

Testimony of
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Before the House Subcommittee on
Economic Growth, Job Creation and Regulatory Affairs
Hearing on the Obama Administration's Investigation of IRS Targeting
February 26, 2014

Mr. Chairman, Ranking Member, Members of the Subcommittee: thank you for inviting me.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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J.D., The Catholic University
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Lee O'Connor is a partner in Pillsbury's Washington, DC office, and leader of the law firm's federal tax controversy and tax policy group. Ms. O'Connor represents clients in civil and criminal federal tax investigations, and in disputes with other government agencies, and formulates and advises on regulatory and legislative solutions to government disputes. She has presented oral arguments in the United States Supreme Court and in the United States Courts of Appeals.

Ms. O'Connor joined Pillsbury in July 2007 after serving for six years as the Assistant Attorney General for the Tax Division of the United States Department of Justice. While at the Department of Justice, she was a member of the President's Corporate Fraud Task Force.

As Assistant Attorney General, Ms. O'Connor headed a division of more than 600 people, including 350 attorneys, and was in charge of all United States civil and criminal tax trials and appeals. Significant cases during her tenure involved corporate and individual abusive tax shelters and offshore tax evasion. She created and implemented continuing programs to coordinate parallel civil and criminal investigations and judicial proceedings with the Internal Revenue Service and United States Attorneys Offices throughout the country. In recognition of her outstanding contributions to the accomplishment of the Justice Department's mission, Ms. O'Connor received the Edmund J. Randolph Award for Outstanding Service. And for her contributions to federal tax administration and enforcement, the Commissioner of the Internal Revenue Service and the IRS Chief Counsel awarded her their highest honors.

Ms. O'Connor has been an authority in corporate tax law with the National Office of the Internal Revenue Service. She is also a CPA and, for more than 20 years, was a national tax consultant with top national accounting firms.

Ms. O'Connor has taught in the graduate tax law program of Georgetown University School of Law, and was Distinguished Adjunct Professor of Tax Policy at the George Mason University School of Law, and has long been a frequent speaker at bar conferences and business seminars.

Honors & Awards

- *Legal 500 US*, Tax Controversy (2011-2012)
- Nation's Top 50 IRS Representation Practitioners, *CPA Magazine* (2008)
- Washington's Top Lawyers, Tax, *Washingtonian* (2007)

Affiliations

Chairman, Administrative Law Group of the Federalist Society for Law and Public Policy Studies



Vice-Chairman, Board of Directors, Americans United for Life

Advisory Council, Republican National Lawyers Association

Fellow, American College of Tax Counsel

Member, National Association of Former United States Attorneys

Member, American, Federal and District of Columbia Bar Associations

Former member, Tax Executive Committee, American Institute of Certified Public Accountants

Courts

United States Supreme Court

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals for the Federal Circuit

District of Columbia Court of Appeals

United States Court of Federal Claims

United States Tax Court

Recent Speaking Engagements

"What, if any, is the Proper Role of the IRS in the Administration of Social Welfare Programs?" ABA Tax Section Mid-Year Meeting, January 24, 2014.

"Executive Branch Gone Wild? Checks and Balances in the 21st Century," Moderator, Federalist Society's National Lawyers Convention, November 16, 2013.

Teleforum with Peter Schweizer about this book "Extortion: How Politicians Extract Your Money, Buy Votes, and Line Their Own Pockets," November 7, 2013

Teleforum with Clark Neily about his book "Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government," October 10, 2013

Teleforum with Christopher deMuth about his essay, "The Bucks Start Here," October 3, 2013

"The Use and Abuse of the Internal Revenue Code - The Chances for Meaningful Tax Reform in 2013." National Black Chamber of Commerce's 21st Annual Convention - Innovation: Growth, Profit & Prosperity, Palm Beach, FL, July 25, 2013

"A Stewardship Challenge: Harmonizing Ecology, Prosperity and Liberty," Foundation for Research on Economics & the Environment Conference, Three Forks, Montana, July 15-19, 2013.

"*City of Arlington* – How Much Deference?" Moderator, Federalist Society Administrative Law and Regulation Practice Group Teleforum, May 20, 2013

"Prospects for Meaningful Tax Reform in 2013." Republican National Lawyers



Association 14th Annual National Policy Conference, Washington, DC, April 25, 2013

"The Use and Abuse of the Internal Revenue Code, and Chances for Tax Reform," Ave Maria Law School, Naples, Florida, April 18, 2013

"Hot Issues Appellate Tax Litigation," Moderator, Federal Bar Association 36th Annual Tax Law Conference, Washington, D.C., March 2, 2012

"The Use and Abuse of the Internal Revenue Code," University of Washington School of Law, Seattle, WA, May 13, 2011

"What Today's Lawmakers Could Learn from President Reagan's Tax Policy," Republican National Lawyers Association's 12th Annual National Policy Conference, Washington, D.C., May 6, 2011

"U.S. Tax Reform and International Trends: Implications for Global Business and U.S. Competitiveness," Council on Foreign Relations Corporate Meeting, Washington, D.C., June 18, 2010

"Federal and State Tax Laws in 2010 and Thereafter," Republican National Lawyers Association's 11th Anniversary National Policy Conference, Washington, D.C., April 16, 2010

"What Tax Law Can Tell Us About How 'Health Care Reform' Will Work," Presentation to Harvard Law School Federalist Society with Abigail Adams Society, Cambridge, MA, March 25, 2010

Publications

IRS Will Scrutinize Fringe Benefits During Employment Tax Audits, 8/3/2010

Supreme Court to Decide Application of Six-Year Limitations Statute to Tax Refund Claim, 12/21/2007

Committee on Oversight and Government Reform
Witness Disclosure Requirement - "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name:

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2011. Include the source and amount of each grant or contract.

none

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

none

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2010, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

none

I certify that the above information is true and correct.

Signature:

Date:

2/25/2014