AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

# REVISITING IRS TARGETING: PROGRESS OF AGENCY REFORMS AND CONGRESSIONAL OPTIONS

## HEARING

BEFORE THE

## SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS

OF THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

JULY 29, 2015

**Serial No. J–114–27**

Printed for the use of the Committee on the Judiciary

*www.judiciary.senate.gov*
*www.govinfo.gov*

# REVISITING IRS TARGETING: PROGRESS OF AGENCY REFORMS AND CONGRESSIONAL OPTIONS

S. HRG. 114–910

# REVISITING IRS TARGETING: PROGRESS OF AGENCY REFORMS AND CONGRESSIONAL OPTIONS

## HEARING

BEFORE THE

## SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS

OF THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

JULY 29, 2015

**Serial No. J–114–27**

Printed for the use of the Committee on the Judiciary

*www.judiciary.senate.gov*
*www.govinfo.gov*

U.S. GOVERNMENT PUBLISHING OFFICE
53–398 WASHINGTON : 2025

## COMMITTEE ON THE JUDICIARY

CHARLES E. GRASSLEY, Iowa, *Chairman*

ORRIN G. HATCH, Utah
JEFF SESSIONS, Alabama
LINDSEY O. GRAHAM, South Carolina
JOHN CORNYN, Texas
MICHAEL S. LEE, Utah
TED CRUZ, Texas
JEFF FLAKE, Arizona
DAVID VITTER, Louisiana
DAVID PERDUE, Georgia
THOM TILLIS, North Carolina

PATRICK J. LEAHY, Vermont, *Ranking Member*
DIANNE FEINSTEIN, California
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois
SHELDON WHITEHOUSE, Rhode Island
AMY KLOBUCHAR, Minnesota
AL FRANKEN, Minnesota
CHRISTOPHER A. COONS, Delaware
RICHARD BLUMENTHAL, Connecticut

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE LUCIUS, *Democratic Chief Counsel and Staff Director*

## SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS

TED CRUZ, Texas, *Chairman*

CHARLES E. GRASSLEY, Iowa
ORRIN G. HATCH, Utah
JEFF SESSIONS, Alabama
JEFF FLAKE, Arizona
LINDSEY O. GRAHAM, South Carolina
MICHAEL S. LEE, Utah
DAVID VITTER, Louisiana

CHRISTOPHER A. COONS, Delaware, *Ranking Member*
DIANNE FEINSTEIN, California
RICHARD J. DURBIN, Illinois
CHARLES E. SCHUMER, New York
SHELDON WHITEHOUSE, Rhode Island
AMY KLOBUCHAR, Minnesota
RICHARD BLUMENTHAL, Connecticut

THOMAS L. JIPPING, *Republican Chief Counsel*
THEODORE SCHROEDER, *Democratic Chief Counsel*

# CONTENTS

## OPENING STATEMENTS


| | Page |
|---|---|
| Cruz, Hon. Ted | 1 |
| Coons, Hon. Christopher A. | 4 |


## WITNESSES


| | |
|---|---|
| Aviv, Diana L. | 43 |
| Prepared statement | 183 |
| Colvin, Gregory L. | 45 |
| Prepared statement | 195 |
| Greim, Edward D. | 38 |
| Prepared statement | 168 |
| Responses to written questions | 239 |
| Koskinen, John | 6 |
| Prepared statement | 68 |
| Responses to written questions | 244 |
| Martin, Jenny Beth | 44 |
| Prepared statement | 192 |
| Mitchell, Cleta | 36 |
| Prepared statement | 72 |
| Responses to written questions | 267 |
| Noble, Lawrence | 40 |
| Prepared statement | 175 |
| Sekulow, Jay Alan | 47 |
| Prepared statement | 210 |
| Responses to written questions | 275 |
| Spaulding, Stephen | 37 |
| Prepared statement | 78 |
| Walker, Toby Marie | 41 |
| Prepared statement | 233 |


## APPENDIX


| | |
|---|---|
| Items submitted for the record | 67 |

# REVISITING IRS TARGETING: PROGRESS OF AGENCY REFORMS AND CONGRESSIONAL OPTIONS

**WEDNESDAY, JULY 29, 2015**

UNITED STATES SENATE,
SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS, AND FEDERAL COURTS,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:05 p.m., in Room 106, Dirksen Senate Office Building, Hon. Ted Cruz, Chairman of the Subcommittee, presiding.

Present: Senators Cruz [presiding], Sessions, Lee, Coons, Durbin, Whitehouse, Klobuchar, and Blumenthal.

Also present: Senator Tillis.

## OPENING STATEMENT OF HON. TED CRUZ, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CRUZ. This hearing will come to order. Welcome, everyone. Welcome, Mr. Koskinen. We appreciate your being here.

We are here today convening this hearing for two unfortunate reasons. The main reason we are here is because we have a broken tax system in this country. Our income tax system today, embodied in the IRS, hurts the American dream. It takes money out of the pockets of hardworking Americans. It reduces their take-home pay. It stifles economic growth. It keeps small businesses from becoming big businesses. It has created a labyrinth of credits and deductions that empowers politicians at the expense of hardworking Americans.

The other reason we are here is because with the exponential growth of the Tax Code, with the unbelievable complexity of our current tax system, we have seen the creation of an entity that I believe is no longer serving the interests of the American people.

The IRS has been considered by the American people to be an abusive agency for so long that for many Americans it has become the embodiment of what is wrong with Government and what is wrong with Washington.

As it has metastasized over the decades, taking more and more out of the pockets of hardworking taxpayers, the IRS has become more and more powerful. There are few things more terrifying to an American citizen than the IRS come knocking at your door.

The last 6½ years, it has taken an even darker turn. Students of history are well aware that Richard Nixon attempted to use the

IRS to target his political enemies. That was wrong. It was an abuse of power. It is to the credit of the professionals at the IRS that they refused President Nixon's demands that the IRS be turned into a political weapon.

The last 6½ years, unfortunately, the IRS did not demonstrate that same courage, that same integrity, that same willingness to stand up to political demands. The available evidence indicates that not only did the Obama administration attempt to use the IRS to silence, to punish its political enemies, but the Obama administration succeeded in doing so.

When Richard Nixon abused his power, he was rightly condemned by both parties for an abuse of power. Indeed, in the early days of the IRS scandal, the same was true of the Obama administration. On the day that the Inspector General report of the Treasury Department broke, President Obama said he was outraged. He said, "I am angry, and the American people have a right to be angry as well."

I do not say this often, but I agree emphatically with President Obama. The American people have a right to be angry when an instrument of the Federal Government is used as a partisan cudgel to punish, to silence citizens that dare speak out against their Government, that dare take a differing policy view than the current party in power.

Yet although the American people had a right to be angry, many months have passed, years have passed, and not one single person has been indicted. Years have passed, and many of the victims of illegal targeting have yet to be interviewed.

Some might think that is curious. If the President of the United States was telling the truth when he said he was angry, one would expect action from prosecutors. Yet subsequently the rather stunning news broke that the Obama Justice Department put in charge of the investigation a major Democratic donor who had given over $6,000 personally to President Obama and the Democrats.

Wonder of wonder, marvel of marvels, when you ask a major Democrat donor to investigate whether the IRS is targeting the political enemies of the Obama White House, nothing happens.

Twice we have seen Lois Lerner come before the U.S. Congress, raise her hand, and plead the Fifth. Now, that is her right under the Constitution, under the Bill of Rights. It is worth understanding what that means. When you are pleading the Fifth, you are saying, "If I answer your questions, I may well implicate myself in criminal conduct." A senior official of the IRS twice saying, "If I answer your questions, I could end up in the slammer."

Anyone who cares about integrity in Government should be horrified at senior Government officials saying, "I cannot tell you what I did because criminal liability may result."

Yet those protestations of how angry the President was, how angry the American people should have been, somehow faded into the mist. With a pattern we have seen of scandal after scandal after scandal of this administration, on day one the President always says he is angry. Then the next step kicks in. The administration begins stonewalling, begins denying witnesses, begins resisting turning over documents, begins suddenly saying, "We have lost Lois Lerner's emails."

Wonder of wonder, do not expect a Government agency to actually keep records of emails being sent by senior Government officials. "We have destroyed the hard drives." I have to say Richard Nixon's ghost must have been smiling at that protestation. Tricky Dick understood well destroying emails. In his day, it was erasing tape. It was much the same. We should expect accountability from our Government, and we should expect to know the extent to which the Federal Government continues to target those who appear to be the political enemies of the President.

There is a reason there is a growing human cry across this country to abolish the IRS altogether. Part of it is simply the abuses of the Tax Code, the burdens on job creation, the burdens on people struggling to achieve the American dream. Part of it is the complexity that nobody, it seems, understands fully what the Tax Code says. Even those with advanced professional training have to hire specialized accountants to keep up with the vast complexity. The real reason why more and more Americans in all 50 States are saying, "Enough is enough," is we should not have a Federal Government agency that becomes an intimidator going after citizens, going after citizen groups, violating their First Amendment right.

No politician has the right to use the machinery of the executive branch to target their political enemies. When Richard Nixon did it, it was wrong, and he rightly resigned from the Presidency in disgrace for his abuse of power.

I am reminded of noted liberal constitutional law professor, Jonathan Turley, who voted for President Obama in 2008—he is no conservative—and yet Professor Turley has told Congress that President Obama has become the embodiment of the imperial Presidency, that Barack Obama has become the President that Richard Milhous Nixon always wished he could be.

This hearing is about ensuring accountability at the IRS, both for past misconduct that continues to be covered up, to be stonewalled, that continues to lack any accountability, and also for current and future practice, to answer the question, what is happening today? Right now, who is being targeted by the Obama IRS? Is it limited to 501(c)(3) and (c)(4) groups? Or is it targeted to individuals?

I cannot tell you how many individuals across this country, as I travel the country, relay stories that say, you know, "I got involved in the last election, the 2012 election. I supported, I raised money for Mitt Romney, I raised money for Rick Perry, I raised money for some Republican candidate. I have been in business 20, 30, 40 years. I have never been audited. As soon as my name was published in the papers, within months the tax man comes knocking."

One or two anecdotal stories does not prove a pattern. It is incumbent on the Senate, it is incumbent on Congress to ask: Is there a pattern? If the IRS has become a partisan arm of the Democratic National Committee, there can be no stronger argument for ending the IRS as we know it so that no administration, Democrat or Republican, can use the IRS to target its political opponents.

If a Republican President did this, as Richard Nixon tried, I can assure you I would be every bit as loud and clear that it is an abuse of power. For a Democratic administration to do this and to find Democratic defenders of this abuse of power is profoundly dan-

gerous to the liberty that is the basis for the incredible miracle we call the United States of America.

Senator Coons.

**OPENING STATEMENT OF HON. CHRISTOPHER A. COONS, A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator COONS. Thank you, Mr. Chairman.

Let me just state at the outset that the IRS activity that is at the root of this hearing was unacceptable and unfortunate. American citizens ought to be confident that their Government will not target them for special scrutiny because of their names or their political views.

I would also note that the Treasury Inspector General of Tax Administration has concluded that the IRS did not willfully withhold or destroy documents, and many of the allegations just made at the opening of this hearing strike me as a rehashing of complex conspiracy theories already thoroughly investigated and dismissed by the Inspector General himself.

In 2010, a narrow five-Justice majority of the Supreme Court decided *Citizens United*, which overturned multiple Supreme Court precedents and threw open the door to unfettered campaign spending by corporations and mega donors. This decision led to a significant increase in political and campaign spending, with 30 percent more being spent by outside groups in the 2010 midterms than in 2008, and then in 2012 an increase of six-fold over 2008.

While much of this spending was done independently or through 527s or super PACs, much of it was also done through 501(c)(4) organizations. At first, one might think 501(c)(4)'s as nonprofit social welfare organizations exist wholly apart from the disputed campaign finance industrial complex. Such organizations, after all, are required by statute to be, quote, "operated exclusively for the promotion of social welfare," close quote. IRS regulations specify that social welfare activities do not include campaign activity.

Rather than interpreting the statutory requirements for such organizations in a strict and technical fashion, however, the IRS has for many, many years decided to permit some political activity by 501(c)(4)'s, provided that their primary purpose is the promotion of social welfare.

The world we live in is one where almost every PAC now has an associated 501(c)(4) which is permitted to engage in some electioneering activity as long as it does not do too much of it and can, thus, operate totally tax free and totally outside of the public disclosure regime that is virtually all that remains of the now tatters of our campaign finance laws.

The IRS in this regard has an exceptionally difficult job to do. The Supreme Court, having dismantled the heart of the McCain-Feingold campaign finance reform bill, has left the IRS to stand in the place of the Federal Election Commission. Thousands of groups present themselves as though they exist to promote social welfare, but really in many cases they actually exist to funnel secret dollars around the country to influence elections.

Many have seized upon the use of inappropriate criteria by the IRS to single out 501(c)(4) applicant organizations for further review as compelling evidence that the IRS is, as I think has just

been suggested, an evil organization. You have heard the Chairman accuse the administration of planning this activity at the highest levels and of having been caught and of engaging in a far-ranging scheme to cover up that involvement. These are very serious allegations. They are also unfounded allegations.

The Republican Inspector General has found not one shred of evidence that the inappropriate targeting of applicant organizations was directed by individuals or entities in Washington. IRS field personnel have uniformly denied any involvement by supervisors in Washington or the White House.

The supervisor of the screening agent who first utilized 9/12 and Tea Party to screen organizations for further review was himself a self-identified conservative Republican who has said, and I quote, "I do not believe that the screening of these cases had anything to do other than with consistency and identifying issues that needed further development."

An IRS specialist in Washington called the idea that there was White House involvement in directing this, quote, "laughable." Progressive groups as well as conservative ones were screened for further development investigation of their files. Any disparity in the raw numbers of organizations on either side that were targeted is likely a result of the fact that, in 2010 to 2013, more than five times as many conservative as liberal groups filed for tax-exempt status under this Code section.

Much has been made of the great difficulty the IRS had had producing emails from relevant custodians over the relevant time period. My understanding through discussions with Commissioner Koskinen is that the total number of emails available to the IRS but not initially produced is actually quite small, and that none of these emails suggest a politically motivated conspiracy on the part of the IRS or the administration. I suspect we will develop that further in these discussions today.

I will just note again that the Treasury Inspector General has concluded the IRS did not willfully withhold or destroy documents. Our campaign finance laws, frankly, are broken. More and more power is being concentrated by super-advantaged donors who are able to exert influence through the propagation of shadowy organizations that lurk in the vague rules that govern 501(c)(4) organizations. The actions by IRS at the center of this hearing and about which many Americans are rightfully upset and concerned were not the result of malicious intent but, rather, the result of workers attempting to administer an unworkable system that has no clear lines and, frankly, makes little logical sense.

Rather than trying to score political points by distorting a set of unfortunate but basically honest mistakes by civil servants, we should instead ask ourselves the question: How is it that we have all allowed such an irrational system to continue to exist? We need clearer rules, rules that define which activities are properly viewed as social welfare, and which are properly viewed as political. We need rules that put organizations on fair notice, and we need rules the IRS can administer.

I hope that the witnesses today will be able to shed some light on this question: How do we reform the Tax Code and the rules so that all Americans once again can regain confidence that the IRS

is operating fairly, transparently, and without favor to enforce the laws that Congress has enacted?

Thank you. Thank you, Mr. Chairman.

Chairman CRUZ. Thank you, Senator Coons.

I ask Mr. Koskinen to please stand, raise your right hand. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KOSKINEN. I do.

[Witness is sworn in.]

Chairman CRUZ. Thank you, Mr. Koskinen. I welcome you to this Committee. I thank you for coming to testify.

The Honorable John Koskinen is the 48th Commissioner of the Internal Revenue Service. Prior to his appointment, Commissioner Koskinen served as the nonexecutive chairman of Freddie Mac from 2008 to 2012, and its acting chief executive, of course, in 2009. Previously, he served as president of the U.S. Soccer Foundation, Deputy Mayor and City Administrator of Washington, DC, and Deputy Director for Management at the Office of Management and Budget. He began his legal career clerking for Chief Judge David L. Bazelon on the U.S. Court of Appeals for the D.C. Circuit. Mr. Koskinen holds a bachelor's degree from Duke University and a law degree from Yale Law School, something for which I am sure we can all forgive him.

[Laughter.]

Chairman CRUZ. Mr. Koskinen.

**STATEMENT OF HON. JOHN KOSKINEN,**

**COMMISSIONER, INTERNAL REVENUE SERVICE,**
**WASHINGTON, DC**

Commissioner KOSKINEN. Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee, thank you for the opportunity to discuss the work the IRS has been doing to correct the management mistakes associated with the determination process for tax-exempt status 2 years ago. Let me reiterate my belief that the IRS must continue to do everything possible to make sure all individuals and organizations can be confident they will be treated fairly in their dealings with this agency. They need to know they will receive fair unbiased treatment, regardless of their political affiliation, their position on contentious political issues, or whom they supported in the last election.

Even with our declining resources, the IRS will still audit over 1 million individual taxpayers this year. When someone hears from us regarding their tax return, they need to understand that it is only because of something that is or should be in their return and not other factors. If someone else has the same issue on their return, they will hear from us as well, within the limits of our budget resources.

The situation described by the Inspector General in his May 2013 report should never have happened, and we are doing everything possible to ensure that the mistakes referenced in that report do not happen again. As part of our work to move forward, we have implemented all of the recommendations of the Inspector General

made in his report. The IG noted our efforts in a follow-up report issued in March of this year. These are important steps.

For example, we have eliminated the use of inappropriate criteria. We have expedited the processing of section 501(c)(4) applications. We have developed new training for employees in the determination area. We have established a new process for documenting the reasons why applications are chosen for further review. We have instituted a quality review process to ensure that unnecessary or improper information requests are not sent to applicants.

We have also reduced the inventory of section 501(c)(4) applications, including the group of 145 cases in the priority backlog that were pending for 120 days or more as of May 2013. As of last month, 140 of these cases, or 97 percent of them, have been closed.

In addition, the Department of the Treasury and IRS have begun the process of drafting guidance on how to measure social welfare and nonsocial welfare activities of section 501(c)(4) organizations. Our efforts to develop this guidance have been greatly informed by the more than 160,000 public comments received in response to the 2013 proposed regulations.

We asked for and received comments on several issues, including three major ones: first, the proposed definition of "political campaign activity"; second, which tax-exempt organizations the definition should apply to; and, third, the amount of political activity an organization can engage in consistent with its particular tax-exempt status. Our goal is to provide guidance that is clear, fair to everyone, and easy to administer.

The investigations into the determination process for tax-exempt status also raised another issue that we have been working to address, that is, the need to improve the IRS' records retention practices. The IRS produced well over 1 million pages of documents to comply with document requests from the 7 investigations ongoing into this event. Our antiquated system for storing emails made the process of retrieving those records extremely difficult and time-consuming. Efforts are now underway to develop a more modern email retention system at the IRS. This will allow the agency to more easily archive, search, and protect electronic official records.

Once a modern system is established, the IRS should be able to respond to even complex congressional inquiries much more efficiently and effectively than in the past. Our goal is to ensure that we have the ability to obtain official records of the agency in a reliable and consistent manner.

Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee, this concludes my testimony, and I would be happy to take your questions.

[The prepared statement of Commissioner Koskinen appears as a submission for the record.]

Chairman CRUZ. Thank you very much, Mr. Koskinen. I would like to start by just asking: Was President Obama wrong to say, quote, "Americans have a right to be angry about it, and I am angry about it?"

Commissioner KOSKINEN. Yes.

Chairman CRUZ. In the 806 days that have followed since this scandal broke, through the Treasury Department's Inspector General's report, has anyone been indicted?

Commissioner KOSKINEN. No.

Chairman CRUZ. Has anyone been fired?

Commissioner KOSKINEN. There have been—at this point the five major people, starting with the Commissioner on down through the Director of Exempt Organizations, are all new. Everyone else is gone.

Chairman CRUZ. Was anyone fired for misconduct?

Commissioner KOSKINEN. Starting with the Acting Commissioner, they were all dismissed—not all of them. I am sorry. The Acting Commissioner was, some retired.

Chairman CRUZ. Let me ask you, based on your assessment, were citizens wrongly targeted for their political beliefs?

Commissioner KOSKINEN. I have said in the past that the process of selecting for determination review organizations simply by the name of their—by the nature of their name was totally inappropriate, it should not have happened, and it should not happen again.

Chairman CRUZ. I appreciate that. Let me ask the question again: Were citizens wrongfully targeted for their political beliefs?

Commissioner KOSKINEN. At this point, that is the subject of several investigations going on. The Senate Finance Committee will issue its report sometime in the next 2 weeks. That has been the subject of their investigation. They are the ones making that determination. I have not made a separate investigation.

Chairman CRUZ. My friend Senator Coons suggested that this was all—I am paraphrasing here—much ado about nothing, that this had all been resolved and there is nothing to see here. Yet, I would note in September of last year, the Senate Committee on Homeland Security and Governmental Affairs, the Permanent Subcommittee on Investigations, then Chaired by Democratic Senator Tom Carper, found that conservative groups were targeted? And at this point, without objection, I am going to move the full report of that Committee, all 228 pages, into the record.

[The information appears as a submission for the record.]

The report's Majority Staff Executive Summary found, among other things, that not only did, quote, "the IRS use inappropriate screening criteria when it flagged for increased scrutiny applications based on the applicant's names or political views rather than direct evidence of their involvement with campaign activities," but that it also was responsible for, quote, "significant program mismanagement, including years-long delays in processing 501(c)(4) applications and inappropriate, intrusive, and burdensome questions of groups."

Indeed, I will point out the raw numbers: 100 percent of all tax-exempt applications with the word "Tea Party," "patriots," or "9/12" in their names were processed as political cases, compared to 30 percent of applications with "progressive" in their name.

There were 298 total political advocacy cases; 83 percent of those—that translates to 248 out of those 298 of these groups—were, quote, "right-leaning organizations."

Mr. Koskinen, does that strike you as anything other than targeting citizen groups based on their political views?

Commissioner KOSKINEN. As the report you cited noted, there were inappropriate criteria used, and we have agreed with that

and said you should never be selected for review simply on the basis of your name. The question of whether there was, quote, "targeting," and whether this was directed for political purposes or by someone outside the IRS as the subject of the investigation, thus far my understanding is there has been no evidence that there is any outside influence on the IRS in this area.

Chairman CRUZ. Were senior IRS officials motivated by partisan political animus?

Commissioner KOSKINEN. That is what the investigations are about. That report that you cited did not find that. The IG's report did not find that.

Chairman CRUZ. Are you aware of any information to suggest that senior IRS officials were motivated by partisan political animus?

Commissioner KOSKINEN. I have not reviewed the information that has been provided. We have provide over 1,300,000 documents. I have not reviewed——

Chairman CRUZ. I would suggest that there is nothing more important for you to review, and willful blindness is not an acceptable approach. I would point out that——

Commissioner KOSKINEN. I would object to the criterion of "willful blindness." We have——

Chairman CRUZ. You said you have not reviewed the evidence.

Commissioner KOSKINEN. Right, because we have been asked by investigators, particularly the Inspector General, not to do an investigation, not to interfere with their work, and we have, in fact, therefore, avoided pursuing any discussions with IRS employees so that we would not interfere or look like we were trying to prejudice those investigations. That is anything but "willful blindness."

Chairman CRUZ. I will point out that among the Lois Lerner emails that have been made public, Ms. Lerner, in November 2012, referred to conservatives as, quote, "our own crazies," and compared them to, quote, "terrorists."

I will point out as well, in February 2011, Ms. Lerner stated, quote, "Tea Party is very dangerous." In your judgment, does that strike you as partisan political animus?

Commissioner KOSKINEN. As your information noted, 30 percent of the groups called "progressives" were also selected inappropriately for review.

Chairman CRUZ. I will ask the question again. Do those descriptions from a senior Government official strike you as partisan political animus?

Commissioner KOSKINEN. Political animus? It demonstrates clearly her political view. It does not demonstrate whether she encouraged anyone to take any action based on her views.

Chairman CRUZ. I have introduced legislation in Congress to make it a Federal criminal offense for any officer or employee of the Internal Revenue Service, regardless of whether the officer or employee is acting under color of law, to willfully act with the intent to injure, oppress, threaten, intimidate, or single out and subject to undue scrutiny for the purpose of harassment any person or organization in any State based solely or primarily on the political, economic, or social positions held or expressed by the person or organization.

In your judgment, should targeting an individual based on their political views be a Federal crime?

Commissioner KOSKINEN. That is a decision of the Congress, but I would certainly agree that anyone who does that in the IRS should be dismissed.

Chairman CRUZ. Would you agree it should be a criminal offense for the IRS to use the full Government power entrusted to it to target citizens for expressing their political views?

Commissioner KOSKINEN. I would agree that citizens should never be targeted for expressing their views, and if Congress decided to make that criminal offense, we would certainly support that.

Chairman CRUZ. Very good. Senator Coons.

Senator COONS. Commissioner Koskinen, thank you for appearing before us here today.

Just to review, you became the Commissioner of the IRS at a time when it had had some significant and serious problems. How many times have you now appeared to testify about this 501(c)(4) controversy before Congress?

Commissioner KOSKINEN. Virtually every time I testify, it has some elements of (c)(4) to it. This is almost my 30th hearing in my year and a half.

Senator COONS. You have never turned down a request to testify, have you?

Commissioner KOSKINEN. Never.

Senator COONS. Roughly how many documents have you turned over in response to the TIGTA investigations that you just referenced?

Commissioner KOSKINEN. As I noted, we have turned over to the investigators 1,300,000 documents.

Senator COONS. Roughly how many of the emails from Ms. Lerner did you produce?

Commissioner KOSKINEN. We produced 78,000, including 24,000 from the period of her hard drive crash.

Senator COONS. TIGTA is the Treasury Department Inspector General for Tax. How many of Ms. Lerner's emails has TIGTA found that you did not produce?

Commissioner KOSKINEN. The Inspector General found 1,000, which he noted had nothing to do with the investigation.

Senator COONS. None of those emails were found to show evidence of a politically motivated plot by the administration or IRS senior leadership. Is that correct?

Commissioner KOSKINEN. That is correct.

Senator COONS. Let me also just make sure I understand. The Inspector General is charged with looking into and investigating the very troubling, concerning, even angering allegations that there was inappropriate targeting based on the names, just the filed names of applicants for 501(c)(4)'s. It was the Inspector General that urged you not to conduct your own separate investigation, and that is the reason that TIGTA has been the primary leader of investigations within the IRS into the resolution of this matter rather than you as Commissioner. Is that correct?

Commissioner KOSKINEN. That is correct. There are also six other investigations going on, and we have agreed with all of them

that we also would not interfere with their investigations, we would not try to talk to any of the witnesses they wanted to talk to before they did.

Senator COONS. Has the Inspector General released a report with concrete and specific recommendations about how to cure some of the management flaws that were revealed and how to deal with the outcome so far of this investigation of the handling of 501(c)(4) cases?

Commissioner KOSKINEN. Those were included in the Inspector General's report in May 2013.

Senator COONS. Have you complied with all nine of the recommendations in that report?

Commissioner KOSKINEN. We have complied with all of them. As I noted, one of them was that we should provide clearer guidance to (c)(4) organizations, and we are working on that one.

Senator COONS. Just to get to that point, if I could, Mr. Commissioner, the IRS Code says that (c)(4) organizations must be—this is in the Code—operated exclusively for social welfare, yet it is IRS regulations that say that campaign activity can occur as long as it is less than 50 percent. Is that correct?

Commissioner KOSKINEN. That is correct. The IRS regs say that as long as you are primarily a social welfare organization—and social welfare activities have been held not to include political campaigning—you are eligible to be and maintain status as a (c)(4).

Senator COONS. What are the benefits to an applicant of being a 501(c)(4)?

Commissioner KOSKINEN. Contributions are not tax deductible, earnings of the 501(c)(4) revenues are not taxes, and also donors are not publicly revealed.

Senator COONS. Did not the IRS attempt to clarify the rules for (c)(4) in 2013 in a rulemaking?

Commissioner KOSKINEN. A couple weeks before my confirmation hearing, they did put out regulations, draft regulations, which generated the 160,000 comments. They were controversial drafts.

Senator COONS. Can you just explain the general principles that you think any subsequent rulemaking ought to follow and give us some insight into the timing and direction of this important rulemaking effort?

Commissioner KOSKINEN. One of the significant questions we asked is to which (c) organizations, exempt organizations, should a definition of "political activity" apply. We had a lot of comments on all sides. When you look at the framework—statutory framework set up by the Congress, including (c)(3)'s, (4)'s, (5)'s, (6)'s, and 527s, it is clear that the Congress has set up a framework under which organizations can pick and choose where they want to fit. Therefore, we think that you ought to look at this as a full statutory framework rather than isolate any one particular organization.

If an organization wants to spend less than half of its money on politics, they can choose to become a (c)(4). If they want to spend more money on politics, if they would like to spend all their money on politics, they can do that and be tax exempt as a 527.

Our view is the IRS does not tell you where to go. The framework does that if we actually have a consistent definition across those terms. It should look at—a definition of "political activity"

should be clearer than it has been. It should not depend just on facts and circumstances. As we have looked at it, we are still working through all of this, but the congressional definitions have been for 527s, (c)(5)'s, and (c)(6)'s, primarily, so primarily it does appear to be the appropriate statutory interpretation.

Again, we are not trying, as we look at this to change significantly the rules under which people have been operating. What we are trying to change is the lack of clarity in terms of what counts as social welfare activity, what counts as political activity, what counts as business-related support, what counts as political activity. We think if we could provide clearer definitions, those running these organizations would have less to worry about somebody coming after the fact and disagreeing with them because of the quote "facts and circumstances."

Senator COONS. Last question for you. There has been some discussion about audits as well as the initial filing. The General Accounting Office, or GAO, which is widely recognized as an independent review arm of the Federal Government, conducted a study of the IRS' audit practices into exempt organizations. Has there been any suggestion through that that anybody in the IRS has targeted groups for auditing based on their perceived political viewpoint?

