

R E S O L U T I O N  
TO INITIATE PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES TO IMPEACH  
JOHN A. KOSKINEN, COMMISSIONER, INTERNAL REVENUE SERVICE,  
FOR  
REFUSAL TO COMPLY WITH A SUBPOENA DULY ISSUED BY THE  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
AND FAILURE TO TESTIFY TRUTHFULLY AND TO COOPERATE WITH  
A CONGRESSIONAL INVESTIGATION

S T A F F R E P O R T  
OF THE  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
UNITED STATES HOUSE OF REPRESENTATIVES

The Committee on Oversight and Government Reform hereby recommends that the House of Representatives initiate proceedings to impeach John A. Koskinen, Commissioner, Internal Revenue Service, based on the following findings:

*Resolved*, That John A. Koskinen, Commissioner, Internal Revenue Service, betrayed the trust and confidence of the American people as an Officer of the United States, and should be removed from office.

*Resolved*, That John A. Koskinen, Commissioner, Internal Revenue Service, offered under oath a series of false statements so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of Internal Revenue Service Commissioner, and should be removed from office.

*Resolved*, That John A. Koskinen, Commissioner, Internal Revenue Service, violated a congressional subpoena by failing to locate and preserve relevant records. This resulted in the IRS erasing 422 backup tapes containing thousands of relevant emails—key pieces of evidence that were in the agency’s possession, and destroyed, on Koskinen’s watch.

*Resolved*, That such conduct warrants impeachment, trial, and removal from office pursuant to the process described in the U.S. Constitution.

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## I. Executive Summary

On May 15, 2013—one day after the Treasury Inspector General for Tax Administration released a report that found the IRS targeted taxpayers on the basis of their political beliefs—President Obama stated the targeting program was “inexcusable and Americans have the right to be angry about it.” Additionally, the President said, “[O]ur administration has to make sure that we are working hand in hand with Congress to get this thing fixed.”

This acknowledgement came five days after Lois Lerner, Director of the Exempt Organizations Division, stated about the targeting, “that was wrong, that was absolutely incorrect, insensitive and inappropriate.” For the past two years, several congressional committees investigated the IRS’s targeting of conservative groups.

IRS Commissioner John Koskinen, however, remained unapologetic about the targeting program and unwilling to work with Congress in the manner the President directed. Rather than cooperate with Congress, Commissioner Koskinen obstructed the congressional investigations of the targeting program by: (1) allowing 24,000 emails relevant to the investigation, and covered by a congressional subpoena and internal preservation order, to be destroyed on his watch; and (2) failing to testify truthfully and providing false and misleading information to Congress.

Commissioner Koskinen’s posture with respect to the various congressional investigations of the IRS caused 52 members of the House of Representatives to sign a letter on July 27, 2015 calling on President Obama to exercise his authority under 26 U.S.C. Section 7803(a)(1)(D) to remove John Koskinen as Commissioner of the IRS. The President took no action, and the House of Representatives is therefore left to consider alternative means to remove Commissioner Koskinen.

It is necessary to remove Mr. Koskinen from his post because his failure to comply with a subpoena and failure to testify truthfully permanently deprived the American people of a complete understanding of the IRS targeting scandal. Commissioner Koskinen’s complete disregard for Congress’s oversight obligations and the American people’s right to know the truth about the IRS targeting program resulted in a deficit of confidence in the nation’s tax collecting agency. His continued leadership of the IRS is an insurmountable obstacle to restoring that confidence. Mr. Koskinen cannot continue be permitted to continue in his role as Commissioner.

This report provides additional details with respect to the various reasons the House of Representatives should initiate impeachment proceedings to remove Koskinen. Briefly, those reasons are:

- **Commissioner Koskinen failed to comply with a subpoena resulting in destruction of key evidence.** Commissioner Koskinen failed to locate and preserve IRS records in accordance with a congressional subpoena and an internal preservation order. The IRS erased 422 backup tapes containing as many as 24,000 of Lois Lerner’s emails—key pieces of evidence that were in the agency’s possession, and destroyed, on Koskinen’s watch.

- **Commissioner Koskinen failed to testify truthfully and provided false and misleading information.** Commissioner Koskinen testified the IRS turned over all emails relevant to the congressional investigation, including all of Ms. Lerner’s emails. When the agency determined Ms. Lerner’s emails were missing, Commissioner Koskinen testified the emails were unrecoverable. Neither of these statements was true.
- **Commissioner Koskinen failed to notify Congress that key evidence was missing.** The IRS knew Lois Lerner’s emails were missing in February 2014. In fact, they were not missing; the IRS destroyed the emails on March 4, 2014. The IRS did not notify Congress the emails were missing until June 2014 - four months later, and well after the White House and the Treasury Department were notified.

## II. Introduction

John Koskinen was confirmed as IRS Commissioner in December 2013 during the 113th Congress. Then-Chairman Darrell Issa reissued a subpoena for Lerner’s emails to him on February 14, 2014.<sup>1</sup> Chairman Issa served Commissioner Koskinen another subpoena on June 17, 2014 for any computer hardware containing Lerner’s emails. Both subpoenas were reissued by Chairman Jason Chaffetz on March 4, 2015 in the 114th Congress.

During his confirmation hearing, Commissioner Koskinen pledged to fully cooperate with the ongoing congressional investigations.<sup>2</sup> His actions have fallen well short of fulfilling that pledge. As commissioner, Koskinen repeatedly assured the Committee that the IRS was working to gather Lois Lerner’s emails and that the IRS would provide these emails to the Committee. For instance, in testimony before the Committee on March 26, 2014, Commissioner Koskinen stated the IRS would produce all of Lois Lerner’s subpoenaed emails.<sup>3</sup> It did not. In fact, under Commissioner Koskinen’s leadership, the IRS destroyed thousands of emails covered by the Committee’s subpoenas.

After he learned that thousands of Lerner’s emails were missing from the IRS’s archiving system, the Treasury Inspector General for Tax Administration (TIGTA) found that Commissioner Koskinen and his staff failed to look in five of the six places where the emails could potentially be recovered. The IRS only examined Lerner’s hard drive, which apparently crashed in 2011. TIGTA examined all the places where Lerner’s emails might have been preserved, including Lerner’s Blackberry devices, email server, backup email server, loaner laptop, the IRS’s own backup tapes, and Lerner’s hard drive. TIGTA’s more thorough investigation recovered over 1,000 emails the IRS previously failed to produce to Congress.<sup>4</sup>

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<sup>1</sup> The original subpoena was served on Treasury Secretary Jack Lew on August 2, 2013, because no permanent IRS Commissioner was in place.

<sup>2</sup> *Nomination of John Koskinen: Hearing Before the S. Comm. on Finance*, 113th Cong. (2013) (question and answer with Ranking Member Orrin Hatch).

<sup>3</sup> *Examining the IRS Response to the Targeting Scandal: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong., at 27 (Mar. 26, 2014) (question and answer with Rep. Chaffetz) [hereinafter Mar. 26, 2014 Hearing].

<sup>4</sup> Treasury Inspector General for Tax Administration, *Report of Investigation: Exempt Organizations Data Loss*, (June 30, 2015) (hereinafter “TIGTA report”).

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

After the backup tapes were destroyed, Commissioner Koskinen made a series of false and misleading statements to Congress while under oath. On June 20, 2014, Commissioner Koskinen testified: “Since the start of this investigation, every email has been preserved. Nothing has been lost. Nothing has been destroyed.”<sup>5</sup> That testimony was subsequently disproven by a TIGTA investigation that found 422 magnetically backup tapes were erased.<sup>6</sup>

Commissioner Koskinen also testified at a congressional hearing on June 20, 2014 that the IRS made a genuine effort to recover the missing Lerner emails. He stated, “We’ve gone to great lengths to spend a significant amount of money trying to make sure that there is no email that is required that has not been produced.”<sup>7</sup> That statement was also proven false by TIGTA, and by Commissioner Koskinen’s own subsequent testimony.

In addition, Commissioner Koskinen testified that the backup tapes were never sent to a lab for professional forensic analysis. That statement also proved false.

Commissioner Koskinen engaged in a systematic effort to obstruct, undermine, and discredit Congress’s investigative function. His actions caused the destruction of documents covered by a subpoena and permanently deprived the American people of a complete understanding of the scope and purpose of the IRS targeting program. In the course of doing so, he made false and misleading statements to Congress. For these reasons, and others, Commissioner Koskinen must be removed from his position.

### **III. Authority**

Article II, Section 4 of the Constitution states: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

The provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law, but also to acts that, though not defined as criminal, adversely affect the public interest.<sup>8</sup> Impeachments have commonly

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<sup>5</sup> *Recent Developments in the Committee’s Investigation into the Internal Revenue Service’s Use of Inappropriate Criteria to Process Applications of Tax-Exempt Organizations: Hearing Before the H. Comm. on Ways & Means*, 113th Cong. (2014).

<sup>6</sup> TIGTA report, *supra* note 4, at 2.

<sup>7</sup> *IRS Commissioner John Koskinen: Hearing Before the H. Comm. on Ways & Means* (June 20, 2014).

<sup>8</sup> Wm. Holmes Brown et. al, *House Practice* 596, 112th Cong. (2011).

involved charges of misconduct incompatible with the official position of the office holder. Such misconduct historically fell into three general categories: (1) abusing or exceeding lawful powers of office; (2) behaving officially or personally in a manner grossly incompatible with the office; or (3) using the power of the office for personal gain or other improper ends.<sup>9</sup>

#### **IV. Background on the Committee’s Investigation**

In February 2012, the Committee received reports that the Internal Revenue Service inappropriately scrutinized certain applicants for 501(c)(4) tax-exempt status. Since then, the Committee has engaged in a comprehensive investigation of the IRS’s process for reviewing applications for tax-exempt status. As part of this investigation, the Committee reviewed more than 1.3 million pages of documents, conducted more than 50 transcribed interviews of current and former IRS officials, and held over a dozen public hearings.

Documents and testimony show the IRS targeted conservative-aligned applicants for tax-exempt status by scrutinizing them in a manner distinct—and more intrusive—than other applicants. Critical questions remain regarding the extent of this targeting, and how and why the IRS acted—and persisted in acting—in this manner. Commissioner Koskinen’s failure to comply with the Committee’s subpoenas and to cooperate fully with the Committee’s investigation has caused many key questions to remain unanswered.

##### **A. IRS Targeting of Tax-Exempt Applications from Conservative Groups**

In late February 2010, a screener in the IRS’s Cincinnati office identified a 501(c)(4) application connected with the Tea Party. Due to “media attention” surrounding the Tea Party, the application was elevated to the Exempt Organizations Technical Unit in Washington, D.C.<sup>10</sup> When officials in the Cincinnati office received several similar applications in March 2010, the Washington, D.C. office asked for two “test” applications, and ordered the Cincinnati employees to “hold” the remainder of the applications, which prevented the applications from moving forward in the review process.<sup>11</sup> A manager in the Cincinnati office asked his screeners to develop criteria for identifying other Tea Party applications so the applications would not “go into the general inventory.”<sup>12</sup> By early April 2010, Cincinnati screeners began to identify and hold any applications that met certain criteria. Applications that met the criteria were removed from the general inventory and assigned to a special group.

