The Heritage Foundation
LEADERSHIP FOR AMERICA

214 Massachusetts Avenue, NE • Washington DC 20002 • (202) 546-4400 • heritage.org

LEGISLATIVE TESTIMONY

IS THE OBAMA ADMINISTRATION CONDUCTING A SERIOUS INVESTIGATION OF IRS TARGETING?

Testimony before the House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs

February 26, 2014

Hans A. von Spakovsky
Senior Legal Fellow
The Heritage Foundation

My name is Hans A. von Spakovsky.[1] I am a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

[1] The title and affiliation are for identification purposes. The staff of The Heritage Foundation testify as individuals discussing their own independent research. The views expressed here are my own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees, and do not reflect support or opposition for any specific legislation. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under § 501(c) (3) of the Internal Revenue Code. It is privately supported and receives no funds from government at any level; nor does it perform any government or other contract work. Heritage is also the most broadly supported think tank in the United States, with nearly 700,000 supporters in every state, 78% of whom are individuals, 17% are foundations, and 5% are corporations. The top five corporate givers provide The Heritage Foundation with 2% of its 2011 income. A list of major donors is available from The Heritage Foundation upon request.

I spent four years at the Justice Department as a career civil service lawyer, including three years as Counsel to the Assistant Attorney General for the Civil Rights Division. I helped coordinate the investigation of many cases in the voting and elections area. That included working with the Public Integrity Section of the Criminal Division of the Justice Department when there were cases in which there appeared to be both civil rights violations and potential criminal violations of federal election laws. Election cases were the only type of cases I ever saw in which there was a potential intersection between the Civil Rights Division and the Public Integrity Section.

After leaving the Justice Department, I spent two years as a commissioner at the Federal Election Commission. At the FEC, we also worked with the Public Integrity Section in cases in which there were potential civil and criminal violations of the Federal Election Campaign Act.

As this committee is well aware, on May 10, 2013, former IRS official Lois Lerner revealed that the IRS had been targeting Tea Party and other conservative organizations in a presentation at a conference in Washington, D.C. sponsored by the American Bar Association.[2] This was apparently made public because of the pending release of a May 14 report by the Inspector General for the Department of the Treasury detailing the "inappropriate criteria" used by the IRS to identify for review the applications of conservatives organizations for tax-exempt status under Section 501(c)(4) of the Internal Revenue Code.[3] These reviews "resulted in substantial delays in processing" of their applications, and the organizations were also subjected to "unnecessary information requests."[4]

On May 14, 2013, Attorney General Eric Holder announced that the Justice Department was opening an investigation and "was coordinating with the FBI to assess whether or not any laws were broken." Holder at that time called the IRS's action "outrageous and unacceptable."[5]

On January 8, 2014, the *Washington Times* reported that Committee Chairman Darrell E. Issa (R-CA) and Subcommittee Chairman Jim Jordan (D-OH) had discovered that the head of the Justice Department investigation is Barbara Kay Bosserman, a trial lawyer in the Civil Rights Division.[6] According to Federal Election Commission records, Bosserman has given $6,750 in political donations since 2004, $5,600 to President Barack Obama's presidential campaigns, $500 to the 2012 Obama Victory Fund, and $650 to the Democratic National Committee. The

---

[2] "IRS apologizes for inappropriately targeting conservative political groups in 2012 election," ASSOCIATED PRESS (May 10, 2013).
[3] "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053 (May 14, 2013).
[4] *Highlights*, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053 (May 14, 2013).
[5] Lucy Madison, "Justice Dept. to investigate IRS targeting," CBS News (May 14, 2013).
[6] Stephen Dinan, "Justice: Feds pick Obama supporter to led probe into IRS tea party targeting," WASHINGTON TIMES (Jan. 8, 2014).

Committee discovered this information only through its own investigative efforts, not from the Justice Department.

A Jan. 8 letter from the Committee to Attorney General Holder outlined the Justice Department's refusal to provide *any* information or updates on the status of the Department's investigation. The letter notes that the FBI offered to meet with Rep. Jordan to do exactly that but later "rescinded" the offer "after [Justice] Department officials apparently interfered."

It is certainly true that the FBI cannot disclose sensitive information during an ongoing criminal investigation, but an active investigation *does not* prevent the FBI and the Justice Department from giving Congress basic information regarding the status of an investigation that does not compromise their work. There is no reason why the Justice Department could not have provided this committee with a briefing on how many FBI agents and Justice Department lawyers are involved in the investigation; who the lead lawyer and supervising FBI agent are; what federal statutes the lawyers believe might have been violated; what the general plan is for investigating this matter; without identifying them specifically, what types of witnesses they have already interviewed or intend to interview (such as IRS employees in certain offices; chief officers of affected conservative organizations; investigators in the Treasury Department's Office of Inspector General, etc.).

The Justice Department and the FBI could also have generally described to the Committee how long they expect the investigation to take, what progress has been made to date, and when they expect to complete their preliminary and final review. None of this information would compromise the integrity and confidentiality of the investigation.