Commissioner KOSKINEN. The GAO report found no evidence of bias in the selection process for audits of exempt organizations. The IG has advised us, as they have done specific investigations, of no evidence of any bias.

On the other hand, GAO did have suggestions as to how we could improve our controls, and we are implementing those because we think it is important to ensure that the examination process also is fair to everyone and does not select anyone for review on the basis of who they are, who they voted for, what political rally they went to last week.

Senator COONS. Thank you, Commissioner.

Chairman CRUZ. Thank you. Senator Lee.

Senator LEE. Thank you very much, Mr. Chairman. Thank you for joining us today.

I want to ask you, as a general matter, is the decision of a Supreme Court case, a single decision by the Supreme Court, grounds for reevaluating which organizations might be eligible for tax-exempt status and which might not?

Commissioner KOSKINEN. It depends on what the Supreme Court says and what is at issue.

Senator LEE. Okay. One question I want to ask on this subject is: If you watched or are familiar with the Supreme Court's decision in the *Obergefell* case, during the oral argument in that case, Justice Alito asked a very important question of Solicitor General Verrilli. He asked him whether, in light of the Supreme Court's ruling 30 years ago in *Bob Jones University v. United States*, whether if the Supreme Court decided, as it now has decided, that there is a constitutional right to same-sex marriage, whether pursuant to that ruling in *Bob Jones University v. United States* the IRS might ultimately conclude that, for example, a religious college or a university might be denied its tax-exempt status on the basis that that religious college or university does not recognize same-sex

marriage, and on that basis might make a decision, for example, about eligibility for residing in housing for married students. He asked this question of Solicitor General Verrilli. In light of that, if we recognize a constitutional right to same-sex marriage, is there a risk of one of these colleges or universities losing their tax-exempt status?

Solicitor General Verrilli's response was chilling to many. He said, "That is going to be an issue, Justice Alito. That is certainly going to be an issue." He reiterated this three or four times. He seemed quite confident in his response.

I would ask you whether you share that view. Is that going to be an issue? Could that be an issue?

Commissioner KOSKINEN. The Chairman last week asked the same question in a letter asking for our response. We responded to the Chairman and we have responded publicly that at this time we see no basis for changing our examination criteria as a result of the Supreme Court case.

Senator LEE. Okay. When you say "at this time," is that meant to qualify or restrict your answer? Are you saying there is no basis upon which you could revisit tax-exempt status?

Commissioner KOSKINEN. At this time, there is no basis for us to revisit tax-exempt status on that grounds. We will continue, obviously, to ensure that those who enjoy tax-exempt status are still doing the work they said they were going to do, but that exam and those reviews will continue as they always have.

Senator LEE. I am still troubled by the fact that you preface all this with "at this time." Are you saying that you are holding open the possibility that at some future point the IRS might open that up, might revisit that question?

Commissioner KOSKINEN. It is a good point. I do not mean to leave uncertainty there. It is not the IRS' position to make public policy. We implement the laws as they stand. It is our view right now, in terms of the overall lay of the land, there is no basis for us at this point to make any change in our review policies or exam policies.

We cannot predict over the next years what is going to happen in terms of decisions that will be made about public policy, but those are not decisions we are going to make.

Senator LEE. Who would have to make those decisions about public policy if they were to be made?

Commissioner KOSKINEN. They would be legislative decisions. They would be court decisions. They would not be decisions by the Internal Revenue Service.

Senator LEE. Okay. That would need to be made by another branch of Government, certainly could not be made within the IRS, because this is a legislative decision as a policy matter. Is that correct?

Commissioner KOSKINEN. Correct, yes.

Senator LEE. To the extent that Solicitor General Verrilli was suggesting otherwise when he said, "That is certainly going to be an issue," he was mistaken?

Commissioner KOSKINEN. No, I think what—you would have to ask him, I guess. He could say better. He did not say——

Senator LEE. You would disagree with that characterization?

Commissioner KOSKINEN. Not necessarily. He was not saying I would be an issue with the IRS. I think what he was saying is over time, in other areas over time, public policy decisions have been made by courts and legislators that ultimately then did influence tax-exempt status. The *Bob Jones* case is one of those. That was not a case of policy made by the IRS. That was a case over 15 or 20 years of decisions made by courts and legislators.

Senator LEE. That was based on a determination made by the IRS. That was on the basis of an action—*Bob Jones University v. United States* involved a judicial challenge of a decision by the IRS that a particular university was no longer entitled to tax-exempt status.

Commissioner KOSKINEN. That is right.

Senator LEE. That was, in fact, made by the IRS, right?

Commissioner KOSKINEN. That was made by the IRS——

Senator LEE. Not by Congress.

Commissioner KOSKINEN [continuing]. By regulation, or I will accept—the regulation put out by the IRS before that case was based on decisions made by Congress and the courts, and everyone was given plenty of notice what the IRS interpretation was. There is no basis for us to issue such regulation at this time.

Senator LEE. There was no act of Congress requiring the action that IRS took in that case. The IRS took the action.

Commissioner KOSKINEN. There were court cases and legislative cases, actions, taken over a 20-year period before the IRS acted.

Senator LEE. Ultimately, that was not a decision made by Congress as to that particular university.

Commissioner KOSKINEN. Congress had passed various anti-discrimination laws, as had State courts had made rulings. All of those decisions were made by people outside the IRS. All we do is follow whatever the public policy that is set by other organizations.

Senator LEE. Okay. Mr. Chairman, I see my time has expired. I would like to point out, as I recall, in that case, the determination was made by the IRS. There was a finding made by the IRS that the university in question was no longer charitable and, therefore, no longer entitled to tax-exempt status.

It is not my intent to revisit that case. This is old caselaw going back more than 30 years. It is, however, my point to make that in this case we could be talking about IRS action that could occur.

Commissioner KOSKINEN. At this point, other actions would have to take place before the IRS would consider issuing a regulation, which would give people notice as to what we thought the public policy was, and then cases and exams would be conducted under that. At this point, as I say, those actions will have to be taken by others. It is not within the realm of the IRS to make those public policy choices.

Senator LEE. Okay. It could be preceded by legislation or perhaps regulation.

Commissioner KOSKINEN. It could be preceded by legislation or court cases. The regulation in that particular case simply reflected court cases and decisions that had been made by other agencies and reflected a public policy that had been adopted. It was not a policy decision by the IRS.

Senator LEE. Thank you, Mr. Chairman.

Chairman CRUZ. Thank you. Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman. Thank you for being here, Mr. Commissioner.

Just so—there is one aspect here I would like to ask a question. The story broke in May 2013, about the improper conduct involving the Internal Revenue Service, and it is my understanding in the more than 2 years that have transpired, you are testifying that either you or someone from the agency has testified before Congress more than 30 times?

Commissioner KOSKINEN. Correct.

Senator DURBIN. Produced more than 1,300,000 documents?

Commissioner KOSKINEN. Correct.

Senator DURBIN. I understand some 52 current and former employees have been interviewed?

Commissioner KOSKINEN. Yes.

Senator DURBIN. Do you have any idea how much this has cost taxpayers in terms of expenses by the IRS?

Commissioner KOSKINEN. We estimate both the hard costs and the employee costs are about $20 million.

Senator DURBIN. What has happened to the appropriations for the Internal Revenue Service in the last, say, 5 years?

Commissioner KOSKINEN. Over 5 years, every year the appropriation has been cut by a total from $1 billion to $2 billion.

Senator DURBIN. If you begin with the premise—and I think most Americans would—that organizations and people in the United States should pay the taxes that are legally required, what has been the situation with the IRS when it comes to holding fast to that principle—auditing where necessary to make sure that there is compliance and that those who legally pay their taxes are not necessarily harassed, but those who do not pay their taxes are held accountable?

Commissioner KOSKINEN. At this point we have 5,000 fewer revenue agents, revenue officers, and criminal investigators. The number of our exam audits in the field are going down. The number of our collections as a result of examination processes are going down.

Senator DURBIN. Is it fair to conclude, then, that some people, some organizations, that are not paying their proper taxes, their legally required taxes, are getting off the hook?

Commissioner KOSKINEN. Unfortunately, that is correct.

Senator DURBIN. Meanwhile, we call you back up here again for more testimony and more evidence on a case that is more than 2 years old that the IRS has spent some $20 million in complying with requests for information by Congress.

Commissioner KOSKINEN. That is correct.

Senator DURBIN. It appears, as my colleague Senator Coons says, that this started with a Supreme Court decision in *Citizens United*, but it really gets down to a question as to whether an organization can be exempt from paying taxes under our laws in the United States and can keep the sources of their money secret, confidential, closed if they qualify as a certain organization under the Internal Revenue Service Code. Is that correct?

Commissioner KOSKINEN. That is correct.

Senator DURBIN. It comes down to a basic question as to whether this organization is a social welfare organization operated exclusively for the promotion of social welfare. Is that correct?

Commissioner KOSKINEN. That is correct.

Senator DURBIN. A 1960 Treasury regulation interpreted that to mean the organization is primarily engaged in promoting in some way the common good and general welfare of the people of the community. Are you familiar with that?

Commissioner KOSKINEN. Yes.

Senator DURBIN. The regulation also states the 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. Is that also correct?

Commissioner KOSKINEN. That is correct.

Senator DURBIN. It appears to be, from what I have heard here today, a period when there were a large number of people applying to become one of these 501(c)(4) organizations.

Commissioner KOSKINEN. Yes.

Senator DURBIN. Do you recall the volume of organizations or people, applications coming forward after *Citizens United*?

Commissioner KOSKINEN. There were well over 100, close to 200, 250, who showed up across the spectrum asking for qualifications, determinations that they could be a (c)(4). I would note you can be a (c)(4) organization without getting a determination from us. You can set up a business and simply start filing the requisite annual reports.

Senator DURBIN. You have made it clear that you do not believe—and I share this belief—that a group should be targeted because their name suggests a political leaning or a political bias. Is that correct?

Commissioner KOSKINEN. That is absolutely correct.

Senator DURBIN. Does the IRS have any obligation to establish or determine whether an applicant, in fact, is eligible to be tax-exempt, that is, to escape liability in paying the laws of the United—taxes of the United States?

Commissioner KOSKINEN. It is our obligation to enforce the Tax Code, and I might note there is some indication abroad, while we are looking at new regulations, as if we are not going to be enforcing the Tax Code, and that could not be farther from the truth. The GAO, in effect, has reviewed our exam procedures and said they are appropriate, we need to improve our controls, and we are going to do that. We are not out of business. We will continue to operate under what we think are unclear but existing regulations that have been around for a long time on facts and circumstances, and we have an obligation to enforce the law.

Senator DURBIN. Mr. Commissioner, I have an impression and I want to know if you share it. The vast majority of Americans as individuals and organizations and companies do their best to pay their legally obligated taxes.

Commissioner KOSKINEN. That is our experience as well, and, in fact, we have tried to make it clear. If you are trying to be compliant, we are anxious to work with you. If you are having difficulties, you do not have to hire somebody off late-night TV to talk to us. We will talk with you, we will work with you. The people that we

chase are the people who are consciously deciding not to pay their taxes.

Senator DURBIN. I hope the chase continues, and I hope we give you the resources to do it.

Chairman CRUZ. Thank you. Senator Sessions.

Senator SESSIONS. Thank you.

Mr. Koskinen, I have great respect for the line officers in the IRS. As a Federal prosecutor, I always held them in high esteem and great respect. I am not questioning their fidelity, but what I am concerned about is the leadership of the IRS at a critical point in history using the power of that august institution for political ends. That is what President Nixon apparently—or his underlings—did, and they paid a great price for it. It is absolutely unacceptable, I think you would agree.

Commissioner KOSKINEN. I would agree.

Senator SESSIONS. With regard to the cost of this, we have not spent too much money trying to get to the bottom of this. Frankly, I do not think we have had the kind of cooperation from the President, from the agency, the Service, or the FBI or Department of Justice for that matter. There are real problems out here. We have not cleared the air.

The Tea Party sprang up at this time, and they requested what they were entitled to under the law, and they were pretty clearly targeted in a degree that was extraordinary. You said they were targeted because of their names. Apparently, if your name is conservative, one of the names in the title was conservative, "Tea Party" or "patriot," you got targeted. I think that leads us quite to believe that they were targeted for their political views more than left-leaning groups were targeted.

Mr. Koskinen, how often have you been to the White House since you have been in office?

Commissioner KOSKINEN. I have been, I think, three or four times. Most all of those were to meet with the Treasury Secretary and the Secretary of HHS to coordinate last fall the implementation of the back end of the Affordable Care Act.

Senator SESSIONS. That does not surprise me too much. There could be quite legitimate reasons for that. Lois Lerner, who was in charge of this program, apparently went to the White House 35 times. Does that strike you as odd?

Commissioner KOSKINEN. No. It depends what she was going for. There were numerous meetings in the White House throughout the period of the implementation, for instance, of the Affordable Care Act. The IRS has had——

Senator SESSIONS. She did not have the Affordable Care Act under her portfolio, did she? She had tax-exempt groups. Is that right?

Commissioner KOSKINEN. Right, I have no idea what she was doing. I had not realized she went 35 times.

Senator SESSIONS. You do not know who she talked to.

Commissioner KOSKINEN. I have no idea who she——

Senator SESSIONS. You do not know what was said in those conversations.

Commissioner KOSKINEN. I do not.

Senator SESSIONS. You acknowledge that there was an inappropriate targeting of tax-exempt groups and groups applying for tax-exempt status.

Commissioner KOSKINEN. There was an inappropriate selection. The question of whether they were targeted is the question that the investigators are looking at. Clearly, that inappropriate selection should not have happened. It should not have happened to conservative groups. It should not have happened to progressive groups. You should not be subject to special review because of the name of your organization or the activity of your organization.

Senator SESSIONS. You are exactly right about that. I do not think we have gotten to the bottom of it. That is what I am concerned about. I know we have had a number of hearings, but I do not think we have gotten there yet.

Do you think if the FBI was going to investigate—and they did investigate, did they not?

Commissioner KOSKINEN. To my understanding, yes, the FBI and the Justice Department are one of the investigations. There are four congressional investigations. The Inspector General has had two investigations.

Senator SESSIONS. Has the FBI notified you that the investigations are still ongoing? Or have they been concluded?

Commissioner KOSKINEN. We have had no information from the FBI either way.

Senator SESSIONS. I am very careful about how I conduct myself in these matters. I did have an opportunity to talk to Mr. Comey and suggested he talk to the victims of the activities from the IRS. Do you think it would be proper for the IRS to interview people who have had their tax-exempt status delayed or otherwise investigated improperly?

Commissioner KOSKINEN. I do not think we ought to be talking with them. I think we ought to do what we have done, which is proceed to promptly process their applications. We should talk to them to find out whatever we need to know. We obviously asked inappropriate questions and far too much irrelevant data from them in that timeframe, and that will not happen again.

Senator SESSIONS. I think we have got to get to the bottom of what happened. Watergate did not just say, "We are not going to see it happen again." They said, "Who did what when? Who knew what when?" We have not gotten to the bottom of that, and I am not happy that the FBI has not even investigated and interviewed some of the victims in my State who had their status delayed improperly, it appears.

Commissioner KOSKINEN. The Senate Finance Committee is one of the investigators, and they hopefully will put out their report, they said, sometime in the next couple weeks, and we will see what they have found.

Senator SESSIONS. They do not have grand jury power behind them.

With regard to the million pages you talked about providing to the FBI or to, I guess, other agencies, is it not a fact that Lois Lerner and Sarah Ingram sent the FBI 21 discs containing a million pages of taxpayers' filings focusing on the possible prosecution of conservative groups?

Commissioner KOSKINEN. My understanding is those discs, which are shared to the public—we distribute those to the public-—were shared with the Department of Justice.

Senator SESSIONS. They certainly did, and they were apparently calling on them—look, we all know what the situation was. The Tea Party had sprung up in America. The President was running for reelection. A lot of these groups, they seized upon the ability to establish these kind of organizations and seek a taxpaying tax status that they wanted to achieve. It was delayed and obstructed. I believe the, 20, 30-some-odd visits to the White House by Mrs. Lerner were not all innocent. I believe it had something to do with the election. I think we are in the real world here. Every Member of this body has to run for reelection. We know that those kind of actions should not take place.

I do not suppose that we know everything yet, but I do not think we have gotten to the bottom of it, and I hope that we will.

Thank you, Senator Cruz, for having this hearing.

Chairman CRUZ. Thank you. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Welcome, Commissioner Koskinen. I wanted to ask you about the forms that applicants to the Internal Revenue Service for 501(c)(4) or 501(c)(3) status are obliged to fill out. The application, is that a—that is an official Government form, correct?

Commissioner KOSKINEN. Yes.

Senator WHITEHOUSE. What are your expectations as to the truthfulness of the applicant's content in the submission of the form?

Commissioner KOSKINEN. They submit those forms as a general matter under penalty of perjury. They, in fact, submit those as if they accurately describe the activities they are about to engage in.

Senator WHITEHOUSE. If an organization says on a 1024 Form, for instance, or if it is a 501(c)(3), a 990 Form, that it has not engaged in any political activity or that it has no plans to engage in any political activity, what are your expectations with regard to that statement on those forms?

Commissioner KOSKINEN. Our expectation would be it would be like 90 percent of the 501(c)(4)'s, and that is, it would have nothing to do with politics. Those are local Kiwanis Clubs, Garden Clubs, a lot of social welfare activity organizations that have nothing to do with politics.

Senator WHITEHOUSE. You would expect that assertion to be a truthful one. Correct?

Commissioner KOSKINEN. You would.

Senator WHITEHOUSE. Let's say that you find out that the organization has, in fact, engaged in political activity after having filed the form indicating to the contrary. What takes place then?

Commissioner KOSKINEN. When we do examinations of exempt organizations, in particular, it is not an on-off switch. If you move over a line one way or another, we do not immediately say, well, you are no longer eligible to be tax-exempt. For most (c)(3)'s, (4)'s, (5)'s, and (6)'s we audit, if there is a problem, it is usually a modest one that they have done something wrong. Oftentimes, they forgot to pay their payroll taxes or something else. Our goal is to——

Senator WHITEHOUSE. On this question of claiming that you will not be involved in political activity——

Commissioner KOSKINEN. If they say they are not going to be involved in political activities and the organization is eligible to be, then we would put them on warning that they need to accurately and adequately report their activities. If, after being given that advice, they continue to operate, they continue not to perform appropriately, then we would consider revoking their exemption.

Senator WHITEHOUSE. Have you done that recently?

Commissioner KOSKINEN. I do not think I am aware of any tax-exempt organization in the last year or two that we have revoked, but we have, when we have reviewed them, given them guidance, education, encouraged them to make sure that they are following both the prescriptions and the laws and regulations, but also their representations as to what their activities would be.

Senator WHITEHOUSE. How do you engage with them once you have discovered that they are not conforming to the statement that they made to your organization under penalty of perjury?

Commissioner KOSKINEN. We will oftentimes, depending on the nature of the difference, correspond with them in writing. We will contact them, depending if it is a more egregious issue. On occasion, we will visit them. We will review their books and records if that is appropriate. It does not happen often. Generally, our review of tax-exempt organizations have to do with failure to pay employee taxes, failure to pay unrelated business income taxes, or defalcations where there has been private inurement as a result of misbehavior by an executive.

Senator WHITEHOUSE. Is it important that organizations who apply to the IRS for one of these types of status tell the truth to you about their political activity? If so, why is that important?

Commissioner KOSKINEN. It is important to us because, as I said earlier, Congress has set up a framework for tax exemption that allows organizations to decide where in that framework they would fit, but they ultimately are getting the benefit of a tax exemption, either on their income or, if they are a 501(c)(3), contributions are tax deductible to the donor. It is important for them to fit within the framework that Congress set up; otherwise, they are not eligible for those tax benefits.

Senator WHITEHOUSE. Are you familiar at all with 18 U.S.C. § 1001, the false statement statute?

Commissioner KOSKINEN. I know about it generally.

Senator WHITEHOUSE. Do you know enough about it to know whether or not Form 1024 and Form 990 qualify as Federal forms that are subject to its strictures against filing false statements?

Commissioner KOSKINEN. I would assume they are, but I do not know that for a fact.

Senator WHITEHOUSE. Okay. I will leave it at that. Thank you very much.

Chairman CRUZ. Thank you. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

Regarding 501(c)(3)'s and 501(c)(4)'s and focusing for the moment on how the IRS will monitor the political activity of 501(c)(4)'s, organizations that will be active in the coming election, I take it that regulations are necessary for the IRS to do its job concerning

501(c)(4)'s, and the IRS has indicated that regulations defining political activity are unlikely to be introduced until after the 2016 election. Is that correct?

Commissioner KOSKINEN. Those would be the updated regulations. There are regulations that exist now that have been in effect since 1959 that still guide us in our examinations.

Senator BLUMENTHAL. Was that 1959?

Commissioner KOSKINEN. 1959. The existing regulations talking about judging political activities on a facts and circumstances basis have been out there that long. The goal in response to the Inspector General was to make those regulations clearer so there would be less doubt, less concern on all parties' parts as to what counts and does not count.

Senator BLUMENTHAL. If those regulations are not released before the election, does that not create enforcement problems for the IRS?

Commissioner KOSKINEN. No. That is what I said. There is a misimpression that while we are drafting updated or new regulations that we simply do not have any authority. We actually continue to have the authority we have always had for the last 50 years under the existing regulations, and our intention is to continue to discharge our obligation to enforce the tax law.

Senator BLUMENTHAL. Will the new regulations be different from the ones that exist now?

Commissioner KOSKINEN. We are working hard in response especially with the benefit of the advice we have gotten from a lot of organizations to make them clearer, easier to understand, and easier for us to enforce.

Senator BLUMENTHAL. They are going to be the same substantively, just clearer?

Commissioner KOSKINEN. They will basically—as a friend of mine says, we are not trying to adjust the strike zone. We are trying to dust off home plate and make it clearer, what fits within the definition of "political activity" and what does not, and to whom it does apply.

Senator BLUMENTHAL. Okay. I would say that might make the strike zone slightly different. It is not just looking down at home plate. It is also looking at the other features of the strike zone. Would you not agree?

Commissioner KOSKINEN. Yes. We need to, as I say—the biggest change, if there is one, will be to make it clear to everyone that there is a statutory framework set up by Congress that runs from the 501(c)(3)'s through the 527s. Organizations can pick where they want to be, but we hope that we will be able to provide clearer guidance, particularly with regard to political activity, as to what counts and what does not count.

Senator BLUMENTHAL. You anticipate no problems in the enforcement of the existing regulations to 501(c)(4) organizations?

Commissioner KOSKINEN. We will continue to enforce the existing regulations. The only problem is I think the Inspector General is right. Purely a facts and circumstances test, even with all the examples we provided, provides less clarity than we think is important and necessary, but we will live with the regulations we have until new regulations are in force.

Senator BLUMENTHAL. There is talk—and, in fact, more than talk, there are proposals to, in effect outside—outsource part of IRS tax enforcement to private debt collectors. How would privatizing IRS enforcement in the highway bill, for example, affect the IRS' ability to effectively collect payments?

Commissioner KOSKINEN. We have tried that twice before, and notwithstanding the projections that you would make more money that way, the Government did not make more money. It complicates our life because we have to spend a lot of time making sure that there is not abuse of taxpayers by those tax collectors.

In the present day and age, it is even more complicated than it was in those two previous circumstances because one of the most prevalent tax scams right now is people calling and masquerading as if they are from the IRS, threatening people, causing them to make improper payments to criminals, provide criminals with personal information.

Now, if you suddenly have private debt collectors calling up saying they are from the IRS, they are going to run into the work that we and the Inspector General and everybody else has had, warning taxpayers that, you know, we do not—if you are surprised to hear from us, you are not hearing from us. There is going to be more difficulty for somebody from the private sector trying to collect taxes.

Senator BLUMENTHAL. Which goes to my next and final question relating to calls that ordinary taxpayers and people may receive from people, mostly con artists, purporting to be from the IRS. Have you detected an increase in the frequency of those kinds of scams—"I am from the IRS. We need to know your Social Security number"?

Commissioner KOSKINEN. It is a rampant scam for the last year and a half. The Inspector General has 600,000 reports of those scams. We have been trying to say if you are surprised to hear from us, you are not hearing from us. We write you first. You will get several notices from us.

Second, when we call you, we will never threaten you. We will never tell you to make a payment immediately. We will never tell you to put it on a debit card. We will never tell you to mail it to some post office box that you have never heard of.

Senator BLUMENTHAL. What will you tell them to do? What should they expect?

Commissioner KOSKINEN. What they should expect is they should get a notice from us, a letter explaining what the audit or the request is, why we think there is an issue on their return. We advise them of their rights to appeal if they disagree. We encourage them to make payments. We provide installment payment opportunities as well for them. But they——

Senator BLUMENTHAL. Do you do that on the phone, or do you invite them in?

Commissioner KOSKINEN. We will do that by letter, we will do it by phone, and ultimately, we will do it in person if we move through the entire process.

Senator BLUMENTHAL. Thank you very much. Thank you for your service.

Chairman CRUZ. Thank you very much.

Mr. Koskinen, when was the political leadership at the IRS first aware of the improper targeting of citizens?

Commissioner KOSKINEN. My understanding is that Lois Lerner knew of what were called "be on the lookout lists" or "BOLO lists" sometime in the 2012 period.

Chairman CRUZ. When was the political leadership at the Department of Treasury aware of it?

Commissioner KOSKINEN. I have no idea.

Chairman CRUZ. When was the political leadership at the White House aware of it?

Mr. KOSKINEN. I have no idea. This all pre-dates my appearance on the scene.

Chairman CRUZ. The public revelation of this did not occur until 2013, after the 2012 election. Is that correct?

Commissioner KOSKINEN. That is correct.

Chairman CRUZ. What can you tell us—Mr. William Wilkins, the Chief Counsel of the IRS, on April 23, 2012, met with President Obama and 12 others in the Roosevelt Room. Now, tax analysts have claimed that meeting was a photo op, and yet the meeting lasted 7 hours. Wilkins checked in at 3:45 p.m.; he left at 11:09 p.m. The IRS changed the targeting criteria 2 days later.

What can you tell us about that meeting with the President of the United States?

Commissioner KOSKINEN. I have no information about that meeting.

Chairman CRUZ. All right. Let's shift to something else. The IRS demanded of one citizens group, the Coalition for Life of Iowa, that they tell the IRS the content of their prayers. Is it appropriate for the IRS to demand of citizens they share the content of their prayers?

Commissioner KOSKINEN. I think that that sounds totally inappropriate and should not happen.

Chairman CRUZ. The IRS also demanded that each member of the Coalition for Life send a signed declaration that they would not picket Planned Parenthood. Is it appropriate for the IRS to demand of citizen groups that they pledge not to exercise their free speech rights?

Commissioner KOSKINEN. Absolutely not.

Chairman CRUZ. Is the IRS still doing it?

Commissioner KOSKINEN. Absolutely not.

Chairman CRUZ. So, that is not being done? There will not be any testimony from any citizens groups that the current IRS is making similar demands?

Commissioner KOSKINEN. If they are, it will be the first I hear of it, and we will pursue that immediately because we have made it clear that we should not have any interest whatsoever in whatever your issue is that you are advocating for. Issue advocacy is part of social welfare. People are advocating on issues, on both sides of many controversial issues. We encourage that. That is the whole purpose of the social welfare—part of the purpose. There are a lot of Kiwanis Clubs. Basically we support that. We should not be indicating any preference as to how people exercise their right to advocate on behalf of either side of any issue.

Chairman CRUZ. Are you willing to apologize on behalf of the IRS to demanding of a citizen group the content of their prayers?

Commissioner KOSKINEN. I already have apologized to anyone who was inappropriately selected for inappropriate questions. I have apologized to those who were stuck in the process for an inordinate amount of time. No one should have to wait for 2 years to get an answer. I would note you could get—you can be a (c)(4) and go out and you do not need our determination, but the reason people want determinations to some extent is because the law is unclear enough that they would like to have some representation from the IRS that what they are planning to do is all right and within the realm, and that is appropriate. We have apologized, and I would apologize again today. People should not be treated that way.

Chairman CRUZ. Can you tell the Committee why the IRS settled with the National Organization of Marriage for $50,000 in taxpayer money for wrongfully giving their confidential IRS documents to an individual who was working with the Obama Presidential campaign?

Commissioner KOSKINEN. I do not know anything about that particular case.

Chairman CRUZ. I would ask you to follow up with this Committee in writing and to explain why the IRS gave confidential information to an individual who was working with the Presidential campaign as a partisan operative.

Let me ask a different question. The lead investigator at the Department of Justice of this scandal is a major Democratic donor, has given over $6,000 to President Obama and Democrats. Are you comfortable with this scandal being investigated by a major Democratic donor?

Commissioner KOSKINEN. It is not my position to make a determination who, whether it is in the congressional investigations, the IG investigation, or the Department of Justice investigation, is doing the investigation. We have supported all of them.

Chairman CRUZ. I would think as the Commissioner you would be concerned about the integrity of the IRS. Have you asked either Attorney General Holder or Attorney General Lynch for a special prosecutor who, at a very minimum, is not a major Democratic donor?

Commissioner KOSKINEN. I have had no conversations with either of them about this.

Chairman CRUZ. All right. Let me ask one additional question or a couple of additional questions on a different line. I mentioned in my opening that I have received numerous anecdotal reports from individuals who became donors or bundlers for Republican Presidential candidates who subsequently found for the first time in their lives they were the target of IRS audits.

Of the individuals who were publicly identified as bundlers for the John McCain 2008 Presidential campaign, do you know what percentage of those individuals were audited?

Commissioner KOSKINEN. I do not.

Chairman CRUZ. Do you know what percentage of the 2008 Obama campaign bundlers were audited?

Commissioner KOSKINEN. I do not.

Chairman CRUZ. In 2012, do you know what percentage of the bundlers for Mitt Romney were audited?

Commissioner KOSKINEN. I do not.

