminal Division of the Justice Department. And if I had to assign a lead in this, I would say that the Criminal Division of Public Integrity Section has actually got the lead. It’s also involving the FBI as well as the inspector general from the—from the Treasury Department.<sup>27</sup>

The Attorney General also stated:

I was the one who actually ordered the investigation into these matters. They’re being handled by the Criminal Division in the Justice Department, the Civil Rights Division in the Justice Department, the Treasury Inspector General and the FBI, as you indicated.<sup>28</sup>

During a hearing before the House Judiciary Committee on April 8, 2014, the Attorney General reiterated this point in response to a question from Chairman Issa:

As I look at the investigation and think of who is in the lead, I think of the Criminal Division as having the primary responsibility. And I talk to the assistant attorney general of the Criminal Division. But the people who are doing the work on the ground for the Criminal Division are the people in the Public Integrity Section.<sup>29</sup>

With respect to allegations of a conflict of interest, Ms. Bosserman’s actions comply with all applicable statutes and regulations.

Pursuant to 28 C.F.R. § 45.2, federal employees are prohibited from participating in a criminal investigation if they have a “political relationship” with an organization having a substantial interest in or directly affected by the outcome of the investigation.<sup>30</sup> The regulation defines “political relationship” as arising “from service as a principal adviser thereto or a principal official thereof” and not merely from making political contributions or attending a bill-signing event.<sup>31</sup>

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<sup>26</sup> Senate Committee on the Judiciary, *Hearing on Department of Justice Oversight* (Jan. 29, 2014).

<sup>27</sup> *Id.*

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

<sup>29</sup> House Committee on the Judiciary, *Hearing on Oversight of the U.S. Department of Justice* (Apr. 8, 2014).

<sup>30</sup> 28 C.F.R. § 45.2.

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

In addition, the federal Hatch Act expressly protects the right of career attorneys to make political donations:

It is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation.<sup>32</sup>

Under federal law, even the most restricted category of employees “retains the right to vote as he chooses and to express his opinion on political subjects and candidates.”<sup>33</sup> The Office of Special Counsel—the federal agency tasked with enforcing the Hatch Act—advises that even employees with the most restrictions on their political activity “*may* contribute money to political campaigns, political parties, or partisan political groups.”<sup>34</sup>

Independent experts have explained that Ms. Bosserman’s political contributions do not create a conflict of interest. Professor Bruce Green of Fordham Law School stated:

[N]o court would seriously entertain a claim that the prosecutor should be disqualified from investigating or prosecuting officials of an executive-branch agency because the prosecutor previously made political donations supporting or opposing the incumbent president or the president’s party.<sup>35</sup>

He added:

Section 45.2 plainly does not apply to a career prosecutor who contributed to the incumbent president’s campaign or political party. The provision is very limited. It applies only to a prosecutor whose close identification with an official, candidate, party or organization arises from the prosecutor’s prior service as a *principal adviser* to the official or candidate or as a *principal official* of the party or organization that is the subject of the investigation or otherwise an interested party. Few, if any, federal prosecutors fit into that category. A campaign contributor does not, because he or she is not “a principal adviser” or a “principal official.”<sup>36</sup>

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<sup>32</sup> 5 U.S.C. § 7321.

<sup>33</sup> 5 U.S.C. § 7323(c).

<sup>34</sup> Office of Special Counsel, *THE HATCH ACT: Permitted and Prohibited Activities for Employees Subject to Additional Restrictions* (emphasis in original) (online at [https://www.osc.gov/Resources/HA%20Poster%20\\_Further%20Restricted%20Employees%20%20with%20OSC%20contact%20info%20%285-11%29.pdf](https://www.osc.gov/Resources/HA%20Poster%20_Further%20Restricted%20Employees%20%20with%20OSC%20contact%20info%20%285-11%29.pdf)).

<sup>35</sup> Letter from Professor Bruce A. Green, Fordham University Law School, to House Committee on Oversight and Government Reform (Feb. 4, 2014) (online at <http://democrats.oversight.house.gov/uploads/Green%20letter%20to%20House%20Committee%20on%20Oversight%20%282-4-13%29.pdf>).

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

Professor Daniel Richman of Columbia Law School agreed:

Any claim that these contributions, in of themselves, create a conflict of interest or should be cause for disqualification for a career prosecutor investigating allegations of political targeting in the Executive Branch strikes me as meritless.<sup>37</sup>

Professor Stephen Saltzburg at the George Washington University Law School also agreed:

I do not regard making contributions as establishing a “close identification” with an official or party or “a close and substantial connection of the type normally viewed as likely to induce partiality.”<sup>38</sup>

On January 28, 2014, Chairman Jordan wrote directly to Ms. Bosserman, alleging that her participation in the investigation created an “appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution” pursuant to 28 C.F.R. § 45.2. He requested Ms. Bosserman’s testimony before the Subcommittee on February 6, 2014.<sup>39</sup>

On January 30, 2014, Deputy Attorney General James Cole responded that no Department representative “will be in a position to provide testimony about this ongoing law enforcement matter” because such testimony would be inconsistent DOJ’s “long-standing policy and could undermine judicial confidence in the independence of the criminal justice process.”<sup>40</sup>

#### **4. Claim That Justice Department Created Illicit Registry**

Republicans have accused the Department of conspiring with the IRS to create a massive and illicit database of confidential taxpayer information as part of an effort to target conservative organizations, but these claims are wildly inaccurate because information provided to the

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<sup>37</sup> Letter from Professor Daniel Richman, Columbia University Law School, to Democratic Staff, House Committee on Oversight and Government Reform (Feb. 5, 2014) (online at <http://democrats.oversight.house.gov/uploads/Richman%20House%20Oversight%20Feb%202014%20letter.pdf>).

<sup>38</sup> Statement of Professor Stephen Saltzburg, George Washington University Law School, to Democratic Staff, House Committee on Oversight and Government Reform (Feb. 3, 2014) (online at <http://democrats.oversight.house.gov/uploads/Saltzburg%20Opinion%202-6-14.pdf>).

<sup>39</sup> Letter from Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, to Barbara Bosserman, Civil Right Division, Department of Justice (Jan. 28, 2014).

