AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

IRS ABUSES: ENSURING THAT TARGETING NEVER HAPPENS AGAIN

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JULY 30, 2014

Serial No. 113–135

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.fdsys.gov
http://www.house.gov/reform

U.S. GOVERNMENT PRINTING OFFICE

89–864 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

DARRELL E. ISSA, California, *Chairman*

JOHN L. MICA, Florida
MICHAEL R. TURNER, Ohio
JOHN J. DUNCAN, JR., Tennessee
PATRICK T. MCHENRY, North Carolina
JIM JORDAN, Ohio
JASON CHAFFETZ, Utah
TIM WALBERG, Michigan
JAMES LANKFORD, Oklahoma
JUSTIN AMASH, Michigan
PAUL A. GOSAR, Arizona
PATRICK MEEHAN, Pennsylvania
SCOTT DESJARLAIS, Tennessee
TREY GOWDY, South Carolina
BLAKE FARENTHOLD, Texas
DOC HASTINGS, Washington
CYNTHIA M. LUMMIS, Wyoming
ROB WOODALL, Georgia
THOMAS MASSIE, Kentucky
DOUG COLLINS, Georgia
MARK MEADOWS, North Carolina
KERRY L. BENTIVOLIO, Michigan
RON DESANTIS, Florida

ELIJAH E. CUMMINGS, Maryland, *Ranking Minority Member*
CAROLYN B. MALONEY, New York
ELEANOR HOLMES NORTON, District of Columbia
JOHN F. TIERNEY, Massachusetts
WM. LACY CLAY, Missouri
STEPHEN F. LYNCH, Massachusetts
JIM COOPER, Tennessee
GERALD E. CONNOLLY, Virginia
JACKIE SPEIER, California
MATTHEW A. CARTWRIGHT, Pennsylvania
TAMMY DUCKWORTH, Illinois
ROBIN L. KELLY, Illinois
DANNY K. DAVIS, Illinois
PETER WELCH, Vermont
TONY CARDENAS, California
STEVEN A. HORSFORD, Nevada
MICHELLE LUJAN GRISHAM, New Mexico
Vacancy

LAWRENCE J. BRADY, *Staff Director*
JOHN D. CUADERES, *Deputy Staff Director*
STEPHEN CASTOR, *General Counsel*
LINDA A. GOOD, *Chief Clerk*
DAVID RAPALLO, *Minority Staff Director*

CONTENTS

	Page
Hearing held on July 30, 2014	1

WITNESSES

Mr. David Keating, President, Center for Competitive Politics	
Oral Statement	5
Written Statement	8
Mr. Hans A. Von Spakovsky, Manager, Election Law Reform Initiative, and Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation	
Oral Statement	16
Written Statement	18
Ms. Cleta Mitchell, Partner, Foley & Lardner LLP	
Oral Statement	26
Written Statement	29
Mr. James Sherk, Senior Policy Analyst in Labor Economics, The Heritage Foundation	
Oral Statement	37
Written Statement	39

APPENDIX

The Hon. Michael R. Turner, a Member of Congress from the State of Ohio, written statement	74
The Hon. Gerald E. Connolly, a Member of Congress from the State of Virginia, written statement	75
The Hon. Matthew Cartwright, a Member of Congress from the State of Pennsylvania, written statement	77
Staff Report "Making Sure Targeting Never Happens: Getting Politics Out of the IRS and Other Solutions	78
Oversight.house.gov Majority Staff Report, April 7, 2014	101
Screening Workshop Notes, July 28, 2010, submitted by Rep. Davis	148
Statement for the record from Prashant K. Khetan, Senior Counsel	151

IRS ABUSES: ENSURING THAT TARGETING NEVER HAPPENS AGAIN

Wednesday, July 30, 2014

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
WASHINGTON, D.C.

The committee met, pursuant to call, at 9:34 a.m., in Room 2154, Rayburn House Office Building, Hon. Darrell E. Issa [chairman of the committee] presiding.

Present: Representatives Issa, Mica, Turner, Jordan, Chaffetz, Walberg, Lankford, Meehan, Gowdy, Farenthold, Woodall, Massie, Collins, Meadows, Bentivolio, DeSantis, Maloney, Norton, Tierney, Connolly, Kelly, Davis, Cardenas and Horsford.

Staff Present: Richard A. Beutel, Senior Counsel; Molly Boyl, Deputy General Counsel and Parliamentarian; Lawrence J. Brady, Staff Director; David Brewer, Senior Counsel; Sharon Casey, Senior Assistant Clerk; Drew Colliatie, Professional Staff Member; John Cuaderes, Deputy Staff Director; Adam P. Fromm, Director of Member Services and Committee Operations; Linda Good, Chief Clerk; Tyler Grimm, Senior Professional Staff Member; Mark D. Marin, Deputy Staff Director for Oversight; Laura L. Rush, Deputy Chief Clerk; Jessica Seale, Digital Director; Andrew Shult, Deputy Digital Director; Peter Warren, Legislative Policy Director; Rebecca Watkins, Communications Director; Tamara Alexander, Minority Counsel; Portia Brown, Minority Counsel; Aryele Bradford, Minority Press Secretary; Jennifer Hoffman, Minority Communications Director; Juan McCullum, Minority Clerk; Dave Rapallo, Minority Staff Director; Donald Sherman, Minority Chief Oversight Counsel; and Katie Teleky, Minority Staff Assistant.

Chairman ISSA. The committee will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any time.

The Oversight Committee exists to secure two fundamental principles. First, Americans have a right to know that the money Washington takes from them is well spent; and, second, Americans deserve an efficient, effective government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers because taxpayers have a right to know what they get from their government. It is our job to work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and to bring genuine reform to the Federal bureaucracy. This is our mission.

Today's hearing continues the committee's oversight of the IRS and its targeting of conservative applicants for tax-exempt status. The committee continues to conduct a thorough and comprehensive investigation of the IRS' targeting.

From this oversight work, we know a great deal about the IRS' targeting. We know that in 2010, as the President traveled the country criticizing the Supreme Court's decision in Citizens United, the IRS began systematically scrutinizing and delaying tax-exempt applications.

We know Lois Lerner talked about the political pressure on the IRS, "to fix the problem." Again, to fix the problem caused by Citizens United. We know that Lois Lerner called conservative tax-exempt applicants, "very dangerous," and ordered them through a multitier review. And we know that conservative tax-exempt applicants faced enhanced scrutiny, extensive delays, and inappropriate questions and requests from the IRS.

While there is much the committee knows about the IRS targeting, there is still much more work to be done, and for that reason, the committee continues its oversight. Today, however, we start the discussion of steps that can be taken to restore confidence in the IRS and ensure that targeting never occurs again.

Our mission on the Oversight and Government Reform Committee is to make government work better for the American people. We meet today for that reason, to make the IRS work better for the American taxpayer.

Our investigation has made it clear that one reform is absolutely critical to improving the IRS. We must get politics out of the IRS. To accomplish this, yesterday we issued a new staff report outlining 15 significant potential long-term reforms to stop abuse and get politics out of the IRS. Here are some of the ideas.

First, the IRS should not be in the business of regulating political speech. When there is no—regulating political speech when there is no impact on tax revenue. This process is where targeting happened. Other Federal agencies exist to regulate political campaigns and their elections, and this is not the IRS' job.

This committee found it very frustrating to have to repeatedly remind Members on the dais here that 501(c)(4)s, in fact, get no tax deduction, no special tax treatment, and that all contributions are post-tax. And yet the IRS took special interest in who their contributors were, even though they were paying for it with money after they had paid their taxes. And Congress should consider changing that law.

Second, the current structure of the IRS as a single-director agencies allowed freedom to people like Lois Lerner and the Exempt Division to grow and gain power. It also allowed—also created the circumstances under which White House was informed of Lois Lerner's lost emails months before Congress and the public knew.

If Congress created a bipartisan, multimember commission, it would create assurances that the IRS truly is an independent, nonpartisan agency.

Third, TIGTA, the special IG for—Treasury IG covering IRS, and the IRS knew that groups had been targeted from May of 2012, but did not take immediate action to help the aggrieved parties. This

was wrong, and this is the kind of inappropriate behavior that, again, affects the outcome of elections.

We must examine the current structures of the Treasury Inspector General for Tax Administration and the IRS' Oversight Board to ensure that they are living up to their oversight responsibilities not only to know, but to take action.

Our report notes 15 problems and offers 15 solutions for Congress to discuss. I am sure there are more good reforms and more good reform ideas that should be part of the discussion, and I expect some Members to raise concerns with aspects that we have already suggested.

Our investigation must also continue, because we clearly do not have the full knowledge of what happened. We don't even have a significant portion of the emails from the most important figure in this investigation.

Serious debate and discussion about reforming a failed agency and getting politics out of the IRS is a good and worthwhile exercise, even though there may not be any clear consensus for those major reforms today. Last week the committee took bipartisan steps on some of these measures.

As we develop future ideas, I hope we will continue to work in a bipartisan spirit. Our witnesses today will help us to explore the other steps that Congress can take to improve the accountability of the IRS. With an agency like the IRS, reform will not be accomplished overnight. This is an important process that will continue into the future and expand to many other committees and stakeholders.

But this is a process we must start today. And from that standpoint, I want to welcome our witnesses, and I look forward to hearing their testimony.

Chairman ISSA. And I would now recognize the distinguished gentleman from Illinois Mr. Davis.

Mr. DAVIS. Thank you very much, Mr. Chairman. Unfortunately, the ranking member Mr. Cummings could not be here today, and I am substituting or sitting in for him.

Today is the twelfth hearing our committee has held on the IRS investigation over the past year. We have held six hearings on this topic in just the last 6 weeks. The IRS Commissioner has testified three times before our committee and a fourth time before the Ways and Means Committee in just the past month.

The same is true for the organizations testifying here today. Representatives from all three groups, True the Vote, The Heritage Foundation, and the Center for Competitive Politics, testified before the committee in February of this year. I welcome our witnesses here today, or perhaps I should say welcome them back.

Some may say our efforts are duplicative. It makes no sense, for example, to require IRS witnesses to submit to transcribed interviews with the Oversight Committee first and then force them to appear again before the Ways and Means Committee, but that is what these two committees on which I serve are doing.

Unfortunately, one person who is not here today is Inspector General Russell George. The title of today's hearing is "IRS Abuses: Ensuring that Targeting Never Happens Again." So it would have made sense to hear from the official who issued the report in 2013

that first identified inappropriate criteria used by IRS employees to screen tax-exempt applications. He could have told us how the IRS is doing in terms of implementing the recommendations in his report. Last week Ranking Member Cummings requested that the committee invite the inspector general, but he's not here today.

Other people who are not here include progressive groups that were singled out. On April 17, 2014, Chairman Issa stated, "There is simply no evidence that any liberal or progressive group received enhanced scrutiny because its application reflected the organization's political views." But the committee has obtained substantial evidence that IRS employees treated progressive groups in a manner similar to conservative groups. For example, a "be on the lookout" list, or BOLO list, from 2010 directed IRS screeners to look for "ACORN successors." Another directed IRS employees to screen for, "progressives."

A PowerPoint presentation from 2010 included images of a donkey and an elephant, and it instructed IRS screeners to look for the terms, "progressive" alongside, "Tea Party."

And a training presentation listed successors to ACORN as examples of organizations to watch for.

Witnesses also confirmed that progressive groups were subjected to extended reviews and delays. He stated that I am—during a transcribed interview with committee staff on October 29, 2013, a senior technical advisor in the Exempt Organizations Division testified that progressive emerge groups were subjected to multitiered reviews that included consolidating cases and working with attorneys in the Office of Chief Counsel. During a hearing before the committee on July 18, 2013, the inspector general testified that he did not become aware of documents relating to progressive groups until after his audit was complete. He stated, "I am disturbed that these documents were not provided to our auditors at the outset, and we are currently reviewing this issue." It is now more than a year later and we still have not heard his update, and we will not hear today.

Finally, late last night, the chairman issued a Republican staff report with new recommendations for the IRS. This report was not provided to committee members in advance, so we did not have an opportunity to review it or offer our opinions.

The primary recommendation is to eliminate the position of IRS Commissioner, one of only two political appointees in the entire agency, and replace it with a board full of political appointees. Personally, I was surprised by this recommendation because it seems to contradict the Republican narrative for this investigation. If you believe there is too much political activity at the IRS, I don't see how increasing the number of political appointees would help.

I also wonder, given the committee's focus on overpoliticized and dysfunctional boards at the Nuclear Regulatory Commission and the Chemical Safety Board, why this model is best for the IRS.

With that, Mr. Chairman, I thank the witnesses very much for being here and look forward to their testimony.

Chairman ISSA. Thank you.

Members may have 7 days in which to submit their opening statements.

I now ask unanimous that the aforementioned majority report, "Making Sure Targeting Never Happens Again: Getting Politics Out of the IRS and Other Solutions," be placed in the record. Without objection, so ordered.

Additionally, I will add the previously published April 7, 2014, Committee on Oversight report, "Debunking the Myth of the IRS Targeting Progressives." Without objection, both will be ordered in.

I might note for the record that we asked repeatedly for the minority to submit a witness. If they wanted the IG to be their witness, they certainly could have had them.

Today we welcome our witnesses. Mr. David Keating is president of the Center for Competitive Politics. Thank you.

The Honorable Hans von Spakovsky——

That's right.

—is the manager of Election Law Reform Initiative and a senior legal fellow at The Heritage Foundation.

Miss Cleta Mitchell is a partner at Foley & Lardner, LLP.

And Mr. James Sherk is the senior policy analyst in labor economics at The Heritage Foundation.

Thank you all for being here.

Pursuant to our committee rules, would you please rise to take the oath. And, yes, please raise your right hands.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Please be seated.

Let the record reflect that all witnesses answered in the affirmative.

In order to allow time for discussion, please try to limit your testimony to 5 minutes. Your entire written statement will be made part of the record.

We'll begin with Mr. Keating.

WITNESS STATEMENTS

STATEMENT OF DAVID KEATING

Mr. KEATING. Mr. Chairman and members of the committee, thank you for the invitation to speak to you today, and thank you also for the investigative work you've done on this very important topic.

While the investigations here and elsewhere are still ongoing, and we don't know the full extent of what happened, we do know enough to make some recommendations already to ensure that nonprofit groups are never targeted again.

I think the most important of these recommendations is to get the IRS out of the speech police business as soon as possible. Given the importance of First Amendment rights and the effect of tax compliance on revenue collections, the IRS is perhaps the last agency that we could envision as the speech police. As a revenue-collecting agency, the IRS has proven that it's in incompetent at regulating political speech, and that in term undermines its primary function of collecting tax revenue. Its continued worked in this area could cost the government tens or even hundreds of bil-

lions of dollars in tax revenue if lack of trust in the IRS causes tax compliance to fall by even a tiny amount.

Now, in fairness to the career staff of the IRS, this is very difficult work. As I like to tell people, campaign finance law is extremely complicated. It makes the tax law seem like a model of simplicity and clarity. Imagine, if you will, if we gave the Federal Election Commission the job of writing a tax regulation or enforcing the tax law. Well, the FEC would probably make a hash of it, too.

The IRS is simply not equipped, it doesn't have the culture, and it doesn't understand First Amendment constitutional rights. And the most important case in this area was the landmark Buckley v. Vallejo discussion. In that ruling the Supreme Court said the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in circumstances wholly at the mercy of the varied understanding of his hearers and consequently whatever inference may be drawn as to his intent and meaning. Such a discussion offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Now, this is exactly the problem with the IRS guidance today for nonprofit organizations. This advocacy places nonprofit groups in, "circumstances wholly at the mercy of the varied understanding of his hearers"; in this case, IRS agents.

Now, the Court's solution was simple and elegant, and it essentially said that political advocacy was defined as communications that in express terms advocate the election or defeat of a clearly identified candidate.

Shortly after this ruling, the Federal Election Commission came up with regulations to implement the decision. The IRS did nothing. Nothing. And as a result, it didn't recognize the Buckley decision, and it didn't modify its guidance in any way to reflect it.

Congress recently, and I'm talking about in the last 15 years, has tried to move the IRS more into the area of political regulation, and this has embroiled the IRS in political fights the Service should avoid.

Given the history of the agency from the 1930s through the 1970s, where there was considerable history of Presidents of both parties attempting to use the IRS to attack political enemies, the Service has long been prickly, and justifiably so, about being dragged into political wars.

Now, I'm concerned that this distrust of the IRS could lead to a fall of tax compliance. If tax compliance fell just 1 percentage point, the government could lose 170 billion in tax collections over the next 10 years.

And that is why we think the solution is pretty simple, and that is to get the IRS out of speech police business. We already have agencies in all 50 States, and we have the Federal Election Commission to regulate speech. And, in fact, the IRS' own National Taxpayer Advocate Nina Olson wrote in her report last year, it may be advisable to separate political determinations from the function of revenue collection. Under several existing provisions that require nontax expertise, the IRS relies on substantive determinations from an agency with programmatic knowledge.

We already have such an agency. As I said, it is the Federal Election Commission. If the FEC decides a group conducts excessive political activities, it can force, and indeed has forced, such groups to register and report to the FEC. If they are a political committee, then they automatically become a 527 organization and are no longer a social welfare business, trade, or union.

So I think that's the most important change that could be made. The IRS could and should do it on its own, and that is getting out of the speech police business. And that's the only solution I believe that can guarantee a similar scandal will not occur again. It will protect against a decline in tax compliance and help restore the agency's reputation.

Chairman ISSA. Thank you.

[Prepared statement of Mr. Keating follows:]

Statement of

David Keating
President, Center for Competitive Politics

on

"IRS Abuses: Ensuring that Targeting Never Happens Again"

Before the Committee on Oversight and Government Reform
United States House of Representatives
July 30, 2014

Mr. Chairman and members of the Committee, thank you for the opportunity to testify on behalf of the Center for Competitive Politics[1] today on this important subject.

While investigations are ongoing and we still do not yet know the full extent of wrongdoing, we know enough to make recommendations to ensure that nonprofit groups are never targeted again. The most important of these recommendations is to get the IRS out of the speech police business as soon as possible.

Given the importance of First Amendment rights and the effect of tax compliance on revenue collections, the IRS is the last agency that should act as the speech police. As a revenue-collecting agency, the IRS is incompetent at regulating political speech, which, in turn, undermines its primary function of collecting revenue. Its continued work in this area could cost the government tens or even hundreds of billions in tax revenue if a lack of trust in the IRS causes tax compliance to fall by even a tiny amount.

The Internal Revenue Service is primarily a tax collection agency. It knows little about nonprofit advocacy and even less about First Amendment protections for free speech. This incompetence was on clear display when the IRS proposed regulations last November attempting to define political activity, which generated over 150,000 public comments. Organizations and citizens across the political spectrum were nearly unanimous in criticizing the proposal for seeking to regulate too much activity.[2]

[1] The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission (FEC). In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels.

[2] According to a recent analysis by the Center, 87% of public comments sampled wrote to the IRS in opposition to this rulemaking, and 94% of those sampled either opposed or partially opposed the proposal. The Center's analysis of comments from organizations, experts, and public officials found that 97% of these commenters submitted statements to the IRS in varying degrees of opposition to the rulemaking, with 64% of organizations, experts, and public officials firmly in opposition. For more

In fairness to the career staff at the IRS, this is extremely difficult work. The tax laws are complicated, but the relationship of campaign finance laws and the First Amendment is even more complex and raises very difficult constitutional issues. This difficulty is one reason why the IRS should not be involved in this type of political regulation.

The outrageous treatment of groups on the basis of their ideology came about in part because the current IRS guidance, known as the "facts and circumstances" test, is so vague. The vagueness in these rules allowed the IRS to delay tax-exempt applications that should have been granted. We believe the rules are unconstitutional under the landmark *Buckley v. Valeo* decision. In that ruling, the Supreme Court wrote:

> "In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."[3]

This is precisely the problem with the IRS guidance today. Advocacy places nonprofit organizations in "circumstances wholly at the mercy of the varied understanding of his hearers" – in this case, IRS agents!

The Court's solution to the deficiencies in the Federal Election Campaign Act was simple and elegant: "in order to preserve the provision against invalidation on vagueness grounds, [the law requiring organizations to register as political committees and therefore to disclose all of their donors to the government] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[4] This is the rule that ought to have been adopted by the IRS 38 years ago following the *Buckley* ruling. Yet, while the Federal Election Commission (FEC) immediately complied with this ruling, the IRS did not. The fact that the IRS did not respond to the *Buckley* decision is more evidence of the agency's inexperience and incompetence in this area – it did not even recognize that *Buckley* had relevance to its regulations.

For political speakers, operating with very low thresholds to trigger status as regulated political committees, such bright lines are essential – there is little room for error. Charged with a task for which it lacks knowledge and expertise, and which is tangential to its core responsibilities, the IRS has yet to produce any type of bright line test similar to that used by the

---

information, please *see*: Matt Nese and Kelsey Drapkin, "Overwhelmingly Opposed: An Analysis of Public and 955 Organization, Expert, and Public Official Comments on the IRS's 501(c)(4) Rulemaking," Center for Competitive Politics' Issue Review. Retrieved on July 29, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/07/2014-07-08_Issue-Review_Nese-And-Drapkin_Overwhelmingly-Opposed.pdf (July 21, 2014).

[3] *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

[4] *Buckley*, 424 U.S. at 44.

Federal Election Commission and required by the Supreme Court in *Buckley*, *FEC v. Massachusetts Citizens for Life*, and *FEC v. Wisconsin Right to Life*.[5] As a result, politically active groups can be reasonably sure they are complying with the Federal Election Campaign Act (enforced by the FEC), only to be left to guess whether they will be pursued by the IRS.

Not only has the IRS failed to develop or apply a bright line test for political advocacy, for social welfare and business associations, there is no clear guidance about the level of permissible political activity as a portion of the organization's budget. The only thing that is clear is that express advocacy counts as political activity, but how much a group can spend even on express advocacy remains an unanswered question.

Equally as important, the recent move into political regulation has embroiled the IRS in political fights the Service should avoid. Given that, from the 1930s through the 1970s, there was considerable history of presidents of both parties attempting to use the IRS to attack political enemies, the Service has long been particularly prickly – and justifiably so – about being dragged into political wars. By forcing the IRS back into the regulation of political activity, however, Congress placed the IRS in an awkward place it prefers not to be and should not be, of having to make audit and tax exemption decisions about politically or public policy oriented entities based on their political and public education activities.

Continued IRS Involvement in Policing Speech May Threaten Tax Compliance, and Could Cost Billions in Tax Collections

The collection of trillions of dollars in taxes each year is based on what the IRS calls the self-assessment feature of the tax laws, where citizens and businesses calculate and pay their taxes. If the agency develops a reputation as a partisan lapdog of the party in power, that could lead to more citizens cheating on their taxes, or simply failing to file, with potentially disastrous implications for the budget deficit. If the level of compliance with just the income tax laws alone were to drop just one percentage point due to a decline in the Service's reputation for fairness, that could cost the government over $170 billion in tax collections over a 10-year period.

A decline in income tax compliance of just 0.2 percentage points is equal to the amount spent by all candidates, parties, and independent groups in the 2012 elections.

Contributions to 501(c)(4) organizations are not tax deductible, and the tax liability of existing 501(c)(4)s wouldn't significantly change if they were reclassified as political committees. Since the IRS's regulation of these groups has essentially nothing to do with tax collection, efforts to increase IRS regulation of political speech makes little sense and is unrelated to the Service's mission of impartial revenue collection.

In any event, the Service has quickly learned that that is not possible to avoid politics once it is given the assignment to regulate overtly political activity. It has been buffeted by politicians from both parties with regularity for its disclosure and enforcement policies regarding

[5] 424 U.S. 1, 79-81; 479 U.S. 238, 253 n. 6 (1986); 551 U.S. 449, 470 (2007) ("...a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.").

nonprofits. The IRS may be rapidly hitting the point at which it will be mired in regulatory gridlock – no new regulations or changes in existing regulations will be considered with good faith by members of Congress, each being viewed instead as a partisan scheme.

This dual regulatory scheme between the FEC and IRS has created confusion among nonprofit groups and the public. Further, it has embroiled the Service in political battles in such a way that it now cannot address substantial areas of its core mission because its actions are so suspect in Congress. Especially given the IRS scandal, it would be a mistake to continue to ask the IRS to play any role – let along an even greater role – in the enforcement of campaign finance laws.

Four Solutions to Avoid Future IRS Targeting Scandals

1) ***Remove the IRS from the "Speech Police" business.***

We question whether the IRS should be engaged in regulating political or politically-related speech at all. If a nonprofit entity with a social welfare purpose (or any other nonprofit purpose) is a political committee ("PAC") under federal or state law, it ought to be regulated as a 26 U.S.C. ("IRC") § 527 organization. If it is not a political committee under federal or state law, it should not be regulated under § 527, but instead, under the appropriate part of 26 U.S.C. § 501(c).

This straightforward approach would harmonize the IRS's rules with those of the Federal Election Commission, the body entrusted by Congress with "exclusive jurisdiction" for civil enforcement of the nation's campaign finance laws.[6]

This approach would recognize that in a democracy, political education aimed at the public not only should but must fall within the definition of "social welfare" and "educational" activities that constitute exempt activities under § 501(c)(4). Nothing in the statute requires exclusion of these functions from the definition of social welfare. Finally, and most importantly, this straightforward approach offers real clarity without dragging the IRS further into the thicket of political regulation, a tangle from which it – and the Service's reputation for the neutral, nonpartisan collection of revenue – may never recover.

IRS National Taxpayer Advocate Nina Olson's 2013 report to Congress recommends getting the IRS out of political regulation. She wrote that "[t]he IRS, a tax agency, is assigned to make an inherently controversial determination about political activity that another agency may be more qualified to make." From her report:

> "It may be advisable to separate political determinations from the function of revenue collection. Under several existing provisions that require non-tax expertise, the IRS relies on substantive determinations from an agency with programmatic knowledge.

[6] 2 U.S.C. § 437c(b)(1).

> Potentially, legislation could authorize the IRS to rely on a determination of political activity from the Federal Election Commission (FEC) or other programmatic agency. Specifically, the FEC would have to determine that proposed activity would not or does not constitute excessive political campaign activity."[7]

In fact, no legislation is needed to make this change. The FEC already decides if a group conducts "excessive political activity" and can force (and has forced) such groups to register and report as political committees. The IRS could, through a rulemaking or even a revenue ruling, acknowledge that it will classify under § 527 any organization the FEC or equivalent state authority considers a political committee. The FEC's regulations on this point already comply with Supreme Court rulings.

When Congress established the FEC, it gave that agency "exclusive jurisdiction" over the nation's campaign finance laws. In keeping with this charter, the Commission was organized so that no one party could control it and use the policing of speech as a partisan weapon. Over the course of decades, the FEC has developed expertise in the area of political regulation and, sometimes with the prodding of the courts, in the limits the First Amendment places on such regulation.

Campaign finance law has become one of the most complex areas of constitutional law imaginable.[8] For example, the IRS faces far fewer issues regarding campaigns and elections in its everyday business than does the FEC. Its culture and expertise are therefore quite different from that of the FEC, which regularly faces these issues. Indeed, one reason for the frustration with the FEC among those who support more speech regulations has been the unwillingness of these advocates to accept the Constitutional restraints under which the FEC operates. Those who seek to push regulation onto other agencies often do so precisely because they seek to bypass such constitutional sensitivities that are, and ought to be, a hallmark of the FEC.

Few view the FEC as sensitive to the First Amendment. Yet for all its faults, it is better than most other agencies in that sensitivity. The other agencies simply do not have the expertise or agency culture and structure to enforce such laws against the backdrop of a complex layer of constitutional law. Enforcement of such complicated law is difficult, and Congress should not attempt to create new enforcement agencies or give the IRS or other agencies new powers that would stray from their mission.

Getting the IRS out of the speech police business is the only solution that can guarantee a similar harassment scandal will never happen again, protect against a decline in tax compliance, and restore the agency's reputation.

---

[7] Nina Olson, "Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status," Taxpayer Advocate Service. Retrieved on July 29, 2014. Available at: http://www.taxpayeradvocate.irs.gov/userfiles/file/FullReport/Special-Report.pdf (June 30, 2013), p. 16.

[8] Indeed, at the oral argument in *McCutcheon v. FEC*, Justice Stephen Breyer offered a series of hypotheticals centered around naming a PAC after a candidate for office, a practice which, via FEC regulation, is illegal. Tr. of Oral Argument, *McCutcheon v. FEC*, 12-536 at 4 (Oct. 8, 2013); 11 C.F.R. 102.14 (2014). Justice Antonin Scalia noted that he felt that "this campaign finance law is so intricate that I can't figure it out." Tr. of Oral Argument, *McCutcheon v. FEC* at 17.

2) ***The provisions of 26 U.S.C. § 7217, which makes it illegal for certain executive branch personnel to either directly or indirectly request that the IRS audit or investigate a taxpayer, should be amended to apply to members of Congress and congressional staff.***

After the Watergate scandal, Congress passed legislation, codified at 26 U.S.C. § 7217, to make it illegal for "the President, the Vice President, any employee of the executive office of the President, and any employee of the executive office of the Vice President" as well as any cabinet level officer other than Attorney General "to request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer." Clearly, the Congress has never found such behavior to be proper.

Since 2010, several Senators pressured the IRS to launch investigations of certain named groups, and this pressure clearly had an impact on the IRS and helped create the environment for the targeting scandal.

Congress should take steps to help ensure that this type of direct pressure on the IRS from Congress does not happen again. The best way to do that would be to amend 26 U.S.C. § 7217 to make it illegal for members of Congress and their staff to make similar requests of the IRS. This rule would not only safeguard nonprofit groups, but assure the public that members of Congress could not use their offices to demand that the IRS audit or investigate political opponents.

3) ***If the IRS continues to police political speech, a clear definition of political activity needs to be implemented.***

As demonstrated by recent events – and recognized by the Service itself – the facts and circumstances test is inefficient to administer, and allows far too much discretion in its application. But, if the IRS continues to police speech, then it needs a clear rule. In order to regain the public's trust, clarification via rulemaking must comport with *Buckley*, a unanimous Supreme Court decision that provides an elegant solution to the complex problem of regulating political speech and association. Moreover, instead of regulating yet more First Amendment activity, the new rule should be simple to follow and understand, and consistent with the Internal Revenue Code.

Such a rule should:

- clarify the definition of "political activity" under the IRC so that it comports with *Buckley*'s definition of political activity, and
- explicitly adopt *Buckley*'s "the major purpose" test for analyzing "primary purpose" under the IRC.

We are not alone in this view that the *Buckley* ruling is a sound guideline for defining political activity. The American Civil Liberties Union recommended to the Senate Finance Committee that:

> "Congress and/or the administration must formulate a qualitative definition of partisan political activity that is clear, easy to understand and

> easy to apply. To the extent the definition ranges beyond express advocacy for or against a candidate or party (and it should not range too far, if at all), covered activity must be clearly and narrowly delineated. The lodestar should be to limit IRS discretion, assuming tax exempt review remains at the IRS, to the greatest extent possible. These limits would provide greater clarity to tax exempt organizations, and would temper self-censorship and the chill on political speech currently created by vague and ill-defined rules and regulations."[9]

Writing a regulation in this fashion builds upon a large body of Court rulings and FEC regulations that are well understood. Adopting this approach will greatly reduce the risk of selective enforcement. Such a standard will also make compliance, monitoring, and auditing far simpler for covered organizations, watchdog groups, and the IRS, since nearly all expenditures for political activities are already publicly reported to both the FEC and equivalent state agencies.

Additionally, basing any new IRS rule in large part on existing FEC rules is in keeping with Congress's directive that "the [Federal Election] Commission and the Internal Revenue Service shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent."[10]

4) ***If an application for 501(c)(4) tax-exempt status is delayed by the IRS for more than nine months, applicants should be permitted to petition the IRS to rule on their application in court, in alignment with statutory relief already offered to applicants for 501(c)(3) tax-exempt status.***

By providing applicants for 501(c)(4) status the same relief available to applicants for 501(c)(3) status, the agency would allow a court to decide the fate of applicants, who are often dependent on their (c)(4) status for fundraising purposes. Additionally, if the IRS is experiencing difficulty either working through an unexpectedly large number of applications or incurring trouble in evaluating a particular application, this remedy will ease the burden of the IRS while allowing an impartial court to provide a final decision for the applicant. A similar suggestion was also made by IRS National Taxpayer Advocate Nina Olson.

Conclusion

Americans' confidence in government has been rocked by information that the IRS systematically targeted groups based on their political beliefs. The best path forward requires getting the IRS out of the messy business of campaign finance regulation altogether. It is no wonder that people suspect corruption when they see a tax-collection agency under control of the President going after the President's political opponents.

---

[9] Laura W. Murphy, Michael W. Macleod-Ball, and Gabriel Rottman, "ACLU Statement for Hearing on 501(c)(4) Criteria," American Civil Liberties Union. Retrieved on July 29, 2014. Available at: https://www.aclu.org/files/assets/5-21-13_-_testimony_for_senate_finance_501c4_hearing_final.pdf (May 21, 2013), p. 5.
[10] 2 U.S.C. § 438(f).

The IRS does important work collecting the revenues needed to operate the government. This important function of the agency is threatened by its role as the speech police. For the sake of the IRS and the First Amendment, the IRS and Congress should work together so the agency can shed this role as soon as possible.

Chairman ISSA. Mr. von Spakovsky.

You know, and I grew up in a neighborhood with a lot of those names. I should be better. But if your name was Jazbinski, I'd have been much more skilled in saying it.

Thank you. Please. You are recognized.

STATEMENT OF HANS A. VON SPAKOVSKY

Mr. VON SPAKOVSKY. Thank you. Mr. Chairman, I appreciate the invitation to be here today for your first hearing on how to fix the problems at the IRS, and that is how to prevent the IRS from abusing its tremendous power.

In May of last year, Lois Lerner, as everyone knows, revealed that the IRS has been targeting Tea Party and other conservative organizations. This was apparently made public just before the public release of an inspector general report that detailed the, "inappropriate criteria," used by the IRS to identify/review the applications of conservative organizations for tax-exempt status under 501(c)(4) of the Internal Revenue Code. These reviews, again quoting the IG report, "resulted in substantial delays in processing" of their applications, and they were also subjected to voluminous requests for totally irrelevant documents and information.

This represents one of the most dangerous actions that can be taken by a government agency, abusing its power to target disfavored individuals and disfavored organizations. What is worse is that the IRS seems to have learned nothing from this effort to regulate political speech, which is outside its statutory mandate, instead of sticking to its mission, which is collecting tax revenue. In fact, the IRS recently proposed new regulations that would, in essence, implement the inappropriate criteria that the IRS used in its unlawful targeting scheme. And, unfortunately, as we all know, the IRS has a history of abusive behavior, starting with Franklin Delano Roosevelt, who used the power of the agency against a host of political rivals and business opponents.

Now, I've got six recommendations that I will make very quickly, although there are certainly others that we can discuss.

First of all, I highly recommend the IRS be made an independent agency run by a multimember commission. When compared to other Federal agencies like the FEC or the SEC, the IRS lacks the safeguards needed to assure citizens that tax regulation enforcement will not be used to stifle political opposition of the party in power.

Specifically, for example, the FEC is an independent agency. And unlike the Treasury Department and the IRS, it is not directly accountable to the party controlling the White House.

Additionally, the FEC has a bipartisan makeup of six Commissioners, instead of just one. Since it takes four votes to carry out any action, it requires the consensus of both parties represented there to take any action. This reassures the public that the agency's policies, regulations, and enforcement decisions are based on the legal and factual merits rather than on partisan and ideological considerations. The IRS lacks both of these important institutional safeguards.

The second recommendation is to place a time limit on the IRS' review of applications or eliminate the IRS review requirement en-

tirely. The investigations revealed that at one point for 27 months the IRS did not approve a single tax exemption application from a Tea Party organization.

This kind of years-long delay can be obviated with a time limit placed on the IRS for review, such as 60 days. That exemption could be granted then automatically if the IRS does not respond within 60 days, and you could even give the IRS the ability to extend that period once if it makes a written request for relevant information.

Alternatively, organizations could be automatically granted tax-exempt status as soon as they submit a basic application to the IRS. That would prevent the type of manipulation that occurred. If the IRS later obtains evidence that an organization is abusing its tax-exempt status, it can then conduct an investigation or an audit, just as it does for any other taxpayers when a problem arises. But there is no logical reason why the IRS should conduct a review of newly formed organizations just starting their activities.

Third, the IRS should only be allowed to take into account political speech or activity that consists of express advocacy. Now, I actually agree with Mr. Keating that they ought to get out of this business entirely, but that is also something that should be considered.

Also, the IRS has completely misinterpreted the definition of the promotion of social welfare. And this is my fourth recommendation. As you know, in order to be a 501(c)(4), what the law says is you must be operated exclusively for the promotion of social welfare. The IRS has wrongly interpreted that term to exclude all political activity. However, in a democracy, political involvement and participation are within the definitions of social welfare.

If you want to promote social welfare, it requires advocacy in the election process, given the broad and extensive scope of modern government. In today's America, you can't promote social welfare without interacting with government officials and legislators, as well as promoting the election of candidates with positions on issues that particular organizations believe are important in achieving their goals for promoting social welfare.

I also think IRS employees should be held personally liable for certain violations of the law, which is not currently the effort.

And, finally, the IRS should be prohibited from using campaign finance reports or public disclosures of a taxpayer's political donations at the FEC as the basis for commencing an IRS investigation.

Thank you.

[Prepared statement of Mr. von Spakovsky follows:]

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

LEGISLATIVE TESTIMONY

IRS ABUSES: ENSURING THAT TARGETING NEVER HAPPENS AGAIN

Testimony before the House of Representatives, Committee on Oversight and Government Reform

July 30, 2014

Hans A. von Spakovsky
Senior Legal Fellow
The Heritage Foundation

Introduction

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 am a former in-house counsel with extensive legal experience as a corporate lawyer. I also 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, where I was responsible for coordinating enforcement of federal laws protecting voting rights.

After leaving the Justice Department, I spent two years as a commissioner at the Federal Election Commission, which is responsible for enforcing the Federal Election Campaign Act that governs the financing of congressional and presidential election campaigns. Being a commissioner is a particularly sensitive post because the federal laws governing campaigns regulate an area protected by the First Amendment: political speech and political activity. While commissioners have a sworn duty to enforce the laws passed by Congress, they also have an obligation to protect the First Amendment rights of candidates, elected officials, and the public when they are carrying out their duties.

Summary of IRS Abuse

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 conservative 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] voluminous requests for information and documentation irrelevant to the exemption determination.

When Attorney General Eric Holder announced on May 14, 2013, that the Justice Department was opening an investigation, he called the IRS's actions "outrageous and unacceptable."[5] I agree – the actions of the IRS were "outrageous and unacceptable." They represent one of the most dangerous actions that can be taken by a government agency: abusing its great power and authority under federal law to target disfavored individuals and organizations. Here, the disfavored entities were seen by Lois Lerner and her colleagues at the IRS – rightly or wrongly – as opponents of the public policies of President Obama and other members of his political party.

Unfortunately, the individuals at the IRS who planned, implemented, coordinated, and engaged in this behavior were urged to do so in public statements and speeches by the President, who publicly accused conservative §501(c)(4) organizations of "posing as not-for-profit, social welfare and trade groups" and called them "a problem for democracy" and a "threat to our democracy."[6] He severely criticized many organizations for their advocacy after the Supreme

---

[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] Kimberley A. Strassel, *An IRS Political Timeline*, WALL ST. J. (June 6, 2013).

Court's decision in *Citizens United v. FEC*,[7] as did members of Congress who sent letter after letter to the IRS demanding investigations of various conservative nonprofit organizations.[8]

And why? Because President Obama and the members did not like the First Amendment-protected advocacy engaged in by these organizations. The voluminous information requests to applicants by the IRS, the multi-tiered review of their applications, and the long delays in granting exemptions were apparently intended to undermine the *Citizens United* decision and to burden the political speech and political activity of conservative organizations.

That this was a partisan action by the IRS is clear. Both the report by the Inspector General and the extensive investigation by this Committee have shown that only conservative organizations were targeted.

What is worse is that the IRS seems to have learned nothing from its effort to regulate political speech – which is outside its statutory mandate – instead of sticking to its mission, which is collecting tax revenue. In fact, the IRS has proposed new regulations governing §501(c)(4) organizations that would in essence implement the "inappropriate criteria" that the IRS used in its unlawful targeting scheme.[9]

These proposed new rules would undermine and interfere with the system of campaign finance laws and regulations established by Congress and the Federal Election Commission (FEC) and confuse regulated entities. It would embroil the IRS in an area in which it lacks both professional expertise and the structure and safeguards necessary to assure the American people that their government will not discriminate against them on the basis of their political beliefs and activities.