Chairman CRUZ. Do you know what percentage of the bundlers for President Obama's campaign were audited?

Commissioner KOSKINEN. No.

Chairman CRUZ. I am going to follow up with a letter asking you to provide this Committee that information, not individual tax returns but the aggregate numbers, the percentages of the publicly released lists of bundlers for each of those campaigns.

Commissioner KOSKINEN. Right. As I have noted, we will do a million audits this year, even with the constrained resources. Those will include people active in politics on both sides of the political spectrum, people who have never been involved in politics, people who go to rallies, people who organize, people who demonstrate. The only reason we are contacting them—and our process has been reviewed. GAO has been reviewing it. GAO is issuing a report today or tomorrow on our exam selection process with suggestions of how to make it better but finding no examples of anyone who was improperly selected for an audit. We take this very seriously.

Chairman CRUZ. I am glad you take it seriously. My question here is not focused on groups and 501(c)(4) or (c)(3) applications. It is individuals.

Commissioner KOSKINEN. The million audits are going to be of individuals, and some of them will be Democrats, some will be Republicans. Some go to church, some do not. None of that makes any difference.

Chairman CRUZ. Will you commit to this Committee to provide the aggregate percentages of the bundlers on each side in our follow up correspondence?

Commissioner KOSKINEN. Again, we do not track people by whether they are bundlers from one political organization or——

Chairman CRUZ. We will provide the names, and I am asking, of these publicly identified names, what percentage was audited on the Republican side and what percentage on the Democrat side. If the percentages are roughly equal, that will be beneficial to the IRS. If they are not, it will naturally raise subsequent questions. I do not know the answer to this question——

Commissioner KOSKINEN. I do not either.

Chairman CRUZ. It is within the control of the IRS.

Commissioner KOSKINEN. The only caveat I will give you is we have a statutory criminal law that says we cannot give out individual taxpayer information, so we will have to figure out if there is a way we can aggregate it so it is not taxpayer information.

Chairman CRUZ. That is why I am asking for aggregate data, not any individuals, and simply a percentage of each of the publicly identified list. Thank you. Senator Coons.

Senator COONS. Thank you, Mr. Chairman.

Commissioner, to the analysis requested by the Chairman, if it seems as you review this aggregate data that more of one group of bundlers than another has been audited, it would also be instructive if you would suggest whether there are neutral IRS-based previously approved auditing principles that might lead toward one group being more heavily reviewed than the other.

Commissioner KOSKINEN. I would be happy to do that. As I say, GAO has looked at—our audits of individuals are all selected automatically. They have looked at it and have determined that while we need to monitor that to make sure we know what our objectives are and how we are proceeding, they found no evidence that that system in any way biases the audit process and the audit selection process.

Senator COONS. Right. Helping ensure that Members of this Committee and the general public are better informed about that audit selection process might help, first of all, any inappropriate conclusions that this is somehow targeted or politically driven.

Commissioner KOSKINEN. Right. We will try to work with the Committee. We will be happy to get you as much data as we can.

Senator COONS. Another Member of the Committee questioned you rather aggressively previously about the FBI not having investigated certain people aggressively enough, the Inspector General, and there not being any indictments so far. Unless I misunderstand, due to the public statements, the relevant Inspector General is a self-identified Republican. The relevant current Director of the FBI if a self-identified Republican. After 2 years of searching investigations, is it not possible that there are no indictments because they have found no cause for criminal convictions?

Commissioner KOSKINEN. That is a possibility. Obviously, they are not going to indict people unless they think there has been a criminal law violation.

Senator COONS. Let me ask you a last question, if I might, because we have got other Senators eager to question.

If an organization does not qualify under 501(c)(4) due to its overt political activity, can that organization qualify for another tax-exempt status that does not burden or limit it in any way its First Amendment activity?

Commissioner KOSKINEN. Yes, it can become a 527, which allows them—in fact, requires them to be primarily a political organization. So, they have to spend more than half the money on politics. That requires you to notify us that you are going to be one of those organizations. What you do not want to do is end up not as tax-exempt because then you have an obligation to file a corporate tax return, and not filing a return is a serious offense.

The statutory program set up by the Congress allows you to decide you want to spend all of your money or significantly all of us as a political organization, and you can become a 527 and still be tax-exempt.

Senator COONS. If you are a Kiwanis Club or a Garden Club and you are really a social welfare organization, you typically file under (c)(4). If you are an expressly political advocacy organization, you typically file under 527. Why would any organization that is attempting to influence elections choose 501(c)(4)?

Commissioner KOSKINEN. The major attraction of a (c)(4), if you are a social welfare organization primarily, is you do not reveal your donors.

Senator COONS. Thank you very much for your testimony today, Commissioner.

Chairman CRUZ. Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

I wanted to follow up with you on our earlier line of questioning. Will you commit to me that while you remain on as the Commissioner of the IRS, as long as you remain there, you will not, in the absence of a directive by Congress or by the courts, a subsequent directive and one not in place right now, that you will not take any action to remove the tax-exempt status from religious colleges and universities based on their belief that marriage is between a man and a woman?

Commissioner KOSKINEN. I can make that commitment.

Senator LEE. Thank you. You can understand why this is a significant issue. I deeply appreciate your willingness to make that commitment, and I assume that is a commitment that you are empowered to make. In other words, if an action like what I described were to be taken, it would be taken by you rather than by the White House. Is that correct?

Commissioner KOSKINEN. It would be a regulation—we would issue a regulation, which Treasury and the IRS issue jointly. If we ever did that, we would issue it for public comment. There would be no surprises. We are not sneaking up on anybody. Down the road, if the IRS ever moves in that direction because of public policy changes, it would first issue a draft regulation for public comment. The public would have plenty of notice and plenty of opportunity to comment. That is not going to happen in the next 2½ years.

Senator LEE. You are committing to me that you will not issue such a regulation.

Commissioner KOSKINEN. In the next 2½ years.

Senator LEE. Thank you.

Chairman CRUZ. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Back to the application forms again, on the 1024 application form, which is the form by which an organization applies for 501(c)(4) status, there is a question—it is Question 15—and it asks this, I will quote it: "Has the organization spent or does it plan to spend any money attempting to influence the selection, nomination, election, or appointment of any person to any Federal, State, or local public office, or to an office in a political organization?" You are familiar with that question?

Commissioner KOSKINEN. Yes.

Senator WHITEHOUSE. There is a Pulitzer Prize-winning nonprofit investigative group, nonpartisan investigative group, ProPublica, which back, I want to say, in 2012 investigated these 501(c)(4) filings. They looked at 104 organizations that had reported electioneering activity. It reported they had spent money in elections to the Federal Election Commission. The Federal Election Commission has a form that you are required to fill out, and you have to report your activity.

ProPublica cross-checked the organizations who swore to the Federal Election Commission that they had spent X amount of dollars in political activity, and then cross-checked them against the 501(c)(4) filings, this Question 15. It turned out that 32 of them had told the IRS that they spent no money to influence elections, i.e., they answered that Question 15, "No."

Could you respond to what red flags that might raise about how you can say to one Federal agency that you spent X dollars on electioneering and tell another agency that you neither spent nor planned to spend any money attempting to influence the selection, nomination, election, or appointment of any person to any Federal, State, or local public office? It does not seem to add up.

Commissioner KOSKINEN. It does not. The definitions the Federal Election Commission uses and the IRS uses under (c)(4)'s do not overlap entirely, but if you spent a lot of money and reported to the FEC and said you were spending no money and reported to the IRS, that would not seem to be consistent and not be appropriate.

Senator WHITEHOUSE. Thank you very much.

Chairman CRUZ. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair. I know I am not on this Subcommittee, but I do appreciate the opportunity. I thank you for holding this important hearing and the opportunity to ask some questions.

Before I get started with the questions, I wanted to share an experience I had in the Aging Committee a couple of months ago where we were talking about IRS scams, or scams, people pretending to be IRS, and literally over the course of 24 hours convincing people to take thousands of dollars out of their bank accounts and use these prepaid cards to pay off what they thought was their debt.

My observation in that is that the kind of perception that the average American person has when they get a call from the IRS, that it would be so believable that somebody would call up, say, "You owe us a debt, and you have 24 hours to pay it," suggests to me that we need to continue to work on a culture where the American people are literally afraid of the IRS. These are not just, you know, a small business. I have heard CEOs, I have heard very prominent people, I have heard good middle-class folks—everybody literally afraid of the IRS.

I think there is a culture there that I hope in the process of your remaining tenure there that you can work on, because the IRS, people should not be afraid of them. People should be prepared to see them as a customer service organization. When they do have a tax issue, we should be helping them solve it, not frightening them in the way that I think there are a number of examples, at least in my State of North Carolina.

Commissioner KOSKINEN. I could not agree with you more. One of the things that surprised me when I started was how much time we spend actually trying to help taxpayers. I think that message needs to get out there. I am serious when I say if you have a tax problem and you are trying to be compliant, you do not have to go, as I said, to late-night TV or get somebody else. You can talk to us directly. We want to work with you. We are here to help you.

Senator TILLIS. Thank you. For any North Carolinians that are watching this hearing or hear about it, I hope that they know the moment they get a call from the IRS that is anything less than respectful and helpful, I want them to call my office, because the next call will be a conference call with me and the taxpayer talking to an IRS person. I think we need to make sure that we are doing

a much better job in terms of establishing you all as somebody that helps, does not literally frighten the average citizen.

I have got a quick question really related to this behavior, and I want to get on to the next panel, so I will try and be brief. We have a number of examples where we do see that maybe there was an overzealous agent or person on the other end of the line representing the IRS. What sort of actions have been taken when you are able to tie that to a specific person to fire them?

Commissioner KOSKINEN. Without going into detail, we have dismissed on a regular basis—we dismiss over 1,000 people a year. Sometimes that is for inappropriately accessing taxpayer information. Sometimes it is for inappropriate behavior with a taxpayer on the line. We know how to—and the IRS employees accept that, the union accepts that we have a high standard of performance. You can also be dismissed for just being delinquent on your taxes.

I do not know about anybody else, but we are an agency that knows how to, in fact, remove employees that are creating problems.

Senator TILLIS. I want to go back and just ask you, if you would, to give me a sense of how well you think you all responded to the—I believe you received, in February 2014, were sent subpoena from the House Committee on Oversight and Government Reform. I believe it was about 18 days after you got the subpoena that we found out about the 400 or so backup tapes containing relevant emails had been magnetically erased. We did not find out about that until June 2014, so 3 or 4 months later.

Do you consider that to be an appropriate response to our oversight function here in the Senate and in the House, that time lag and that process?

Commissioner KOSKINEN. The time lag, there was an investigation—I did not know about it until April. What we did between April and June, the 6 to 8 weeks, was, in fact, to make sure that we could provide you as much information from that period as possible. That is when we found the 24,000 Lois Lerner emails from the time her hard drive crashed.

Senator TILLIS. Thank you, Mr. Chair. I am looking forward to the next panel.

Chairman CRUZ. Thank you, Senator.

Senator TILLIS. Thank you, Mr. Commissioner.

Commissioner KOSKINEN. Thank you.

Chairman CRUZ. Senator Sessions.

Senator SESSIONS. Just briefly, to me the question is not the complexity of the issue. I do not think it is that complex, but these issues can be debatable on occasion. The question is: Has there been a targeting of groups based on their political or philosophical approach to life? That is absolutely unacceptable. The way I see it is that we should follow the leads where they go. Ms. Lerner is gone now from the department, but it is not over as far as I am concerned.

I can remember well John Mitchell, John Dean, Haldeman, Ehrlichman, and the White House going down because they had participated, blessed, or approved these kind of activities that targeted people politically when they had no right to do so.

Ms. Lerner goes to the White House 35 times, and that raises a question with me, during a campaign, having groups that do not agree with the President's policies being targeted disproportionately. I want to know who all knew about it.

The way I look at these numbers, one total of data of IRS targeting statistics of files showed that 104 conservative groups were targeted and 7 progressive; that, of those, approved, all 7 progressive groups were approved, and only 48 of the 104 of the conservative groups were approved. Ms. Lerner—and I think every Tea Party group was held up. Ms. Lerner in 2011 stated, quote, "The Tea Party is dangerous."

First, let me ask you this: Will you assure us that you will utilize every power that you have to ensure that all evidence relevant to this matter is brought forth?

Commissioner KOSKINEN. I will, and we have done that. The Senate Finance Committee has all of that information and all of those emails, and I think all of us are looking forward to what their report tells us.

Senator SESSIONS. If Ms. Lerner discussed any of these plans to target these groups that politically may not have been in accord with the President or his policies or his politics, would that be wrong?

Commissioner KOSKINEN. That would be wrong. There is no evidence that anybody outside the IRS had any conversations with her about that or that she even had directives internally. It would be wrong.

Senator SESSIONS. I think it would be wrong, too. Thank you, Mr. Chairman.

Chairman CRUZ. Thank you very much.

This will be my final line of questions, and thank you for being here for what has been an extended hearing. I want to briefly say you mentioned there is no evidence that Ms. Lerner or anyone else had conversations with political operatives.

Commissioner KOSKINEN. About targeting conservative groups.

Chairman CRUZ. At the White House or elsewhere. You would agree that that would be a serious concern if it occurred, and that a fair and impartial investigation would include answering that question.

Commissioner KOSKINEN. Yes. As I say, all of the information that the Senator has talked about has been available, is available. The Senate Finance Committee has been working on this for 2 years, and they have announced that sometime in the next couple weeks they are going to put out their report.

Chairman CRUZ. You would expect that any such investigation would include political operatives at the White House.

Commissioner KOSKINEN. Yes. We have produced—actually, there are no emails on this subject out of the IRS to the White House or the Treasury Department. We produced everything that we could find. Other investigations are proceeding, but thus far, we have not seen any external emails or discussions with that. It would be inappropriate—it is inappropriate and it was wrong for these groups to be selected just by their names. Whether somebody was consciously targeting them or not, it was still the wrong thing to do. It should not have happened.

Chairman CRUZ. A serious investigation into the 35 meetings Lois Lerner had at the White House that Senator Sessions referenced would naturally begin with the agenda of each of those 35 meetings, the participants who attended them, and inquiring what was discussed at those meetings. Would you agree with that?

Commissioner KOSKINEN. That sounds like a perfectly understandable way to go.

Chairman CRUZ. Okay. I want to focus on the IRS' recordkeeping, particularly concerning Lois Lerner. The House Oversight and Government Reform Committee has produced a detailed timeline of the IRS' recordkeeping failures, and I want to, without objection, enter it into the record because it is too detailed to read in its entirety.

[The information appears as a submission for the record.]

Chairman CRUZ. I do want to highlight a couple of components of it. On June 13, 2011, Lois Lerner reports to IT that her computer is inoperable, and we are told that the IRS made unsuccessful attempts to recover the hard drive.

On August 2, 2013, 3 months after Lois Lerner invoked the Fifth Amendment, House Oversight Committee Chairman Darrell Issa issued the first subpoena to the Treasury Department for IRS materials. At that point, August 2, 2013, this created a legal obligation on the part of the IRS to preserve Lois Lerner's emails.

On March 4, months after that subpoena issued, IRS employees at the IRS Data Center in Martinsburg, West Virginia, magnetically erased 422 backup tapes, destroying information likely to contain up to 24,000 Lois Lerner emails from 2011 during the mobilization of the IRS' targeting efforts.

My first question is: Do you consider a Congressional subpoena to create a binding legal obligation on the IRS and on you as the Commissioner?

Commissioner KOSKINEN. Yes.

Chairman CRUZ. Can you explain why the IRS disregarded the subpoenas and destroyed Lois Lerner's emails?

Commissioner KOSKINEN. The Inspector General for Tax Administration of the Treasury Department spent a year investigating that subject and concluded that there was no evidence that anyone in the IRS, including the employees who did the action, did that in any way to interfere with a congressional investigation or did it to destroy evidence.

Chairman CRUZ. You stated why it was not done. Can you explain why it was done?

Commissioner KOSKINEN. It was done because it was a mistake that should not have happened. Again, there was a clear order. The IG reviewed that order and talked to everyone about it throughout the IRS to preserve evidence, including all of the tapes that existed. That order went out. There was a follow up. There were two or three follow ups, including from counsel in my office, to, in fact, make sure that evidence was preserved. That order, by the time it trickled down through, was misunderstood to not apply to what—as the IG said, this was old and viewed as junk, and so the employees, when they got it, assumed in their normal course that they should, in fact, prepare it for destruction. That should not have happened. It was a mistake. The IG said nobody did it purpose-

fully. Nobody was trying to avoid anything. It still should not have happened.

Chairman CRUZ. After the records were destroyed, you testified, not once but twice before Congress, that IRS' records were intact, that nothing had been destroyed, and the IRS would be turning over all relevant documents. That was once on March 26, 2014, and a second time on June 20, 2014.

Commissioner KOSKINEN. That is what I had been advised. That is what I believed. I testified at that time truthfully to what I knew.

Chairman CRUZ. The first statement was made 22 days after the IRS had destroyed approximately 24,000 emails. You were unaware of it at that time.

Commissioner KOSKINEN. That is right. It was done by two employees on the midnight shift in Martinsburg, West Virginia. The first we knew about it was almost a year later.

Chairman CRUZ. The second statement was made 7 days after the IRS formally notified Congress that all of Lois Lerner's emails between January 2009 and April 2011 had been destroyed. Were you aware that the IRS had notified Congress of that?

Commissioner KOSKINEN. We notified the Congress that, in fact—I am sorry. In 2014, we notified the Congress that her hard drive had crashed and that it had been unable—in 2011, no one had been able to retrieve the emails. We had then discovered and found 24,000 emails from the time her hard drive collapsed, and we advised the Congress of that.

Chairman CRUZ. You notified Congress, the IRS notified Congress that Lois Lerner's emails had been destroyed.

Commissioner KOSKINEN. Her hard driven had self-destructed. We did not destroy it. IRS did not destroy her emails.

Chairman CRUZ. Seven days later, you testified to Congress that all of the records were intact. Was that testimony truthful?

Commissioner KOSKINEN. When I testified to that, that was a testimony about Lois Lerner's hard drive crash, and my testimony at that point was truthful on the basis of what I knew.

Chairman CRUZ. Let me ask you, if a citizen was being audited by the IRS and an American citizen responded to the IRS that his or her records, business records, charitable contribution records, whatever records, were destroyed because a hard drive went down, would the IRS accept that from a citizen and exonerate the citizen from wrongdoing?

Commissioner KOSKINEN. We would accept it from the citizen and work with the citizen, which we do in many cases, to reconstruct records to the best of their ability and ours to, in fact, be able to conclude with an audit. We do not automatically penalize them for the fact that their records have disappeared. We actually will work with them to figure out what other records are there or are there other ways that we and they can figure out what they owe as taxes.

Chairman CRUZ. How would the IRS respond to a citizen whose electronic records were destroyed after a subpoena had issued and the citizen was under a legal obligation to preserve those records?

Commissioner KOSKINEN. If the citizen had done that, we would respond unhappily. If it were a corporation and two employees in

Martinsburg, West Virginia, ignoring the subpoena had done it, we would do an investigation, as the IG did, to find out if that was purposeful. In this case, the IG determined nobody did this to avoid disclosure; nobody did this to interfere with an investigation.

Chairman CRUZ. You have spent time in the private sector.

Commissioner KOSKINEN. Twenty years.

Chairman CRUZ. If you were the CEO of a corporation and the corporation were subject to a binding subpoena, and an employee of that corporation destroyed records in violations of the subpoena, would you expect a CEO to be held accountable for the corporation's defiance of a subpoena?

Commissioner KOSKINEN. I would not view it as defiance, but I would expect to be held accountable. I am accountable as the head of the IRS.

Chairman CRUZ. Thank you. Senator Coons.

Senator COONS. No further questions, Mr. Chairman, although I believe Senator Whitehouse does.

Chairman CRUZ. Senator.

Senator WHITEHOUSE. Thank you, Commissioner. One last question. The narrative has developed during the course of today's inquiry that the Obama administration intruded into the IRS with respect to the conservative political organizations because it was concerned about the conservative organizations' efforts to influence the upcoming 2012 election, and that that would have been contrary to the political interests of the administration, and that was their motivation for trying to influence the IRS to pursue this.

If the predicate of that was that these were organizations whose purpose was to attempt to influence the Presidential election of 2012, would the truthful answer to the Question 15 form be, "Yes"?

Commissioner KOSKINEN. No.

Senator WHITEHOUSE. Why would that not be the case?

Commissioner KOSKINEN. Because then if the purpose of the organization was to engage in political activity in the 2012 election, it should be reflected on their application.

Senator WHITEHOUSE. That is what I mean. If Question 15 says, "Has the organization spent or does it plan to spend any money attempting to influence the selection, nomination, election, or appointment of any person to any Federal, State, or local public office?" the truthful answer is, "Yes." Correct? If that is what they intended to do.

Commissioner KOSKINEN. If that is what they intended to do, and certainly if that is what they did.

Senator WHITEHOUSE. If the Obama administration's purpose was to try to defeat that, the fundamental predicate of all of that is that these organizations did, in fact, have that intention and should have answered, "Yes," to Question 15, "We do plan to spend—spend or plan to spend to influence the election."

Commissioner KOSKINEN. If that was their intention, that should have been their answer.

Senator WHITEHOUSE. Correct.

Commissioner KOSKINEN. I would note there is no evidence that anyone in the White House or the Treasury indicated or encouraged the IRS to take any action.

Senator WHITEHOUSE. Yes. I am not here to vindicate that narrative. I am just pointing out that that element of it would suggest that the answer to Question 15 must be yes if it is to be truthful.

Commissioner KOSKINEN. That is correct.

Senator WHITEHOUSE. Thank you.

Senator SESSIONS. Mr. Chairman, could I——

Chairman CRUZ. Senator Sessions.

Senator SESSIONS. You know, the Tea Party group in Alabama was asked to list the names of all their members and all their donors and the date that they gave. Do you think that is a proper question? Do you know who is responsible for asking that question?

Commissioner KOSKINEN. I do not know who is responsible for asking that question. In some cases, depending on the organization, it may be appropriate to find out who, in fact, on your 990 you list donors, although we are about to try to change that. As a general matter, who gives to you should not matter as to what you are about to do.

Senator SESSIONS. What about lists of members?

Commissioner KOSKINEN. The list of members should not be an issue that we are concerned about.

Senator SESSIONS. It troubles me that Mr. Comey and the FBI have not bothered to even talk to Ms. Gerritson, head of the Tea Party in Wetumpka, in Alabama, about these questions. Those are the kinds of things that they were asked about. I am concerned about that.

Thank you, Mr. Chairman.

Chairman CRUZ. Just to clarify, is the IRS currently asking applicants either their list of members or their list of donors?

Commissioner KOSKINEN. No, not to my knowledge at all.

Chairman CRUZ. Would you know if they were?

Commissioner KOSKINEN. I would know if they were. As I say, there may be occasions where, depending on your activity, we would want to know are you getting support from other charities. If you are going to be a (c)(4) and engage in politics, are you getting support from other political organizations in terms of where is your money coming from? We would at this point have no need to know who your members are, no need to know a list of all of your donors.

Chairman CRUZ. Thank you, Mr. Koskinen. This first panel is excused. We appreciate your taking the time to participate in this hearing.

We will take a very brief break to welcome up the second panel, and we will start momentarily with the second panel.

Commissioner KOSKINEN. Thank you, Mr. Chairman.

[Whereupon the hearing was recessed and reconvened.]

Chairman CRUZ. Welcome, everyone. I would ask you to please stand and be sworn in. Please raise your right hand. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. MITCHELL. I do.

Mr. SPAULDING. I do.

Mr. GREIM. I do.

Mr. NOBLE. I do.

Ms. WALKER. I do.

Ms. AVIV. I do.
Ms. MARTIN. I do.
Mr. COLVIN. I do.
Mr. SEKULOW. I do.
[Witnesses are sworn in.]

Chairman CRUZ. Thank you very much. Welcome. I am going to briefly introduce each of our nine witnesses, and then we are going to get straight to testimony.

Cleta Mitchell is a partner and political law attorney in the Washington, DC, office of Foley & Lardner, where she advises nonprofit and issue organizations as well as campaigns on State and Federal campaign finance and election law. She has served as legal counsel to the National Republican Senatorial Committee, counsel to the National Republican Congressional Committee, and president of the Republican National Lawyers Association.

Stephen Spaulding is policy counsel at Common Cause where he focuses his research on campaign finance reform, voting rights, election administration, and governmental transportation. Previously, he was a litigation associate at Goodwin Procter.

Edward Greim is a partner at the law firm of Graves Garrett in Kansas City, Missouri, where he practices political law. Previously, he was a litigation associate at Bryan Cave in New York.

Lawrence Noble is senior counsel to the Campaign Legal Center and an adjunct professor at the George Washington University Law School, where he teaches campaign finance law. Previously, he was president and CEO of Americans for Campaign Reform, practiced political law at Skadden, Arps, Slate, Meagher & Flom, and was the executive director and general counsel of the Center for Responsive Politics. He also served as General Counsel of the Federal Election Commission from 1987 to 2000.

Toby Marie Walker is the cofounder and president of the Waco Tea Party. She is a highly decorated grassroots activist. She has earned Watchdog of the Month and Tea Party Leader of the Year from AFP Texas and the Sam Adams Alliance has awarded her "Rookie of the Year."

Diana Aviv is president and CEO of Independent Sector, a national leadership network for America's nonprofits, foundations, and corporate giving programs. Previously, Ms. Aviv was associate executive vice chair at the Jewish Council of Public Affairs and director of programs at the National Council of Jewish Women. In December 2010, she was appointed by President Obama to the White House Council for Community Solutions.

Jenny Beth Martin is the president and cofounder of Tea Party Patriots, one of the largest national umbrella groups within the Tea Party Movement. Before founding the Tea Party Patriots, she had transitioned out of her career as a technology executive for The Home Depot.

Gregory Colvin is Chairman of the Board of Adler & Colvin, a San Francisco law firm that specializes in the representation of nonprofit organizations and their donors. He currently serves as the chair of the Drafting Committee of Bright Lines Project sponsored by Public Citizen, which is aimed at reforming IRS rules defining political campaign activity.

Finally, Jay Sekulow is chief counsel of the American Center for Law and Justice, a law firm and grassroots organization with more than one million members. Mr. Sekulow has argued 12 cases before the U.S. Supreme Court and is widely recognized as one of the leading litigators defending religious liberty in the country.

A number of the members of this panel are long-time friends of mine. We have been side by side in a great many endeavors, and it is a pleasure to welcome each of you here today.

Ms. Mitchell, we will begin with your testimony.

**STATEMENT OF CLETA MITCHELL, PARTNER, FOLEY & LARDNER LLP, WASHINGTON, DC**

Ms. MITCHELL. Thank you, Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee. Thank you for allowing me to testify today, and thank you for conducting this hearing about the IRS and its targeting of hundreds of citizens organizations and, indeed, thousands of individual citizens based on their political viewpoints, their involvement with and contributions to conservative organizations, candidates, and causes.

While the President of the United States joked about and denied this scandal ever occurred—on a comedy show, no less—I am here to tell you that I experienced it firsthand on behalf and with and for my clients and hundreds of others like them across the Nation, beginning in the fall of 2009, the first year of the Obama administration. It is not a joke, it is not funny, and it is not pretend.

Mr. Chairman, you are asking the right questions. Have laws been broken? What should Congress do about it?

The answer to your first question is yes, laws have been broken. IRS officials, including former Commissioner Doug Shulman, Acting Commissioner Steven Miller, Exempt Organizations Unit Director Lois Lerner, and now IRS Commissioner John Koskinen have all at one time or another lied to Congress. Lying to Congress is perjury. 18 U.S.C. § 1001 makes it a felony to lie to Congress, and I was a little bit surprised that Commissioner Koskinen said today he was "generally familiar" with that statute. I do not let any client talk to any employee, agent of the Federal Government or Congressional appearance without reminding them of their obligations under 18 U.S.C. § 1001. 18 U.S.C. § 1621 is the general perjury statute, and both of these statutes are applicable to communications to and false testimony to the Congress of the United States.

IRS agents and employees have violated other Federal laws. They have illegally released and inspected confidential tax returns and return information of taxpayers, violating laws that Congress enacted after Watergate to ensure that that never happened again to political enemies of a future administration.

The IRS routinely ignores Freedom of Information requests from the public and other laws that Congress has enacted to protect taxpayers and citizens from overreaching regulatory agencies. With the most politicized Department of Justice in American history, there is no one to enforce the laws when they are broken by IRS officials. We come to the second question posed by this Committee for today's hearing: What can and should Congress do?

I think the most important thing Congress should do is remove John Koskinen from office. The House should impeach him, and the

Senate should convict him. Commissioner Koskinen has lied to Congress more than once. There is sufficient evidence of his false testimony to warrant Articles of Impeachment, which should be passed by the House, and a trial conducted in the Senate.

This is stout medicine, I realize, but the integrity of Congress and its ability to properly investigate and oversee Federal agencies is at stake. Mr. Koskinen has committed perjury, and he has willfully disregarded his duties as the Commissioner of the IRS.

Then I have included in my written testimony seven statutory changes that would remedy some of the abuses that have been uncovered and discovered during the House investigation. I hope that Congress will take those seriously and deal with those and pass those this year.

Mr. Chairman, the American people are ready for the Congress to hold the IRS accountable. It is way past time for something to be done to the people who brought about this unwarranted, unconstitutional, and illegal abuse of the American people. Thank you.

[The prepared statement of Ms. Mitchell appears as a submission for the record.]

Chairman CRUZ. Thank you, Ms. Mitchell. Mr. Spaulding.

**STATEMENT OF STEPHEN SPAULDING, POLICY COUNSEL, COMMON CAUSE, WASHINGTON, DC**

Mr. SPAULDING. Chairman Cruz, Senator Sessions, distinguished Members of the Committee, thank you for the opportunity to testify this afternoon. I am Stephen Spaulding, policy counsel with Common Cause, a nonpartisan, nonprofit organization of 400,000 members committed to open, honest, and accountable Government.