<sup>40</sup> Letter from Deputy Attorney General James Cole, Department of Justice, to Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (Jan. 30, 2014).

Department by the IRS was predominantly publicly available and was never actually reviewed or used for any investigations or prosecutions.

On June 10, 2014, Chairman Issa and Chairman Jordan sent a letter to the Attorney General claiming that “the Justice Department worked with the IRS to compile a massive database of nonprofit information, including confidential taxpayer information,” which they referred to as “an illicit and comprehensive registry by federal law-enforcement officials.” They claimed that the Department used this registry “for the potential prosecution of nonprofits,” and they argued that “a special prosecutor is needed for a truly independent criminal investigation of the IRS targeting.”<sup>41</sup>

These accusations are not supported by the facts. On May 29, 2014, the Department informed the Committee that the IRS had provided 21 computer disks to the FBI in 2010. These disks included approximately 1.1 million pages of Form 990s, which are forms filed each year by groups that already have tax-exempt status. The disks contained forms not only from conservative and progressive groups, but from all groups, “regardless of political affiliation,” filed between January 1, 2007, and October 1, 2010. This is the same information the IRS provides to the non-profit organization Guidestar.org, “which makes the information available to the public through a free account.”<sup>42</sup>

The Department’s letter explained that the FBI never reviewed the information in the 21 disks and never used the information as part of any investigation or prosecution:

FBI advises that upon receipt of the disks, an analyst imported the index, which is set forth in one of the disks, into a spreadsheet, but did nothing further with the disks, and to the best of our knowledge, the information contained on the disks was never utilized for any investigative purpose.<sup>43</sup>

The Department reiterated this point in a letter on June 4, 2014, stating that the FBI “did not review the disks except for the index” and that “neither the FBI nor the Department used them for any investigative purpose.”<sup>44</sup>

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<sup>41</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs, to Attorney General Eric J. Holder Jr., Department of Justice (June 10, 2014).

<sup>42</sup> Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (May 29, 2014).

<sup>43</sup> *Id.*

<sup>44</sup> Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 4, 2014).

FBI Director James B. Comey made this point again in testimony before the House Judiciary Committee on June 11, 2014:

[M]y understanding is an analyst in our Criminal Investigation Division looked at an index of it to see what it was and then parked it to see if DOJ was going to ask us to do anything with it, and they never did. So it sat in her—I don't know whether desk or her file, the last four years.<sup>45</sup>

On June 4, 2014, the Department informed the Committee that it discovered for the first time that the disks submitted by the IRS in 2010 inadvertently included a very limited amount of confidential taxpayer information protected by Section 6103 of the Internal Revenue Code. The Department's letter stated:

The IRS now has informed us that its preliminary review of the disks reveals that a small number of the Form 990s on the disks inadvertently include confidential information protected by I.R.C. § 6103.<sup>46</sup>

Two days later, on June 6, 2014, the IRS confirmed this fact to Committee staff:

Earlier this week, we identified a small number of instances where non-public information was included in approximately 33 of the more than 12,000 returns. This information appears to have been inadvertently not redacted or removed when the Forms 990 were processed for public disclosure.<sup>47</sup>

On June 26, 2014, the Department sent a letter explaining further:

[W]e did not know that the disks contained confidential taxpayer information until after our June 2, 2014 letter to you, and when the IRS informed us that they did, we then promptly relayed that information to the Committee.<sup>48</sup>

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<sup>45</sup> House Committee on the Judiciary, *Hearing on Oversight of the Federal Bureau of Investigation* (June 11, 2014).

<sup>46</sup> Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 4, 2014).

<sup>47</sup> Email from Leonard T. Oursler, Director, Legislative Affairs, Internal Revenue Service, to House Committee on Oversight and Government Reform Staff (June 6, 2014).

<sup>48</sup> Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Jim Jordan, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs (June 26, 2014).

## 5. Claim That Special Counsel Needed

Republicans passed a Resolution on the House floor calling on the Attorney General to appoint a special counsel to conduct the criminal investigation, but it relies on many of the same Republican claims that have already been debunked, and the Department has explained why a special counsel is not warranted in this case.

On May 7, 2014, Subcommittee Chairman Jim Jordan offered House Resolution 565 calling on the Attorney General to “appoint a special counsel to investigate the targeting of conservative nonprofit groups by the Internal Revenue Service.”<sup>49</sup> The Resolution included a lengthy recitation of previous Republican accusations and expressed the sense of the House:

[T]he statements and actions of the IRS, the Department of Justice, and the Obama Administration in connection with this matter have served to undermine the Department of Justice’s investigation.<sup>50</sup>

The Resolution sought to justify the need for a special counsel based on Republican accusations of a conflict of interest against Department attorney Barbara Bosserman:

[T]he appointment of a person who has donated almost seven thousand dollars to President Obama and the Democratic National Committee in a lead investigative role, have created a conflict of interest for the Department of Justice that warrants removal of the investigation from the normal processes of the Department of Justice.<sup>51</sup>

The Resolution passed with a vote of 250 to 168 on a largely partisan basis, and all Democratic Members of the Oversight Committee opposed the Resolution.<sup>52</sup>

On June 26, 2014, the Department sent a letter explaining why a special counsel is not warranted in this case:

After consideration of your request, we have concluded that such an appointment is not warranted. This investigation has been and will continue to be conducted by career prosecutors and law enforcement professionals in accordance with established Department policies and procedures, which are designed to ensure the integrity of an ongoing criminal investigation. The Department is committed to integrity and fairness in all of its law enforcement efforts, without regard to politics.<sup>53</sup>

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<sup>49</sup> H. Res. 565.

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

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

<sup>52</sup> U.S. House of Representatives, Roll Call Vote on Agreeing to H. Res 565 (May 7, 2014).

<sup>53</sup> Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Dave Camp, House Committee on Ways and Means (June 26, 2014).

## 6. Claim That Justice Department Ignoring Ways and Means Referral

Republicans have accused the Department of ignoring a referral letter sent by the Chairman of the House Committee on Ways and Means alleging criminal violations by Lois Lerner, but despite major factual errors and unsubstantiated claims in the letter, the Department has pledged to carefully consider it as part of its ongoing investigation.