Unfortunately, the IRS has a history of similar abuse, starting with President Franklin Roosevelt, who used the power of the agency "against a host of political rivals and business opponents."[10] Revenue collection in the U.S. relies on voluntary compliance. This type of partisan behavior by the IRS seriously threatens the credibility of the agency as a nonpartisan, politically disinterested agency – a reputation *essential* to its mission.

Recommended Solutions

The misbehavior of the IRS raises the question of what regulatory or legislative changes can be made to prevent this type of abusive action by the agency from reoccurring. There are a number

---

[7] 558 U.S. 310 (2010).

[8] For a listing and timeline outlining these criticisms and demand for IRS action, see the Appendix of the Letter of Eight Former Federal Election Commissioners to the IRS (Feb. 27, 2014), available at http://www.campaignfreedom.org/wp-content/uploads/2013/12/Comment-on-IRS-NPRM-by-former-FEC-Commissioners.pdf.

[9] "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," 78 FED. REG. 71535 (Nov. 29, 2013).

[10] *See* Gail Russell Chaddock, "Playing the IRS card: Six presidents who used the IRS to bash political foes," THE CHRISTIAN SCIENCE MONITOR (May 17, 2013); Elizabeth MacDonald, "The Kennedys and the IRS," WALL ST.J. (Jan. 29, 1997).

of changes that could be made in both the organizational structure of the IRS as well as the revenue laws governing tax-exempt organizations.

- **Make the IRS an independent agency run by a multi-member commission.**

When compared to other federal agencies like the FEC, the IRS lacks the type of safeguards that Congress put in place to assure citizens that tax regulation and enforcement would not be used to stifle political opposition to the party in power. Specifically, the FEC is an independent agency and, unlike the Treasury Department and the IRS, is not directly accountable to the party controlling the White House. Additionally, the FEC has a bipartisan makeup of six commissioners, three from each of the two major political parties, nominated by the President and confirmed by the Senate. Since it takes four votes for the FEC to carry out any action, this reassures the public that the agency's policies, regulations, and enforcement decisions are based on the legal and factual merits rather than on partisan or ideological considerations. The IRS lacks both of these important institutional safeguards.

The dangers that this creates for IRS involvement in the political process should be obvious in light of the Inspector General's report of May 2013 and the ensuing congressional investigations. Whether or not IRS personnel acted contrary to laws or ethical norms or targeted particular ideologies, it should be apparent that the IRS's status within the Treasury Department, as part of the Obama Administration and as an agency controlled by a single political party, will leave any political involvement subject to claims that the agency is being misused for partisan purposes.

- **Place a time limit on the IRS's review of applications or eliminate the IRS review requirement entirely.**

The IRS's use of "inappropriate criteria" to target the tax-exempt applications of conservative §501(c)(4) organizations led to unjustified and inexcusable years-long delays that hindered or entirely stopped the operations of these organizations, particularly their ability to raise money from donors. Thus, it is obvious that a time limit should be placed on IRS review of tax-exempt applications; exemptions should be granted *automatically* unless the IRS completes its review within a specified period of time. This time period could be extended *once* if the IRS requested further *relevant* information, but there should be an absolute deadline so that determinations cannot be delayed for years either intentionally or through errors made by IRS employees.

Such a time limit is not unprecedented. The U.S. Department of Justice operated under a 60-day time limit when it reviewed voting changes submitted by jurisdictions for preclearance under Section 5 of the Voting Rights Act.[11] Failure of the Attorney General to respond within the 60-day period constituted automatic preclearance of the submitted changes.[12]

Alternatively, §501(c)(4) organizations could be automatically granted tax-exempt status as soon as they submit a basic application to the IRS. This would free up IRS employees from having to conduct a review of the organization and prevent the type of partisan manipulation that occurred

[11] 28 CFR § 51.9.

[12] *Id.* § 51.42.

under Lois Lerner. If a problem develops in the future or the IRS later obtains evidence that an organization is abusing its tax-exempt status, it could at that time conduct a detailed audit just as it does for other individual taxpayers and businesses when problems arise. There is no logical or legal reason why the IRS should conduct a review of these applications for newly formed organizations that are just starting their activities.

- **The IRS should only be allowed to take into account political speech or activity that consists of express advocacy.**

The vague and extremely broad nature of the definition of campaign activity for exempt organizations contained within 26 U.S.C. § 501—"participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"—gives the IRS far too much leeway to create mischief and interfere with protected First Amendment activity by applying an ambiguous "facts and circumstances" test. The e-mails and other documents disclosed to date in the investigation of the IRS by the House Oversight and Government Reform Committee demonstrate that IRS employees often mistakenly believed that criticism of elected officials like President Obama or their policies and positions on important issues constituted prohibited campaign activity instead of what it was—protected speech—even though the IRS considered it "anti-Obama rhetoric" and "emotional" and inflammatory "propaganda."[13]

Therefore, the statutory language should be amended so that "political" or "campaign" activity consists only of "express" advocacy on behalf of or in opposition to the election of particular candidates—that is, advocacy that directly and explicitly asks individuals to vote for or against candidates. Such a reform would draw a bright line between real campaign activity and speech about issues, politics, government, and elected officials. Furthermore, such a definition would also be easier to administer since there is a long history of cases and regulatory actions by the Federal Election Commission on express advocacy.

- **The IRS should be forced to define "the promotion of social welfare" to include and allow political speech and political activity.**

To qualify for tax-exempt status under 26 U.S.C. §501(c)(4), a nonprofit organization must be "operated exclusively for the promotion of social welfare." The IRS's regulations have long stated that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[14] The regulations provide, however, that §501(c)(4) organizations may participate in political campaigns as long as such participation does not constitute the "primary purpose" of the organization.[15]

---

[13] Greg Korte, *IRS List Reveals Concerns over Tea Party "Propaganda,"* USA TODAY, Sept. 18, 2013.

[14] 26 CFR §1.501(c)(4)-1(a)(2)(ii).

[15] *See* IRS Revenue Ruling 81-95, 1981 WL 166125 (1981) ("Since the organization's primary activities promote social welfare, its lawful participation or intervention in political campaigns on behalf of or in opposition to candidates for public office will not adversely affect its exempt status under section 501(c)(4) of the Code. Further

In contrast, §501(c)(3) of the Internal Revenue Code completely prohibits charitable organizations from participating or intervening in political campaigns on behalf of or in opposition to candidates for public office. *No such prohibition exists in §501(c)(4) of the Code.*

Instead, the IRS has imposed such a limitation by its misguided interpretation of "social welfare," which Congress did not define when it enacted §501(c)(4). However, contrary to the IRS's misinterpretation, in a democracy, political involvement and participation are certainly within the definitions of "social welfare." This is particularly so when Congress, in the statutory section immediately preceding, expressly prohibited other types of organizations from engaging in political activity.[16]

Existing IRS regulations defining "social welfare" for the purposes of §501(c)(4) begin and end with these provisions: "An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community" and "[a]n organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements."[17]

Promoting the common good and general welfare of the people for the purpose of bringing about civic betterment and social improvement must include advocacy in the election process. This is particularly true given the broad and extensive scope of modern government. In today's America, promoting "civic betterments and social improvements" is almost impossible without interacting with and attempting to influence government officials and legislators, as well as promoting the election of candidates with the principles and positions on issues that particular organizations believe are important to achieving their goals for promoting "social welfare."

By manipulating the definition of "social welfare" to exclude political speech and political activity such as voter registration efforts, voter education, meet-the-candidates forums and debates, get-out-the-vote drives and other such activities, the IRS is trying to impose political restrictions as a condition of receiving tax-exempt status as a §501(c)(4) organization *in direct conflict with* the decision by Congress in enacting §501(c)(4) *not* to impose political restrictions as such a condition.

Section §501(c)(4) organizations should be allowed to fully participate in political speech and political activity that is necessary to promote their particular issues and mission. At a bare minimum, the IRS should only include express advocacy and not "indirect participation" in election activities in its tallying of the amount of candidate-related political activity an advocacy organization engages in.

---

this organization will be subject to the tax imposed by section 527 on any of its expenditures for political activities that come within the meaning of section 527(e)(2).").

[16]Indeed, if §501(c)(4) prohibited all political activities, as some have argued, *see, e.g.*, Citizens for Responsibility and Ethics in Washington, *Gill v. Department of Treasury Fact Sheet,* May 17, 2013, available at http://www.citizensforethics.org/page/-/PDFs/Legal/CREW%20vs.%20IRS/5-17-13_CREW_IRS_Lawsuit_Fact_Sheet.pdf, many organizations would become "orphans" under the tax code. They would no longer qualify under §501(c)(4), nor would they qualify as "political organizations" under 26 U.S.C. §527, because they would not be "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures" as required by §527. The only other option would be to treat such organizations as the Sierra Club, the Planned Parenthood Action Fund, and the League of Women Voters as for-profit businesses, a result clearly not contemplated by Congress.

[17]26 CFR §1.501(c)(4)-1(a)(2)(i).

It is important to keep in mind that this definition of the allowed activities of a §501(c)(4) is *not* a tax-revenue issue since they are not charitable organizations – donations are not tax-deductible. Even organizations that expressly spend 100 percent of their time on political campaign activity – Section 527 organizations – are still exempt from taxation except under certain limited circumstances. The IRS should get itself out of the business of judging what is and what is not acceptable political speech and political activity.

- **IRS employees should be held personally liable for breaching the confidentiality of taxpayers.**

Under 26 U.S.C. §6103, the IRS as an agency is liable for the disclosure of confidential tax return information filed by taxpayers. But there is no personal liability imposed on the IRS employee for such an egregious violation of the public trust, which limits the deterrent value of this statute given the merit system civil service rules that make it almost impossible to fire a career employee. Neither is personal liability imposed for an IRS employee opening up an audit or investigating groups for illegitimate, nontax-related reasons. The IRS has also cynically misused the confidential requirements of this statute as an excuse to avoid identifying IRS employees who have unlawfully disclosed such information to complaining taxpayers. This happened most prominently with the National Organization for Marriage, which complained to the IRS about its confidential Schedule B donor form being improperly disclosed by someone at the IRS. After identifying the responsible employee, the IRS refused to reveal that individual's name to NOM, citing the prohibitions in Sec. 6103.

It should be made clear that Section 6103 does not prevent the IRS from providing the name of an IRS employee who has violated the nondisclosure requirements to both the complaining taxpayer and congressional investigators. This would facilitate implementation of a new statutory provision holding IRS employees personally liable for unlawfully disclosing taxpayer information or opening an audit or investigating a taxpayer for illegitimate, nontax-related reasons – particularly actions based on viewpoint discrimination, i.e., taxpayers being targeted because of their political philosophy, ideology or the exercise of their First Amendment rights.

- **The IRS should be prohibited from using campaign finance reports or public disclosure of a taxpayer's political donations as a basis for commencing an IRS audit or investigation of the taxpayer**

There is evidence that the IRS and particularly Lois Lerner exchanged information with the FEC on a particular organization that had applied for tax exempt status.[18] The disclosure rules that govern federal campaigns should not be abused by the IRS to target taxpayers based on their political donations. This represents a partisan misuse of such disclosure information. The IRS should be barred from using donor and other information filed with the FEC as a basis for targeting a taxpayer for investigation or an audit.

---

[18] Eliana Johnson, "E-mails Suggest Collusion Between FEC, IRS to Target Conservative Groups," NATIONAL REVIEW ONLINE (July 31, 2013), at http://www.nationalreview.com/corner/354801/e-mails-suggest-collusion-between-fec-irs-target-conservative-groups-eliana-johnson

This Committee's investigation into the IRS scandal is extremely important and it should continue to attempt to get more information about what happened. It is also vital that Congress, based on the Committee's findings, makes the legislative and other changes necessary to make sure this does not happen again. Otherwise, the IRS and federal bureaucrats will believe that they can use the enormous power of our federal tax laws to target the political opposition of an administration without any fear of any consequences.

Respectfully submitted,

Hans A. von Spakovsky

Mr. MICA. [Presiding.] Thank you.

I now recognize Ms. Mitchell, partner with Foley & Lardner. Welcome, and you are recognized.

STATEMENT OF CLETA MITCHELL

Ms. MITCHELL. Thank you, Mr. Chairman, members of the committee. I want to thank you for conducting this hearing, but I also want to thank the committee and the chairman—I'm sorry he's not here for me to personally thank—and to thank the—this committee, because you've been determined and dogged and relentless in trying to get to the truth. And from those of us, and particularly my clients, who were on the receiving end of the IRS targeting, I can tell you that the IRS was determined and dogged and relentless in the denial of the First Amendment rights of hundreds of citizens groups and thousands of law-abiding, patriotic Americans.

So my—my sympathy for the poor IRS being subjected to all of this investigation is not very—not very high.

You've asked us for recommendations about ensuring this targeting never happens again, and I come before you today as somebody who has represented clients before the IRS many—for many years before the targeting started, represented clients during the targeting, and now represent clients in suing the IRS in three different lawsuits that are cases that have arisen from this unlawful targeting.

And I want to say, first of all, that I believe that the IRS is such a corrupt and rotten and broken agency that it cannot be salvaged. And, frankly, for that reason, I would urge the Members of Congress to support Representative Jim Bridenstine's bill, House Joint Resolution 104, which would repeal the 16th Amendment, abolish the income tax, and, by definition and extension, abolish the IRS, because I don't think this agency can be saved.

But knowing that that takes a little while, in the meanwhile I have 10 recommendations I'm going to go through quickly, which are things that Congress needs to do to reinstate the rule of law at the IRS, because that's what has been lost through all of this is an abiding by the IRS of the—with the rule of law.

First of all, I believe that IRS employees should be prohibited from being unionized. They should not be in a political organization that gives 94 percent of its contributions to Democrats, including 11 members of this committee, all Democrats. No Republicans have received any contributions from this union.

I think, number two, that we should eliminate the application process for all 501(c) organizations other than (c)(3)s. There's absolutely no reason for organizations to go through this "Mother may I?" with the Federal Government to find out whether they can operate as a tax-exempt organization. They do not receive the tax-deductible contributions. Contrary to what I hear constantly from Members of Congress at these hearings—it makes me—makes my head spin—contributions to a 501(c)(4) organization are not tax deductible to the donor, and there's no reason for organizations from any 501(c) category, all 29 of them— there's no reason for them to have to get permission from the government to operate.

Number three, define by statute that political activities are social welfare activities. We should be encouraging, not discouraging, the

people from participating in political activities, and citizens organizations have a—have a right and a duty to do that.

Number four, repeal the tax that is imposed on political expenditures by 501(c) organizations. It is a hateful violation, in my view, of the First Amendment to tax citizens groups for the exercise of their First Amendment rights.

Number five. This one needs a lot of work. Congress has got to take section 26 U.S.C. 6103, which was enacted by Congress to protect taxpayers from unlawful inspection, release of their tax information. The IRS has turned it on its head and now uses 6103 as a basis for denying the rights of citizens and taxpayers, denying Congress access to information about misdeeds by the IRS. We need to give taxpayers a private right of action and opportunity to recover treble damages from individual IRS employees who violate their 6103 rights.

We need to repeal—number six—repeal the requirement that organizations must—must reveal to the IRS their donors. That is a terrible law, and it has given rise already. The first inkling we had of IRS targeting of conservatives was when we saw the IRS going after donors to a conservative group and tried to impose a gift tax on them. There is no public interest and no public policy imperative for citizens to have to disclose to the government who their donors are. These are not public documents, and they should not be subject to being disclosed to the IRS.

Number seven, as Hans said, we must—and I think the committee should expand its investigation and ask and investigate, because I'm absolutely convinced that the IRS has used campaign finance reports and, in particular, donors to the Romney Presidential campaign or super PAC as the basis of conducting personal IRS tax audits, and I think that that should be illegal. But this committee needs to get to the bottom of that particular situation, because I have heard too many stories from too many people from all over the country to not think that that—that something is afoot there.

We need to give a—number eight—a private right of action to citizens to be able to go—to file lawsuits and to recover damages for the violation of their constitutional rights by Federal employees. Just as they can today against State and local employees, that should be extended to Federal employees.

Number nine, we have to reaffirm, Congress should reaffirm that the laws that Congress has enacted to protect taxpayers and citizens from an overreaching Federal Government in fact apply to the IRS. I have listened and watched and read the IRS say that things like the Administrative Procedures Act, the Regulatory Flexibility Act, the Paperwork Reduction Act don't apply to them. And we've seen that the IRS has completely disregarded its statutory obligations under the Federal Records Act and the Federal Information Security Management Act, and they're making a joke out of FOIA, because now they either don't answer your questions, make you sue them, or they lie.

And finally, that we should make a law, 18 U.S.C. Section 1001 makes it a crime for any citizen to make a false statement to a Federal agency, agent, or investigator. Well, I believe that the IRS, and its employees and Federal employees should be held to the same standard when they lie to us.

The IRS Commissioner came—Doug Shulman came before this committee in March of 2012 and told this committee that there was no targeting of conservative groups, and that was a lie. And what has happened to him? And I—Lois Lerner has lied. Other members of the IRS, they have lied, and I think that they should be subject to the rule of law, and all the laws that Congress has enacted that apply to everybody else ought to apply to the IRS. Thank you.

Mr. MICA. Thank you for your testimony.

[Prepared statement of Ms. Mitchell follows:]

TESTIMONY OF CLETA MITCHELL
ATTORNEY
PARTNER, FOLEY & LARDNER LLP

HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
WEDNESDAY, JULY 30, 2014

"IRS Abuses: Ensuring that Targeting Never Happens Again"

MR. CHAIRMAN;

Thank you for conducting this hearing and for conducting the investigation into the unlawful and unconstitutional political targeting of American citizens and citizens groups by the Internal Revenue Service. You have been determined and dogged and relentless – and for those of us on the receiving end of the IRS targeting – the IRS and its top leaders were determined and dogged and relentless in denying the First Amendment rights of hundreds of organizations and literally thousands of law-abiding, patriotic American citizens. What the IRS has done – and which, I believe, they are still doing and planning to do – is unconscionable, unconstitutional and must be stopped and must never be allowed to happen again.

So, how, Mr. Chairman, can the Congress of the United States make certain that the IRS never again singles out Americans for their political beliefs and subjects them to harassment and the denial of the statutory procedures available to others who do not share their beliefs?

I have several recommendations. These recommendations are based on my years as an attorney representing many, many of these groups before the IRS, as someone who realized in early 2010 that something was going on at the IRS with regard to applications for exempt status, and as someone who represents three different citizens groups who have sued the IRS in the past year over various egregious violations of federal law and the US Constitution.

First, I believe that the Internal Revenue Service is so corrupt and so rotten to the core that it cannot be salvaged. It has too much power, too much money, too many employees and it needs to be absolutely jerked out at the roots. I would urge the members of this Committee and all members of Congress to support Rep. Jim Bridenstine's bill, House Joint Resolution 104, which would repeal the 16th Amendment to the US Constitution. It would abolish the income tax and, by extension, it would abolish the IRS. Yes, that's what I said. **Abolish the IRS.** The only way to ensure that the IRS never does this sort of thing again is to get rid of the agency altogether

The IRS cannot be saved. The 16th Amendment and the IRS should both become relics of American history –and the sooner the better.

The IRS is comprised of 90,000 civil service employees and 2 who are not protected by the civil service system. Two. The Commissioner and the Chief Counsel. Congress thought that by protecting the IRS employees from political pressure, the IRS employees would be politically neutral and would not succumb to political pressure. Well, as Dr. Phil says, "how's that working out for us?" The entire IRS targeting scandal was carried out by civil service employees who were TOTALLY directed and motivated by political pressures and momentum from one side of the political aisle – that is perfectly clear from the investigation this Committee has conducted. This scandal began as a result of political pressure from the White House, from the President's speeches over many months demanding that 'something be done' about these conservative organizations, political pressure from Democrats in Congress and political pressure from liberal interest groups. All demanding, as Lois Lerner remarked, that her office "do something" about these conservative groups. So they did.

An agency which by every objective measure should have total freedom to function in a totally objective manner, instead completely succumbed to political pressure.

And so I say, #1 – abolish the IRS. Repeal the 16th Amendment. This agency can NOT be saved.

But knowing how difficult it is to change the US Constitution – its having happened only 29 times in more than 200 years – and the first 10 times came in the first years of the country – I will turn my attention to what I believe Congress should do in the meantime to ensure that the IRS targeting of citizens and citizens groups never happens again.

Here are ten recommendations that Congress should adopt to protect the American people FROM the IRS, while the citizens go about the business of repealing the 16th Amendment.

1. **Prohibit IRS employees from being part of a union.** The National Treasury Employees Union provides no protection to IRS employees that federal statutes and the civil service system do not already provide. Holding an IRS employee accountable for his/her actions seems to take an act of God. So it is redundant for IRS employees to belong to a union. IRS employees should <u>not</u> be unionized. Period. It is a conflict of interest for any IRS employee to be part of a political organization like the Treasury employees union, when these are agents and employees who have such power over all the citizens of the United States. The National Treasury Employees union in this cycle alone, has given 94 % of its contributions to Democrats – including to the ranking member and 10 of the minority members of this Committee.

So I can understand why the Democrats on this and other committees are defending the IRS and trying to shut down the Committee's investigation into the IRS targeting.

2. **Eliminate the application process for exempt organizations other than Section 501(c)(3) entities.** Stop this "mother, May I?" application process to the federal government before a citizens group can function. Every exempt organization should do what every for profit entity does and what any other type of tax entity in America does: just file. Tell the IRS what it is that the entity is and just operate that way. The IRS must never again be allowed to decide who can and cannot be a social welfare organization – or a union or a business league or a veterans organization or any other type of exempt organization. The IRS does not get to decide those questions for any other type of entity in America – and the exempt organizations unit should be confined to making those decisions solely about groups that seek exemption as charitable organizations. The IRS in the targeting scandal and, indeed, according to guidance issued this past March, used the application process as a means of conducting program audits of citizens organizations – without any expertise, criteria, legal standards or accountability. Just eliminate the application process altogether and allow random statistically based program reviews of exempt organizations after they have been operational as a means of ascertaining whether the organizations are operating within their designated section of the Internal Revenue Code. But the application process is hopelessly broken and should be eliminated altogether for all but 501(c)(3) organizations. ONLY Section 501(c)(3) groups are entitled to tax deductible contributions. None of the others receive that benefit and there is no justification for an application process that the IRS admits is not required by law. Get rid of it.

3. **Define by statute that political activities ARE social welfare activities.** Social welfare organizations SHOULD conduct candidate debates and they SHOULD tell the public how candidates stand on issues and they SHOULD develop voting records and voter guides and encourage citizen engagement in politics. Political involvement is a good thing, not a bad thing – and it shouldn't be reserved just to the editorial writers and the political consultants and the professional politicians. Normal Americans who join citizens groups whose values and principles they share SHOULD be able to associate for political purposes and we need to get rid of the obstacles to their involvement. And there should NEVER be a situation where the IRS, as the most powerful agency in the country without bombs and missiles, is allowed to run roughshod over the constitutional rights of the American people to engage in protected speech and political activities. That is not their job and it should be made clear that it is not their job.

4. **Repeal the tax imposed on political expenditures by 501(c) organizations.** It cannot be constitutionally permissible for a citizens group to be taxed on the exercise of its First Amendment rights. The tax on political expenditures by 501(c) organizations is an egregious and hateful tax and should be repealed.

5. **Strengthen 26 U.S.C. § 6103 to make it meaningful for taxpayers, not capable of being used as an excuse for the IRS to fail to cooperate with taxpayers whose rights have been violated by the IRS.** Congress enacted Section 6103 for the clear purpose of protecting taxpayers from having their confidential taxpayer information inspected or released by IRS employees. Now, the IRS uses Section 6103 as an excuse for NOT telling taxpayers the truth when an IRS employee has unlawfully inspected or disclosed confidential taxpayer information. Section 6103 is relied upon by the IRS as a shield to protect itself, and its employees, from being held accountable for violating 6103. For example: If I learn or believe that my confidential tax information has been inspected, compromised, or released, the IRS takes the position that it cannot tell me, the taxpayer who is the victim of a violation of this law, anything about the violation. The IRS argues that the IRS employee who perpetrates the offense is ALSO a taxpayer and for the IRS to disclose information to me about the compromise or disclosure of my taxpayer information would constitute a violation of the IRS employee's 6103 rights. Yes, the IRS has turned Section 6103 on its head – it is unbelievable but some courts have bought this legal fiction. Congress has to fix it.

   Some recommendations for strengthening Section 6103:

   - Congress should provide a cause of action for taxpayers to be able to sue personally any IRS employee who violates Section 6103, and should provide for treble damages to injured taxpayers.
   - Any taxpayer, upon written request, should be able to obtain the name and employee ID information about any IRS employee who has accessed or inspected the taxpayer's information and the legal authority for the IRS employee's inspection.
   - Congress should repeal the authority of state and local government agencies to have access to the taxpayer's federal tax information or, at the very least, require state or local agencies to issue subpoenas, with notice to the taxpayer of the request for inspection by the state or local government agency, employee or official of the taxpayer's confidential federal tax information.
   - Prohibit the sharing of taxpayer information by the IRS with any other federal agency without due process: a subpoena and written notice to the taxpayer that the taxpayer's confidential information is being sought by another federal agency.

- Shift the burden from the taxpayer to the IRS when it comes to taxpayers being forced to provide information to the IRS. Make the IRS responsible for showing that any information it seeks from taxpayers has a lawful, legitimate purpose and is not just demanded by an overreaching federal employee. Section 6103 should protect taxpayers from being forced to provide information to the IRS to which it is not entitled, thereby allowing the IRS to unlawfully inspect confidential information that taxpayers should not have to provide without a legal basis for doing so.

Section 6103, is supposed to protect taxpayers from the unlawful inspection or disclosure of confidential taxpayer information. It should NOT be used as an excuse for the IRS to refuse to tell taxpayers who has unlawfully inspected or disclosed their taxpayer information, and it should not be the catch-all excuse for the IRS to avoid accountability to Congress and the taxpayers for violations of the rights of the American people. Section 6103 needs to be thoroughly reviewed and strengthened for the benefit of the taxpayers, NOT the IRS.

6. **Repeal the provision of the IRC that requires exempt organizations to disclose their donors to the IRS.** There is no public purpose to this mandatory, compelled disclosure of donor information; it is not publicly disclosed, nor should it be. And we saw just three years ago, in the first inkling of the IRS targeting scandal, the situation where the IRS targeted several donors to one conservative group and attempted to impose a gift tax on those donors for their contributions to that exempt organization. There is no public policy imperative for citizens groups to be required to disclose to the IRS the donors to their organizations. Congress should repeal this provision and prohibit the disclosure to the IRS of donors to exempt groups.

7. **Prohibit the use of or reliance upon by the IRS of any/all information regarding contributions to candidates, political organizations, parties, committees or exempt organizations by a taxpayer for purposes of targeting or initiating audits of any taxpayer**. I believe that the IRS has used campaign finance reports of donors / contributors to political campaigns as a selection criteria for personal IRS audits. I believe this Committee should investigate that issue. I have received too many reports from too many people from across the nation to think it is coincidental. And I am quite certain it has happened because I noticed IRS Commissioner Koskinen, in his first appearance before the House Ways & Means Committee in January, came prepared and briefed by his staff – as he always does – he shows up spouting the party line – but he made a preemptory comment that 'of course donors would be more frequently audited because they are higher income persons…" That is not what has happened. Imagine that the IRS uses campaign finance reports, required to be filed with the FEC – or a state or local campaign finance agency -- as the source for targeting taxpayers for IRS personal tax audits. That should be investigated by this Committee – did they

just use the Romney donor information? Or did they also use the Obama donor information for selecting their targets for audit? This Committee should find the answers to that question – and using reports of donors to political campaigns and committees as a basis for IRS audit should be illegal. Making an after tax voluntary campaign contribution should not subject a donor to an IRS audit. This prohibition should apply as well to the use by IRS employees of contribution and/ or donor information disclosed to the IRS of contributions to exempt organizations – See #7 above – and to the use of ANY reports of taxpayer campaign contributions required to be disclosed to local, state or federal campaign finance agency.

8. **Amend 42 USC Section 1983 to reinforce that citizens are entitled to constitutional protections when dealing with any federal agency; establish under the statute that citizens have a cause of action against IRS employees - and any federal employees - who violate their constitutional rights. Just as it is the case with state and local government employees.** We believe from our legal research that there is a clear cause of action against the IRS employees personally – people like Lois Lerner – who violated the constitutional rights of the organizations targeted by the IRS in this scandal. The IRS employees argue to the federal courts that there is NO cause of action available to the injured citizens and citizens groups because there is no statute which clearly authorizes the suit- and thus, they claim, they are immune from suit. We have argued that that is not the case – and have cited to the Court that the reason there is NOT a specific provision included in the Internal Revenue Code is that, when Congress was considering and enacting the Taxpayer Bill of Rights in 1987, the IRS commissioner testified to Congress that there wasn't a need to include such a provision in the Code because the Supreme Court had already recognized that a federal employee, including any employee of the IRS, who violates the constitutional rights of a citizen may be sued personally for those actions.

   My fellow attorneys and I who represent the plaintiffs who have filed these lawsuits disagree and we believe that such a cause of action does exist. But it would certainly enhance the protections available to the American taxpayers against abuse and discrimination against them by the IRS and other federal employees if Congress were to codify the Supreme Court's decision in *Bivens v Six Unnamed Agents,* and to give the American people the same rights against federal employees that now exist against state and local employees. A violation of the civil rights of a citizen should be capable of being redressed whether it is a local policeman or an IRS employee who has committed the violation of a person's constitutional rights.

9. **Reaffirm clearly that the laws Congress enacted to provide due process rights to the American people at the hands of their government and to protect the citizens from over-regulation and overreach by federal agencies – that those laws do in fact apply to the IRS, just as they apply**

to other federal agencies. In the past several years, I have seen, heard and watched the IRS assert that the laws enacted by Congress either do not apply to the IRS or the IRS essentially *ignores* the federal law: the Administrative Procedures Act, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Federal Records Act, the Federal Information Security Management Act – these are all examples of federal statutes the IRS either disregards or actually argues are inapplicable to the agency. The IRS has made a mockery of the Freedom of Information Act, either lying outright to citizens who file FOIA requests – telling them there are no responsive documents, but when sued by the taxpayer, it turns out that there are thousands of responsive documents. Or, what appears to be the current practice is for the IRS simply to ignore FOIA requests, forcing citizens to sue to obtain documents from the agency. The IRS has contempt for the law and contempt for the citizens. Congress should at the very least take steps to clarify for the judiciary that, indeed, the IRS and its employees are not immune from the application and coverage of the laws Congress enacts and failure to comply will result in adverse consequences to the agency.

10. **Apply the provisions of 18 U.S.C.§ 1001 to federal agencies and employees: if the citizens can be punished for lying to the government, the government and its employees should be capable of being punished for lying to the American people.** 18 U. S. C. § 1001 makes it a criminal offense for any person to make a false statement to a federal agency, agent or investigator. Yet, the IRS has made false statements to the American people consistently, and with seeming impunity. The IRS Commissioner in March 2012 told this Committee that there was no targeting by the IRS of citizens groups based on their political beliefs. That was a lie. The IRS lied to the American people when it stated publicly last November that there were no 'supporting documents' related to the proposed IRS regulations for 501(c)(4) organizations. We are now suing the IRS and Treasury for failure to produce such documents via a FOIA request. And we have started receiving documents pursuant to a scheduling order in the federal court – but we know for a fact, again because of the work of this Committee, that there are thousands of documents related to the proposed regulation of citizen speech and political activities, going back several years. The IRS should not be allowed to lie with impunity to the people or their elected representatives in Congress, just as citizens cannot lie to federal agencies such as the IRS without fear of criminal prosecution.

These are recommendations that have arisen based on my experiences with the IRS over the past several years – within the administrative, rulemaking and litigation contexts.

Lois Lerner famously said that the IRS targeting scandal arose because of some 'rogue' agents in Cincinnati. That was a lie – and she should be punished for lying to the American people.

But her reference to there being rogue agents is not wrong – the IRS as a whole has gone rogue. Congress has some heavy lifting if it is to try and rein in this out-of-control agency.

I end where I began: repeal the 16th Amendment and abolish this monstrosity. But in the meanwhile, get control of the agency by firmly reinstating the rule of law within it – and removing many of the opportunities and temptations that exist under current law for the targeting scandal to happen again.

Thank you for your hard work and efforts on behalf of the American people.

Mr. MICA. We will now turn to our final witness, Mr. James Sherk. He is the senior policy analyst in labor economics at The Heritage Foundation. Welcome. And you are recognized, sir.

STATEMENT OF JAMES SHERK

Mr. SHERK. Representative Mica, Representative Davis, and committee members, thank you for the invitation to testify.

My name is James Sherk, and I—though I work at The Heritage Foundation, my testimony this morning should not be construed as an official position of The Heritage Foundation.

This morning I want to explain to you that the law makes it very difficult to fire Federal employees, and that this shelters workers who engage in misconduct. Congress should streamline the firing procedures to discourage employees at the IRS and at other agencies from abusing their positions.

There are three facts about the current civil service system that Congress should understand. The first fact is that trying to fire a Federal employee takes years of effort. Agencies can remove workers; however, even after severe misconduct, doing so takes incredible time and effort. An agency must show that a reasonable person would more likely than not conclude that the evidence justifies a firing. Gathering the evidence to show this can take months. Then the agency must give the employee 30 days' advance notice before removing them. During this time they cannot hire a replacement and must pay the employee. If the employee during this time alleges that their supervisor is firing them for exposing misconduct, they can ask for a whistleblower investigation, during which time they also cannot be fired, even if it's a completely baseless investigation.

After all this, the agency can remove the employee; however, the employee can appeal their firing to the Merit Systems Protection Board, or MSPB. In 2013, this initial appeal took an additional 3 months. If the employee loses this appeal, they can then file a second appeal to the MSPB headquarters in Washington. In 2013, this second appeal took an average of over 9 months. If the MSPB rules against the employee again, they can appeal then to the EEOC or to the Federal courts.

In total, it can take several years to fire employees for even flagrant misconduct. For example, it took the Treasury Department 5 years to fire Lester Erickson for lying to investigators during an internal misconduct investigation.

For many managers, successfully removing a problem employee becomes a full-time job in its own right, and doing nothing is, unfortunately, often the path of least resistance. An Office of Personnel Management study found that managers feel it takes "heroic" efforts to remove problematic employees.

The second fact is that this causes Federal employees to rarely lose their job, sheltering those who abuse their position. Most Federal agencies are not run by heroes; they are run by managers trying to operate the government. An OPM survey found that only 8 percent of managers with poorly performing employees attempted to remove them, less than 1 in 10. And of those who attempted to do so, over three-quarters reported that their efforts had had no ef-

fect whatsoever. So, unsurprisingly, the statistics show that Federal employees rarely get fired.

OPM data also shows that last year the Federal Government fired less than 10,000 workers out of its 2.1 million-man workforce for discipline or performance reasons. Almost half of those firings occurred among new hires in the probationary period. Last year the government fired just one-quarter of 1 percent of tenured employees with 2 or more years of experience.

Now, employees who engage in misconduct know how hard it is to remove them. The Office of Personnel Management reports that many managers stated in their agencies, "The unwritten policy was to avoid any situation that could lead to an appeal or lawsuit."

In other words, managers frequently let misconduct slide. For example, at Housing and Urban—at the Department of Housing and Urban Development, an employee spent over one-third of his time over the course of 5 years conducting private business deals using his official email account. One of those business deals involved providing a lap dancer to a private party. HUD officials did not even try to fire him.

And this system also shelters the IRS employees who target Americans for their political views. IRS employees have the same notice and appeals process as other government workers. Consequently, IRS managers had and still have strong incentives to ignore employees targeting Americans for their political beliefs. It would take heroic efforts to remove employees engaging in such conduct.

Now, the third fact is that Congress can fix these problems by reforming America's civil service laws. Ideally Congress should return to the spirit of the original Pendleton Act, which regulated the hiring of Federal employees to prevent a political spoils system while allowing managers to remove employees at will. Congress should return to this policy and make Federal employees at will while still preventing patronage and nepotism appointments in the hiring process.

Barring such reform, Congress should at least streamline the firing process so it takes less time and effort. Congress can take several steps to do so, such as allowing Federal managers to immediately suspend employees without pay when they've engaged in misconduct, and then providing the due process after their suspension.

Congress should also eliminate the ability of Federal employees to appeal their dismissal through multiple forums. They should have to pick one.

Congress should also extend the probationary period from 1 to 3 years to give managers more time to vet employees and remove those likely to cause problems later.

And to encourage good behavior, Congress should transform the current seniority-based step increases into performance-based raises.

Thank you. I appreciate the opportunity to explain that the law makes it very difficult to fire Federal employees, and that this shelters workers who engage in misconduct.

[Prepared statement of Mr. Sherk follows:]

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

Congressional Testimony

IRS Abuses: Ensuring that Targeting Never Happens Again

Testimony before
Oversight and Government Reform Committee
U.S. House of Representatives

July 30th, 2014

James Sherk
Senior Policy Analyst in Labor Economics
The Heritage Foundation

Chairman Issa, Ranking Member Cummings, and Members of the Oversight and Government Reform Committee, thank you for inviting me to testify this morning. My name is James Sherk. I am a Senior Policy Analyst in Labor Economics 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.

Federal law makes it very difficult to separate federal employees from their jobs. Managers who wish to fire problematic employees, whether because of misconduct or poor performance, must go through draining and time-consuming procedures that take about a year and a half. Consequently the federal government very rarely fires its employees, even when their performance or conduct justifies it. In fiscal year (FY) 2013 the federal government terminated the employment of just 0.26 percent of its tenured workforce for performance or misconduct—a rate one-fifth that of *monthly* private-sector layoffs.

This system shelters employees who engage in misconduct. IRS officials who wanted to fire employees engaging in misconduct would have had great difficulty doing so. Most federal managers find letting all but the most egregious misconduct slide the path of least resistance. Congress should streamline the firing process in the federal government. The system should serve the interests of the public, not the civil service itself.

Hard to Remove Federal Employees

The law makes firing problematic federal employees extremely difficult. Consider that General Services Administration (GSA) regional commissioner Paul Prouty helped plan the infamous $800,000 lavish employee conference in Las Vegas. The GSA fired him when this came to light. Nonetheless he remains on the federal payroll to this day. The Merit Systems Protection Board (MSPB) overruled the GSA's decision and ordered Prouty reinstated.[1] The MSPB concluded his involvement in the conference did not justify firing him and ordered the GSA to give him 11 months of back pay. Federal managers at the IRS and elsewhere have great difficulty removing problem employees.

This system evolved from well-intentioned civil service reforms in the 19th century. Congress passed the Pendleton Act in 1883 to replace the spoils system with a merit system in federal hiring. The Pendleton Act only regulated the hiring process; it left government officials free to remove federal employees at will. However, subsequent legislation, Executive Orders, and Supreme Court decisions also made terminating federal employment very difficult. The Civil Service Reform Act of 1978 codified the currently required procedures.

[1]Lisa Rein, "GSA Ordered to Give Job Back to Executive Fired after Las Vegas Conference Scandal," *The Washington Post*, March 13, 2013, http://www.washingtonpost.com/politics/gsa-executive-fired-after-las-vegas-scandal-ordered-to-get-his-job-back/2013/03/13/279ad318-8b5b-11e2-b63f-f53fb9f2fcb4_story.html (accessed July 28, 2014).

The Supreme Court's decision in *Cleveland Board of Education v. Loudermill* (1985) further reinforced these protections.[2] The Supreme Court found that civil service laws give government employees a property interest in their jobs. As such the Court ruled the Due Process clause of the U.S. Constitution prevents the government from firing tenured civil servants without first "some kind of hearing" and an administrative process afterwards.

Once the government has extended civil service protections the Court ruled it must maintain them in some fashion. If federal managers want to fire a federal employee today they can use one of two forms of due process: Chapter 43 or Chapter 75 of Title 5 of U.S. Code. Both avenues involve significant time and expense.

Chapter 75

Federal managers can penalize employees for misconduct or bad performance using Chapter 75. However, even in cases of misconduct—as occurred at the IRS—managers cannot simply fire someone. Instead they must analyze infractions using the 12 *Douglas* factors.[3] These factors include the relationship of the infraction to the employee's responsibilities, the workers' disciplinary and work records, how clearly the manager informed the employee they were violating the rules, the possibility of rehabilitation, mitigating circumstances such as personality clashes, and the efficacy of alternative punishments in deterring future misconduct. Managers must show they carefully evaluated all 12 *Douglas* factors before proposing to fire an employee. If they do not the MSPB may reduce the penalty from firing to something less serious on appeal.

If an agency concludes the *Douglas* factors merit firing it must also gather enough evidence to support this conclusion. To successfully fire an employee the agency must show that "a preponderance of evidence" justifies doing so. In other words they must show that a reasonable person would be more likely than not to conclude the evidence justifies a firing. The manager must also prove that firing the employee will improve the efficiency of their agency.[4] The process of gathering sufficient evidence can take several months. If the agency believes it has enough evidence to overcome this burden of proof it can begin the firing process.