Let me be clear: It was wrong for the IRS to subject some "social welfare" nonprofit applications to extra scrutiny based solely on their names and identified interests. We applaud Commissioner Koskinen's public commitment to continuing a rulemaking that will prevent this episode from repeating itself, and we urge the IRS to move forward. The IRS must not be intimidated by partisan political operatives on the right and the left who set up phony social welfare groups that pump hundreds of millions of dollars from secret sources into our elections. Those groups deprive the American people of the information they need about who is trying to influence their votes and to whom their elected officials owe political favors.

The ongoing scandal stems from at least four factors: One, a lack of bright-line standards about what nonprofit (c)(4)'s can do.

Two, the willingness of political consultants to manipulate the rules and operate social welfare groups as de facto political action committees.

Three, an underresourced agency that has thus far failed to do its job fully to hold the largest offenders accountable.

Four, champions of gridlock who have blocked Congress from passing disclosure legislation.

Congress never intended for social welfare groups to be conduits for secret political spending. Citing public reports about their political spending operations, some campaign finance reform advocates have urged the IRS to investigate groups on the left like Priorities USA and on the right like the American Action Network. There is

no example of this phenomenon more flagrant than Crossroads GPS, a purported (c)(4) founded in 2010 by Karl Rove and others, which has spent significant amounts of money influencing campaigns. It is the sister organization of the super PAC American Crossroads, which discloses its donors. Crossroads GPS, however, does not.

American Crossroads' own political director said in 2010, quote, ". . . some donors didn't want to be disclosed, and therefore, a (c)(4) was created," end quote. The FEC General Counsel concluded that Crossroads GPS' major purpose in 2010 was Federal campaign activity and should have registered as a political committee, but a gridlocked FEC split 3 to 3 on whether to pursue an enforcement action.

Crossroads then went on to spend $71 million in the 2012 races, making it the top secret money spender of the cycle. Who funded all of these attack ads? Only Crossroads GPS officials, the IRS, and perhaps the politicians who benefited from the spending can answer that. It reported in its public tax returns one single anonymous donation of $22.5 million, another for $18 million, another for $10 million. In total, 50 donations for $1 million or more, and Americans deserve to know, Senators. Americans deserve to know who was making investments of this magnitude in political races.

This trend shows no sign of stopping in 2016. According to the New York Times, at least eight Republican candidates have aligned with nonprofit groups, and according to the paper, Secretary Clinton's supporters are considering setting up a (c)(4) as well.

Congress has thus far failed to pass comprehensive campaign finance disclosure reform that could have addressed this problem. The IRS and Treasury Department took the important step in 2013 of issuing proposed rules so that the public and the Government would benefit from clearer definitions of candidate-related political activity.

The IRS must move ahead in its rulemaking and aggressively watchdog blatant efforts by partisan front groups to pollute our elections with unlimited amounts of secret money. The American people deserve better.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Spaulding appears as a submission for the record.]

Chairman CRUZ. Thank you. Mr. Greim.

**STATEMENT OF EDWARD D. GREIM, PARTNER, GRAVES GARRETT LLC, KANSAS CITY, MISSOURI**

Mr. GREIM. Chairman Cruz, Ranking Member Coons, and Senator Sessions, thank you for inviting me here today. As I will explain in a moment, we can already draw some lessons from some of the ongoing civil litigation against the IRS. Even though there is much more for us to learn in civil discovery, it is not too soon to consider legislation.

Statutes can never state the desire of Federal bureaucrats to use their offices inappropriately. As our Founders well knew, that is human nature. It goes with the beast that we have built in Washington. The reforms I will proposed will ensure that the next targeting happens involving either party, taxpayers will be able to

protect their rights immediately. They should not have to wait 2 or 3 years after evidence is lost and memories blur to learn the truth. As a modest first step, I propose four legislative fixes.

First, I will briefly explain my background in this area. My firm is lead counsel for plaintiffs in the class action case of *NorCal v. Internal Revenue Service*. It is pending in the Southern District of Ohio because that is where Cincinnati is, and that is where the IRS said the targeting was confined to at first. Our motion for class certification is due in just a couple of days.

We have had the opportunity in 2015 to conduct class discovery. We have deposed several IRS employees and executives in Cincinnati, here in Washington, and in other parts of the country.

I would like to focus on two points today, one factual and one legal. First, I want to show that the IRS still remains ripe for political abuse. Second, I will briefly outline these legislative fixes.

The first observation is simply this: The IRS' internal procedures promote uniform treatment of taxpayers. That is a virtuous goal. Like every virtue, that goal of uniform treatment can be perverted to accomplish nefarious purposes, and we think that happened here.

Second, as the IRS' 30(b)(6) deposition confirmed, the criteria for centralization and special treatment of cases found in the Internal Revenue Manual are almost endlessly flexible, and they were used here in this case. In fact, *Citizens United* is important in our case because that may well have been the reason that Lois Lerner decided that she wanted to focus on the Tea Party movement. That is still viewpoint discrimination, by the way.

Third, key officials at the IRS had a built-in distrust of conservative-leaning organizations. In fact, there is an important email from 2011. Carter Hull, the employee in Washington who was responsible for working a handful of test cases, made a telling observation. He explained to a group of other officials that "we noted that the list contained organizations that appeared to be a particular political ideology." No one on the email chain even responded to that remark.

Finally, vague standards for recognizing group status, the much maligned facts and circumstances test, become a talking point, but they are no excuse for the IRS' conduct. When you go through and read the emails, no one is agonizing over the vagueness of the test as the reason to hold these groups up. That was not what was actually going on in this case. My four legislative fixes are outlined in my written testimony.

I just want to emphasize at the end of the day that I think it is important to pass laws that let citizens actually take charge of this matter themselves, that let them file lawsuits if necessary. I do not think a criminal fix is the only way to go because that depends on prosecutorial discretion, and so that is what we have focused on in our four criteria.

This is a step in the direction of restoring an important virtue for a constitutional, democratic republic—that is, citizen awareness and self-governance. That is what we stand for, and I think that is what legislative fixes should focus on. Thank you.

[The prepared statement of Mr. Greim appears as a submission for the record.]

Chairman CRUZ. Thank you. Professor Noble.

**STATEMENT OF LAWRENCE NOBLE, PROFESSOR, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, AND SENIOR COUNSEL, CAMPAIGN LEGAL CENTER, WASHINGTON, DC**

Professor NOBLE. Thank you. Chairman Cruz, Ranking Member Coons, and Senator Sessions, I appreciate the opportunity to address the Subcommittee on the activities of the Internal Revenue Service and the oversight of political activity of tax-exempt organizations.

As Justice Kennedy wrote in *Citizens United v. FEC*, "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

However, as has been discussed, the IRS' failure to enforce the laws governing political activity by 501(c)(4) organizations, together with the FEC's failure to enforce the campaign finance laws, has resulted in hundreds of millions of tax-exempt dollars being used to elect candidates with little or no transparency as to the sources of these funds.

According to the Center for Responsive Politics, groups claiming to be exempt from tax under 501(c)(4) reported spending over $257 million in the 2012 elections and over $118 million in the 2014 elections. Very few of these politically active groups publicly disclose any of their donors. Even if they report some of their election-related activity, there is no real transparency. These figures do not include the spending of organizations who do not report to the IRS or to the FEC.

Already in the 2016 election cycle, groups set up by candidates run by people who have worked on behalf of the candidates and financed through the candidates' fundraising are using secret money to support their candidates' elections. As this past Sunday's New York Times reported, it appears that many Presidential hopefuls have been meeting with donors, hiring staff, visiting New Hampshire and Iowa since last year, but have had their travel and other expenses paid for by their super PACs and their 501(c)(4) organizations.

Some of these groups are now planning to use the same secret money to finance activity that previously we expected the campaigns to pay for, such as hiring people for grassroots outreach, opposition research, and campaign strategy. We can also expect to see an increase in the funding of 501(c)(4) organizations that are not directly connected to a specific candidate, but who are supporting specific candidates.

There is no question that the goal of these organizations is to affect the outcome of our elections while hiding the true source of their funds. This means we have no way of knowing whether the campaign activity of these groups is being funded by thousands of small donors, several wealthy individuals, corporations, labor unions, or even foreign nationals, foreign companies, or foreign governments.

The use of these organizations as conduits for hundreds of millions of dollars to elect candidates is possible because of the way the IRS has defined "political activity." As has already been discussed, the law requires a 501(c)(4) to be devoted to the promotion of social welfare, which does not include political activity. The IRS decided that meant primarily devoted to social welfare, but they did not describe what that meant. They did not describe what "primarily" meant what a "political activity" is beyond a facts and circumstances test. What that has allowed are these groups and their lawyers to decide that as long as they spend only up to 49 percent on political activity, they are still primarily doing social activity, and also define very narrowly what is political activity.

Well, 49 percent of a $100 million group is a lot of money; 49 percent of a $10 million group is a lot of money.

The problem here is that the IRS now is under a lot of pressure not to do anything. They started a rulemaking, but have been criticized by Members of Congress and the public because of that rulemaking.

With a public rulemaking, we may agree with part of it, we may disagree with part of it, and that is the whole point of it, to get comments and to come up with the best rules as to what are the standards for a 501(c)(4) organization. Instead, because of the scandal—and I agree that if they targeted groups for their political ideology, that was wrong—they are now under pressure not to do anything. We expect to see less enforcement of the laws, and they are under pressure now not to do new rules.

This is wrong. This is not what Congress intended. This defeats transparency, and it ultimately harms our democracy. Thank you.

[The prepared statement of Mr. Noble appears as a submission for the record.]

Chairman CRUZ. Thank you. Ms. Walker.

**STATEMENT OF TOBY MARIE WALKER,**
**PRESIDENT, WACO TEA PARTY, WACO, TEXAS**

Ms. WALKER. Thank you, Chairman Cruz, Senator Coons, and Members of the Committee, for inviting me to share my story today. I am the president and founder of the Waco Tea Party.

I am an optimistic person, most people can tell you. I can see the light at the end of the tunnel, and I keep going. In this situation, the light at the end of the tunnel turned out to be a train coming at me, and I had been tied to the tracks by red tape with the IRS.

Dealing with the IRS targeting has been incredibly difficult on me. It has impacted my health, so much so that my heart doctor has pulled me aside and explained that stress is a silent killer. When I laughed at him and said, "Oh, I will be fine," he said, "You will not be fine. You need to reduce your stress." He asked me what the problem was, and I explained this, and it was the first time that I had discussed it honestly with someone.

The impact the targeting has had on me and others is a very personal effect on our families, our relationships, our professions, our reputations, and our lives in general. Nothing can ever be done to repair it.

The Waco Tea Party is a small organization. Our operating budget is less than $10,000 a year. We do not have paid staff. We do

not have offices. We do not have consultants. We do it for love of country. We do not do it for financial gain or for notoriety.

I have submitted testimony today outlining our ordeal with the IRS. To sum it up, we believe that the IRS was not looking for compliance with us. We believe that they were intending to abuse the tax law to disparage, demoralize, discourage, and ultimately disallow us participation in the political process.

Why the IRS was so concerned about a tiny organization in Waco, Texas, is beyond me. Why they targeted us—and make no mistake, we were targeted. We may never know why the IRS chose us. We may never know who put us on that list. We do not know who they are protecting. We do know for certain that there were Senators encouraging them to target us. We know that those shameful actions started a domino effect throughout the IRS.

When the ruling class can treat the rest of us as pawns in their corrupted game, we are no longer a free society. When a Senator can use the IRS as a weapon against an American citizen or organization or group of people, they have too much power. When a letter to the right bureaucrat in the IRS can cause the trust of the American people to be shattered, it has lasting effects on a free society.

We won the cold war to stop that kind of oppression from being thrust upon us by foreign powers. We should not have to tolerate it now just because it is homegrown tyranny.

Senators, you need us, you need taxpayers. You need our money, and you need to keep the Government going. You forget that it is not yours. You did not earn it. You did not build it. We did. You are not entitled to it. You have no right to tax our speech. You have no right to tax the way we assemble. You have no right to force the most powerful agency in the Federal Government on us because someone did not like a Supreme Court ruling.

Gentlemen, many people have forgotten that the basic principle of our Government is supposed to be of the people, by the people, and for the people, not against the people.

The very Government that I trusted to protect its citizens engaged in a scheme to harass and intimidate me, my organization, and many others across the country. The American people deserve answers. They deserve to be protected from public servants who would use their power and influence to destroy lives. If we allow this to pass today, it stands as a precedent for tomorrow. I do not want my children and my grandchildren to grow up in a country like this.

I will never stop fighting to keep it from becoming that way. We need legislation that will protect the taxpayers and their information, and it will also guarantee that we get our records from the IRS when they abuse our information.

We must have legislation that prohibits the misuse of Government office to reward friends and punish enemies from either side of the aisle. The elected—any elected official or Government employee who does engage in this should have a separation of service. All I ask is that Congress acts, that they do something and not bicker about it. It is time that they are held responsible.

Thank you.

[The prepared statement of Ms. Walker appears as a submission for the record.]

Chairman CRUZ. Thank you, Ms. Walker. Ms. Aviv.

## STATEMENT OF DIANA L. AVIV, PRESIDENT AND CHIEF EXECUTIVE OFFICER, INDEPENDENT SECTOR, WASHINGTON, DC

Ms. AVIV. Chairman Cruz, Senator Coons, thank you so much for the opportunity to share the perspective of Independent Sector.

Charitable organizations understand that continued support from Americans who give of their time and their money depends upon a high level of public trust, and that any erosion of that trust harms our ability to advance our missions. We are, therefore, deeply committed to ensuring that the charitable and philanthropic sector continuously aspires to the highest standards of ethical conduct and adheres to all rules governing our organizations.

Problems arise when laws and regulations are unclear, inconsistent, and create confusion even for the most responsible charitable organizations. In particular, Independent Sector is concerned that there is great confusion regarding the difference between permissible nonpartisan activities undertaken by charitable organizations to encourage civic participation and partisan political activities aimed at influencing the outcome of elections.

The public expects and supports the efforts to educate policymakers about matters affecting their communities as well as to ensure our citizens understand these issues and participate in the electoral process. They draw a line, however, between this engagement and efforts to ensure that a particular candidate of political party prevails in an election.

Unfortunately, there is great confusion about what actually constitutes partisan political activity which is permissible for certain tax organizations. The absence of clear and consistent definitions of partisan political activity, coupled with vague limits on how much of this activity is permitted, has left the door open for individuals exclusively interested in influencing elections to use 501(c)(4) social welfare organizations as their primary vehicle. The result has been a massive influx of money to these entities while allowing donors to hide behind the same privacy protections extended to contributions that support charitable causes. This has served to further confuse the public on the role that the charitable community plays in the political arena.

This lack of clarity about definitions and the ambiguous so-called facts and circumstances test that the IRS applies in making determinations about political activity resulted in the improper handling of applications for exempt status from both conservative and liberal organizations.

We support the IRS' effort to provide greater clarity on this issue rather than leaving it up to the broad discretion of agents examining exempt applications and the annual Form 990 information returns. A clear definition of "candidate-related political activity" and a specific threshold for permissible political activity applied across all 501(c) organizations will provide regulators a clear, unambiguous standard by which to review applications for tax-exempt sta-

tus and ensure transparency and consistent application of regulations for tax-exempt organizations.

The permissible level should be insubstantial relative to an organization's size and indexed for inflation, and the rules should require the disclosure of donors whose contributions are intended to be used to influence the outcome of elections. Clarifying the rules will help both 501(c)(3) and 501(c)(4) organizations to better understand what is permissible and enable IRS agents to make more precise determinations regarding the granting of tax-exempt status. It will also preserve the important advocacy role and vital voice of exempt organizations in civic engagement efforts that benefit and sustain the communities we serve and strengthen our democratic society.

Thank you.

[The prepared statement of Ms. Aviv appears as a submission for the record.]

Chairman CRUZ. Thank you. Ms. Martin.

**STATEMENT OF JENNY BETH MARTIN, PRESIDENT AND CO-FOUNDER, TEA PARTY PATRIOTS, INC., WOODSTOCK, GEORGIA**

Ms. MARTIN. Mr. Chairman, Senator Coons, Members of the Committee, thank you for inviting me to testify.

As Americans, we enjoy rights granted by our Creator, rights guaranteed by our Constitution. I am exercising at least two of those rights today: the right to free speech and the right to petition my Government for redress of grievances.

About those grievances, what we have experienced at Tea Party Patriots over the last 6 years and what we have learned over the last 2-plus years leads me to the following.

For years, the most feared, most threatening, most coercive civil agency of the Federal leviathan—the Internal Revenue Service—ran roughshod over the fundamental rights of speech and association enshrined in the First Amendment, and we are still waiting for someone in a position of authority and responsibility to actually do something about it.

Last week, on a comedy show, the President of the United States joked, laughed, and denied that any deliberate targeting happened. He shrugged off the suggestion that any conspiracy had taken place—even though documents released just a week earlier showed Lois Lerner had met with attorneys from the Justice Department and a representative of the FBI in 2010 to discuss bringing criminal charges against conservative nonprofits.

Shame on you, Mr. President. Were we hurt by the decision to target us? Of course.

Groups and individuals were affected from east to west, north to south, and everywhere in between. I cannot count the number of times after I gave a speech when supporters came up to with tears in their eyes, fear in their voice, and an envelope from the IRS in their hands, asking me how to work to this out-of-control agency stop and how to bring about constitutionally limited Government. Know this: I sit here today for these Americans.

The targeting forced us at Tea Party Patriots to spend time and money educating our supporters, educating the press, researching

information needed for various House and Senate Committees investigating the matter, arranging town hall meetings, coordinating and paying for travel for our local coordinators to come to Washington to testify and to talk to Members of Congress and Committee staff. We filed FOIA requests, and then we need to pay our smart attorneys to help us understand the gibberish and the thousands of redacted pages of paper we got in response. Of course, we had to spend precious time answering all those crazy questionnaires from the IRS in the first place.

We estimate we spent at least 5,000 man-hours working on IRS targeting-related issues. Think about that for a minute: 5,000 man-hours. That is the equivalent of one employee working 2½ years full-time on this issue alone.

Some have asked us to put a price tag on what the IRS targeting has cost us. How do you put a price on free speech? Whether it costs us $1 or $1 million, somewhere in between or more, it does not matter. Free speech in America should never be silenced, no matter what the dollar amount.

Were we stopped by this decision? Of course not. None of these things were going to stop us, and let me tell you, it has not been easy.

The Tea Party movement has been targeted by the White House, the IRS, and their allies and maligned by the Republican establishment. The opposition has done all they can to destroy us, to crush us. They underestimated one thing: Our love of our country, our freedom, and our future are more important to us than any of them.

Tea Party Patriots is doing just fine, Mr. Chairman. We have 665 active local groups whose local coordinators meet with every single Sunday night. We have over 600,000 email addresses and over 2 million people in our data base working every day for our principles and our mission.

No one—no one—from the President to the IRS Commissioner or anyone else is going to trample on our rights without a fight.

We have had everything thrown at us, including the kitchen sink, but we are still here. We are not going away. We are living proof that when a few good people are willing to speak truth to power, we can change things, because we are Americans and we are just getting started. Thank you.

[The prepared statement of Ms. Martin appears as a submission for the record.]

Chairman CRUZ. Thank you, Ms. Martin. Mr. Colvin.

**STATEMENT OF GREGORY L. COLVIN,**
**PRINCIPAL AND CHAIR OF THE BOARD,**
**ADLER & COLVIN, AND DRAFTING COMMITTEE**
**CHAIR, PUBLIC CITIZEN'S BRIGHT LINES**
**PROJECT, WASHINGTON, DC**

Mr. COLVIN. Chairman Cruz, Ranking Member Coons, and distinguished Members of the Subcommittee, I appreciate the chance to come before you in support of giving the IRS a green light to move ahead on its historic work to define political intervention.

My law firm in San Francisco represents a broad range of nonprofits. For almost 40 years, I have formed tax-exempt corporations

and advised them on their political activities under IRS rules. I am appearing today on behalf of the Bright Lines Project, supported by Public Citizen.

Why is the IRS in the business of enforcing political rules? Because Congress, for more than 60 years, has placed that duty upon them through the Internal Revenue Code. Unless Congress were to remove that mandate, the IRS must continue to exercise its judgment as to what is partisan and what is nonpartisan election activity.

Why is this? Politics in America involves the raising and spending of money. Every person, every entity, in the country has a Federal tax existence. It must pay tax on its income unless it is exempt. The determination of taxable income throughout the Code depends on distinguishing deductible from nondeductible expenses. Donations to charities are tax deductible only if the organization does not intervene in political campaigns.

Donations to political groups are not deductible. A for-profit corporation cannot deduct a political payment as a business expense. The Code is remarkably consistent on this score. Politics must be paid for with after-tax income. Thus, the IRS is not here to tell us what we may or may not say politically but to determine whether such speech should be subsidized by a Federal income tax deduction.

The main problem with political tax law enforcement is this: It is vague, ambiguous, and unpredictable. What is political intervention? The IRS has insisted on an open-ended facts and circumstances approach rather than drawing bright lines between partisan politics and truly nonpartisan forms of voter education and engagement.

In September 2012, I asked Lois Lerner, then head of Exempt Organizations, at a meeting of the ABA to reconcile two different IRS rulings on so-called issue ads. She declined. I wish I had asked her, "If you cannot explain to us how you judge issue advocacy under these rulings, what do you say to your own staff in Cincinnati?" I mention her not as a personal critique, but because the reluctance to fix the political tax rules has been systemic within the IRS—until now.

In May 2013, the IRS' ability to rule on politically active (c)(4) applications had collapsed. This created the historic opportunity for Treasury and the IRS to commence exactly the kind of new regulations project that we have needed for decades.

The Drafting Committee of the Bright Lines Project began work in 2008, 5 years before the IRS crisis erupted. Our goal was to pressure the IRS in every possible way for better guidance. Our proposals go right down the middle, between preventing corruption and promoting free speech.

We all will be better served by clear, neutral, objective standards that reduce the degree of discretion the IRS may exercise. The rulemaking must continue. We look forward to open public hearings where the American people can join that conversation.

Some, in Congress, want to pull the plug on this IRS process. Not only would that leave us in the Dark Ages with the murky facts and circumstances approach, but it would stifle the voices of thou-

sands who are eager to see the next version. There must be no turning back this time.

The Commissioner has said that no new IRS rules would be put in place for the 2016 elections. Fair enough. They could go into effect in 2017. The process should be completed before the change in administration while the public is engaged and momentum for better rules remains alive.

Let me leave you with this thought: We do not want bad political rules that apply only to (c)(4)'s, but good rules for everybody. Thank you.

[The prepared statement of Mr. Colvin appears as a submission for the record.]

Chairman CRUZ. Thank you. Mr. Sekulow.

**STATEMENT OF JAY ALAN SEKULOW, J.D., PH.D., CHIEF COUNSEL, AMERICAN CENTER FOR LAW AND JUSTICE, WASHINGTON, DC**

Mr. SEKULOW. Chairman Cruz, Ranking Member Coons, Senator Sessions, thank you from allowing me to appear on behalf of the American Center for Law and Justice and 185,000 of our members.

I would like to call the Committee's attention to a statement that was made by the Commissioner, with due respect. He made it several times. He said that there is no evidence whatsoever of outside influence on any of the matters involving the situation with the Internal Revenue Service.

I call to the Committee's attention an email from Lois Lerner dated Wednesday, March 27, 2013. "As I mentioned yesterday"—and this is a quote, "there are several groups of folks from the FEC world that are pushing tax fraud prosecution for (c)(4)'s who report that they are not conducting political activity when they are (or these folks think they are). One is my ex-boss, Larry Noble", who is testifying today, "former General Counsel at the FEC, who is now president of Americans for Campaign Reform. This is their latest push to shut down these groups. One IRS prosecution would make an impact, and they would not feel so comfortable doing this stuff. Do not be fooled about how this is being articulated. It is all about 501(c)(4)'s orgs and political activity." From Lois Lerner.

This idea that there is no outside influence in this is nonsense. I represent 38 groups that were targeted by the Internal Revenue Service. That targeting, by the way, has not resulted in an end of all the cases. I have got two clients, one of which is waiting now for 6 years for a determination from the Internal Revenue Service.

Let me also call, if I may—and, by the way, I am not sure that this is in the record, so I would request of the Committee that this email be made part of the record.

Chairman CRUZ. Without objection.

Mr. SEKULOW. Thank you, Mr. Chairman.

[The information appears as a submission for the record.]

Mr. SEKULOW. We sent a letter to the Department of Justice on June 18, 2014, stating that we would no longer participate in having our clients interviewed by the DOJ for what I consider to be a faux investigation.

By the way, the President of the United States will go to television to state that there is not a smidgeon of corruption—he said

that a couple of years ago—or more recently that there is absolutely no evidence of wrongdoing, which is interesting because the Federal Bureau of Investigation is allegedly still investigating this matter and has not made a determination. I do not know where the President is not speaking to the Department of Justice, but apparently that seems to be the situation.

There is another email. This email is dated May 9, 2013. It is also from Lois Lerner—excuse me, May 8, 2013: "I got a call today from Richard Pilger, Director, Elections Crime Branch at DOJ. I know him from contacts from my days there. He wanted to know who at IRS, the DOJ folks could talk to about Senator Whitehouse's idea at the hearing that DOJ could", these are her words again, "piece together false claim cases about applicants who quote, 'lied', end quote, on their 1024s, saying they were not planning on doing political activity and then turning around and making large visible political expenditures. DOJ is feeling like it needs to respond, but wants to talk to the right folks at IRS to see whether there are impediments from our side and what, if any, damage this might do to IRS program. I told him that it sounded like we need several folks from IRS."

The response from Nikole Flax was, "I think we also need to include CI," which, of course, is the Criminal Investigation Division.

The Department of Justice was part of this from the beginning. This idea that the Department of Justice is engaged in this independent inquiry is nonsense. The fact of the matter is, as the GAO said a few days ago, quote, "Unfortunately, the IRS has not taken sufficient steps to prevent targeting Americans based on their personal beliefs."

Let me close with this, if I may. During the oral arguments in the *Z Street* case, Chief Judge Garland said the following to the IRS attorneys, in this case, of course, the *Z Street* case very similar to a targeting situation as we have here: "I think if I were you", this is what the judge said, "I would go back and ask your superiors whether they want us to represent that the Government's position in this case is that the Government is free to unconstitutionally discriminate against its citizens for 270 days. I would be stunned if the current Attorney General agreed with that. Or the last Attorney General. Or the one before that, or the one before that. Or anyone. That cannot be the position. Now, do you want to think about it again, whether you really want that to be your position?"

The response from the DOJ lawyer was, "That is basically our position." They did not move from that at all.

I would just like to say, Senator, I appreciate you holding these hearings, and I appreciate everyone's participation. This is a really serious problem. We have been litigating now for a couple of years, and there are still clients that have not had redress. Thank you.

[The prepared statement of Mr. Sekulow appears as a submission for the record.]

Chairman CRUZ. I would like to thank each of the witnesses who has come forth for your powerful testimony and particularly for those who have been improperly targeted for your political views. I would like to apologize on behalf of the U.S. Government. No cit-

izen should ever see the Federal Government targeting them for expressing their First Amendment rights.

Ms. Mitchell, in your testimony, you called for the impeachment of Mr. Koskinen. Each of you, I believe, heard his testimony before this Subcommittee today. I would like to ask you or anyone else if there was anything in his testimony that you heard that is demonstrably false or that might reach the level of perjury.

Ms. MITCHELL. Mr. Chairman, obviously I would want to go back and review the transcript, but IRS Commissioner Koskinen has an amazing way of deflecting and not answering questions or misleading the Congress when he responds to questions that are posed to him by Members of normally the House. Actually, I think this is only the second hearing that the Senate has had on the IRS targeting since May 2013, the first hearing. I do not know of another hearing. I appreciate the fact that you are having a hearing.

If you—a couple of things come immediately to mind. I do not recall the TIGTA report concluding that there was no willful destruction of evidence in terms of the destruction of the Lois Lerner emails and the backup tapes. I do not recall that the TIGTA report said that. I am going to have to go back and look at exactly what they said. He said several times today that the TIGTA report concluded that the IRS did not willfully destroy those tapes.

There is a lot—the tapes were destroyed on purpose, and I know that under legal prosecutions, if you intend to do something and you do it, that is a willful act. The fact that—one needs to put this in context in the timeframe. There was a—there was a preservation order issued in May 2013 for all records. There was a subpoena in August 2013 from the House Oversight Committee to preserve all records and documents. There was another subpoena in February 2014 to preserve all documents.

Commissioner Koskinen took office I believe in late 2013 or early 2014. He appeared before the House Oversight Committee in March 2014, and they pressed him—because now they have issued two subpoenas, and they had not yet started to receive any of the Lois Lerner emails, and they pressed him over and over about producing those emails: "Will you produce to us all of Lois Lerner's emails and documents?"

He knew at the time he testified in answer to that question, he had been told, they knew, that there was a gap, that emails were missing.

At the same time, during this same timeframe, backup tapes are destroyed, and yet he comes before the House—both the House Ways and Means Committee and the House Oversight Committee in June 2014, and says, "We have done everything we can. There is nothing we can do." Yet TIGTA reported back to the Committee that, in fact, they drove to West Virginia, got the backup tapes, and said nobody had ever asked for them. I think that this Committee should look very carefully at what the TIGTA report actually said and compare it to his testimony.