In late spring 2010, Carter Hull, based in the Washington, D.C. IRS office, was assigned to work on the test applications.<sup>13</sup> Hull, a federal employee with almost fifty years of

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<sup>9</sup> *Id.*

<sup>10</sup> Email from Cindy Thomas, Manager, Exempt Organizations Determinations, IRS, to Holly Paz, Manager, Exempt Organizations Technical Unit, IRS (Feb. 25, 2010) [IRSR 428451].

<sup>11</sup> Transcribed Interview of Elizabeth Hofacre, Revenue Agent, Exempt Orgs. Determinations Unit, IRS (May 31, 2013) [hereinafter Hofacre Tr.].

<sup>12</sup> Transcribed Interview of John Shafer, Group Manager, Exempt Orgs. Determinations Unit, IRS (June 6, 2013).

<sup>13</sup> Transcribed interview of Carter Hull Internal Revenue Serv., in Wash., D.C. (June 14, 2013).

experience, was a recognized expert in 501(c)(4) applications that showed indicia of political activity.<sup>14</sup> He issued letters to the test applicants requesting additional information or clarification about certain information contained in their applications for tax-exempt status.<sup>15</sup>

Meanwhile, through the summer and into fall 2010, applications from other conservative-aligned groups were also held. As the Cincinnati office awaited guidance from Washington regarding those applications, a backlog developed. By fall 2010, the backlog of applications held in the Cincinnati office had grown to 60.

On February 1, 2011, Lois Lerner, who served as Director of Exempt Organizations (EO) at IRS from 2006 to 2013,<sup>16</sup> wrote an email to Michael Seto, the manager of the Technical Office within the Exempt Organizations business division. The EO Technical Office was staffed by approximately 40 IRS lawyers who provided advice to IRS agents across the country. Lerner wrote, “Tea Party Matter very dangerous” and asked the Office of Chief Counsel to get involved.<sup>17</sup> She advised Seto that “Cincy [Cincinnati] should probably NOT have these cases,” implying they should be handled at IRS headquarters in Washington.<sup>18</sup> Seto testified to the Committee that Lerner ordered a “multi-tier” review for the test applications, a process that involved her senior technical advisor and the Office of Chief Counsel.<sup>19</sup>

On July 5, 2011, Lerner became aware the backlog of Tea Party applications pending in Cincinnati had swelled to “over 100.”<sup>20</sup> Lerner also learned of the specific criteria used to screen the cases that were caught in the Tea Party backlog, which included the terms “Tea Party,” “Patriots,” and “9/12.”<sup>21</sup> She believed the term “Tea Party”—a term that triggered additional scrutiny under the criteria IRS personnel developed—was “pejorative.”<sup>22</sup> Lerner ordered her staff to adjust the criteria.<sup>23</sup> She also directed the Technical Unit to conduct a “triage” of the backlogged applications and to develop a guide sheet to assist agents in Cincinnati with processing the cases.<sup>24</sup>

In November 2011, the draft guide sheet for processing the backlogged applications was complete.<sup>25</sup> By then, there were 160-170 pending applications in the backlog.<sup>26</sup> After the

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

<sup>15</sup> IRS, *Timeline for the 3 exemption applications that were referred to EOT from EOD*, [IRSR 58346-49].

<sup>16</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong., at 22 (May 22, 2013) (H. Rpt. 113-33) (statement of Lois Lerner, Director, Exempt Orgs., IRS).

<sup>17</sup> Email from Lois Lerner, Director, Exempt Orgs., IRS to Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS (Feb. 1, 2011) [IRSR 161810].

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

<sup>19</sup> Transcribed Interview of Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS (July 11, 2013) [hereinafter Seto Tr.].

<sup>20</sup> Transcribed Interview of Justin Lowe, Technical Advisor to the Commissioner, Tax Exempt and Gov’t Entities Division, IRS (July 23, 2013).

<sup>21</sup> *Id.*

<sup>22</sup> Transcribed Interview of Holly Paz, Director, Exempt Orgs., Rulings and Agreements, IRS (May 21, 2013).

<sup>23</sup> *Id.*

<sup>24</sup> Seto Tr. at 121-23.

<sup>25</sup> Email from Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS, to Cindy Thomas, Manager, Exempt Orgs. Determinations Unit, IRS (Nov. 6, 2011) [IRSR 69902].

Cincinnati office received the guide sheet from Washington, officials in the EO division began to process the applications in January 2012. IRS employees drafted questions to solicit information from the applicants pursuant to the guide sheet. The questions asked for information about the applicant organizations' donors, volunteers, board membership, and political affiliation, among other things.<sup>27</sup>

By early 2012, questions about the IRS's treatment of these backlogged applications attracted public attention. Committee staff met with Lerner on February 24, 2012 regarding the IRS's process for evaluating tax-exempt applications.<sup>28</sup> Lerner never informed the Committee about the true nature of the IRS's treatment of the applications from conservative groups. Instead, she told Committee staff that the IRS's criteria for evaluating tax-exempt applications had not changed. Lerner also mentioned the guide sheet developed by the Washington office and used by revenue agents to process applications.

Committee staff subsequently met with TIGTA representatives on March 8, 2012.<sup>29</sup> Shortly thereafter, TIGTA began an audit of the IRS's process for evaluating tax-exempt applications.

In late February 2012, after Lerner briefed Committee staff, then-IRS Deputy Commissioner Steven Miller requested a meeting with her to discuss these applications. She informed Miller of the backlog and advised that the IRS had asked applicant organizations for donor information.<sup>30</sup> Miller relayed this information to IRS Commissioner Douglas Shulman.<sup>31</sup> On March 23, 2012, Miller convened a meeting of his senior staff to discuss these applications. Miller launched an internal review of potentially inappropriate treatment of Tea Party 501(c)(4) applications "to find out why the cases were there and what was going on."<sup>32</sup>

The internal IRS review took place in April 2012. Miller realized there was a problem and that the application backlog needed to be addressed.<sup>33</sup> IRS officials designed a new system to process the backlog, and Miller received weekly updates on the progress of the backlog throughout the summer 2012.<sup>34</sup>

In May 2013, in advance of the release of TIGTA's audit report on the IRS's process for evaluating applications for tax-exempt status, the IRS planned to acknowledge publicly that certain tax-exempt applications were inappropriately targeted.<sup>35</sup> On May 10, 2013, at an event

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<sup>26</sup> Transcribed Interview of Stephen Daejin Seok, Group Manager, Exempt Orgs. Determinations Unit, IRS (June 19, 2013).

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

<sup>28</sup> Briefing by Lois Lerner, Director, Exempt Orgs., IRS, to H. Comm. on Oversight & Gov't Reform Staff (Feb. 24, 2012).

<sup>29</sup> Briefing by Treasury Inspector Gen. for Tax Admin. staff, to H. Comm. on Oversight & Gov't Reform Staff (May 2013).

<sup>30</sup> Transcribed Interview of Steven Miller, Deputy Commissioner, IRS (Nov. 13, 2013) [hereinafter Miller Tr.].

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

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

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

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

<sup>35</sup> Email from Nicole Flax, Chief of Staff to the Deputy Commissioner, IRS, to Lois Lerner, Director, Exempt Orgs., IRS (Apr. 23, 2013) [IRSR 189013]; Miller Tr. At 154-56; Transcribed Interview of Sharon Light, Senior Technical

sponsored by the American Bar Association (ABA), Lerner responded to a question she planted with a member of the audience prior to the event. A veteran tax lawyer asked:

Lois, a few months ago there were some concerns about the IRS's review of 501(c)(4) organizations, of applications from tea party organizations. I was just wondering if you could provide an update.<sup>36</sup>

In response, Lerner stated:

So our line people in Cincinnati who handled the applications did what we call centralization of these cases. They centralized work on these in one particular group.<sup>37</sup>

Lerner also stated:

However, in these cases, the way they did the centralization was not so fine. Instead of referring to the cases as advocacy cases, they actually used case names on this list. They used names like Tea Party or Patriots and they selected cases simply because the applications had those names in the title. That was wrong, that was absolutely incorrect, insensitive, and inappropriate—that's not how we go about selecting cases for further review. We don't select for review because they have a particular name.<sup>38</sup>

Lerner's statements during the ABA panel, entitled "News from the IRS and Treasury," were the first public acknowledgement that the IRS had inappropriately scrutinized the applications of conservative-aligned groups. Within days, the President and the Attorney General expressed serious concerns about the IRS's actions. The President stated:

It's inexcusable, and Americans are right to be angry about it, and I am angry about it. I will not tolerate this kind of behavior in any agency, but especially in the IRS, given the power that it has and the reach that it has into all of our lives.<sup>39</sup>

At the same press conference, the Attorney General announced a Justice Department investigation.<sup>40</sup>

Because of Lerner's announcement at the ABA panel, and for other reasons, the Committee scheduled a hearing where Lerner would appear and answer questions about how and why the IRS processed conservative-aligned applicants for tax-exempt status. On May 14, 2013,

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Advisor to the Director, Exempt Orgs., IRS (Sept. 5, 2013); Email from Nicole Flax, Chief of Staff to the Deputy Commissioner, IRS, to Adewale Adeyemo, Dept. of the Treasury (Apr. 22, 2013) [IRSR 466707].

<sup>36</sup> Eric Lach, *IRS Official's Admission Baffled Audience at Tax Panel*, TALKING POINTS MEMO, May 14, 2013.

<sup>37</sup> Rick Hasen, *Transcript of Lois Lerner's Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 a.m.), available at <http://electionlawblog.org/?p=50160> (last visited Oct. 23, 2015).

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

<sup>39</sup> Statement by the President, May 15, 2013, available at <https://www.whitehouse.gov/the-press-office/2013/05/15/statement-president> (last visited Oct. 23, 2015).

<sup>40</sup> *Holder Launches Probe into IRS Targeting of Tea Party Groups*, FOXNEWS.COM, May 14, 2013.

Chairman Issa invited Lerner to testify at a hearing on May 22, 2013.<sup>41</sup> Lerner, through her attorney, confirmed she would appear at the hearing,<sup>42</sup> and that she planned to invoke her Fifth Amendment rights and not answer questions.<sup>43</sup>

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

At the hearing, after being sworn, Lerner made a voluntary opening statement. She stated (in pertinent part):

I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee. And while I would very much like to answer the Committee's questions today, I've been advised by my counsel to assert my constitutional right not to testify or answer questions related to the subject matter of this hearing. After very careful consideration, I have decided to follow my counsel's advice and not testify or answer any of the questions today.<sup>44</sup>

Following her statement, Chairman Issa explained he believed she had waived her right to assert a Fifth Amendment privilege and asked her to reconsider her position on testifying.<sup>45</sup> In response, Lerner stated: "I will not answer any questions or testify about the subject matter of this Committee's meeting."<sup>46</sup> The hearing was placed in recess so the Committee could consider whether Lerner had in fact waived her Fifth Amendment rights.

At a business meeting on June 28, 2013, the Committee approved a resolution rejecting Lerner's Fifth Amendment privilege claim based on her waiver at the May 22, 2013, hearing. The hearing was reconvened on March 5, 2014. Lerner again refused to answer questions, and the Committee initiated the process to hold her in contempt of Congress.