On April 9, 2014, Rep. Dave Camp, the Chairman of the Committee on Ways and Means, sent a referral letter to Attorney General Holder regarding the actions of former IRS employee Lois Lerner. The letter urged the Attorney General to “take a serious review of the evidence uncovered through the Committee’s investigation to determine whether Lerner violated criminal statutes.”<sup>54</sup> Specifically, the referral letter alleged:

1. Lerner used her position to improperly influence agency action against only conservative organizations, denying these groups due process and equal protection rights under the law as guaranteed by the U.S. Constitution, in apparent violation of 18 U.S.C. § 242;
2. Lerner impeded official investigations by providing misleading statements in response to questions from the Treasury Inspector General for Tax Administration (TIGTA), in apparent violation of 18 U.S.C. § 1001; and
3. Lerner risked exposing, and may actually have disclosed, confidential taxpayer information, in apparent violation of IRC § 6103 by using her personal email to conduct official business.<sup>55</sup>

According to Chairman Camp, Ms. Lerner could face up to 11 years in prison if convicted of these crimes.<sup>56</sup>

Democratic Committee Members opposed Chairman Camp’s letter, and they issued a public statement asserting that Committee Republicans “failed to prove any of their allegations of White House involvement, pursuit of an enemies list, or targeting of only conservative groups.”<sup>57</sup>

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<sup>54</sup> House Committee on Ways and Means, *Ways and Means Committee Refers Lois Lerner to Department of Justice for Criminal Prosecution* (Apr. 9, 2014) (online at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=375999>).

<sup>55</sup> Letter from Chairman Dave Camp, House Committee on Ways and Means, to Attorney General Eric H. Holder Jr., Department of Justice (Apr. 9, 2014).

<sup>56</sup> House Committee on Ways and Means, *Ways and Means Committee Refers Lois Lerner to Department of Justice for Criminal Prosecution* (Apr. 9, 2014) (online at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=375999>).

<sup>57</sup> House Committee on Ways and Means Democrats, *Statement from W&M Democrats Opposing Referral Letter to Justice Department* (Apr. 9, 2014) (online at

In Minority Views attached to Chairman Camp's letter, Ranking Member Sander Levin wrote: "The Republicans have hand selected information that they claim proves their case from the over 660,000 documents provided during this investigation."<sup>58</sup> He also wrote:

[T]he materials released to the public today confirm our position from the very beginning—that Democratic-leaning and progressive groups were subject to the same scrutiny as "Tea Party" and other Republican-leaning groups. Exhibit 21 (attached to the referral letter) contains a list of tax-exempt applications that were subject to additional review.

Among that list are a group of Democratic-leaning organizations with the term "Emerge" in their name. According to a New York Times story dated July 20, 2011, Emerge Maine, Emerge Nevada and Emerge Massachusetts were all denied tax-exempt status after their applications were pending for over three years. These denials happened during the period of TIGTA's audit, but they were not disclosed by the Inspector General in the audit report or during his testimony before Congress. These applications were processed in the same manner as the Tea Party cases as outlined in TIGTA's audit report:

- The cases were identified and screened for political activities;
- They were transferred to Exempt Organizations Technical Unit;
- They were the subject of a Significant Case Report (included in Exhibit 21 of the Republicans Letter);
- They were subject to multiple levels of review within the IRS; and
- They were reviewed by IRS Chief Counsel.<sup>59</sup>

On May 2, 2014, Chairman Camp accused the Department of Justice of ignoring his letter and joined other Republicans in calling for a special counsel. He wrote:

After almost a year of investigating the IRS's targeting of conservative groups, the Ways and Means Committee found that Lois Lerner likely violated multiple criminal statutes. The Department of Justice has a duty to pursue the wrongdoing the Committee laid out in its criminal referral letter. We must hold the IRS accountable so this powerful agency cannot be used as a tool to target and harass Americans for their political beliefs. I have serious concerns that the Department of Justice has brushed aside this investigation and will not pursue Lerner for the wrongdoing she committed. Therefore, DOJ must appoint

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<http://democrats.waysandmeans.house.gov/press-release/statement-wm-democrats-opposing-referral-letter-justice-department>).

<sup>58</sup> House Committee on Ways and Means, *Referral to the Honorable Eric H. Holder, Jr., Attorney General, of Former Internal Revenue Service Exempt Organizations Division Director Lois G. Lerner for Possible Criminal Prosecution for Violations of One or More Criminal Statutes Based on Evidence the Committee has Uncovered in the Course of the Investigation of IRS Abuses*, Minority Views, 113th Cong. (Apr. 11, 2014) (H. Rept. No. 113-414).

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

a Special Counsel, so we can have an independent review of what really happened at the IRS.<sup>60</sup>

House Republicans also cited Chairman Camp's referral letter in support of the resolution requesting the appointment of a special counsel. In a joint statement, several House Republicans, including Chairman Issa, Chairman Jordan, and Chairman Chaffetz, wrote:

In light of this conflict of interest, the apparent criminal activity by Lois Lerner outlined by the Ways and Means Committee's referral letter to DOJ, and the ongoing disclosure of internal communications showing potentially unlawful conduct by Executive Branch personnel, the removal of the investigation from the normal process is warranted and the appointment of a Special Counsel is in the public's best interest.<sup>61</sup>

On May 7, 2014, the Department responded to Chairman Camp's letter by reiterating that its criminal investigation is ongoing and stating that it would consider the information provided:

As you may know, the Department has an ongoing criminal investigation into the IRS's treatment of groups applying for tax-exempt status, which is being conducted jointly with the Treasury Inspector General for Tax Administration (TIGTA). We appreciate your concern and will carefully consider the Committee's findings as part of our investigation into these allegations.<sup>62</sup>

## 7. **Claim That Justice Department Ignoring Deliberate Computer Crash**

Republicans have accused the Department of ignoring what they allege is the intentional destruction of Lois Lerner's computer hard drive in an effort to conceal her emails, but contemporaneous documents and other evidence obtained by the Committee indicate that her computer crash was not deliberate, but rather was caused by a technological malfunction.