I will ask you to look at one other report. The GAO report on the auditing that was issued last week that is going to be officially issued in the next few days did not, as I understand it, clear the IRS of any political targeting of exempt organizations. I know it had nothing to do with audits of individuals. It only addressed au-

dits of exempt organizations. My understanding, my reading of it, is that it said that they did not keep proper documentation. They did not ask the questions about whether there was political involvement in the targeting, selection of audit targets. What they did say, what is very clear when you read it, is that they look at things other than the tax return, which was the third thing that he said today that I do not think is accurate. Commissioner Koskinen said today that when you get audited, it is because of something that is in your tax return or not. Yet in that GAO report, what I found very disturbing is something I have been concerned about for some time, which is—which goes to your question that you asked him, that they look at—that they go outside the tax returns and they look at publicly available information. I believe they look at publicly available campaign finance reports, disclosure reports required by law, as a basis for selecting targets for IRS audits. All these witnesses that talk about how we want to have disclosure, we need political disclosure, I think it is really important to have that discussion. If we are talking about that information then being used to audit donors, I think that is horrific. That someone exercising a protected First Amendment right to make a campaign contribution or a contribution to an organization would then be subject to an IRS audit, I think that is pretty terrible, and we better do something about it.

Chairman CRUZ. I think that is a very good question and certainly one that I intend to ask the Commissioner whether the IRS is using campaign contributions.

I would like to ask one additional question, Mr. Sekulow. As I understand it, it is contrary to Federal law for the IRS to hand over confidential taxpayer information to anyone else. If it turns out that the Department of Justice was knowingly in receipt of confidential taxpayer information, would that implicate them in a violation of the law?

Mr. SEKULOW. Absolutely, and I think, Senator, that is the most significant problem with this idea that the Department of Justice could create this investigation. The fact is the email chain establishes that the Department of Justice was involved in the conversations, including the targeting and possibly even piecing together criminal cases against individuals.

By the way, "piecing together criminal cases," that is a pretty serious allegation to be piecing together. My first job out of law school was actually Chief Counsel's Office in the Internal Revenue Service. I was a trial lawyer. We took our criminal referrals cases very seriously before we would do that.

I think, yes, I think the Department of Justice involvement here also should have disqualified them from engaging in this investigation, and it should have been an independent or special counsel.

Chairman CRUZ. If the Department of Justice was involved in the criminal wrongdoing, it cannot be expected to investigate itself; and any fair and impartial investigation should occur by a special prosecutor.

Mr. SEKULOW. That is correct, and that is why after participating in the investigations for a period of time, we decided and elected on behalf of our clients to no longer participate in those investiga-

tions because of the emails that came to light where DOJ was involved.

Chairman CRUZ. Thank you. Senator Coons.

Senator COONS. Thank you, Mr. Chairman.

If I might just start with Professor Noble. Mr. Sekulow in his testimony stated there has been inappropriate influence by outside groups, and then read an email. I would just give you an opportunity, if I might, to comment on the appropriateness or inappropriateness of the nonprofit you led seeking enforcement of the law. I would be interested in your view on what happened.

Professor NOBLE. Thank you. I think what I did and what our organization did, what all these organizations do, is totally appropriate. It is a great example of how emails—because with this one, I know what she was talking about being taken out of context and being used for purposes that they were not intended. What she was referring to there is that my group, myself and others—when she talks about the FEC world, that means the campaign finance world—were saying that the IRS should become more active and should look at ways to stop these groups that are using millions of dollars in undisclosed funds for political activity. One of the ideas that had been talked about—and it has been talked about in this hearing—has been the idea that it is tax fraud, it is lying to the Government. If you say on a (c)(4) application that you are not going to get involved in political activity and you do, that is lying to the Government. If you do get involved in political activity, again, it is tax fraud. We were talking about this publicly, and that is what she is reporting on.

The other email I also know something about. It refers to the hearing where Senator Whitehouse asked DOJ about other activity that could be done, what DOJ's role was. The email that they are referring to I am amused by because I was General Counsel to the Federal Election Commission for 13 years. When a Senator at a hearing asked the agency what it could do about something, if the agency went back and did not do anything about getting an answer, not necessarily following up and doing what the Senator may be suggesting, but getting an answer, I would have been in a lot of trouble.

What that email seems to reflect—and I have no personal knowledge of it other than being at the hearing—was she was going back and saying that DOJ came to the IRS and said they got this question, and we need to sit down and talk about what the response is. It does not say they did anything about it. It does not say that they decided to go along with anything that was suggested. It was merely a statement.

In terms of her reference to the criticism that the IRS was taking the email where Ms. Lerner referred to me, she was absolutely right. We were pushing her. We had no idea of what they were doing, and, in fact, I was probably as surprised as anybody when their activity become public because our understanding was that they were not doing anything.

Senator COONS. Thank you, Professor.

Ms. Aviv, if I might, the inappropriate triage of 501(c)(4) applications for further processing that took place in Cincinnati some would argue is a predictable consequence of the real lack of clarity

in the rules. The rules are simply not reasonably administrable in a way that is consistent, clear, and fair; and, further, due in part to dozens of congressional hearings just like this one, the unfortunate result is the IRS has been cowed into barely enforcing these rules at all.

How does the lack of meaningful enforcement in this area affect your members, which, if I understand correctly, include thousands of nonprofits?

Ms. AVIV. I have hundreds of thousands of nonprofits. If you had to give out our members' affiliates, we are talking about hundreds of thousands, and the charitable sector itself, 501(c)(3)'s and (c)(4)'s, are well over a million organizations.

One of the problems is that if you do not have clarity of what is allowed, and 501(c)(3) organizations are not allowed to engage in partisan political activity at all, and (c)(4) organizations can only engage in an insubstantial percentage of their time, and "insubstantial" is not explained and described what it is, it leaves it up to the discretion of the IRS officials to decide what that is, but if they do not know what the activities include, then there is a very good chance that lots of organizations will not engage in activities that they are perfectly legally entitled to engage in. That is part of their civic responsibility. That is part of their right as citizens of the United States, to petition Government for the redress of grievances and to participate in the public space.

For some, it means that they have pulled back and they have cowed themselves, and for others, they may engage in activities, because they do not know that they can or they cannot, that is probably improper.

I think that for our organizations, clarity on defining what is political activity, how much (c)(4) organizations can engage in, would enable these organizations to do what is proper and to enable them to fulfill their missions more effectively.

Senator, one last thing that I just want to make a point about, because we have been asked often about the difference between (c)(3) organizations and (c)(4) organizations, and why do we need (c)(4) organizations if you have got 527s, if people intend to engage in partisan political activity, just go in that direction.

There is a great value in having organizations that can do both. They do not have the benefit of allowing donors to get a charitable deduction, but at the same time, they have at their disposal the full range of activities that are involved in public policy activity all the way up to and including electoral activity. We think there is still great value in those organizations.

Senator COONS. Professor Noble, if I might, just looking at the campaign side of the equation we were just discussing, what is the consequence of allowing organizations that are effectively campaign advocacy organizations to shield themselves under the 501(c)(4) label?

Professor NOBLE. It has a tremendous effect, and part of the problem is due to the ineffectiveness of the FEC and now the IRS. What you have is a campaign finance system that is based on disclosure, transparency, which the Supreme Court has said is critical; a system that also has contribution limits and prohibitions,

which cover anything from corporations or unions giving directly to candidates, to foreign nationals giving in any election.

If you allow (c)(4) organizations that do not disclose to get involved in this political activity and they are not held accountable for disclosure, then you have no way of knowing if the contribution limits are being followed, if there is any coordination going on, if foreign nationals are involved in the process, and you have totally undermined transparency. We do not know who is supporting the candidates. The Supreme Court has said over and over again—including in *Citizens United* and the recent *McCutcheon* case, that transparency is critical. The Supreme Court's decisions assume that what is happening is that all this money being spent on politics, whether by independent groups or groups affiliated with candidates, is being disclosed. If you let the (c)(4)'s do this without disclosing, whether they are Republican or Democratic, Tea Party groups or liberal groups, you have undermined the campaign finance laws.

Senator COONS. Thank you. Thank you, Mr. Chairman.

Chairman CRUZ. Senator Sessions.

Senator SESSIONS. Ms. Martin, thank you for your testimony and the courage that you have taken to advance the base that you care about. How do you feel about the person in charge of establishing your tax situation to have stated that the Tea Party is dangerous?

Ms. MARTIN. Senator, I cannot describe to you how disgusted that makes me feel. The people who got involved in this Tea Party movement are just like Toby Marie Walker. They are people who love our country, that want to make our country better, and they want to hold our elected officials accountable. To be called—or someone to go so far as to say that we are dangerous or that we are terrorists, when all we are trying to do is work within the system to hold our Government accountable is one of the most disgusting aspects of this.

Senator SESSIONS. That is the person who is delaying your progress in getting your status. Ms. Walker said it was designed to demoralize and delay their efforts. Do you agree with that?

Ms. MARTIN. I think that they intended to delay our efforts. They certainly tied us up with a lot of red tape and a lot of time and energy. We care too much about this country to let them stop us. They are not going to stop us.

Senator SESSIONS. You are not going to be demoralized.

Ms. MARTIN. You know, we have a choice in how we respond to this and the attitude that we have, and at Tea Party Patriots, we are taking the attitude that we are happy warriors. We are going to continue to fight. We are going to remember that this country is founded on freedom and that that is what we are standing for, and it is worth every bit of the effort.

Senator SESSIONS. Mr. Sekulow, is it still true that the attorney in the Department of Justice who has been given assignment of this case contributed $6,000 to the President's reelection?

Mr. SEKULOW. It is correct, Senator Sessions, and in our letter to the IRS—excuse me, to the Department of Justice we noted that, and we noted that in meetings how inappropriate that was.

There is another aspect of this, Senator, that I just find amazing. These rules and the regulations have been around since the 1960's,

and all of a sudden, it took until 2011 for there to be confusion and problems? What happened the preceding 40 or 50 years?

By the way, this whole idea about transparency is very interesting, except for one thing everyone tends to forget. Some organizations, especially (c)(3)'s, do not have to give their donor lists. You know, they tried that against the NAACP, and the Supreme Court said you do not get to do that, you do not get to ask for that.

I think they are conflating the principles here that we have to be very, very cautious of in making general statements. I am just—I raise that, just the rules and the reg rulings have been around for decades. Now, all of a sudden it is a problem.

Senator SESSIONS. I understand that Ms. Lois Lerner has refused to testify before the House. Is that correct?

Mr. SEKULOW. Yes. She invoked her Fifth Amendment privilege.

Senator SESSIONS. Well——

Mr. SEKULOW. Kind of.

Senator SESSIONS. This is what I wonder: To me—I spent 15 years in the Department of Justice. I do not think any of—I am not aware of anybody that gave $6,000 to the reelection of any President that I am aware of. I think that is very unusual, number one.

Number two, it seems to me that an investigation as it would normally proceed would be to question whether or not there was political influence here. The obvious next step would be to ask who Ms. Lerner talked to in the White House, every one of them, and then find out from every one of them what they talked about, and whether they talked about these kind of issues. Do you agree?

Mr. SEKULOW. I do, Senator, and I find——

Senator SESSIONS. Has anything of that nature to your knowledge been done?

Mr. SEKULOW. No, there has not, and I would like to know why the Department of Justice, as far as we can tell, and the testimony that we have heard in other hearings in the House, why did they not ask who crafted the questions that ask who you prayed with, who your membership lists are, who is on your membership list, who your donors are, what Members of a legislative body have you talked with. Who crafted those questions? That is something I still—no one has given us an answer on that. Where did those questions come from? I do not believe they came from a revenue agent in Cincinnati.

Senator SESSIONS. I could not agree more.

Ms. Mitchell, don't you think that the appropriate step for a real investigation would be to find out if there are any White House staffers or other people in the White House, however high it goes, whether or not they coordinated with this idea and sought to punish, demoralize, or delay legitimate rights of people who did not agree with some of their views?

Ms. MITCHELL. Yes, Senator, and I think one of the things we have to focus on—and this has been written about by Kimberly Strassel at the Wall Street Journal. The President of the United States was going around the country demanding that the IRS take action. There were, excuse me, but Members of this body who were sending letters demanding that the IRS take action.

The difference between Watergate and the IRS scandal in the Obama administration is that during the Watergate scandal, the

IRS refused to act at the political urging of whether the President—the President of the United States. In this case, the IRS took very seriously the directives from partisans with whom I disagree. I do not want the IRS to decide that they are going to take your view or your view instead of my view. They should not be taking sides in a political dispute. We have very real policy differences, and the IRS under Lois Lerner clearly took sides, and that to me is the most frightening part of this, that they took sides.

Senator SESSIONS. Thank you. I share that view, and I think we have to be eternally vigilant that the persons who can extract money from American citizens are never using their power to direct—or to be hostile to one voice or another voice. Thank you, Mr. Chairman.

Chairman CRUZ. Thank you, Senator Sessions. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Ms. Mitchell, do you represent an organization called, "True the Vote"?

Ms. MITCHELL. I do.

Senator WHITEHOUSE. Is True the Vote a 501(c)(3) approved entity?

Ms. MITCHELL. After we received the IRS—yes, on the day the Government was to answer, after 3½ years, they said, "Oh, you"—"We are going to grant you your tax-exempt status today."

Senator WHITEHOUSE. Is there a district court action in the District of Columbia that has True the Vote's application to the IRS in it as a public record?

Ms. MITCHELL. Yes, I believe—well, I do not know that—I think the whole application is in there. I am not sure of that. I do not remember the exhibit. That case is now on appeal at the D.C. Circuit.

Senator WHITEHOUSE. You do represent True the Vote, it is a 501(c)(3).

Ms. MITCHELL. It is.

Senator WHITEHOUSE. Its application, because of this case, is a public record. Did——

Ms. MITCHELL. Part of it.

Senator WHITEHOUSE. Did True the Vote, in answering Part 8, Question 1—and let me quote the question: "Do you support or oppose candidates in political campaigns in any way? If yes, explain." That is the question. Are you familiar with the question? Have I read it correctly?

Ms. MITCHELL. I do not have it in front of me, but I presume the answer to that question is no, because they do not support or oppose candidates in elections.

Senator WHITEHOUSE. In any way?

Ms. MITCHELL. In any way.

Senator WHITEHOUSE. The $5,000 that the organization gave to something called the "Republican State Leadership Committee" was not intended to support or oppose political candidates in any way?

Ms. MITCHELL. That contribution was incorrectly made from the (c)(3). When the president, Catherine Engelbrecht, learned about it—it was done by a consultant fundraiser, and when she learned

about it, that was refunded, and a contribution from a different permissible source was given.

Senator WHITEHOUSE. The reason is because the Republican State Leadership Committee defines itself, and I quote, "The RSLC is the largest caucus of Republican State leaders and the only national organization whose mission is to elect down-ballot, State-level Republican office holders." Correct?

Ms. MITCHELL. That is right, and that is why it was a mistake, and it was refunded, and that—because once the president found out and she called me, I said, "Well, that is illegal, so you are going to have to get that money back." They did.

Senator WHITEHOUSE. True the Vote engaged in the 2012 Wisconsin recall effort on behalf of Governor Scott Walker?

Ms. MITCHELL. No. What they did was that they went to Wisconsin to validate petitions of signers of the recall petitions against voter lists to make certain that the integrity of the process was appropriate and had been followed. That is the mission of True the Vote, to help protect the integrity of elections. What they volunteered to do was to provide volunteer assistance to the Government Accountability Board of Wisconsin to ensure that the petitions were valid and had—were signed by only those who were registered to vote in Wisconsin and eligible to sign the petition, so that any structure ensuing recall election would be properly called.

Senator WHITEHOUSE. Your view is that defending Governor Scott Walker against the 2012 Wisconsin recall effort was not supporting or opposing him in political campaigns in any way?

Ms. MITCHELL. I believe that supporting the integrity of elections is something that both Republicans and Democrats ought to be for, and that supporting things such as voter identification and other measures that ensure the integrity of our elections, that those are appropriate activities for a 501(c)(3) organization, yes.

Senator WHITEHOUSE. Did the president of True the Vote appear at a conservative political action conference in 2012 and state that she absolutely was working to replace the Obama administration?

Ms. MITCHELL. I do not know that she said that. Do you have a video or a transcript of that?

Senator WHITEHOUSE. I have a quote, and I can get it to you.

Ms. MITCHELL. I would find that hard to believe. I would find that hard to believe.

Senator WHITEHOUSE. Because——

Ms. MITCHELL. I think that it is true——

Senator WHITEHOUSE. Why would you find that hard to believe?

Ms. MITCHELL. Because I think that Catherine knows the difference between what is appropriate and not appropriate for appearances in her capacity as president of True the Vote. I will tell you that if—that I have never seen anyone—and this is another part of this scandal. Once she established that 501(c)(3) and a companion 501(c)(4), she was suddenly visited over the course of the next year by the FBI, the IRS, 7 times from the FBI, 3 times by the IRS, OSHA, the Bureau of Alcohol, Tobacco, and Firearms. She was subjected to letters from the White House Counsel and to demands by members—Democratic Members of Congress to travel to Washington to present herself and defend herself.

Honestly, I can imagine that she might have said something along those lines about the Obama administration, because I think she felt pretty put upon.

Senator WHITEHOUSE. Turning to a 501(c)(4), Ms. Martin, you represent Tea Party Patriots here?

Ms. MARTIN. Yes, sir.

Senator WHITEHOUSE. That is a 501(c)(4) organization?

Ms. MARTIN. Yes. We were notified, our attorneys were called by the IRS the day before I testified last year before the House.

Senator WHITEHOUSE. On the 501(c)(4) application, there is a Question 15: Has the organization spent or does it plan to spend any money attempting to influence the selection, nomination, election, or appointment of any person to any Federal, State, or local public office? If yes, explain in detail.

Do you know if your organization answered that question yes or no?

Ms. MARTIN. I believe that we answered the question no. I do not have the application in front of me.

Senator WHITEHOUSE. Assuming that you answered the question no, a column in Forbes Magazine ascribes the following email language to your organization, and I will quote it: "I am being told by my staff that we are probably going to have to let some leftist like Bruce Braley in Iowa or Kay Hagan in North Carolina win because we cannot afford to fight back in every important State. Your gift today will be sent immediately to the front lines to enable our grassroots volunteers and staffers to contact these voters and move them to the polls to fire Harry Reid. If we succeed this year", oh, where did the rest of that page go?-, "we will shock the political world."

It strikes me that an effort to fight back against Bruce Braley in Iowa and Kay Hagan in North Carolina, who, for the record, were candidates on the ballot at the time, and to take money solicited in response to that email and give it to grassroots volunteers and staffers to contact voters and move them to the polls, that does seem a bit like an attempt to influence the election of any person to a Federal, State, or local public office, does it not?

Ms. MARTIN. Senator——

Chairman CRUZ. Ms. Martin, you can answer this question, but I would note the Senator's time has long expired, so keep your answer brief, please.

Ms. MARTIN. We also, after the 2012 election, because we could not even say the word "Obamacare" because of the targeting and our attorneys advised us not even to use the term "Obamacare" and to only refer to it as "the President's healthcare law," we decided that it would be—so that we could exercise our First Amendment rights, we needed to start a 527 super PAC so that we could actually mention the name of the President and other elected officials, and we did that. I do not know what you are referring to precisely from a Forbes article. I would have to look at the email that was sent. It is highly likely that the email was sent from the 527 super PAC, which is Tea Party Patriots Citizens Fund, not the 501(c)(4) Tea Party Patriots.

Senator WHITEHOUSE. I apologize for going over my time, Chairman. I thought that had become the tradition in this particular hearing.

Chairman CRUZ. We are endeavoring to be generous, but it was over 5 minutes over. We are endeavoring to be generous on both sides of the aisle, with considerable leeway, and then that will continue to be the standard.

Ms. Mitchell, Senator Whitehouse just a moment ago suggested that True the Vote's effort to protect the integrity of the ballot somehow was harmful—beneficial to the political prospects of Governor Scott Walker. If I am understanding the argument that the Senator from Rhode Island made, the necessary premise of that is that voter fraud, fraudulent election activity, disproportionately benefited the Democratic opponents of Governor Walker. Is that correct, that that is the necessary premise of that argument?

Ms. MITCHELL. It seems to be. This is an issue which I have been very involved in, not just as counsel to True the Vote but in other capacities. I do not understand why voter integrity and combating voter fraud, which is an actual problem in America, I do not understand why that is a partisan issue.

Chairman CRUZ. The only way it could be is if there was more fraud on one side of the aisle than the other. If you are ensuring that voter laws are complied with, that ought to be, by definition, nonpartisan unless members of this panel know of some large concentration of voter fraud that benefits one party or another.

Ms. MITCHELL. That would certainly be the inference.

Chairman CRUZ. Mr. Sekulow, you mentioned that you represent *Z Street*. I would ask you to share with this panel briefly just the facts of the *Z Street* matter.

Mr. SEKULOW. I did not, and I wanted to clarify. We do not represent *Z Street*. It is separate litigation. They have separate counsel. We have been involved in the process.

*Z Street* involved an application for a pro-Israel organization to form as a tax-exempt organization. The agent that was subject to assign the case for review stated to the lawyer that was representing *Z Street*—we actually met with the original plaintiffs in that case in Jerusalem a couple years before the litigation started because they were already having problems and we were at a conference. The end result was that the agent stated to the lawyer that, in fact, there was a special Israel unit inside of the Internal Revenue Service that was reviewing applications, and if the application information—some of the statements that Senator Whitehouse was talking about, where they have the general information section describing your activities, if the position of the organization was in opposition to the position of the administration regarding the Middle East or with Israel, it was handled differently. That case——

Chairman CRUZ. By the way, quickly, Mr. Sekulow, are you aware of any other Nation on the face of the globe that is somehow targeted or singled out that if an organization defends that particular nation they get special scrutiny?

Mr. SEKULOW. Absolutely not. In fact, the unit was called the, "Israel Special Policy Unit."

Chairman CRUZ. It is almost as if the administration has some particular hostility to any entity that is defending the Nation of Israel.

Mr. SEKULOW. This was precisely—and it is similar in our cases in the sense that the allegations in *Z Street* were based not on the granting of the tax exemption but the process upon which the application——

Chairman CRUZ. I want to be clear. I understand. Is there an Iran unit?

Mr. SEKULOW. No, there is not an Iran unit that I know of.

Chairman CRUZ. Is there a North Korea unit?

Mr. SEKULOW. Not that I am aware of.

Chairman CRUZ. Is there an ISIS unit?

Mr. SEKULOW. Not that I am aware of.

Chairman CRUZ. Apparently Israel gets more scrutiny than radical Islamic terrorists who are seeking to murder Americans. Is that correct?

Mr. SEKULOW. That apparently is the position of the Internal Revenue Service. At least it was until the district court's opinion. The district court, by the way, denied the Government's request for a motion to dismiss under 12(b)(6). It was appealed to the D.C. Circuit. The D.C. Circuit ruled, in fact, that political viewpoint cannot be the basis upon which applications are moved forward or not, which is precisely what we are talking about here today. This type of internal investigation is problematic from the start. The idea that your viewpoint is the basis upon which your exemption is either granted or denied is problematic. That is what the district court-—the court of appeals said as well.

Chairman CRUZ. Ms. Walker, as I understand it, you received a questionnaire and letter from the IRS. Can you give an example of a question that was difficult or even impossible to answer?

Ms. WALKER. There were several. One of the questions they wanted was every news article that ever been written about us, whether we engaged in the interview or not. They wanted a copy of it. When we googled our name to see how many hits were on the internet, we came up with over 400,000 at that time. There was no way that a group of 5 or 6 volunteers was going to be able to go through 400,000 news articles and ascertain whether they really were about us, if we were mentioned, print it, then send it to the IRS, because we were not allowed to do anything electronically. It had to be printed. It would have taken hordes of U-Haul trucks just to figure it out. We could not even pay for that.

They also asked us for every relationship we have ever had with every candidate or would have. They asked us to give them transcript—we have an internet radio show, and at that time we also had one on a local radio. We had anywhere from 4 to 6 hours of programming a week. They wanted transcripts of every time a candidate was on the air. When we asked what a candidate was, they could not explain that to us either, because if you are an incumbent and you are going to run for reelection and you are talking about policy, are you a candidate? Could not answer it.

They asked us—they told us those things were subjective, tell us everybody that we knew and everybody—and what the relationship was.

Chairman CRUZ. Ms. Walker, you are a citizen, a wife, a mother. How does it feel to be targeted by the Federal Government for expressing your First Amendment rights?

Ms. WALKER. It feels like I do not live in America anymore. This is something that I grew up—I grew up in the cold war. I grew up under Reagan. This is what I saw on TV in other countries, not in the United States, where it is celebrated to have a diverse opinion. It is okay to have diverse sexual orientations, but it is not okay to have a diverse political orientation in this country anymore. If you are conservative, if you are a Tea Party, you are vilified.

Chairman CRUZ. Okay. Let me ask one final question. Ms. Walker, Ms. Martin, and I will ask this also of Ms. Mitchell and Mr. Sekulow for your clients, we have been told for some 800-plus days—806 days since this scandal first broke—since the Treasury Department Inspector General report came out, it has been 806 days. We have been told that there is an investigation, albeit led by a major Democratic donor. That investigation has produced zero indictments despite the fact that President Obama said the American people should be angry, and he claimed he was angry—until he started going on comedy shows making fun of targeting American citizens.

My question to each of you is: In the course of this ostensible investigation—that I believe at this point has become more of a coverup—have each of you been interviewed by the FBI to determine whether and to what extent the IRS wrongfully targeted you because of your political views?

Ms. WALKER. I would like to defer to my attorney to answer that question.

Ms. MARTIN. I have not.

Mr. SEKULOW. I would be happy to answer because I am Ms. Walker's attorney. The initial investigation with the FBI, I did include an interview with Ms. Walker. The problem became—and it is two-fold, Senator. Once the information about the head of the Department of Justice or the person that was assigned to lead the investigation became public, and we had the email exchange between the IRS and the Department of Justice about piecing together these criminal cases, and in light of all of that, we made the determination at that point, although she had already been interviewed, to no longer participate in that, and we notified the Department of Justice.

I might add also on the question, just to clarify it for the sake of my client here, one of the questions asked, Question 17 of the application or the request that came in from the IRS, "Do you have a close relationship with any candidate for public office or political party? If so, describe fully the nature of that relationship." That was just one of—whatever, "close relationship", means. We notified the IRS on behalf of Ms. Walker and others that much of what the IRS was asking was outside the scope of legitimate inquiry, and after months and months and months, they started narrowing down the scope of their questions. This took a process of years to engage in.

To answer the question about the investigation, Ms. Walker did speak—was interviewed by the Department of Justice, and there was never any follow up after that.

Chairman CRUZ. Ms. Mitchell? I am now, like Senator Whitehouse, well over my time, so if you would briefly answer that.

Ms. MITCHELL. I was asked——

Senator WHITEHOUSE. I think you have even topped me here, Mr. Chairman.

Chairman CRUZ. I try every time.

Ms. MITCHELL. The day I—I must tell you this story. I was testifying before the House Oversight Committee in February of last year, and I filed my testimony in the morning, and in it I said that the DOJ investigation was a sham. At 2 o'clock that afternoon, I started getting phone calls from the Department of Justice saying that they wanted to talk to me, and I talked to them for the first time on the Friday following my testimony. They wanted to interview Catherine Engelbrecht. However, our litigation team, as Senator Whitehouse pointed out, we had pending litigation against the IRS which was being defended by the Department of Justice. Our litigation team made a decision that they would let them talk to me initially since I represented a number of people who had gone through this situation. We are still going through it.

I talked with them and described all the different experiences of all of my clients, including the conversation—the conference call that was organized by Ms. Walker after all of those letters went out to groups all over the country. There were more than 80 people, I think, on that phone call, that conference call, with accountants and people saying, "I have never seen anything like this." The only question that Barbara Bosserman, the head of the Department of Justice investigation, the only thing she said during the entire 2 hours in which I was talking to them was she asked were there any progressive groups on that call, which I thought—I just looked at her in disbelief.

Following that, they wanted to interview Catherine Engelbrecht, and Catherine, in addition to having the lawsuit that True the Vote had filed in the district court, she was also seeking on behalf of True the Vote to intervene in a voter ID case in Texas, a Federal voter ID case, which the Department of Justice has objected to and had made some fairly unflattering comments about True the Vote. Ms. Engelbrecht made the decision that—she said, "I would be happy to interview with the FBI and with the DOJ as long as I do not have anyone from the Civil Rights Division present." Of course, Ms. Bosserman was the head of that. They refused to meet with her because they said that they could not let a witness make demands. I said, "She is not a witness. She is a victim."

Chairman CRUZ. Thank you, Ms. Mitchell. Senator Coons.

Senator COONS. Thank you, Mr. Chairman.

Mr. Spaulding, if I might, just to follow up on a question I asked previously of Professor Noble, he suggested that there are some consequences to allowing organizations that are effectively campaign advocacy organizations to shield themselves under 501(c)(4) labels and cited Supreme Court cases, I think *McCutcheon* and *Citizens*, that highlighted the value and the importance of disclosure. Is there any evidence that the consequences that Professor Noble warned about are actually occurring? Why is this of concern to the roughly 400,000 members of Common Cause?

Mr. SPAULDING. Thank you, Senator Coons. It is absolutely important. In the 2012 elections, over $300 million came from undisclosed sources. The vast majority of that money went through 501(c)(4) organizations, and, by the way, I am talking about 501(c)(4) organizations like Crossroads GPS that spent $70 million. These are the powerful, politically connected organizations that are manipulating the rules, and in so doing, voters are left without much information when they go to the polls.

Ms. Martin talked about our country being founded on the values of freedom. I would add equality, and we are getting more and more perfect in that regard. We have a long way to go. Freedom and equality frankly do not mean that much if you do not have an informed electorate, and that is why the Supreme Court has said repeatedly, emphatically, 8–1, in *Citizens United* that disclosure advances First Amendment values so that voters know who is speaking to them, so that voters can hold elected officials accountable, and so that our laws can be enforced.

Even Justice Scalia said, in *Doe v. Reed*, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." That is what is at stake, Senator Coons.

Senator COONS. Thank you, Mr. Spaulding.

Mr. Colvin, if I might, I just want to commend the work that you and your colleagues at Bright Lines Project have done to attempt to bring some clarity to what I think has long been a murky area here—not in statute but in the regulations and the rules.

