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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

November 2, 2015

The Honorable Loretta E. Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Lynch:

I write today to strongly urge you, as head of the Department of Justice, to take specific steps to ensure that the Department preserves all of its Internal Revenue Service-related documents and information indefinitely. This Administration's recent announcement that it does not intend to conduct or allow an appropriate criminal investigation of the IRS's targeting of Tea Party and other conservative organizations has finally made it abundantly clear that the responsibility of ensuring a thorough, fair, and impartial investigation of IRS employees and their potential criminal conduct will fall to the next presidential administration, and relevant materials must be protected accordingly.

On Friday, October 23, the Department stated that it would end its investigation of the IRS and the personnel who were part of the agency's well-documented targeting efforts, including the former director of the IRS's Exempt Organizations Unit, Lois Lerner, who invoked her Fifth Amendment right to not incriminate herself during a 2013 congressional oversight hearing.¹ Presumably, this latest decision to abandon the investigation required your approval. This decision also comes in the wake of at least two formal rejections by President Obama's former Attorney General Eric H. Holder, Jr., of requests for the appointment of a special prosecutor to handle the investigation.²

¹ See generally Dr. Susan Berry, *DOJ: No Criminal Charges Against IRS's Lois Lerner*, BREITBART.COM (Oct. 23, 2015).

² See Josh Hicks, *Eric Holder declines Ted Cruz's request for special prosecutor in IRS case*, WASH. POST (Mar. 20, 2014) (quoting Holder as saying a special prosecutor "is not warranted" because of the alleged absence of a conflict of interest); see also Letter from Peter J. Kadzik to Sen. Ted Cruz (Mar. 10, 2014); see also Letter from Sen. Ted Cruz to Attorney General Eric H. Holder, Jr. (Jan. 22, 2014); Letter from Sen. Ted Cruz to Eric H. Holder, Jr. (May 7, 2014).

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Bluntly stated, your decision is disappointing but also not surprising, and only confirms suspicions that the current Department is equipped to neither handle an appropriate investigation nor make appropriate judgments regarding existing conflicts of interest,³ based on its failure to appoint a special prosecutor. Despite numerous requests for a fair and impartial process, you, your predecessor, and this Administration generally have been dismissive of congressional and other calls for an appropriate accounting of the IRS's abusive behavior.

Make no mistake: the IRS's targeting of ordinary citizens for their political viewpoints under this Administration is not a minor issue, and represents a significant breach of the public trust. Even a casual observer of the IRS targeting scandal could not help but come to the conclusion that there is a strong appearance that the IRS, under this Administration's political leadership, used the coercive tools available to the tax collection agency to harass people with conservative viewpoints. The little information that is available in the public domain about what happened at the IRS also makes it appear that laws, including criminal laws, may have been broken.

That said, as an attorney and former state law enforcement official, I am keenly aware that the facts of a case require objective, non-political review. That is why I and others have been adamant about the need for the appointment of a special prosecutor, who would be appointed by the Administration in accordance with federal law and afforded the freedom and resources to conduct a thorough, fair, and impartial investigation and, if necessary, prosecution.

It is important for you and other officials in this Administration to understand that this Administration's decisions to neither continue this investigation nor appoint a special prosecutor do not represent the conclusion of this matter. Given this Administration's refusal to conduct itself appropriately, or take the issue of the potential illegal conduct of IRS employees seriously, any subsequent administration should reserve the right to reopen the matter, conduct its own investigation, or appoint a special prosecutor to conduct an investigation.

With that in mind, it is imperative that you, as Attorney General, take extraordinary steps to see to it that the Department preserves all the documents and materials in its possession in relation to its evaluation of the IRS's targeting efforts, as well as everything in its possession used to evaluate the potential criminal activity of IRS employees. This request for extraordinary preservation steps is unfortunately necessary, given this Administration's poor track record for recordkeeping.

I will also take this moment to remind you, your fellow political appointees within the Department, and any other Department employees, advisors, or contractors that destruction of any of the requested documents or information could subject those responsible for such destruction to criminal prosecution in the future.⁴ I have previously warned Treasury and IRS

³ See, e.g., Erik Wasson, *Obama: Not 'even a smidgen of corruption' behind Internal Revenue Service targeting*, THE HILL (Feb. 2, 2014) (quoting President Obama as saying that "[t]here were some boneheaded decisions" made by IRS personnel, but that there was neither "mass corruption" nor "a smidgen of corruption"); see also Josh Hicks, *Obama political donor leading Justice Department's IRS investigation*, WASH. POST (Jan. 9, 2014) (identifying Barbara Bosserman, who donated a combined \$6,750 to President Obama and the Democratic National Committee since 2004, as the individual chosen by Holder to lead the Department's IRS inquiry).

⁴ See generally 18 U.S.C. § 1505.

officials that such consequences could also result for any such destruction of records within their control, and those warnings stand. One's position as a past or present federal employee does not afford immunity from the federal criminal justice system. It is my hope that a future administration would pursue justified prosecutions with all due energy.

In accordance with the above, I would request that the Department engage in the following preservation efforts, effective immediately:

1. Preserve all paper-based documents, e-mail-based communications, e-mail-based calendar appointments, electronic documents, electronic communications (including voicemails, SMS (i.e., text) messages, and instant messages), and all other electronic data regardless of format, created since January 1, 2010, that:
 - a. Are records, **regardless of content**, that were originally produced or possessed by the IRS or any of its employees, contractors, subcontractors, grantees, subgrantees, or consultants;
 - b. Are communications, **regardless of author, source, or content**, that in any way address the IRS or any of its past or current employees; and
 - c. Include or reference the names **Douglas Shulman, John Koskinen, Lois Lerner, William Wilkins, Holly Paz, Judy Kindell, and/or Carter Hull**, or any versions of these names, including initials or nicknames.

For the purposes of this request, "preserve" means taking any and all reasonable steps to prevent the partial or full destruction, alteration, overwriting, formatting, deletion, shredding, incineration, wiping, relocation, migration, theft, revision, or mutation of electronic and non-electronic documents, records, and logs, as well as negligent or intentional handling that would make such records incomplete or inaccessible.

2. Exercise any and all reasonable efforts to identify and notify former Department employees, contractors, subcontractors, grantees, subgrantees, and consultants who may have access to such electronic or non-electronic records that these records are also to be preserved.
3. If it is a practice of the Department, any Department component, any federal employee, any contract employee, any grantee or subgrantee, or any consultant to destroy or otherwise alter such electronic or non-electronic records, either halt such practices immediately, or arrange for the preservation of complete and accurate duplicates or copies of such records, suitable for production if requested.

I am also requesting that the Department make additional arrangements with both the Department's Inspector General and the Archivist of the United States for them to receive copies of all such records.

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Please provide a detailed update regarding your efforts to coordinate with the Inspector General and the Archivist no later than **5:00 p.m. on Monday, November 9, 2015.**

I look forward to your cooperation. Please contact Committee staff at (202) 224-5225 if you have any additional questions about these requirements.

Sincerely,



Ted Cruz
Chairman
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts

Cc: The Honorable Charles E. Grassley
Chairman
Senate Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Christopher A. Coons
Ranking Member
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts

The Honorable James Comey
Director
Federal Bureau of Investigation
U.S. Department of Justice

The Honorable Michael E. Horowitz
Inspector General
Office of the Inspector General
U.S. Department of Justice

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration

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Gary M. Stern
General Counsel
National Archives and Records Administration

The Honorable Jack Lew
Secretary
U.S. Department of the Treasury

The Honorable John Koskinen
Commissioner
Internal Revenue Service