To fire someone the agency must first give the employee 30 days advanced notice. They agency must explain why it intends to fire the employee and give the employee a chance to respond. If the agency wants the employee gone during this time it must put him (or her) on paid leave—the law does not permit faster removals or unpaid leave except in extreme cases.[5] During this time the agency cannot hire a replacement; legally the employee still fills that job and no vacancy exists.

---

[2]470 U.S. Code § 532.

[3]*Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06

[4]U.S. Merit Systems Protection Board, "Addressing Poor Performers and the Law," Report to the President and the Congress of the United States, September 2009, page 33, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=445841&version=446988& (accessed July 28, 2014).

[5]An agency may terminate an employee in less than 30 days if it has good reason to believe the employee has committed a crime for which he (or she) could get sent to jail. See 5 U.S. Code § 7513(b)(1)-(2).

If during this time the employee alleges his supervisor fired him for blowing the whistle on misconduct they can ask the Office of Special Counsel (OSC) to investigate. During an OSC whistleblower investigation the agency cannot terminate him.

After this 30-day period, and after any OSC investigation, the agency can fire the employee and stop paying him. However, the employee has 30 days to appeal this decision to his regional Merit Systems Protection Board or to file a grievance with his union (the worker can pick one or the other but not both). The regional MSPB will conduct an investigation and issue a ruling. In 2013 this took an average of 93 days—three months.[6] The MSPB has the authority to downgrade the firing to a less serious punishment, such as a demotion. If the employee loses this appeal, he can file a second appeal to the MSPB headquarters in Washington, D.C. The MSPB headquarters will review and possibly overturn the regional board's decision. In 2013 this process took an average of 281 days—over nine months.[7] If the employee uses all his appeal rights within the MSPB, the firing process takes an average of about one and a half years from start to finish.[8]

Having exhausted appeals to the MSPB the employee can then file appeals in alternative forums. They have the option of appealing to the federal courts. If the employee alleges they were fired for discriminatory reasons, the employee can also file charges with the Equal Employment Opportunity Commission (EEOC)—instigating an investigation that can take years. The EEOC has the authority to order the employee reinstated even if the MSPB rejected the employees' allegations of discrimination. In total it can take several years to fire employees for even flagrant misconduct.

For example, Lester Erickson, a police officer at the Bureau of Engraving and Printing, lied to investigators during an internal misconduct investigation. The Bureau fired him for lying. Erickson appealed to the MSPB, the Court of Appeals, and ultimately the Supreme Court.[9] From start to finish it took the Bureau five years to finish the process of terminating his employment.

In another case the U.S. Postal Service (USPS) required an employee, Winford Sullivan, to undergo a medical evaluation to support his claim to need five to 10 days of medical leave a month. In February 2009 Sullivan refused to appear at the medical evaluation but continued taking medical leave. He proceeded to rack up 44 unscheduled absences in the coming months. After clear warnings he had violated agency procedures the USPS

---

[6]U.S. Merit Systems Protection Board, *Annual Performance Report for FY 2013 and Annual Performance Plans for FY 2014 – 2015*,, March 10, 2014, p. 11, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=996058&version=999982&application=ACROBAT (accessed July 28, 2014).

[7]Ibid.

[8]Three months to gather evidence supporting the firing, the 30-day advance notice requirement, 30-day waiting period for appeals to the MSPB, three months for the first MSPB appeal, nine months for the second MSPB appeal totals 17 months, in addition to any investigation by the OSC, the EEOC, or appeals to the federal courts.

[9]*LaChance v. Erickson*, 522 U.S. Code 262 (1998).

terminated Sullivan's employment in March 2010. Sullivan appealed his firing to the MSPB which rejected his claims in July 2011. Sullivan then appealed his firing to the U.S. Court of Appeals for the Federal Circuit, which ruled against him in February 2012—three years after his misconduct started.[10]

Chapter 43

Federal managers seeking to remove poorly performing employees can also use Chapter 43. These procedures only apply to performance issues—managers cannot use them for misconduct.[11] The IRS could only use Chapter 43 to punish misconduct if that misconduct also affected the employee's job performance.

Chapter 43 offers some benefits over Chapter 75. First it has a lower burden of proof. Managers need only prove that "substantial evidence" supports removing or demoting the employee. That means that a reasonable person might find the evidence justifies the action—even though another reasonable person might disagree. Managers do not have to show that a reasonable person would probably agree with their actions. Second, the MSPB cannot reduce penalty. If a manager proposes firing an employee the MSPB cannot instead order them suspended or demoted. A manager who proves his case knows he can remove the employee from the federal service.[12] Third, managers do not have to prove that firing the employee will improve the efficiency of the federal service. Fourth, the agency does not have to use the *Douglas* factors when proposing a penalty.

These benefits come at a cost. In order to take action under Chapter 43 the agency must first show the employee has fallen short in a critical area of his work. Before proposing removal the employee's manager must (1) clearly inform the employee of his particular shortcoming; (2) work with him to help improve his performance; and (3) expressly warn the employee that continued poor performance could lead to his removal. Federal employees call this a PIP—short for both a Performance Improvement Plan and Performance Improvement Period.

If the employee's performance improves during the PIP and remains at tolerable levels for a year, his agency cannot fire him using Chapter 43. If his performance reverts to unacceptable levels after that period, the agency must give him a new PIP.

If the employee's performance does not improve during the PIP the agency can then propose firing him. As with Chapter 75 the agency must give the employee 30 days advance notice. Unlike Chapter 75 that notice must include not only specific instances that lead to the firing but also the critical performance element where the employee fell short.

After getting fired the employee then has the same appeal rights to the MSPB and other forums that he would under Chapter 75.[13] Consequently, disciplinary actions often take

[10] *Sullivan v. U.S. Postal Service*, 464 F. App'x 895 (Fed. Cir. 2012).
[11] Managers must use Chapter 75 to remove employees for misconduct.
[12] U.S. Merit Systems Protection Board, "Addressing Poor Performers and the Law," pp 33–34.
[13] Ibid.

longer under Chapter 43 than under Chapter 75. A manager must work with a problematic employee on a PIP, give him time to improve, and document his failure to do so before beginning the termination process.

The structure of Chapter 43 also allows employees to fail repeatedly without getting fired. If an employee does poorly in one element of his job, improves during the PIP, but reverts to old habits after the year has passed his manager cannot fire him. Such a yo-yo pattern of unacceptable–acceptable–unacceptable performance can recur for years without a firing under Chapter 43.

Similarly, managers need a separate PIP for each separate performance shortcoming. A PIP dealing with one performance issue does not permit firing an employee for a different failure. For example, an employee might submit his reports chronically late. His supervisor could work with that employee on a PIP. If the employee subsequently got his reports in on time, but the quality of those reports deteriorated, the manager could not fire him. They would have to start a new PIP to deal with quality issues. If the employee then improved the timeliness and quality of those reports, but began neglecting another element of his job, the manager could not fire him without another PIP dealing with the new issue. This can make Chapter 43 very difficult and frustrating for federal managers to use.

No Action the Path of Least Resistance

Federal managers typically find navigating these procedures time-consuming and difficult. For many successfully removing a problematic employee becomes a full-time job in its own right. Daniel Michaels, former Director of the Food and Drug Administration's Office of Enforcement explains, "The most difficult thing [about firing someone] is the time it takes away from managing the organization in order to document the case."[14] A MSPB survey found that one-third of federal managers with a problematic employee cited a lack of time as their greatest obstacle to dealing with the problem.[15] One representative complaint from an Office of Personnel Management (OPM) survey of federal managers states: "Because of the amount of time I had to spend on the [disciplinary] action, my performance suffered and I received a rating of 'needs improvement.'"[16]

Employees can also avoid getting fired if they can convince the MSPB or EEOC that their manager is firing them for racially or sexually discriminatory reasons, or if they can convince the Office of Special Counsel they blew the whistle on wrongdoing. This gives employees facing termination a strong incentive to accuse their supervisor of bigotry or

[14]Denise Kersten Willis, "You're Fired," Government Executive, March 1, 2006, http://www.govexec.com/magazine/features/2006/03/youre-fired/21285/ (accessed July 28, 2014).
[15]U.S. Merit Systems Protection Board, Office of Policy and Evaluation, "Removing Poor Performers in the Federal Service," Issue Paper, September 1995, pp. 6–7, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253662&version=253949&application=ACROBAT (accessed July 28, 2014).
[16]U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, "Poor Performers in Government: A Quest for the True Story," January 1999, p. 11, http://archive.opm.gov/studies/perform.pdf (accessed July 28, 2014).

misconduct. OPM has found this discourages managers from disciplining employees.[17] As Timothy Dirks, a former director of human resources for the Department of Energy puts it this way: "In effect, the manager is being put on trial."[18]

For most federal managers doing nothing becomes the path of least resistance. The MSPB reports that "many supervisors believe it is simply not worth the effort to attempt to remove Federal employees who cannot or will not perform adequately."[19] An OPM study found that it takes "heroic" efforts for federal managers to remove problematic employees.[20]

Exceptionally Low Firing Rates

Most federal managers are not heroes. They are managers trying to run a federal agency. Faced with these incentives they rarely attempt to remove employees with conduct or performance issues. A MSPB survey found that almost four-fifths of federal managers have managed a poorly performing employee. Fewer than one-quarter of these managers attempted to demote or fire that worker.[21] Another OPM survey found even bleaker results. OPM reported that only 8 percent of managers with problem employees attempted to demote or fire those workers. Fully 78 percent of these managers said these efforts had no effect.[22]

This inaction translates into exceptionally low firing rates for federal employees. OPM data shows that in FY 2013 the federal government fired only 9,603 employees for discipline or performance reasons out of its entire 2.1 million person workforce.[23] That translates into an annual firing rate of 0.46 percent—less than a third that of the 1.5 percent *monthly* layoff and discharge rate in the private sector.[24][25]

Even these rates are artificially inflated. Federal employees go through a one-year—or at some agencies two-year—probationary period. During this period they have almost no

---

[17]Ibid., p. 11.

[18]Willis, "You're Fired."

[19]U.S. Merit Systems Protection Board, Office of Policy and Evaluation, "Removing Poor Performers in the Federal Service," p. 2.

[20]U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, "Poor Performers in Government: A Quest for the True Story," January 1999, p. 1, http://archive.opm.gov/studies/perform.pdf (accessed July 28, 2014).

[21]U.S. Merit Systems Protection Board, Office of Policy and Evaluation, "Removing Poor Performers in the Federal Service," p. 5.

[22]U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, "Poor Performers in Government: A Quest for the True Story," p. 11.

[23]Heritage Foundation calculations using data from the U.S. Office of Personnel Management, FedScope – Federal Human Resource Data. The rate divides FY 2013 terminations for discipline/performance by June 2013 total federal employment. Available online at www.fedscope.opm.gov (accessed July 28, 2014).

[24]Department of Labor, Bureau of Labor Statistics, "Job Openings and Labor Turnover – May 2014," Table 5, July 8, 2014.

[25]Unfortunately, the Bureau of Labor Statistics does not estimate discharges separately from layoffs, so this is the best available estimate of the firing rate in the federal government. These figures are not strictly comparable because the layoff and discharge rate includes both firing/terminations and job losses due to contracting (or bankrupt) enterprises laying off employees. The federal government did not go bankrupt in 2013 and despite sequestration under 600 federal employees lost their jobs to a reduction in force.

appeal rights and their managers can fire them with little difficulty. Many managers use this probationary period to weed out employees with conduct or performance issues. Almost half of the FY 2013 firings occurred among employees with fewer than two years of federal service.[26] The firing rate stood at just 0.26 percent among tenured federal workers with two or more years of experience.[27] The system that makes it hard to fire federal employees for political reasons makes it hard to fire them for any reason.

Sheltering Misconduct

This system shelters government employees who engage in misconduct. It takes extreme effort for federal managers to fire subordinates who abuse their position. Even if they put in the effort to do so the MSPB may overrule their decision, as Paul Prouty's case demonstrates. So federal managers let conduct slide that private-sector employers would never tolerate.

For example a Housing and Urban Development (HUD) employee spent over a third of his working time for over five years conducting private business deals with his official e-mail account. This included arrangements to provide a lap-dancer to a private party. Another HUD employee operated a private trucking business during work hours from her worksite. HUD officials did not try to fire either worker.[28] The OPM reports managers said that "the unwritten policy [in their agencies] was to avoid any situation that could lead to an appeal or law suit."[29]

This system protects IRS employees who targeted conservative groups for their political views. Section 1203 of the IRS code allows IRS supervisors to immediately fire an employee who violates the constitutional rights of any citizen. However, IRS employees still go through the same notice and appeals process as government employees do for any other violation. It would take incredible time and effort for IRS managers to discipline their subordinates from engaging in this behavior.

Consequently, IRS managers have strong incentives to let misconduct like targeting Americans for their political beliefs slide. Unless IRS managers undertook heroic efforts their employees will remain on the job, conducting their work as they see fit, without repercussions for selectively targeting Americans for their beliefs.

Solutions

---

[26]Heritage Foundation calculations using data from the U.S. Office of Personnel Management, FedScope – Federal Human Resource Data. The federal government terminated the employment of 4,419 federal employees with fewer than two years of service in FY 2013.

[27]Heritage Foundation calculations using data from the U.S. Office of Personnel Management, FedScope – Federal Human Resource Data. The rate divides FY 2013 terminations for discipline/performance for employees with two or more years of service by June 2013 total federal employment of employees with two or more years of federal service.

[28]Jim McElhatton "Nice Work If You Can Get It: Federal Workers Keep Jobs Despite Misconduct," *The Washington Times*, May 13, 2014, http://www.washingtontimes.com/news/2014/may/13/federal-workers-hold-on-to-jobs-despite-blatant-mi/?page=all#pagebreak (accessed July 28, 2014).

[29]U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, "Poor Performers in Government: A Quest for the True Story," p. 11.

Congress should reform civil service laws to better serve the American public. The law now makes government employees largely unaccountable to the American people or their elected representatives. It protects poor performers and those who abuse the public trust.

Ideally, Congress should eliminate all restrictions on firing federal employees. The original Pendleton Act regulated the hiring of federal employees without making it difficult to fire them. Congress can prevent patronage appointments by returning to such a system. If Congress does not want to take this step it can take several incremental measures to bring greater accountability to federal employees. These include:

- **Allowing federal managers to immediately suspend employees** without pay for misconduct or poor performance, providing due process after the suspension. Federal managers should not have to wait 30 days before removing an employee from their job.

- **Permitting federal managers to immediately fill vacancies** created by suspending an employee instead of waiting until the end of the 30-day period.

- **Eliminating the ability of federal employees to appeal their dismissal through multiple forums.** Currently, employees can appeal their termination through either their union grievance system or the MSPB, and then potentially file charges with the Equal Employment Opportunities Commission or the Office of Special Counsel. They should have to pick one agency to review their case without getting to re-litigate their removal through multiple agencies.

- **Extending the probationary period from one to three years.** This would give managers more time to vet employees and remove those likely to cause problems later.

- **Transforming the current seniority-based "step increases" in pay into performance-based raises and reward good behavior.** Congress can do this by restricting these raises to employees rated four or five on the federal performance scale. Currently, employees rated three or higher receive step increases. However managers must develop a Performance Improvement Plan for employees rated a one or two on this scale and work with them intensively to improve their performance. Consequently, the overwhelming majority of federal employees earn a rating of three or higher and step increases effectively function as seniority-based raises. Restricting them to employees rated 4 or higher would turn them into truly performance-based raises that would enable managers to encourage good behavior—not just penalize misconduct.

America's civil service laws do more to serve the interests of poorly performing federal employees than the public. Even many government employees object to the excessive job protections given to them and their colleagues—they force diligent and hard-working federal employees to pick up the slack left by those who do not pull their own weight. The hard work of honest federal workers gets impugned by those who abuse their position and abuse the public trust. A recent MSPB survey found that less than a quarter of federal employees believe their agency deals with poor performers effectively—the lowest rating of every measure of organizational stewardship the MSPB surveyed.[30] The American public and conscientious federal workers deserve better.

Conclusion

Congress intended civil service laws to prevent administrations from using federal employment to reward their supports. It has turned into a system that makes it very challenging to remove a federal employee for any reason—even serious misconduct. IRS employees who targeted Americans based on their political beliefs knew that removing them could easily take their managers over a year and a half. This system ensured they would face little accountability for their actions. Such a system serves the interests of the federal bureaucracy, not the general public. Congress should streamline firing procedures to enable managers to swiftly remove problem employees.

****

[30]U.S. Merit Systems Protection Board, "Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces," A Report to Congress and the President, Figure 1, p. 11, January 2013, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=790793&version=793798&application=ACROBAT (accessed July 28, 2014).

The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 2012 it had nearly 700,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2012 income came from the following sources:

Individuals	81%
Foundations	14%
Corporations	5%

The top five corporate givers provided The Heritage Foundation with 2% of its 2012 income. The Heritage Foundation's books are audited annually by the national accounting firm of McGladrey & Pullen. A list of major donors is available from The Heritage Foundation upon request.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

Mr. MICA. Thank you, Mr. Sherk and the other witnesses, for their testimony.

Ms. Mitchell, unfortunately you seem to be very wavering in whether you think we should do something about the IRS. But all humor aside, it sounds like you represented some people who also were targeted, and maybe could you tell us a little bit more about again about what you've seen and people—the other thing, too, is these people, if you're defending them, you're the attorney. Who's absorbing the cost? What's this doing to their lives?

Now, we're here to look at a remedy, but I think it's also important to look at the impact. And you are by far one of the most forward-speaking people about the damage that has been done by IRS that we've had before our committee. So would you mind commenting?

Ms. MITCHELL. I'm happy to do that, Mr. Chairman.

I testified in February before Mr. Jordan's subcommittee. I told the story, but this wasn't the full committee.

I first—I represent people who apply for tax-exempt status. And I've been doing this for many years. I've been dealing with IRS Exempt Organizations Unit for many, many years, representing groups seeking tax-exempt status of various kinds, (c)(3), (c)(4), (c)(6)s. And it used to take—prior to the onset of this scandal, to get a 501(c)(4) application reviewed and processed would take 3 to 4 weeks.

I had an application for—I first began to realize something was going on at the IRS in early 2010, because I had a client—we applied for tax-exempt status for 501(c)(4) group in the fall of—October of 2009, and IRS cashed the check, because you do have to pay for this privilege, and then we didn't hear from them again until June of 2010. And this was very unusual. This had never happened before.

And in early 2010—and then, you know, I have another application that we file——

Mr. MICA. How long before—you said 2010. How long before were you handling these kinds of cases?

Ms. MITCHELL. Oh, decades.

Mr. MICA. So——

Ms. MITCHELL. Yeah, I mean, this wasn't——

Mr. MICA. This was quite a departure from——

Ms. MITCHELL. It was a total departure.

Mr. MICA. Total departure.

Ms. MITCHELL. It was a total departure.

And, by the way, that organization that filed for tax-exempt status in October 2009 did not get its 501(c)(4) tax status granted until July of last year, and only after this committee—the scandal broke and this committee began this work.

So, I mean, I've represented a number of organizations that applied for tax-exempt status during that period and were associated with—they were conservative or Tea Party groups. They were groups that were opposing Obamacare. And I really do believe, frankly, that that one is one of the triggers. We don't know all the information that you know and that your investigators know, but I think one of the criteria that the IRS was looking at was whether

these organizations were opposing Obamacare as a matter of policy.

And now you have a situation, I think it goes to the—my colleagues' testimony, which is that when you have an agency that now not only is collecting taxes, but is the agency that is enforcing Obamacare, and now it's regulating political activities, you're mixing things that should not be mixed in an agency that is set up to collect revenue.

Mr. MICA. Did you have any progressive groups also come to you with——

Ms. MITCHELL. Well, you know, it doesn't really work that way. The fact is—you gotta choose. You're gonna for play for USC or Notre Dame; you can't play for both. And people have lawyers who—or, in our case, the University of Oklahoma or Oklahoma State. I see my Congressman from Oklahoma City, which is where I'm from.

Mr. MICA. Your future Senator.

Ms. MITCHELL. My future Senator. Yes.

But, you know, Republicans have lawyers, and Democrats have lawyers. You know, they represent them because—and same with——

Mr. MICA. Were you aware of—I mean, the accusation is that——

Ms. MITCHELL. I'm well aware of that.

Mr. MICA. —that this was also a targeting towards progressive groups?

Now, I just asked the staff, there was one of the principal promotions—what was the name of it? Organizing for Action. I think it was approved in 73 days, and 27 months there was a freeze on conservative groups. It doesn't appear to us that the other side was targeted.

Ms. MITCHELL. They were not——

Mr. MICA. Let me say this, too. If you were targeting progressives, if this was all about progressives or liberals, the ceiling would be coming down——

Ms. MITCHELL. Yes, it would.

Mr. MICA. —and there would be riots in the street.

Ms. MITCHELL. Mr. Chairman, if you look at the documents, I mean, I know that this is something that the minority members of this committee and the House keep saying, but it simply isn't borne out by the facts.

If you look at the documents, frankly, that have been posted by Congressman Levin on the Democratic—the Democrats—the minority pages of the Ways and Means Committee, he has posted a lot of documents from the IRS, and he posted it to stand for the proposition that progressives were referenced just the same as Tea Party groups in these monthly reports.

And I've read the training materials to which Mr. Davis refers, but if you read what they said in the training, and you look at what the instructions were, here's what the instructions were for progressive groups: You look at those. Yes, they were on a BOLO list, but if you found them, what the instructions said was there are some progressive groups who have applied for 501(c)(3) status; it is more appropriate to tell them to be (c)(4)s.

If you look at what it said for the Tea Party groups, it said, send them all—basically quarantine them in a—in a special unit in Cincinnati. And that's the difference. Yes, they looked at them, but they looked and got different treatment depending on whether they were progressive or Tea Party. If they were Tea Party, they literally were quarantined for a period of years. The progressive groups were looked at to make sure they'd applied for the right status, and then they got their tax status. That's the difference.

And in the case of many of these conservative groups and Tea Party groups, there's one—the Tea Party of Albuquerque still hasn't gotten its tax-exempt status. And there are many of these small groups, when they got these letters from the IRS saying, tell us everyone who has spoken at your meetings, tell us everybody who is on your board, every—who are your volunteers; how many volunteers do you have; what are their names; who attended your meetings; do you have transcripts of who spoke, of everything they said when they spoke to you; tell us everywhere where your president spoke in the last year and where she plans to speak in the next 2 years. These are impossible questions, and a lot of these groups when they got these very burdensome letters from the IRS saying things like, did you have candidate debates? Did you do voter registration? And I had people saying, were we not supposed to do candidate debates? Are we not supposed to conduct voter registration? Because they think if the government's asking them those questions, that maybe they were doing something wrong.

And so what did they do? They started backing away. Many times groups just went away because they couldn't get contributions because they didn't have their tax status. And it—it had the desired chilling effect, and that viewpoint discrimination caused injury to hundreds and hundreds of organizations nationwide.

Mr. MICA. And gagged a particular viewpoint prior to a national election.

Mr. Davis.

Mr. DAVIS. Thank you very much, Mr. Chairman.

Seems to me that the logical place to start this discussion is with the report issued by the inspector general in May of last year. And it is my understanding that Mr. Cummings did ask that the inspector general be a part of this hearing.

That the inspector general found that IRS employees in Cincinnati developed what he called inappropriate criteria for screening applications for attempt status. He also identified serious deficiencies by IRS managers. He found that Lois Lerner was not aware that these employees were using these criteria for a full year. He also found that even though she ordered an immediate stop to them, the employees used different, inappropriate criteria anyway.

Since then the committee has obtained evidence that progressive groups were also singled out in similar ways, being listed expressly in so-called "be on the lookout," or BOLO, lists, receiving lengthy questionnaires, facing long delays, and sometimes being denied. I agree that no groups, conservative or progressive, should be singled out based on inappropriate criteria.

In his report, the inspector general made nine recommendations for reform at the agency. Ms. Mitchell, let me ask you, in your

opinion, how do you think the IRS is doing in implementing these recommended reforms?

Ms. MITCHELL. Congressman, I have to tell you in all honesty I think the application process is completely broken. It is Humpty-Dumpty. It is off the wall, and it cannot be put back together again.

What the IRS has done subsequent to the TIGTA report is to make matters worse.

Mr. DAVIS. Well, then, let me ask our witness——

Ms. MITCHELL. Can I give you an example what they've done?

Mr. DAVIS. Yes.

Ms. MITCHELL. Because this—they issued those regulations the day after Thanksgiving, which had clearly been in process for many months, if not years. I think this committee released an email from Ruth Madrigal from the Treasury Department to Lois Lerner that was dated, I want to say, maybe even 2011.

And they—so they'd been working on regulations off plan, not in public view, which they sprung on the American people over the Thanksgiving holiday and gave us until February 28 to issue comments. And there were over 160,000 comments. I want to tell you that some of us worked pretty darn hard to get those comments filed. And what those regulations would have done would have codified the egregious, horrible principles that were in all of those, "development letters" that were sent to the conservative groups.

But since that——

Mr. DAVIS. My time is running so just——

Ms. MITCHELL. One other thing.

Mr. DAVIS. Let me just ask the other witnesses what their opinions are.

Mr. KEATING. Well, I think one of the recommendations was for the IRS to come up with clearer rules. And I think the IRS, as Cleta indicated, their proposed rulemaking was horrible.

We did a study of all the comments filed, and the opposition was almost unanimous. And you had groups, left and right, business and labor unions, were unanimous in their criticism of the agency's rules.

So I don't think the IRS gets it, I don't think they understand the First Amendment, and that's why I think the key recommendation is the IRS should get out of the speech police business.

And this is something that the National Taxpayer Advocate and independent voice inside the IRS, Nina Olson, she actually has a background in low-income taxpayer compliance and advocacy, and she came to the same conclusion, and I think it is something the IRS should do.

Mr. VON SPAKOVSKY. Congressman Davis, I'll just make one comment on that. And to show you just how confused the IRS was, these new regulations they proposed, they were all, in essence, to have what their definition would be of campaign-related activity. Well, their definition of campaign-related activity would completely conflict with the Federal Election Commission's definition of campaign-related activity. So things that the FEC thinks are just fine and are not campaign related, the IRS would say, no, no, those are campaign related, which would put all kinds of organizations in this untenable position.

And these regulations were so bad that I and seven other former FEC Commissioners wrote an extensive public comment pointing out all of the basic errors and mistakes that the IRS had made with these proposed new regulations.

Mr. DAVIS. Let me just hear from Mr. Sherk.

Mr. SHERK. Representative, would it take an act of Congress for the IRS to be able to streamline their firing procedures. I mean, there's some internal agency regulations, but the core of it is mandated by Congress. And Chapter 43 and Chapter 75 of Title V of the U.S. Code, and unless Congress acts, they can't do much to make it easier to remove people quickly for misconduct.

Mr. DAVIS. Thank you very much, Mr. Chairman. And I assume we are going to come back. And I have got some other questions I'd like to raise on that.

Chairman ISSA. [presiding.] So we've had 12 hearings, and you still have questions. I appreciate that, Mr. Davis.

Mr. Jordan.

Mr. JORDAN. I thank the chairman.

And I want to thank our witnesses for being here today, but, more importantly, for all the work they have done in helping let the American people know what the Internal Revenue Service was up to, what they did, how they harassed people and targeted people for exercising their most fundamental right, their right to speak out in a political fashion against—against their government.

Let me just dispel one thing; 104 to 7. Those are the numbers. One hundred four conservative groups we know were targeted, harassed, delayed, delayed, delayed. Seven progressive groups were put on a different list, as Ms. Mitchell pointed out, put on a different list, got their (c)(4) status, and never received anything close to the same kind of treatment. So this idea that it's wrong, it's false, it is just simply not borne out by the facts.

The idea that the IRS is involved in way too many things. Of course. Mr. von Spakovsky, they're not the FEC, for goodness sake. They can't enforce election law. They shouldn't be involved in healthcare law. Of course.

And the rule that Mr. Keating just brought up. We had a hearing several months ago where we had the ACLU, Tea Party Patriots, Motorcycle Association of America, and Home School Legal Defense Association, all opposed to the rule. Now, when you have the ACLU, and the Tea Party, and home schoolers and Harley riders all against the same thing, you know that they—this is unbelievable.

The thing I want to get to the question, just get your responses. I know we have people with a background—there's another hearing going on. That's why you see a lot of Members over at the other hearing dealing with the special prosecutor resolution that passed Congress with 26 Democrats, I might point out. Every single Republican, 26 Democrats supported a resolution saying what the Justice Department is doing in their investigation here warrants an outside special counsel. So I want to get your thoughts on that.

And let me just—let me just prompt you with one thing. Two weeks ago we had James Cole, Deputy Attorney General, the number two guy at the Justice Department, James Cole, sitting right where you all are sitting, and we asked him a pretty basic ques-

tion: When did you learn, when did the Justice Department learn that the Internal Revenue Service had lost Lois Lerner's emails? And his response shocked us all. He said, we learned when it was reported in the press that they had been lost, even though, sitting at that same table a week ago, Mr. Koskinen told us he knew in April, and his chief counsel knew in February. And the Justice Department learns June 13th, when the rest of America learned, that they had lost Lois Lerner's emails.

So I want your thoughts on do we need a special—I'll just go right down the list, but particularly Mr. von Spakovsky and Ms. Mitchell, who I know have had a background in dealing with this. But let's start with Mr. Keating.

Mr. KEATING. I think that would be advisable. I think I first suggested that—I wasn't the first to suggest, but I first suggested that last year shortly after the scandal broke.

Mr. JORDAN. Thank you.

Mr. von Spakovsky, if I'm correct, you worked in the Justice Department.

Mr. VON SPAKOVSKY. I did. And I, frankly, was astonished at Cole's answer for this reason. In May of last year is when Attorney General Eric Holder announced that he was opening up a criminal investigation of this. Well, I was involved in investigations with the Justice Department. The first thing you would do if you have the FBI as your investigator situation like this is go and seize all of the documents and information the way the FBI does when they're investigating a private organization. A year and a half later, they clearly had not done that and didn't even know that all of the evidence they were supposedly supposed to be looking at, all those emails, didn't exist.

Mr. JORDAN. And when we asked that specific question, did you get a court order, did you get a warrant, did you go in—did you go to Lois Lerner's office, did you grab all the documents, did you get her computer, of course they hid behind, well, there's an ongoing investigation. We can't comment.

But based on witnesses we have had in depositions and transcribed interviews, it sure seems like they haven't. And based on what—the response, it sure looks like they haven't.

Mr. VON SPAKOVSKY. No, I don't think they've taken the most basic steps you would take in a real investigation.

Mr. JORDAN. Yes. Ms. Mitchell.

Ms. MITCHELL. I don't think there's any question that there should be a special prosecutor. You know, the problem is that the longer they wait, the harder it is to conduct an authentic investigation because of the spoliation of evidence, et cetera.

We filed a motion in our civil suit. True the Vote sued the IRS and a number of individual IRS employees for the denial of its First Amendment rights in the consideration of its application. And so we filed 3 weeks ago a motion for a preliminary injunction asking the court to conduct an evidentiary hearing into what has happened. And that motion is pending. We had a hearing, and we are waiting. And the judge ordered the IRS to file three declarations that are supposed to be first-person, authentic evidence. And, you know, and the Justice Department told the court that this is in the civil case.

Mr. JORDAN. Yeah. Mr. Sherk, yeah.

Ms. MITCHELL. But they didn't know until they read it in the paper.

Mr. SHERK. It certainly seems that such an investigation would be warranted. But even if you had a special prosecutor who brought charges against the IRS, individual IRS employees, it would still take the agency months to remove them, and in many cases be collecting pay.

Mr. JORDAN. Mr. Chairman, if I—are we giving a little extra time here, Mr. Chairman?

Chairman ISSA. If no one objects.

Mr. JORDAN. Okay. Well, I'll wait for the second round. I don't want to do that. I know we have got——

Chairman ISSA. The gentlelady from Illinois Ms. Kelly.

Ms. KELLY. Thank you, Mr. Chair.

Mr. Sherk, in April our chairman made this statement: "There is simply no evidence that any liberal or progressive group received enhanced scrutiny." Do you agree with that statement?

Mr. SHERK. I'm an expert on the firing procedures, and Federal workforce. I would defer to the others on the panel who have more expertise on the specifics of the targeting.

Ms. KELLY. So you have no opinion?

Mr. SHERK. I would certainly give the other chairman always the benefit of the doubt, and I would assume it would be accurate. But if you'd like to talk to me about ways we can fix the—how—the civil service laws, I'd be happy to answer those questions.

Ms. KELLY. Well, I'd like to go through some of the evidence our committee has obtained during our investigation. These should be simple yes-or-no answers. First, we received a copy of a so-called BOLO list from November 2010 that directs IRS employees to screen for progressives. It states, "Common threat is the word progressive. Activities appear to lean toward a new political party. Activities are partisan and appear anti-Republican."

Were you aware of that document?

Mr. SHERK. I'm aware to the extent I've heard it discussed at this hearing, that there was differential treatment between the two groups. But again, my focus and expertise is on labor policy and on the Federal civil service laws.

Ms. KELLY. Well, let me go on. Another BOLO list from August 2010 directs IRS screeners to look specifically for ACORN successors. Were you aware of that document?

Mr. SHERK. I was not aware of that, although, as Representative Jordan pointed out, it was something like 104 to 7 was the differential treatment between groups on the right and groups on the left.

Ms. KELLY. So there were probably more Tea Party groups that applied, so you probably would have some differences.

A BOLO list from February 8, 2012, includes an entry for Occupy organizations. Were you aware of that document?

Mr. SHERK. No, I was not, but I wasn't looking for it. Again, I was looking into Federal firearm procedures.

Ms. KELLY. Yes or no is fine.

A PowerPoint presentation from 2010 includes images of a donkey and an elephant and instructs IRS screeners to look for the

terms "progressive" alongside "Tea Party" when reviewing tax-exempt applications. Were you aware of that document?

Mr. SHERK. That's not something I looked into because, again, my expertise is on the Federal civil service laws.

Ms. KELLY. Thank you.

Notes from an IRS screening workshop in 2010 list emerged, "groups" alongside "patriot," and 9/12 organizations. Were you aware of that document?

Mr. SHERK. Again, as with all your questions——

Ms. KELLY. You can just say yes or no.

Mr. SHERK. No, I was not, Representative.

Ms. KELLY. Progressive groups were sent lengthy questionnaires almost identical to the ones sent to Tea Party groups, and they also had to wait years to receive tax-exempt status. For example, a Palestinian rights group in Minnesota received inquiries that were almost identical to those sent to conservative groups and waited more than 2 years for final IRS tax-exempt status approval.

Were you aware of those questionnaires? Just yes or no.

Mr. SHERK. No, I was not, Representative.

Ms. KELLY. Thank you.

How about witness testimony? Our committee interviewed witnesses who testified that progressive groups went through a multiyear, multitiered IRS review process similar to that used for conservative groups. For example, during a transcribed interview with committee staff on October 29, 2013, a senior technical adviser in that Tax-Exempt Government Entities Division explained that, like Tea Party organizations, emerge cases were grouped together and subjected to a lengthy multitiered review.

Were you aware of that testimony?

Mr. SHERK. No, I was not, Representative.

Ms. KELLY. Many people point to the number of Tea Party cases that were screened as evidence of bias, but the simple fact is that there were many, many, many more tax-exempt applications during this timeframe from Tea Party groups. And it's really time for us to stop politicizing this issue. People on both sides of the aisle in this room, we don't want bias and discrimination and wrongful treatment against any group. We just want to get to what the fact of the matter is and make sure that each group is treated fairly.

And I might add that the IG said that he was not aware of the BOLOs for screening progressive groups before his audit was released. That's why the report was skewed. And I wish the IG was here to actually answer questions about this.

I yield back.

Chairman ISSA. I thank the gentlelady. You have only your ranking member to complain to for not asking for the IG.

Is there anyone else who would like to answer that question or comment, since Mr. Sherk, quite frankly, was probably the worst person as far as, A, looking at those questions?

Ms. Mitchell.

Ms. MITCHELL. Mr. Chairman, I've seen most of those. I've reviewed most of those reports to which the Congresswoman was referring. And those training materials from July of 2010 specifically state progressive does not equal Tea Party. That's in the outline. That's in the minutes of that training session. And what they—

and, yes, they were looking for that term. They were looking for the term and given different instructions as to what to do if they saw it.

And I'll give you an example. There's an organization called Progress Texas——

Chairman ISSA. The gentlelady might want to remain. This is still your time and answers to your questions.

Ms. KELLY. Right. But I've stayed long, and I have another committee that I have to go to.

Chairman ISSA. I understand.

Continue, please.

Ms. MITCHELL. There is an organization called Progress Texas, and in a report that was leaked to USA Today in September of last year, this was a November 2010, maybe 2011, report of the IRS, and it was a sensitive case report. And it had, I think, 162 cases on it. And it did have some progressive groups, but what happened was Progress Texas, when it had the comments about Progress Texas, it said, seems to have anti-Rick Perry propaganda. And within 6 months, they had their tax-exempt status, their (c)(4) status, compared to my client, King Street Patriots from Houston, where it said, likely approval. You know when they got their 501(c)(4) status? November. I'm sorry, December of 2013. They just got it. And we got another round of questions last August after the scandal broke.

So, yes, progressive groups—the word "progressive" was on some of those reports, but what the IRS employees were instructed to do when they saw that term was totally different from what they were instructed to do when they saw a Tea Party, 9/11 or other conservative group.

Chairman ISSA. I thank the gentlelady for making the answers complete, and I hope MSNBC will broadcast both.

We now go to the gentleman from Oklahoma Mr. Lankford.

Mr. LANKFORD. You are an optimist on that, Mr. Chairman.

I do have a couple follow-up questions. The specific goal of this hearing is to be able to determine how do we keep this from happening again. Now, there's several comments that have been made, and I appreciate all of your written statements and your oral statements as well to be able to walk through this.

Probation changes. Mr. Sherk, you mentioned this, as well, change in the probation, extending that. You made a brief comment on that. I'd like for you to expand on that. From 1 to 3 years for new employees so we can deal—if there's a problem early, we can discover it early. What's the difference on trying to be able to deal with discipline for an employee in their probation status versus once they've been there?

Mr. SHERK. Thank you, Representative.

For the first year in most agencies, in some agencies it extends to 2 years, employees are called basically probationary, and they can be fired almost at will. There's only two reasons you can't fire them during the probationary period. One is for political discriminations; you can't say you're a Republican, you're a Democrat, get out of the Federal service. And the second is on the basis of marital status. For any other reason beyond those two, they can be fired, and fairly large numbers of them are. Again, if you look at the fig-

ures for terminations, for layoff in performance in the Federal Government for last year, almost half of them came from employees with less than 2 years of experience.

Mr. LANKFORD. Okay. So is that something you'd recommend governmentwide, or are you recommending that simply for the IRS?

Mr. SHERK. I'd recommend it governmentwide. Give the managers more time to review the employees and get rid of people they think might cause problems later.

Mr. LANKFORD. Okay. Thank you very much.

Ms. Mitchell, thanks for being here, as well. We can speak Okie to each other back and forth off the dais as well.

But the second recommendation, "Eliminate the application process for exempt organizations other than 501(c)(3) entities. Stop the Mother, may I."

Ms. MITCHELL. Yes.

Mr. LANKFORD. Can you go into greater detail why that would matter? There are lots of folks coming in that say, if they're going to be tax exempt, they're, "getting Federal funds, and so they should be limited."

Ms. MITCHELL. Well, that is simply not true, and it demonstrates a lack of understanding of how the process works and the end result when you get a letter of determination from the IRS. And I recall that when this committee had then-IRS Commissioner Shulman appear before it in March of 2012, and when he lied to the committee and said there was no targeting when there was, the other thing that he said at that hearing was, well, you know, 501(c)(4) organizations don't even have to have a letter of determination from the IRS in order to operate as a 501(c)(4). So but if they submit themselves to our jurisdiction, we can ask them whatever we want, which I thought was a pretty arrogant comment, frankly.

But anything else you do, and if you want to open any kind of entity, if I want to open a flower shop, if I, you know, am going to be my mother's estate executor, I have to open a bank account, I file a form with the IRS, I tell the IRS what it is that the entity is going to be, and then I just start operating. And I file the correct tax return, and the IRS deals with it after the fact.

And one of the problems here with the 501(c)(4) screening process that they employed was that they started trying to conduct program audits during the review process, the application review process. They completely abandoned their published rules and application and all.

501(c)(3) is the only organization, the only type of entity, that offers a benefit to the donor that you give money to it, and you get a tax deduction. Every other 501(c) group is—as the chairman pointed out, receives contributions after tax. So there's no reason to have all of this process in the first place. Just get rid of it.

