

Testimony of
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Economic Growth, Job Creation and Regulatory Affairs
Hearing on the Obama Administration's Investigation of IRS Targeting
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Mr. Chairman, Ranking Member, Members of the Subcommittee: thank you for inviting me.

I speak on my own behalf as a private citizen and not on behalf of my firm or partners or clients. I hope to bring to you some of the understanding I have gained through many decades of working with the Internal Revenue Code and therefore with the Internal Revenue Service, including the six years I was privileged to lead the honorable and dedicated men and women of the Justice Department's Tax Division.

Americans deserve to trust and respect the institutions of their government. Revelations that the machinery of government might have been turned against our own citizens damage that trust, and I am grateful for your efforts to learn the whole truth about the group of government activities that have collectively come to be called "IRS targeting." Perhaps you are more limited than this in your current inquiry, but for my purposes, the targeting you should be considering is not just the disparate and apparently discriminatory treatment of certain groups in the processing of applications for tax exemption, but also

- the leaking of confidential information,
- the disproportionate selection of certain groups for examination, and
- what appears to be a coordinated attack by a multitude of federal agencies based on information that might be available only to the IRS.

I hope that you are looking into the entire spectrum of what appears to be serious misconduct by IRS and perhaps other government personnel.

The U.S. tax system depends on Americans taking it upon themselves to gather their tax information and prepare and file their tax returns every year. One reason they are willing to do this, to provide personal information to the government, is the government's solemn promise, embodied in law providing criminal consequences for its violation, that the information they provide will be kept in the strictest confidence.

And when people form organizations and apply for tax-exempt status, they are entitled to expect that their confidential information will be respected as such, and that their applications will be processed promptly and considered fairly in accordance with the applicable law, and not in accordance with special procedures designed just for them.

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One Friday last May, a planted question at an ABA conference prompted an IRS official – just in time to get the news out ahead of an IG report – to admit that the IRS had, as some had long suspected, been targeting conservative groups for additional scrutiny. By Monday, according to a Wall Street Journal Washington Wire blog entry posted that day:

- the House Ways and Means Committee had set a hearing a mere four days hence. That Committee had been investigating these allegations for nearly two years.
- Senator Baucus, its Chairman, had said the IRS should prepare for a full investigation by the Senate Finance Committee
- the President had said he was outraged, and that IRS personnel would be held fully accountable for their actions
- Senate Majority Leader Reid had called the prospect of the IRS administering the tax laws selectively based on the political views “troubling” and “a terrible breach of the public’s trust”
- Rep. Pelosi had said the tea party targeting had to be “condemned”
- Senator Warner had said “a quick and thorough investigation” should be carried out by the administration and ... those responsible for the “betrayal of public trust” should be fired.

These statements of outrage and something-must-be-done came a day before the Inspector General’s damning report was even issued. Tuesday, the day it was issued, the New York Post reported that in June 2011 – while conservative groups waited for years – a questionable organization the President’s half-brother had established more than two years before received a determination of tax exempt status within about a month of requesting it.

Early the next week, a group of nearly 20 organizations spanning the political spectrum – from the ACLU to the Tea Party Express - had signed a statement that began:

“It is difficult to conceive of a more serious threat to the First Amendment of the Constitution of the United States than the federal government using its awesome power to target individuals and organizations solely because of their political beliefs.”

What a shame that members of the House and Senate squandered the opportunity to immediately use the tools at their disposal -

- to “specially authorize” a committee with authority to investigate the allegations, or
- to appoint a special counsel to investigate the allegations, or
- to engage an outside counsel to advise them in their investigations.

It was right in line with predictions when, just a few weeks later, House Oversight and Government Affairs Committee Ranking Member Cummings [said](#) on a Sunday talk show that he thought the evidence adduced to that point showed "that the White House was not involved in this. . . ," adding: "Based upon everything I've seen the case is solved. And if it were me, I would wrap this case up and move on, to be frank with you."

With all due respect, it seems that whether the White House was involved was not only not the only question, but also that it has yet to be fully answered.

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I turn now to the Administration's investigation of these matters: regulations under Title 28 set out the jurisdictions and responsibilities of various parts of the Justice Department. 28 CFR Part O, Subparts J, K, and M, describe the authority of the Civil Rights, Criminal, and Tax Divisions, respectively. Generally speaking, the Tax Division handles all litigation, civil and criminal, trial and appellate, arising under Title 26, the Internal Revenue Code. But when the criminal offenses to be investigated and prosecuted involve allegations of misconduct by IRS personnel, the investigation and prosecution is the responsibility of the Criminal Division. The Civil Rights Division is charged with the enforcement of the nation's civil rights laws.

DOJ officials have selected a career attorney in the Civil Rights Division to conduct the investigation into the allegations of misconduct by IRS personnel. Some have criticized that selection as inappropriate because the attorney contributed to the President's campaign and to other causes of his political party.

But when does support for the sitting President and his party make one an imprudent choice for an assignment? Not usually. But perhaps it does when the assignment is to investigate the Administration's alleged mistreatment of its political adversaries.

Here is why: Justice must not only be done, it must be seen to be done. This has two elements.

First, when wrongdoing has come to light, the public deserves to know that those responsible have been identified and dealt with appropriately. This is why, when I was at the Department, I initiated a program of press releases to announce newsworthy developments, so that the public would know the law was being enforced, and that there were consequences to violating it. This is important not only to deter potential lawbreakers, but also to reassure law abiding citizens.

Second, not only must the laws be enforced impartially, but they must also be seen to be enforced, in the words of Deuteronomy¹, without respect to persons. It is for this reason

¹ Deuteronomy 1:17 King James Version - Ye shall not respect persons in judgment; but ye shall hear the small as well as the great. .

that judges recuse themselves from deciding cases. Not because they would not be able to rule impartially, but because there might be a reason the public might think they are not impartial. It is essential to respect for our laws that even the appearance of partiality be avoided.

These same considerations are applicable in the assignment of a case to a DOJ employee. A prosecutor who might appear to have a personal grudge against a defendant would never be assigned to his prosecution. Similarly, a prosecutor who might appear to favor a defendant wouldn't either. While DOJ might not be permitted to take into account an employee's political contributions, in this case, where the very allegations are of targeting people and organizations for political reasons, avoiding the appearance of partiality or of a conflict of interests might have been in the best interests of justice.

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In 1959, Ian Fleming had his character Goldfinger say: Once is happenstance. Twice is coincidence. Three times is enemy action.

- We know, because the Treasury IG for Tax Administration's report says so, that groups banding together to promote an understanding of and fidelity to our nation's founding principles were targeted for special scrutiny that was harsh, intrusive, probably unnecessary, and resulted in the delay, if not the constructive denial, of their applications for tax-exempt status, effectively silencing them during the better part of two election cycles.
- We know, because they had the courage to come forward and tell us about it, that people engaged in activities directed at improving the integrity of our elections were targeted for scrutiny not just by the IRS, but also by other arms of the federal government.
- We know, because we've seen it in the public domain, that the private information of people who contributed to organizations devoted to preserving traditional values was made public, in violation of 26 USC §6103, a crime punishable by fines and imprisonment of up to five years.

As an American who cares about our country and our laws and our future, I thank the Committee for continuing to press to learn the truth about what appears to be the Administration's targeting of people who disagree with its policies, and encourage you to use all the tools available to you to do so.

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