Meanwhile, the Committee's investigation continued. Documents and testimony obtained by the Committee confirmed that Lerner was a central figure in the IRS's inappropriate scrutiny of certain applicants for tax-exempt status. The Committee therefore focused investigative resources on obtaining documents—including emails—that would help investigators understand the full extent of her role in the targeting program.

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<sup>41</sup> Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Lois Lerner, Director, Exempt Orgs., IRS (May 14, 2013) (letter inviting Lerner to testify at May 22, 2013 hearing).

<sup>42</sup> Email from William W. Taylor, III, Zuckerman Spaeder LLP, to H. Comm. on Oversight & Gov't Reform Majority Staff (May 17, 2013).

<sup>43</sup> Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 20, 2013).

<sup>44</sup> *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 22 (May 22, 2013) (H. Rpt. 113-33) (statement of Lois Lerner, Director, Exempt Orgs., IRS).

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

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

## B. Lois Lerner's Emails are Critical to the Committee's Investigation

Because Lerner refused to testify, her emails are vital to establish her precise role in the targeting. Without access to the entirety of her communications, especially those that occurred when the IRS's program to target conservative applicants for tax-exempt status was active, the full extent of her role cannot be known.

Lerner was, when the targeting occurred, the Director of the Exempt Organizations business division of the IRS. The Exempt Organizations business division contains the two IRS units responsible for executing the targeting program: the Exempt Organizations Determinations Unit in Cincinnati; and the Exempt Organizations Technical Unit in Washington, D.C.

Lerner has unique, first-hand knowledge of how, and why, the IRS scrutinized applications for tax-exempt status from conservative-aligned groups. The IRS sent letters to 501(c)(4) application organizations, signed by Lerner, that included questions about the organizations' donors. These letters went to applicant organizations that met certain political criteria. Lerner later described the selection of these applicant organizations as "wrong, [] absolutely incorrect, insensitive, and inappropriate."<sup>47</sup>

In addition to being in a position to control and direct the targeting, the incomplete set of Lerner's emails obtained by the Committee makes clear she was personally motivated to target conservative-oriented tax-exempt organizations. In 2010, while IRS employees were screening applications, Lerner and her colleagues contemplated concerns about the "hugely influential Koch brothers."<sup>48</sup> Lerner advised that her unit should "do a c4 project next year" focusing on existing organizations.<sup>49</sup> She went on to acknowledge the potential scrutiny the effort could receive and stated that it should be engineered so as not appear to be a "*per se* political project."<sup>50</sup>

As left-leaning groups pressured the IRS to investigate conservative nonprofits, Lerner wrote on August 31, 2010: "We won't be able to stay out of this—we need a plan!"<sup>51</sup> Later, in October 2010, Lerner spoke of the intense pressure on the IRS to "fix the problem" resulting from the Supreme Court's decision in *Citizens United v. Federal Election Commission*, saying, "Everybody is screaming at us right now: 'Fix it now before the election. Can't you see how much these people are spending?'"<sup>52</sup>

Lerner played a central role in the IRS's disparate treatment of certain tax-exempt groups. She was extensively involved in handling the Tea Party cases—from directing the review

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<sup>47</sup> Rick Hasen, *Transcript of Lois Lerner's Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 AM), <http://electionlawblog.org/?p=50160>.

<sup>48</sup> Email from Paul Streckfus to Paul Streckfus (Sep. 15, 2010) (EO Tax Journal 2010-130) [IRSR 191032-33].

<sup>49</sup> Email from Lois Lerner, IRS, to Cheryl Chasin et al., IRS (Sep. 15, 2010) [IRSR 191032-33].

<sup>50</sup> Email from Lois Lerner, IRS, to Cheryl Chasin et al., IRS (Sep. 16, 2010) [IRSR 191030].

<sup>51</sup> Email from Lois Lerner, IRS, to Sarah Hall Ingram, IRS (Aug. 31, 2010) [IRSR 632342].

<sup>52</sup> "Lois Lerner Discusses Political Pressure on IRS in 2010," *available at* <https://www.youtube.com> (last visited July 31, 2014) (transcription by Committee).

process to receiving periodic status updates.<sup>53</sup> She created roadblocks to delay the approval of certain organizations' tax-exempt applications. Lerner directed the manager of the IRS's EO Technical Unit to subject Tea Party cases to a "multi-tier review" system out of concern the applications could extend the *Citizens United* decision to nonprofit law.<sup>54</sup> The system Lerner helped implement and manage eventually led to the significant delay of Tea Party 501(c)(4) applications by subjecting these applications to an unprecedented level of scrutiny.<sup>55</sup>

Lerner refused to testify before Congress about her role in the IRS targeting scandal. Lerner's refusal to cooperate with the Committee's investigation rendered her contemporaneous emails even more important to the congressional effort to understand the extent of the IRS targeting program and her role in it.

## **V. The IRS Significantly Delayed Production of Documents Pursuant to the Committee's First Subpoena**

For more than two years, the Committee has sought all of Lerner's emails from the IRS.<sup>56</sup> On June 4, 2013, the Committee wrote to Koskinen's predecessor, Acting IRS Commissioner Daniel Werfel, to request "[a]ll documents and communications sent by, received by, or copied to Lois Lerner" from January 1, 2009 to the present.<sup>57</sup>

Because the IRS did not comply with the Committee's requests for information, on August 2, 2013, then-Chairman Issa issued a subpoena to Treasury Secretary Jacob Lew, as the custodian of IRS documents.<sup>58</sup> Paragraph 1 on the subpoena schedule requested "[a]ll communications sent or received by Lois Lerner, from January 1, 2009, to August 2, 2013."<sup>59</sup> The subpoena described eight discrete categories of documents to allow the IRS to identify and produce responsive documents in an efficient way.<sup>60</sup>

On August 2, 2013, Acting Commissioner Werfel testified under oath regarding the IRS's effort to produce all of Lerner's emails to the Committee. He testified:

Rep. JORDAN.            So I just want to be clear then. Every single email of Lois Lerner's that we have asked for, you have sent to us?

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<sup>53</sup> Justin Lowe, IRS, Increase in (c)(3)/(c)(4) Advocacy Org. Applications (June 27, 2011). [IRSR 2735]; Email from Judith Kindell, IRS, to Lois Lerner, IRS (July 18, 2012). [IRSR 179406].

<sup>54</sup> Seto Tr., at 34.

<sup>55</sup> See e.g., Transcribed Interview of Carter Hull, Tax Law Specialist, Exempt Orgs. Technical Unit, IRS, at 38-44, 44-51 (June 14, 2013) [hereinafter Hull Tr.]; Hofacre Tr. at 24-25.

<sup>56</sup> Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Daniel Werfel, Acting Commissioner, IRS, June 4, 2013.

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

<sup>58</sup> H. Comm. on Oversight & Gov't Reform Subpoena to Jacob Lew, Sec'y, Dep't of the Treasury (Aug. 2, 2013)

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

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

Mr. WERFEL. No. But we've provided hundreds of her emails. But, again, this is a process.

Rep. JORDAN. No, no, no, no, no, no. It's pretty simple. You go to her computer and you get her emails.

Eventually, Werfel committed to produce Lerner's emails. He testified:

Rep. JORDAN. We have a specific request. We want every bit of correspondence from Lois Lerner and you won't give it to us. Here is the lady who broke the story with the planted question. Here is the lady who took the Fifth. Here is the lady who is at the center of this storm. And we want every bit of email from her, and you won't give it to us.

Mr. WERFEL. I will tell you I'm committed to.

Rep. JORDAN. And you have had 3 months to do it.

Mr. WERFEL. I will tell you what we're committed to. We're committed to reviewing every one of Lois Lerner's emails, and providing the response.

Werfel reiterated his commitment to produce Lerner's emails later during his testimony. He stated:

Mr. WERFEL. Yeah, I know. A couple of other responses. First, Lois Lerner's emails are on the top of our list and we are working through it. But we're also producing—

Rep. JORDAN. That's not good enough. That's not. We want them and we wanted them.<sup>61</sup>

Despite making the production of Lerner's emails the IRS's "top" priority, Werfel did not disclose there were problems with the preservation and collection of the entirety of Lerner's emails. In fact, contrary to Acting Commissioner Werfel's claim that the IRS was "aggressively working to share, gather and provide information" to the Committee, the agency continued to

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<sup>61</sup> *Examining the Skyrocketing Problem of Identity Theft Related Tax Fraud at the IRS: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight & Gov't Reform, 113th Cong., at 81-83 (2013) (testimony of Hon. Daniel Werfel, Principal Deputy Comm'r, Internal Revenue Serv.).*

obstruct the Committee's investigation even after a new permanent commissioner was appointed.<sup>62</sup>

## VI. Commissioner Koskinen's Obstruction of Congressional Investigations

President Obama nominated John A. Koskinen to be the permanent IRS Commissioner on August 1, 2013.<sup>63</sup> During his confirmation hearing, Koskinen pledged to cooperate with several congressional investigations examining the targeting scandal.<sup>64</sup> He stated, "[W]e will be transparent about any problems we run into; and the public and certainly this committee will know about those problems as soon as we do."<sup>65</sup> On December 23, 2013, John Koskinen was sworn in as the 48th IRS Commissioner.<sup>66</sup>

Commissioner Koskinen was on notice from his earliest days in office regarding the need to preserve documents relevant to the IRS targeting scandal. When Koskinen became the head of the agency, a Committee subpoena had been in place for more than four months, since August 2, 2013. The subpoena covered "[a]ll communications sent or received by Lois Lerner, from January 1, 2009, to August 2, 2013."<sup>67</sup> The Committee reissued that subpoena to Koskinen on February 14, 2014, seven weeks after he was sworn in.<sup>68</sup>

The subpoena made clear the legal obligation for Koskinen, as the Commissioner of the IRS, to produce all eight categories of documents covered by the subpoena, including emails to and from Lois Lerner. Despite this, Koskinen failed to make the Committee aware that thousands of emails covered by the subpoena were missing.

The chain of events that ultimately caused many of Lerner's emails to be unavailable to the Committee began in June 2011, when Lerner's computer crashed. On February 2, 2014, Catherine Duval, Counselor to the Commissioner, noticed a massive gap in the batch of Lerner's emails that were being collected for production to the Committee.<sup>69</sup> Duval noticed there were no custodial emails (emails extracted from Lerner's computers) from before 2011 because the hard

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<sup>62</sup> Letter from Hon. Daniel Werfel, Principal Deputy Comm'r, Internal Revenue Serv., to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform & Hon. Jim Jordan, Chairman, Subcomm. on Economic Growth, Job Creation, and Regulatory Affairs (Aug. 2, 2013).

<sup>63</sup> The White House, Press Release, *President Obama Announces His Intent to Nominate John Koskinen as Commissioner of the Internal Revenue Serv.* (Aug. 1, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/01/president-obama-announces-his-intent-nominate-john-koskinen-commissioner> (last visited July 31, 2014).

<sup>64</sup> *Nomination of John Koskinen: Hearing Before the S. Comm. on Finance*, 113th Cong. (2013) (question and answer with Ranking Member Orrin Hatch).

<sup>65</sup> *Nomination of John Andrew Koskinen, to be Commissioner, Internal Revenue Service: Hearing Before the S. Comm. on Finance*, 113th Cong. (2013).

<sup>66</sup> Internal Revenue Serv., *Commissioner John Koskinen*, <http://www.irs.gov/uac/Commissioner-John-Koskinen> (last visited July 31, 2014).