Mr. LANKFORD. Right. What about the publication of donors and submitting the list of donors to the IRS?

Ms. MITCHELL. Every tax-exempt organization has to file a Schedule B with its Form 990 tax return in which it must disclose to the IRS all donors of $5,000 or more. Now, that is not a public

schedule. The public is not entitled to it. It is, by law, confidential. So the only people you're telling the information to is the IRS.

And since, as I said, for all organizations other than (c)(3)s—I mean, I would probably get rid of it for (c)(3)s, because I don't really see the point—but if they can make an argument that they're in a different category because contributions are deductible, but there's no public policy reason to tell the government who has given of their after-tax dollars to an exempt organization.

Mr. LANKFORD. Are they cross-referencing that to the individual's tax returns?

Ms. MITCHELL. Well, there's no reason to because they don't get any tax benefit.

Mr. LANKFORD. Okay. So that is the question, then, of why you gather that. That limits the authority, that IRS typically functions in the gray areas of the law, and that's where they have the greatest amount of power.

You had also started a comment earlier telling a story about the new rulemaking, and you were giving an example that we had run out of time on. Can you finish that story briefly?

Ms. MITCHELL. The day that—thank you, Congressman. The day that the comments closed was February 28 of 2014, and at last count I think it's over 160,000 comments. The following Tuesday—that was on a Thursday. The following Tuesday, March 4, the IRS issued new guidance for reviewing applications for exempt status for 501(c)(4)s. Guess what's in that guidance? It is all of the questions—many of the questions that they were trying to include in their new definition of candidate-related political activities are now in their guidance as to the kinds of development letters and questions that every 501(c)(4) organization can anticipate receiving from the IRS if you file an application for (c)(4) status going forward.

I just will tell you from a practitioner's point of view, I think it is malpractice if I ever submit another one of those applications to the IRS until we get rid of it. So I just think the whole process is completely broken, and it just needs to be eliminated.

Mr. LANKFORD. Okay. I yield back.

Chairman ISSA. Thank the gentleman.

We'll go to the gentleman from Nevada Mr. Horsford.

Mr. HORSFORD. Thank you, Mr. Chairman, and to the ranking member.

Thank you to the witnesses who are here today.

Let me begin by saying, as I have said before, I think, this is probably over our fifteenth hearing or something like that on this issue. I am not a——

Chairman ISSA. The gentleman wasn't here, but it was noted by the ranking member it's the twelfth.

Mr. HORSFORD. Okay. Twelve, fifteen, they all kind of run together when it's the same regurgitated issues with no resolution. I'm not a defender of the IRS; I'm a defender of my constituents who want there to be accountability. I believe that there was wrongdoing by individuals, staff-level individuals, and part of this committee's oversight and government reform function should be to get those facts and to address those concerns. I am not here nor do I care about how this hearing plays with MSNBC or FOX News,

because it's the constituents back home and their opinion that matters to me most.

So I have one question for each of you, and I would ask you to be brief so I can tackle another issue that I'd like to put on the record, and that is this title is "IRS Abuses: Ensuring that Targeting Never Happens Again."

So what is one concrete suggestion that this committee should act on in order for the targeting that did occur, the IRS wrongdoing that did occur can be addressed? Each of you, if you could limit your comments, one suggestion.

Mr. KEATING. Well, my one suggestion would be to do what Nina Olson, the National Taxpayer Advocate, the independent ombudsmen inside the IRS, recommended, and that is to get the IRS out of the business of making political determinations about speech. And this is something I think the committee should encourage the IRS to do, it already has the authority to do, and it has other agencies to make these determinations, and the IRS wouldn't have to do anything further.

Mr. HORSFORD. Thank you.

Mr. VON SPAKOVSKY. Congressman, I have to agree with that, and that is something that all organizations—I don't care whether they're conservative, liberal or moderate, all of them should want that the IRS not be looking at and analyzing the speech and activity they engaged in to determine whether they think it's political or not.

Mr. HORSFORD. So is your point that some other entity should perform that function and that determination?

Mr. VON SPAKOVSKY. No. It's just that the IRS has the wrong definition that it uses when it looks at 501(c)(4)s. I detailed this in my testimony, but basically they've misinterpreted the law in a way they shouldn't be doing to use that against organizations, and they simply should not be doing that.

Mr. HORSFORD. Thank you.

Ms. MITCHELL. Well, when you have 10 children, I've just recommended 10 things, I've got to pick my favorite. So if you want to be sure that there's no targeting of citizens groups, you eliminate the process of having to ask the IRS for permission to operate as a citizens group. Just eliminate that application process altogether, and then you won't get into a fight about whether it was progressives or Tea Party because you take away the power of the IRS to make that determination in the first place.

Mr. SHERK. I would reform our civil service laws to return to the spirit of the original Pendleton Act in which you regulate the hiring to prevent a political spoils system, while leaving the government fairly free to fire people for misconduct and firing without this extensive appeals process afterwards.

Mr. HORSFORD. Thank you.

You know, I respect people's suggestions, and, again, I want to hear and listen to what those suggestions should be. And we have now had some 45 transcribed interviews, some 250 employees from the IRS, some 700,000 pages of documents, and the IRS, at taxpayer expense, has spent over $18 million responding to congressional inquiries, but yet we have not, as a committee, taken action on anything, but we continue to have these hearings where allega-

tions about White House involvement is alleged, you know, from the very beginning when the chairman first started this process, when the inspector general first issued his report.

It was Chairman Issa who went on national television and said, "This was the targeting of the President's political enemies, effectively, and lies about it during an election year."

Hal Rogers, the chairman of the Committee on Appropriations, stated.

Chairman ISSA. The gentleman's time is expired, but please continue—

Mr. HORSFORD. Thank you.

"Of course, the enemies list out of the White House that IRS was engaged in shutting down or trying to shut down the conservative political viewpoint across the country, an enemies list that rivals that of another President some time ago."

But after this exhaustive investigation, the committee has obtained no evidence to support these accusations. And so, again, I have asked the chairman respectfully, and to my Members on the other side who I have talked with, you know, let's get to the place where we can fix what is broken so that there is no longer targeting and this never happens again, because there are some of us who have that concern and want to get to that point. But we don't think that it should involve conspiracies and accusations that are unfounded, not after $18 million of taxpayer investment has been wasted.

I yield back my time.

Chairman ISSA. I thank the gentleman.

I might note for the record that long before I made those statements, I suggested that the White House would be well served to hire accountants rather than attorneys, but they didn't take my advice on that either.

Mr. Meadows, would you like to be next up? The gentleman is recognized.

Mr. MEADOWS. Thank you, Mr. Chairman.

I will be very brief, but, Ms. Mitchell, I want to come back to you on a couple of areas, because one thing that was troubling to me as we went through 12 hearings was that the IRS early on said that if you were applying for a 501(c)(4) status, that there was a waiver, kind of an exemption, that you really didn't have to apply. And out of the people that you've represented or the ones that you know that have been represented that were caught up in this targeting, how many of them were notified by the IRS that there was this exemption; that if it went over I think it's 270 days, that, you know, one—how many of them were notified by the IRS?

Ms. MITCHELL. Well, for—actually for a 501(c)(4) application, this is what I'm saying, that you don't have to have a letter of determination——

Mr. MEADOWS. Right.

Ms. MITCHELL. —from the IRS in order to function as a 501(c)(4) organization. However, if you want to raise money from the public——

Mr. MEADOWS. Right.

Ms. MITCHELL. —and you—you have to file charitable registrations in 38 States, and those States all require a letter from the

IRS or a copy of your application that you're trying to get one, which is why they've got to eliminate the process. So—but the 270-day threshold only applies to 501(c)(3)s. Once you apply as a (c)(4) or (5) or (6) or (7) or (8) or (9), you are at the mercy of the IRS to decide when it's going to issue your letter. And you don't have any statutory right to pursue a civil remedy in court.

In the case of True the Vote, the IRS and the Department of Justice filed on the day their answer was due in our lawsuit. They said, oh, we decided to give you your (c)(3) status.

Mr. MEADOWS. So are you telling me when Mr. Shulman came here to this particular body and said that there was these waivers and they really didn't have to do that, that that was, at best, disingenuous, what——

Ms. MITCHELL. Well, what he was saying, as I understood his testimony at the time—and as I said, I thought it was very arrogant where he said that, well, these groups don't have to come to us for a letter, which is technically true; but if they do, then we can ask them whatever we want to. That was the position that he took before this committee. And I thought at the time that that was actually—that ignored the rule of law——

Mr. MEADOWS. Right.

Ms. MITCHELL. —because there are standards, and there are application and instructions, and they shouldn't be able to go beyond the four corners of that.

But there's one other exemption waiver thing that I think that you might also be recalling. You will remember that when Interim Commissioner Werfel went before Ways and Means in June of last year, he told the Ways and Means Committee—and they sent letters to all of those whose applications were still pending, that had not—all the Tea Party groups who had not gotten their exempt status waiting for all this period of time, hundreds of them, and several of my clients. And they received letters from the IRS saying, if you will promise that you will never engage in more than 40 percent political activity, and if you will also promise—and they threw in there a ringer that said, counting not only your program expenditures, which is what the law says, but they threw in—as I say, they have abandoned the rule of law—they threw in this other category of counting volunteer activity. Well, how are you supposed to do that? There's no standard. There's no—you know, and I told several clients who have said, what should I do, I said, well, I don't know how to tell you to answer that, because you're going to have to sign under penalty of perjury from now on that you're complying with something that has no legal definition.

Mr. MEADOWS. Well, what it sounds like, we talked about banks that are too big to fail. It sounds like the IRS has gotten too big not to fail. Would you agree with that?

Ms. MITCHELL. Well, that's why my number one recommendation is that everybody ought to sign on to Congressman Jim Bridenstine's House joint resolution, what is it, 104, to abolish—to repeal the 16th Amendment, abolish the income tax and get rid of the IRS, because I think it's become the tail wagging the dog of our country, and I think it's a detriment to our Nation.

Mr. MEADOWS. All right. Mr. Sherk, let me go to you from a labor standpoint. One of the frustrations, as a business guy, I sometimes

call the government "the big easy," that once you get here, there's no way that you get fired. Would you say that after someone has been with the government for 2 years that the chances of them getting fired are slim to none?

Mr. SHERK. They are incredibly minuscule. Like I said in my testimony, once you pass that probationary period, your odds of getting fired are one-quarter of 1 percent. So, you know——

Mr. MEADOWS. How does that compare to the private sector?

Mr. SHERK. So the private sector, monthly, the best we know from the Bureau of Labor Statistics is they have a figure for both layoffs and discharges. So both we fired you for showing up drunk, and we fired you because we're losing business. It's not strictly comparable to the Federal Government, because, of course, the Federal Government doesn't go out of business in the same way private-sector companies do. But that monthly layoff and discharge rate is about 1.3 percent versus an annual termination rate for performance and misconduct rate of, you know, basically one-quarter of 1 percent. So it's—the monthly private-sector rate is five times greater than the annual Federal rate.

Mr. MEADOWS. So a fraction of the private sector?

Mr. SHERK. Exactly.

Mr. MEADOWS. I appreciate the patience of the chair. I'll yield back.

Chairman ISSA. I thank the gentleman.

I'll go to the gentleman from Michigan Mr. Bentivolio.

Mr. BENTIVOLIO. Thank you very much, Mr. Chairman.

Ms. Mitchell, thank you very much for all the work you're doing. God bless you. As a Tea Party Republican, I'm a big fan. And since this story broke, thanks to you, about the IRS targeting Tea Party groups and conservative groups, a number of people have come to me back in my district saying they believe that they've been targeted because of their political beliefs working as a schoolteacher that's run by the Michigan Educational Association.

Auto dealers that lost their dealership at GM and Chrysler during the bailouts lost their dealerships not because of their past performance, but because the dealer owners donated to Republican groups.

And now there are churches. I'm hearing some people that are—have to go before the IRS and explain what they're doing in their church regarding their political activities.

Have you heard of any other groups being targeted because of their political position?

Ms. MITCHELL. Well, as I said in my testimony, I think that this is something the committee really should investigate, and that is, I have heard repeatedly from Romney donors across the country that they were subject to personal income tax audits by the IRS, or their businesses were subjects to audits. And I just have a sense that it's too common to be—it's not scientific. I've spoken with TIGTA about it.

I think that it's really important that the IRS answer the one question, did you use, have you ever used campaign finance reports and donor information to target individuals for IRS audits? And I think they should be forced to answer that question. And then you have to then ask, did you do it equally to donors to the Obama

super PAC as you did to the Romney super PAC? Because I think that this committee needs to get to the bottom of that, because I really firmly believe that that's been going on, and I think that that should be made statutorily illegal.

Mr. BENTIVOLIO. Thank you very much. Once again, thank you for all that you do.

Mr. Chairman, I yield back.

Chairman ISSA. Would the gentleman yield to me?

Mr. BENTIVOLIO. Yes.

Chairman ISSA. Briefly, I just want to get one thing on the record that we haven't talked about. And I know Mr. Horsford was interested in the reforms, but he didn't stay to hear them nor apparently read what we put out on the suggested reforms.

But, Mr. Keating, we already previously made clear 501(c)(4)s get no tax exempt, no—you pay with after-tax dollars if you want to belong to that affiliated group.

What's the best way for people to understand the history of anonymous giving to groups that represent them in some cause? Call it political, call it ideological, but isn't there a long history of the Court looking at people's ability to have anonymous free speech through association so that they not be ultimately persecuted for their attempt to bring some form of justice? Can you give us, either of you give us some of the history?

Mr. KEATING. Well, probably the most famous case that people are aware of is NAACP v. Alabama. And obviously, back in the 1950s, the State of Alabama was not that keen on the types of recommendations being made by the NAACP, and they sought to get their membership list and presumably their donor records as well. And this case went up to the Supreme Court, and the Supreme Court said the State had no right to get that information under the circumstances designed in the law.

But this is not the only case. There's another case that I would like to cite. I believe it's Tally, but I may be getting the name wrong. There was an ordinance passed to require labor organizers to register or display names while they were trying to organize, and the Court, again, said there's no right for the government to force that kind of disclosure.

What we like——

Chairman ISSA. I suspect that the tag should say "hit me" in the anti union movement potentially so—I mean, that clearly you would have been sectioned out; that was a way to go after the union movement, if they would have been allowed.

Mr. KEATING. Absolutely. And, you know, what we point out is the purpose of disclosure is to allow citizens to monitor their government and to monitor government officials. The purpose of disclosure shouldn't be for government to monitor the citizens or for people to use that in coordination with the people in power to monitor citizens or harass citizens for their political activity.

Chairman ISSA. So the history of anonymous free speech, of the right of people to associate, and to associate in a way in which their ideas can be put forward without retribution is, in fact, not a conservative history; in many ways it's a progressive history of the Court finding on behalf of the American people that right, isn't it?

Mr. KEATING. Absolutely.

Chairman ISSA. Thank you.

With that, we go to Mr. Woodall.

Mr. WOODALL. Thank you, Mr. Chairman.

I was just watching it on TV back in the office, and I was so enjoying everybody's answers and solutions, and I thought I want to come see it in person before folks leave.

I don't want to slow you down any further. You represent—well, I came up in that big freshman class in 2010, and you represent the pulling on the rope that so many of those Members from both sides of the aisle—that inspiration that brought them here. The Heritage Foundation has been the touchstone to which folks have looked not for blame, but for opportunity to make a change for decade upon decade. There's no one else who has played that role better.

Ms. Mitchell, your name has come up—I won't tell you for how many years your name has come up in my readings and dealings. I didn't have to get any further than the first page of your testimony where you said the secret is just to repeal the 16th Amendment, and then we can solve these issues. You had me right there. We were committed.

And, of course, Mr. Keating has been in this business a while, trying to pull on the rope and make a difference. Candidly, I'd never thought about why it was post-Watergate we decided that the executive branch manipulation of the IRS was a bad thing, but if Congress wanted to manipulate the IRS, maybe that would be okay. That makes no sense whatsoever. While Ms. Mitchell's recommendation to repeal the 16th Amendment would solve it better, prohibiting Congress from manipulating it would certainly make a difference.

I, too, heard Mr. Horsford ask about what the solutions are, which is the question I would hope 435 people wanted to ask, but if you guys are not doing what you do, we never get around to the asking of the question. I can't tell you how many conversations I had where folks said, oh, the IRS would just never do that. That could never happen. This is America. This would never happen in America.

And until somebody cares enough, Ms. Mitchell, to make sure that grievances get heard, you think it could never happen in America, but it does. Without the think tank, without the watchdog groups, we are lost.

I looked at your testimony, and I thought, golly, where are the liberal witnesses on this panel? And I thought, you know what? This is not really a conservative or a liberal issue. Free speech, without it neither of us could persist.

So I won't delay you any longer. Just know how much I appreciate what it is that you do. I can't tell you how many conversations we've had in this freshman class of 2010 that say we want to make a difference, but it's so hard to figure out how sometimes. You all don't have a voting card, but you have a long list of resources and an endless amount of passion that folks who do have voting cards look to to try to make a difference for families back home, and I'm grateful to each one of you for that.

Mr. Chairman, I yield back.

Chairman ISSA. I thank the gentleman.

This may come as a surprise, but I never asked my first round of questions, so I'm going to sort of finish by asking.

We made a number of suggestions in the document we put in. It was provided to all of you. But there's more than one way to skin a cat is an old expression. Are they equal, acceptable; would they all be improvements is the general set of questions.

Mr. Sherk, you looked at what we did in the way of civil service reform last week. Was that a good start?

Mr. SHERK. I think it's certainly a good start. It's moving in the right direction. I think, though, that you need to move beyond the SES; that a lot of the employees engaging misconduct are not the managers, but the rank and file. And if Congress isn't going to wholesale overhaul the civil service protections, things like allowing people to be immediately removed without pay instead of waiting for 30 days, things like extending the probationary period, and really just making it—reducing the number of appeals employees can have. That's what really gets the agencies upset is that it's, you know, the in-house review, okay, that's one thing, but then when it goes to the Merit Systems Protection Board, then it goes to headquarters, then it goes to the EEOC, then it goes to the courts. Just pick one forum and only one set of appeals. Don't, you know, get to relitigate it time and time again so it drags out over a course of years, I think, would make the Federal managers more willing to use those procedures.

Chairman ISSA. Well, one of the suggestions that's been made, and I want your opinion on it, is that people have to choose to either be members of a union and come under that union contract protection or civil service, but not both.

Mr. SHERK. Well, it sort of works that way now. So you can either use your union grievance procedures, or you can use the Merit Systems Protection Board. So to that limited extent you've got one forum, but then at the end of the either the union grievance, the arbitration or the MSPB, then you can appeal to Federal courts. Then you can—if you're alleging discrimination, you can appeal to the EEOC. And I think you should have to pick one. If you're saying you're fired for discriminatory reasons, appeal to the EEOC right at the beginning. Don't go through the grievance, then go to the EEOC, then go to the courts. Just pick one forum.

Chairman ISSA. Now, on another subject, the question of should there be one Commissioner or a board. We put that out, I think I'd get a general agreement that you think that the normal commission process where you have a bipartisan commission of some sort, whether it's five with the Chairman being the party of the President, such as the SEC and so on, or six, such as the FEC where it's truly an equal board, you all think that would be an improvement over the current Commissioner who is strictly a political appointee of the current President; is that right?

Mr. VON SPAKOVSKY. I certainly agree with that, and I speak from experience as a Commissioner at the FEC. I mean, the whole advantage of having a multimember commission is that the board has to work to try to reach consensus on issues. And therefore, if something comes up on an enforcement question, a regulatory question, a policy question, you've got people with different points

of view raising issues about it. It's particularly important, quite frankly, to have members of both political parties there.

Chairman ISSA. So your point would be that by having a multi-member commission, when they all agree, American confidence is much greater than when the political appointee of one party makes a decision?

Mr. VON SPAKOVSKY. No, that's exactly right. And frankly, look, when they disagree—for example, look, there are rare occasions, it's actually a very small percentage despite what people may believe, when the FEC, which has six Commissioners, will disagree 3 to 3. Well, if they're disagreeing on the interpretation of a regulation, then it's probably a good thing that regulation is not going in place, because if the six Commissioners who are tasked with enforcing the law disagree on what the law means, then you shouldn't be forcing that on the public to try to comply with a confusing regulation or confusing law.

Chairman ISSA. Now, there's a suggestion that we remove the political question entirely from the IRS, which means that, for example, with a 501(c)(3), the question of the deductibility would remain at the IRS; however, whether the American Heart Association, American Lung Association, the Red Cross, whether they crossed lines of political speech and, if so, what the reporting requirement would shift to the FEC. Is that your understanding?

And I said 501(c)(3) for a moment because we've only talked about the (c)(4)s and other corporations. Would it be the same for 501(c)(3)s in your interest, or would there be a legacy there?

Mr. KEATING. I think there has to be a difference. The statute specifically says a 501(c)(3) can engage in no political activity at all.

Chairman ISSA. I agree with you, except that the precedent is, yes, they can, and they do. It's been limited to, "de minimis." The American Lung Association actively supports laws that reduce smoking, and they campaign on television supporting the establishment of, let's just say, a vote to ban smoking in public places. They do that. The question is to the extent that there is any activity, who should regulate it?

And I ask that for a reason. Inevitably, free speech becomes political by somebody's interpretation. Now, there's not an R or a D after, you know, clean air. There's not an R or a D after smoking and nonsmoking. I've noticed people of both parties will choose one side or the other, so it's not partisan, per se.

But the question is should we transfer entirely to the FEC any and all responsibility for compliance with any and all laws related to political activities?

Mr. KEATING. Well, generally I think for any other 501(c) organizations other than (c)(3), where there's a prohibition on political activity, and by that I believe really means express advocacy for or against a candidate, not for or against an issue, I don't think there's any——

Chairman ISSA. So as long as that definition is maintained, you're comfortable with the 501(c)(3)s as they are because their ban would be absolute, and thus it's not a judgment call?

Mr. KEATING. Right, although I do think the rules there need to be clearer as well.

Chairman ISSA. All right. I appreciate that.

Let me ask one more question, and it goes sort of like this: If we were to move political oversight to the Federal Election Commission, consolidate in one place with one expertise, and, Ms. Mitchell, as you said, with a consistent definition, which would certainly be helpful, then would one of the reforms of the IRS be, as we said earlier, a multimember commission, or, in the alternative, if Congress in the process felt that a Commissioner that did not serve at the pleasure of the President, but rather, like the FBI Director or the Fed Chairman, served a tenure that was longer than a particular President and thus had a level of freedom, would either of those, in your opinions, be an improvement? Not saying you're picking favorites, but just would either be an improvement over the present situation in which you have an overt appointee of the President who is beholden to the President every day for his or her appointment?

Ms. Mitchell.

Ms. MITCHELL. Well, I think either of those would be an improvement, but I would certainly caution that that reform, absent some of these other statutory changes, will not be sufficient to reinstate the rule of law at an agency which has essentially gone rogue.

Lois Lerner talked about rogue agents in Cincinnati. The agency itself has gone rogue, and there is a real need for—and that's one of the reasons that I'm so grateful that this committee is conducting oversight of this agency, intensive scrutiny of this agency. Yes, it may be uncomfortable, it may be expensive, it may be time-consuming, but this agency is out of control, and I'm sure every member of this committee, Democrat and Republican, has heard horror stories from constituents about the IRS. And Congress has got to reassert its authority over this agency because it feels as though it is capable of completely thumbing its nose at the people's representatives, and I don't care what party affiliation, I would be very offended by that if I were a Member of Congress. I certainly am as a taxpayer.

Chairman ISSA. Thank you.

Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman.

If I might, just I want to make sure that the record is clear regarding the publicly released notes regarding the July 2010 screening workshop for IRS employees. Contrary a bit to what Ms. Mitchell has said, although it says that, "progressive and Tea Parties are not the same and should not be sent to the Tea Party coordinator," the notes direct IRS screeners to treat Tea Party and progressive groups the same.

It says, "Current political activities discussion focused on the political activities of Tea Parties and the like. Regardless of the type of application, if in doubt, err on the side of caution and transfer to 7822. Indicated the following names or titles were of interest and should be flagged for review: 9/12 Project, Emerge, Progressive, We the People, Rally Patriots, and Pink Slip Program."

I ask that these notes be included in the record.

Mr. COLLINS. [Presiding.] Without objection, so ordered.

Mr. DAVIS. And I might also note that, you know, it's interesting to have political ideologies and philosophies, but I also note that

the IRS Commissioner as well as the inspector general, who were in place as these allegations surfaced, were both President Bush appointees, which sort of would indicate to some people that they may have had some Republican leaning, although not necessarily so. But that would appear to be some type of implication.

I also might note that the inspector general, while he or she cannot change law, they can make recommendations. And this inspector general made nine recommendations, all of which the Internal Revenue Service has complied with and gone beyond. And so I think it's an indication that the Internal Revenue Service is moving progressively to try and make sure that it improves its operation, and that whatever happened in the past is not necessarily what is going to happen in the future and is not what's happening now.

And I know there are people who would not like to pay taxes, and so they'd like there not be a mechanism for which to collect, but I doubt very seriously—we have difficulty agreeing on very minor things around here, so I doubt very seriously if we would reach that point.

Mr. COLLINS. Well, thank you, Mr. Davis. I would love to see the fair tax, and then we can go on from that.

And I know, Mr. Woodall, would that be an amen from the front row up there?

Mr. WOODALL. Support the chair. Amen.

Mr. DAVIS. Well, I think we'll be working on taxation for a long, long time. And I want to thank the witnesses for being here, I want to thank the chairman for holding this hearing, and I yield back.

Mr. COLLINS. I thank the gentleman.

At this time the chair recognizes himself for questions, and just a few questions here. And I just have to say on the point of, first, Mr. Spakovsky, your book, "Obama's Enforcer," you actually detailed one of my inquiries with the non-enforcer-in-chief, I think the obstacle-in-chief a lot of times for this administration. And I think it sort of shows—frankly, it's very disturbing. I think it's sort of been developed over time in many of these agencies there's just a disdain for coming up here and having Congress do its normal oversight role. We may disagree, but there is a role for both to play, and I do appreciate that.

And between—and, Ms. Mitchell, I have a question. Tea Party tax-exempt application experienced significant delays when they were in the determination process, with some waiting years to hear back from agencies regarding their status. These delays cause the groups to lose support and funding and can even cause them to disband. Therefore, you know, to me it's worth considering proposals to streamline the IRS tax-exempt application process by implementing a time limit to evaluate applications.

What are the consequences of an IRS delaying applications of these potential tax-exempt groups, and then, also, what your thoughts on a timeline would be?

Ms. MITCHELL. Well, it's very detrimental to these organizations, and particularly most of these organizations are not the Karl Rove-type groups. I mean, these are mom-and-pop organizations. They're small citizens groups that operate on very small budgets, and the cost to them of the delay meant people thought, well, maybe they weren't legitimate, so they couldn't raise money. For some of the

larger groups who were trying to build a network that they could help then smaller groups, then they would run into trouble with the State regulators because they didn't have letters of exempt status.

But my basic belief is that we should just eliminate that application process altogether, and then you just get rid of it. Then there's no temptation. You just let a citizens group file, say I'm a 501(c)(4), I'm a 501(c)5, I'm a 501(c)6, whatever, just the same way you do for any other entity in America. To open a bank account, you get an employer ID number. And then they file their 990s, and then the IRS can, you know, on a random statistical basis—not on a basis of selection based on political philosophy, but on a random basis—be able to look at organizations, and look at their operations through their Form 990s, and look at their programs after the fact, after they've been operating for a few years.

But what the IRS did here through this application process, and which they've said they're going to continue to do—this is the part that I want everybody to understand. The IRS said on March the 4th of this year they're going to continue to do this. And it's in their guidance. It's not in any regulations, and they buried it at the bottom of a newsletter that about four of us received, and that I read at 3 o'clock in the morning because I was waking up and couldn't sleep. And it says they're——

Mr. COLLINS. Not the most open and transparent process there.

Ms. MITCHELL. No. And they're going to continue. And they're going to try to look—the questions that they're going to ask applicants presuppose that these are organizations that have been operating for 2 or 3 years before they can answer the question.

So we just need to—we need to make—here's clarity: Abolish the process. Here's clarity: Define political activity for all purposes for any—who—whatever agency is doing it, whether it's the FEC or the IRS, as expressly advocating the election or defeat of a clearly identified candidate, using words such as "support," "oppose," "elect," "defeat," "vote for," "vote against." If we did that, we would clarify. That is clarity, and that's the kind of thing that we need to have Congress do.

Mr. VON SPAKOVSKY. Yeah. No, I totally agree with that. I think you should eliminate the IRS having to approve an application. If Congress doesn't want to go that far, I mean, this fall-back position is to put in a time limit. Give the IRS 60 days to approve it, and if they don't approve it in that time, then it automatically becomes approved.

There's certainly precedent for that. A 60-day time limit, for example, was the time limit imposed by statute and regulation on the Department of Justice under section 5 of the Voting Rights Act. So there's precedent for this, and that's the way to do it.

Mr. COLLINS. Well, and I think that, again, is fairness for all. Let's just make it simple. Let's make it a process. If you're doing wrong, you're doing wrong, and you get it fixed, and that's the catch process, not the front end that seems to be such a problem.

One issue I think that is just stuck in the craw of most Americans that they just don't figure out—and Mr. Woodall and I are from Georgia, we get this question all the time— you know, it's why somebody either, one, can't be fired. This has been an amazing

discussion we've had in this office before, in this hearing room before. But when Ms. Lerner left between May 2013 and September 2013, she collected full pay and benefits, and roughly 60- to 100,000, that was her annual.

At what point does there also need to be personnel changes or personnel issue development in the IRS and possibly a bigger—Mr. Keating, anybody, want to tackle that in my last little—as we finish up here?

Mr. SHERK. Well, I'd just like to say that we've got a horrible system that makes it very difficult to remove government employees for any reason. I think Congress quite sensibly didn't want to have a lot of these jobs handed out on the basis of political connections and help with the campaign, but we've gone way overboard where you not only regulate the hiring on a merit basis, which I think is quite reasonable, but make it very difficult to remove employees.

I mean, I outlined if you just stay within the Merit Systems Protection Board process, it takes an advantage of about a year and a half from start to finish, from when a supervisor says, I want to remove a problem employee, to when, you know, that level of appeals are done, outside of any appeals to the EEOC or to the Federal courts. I mean, when the Office of Personnel Management says that managers describe the efforts needed to remove an employee as, "heroic," then I think we know we've gone too far.

Mr. COLLINS. Right. I think protection needs to be there, but at the same point, it shouldn't take an—almost literally an act of Congress to do something.

Well, I think what we're seeing here is interesting. I think the hearing has been, I think, something to discuss, the fact that there are many problems here. But I think the one thing we can all come to a conclusion, as I told the Commissioner of IRS when he was sitting here just a little over a week ago, I said, you've lost the trust of the American people. It was never the highest in the world, but just by basically what they did, but we've now lost the trust in everything.

It doesn't matter how much work we've been, because, as my friend Congressman Davis said, there is a tax system, there is a collection system right now. We may not like it, we work to change it, but this is a system, and when you've lost trust in the very ones who are supposed to be actually enforcing that and taking that in, that's a problem, and the people aren't satisfied with that.

With that, I'd like to thank our witnesses for taking their time out of their busy schedule to appear before us today. And with that, the committee stands adjourned.

[Whereupon, at 11:27 a.m., the committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Statement for the Record
Congressman Michael R. Turner
House Committee on Oversight and Government Reform
"IRS Abuses: Ensuring that Targeting Never Happens Again"
July 30, 2014

Since Treasury Inspector General for Tax Administration (TIGTA), J. Russell George, first testified before us on the Internal Revenue Service's (IRS) systematic targeting of certain groups and individuals for their political beliefs, our Committee has continued to investigate and conduct oversight of this politically-motivated and discriminatory action.

While the Committees on Oversight and Government Reform and Ways and Means continue to investigate this unwarranted intrusion into the lives of taxpayers, we are here today to examine potential opportunities for meaningful reform of the IRS, so that future abuses may be prevented.

As we have seen throughout our investigation, the Administration's story continues to change with each new development and revelation. In the beginning, former IRS official Lois Lerner blamed a few "rogue" rank-and-file employees in the Cincinnati, Ohio office, but the IRS then changed their story when our investigation discovered the involvement of senior officials in the Washington, D.C. office. Later, the Federal Bureau of Investigation (FBI) appointed a campaign contributor and politically-connected ally of the President to lead its so-called investigation into the matter. This was followed by President Obama's statement that there was "not a smidgeon of corruption." Since then, we recently learned that, while the IRS may have deleted years' worth of Lois Lerner's emails, TIGTA investigators have located the hard drive are actively working to determine whether any of the lost and destroyed evidence may be recoverable.

The Administration's repeated pattern of altering its story in response to the findings of our investigation is of serious concern, and the act of singling out Americans for their political beliefs – and not a legitimate tax-related purpose – demands an adequate deterrent. It demands a punishment that fits the crime.

That is why I authored H.R. 1950, the Taxpayer Nondiscrimination and Protection Act. This bill is aimed at preventing biased, politically-motivated discrimination and seeks to strengthen taxpayer protections by making it a crime for IRS employees to execute this sort of targeted discrimination. With the support of over one-hundred of our colleagues as cosponsors and companion legislation in the Senate introduced by Senator Marco Rubio, this bill would take the important step of increasing the maximum penalty for discrimination from mere termination to a criminal punishment.

The criminal punishment would allow the federal government to impose a fine, up to five years imprisonment, or both - which is identical to the maximum imprisonment for a member of the President's cabinet who directs an employee to take that sort of action (26 U.S.C. §7217). Moreover, the bill expressly states that political speech and political expression are rights guaranteed by the U.S. Constitution. The Taxpayer Nondiscrimination and Protection Act seeks to restore those concepts of fairness to the federal government's tax collectors, so that no individual or group is so wrongly discriminated against in the future.

As a senior Member of Committee on Oversight and Government Reform, I remain committed to our investigation into the IRS' targeting and restoring the transparency and much-needed accountability to the agency.

Statement of Congressman Gerald E. Connolly (VA-11)
Committee on Oversight and Government Reform
IRS Abuses: Ensuring that Targeting Never Happens Again
July 30, 2014

In our current climate of vitriolic partisan polarization, we often forget that underlying the petty grievances and disagreements separating our Nation's two main political parties are fundamental philosophical disagreements over our country's most basic principles and rights.

For instance, as a Congressman who has the great privilege and honor of representing the 11th Congressional District of the Commonwealth of Virginia, I am quite familiar with the writings of our Founding Father Thomas Jefferson, particularly our Declaration of Independence. Yet, having searched the text again this morning, I am still searching for where it states that the unalienable Rights of Americans include "Life, Liberty, and unfettered and unquestioned access to 501(c)(3) and 501(c)(4) tax-exempt status."

Perhaps stepping back and gaining some *perspective* might help mitigate some of the wild and outlandish accusations that will be thrown around today by the witnesses before us, while allowing us to proceed in improving the tax-exempt review process in a serious, substantive, and informed manner. We must never forget that no single organization, individual, or political party, holds a monopoly over liberty and patriotism.

No government on this earth is perfect, yet I am confident that we will get through this, for only in America could a political activist, such as the leader of the Tea Party voter suppression group *True the Vote*, accuse a Presidential Administration of being "willing to take any action necessary to silence the opposition" while public testifying before the United States Congress. The sheer amount of press coverage given to this issue, combined with the ceaseless hours of Republican political theater in Congress, directly refute claims of an Administration that is willing to take *any action* necessary to silence its opposition.

Leaving aside for the moment the curious question as to why a non-political, so-called "social welfare organization" would constitute the opposition to any Presidential Administration, it is striking to witness the cognitive dissonance of my friends on the other side of the aisle who would have the public believe the Republican conspiracy theory that there has been an insidious and effectively coordinated Federal effort against Tea Party organizations led by an Administration that is simultaneously incompetent to such an extent that despite its willingness "...to take any action necessary to silence the opposition," it has allowed its "opposition" to publicly testify not once, but twice, before this very Committee!

Of course, the Internal Revenue Service (IRS) is not an innocent victim either. The agency's atrocious rulemaking, combined with questionable judicial decisions, have distorted the meaning of the term "exclusively" beyond any reasonable plain language reading of the Internal Revenue

(OVER)

Code (IRC) statute, which in Section 501, subsection C, paragraph 4, clearly defines the type of "social welfare organization" that can qualify for tax-exempt status:

*"Civic leagues or organizations not organized for profit but operated **exclusively** for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."*

Does anyone in this room seriously believe that the famous Republican political operative Karl Rove's Crossroads GPS, or the well-known Democratic political operative Bill Burton's Priorities USA, constitute "social welfare organizations" whose "primary activity of organization" is *not* engaging in political campaigns?

The notion that either of these supposed "social welfare organizations" would even exist absent the 2012 Presidential election is absurd on its face. Yet, the IRS – which supposedly seeking to "silence the opposition" – whoever the unidentified opposition even is – deemed both of these political organizations as entitled to receive 501(c)(4) tax-exempt status.

I recognize that misguided precedent was established many decades ago through a Supreme Court case that somehow decided the term "exclusive" did not actually mean exclusive and subsequent Treasury regulations that further twisted and distorted the definition and meaning of the word "exclusively" far beyond any reasonable plain language reading of the law.

As one prominent Pulitzer Prize winning investigative journalist and expert on tax law has asked, "Is there an adult in America who's been in a romantic relationship who thinks that "exclusively" is 49 percent of the time?" Yet, this ludicrous interpretation of the term "exclusively" remains in the Federal regulations to this very day. If we truly want to improve the approval process for determining tax-exempt status, I would suggest Congress start with fixing this absurd status quo.

-END-

Statement For The Record

Rep. Matt Cartwright

Committee on Oversight and Government Reform

Hearing on "IRS Abuses: Ensuring that Targeting Never Happens Again"

July 30, 2014

Mr. Chairman, I would like to express my objection to the Committee's continued harassment of the IRS. None of the past hearings have given us any evidence that confirms accusations from the majority that the IRS has misguided the Congressional investigation or committed any other wrongdoing. It is not the duty of this Committee to attract headlines, embellish scandals, or harass members of federal agencies without end; our duty is to conduct responsible oversight on a host of legitimate issues. The continued investigation of the IRS has wasted a great deal of this Committee's time, as well as a significant amount of American tax dollars, on an unsuccessful search to discover a liberal conspiracy.

U.S. House of Representatives

Committee on Oversight and Government Reform

Darrell Issa (CA-49), Chairman

Making Sure Targeting Never Happens: Getting Politics Out of the IRS and Other Solutions

Staff Report
113th Congress

July 29, 2014

Executive Summary

The Internal Revenue Service is a broken agency. Endowed by statute with vast power and tremendous responsibility, the IRS lacks basic public trust and accountability. In recent years, as the IRS has assumed an increasingly partisan policy-making role, it has sacrificed its administrative independence for political expedience. The IRS's structure and lack of effective internal oversight allowed fiefdoms – such as the Exempt Organizations Division – to grow and wrongdoing to go unexposed and unaddressed. These serious deficiencies and failures culminated in the IRS's targeting of conservative tax-exempt applicants for their political beliefs.

The Committee on Oversight and Government Reform continues to conduct a comprehensive examination of the IRS's targeting of conservative tax-exempt applicants. To date, the Committee has reviewed approximately 800,000 pages of documents produced by the IRS, the Treasury Department, the Justice Department, the Federal Election Commission, the IRS Oversight Board, the Treasury Inspector General for Tax Administration, and other custodians. The Committee has thus far conducted transcribed interviews with over 35 IRS employees – ranging from Cincinnati revenue agents to the former Commissioner of the IRS – and another 8 transcribed interviews with Treasury Department and Justice Department personnel. However, with important questions still unanswered, the Committee's fact-finding is not yet complete.

While the Committee's oversight of the IRS continues, it is apparent already that serious problems plague the agency. The IRS is no longer a neutral administrator of federal tax law. In recent years, and especially with its outsized role in the Affordable Care Act, the IRS has grown to become a partisan policy-making body and full-fledged arm of the Administration in power. The IRS has noticeably departed from its traditional and proper role of impartial tax administration. This departure can be vividly seen in how the agency viewed and treated conservative tax-exempt applicants in the wake of the Supreme Court's *Citizens United v. Federal Election Commission* decision.