One of the challenges here is bringing clarity to what qualifies as political activity under the Tax Code. But defining "political activity" is only part of the problem. Do you believe that 501(c)(3) and (c)(4) organizations ought to be able to engage in campaign activity? If so, how much? How do you measure appropriately the level of political activity of an organization? If you might, in closing, since I am going to keep mine short this time, what has happened in the past when the IRS has attempted to enforce its demonstrably unclear rules against high-profile groups or individuals that violate it?

Mr. COLVIN. First of all, with respect to 501(c)(3) charitable organizations, the rule has been for 60 years that they are absolutely prohibited from political intervention, and I think that should continue to be the case. That would be political intervention of any kind, whether it involved the expenditure of money or making of statements or other activities by volunteers, by staff, that might support or oppose political candidates.

With respect to (c)(4)'s, as we know, 501(c)(4)'s do not have the benefit of tax-deductible donations, so they have greater latitude. Certainly they can lobby on legislation without limit. They also have an allowance for political campaign activity, which makes sense if you consider groups like the Sierra Club or the National Rifle Association that have a need to put out voter guides, let people know where the candidates stand on issues.

The quantitative limit of less than primary has never been stated, and should be, in dollars of annual expenditures, by a percentage. There has been a sort of folk wisdom that the percentage is 49 percent. The IRS has an expedited process for (c)(4) organiza-

tions to declare they will not spend more than 40 percent of money or staff time on political activity. There are many who would like to see that be lowered to an insubstantial level of 5 or 10 percent.

The Bright Lines Project does not take a position on the exact percentage, but does believe that it should be solely measured by annual expenditures.

Senator COONS. What would be the benefit of having a brighter line? What would be the benefit to organizations that seek to have a predictable path forward, to have clarity that their First Amendment rights are going to be protected? Why would that be positive or beneficial?

Mr. COLVIN. It would be positive because the 501(c)(3) and (c)(4) and, for that matter, unions that are (c)(5)'s, trade associations that are (c)(6)'s, could engage in nonpartisan voter turnout. We have terribly low voter turnout in the United States, and we need to use social welfare and charitable and other organizations to increase that, without being partisan to do so. That is the positive effect you would look for for activities that should be encouraged under the IRS line drawing.

Also, if it is the policy certainly of campaign finance laws and also of the IRS and its enforcement of Section 527 to have disclosure of money that is used for influencing political campaign, then one would hope that a better definition and a clear limit for 501(c)(4)'s, (5)'s, and (6)'s would push those who wish to have political activity transpire into the 527 category.

My California license plate says C3C4527.

[Laughter.]

Mr. COLVIN. I believe that that is the most effective way for an organization, whatever its cause, to influence the Government. The question is: How do you arrange your expenditures and activities between those three categories?

Senator COONS. Thank you, Mr. Colvin, and I would like to thank all the members of this panel who, at great personal investment and effort and difficulty, have come and testified before us today. This is an important issue, and one I suspect we will not resolve with just this hearing, but I just want to express my gratitude to everyone who has testified today. Thank you.

Thank you, Mr. Chairman.

Chairman CRUZ. Thank you. I will note, Mr. Colvin, I hope that the IRS does not audit you for your expression of free speech on your license plate. Senator Sessions.

[Laughter.]

Senator SESSIONS. Thank you. A little jingle I created one time was, "Oh, what a tangled web we create/When we first start to regulate." It is just very difficult to close all the loopholes.

Mr. Sekulow—or let me ask Ms. Mitchell—I asked him, but I want to pursue this idea that, well, we have an idea about how this interpretation of the law for exempt organizations should be handled, and I believe Mr. Spaulding correctly said, however it is interpreted, it ought to be fair across the board.

Do you feel like it is being fairly applied across the board? Are there—has the Tax Division targeted individuals based on their ideas?

Ms. MITCHELL. Absolutely, and I think that the evidence shows that. The Inspector General wrote a letter to the House Ways and Means Committee in June 2014 in which—excuse me, June 2013, in which he outlined that just the sheer numbers of the conservative and Tea Party, pro-life, pro-Israel groups, and how they had been treated compared to groups who had the word "progressive" in their name. I compare it to when you go fishing. It is one thing to catch the fish and put it in the boat and keep it, which is what happened to the conservative groups. What happened to the progressive groups, it was catch and release. They caught it, looked at it a little bit—Progress Texas, good example. It was on the list in September 2010. That was leaked to USA Today. There were, I think, 80—I do not even—112 groups on that list. There were a few progressive groups. One was Progress Texas. One was Tea Party Patriots. Tea Party Patriots, and the comments out by the side said, "Appears to be engaging in anti-Obama propaganda." That is what it said about Tea Party Patriots.

You go back a few pages, there is Progress Texas: "Appears to be engaging in anti-Rick Perry propaganda."

Here is the difference: In September 2011, or 2010, whenever it was, September of that year, Progress Texas got its tax-exempt status in just a few months. Tea Party Patriots waited another several years and had to go through multiple rounds of IRS quote, "development letters."

Senator SESSIONS. I think this is not over.

Ms. MITCHELL. No, it is not.

Senator SESSIONS. This is not right.

Ms. MITCHELL. It is not right.

Senator SESSIONS. The IRS cannot be used in this fashion, and I want to get to the bottom of it, and I want to find out if there was political direction from the White House, because the people who run the IRS are appointed by the White House.

Let me ask you, Mr. Sekulow, are you aware that today, apparently today—I was just handed this—Judge Emmet Sullivan threatened to hold the IRS Commissioner in contempt at a Judicial Watch——

Mr. SEKULOW. For the failure to produce FOIA information.

Senator SESSIONS. Yes. Are you familiar——

Mr. SEKULOW. I know about the case. I did not know that—I have been here attending the hearing, so I did not know that the order came out. This has been an—we actually have FOIA litigation going on as well, and the courts in that particular case—the IRS has not been forthcoming with the documents, or if they do supply documents, they are so redacted, you do not even—it is not even clear what the documents respond to.

I think in that particular case, I think the IRS just made the determination they were not responding. I do not know the context of the order.

Senator SESSIONS. You would say that the administrator who testified earlier, when he said they are fully cooperating, in your view as a practicing lawyer with many years of experience with discovery, in your view they are not fully cooperating?

Mr. SEKULOW. Absolutely. Not fully cooperating, and the fact of the matter is—and the President can have his own opinion, but he

does not get to create his own facts, and that is just not a fact. The IRS has not been cooperative.

Does it not seem bizarre, just bizarre, that there is a gap for the years in question in Lois Lerner's emails? I will say this, Senator, with due respect to the Committee, and I appreciate the time here. My colleagues in the Office of Chief Counsel when I served, in 1979, were notified that there was a breach of Federal personnel records, including personnel records in our office, and my colleagues from that year, 1979, a long time ago, were notified that their records may have been compromised in that. That record was available from 1979. Lois Lerner's emails from the years in questions vanish.

Senator SESSIONS. This is what the Judicial Watch statement today says the judge is saying, quote: "I will haul into court the IRS Commissioner to hold him personally in contempt," close quote. Then it goes on, quote: "In a status hearing today, Judge Sullivan warned that the failure to follow his order was serious and the IRS and Justice Department's excuses for not following his July 1 order were, quote 'indefensible, ridiculous, and absurd'", close quote.

I would say that what I have seen throughout this is a foot dragging, a lack of full and open cooperation, and what the IRS should have done from the very beginning was to say, "We are going to restore the integrity of the Internal Revenue Service, and we are going to go to the bottom of it. We are going to find out every fact, and if anybody did wrong, they are going to be fired and/or prosecuted. If anybody at a higher level directed them politically to target people that they did not like, we are going to investigate them; and if they violate the law, they go to jail."

That is what should be done here. I sense no commitment of this kind on behalf of the Obama administration, and I think it has placed at jeopardy the integrity of the IRS, and I am very disappointed about it.

Chairman CRUZ. Thank you, Senator Sessions. Senator Whitehouse.

Senator WHITEHOUSE. Mr. Chairman, just two things for the record.

One, with respect to your exchange with Ms. Mitchell, the matter in question was a recall petition. It was not an election. Every signature that could be struck was necessarily to the benefit of Governor Walker. Your point that this in some way might reflect on the disproportionately Democratic nature of voter fraud is simply not germane in a circumstance in which—there was no accompanying petition not to recall. This was a petition to recall. I wanted to make sure that point was clear.

The second is, with respect to Ms. Martin, I owe her the courtesy of giving her the source, which was a Forbes Magazine column, November 3, 2014, written by a man named Peter Reilly. To be precise about quoting it, "On September 1, I got an email from Jenny Beth Martin"—and here is what he says—"in her capacity as cofounder and National Coordinator of TPP Inc, open paren (the social welfare organization) close paren that indicated quote: 'Your gift today will be sent immediately to the front lines to enable our grassroots volunteers and staffers to contact these voters'," et

cetera. At least it was Mr. Reilly's belief that he received this email in Ms. Martin's capacity as cofounder and national coordinator of TPP Inc., the social welfare organization, which was the one that answered the question, "Do you plan to spend any money attempting to influence the selection, nomination, election, or appointment of any person?" "No."

Thank you.

Chairman CRUZ. Thank you, and I would like to thank each of the witnesses, a number of whom traveled a long distance to be here. Thank you for your time. This has been an extended hearing, but I think a very important one, and I appreciate the diligence with which you have provided your testimony.

We will keep the hearing record open for an additional 5 business days, which means the record will be closed at the end of the business day on Wednesday, August 5, 2015.

With that, this hearing is now adjourned.

[Whereupon, at 5:38 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

# A P P E N D I X

**Miscellaneous submissions:**


Cause of Action, Statement ..... 290
Foley & Lardner LLP, letter ..... 276
Permanent Subcommittee on Investigations, September 5, 2014 ..... 346
Public Citizen, testimony ..... 295
Shafer, John, various emails ..... 279
Tea Party Patriots, letter ..... 301
Treasury Inspector General for Tax Administration, May 14, 2013 ..... 574
Various Senators, letter ..... 342
Z Street ..... 345

**WRITTEN TESTIMONY OF**
**JOHN A. KOSKINEN**
**COMMISSIONER**
**INTERNAL REVENUE SERVICE**
**BEFORE THE**
**SENATE JUDICIARY COMMITTEE**
**SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS**
**ON THE EXEMPT ORGANIZATIONS DETERMINATION PROCESS: PROGRESS OF AGENCY REFORMS AND CONGRESSIONAL OPTIONS**
**JULY 29, 2015**

Chairman Cruz, Ranking Member Coons and Members of the Subcommittee, thank you for the opportunity to discuss actions taken by the IRS in response to the report two years ago by the Treasury Inspector General for Tax Administration (TIGTA) regarding the improper criteria used in processing applications for tax-exempt status under section 501(c)(4) of the Internal Revenue Code.

Let me begin by reiterating what I have said earlier in my tenure as IRS Commissioner. The situation described by the Inspector General in his report should never have happened, and we are doing everything possible to ensure that the mistakes referenced in the report do not happen again. Every taxpayer, whether an individual or an organization, needs to be confident that they will be treated fairly by the IRS no matter what their political affiliation, their position on contentious political issues, or whom they supported in the last election.

Even with our declining resources, we will still audit over 1 million taxpayers this year. And when someone hears from us regarding their tax return – by letter, I should add, in light of the recent proliferation of IRS impersonation telephone scams – they need to understand that it is only because of something in their tax return, and not other factors. And, if someone else has the same issue on their return, they will hear from us as well, within the limits of our budget resources.

A shared belief in the fairness of our tax system and its administration is fundamental to the voluntary compliance by our citizens with the requirements of our tax laws. This compliance provides the vast majority of the over $3 trillion in revenue that we collect for the nation every year. We are the stewards of this system and take our responsibility seriously.

As part of our work to move forward, we have implemented all of the recommendations made by the Inspector General in his May 2013 report. The Inspector General reviewed our actions and issued a follow-up report in March of

this year, noting that the IRS has taken "significant actions" to address his recommendations.

These are important steps. We have eliminated the use of inappropriate criteria; we have expedited the processing of section 501(c)(4) applications; and we have instituted a quality review process to assure that unnecessary or improper information requests are not sent to applicants. In addition, the Department of the Treasury and the IRS have begun the process of drafting guidance on how to measure social welfare and non-social welfare activities of section 501(c)(4) organizations.

Our efforts to develop this guidance have been greatly informed by the more than 160,000 public comments received in response to the 2013 proposed regulations. We asked for, and received, comments on several issues, including three major issues: the proposed definition of political campaign activity; to which organizations that definition should apply; and the amount of political activity an organization can engage in consistent with a particular tax-exempt status. Our goal is to provide guidance that is clear, fair to everyone, and easy to administer.

The changes we have made in response to the Inspector General's recommendations on exempt organizations also include:

- Establishing a new process for documenting the reasons why applications are chosen for further review;
- Developing new training and workshops for employees on a number of critical issues, including the difference between issue advocacy and political campaign intervention, and the proper way, under current law, to identify applications that require review of potentially significant political campaign intervention;
- Establishing guidelines for specialists in the IRS's Exempt Organizations (EO) division on how to process requests for tax-exempt status involving organizations engaging in potentially significant political campaign intervention; and
- Creating a formal, documented process for EO determinations personnel to request assistance from technical experts.

In addition to these actions, the entire leadership chain – from the top down to the Exempt Organizations Division – is new since 2013, starting with the Commissioner of the IRS, the Deputy Commissioner for Services and Enforcement, the Commissioner of the Tax Exempt/Government Entities Division (TE/GE), the Deputy Commissioner of TE/GE, and the Director of Exempt Organizations. All of us are committed to providing taxpayers with the fair, unbiased actions and responses to their inquiries that they have a right to expect.

Importantly, the work of this new leadership team has included reducing the inventory of section 501(c)(4) applications, including the group of 145 cases in

the "priority backlog" – those that were pending for 120 days or more as of May 2013. By July 2, 2015, 140 of those cases, or 97 percent, were closed. Of the closed cases, 107 of them were approved, including 43 organizations that took advantage of a temporary self-certification procedure we offered in the summer of 2013. Of the remaining 33 closed cases, most were closed without a determination, either because the organization withdrew the application or it failed to respond to our questions. To date, five applications have been denied. The remaining five cases are still open.

Beyond the scope of the Inspector General's recommendations, we have also established an agency-wide enterprise risk management program, creating risk management liaisons in each area of our operations and providing for the regular identification and analysis of risks to be eliminated or managed across the agency. We are working to create a culture where employees are encouraged to think of themselves as risk managers and to report any issues or problems that occur. My goal is to have employees understand that the only problems we can't solve are the ones we don't know about. As a corollary to that effort, we are encouraging the further flow of information from front line employees up through the organization as well as out to the front line from senior managers.

The investigations into the determination process for tax-exempt status also raised another issue that we have been working to address, and that is the need to improve the IRS' records retention practices. This issue was brought into focus recently with the Inspector General's release of a report on the IRS' production of emails relevant to the investigations. The report described difficulties in searching for emails and retrieving them from the IRS' outdated system for electronic records retention.

It is important to note that even with our antiquated system, the IRS was able to produce more than one million pages of documents to the investigating Committees, although at a cost of approximately $20 million. This included a total of 78,000 emails sent or received by former Director of Exempt Organizations Lois Lerner. The Inspector General's review found just 1,330 additional emails that had not already been produced. The Inspector General also observed that a review of those emails did not provide additional information for purposes of his investigation. The Inspector General also found that the erasure by IRS employees of a set of disaster recovery tapes in 2014 was not intentional and that there was no evidence that those employees had been directed to conceal information from investigators. Nonetheless, this situation should not have happened, and we are reviewing the IG's report and taking steps to ensure that future document preservation instructions are understood and followed throughout the agency.

In addition, efforts are now underway to develop a more modern email retention system at the IRS, which will greatly improve the management and storage of emails that are Federal records. In particular, as detailed below, we are taking

measures going forward to ensure that our archival data is no longer stored in a manner that is vulnerable to loss through equipment failures – such as hard drive crashes. This will enhance our ability to fully and efficiently comply with information and document requests, without having to resort to the uncertain, costly, and difficult process of retrieving data either from individual employee hard drives or, as a backup, disaster recovery systems.

Even though the IRS has a long history of complying with the standards for retention of federal records set by the National Archives and Records Administration (NARA), the unprecedented volume and scope of the document requests made by Congress and the public since 2013 in regard to the processing of applications for tax-exempt status highlighted the need for the IRS to continue improving its maintenance of federal records that are in electronic form, consistent with the constraints on our budget. In this effort, we have been in close consultation with NARA to ensure the best approach.

As a first step, in October 2014, we implemented an interim email retention policy for all senior IRS executives. This interim policy, which follows NARA's recommendations for email records retention, was extended to all IRS executives in December 2014. This policy is to be followed by a more fully developed enterprise solution to allow us to securely store, search and retrieve emails that are federal records. We are working to complete the development and implementation of the enterprise solution, though success will depend on funding, staffing, and prioritization with other business requirements.

While the interim policy is an important step toward a consistent policy of electronic federal records retention, the IRS ultimately intends to develop and implement more automated enterprise solutions, consistent with government-wide guidance and standards. Given the importance of this issue, we have already begun to take action using the resources available to us.

The IRS considered putting a more modern system in place three years ago, but was unable to do so because of budget constraints. Now, however, we have made the decision to move forward with the new system, even if that means reducing resources to other areas of agency operations already hampered by continually diminished resources provided in the IRS budget each year. Once a more modern system is established, the IRS should be able to respond to even complex Congressional inquiries much more efficiently and effectively than in the past. Our goal is to ensure that we have the ability to obtain official records of the agency in a reliable and consistent manner.

Chairman Cruz, Ranking Member Coons and members of the Subcommittee, this concludes my testimony. I would be happy to take your questions.

**SENATE COMMITTEE ON THE JUDICIARY**

SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS

*"REVISITING IRS TARGETING:*
*PROGRESS OF AGENCY REFORMS & CONGRESSIONAL OPTIONS"*

TESTIMONY OF CLETA MITCHELL, ESQ.
JULY 29, 2015

Mr. Chairman, Ranking Member and Members of the Subcommittee:

Thank you for conducting this hearing and thank you for inviting me to testify about the unconstitutional and illegal viewpoint discrimination and harassment by the IRS to which hundreds of grassroots citizens organizations, as well as individuals who lead or donate to conservative organizations or who speak out publicly to criticize the IRS or the Obama administration were and continue to be subjected.

You are asking the right questions, Mr. Chairman:

1. Has the IRS broken any laws?
2. What should Congress do about it?

The answer to the first question is: yes. *Laws have been and continue to be broken by the IRS, its leaders and employees.*

Let me give some examples:

- **IRS officials lie to Congress.** There is no doubt that high-ranking IRS officials have lied to Congress, starting at least as early as 2011 and continuing to this very day. Former Commissioner Douglas Shulman, Acting Commissioner Steven Miller, Exempt Organizations Director Lois Lerner and now IRS Commissioner Koskinen -- each have made false statements to Congress during meetings with Members and staff, in communications before and after such meetings and in testimony before congressional committees. Lying to Congress is perjury and a felony under the federal criminal code: 18 U.S.C. §1001 and 18 U.S.C.§1621.

- **IRS officials have violated the provisions of federal law that prohibit disclosure of confidential taxpayer information, 26 U.S.C. §6103 of the Internal Revenue Code ("IRC").** Despite the fact that federal law prohibits the disclosure of confidential taxpayer information to any person not specifically authorized by law to receive it, we know of multiple instances in which the IRS and its officials and employees did that very thing:

- The IRS released the confidential donor information of several conservative organizations, including the National Organization for Marriage, the Texas Public Policy Institute, and others.
- The IRS released the confidential taxpayer information of Koch Industries - which was discussed publicly with reporters by White House Economic Advisor, Austen Goolsbee in September 2010 . . . yet the IRS has refused to provide to Koch Industries information as to how and who and why that confidential taxpayer information was shared with the White House.
- Lois Lerner and other IRS officials transmitted the confidential taxpayer information of more than 12,000 grassroots organizations to the Department of Justice and the FBI in order to try to develop criminal prosecutions of citizens groups for exercising their First Amendment rights. The 1.1 million page database was transmitted in October 2010 . . . one month before the mid-term elections of 2010.

- **The IRS has subjected organizations and individuals who criticize the agency, the Obama Administration, or donate to Obama opponents to IRS audits, a violation of the First Amendment to the United States Constitution and the IRS's own 'mission statement' which promises that it will "provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."** ***See IRS Mission Statement http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority.***

  Since I became publicly identified as a champion of the tea party groups whose applications for exempt status were quarantined and subjected to extraordinary scrutiny because of their political beliefs, I have received from individuals across the country countless stories of how they were personally audited by the IRS after donating to conservative groups, to the 2012 Romney campaign, or appeared at tea party rallies opposing Obamacare, or appeared in news reports challenging the IRS Commissioner's statements regarding the 'missing' Lois Lerner emails, and on and on. There are too many instances of this type for these to be 'random' or 'coincidental'. I believe that the IRS uses confidential Schedule B donor information required to be filed by exempt organizations, listing their donors of $5,000 or more -- to select audit targets. I believe that the IRS pulls publicly required information of donors to political candidates, and selects donors to GOP candidates and conservative SuperPACs to IRS audits. I believe that the IRS monitors news reports and targets individuals and their businesses to IRS audits when/if they see news of American citizens criticizing the IRS or the Obama administration. And the report issued last week by the GAO as to HOW audit targets are selected, only confirms my belief that this has happened, is happening and will continue to happen until and unless Congress stops it.

- **The IRS routinely disregards federal law: the Freedom of Information Act (FOIA) and federal laws enacted by Congress to protect Americans from abusive federal agency rulemaking and regulatory overreach. The IRS takes the position that such laws simply do not apply to the IRS.**

The IRS has been allowed by Congress to operate above or outside the law for decades, something I have learned firsthand over the past five years. What have I witnessed?

- The IRS targeted tea party and conservative, pro-Israel and pro-life organizations and denied their statutory and constitutional rights to obtain tax exempt status on a timely basis, in accordance with duly enacted procedures and published forms and formats – a violation of the federal Administrative Procedures Act;
- The IRS essentially doesn't respond to FOIA requests until/unless it is sued in federal court; and
- The IRS rulemaking process disregards and ignores statutes such as the Regulatory Flexibility Act, the Paperwork Reduction Act, the Administrative Procedures Act and other federal laws and Executive Orders in the development and promulgation of IRS regulations.

I could go on. And on. The abuses of the IRS - and the violations of federal law by the IRS and its officials and employees - are too numerous to detail here.

***So the next question you have posed, Mr. Chairman, is what should Congress do about it?***

Please understand that I believe the IRS should be abolished and the 16th Amendment repealed in its entirety. I do not think this arrogant, out-of-control agency can be saved. It is rotten to the core, and should be completely eliminated and the Internal Revenue Code repealed - allowing for a new tax code and new tax collecting agency to be established without the baggage that this agency has taken on over the past century.

Since that will likely take some doing and some time, there are some other, immediate steps that Congress can and should undertake NOW.

**The first, most important thing the Congress can and must do is to impeach and remove IRS Commissioner John Koskinen.**

The IRS has become a weapon of political destruction of the Obama administration's enemies, led by Commissioner John Koskinen, who is an active, partisan Democrat, having donated more than $80,000 over several years to the Obama campaigns, the Democratic National Committee, the Clinton campaigns and the campaigns of other Democrats. Commissioner Koskinen is a partisan Democrat who has no business leading the IRS and has not the slightest bit of objectivity in terms of his political viewpoint. He has repeatedly made false statements to Congress in his testimony before various congressional committees. Any person of his obvious political bias should NEVER have been nominated or confirmed to the position of IRS Commissioner. Based on his false testimony to Congress since his assuming the position of Commissioner, and his actions as Commissioner, he should be impeached by the House, convicted by the Senate and removed from office.

Clearly, the Obama Department of Justice is so politicized that no prosecutions for perjury are in the offing for the IRS Commissioner, Lois Lerner or any other IRS official. That leaves only one

avenue to punish IRS Commissioner Koskinen for his false testimony to Congress, for his failure to faithfully execute his obligations, and for allowing the IRS to destroy backup tapes of Lois Lerner (and other IRS employees') emails, all the while he was testifying under oath that his agency was taking every step to preserve all of the records the IRS is required under federal law to preserve.

There is nothing that Congress can do that would be more important in sending the signal to the IRS and, indeed, to every federal agency saying, "Do not lie to Congress. Do not abuse the American people. Do not trample on the Constitution." . . . than the removal of IRS Commissioner Koskinen.

**There are then seven (7) statutory changes that Congress should enact immediately to protect the American people from this out-of-control agency. Those 7 are as follows:**

**1. Repeal the law that requires citizens organizations to turn over their donor lists to the IRS.**
Federal law requires every citizens group to file a Schedule B of its donors of $5,000 or more, as part of its annual Form 990 tax information return. That schedule is supposed to be confidential - available *only* to the IRS. There is no compelling governmental interest in requiring citizens groups to tell the government who their donors are . . . and the listing of those donors is the source of much mischief, and abuse. The Supreme Court has held for decades that the right to make a contribution to a candidate or a cause of one's choosing is a protected First Amendment right. That right should be exercised without the recipient organization being required to disclose that information to the government. Congress should repeal the law that requires the disclosure of donor information to the IRS. The politically motivated attorneys general of California and New York are now pursuing organizations, demanding that they turn over the unredacted donor information that groups are required to file with the IRS – but which federal law specifically protects from public disclosure. Now, we see two attorneys general, without any statutory authorization by the legislatures of their states, demanding the donor information that only the IRS is supposed to receive. Congress can – and should – fix this. Repeal the federal law requiring donor information to be filed with the IRS.

**2. The IRS should be prohibited by federal law from surveillance or use of publicly filed campaign contribution reports and information as a basis for selecting taxpayers for audit**. Again, contributing to the candidates or causes of one's choice is a protected First Amendment right according to the United States Supreme Court. The IRS should be prohibited by law from accessing and using that information as the basis for subjecting individuals or other entities for audits.

**3. The IRS should be required by law to advise any taxpayer selected for audit as to the REASON that taxpayer is being audited and to document that information to the taxpayer.**
The IRS should not be allowed to select a taxpayer for audit and to withhold the reasons for that selection. The IRS should be required to document to a taxpayer why that taxpayer is being audited and the authority for that audit. With regard to organizations, the IRS should annually and randomly select exempt organizations to be audited, publish the list of those randomly selected audits in order to provide public transparency and to remove any stigma associated with

an audit, as well as removing the ability of lone IRS agents to target taxpayers based on personal bias or vendettas. The GAO report last week about the manner in which IRS audits are selected should be of great concern to all of us -- and the IRS response to that report is no comfort whatsoever. Congress must act to protect the American people from abuse by the IRS through the auditing process and selection - and require transparency and openness in the "star chamber" type of process that currently exists.

**4. Prohibit the IRS from developing its own definitions of political activities prohibit the IRS from regulating the free speech rights of the American people and groups to which they belong.**

The IRS issued far-reaching and draconian proposed regulations severely restricting political activities of 501(c)(4) organizations in November 2013 and withdrew them in May 2014 after more than 160,000 comments - largely in opposition - were filed. IRS Commissioner Koskinen keeps saying publicly that the IRS is continuing to rewrite the proposed regulations. STOP THE IRS from doing anything further on this topic. Congress can and must prohibit the IRS from policing the First Amendment rights of the American people. Simply put, the IRS is supposed to be a tax collector . . . Period. It has no expertise and no authority to issue ANY regulations that would infringe upon the free speech and association rights of the citizens. Congress should act NOW to stop the IRS from going forward with any such regulations, regardless of when they are to take effect.

**5. Eliminate the process whereby 501(c)(4), (5) and (6) groups seek or obtain tax exempt status from the IRS.**

Just eliminate the procedure, allow all 501(c)(4), (5) and (6) organizations to simply check the box as to what type of entity it is, and to begin operations as that type of entity. The IRS through RANDOM audits of 990's filed by the organizations can make certain that the organizations are operating within the proper parameters for that type of entity.

**6. Codify present IRS policy that contributions to 501(c) groups are not subject to the gift tax**.

The first targeting of conservative groups began during and following the 2008 election cycle, when donors to a conservative organization suddenly received notices that their contributions to one conservative organization were subject to the gift tax. The IRS knew who the donors were because that was disclosed to the IRS on the organization's Schedule B. After a hue and cry, including from Congress, the IRS withdrew the notices, and publicly stated that there would be no efforts to impose the gift tax on such contributions 'for the time being'. That suspension continues to this day -- Congress should remove all doubt and enact legislation stating that contributions to 501(c) groups are not subject to federal gift tax.

**7. Codify *clearly* and *with particularity* that Section 6103 of the IRC is intended to protect *taxpayers,* not IRS employees and agents.**

The IRS relies on the federal law enacted to protect taxpayers from the release of their confidential tax information and turned it into a shield, to avoid disclosing information about improper and unlawful actions by IRS employees involving the taxpayer. It is Orwellian twisting of language at its very worst – and the IRS routinely refuses to disclose information regarding its own failures to protect taxpayer privacy, stating that Section 6103 precludes the

IRS from telling a taxpayer WHO at the IRS may have been responsible for unlawful disclosure of a taxpayer's information.

In conclusion, it is high time for Congress to act, to punish the IRS for its wrongdoing and to hold the IRS accountable for its violations of federal law and the US Constitution.

Congress should remove IRS Commissioner Koskinen and make statutory changes in federal law to protect the American people going forward.

Thank you for conducting this hearing and asking these questions. I look forward to working with the Committee to make meaningful changes that will ensure the IRS is not allowed to continue to abuse the American people in their rightful exercise of their privileges as American citizens.

###

**United States Senate**
**Committee on the Judiciary**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**

***Testimony of***
**Stephen Spaulding**
**Policy Counsel**
**Common Cause**

***For the Hearing***
**"Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options"**

**July 29, 2015**

Chairman Cruz, Ranking Member Coons, and distinguished members of the Committee, thank you for the opportunity to testify this afternoon. I am the policy counsel with Common Cause, a nonpartisan, nonprofit organization of 400,000 members nationwide working to restore core values of American democracy and committed to open, honest, and accountable government that serves the public interest. Common Cause is an independent voice for change and a watchdog against corruption and abuse of power. Among other issues, Common Cause works at the federal, state, and local level to advocate for full transparency and disclosure in our elections, and to reduce the undue influence of money in politics.