On June 13, 2014, Chairman Issa issued the following statement:

The supposed loss of Lerner's emails further blows a hole in the credibility of claims that the IRS is complying with Congressional requests and their repeated assurances that

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<sup>60</sup> House Committee on the Judiciary, *House Republicans Introduce Resolution Calling on Holder to Appoint Special Counsel in IRS Investigation* (May 2, 2014) (online at <http://judiciary.house.gov/index.cfm/2014/5/house-republicans-introduce-resolution-calling-on-holder-to-appoint-special-counsel-in-irs-investigation>).

<sup>61</sup> *Id.*

<sup>62</sup> Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to Chairman Dave Camp, House Committee on Ways and Means (May 7, 2014).

they're working to get to the truth. If there wasn't nefarious conduct that went much higher than Lois Lerner in the IRS targeting scandal, why are they playing these games?<sup>63</sup>

On June 18, 2014, Chairman Issa appeared on Fox News and stated: "We believe these e-mails could be found. Unless, in fact, the IRS and Lois Lerner have made sure they can't be found."<sup>64</sup>

Later that night, Chairman Issa stated that "official records, like the e-mails of a prominent official, don't just disappear without a trace unless that was the intention."<sup>65</sup>

Other Republican Members of Congress have made similar allegations. On June 17, 2014, Chairman Dave Camp and Rep. Charles Boustany of the Ways and Means Committee issued the following statement:

It looks like the American people were lied to and the IRS tried to cover-up the fact it conveniently lost key documents in this investigation. The White House promised full cooperation, the Commissioner promised full access to Lois Lerner emails and now the Agency claims it cannot produce those materials and they've known for months they couldn't do this.<sup>66</sup>

Contrary to claims that Ms. Lerner intentionally destroyed her emails, the IRS has provided the Committee with contemporaneous emails from 2011 showing that after Ms. Lerner's computer crashed on June 13, 2011, she contacted IRS IT staff for help, and that while they tried to recover her hard drive, they were ultimately unsuccessful.

On July 19, 2011, Ms. Lerner sent an email asking the Associate Chief Information Officer at the IRS for help in recovering her hard drive:

It was nice to meet you this morning—although I would have preferred it was under different circumstances. I'm taking advantage of your offer to try and recapture my lost personal files. My computer skills are pretty basic, so nothing fancy—but there were

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<sup>63</sup> House Committee on Oversight and Government Reform, *Issa Statement on Lois Lerner's Deleted IRS Emails* (June 13, 2014) (online at <http://oversight.house.gov/release/issa-statement-lois-lerners-deleted-irs-emails/>).

<sup>64</sup> "Tired of Being Lied To": *Issa Expects Investigators Can Find Lerner Emails*, Fox News Insider (June 18, 2014) (online at <http://foxnewsinsider.com/2014/06/18/darrell-issa-expects-investigators-can-recover-irs-lost-lois-lerner-emails/>).

<sup>65</sup> House Committee on Oversight and Government Reform, *Issa Statement on Report that IRS Destroyed Lois Lerner's Hard Drive* (June 18, 2014) (online at <http://oversight.house.gov/release/issa-statement-report-irs-destroyed-lois-lerners-hard-drive/>).

<sup>66</sup> House Committee on Ways and Means, *Exposed: IRS Kept Secret for Months, More than Just Lerner Emails Lost* (June 17, 2014) (online at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=384708>).

some documents in the files that are irreplaceable. Whatever you can do to help, is greatly appreciated.<sup>67</sup>

That day, the Associate Chief Information Officer asked his staff to seek assistance from the Field Director for the IT Division's Customer Service Support, writing: "If she can't fix it nobody can."<sup>68</sup>

On July 20, 2011, the Field Director emailed Ms. Lerner to inform her of the status of efforts to recover her hard drive:

I checked with the technician and he still has your drive. He wanted to exhaust all avenues to recover the data before sending it to the "hard drive cemetery." Unfortunately, after receiving assistance from several highly skilled technicians including HP experts, he still cannot recover the data. I do have one other possibility that I am looking into and I hope to update you on the progress soon.<sup>69</sup>

Ms. Lerner replied: "Thanks for the update—I'll keep my fingers crossed."<sup>70</sup>

On August 1, 2011, the Field Director emailed Ms. Lerner explaining that her hard drive was being sent to the IRS Criminal Investigation Division's forensic laboratory:

As a last resort, we sent your hard drive to CI's forensic lab to attempt data recovery. The CI tech working on the recovery is unexpectedly out until Aug 3rd and promised to update me when he returns.<sup>71</sup>

On August 5, 2011, the Field Director informed Ms. Lerner that all efforts to recover her hard drive were unsuccessful:

Unfortunately the news is not good. The sectors on the hard drive were bad which made your data unrecoverable. I am very sorry. Everyone involved tried their best.<sup>72</sup>

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<sup>67</sup> Email from Lois Lerner, Director, Exempt Organizations, Internal Revenue Service, to Associate Chief Information Officer, Internal Revenue Service, *et al.* (July 19, 2011).

<sup>68</sup> Email from Associate Chief Information Officer, Internal Revenue Service, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service, *et al.* (July 19, 2011).

<sup>69</sup> Email from IT Customer Support Field Director, Internal Revenue Service, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service (July 20, 2011).

<sup>70</sup> Email from Lois Lerner, Director, Exempt Organizations, Internal Revenue Service, to IT Customer Support Field Director, Internal Revenue Service (July 20, 2011).

<sup>71</sup> Email from IT Customer Support Field Director, Internal Revenue Service, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service (Aug. 1, 2011).

<sup>72</sup> Email from IT Customer Support Field Director, Internal Revenue Service, to Lois Lerner, Director, Exempt Organizations, Internal Revenue Service (Aug. 5, 2011).