Throughout 2010 in the build-up to the midterm congressional election, prominent Democratic elected officials publicly and repeatedly denounced the *Citizens United* decision and political speech by conservative groups organized under section 501(c)(4) of the tax code. As President Barack Obama and other national Democrats decried the political speech of these so-called "shadowy" groups as posing a "threat to our democracy," the IRS systematically scrutinized and delayed tax-exempt applications filed by conservative groups.[1] Around this same time, former IRS Exempt Organization Director Lois Lerner spoke about the political pressure on the IRS to "fix the problem" posed by *Citizens United*.[2] She began a "c4 project" careful that it was not seen as "*per se* political."[3] Lerner later called the conservative tax-exempt applications "very dangerous" because she felt they could be the "vehicle" to undoing IRS

[1] H. COMM. ON OVERSIGHT & GOV'T REFORM, HOW POLITICS LED THE IRS TO TARGET CONSERVATIVE TAX-EXEMPT APPLICANTS FOR THEIR POLITICAL BELIEFS (June 16, 2010).
[2] John Sexton, *Lois Lerner Discusses Political Pressure on the IRS in 2010*, BREITBART.COM, Aug. 6, 2013.
[3] E-mail from Lois Lerner, Internal Revenue Serv., to Cheryl Chasin, Laurice Ghougasian, & Judith Kindell, Internal Revenue Serv. (Sept. 15, 2010). [IRSR 191031-32]

regulation of nonprofit political speech.[4] For 27 months beginning in February 2010, the IRS did not approve a single tax-exempt application filed by a Tea Party group.[5]

The solution is obvious and ought to be noncontroversial: Congress must disentangle politics from the IRS. To regain the trust of American taxpayers, the IRS must return to its traditional role as a dispassionate administrator of the federal tax code. The IRS must not be an agency that determines what is and what is not political speech and, correspondingly, whether a social-welfare group receives a tax-exemption for making political speech. Political speech can help advance the social welfare and social-welfare groups should be allowed to advance the debate about issues important to the nation.[6] Other federal regulators exist to oversee political campaigns and elections. That duty has never belonged – and should not belong – to the IRS.

Due to structural deficiencies and ineffective internal oversight, Lois Lerner had virtual autonomy to run the Exempt Organization Division. For several reasons – chief among them, the IRS's role in the Affordable Care Act – the IRS leadership did not adequately supervise the unit's work. Then-Commissioner Doug Shulman spent a considerable amount of time working on the implementation of the Affordable Care Act, and Lerner's direct supervisor, Sarah Hall Ingram, left her permanent job to lead the IRS's Affordable Care Act office. Likewise, both the IRS Oversight Board and the Treasury Inspector General for Tax Administration failed to exercise independent oversight of the IRS and prevent the targeting.

Other operational failures within the IRS contributed to the targeting. The IRS trained its agents to identify and elevate applications that could draw media attention, even though media attention has no bearing on a group's qualification for tax-exemption. As Washington employees evaluated the applications, they evaluated whether the groups' activities were "good" nonprofit activities or merely "emotional" propaganda with "little educational value."[7] The IRS allowed these tax-exempt applications to languish for years without action. Subsequently, as it sought to work through the backlog, the agency requested inappropriate and burdensome information from groups applying for tax-exempt status.

The IRS's targeting had real consequences, and the failures of IRS leadership and its oversight bodies exacerbated the injuries. As the IRS ignored tax-exempt applications, donors stopped giving to the groups, overall interest waned, and some groups even stopped their operations.[8] The delays also resulted in the automatic revocation of some groups' exemptions by operation of law because the groups had been waiting for an answer so long that they did not file

---

[4] E-mail from Lois Lerner, Internal Revenue Serv., to Michael Seto, Internal Revenue Serv. (Feb. 1, 2011). [IRSR 161810]

[5] Gregory Korte, *IRS Approved Liberal Groups while Tea Party in Limbo*, USA TODAY, May 15, 2013.

[6] The ability of social-welfare groups to advance meaningful policy discussions is as important for groups such as the American Civil Liberties Union and the National Association for the Advancement of Colored People as it is for entities like the Tea Party groups. One witness during a Committee hearing called these groups "the beating heart of civil society," "which go out there and take unpopular positions and move the national debate and make this a vibrant and functioning democracy." *"The Administration's Proposed Restrictions on Political Speech: Doubling Down on IRS Targeting": Hearing before the Subcomm. on Economic Growth, Job Creation & Regulatory Affairs of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014) (statement of Allen Dickerson).

[7] *See* Gregory Korte, *IRS List Reveals Concerns over Tea Party 'Propaganda,'* USA TODAY, Sept. 18, 2013.

[8] *See* Patrick O'Connor, *Groups Recount Tax Battle's Toll*, WALL ST. J., May 14, 2013.

for renewal within the statutorily proscribed period.[9] Congress should consider proposals to ensure that American taxpayers never again face these kinds of injuries due to the heavy hand of the IRS.

Although the Committee's oversight work is ongoing, the investigation so far has shown the need for serious reforms to the IRS and other aspects of federal tax administration. The Committee has already taken steps on short-term reforms to improve IRS accountability.[10] It is clear, however, that systemic and structural issues within the IRS are in need of attention. The Oversight Committee is charged by the House of Representatives with proposing policy recommendations.[11] In this spirit, to more fully address these serious deficiencies, this staff report offers the following long-term solutions to reform the IRS and ensure that it never again targets Americans for their political beliefs. These ideas are designed to spark a constructive debate about how best to bring much-needed reform to the IRS. For this reason, these proposals are articulated as broad-based policy options to address what ails the IRS.

Based on the Committee's oversight work to date, this staff report proposes several reforms to improve the Internal Revenue Service, the Treasury Inspector General for Tax Administration, and the federal workforce. These proposals include ideas to remove the IRS from politics and partisan policy-making, and to remodel the IRS to improve internal controls and oversight. It also includes proposals to improve the accountability function of the IRS and to make the tax-exempt application process work better for taxpayers. Finally, the staff report articulates ideas to address some of the shortcomings in the federal bureaucracy identified during the investigation.

Because "[t]he power to tax involves the power to destroy,"[12] Americans rightly hold the IRS to a standard of performance higher than any other federal agency. American taxpayers always expect the IRS to be neutral, independent, and apolitical. The modern-day IRS, however, with its vast authority, has violated these basic tenets. Discussion of these the initial policy reforms are a first step toward restoring trust and accountability in the IRS. More clearly must be done, but a national discussion about the IRS is long overdue to ensure that tax administration works for the taxpayers.

---

[9] *See* Pub. L. 109-280, § 1223(b), 120 Stat. 780, 1090 (2006).
[10] Press Release, H. Comm. on Oversight & Gov't Reform, Oversight Committee Approves Bipartisan Government Accountability Legislation (July 24, 2014).
[11] Rules of the House of Representatives, R. X(4)(c)(2).
[12] McCulloch v. Maryland, 17 U.S. 316, 431 (1819).

Table of Contents

Executive Summary i

Table of Contents iv

Tax administration working for the taxpayers: Suggested reforms for the IRS, TIGTA, and the federal bureaucracy 1

- Make the IRS a multi-member, bipartisan commission 2
- Remove the IRS as a regulator of political speech for social-welfare groups 3
- Revamp the IRS Oversight Board 5
- Allow taxpayers, and not the IRS, to control access to their confidential taxpayer information 5
- Establish a public and transparent investigation process for leaked confidential taxpayer information 6
- Create a private right of action for victims of willful and injurious IRS leaks of confidential taxpayer information 8
- Modify the term of the Inspector General 9
- Establish transparent and objective criteria for scrutiny of applicants 10
- Limit the time for IRS review of a tax-exempt application 11
- Establish clear and transparent rules for information-collecting purposes 12
- Prohibit political and policy communications between the IRS and Executive Office of the President 13
- Remove the IRS from implementation of the Affordable Care Act 14
- Establish personnel reforms for dismissed federal workers 15
- Increase political activity restrictions for certain IRS employees 16
- Implement rigorous training on the use of personal e-mail and penalties for misuse 17

Conclusion 18

Tax administration working for the taxpayers: Suggested reforms for the IRS, TIGTA, and the federal bureaucracy

From February 2010 until May 2012, the Internal Revenue Service systematically scrutinized and delayed applications for tax-exempt status filed by conservative groups. The IRS targeting developed out of concern, voiced by prominent Democratic elected officials, about nonprofit political speech in the wake of the Supreme Court's *Citizens United v. Federal Election Commission* decision.[13] Tax-exempt applications filed by conservative groups were identified and segregated based solely on their names and political beliefs. At Lois Lerner's direction, the IRS did not process these applications until her office and the IRS Chief Counsel's office finalized and provided guidance on two "test" cases.[14] That guidance never came. A large backlog formed, resulting in substantial and unjustified delays. The IRS later posed inappropriate and burdensome questions to applicants as it sought to work through the backlog.[15] As public concerns mounted about the apparent mistreatment of conservative groups, senior IRS leadership gave false "assurances" that targeting was not occurring.[16]

The IRS's targeting of conservative tax-exempt applicants is an unfortunate and regrettable chapter in the history of federal tax administration. While some facts remain unknown, what is certain is cause for alarm. The IRS targeted American taxpayers. The most powerful domestic entity in the federal government – with the unmatched power to reach deep into Americans' lives and inalterably destroy their livelihoods – singled out and scrutinized citizen-advocacy groups based on their political beliefs. There is bipartisan concern about the targeting – which President Obama called "inexcusable"[17] – and there ought to be broad-based agreement on how to improve tax administration to prevent any future misconduct.

The Committee's investigation into the IRS's targeting of conservative-oriented tax-exempt applicants makes clear that tax administration in the United States is in need of reform. Under Rule X of the Rules of the House of Representatives, the Committee on Oversight and Government Reform may "at any time" investigate "any matter" and shall make recommendations based on the findings of its investigatory work.[18] Pursuant to this authority, the Committee has identified several areas of reform needed for the IRS, TIGTA, and the federal bureaucracy. These initial reform proposals are submitted with the aim of starting a national discussion on how best to improve the accountability and transparency of tax administration and make the federal government work better for the American people.

---

[13] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[14] E-mail from Lois Lerner, Internal Revenue Serv., to Michael Seto, Internal Revenue Serv. (Feb. 1, 2011). [IRSR 161810]
[15] TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (May 14, 2013) [hereinafter "TIGTA Audit Rpt."].
[16] *"Internal Revenue Service Operations and the 2012 Tax Return Filing Season": Hearing before the Subcomm. on Oversight of the H. Comm. on Ways &Means*, 112th Cong. (2012) (question and answer with Chairman Boustany).
[17] The White House, Statement by the President (May 15, 2013).
[18] Rules of the House of Representatives, R. X(4)(c)(2).

Make the IRS a multi-member, bipartisan commission

The IRS has increasingly assumed duties beyond its original role as an impartial tax collector. In recent years, and especially with its new responsibilities imposed by the Affordable Care Act, the IRS has become more of a policy-making agency. As a consequence, a single commissioner structure no longer supports the IRS's growing policy-based portfolio. For the IRS to remain a partisan policy-making agency, it must be reformed to become a multi-member, bipartisan commission.

The Committee's investigation has uncovered serious management failures of the IRS leadership in preventing and, later, responding to serious misconduct. The unitary director structure allowed these serious problems to go unnoticed and unaddressed for multiple years. This structure also emboldened Division-level leadership, such as Exempt Organizations Director Lois Lerner, to run their fiefdoms with relative impunity. As the investigation has shown, Lerner was able to successfully hide her unit's misconduct for almost a year until public complaints became too numerous.

There are empirical benefits to remolding the IRS as a multi-member, bipartisan commission. According to one academic study, a multi-member commission results in more measured policy-making, especially as the regulated policies relate to individual rights. The authors of one study wrote:

> Placing decisional responsibility with a group ensures that the group takes into account diverse policy perspectives and that it adopts moderate policies. Consensus building through compromise can also produce a broader range of public acceptance for those decisions ultimately reached. This approach has especially drawn favor where agencies serve as adjudicators, deciding licensing, rate-making, antitrust and similar cases that typically involve the resolution of issues affecting individual rights.[19]

The Committee's investigation has shown how easily the IRS can trample individuals' constitutional rights. With such vast power over every taxpayer and an increasing policy agenda, the IRS sorely needs measured policies and public acceptance of its actions.

Solution: The IRS needs internal controls – such as the checks and balances generated by a multi-member, bipartisan structure – to help thwart future transgressions and ensure timely awareness and response to any misconduct. Congress ought to consider legislation to reform the structure of the IRS from an agency led by a single commissioner to a multi-member, bipartisan commission.

[19] Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1198 (2000).

Remove the IRS as a regulator of political speech for social-welfare groups

Freedom of speech and freedom of assembly, including political speech and political association, are rights enshrined in the Constitution.[20] As fundamental elements of the nation's social contract, the right to speak and assemble freely are owned by all citizens and contribute to the betterment of shared society. In that respect, activities that promote free political speech and free political assembly benefit the general welfare. Social-welfare groups, organized under section 501(c)(4) of the Internal Revenue Code, are formed to "operate[] exclusively for the promotion of social welfare,"[21] and they should be allowed to engage in political speech within the confines of existing campaign-finance laws.

The right to free speech extends to groups of citizens who assemble together for a shared purpose. As the Supreme Court stated, political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[22] Like a for-profit corporation or a labor union, a section 501(c)(4) organization engages in political speech as a group of individuals joining together for a common purpose. Federal law protects section 501(c)(4) organizations from publicly disclosing their contributors.[23] The Supreme Court recognized in the 1950s the need for anonymous political speech because, as it explained, "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association," particularly "where a group espouses dissident beliefs."[24]

In wake of the TIGTA audit report, the IRS repeatedly claimed that the targeting was attributable to the difficulty in measuring political activity for section 501(c)(4) groups.[25] Notwithstanding the fact that several veteran IRS employees testified that this issue was not novel in tax law,[26] the IRS simply should not be in the business of regulating political speech. Other federal regulators – namely, the Federal Election Commission – exist to regulate political campaigns and election activities. If the section 501(c)(4) applicants operate within the bounds of applicable and appropriate campaign-finance restrictions,[27] the IRS should presume to consider all types of political speech to be consistent with social-welfare conduct. By erring on the side of free speech and free association, this proposal would ease the IRS's task of evaluating a tax-exempt application and recognize the applicants' constitutional rights.

In late November 2013, the IRS and the Treasury Department issued a proposed regulation that moved in precisely the wrong direction, placing *more* restrictions on the type of

---

[20] U.S. CONST. amend. I.
[21] I.R.C. § 501(c)(4).
[22] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 313 (2010) (quoting First Nat. Bank of Boston v. Belotti, 435 U.S. 765, 777 (1978)) (internal quotation marks omitted).
[23] I.R.C. § 6104.
[24] NAACP v. Alabama, 357 U.S. 449, 462 (1958).
[25] *See, e.g.*, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. § 501).
[26] *See, e.g.*, Transcribed interview of Judith Kindell, Internal Revenue Serv., in Wash., D.C. (Oct. 29, 2013); Transcribed interview of Steven Miller, in Wash., D.C. (Nov. 13, 2013).
[27] This proposal does not intend to supplant campaign-finance restrictions. For example, a section 501(c)(4) group would still be barred from acting as a conduit for a campaign contribution. *See* 2 U.S.C. § 441f.

permissible political speech.[28] The proposed regulation would have created broad restrictions for political activity that promotes the social welfare through education or outreach. For example, the proposal would have categorized non-partisan voter registration drives as "political" activity, when encouraging and assisting eligible citizens to vote is part of the essence of social welfare. The proposed regulation also would have prohibited elected representatives from addressing nonprofit groups about *any topic* during specified periods. These highly restrictive proposals violate fundamental freedoms of speech and association and undermine the fabric of representative democracy. Although the IRS withdrew its proposed rule, efforts to stifle political speech by section 501(c)(4) groups continue.

There is a widespread misconception, used by some to argue for greater restrictions on political speech by section 501(c)(4) groups, that these groups spend untaxed dollars on political speech.[29] That is not the case. Unlike section 501(c)(3) charitable groups, which are allowed to receive tax-deductible contributions, donations received by section 501(c)(4) social-welfare groups are not tax-deductible.[30] The contributions received by a section 501(c)(4) group come from after-tax income of the group's donors. As Chairman Issa articulated during a Committee hearing, section 501(c)(4) groups are tax-exempt "in that the money they receive from taxpayers who have paid their taxes and then give them their after-tax income, they don't count it as profit."[31] Simply put, section 501(c)(4) organizations do not utilize untaxed income for political speech. Unlike 501(c)(3) charitable organizations that offer donors tax benefits, donations and expenditures to and by 501(c)(4) organizations, like other organizations regulated by the Federal Election Commission, have no impact on tax revenues.

The IRS's regulation concerning section 501(c)(4) groups has been in existence for over half a century.[32] For decades, the IRS has interpreted the law to mean that a §501(c)(4) group may engage in political speech activities.[33] As the debate continues on whether to limit the IRS's long-standing approach to political speech by section 501(c)(4) groups, given the importance of these issues, any changes ought to be made legislatively by the elected representatives of the Americans taxpayers and not by Administrative fiat.

Solution: Congress ought to consider legislation that removes the IRS as a regulator of the political speech by section 501(c)(4) groups by recognizing that political speech can be part of efforts to advance the social welfare. This idea would not only help to prevent politically oriented IRS misconduct from occurring in the future, but would also recognize the constitutional rights of applicants to free speech and free association.

---

[28] *See* Press Release, Internal Revenue Serv., Treasury, IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations (Nov. 26, 2012).
[29] *See "IRS Obstruction: Lois Lerner's Missing Emails, Part II": Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014).
[30] I.R.C. § 170.
[31] *"IRS Obstruction: Lois Lerner's Missing Emails, Part II": Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014).
[32] Treas. Reg. § 1.501(c)(4)-1(a)(2).
[33] *See* I.R.C. § 501(c)(4); Treas. Reg. § 1.501(c)(4)-1(a)(2); ERIKA K. LUNDER & L. PAIGE WHITACKER, CONG. RESEARCH SERV., 501(C)(4)S AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS (2013).

Revamp the IRS Oversight Board

Congress created the IRS Oversight Board in the IRS Restructuring and Reform Act of 1998,[34] and charged it "with providing the IRS with long-term guidance and direction."[35] The board consists of the Secretary of the Treasury, the Commissioner of the IRS and seven "private-life" members, who are appointed by the President and confirmed by the Senate.[36] In creating the Board, Congress gave it the specific responsibility to "ensure the proper treatment of taxpayers by the employees of the Internal Revenue Service."[37]

Despite this solemn responsibility, the Committee's investigation has shown serious deficiencies in the Board's oversight work. According to the Paul Cherecwich, the Chairman of the Board, some of the private-life members asked Commissioner Shulman during an executive session meeting in 2012 about news reports raising concerns about Tea Party applicants seeking 501(c)4 status.[38] Commissioner Shulman assured the members "that the IRS had safeguards in place and that there was no targeting going on, and this was a typical claim that arose each election cycle."[39] Aside from this one question, which the Committee only learned in a June 2013 letter, it appears there was little inquiry from the Board about the targeting. The Board's dereliction of its oversight responsibilities allowed the IRS to inappropriately treat conservative-oriented tax-exempt applicants.

Solution: The IRS Oversight Board's oversight role of IRS overlaps greatly with the responsibilities of other oversight entities. The Committee is unable to find sufficient justification for its continued existence in its present form. Congress ought to consider legislation to eliminate the IRS Oversight Board and transfer its broad functions to the multi-member commission leading the IRS.

Allow taxpayers, and not the IRS, to control access to their confidential taxpayer information

The Committee's investigation highlights the need for clarifying section 6103 of the Internal Revenue Code. This section prohibits any government employee from "disclos[ing] any return or return information obtained by him in any manner in connection with his service as such an officer or an employee."[40] While the law was intended to protect government abuse of

[34] IRS Restructuring and Reform Act of 1998, Pub. L. 105-206, I.R.C. § 7802.
[35] IRS Oversight Board, About the IRS Oversight Board, http://www.treasury.gov/irsob/.
[36] *Id.*
[37] *Id.*
[38] Letter from Paul Cherecwich, IRS Oversight Board, to Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov't Reform (June 18, 2013).
[39] *Id.*
[40] I.R.C. § 6103.

taxpayer information, its interpretation has been significantly broadened to shield misconduct within the Administration.

During the course of the Committee's oversight, the IRS used section 6103 to keep information from the Committee. Federal law prohibits the "willful misuse of the provisions of section 6103 . . . for the purpose of concealing information from a congressional inquiry."[41] In fall 2013, the Committee became aware of e-mail correspondence between IRS executive Sarah Hall Ingram and the White House about the implementation of the Affordable Care Act.[42] Portions of these emails were redacted on the basis of section 6103. When confronted by Chairman Issa with the possibility that a senior IRS official had shared confidential taxpayer information with the White House, the IRS reversed course and stated that the redacted information was not in fact protected by section 6103.[43] The IRS's shifting interpretations of section 6103 – and the Committee's inability to verify its interpretation – unnecessarily impeded the Committee's investigation.

As written currently, the tax code allows some political appointees in the IRS and the Treasury Department to access confidential taxpayer information "without written request,"[44] but it does not provide for circumstances when disclosure to the public, Members of Congress, or government watchdogs may be appropriate. Taxpayers may opt of section 6103 protections only with detailed waivers and request their confidential taxpayer information, but still may not receive all IRS material covered under the statute. Although the IRS must protect confidential taxpayer information, it must also remember that that information belongs to the taxpayer – and not the IRS. The IRS's current interpretation of section 6103 protects the agency from oversight more than it aids the taxpayer.

Solution: Congress ought to consider legislation to revise section 6103 of the Internal Revenue Code. The revision should allow the American taxpayers to control the access to their confidential taxpayer information and provide the opportunity for taxpayers to request all of their confidential taxpayer information from the agency or authorize other entities to access it. Taxpayers should also be allowed to waive, opt out, and change access to their confidential taxpayer information as they wish.

Establish a public and transparent investigation process for leaked confidential taxpayer information

In recent years, public statements and disclosures have indicated that confidential taxpayer information about conservative figures and conservative-leaning groups has been illegally disclosed. In August 2010, White House advisor Austan Goolsbee publicly commented

[41] I.R.C. § 7804 note.
[42] *See, e.g.*, E-mail from David Fish, Internal Revenue Serv., to Jeanne Lambrew & Ellen Montz, Exec. Office of the Pres. (July 20, 2013).
[43] *See* Letter from Daniel Werfel, Internal Revenue Serv., to Darrell E. Issa, H. Comm. on Oversight & Gov't Reform (Oct. 11, 2013).
[44] I.R.C. § 6103(h)(1).

that a prominent conservative organization did not pay corporate income tax.[45] In July 2012, Senate Majority Leader Harry Reid publicly disclosed that Republican presidential candidate Mitt Romney had not paid taxes for ten years.[46] In December 2012, ProPublica also obtained confidential tax information from a number of conservative applicants.[47] However, because of the interpretation of federal tax law, the public was left in the dark about where and how this confidential tax information was obtained.

Section 6103 of the Internal Revenue Code prohibits any government employee from "disclos[ing] any return or return information obtained by him in any manner in connection with his service as such an officer or an employee."[48] The IRS Restructuring and Reform Act of 1998 created TIGTA to provide independent oversight of IRS activities.[49] TIGTA has authority to investigate waste, fraud, and abuse within the IRS. As the IRS's watchdog, it has the sole responsibility for enforcing section 6103's prohibitions relating to the disclosure of confidential taxpayer information.[50] TIGTA interprets the law to prevent the IRS's watchdog from publishing the results of these investigations. Even with a section 6103 waiver, TIGTA refuses to provide information about its investigations into unauthorized disclosures of confidential taxpayer information. TIGTA's interpretation of the law only serves to protect the wrongdoer.

For example, in 2012, confidential taxpayer information belonging to the National Organization for Marriage (NOM) was publicly released by the Human Rights Campaign.[51] The documents showed that then-Republican Presidential candidate Mitt Romney contributed a sizeable donation to the group in 2008.[52] Although NOM ascertained the identity of the third-party individual, Matthew Meisel, who turned the confidential taxpayer information over to the Human Rights Campaign, section 6103 prevented the group from learning the identity of the IRS employee who leaked the information to Meisel.[53] The statute's interpretation protected the unidentified leaker rather than the victim.

During this investigation, the Committee has learned that senior IRS officials – up to and including the IRS Chief Counsel – receive summary reports on the findings of TIGTA investigations into leaked confidential taxpayer information.[54] Under the law's current interpretation, the public never receives similar information about an investigation into a leak of confidential taxpayer information. Section 6103 exists to protect taxpayers and not tax leakers. While confidential taxpayer information must be protected, there is no reason that TIGTA cannot provide basic investigatory information. Greater transparency around investigations into unauthorized disclosures of confidential taxpayer would improve taxpayer confidence in TIGTA

---

[45] Ryan J. Donmoyer, *White House Advisor Goolsbee's Comment on Koch Taxes Reviewed by Treasury*, BLOOMBERG, Oct. 7, 2010.
[46] Ed O'Keefe, *Harry Reid: Mitt Romney Didn't Pay Taxes for 10 Years*, WASH. POST, July 31, 2012.
[47] *See* Kim Barker & Justin Elliott, *IRS Office That Targeted Tea Party Also Disclosed Confidential Docs From Conservative Groups*, PROPUBLICA, May 13, 2013.
[48] I.R.C. § 6103(a).
[49] *See* Treasury Inspector Gen. for Tax Admin., http://www.treasury.gov/tigta/.
[50] *See* Treas. Order 115-01 (Feb. 14, 2013).
[51] Press Release, Human Rights Campaign, Mitt Romney Fuels NOM's Divisive Racial Tactics (Mar. 2012).
[52] *Id.*
[53] Eliana Johnson, *Investigation IDs IRS Leaker*, NAT'L REVIEW ONLINE (Oct. 30, 2013).
[54] Transcribed interview of William Wilkins, Internal Revenue Serv., in Wash., D.C. (Nov. 6, 2013).

and discourage future intentional leaks. By providing basic information about the leak of confidential taxpayer information, the status of the investigation, and other appropriate details, TIGTA could improve a vital aspect of federal tax administration.

Solution: Due to the current interpretation of section 6103 of the Internal Revenue Code, there is virtually no public information about investigation of unauthorized disclosures of taxpayer information. Because this aspect of section 6103 results in a perverse distortion of justice, Congress should consider legislative reforms to protect confidential tax information while allowing potential victims and the public to know basic facts about unauthorized disclosures of confidential taxpayer information.

Create a private right of action for victims of willful and injurious IRS leaks of confidential taxpayer information

Under current law, the victim of a breach in IRS confidentiality requirements has little recourse to redress his or her lost privacy. The investigation is left to TIGTA, and the victim has no right to information uncovered in the course of that investigation. Often times, the victim of an IRS confidentiality breach is left in the dark, not knowing who breached his or her tax information or even why.

Congress has created an express private right of action in federal law for violations of the Constitution's guarantee of "rights, privileges, or immunities";[55] and other private rights of action in commodities trading.[56] A new private right of action in the Internal Revenue Code may be needed to better ensure that all IRS employees act as better stewards of confidential taxpayer information. This report suggests a proposal to create a private right of action allowing a victim of IRS confidentiality breaches to bring action against an IRS employee for any harm caused by a willful and injurious breach. A private right of action would not only allow the victim the opportunity to vindicate the harm, but it would provide a strong incentive for IRS employees to better protect confidential taxpayer information. To effectively address individual accountability, the private right of action should be limited to circumstance where the breach was deliberate and caused damage – not to inadvertent disclosure of confidential taxpayer information.

Solution: Current law severely limits the tools of redress available to taxpayers harmed by the unauthorized release of their confidential taxpayer information. Congress ought to consider legislation creating a private right of action for victims of IRS confidentiality breaches to bring suit against an IRS employee for harm caused by a willful and injurious breach.

[55] *See* 42 U.S.C. § 1983.
[56] *See, e.g.*, 7 U.S.C. § 25(b).

Modify the term of the Inspector General

Like other inspectors general (IGs) throughout the federal government, the Treasury Inspector General for Tax Administration is appointed by the President and confirmed by the Senate. IGs are appointed for life and may be removed only by the President.[57] While this structure is optimal for the majority of the IG community, TIGTA is unique given the IRS's abuses of the public trust and TIGTA's responsibility for safeguarding confidential taxpayer information. As evident from TIGTA's failure to immediately inform Congress of the targeting when it became aware in May 2012, a lifetime appointment does not guarantee the most effective vigilance of an office as important as TIGTA.

The investigation also highlights the shortcomings in TIGTA's audit of the IRS's treatment of tax-exempt applicants. First, and most importantly, TIGTA failed to disclose its findings to the Committee until *after* Lois Lerner had leaked the IRS targeting on May 10, 2013. For several months, the Committee repeatedly sought information from TIGTA about its work.[58] Each time, TIGTA responded that it was not able to provide any update.[59] While TIGTA was withholding information from the Committee, it had already briefed senior IRS officials about the audit's early findings. In particular, on May 30, 2012, Inspector General J. Russell George briefed IRS Commissioner Shulman on TIGTA's finding that the IRS had used the term "Tea Party" to screen tax-exempt applicants.[60]

Under section 5(d) of the Inspector General Act, an inspector general must report particularly flagrant problems to Congress via the agency head within seven days via what has become known as a "seven-day letter."[61] As recently as August 2012, Chairman Issa wrote to Mr. George reminding him of his responsibility under section 5(d).[62] When Mr. George briefed Commissioner Shulman that the IRS had used the term "Tea Party" to screen applicants – an IRS misdeed – Mr. George should have simultaneously notified Congress pursuant to section 5(d). Because Mr. George did not, the Committee and the American people were kept in the dark about the IRS targeting until Lerner's public apology on May 10, 2013.

Second, the manner in which TIGTA conducted its audit needlessly compromised the independence and integrity of the process. TIGTA allowed IRS executive Holly Paz to sit in on nearly every TIGTA interview with IRS line-level employees.[63] Paz therefore had access to the information TIGTA gathered during these interviews and shared this material with her superiors.[64] In addition, TIGTA shared multiple drafts of its audit report with Paz, Lerner, and other senior IRS executives in late 2012 and early 2013.

---

[57] 5 U.S.C. app. § 3.
[58] *"The IRS Targeting Americans for their Political Beliefs": Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013).
[59] *Id.*
[60] Transcribed interview of Doug Shulman, in Wash., D.C. (Dec. 4, 2013).
[61] 5 U.S.C. app. §5(d).
[62] Letter from Darrell Issa, H. Comm. on Oversight & Gov't Reform, to J. Russell George, Treasury Inspector Gen. for Tax Admin. (Aug. 3, 2012).
[63] *See* Transcribed interview of Holly Paz, Internal Revenue Serv., in Wash., D.C. (May 21, 2013).
[64] *Id.*

TIGTA must work aggressively to ensure that the IRS works on behalf of the American people. The watchdog must have an incentive to work quickly and to report grievous abuses in a timely manner. Because tax administration calls for robust oversight, a lifetime appointment for the inspector general creates an overly cozy relationship between the overseer and an agency filled with very senior career officials that transcend administrations. A shorter, fixed term may produce greater zeal on the part of TIGTA in overseeing the work of the IRS.

Solution: The IRS's targeting of conservative tax-exempt applicants demonstrates the need for a vigilant and effective IRS watchdog. TIGTA may be better equipped to carry out its mission if Congress reformed the appointment conditions for the IG. Congress ought to consider whether to change the appointment of the Treasury Inspector General for Tax Administration to a fixed five-year term.

Establish transparent and objective criteria for scrutiny of applicants

The IRS's inappropriate treatment of the Tea Party applications began when a screener in the Cincinnati office identified and elevated a 501(c)(4) application because "media attention" indicated that it could be a "high profile" case.[65] As the application continued to rise through the IRS chain of command, its potential for media attention motivated the requests for additional scrutiny.[66] In fact, when Washington IRS official Holly Paz decided to work the application in Washington, she couched her reason in the likelihood of press attention. She wrote: "I think sending [the application] up here is a good idea given the potential for media interest."[67]

The IRS claims to evaluate tax-exempt applicants on the facts and circumstances of each particular case. Several IRS employees interviewed by the Committee reiterated the IRS's fact-intensive approach.[68] However, for the Tea Party applications, the IRS did not evaluate the individual merits of the applications but instead systematically subjected them to additional scrutiny. EO Determination Manager Cindy Thomas confirmed this fact during her transcribed interview. She testified:

> Q And what was unique about this case that caused the agent to shoot it up the chain?
>
> A It was sent up the chain because it was considered a high profile case because it had – Tea Party organizations had been in the media a lot.
>
> Q Do you know in what context they were in the media?

[65] E-mail from John Koester, Internal Revenue Serv., to John Shafer, Internal Revenue Serv. (Feb. 25, 2010). [Muthert 4]
[66] E-mail from Cindy Thomas, Internal Revenue Serv., to Holly Paz, Internal Revenue Serv. (Feb. 25, 2010). [Muthert 2-3]
[67] E-mail from Holly Paz, Internal Revenue Serv., to Cindy Thomas, Internal Revenue Serv. (Feb. 26, 2010). [Muthert 2]
[68] *See, e.g.*, Transcribed interview of Justin Lowe, Internal Revenue Serv., in Wash., D.C. (July 23, 2013).

A I don't know.

Q Okay. So the reason it was sent up is because it was a media issue? Is that right?

A That's correct.

Q There was nothing novel or difficult about the case?

A To my knowledge, it was because it was media attention.

***

Q Ma'am, other than the media attention, was there any other reason to – to send this case to Washington?

A No.[69]

The fact that "media attention" qualified the Tea Party applications for additional scrutiny runs contrary to idea that applications are judged on their merits. Because an application's potential for media attention has no bearing on the applicant's qualification for tax-exemption, the IRS's use of media attention as a criterion for additional scrutiny should be inappropriate. Rather than relying on *ad hoc* criteria, policymakers should consider delineating appropriate criteria, excluding the potential for media attention, for the IRS to use when selecting applications for additional scrutiny.

Solution: The investigation shows how concern for "media attention" led some in the IRS to elevate and delay certain tax-exempt applications. Congress ought to consider legislative proposals to establish transparent and objective criteria for applying additional scrutiny to tax-exempt applicants. These criteria should include only those factors that bear directly on the applicant's qualifications for tax-exemption, and not irrelevant factors such as the likelihood for media attention.

Limit the time for IRS review of a tax-exempt application

The Committee's investigation has found that Tea Party tax-exempt applicants experienced significant delays in the IRS's determination process. According to several IRS employees, applications filed as early as 2010 waited several years for a decision by the IRS.[70] TIGTA's audit report also documents these delays.[71] These excessive delays deny applicants

[69] Transcribed interview of Lucinda Thomas, Internal Revenue Serv., in Wash., D.C. (June 28, 2013).
[70] *See* Transcribed interview of David Marshall, Internal Revenue Serv., in Wash., D.C. (July 26, 2013); Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013).
[71] TIGTA Audit Rpt., *supra* note 15.

any resolution, cause supporters to get wary, and deter outside funding and other support. Often times, it can mean the difference between a group's survival and its failure.

The need for a more streamlined approach for processing tax-exempt applications is evident. The IRS requires an applicant to respond to extensive information-request letters within a definite period. When an applicant fails to respond to questions by the deadline, the IRS may close the application. The IRS does not afford the taxpayer much leeway. The agency ought to be subject to its own rule. It should not be allowed to excessively delay the determination of a tax-exempt application. The IRS evaluation should be subject to a time limit, at the expiration of which the application is automatically granted if the IRS has failed to make a determination.

Solution: The IRS should not be able allowed to review a tax-exempt application indefinitely. Congress ought to consider legislative proposals to implement an appropriate limit – for example, 60 days – for the IRS internal evaluation of applications for tax-exemption, after which the applicant automatically receives exemption if the IRS has not made a determination.

Establish clear and transparent rules for information-collecting purposes

The IRS has established guidelines detailing its requirements and standards for recognizing tax-exempt status.[72] These guidelines include a rule allowing the agency to "request additional information before issuing a determination letter or ruling" even if the tax-exempt application is "substantially complete."[73] However, the IRS's manual does not offer much guidance on the substance of information requests, stating merely: "Information requests should be professional in tone, grammatically correct, free of spelling errors, formatted properly, complete, and material to the determination requested."[74] The IRS does not have any clear rules about what type of, or how much, information the agency may collect when seeking material from the applicant.[75]

The Committee's investigation has shown that the IRS requested unnecessary and inappropriate information from groups applying for tax-exempt status. Revenue agents requested unnecessary material from these groups, including intrusive information about the identities of donors, views of issues important to their organizations, and political affiliation of officers.[76] The IRS and TIGTA both found these information requests to be inappropriate.[77] The Committee agrees.

---

[72] *See* Rev. Proc. 2013-9, 2013-2 I.R.B. 255.
[73] *Id.* § 4.06.
[74] I.R.M. 7.20.2.4.1, *Requesting Additional Information.*
[75] *See* Letter from Joseph H. Grant, Internal Revenue Serv., to Charles Boustany, H. Comm. on Ways & Means (Mar. 23, 2012).
[76] *See* E-mail from Judith Kindell, Internal Revenue Serv., to Holly Paz & Sharon Light, Internal Revenue Serv. (Apr. 25, 2012). [IRSR 13868]
[77] *See id.*; TIGTA Audit Rpt., *supra* note 15.

Solution: The IRS misconduct is partially attributable to the IRS's lack of clear guidelines on what information may be sought in course of developing a tax-exempt application. Congress should consider developing and implementing clear and transparent rules on the amount and type of information that agents may collect when examining an application for tax-exempt status.

Prohibit political and policy communications between the IRS and Executive Office of the President

The Committee's investigation has uncovered evidence that political figures in the White House have sought to use the IRS for policy and political guidance.[78] Jeanne Lambrew, the Deputy Assistant to the President for Health Policy, sought counsel from the IRS about the scope and contours of the Administration's religious exemption to the Affordable Care Act's contraception mandate.[79] This type of partisan policy discussion between the White House and the IRS violates the sanctified trust that the American people place in the IRS to "enforce the law with integrity and fairness to all."[80]

Close coordination between the White House and a subordinate federal entity generally should not be of concern. Such a close coordination is of great concern, however, when the entity is the IRS – an independent agency charged with powerful and far-reaching tax administration obligations. The Committee's investigation has shown the IRS's outsized role in the implementation of the Affordable Care Act has helped to contribute to the overall politicization of the IRS.

The IRS ought to be an impartial administrator of tax law. Even the appearance of partiality is a detriment to the mission of the IRS. Accordingly, steps must be taken to prevent the IRS from engaging with the Executive Office of the President on overtly policy or political matters. However, the IRS could maintain relationship with the Treasury Department's Office of Tax Policy, which is the proper conduit for policy discussions between the IRS and the Administration.

Solution: The investigation demonstrates how the IRS has become increasingly close with the Executive Office of the President. Although there is a role for coordination with the Office of Tax Policy in the Treasury Department, Congress ought to consider legislative steps to prevent IRS employees from engaging in political or policy discussions directly with the White House.

---

[78] *See, e.g.*, E-mail from David Fish, Internal Revenue Serv., to Jeanne Lambrew & Ellen Montz, Exec. Office of the Pres. (July 20, 2013).

[79] *See* Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov't Reform, to J. Russell George, Treasury Inspector Gen. for Tax Admin. (Oct. 21, 2013).

[80] Internal Revenue Service, *The Agency, its Mission and Statutory Authority*, http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority (last visited Jan. 7, 2014).

Remove the IRS from implementation of the Affordable Care Act

The IRS should be a non-partisan, neutral administrator of federal tax law. For this very reason, the Department of the Treasury contains an Office of Tax Policy to serve as the Administration's partisan policy-making entity with respect to tax policy. The Committee's investigation, however, highlights how the IRS has become an agency responsive to political rhetoric and the Administration's policy overtures. A large cause of this problem lies in the IRS's outsized role in the implementation and administration of the Affordable Care Act.