<sup>67</sup> H. Comm. on Oversight & Gov't Reform Subpoena to Jacob Lew, Sec'y, Dep't of the Treasury (Aug. 2, 2013).

<sup>68</sup> H. Comm. on Oversight & Gov't Reform Subpoena to John Koskinen, Comm'r, Internal Revenue Serv. (Feb. 14, 2014).

<sup>69</sup> Transcribed interview of Thomas Kane, Deputy Assoc. Chief Counsel, Procedure & Administration, Office of Chief Counsel, Internal Revenue Serv. (July 17, 2014).

drive that contained those messages crashed.<sup>70</sup> Duval realized that emails from the period in question may have been recoverable on backup tapes and made an inquiry with the Office of the Chief Information Officer.<sup>71</sup> Steven Manning, IRS's Deputy Chief Information Officer, informed Duval and Thomas Kane, a lawyer in the Chief Counsel's Office, that the IRS's "disaster recovery tapes" (also called backup tapes) are reused every six months, and that the previous information is written over.<sup>72</sup>

According to Commissioner Koskinen's own testimony at a hearing on July 23, 2014, he became aware that thousands of Lerner's emails were missing in February 2014, shortly after Duval and Kane learned backup tapes that might contain the missing emails are routinely overwritten.<sup>73</sup> In fact, Commissioner Koskinen testified that Kane learning this information was tantamount to the entire agency being aware that Lerner's emails were missing. Commissioner Koskinen testified: "If you told me now that Tom Kane said he knew in February, I would henceforth say we, as the IRS, knew in February."<sup>74</sup>

Commissioner Koskinen—despite knowing that thousands of emails covered by a congressional subpoena were missing and in jeopardy of being permanently lost—took no meaningful action to retrieve them. And so, on March 4, 2014, IRS employees working the midnight shift at a facility in Martinsburg, West Virginia, magnetically erased 422 backup tapes that contained the missing Lerner emails.<sup>75</sup> The backup tapes that were destroyed contained as many as 24,000 Lerner emails responsive to the subpoenas.<sup>76</sup>

Koskinen did not reveal to Congress that thousands of Lerner's emails were missing until June 20, 2014,<sup>77</sup> despite a series of opportunities to do so.

#### **A. Koskinen Testified the Agency Would Comply with the Committee's Subpoena**

Rather than notify the Committee that thousands of emails covered by a subpoena were missing, Commissioner Koskinen devised a series of excuses for the IRS's inability to produce Lerner's emails. At a Committee hearing on March 26, 2014, Commissioner Koskinen blamed the scope of the subpoena for the IRS's failure to comply. He asserted the subpoena covered

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<sup>70</sup> *Id.*; Letter from Leonard Oursler, Internal Revenue Serv., to Ron Wyden & Orrin Hatch, S. Comm. on Finance, encl. 3 at 6 (June 13, 2014).

<sup>71</sup> Transcribed interview of Thomas Kane, Deputy Assoc. Chief Counsel, Procedure & Administration, Office of Chief Counsel, Internal Revenue Serv. (July 17, 2014).

<sup>72</sup> *Id.*

<sup>73</sup> *An Update on the IRS Response to Its Targeting Scandal: Hearing Before the H. Comm. on Oversight & Gov't Reform Subcomm. on Econ. Growth, Job Creation & Reg. Affairs*, 113th Cong. (2014).

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

<sup>75</sup> Treasury Inspector General for Tax Administration, *Report of Investigation: Exempt Organizations Data Loss 2* (June 30, 2015).

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

<sup>77</sup> "Recent Developments in the Committee's Investigation into the Internal Revenue Service's Use of Inappropriate Criteria to Process Applications of Tax-Exempt Organizations": *Hearing Before the H. Comm. on Ways & Means*, 113th Cong. (2014).

“not thousands, but millions of documents.”<sup>78</sup> Koskinen never mentioned that any IRS officials’ emails were missing or destroyed. When asked specifically whether the IRS would respond to the subpoena, he responded that the agency would do so. He testified:

Rep. CHAFFETZ. You have a duly issued subpoena. Are you or are you not going to provide this committee the emails as indicated in this subpoena, yes or no?

Mr. KOSKINEN. We have never said we weren’t—

Rep. CHAFFETZ. I am asking you yes or no.

Mr. KOSKINEN. We are going to respond to the subpoena—

Rep. CHAFFETZ. No, no. Sir—

Mr. KOSKINEN. Yes, we are going to respond to the subpoena. I am just telling you to respond fully to the subpoena, we are going to be at this for years, not months.<sup>79</sup>

During the same hearing, Commissioner Koskinen testified under oath that the IRS would produce all of Lerner’s emails to the Committee.<sup>80</sup> He stated:

Rep. CHAFFETZ. And I don’t understand that. Just specific to item one, Lois Lerner—

Mr. KOSKINEN. Lois Lerner’s emails—

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

Mr. KOSKINEN. We are already starting—

Rep. CHAFFETZ. Yes or—

Mr. KOSKINEN. Yes, we will do that.<sup>81</sup>

In a later exchange, Commissioner Koskinen again stated that he would provide the subpoenaed documents.

Rep. CUMMINGS. Well, reclaiming just for a second. I just want us to be clear. I mean, time is precious, money is

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<sup>78</sup> Mar. 26, 2014 Hearing, *supra* note 3, at 27.

<sup>79</sup> *Id.* at 30 (testimony of John Koskinen, Comm’r, Internal Revenue Serv.).

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

<sup>81</sup> *Id.*

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

Mr. KOSKINEN. Yes.

Rep. CUMMINGS. That were subpoenaed.

Mr. KOSKINEN. Yes.<sup>82</sup>

Like Acting Commissioner Werfel before him, Commissioner Koskinen promised to produce all of the emails Lerner sent or received during the period in question. At the hearing, Koskinen made no mention of the fact that the IRS did not possess thousands of emails responsive to the subpoenas.

## **B. Commissioner Koskinen's Senior Advisors Promised to Comply**

Following Commissioner Koskinen's testimony before the Committee, his senior advisors assured Committee staff the IRS would produce Lerner's emails. In a bipartisan staff meeting on April 4, 2014, two of Commissioner Koskinen's senior advisors, Catherine Duval and Leonard Oursler, discussed the IRS's response to the Committee's subpoena.<sup>83</sup> Duval stated the IRS had identified and set aside all of Lerner's emails as part of its document production process.<sup>84</sup> Neither Duval nor Oursler disclosed that the IRS had already destroyed a significant cache of Lerner's emails.

## **VII. Commissioner Koskinen's False Claim that Key Evidence was Lost or Destroyed Prolonged the Investigation**

According to the IRS, Lerner's laptop computer crashed in June 2011. When technicians reviewed the hard drive after the crash, they determined the data on her hard drive was unrecoverable.<sup>85</sup> An investigation by TIGTA concluded Lerner's hard drive most likely crashed on June 11, 2011, a Saturday. Efforts to determine who had access to Lerner's office at the time

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<sup>82</sup> *Id.* at 31.

<sup>83</sup> Meeting between H. Comm. on Oversight & Gov't Reform Staff & Catherine Duval & Leonard Oursler, Internal Revenue Serv. (Apr. 4, 2014).

<sup>84</sup> *Id.*

<sup>85</sup> Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden & Hon. Orrin Hatch, S. Comm. on Finance (June 13, 2014).

were unsuccessful because the security badge entry and exit logs from that day were also destroyed.<sup>86</sup> Aaron Signor, an IRS IT specialist, initially examined Lerner's hard drive.<sup>87</sup> Signor provided computer-related assistance to the Exempt Organizations Division. Signor removed the computer from Lerner's office and determined that a problem existed with the computer's hard drive.<sup>88</sup> Signor attempted unsuccessfully to retrieve data from the hard drive before discarding it in a cardboard box containing roughly thirty other crashed drives.<sup>89</sup> That was the extent of Signor's attempt to restore data on the hard drive and he closed the matter on June 21, 2011.<sup>90</sup>

In July or August 2011, Signor received a phone call from Lillie Wilburn, an IT manager, asking whether he still had Lerner's hard drive.<sup>91</sup> She asked Signor to ship the hard drive to another technician for additional examination.<sup>92</sup> John Minsek, a senior investigative analyst in the IRS's Criminal Investigations (CI) unit, eventually received Lerner's hard drive.<sup>93</sup> Minsek understood the hard drive was from "a computer of importance" and there was a "sense of urgency" to recover data.<sup>94</sup> Using the CI unit's digital forensic facilities, Minsek opened the hard drive and conducted additional tests.<sup>95</sup> Once he opened the hard drive, Minsek noticed "well-defined scoring creating a concentric circle in the proximity of the center of the disk."<sup>96</sup> According to Minsek, the scoring covered less than one percent of the surface of the disk.<sup>97</sup>

Following Minsek's examination, he determined he was unable to recover the data and returned the hard drive to the IRS's IT team.<sup>98</sup> In a subsequent conversation with IRS IT personnel, Minsek raised the possibility the IRS could send Lerner's hard drive to a data recovery service, believing it was "possible that they had techniques, methods, perhaps proprietary tools that I did not have."<sup>99</sup> Instead, Lerner's hard drive was sent to an IRS facility and recycled by an outside contractor.<sup>100</sup>

The destruction of Lerner's hard drive in June 2011 occurred during a pivotal time in the IRS's targeting of conservatives. Just four months earlier, in February 2011, Lerner called the Tea Party applications "very dangerous" and ordered the cases undergo an unprecedented "multi-tier" review.<sup>101</sup> In early June 2011, Lerner requested a copy of the tax-exempt application filed

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<sup>86</sup> TIGTA report, *supra* note 4, at 9.

<sup>87</sup> Transcribed interview of Aaron Signor, Internal Revenue Serv. (Aug. 1, 2014).

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

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

<sup>90</sup> *Id.*

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

<sup>92</sup> *Id.*

<sup>93</sup> Transcribed interview of John Minsek, Internal Revenue Serv. (July 24, 2014).

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

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

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

<sup>97</sup> *Id.*

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

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

<sup>100</sup> Transcribed interview of Thomas Kane, Internal Revenue Serv. (July 17, 2014).

<sup>101</sup> Email from Lois Lerner, Internal Revenue Serv., to Michael Seto, Internal Revenue Serv. (Feb. 1, 2011) [IRS 161810].

by the prominent conservative group Crossroads GPS for review by her senior technical advisor.<sup>102</sup>

Witnesses testified that Lerner stored a significant amount of information on her computer's hard drive. According to Signor, the IT technician who regularly serviced Lerner's computer, Lerner maintained a large volume of data on the hard drive of her computer.<sup>103</sup> Signor recommended Lerner back up her data on a network server. He testified:

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

A. Yes.

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

A. Yes.

Despite that recommendation, Signor was told Lerner did not have the time or responsibility to save her data. Signor testified:

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

A. Yes.

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

A. Yes.

Q. When?

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

Q. Do you know in what context?

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

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<sup>102</sup> Email from Holly Paz, Internal Revenue Serv., to Cindy Thomas, Internal Revenue Serv. (June 1, 2011) [IRSR 69914-15].

<sup>103</sup> Transcribed interview of Aaron Signor, Internal Revenue Serv. (Aug. 1, 2014).