Yet lawyers representing dozens of the targeted conservative groups have recently testified before this Committee and have said that their clients have not been contacted or interviewed by any FBI agents.

I find that simply incredible – that nine months after the Attorney General announced he was opening an investigation, neither the FBI nor the Justice Department has conducted basic interviews with the victims to gather information about their dealings with the IRS officials and employees who may have been involved in wrongdoing.

In addition to the unjustified refusal of the Department to provide this Committee with any information about its investigation, there is the troubling selection of a Civil Rights Division lawyer, Barbara Bosserman, as the lead lawyer in the investigation.[7] This scandal involves the possibility of public corruption – misbehavior by federal employees in the Internal Revenue

[7] In testimony on Jan. 29, 2014, Attorney General Holder denied the "characterization" of Bosserman as the "lead" lawyer in the matter. *See* Melanie Hunter, "'I Don't Know Anything…' Holder Denies Knowing IRS Investigator Was Obama Contributor," CNS NEWS (Jan. 30, 2014).

Service. It is the Public Integrity Section of the Criminal Division – not the Civil Rights Division – that has long been responsible for investigating and prosecuting this type of public corruption.

Bosserman works in the most politicized division within the entire Justice Department. She is a lawyer in the Criminal Section of the Division, whose own website says that it prosecutes cases "involving the violent interference with liberties and rights defined in the Constitution or federal law" through the "use of force, threats, or intimidation." The website's list of cases that the Section has prosecuted involve hate crimes, interference with the exercise of religious beliefs, human trafficking, interference with access to abortion services, and official misconduct. The cases listed under "official misconduct" are almost all cases involving violent assaults, rapes, sexual misconduct, and the use of force by police officers and prison officials.[8] As bad as what the IRS did, I don't think anyone would characterize the actions of IRS employees as "violent."

It is certainly possible that the IRS practices under investigation may be civil rights violations, but it is curious that Attorney General Holder chose to dip into that talent pool for this particular lawyer to lead this investigation, rather than allowing the Public Integrity Section to conduct this investigation in its entirety. The lawyers there are very experienced in investigating and prosecuting the type of official corruption alleged in the IRS scandal. As its own website reflects, it is the Public Integrity Section that "oversees the federal effort to combat corruption though the prosecution of elected and appointed public officials at all levels of government…Section attorneys prosecute selected cases against federal, state, and local officials."[9]

General Holder would certainly understand the specific expertise that the Public Integrity Section brings to such an investigation – the very first job he got at the Justice Department when he was hired right out of law school as part of the Attorney General's Honors Program *was in the Public Integrity Section.*[10]

The Justice Department's pick of Barbara Bosserman to lead or be involved in making decisions about this investigation raises the appearance of a conflict of interest because of her extensive political donations to President Barack Obama, who recently said there was "not even a smidge of corruption" in the IRS scandal – even though the investigation is supposedly not complete.[11]

---

[8] See http://www.justice.gov/crt/about/crm/selcases.php#conduct.
[9] See http://www.justice.gov/criminal/pin/.
[10] Wil S. Hylton, "Hope. Change. Reality.," GQ (Dec. 2010).
[11] "'Not even a smidgen of corruption'" Obama downplays IRS, other scandals," Fox News (Feb. 3, 2014).

When this first became public, Justice Department spokeswoman Dena Iverson claimed that Bosserman could not be removed from the investigation because "[i]t is contrary to department policy and a prohibited personnel practice under federal law to consider the political affiliation of career employees or other non-merit factors in making personnel decisions."[12] The problem with this claim is that it is not true.

Taking a lawyer off a particular case because of a possible conflict of interest or the appearance of such a conflict is not a "prohibited personnel practice" like firing, terminating, or changing the pay of someone for political reasons. Indeed, Justice Department regulations clearly state that DOJ lawyers must avoid even "an appearance of a conflict of interest likely to affect the public perception of the integrity" of an investigation or prosecution.[13]

No one questions the right of career employees to make political donations. This is allowed under the Hatch Act and applicable DOJ regulations, as explained by the Justice Department's Ethics Office.[14] But Bosserman's considerable campaign contributions certainly raises the appearance of a possible conflict of interest in terms of the public's perception of her ability to make unbiased, objective decisions in an investigation that could prove very embarrassing to the president she supports – a president who has already signaled through his public statements what he thinks the outcome of the investigation ought to be.

Contrary to Iverson's claim, the Justice Department has previously acted in the exact way she now says it cannot. During the investigation into the unjustified dismissal of the New Black Panther Party voter intimidation case, the Justice Department's Office of Professional Responsibility removed the first career lawyer assigned to the investigation, Mary Aubry, after reports surfaced that she had contributed more than $7,000 (almost the same amount as Bosserman) to the Democratic Party and Democratic candidates including Barack Obama.[15] In fact, two veterans of the Civil Rights Division told me that DOJ removes attorneys from cases all the time for such perceived potential conflicts of interest. One of them also told me that Bosserman was more of a "research" attorney who almost never goes to court, which seems an odd choice to head up such a significant investigation.