Let me be clear at the outset: it was wrong for the IRS to subject some "social welfare" nonprofit applications to extra scrutiny based solely on their names and identified interests. The agency should take action to ensure these mistakes are not repeated.

However, it continues to be wrong for the IRS to look the other way as partisan political operatives on the right and the left establish phony social welfare organizations that collectively pump hundreds of millions of dollars from secret sources into our elections. Rather than carry out their election-related spending through tax-exempt organizations in accordance with Section 527, which requires donor disclosure, major political groups are masquerading improperly as

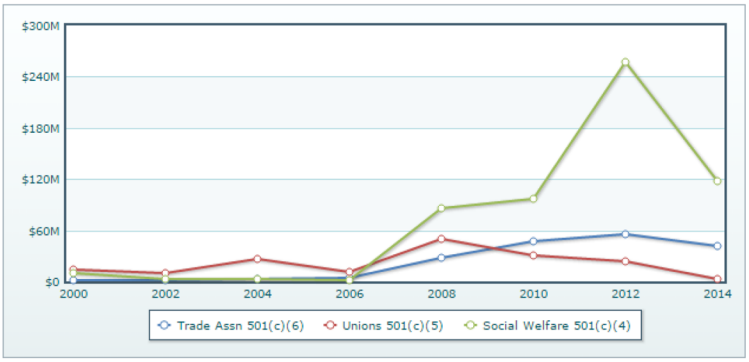
social welfare nonprofits under Section 501(c)(4) – solely to keep political spenders anonymous. This deprives the American people of the information they need about who is trying to influence their votes, and to whom their elected officials may owe a debt of gratitude after Election Day.

This ongoing scandal undermines confidence in our democracy and threatens the integrity of our elections. It stems from a powerful combination of at least four factors: 1) a lack of bright line standards about what constitutes partisan political activity, including how much social welfare organizations can do and how to measure it; 2) the brazen willingness of political consultants to exploit and manipulate the rules governing social welfare organizations by operating them as de facto political committees; 3) an under-resourced agency that has thus far failed to do its job to hold the largest offenders accountable; and 4) champions of gridlock who have blocked Congress from considering comprehensive disclosure legislation in the wake of *Citizens United.*

Up to and including the 2006 election cycle, social welfare groups spent little on partisan political activity. Then, a series of court decisions dramatically changed the status quo. First, the Supreme Court's 2007 decision in *FEC v. Wisconsin Right to Life* lifted prohibitions on corporate spending for election-related communications except for express advocacy and its functional equivalent.[1] That led to a sharp increase in spending on electioneering communications from nonprofit groups that do not disclose their donors. A far larger increase came after the Supreme Court's 2010 decision in *Citizens United* struck down all prohibitions on corporate election-related outside spending.[2] Combined with the D.C. Circuit's opinion in *SpeechNow.org v. FEC*, these decisions led to an explosion in non-party outside election spending.[3] It topped $1 billion in the 2012 elections and over $500 million in the 2014 midterms.[4]

With this increased spending came increased secrecy about who is financing these political expenditures and, consequently, a less-informed electorate. Approximately one-third of the outside money in the 2012 and 2014 elections came from secret sources, to the tune of $481 million, of which spending by social welfare nonprofits accounted for approximately $375 million.[5] These numbers, though staggering, underestimate the total spent by these organizations to influence campaigns, because they only include the money spent on federal, and not state, elections. The amounts also exclude money that funds communications that fall short of express advocacy outside of the electioneering communications windows but are clearly intended to influence elections.

**501(c) Spending, Cycle Totals, by Type**




*Source:* Center for Responsive Politics, http://www.opensecrets.org/outsidespending/nonprof_summ.php (last accessed July 27, 2015).

As election-related spending by social welfare organizations soared after *Citizens United* and *SpeechNow.org*, so did the number of applications from groups seeking 501(c)(4) tax-exempt status. They nearly doubled between 2010 and 2012, from 1,735 in 2010 to 3,357 in 2012.[6] Although social welfare organizations may self-declare without submitting a formal

application to the IRS, the optional approval process provides them with more certainty that their operations will not jeopardize their tax-exempt status.

Congress never intended for social welfare organizations to exist as conduits for secret political spending. In exchange for their tax exemption, the law requires these nonprofits to engage exclusively in the promotion of social welfare.[7] The IRS has said social welfare activities do not include political campaign intervention.[8] IRS regulations muddied the waters with a primary purpose analysis that is inconsistent with the exclusivity requirement of the Internal Revenue Code.[9]

Today, no bright line IRS standard exists as to how much and by what measure the IRS should evaluate a social welfare organization's furtherance of its primary purpose. As the IRS has explained, "no precise definition exists in relevant revenue rulings, cases or regulations" to decide if an organization is "'primarily' engaged in social welfare activities."[10] This may "often requir[e] a sophisticated legal and complex factual review to evaluate the application."[11] We are left with a vague "facts and circumstances" test that invites inconsistent enforcement of the law. Even when applied properly, some political groups are out of compliance with the existing flawed regulations.

In the wake of *Citizens United*, this discrepancy – coupled with a lack of enforcement – has paved the way for several high-profile partisan political organizations on the right and left to pose as social welfare organizations and spend tens of millions of dollars from undisclosed sources on elections. Ultimately, it is the secrecy that social welfare nonprofits provide to donors that makes them attractive vehicles for political spending, and all the more reason why Americans expect the IRS to do its job and enforce the law. Citing their campaign spending and public reports about their operations, some campaign finance reform advocates have urged the

IRS to investigate groups on the left like Priorities USA and on the right like American Action Network to gauge whether they are in fact organizations that exist primarily to influence candidate election outcomes.[12]

But there is no example of this phenomenon more flagrant than Crossroads GPS, a purported 501(c)(4) social welfare organization founded in 2010 by Karl Rove, which has spent significant amounts of money influencing campaigns. It is the sister organization of American Crossroads, a Super PAC registered with the Federal Election Commission. As such, American Crossroads discloses its donors. Crossroads GPS, however, does not.

During the 2010 election, Crossroads GPS spent approximately $20.8 million on federal campaign activities, more than half of what it spent in total that cycle. This led the Federal Election Commission General Counsel to conclude that Crossroads GPS' major purpose in 2010 was federal campaign activity, even though a gridlocked FEC ultimately split 3-3 on whether to pursue an enforcement action.[13]

Crossroads GPS then spent at least $71 million on political expenditures in the 2012 elections, making it the top secret money spender during that cycle.[14] Aside from the presidential race, a significant amount of Crossroads GPS' election-related spending – over $30 million – targeted Senate candidates in some of the 2012 presidential battleground states, including Virginia, Nevada, Ohio, Wisconsin, and Indiana.[15]

Who funded all of its attack ads? Only Crossroads GPS officials, the IRS, the funders themselves, and perhaps the politicians who benefitted from the spending can answer that. In its 2012 Form 990, filed with the IRS, Crossroads GPS reported one single anonymous donation of $22.5 million; another for $18 million; another for $10 million; and many other seven-figure

contributions.[16] Americans deserve to know who was making investments of this magnitude in political races and their eventual outcome.

Mr. Rove himself boasted about how much Crossroads GPS spent boosting President Obama's opponent, Gov. Mitt Romney. In an op-ed published in the *Wall Street Journal* during the 2012 campaign, Mr. Rove said that the Romney campaign had spent less than outside groups, "with $107.4 million more in ads attacking Mr. Obama's policies or boosting Mr. Romney coming from outside groups (with Crossroads GPS, a group I helped found, providing over half)."[17]

Its founders created Crossroads GPS to serve as the secret money corollary to American Crossroads. In post-election remarks at the Annenberg Public Policy Center in 2010, the political director of American Crossroads – Crossroads GPS' sister Super PAC organization – put it bluntly. "[D]isclosure was very important for us, which is why the 527 [American Crossroads] was created. But some donors didn't want to be disclosed, and therefore, a (c)(4) [Crossroads GPS] was created. … Whether they [donors] would have – whether they would have given ultimately or not, I don't know. I know they [donors] were more comfortable giving to a (c)(4). And so we created one."[18]

Still, the IRS has done little to hold Crossroads GPS accountable, despite reams of evidence that its overriding purpose appears to be to provide anonymity to donors eager to spend unlimited amounts of money supporting and attacking candidates for public office.[19]

This troubling trend shows no sign of stopping in 2016. According to the *New York Times*, supporters of former Secretary of State Hillary Rodham Clinton are considering activating a 501(c)(4) to support her run for the White House.[20] On the Republican side, at least eight candidates "have aligned with nonprofit groups to raise hundreds of millions of dollars,"

including at least one that has already planned a $1 million advertising campaign in support of one of the individuals running for the nomination.[21]

Voters deserve to know who is attempting to influence their votes and who is speaking to them. Disclosure allows them to evaluate the strength, content and agenda of political messages, and is an important tool to hold representatives accountable to their interests instead of those of their representatives' financial backers. That is why courts have repeatedly upheld disclosure requirements.[22] Specifically, the Supreme Court ruled 8-1 in *Citizens United* that disclosure by outside spending groups "permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency [in political spending] enables the electorate to make informed decisions and give proper weight to different speakers and messages."[23] *Citizens United* reaffirmed prior campaign finance cases that upheld disclosure requirements, citing "evidence in the record that independent groups were running election-related advertisements 'while hiding behind dubious and misleading names.'"[24]

Consistent with this important First Amendment value – an informed electorate – the law requires Super PACs and other Section 527 organizations to disclose their donors when they spend money to influence elections. Political operatives should not circumvent the constitutionally sound bedrock policy of disclosure by exploiting inconsistent enforcement and vague regulations governing organizations that Congress never anticipated would engage in election-related spending.

There is, of course, legislation that Congress should enact that is in keeping with the Supreme Court's affirmation of the value of disclosure in *Citizens United*. Unfortunately, Congress has thus far failed to pass comprehensive campaign finance disclosure reform that

could have addressed this problem, due in large part to a Republican-led filibuster of the DISCLOSE Act in 2010.

Impartial and consistent enforcement of the law governing nonprofit political spending is squarely within the IRS's mandate and authority. The IRS and Treasury Department took the important step in 2013 of issuing a notice of proposed rulemaking, recognizing that both the public and the government "would benefit from clearer definitions" of campaign-related political activity.[25] This action was in keeping with one of the recommendations in the Treasury Inspector General for Tax Administration's report on the IRS' use of inappropriate criteria to select social welfare applications for review.[26] The IRS and Treasury Department's notice of proposed rulemaking was a critical first step to solve the problem and protect the integrity of our tax laws. Still, the proposal had significant flaws. Common Cause – along with over 16,000 of our members who have signed our petition – continue to urge the IRS to release a second proposed rule for comment.

It is essential that the next proposed rule establish a low limit on the amount of campaign activity a group can engage in consistent with the statute. New commonsense regulations should allow some modest amount of activity that is unrelated to a 501(c)(4)'s social welfare purpose without jeopardizing the organization's tax-exempt status. Such a rule would permit a small amount of candidate-related political activity, so long as it is not more than an insubstantial part of its activities. An organization could establish a Section 527 organization, which requires disclosure, for all other election-related expenditures.

We recognize that the IRS funding levels have fallen steadily from $13.4 billion in 2010 to $10.9 billion in 2015 – a one-fifth reduction in funding, adjusting for inflation.[27] This hobbles meaningful action and forces the IRS to rethink its priorities. Senate appropriators proposed

another cut in the FY16 Financial Services appropriations bill last week, reducing the IRS' funding another $470 million to $10.4 billion.[28] The IRS should not use these budgetary constraints to justify a green light for continued misuse of social welfare organizations.

The use of inappropriate criteria to single out some social welfare applicants for scrutiny does not justify an abrogation of the agency's duty to enforce the law fairly and impartially in the first place. The IRS should hold political groups on the right *and* the left accountable if they misappropriate the privileges of the social welfare organization's structure. The IRS should bring its regulations in line with the Internal Revenue Code, while watchdogging blatant efforts to violate even the flawed rules. Finally, orchestrated gridlock in Congress does not excuse the wholesale abuse of our tax laws by partisan front groups eager to pollute our elections with unlimited amounts of secret money.

Thank you, Mr. Chairman, for the opportunity to testify and I look forward to your questions.

---

[1] 551 U.S. 449 (2007).
[2] 558 U.S. 310 (2010).
[3] 599 F.3d 686 (2010); Richard L. Hasen, *The Numbers Don't Lie*, SLATE, Mar. 9, 2012, http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html (last accessed July 26, 2015).
[4] Center for Responsive Politics, Outside Spending by Cycle, http://www.opensecrets.org/outsidespending/index.php (last accessed July 26, 2015).
[5] Center for Responsive Politics, Outside Spending by Disclosure, Excluding Party Committees http://www.opensecrets.org/outsidespending/disclosure.php (last accessed July 27, 2015); Center for Responsive Politics, 501(c) Spending, Cycle Totals, by Type http://www.opensecrets.org/outsidespending/nonprof_summ.php (last accessed July 27, 2015).
[6] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 3 (2013).
[7] 26 U.S.C. § 501(c)(4).
[8] Treas. Reg. § 1.501(c)(4)-(1)(a)(2)(ii).
[9] Treas. Reg. § 1.501(c)(4)-(1)(a)(2)(i).
[10] IRS, CHARTING A PATH FORWARD AT THE IRS: INITIAL ASSESSMENT AND PLAN OF ACTION 25 (2013).
[11] *Id.* at 22.
[12] *See* Letter from J. Gerald Hebert, Executive Director, Campaign Legal Center and Fred Wertheimer, President, Democracy 21 to the IRS, September 28, 2011, *available at* http://www.democracy21.org/wp-content/uploads/2014/05/9-28-2011-Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center.pdf.
[13] FEDERAL ELECTION COMMISSION, FIRST GENERAL COUNSEL'S REPORT, MUR 6396 (Nov. 13, 2012).

[14] Center for Responsive Politics, Political Nonprofits: Top Election Spenders (2012), http://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2012 (last accessed July 27, 2015).
[15] Center for Responsive Politics, Crossroads GPS, Outside Spending: Independent Expenditures, Electioneering Communication & Communication Costs by Targeted Candidate, http://www.opensecrets.org/outsidespending/recips.php?cmte=C90011719&cycle=2012.
[16]Kim Barker, "Crossroads' Tax Return Shows Big Donors, But Doesn't Name Them," PROPUBLICA, Nov. 18, 2013, *available* at http://www.propublica.org/article/crossroads-tax-return-shows-big-donors-but-doesnt-name-them.
[17] Karl Rove, "The Obama Ad Bliz Isn't Working," WALL ST. J., August 1, 2012, *available at* http://www.wsj.com/articles/SB10000872396390443687504577563002812933574.
[18] Carl Forti, Remarks on Panel, Annenberg Public Policy Center of the University of Pennsylvania, "Cash Attack 2010: Political Advertising in a Post-*Citizens United* World," Dec. 13, 2010, Washington, DC (transcript by Federal News Service, *available at* http://www.factcheck.org/UploadedFiles/2011/01/rep_panel.pdf).
[19] Democracy 21 and the Campaign Legal Center have sent at least 11 letters to the IRS, thoroughly documenting the extent of Crossroads GPS' campaign activity and its legal argument for why the IRS should deny Crossroads GPS' social welfare status and assess penalties for any violations of the law. They sent letters on May 6, 2014; January 2, 2013; September 27, 2012; July 23, 2012; May 24, 2012; April 17, 2012; March 22, 2012; March 9, 2012; December 14, 2011; September 28, 2011; and October 5, 2010 and will provided to the Committee as an appendix.
[20] Eric Lichtblau, "IRS Expected to Stand Aside as Nonprofits Increase Role in 2-16 Race," N.Y. TIMES, July 5, 2015, *available at* http://www.nytimes.com/2015/07/06/us/politics/irs-expected-to-stand-aside-as-nonprofits-increase-role-in-2016-race.html.
[21] *See id*.
[22] *See* Letter from Fred Wertheimer, President, Democracy 21 & Trevor Potter, President, Campaign Legal Center to Senators, Nov. 14, 2013, *available at* http://www.democracy21.org/wp-content/uploads/2013/11/LETTER-TO-HSE-AND-SENATE-ON-COURTS-REJECTING-CHALLENGES-TO-DISCLOSURE-FINAL-11-1-3-13.pdf.
[23] *Citizens United*, 558 U.S. at 371.
[24] *Id*. at 367.
[25] 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. pt. 1).
[26] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 17 (2013).
[27] Brandon DeBot and Chuck Marr, *Poor IRS Service Reflects Congress's Deep Funding Cuts* (June 1, 2015), Center for Budget and Policy Priorities, *available at* http://www.cbpp.org/sites/default/files/atoms/files/6-1-15tax.pdf.
[28] Press release, Senate Committee Agrees to FY2016 Financial Services Appropriations Bill, July 23, 2015, *available at* http://www.appropriations.senate.gov/news/senate-committee-agrees-fy2016-financial-services-appropriations-bill.

**United States Senate**
**Committee on the Judiciary**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**

***Testimony of***
**Stephen Spaulding**
**Policy Counsel**
**Common Cause**

***For the Hearing***
**"Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options"**

**July 29, 2015**

# APPENDIX

May 6, 2014

Honorable John Koskinen, Commissioner
Tamera Ripperda, Director of Exempt Organizations
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Re: Application for section 501(c)(4) status by Crossroads GPS

Dear Commissioner Koskinen and Director Ripperda:

Democracy 21 and the Campaign Legal Center are writing again to urge the Internal Revenue Service (IRS) to deny tax exempt status as a "social welfare" organization to Crossroads GPS.

Crossroads GPS submitted an application for tax exemption under section 501(c)(4) of the Internal Revenue Code (IRC) in September 2010. To the best of our knowledge, Crossroads GPS has been operating as a "social welfare" organization for more than three and a half years without being granted section 501(c)(4) tax-status by the IRS.

We believe the record is clear, as we have stated in numerous letters to the IRS, that Crossroads GPS, which was founded by Republican operative Karl Rove, is a campaign operation formed to hide the donors who are financing the campaign expenditures the group makes.

Beginning in October 2010, Democracy 21 and the Campaign Legal Center have written to the IRS on ten occasions, urging the IRS to deny tax exemption under section 501(c)(4) to Crossroads GPS because the organization is primarily engaged in campaign activities. As such, it is not a "social welfare" organization and does not qualify for tax exemption under section 501(c)(4). We urge the IRS to take expeditious action to deny the application filed by the organization.

Our letters to the IRS on this subject are dated October 5, 2010, December 14, 2011, September 28, 2011, September 27, 2012, July 23, 2012, May 24, 2012, April 17, 2012, March 22, 2012, March 9, 2012, and January 2, 2013. In those letters, we thoroughly document the extent of the campaign activity that Crossroads GPS has engaged in and presented the legal case as to why Crossroads GPS fails to qualify as a "social welfare" organization.

Our prior letters also raised similar complaints about Priorities USA, a pro-Obama group, Americans Elect, a group that supported independents, and American Action Network, a group supporting Republicans. We continue to urge the IRS to take enforcement actions against these organizations as well by denying their section 501(c)(4) tax-status.

The basis for our views about the eligibility requirements applicable to section 501(c)(4) groups and about the proper interpretation of section 501(c)(4) is set forth in two sets of comments we submitted to the IRS on February 27, 2014. The submissions were made in the ongoing rulemaking to review IRS regulations that implement section 501(c)(4). These comments are attached for your information.

We are writing to bring to your attention a report issued by the General Counsel of the Federal Election Commission. The report concluded, consistent with what we have argued in our letters to the IRS, that Crossroads GPS has a major purpose to influence federal elections. First General Counsel's Report, MUR 6396 (Nov. 21, 2013) (copy attached).

The General Counsel's report was prepared following review of a complaint filed with the FEC alleging that Crossroads GPS had violated the campaign finance laws by failing to register and report as a "political committee" under the Federal Election Campaign Act, as well as review of information submitted by Crossroads GPS to the FEC in response to the complaint, and reports of political spending filed by Crossroads GPS with the FEC.

The General Counsel's report confirms our position that Crossroads GPS is a political group, not a "social welfare" organization. The report concluded that there "is reason to believe that Crossroads GPS had as its major purpose the nomination or election of federal candidates." Report at 3. The General Counsel stated that the amount of campaign-related spending by Crossroads GPS in 2010 "is alone sufficient to establish that its major purpose in 2010 was the nomination or election of federal candidates." Report at 17.

The General Counsel examined the campaign-related spending by Crossroads GPS in the 2010 election and concluded:

> In short, taking into account all of its spending in 2010, Crossroads GPS appears to have spent approximately $20.8 million on the type of communications that the Commission considers to be federal campaign activity—approximately $15.4 million on express advocacy communications and $5.4 million on non-express advocacy communications that criticize or oppose a clearly identified federal candidate. This total of $20.8 million represents approximately 53 percent of the $39.1 million Crossroads GPS reported spending during 2010. Therefore, Crossroads GPS's spending by itself shows that the group's major purpose during 2010 was federal campaign activity (i.e., the nomination or election of a federal candidate.)
>
> Report at 26-27. (emphasis added.)

By a divided 3-3 vote on December 3, 2013, the Commission did not adopt the General Counsel's recommendation to find reason to believe Crossroads GPS had violated the law. Under FEC precedents, a tie vote means the FEC itself takes no formal position, one way or the other, on the report. The three Commissioners who supported the General Counsel's recommendation wrote in a statement:

> Crossroads GPS's spending on campaign activity is vast, both in absolute terms and as a proportion of its total spending. In 2010, the organization spent at least $15,445,039 on independent expenditures—that is, communications expressly advocating the election or defeat of a clearly identified federal candidate. Additionally, Crossroads GPS spent approximately $5.4 million on communications that did not contain express advocacy, but that nonetheless criticized or opposed a clearly identified federal candidate. . . .Combined, these communications total approximately $20.9 million, 53 % of what Crossroads GPS reported spending in 2010—and that is without making any judgments about whether any of the other activity engaged in by Crossroads GPS may have constituted federal campaign activity.

Statement of Reasons of Vice Chair Ann M. Ravel, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub, MUR 6396 (Jan. 1, 2014) at 4.

The FEC's failure to move forward with an enforcement action against Crossroads GPS due to an evenly divided vote has been challenged as contrary to law. *Public Citizen, et al. v. FEC*, No. 1:14-cv-00148 (D.D.C. filed Jan. 31, 2014). That case is pending in federal district court.

Notwithstanding the FEC's tie vote on the issue of whether to pursue an enforcement action, the IRS should take cognizance of the factual analysis of the FEC's General Counsel, and of his conclusion that Crossroads GPS has a major purpose to engage in campaign activity. The General Counsel's conclusion is amply supported by the analysis set forth in his report, and confirms the position we have taken, and the documentation we have provided, in our previous letters to the IRS about Crossroads GPS.

Crossroads GPS continues to engage in campaign activity as the 2014 election season unfolds and continues to do so under a claim of tax exempt status as a "social welfare" organization. This allows the organization to continue to improperly hide the identity of its donors who are funding the campaign activities it is conducting.

The IRS has permitted Crossroads GPS to operate through two elections, and now well into a third election, as a campaign operation masquerading as a "social welfare" organization. Since Crossroads GPS is one of the major "dark money" operations in the country, the failure by the IRS to act has denied the public basic campaign finance information that they have a right to know.

The IRS should deny section 501(c)(4) exempt status to Crossroads GPS, which is being used to funnel huge amounts of secret money into federal elections, and end its phony claim of being a "social welfare" organization.

Sincerely,

| | |
|---|---|
| */s/ Gerald Hebert* | */s/ Fred Wertheimer* |
| J. Gerald Hebert<br>Executive Director<br>Campaign Legal Center | Fred Wertheimer<br>President<br>Democracy 21 |

January 2, 2013

Steven T. Miller
Acting Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Application for section 501(c)(4) status by Crossroads GPS

Dear Acting Commissioner Miller and Director Lerner:

ProPublica, a news organization, recently received and publicly disseminated the Form 1024, "Application for Recognition of Exemption under Section 501(a), filed by Crossroads GPS on September 3, 2010, seeking recognition as a "social welfare" organization under section 501(c)(4) of the Internal Revenue Code. So far as we are aware, the IRS has yet to grant the application.

In its application, Crossroads GPS states that 50 percent of its activities will be devoted to "public education," 30 percent will be devoted to "influenc[ing] legislation and policymaking," and 20 percent will be devoted to "research." Application at 2. Thus, when asked to provide a "detailed narrative description of all the activities of the organization – past, present and planned," Crossroads GPS fails to mention any activities devoted to influencing federal elections, and instead describes 100 percent of its activities as involving efforts other than electioneering.

Inconsistently, in response to a different question on the application, Crossroads GPS states that it plans to spend funds "to distribute independent political communications," but such activity "will be limited in amount, and will not constitute the organization's primary purpose." *Id.* at 4.

We have written to you on a number of occasions in the past two years regarding the enormous sums of money spent by Crossroads GPS to influence the 2010 and 2012 federal

elections. In those letters, we have challenged the organization's eligibility for section 501(c)(4) tax-exempt status.

According to the Center for Responsive Politics (CRP), Crossroads GPS spent $70 million on independent expenditures to elect Republican candidates or defeat Democratic candidates in the 2012 elections. This is an extraordinary amount of money to be spent on influencing elections by a group which claims it is a "social welfare" organization.

Indeed, Crossroads GPS and its affiliated Super PAC, American Crossroads, together spent a total of $175 million on independent expenditures and electioneering communications to influence the 2012 elections—far more than any other outside spender, according to CRP.

The $70 million in campaign expenditures attributed to Crossroads GPS consists overwhelmingly of ads reported to the Federal Election Commission as "independent expenditures," *i.e.*, ads that contain "express advocacy."

As we have discussed at length in our prior correspondence with you, the IRS uses a different test to define activity that constitutes intervention or participation in elections, and additional ads by Crossroads GPS that may not be subject to reporting to the FEC may nonetheless fall well within the test used by the IRS to determine what constitutes campaign spending by a tax-exempt group.

In continuing any ongoing review of the application submitted by Crossroads GPS for status as a section 501(c)(4) organization, we believe it is essential that you not accept at face value either the obviously self-serving statement on its application that Crossroad GPS's campaign spending will not constitute its "primary purpose" or any self-serving claims by the organization that communications were "issue ads."

The IRS should closely scrutinize the spending that Crossroads GPS engaged in during the 2012 campaign. This includes both the spending that was reported to the FEC as "independent expenditures" because it included "express advocacy," and any other spending on communications that may well have constituted intervention or participation in campaigns under IRS rules, even if the ads did not contain "express advocacy."

In particular, we strongly urge you not to accept at face value any claim by Crossroads GPS that any or all of its ads that mention federal candidates and did not contain express advocacy were "public education ads" or "issue ads." These ads, and the context in which they were run, must be reviewed by the IRS to determine whether in fact any or all of the ads constituted ads to intervene or participate in elections, within the IRS definition of that standard. *E.g.*, Revenue Ruling 2004-6, 2004-1 C.B. 328.

In our letter to you of September 27, 2012, we submitted transcripts of the ads run by Crossroads GPS from January 1, 2012 through September 24, 2012. We urged the IRS to review each of these ads, and to apply the agency's standards to determine whether the ads constituted intervention or participation in campaigns. We again urge you to conduct such a review.

In any event, we submit that the $70 million spent by Crossroads GPS just on campaign ads reported to the FEC in 2012 is *prima facie* evidence that the organization does have a "primary purpose" to engage in campaign activities. The statement made by Crossroads GPS two years ago on its application for tax-exempt status that its campaign activities will be "limited in amount, and will not constitute the organization's primary purpose" are simply not credible, in light of the actual practices of the organization and the tens of millions of dollars Crossroads GPS spent on campaign ads since then.

As we have stated in previous letters, the misuse of "social welfare" organizations as vehicles for campaign spending results in direct and serious harm to the American people because it hides from public scrutiny the identity of the donors funding the campaign spending.

Crossroads GPS itself reported on its Form 990s filed with the IRS for 2010 and 2011 that it received 23 separate donations of $1 million or more in 2010 and 2011 – including two contributions of $10 million each. But Crossroads GPS used its claim to section 501(c)(4) tax-exempt status as the basis for not publicly disclosing the identity of any of these million-dollar and multi-million dollar donors. It is very likely the case that the organization received additional seven- or eight-figure donations in 2012.

It is also very likely that some, if not most, of the undisclosed contributions raised by Crossroads GPS were spent for campaign ads to influence the 2012 elections. Thus, the tactic of directing campaign money through the form of an entity claiming to be a "social welfare" organization has enabled tens of millions of dollars of "dark" money to be spent to influence federal elections.

It is the responsibility and obligation of the IRS to stop this kind of abuse of the tax laws. It is imperative that the IRS closely and critically review the assertions made by Crossroads GPS in its application for tax-exempt status, and in its tax returns, in light of its massive, campaign spending in the 2012 federal elections.

Crossroads GPS served as little more than a campaign operation in 2012. Crossroads GPS has no business being treated as a "social welfare" organization and the IRS should deny its application for tax-exempt status as a section 501(c)(4) organization.

Sincerely,

| | |
|---|---|
| */s/ Gerald Hebert* | */s/ Fred Wertheimer* |
| J. Gerald Hebert | Fred Wertheimer |
| Executive Director | President |
| Campaign Legal Center | Democracy 21 |

September 27, 2012

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Crossroads GPS

Dear Commissioner Shulman and Director Lerner:

Democracy 21 and the Campaign Legal Center have written to you on multiple occasions seeking an investigation by the IRS into whether four organizations—Crossroads GPS, Priorities USA, American Action Network and Americans Elect—are improperly claiming status as a "social welfare" organizations under section 501(c)(4) of the tax code.