The Affordable Care Act endowed the IRS with responsibility for implementing at least 47 new provisions, including 18 new taxes that would increase cumulative tax burden by $1 trillion over the next decade.[81] Among these new tasks, the law charged the IRS with monitoring the health-insurance choices of the public, penalizing citizens who opt not to obtain government-approved coverage, and penalizing employers who do not provide government-approved coverage.[82] The Affordable Care Act also placed the IRS in the position of sharing confidential taxpayer information with other federal agencies.[83]

Testimony provided to the Committee shows that the implementation of the Affordable Care Act has politicized the IRS and affected the agency's first-order responsibility of impartial tax administration. Commissioner Shulman testified:

> Q And, sir, when you were IRS Commissioner, how much of your time was taken up with ObamaCare-related matters?
>
> A I don't have a percentage, but, you know, a couple of big pieces of legislation passed during my tenure. One was the Recovery Act, which had major tax components, and the second was, you know, the Affordable Care Act, which had a lot of tax components. And so, you know, I spent a fair amount of time on both of those.
>
> Q Would you say you spent a significant amount of time on ObamaCare-related issues?
>
> A I'd have a hard time characterizing it. You know, sure. You know, I definitely spent, you know, time on making sure, you know, a major piece of tax legislation that had been passed was going to get implemented correctly.[84]

Shulman attended regular meetings with White House officials about the broad implementation of the Affordable Care Act.[85] Likewise, Sarah Hall Ingram, the head of the IRS's Affordable

---

[81] *See* Letter from Douglas W. Elmendorf, Cong. Budget Office, to John Boehner, Speaker of the House of Representatives (July 24, 2012).
[82] I.R.C. § 5000A.
[83] *Your Next IRS Political Audit*, WALL ST. J., May 14, 2013.
[84] Transcribed interview of Doug Shulman, in Wash., D.C. (Dec. 4, 2013).
[85] *Id.*

Care Act office and former Tax Exempt and Government Entities Commissioner, told the Committee that she also regularly attended meetings with the White House.[86] Ingram also provided guidance to Jeanne Lambrew, the President's Deputy Assistant for Health Policy, about tax provisions within the Affordable Care Act.[87] During the same exchange, IRS officials may have disclosed confidential taxpayer information to the White House.[88]

These concerns about the IRS's outsized role in the Affordable Care Act implementation are not new. In her *Annual Report to Congress* in 2010, the National Taxpayer Advocate warned that the Affordable Care Act will present the IRS with "a number of decisions and guidance projects unrelated to its employees' traditional expertise and skill set."[89] In testimony to the Committee in 2012, former Commissioner Mark Everson lamented the IRS's shrinking independence. He testified:

> For important and well-understood reasons, the IRS operates with a great deal of independence from other agencies. **I worry that such direct participation of the Service in a major non-tax Administration initiative has the potential to erode the historic independence of the Service.**[90]

For these reasons, impartial tax administration would be well-served by removing the IRS from implementing and administering the Affordable Car Act.[91] These changes are necessary to return the IRS to its traditional and proper role as a non-partisan, neutral administrator of tax law.

Solution: The Affordable Care Act endowed the IRS with a tremendous responsibility over a highly partisan law. This responsibility has resulted in a close relationship between the IRS and political elements of the Administration. To return the IRS to its traditional role as an impartial administrator of the tax code, Congress ought to consider legislation to remove the IRS from the implementation and administration of the Affordable Care Act.

Establish personnel reforms for dismissed federal workers

A "public office is a public trust."[92] The misconduct identified by the Committee provides ample justification for reforming federal civil service policies. The case of Lois Lerner is a prime example. After apologizing for the targeting and later refusing to answer questions

---

[86] Transcribed interview of Sarah Hall Ingram, Internal Revenue Serv., in Wash., D.C. (Sept. 23, 2013).
[87] *See* E-mail from Sarah Hall Ingram, Internal Revenue Serv., to Jeanne Lambrew & Ellen Montz, Exec. Office of the Pres. (July 19, 2012). [IRSR 182160]
[88] E-mail from David Fish, Internal Revenue Serv., to Jeanne Lambrew & Ellen Montz, Exec. Office of the Pres. (July 20, 2012). [IRSR 189777]
[89] NATIONAL TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS 20 (Dec. 31, 2010).
[90] *"IRS: Enforcing ObamaCare's New Rules and Taxes": Hearing before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2012) (statement of Mark W. Everson) (emphasis added).
[91] *See, e.g.*, H.R. 2009, 113th Cong. (introduced 2013).
[92] Grover Cleveland, *reprinted in* MICHAEL C. THOMSETT & JEAN FREESTONE THOMSETT, POLITICAL QUOTATIONS (1994).

about her conduct, the IRS placed Lerner on administrative leave. There, from May 2013 through September 2013, she collected her full pay and benefits. Only when the Accountability Review Board prepared to recommend that she be removed from her position did Lerner step aside, retiring from the IRS with her full pension.[93] Reportedly, Lerner's retirement could cost the taxpayers between $60,000 to over $100,000 annually.[94]

Federal administrative leave is a long-standing problem. An Office of Personnel Management regulation allows management to place an employee on paid but non-duty status during the time it takes to effectuate a disciplinary action, referred to as administrative leave.[95] Once placed on administrative leave for allegations of misconduct, often federal employees remain in a paid status for months or years.[96] While on leave, federal employees continue to accrue time in service towards pay increases, benefits, and pensions.

The current personnel practices are unfair to American taxpayers and do little to deter misconduct by federal employees. The federal government must implement better policies relating to administrative leave. Adjudication of misconduct cases must be timelier. If resolution is adverse to an employee, any pay received during the period of administrative leave must be rescinded. Federal workers who acknowledge misconduct must not be afforded full pay and full benefits. Finally, under particularly egregious circumstances, like the targeting of taxpayers for their political beliefs, an adverse ruling must result in the loss of pension benefits.

Solution: The federal workforce should work better for the American taxpayers. Congress should consider proposals to improve accountability in the federal workforce and make the government work better for the American taxpayers. Among these proposals, Congress should examine changes to civil serve protections and pay for federal workers removed for misconduct.

Increase political activity restrictions for certain IRS employees

Because a public office is a public trust, the Hatch Act limits certain political activities conducted by employees of the Executive Branch.[97] The Act prohibits employees from engaging in partisan political activity while on federal duty at a federal workplace.[98] Certain employees are further restricted by the Hatch Act from engaging in partisan political campaigns or

[93] John D. McKinnon, *Lois Lerner, at Center of IRS Investigation, Retires*, WALL ST. J., Sept. 23, 2013; Lauren French, *Lois Lerner Still Hill's Favorite Piñata*, POLITICO, Sept. 23, 2013.
[94] *See* Nat'l Taxpayers Union, Learning the Cost Lois Lerner's Pension, Sept. 30, 2013, available at http://www.ntu.org/governmentbytes/9-30-13-lerner-taxpayer-pension-cost.html.
[95] *See* 5 C.F.R. § 9701.609.
[96] *See, e.g.*, Lisa Rein, *Civil servants put on paid administrative leave can get stuck in an ill-defined limbo*, WASH. POST, Dec 30, 2012.
[97] 5 U.S.C. §§ 7321-26.
[98] *Id.* § 7324.

management.[99] This further restriction already applies at the IRS to employees of the Office of Criminal Investigation.[100]

The Committee's investigation has shown the degree to which the IRS has become a partisan agency with political bias evident in its conduct. Because of the great potential for the IRS Exempt Organizations Division to misuse its power, it is worth examining whether to increase Hatch Act restrictions for these employees. In particular, the Committee recommends the Congress designate employees of the IRS Exempt Organizations as further restricted employees under the Hatch Act. This change would help to restore the IRS's credibility as a nonpartisan tax collector.

Solution: The Committee's investigation has shown that the IRS has become an increasingly politicized agency. Congress should consider proposals to increase political activity restrictions for IRS Exempt Organizations Division personnel. Congress could consider including IRS Exempt Organizations employees as "further restricted" under the Hatch Act.

Implement rigorous training on the use of personal e-mail and penalties for misuse

The Committee is extremely troubled by the persistent use of non-official e-mail accounts by federal employees to conduct official government business in circumvention of existing records-keeping laws. It not only potentially violates the Federal Records Act and impedes the Administration's ability to respond to its Freedom of Information Act obligations, but it also frustrates Congressional oversight.

In recent years, the Committee has seen examples of non-official e-mail accounts used for official government business throughout the Obama Administration. The Committee has documented how Labor Secretary Thomas Perez used his personal e-mail account almost 1,200 times to conduct official business during his time at the Department of Justice.[101] The Committee has also highlighted how former Energy Department official Jonathan Silver sent and received thousands of messages from his personal e-mail account related to official business.[102]

The Committee's investigation into this matter has uncovered multiple IRS employees – including Lois Lerner – who used their personal e-mail accounts to conduct official IRS business.[103] Documents produced to the Committee even show that in some instances these employees exchanged confidential taxpayer information over non-official, and therefore non-secure, e-mail accounts. Because federal law places heightened sensitivity on confidential

[99] *See* U.S. Office of Special Counsel, About the Hatch Act, http://www.osc.gov/haFederalFurtherRestricted.htm.
[100] *Id.*
[101] *See* Letter from Darrell Issa, H. Comm. on Oversight & Gov't Reform, to Thomas E. Perez, U.S. Dep't of Justice (Apr. 18, 2013).
[102] *See "Preventing Violations of Federal Transparency Laws": Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013).
[103] *See, e.g.*, E-mail from Judith Kindell to Lois Lerner (Aug. 23, 2011); E-mail from Nikole Flax to Lois Lerner (Feb. 11, 2010).

taxpayer information,[104] the use of non-official e-mail accounts in this setting is particularly troubling.

Solution: Given the apparent frequency of federal employees using non-official e-mail accounts to conduct official business, the IRS and other federal agencies ought to develop and implement more rigorous training on the appropriate use of non-official e-mail accounts and the protection of sensitive records. In addition, Congress should consider legislation to implement penalties for federal employees who misuse non-official e-mail accounts for official government business.

Conclusion

The Internal Revenue Service needs repair to how it administers federal tax law and to recommit itself to being an impartial federal agency. From February 2010 until May 2012, the IRS targeted conservative-oriented applicants for tax-exempt status. These applicants were identified and separated based on their names and political activities. They were subjected to excessive delays and received inappropriate and burdensome information requests. Although senior IRS leadership knew of the targeting, no public disclosure was made until Lois Lerner answered a planted question at an obscure tax-law event in May 2013.

The IRS targeting did not occur in a vacuum. Reforms to ensure that similar misconduct never reoccurs must take into account the causes and circumstances that led to the targeting. The IRS must be disentangled from politics and returned to its traditional role as a dispassionate tax administrator. Structural changes are needed to promote accountability and enhanced internal oversight. Tax administration must be altered to tip the balance in favor of the taxpayer rather than the IRS. Federal workforce changes are vital to holding wrongdoers accountable and guaranteeing that the IRS works for the taxpayers, and not the other way around.

The Committee's investigation of the IRS targeting is by no means complete. However, as fact-finding continues, the initial reforms proposed in this staff report are a first step toward addressing the serious deficiencies at the IRS. The Committee articulates these proposals to bring accountability and transparency back to federal tax administration. These reforms are not the exclusive means, or an exhaustive list, of proposals to fix the IRS and improve tax administration. The Committee's proposals are presented in the spirit of sparking a national discussion on steps to restore confidence in the IRS. As this oversight work progresses, the Committee will continue with its stated mission of holding government accountable to taxpayers and bringing genuine reform to the federal bureaucracy.

[104] *See* I.R.C. § 6103.

U.S. House of Representatives

Committee on Oversight and Government Reform

Darrell Issa (CA-49), Chairman

Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment

Staff Report
113th Congress

April 7, 2014

Table of Contents

Table of Contents i
Executive Summary 1
Findings 4
Coordinated and misleading Democratic claims of bipartisan IRS targeting 6
The IRS acknowledges that portions of its BOLO lists included liberal-oriented entries 6
Ways and Means Committee Democrats allege bipartisan IRS targeting 7
Acting IRS Commissioner volunteers to testify at the Oversight Committee's July 17, 2013 subcommittee hearing 8
Democrats attack the Inspector General during the Oversight Committee's July 18, 2013 hearing 9
The IRS reinterprets legal protections for taxpayer information to bolster Democratic allegations 11
Recent Democratic efforts to perpetuate the myth of bipartisan IRS targeting 12
The Truth: The IRS engaged in disparate treatment of conservative applicants 13
The Committee's evidence shows the IRS sought to identify and scrutinize Tea Party applications 14
The initial "test" cases were exclusively Tea Party applications 14
The initial screening criteria captured exclusively Tea Party applications 19
The IRS continued to target Tea Party groups after the BOLO criteria were broadened 22
The IRS's own retrospective review shows the targeted applications were predominantly conservative-oriented 26
The IRS treated Tea Party applications differently from other applications 27
Myth versus fact: How Democrats' claims of bipartisan targeting are not supported by the evidence 31
BOLO entries for liberal groups and terms only appear on lists used for awareness and were never used as a litmus test for enhanced scrutiny 31
The IRS identified some liberal-oriented groups due to objective, non-political concerns, but not because of their political beliefs 32
Substantially more conservative groups were caught in the IRS application backlog 33
The IRS treated Tea Party applicants differently than "progressive" groups 35
The IRS treated Tea Party applicants differently than ACORN successor groups 40
The IRS treated Tea Party applicants differently than Emerge affiliate groups 42
The IRS treated Tea Party applicants differently than Occupy groups 44
Conclusion 45

Executive Summary

In the immediate aftermath of Lois Lerner's public apology for the targeting of conservative tax-exempt applicants, President Obama and congressional Democrats quickly denounced the IRS misconduct.[1] But later, some of the same voices that initially decried the targeting changed their tune. Less than a month after the wrongdoing was exposed, prominent Democrats declared the "case is solved" and, later, the whole incident to be a "phony scandal."[2] As recently as February 2014, the President explained away the targeting as the result of "bone-headed" decisions by employees of an IRS "local office" without "even a smidgeon of corruption."[3]

To support this false narrative, the Administration and congressional Democrats have seized upon the notion that the IRS's targeting was not just limited to conservative applicants. Time and again, they have claimed that the IRS targeted liberal- and progressive-oriented groups as well – and that, therefore, there was no political animus to the IRS's actions.[4] These Democratic claims are flat-out wrong and have no basis in any thorough examination of the facts. Yet, the Administration's chief defenders continue to make these assertions in a concerted effort to deflect and distract from the truth about the IRS's targeting of tax-exempt applicants.

The Committee's investigation demonstrates that the IRS engaged in disparate treatment of conservative-oriented tax-exempt applicants. Documents produced to the Committee show that initial applications transferred from Cincinnati to Washington were filed by Tea Party groups. Other documents and testimony show that the initial criteria used to identify and hold Tea Party applications captured conservative organizations. After the criteria were broadened in July 2012 to be cosmetically neutral, material provided to the Committee indicates that the IRS still intended to target only conservative applications.

A central plank in the Democratic argument is the claim that liberal-leaning groups were identified on versions of the IRS's "Be on the Look Out" (BOLO) lists.[5] This claim ignores significant differences in the placement of the conservative and liberal entries on the BOLO lists

---

[1] *See, e.g.*, The White House, Statement by the President (May 15, 2013) (calling the IRS targeting "inexcusable"); *"The IRS: Targeting Americans for their Political Beliefs": Hearing before the H. Comm. on Oversight & Gov't*, 113th Cong. (2013) (statement of Ranking Member Elijah E. Cummings) ("The inspector general has called the action by IRS employees in Cincinnati, quote, "inappropriate," unquote, but after reading the IG's report, I think it goes well beyond that. I believe that there was gross incompetence and mismanagement in how the IRS determined which organizations qualified for tax-exempt status."); Press Release, Rep. Nancy Pelosi, Pelosi Statement on Reports of Inappropriate Activities at the IRS (May 13, 2013) ("While we look forward to reviewing the Inspector General's report this week, it is clear that the actions taken by some at the IRS must be condemned. Those who engaged in this behavior were wrong and must be held accountable for their actions.").

[2] *State of the Union with Candy Crowley* (CNN television broadcast June 9, 2013) (interview with Rep. Elijah E. Cummings); *Fox News Sunday* (Fox News television broadcast July 28, 2013) (interview with Treasury Secretary Jacob Lew).

[3] *"Not even a smidgeon of corruption": Obama downplays IRS, other scandals*, FOX NEWS, Feb. 3, 2014.

[4] *See, e.g.*, Lauren French & Rachael Bade, *Democratic Memo: IRS Targeting Was Not Political*, POLITICO, July 17, 2013.

[5] *See Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013).

and how the IRS used the BOLO lists in practice. The Democratic claims are further undercut by testimony from IRS employees who told the Committee that liberal groups were not subject to the same systematic scrutiny and delay as conservative organizations.[6]

The IRS's independent watchdog, the Treasury Inspector General for Tax Administration (TIGTA), confirms that the IRS treated conservative applicants differently from liberal groups. The inspector general, J. Russell George, wrote that while TIGTA found indications that the IRS had improperly identified Tea Party groups, it "did not find evidence that the criteria [Democrats] identified, labeled 'Progressives,' were used by the IRS to select potential political cases during the 2010 to 2012 timeframe we audited."[7] He concluded that TIGTA "found no indication in any of these other materials that 'Progressives' was a term used to refer cases for scrutiny for political campaign intervention."[8]

An analysis performed by the House Committee on Ways and Means buttresses the Committee's findings of disparate treatment. The Ways and Means Committee's review of the confidential tax-exempt applications proves that the IRS systematically targeted conservative organizations. Although a small number of progressive and liberal groups were caught up in the application backlog, the Ways and Means Committee's review shows that the backlog was 83 percent conservative and only 10 percent were liberal-oriented.[9] Moreover, the IRS approved 70 percent of the liberal-leaning groups and only 45 percent of the conservative groups.[10] The IRS approved every group with the word "progressive" in its name.[11]

In addition, other publicly available information supports the analysis of the Ways and Means Committee. In September 2013, *USA Today* published an independent analysis of a list of about 160 applications in the IRS backlog.[12] This analysis showed that 80 percent of the applications in the backlog were filed by conservative groups while less than seven percent were filed by liberal groups.[13] A separate assessment from *USA Today* in May 2013 showed that for 27 months beginning in February 2010, the IRS did not approve a single tax-exempt application filed by a Tea Party group.[14] During that same period, the IRS approved "perhaps dozens of applications from similar liberal and progressive groups."[15]

The IRS, over many years, has undoubtedly scrutinized organizations that embrace different political views for varying reasons – in many cases, a just and neutral criteria may have

---

[6] *See, e.g.*, Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013); Transcribed interview of Stephen Daejin Seok, Internal Revenue Serv., in Wash., D.C. (June 19, 2013); Transcribed interview of Lucinda Thomas, Internal Revenue Serv., in Wash., D.C. (June 28, 2013).
[7] Letter from J. Russell George, Treasury Inspector Gen. for Tax Admin., to Sander M. Levin, H. Comm. on Ways & Means (June 26, 2013).
[8] *Id.*
[9] *Hearing on the Internal Revenue Service's Exempt Organizations Division Post-TIGTA Audit: Hearing before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 113th Con. (2013) (opening statement of Chairman Charles Boustany) [hereinafter "Ways and Means Committee September 18th Hearing"].
[10] *Id.*
[11] *Id.*
[12] *See* Gregory Korte, *IRS List Reveals Concerns over Tea Party 'Propaganda,'* USA TODAY, Sept. 18, 2013.
[13] *Id.*
[14] Gregory Korte, *IRS Approved Liberal Groups while Tea Party in Limbo*, USA TODAY, May 15, 2013.
[15] *Id.*

been fairly utilized. This includes the time period when Tea Party organizations were systematically screened for enhanced and inappropriate scrutiny. But the concept of *targeting*, when defined as a systematic effort to select applicants for scrutiny simply because their applications reflected the organizations' political views, only applied to Tea Party and similar conservative organizations. While use of term "targeting" in the IRS scandal may not always follow this definition, the reality remains that there is simply no evidence that any liberal or progressive group received enhanced scrutiny because its application reflected the organization's political views.

For months, the Administration and congressional Democrats have attempted to downplay the IRS's misconduct. First, the Administration sought to minimize the fallout by preemptively acknowledging the misconduct in response to a planted question at an obscure Friday morning tax-law conference. When that strategy failed, the Administration shifted to blaming "rogue agents" and "line-level" employees for the targeting. When those assertions proved false, congressional Democrats baselessly attacked the character and integrity of the inspector general. Their attempt to allege bipartisan targeting is just another effort to distract from the fact that the Obama IRS systematically targeted and delayed conservative tax-exempt applicants.

Findings

- The IRS treated Tea Party applications distinctly different from other tax-exempt applications.
- The IRS selectively prioritized and produced documents to the Committee to support misleading claims about bipartisan targeting.
- Democratic Members of Congress, including Ranking Member Elijah Cummings, Ranking Member Sander Levin, and Representative Gerry Connolly, made misleading claims that the IRS targeted liberal-oriented groups based on documents selectively produced by the IRS.
- The IRS's "test" cases transferred from Cincinnati to Washington were exclusively filed by Tea Party applicants: the Prescott Tea Party, the American Junto, and the Albuquerque Tea Party.
- The IRS's initial screening criteria captured exclusively Tea Party applications.
- Even after Lois Lerner broadened the screening criteria to maintain a veneer of objectivity, the IRS still sought to target and scrutinize Tea Party applications.
- The IRS targeting captured predominantly conservative-oriented applications for tax-exempt status.
- Myth: IRS "Be on the Lookout" (BOLO) entries for liberal groups meant that the IRS targeted liberal and progressive groups. Fact: Only Tea Party groups on the BOLO list experienced systematic scrutiny and delay.
- Myth: The IRS targeted "progressive" groups in a similar manner to Tea Party applicants. Fact: The IRS treated "progressive" groups differently than Tea Party applicants. Only seven applications in the IRS backlog contained the word "progressive," all of which were approved by the IRS. The IRS processed progressive applications like any other tax-exempt application.
- Myth: The IRS targeted ACORN successor groups in a similar manner to Tea Party applicants. Fact: The IRS treated ACORN successor groups differently than Tea Party applicants. ACORN successor groups were not subject to a "sensitive case report" or reviewed by the IRS Chief Counsel's office. The central issue for the ACORN successor groups was whether the groups were legitimate new entities or part of an "abusive" scheme to continue an old entity under a new name.
- Myth: The IRS targeted Emerge affiliate groups in a similar manner to Tea Party applicants. Fact: The IRS treated Emerge affiliate groups differently than Tea Party

applicants. Emerge applications were not subjected to secondary screening like the Tea Party cases. The central issue in the Emerge applications was private benefit, not political speech.

- Myth: The IRS targeted Occupy groups in a similar manner to Tea Party applicants. Fact: The IRS treated Occupy groups differently than Tea Party applicants. No applications in the IRS backlog contained the words "Occupy." IRS employees testified that they were not even aware of an Occupy entry on the BOLO list.

Coordinated and misleading Democratic claims of bipartisan IRS targeting

As the IRS targeting scandal grew, the Administration and congressional Democrats began peddling the allegation that the IRS targeting was not just limited to conservative tax-exempt application, but that the IRS had targeted liberal-leaning groups as well. These assertions kick-started when Acting IRS Commissioner Daniel Werfel told reporters that IRS "Be on the Look Out" lists included entries for liberal-oriented groups. Congressional Democrats seized upon his announcement and immediately began feeding the false narrative that liberal groups received the same systematic scrutiny and delay as conservative applicants. In the ensuing months, the IRS even reconsidered its previous redactions to provide congressional Democrats with additional fodder to support their assertions. Although TIGTA and others have rebuffed the Democratic argument, senior members of the Administration and in Congress continue this coordinated narrative that the IRS targeting was broader than conservative applicants.

The IRS acknowledges that portions of its BOLO lists included liberal-oriented entries

On June 24, 2013, Acting IRS Commissioner Daniel Werfel asserted during a conference call with reporters that the IRS's misconduct was broader than just conservative applicants.[16] Werfel told reporters that "[t]here was a wide-ranging set of categories and cases that spanned a broad spectrum."[17] Although Mr. Werfel refused to discuss details about the "inappropriate criteria that was [*sic*] in use," the IRS produced to Congress hundreds of pages of self-selected documents that supported his assertion.[18] The IRS prioritized producing these documents over other material, producing them when the Committee had received less than 2,000 total pages of IRS material. Congressional Democrats had no qualms in putting these self-selected documents to use.

Virtually simultaneous with Mr. Werfel's conference call, Democrats on the House Ways and Means Committee trumpeted the assertion that the IRS targeted liberal groups similarly to conservative organizations.[19] Ranking Member Sander Levin (D-MI) released several versions of the IRS BOLO list.[20] Because these versions included an entry labeled "progressives," Ranking Member Levin alleged that "[t]he [TIGTA] audit served as the basis and impetus for a wide range of Congressional investigations and **this new information shows that the**

---

[16] *See* Alan Fram, *Documents show IRS also screened liberal groups*, ASSOC. PRESS, June 24, 2013.
[17] *Id.*
[18] *See* Letter from Leonard Oursler, Internal Revenue Serv., to Darrell Edward Issa, H. Comm. on Oversight & Gov't Reform (June 24, 2013).
[19] Press Release, H. Comm. on Ways & Means Democrats, New IRS Information Shows "Progressives" Included on BOLO Screening List (June 24, 2013).
[20] *Id.*

foundation of those investigations is flawed in a fundamental way."[21] (emphasis added). These documents would initiate a sustained campaign designed to falsely allege that the IRS engaged in bipartisan targeting.

Ways and Means Committee Democrats allege bipartisan IRS targeting

During a hearing of the Ways and Means Committee on June 27, 2013, Democrats continued to spin this false narrative, arguing that liberal groups were mistreated similarly to conservative groups. Ranking Member Levin proclaimed during his opening statement:

> This week we learned for the first time the three key items, one, the screening list used by the IRS included the term "progressives." Two, progressive groups were among the 298 applications that TIGTA reviewed in their audit and received heightened scrutiny. And, three, the inspector general did not research how the term "progressives" was added to the screening list or how those cases were handled by a different group of specialists in the IRS. The failure of the I.G.'s audit to acknowledge these facts is a fundamental flaw in the foundation of the investigation and the public's perception of this issue.[22]

Other Democratic Members picked up this thread. While questioning the hearing's only witness, Acting IRS Commissioner Werfel, Representative Charlie Rangel (D-NY) raised the specter of bipartisan targeting. He stated:

Mr. RANGEL:	You said there's diversity in the BOLO lists. And you admit that conservative groups were on the BOLO list. Why is it that we don't know whether or not there were progressive groups on the BOLO list?
Mr. WERFEL:	Well, we do know that – that the word "progressive" did appear on a set of BOLO lists. We do know that. When I was articulating the point about diversity, I was trying to capture that the types of political organizations that are on these BOLO lists are wide ranging. But they do include progressives.[23]

Similarly, Representative Joseph Crowley (D-NY) alleged that the IRS mistreated progressive groups identically to Tea Party groups. He said:

> As the weeks have gone on, we have seen that there is a culture of intimidation, but not from the White House, but rather from my Republican colleagues. **We know for a fact that there has been targeting of both tea party and**

[21] *Id.*
[22] *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013) (statement of Ranking Member Sander Levin).
[23] *Id.* (question and answer with Representative Charlie Rangel).

> **progressive groups by the IRS. . . . Then, as we see, the progressive groups were targeted side by side with their tea party counterpart groups.**[24] (emphasis added).

Acting IRS Commissioner volunteers to testify at the Oversight Committee's July 17, 2013 subcommittee hearing

On July 17, 2013, the Oversight Committee convened a joint subcommittee hearing on ObamaCare security concerns, featuring witnesses from the federal agencies involved in the law's implementation.[25] The Chairmen invited Sarah Hall Ingram, the Director of the IRS ObamaCare office, to testify.[26] Prior to the hearing, however, Acting IRS Commissioner Werfel personally intervened and volunteered himself to testify as the IRS witness in Ms. Ingram's place. Committee Democrats used Mr. Werfel's appearance as an opportunity to continue pushing their false narrative of bipartisan IRS targeting.

During the hearing, Ranking Member Elijah Cummings (D-MD) used the majority of his five-minute period to question Mr. Werfel not on the subject matter of the hearing, but rather on the IRS's treatment of liberal tax-exempt applicants. They engaged in the following exchange:

Mr. CUMMINGS.	I would like to ask you about the ongoing investigation into the treatment of Tea Party applicants for tax exempt status. During our interviews, we have been told by more than one IRS employee that there were progressive or left-leaning groups that received treatment similar to the Tea Party applicants. As part of your internal review, have you identified non-Tea Party groups that received similar treatment?
Mr. WERFEL.	Yes.
Mr. CUMMINGS.	We were told that one category of applicants had their applications denied by the IRS after a 3-year review; is that right?
Mr. WERFEL.	Yes, that's my understanding that there is a group or seven groups that had that experience, yes.[27]

---

[24] *Id.* (question and answer with Representative Joseph Crowley).
[25] *"Evaluating Privacy, Security, and Fraud Concerns with ObamaCare's Information Sharing Apparatus": J. Hearing before the Subcomm. on Energy Policy, Health Care and Entitlements of the H. Comm. on Oversight and Gov't Reform and the Subcomm. on Cybersecurity, Infrastructure Protection, and Security Technologies of the H. Comm. on Homeland Security*, 113th Cong. (2013) [hereinafter "July 17th Hearing"].
[26] *See* Letter from James Lankford, H. Comm. on Oversight & Gov't Reform, & Patrick Meehan, H. Comm. on Homeland Security, to Sarah Hall Ingram, Internal Revenue Serv. (July 10, 2013).
[27] July 17th Hearing, *supra* note 25.

It is certain that Ranking Member Cummings would not have had the opportunity to ask these questions had Ms. Ingram testified as originally requested.

The circumstances of Mr. Werfel's statements are striking. He volunteered to replace the undisputed IRS expert on ObamaCare at a hearing focusing on ObamaCare security, after being at the IRS for less than two months. He volunteered to testify at a subcommittee the day before the Committee convened a hearing that would feature testimony about the IRS's targeting of conservative applicants. By all indications, Mr. Werfel's testimony allowed congressional Democrats to continue to perpetuate the myth of bipartisan IRS targeting.

Democrats attack the Inspector General during the Oversight Committee's July 18, 2013 hearing

Unsurprisingly, Democrats on the Oversight Committee highlighted Mr. Werfel's assertions as their main narrative during a Committee hearing on the IRS targeting the following day. During his opening statement, Ranking Member Cummings criticized Treasury Inspector General for Tax Administration J. Russell George, accusing him of ignoring liberal groups targeted by the IRS.[28] Ranking Member Cummings stated:

> I also want to ask the Inspector General why he was unaware of documents we have now obtained showing that the IRS employees were also instructed to screen for progressive applicants and why his office did not look into the treatment of left-leaning organizations, such as Occupy groups. I want to know how he plans to address these new documents. Again, we represent conservative groups on both sides of the aisle, and progressives and others, and so all of them must be treated fairly.[29]

Representative Danny Davis (D-IL) utilized Mr. Werfel's testimony from the day before to also criticize the inspector general. Representative Davis said:

> **Yesterday, the principal deputy commissioner of the Internal Revenue Service, Danny Werfel, testified before this committee that progressive groups received treatment from the IRS that was similar to Tea Party groups when they applied for tax exempt status**. In fact, Congressman Sandy Levin, who is the ranking member of the Ways and Means Committee, explained these similarities in more detail. He said the IRS took years to resolve these cases, just like the Tea Party cases. And he said the IRS, one, screened for these groups, transferred them to the Exempt Organizations Technical Unit, made them the subject of a sensitive case report, and had them reviewed by the Office of Chief Counsel. According to the information provided to the Committee on Ways and Means, some of these progressive groups actually had their applications denied

[28] *"The IRS's Systematic Delay and Scrutiny of Tea Party Applications": Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013) (statement of Ranking Member Elijah E. Cummings) [hereinafter "July 18th Hearing"].
[29] *Id.*

> after a 3-year wait, and the resolution of these cases happened during the time period that the inspector general reviewed for its audit.[30] (emphasis added).

Inspector General George testified at the hearing to defend his work and debunk Democratic myths of bipartisan targeting. Committee Democrats took the opportunity to harshly interrogate Mr. George, using Mr. Werfel's testimony. Representative Gerry Connolly (D-VA) said to him:

> Well, so I want to make sure—you're under oath, again—it is your testimony today, as it was in May, but let's limit it to today, that at the time you testified here in May you had absolutely no knowledge of the fact that in any screening, BOLOs or otherwise, the words "Progressive," "Democrat," "MoveOn," never came up. You were only looking at "Tea Party" and conservative-related labels. You were unaware of any flag that could be seen as a progressive—the progressive side of things.[31]

Similarly, Representative Jackie Speier (D-CA) told Mr. George:

> Now, that seems completely skewed, Mr. George, if you are indeed an unbiased, impartial watch dog. It's as if you only want to find emails about Tea Party cases. These search terms do not include any progressive or liberal or left-leaning terms at all. Why didn't you search for the term "progressive"? It was specifically mentioned in the same BOLO that listed Tea Party groups.[32]

Representative Carolyn Maloney (D-NY) said:

> How in the world did you get to the point that you only looked at Tea Party when liberals and progressives and Occupy Wall Street and conservatives are just as active, if not more active, and would certainly be under consideration. That is just common plain sense. And I think that some of your statements have not been—it defies—it defies logic, it defies belief that you would so limit your statements and write to Mr. Levin and write to Mr. Connolly that of course no one was looking at any other area.[33]

Armed with self-selected IRS documents and Mr. Werfel's testimony, congressional Democrats vehemently attacked TIGTA in an attempt to undercut its findings that the IRS had targeted conservative tax-exempt applicants. Their *ad hominen* attacks on an independent inspector general sought to distract and deflect from the real misconduct perpetrated by the IRS.

---

[30] *Id.* (question and answer with Representative Danny Davis).
[31] *Id.* (question and answer with Representative Gerry Connolly).
[32] *Id.* (question and answer with Representative Jackie Speier).
[33] *Id.* (question and answer with Representative Carolyn Maloney).

The IRS reinterprets legal protections for taxpayer information to bolster Democratic allegations

The IRS was not an unwilling participant in spinning this false narrative. Section 6103 of federal tax law protects confidential taxpayer information from public dissemination.[34] Under the tax code, however, the IRS may release confidential taxpayer information to the House Ways and Means Committee and the Senate Finance Committee.[35] The IRS cited this provision of law to withhold vital details about the targeting scandal from the American public. The prohibition did not stop the IRS from releasing information helpful to its cause.

In August 2013, the IRS suddenly reversed its interpretation of the law. In a letter to Ways and Means Ranking Member Levin – who already had access to confidential taxpayer information – Acting IRS Commissioner Werfel wrote: "Consistent with our continuing efforts to provide your Committee and the public with as much information as possible regarding the Service's treatment of tax exempt advocacy organizations, we are re-releasing certain redacted documents that had been previously provided to your Committee."[36] Mr. Werfel explained the reversal as the result of "our continuing review of the documents" and "a thorough section 6103 analysis."[37] The reinterpretation allowed the IRS to release information related to "ACORN Successors" and "Emerge" groups.[38]

Congressional Democrats embraced the IRS's sudden reversal. Releasing new IRS documents, Ranking Member Levin and Ranking Member Cummings issued a joint press release announcing that "**new information from the IRS that provides further evidence that progressive groups were singled out for scrutiny in the same manner as conservative groups**."[39] (emphasis added). Ranking Member Levin proclaimed: "These new documents make it clear the IRS scrutiny of the political activity of 501(c)(4) organizations covered a broad spectrum of political ideology and was not politically motivated."[40] Ranking Member Cummings similarly intoned: "This new information should put a nail in the coffin of the Republican claims that the IRS's actions were politically motivated or were targeted at only one side of the political spectrum."[41]

The IRS's sudden reinterpretation of section 6103 allowed congressional Democrats to continue their assault on the truth. Again using documents self-selected by the IRS, these defenders of the Administration carried on their rhetorical campaign to convince Americans that the IRS treated liberal applicants identically to Tea Party applicants.

---

[34] I.R.C. § 6103.
[35] *Id.* § 6103(f).
[36] Letter from Daniel I. Werfel, Internal Revenue Serv., to Sander Levin, H. Comm. on Ways & Means (Aug. 19, 2013), *available at* http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/IRS%20Letter%20to%20Levin%20August%2019%2C%202013.pdf.
[37] *Id.*
[38] *Id.*
[39] Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov't Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).
[40] *Id.*
[41] *Id.*

Recent Democratic efforts to perpetuate the myth of bipartisan IRS targeting

Democratic efforts to spin the IRS targeting continue through the present. On January 29, 2014, Senator Chris Coons raised the allegation while questioning Attorney General Eric Holder about the Administration's investigation into the IRS's targeting. Senator Coons stated:

> Well, thank you, Mr. Attorney General. I -- I join a number of colleagues in urging and hoping that the investigation into IRS actions is done in a balanced and professional and appropriate way. And I assume it is, unless demonstrated otherwise. **And what I've heard is that there were progressive groups, as well as tea party groups, that were perhaps allegedly on the receiving end of reviews of the 501(c)(3) applications**. And it's my expectation that we'll hear more in an appropriate and timely way about the conduct of this investigation.[42] (emphasis added).

On February 3, 2014, during his daily briefing, White House Press Secretary Jay Carney echoed the Democratic line that the IRS targeted liberal groups in the same manner in which it targeted conservative groups. In defending the President's comments about "not even a smidgeon of corruption," Mr. Carney said:

> Q Jay, in the President's interview with Bill O'Reilly last night, he said that there was "not even a smidgen of corruption," regarding the IRS targeting conservative groups. Did the President misspeak?
>
> A No, he didn't. But I can cite – I think have about 20 different news organizations that cite the variety of ways that that was established, including by the independent IG, who testified in May and, as his report said, that **he found no evidence that anyone outside of the IRS had any involvement in the inappropriate targeting of conservative – or progressive, for that matter – groups in their applications for tax-exempt status**. So, again, I think that this is something –[43] (emphasis added).

During debate on the House floor on H.R. 3865, the Stop Targeting of Political Beliefs by the IRS Act of 2014, Ways and Means Committee Ranking Member Levin spoke in opposition to the bill. He said:

> On a day when the Chairman of the Ways and Means Committee, Mr. Camp, is unveiling a tax measure that requires serious bipartisanship to be successful, we are here on the floor considering a totally political bill in an attempt to resurrect an alleged scandal that never existed. . . . **And what have we learned? That**

[42] *"Oversight of the U.S. Department of Justice": Hearing before the S. Comm. on the Judiciary*, 113th Cong. (2014) (question and answer with Senator Chris Coons).
[43] The White House, Press Briefing by Press Secretary Jay Carney, 2/3/14, http://www.whitehouse.gov/photos-and-video/video/2014/02/03/press-briefing#transcript.

> **both progressive and conservative groups were inappropriately screened out by name and not by activity.**[44] (emphasis added).

As recently as early March 2014, Democrats have been spreading the myth that liberal-oriented groups were targeted in the same manner as conservative organizations. Appearing on *The Last Word with Lawrence O'Donnell*, Representative Gerry Connolly continued the Democratic allegations of bipartisan targeting. Representative Connolly said:

> You know, that's true, but I think we need to back up. This is not an honest inquiry. This is a Star Chamber operation. **This is cherry picking information, deliberately colluding with a Republican idea in the IRS to make sure the investigation is solely about tea party and conservative groups even though we know that the tilt is included progressive titles as well as conservative titles and that they were equally stringent.** It was a foolish thing to do. And it's wrong, but it was not just targeted at conservatives. But Darrell Issa wants to make sure that information does not get out.[45] (emphasis added).

The Democratic myth of bipartisan IRS targeting simply will not die. Working hand in hand with the Obama Administration's IRS, congressional Democrats vigorously asserted that the IRS mistreated liberal tax-exempt applicants in a manner identical to Tea Party groups. The IRS – the very same agency under fire for its actions – assisted these efforts by producing self-selected documents and volunteering helpful information. The result has been a fundamental misunderstanding of the truth about the IRS's targeting of conservative tax-exempt applicants.

The Truth: The IRS engaged in disparate treatment of conservative applicants

Contrary to Democratic claims, substantial documentary and testimonial evidence shows that the IRS systematically engaged in disparate treatment of conservative tax-exempt applicants. The Committee's investigation shows that the initial applications sent to the Washington as "test" cases were all filed by Tea Party-affiliated groups. The IRS screening criteria used to identify and separate additional applications also initially captured exclusively Tea Party organizations. Even after the criteria were changed, documents show the IRS intended to identify and separate Tea Party applications for review.

No matter how hard the Administration and congressional Democrats try to spin the facts about the IRS targeting, it remains clear that the IRS treated conservative tax-exempt applicants differently. As detailed below, the IRS treated Tea Party and other conservative tax-exempt applicants unlike liberal or progressive applicants.

---

[44] Press Release, H. Comm. on Ways & Means Democrats, Levin Floor Statement on H.R. 3865 (Feb. 26, 2014).
[45] *The Last Word with Lawrence O'Donnell* (MSNBC television broadcast Mar. 5, 2014) (interview with Representative Gerry Connolly).

The Committee's evidence shows the IRS sought to identify and scrutinize Tea Party applications

To date, the Committee has reviewed over 400,000 pages of documents produced by the IRS, TIGTA, the IRS Oversight Board, and others. The Committee has conducted transcribed interviews of 33 IRS employees, totaling over 217 hours. From this exhaustive undertaking, one fundamental finding is certain: the IRS sought to identify and scrutinize Tea Party applications separate and apart from any other tax-exempt applications, including liberal or progressive applications.