When IRS Commissioner Koskinen testified before the Ways and Means Committee on June 20, 2014, he emphasized the significant efforts taken by IRS personnel to recover Ms. Lerner's emails, including sending her computer to the IRS Criminal Investigation division's forensics lab:

This step is not normally taken when an employee's computer crashes. The experts at the IRS forensics lab are experienced at recovering hard drives, which is part of their work assisting on criminal cases. The Criminal Investigation employees are highly skilled in this area and respected for their work in the greater law-enforcement community.<sup>73</sup>

In addition, on June 26, 2014, Inspector General Russell George disclosed to Committee staff that Ms. Lerner informed his office in 2012 that her computer crashed and that she might have difficulty recovering documents. The Inspector General's Director of Audits for the Tax-Exempt Government Entities Unit discovered notes from a meeting he had with Ms. Lerner on October 1, 2012, regarding various audits. In his notes, he wrote that Ms. Lerner stated that "she had lost her hard drive" and that "it may take some effort to recover documentation for the audit team to review."<sup>74</sup>

In a subsequent briefing with Committee staff, the Audit Director stated that he never followed up with Ms. Lerner to determine if her computer crash impacted the recovery of any documents. He also stated that he saw no evidence that Ms. Lerner intentionally destroyed her hard drive, and that he had no reason to believe Ms. Lerner destroyed documents relating to any Inspector General audit.<sup>75</sup>

In a separate briefing with Committee staff, the IRS Assistant Chief Information Officer stated that he has no reason to believe Ms. Lerner intentionally crashed her hard drive:

Q: Do you have any reason to believe that Ms. Lerner intentionally crashed her hard drive?

A: I have no reason to believe it, and haven't seen anything that would say that she did that, no.<sup>76</sup>

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<sup>73</sup> Statement of John Koskinen, Commissioner, Internal Revenue Service, House Committee on Ways and Means, *Hearing with IRS Commissioner John Koskinen* (June 20, 2014).

<sup>74</sup> Notes of Director, Tax Exempt Government Entities, Treasury Inspector General for Tax Administration (produced on June 26, 2014).

<sup>75</sup> Briefing by Director, Tax Exempt Government Entities, Treasury Inspector General for Tax Administration, to House Committee on Oversight and Government Reform Staff (June 27, 2014).

<sup>76</sup> Briefing by Assistant Chief Information Officer, Internal Revenue Service, to House Committee on Oversight and Government Reform Staff (June 23, 2014).

He told Committee staff that “Ms. Lerner was insistent in trying to recover whatever documents she could.” He stated: “I have no indication that there was anything nefarious about the loss of Ms. Lerner’s emails.” When asked whether he was “aware of anyone at the IRS intentionally destroying documents that are relevant to a Congressional investigation,” he responded, “absolutely not.”<sup>77</sup>

## **8. Claim That Justice Department Motivated by Politics**

Republicans have accused the Department of failing to actively pursue the criminal investigation because of political motivations, but the Committee has obtained no evidence to support these claims.

On June 26, 2014, Senator Ted Cruz stated:

When an attorney general refuses to enforce the law, when an attorney general mocks the rule of law, when an attorney general corrupts the Department of Justice by conducting a nakedly partisan investigation to cover up political wrongdoing, that conduct by any reasonable measure constitutes high crimes and misdemeanors.<sup>78</sup>

On May 2, 2014, Chairman Issa questioned the motives of the Department, stating:

Congressional investigations into the IRS targeting scandal have uncovered evidence of serious criminal activity which must be resolved according to the law. Unfortunately, the Department of Justice’s current investigation has lost credibility and public confidence. Appointing a Special Counsel is a necessary step to restore impartiality to a case that requires it. The person Attorney General Holder appoints must be someone beyond the Administration’s own political circle, whose professional independence and political disinterest is beyond reproach.<sup>79</sup>

On the same day, House Judiciary Committee Chairman Bob Goodlatte alleged that “the President and Administration officials have publicly undermined the investigation on multiple occasions.”<sup>80</sup>

Contrary to these claims, Department officials have explained repeatedly that their investigators are conducting the investigation without regard to political considerations. Appearing before the House Judiciary Committee on April 8, 2014, Attorney General Holder

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<sup>77</sup> *Id.*

<sup>78</sup> *Ted Cruz: Eric Holder Should Be Impeached Over IRS Scandal*, Huffington Post (June 26, 2014) (online at [www.huffingtonpost.com/2014/06/26/ted-cruz-eric-holder\\_n\\_5534661.html](http://www.huffingtonpost.com/2014/06/26/ted-cruz-eric-holder_n_5534661.html)).

<sup>79</sup> House Committee on the Judiciary, *House Republicans Introduce Resolution Calling on Holder to Appoint Special Counsel in IRS Investigation* (May 2, 2014) (online at <http://judiciary.house.gov/index.cfm/2014/5/house-republicans-introduce-resolution-calling-on-holder-to-appoint-special-counsel-in-irs-investigation>).

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

testified that “the investigation’s being done by career people who have constitutional rights to engage in political activity.” He said: “I don’t think there’s any basis to believe that anybody who was involved in this investigation would conduct themselves in a way that is inappropriate or would be shaded by their political activity.” The Attorney General added:

The men and women who are career employees or who are in the department for lesser periods of time make their decisions based only on the facts and the law and conduct themselves in the way that is in the best traditions of this department, and I’ll stand—put my record up against any other attorney general, any other Justice Department, and any hint that we have engaged in anything that is partisan or inappropriate in nature I totally 1,000 percent reject.<sup>81</sup>

On May 6, 2014, Committee staff interviewed Richard Pilger, a career prosecutor currently serving as the Director of the Election Crimes Branch in the Department’s Public Integrity Section. He stated:

I understand from the committee’s letter that the subject of this interview is my contact with Ms. Lois Lerner, former director of the Internal Revenue Service, Exempt Organizations Division, and the committee members’ question regarding whether the Department of Justice has improperly targeted particular tax-exempt groups for prosecution based upon their political views.

The short answer to that question is absolutely not. I have pursued my career and continued my career at the Public Integrity Section precisely because it was formed in the wake of Watergate to stand against the abuse of power.

Since I joined the Public Integrity Section in 1992, I have never encountered politically motivated decisions. To the contrary, it has been my consistent experience this section has acted, without exception, on a strictly nonpartisan basis in all of its decisions and actions. In my experience, politics plays no role in our work as prosecutors, period.<sup>82</sup>

He added:

To my knowledge, the IRS did not refer any matters to the Public Integrity Section as a result of contacts with Ms. Lerner. I do not believe that there was anything inappropriate about the direction given to me nor in my interactions with Ms. Lerner.