Given the allegations in the IRS case, especially the suspicion that conservative organizations were specifically targeted by IRS officials to help dampen public opposition to President Obama's reelection, the Justice Department should make every effort to conduct a thorough investigation and avoid any questions about the objectivity of the attorneys and investigators involved in the investigation.

---

[12] Josh Hicks, "Obama political donor leading Justice Department's IRS investigation," WASHINGTON POST (Jan. 9, 2014).
[13] 28 CFR §45.2.
[14] *See* http://www.justice.gov/jmd/ethics/politic.html.
[15] Hans A. von Spakovsky, "Is the Fix In at Justice?" National Review Online (Jan. 26, 2011).

This is particularly true given that the Justice Department's Inspector General Michael Horowitz sent a memorandum to General Holder in December reminding him that "public trust in the Department, its senior officials, and its employees is essential to every aspect of the Department's operations." One of the biggest challenges, according to Horowitz, is the Civil Rights Division, where Bosserman works. The Office of the Inspector General reported that the way the division has handled cases "risked undermining public confidence in the non-ideological enforcement" of federal law.[16]

The involvement of the Civil Rights Division and the appearance of possible bias by one of the supervising, if not lead, lawyers in this investigation is a very serious issue. When combined with the refusal of the Justice Department and the FBI to provide even basic information about the status of the investigation, as well as the seemingly unjustifiable delays in talking to key witnesses in the conservative organizations targeted by the IRS, it raises substantial questions about whether or not a serious, objective, unbiased investigation is being conducted.

This Committee should continue to attempt to get more information about the integrity of the government's investigation and should pursue its oversight function vigorously. Otherwise, what happened at the IRS will happen again, and federal employees will believe that they can engage in wrongdoing by targeting the political opposition of the administration without fear of any consequences.

[16] "Top Management and Performance Challenges Facing the Department of Justice – 2013," Memorandum for the Attorney General and the Deputy Attorney General from Michael E. Horowitz, Inspector General (Dec. 11, 2013, re-issued Dec. 23, 2013).

Hans A. von Spakovsky

Heritage Foundation
214 Massachusetts Avenue, N.E.
Washington, DC 22180
Phone 202.608.6207
Mobile 202.436.6311
Hans.vonSpakovsky@heritage.org

Biography

Heritage Foundation – As a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Center for Legal and Judicial Studies, Hans von Spakovsky concentrates on voting, elections, campaign finance, civil rights, immigration enforcement, and government reform. He is the author, along with John Fund, of *Who's Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (Encounter Books, August 2012).

Federal Election Commission – Mr. von Spakovsky was a Commissioner in 2006 and 2007 at the agency responsible for enforcing federal campaign finance laws for all congressional and presidential elections, including the presidential public funding program.

U.S. Department of Justice – He served as Counsel to the Assistant Attorney General for Civil Rights from 2002 to 2005, where he provided expertise and advice on voting and election issues, including enforcement of the Voting Rights Act and the Help America Vote Act of 2002.

U.S. Election Assistance Commission – He served as a member of the first Board of Advisors of the EAC, which advised the Commissioners on the administration of the Help America Vote Act.

Fairfax County Electoral Board – Mr. von Spakovsky served as Vice Chairman of the county board responsible for administering elections in the largest county in Virginia from 2010 to 2013. He formerly served for five years as a member of the Fulton County Registration and Election Board, the largest county, Georgia. He is also a former member of the Virginia Advisory Board to the U.S. Commission on Civil Rights.

Education - He is a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.

Hans von Spakovsky has a wide range of experience in civil rights, civil justice, immigration, and election-related issues, including campaign finance reform, voter fraud, enforcement of federal voting rights laws, election administration, and voting equipment standards. The Commission on Federal Election Reform organized

by President Jimmy Carter and Secretary James Baker also sought his expertise, and he served on the Virginia Advisory Committee of the U.S. Commission on Civil Rights.

His series at *PJ Media*, "Every Single One," was nominated for a Pulitzer Prize and he has published articles in the *Wall Street Journal*, the *Washington Times*, *National Review*, and *Human Events*, and appeared on FOX News, CNN, and numerous radio shows. He has testified before state and Congressional legislative committees, as well as made presentations to organizations such as CPAC, the National Association of Secretaries of State, the National Association of State Election Directors, the American Legislative Exchange Council, the National Conference of State Legislatures, and the Federalist Society.

Prior to entering public service, Hans von Spakovsky worked for 17 years as a government affairs consultant, in a corporate legal department, and in private practice. He is a former member of the Board of Directors of Global Centurion, a nonprofit dedicated to eradicating the scourge of human trafficking.

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

Name: HANS A. VON SPAKOVSKY

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.

The views I express are my own and do not reflect the institutional position of the Heritage Foundation.

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: Hans A. von Spakovsky Date: 2-24-14