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Neil A.G. McPhie, Director of Legal Services for Tully Rinckey PLLC, discusses the latest in the Lerner case with Politico.

GOP vs. IRS' Lois Lerner: The breakdown

By KIM DIXON and RACHAEL BADE | 4/11/14 10:45 AM EDT

Republicans think they have the goods on ex-IRS official Lois Lerner, but experts say that's by no means crystal clear. A closer look at the newest batch of documents attached to House Republicans' referral to the Justice Department for Lerner shows GOP lawmakers still have some digging to do. Republicans have sought to make the former chief of the tax-exempt unit their boogeyman, using the latest emails released this week purporting to show she personally directed denial of tax-exempt status for Karl Rove-backed Crossroads GPS, misled investigators and broke tax confidentiality laws.

Lerner, through her lawyer, maintains her innocence and says she was just doing her job. On Wednesday, House Ways and Means Republicans, which released the new evidence, voted to ask the Justice Department to criminally prosecute Lerner, and Oversight Committee Republicans voted to hold her in contempt of Congress on Thursday. But even lawyers who think the committee might have a case against Lerner say the evidence is so fragmentary that none of it will allow them to blame one person for practices that came under fire. Neil McPhie, former chairman of the U.S. Merit Systems Protection Board, which judges federal employees who get in trouble, said some of the evidence against Lerner appears damning — including her less-than-forthcoming inspector general interview, but he said it doesn't amount to the "slam dunk" prosecutors might need. "It remains to be seen," he said. "There's a whole bunch of emails chains [still out there] that

could pass the light in a different direction.” Here’s a look at some of the charges Republicans made and the questions that remain. Lerner’s role in the Crossroads’ application

She certainly played a role here, enough to raise eyebrows. But did she break the law? That’s unclear. Republicans say Lerner inappropriately pushed for denial of Crossroads’ application, citing her meetings with groups backing that position in January 2013 and queries she sent around to IRS officials the same week asking why the group hadn’t been selected for audit. She wrote: “We are working on the denial for [Crossroads].” Within a week of her meeting with the groups, the IRS agent handling the application began working on a denial letter, “logging” onto the application more times the week after Lerner’s meeting than he had the entire year before. Before that, Republicans say, he never discussed denying Crossroads. The panel alleges that the revenue agent “was directed to reach a particular result with Crossroads.” The “chronology record” of the Cincinnati-based line agent, though, contains less than a sentence for each time period in monthly notes during 2012 and 2013 — not detailed descriptions of process or thinking. Former IRS attorney Bryan Camp, who worked in chief counsel’s office for eight years, said “it is not at all uncommon for national office in D.C. to be asked for advice by the field, in fact there is a whole set of rules where they are required to do that.” And it was also not unusual for Lerner to weigh in on the group’s so-called 1024 form, which are reviewed by the agency, according to Camp, now at Texas Tech University. Plus, campaign finance reform advocates say it is not surprising for someone in Lerner’s position to oversee such an important application. They say she was right to question whether Crossroads, which spent \$70 million through its nonprofit arm to influence the 2012 elections, deserved a tax break. McPhie says that the emails “seem to be pretty clear, that she was trying to deny their 501(c)(4).” On whether that was illegal, he said it depends on how she treated other groups: “What they have to prove is that these conservative groups in particular ... were not given the benefit of the same kind of review” that other groups received. Republicans contend that was the case, arguing there is “no evidence she directed reviews of similarly situated left-leaning groups.” Lerner’s influence on IRS appeals — or not?

The panel alleges that Lerner abused her authority when she contacted the IRS Independent Appeals Process unit. Agency rules prohibit appeals agents

and other IRS employees from ex parte communicating "to the extent that such communications appear to compromise the independence of the appeals process." Lerner appears to have corresponded with those appeals agents. She emailed Chief of IRS Appeals Chris Wagner to give him a "heads-up" that his department may be hearing complaints from groups that were denied (c)(4) status: "I explained the issue was very sensitive. . . . I offered a general tutorial session on the law. . . . I told them this is a place where we have worked very hard to be consistent. . . . and suggested they might want to do something similar." She closes by writing: "Hope this doesn't [sound] like I'm trying to run your shop." But former IRS officials familiar with the law said these examples do not mention a specific case and are not therefore "ex parte."

"Generally, it is not unusual for the head of an organization to be briefed on issues that concern their division, so that talking to other offices, like Chief Counsel, Appeals, I wouldn't say is unusual" said Milt Cerny, a former IRS attorney in Washington who was a technical adviser to the assistant commissioner that handled exempt issues. Lerner's knowledge of tea party cases

Republicans say Lerner may have impeded an official investigation when asked about the timeline of when she found out that "tea party" was a trigger word on a "be on the lookout" list for groups to get extra IRS scrutiny. In an interview with the Treasury inspector general for tax administration, Lerner said she first learned that tea party cases were listed on a BOLO on June 29, 2011. But the panel released emails showing that she knew that "tea party" cases were being treated differently as early as April 2010. Still, even Charles Boustany, a Republican on the Ways and Means Committee, admits that they can't call that a flat-out lie. In one instance she was talking about the BOLOs specifically. What they might say more definitively is that she may have been misleading. And "lack of candor," though a lesser charge than flat out "falsification," is still against the law in certain circumstances. On April 28, 2010, Lerner received an email alerting her that "there are 13 tea party cases out in EO Determinations." A few months later, on Aug. 3, 2010, Lerner asked her assistant to print the sensitive case report that detailed how the tea party groups were being handled. A few months later, in early 2011, she would write to her colleagues that the "Tea party matter [is] very dangerous." Republicans are furious that Lerner failed to disclose to lawmakers in private and public sessions any added scrutiny

that, it appears from various emails, she was aware of. For example, Ways and Means Oversight staff met with IRS staff including Lerner in December 2011. IRS officials did not mention any knowledge that the IRS targeted conservative groups, Republicans say — not even when lawmakers specifically asked about rumors of such treatment before the scandal broke. Marcus Owens, who held Lerner's position at the IRS until 2000, said it is impossible to tell whether Lerner was misleading from the fragments presented. "You simply cannot evaluate whether the statement by Lerner was misleading without seeing the whole statement in the context with which it occurs," Owens said. "They go to this great length to avoid that. ... Which tells me they don't have a case," Owens said.

Breaking taxpayer privacy laws

Republicans allege that Lerner may have violated taxpayer privacy laws by sending sensitive taxpayer information to a personal email account. Unauthorized disclosure of so-called 6103 information is a felony punishable by up to five years in prison. Although sending such information to personal email account is against IRS rules, McPhie said the thing that matters is whether another person who wasn't authorized to see the information accessed to account to do so. "That one is written timidly," McPhie says of 6103 section of the GOP report. "You have to prove that the disclosure was to a person." Republican investigators have told POLITICO, however, that the email account is registered in Lerner's husband's name, and they're trying to determine whether he might have seen the documents. "If he had access to that account that could be problematic," said Raymond Shepherd, head of the Congressional Investigations practice at Venable LLP and former chief counsel to the Senate Permanent Subcommittee on Investigations.