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<sup>81</sup> House Committee on the Judiciary, *Hearing on Oversight of the U.S. Department of Justice* (Apr. 8, 2014).

<sup>82</sup> House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Office of Public Integrity, Department of Justice, at 7-8 (May 6, 2014).

More specifically, I assure you that the Public Integrity Section never sought to target tax-exempt groups of any kind based upon the partisan content of any political speech, nor would I have ever tolerated such conduct.<sup>83</sup>

On May 29, 2014, Committee staff interviewed Jack Smith, the Chief of the Public Integrity Section at the Department of Justice, who stated:

Since I've been chief of the section, of the Public Integrity Section, I have never encountered, nor would I tolerate, any politically motivated decisions. Politics does not and cannot play a role in our work as prosecutors.<sup>84</sup>

## 9. Claim That Prominent Democrats Prompted Targeting

Republicans have accused the Department of conspiring with the IRS to single out conservative groups for potential prosecution in response to pressure from prominent Democrats, but these claims have been refuted during transcribed interviews conducted by Committee staff.

On May 22, 2014, Chairman Issa and Chairman Jordan sent a letter to the Attorney General claiming that “the Department’s leadership, including Public Integrity Section Chief Jack Smith, was closely involved in engaging with the IRS in wake of *Citizens United* and political pressure from prominent Democrats.”<sup>85</sup> A press release accompanying their letter claimed that Department officials and Ms. Lerner “discussed singling out and prosecuting tax-exempt applicants, at the urging of a Democratic Senator.”<sup>86</sup>

Based on several transcribed interviews conducted by Committee staff, these allegations appear to be without merit.

On April 9, 2013, Senator Whitehouse held a hearing on campaign finance enforcement before the Crime and Terrorism Subcommittee of the Senate Judiciary Committee. One of the witnesses was Mythili Raman, the then-Acting Assistant Attorney General for the Criminal Division. During the hearing, Chairman Whitehouse asked Ms. Raman about the Department’s efforts to prosecute false statements on applications for tax-exempt status. Ms. Raman responded: “Without discussing ongoing investigations, we can assure you that we are

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<sup>83</sup> *Id.* at 11.

<sup>84</sup> House Committee on Oversight and Government Reform, Interview of Jack Smith, Chief, Office of Public Integrity, Department of Justice, at 7 (May 29, 2014).

<sup>85</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to Attorney General Eric H. Holder Jr., Department of Justice (May 22, 2014).

<sup>86</sup> House Committee on Oversight and Government Reform, *Testimony: In 2010, Justice Department Sought Lois Lerner’s Help to Prosecute Tax Exempt Groups Engaging in Politics* (May 22, 2014) (online at <http://oversight.house.gov/release/testimony-2010-justice-department-sought-lois-lerners-help-prosecute-tax-exempt-groups-engaging-politics/>).

incredibly vigilant about the use of these organizations as an end run around the contribution limits.”<sup>87</sup>

Ms. Raman also discussed challenges facing the Department in light of the *Citizens United* decision:

We face certain investigative and prosecutorial challenges as a result of this new landscape. With regard to super PACS, the primary challenge we face is establishing illegal coordination between a super PAC and a campaign. ... With regard to designated classes of 501(c) organizations, we are hampered by the fact that unlike PACS—super PACS and other political organizations, these 501(c) are not required to publicly disclose their donors to the FEC, even though those donors contributions may be used as expenditures to seek to influence federal elections.<sup>88</sup>

Ms. Raman also made clear the Department’s intent to follow the *Citizens United* decision:

It is not the government’s position to second guess the Supreme Court. I am here, however, to clearly describe what some of our challenges are in light of *Citizens United*. Obviously, the government took a particular position before the Supreme Court and *Citizens United*, but now we have a law, and we intend to follow it.<sup>89</sup>

Following the hearing, Senator Whitehouse sent a letter on April 25, 2013, requesting assurances that the Department was taking all appropriate steps to prosecute false statements on applications for 501(c)(4) status.<sup>90</sup> Senator Whitehouse’s letter made no reference to Tea Party organizations or any other specific groups.

During a May 29, 2014, transcribed interview with Committee staff, Jack Smith, the Public Integrity Section Chief, had this exchange:

Q: Did Senator Whitehouse in this letter or elsewhere request that the Department of Justice prosecute Tea Party organizations?

A: No.

Q: Did Senator Whitehouse in this letter or elsewhere request that the Department of Justice prosecute conservative organizations?

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<sup>87</sup> Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism, *Hearing on Current Issues in Campaign Finance Law Enforcement* (Apr. 9, 2013).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Letter from Chairman Sheldon Whitehouse, Subcommittee on Crime and Terrorism, Senate Committee on the Judiciary, to Attorney General Eric H. Holder Jr. and Secretary of the Treasury Jacob L. Lew (Apr. 25, 2013).

A: No.

Q: Is it fair to say that your understanding upon receipt of this letter was that Senator Whitehouse was requesting that the Department of Justice prosecute organizations violating campaign finance laws regardless of whether the organizations were affiliated with the Tea Party or any other political ideology?

A: I took the letter to mean exactly what it says, that he wanted assurances that potentially criminally conduct that he described in the letter is being thoroughly investigated. And, from our perspective, if it's being investigated, if there's investigative agency like the IRS doing it, that we're prosecuting it, that there's a mechanism for it to come to us and us to prosecute it. ...

Q: Did you ever receive any instruction from any Member of Congress to target Tea Party or conservative groups for prosecution?

A: No.<sup>91</sup>

In addition, on May 6, 2014, Committee staff conducted a transcribed interview of Richard Pilger, the Director of the Election Crimes Branch, who agreed that Senator Whitehouse's letter did not focus on conservative organizations:

Q: Senator Whitehouse's letter did not direct you to target conservative organizations for prosecution?

A: No, it did not.

Q: Did you interpret Senator Whitehouse's letter when you read it to ask DOJ only to prosecute Tea Party organizations?

A: No, and if I had ever read it that way, I would remember that, and I would have had a very strong lasting reaction to it, that it was improper to do so.