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

A. Yes.

Q. What do you know?

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

Signor later clarified the point further:

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

A. There was one day where she and I were in Lois's office. I can't remember if Lois was present or not. But I had said, you know, "Lois has plenty of data. We really should get backups of her data." And her response was, "Well, I don't think that Lois has the time to do it, and it's not her responsibility." That's what was said, something – I'm not quoting exactly, but something like that would have been said.<sup>104</sup>

On September 5, 2014, the IRS notified Congress it could not find emails from five other records custodians, in addition to Lerner.<sup>105</sup> The IRS lost emails sent and received by Judy Kindell, Lerner's senior technical advisor and expert on non-profit political speech; Ronald Shoemaker, a Washington manager who oversaw work on the applications; and Julie Chen and Nancy Heagney, two Cincinnati-based Determinations Specialists.<sup>106</sup> Some of the missing emails were sent and received during key periods of the IRS's targeting of conservative tax-exempt applicants. For instance, Judy Kindell's missing emails were from August 2010, when the IRS began to receive media inquiries related to the President's critical rhetoric of *Citizens United* and political speech by conservative non-profit groups. According to the IRS, Kindell was instructed to save old emails on her computer's hard drive and "when her hard drive failed, she lost email that resided on that drive."<sup>107</sup>

In June 2011, after her emails were destroyed, Lerner emailed David Fish, who also experienced a hard drive failure. "No one will ever believe," she wrote, "that both your hard drive and mine crashed within a week of each other!"<sup>108</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Dave Camp, Chairman, H. Comm. on Ways & Means (Sep. 5, 2014).

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

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

<sup>108</sup> Email from Lois Lerner, Internal Revenue Serv., to David Fish & Nikole Flax, Internal Revenue Serv. (June 29, 2011) [IRSR 903314].

**A. Commissioner Koskinen Promised to Produce Lois Lerner’s Emails Even After He Knew Some Were Missing**

Commissioner Koskinen’s continually evolving and misleading statements about Lois Lerner’s emails compounded the challenges created by their destruction. For several months, Koskinen’s unwillingness to provide accurate and straightforward information about the missing emails unnecessarily delayed and hindered the Committee’s fact-finding efforts.

On March 26, 2014, Commissioner Koskinen appeared before the Committee to testify about the IRS’s compliance with congressional subpoenas and document requests.<sup>109</sup> As described above, during the hearing, Koskinen was repeatedly asked whether he would commit to producing all of Lerner’s emails. Commissioner Koskinen testified repeatedly that he would.

The Committee subsequently obtained testimony that the IRS knew Lerner’s emails had been destroyed at the time of Koskinen’s appearance in March 2014. In particular, IRS Deputy Associate Chief Counsel, Thomas Kane—who had responsibility for the IRS’s document production process in response to congressional requests—testified that senior IRS leadership became aware of problems with Lerner’s emails in early February 2014.<sup>110</sup> Kane testified that on February 2, 2014, Catherine Duval, Counselor to the Commissioner, noticed a discrepancy in the number emails gathered from Lerner’s account.<sup>111</sup> The IRS had gathered 16,000 emails from the period after April 2011 and “less than 100” from the period before April 2011.<sup>112</sup>

After becoming aware of the discrepancy in the number of emails, Kane asked a subordinate, Paul Butler, to look into the matter.<sup>113</sup> Two days later, on February 4, senior IRS leadership learned that Lerner’s hard drive had crashed in 2011 from her former administrative assistant, Dawn Marx.<sup>114</sup> Kane testified:

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

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

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

A. Dawn Marx. Marx with an “x.”

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<sup>109</sup>*Examining the IRS Response to the Targeting Scandal: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (2014).

<sup>110</sup> Transcribed interview of Thomas Kane, Internal Revenue Serv. (July 17, 2014).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*; Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden, Chairman, & Hon. Orrin Hatch, Ranking Member, S. Comm. on Finance encl. 3 at 6 (June 13, 2014).

<sup>113</sup> Transcribed interview of Thomas Kane, Internal Revenue Serv. (July 17, 2014).

<sup>114</sup> *Id.*

Later, Kane testified:

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

A. February 4th.

Q. Of 2014?

A. Correct.

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

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

When asked whether it took long to figure out what happened, Kane stated:

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

Once Kane discovered the crash, he communicated up the chain of command to Catherine Duval. Kane testified:

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

A. That was relayed to Kate [Duval].

Q. By who?

A. I would have been the one to do it, yes.<sup>115</sup>

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

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

A. I don't recall a specific date or time period, or time, but it certainly would have been within the period of time when he was actively interacting with the IT people, in early to mid-February.<sup>116</sup>

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

<sup>116</sup> *Id.*

Kane also testified about the process that rendered the hard drive unrecoverable. He stated:

Q. Do you have an understanding now as to what that term, “recycled,” means?

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

Q. What happened to the hard drive?

A. After the CI forensic analysis determined that it was – that the material on it was unrecoverable, it was returned to the IT people, who at some point in time degaussed it to make sure that if there was anything else on it, particularly from a 6103 perspective, that it would not be recovered. It was then sent to New Carrollton again. A lot of our IT functions are housed out there, and they have a recycling function out there where material is eventually recycled to an outside contractor. And I have no idea what the outside contractor does with these materials.<sup>117</sup>

From mid-February 2014 to April 2014, the IRS attempted to recover some of the missing Lerner emails by other means.<sup>118</sup> However, it is clear from Kane’s testimony that the IRS knew no later than mid-February 2014 that a portion of Lerner’s emails were missing. In fact, Koskinen acknowledged during a July 23, 2014 hearing: “If you told me now that Tom Kane said he knew in February, I would henceforth say we, as the IRS, knew in February.”<sup>119</sup> Moreover, Koskinen himself stated that he personally knew about problems with Lerner’s emails in February. Commissioner Koskinen testified:

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

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

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *An Update on the IRS Response to Its Targeting Scandal: Hearing Before the Subcomm. on Econ. Growth, Job Creation & Reg. Affairs of the H. Comm. on Oversight & Gov’t Reform, 113th Cong. (2014).*

With regard to when officials at the IRS knew the impact of the hard drive crash, as I have testified several times in the 11 hours of hearings since June 13th, what I was advised and knew in February was that when you took the emails that had already been provided to this committee and other investigators, and, instead of looking at them by search terms, looked at them by date, it was clear that there were fewer emails in the period up through 2011 and subsequently. And there was also, I was told, there had been a problem with Ms. Lerner's computer. It was not described to me in any greater detail than that.<sup>120</sup>

Despite knowing about the missing emails in February, Commissioner Koskinen failed to mention anything during his sworn testimony on March 26, 2014. Instead, he promised the Committee the IRS would produce all of Lerner's emails. In addition, Counselor to the Commissioner, Catherine Duval, and the IRS's National Director for Legislative Affairs, Leonard Oursler, failed to mention any problems with Lerner's emails during a meeting with bipartisan Committee staff on April 4, 2014.<sup>121</sup> Duval requested this meeting specifically to discuss how the IRS would execute the Commissioner's promise to produce the subpoenaed Lerner emails, but did not use this opportunity to inform the Committee of any issues related to Lerner's emails.

Even when the IRS finally acknowledged the missing emails on June 13, 2014, it failed to provide full and complete information to the Committee. First, the IRS stated it "confirmed" that backup tapes from the relevant period had been destroyed.<sup>122</sup> Koskinen repeated this information during his sworn testimony to the House Committee on Ways and Means on June 20, 2014. He testified:

In light of the hard-drive issue, the IRS took multiple steps over the past months to assess the situation and produce as much email as possible for which Ms. Lerner was an author or recipient. We retraced the collection process for her emails. We located, processed and included email from an unrelated 2011 data collection for Ms. Lerner. We confirmed that backup tapes from 2011 no longer existed because they have been recycled, pursuant to the IRS normal policy. We searched email from other custodians for material on which Ms. Lerner appears as author or recipient.<sup>123</sup>

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

<sup>121</sup> Meeting between Committee staff and Catherine Duval & Leonard Oursler, Internal Revenue Serv. (Apr. 4, 2014).

<sup>122</sup> Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden, Chairman, & Hon. Orrin Hatch, Ranking Member, S. Comm. on Finance encl. 3 (June 13, 2014).

<sup>123</sup> *Recent Developments in the Committee's Investigation into the Internal Revenue Service's Use of Inappropriate Criteria to Process Applications of Tax-Exempt Organizations: Hearing Before the H. Comm. on Ways & Means, 113th Cong. (2014) (statement of John Koskinen, IRS Commissioner).*

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

Rep. GOWDY. What does the word “confirmed” mean to you?

Mr. KOSKINEN. Confirmed means that somebody went back and looked and made sure that in fact any backup tapes that had existed had been recycled.<sup>124</sup>

Confirmation, by Koskinen’s or any definition, never occurred. TIGTA was able to establish that several backup tapes from this timeframe had not, in fact, been recycled. Moreover, Commissioner Koskinen did not divulge in June 2014 that the normal policy had not applied since May 22, 2013. In fact, Koskinen withheld from Congress that a notice to preserve backup tapes had been in place for over a year and that the IRS had deleted backup tapes containing as many as 24,000 emails during that time.<sup>125</sup>

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

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

Mr. KOSKINEN. There’s no indication. I have said, we’ve gone to great lengths. We’ve retraced the process for producing her email twice just to make sure that no email was missing. We understand the importance of this investigation. We’ve gone to great lengths to spend a significant amount of money trying to make sure that there is no email that is required that has not been produced.<sup>126</sup>

The Committee subsequently learned that, contrary to Commissioner Koskinen’s assertions, some backup material did exist. TIGTA informed the Committee on July 29, 2014, that at least some backup tapes were not overwritten by the IRS.<sup>127</sup> TIGTA also told the Committee it located Microsoft Exchange server drives from the relevant period the IRS had not searched

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<sup>124</sup> *An Update on the IRS Response to Its Targeting Scandal: Hearing Before the Subcomm. on Econ. Growth, Job Creation & Reg. Affairs of the H. Comm. on Oversight & Gov’t Reform*, 113th Cong. (2014).

<sup>125</sup> Email from Terrance Milholland, Internal Revenue Serv. to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, (carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv.) (May 22, 2013).

<sup>126</sup> *IRS Commissioner John Koskinen: Hearing Before the H. Comm on Ways and Means*, 113th Cong. (2014).

<sup>127</sup> Conference call between Treasury Inspector Gen. for Tax Admin. and Cong. Staff (July 29, 2014).

because it was under the mistaken belief the drives had been destroyed.<sup>128</sup> The IRS never bothered to determine whether the drives had in fact been destroyed.