The initial "test" cases were exclusively Tea Party applications

From documents produced by the IRS, the Committee is aware that the initial test cases transferred to Washington in spring 2010 to be developed as templates were applications filed by Tea Party-affiliated organizations. According to one document entitled "Timeline for the 3 exemption applications that were referred to [EO Technical] from [EO Determinations]," the Washington office received the 501(c)(3) application filed by the Prescott Tea Party, LLC on April 2, 2010.[46] The same day, the Washington office received the 501(c)(4) application filed by the Albuquerque Tea Party, Inc.[47] After Prescott Tea Party did not respond to an IRS information request, the IRS closed the application "FTE" or "failure to establish." The Washington office asked for a new 501(c)(3) application, and it received the application filed by American Junto, Inc., on June 30, 2010.[48]

Testimony provided by veteran IRS tax law specialist Carter Hull, who was assigned to work the test cases in Washington, confirms that they were exclusively Tea Party applications. He testified:

> Q Now, sir, in this period, roughly March of 2010, was there a time when someone in the IRS told you that you would be assigned to work on two Tea Party cases?
>
> A Yes.
>
> ***
>
> Q Do you recall when precisely you were told that you would be assigned two Tea Party cases?
>
> A When precisely, no.
>
> Q Sometime in –

[46] Internal Revenue Serv., Timeline from the 3 exemption applications that were referred to EOT from EOD. [IRSR 58346-49]
[47] *Id.*
[48] *Id.*

A Sometime in the area, but I did get, they were assigned to me in April.

***

Q Okay, and just to be clear, April of 2010?

A Yes.

***

Q And sir, were they cases 501(c)(3)s, or 501(c)(4)s?

A One was a 501(c)(3), and one was a 501(c)(4).

Q So one of each?

A One of each.

Q What, to your knowledge, was it intentional that you were sent one of each?

A Yes.

Q Why was that?

A I'm not sure exactly why. I can only make assumptions, but those are the two areas that usually had political possibilities.

***

Q The point of my question was, no one ever explained to you that you were to understand and work these cases for the purpose of working similar cases in the future?

***

A All right, I -- I was given -- they were going to be test cases to find out how we approached (c)(4), and (c)(3) with regards to political activities.

***

Q Mr. Hull, before we broke, you were talking about these two cases being test cases, is that right? Do you recall that?

A I realized that there were other cases. I had no idea how many, but there were other cases. And they were trying to find out how we should approach these organizations, and how we should handle them.

***

Q And when you say these organizations, you mean Tea Party organizations?

A The two organizations that I had.[49]

Hull's testimony also confirms that the Washington IRS office requested a similar 501(c)(3) application to replace the Prescott Tea Party's application. He testified:

Q Did you send out letters to both organizations the 501(c)(3) and 501(c)(4)?

A I did.

Q Did you get responses from both organizations?

A I got response from only one organization.

Q Which one?

A The (c)(4).

Q (C)(4). What did you do with the case that did not respond?

A I tried to contact them to find out whether they were going to submit anything.

Q By telephone?

A By telephone. And I never got a reply.

Q Then what did you do with the case?

A I closed it, failure to establish.

***

Q So at this time, when the (c)(3) became the FTE, did you begin to work only on the (c)(4)?

[49] Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013).

A I notified my supervisor that I would need another (c)(3) if they wanted me to work one of each.

***

Q How did you phrase the request to Ms. Hofacre? Was it -- were you asking for another (c)(3) Tea Party application?

A I was asking for another (c)(3) application in the lines of the first one that she had sent up. I'm not sure if I asked her for a particular organization or a particular type of organization. I needed a (c)(3) that was maybe involved in political activities.

Q And the first (c)(3), it was a Tea Party application?

A Yes, it was.[50]

[50] Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013).

Fig. 1: IRS Timeline of Tea Party "test" cases[51]

A. Timeline for the 3 exemption applications that were referred to EOT from EOD

1. Prescott Tea Party, LLC	**2. American Junto, Inc.**	**3. Albuquerque Tea Party, Inc.**
The Applicant sought exemption under §501(c)(3) formed to educate the public on current political issues, constitutional rights, fiscal responsibility, and support for a limited government. It planned to undertake this educational activity through rallies, protests, educational videos and through its website. The organization also intended to engage in legislative activities. The case was closed FTE on May 26, 2010.	The organization applied for exemption under §501(c)(3), stating it was formed to educate voters on current social and political issues, the political process, limited government, and free enterprise. It also indicated it would be involved in political campaign intervention and legislative activities. The case was closed FTE on January 4, 2012.	The organization applied for exemption under §501(c)(4) as a social welfare organization for purposes of issue advocacy and education. A proposed adverse is being prepared on the basis that the organization's primary activity is political campaign intervention supporting candidates associated with a certain political faction, its educational activities are partisan in nature, and its activities are intended to benefit candidates associated with a specific political faction as opposed to benefiting the community as a whole.
Timeline: **2009** • **11/09/2009** → Application received by EOD. • **12/18/2009** → Case assigned to EOD specialist. **2010** • **3/08/2010** → **Date the case was referred to EOT.** Case pulled from	**Timeline:** **2010** • **2/11/2010** → Application was received by EOD.	**Timeline:** **2010** • **1/4/2010** → Application was received by EOD.
EOD files to send to EOT for review. • **3/11/2010** → EOD prepared a memo to transfer the case to EOT as part of EOT's review of some of the "advocacy organization" cases being received in EOD. • **4/02/2010** → Case assigned to EOT. • **4/14/2010** → 1st development letter mailed to Taxpayer (Response due by 5/06/2010). • **5/26/2010** → Case closed FTE (90-day suspense date ended on 8/26/2010).	• **4/11/2010** → Case assigned to a specialist in EOD. • **4/25/2010** → EOD emailed EOT (Manager Steve Grodnitzky) regarding who EOD should contact for help on "advocacy organization" cases being held in screening. • **5/25/2010** → EOT requested a §501(c)(3) "advocacy organization" case be transferred from EOD to replace Prescott Tea Party, LLC, a §501(c)(3) advocacy organization applicant that had been closed FTE. • **6/25/2010** → Memo proposing to transfer the case to EOT was prepared by EOD specialist. • **6/30/2010** → **Date the case was referred to EOT.** • **7/7/2010** → 1st development letter sent (Response due by 7/28/2010). • **7/28/2010** → EOT received Taxpayer's response to 1st development letter.	• **2/22/2010** → Case assigned to EOD specialist. • **3/11/2010** → EOD prepared memo to transfer the case to EOT as part of EOT's help reviewing the "advocacy organization" cases received in EOD. • **4/02/2010** → Case assigned to EOT. • **4/21/2010** → 1st development letter sent (Response due by 5/12/2010). • **4/29/2010** → Taxpayer requested extension for time to respond to 1st development letter. TLS granted extension until 6/11/2010. • **6/8/2010** → EOT received the Taxpayer's response to 1st development letter.

[51] Internal Revenue Serv., Timeline from the 3 exemption applications that were referred to EOT from EOD. [IRSR 58346-49]

The initial screening criteria captured exclusively Tea Party applications

Documents and testimony provided to the Committee show that the IRS's initial screening criteria captured only conservative organizations. According to a briefing paper prepared for Exempt Organizations Director Lois Lerner in July 2011, the IRS identified applications and held them if they met any of the following criteria:

- "Tea Party," "Patriots" or "9/12 Project" is referenced in the case file
- Issues include government spending, government debt or taxes
- Education of the public by advocacy/lobbying to "make America a better place to live"
- Statements in the case file criticize how the country is being run.[52]

Based on these criteria, which skew toward conservative ideologies, the IRS sent applications to a specific group in Cincinnati.

Fig. 2: IRS Briefing Document Prepared for Lois Lerner[53]

Background:

- EOD Screening has identified an increase in the number of (c)(3) and (c)(4) applications where organizations are advocating on issues related to government spending, taxes and similar matters. Often there is possible political intervention or excessive lobbying.
- EOD Screening identified this type of case as an emerging issue and began sending cases to a specific group if they meet any of the following criteria:
  - "Tea Party," "Patriots" or "9/12 Project" is referenced in the case file
  - Issues include government spending, government debt or taxes
  - Education of the public by advocacy/lobbying to "make America a better place to live"
  - Statements in the case file criticize how the country is being run

Testimony presented by the two Cincinnati employees shows that the initial applications in the growing IRS backlog were exclusive Tea Party applications. Elizabeth Hofacre, who oversaw the cases from April 2010 to October 2010, testified during her transcribed interview that "we were looking at Tea Parties." She testified:

> Q And you mentioned the Tea Party cases. Do you have an understanding of whether the Tea Party cases were part of that grouping of organizations with political activity, or were they separate?
>
> A That was the group of political cases.
>
> Q So why do you call them Tea Parties if it includes more than –

[52] Justin Lowe, Internal Revenue Serv., Increase in (c)(3)/(c)(4) Advocacy Org. Applications (2011). [IRSR 2735]
[53] *Id.*

A Well, at that time that's all they were. That's all that we were -- that's how we were classifying them.

Q In 2010, you were classifying any organization that had political activity as a Tea Party?

A No, it's the latter. I mean, we were looking at Tea Parties. I mean, political is too broad.

Q What do you mean when you say political is too broad?

A No, because when -- what do you mean by "political"?

Q Political activity -- if an application has an indication of political activity in it.

A I mean, I was tasked with Tea Party, so that's all I'm aware of. So I wasn't tasked with political in general.

Q Was there somebody who was tasked with political in general?

A Not that I'm aware of.[54] (emphasis added).

During the Committee's July 2013 hearing about the IRS's systematic scrutiny of Tea Party applications, Hofacre specifically rejected claims that liberal-oriented groups were part of the IRS backlog. She testified:

Mr. MICA. Okay, the beginning of 2010. And you—this wasn't a targeting by a group of your colleagues in Cincinnati that decided we're going to go after folks. And most of the cases you got, were they "Tea Party" or "Patriot" cases?

Ms. HOFACRE. Sir, they were all "Tea Party" or "Patriot" cases.

Mr. MICA. Were there progressive cases? How were they handled?

Ms. HOFACRE. **Sir, I was on this project until October of 2010, and I was only instructed to work "Tea Party"/ "Patriot"/"9/12" organizations.**[55] (emphasis added)

Ron Bell, who replaced Hofacre in overseeing the growing backlog of applications in Cincinnati, similarly testified during a transcribed interview that he only received Tea Party applications from October 2010 until July 2011. He testified:

[54] Transcribed interview of Elizabeth Hofacre, Internal Revenue Serv., in Wash., D.C. (May 31, 2013).
[55] July 18th Hearing, *supra* note 28.

Q Okay. So at this point between October 2010 and July 2011, were all the Tea Party cases going to you?

A Correct.

Q And to your knowledge, during this same time period, was it only Tea Party cases that were being assigned to you or were there other advocacy cases that were part of this group?

***

A Does that include 9/12 and Patriot?

Q Yes, yes.

A Yes.

Q Okay. So it was just those type of cases, not other type of advocacy cases that maybe had a different -- a different political -- a liberal or progressive case?

A Correct.

***

Q Okay. And to your knowledge, when you were first assigned these cases in October 2010 and through July 2011, do you know what criteria the screening unit was using to identify the cases to send to you?

A Yes.

Q And what was that criteria?

A It was solicited on the Emerging Issues tab of the BOLO report.

Q And what did that say? What did that Emerging Issue tab on the BOLO say?

A In July 20 –

Q In October 2010 we'll start.

A I don't know exactly what it said, but it just -- Tea Party cases, 9/12, Patriot.

Q And do you recall how many cases you inherited from Ms. Hofacre?

A 50 to 100.

Q And were those only Tea Party-type cases as well?

A To the best of my knowledge.[56]

The IRS continued to target Tea Party groups after the BOLO criteria were broadened

From material produced to the Committee, it is apparent that Exempt Organizations Director Lois Lerner began orchestrating in late 2010 a "c4 project that will look at levels of lobbying and pol[itical] activity" of nonprofits, careful that the effort was not a "*per se* political project."[57] Consistent with this goal, Lerner ordered the implementation of new screening criteria for the Tea Party cases in summer 2011, broadening the BOLO language to "advocacy organizations." According to testimony received by the Committee, Lerner ordered the language changed from "Tea Party" because she viewed the term to be "too pejorative."[58] While avoiding *per se* political scrutiny, other documents obtained by the Committee suggest that Lerner's change was merely cosmetic. These documents show that the IRS still intended to target and scrutinize Tea Party applications, despite the facial changes to the BOLO criteria.

An internal "Significant Case Report" summary chart prepared in August 2011 illustrates that Lerner's change was merely cosmetic (figures 3A and 3B). While the name of entry was changed "political advocacy organizations," the description of the issue continued to reference the Tea Party movement.[59] The issue description read: "Whether a tea party organization meets the requirements under section 501(c)(3) and is not involved in political intervention. Whether organization is conducting excessive political activity to deny exemption under section 501(c)(4)."[60]

---

[56] Transcribed interview of Ronald Bell, Internal Revenue Serv., in Wash., D.C. (June 13, 2013).
[57] E-mail from Lois Lerner, Internal Revenue Serv., to Cheryl Chasin et al., Internal Revenue Serv. (Sept. 16, 2010). [IRSR 191030]
[58] Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013).
[59] Internal Revenue Serv., Significant Case Report (Aug. 31, 2011). [IRSR 151653]
[60] *Id.*

Fig. 3A: IRS Significant Case Report Summary, August 2011[61]

A. Open SCs:

	Name of Org/Group	Group #/Manager	EIN	Received	Issue	Tax Law Specialist	Estimated Completion Date	Status/Next action	Being Elevated to TEGE Commissioner This Month
1.	Political Advocacy Organizations	T2/Ron Shoemaker	[redacted]	4/2/2010	Whether a tea party organization meets the requirements under section 501(c)(3) and is not involved in political intervention. Whether organization is conducting excessive political activity to deny exemption under section 501(c)(4)	Chip Hull & Hilary Goehausen	3/31/2011 (Orig) 05/31/2011 (Rev) 07/31/2011 (Rev) 10/30/2011 (Rev) 12/31/2011 (Rev)	Developing both a (c)(3) and (c)(4) cases. Proposed (c)(4) favorable is currently being reviewed. Proposed denial currently being reviewed on (c)(3). Cases were discussed with Judy Kindell on 04/06/11. Judy requested staff to get additional information from taxpayers regarding certain activities. Development letters were sent. Proposed favorable (c)(4) ruling forwarded to Chief Counsel for comments on 05/04/11. Information from (c)(3) organizations regarding activities due on 05/18/2011. Waiting on taxpayer response. 5/16/11 Met with Director EO on June 29, 2011. Met with Counsel on 3/16/11 to discuss the cases. Counsel recommended further development of the cases by getting information on the organizations' 2010 activities. Counsel gave us directions on the type of information needed. [redacted] Next Action: [redacted]	No

Fig. 3B: IRS Significant Case Report Summary, August 2011 (enlarged)[62]

	Name of Org/Group	Group #/Manager	EIN	Received	Issue
1.	Political Advocacy Organizations	T2/Ron Shoemaker	b7(3) [redacted] b7...	4/2/2010	Whether a tea party organization meets the requirements under section 501(c)(3) and is not involved in political intervention. Whether organization is conducting excessive political activity to deny exemption under section 501(c)(4)

Likewise, in comparing the individual sensitive case report prepared for the Tea Party cases in June 2011 with the report prepared in September 2012, it is apparent that the BOLO criteria changed was superficial. The reports' issue summaries are nearly identical, except for replacing "Tea Party" with "advocacy organizations."[63] The June 2011 sensitive case report (figure 4A) identified the issue as: "The various 'tea party' organizations are separately organized, but appear to be a part of a national political movement that may be involved in political activities. The 'tea party' organizations are being followed closely in national newspapers (such as The Washington Post) almost on a regular basis."[64]

[61] *Id.*
[62] *Id.*
[63] *Compare* Internal Revenue Serv., Sensitive Case Report (June 17, 2011) [IRSR 151687-88], *with* Internal Revenue Serv., Sensitive Case Report (Sept. 18, 2012). [IRSR 150608-09]
[64] Internal Revenue Serv., Sensitive Case Report (June 17, 2011). [IRSR 151687-88]

Fig. 4A: IRS Sensitive Case Report for Tea Party cases, June 17, 2011[65]

CASE OR ISSUE SUMMARY:
The various "tea party" organizations are separately organized, but appear to be a part of a national political movement that may be involved in political activities. The "tea party" organizations are being followed closely in national newspapers (such as The Washington Post) almost on a regular basis. Cincinnati is holding three applications from organizations which have applied for recognition of exemption under section 501(c)(3) of the Code as educational organizations and approximately twenty-two applications from organizations which have applied for recognition of exemption under section 501c)(4) as social welfare organizations. Two organizations that we believe may be "tea party" organizations already have been recognized as exempt under section 501(c)(4). EOT has not seen the case files, but are requesting copies of them. The issue is whether these organizations are involved in campaign intervention or, alternatively, in nonexempt political activity.

The September 2012 sensitive case report (figure 4B) identified the issue as: "These organizations are 'advocacy organizations,' and although are separately organized, they appear to be part of a larger national political movement that may be involved in political activities. These types of advocacy organizations are followed closely in national newspapers (such as The Washington Post) almost on a regular basis."[66]

Fig. 4B: IRS Sensitive Case Report for "Advocacy Organizations," Sept. 18, 2012[67]

CASE OR ISSUE SUMMARY:
These organizations are "advocacy organizations," and although are separately organized, they appear to be part of a larger national political movement that may be involved in political activities. These types of advocacy organizations are followed closely in national newspapers (such as The Washington Post) almost on a regular basis. Cincinnati has in its inventory a number of applications from these types of organizations that applied for recognition of exemption under section 501(c)(3) of the Code as educational organizations and from organizations that applied for recognition of exemption under section 501(c)(4) as social welfare organizations.

Reading these items together, it is clear that although the BOLO language was changed to broader "political advocacy organizations," the IRS still intended to identify and single out Tea Party applications for scrutiny. Ron Bell testified that after the BOLO change in July 2011, he received more applications than just Tea Party cases. He testified:

> Q And do you recall when that – when the BOLO was changed after – you said it was after the meeting [with Lerner], they changed the BOLO after the meeting, do you recall when?
>
> A July.
>
> Q Of 2011?
>
> A Yes, sir.

[65] *Id.*
[66] Internal Revenue Serv., Sensitive Case Report (Sept. 18, 2012). [IRSR 150608-09]
[67] *Id.*

Q And you were going to say the BOLO became more, and then you were cut off. What were you going to say?

A It became more – they had more the advocacy, more organizations to the advocacy, like I mentioned about maybe a cat rescue that's advocating for let's not kill the cats that get picked up by the local government in whatever cities.[68]

Bell also stated that while he could not process the Tea Party applications because he was awaiting guidance from Washington, he could process the non-Tea Party applications. He testified:

Q Mr. Bell, in July 2011, when the BOLO was changed where they chose broad language, after that point, did you conduct secondary screening on any of the cases that were being held by you?

A You mean the cases that I inherited from Liz are the ones that had already been put into the whatever timeframe, Tea Party advocacy, slash advocacy?

Q Other type, yes.

A No, these were new ones coming in that someone thought that they perhaps should be in the advocacy, slash, Tea Party inventory.

Q Okay.

A They were assigned to Group 7822, and I reviewed them, and you know, maybe some were, but a vast majority was like outside the realm we were looking for.

Q And so they were like the . . . cat type cases you were discussing earlier?

A Yes.

***

Q After the July 2011 change to the BOLO, how long did you perform the secondary screening?

A Up until July 2012.

Q So, for a whole year?

A Yeah.

[68] Transcribed interview of Ronald Bell, Internal Revenue Serv., in Wash., D.C. (June 13, 2013).

Q And you would look at the cases and see if they were not a Tea Party case, you would move that either to closing or to further development?

A Yeah, and then the BOLO changed about midway through that timeframe.

Q Okay.

A To make it where we put the note on there that we don't need the general advocacy.

Q And after the BOLO changed in January 2012, did that affect your secondary screening process?

A There was less cases to be reviewed.

Q Okay. **So during this whole year, the Tea Party cases remained on hold pending guidance from Washington while the other cases that you identified as non-Tea Party cases were moved to either closure or further development; is that right?**

A **Correct.**[69] (emphasis added).

The IRS's own retrospective review shows the targeted applications were predominantly conservative-oriented

In July 2012, Lerner asked her senior technical advisor, Judith Kindell, to conduct an assessment of the political affiliation of the applications in the IRS backlog. On July 18, Kindell reported back to Lerner that of all the 501(c)(4) applications, having been flagged for additional scrutiny, at least 75 percent were conservative, "while fewer than 10 [applications, or 5 percent] appear to be liberal/progressive leaning groups based solely on the name."[70] Of the 501(c)(3) applications, Kindell informed Lerner that "slightly over half appear to be conservative leaning groups based solely on the name."[71] Unlike Tea Party cases, the Oversight Committee's review has received no testimony from IRS employees that any progressive groups were scrutinized because of their organization's expressed political beliefs.

---

[69] *Id.*
[70] E-mail from Judith Kindell, Internal Revenue Serv., to Lois Lerner, Internal Revenue Serv. (July 18, 2012). [IRSR 179406]
[71] *Id.*

Fig. 5: E-mail from Judith Kindell to Lois Lerner, July 18, 2012[72]

From:	Kindell Judith E
Sent:	Wednesday, July 18, 2012 10:54 AM
To:	Lerner Lois G
Cc:	Light Sharon P
Subject:	Bucketed cases

Of the 84 (c)(3)

cases, slightly over half appear to be conservative leaning groups based solely

on the name. The remainder do not obviously lean to either side of the

political spectrum.

Of the 199 (c)(4)

cases, approximately 3/4 appear to be conservative leaning while fewer than 10

appear to be liberal/progressive leaning groups based solely on the name.

The remainder do not obviously lean to either side of the political

spectrum.

Documents and testimony obtained by the Committee demonstrate that the IRS sought to identify and scrutinize Tea Party applications. For fifteen months beginning in February 2010, the IRS systematically identified, separated, and delayed Tea Party applications – and only Tea Party applications. Even after the IRS broadened the screening criteria in the summer of 2011, internal documents confirm that that agency continued to target Tea Party groups.

The IRS treated Tea Party applications differently from other applications

Evidence obtained by the Committee in the course of its investigation proves that the IRS handled conservative applications distinctly from other tax-exempt applications. In February 2011, Lerner directed Michael Seto, the manager of Exempt Organizations Technical Unit, to put the Tea Party test cases through a "multi-tier" review.[73] Lerner wrote to Seto: "This could be the vehicle to go to court on the issue of whether Citizen's [*sic*] United overturning ban on corporate

[72] *Id.*
[73] Transcribed interview of Michael Seto, Internal Revenue Serv., in Wash., D.C. (July 11, 2013).

spending applies to tax exempt rule. Counsel and Judy Kindell need to be in on this one please."[74]

Carter Hull, an IRS specialist with almost 50 years of experience, testified that this multi-tier level of review was unusual. He testified:

Q Have you ever sent a case to Ms. Kindell before?

A Not to my knowledge.

Q This is the only case you remember?

A Uh-huh.

Q Correct?

A This is the only case I remember sending directly to Judy.

***

Q Had you ever sent a case to the Chief Counsel's office before?

A I can't recall offhand.

Q You can't recall. So in your 48 years of experience with the IRS, you don't recall sending a case to Ms. Kindell or a case to IRS Chief Counsel's office?

A To Ms. Kindell, I don't recall ever sending a case before. To Chief Counsel, I am sure some cases went up there, but I can't give you those.

Q Sitting here today you don't remember?

A I don't remember.[75]

Similarly, Elizabeth Hofacre, the Cincinnati-based revenue agent initially assigned to develop cases, told the Committee during a July 2013 hearing that the involvement of Washington was "unusual."[76] She testified:

I never before had to send development letters that I had drafted to EO

[74] E-mail from Lois Lerner, Internal Revenue Serv., to Michael Seto, Internal Revenue Serv. (Feb. 1, 2011). [IRSR 161810]
[75] Transcribed interview of Carter Hull, Internal Revenue Serv., in Wash., D.C. (June 14, 2013).
[76] *"The IRS's Systematic Delay and Scrutiny of Tea Party Applications": Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013) (statement of Elizabeth Hofacre).

> Technical for review, and I never before had to send copies of applications and responses that were assigned to me to EO Technical for review. I was frustrated because of what I perceived as micromanagement with respect to these applications.[77]

Hofacre's successor on the cases, Ron Bell, also told the Committee that it was "unusual" to have to wait on Washington to move forward with an application.[78] He testified:

> Q So did you see something different in these Tea Party cases applying for 501(c)(4) status that was different from other organizations that had political activity, political engagement applying for 501(c)(4) status in the past?
>
> A I'm not sure if I understand that.
>
> Q I guess what I'm getting at is you said you had seen previous applications from an organization applying for 501(c)(4) status that had some level of political engagement, and these Tea Party groups are also applying for 501(c)(4) status and they have some level of political engagement. Was there any difference in your mind between the Tea Party groups and the other groups that you'd seen in your experience at the IRS?
>
> A No.
>
> Q So, do you think that Tea Party groups are treated the same as these other groups from your previous experience?
>
> A No.
>
> ***
>
> Q In your experience, was there anything different about the way that the Tea Party 501(c)(4) cases were treated that was as opposed to the previous 501(c)(4) applications that had some level of political engagement?
>
> A Yes.
>
> Q And what was different?
>
> A Well, they were segregated. They seemed to have been more scrutinized. I hadn't interacted with EO technical [in] Washington on cases really before.
>
> Q You had not?

---

[77] *Id.*

[78] Transcribed interview of Ronald Bell, Internal Revenue Serv., in Wash., D.C. (June 13, 2013).

A Well, not a whole group of cases.[79]

Another Cincinnati employee, Stephen Seok, testified that the type of activities that the conservative applicants conducted made them different from other similar applications he had worked in the past. He testified:

Q And to your knowledge, the cases that you worked on, was there anything different or novel about the activities of the Tea Party cases compared to other (c)(4) cases you had seen before?

***

A **Normal (c)(4) cases we must develop the concept of social welfare, such as the community newspapers, or the poor, that types. These organizations mostly concentrate on their activities on the limiting government, limiting government role, or reducing government size, or paying less tax. I think it[']s different from the other social welfare organizations which are (c)(4).**

***

Q **So the difference between the applications that you just described, the applications for folks that wanted to limit government, limit the role of government, the difference between those applications and the (c)(4) applications with political activity that you had worked in the past, was the nature of their ideology, or perspective, is that right?**

A **Yeah, I think that's a fair statement**. But still, previously, I could work, I could work this type of organization, applied as a (c)(4), that's possible, though. Not exactly Tea Party, or 9-12, but dealing with the political ideology, that's possible, yes.

Q **So you may have in the past worked on applications from (c)(4), applicants seeking (c)(4) status that expressed a concern in ideology, but those applications were not treated or processed the same way that the Tea Party cases that we have been talking about today were processed, is that right?**

A **Right**. Because that [was] way before these – these organizations were put together. So that's way before. If I worked those cases, way before this list is on.[80] (emphases added).

---

[79] *Id.*

[80] Transcribed interview of Stephen Daejin Seok, Internal Revenue Serv., in Wash., D.C. (June 19, 2013).

This evidence shows that the IRS treated conservative-oriented Tea Party applications differently from other tax-exempt applications, including those filed by liberal-oriented organizations. Testimony indicates that the IRS instituted new procedures and different hurdles for the review of Tea Party applications. What would otherwise be a routine review of an application became unprecedented scrutiny and delays for these Tea Party groups.

Myth versus fact: How Democrats' claims of bipartisan targeting are not supported by the evidence

In light of the evidence available to the Committee and under close examination, each Democratic argument fails. Despite their claims that liberal-leaning groups were targeted in the same manner as conservative applicants, the facts do not bear out their assertions. Instead, the Committee's investigation and public information shows the following:

- IRS BOLO entries for liberal groups and terms only appear on lists used for awareness and were never used as a litmus test for enhanced scrutiny;
- Some liberal-oriented organizations were identified for scrutiny because of objective, non-political concerns, but not because of their political beliefs;
- Substantially more conservative-leaning applicants than liberal-oriented applicants were caught in the IRS's backlog;
- The IRS treated Tea Party applicants differently from "progressive" groups;
- The IRS treated Tea Party applicants differently from ACORN successor groups;
- The IRS treated Tea Party applicants differently from Emerge affiliate groups; and
- The IRS treated Tea Party applicants differently from Occupy groups.

When carefully examined, these facts refute the myths perpetrated by congressional Democrats and the Administration that the IRS engaged in bipartisan targeting. The facts show, instead, that the IRS targeted Tea Party groups for systematic scrutiny and delay.

Perhaps most telling is the IRS's own actions. When Lois Lerner publicly apologized for the IRS's targeting of Tea Party applicants, she offered no such apology for its targeting of any liberal groups. When asked if the IRS had treated liberal groups inappropriately, Lerner responded: "I don't have any information on that."[81] This admission severely undercuts Democratic *ex post* allegations of bipartisan targeting.

BOLO entries for liberal groups and terms only appear on lists used for awareness and were never used as a litmus test for enhanced scrutiny

Congressional Democrats and some in the Administration claim that the IRS targeted liberal groups because some liberal-oriented organizations appeared on entries of the IRS BOLO

[81] Aaron Blake, *'I'm not good at math': The IRS's public relations disaster*, WASH. POST, May 10, 2013.

lists.[82] This claim is not supported by the facts. The presence of an organization or a group of organizations on the IRS BOLO list did not necessarily mean that the IRS targeted those groups. As the Ways and Means Committee phrased it, "being on a BOLO is different from being targeted and abused by the IRS."[83] A careful examination of the evidence demonstrates that only conservative groups on the IRS BOLO lists experienced systematic scrutiny and delay.

The Democratic falsehood rests on a fundamental misunderstanding of the structure of the BOLO list. The BOLO list was a comprehensive spreadsheet document with separate tabs designed for information intended for different uses. For example, the "Watch List" tab on the BOLO document was designed to notify screeners of potential applications that the IRS has not yet received.[84] The "TAG Issues" tab listed groups with potentially fraudulent applications. The "Emerging Issues" tab, contrarily, was designed to alert screeners to groups of applications that the IRS has *already received* and that presented special problems.[85] Therefore, whereas the Watch List tab noted hypothetical applications that could be received and TAG Issues tab noted fraudulent applications, the Emerging Issues tab highlighted non-fraudulent applications that the IRS was actively processing.

The Tea Party entry on the IRS BOLO appears on the "Emerging Issues" tab, meaning that the IRS had already received Tea Party applications. The liberal-oriented groups on the BOLO list appear on either the Watch List tab, meaning that the IRS was merely notifying its screeners of the potential for those groups to apply, or the TAG Issues tab, indicating a concern for fraud. In effect, then, whereas the appearance of Tea Party groups on the BOLO signifies the *actuality* of review and subsequent delay, the appearance of the liberal groups on the BOLO signifies either the *possibility* that some group may apply in the future or the potential for fraud in a group's application.

The differences in where the entries appear on the BOLO document manifests in the IRS's differential treatment of the groups. According to evidence known to the Committee, only Tea Party applications appearing on the Emerging Issues tab resulted in systematic scrutiny and delay. Although some liberal groups appeared on versions of the BOLO, their mere presence on the document did not result in systematic scrutiny and delay – contrary to Democratic claims of bipartisan IRS targeting.

The IRS identified some liberal-oriented groups due to objective, non-political concerns, but not because of their political beliefs

Where the IRS identified liberal-oriented groups for scrutiny, evidence shows that it did so for objective, non-political reasons and not because of the groups' political beliefs. For

---

[82] *See, e.g.*, *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013); The White House, Press Briefing by Press Secretary Jay Carney, 2/3/14, http://www.whitehouse.gov/photos-and-video/video/2014/02/03/press-briefing#transcript.
[83] H. Comm. on Ways & Means, Being on a BOLO is Different from Being Targeted and Abused by the IRS (June 24, 2013), http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=340314.
[84] Internal Revenue Serv., Heightened Awareness Issues. [IRSR 6655-72]
[85] *Id.*

instance, the IRS scrutinized Emerge America applications for conveying impermissible benefits to a private entity, which is prohibited for nonprofit groups.[86] The IRS scrutinized ACORN successor groups due to concerns that the organizations were engaged in an abusive scheme to rebrand themselves under a new name.[87] Likewise, the IRS included an entry for "progressive" on its BOLO list out of concern that the groups' partisan campaign activity "may not be appropriate" for 501(c)(3) status, under which there is an absolute prohibition on campaign intervention.[88] Unlike the Tea Party applications, which the IRS scrutinized for their social-welfare activities, the Committee has received no indication that the IRS systematically scrutinized liberal-oriented groups because of their political beliefs.

Substantially more conservative groups were caught in the IRS application backlog

Another familiar refrain from the Administration and congressional Democrats is that the IRS targeted liberal groups because left-wing groups were included in the IRS backlog along with conservative groups. Ways and Means Ranking Member Sander Levin (D-MI) alleged that the IRS engaged in bipartisan targeting because some "progressive groups were among the 298 applications that TIGTA reviewed in their audit and received heightened scrutiny."[89] Similarly, Representative Gerry Connolly (D-VA) said that "the tilt . . . included progressive titles as well as conservative titles and that they were equally stringent."[90] These allegations are misleading. Several separate assessments of the IRS backlog prove that substantially more conservative groups than liberal groups were caught in the IRS backlog.

An internal IRS analysis conducted for Lois Lerner in July 2012 found that 75 percent of the 501(c)(4) applications in the backlog were conservative, "while fewer than 10 [applications] appear to be liberal/progressive leaning groups based solely on the name."[91] The same analysis found that "slightly over half [of the 501(c)(3) applications] appear to be conservative leaning groups based solely on the name."[92] A Ways and Means examination conducted in 2013 similar found that the backlog was overwhelmingly conservative: 83 percent conservative and only 10 percent liberal.[93]

In September 2013, *USA Today* independently analyzed a list of about 160 applications in the IRS backlog.[94] This review showed that conservative groups filed 80 percent of the

---

[86] Transcribed interview of Amy Franklin Giuliano, Internal Revenue Serv., in Wash., D.C. (Aug. 9, 2013).
[87] Transcribed interview of Robert Choi, Internal Revenue Serv., in Wash., D.C. (Aug. 21, 2013).
[88] *See, e .g.*, Internal Revenue Serv., Be on the Look Out List (Nov. 9, 2010). [IRS 1349-64]
[89] *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013) (statement of Ranking Member Sander Levin).
[90] *The Last Word with Lawrence O'Donnell* (MSNBC television broadcast Mar. 5, 2014) (interview with Representative Gerry Connolly).
[91] E-mail from Judith Kindell, Internal Revenue Serv., to Lois Lerner, Internal Revenue Serv. (July 18, 2012). [IRSR 179406]
[92] *Id.*
[93] Ways and Means Committee September 18th Hearing, *supra* note 9.
[94] *See* Gregory Korte, *IRS List Reveals Concerns over Tea Party 'Propaganda,'* USA TODAY, Sept. 18, 2013.

applications in the backlog while liberal groups filed less than seven percent.[95] An earlier analysis from *USA Today* in May 2013 showed that for 27 months beginning in February 2010, the IRS did not approve any tax-exempt applications filed by Tea Party groups.[96] During that same period, the IRS approved "perhaps dozens of applications from similar liberal and progressive groups."[97]

Testimony received by the Committee supports this conclusion. During a hearing of the Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs, Jay Sekulow – a lawyer representing 41 groups targeted by the IRS – testified that substantially more conservative groups were targeted and that all liberal groups targeted eventually received approval.[98] In an exchange with Representative Matt Cartwright (D-PA), Sekulow testified:

Mr. CARTWRIGHT. And Mr. Sekulow, you were helpful with some statistics this morning, and I wanted to ask you about that. **You mentioned 104 conservative groups targeted. Was that the number?**

Mr. SEKULOW. This is from the report of the IRS dated through July 29th of 2013 – **104 conservative organizations in that report were targeted**.

Mr. CARTWRIGHT. Thank you. **And then seven progressive targeted groups**?

Mr. SEKULOW. **Seven progressive targeted groups, all of which received their tax exemption**.

Mr. CARTWRIGHT. Does it give the total number of applications? In other words, 104 conservative groups targeted. How many – how many applied? How many conservative groups applied?

Mr. SEKULOW. In the TIGTA report there was – I think the number was 283 that they had become part of the target. But actually, applications, a lot of the IRS justification for this, at least purportedly, was an increase in applications, and there was actually a decrease in the number.

Mr. CARTWRIGHT. Right. And does it give the number of progressive groups that applied for tax-exempt status?

---

[95] *Id.*
[96] Gregory Korte, *IRS Approved Liberal Groups while Tea Party in Limbo*, USA TODAY, May 15, 2013.
[97] *Id.*
[98] *"The IRS Targeting Investigation: What Is the Administration Doing?": Hearing before the Subcomm. on Economic Growth, Job Creation, and Regulatory Affairs of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014) (question and answer with Rep. Matt Cartwright).

Mr. SEKULOW. No, the only report that has the progressive –

Mr. CARTWRIGHT. No, no?

Mr. SEKULOW. The one that I have just is the – the report I have in front of me is the one through the – which just has the seven.

Mr. CARTWRIGHT. OK. All right, thank you.

MR. SEKULOW. None of those have been denied, though.[99] (emphases added).

Contrary to the Democratic claim that the IRS targeting of liberal groups was "equally stringent" to conservative groups,[100] the overwhelming majority of applications in the IRS backlog were filed by conservative-leaning organizations. This evidence further demonstrates that the IRS did not engage in bipartisan targeting.

The IRS treated Tea Party applicants differently than "progressive" groups

Democrats in Congress and the Administration argue that the IRS treated "progressive" groups in a manner similar to Tea Party applicants. Because the IRS BOLO list had an entry for "progressives," Democrats allege that "progressive groups were singled out for scrutiny in the same manner as conservative groups,"[101] and that "the progressive groups were targeted side by side with their tea party counterpart groups."[102] Again, the evidence available to the Committee does not support these Democratic assertions. Rather, the evidence clearly shows that the IRS did not subject "progressive" groups to the same type of systematic scrutiny and delay as conservative applicants.

Perhaps the most significant difference between the IRS's treatment of Tea Party applicants and "progressive" groups is reflected in the IRS BOLO lists. The Tea Party entry was located on the tab labeled, "Emerging Issues," meaning that the IRS was actively screening for similar cases.[103] The "progressive" entry, however, was located on a tab labeled "TAG historical," meaning that the IRS interest in those cases was dormant.[104] Cindy Thomas, the manager of the IRS Cincinnati office, explained this difference during a transcribed interview with Committee staff.[105] She told the Committee that unlike the systematic scrutiny given to the

---

[99] *Id.*
[100] *The Last Word with Lawrence O'Donnell* (MSNBC television broadcast Mar. 5, 2014) (interview with Representative Gerry Connolly).
[101] Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov't Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).
[102] *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013) (question and answer with Representative Joseph Crowley).
[103] *See* Internal Revenue Serv., Heightened Awareness Issues. [IRSR 6655-72]
[104] *Id.*
[105] Transcribed interview of Lucinda Thomas, Internal Revenue Serv., in Wash., D.C. (June 28, 2013).

conservative-oriented applications as a result of the BOLO, "progressive" cases were never automatically elevated to the Washington office as a whole. She testified:

Q Ms. Thomas, is this an example of the BOLO from looks like November 2010?

A I don't know if it was from November of 2010, but –

Q This is an example of the BOLO, though?

A Yes.

Q Okay. And, ma'am, under what has been labeled as tab 2, TAG Historical?

A Yes.

***

Q Let's turn to page 1354.

A Okay.

Q Do you see that, it says -- the entry says progressive?

A Yes.

Q This is under TAG Historical, is that right?

A Yes.

Q So this is an issue that hadn't come up for a while, is that right?

A Right.

Q And it doesn't note that these were referred anywhere, is that correct? What happened with these cases?

A This would have been on our group as – because of – remember I was saying it was consistency-type cases, so it's not necessarily a potential fraud or abuse or terrorist issue, but any cases that were dealing with these types of issues would have been worked by our TAG group.

Q **Okay. And were they worked any different from any other cases that EO Determinations had?**

A **No. They would have just been worked consistently by one group of agents.**

Q Okay. And were they cases sent to Washington?

A I'm not – I don't know.

Q Not that you are aware?

A I'm not aware of that.

Q As the head of the Cincinnati office you were never aware that these cases were sent to Washington?

A There could be cases that are transferred to the Washington office according to, like, our [Internal Revenue Manual] section. I mean, there's a lot of cases that are processed, and I don't know what happens to every one of them.

Q Sure. But these cases identified as progressive as a whole were never sent to Washington?

A Not as a whole.[106]

The difference in where the entries appeared in the BOLO list resulted in disparate treatment of Tea Party and "progressive" groups. Unlike the systematic scrutiny given to Tea Party applicants, "progressive" cases were never similarly scrutinized.

The House Ways and Means Committee, with statutory authority to review confidential taxpayer information, concluded that the IRS treated conservative tax-exempt applicants differently than "progressive" groups. The Ways and Means Committee's review found that while the IRS approved only 45 percent of conservative applicants, it approved 100 percent of groups with "progressive" in their name.[107] Likewise, Acting IRS Commissioner Daniel Werfel testified before the Way and Means Committee:

Mr. REICHERT. Mr. Werfel, isn't it true that 100 percent of tea party applications were flagged for extra scrutiny?

