



Outrageous IRS Commissioner False Claim: 'Whenever we can, we follow the law'

By [Mark J. Fitzgibbons](#)

Internal Revenue Service Commissioner John Koskinen made a disturbing statement before Congress that the IRS follows the law “whenever we can.”

As Thomas Lifson [wrote](#), “The law, to Koskinen, evidently is a suggestion, not an ironclad requirement.” Actually, the situation is even worse than that.

Lernergate unveiled for the public a deeper, even more sinister problem at the IRS. The [evidence of criminal wrongdoing](#) in the Tax Exempt unit of the IRS, with its cover-up involving widespread destruction of evidence, is like one highlight reel of a bigger reality within the Service and government agencies generally.

The IRS, like other government agencies, is in fact is a perennial, institutional lawbreaker. Professor Paul Caron’s TaxProf Blog, for example, annually covers the report of the Treasury Inspector General for Tax Administration (TIGTA) about IRS lawbreaking in asset seizures.

In the review period through June 2012, the IRS violated the law [30 percent](#) of the time in asset seizure matters, up from [22 percent](#) the prior year. It was [38 percent](#) the year before that.

These are stunning statistics made more disturbing by the lack of being cured. Property, right up there with life and liberty, is a fundamental right expressly identified in the Fifth Amendment to the Constitution. This raises the obvious questions: What is the level of lawbreaking at the IRS when the stakes are not so high, and what lawbreaking at the IRS does TIGTA *not* look for?

Both Congress and the courts, however, have contributed to the underlying lawlessness at the IRS in ways that most Americans find offensive -- or would if they were to understand the abdication of power to the IRS.

The tax code is a behemoth loaded with goodies for special interests. It has become a social policy Christmas tree, and its complexities are not understood by IRS employees, never mind ordinary taxpayers. It is plagued and zealously guarded by powerful interests and lobbyists in Washington. The tax code is ripe for abuse.

Again covered by [TaxProf Blog](#), in 2010 TIGTA reported that the IRS wasted billions in stimulus and procurement spending. This past year, and without due process, the IRS [seized tax refunds](#) of the adult children of taxpayers who had been overpaid federal benefits decades ago. The IRS was recently caught [opening emails without warrants](#).

The buck never really stops with our elected officials, who later seem surprised that these abuses are the result of power and discretion given to the IRS by Congress.

One area of IRS abuse caused by Congress and the courts falls under the Fourth Amendment. Cato Institute's 1981 paper [The IRS and Civil Liberties: Powers of Search and Seizures](#) shows just how long this has been a problem.

The IRS has to large extent been exempted from the Fourth Amendment. This is a problem because it fosters politically motivated or other improperly targeted audits.

In [United States v. Powell](#) from 1964, the Supreme Court solidified that the IRS was somehow exempted from the probable cause standard. The Constitution, it seems, would "hamper" the IRS:

Although a more stringent interpretation is possible, one which would require some showing of cause for suspecting fraud, we reject such an interpretation because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted, forcing him to litigate and prosecute appeals on the very subject which he desires to investigate, and because the legislative history of 7605 (b) indicates that no severe restriction was intended.

The court even relied on one of those contrived floor colloquies among two senators to allow the IRS to violate the Fourth Amendment under the guise of actually protecting taxpayers:

"Mr. WALSH. . . . So that up to the present time an inspector could visit the office of an individual or corporation and inspect the books as many times as he chose?

"Mr. PENROSE. And he often did so.

"Mr. WALSH. . . . And this provision of the Senate committee seeks to limit the inspection to one visit unless the commissioner indicates that there is necessity for further examination?

"Mr. PENROSE. That is the purpose of the amendment.

"Mr. WALSH. . . . I heartily agree with the beneficial results that the amendment will produce to the taxpayer.

"Mr. PENROSE. I knew the Senator would agree to the amendment, and it will go a long way toward relieving petty annoyances on the part of honest taxpayers." 61 Cong. Rec. 5855 (Sept. 28, 1921).

Remarkably, the Supreme Court held that Congress could simply legislate away constitutional protections:

"For us to import a probable cause standard to be enforced by the courts would substantially overshoot the goal which the legislators sought to attain. There is no intimation in the legislative history that Congress intended the courts to oversee the Commissioner's determinations to investigate."

In June this year, the Supreme Court in [United States v. Clarke](#) was handcuffed by precedent and ruled that the burden is on the taxpayer to prove bad faith audits. Given what we have seen with how the IRS operates when under congressional subpoenas and court scrutiny to produce emails, taxpayers are at the mercy of the IRS.

Justice Kagan's opinion at least leaves an opening:

The taxpayer is entitled to examine an IRS agent when he can point to specific facts and circumstances plausibly raising an inference of bad faith. Naked allegations of improper purpose are not enough: The

taxpayer must offer some credible evidence supporting his charge. But circumstantial evidence can suffice to meet that burden; *after all, direct evidence of another person's bad faith, at this threshold stage, will rarely if ever be available. And although bare assertion or conjecture is not enough, neither is a fleshed out case demanded: The taxpayer need only make a showing of facts that give rise to a plausible inference of improper motive. That standard will ensure inquiry where the facts and circumstances make inquiry appropriate, without turning every summons dispute into a fishing expedition for official wrongdoing.*

The irony lost on the Supreme Court, Congress and most certainly the IRS is that the Fourth Amendment's protections, including probable cause, evolved from abuses of searches and seizures for collecting taxes and suppressing what are now First Amendment rights.

The bottom line is that intentional lawbreaking within the IRS and other government agencies exists mostly because it can. Think of many bureaucrat 'Barack Obamas' taunting "so sue me" for violating the law. They are mostly insulated from consequences of lawbreaking because of a lack of congressional oversight of our monster-sized federal government, legal immunity, and the practical immunity of fear by their challengers -- even internal whistleblowers -- that they will face retribution.

Then there are the enablers. Democrats in Congress and progressives in the [nonprofit community](#) see the Lois Lerner situation as "missing the point." The partisan *Nonprofit Quarterly* actually blames the lack of "adequate funding of the tax-exempt unit which has been starved for financial and staff resources," and LernerGate shows the need for "stronger rules and regulations concerning the definitions and operations of 501(c)(4) social welfare organizations."

The big-government response to lawbreaking government, even when it infringes on constitutionally protected rights, always seems to be more regulation, more power, and more money. That misses the point that too often the IRS does not follow the law even when it can.