Additionally, Steven Manning, the Deputy Chief Information Officer at the IRS from 2009 until March 2015, stated that the IRS made no effort to recover information from the backup tapes. Manning was the point person on issues related to the IT component of e-discovery. He testified:

Q. Did the Commissioner ever ask for the backup tapes to be forensically examined?

A. Not to me. Not that I recall—not to me.<sup>129</sup>

For four months, from February 2014 to June 2014, Commissioner Koskinen withheld vital information about the IRS's ability to comply with the Committee's subpoena for all of Lerner's emails. Even after claiming Lerner's emails were missing, Koskinen continued to provide incomplete and misleading information about the IRS's efforts to recover them. As recently as September 12, 2014, Koskinen insisted Lerner's emails were permanently missing. In a letter to Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs Chairman Jim Jordan regarding whether Lerner's emails might be recoverable from backup tapes maintained by the IRS, Koskinen wrote: "We have seen no indication that any email data from the June 2011 timeline exists or is accessible on these [backup] tapes."<sup>130</sup>

This statement by Commissioner Koskinen was false. On November 21, 2014, TIGTA notified congressional investigators that it located a significant portion of Lerner's "missing" emails.<sup>131</sup> TIGTA found the emails among hundreds of "disaster recovery tapes" that were used to back up the IRS email system.<sup>132</sup>

## **B. The Committee Learned Lois Lerner's Emails Are Lost**

Following months of noncompliance with the Committee's subpoenas, the IRS finally informed Congress on June 13, 2014 that it had lost a portion of Lerner's emails. The IRS cited a hard drive crash in 2011 as the cause for the loss.<sup>133</sup> The apparent hard drive crash compromised Lerner's emails from January 2009 to April 2011, a time period critical to the Committee's investigation.<sup>134</sup> Four days later, the IRS contacted Congress again, this time to

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

<sup>129</sup> Transcribed interview of Steven Manning, Internal Revenue Serv., in Wash., D.C. (April 6, 2015).

<sup>130</sup> Letter from John Koskinen, Internal Revenue Serv., to Rep. Jim Jordan, Chairman, Subcomm. on Economic Growth, Job Creation, and Regulatory Affairs (Sep. 12, 2014).

<sup>131</sup> Rachel Bade, *Thousands of lost Lois Lerner IRS emails found by IG*, POLITICO, Nov. 23, 2014.

<sup>132</sup> Susan Ferrechio, *30,000 missing emails from IRS' Lerner recovered*, WASH. EXAMINER, Nov. 22, 2014.

<sup>133</sup> Letter from Leonard Oursler, Nat'l Dir. for Legislative Affairs, Internal Revenue Serv., to Hon. Ron Wyden, Chairman, S. Comm. on Finance & Hon. Orrin Hatch, Ranking Member, S. Comm. on Finance (June 13, 2014), encl. 3, at 7 (carbon copy to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform) [hereinafter June 13, 2014 Letter].

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

explain that it had also lost the emails of other IRS officials. All were relevant figures in the Committee's investigation.<sup>135</sup>

The chain of events that eventually led the IRS to disclose the missing emails began on April 23, 2014, when the Committee wrote to the Justice Department about a new revelation that Richard Pilger, Director of the Justice Department's Election Crimes Branch, spoke with Lerner about coordinating with the IRS to prosecute tax-exempt applicants.<sup>136</sup> The Committee's letter included a request for "[a]ll documents and communications between or among Lois Lerner and employees of the Department of Justice for the period of January 1, 2009, through the present."<sup>137</sup>

On May 20, 2014, the Committee subpoenaed the Justice Department for the documents described in the April 23, 2014 letter.<sup>138</sup> A May 28, 2014 production from the Justice Department included additional emails sent between Pilger and Lerner.<sup>139</sup> These emails were not contained in any prior document production from the IRS to the Committee. After the Committee obtained emails that demonstrated the IRS's production of emails in response to the subpoena was incomplete, the IRS came clean.<sup>140</sup>

Late in the afternoon on Friday, June 13, 2014, the IRS notified Congress that due to a hard drive crash, Lois Lerner's emails to and from other IRS employees from January 2009 to April 2011 were missing.<sup>141</sup> According to the IRS, because Lerner's hard drive had crashed in mid-2011, an unknown number of federal records were permanently destroyed.<sup>142</sup> The IRS, therefore, was unable to recover the emails Lerner sent and received during that key period. This admission was the first time that the IRS gave any indication it did not possess all of Lerner's emails covered by the subpoena. The White House and Treasury Department learned that Lerner's emails were missing months earlier.<sup>143</sup>

In written testimony submitted to the Committee in advance of a June 23, 2014 hearing, Commissioner Koskinen explained that IRS officials first discovered the possibility that Lerner's computer may have malfunctioned in February 2014 when gathering emails responsive to

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<sup>135</sup> Rachael Bade, *GOP: IRS Lost More Emails in Tea Party Affair*, POLITICO, June 17, 2014 [hereinafter Bade, *IRS Lost More Emails*].

<sup>136</sup> Letter from Members, H. Comm. on Oversight & Gov't Reform, to Hon. Eric Holder, Attorney Gen., U.S. Dep't of Justice (Apr. 23, 2014) [hereinafter Apr. 23, 2014 Letter]; Email from Richard Pilger, Dir., Election Crimes Branch, U.S. Dep't of Justice, to Lois G. Lerner, Internal Revenue Serv. (May 8, 2013). [IRSR 209188].

<sup>137</sup> Apr. 23, 2014 Letter, *supra* note 138.

<sup>138</sup> Subpoena from H. Comm. on Oversight & Gov't Reform to Hon. Eric Holder, Attorney Gen., U.S. Dep't of Justice (May 20, 2014).

<sup>139</sup> Letter from Peter J. Kadzik, Principal Deputy Asst. Attorney Gen., U.S. Dep't of Justice, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 28, 2014).

<sup>140</sup> June 13, 2014 Letter, *supra* note 133.

<sup>141</sup> *Id.*

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

<sup>143</sup> *IRS Obstruction: Lois Lerner's Missing Emails, Part I: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong., at 170 (June 23, 2014) (question and answer with Rep. Jordan) [hereinafter June 23, 2014 Hearing]; Josh Hicks, *IRS Email Controversy Continues this Week with Two Hearings*, WASH. POST, June 23, 2014; Rachel Bade, *IRS Chief Defiant on Lois Lerner Email Loss*, POLITICO, June 20, 2014.

congressional requests.<sup>144</sup> It was at this point that IRS officials first noticed a discrepancy in the distribution of the dates on her emails.<sup>145</sup> According to testimony obtained from Thomas Kane, IRS Deputy Associate Chief Counsel for Procedure and Administration, senior IRS leadership first became concerned about the possibility that Lerner’s emails were missing on February 2, 2014, and confirmed that her hard drive had crashed just two days later.<sup>146</sup> IRS officials then briefed Commissioner Koskinen in February about this issue.<sup>147</sup> Commissioner Koskinen testified in June 2014 that IRS Information Technology professionals “learned additional facts regarding Lerner’s computer crash in mid-2011” during a search for Lerner emails in mid-March 2014.<sup>148</sup> Koskinen’s written and oral testimony not only indicate that IRS employees knew about a potential problem with Lerner’s computer at least four months before telling Congress, but also before Commissioner Koskinen’s March 26, 2014 testimony before the Committee.

Despite receiving questions during the Committee’s March 26, 2014 hearing directly pertaining to the collection of Lerner’s emails, Commissioner Koskinen assured Members that the IRS “was already starting” to gather Lerner’s emails—never mentioning the possibility that any of her emails were irretrievable.<sup>149</sup> Commissioner Koskinen testified under oath that the IRS would respond to the subpoena, again failing to mention the possibility that some documents covered by the subpoena were lost.<sup>150</sup> Months later, however, during testimony before the Committee, Commissioner Koskinen admitted that at the time of the Committee’s March 26, 2014 hearing, “he knew there’d been a problem” with Lerner’s emails.<sup>151</sup>

### **C. Commissioner Koskinen Failed to Disclose Knowledge of Additional Hard Drive Crashes**

On June 17, 2014—four days after the IRS admitted that an unknown number of Lerner’s emails were lost—the agency informed Congress that it was not able to produce emails for other key officials at the center of the Committee’s investigation.<sup>152</sup> Specifically, the IRS informed Congress that six more employees’ hard drives failed, causing the agency to lose emails for officials who were central to the IRS targeting investigation.<sup>153</sup> Commissioner Koskinen later adjusted the number of affected employees to eight.<sup>154</sup> Even more troubling, the IRS remained unsure if additional employees’ hard drives crashed, raising questions as to the extent to which the Committee received all emails relevant to its investigation.<sup>155</sup> Commissioner Koskinen

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<sup>144</sup> H. Comm. on Oversight & Gov’t Reform, Written Testimony of John A. Koskinen, Comm’r, Internal Revenue Serv. (June 23, 2014), at 2 [hereinafter Koskinen Written Testimony, June 23, 2014].

<sup>145</sup> *Id.*

<sup>146</sup> Kane Tr. at 45.

<sup>147</sup> June 23, 2014 Hearing, *supra* note 143, at 38 (question and answer with Rep. Mica).

<sup>148</sup> Bade, *IRS Chief Defiant*, *supra* note 135.

<sup>149</sup> Mar. 26, 2014 Hearing, *supra* note 3, at 30.

<sup>150</sup> *Id.*

<sup>151</sup> June 23, 2014 Hearing, *supra* note 143, at 31 (question and answer with Chairman Issa).

<sup>152</sup> Bade, *IRS Lost More Emails*, *supra* note 135.

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

<sup>154</sup> Koskinen Written Testimony, June 23, 2014, *supra* note 144, at 4.

<sup>155</sup> Bade, *IRS Chief Defiant*, *supra* note 135.

testified before the Committee that the IRS is “still looking” into whether additional hard drives crashed, and that he is unaware as to “what the final number will be.”<sup>156</sup>

The IRS apparently lost emails for Supervisory Public Affairs Specialist Michelle Eldridge, Agent Kimberly Kitchens, Agent Julie Chen, Supervisory Agent Tyler Chummy, and Agent Nancy Heagney.<sup>157</sup> According to the IRS, the missing data for seven of the eight officials came from the period under investigation.<sup>158</sup> The IRS explained that it relied on employees to archive emails themselves on their personal computers, rather than preserving records by automatically backing up emails or by other means.<sup>159</sup>

Despite the Committee’s frequent, ongoing correspondence with the IRS regarding its document productions pursuant to the Committee’s subpoena, the IRS never mentioned—until thirteen months after the Committee’s initial document request—the possibility that it would not fully produce Lois Lerner’s emails or those of any other IRS official.

Even when asked directly whether there were any other anomalies in the data retrieval for the Committee’s requests, Commissioner Koskinen testified that he was not aware of any. He testified:

Rep. MASSIE. And what I want to ask you now is: Are there any other anomalies in the data or in the retrieval of emails that you can think of now so we can avoid having a second hearing on this in 6 months?

Mr. KOSKINEN. That’s a fair question, a good question. I’m not aware of any.

Rep. MASSIE. Okay. So there’s nothing like somebody came to you—

Mr. KOSKINEN. Other than we’re pursuing the other custodians.

Rep. MASSIE. Right. The other eight hard drives that have crashed.

Mr. KOSKINEN. Right. That’s what we knew last week. We’re still looking. I don’t know what the final number will be.

Rep. MASSIE. Okay. So you understood my question?

Mr. KOSKINEN. I understand your question.

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<sup>156</sup> June 23, 2014 Hearing, *supra* note 143, at 137 (question and answer with Rep. Chaffetz).

<sup>157</sup> Bade, *IRS Lost More Emails*, *supra* note 135.

<sup>158</sup> *Id.*; Koskinen Written Testimony, June 23, 2014, *supra* note 144, at 4.

<sup>159</sup> Bade, *IRS Lost More Emails*, *supra* note 135.