Mr. WERFEL. I think that – yes. The framework from the BOLO. It's my understanding, the way the process worked is if there's "tea party" in the application it was automatically moved into -- into this area of further review, yes.

---

[106] *Id.*

[107] *Hearing on the Internal Revenue Service's Exempt Organizations Division Post-TIGTA Audit: Hearing before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 113th Con. (2013) (opening statement of Chairman Boustany).

Mr. REICHERT.	OK, and you – you know how many progressive groups were flagged?
Mr. WERFEL.	I do not have that number.
Mr. REICHERT.	I do.
Mr. WERFEL.	OK.
Mr. REICHERT.	Our investigation shows that there were seven flagged. Do you know how many were approved?
Mr. WERFEL.	I do not have that number at my fingertips.
Mr. REICHERT.	All of those applications were approved.[108]

The IRS's independent inspector general has repeatedly confirmed the Ways and Means Committee's assessment. During the Oversight Committee's July 2013 hearing, TIGTA J. Russell George told Members that "progressive" groups were not subjected to the same systematic treatment as Tea Party applicants. He testified:

> With respect to the 298 cases that the IRS selected for political review, as of the end of May 2012, three have the word "progressive" in the organization's name; another four were used—are used, "progress," none of the 298 cases selected by the IRS, as of May 2012, used the name "Occupy."[109]

Mr. George also informed Congress that at least 14 organizations with "progressive" in their name were not held up and scrutinized by the IRS.[110] "In total," Mr. George wrote, "**30 percent of the organizations we identified with the words 'progress' or 'progressive' in their names were process as potential political cases. In comparison, our audit found that 100 percent of the tax-exempt applications with Tea Party, Patriots, or 9/12 in their names were processed as potential political cases** during the timeframe of our audit."[111] (emphasis added).

Documents produced by the IRS support the finding of disparate treatment toward Tea Party groups. Notes from one training session in July 2010 reflect that the IRS ordered screeners to transfer Tea Party applications to a special group for "secondary screening."[112] The same notes show that the screeners were asked to "flag" progressive groups.[113] But multiple

---

[108] *Hearing on the Status of IRS Review of Taxpayer Targeting Practices: Hearing before the H. Comm. on Ways & Means*, 113th Cong. (2013) (question and answer with Representative Dave Reichert).
[109] *"The IRS's Systematic Delay and Scrutiny of Tea Party Applications": Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013) (statement of J. Russell George).
[110] Letter from J. Russell George, Treasury Inspector Gen. for Tax Admin., to Sander M. Levin, H. Comm. on Ways & Means (June 26, 2013).
[111] *Id.*
[112] Internal Revenue Serv., Screening Workshop Notes (July 28, 2010). [IRSR 6703-04]
[113] *Id.*

interviews with IRS employees who worked individual cases have yielded no evidence that these "flags" or frontline reviews for political activity led to enhanced scrutiny – except for Tea Party organizations. One sentence on the notes explicitly reminds screeners that "progressive' applications are not considered "Tea Parties.'"[114] These notes confirm testimony from Elizabeth Hofacre, the "Tea Party Coordinator/Reviewer," who told the Committee that she only worked Tea Party cases.[115]

Fig. 6: IRS Screening Workshop Notes, July 28, 2010[116]

Screening Workshop Notes - July 28, 2010 2

- The emailed attachment outlines the overall process.
- Glenn deferred additional statements and/or questions to John Shafer on yesterday's developments: how they affect the screening process and timeline.
- Concerns can be directed to Glenn for additional research if necessary.

Current/Political Activities: Gary Muthert

- Discussion focused on the political activities of Tea Parties and the like-regardless of the type of application.
- If in doubt Err on the Side of Caution and transfer to 7822.
- Indicated the following names and/or titles were of interest and should be flagged for review:
  - 9/12 Project,
  - Emerge,
  - Progressive
  - We The People,
  - Rally Patriots, and
  - Pink-Slip Program.

- Elizabeth Hofacre, Tea Party Coordinator/Reviewer
  - Re-empathize that applications with Key Names and/or Subjects should be transferred to 7822 for Secondary Screening. Activities must be primary.
  - "Progressive" applications are not considered "Tea Parties"

Despite creative interpretations of this individual document, the full evidence rebuts the Democratic claim that the IRS targeted "progressive" groups alongside Tea Party applicants. Although "progressive" groups were referenced in the IRS BOLO lists and internal training documents, Democrats in Congress and the Administration have repeatedly ignored critical distinctions that qualify their meaning. A careful evaluation of facts in context reveals one conclusion: the IRS treated Tea Party groups differently than "progressive" groups.

---

[114] *Id.*
[115] Transcribed interview of Elizabeth Hofacre, Internal Revenue Serv., in Wash., D.C. (May 31, 2013).
[116] Internal Revenue Serv., Screening Workshop Notes (July 28, 2010). [IRSR 6703-04]

The IRS treated Tea Party applicants differently than ACORN successor groups

Democratic defenders of the IRS misconduct also argue that the IRS treated Tea Party applicants similar to ACORN successor groups. ACORN endorsed President Barack Obama in his election campaign and had established deep political ties before its network of affiliates delinked and rebranded themselves following scandalous revelations about the organization in 2009.[117] To support allegations about ACORN being targeted, Democrats have pointed to BOLO lists and training documents that "instructed [IRS] screeners to single out for heightened scrutiny . . . ACORN successors."[118]

But allegations of targeting fall flat. First, ACORN successor groups appear on the "Watch List" tab of the BOLO list, unlike Tea Party groups, which appear on the "Emerging Issues" tab.[119] According to IRS documents, the Watch List tab was intended to include applications "not yet received," or "issues [that] are the result of significant world events," or "organizations formed as a result of controversy."[120] The Emerging Issue tab was created to spot groups of applications *already* received by the IRS. An internal IRS training document specifically cites "Tea Party cases" as an example of an emerging issue; it does not similarly cite ACORN successor groups.

Second, Robert Choi, the director of EO Rulings and Agreements until December 2010, testified to several differences between how the IRS treated ACORN successors and how the IRS treated Tea Party applicants. He told the Committee that unlike the Tea Party "test" cases, he did not recall the ACORN successor applications being subject to a "sensitive case report" or worked by the IRS Chief Counsel's office.[121] Most importantly, he explained that the IRS had objective concerns about rebranded ACORN affiliates that had nothing to do with the organization's political views. The primary concern about the ACORN successor groups, according to Choi, was whether the groups were legitimate new entities or part of an "abusive" scheme to continue an old entity under a new name.[122] Mr. Choi testified:

> Q You said earlier in the last hour there was email traffic about the ACORN successor groups in 2010; is that right?
>
> A That's correct, yes.
>
> Q But the ACORN successor groups were not subject to a sensitive case report; is that right?

---

[117] Stephanie Strom, *On Obama, Acorn and Voter Registration*, N.Y. TIMES, Oct. 10, 2008; Stanley Kurtz, *Inside Obama's Acorn*, NAT'L REVIEW ONLINE, May 29, 2008.
[118] Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov't Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).
[119] *See* Internal Revenue Serv., Be on the Look Out list, "Filed 112310 Tab 5 – Watch List." [IRSR 2562-63]
[120] Internal Revenue Serv., Heightened Awareness Issues. [IRSR 6655-72]
[121] Transcribed interview of Robert Choi, Internal Revenue Serv., in Wash., D.C. (Aug. 21, 2013).
[122] *Id.*

A I don't recall if they were listed in there, in the sensitive case report.

Q So you don't recall them being part of a sensitive case report?

A I think what I'm saying is they may be part of a sensitive case report. I do not have a specific recollection that they were listed in a sensitive case report.

Q But you do have a specific recollection that the Tea Party cases were on sensitive case reports in 2010.

A Yes.

Q To your knowledge, did any ACORN successor application go to the Chief Counsel's Office?

A I am not aware of it.

Q Are you aware of any ACORN successor groups facing application delays?

A I do not know if – well, when you say "delays," how do you –

Q Well –

A I mean, I'm aware of successor ACORN applications coming in, and I am aware of email traffic that talked about my concern of delays on those cases and, you know, that there was discussion about seeing an influx of these applications which appear to be related to the previous organization.

***

Q And the concern behind the reason that they weren't being processed was that they were potentially the same organization that had been denied previously?

A Not that they were denied previously. **These appeared to be successor organizations, meaning these were newly formed organizations with a new EIN, employer identification number, located at the same address as the previous organization and, in some instances, with the same officers. And it was an issue of concern as to whether or not these were, in fact, the same organizations just coming in under a new name**; whether, in fact, the previous organizations, if they were, for example, 501(c)(3) organizations, properly disposed of their assets. Did they transfer it to this new organization? Was this perhaps an abusive

scheme by these organizations to say that they went out of business and then not really but they just carried on under a different name?

Q And that's the reason they were held up?

A Yes.[123] (emphasis added).

Choi's testimony shows that the inclusion of ACRON successor groups on the BOLO list centered on a concern for whether the new groups were improperly standing in the shoes of the old groups. As the Committee has documented previously, ACORN groups received substantial attention in 2009 and 2010 for misuse of taxpayer funds and other fraudulent endeavors.[124] In fact, Congress even cut off funding for ACORN groups given widespread concerns about the groups' activities.[125] Six Democratic current members of the Oversight Committee and seven Democratic current members of the Ways and Means Committee voted to stop ACORN funding.[126] The IRS included ACORN successor groups on a special watch list, according to Choi, due to concern "as to whether or not these were, in fact, the same organizations just coming in under a new name."[127]

This information undercuts allegations by congressional Democrats that the IRS's placement of ACORN successor groups on the BOLO list signified that those groups were targeted by the IRS in the same manner as Tea Party cases. Unlike the Tea Party applicants, ACORN successor groups were placed on the IRS BOLO out of specific and unique concern for potentially fraudulent or abusive schemes and not because of their political beliefs. Once identified, even ACORN successor groups were apparently not subjected to the same systematic scrutiny and delay as Tea Party applicants.

The IRS treated Tea Party applicants differently than Emerge affiliate groups

Congressional Democrats attempt to minimize the IRS's targeting of Tea Party applicants by alleging a false analogy to the IRS's treatment of Emerge affiliate groups. Emerge touts itself as the "premier training program for Democratic women" and states as a goal, "to increase the number of Democratic women in public office."[128] In particular, citing IRS training documents, Ranking Member Sander Levin and Ranking Member Elijah Cummings argued that "the IRS

---

[123] *Id.*
[124] *See* H. COMM. ON OVERSIGHT & GOV'T REFORM MINORITY STAFF, IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE? (July 23, 2009).
[125] *See* H. COMM. ON OVERSIGHT & GOV'T REFORM MINORITY STAFF, FOLLOW THE MONEY: ACORN, SEIU AND THEIR POLITICAL ALLIES (Feb. 18, 2010).
[126] *See* 155 Cong. Rec. H9700-01 (Sept. 17, 2009). The Democratic Members who opposed ACORN funding were Representatives Maloney (D-NY); Tierney (D-MA); Clay (D-MO); Cooper (D-TN); Speier (D-CA); Welch (D-VT); Levin (D-MI); Doggett (D-TX); Thompson (D-CA); Larson (D-CT); Blumenauer (D-OR); Kind (D-WI); and Schwartz (D-PA). *Id.*
[127] Transcribed interview of Robert Choi, Internal Revenue Serv., in Wash., D.C. (Aug. 21, 2013).
[128] Emerge America, www.emergeamerica.org (last visited Apr. 2, 2014).

instructed its screeners to single out for heightened scrutiny 'Emerge' organizations."[129] The evidence, once more, fails to support their contention. The IRS did not target Emerge affiliate groups in any similar manner to Tea Party applicants.

The same training documents cited by congressional Democrats as proof of bipartisan IRS targeting clearly show differences between the treatment of Tea Party applications and those filed by Emerge affiliate. The IRS ordered its screeners to transfer Tea Party applications to a special group for "secondary screening," but it asked the screeners to merely "flag" Emerge groups.[130] While another training document specifically offers the Tea Party as an example of an emerging issue, the Emerge affiliate groups were not referenced on the document.[131]

Democrats cite testimony from IRS employee Steven Grodnitzky to support their argument that the IRS engaged in bipartisan targeting. Ranking Member Cummings referenced this testimony when questioning Acting IRS Commissioner Daniel Werfel during his unsolicited testimony before the Committee on July 17, 2013.[132] Although Grodnitzky did testify that some liberal applications experienced a three-year delay,[133] he also gave testimony that contradicts the Democrats' manufactured narrative. Grodnitzky testified that unlike the Tea Party cases, which were filed by unaffiliated groups with similar ideologies, the Emerge cases were affiliated entities with different "posts" in each state.[134] He also testified that unlike the Tea Party applications, where the IRS was focused on political speech, the central issue in the Emerge applications was that the groups were conveying an impermissible private benefit upon the Democratic Party.[135] Finally, Grodnitzky testified that there were far fewer Emerge cases than Tea Party applications.[136] While Grodnitzky's testimony supports a conclusion that specific and objective concerns at the IRS led to scrutiny and delayed applications from Emerge affiliates, it does not support a parallel between these organizations and what the IRS did to Tea Party applicants.

Emerge existed as a series of affiliated organizations. One IRS employee testified that whereas the Tea Party applicants waited years for IRS action, some of the Emerge applications were approved by Cincinnati IRS employees in a "matter of hours."[137] But the IRS eventually reversed course, out of concern about impermissible private benefit. Because Emerge affiliates were seen as essentially the same organization, the IRS wanted to flag new affiliates to ensure that these new applications were considered in a consistent manner. Testimony from IRS employee, Amy Franklin Giuliano, explains why the Emerge applicants "were essentially the same organization."[138] She testified:

---

[129] Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov't Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).
[130] Internal Revenue Serv., Screening Workshop Notes (July 28, 2010). [IRSR 6703-04]
[131] Internal Revenue Serv., Heightened Awareness Issues. [IRSR 6655-72]
[132] *See* July 17th Hearing, *supra* note 25.
[133] Transcribed interview of Steven Grodnitzky, Internal Revenue Serv., in Wash., D.C. (July 16, 2013).
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] Transcribed interview of Amy Franklin Giuliano, Internal Revenue Serv., in Wash., D.C. (Aug. 9, 2013).
[138] Transcribed interview of Amy Franklin Giuliano, Internal Revenue Serv., in Wash., D.C. (Aug. 9, 2013).

Q The reason that the other five cases would be revoked if that case the Counsel's Office had was denied, was that because they were affiliated entities?

A It is because they were essentially the same organization. I mean, every – the applications all presented basically identical facts and basically identical activities.

Q And the groups themselves were affiliated.

A And the groups themselves were affiliated, yes.[139]

Giuliano also told the Committee that the central issue in these cases was not impermissible political speech activity – as it was with the Tea Party applications – but instead private benefit. She testified:

Q The issue in the case you reviewed in May of 2010 was private benefit.

A Yes.

Q As opposed to campaign intervention.

A We considered whether political campaign intervention would apply, and we decided it did not.[140]

Most striking, Giuliano told the Committee that the career IRS experts recommended *denying* an Emerge application, whereas the experts recommended *approving* the Tea Party application.[141] Even then, despite the recommended approval, the Tea Party applications still sat unprocessed in the IRS backlog.

Documents and testimony received by the Committee demonstrate that the IRS never engaged in systematic targeting of Emerge applicants as it did with Tea Party groups. IRS scrutiny of Emerge affiliates appears to have been based on objective and non-controversial concerns about impermissible private benefit. Taken together, this evidence strongly rebuts any Democratic claims that the IRS treated Emerge affiliates similarly to Tea Party applicants.

The IRS treated Tea Party applicants differently than Occupy groups

Finally, congressional Democrats defend the IRS targeting of Tea Party organization by arguing that liberal-oriented Occupy groups were similarly targeted.[142] Contrary to these claims, evidence available to the Committee indicates that the IRS did not target Occupy groups.

---

[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] July 18th Hearing, *supra* note 28

TIGTA found that none of the applications in the IRS backlog were filed by groups with "Occupy" in their names.[143] Several IRS employees interviewed by the Committee testified that they were not even aware of any Occupy entry on the BOLO list until after congressional Democrats released the information in June 2013.[144] Further, there is no indication that the IRS systematically scrutinized and delay Occupy applications, or that the IRS subjected Occupy applicants to burdensome and intrusive information requests. To date, the Committee has not received evidence that "Occupy Wall Street" or an affiliate organization even applied to the IRS for non-profit status.

Conclusion

Democrats in Congress and the Administration have perpetrated a myth that the IRS targeted both conservative and liberal tax-exempt applicants. The targeting is a "phony scandal," they say, because the IRS did not just target Tea Party groups, but it targeted liberal and progressive groups as well. Month after month, in public hearings and televised interviews, Democrats have repeatedly claimed that progressive groups were scrutinized in the same manner as conservative groups.[145] Because of this bipartisan targeting, they conclude, there is not a "smidgeon of corruption" at the IRS.

The problem with these assertions is that they are simply not accurate. The Committee's investigation shows that the IRS sought to identify and single out Tea Party applications. The facts bear this out. The initial "test" applications were filed by Tea Party groups. The initial screening criteria identified only Tea Party applications. The revised criteria still intended to identify Tea Party activities. The IRS's internal review revealed that a substantial majority of applications were conservative. In short, the IRS treated conservative tax-exempt applications in a manner distinct from other applications, including those filed by liberal groups.

Evidence available to the Committee contradicts Democrats' claims about bipartisan targeting. Although the IRS's BOLO list included entries for liberal-oriented groups, only Tea Party applicants received systematic scrutiny because of their political beliefs. Public and nonpublic analyses of IRS data show that the IRS routinely approved liberal applications while holding and scrutinizing conservative applications. Even training documents produced by the IRS indicate stark differences between liberal and conservative applications: "'progressive' applications are not considered "Tea Parties."'"[146] These facts show one unyielding truth: Tea Party groups were target because of their political beliefs, liberal groups were not.

---

[143] *"The IRS's Systematic Delay and Scrutiny of Tea Party Applications": Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2013) (statement of J. Russell George).

[144] *See, e.g.*, Transcribed interview of Elizabeth Kastenberg, Internal Revenue Serv., in Wash., D.C. (July 31, 2013); Transcribed interview of Sharon Light, Internal Revenue Serv., in Wash., D.C. (Sept. 5, 2013); Transcribed interview of Joseph Grant, Internal Revenue Serv., in Wash., D.C. (Sept. 25, 2013); Transcribed interview of Nancy Marks, Internal Revenue Serv., in Wash., D.C. (Oct. 8, 2013); Transcribed interview of Justin Lowe, Internal Revenue Serv., in Wash., D.C. (July 23, 2013).

[145] Press Release, H. Comm. on Ways and Means Democrats & H. Comm. on Oversight & Gov't Reform Democrats, New Documents Highlight IRS Scrutiny of Progressive Groups (Aug. 20, 2013).

[146] Internal Revenue Serv., Screening Workshop Notes (July 28, 2010). [IRSR 6703-04]

Screening Workshop Notes - July 28, 2010

Participants included members of the screening group, embedded screeners from Cincinnati, west coast screeners, selected secondary screeners, TE/GE EO Quality Assurance's Staff and Area 1 & 2 Managers. The workshop agenda, PowerPoint and attachments were presented to participants via email.

Topics and Highlights

Opening Statements: John Shafer

- Welcomed participants.
- Encouraged participants to email topics for inclusion in our next Workshop.
- Current workshop is to provide an update on current issues and concerns.
- Floor was turned over to Presentators. Topics/Presentators follow:

Healthcare Reform: Roger Vance/John Schafer

- Re-empathized items listed on the Healthcare Memorandum are subject to Mandatory Secondary Screening.
- Any reference to "Patient Protection and Affordable Care Act" and the "Health Care and Education Reconciliation Act of 2010" still requires Secondary Screening.
    - Wayne Bothe, Secondary Screener indicated that Health Care does not include the following:
        - Elderly Housing
        - Assisted Living
- New Topics/Phrases that require Secondary Screening include:
    - "Accountable Care" Organizations,
    - "Additional Medicare Payments to Physician Medicare based upon Quality Care."
- Any topic that you believe, or think, that it might be related to Health Care should be subject to Secondary Screening. John Shafer - "Err on the side of caution".
- VEBAs must be screened by Group 7824 and should not be screened out.
- Initial Screeners should not assign the T# for Health Care; utilize the Category # for Secondary Screening as presented on the new 51 Sheet and/or TEDS.

Organization filing after 27-Month their Formation: Glenn W Collins/John Shafer

- Glenn provided a brief summary as to why a secondary screening process was created.
- Pension Protection Act of 2006 created the legal requirement for organizations not required to file Form 990* to notify the IRS within three years of exemption. Failure to do so creates Automatic Revocation of Exemption.
    - *This requirement does not include Churches or Church-Related Organizations- and are not subject to the Automatic Revocation.
    - An opportunity for a one-time relief from revocation has been presented.
    - As a result automatic revocations have been delayed until January 2011.
    - Once effective automatic revocations will reflect ST 97.
- Three characteristics were identified that mandates transfer to Group 7822 for Secondary Screening and IDRS research.

- The emailed attachment outlines the overall process.
- Glenn deferred additional statements and/or questions to John Shafer on yesterday's developments; how they affect the screening process and timeline.
- Concerns can be directed to Glenn for additional research if necessary.

Current/Political Activities: Gary Muthert

- Discussion focused on the political activities of Tea Parties and the like-regardless of the type of application.
- If in doubt Err on the Side of Caution and transfer to 7822.
- Indicated the following names and/or titles were of interest and should be flagged for review:
  - 9/12 Project,
  - Emerge,
  - Progressive
  - We The People,
  - Rally Patriots, and
  - Pink-Slip Program.

- Elizabeth Hofacre, Tea Party Coordinator/Reviewer
    - Re-empathize that applications with Key Names and/or Subjects should be transferred to 7822 for Secondary Screening. Activities must be primary.
    - "Progressive" applications are not considered "Tea Parties"

Disaster Relief: Renee Norton/Joan Kiser

- Advise audience that buzz words or phrases include:
  - "X" Rescue
  - References to the Gulf Coast, Oil Spills,
- Reminded screeners that Disaster Relief is controlled by 7838, and then forwarded to Group 7827, for Secondary Screening.
- Denied Expedites worked by initial screener:
  - Complete Expedite Denial CCR, place on left side of file.
  - Email Renee or Joan with specific reason why expedite was denied and disposition (i.e. AP, IP, 51).
  - Place Post-It on Orange Folder advising Karl
    - "Denied Expedite / Fwd to M Flammer."

Power of Attorneys: Nancy Heagney

- Form 2848 that references 990, 941 or the like should be
  - Printed and annotate on the bottom per procedures
  - Documentation on TEDS should be made.
    - See Interim Guidance located on Public Folders.

Closing Sheets: Gary Muthert

- Closing Sheets should not cover pertinent info on the AIS sheet or EDS' 8327.
- Case Grade and Data (e.g. NTEEs) must be correctly presented and accurately depict the case's complexity and purpose.
  - Inaccurate presentations create processing delays.
  - Steve Bowling, Mgr 7822 "Volumes of cases are graded incorrectly."
  - EDS and TEDS must Agree to achieve desire business results

Credit Counseling (CC)
Stephen Seok

- Re-stressed impact that section 501(q) had on purely educational cases.
  - Cases are fully developed as 501(q) Credit Counseling Cases.
  - Key analysis is whether financial education and/or counseling activities are "substantial".
  - Cases with financial education and/or financial counseling - substantial or insubstantial are still subject to Secondary Screening until further notice.
  - Continue to document the analysis as "Substantial" or "Insubstantial" on the CC Check-sheet.
  - Feedback on cases received is in process.

TAG
Jon Waddell

- The New List will be completed and issued this week- approximately 7/30/10.
- Sharing a Drive on the Server has created the delay/dilemma.
- Monthly Emails will restart shortly after the List's distribution.
- Listing will include the following:
  - Touch and Go, Emerging Issues and Issues to Watch For.
  - [redacted] Cases* (Puerto Rico based low-income housing) are considered "Potential Abusive Cases".
  - [redacted] Cases (Las Vegas, NV) should continue to be sent to TAG Group for re-screening

  *LCD referrals are in process since both have questionable practices.

STATEMENT FOR THE RECORD

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

July 30, 2014

Hearing on IRS Abuses: Ensuring that Targeting Never Happens Again

2154 Rayburn House Office Building
Chairman Darrell E. Issa (R-CA)

Prashant K. Khetan
Senior Counsel

Thank you, Chairman Issa, for the opportunity to submit this statement for the record to the Committee on Oversight and Government Reform at the U.S. House of Representatives. My name is Prashant K. Khetan and I am a Senior Counsel at Cause of Action,[1] a non-profit, nonpartisan government accountability organization that uses investigative, legal, and communications tools to educate the public on how government transparency and accountability protect economic opportunity for American taxpayers.

Cause of Action is at the forefront of exposing the politicization and malfeasance that has occurred at the Internal Revenue Service (the "IRS"). From our legal efforts to prevent the IRS from finalizing widely-criticized proposed rules affecting 501(c)(4) social welfare organizations,[2] to our use of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to uncover the scope and severity of Lois Lerner's targeting scheme,[3] we are committed to supporting positive reform at what is now – as this Committee termed it in its most recent staff report – a "broken agency."[4]

Relevant to this Hearing, Cause of Action has experience with the IRS and the Treasury Inspector General for Tax Administration ("TIGTA") in connection with FOIA requests and litigation that is relevant to the issue of why reform of 26 U.S.C. § 6103 ("Section 6103") should be a Congressional priority.[5] Specifically, and as discussed below, the IRS and TIGTA have adopted inconsistent and overbroad interpretations of Section 6103 in order to preclude public and Congressional access to records that could demonstrate wrongdoing by Federal officials.

---

[1] CAUSE OF ACTION, *available at* www.causeofaction.org.
[2] *Cause of Action Sues IRS Over Proposed Regulations Affecting Nonprofits*, CAUSE OF ACTION, http://causeofaction.org/cause-action-sues-irs-proposed-regulations-affecting-nonprofits/ (last visited Aug. 4, 2014).
[3] *FOIA Request to IRS regarding IRS Targeting and Records Management*, CAUSE OF ACTION, http://causeofaction.org/foia-request-irs-regarding-irs-targeting-records-management/ (last visited Aug. 4, 2014).
[4] H. COMM. ON OVERSIGHT & GOV'T REFORM STAFF REPORT, MAKING SURE TARGETING NEVER HAPPENS: GETTING POLITICS OUT OF THE IRS AND OTHER SOLUTIONS i (July 29, 2014), *available at* http://oversight.house.gov/wp-content/uploads/2014/07/2014-07-29-Getting-Politics-Out-of-the-IRS-and-Other-Solutions.pdf.
[5] *Cause of Action v. Internal Revenue Serv.*, No. 13-920 (D.D.C.); *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C.); *see generally Related Documents: IRS Targeting & Politicization*, CAUSE OF ACTION, http://causeofaction.org/related-documents-irs-targeting-politicization/ (last visited Aug. 4, 2014).

Our work confirms recent testimony provided to this Committee – that the "IRS has turned Section 6103 on its head" in order to protect government wrong-doers.[6]

ENACTMENT OF SECTION 6103

Section 6103 protects confidential taxpayer returns and return information from unauthorized disclosure except in a limited number of statutorily prescribed circumstances. Congress enacted Section 6103 to instill public trust in the confidentiality of tax returns after many citizens expressed concern that the IRS was acting as a "lending library" of return information for other agencies.[7] As the Joint Committee on Taxation more recently reported:

> The IRS was at risk of becoming the Federal government's central information clearing house. A question arose as to whether the virtually unfettered access to returns and return information unnecessarily intruded into the privacy of taxpayers. . . . Prior law [before the 1976 amendment of Section 6103] afforded the President broad discretion to determine who had access to returns and return information.[8]

In other words, Congress sought to prevent "highly publicized attempts to use the [IRS] for political purposes," especially when such efforts involved the delivery of tax returns to the White House.[9] Thus, in enacting Section 6103, Congress intended to curtail abusive intergovernmental disclosure practices; it did *not* intend to prevent government watchdogs – whether Congressional or public – from exposing potential malfeasance in the Federal government.[10]

THE IRS HAS ADOPTED INCONSISTENT AND OVERBROAD INTERPRETATIONS OF SECTION 6103

Simply put, the IRS has misused Section 6103. The IRS's practice reflects that it will choose when and how Section 6103 applies based on the level of interest in keeping the subject matter of requested records hidden from scrutiny. Shockingly, the IRS has even stated that the decisions made by a FOIA manager do not bind the agency as a whole.

For example, Section 6103(g) permits the President to request in writing, and by his own signature, the tax return and return information of any individual taxpayer.[11] Concerned by the

---

[6] *"IRS Abuses: Ensuring that Targeting Never Happens Again": Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014) (statement of Cleta Mitchell), *available at* http://oversight.house.gov/wp-content/uploads/2014/07/Mitchell-Statement-IRS-Abuses-7-30.pdf.

[7] 122 Cong. Rec. 24,013 (1976) (remarks of Sen. Weicker).

[8] Joint Committee on Taxation, Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions As Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, vol. 1, 127 (Jan. 28, 2000), *available at* https://www.jct.gov/publications.html?func=startdown&id=2554.

[9] 122 Cong. Rec. 24,013 (1976) (remarks of Sen. Dole).

[10] *See Tax Reform Research Group v. Internal Revenue Serv.*, 419 F. Supp. 415, 419-20 (D.D.C. 1976) (Section 6103 could not be used in conjunction with FOIA Exemption 3 to withhold records of requests by President Nixon's special counsel for status reports on pending IRS investigations of taxpayers).

[11] 26 U.S.C. § 6103(g)(1) ("Upon written request by the President, signed by him personally, the [IRS] shall furnish to the President, or to such employee or employees of the White House as the President may designate . . . a return or return information with respect to any taxpayer named in such request.").

prospect that the White House contravened the processes delineated by Section 6103(g), Cause of Action sent a FOIA request to the IRS in October 2012 to determine whether the President had, in fact, sought to access tax return information in an unauthorized manner (the "Section 6103(g) Request").[12] Specifically, the Section 6103(g) Request sought records of Presidential requests for tax return information under Section 6103(g), as well as requests made outside the scope of Section 6103(g), and documents concerning any investigation by TIGTA into unauthorized disclosures of return information to the White House.

In its response to the Section 6103(g) Request,[13] the IRS stated that the only responsive records it could locate were records of "tax checks," which are requests by the Administration for return information provided on a voluntary basis by taxpayers pursuant to Section 6103(c).[14] The IRS refused to release these records, however, claiming that "tax checks" were categorically "return information" and could be withheld regardless of the IRS's ability to segregate and release non-personally-identifying information. This interpretation, however, is inconsistent both with the law[15] and the IRS's own practice, which at times has been to release "tax check" letters with personal information redacted – a common sense interpretation that balances the privacy interests of Section 6103 against the public interest in open government.

For example, Cause of Action previously submitted a FOIA request to the Department of Energy ("DOE") seeking copies of all requests to the IRS under Section 6103(l)(3), which permits checks for tax delinquency of applicants for Federal loan programs (the "Section 6103(l) Request").[16] The Section 6103(l) Request was referred to the IRS, which produced 142 pages of "tax checks."[17] While the IRS redacted identifying information and the actual credit worthiness determinations, the segregable portions of the records were produced,[18] contrary to the IRS's position in connection with the Section 6103(g) Request that "tax checks" are categorically exempt "return information."

In a pending lawsuit regarding the Section 6103(g) Request, Cause of Action confronted the IRS with its inconsistent interpretations of Section 6103. In response, earlier this week, the IRS re-confirmed the view that "tax checks" are entirely exempt.[19] And in response to the clear

---

[12] Letter from Cause of Action to Ava Littlejohn, Public Liaison, Internal Revenue Serv. (Oct. 9, 2012), *available at* http://causeofaction.org/assets/uploads/2013/05/2012-10-9-IRS-WH-FOIA-Request.pdf.

[13] Letter from Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv. (Dec. 11, 2012), *available at* http://causeofaction.org/assets/uploads/2013/06/Exhibits-for-TIGTA-Appeal.pdf (labeled as Exhibit 3).

[14] 26 U.S.C. § 6103(c) ("The Secretary may . . . disclos[e] the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person.").

[15] *See* 5 U.S.C. § 552(b) (requiring an agency to produce any "reasonably segregable portion" of responsive records after deleting exempt portions); *see also Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 611 (D.C. Cir. 1997) (IRS has duty to "delete[] exempt matters, including [Section] 6103 return information," before releasing records).

[16] Letter from Cause of Action to Alexander Morris, FOIA Officer, Dep't of Energy (June 12, 2012) (on file with Cause of Action).

[17] Letter from Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv., to Cause of Action (Jan. 22, 2013) (on file with Cause of Action).

[18] *E.g.*, Letter from Ava F. Littlejohn, Disclosure Manager, Internal Revenue Serv., to David G. Frantz, Dep't of Energy (Jan 26, 2011) (attached hereto as Exhibit 1) (example of produced "tax check" with redactions).

[19] *See* Def.'s Reply at 7-8, *Cause of Action v. Internal Revenue Serv.*, No. 13-920 (D.D.C. July 28, 2014).

inconsistency, the IRS took its position one step further. Even though the same FOIA Disclosure Manager was responsible for providing the IRS's final response in both matters, the IRS stated in court papers that:

> The alleged act of an individual agency employee cannot overturn [a prior] holding as to what information the [IRS] is permitted to disclose under [S]ection 6103.[20]

In addition to these inconsistencies, the IRS has used an overbroad interpretation of Section 6103. For example, the IRS misapplied Section 6103 in response to Cause of Action's request for records of communications between the IRS and third parties regarding the tax-exempt status of True the Vote ("TTV") (the "TTV Request"), which was approved after three years of scrutiny.[21] Throughout the tax-exempt approval process, TTV was concerned that the Service Employees International Union ("SEIU") was urging the IRS either to deny TTV's application or to subject it to undue scrutiny. As a result, Cause of Action sought records reflecting communications between the IRS and SEIU concerning TTV.[22] Even though no underlying tax returns or return information were requested, the IRS refused to produce any responsive documents, claiming that Section 6103 forbade the disclosure of any responsive records and, accordingly, that the TTV Request was closed.[23]

In its response to the TTV Request, the IRS made no effort to explain how the documents requested by Cause of Action consisted entirely of information protected under Section 6103. If they did not, then the IRS's failure to segregate the non-exempt information from otherwise exempt records would violate FOIA. As Cause of Action noted in its administrative appeal of this blanket application of Section 6103:

> [T]he IRS appears to take the position that *any* information about a third party contained in IRS files constitutes protected return information. As the Court of Appeals for the District of Columbia Circuit has held, however, not all information in IRS files is return information. "Congress would not have adopted such a detailed definition of return information in Section 6103 if it had simply intended the term to cover all information in IRS files."[24]

---

[20] *Id.*

[21] Cathy Burke, *DOJ, IRS Grant True the Vote Tax-Exempt Status*, NEWSMAX (Sept. 23, 2013), *available at* http://www.newsmax.com/Newsfront/doj-irs-true-vote/2013/09/23/id/527285.

[22] Letter from Cause of Action to Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv. (Oct. 2, 2013) (on file with Cause of Action).

[23] Letter from Bertrand Tzeng, Disclosure Manager, Internal Revenue Serv., to Cause of Action (Nov. 15, 2013) (on file with Cause of Action).

[24] Letter from Cause of Action, to Appeals Officer, Internal Revenue Serv. at 3 (Dec. 16, 2013) (on file with Cause of Action) (citations and brackets omitted).

TIGTA ALSO HAS ADOPTED INCORRECT INTERPRETATIONS OF SECTION 6103

As previously indicated, Cause of Action's Section 6103(g) Request also sought records regarding TIGTA investigations into the unauthorized disclosure of Section 6103 "return information" to individuals in the Executive Office of the President; the IRS referred this portion of the Request to TIGTA. In November 2012, TIGTA stated that it could neither confirm nor deny the existence of records related to the Request, what is commonly referred to as a "Glomar" response.[25] TIGTA argued that Section 6103 precluded the release of "return information," and that the mere fact of the existence or non-existence of an investigation into unauthorized disclosures would itself constitute return information within the meaning of Section 6103.[26]

TIGTA's interpretation, however, sweeps too broadly. It effectively denies public access to meaningful information about whether TIGTA is investigating whether federal officials have violated Section 6103. Congress, however, never intended Section 6103 to be an all-purpose shield against public disclosure of agency records. To the contrary, whether TIGTA possesses records reflecting an investigation is not something that uniquely pertains to a particular taxpayer, but is instead a useful indicator of whether TIGTA is investigating the conduct of federal officials. Indeed, TIGTA's flawed interpretation directly contravenes this Committee's recent statement: "[T]here is no reason that TIGTA cannot provide basic investigatory information" to "potential victims and the public," while still ensuring that "confidential taxpayer information [is] protected."[27]

As Cause of Action's litigation and FOIA work demonstrate, if the IRS and TIGTA prevail in their sweeping and inconsistent interpretations of Section 6103, then the public will be hampered in its efforts to determine whether Federal officials are violating the law. Accordingly, Cause of Action endorses many of the Recommendations contained in this Committee's July 29, 2014 Staff Report, and respectfully encourages the Committee to support revising Section 6103 to realize its intended purpose of preventing unauthorized "sharing" of taxpayer information within the Federal government and allow access to information concerning the activities of TIGTA.[28]

---

[25] Letter from Diane K. Bowers, Dep't of the Treasury, to Cause of Action (Nov. 30, 2012) (on file with Cause of Action); *see generally Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (affirming CIA's refusal to confirm or deny its ties to Howard Hughes's submarine retrieval ship, the *Glomar Explorer*).

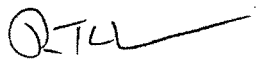
[26] TIGTA also has taken inconsistent positions in connection with its application of Section 6103. In prior litigation where the Government faced potential liability for violating 26 U.S.C. § 7431(a)(1) and the prospect of paying monetary damages to a taxpayer, TIGTA argued for a more flexible interpretation of whether Section 6103 permitted it to release *some* "return information" outside of strict statutory exceptions. *See* Pl.'s Reply Br. at 9 and n.4, *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (Mar. 13, 2014), *available at* http://causeofaction.org/assets/uploads/2014/01/ECF-No.-33-Reply-Brief-ISO-Plaintiffs-Cross-Motion-for-Summary-Judgment-and-Opposition-to-Defendants.pdf.

[27] *See* MAKING SURE TARGETING NEVER HAPPENS, *supra* note 4, at 7-8. The statement was made in the context of TIGTA notifying Koch Industries, Inc. that it could access TIGTA's report (via FOIA) of an investigation into White House advisor Austan Goolsbee's public comment that Koch Industries did not pay corporate income tax. *See id.* at 6-7; E-mail from Daniel K. Carney, Special Agent, Treasury Inspector Gen. for Tax Admin., to Mark Holden, Gen. Counsel, Koch Indus. (Aug. 10, 2011) (on file with Cause of Action).

[28] *See* MAKING SURE TARGETING NEVER HAPPENS, *supra* note 4, at 5-8.

Thank you for your consideration of our views and investigation. We would be pleased to provide the Committee with any further information the Committee needs or to answer any questions raised by this Statement.

Sincerely,



PRASHANT K. KHETAN
SENIOR COUNSEL

EXHIBIT 1

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SMALL BUSINESS/SELF-EMPLOYED DIVISION

JAN 26 2011

David G. Frantz
Department of Energy
1000 Independence Avenue S.W.
Washington, DC 20585

Dear Mr. Frantz:

I am responding to your request dated January 25, 2011 that we received on January 25, 2011.

You asked for information under the provisions of Internal Revenue Code (IRC) section 6103(l)(3) pertaining to [redacted] The information provided below can be used solely for the purpose of determining the credit worthiness of the referenced individual as an applicant for a Federal loan. (b)(3)/26 USC 6103

I reviewed the account for the referenced entity and found [redacted] (b)(3)/26 USC 6103

Persons having access to this information should be made aware of the penalty provisions of Sections 7213 and 7431 of the Internal Revenue Code (IRC) regarding the unauthorized disclosure of such information and of Section 7213A of the IRC regarding the unauthorized access to federal tax information. Please destroy this document after its purpose has been served. We have enclosed Notice 129 for your reference.

If you have any questions please call Disclosure Assistant Robert Beloat, ID # 1001792539 at (513) 263-4199 or write to: Internal Revenue Service, Disclosure Office 5, 550 Main St. Room 7019, Cincinnati, OH 45202. Please refer to case number 05-2011-00828.

Sincerely,

Ava F. Littlejohn

Ava F.Littlejohn
Disclosure Manager
Disclosure Office 5

Inspecting or Disclosing Tax Notices