Q: Did you interpret Senator Whitehouse's letter to ask DOJ only to prosecute conservative organizations?

A: No.<sup>92</sup>

Mr. Pilger also had this exchange with Committee staff:

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<sup>91</sup> House Committee on Oversight and Government Reform, Interview of Jack Smith, Chief, Office of Public Integrity, Department of Justice, at 150-51 (May 29, 2014).

<sup>92</sup> House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Office of Public Integrity, Department of Justice, at 68 (May 6, 2014).

Q: Are you aware of any member of Congress directing Department of Justice personnel to target Tea Party or conservative groups for prosecution under 18 USC 1001 or any other statute?

A: I don't recall any such communication with or from Congress. Now, whether any congressional correspondence has ever mentioned a particular group, I don't remember. Whether a correspondence or communication has suggested that a certain group should be targeted as you say or should be investigated or actions should be taken because they are affiliated with one side or the other of the partisan divide, I don't remember that happening, and I think I would remember it happening and I wouldn't—to the extent it was in my power, I wouldn't tolerate it.<sup>93</sup>

Mr. Pilger confirmed that several meetings were held to prepare Ms. Raman for her testimony before Senator Whitehouse's subcommittee, and that Ms. Lerner participated in one of those meetings. He also told Committee staff that Ms. Lerner never disclosed any information related to IRS employees' use of inappropriate screening criteria to review applications for tax-exempt status in any meeting he attended with her.<sup>94</sup>

Mr. Pilger explained to Committee staff that, in response to Senator Whitehouse's letter, Mr. Smith asked him to contact Ms. Lerner to determine whether the IRS had an effective mechanism to refer evidence of false statements to the Department. He stated that Ms. Lerner explained that she was leaving on vacation, and that he did not "recall that any follow up occurred thereafter."<sup>95</sup>

#### 10. Claim That *Citizens United* Prompted Targeting

Republicans claim that the targeting of conservative groups is a government-wide conspiracy initiated after the Supreme Court's 2010 decision in *Citizens United* involving the President, the IRS, the Department of Justice, the Securities and Exchange Commission, the Federal Elections Commission, and other agencies, but the Committee has obtained no evidence linking these claims to the inappropriate criteria used by IRS employees in Cincinnati to screen applications for tax-exempt status, which was the basis for the Inspector General's report.

With respect to the Justice Department, on April 23, 2014, Chairman Issa and other Republican Committee Members sent a letter to the Attorney General alleging that "the Justice Department, like the IRS and the Securities and Exchange Commission, played a role in a

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<sup>93</sup> House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Office of Public Integrity, Department of Justice, at 74 (May 6, 2014).

<sup>94</sup> *Id.* at 11, 45, 57-59, 173.

<sup>95</sup> *Id.* at 10-11.

government-wide effort to target political speech.”<sup>96</sup> On June 16, 2014, Chairman Issa issued a partisan staff report concluding: “Like the IRS, the Justice Department also received and internalized the President’s political rhetoric lambasting *Citizens United* and nonprofit political speech.”<sup>97</sup>

Contrary to these claims, the investigations conducted by both the Committee and the Inspector General show that the search terms identified as inappropriate in the Inspector General’s report originated with a screening agent in Cincinnati and had absolutely nothing to do with the *Citizens United* decision. Neither investigation has identified any evidence of White House involvement, political motivation, or a government-wide conspiracy.

On May 14, 2013, the Inspector General issued a report concluding that IRS employees in Cincinnati used “inappropriate criteria” to screen applications for tax-exempt status. 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. The report stated that these employees “developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names.” The report also stated that these employees “developed and implemented inappropriate criteria in part due to insufficient oversight provided by management.”<sup>98</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>99</sup> Despite this direction, the Inspector General’s report found that employees subsequently began using different inappropriate criteria “without management knowledge.” The Inspector General reported that “the criteria were not influenced by any individual or organization outside the IRS.”<sup>100</sup>

The Committee’s investigation confirmed these findings. On June 6, 2013, Committee staff interviewed an IRS Screening Group Manager in Cincinnati who provided a detailed, first-hand account of how groups applying for tax-exempt status were initially identified by the IRS. A self-identified “conservative Republican” and 21-year veteran of the IRS, he denied that he or anyone on his team was directed by the White House to take these actions or that they were politically motivated. Instead, he explained that the first case at issue in this investigation was

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<sup>96</sup> Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, to Attorney General Eric H. Holder, Department of Justice (Apr. 23, 2014).

<sup>97</sup> Republican Staff, House Committee on Oversight and Government Reform, *How Politics Led the IRS to Target Conservative Tax-Exempt Applicants for their Political Beliefs* (June 16, 2014).

<sup>98</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>99</sup> *Id.*

<sup>100</sup> *Id.*

initially flagged by one of his own screeners in 2010. He explained that he initiated the first effort to gather similar cases in order to ensure their consistent treatment, and that he took this action on his own, without any direction from his superiors. He also confirmed that one of his screeners developed terms identified by the Inspector General as “inappropriate,” such as “Patriot” and “9/12 project,” but that he did not become aware that his screener was using these terms until more than a year later.<sup>101</sup>

On the question of whether the *Citizens United* decision led the IRS to use the inappropriate criteria identified by the Inspector General, on December 4, 2013, former IRS Commissioner Doug Shulman had the following exchange during his transcribed interview with Committee staff:

Q: Sir, to the best of your knowledge, did the Citizens United case in any way affect the IRS process for handling tax-exempt applications?

A: Affect the process? No. You know, to the best of my knowledge, it did not.<sup>102</sup>

On November 13, 2013, former Acting IRS Commissioner Steve Miller had this exchange during his transcribed interview with Committee staff:

Q: Did you understand that Citizens United would change in any way the way that EO functioned?

A: No.

Q: So there was more money flowing into (c)(4)s than other exempt organizations, but you weren't aware of a way that the case would change the way that EO operated. Is that fair to say?