Rep. MASSIE. A hint of bad news that was similar to the bad news we had in February, I'm asking you to just share it now.

Mr. KOSKINEN. And I've said I do not know of any other bad news, as you put it.<sup>160</sup>

The Committee later learned, however, that the IRS became aware of additional hard drive crashes one week before the June 23, 2014 hearing. During a transcribed interview with Committee staff, Thomas Kane, the IRS Deputy Associate Chief Counsel for Procedure and Administration, testified that the IRS learned of as many as twenty additional hard drive crashes on June 16, 2014. Commissioner Koskinen, however, failed to disclose the extent of these additional crashes, or that there were complications of any kind with respect to the agency's efforts to comply with the Committee's subpoenas. Kane testified:

Q. Sir, according to a news report, there were hard drive failures from other IRS custodians; is that right?

A. Yes. There were—well, there are—were identified potential hard drive problems, yes.<sup>161</sup>

Kane later testified that he became aware of the additional hard drive failures on June 16, 2014. He testified:

Q. And, sir, when did you personally become aware of those other hard drive problems?

A. On the Monday morning before that that first briefing took place.

Q. The briefing with Ways and Means?

A. Yes.

Q. So June 16?

A. That's right. I believe it was on Monday morning.<sup>162</sup>

Kane further testified:

Q. Do you know how many custodians, in addition to the seven or eight identified at Ways and Means?

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<sup>160</sup> June 23, 2014 Hearing, *supra* note 143, at 136-37 (question and answer with Rep. Massie).

<sup>161</sup> Kane Tr. at 165.

<sup>162</sup> *Id.* at 165-66.

- A. I don't recall the exact number. It was less than 20, and again, some of these people were identified without any—these people were identified without any real investigation as to knowing, you know, what was reported or why and what the consequences of anything that may have been wrong.<sup>163</sup>

Kane explained that the IRS officials whose hard drives crashed included Andy Megosh, a group manager in EO Guidance, Kimberly Kitchens, an IRS revenue agent in Cincinnati, Justin Lowe, the Technical Advisor to the Commissioner of Tax-Exempt and Government Entities, and David Fish, Manager of EO Guidance—all relevant figures to the Committee's inquiry.<sup>164</sup>

When Commissioner Koskinen appeared before the Committee on June 23, 2014, he had a responsibility to provide a candid account of the additional hard drive crashes and whether the crashes could interfere with the agency's ability to respond to the subpoenas. Koskinen's testimony that there were no other anomalies in the data collection indicates that he failed to fully disclose to the Committee all of the details the IRS knew at that time about the extent of the additional hard drive crashes.

#### **D. The IRS Made No Effort to Recover Lois Lerner's Email Archive**

Koskinen testified that in 2011, the IRS maintained a disaster recovery system designed to back up computer contents for six months.<sup>165</sup> During a June 23, 2014 Committee hearing, Commissioner Koskinen explained that the IRS made no effort to recover Lerner's email archive from the six-month backups after she initially detected problems with her computer in June 2011.<sup>166</sup>

When the IRS informed Congress of Lerner's hard drive crash, the agency stated that IT professionals tried "multiple processes to recover the information stored on her computer's hard drive," but the "hard drive was determined at the time to be unrecoverable by the IT professionals."<sup>167</sup> IT professionals, however, never attempted to recover her emails from the backup tapes.<sup>168</sup> According to Commissioner Koskinen, the IRS failed to pursue recovery because it was "costly."<sup>169</sup> He testified:

Rep. CHAFFETZ. Thank the chairman. My understanding is that the backup of emails was only—only lasted for 6 months. Is that correct?

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<sup>163</sup> *Id.* at 169.

<sup>164</sup> *Id.* at 172.

<sup>165</sup> June 23, 2014 Hearing, *supra* note 133, at 92-93 (question and answer with Rep. Chaffetz).

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

<sup>167</sup> June 13, 2014 Letter, *supra* note 133.

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

<sup>169</sup> June 23, 2014 Hearing, *supra* note 143, at 93 (question and answer with Rep. Chaffetz).

Mr. KOSKINEN. Yes. It's actually a disaster recovery system, and it backs up for 6 months in case the entire system goes down.

Rep. CHAFFETZ. And that was in place in 2011?

Mr. KOSKINEN. That was the rule in 2011, policy.

Rep. CHAFFETZ. So when Lois Lerner figured out on June 13 that her computer crashed and you've – there have been emails showing that she was going to great lengths to try to get that recovered, why didn't they just go to that 6-month tape?

Mr. KOSKINEN. Because that 6-month tape is a disaster recovery tape that has all of the emails on it and is a very complicated tape to actually extract emails for. But I have not seen any emails to explain why they didn't do it. So I—it would be difficult, but I don't know why they didn't.

Rep. CHAFFETZ. But you said that the IRS was going to extraordinary lengths to give it to the recovery team.

Mr. KOSKINEN. That's correct. That's correct.

Rep. CHAFFETZ. But it's back up on tape?

Mr. KOSKINEN. For 6 months. Yes.

Rep. CHAFFETZ. And that was within the 6-month window. So why didn't you get them off the backup?

Mr. KOSKINEN. All I know about that is that the backup tapes are computer recovery tapes that put everything in one lump and extracting individual emails out of that is very costly and difficult and it was not the policy at the time.

Rep. CHAFFETZ. Did anybody try?

Mr. KOSKINEN. I have no idea—indication that they did.

Rep. CHAFFETZ. So you have multiple emails showing that she was trying to recover this. The testimony of the IRS that

they were trying desperately—in fact, you got a forensic team to try to extract this. You went to great lengths. You made a big point over the last week about all the efforts you were going through. But they were backed up on tape and you didn't do it?

Mr. KOSKINEN. As far as I know, they did not. But they did have, as I noted in the email, she had 3 months' worth of emails at that time going from April—or 2 months from April to—<sup>170</sup>

Despite the IRS's policy in 2011 to retain six-month backup tapes of the contents of employees' computers, IT professionals apparently neglected to use all available resources at that time to retrieve Lerner's emails, including foregoing any attempt to recover her emails from the agency's own disaster recovery system.

**E. Commissioner Koskinen's Misleading Statements That No Backup Tapes Exist**

Subsequently, the Committee learned that contrary to Commissioner Koskinen's assertions, some backup material did exist. The IRS's inspector general informed the Committee on July 29, 2014, that at least some backup tapes were not overwritten by the IRS.<sup>171</sup> The inspector general also told the Committee it located Microsoft Exchange server drives from the relevant period, and that the IRS had not searched those drives because agency staff were under the mistaken belief the drives had been destroyed.<sup>172</sup> The IRS never bothered to determine whether this was true.

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

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

Mr. CAMUS. Correct. We took possession of—740—the initial set of backup tapes on July 1, roughly 15 days after we started our investigation.<sup>173</sup>

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<sup>170</sup> *Id.* at 92-93.

<sup>171</sup> Conference call between Treasury Inspector Gen. for Tax Admin. and Cong. Staff (July 29, 2014).

<sup>172</sup> *Id.*

<sup>173</sup> *IRS: TIGTA Update Part II: Hearing Before the H. Comm on Oversight and Gov. Reform*, 114th Cong. (2015).

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

## 1. Poor IRS Leadership Led to Destruction of Backup Tapes

The IRS information technology department records backups incrementally on a daily basis, with a full backup performed weekly.<sup>174</sup> Before May 2013, the IRS reused and recycled backup tapes every six months as a cost saving measure.<sup>175</sup>

On May 22, 2013, the IRS Chief Technology Officer Terence Milholland sent an email directive to senior staff ordering the preservation of electronic email media indefinitely.<sup>176</sup> That email, titled “Information Retention Policy Revision,” changed the previous policy of keeping backup tapes only for six months.<sup>177</sup> Milholland’s order stated:

Given the current environment and ongoing investigations, do not destroy/wipe-reuse and of the existing backup tapes for email, or archiving of other information from IRS personal computers. Further, do not reuse or refresh or wipe information from any personal computer that is being reclaimed/returned/refreshed/updated from any employee or contractor of the IRS. Finally, effective immediately, the email retention policy for backups is to be indefinite rather than 6 months.<sup>178</sup>

Milholland continued: “In other words, retain everything to do with email or information that may have been stored locally on a personal computer.”<sup>179</sup>

In an interview with TIGTA, Milholland stated he was “blown away” at the revelation that backup tapes were degaussed in March 2014, ten months after he issued this directive.<sup>180</sup>

Despite the need to preserve documents for the ongoing investigations by Congress, the Department of Justice, and TIGTA, IRS senior leadership made no effort to ensure the IRS IT department and lower level personnel understood the impact of, or complied with, the preservation order. Commissioner Koskinen was made aware of the existence of the preservation order shortly after his appointment as IRS Commissioner.<sup>181</sup> Yet, he did nothing to

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<sup>174</sup> TIGTA report, *supra* note 4, at 12.

<sup>175</sup> *Id.* at 12.

<sup>176</sup> Email from Terrance Milholland, Internal Revenue Serv., to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, (carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv.) (May 22, 2013).

<sup>177</sup> TIGTA report, *supra* note 4, at 4.

<sup>178</sup> Email from Terrance Milholland, Internal Revenue Serv., to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, (carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv.) (May 22, 2013).

<sup>179</sup> *Id.*

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

<sup>181</sup> *Id.* at 1272.

ensure that his staff complied. He neither reissued it nor sent out an email reminding IRS personnel of its importance. In fact, he took no action of any kind with respect to the order. When asked by TIGTA if the email directive was sufficient, Koskinen acknowledged the matter “probably could have been handled differently.”<sup>182</sup>

Koskinen repeatedly missed opportunities to ensure compliance with the preservation order. Koskinen failed to raise the issue in February 2014 upon learning of the gap in emails; he failed to ensure that the Media Management Midnight Unit (the team that destroyed the backup tapes) properly understood the order; and failed to make certain that individuals who ordered the destruction of the specific media, in this instance the backup tapes, properly understood the preservation order.<sup>183</sup> Camus testified:

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

Mr. CAMUS. There is very much confusion, and I’m not certain there was appropriate management oversight of that directive.<sup>184</sup>

In February 2014, upon learning that emails may be missing, the IRS should have investigated whether backup tapes existed, and whether the instruction not to destroy documents was properly understood and executed throughout the agency. Counselor to the Commissioner, Catherine Duval, testified her first reaction upon discovering the gap in the Lerner production on February 2, 2014, was to revisit the preservation order. During a transcribed interview, Duval testified:

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

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

Q. Okay. What was your reaction?

A. My reaction was the next day I talked to the IT people and other folks in the Office of Chief Counsel about the need to look for

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

<sup>183</sup> *Id.* at 16.

<sup>184</sup> *IRS: TIGTA Update Part II: Hearing Before the H. Comm on Oversight and Gov. Reform*, 114th Cong. (2015).

backup tapes from the relevant time period, to secure Ms. Lerner's laptop, to do a quality control check on the document preservation and collection process. And to learn what we could learn about that.<sup>185</sup>

Despite her instinct to confirm agency-wide compliance with the document preservation order, it does not appear that occurred. Had Duval taken action, the destruction of the backup tapes would have halted. When TIGTA investigated the missing emails, however, the gross mismanagement of the preservation notice came to light. TIGTA found a breakdown in communications following Milholland's email directive resulted in the failure to preserve backup tapes. Had IRS managers taken simple steps to ensure compliance with the order, the tapes likely would not have been destroyed.

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

Robert Lyewsang, an IT specialist at the IRS, told TIGTA he never received a copy of the preservation order, nor did anyone in his chain of command explain the need to preserve the backup tapes. Because of this, he sent the Form 3210 to the Media Management Midnight Team formally authorizing the destruction of the backup tapes.<sup>186</sup>

Lyewsang authorized the destruction of the tapes because Steve Warren, the manager of IT backup equipment nationwide, told him the tapes were not needed and the room where they were located needed to be cleaned out. Warren told Lyewsang the agency no longer needed the backup tapes sometime in the fall of 2013.<sup>187</sup> Lyewsang told TIGTA that the IRS wanted to remodel the space to house a new network operations center, and he was being pressured to move the backup tapes.<sup>188</sup> Lyewsang's intern testified under oath about the disorganized cleaning process, specifically that the room in question had been a year overdue for clearing out to reduce computer space.<sup>189</sup>

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

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<sup>185</sup> Transcribed interview of Catherine Duval, Internal Revenue Serv. (July 31, 2014).

<sup>186</sup> *Id.* at 964, 967.

<sup>187</sup> *Id.* at 963.

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

<sup>189</sup> *Id.* at 1202.

In June 2014, after the IRS acknowledged the missing Lerner emails, the agency stated that it “confirmed that backup tapes from 2011 no longer exist because they have been recycled” but failed to disclose when this occurred.<sup>190</sup> Commissioner Koskinen repeated this information during his sworn testimony to the House Committee on Ways and Means on June 20, 2014, where he testified that the IRS went to “great lengths” to recover Lerner’s emails.

The Committee learned these statements were false. Not only did the IRS fail to “confirm” the tapes had been destroyed, the backup tapes were swiftly recovered by TIGTA when it became aware of the issue in June 2014. Further, had the IRS either abided by its preservation notice of May 22, 2013 or looked for backup tapes upon learning of the problems in the email production in February 2014, up to 24,000 additional Lerner emails may have been recovered. The IRS, however, failed on both accounts.

## 2. The Current IRS Email System Backup Tapes

In May 2011, the IRS migrated its email backup system from New Carrollton, Maryland, to Martinsburg, West Virginia.<sup>191</sup> At that time, and until May 22, 2013, IRS policy was to recycle the backup tapes every six months.<sup>192</sup> On May 22, 2013, IRS Chief Technology Officer Terrance Milholland issued a policy directive via email titled “Information Retention Policy Revision,” changing the backup tape recycle policy to an indefinite retention period.<sup>193</sup>

TIGTA learned about Lois Lerner’s hard drive crash and resulting gaps in the IRS’s production on June 13, 2014, the same day Congress and the American public learned of the problem, but months after the IRS discovered the missing emails.<sup>194</sup> TIGTA promptly opened an investigation to determine whether the emails the IRS reported as lost could be recovered.

Two weeks later, on June 30, 2014, TIGTA requested the IRS provide any backup tapes that could contain Lerner’s emails from January 1, 2008, through December 31, 2011.<sup>195</sup> In response to this request, the IRS provided 744 tapes that may have been used to back up Lerner’s email account.<sup>196</sup> From these tapes, TIGTA found five sets of weekly backups of Lerner’s email beginning on November 20, 2012, approximately six months before Milholland’s backup tape

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<sup>190</sup> Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden, Chairman, & Hon. Orrin Hatch, Ranking Member, S. Comm. on Finance, encl. 3 (June 13, 2014).

<sup>191</sup> *IRS: TIGTA Update Part II, Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. 4 (2015) (written testimony of Hon. J. Russell George and Timothy P. Camus, TIGTA) (hereinafter “June 25 TIGTA testimony”).

<sup>192</sup> TIGTA report, *supra* note 4, at 4.

<sup>193</sup> Email from Terrance Milholland, Internal Revenue Serv. to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, (carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv.) (May 22, 2013).

<sup>194</sup> TIGTA report, *supra* note 4, at 1.

<sup>195</sup> *Id.* at 13.

<sup>196</sup> *Id.*

retention policy directive took effect.<sup>197</sup> According to TIGTA, these tapes are the oldest known Lerner email account backups available.<sup>198</sup>

TIGTA compared the Lerner emails it recovered from these backup tapes to the IRS's production to Congress and found over 1,000 new emails the IRS never produced.<sup>199</sup>

Timothy Camus explained to the Committee how TIGTA found the backup tapes for the current IRS email system: "To the best we can determine through the investigation, they just – *they simply didn't look for those emails*. So for the 1,000—over 1,000 emails that we found on the backup tapes—we *found them because we looked for them*."<sup>200</sup> In fact, the IG determined the agency failed to look in five of the six possible sources of "electronic media, all of which the IRS had in their possession."

### 3. The Decommissioned Email Server Backup Tapes

When the IRS moved the email server from New Carrollton, Maryland to Martinsburg, West Virginia, it turned off the old email server but left it in place.<sup>201</sup> In December 2011, IRS IT employees disassembled the server and treated the server hard drives and backup tapes as junk.<sup>202</sup> In April 2012, most, but not all, of these parts were destroyed by an IRS contractor. In December 2013, months after the preservation order was issued, the remaining servers and backup tapes were shipped to Martinsburg for destruction.<sup>203</sup> These servers and tapes remained in Martinsburg until March 2014 until Lyewsang sent the proper paperwork to destroy the hard drives and backup tapes.<sup>204</sup>

On or about March 4, 2014, one month after the IRS realized it did not have all of Lerner's emails, IRS employees on the Media Management Midnight Unit in Martinsburg, West Virginia, magnetically erased, or degaussed, 422 backup tapes that likely contained full, weekly backups of Lerner's email account dating back to late November or December 2010.<sup>205</sup> During its investigation, TIGTA found and examined these tapes, but they contained no recoverable data.<sup>206</sup> As discussed above, the employees did not destroy the server hard drives shipped with the backup tapes because they incorrectly believed the preservation order only applied to hard drives.<sup>207</sup>

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<sup>197</sup> *Id.* at 14.

<sup>198</sup> *Id.* at 14.

<sup>199</sup> *Id.* at 15.

<sup>200</sup> *IRS: TIGTA Update Part II, Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015) (emphasis added).

<sup>201</sup> June 25 TIGTA testimony, *supra* note 191, at 4.

<sup>202</sup> TIGTA report, *supra* note 4, at 3.

<sup>203</sup> *Id.*

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

<sup>205</sup> *Id.* at 17.

<sup>206</sup> June 25 TIGTA testimony, *supra* note 191, at 7.

<sup>207</sup> TIGTA report, *supra* note 4, at 17.

Notwithstanding Milholland's May 2013 directive not to destroy any of the backup tapes for email, the IRS continued to degauss backup tapes until approximately June 2014.<sup>208</sup> TIGTA estimates the IRS's failure to comply with the May 2013 preservation order and congressional subpoenas resulted in the loss of up to 24,000 Lerner emails.<sup>209</sup> Camus testified before the Committee about the destruction of these tapes. He stated:

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

Mr. CAMUS. *It's an unbelievable set of circumstances that would allow that to happen.*<sup>210</sup>

Despite the known gaps in Lerner's emails identified in February 2014, the IRS never asked any of the employees in question to look for backup tapes or the server hard drives associated with the decommissioned server.<sup>211</sup> TIGTA made the first request for these tapes in June 2014. TIGTA found, if the IRS had actually conducted a search for backup tapes for Lerner's email account, the agency would have probably identified the tapes before they were degaussed in March 2014.<sup>212</sup>

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

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

Mr. CAMUS. I would not.<sup>213</sup>

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

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

Mr. CAMUS. We believe there were six.

Rep. WALBERG. Namely?

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<sup>208</sup> *Id.* at 17.

<sup>209</sup> June 25 TIGTA testimony, *supra* note 191, at 8.

<sup>210</sup> *IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015) (emphasis added).

<sup>211</sup> TIGTA report, *supra* note 4, at 18.

<sup>212</sup> *Id.*

<sup>213</sup> *IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015).

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

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

Mr. CAMUS. We're not aware that they searched any one in particular. They did—it appears they did look into initially whether or not the hard drive had been destroyed, but they didn't go much further than that.<sup>214</sup>

The lack of due diligence with respect to retrieving Lerner's missing emails was compounded by a stunning ignorance of where those missing emails might reside. On June 20, 2014, after the email problems became public, Koskinen testified he was not even aware as to whether or not Lerner had a Blackberry. He testified:

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

Mr. KOSKINEN. I do not know.

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

Mr. KOSKINEN. I can find that out and be happy to let you know.<sup>215</sup>

Commissioner Koskinen's posture with respect to the Committee's efforts to obtain Lerner's emails delayed the Committee's investigation. Commissioner Koskinen's credibility was further damaged when TIGTA found approximately 1,000 missing Lerner emails that Commissioner Koskinen previously claimed were permanently lost. In fact, TIGTA located a number of backup tapes that yielded some emails within fifteen days. Timothy Camus, the TIGTA Deputy Inspector General for Investigations, testified:

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

Mr. CAMUS. Correct. We took possession of—740—the initial set of backup tapes on July 1, roughly 15 days after we started our investigation.<sup>216</sup>

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<sup>214</sup> IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight and Gov't Reform, 114th Cong. (2015).

<sup>215</sup> IRS Commissioner John Koskinen: Hearing Before the H. Comm. on Ways and Means, 113th Cong. (2014).

<sup>216</sup> IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight and Gov't Reform, 114th Cong. (2015).

Had the IRS taken immediate steps to locate backup tapes upon the discovery of the gap in Lerner emails in February 2014, tapes containing up to an additional 24,000 emails may not have been destroyed on March 4, 2014. Camus further testified:

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

Mr. CAMUS. To the best we can determine through the investigation, *they just simply didn't look for those emails*. So for the 1,000—over 1,000 emails that we found on the backup tapes—we found them because we looked for them.<sup>217</sup>

### **VIII. Commissioner Koskinen Should be Removed from Office**

More than two years have passed since Congress began investigating the IRS's mistreatment of conservative tax-exempt groups. After reviewing more than one million pages of documents, conducting more than 50 transcribed interviews, and holding numerous public hearings, the American people still do not have a complete accounting of how and why the IRS deprived American citizens' First Amendment rights.

On February 14, 2014, Commissioner Koskinen was served by this Committee with a subpoena for all of Lerner's emails. On March 4, 2014, under Koskinen's watch, the IRS destroyed 24,000 relevant Lerner emails. Had Koskinen taken common-sense steps to educate employees about the agency's preservation notice, or undertaken any sort of investigation once he learned that key emails were missing, he could have stopped the destruction of evidence. In the absence of Lois Lerner's testimony, her emails are critically important to the Committee's investigation. Commissioner John Koskinen's false and misleading statements to Congress about the status of Lerner's emails compounded the problem. His unwillingness to present accurate information about the missing emails delayed and hindered the Committee's efforts, perhaps permanently.

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

For these reasons, Commissioner Koskinen should be removed from office.

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<sup>217</sup> IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight and Gov't Reform, 114th Cong. (2015) (emphasis added).