A: Correct.<sup>103</sup>

On November 6, 2013, IRS Chief Counsel William Wilkins had this exchange during his transcribed interview with Committee staff:

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<sup>101</sup> Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, *First-Hand Account: Cummings Releases Full Transcript of “Conservative Republican” IRS Manager Explaining Genesis of Tea Party Screening* (June 18, 2013) (online at [http://democrats.oversight.house.gov/index.php?option=com\\_content&task=view&id=5936&Itemid=104](http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=5936&Itemid=104)).

<sup>102</sup> House Committee on Oversight and Government Reform, Interview of Doug Shulman, Former Commissioner, Internal Revenue Service, at 164 (Dec. 4, 2013).

<sup>103</sup> House Committee on Oversight and Government Reform, Interview of Steve Miller, Former Acting Commissioner, Internal Revenue Service, at 194-5 (Nov. 13, 2013).

Q: Have you ever been involved in discussions within the IRS about the Citizens United case?

A: I don't recall any.

Q: Sir, in your expert opinion, is the Citizens United case a tax law case?

A: I believe it's a free speech case and not a tax law case.

Q: In your view, sir, can the Citizens United case at all affect the way the IRS approaches or processes applications for exempt status?

A: It didn't change the tax law, is maybe the best way to respond to that.<sup>104</sup>

With respect to Republican claims that the Department of Justice conspired to prosecute conservative groups after the *Citizens United* decision, the Committee conducted a transcribed interview of Jack Smith, the Chief of the Department's Public Integrity Section on May 29, 2014. He explained that, after reading a newspaper article, he requested a meeting with the IRS about 501(c) organizations that may be violating the law by claiming that they did not intend to engage in political activity, when they in fact did engage in such activity.<sup>105</sup>

Mr. Smith told Committee staff that, when he met with Ms. Lerner on this topic, she stated that such prosecutions would be "difficult or impossible." He also explained that the Department never pursued any such prosecutions:

In September of 2010, I read an article that suggested that, as a result of changes in the law following the Supreme Court's decision in *Citizens United v. FEC*, groups might be attempting to falsely claim 501(c) tax-exempt status to circumvent existing campaign finance laws and disclosure requirements. As a result, I directed Mr. Pilger to set up a meeting with the IRS regarding the issue. Subsequently, a meeting was held in the Public Integrity Section conference room attended by, among others, Mr. Pilger, myself, and Lois Lerner from the IRS. To my knowledge, I had never met Ms. Lerner before that date.

During the meeting, Ms. Lerner expressed strong opinion—her strong opinion that it would be difficult or impossible to prosecute the abuse of tax status by organizations making false representations to gain 501(c) status. No criminal investigations or prosecutions were subsequently referred by the IRS or opened by the Public Integrity Section as a result of this meeting.<sup>106</sup>

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<sup>104</sup> House Committee on Oversight and Government Reform, Interview of William Wilkins, Chief Counsel, Internal Revenue Service, at 156 (Nov. 6, 2013).

<sup>105</sup> House Committee on Oversight and Government Reform, Interview of Jack Smith, Chief, Public Integrity Section, Department of Justice, at 8-9 (May 29, 2014).

<sup>106</sup> *Id.*

Mr. Smith also had the following exchange with Committee staff:

Q: At the October 8, 2010, meeting, did you or anyone else from the Department of Justice suggest to IRS employees that they should, quote, “fix the problem posed by the Citizens United decision”?

A: No.

Q: In your opinion, does the Citizens United decision pose a problem?

A: It is not my role to comment on the law of the land. It is the law of the land. My job is to enforce the law. Citizens United is the law of the land.

Q: Are you aware of any Department official directing the IRS to, quote, “fix the problem posed by Citizens United”?

A: I’m not.<sup>107</sup>

Richard Pilger, Director of the Election Crimes Branch of the Department’s Public Integrity Section also told Committee staff that Department officials were not working to “fix” the *Citizens United* case. He explained:

Q: In your tenure at the Justice Department, have you ever been involved in an effort to fix problems posed by the Supreme Court’s Citizens United decision?

A: I can’t accept that framing of the issue, and I don’t understand Citizens United that way. Citizens United isn’t a problem, it is the law of the land. It, like other cases in the field of criminal law, have created opportunities that we have to be vigilant about.

They have like *Mapp v. Ohio*, like the *Miranda* case. They have created opportunities, it has created opportunities for criminal conduct to go undetected or given us a challenge in detecting it. But, like all those other cases, it is the law of the land. It is the constitutional right of people and entities to make the contributions that the Citizens United court held they could make, in overturning parts of FECA.

So Citizens United is not a problem. It is the law. And, so no, I am not aware of any effort or part of any effort to fix a problem from Citizens United. I am aware that it changed the law though and that law enforcement in reaction to such changes must be vigilant about the opportunities they present for law breaking.

Q: In order to comply with the law as outlined by the Supreme Court?

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<sup>107</sup> *Id.* at 77.

A: Not to quibble, but in order to enforce the laws around the rights recognized by the Supreme Court while still scrupulously respecting those rights.<sup>108</sup>

Mr. Smith, the Chief of the Department's Public Integrity Section also directly refuted allegations of a government-wide conspiracy. He had this exchange with Committee staff:

Q: Have you been part of a government-wide effort to target political speech?

A: No.

Q: Are you aware of the Department of Justice participating in a government-wide effort to target political speech?

A: No.

Q: Are you aware of anyone at the Department of Justice collaborating with any IRS employee to treat organizations with conservative viewpoints differently than any other organization?

A: No.<sup>109</sup>

Richard Pilger, Director of the Election Crimes Branch in the Department's Public Integrity Section agreed that there was no evidence of a government-wide conspiracy. He had this exchange with Committee staff:

Q: Are you aware of any such effort, government-wide effort to target political speech?

A: No.<sup>110</sup>

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<sup>108</sup> House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Public Integrity Section, Department of Justice, at 128-29 (May 6, 2014).

<sup>109</sup> House Committee on Oversight and Government Reform, Interview of Jack Smith, Chief, Public Integrity Section, Department of Justice, at 85-6 (May 29, 2014).

<sup>110</sup> House Committee on Oversight and Government Reform, Interview of Richard Pilger, Director, Election Crimes Branch, Public Integrity Section, Department of Justice, at 127 (May 6, 2014).