Our first letter challenging the claim by Crossroads GPS to tax-exempt status as a "social welfare" organization was sent to the IRS nearly two years ago, on October 5, 2010. We have subsequently sent eight letters to you regarding Crossroads GPS and the other organizations. (These letters are dated July 27, 2011, September 28, 2011, December 14, 2011, March 9, 2012, March 22, 2012, April 17, 2012, May 24, 2012 and July 23, 2012.)

We believe the facts we have presented to you in our letters make clear that each of these organizations is, to put it simply, a campaign operation—an organization whose overwhelming focus and purpose has been to elect and/or defeat candidates in the 2012 elections. Because the primary purpose of each of these organizations is to participate or intervene in candidate elections, these organizations are not, and should not be permitted to claim status as, "social welfare" organizations under section 501(c)(4).

There is a serious and continuing harm in the failure of the IRS to enforce the law. If these groups were registered as "political organizations" under section 527 of the tax code, they would be required to disclose their donors of $200 or more and the public would be able to scrutinize the sources of money they are using to fund their campaign activities. 26 U.S.C. § 527(j). But as purported "social welfare" organizations, these groups are not required to publicly disclose their donors, and can therefore spend millions of dollars on efforts to influence the 2012 elections while hiding their donors from the American people.

In recent letters to the IRS, Senator Carl Levin (D-MI) has raised appropriate concerns about the agency's lack of enforcement of the rules governing section 501(c)(4) status. As Senator Levin pertinently noted, "I find it unacceptable that the IRS appears to be passively standing by while organizations that hold themselves out to be 'social welfare' organizations clearly ignore the tax code with no apparent consequences."[1]

We strongly agree.

The purpose of this letter is to provide additional information to document that Crossroads GPS is an organization with an overriding purpose to influence candidate elections, and is accordingly not entitled to tax-exempt status as a section 501(c)(4) "social welfare" organization. In addition, this letter raises as a second ground for denying tax-exempt status the fact that Crossroads GPS also fails to meet the applicable legal test under the "private benefit" doctrine because it serves private political interests, not public "social welfare" interests.

Crossroads GPS reported in its Form 990s filed with the IRS for 2010 and 2011 that it received 24 separate donations of $1 million or more in 2010 and 2011—the largest being two single donations of $10 million. But the organization did not disclose the identity of any of these donors. As one published report stated, "In its first 18 months, Crossroads GPS raised $67 million of its total $77 million from as few as 16 rich donors."[2] Undoubtedly, Crossroads GPS has received more such contributions this year.

There is little question that these million dollar donors are funding the campaign ads being sponsored by Crossroads GPS, yet the identity of these donors is hidden from the public by the fact that they have funneled their money through a group improperly claiming status under section 501(c)(4). This is an abuse of the tax laws, in service of evading the bedrock principle that money spent to influence federal elections should be subject to public disclosure.

The evidence we have presented to the IRS shows that Crossroads GPS is being operated "for the substantial nonexempt purpose of benefiting the private interests of Republican Party entities and candidates." *See American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989). Under these circumstances, Crossroads GPS is not entitled to section 501(c)(4) tax-

---

[1] Letter of August 31, 2012 from Senator Carl Levin to The Honorable Daniel H. Shulman, Commissioner, Internal Revenue Service.

[2] S.V. Date, "Rove's Crossroads GPS Gets Explicit In Anti-Obama Air War," *NPR* (Sept. 12, 2012).

exempt status under the "private benefit" doctrine because it is an organization created and operated to serve private political interests, not public "social welfare" purposes.

Crossroads GPS and its sister Super PAC organization, American Crossroads, were established in the summer of 2010, and were conceived and founded by Karl Rove and Ed Gillespie. Crossroads GPS was created shortly after American Crossroads in order for donors to be able to provide funds anonymously to influence federal elections.

Karl Rove is the leading Republican Party political operative in the country. Rove was the chief political adviser to President George W. Bush for his eight years in office.

Ed Gillespie was named a counselor to the Romney campaign in April 2012 and serves as a senior adviser for the Romney presidential campaign. Gillespie is a former Chairman of the Republican National Committee and served as a counselor to President George W. Bush in 2007 and 2008. In 2010, Gillespie was named chairman of the Republican State Leadership Committee, which helps elect state attorneys general, lieutenant governors, secretaries of state and house and senate candidates across the country.

The evidence clearly indicates that Crossroads GPS (along with American Crossroads) was founded by Rove and Gillespie to carry out their private political interests in electing Republicans and defeating Democrats, and not to engage in public "social welfare" activities. The organization's operations have furthered these private political interests.

Karl Rove recently confirmed publicly that Crossroads GPS is a political operation and that its activities are intended to elect Republicans and defeat Democrats. In an op-ed article published in *The Wall Street Journal* (August 1, 2012) (emphasis added), Rove said:

> Roughly $111 million of Mr. Obama's ad blitz was paid for by his campaign; outside groups chipped in just over $20 million. The Romney campaign spent only $42 million over the same period in response, with $107.4 million more in ads attacking Mr. Obama's policies or boosting Mr. Romney coming from outside groups (with Crossroads GPS, a group I helped found, providing over half).

Rove thus stated that in response to an "ad blitz" by President Obama's reelection campaign and supportive Democratic outside groups, Crossroads GPS spent more than $53 million on ads "attacking Mr. Obama's policies or boosting Mr. Romney." This blunt statement by Rove unmasks the fact that Crossroads GPS is a campaign operation and makes clear that the ads run by Crossroads GPS about Obama and Romney are campaign ads.

This unambiguously partisan political activity clearly falls within the standard set forth by the IRS in a ruling denying section 501(c)(4) tax-exempt status to an organization that was "not operated primarily to promote social welfare because your activities are conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole." Final Determination Letter, Number 201128032 (April 4, 2011).

In that matter, the IRS concluded that "an organization which conducts its educational activities to benefit a political party and its candidates serves private interests. And . . . an organization that primarily serves private interests fails to qualify for exemption under section 501(c)(4)." *Id.* at 6 (citing *American Campaign Academy*). The IRS concluded in that matter:

> In summary, you are not operated primarily to promote social welfare because your activities are conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole. Accordingly, you do not qualify for exemption as an organization described in section 501(c)(4) of the Code and you must file federal income tax returns.

*Id.*; *see also* Determination Letter 201221028 (March 2, 2012) ("Educational activities undertaken to provide a partisan benefit are considered to serve private interests, rather than the common good."); Determination Letter, Number 201224034 (March 21, 2012) (same).

The information we are submitting here, as well as the information we have submitted in our past letters to the IRS, also shows that the overriding, if not exclusive, purpose of Crossroads GPS is to influence candidate elections and that it is engaged primarily in campaign activities. Under these circumstances, Crossroads GPS does not have a primary purpose of conducting "social welfare" activities and is therefore not entitled to tax-exempt status as a section 501(c)(4) organization.

There can be no doubt that Crossroads GPS is engaging in massive spending on television ads that have the purpose and effect of influencing the 2012 elections, and thereby constitute participation or intervention in the campaign.

The apparent basis for the claim by Crossroads GPS that it is entitled to tax status as a "social welfare" organization is its assertion that its ads are "issue" ads, not campaign ads, because the ads do not contain "express advocacy."[3] As one recent press report stated, "For

---

[3] Ironically, Crossroads GPS did switch to "express advocacy" ads for a short period in order to avoid disclosure of its donors under the campaign finance laws. In a March 2012 ruling, a federal district court invalidated an FEC regulation which limited disclosure of donors to groups that make "electioneering communications" (*i.e.*, ads that are proximate in time to an election but do not contain express advocacy). This ruling required donor disclosure by groups sponsoring electioneering communications, but not for independent expenditures (*i.e.*, ads that do contain express advocacy and are subject to a different FEC disclosure regulation). In order to avoid disclosure once its ads were within the electioneering communications time frame, Crossroads GPS and other section 501(c)(4) groups began adding express advocacy to their ads in early September, so those ads became independent expenditures rather than electioneering communications. K. Doyle, "D.C. Circuit Revives FEC Rule Allowing Political Ad Sponsors to Avoid Disclosure," *BNA Money and Politics Report* (Sept. 19, 2012) ("One paradoxical result was that groups previously sponsoring 'issue ads' began sponsoring messages that explicitly call for votes for or against candidates. The reporting rules for such 'independent expenditure' messages were not affected by the Van Hollen litigation and continued to allow ad sponsors to keep donors secret. The groups switching from electioneering communications to independent expenditures include such high-profile, GOP-leaning organizations as U.S. Chamber of Commerce, Americans for Prosperity, and Crossroads GPS. . . ."). The Court of Appeals for the D. C. Circuit reversed the district

months, the tax-exempt Crossroads GPS has argued that its anti-Obama ads were merely issue ads and not political ads."[4] The same story stated, "Crossroads GPS spent more than $50 million on ads attacking President Obama this spring and summer. But its officers do not believe those count as political activity because they did not tell viewers to vote against Obama." *Id.* (emphasis added).

As noted above, however, Karl Rove has publicly confirmed that more than $53 million in ads run by Crossroads GPS are campaign ads run in response to President Obama's "ad blitz."

Furthermore, it is a flat misstatement of the law to claim that ads are "issue" ads, and not campaign ads, simply because the ads do not contain "express advocacy." The IRS has made clear in rulings that "express advocacy" is not required for a group's spending to count as intervention or participation in a campaign for purposes of assessing a group's eligibility for exempt status under section 501(c)(4). A recent report by the Congressional Research Service summarized the law as it applies to 501(c)(4) organizations:

> Clearly, any advertisement that expressly endorses or opposes a candidate is campaign activity. It is also clear that there is no rule that campaign intervention occurs only when an organization expressly advocates for or against a candidate.[5]

Instead, the IRS has set forth in two Revenue Rulings the "facts and circumstances" that the agency takes into consideration in determining whether an ad constitutes intervention or participation in a campaign, even if the ad does not contain "express advocacy."

Revenue Ruling 2004-6, 2004-1 C.B. 328, explains that, because section 501(c)(4) public policy advocacy "may involve discussion of the positions of public officials who are candidates for public office, a public policy advocacy communication may constitute an exempt function (a political activity) within the meaning of § 527(e)(2)." Rev. Rul. 2004-6 at 1. The Ruling states:

> All the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function under § 527(e)(2). When an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under § 527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need

---

court ruling earlier this month. *Center for Individual Freedom v. Van Hollen*, ___ F.3d ___, 2012 WL 4075293 (D.C. Cir. Sept. 18, 2012) *reversing Van Hollen v. FEC*, 851 F.Supp. 2d 69 (D.D.C. 2012).

[4] S.V. Date, "Rove's Crossroads GPS Gets Explicit In Anti-Obama Air War," *NPR* (Sept. 12, 2012).

[5] E. Lunder, "R42684: Political Ads: Issue Advocacy or Campaign Activity Under the Tax Code," *Congressional Research Service* (Aug. 29, 2012).

> to be considered to determine whether the expenditure is for an exempt function under § 527(e)(2).

*Id.* (emphasis added)

Rev. Rul. 2004-6 lists six factors that "tend to show" that an advertisement is "exempt function" political campaign activity, and five competing factors that "tend to show" that an advertisement is not. Rev. Rul. 2004-6 at 3-4. These factors are not in themselves dispositive. In the end, the regulations require a determination to be made based on "the facts and circumstances" of each advertisement.

The "factors that tend to show that an advocacy communication on a public policy issue is for an exempt function (political activity) under § 527(e)(2)" include the following:

a) The communication identifies a candidate for public office;

b) The timing of the communication coincides with an electoral campaign;

c) The communication targets voters in a particular election;

d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;

e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and

f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Rev. Rul. 2004-6 at 3.

The "factors that tend to show that an advocacy communication on a public policy issue is not for an exempt function under § 527(e)(2)" include the following:

a) The absence of any one or more of the factors listed in a) through f) above;

b) The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;

c) The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);

d) The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and

e) The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

*Id.*

Similarly, in Rev. Rul. 2007-41, 2007-1 C.B. 1421, the IRS stated that "[w]hether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case." Rev. Rul. 2007-41 at 2. With regard to campaign ads, the Revenue Ruling states:

> Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate. . . . All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.

*Id.* at 6 (emphasis added). According to the Revenue Ruling, the factors relevant to this determination include:

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
- Whether the statement is delivered close in time to the election;
- Whether the statement makes reference to voting or an election;
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

*Id.* The Revenue Ruling notes, "A communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election." *Id.* at 7.

Under established IRS rulings, and with regard to the requirement that the group be primarily engaged in "social welfare activities," the agency needs to examine the body of ads run by Crossroads GPS this year, to apply the standards laid out in the pertinent IRS Revenue Rulings, and to determine whether the ads run by Crossroads GPS constitute intervention or participation in candidate elections. Once the IRS has determined the extent to which Crossroads GPS has engaged in spending for ads to intervene or participate in candidate elections, the agency can then determine whether such campaign activities constitute its "primary purpose," in violation of the permissible standard for "social welfare" organizations.

In order to assist the IRS in its task of determining the extent of non-social welfare activities being engaged in by Crossroads GPS, we have enclosed a transcript of each ad that has been aired by Crossroads GPS from January 1, 2012 through September 24, 2012. We believe that a review of these ads, and the circumstances related to where and when they have been run, will demonstrate that under the applicable IRS standards, these ads constitute intervention and participation in candidate elections.

For example, an ad entitled "Suffered," that was run by Crossroads GPS on July 23, 2012, states:

> Narrator: America has suffered three years of crushing unemployment. Remember this: Obama: "We'll create nearly half a million jobs by investing in clean energy." Narrator: What really happened? Billions wasted on failed investments. Thousands of Americans lost jobs. While stimulus money went to companies that created jobs overseas. Paid for by the $4 billion Obama has added to our debt every day. Tell President Obama, for real job growth, cut the debt. Support the New Majority Agenda at newmajorityagenda.org.

This ad identifies President Obama and expresses strong disapproval for his positions on jobs and stimulus, two issues that distinguish the candidates in the election. This ad was run in this campaign season and was not related to any identified non-electoral event. Given these facts and circumstances, there is little doubt that this ad would constitute candidate campaign intervention and participation under the standards set forth in the Revenue Rulings discussed above.

The same is true for all of the other ads run by Crossroads GPS this year. For instance, an ad entitled "Basketball," which began running on May 22, 2012, states:

> Woman: "I always loved watching the kids play basketball. I still do, even though things have changed. It's funny, they can't find jobs to get their careers started and I can't afford to retire and now we are all living together again. I supported President Obama because he spoke so beautifully. He promised

> change, but things changed for the worse. Obama started spending like our credit cards have no limits. His health care law made health insurance even more expensive. We've had stimulus and bailouts. Obama added over $16,000 in debts for every American. How will my kids pay that off when they can't even find jobs? Now, Obama wants more spending and taxes. That won't fix things. I had so many hopes. Cutting taxes and debt and creating jobs. That's the change we need. Tell President Obama to cut the job killing debt and support the new majority agenda at newmajorityagenda.org.

This ad, as well, identifies and criticizes President Obama on issues that are central to the presidential election—the health care law, the stimulus and the national debt. There is little doubt that this ad would constitute candidate campaign intervention under applicable IRS standards.

Almost all of the ads run by Crossroads GPS, furthermore, have been run in presidential battleground states and/or states involving contested Senate races. In a number of cases, the Crossroads GPS ads mention both President Obama and a Senate candidate in states that are both a presidential battleground state and a state with a contested Senate race.

Thus, for example, 47 of the 60 ads mention Obama and a Senate candidate, or just the Senate candidate. They include: eight ads that mention Virginia Democratic Senate candidate Tim Kaine, seven ads that mention Montana Democratic Senator Jon Tester, seven ads that mention Nevada Democratic Senate candidate, Representative Shelley Berkley, six ads that mention North Dakota Senate candidate Heidi Heitkamp, six ads that mention Ohio Democratic Senator Sherrod Brown, five ads that mention Missouri Democratic Senator Claire McCaskill, three ads that mention Wisconsin Senate Democratic candidate, Representative Tammy Baldwin, two ads that mentions Indiana Democratic Senate candidate, Joe Donnelly, two ads that mention New Mexico Democratic Senate candidate, Representative Martin Heinrich and one ad that mentions Florida Democratic Senator Bill Nelson.

The Senate races in Montana, Virginia, North Dakota, Nevada, Missouri, Ohio, Wisconsin, New Mexico, Florida and Indiana—the states where the Crossroads GPS ads mentioning Senate candidates have run—are all races that have been considered "in play" during the 2012 elections and have been viewed as key races in determining whether the Republicans can take control of the Senate in 2013.

The transcripts of the ads have been obtained by us from YouTube where Crossroads GPS posts its ads. We do not know how often each of these ads has run, but the IRS can and should obtain that information as part of reviewing the activities of Crossroads GPS to determine whether the group is eligible for section 501(c)(4) tax status.

We urge the IRS to review each of the attached ads, and to apply the agency's standards to determine whether the ads constitute candidate campaign intervention. If you find, as we believe you must, that all, or the overwhelming majority, of these ads are campaign ads, then the inescapable conclusion is that the primary purpose of Crossroads GPS is to participate or intervene in the 2012 elections. As such, its claim to status as a "social welfare" organization

under section 501(c)(4) is not in compliance with the tax laws. Similarly, the IRS should find that the "private benefit" doctrine disqualifies Crossroads GPS for tax-exempt status under section 501(c)(4).

The IRS should act expeditiously in examining these ads, in denying Crossroads GPS tax-exempt status and in imposing appropriate penalties on the organization. The IRS should also act expeditiously in addressing the information we have presented in our prior letters with regard to Priorities USA, American Action Network and Americans Elect, and similarly should deny tax exempt status to those groups and impose appropriate penalties.

Crossroads GPS is engaged in a massive scheme to serve as a black box conduit to mask the sources of tens of millions of dollars flowing into the 2012 elections. We believe that Crossroads GPS is blatantly abusing the non-profit tax laws to do so.

It is the responsibility of the IRS to stop this abuse. We urge you to do so promptly.

Sincerely,

*/s/ Gerald Hebert*
J. Gerald Hebert
Executive Director
Campaign Legal Center

*/s/ Fred Wertheimer*
Fred Wertheimer
President
Democracy 21

July 23, 2012

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Petition for rulemaking on campaign activities by Section 501(c)(4) tax-exempt organizations

Dear Commissioner Shulman and Director Lerner:

Democracy 21 and the Campaign Legal Center acknowledge and welcome the letter we received from Ms. Lerner on July 17, 2012 in response to our letter of July 27, 2011 which transmitted a "Petition for Rulemaking on Campaign Activities by Section 501(c)(4) organizations," and our subsequent letter of March 22, 2012 following up on the Petition request.

Our letters and Petition urged the Internal Revenue Service (IRS) to undertake a rulemaking to clarify and bring into compliance with the law the IRS regulations that govern campaign activity by "social welfare" organizations claiming tax-exempt status under section 501(c)(4) of the Internal Revenue Code (IRC).

In her July 17, 2012 letter, Ms. Lerner stated:

> The IRS is aware of the current public interest in this issue. These regulations have been in place since 1959. We will consider proposed changes in this area as we work with the IRS Office of Chief Counsel and the Treasury Department's Office of Tax Policy to identify tax issues that should be addressed through regulations and other published guidance.

As you know from our letters, we believe the "proposed changes in this area" that Ms. Lerner says the IRS will now consider are crucially important and need to be made with urgency.

The circumstances surrounding the role being played today by a number of section 501(c)(4) groups in presidential and congressional elections are dramatically different than the circumstances that existed 53 years ago when the current IRS regulations were put in place.

We believe the letter from Ms. Lerner recognizes the controversy that currently exists over the role that groups claiming status as "social welfare" organizations are playing in our elections, post-*Citizens United.*

One year ago, on July 27, 2011, Democracy 21 and the Campaign Legal Center submitted a Petition for rulemaking to the IRS on this important matter.

The Petition challenged as contrary to law the existing regulations that define eligibility for an organization to qualify for section 501(c)(4) tax status. The Petition called on the IRS to initiate a rulemaking proceeding to revise and clarify its regulations regarding the extent of candidate election activities that a "social welfare" organization can engage in under 26 U.S.C. § 501(c)(4).

The Petition called for expeditious action by the IRS in order to protect the integrity of the 2012 federal elections:

> The large scale spending of secret contributions in federal elections by section 501(c)(4) organizations is doing serious damage to the integrity and health of our democracy and political system. The IRS needs to act promptly to address this problem by issuing new regulations to stop section 501(c)(4) organizations from being improperly used to inject tens of millions of dollars in secret contributions into federal elections. The new regulations must conform with the IRC and with court rulings interpreting the IRC. The regulations should provide a bright-line standard that implements the insubstantial expenditures standard set forth by the courts and specifies a limit on the amount of campaign activity that a section 501(c)(4) organization may undertake consistent with its tax-exempt status. <u>The IRS needs to act expeditiously to ensure that the new regulations are in effect in time for the 2012 presidential and congressional elections</u>.

Petition at 18-19 (emphasis added).

We wrote to you again on March 22, 2012 to urge you to take action on our Petition and initiate a rulemaking proceeding.

Meanwhile, developments in the course of the 2012 national elections have served to underscore that IRS regulations that are contrary to law are facilitating widespread misuse and abuse of the tax laws by organizations claiming tax-exempt status under section 501(c)(4) as

"social welfare" organizations, in order to keep secret the donors financing their campaign-related expenditures.

Campaign-related spending by section 501(c)(4) groups whose overriding purpose clearly appears to be influencing elections, has grown exponentially since we first called on the IRS to conduct a rulemaking proceeding a year ago.

For example, we have written to you previously on several occasions challenging the claim by Crossroads GPS, a group affiliated with the American Crossroads super PAC, that it is entitled to section 501(c)(4) tax-status. We have repeatedly asked you to investigate this matter.

According to a recent news article, Crossroads GPS and American Crossroads together "are poised to inject up to $70 million into a battle for the Senate on behalf of the Republicans."[1]

Another article recently noted, "The GOP independent spending goliath American Crossroads and its affiliate group Crossroads GPS are launching a new barrage of attack ads in six competitive Senate races, assailing a range of Democratic candidates as big-spending, liberal, ethically challenged and overly close to President Barack Obama."[2] The article states that American Crossroads is targeting the Nebraska, Nevada and Virginia Senate contests "while 501(c)(4) Crossroads GPS is funding the ads in North Dakota, Missouri and Ohio."

An earlier article reported that a $25 million advertising campaign by Crossroads GPS in 10 swing states that began on May 23, 2012 "is expected to become one of the most heavily broadcast political commercials of this phase of the general election." According to the article, Crossroads GPS conducted "18 different focus groups" that took place "over nearly a year" and that provided "a clear rationale for voters to deny Mr. Obama a second term."[3]

There is little doubt that Crossroads GPS is spending tens of millions of dollars to influence the 2012 national elections and also little reason to doubt that influencing elections, and not "social welfare activities," is the overriding purpose of the group.

While Crossroads GPS may be the biggest and most blatant example of massive campaign spending by a group claiming tax-exempt status as a section 501(c)(4) "social welfare" organization, it is by no means the only such group.

We have also previously written to you on several occasions challenging the claims to 501(c)(4) tax-exempt status by American Action Network, Priorities USA and Americans Elect,

---

[1] D. Drucker and S. Toeplitz, "American Crossroads' $70 Million Senate Blitz," *Roll Call* (July 11, 2012).

[2] A. Burns, "Crossroads bombards six Dem Senate candidates, hits Berkley on ethics," *Politico* (June 13, 2012).

[3] J. Peters, "Subtler Entry From Masters of Attack Ads," *The New York Times* (May 22, 2012)

and asking for IRS investigations of these groups which have also been spending large sums to influence federal elections.

For example, we informed you in our letter of December 14, 2011 that American Action Network in 2010 reportedly spent $26 million of its total expenditures of $30 million, or 87 percent, on campaign-related activities that the group reported to the FEC as "independent expenditures" and "electioneering communications."[4] It is hard to see on what conceivable basis this group could qualify for tax-exempt status as a section 501(c)(4) "social welfare" group.

The reason that section 501(c)(4) groups are being used as vehicles for spending large amounts to influence elections is that they are providing anonymity to their donors. A recent article about Crossroads GPS and one of its donors, casino executive Steve Wynn, stated:

> Unlike super PACs, Crossroads GPS is registered under a section of the tax code for so-called "social welfare" groups – 501(c)(4) – that does not require groups to reveal their donors' names, only donation amounts. The promise of anonymity is one of the main reasons GPS was established – it allows Wynn and like-minded contributors to avoid the controversy that has dogged top political donors like competing casino mogul Sheldon Adelson, as well as the libertarian industrialist Koch Brothers or the liberal financier George Soros.[5]

Political operatives are using "social welfare" organizations as conduits for injecting secret money into federal elections by attempting to exploit what they claim to be purported ambiguities in existing IRS standards.

These operatives argue, for example, that as long as ads do not contain "express advocacy" they can attack or promote candidates in whatever way they want and such ads do not constitute "intervention or participation" in campaigns, and thus may be run without limit by a section 501(c)(4) organization.

The IRS, however, has made clear that ads do not need to contain "express advocacy" in order to be treated as "intervention or participation" in campaigns for purposes of section 501(c)(4). *See, e.g.,* Rev. Rul. 2004-6 (listing six factors that "tend to show" that an ad is for the purpose of influencing a candidate election.)

The political operatives also argue that a "social welfare" organization can spend up to 49 percent of its revenues on overt campaign intervention, without running afoul of the rules that currently require a section 501(c)(4) organization to be "primarily engaged" in social welfare activities. *See* 26 C.R.F. 1.501(c)(4)-1(a)(2)(i).

---

[4] P. Stone, "Fine line between politics and issues spending by secretive 501(c)(4) groups," *iWatch News* (Oct. 31, 2011).

[5] K. Vogel & S. Friess, "Karl Rove hits big: The birth of a mega-donor," *Politico* (July 13, 2012) (emphasis added).

Such claims have gone unchallenged by the IRS, despite the fact that the IRS has never set forth a "49 percent" rule. The IRS has failed to clarify its rules regarding the amount of candidate election-related activity a section 501(c)(4) "social welfare" group is permitted to conduct. As a result, groups claiming status as section 501(c)(4) organizations have been allowed to become major players in influencing the 2012 federal elections and to use secret contributions to do so.

The failure of the IRS to take action on this matter has allowed groups that are in reality campaign operations – but claim to be 501(c)(4) "social welfare" groups – to make assertions about IRS rules that are unsupported by law, and thereby to provide a veil of secrecy for the donors financing their campaign-related expenditures.

We welcome Ms. Lerner's statement in your July 17 letter that the IRS "will consider proposed changes" in the regulations governing eligibility for tax-exempt status under section 501(c)(4). But we want to stress once again that the need for urgent action we noted in our July 27, 2011 letter is all the more true today.

We strongly urge the IRS to promptly institute a rulemaking proceeding to address this matter. We also strongly urge the IRS to act expeditiously in the interim to stop the blatant abuses of the tax laws that are resulting in massive amounts of secret money being laundered into our national elections by groups claiming to be "social welfare" organizations.

Sincerely,

| | |
|---|---|
| */s/ Gerald Hebert* | */s/ Fred Wertheimer* |
| J. Gerald Hebert | Fred Wertheimer |
| Executive Director | President |
| Campaign Legal Center | Democracy 21 |

May 24, 2012

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Crossroads GPS

Dear Commissioner Shulman and Director Lerner:

On April 13, 2012, Crossroads GPS filed Form 990 tax returns for the periods June 1, 2010 through May 31, 2011 and June 1, 2011 through December 31, 2011. Both of these tax returns noted that the group's application for tax-exempt status under section 501(c)(4) of the Internal Revenue Code (IRC) is "pending." More information as to why that application should be denied continues to surface and is set forth in this letter.

We have written to you a number of times about the overtly campaign-related activities of Crossroads GPS and other similarly-situated groups claiming tax-exempt status under section 501(c)(4). *See* letters from Democracy 21 and Campaign Legal Center dated October 5, 2010, September 28, 2011, December 14, 2011, March 9, 2012 and March 22, 2012.

These letters have provided information that raises serious questions about whether Crossroads GPS is primarily engaged in activities that constitute participation or intervention in campaigns, and for that reason is ineligible for tax-exempt status under section 501(c)(4).

New information strongly supports the conclusion that Crossroads GPS is not eligible for tax-exempt status as a "social welfare" organization, and is using its claim for status under section 501(c)(4) in order to hide from the public the identity of the donors who are financing its overtly campaign-related activities.

We strongly urge you to move promptly to deny the application of Crossroads GPS for section 501(c)(4) tax-exempt status and to make clear that they (and other similarly situated groups) cannot use this section of the IRC as the basis for refusing to disclose donors funding their campaign activities.

An article about Crossroads GPS in *The New York Times* this week strongly reinforces the conclusion that the organization, which was founded by Republican political operative Karl Rove, is, in essence, operating as a campaign arm of the Republican Party. J. Peters, "Subtler Entry From Masters of Attack Ads," *The New York Times* (May 22, 2012).

The article discusses a new anti-Obama campaign commercial by Crossroads GPS, entitled "Basketball,"[1] that is the "centerpiece" of a $25 million ad campaign "in 10 swing states" and that "is expected to become one of the most heavily broadcast political commercials of this phase of the general election."

According to the article, the anti-Obama ad is the result of "one of the greatest challenges for Republicans in this election: how to develop a powerful line of attack against a president who remains well liked even by people who are considering voting against him." The article notes that the "concept" for the ad "and even some of the lines" were "culled directly from focus groups of undecided and sometimes torn voters" as part of "18 different focus groups and field tests" conducted by Crossroads GPS "over nearly a year."

The article states, "In interviews with voters, Crossroads strategists picked up on some common sentiments that they concluded could provide a clear rationale for voters to deny Mr. Obama a second term." The article quotes Steven J. Law, the president of Crossroads GPS, as stating, "There are some who believe [Obama] made things worse; then there's a larger group of people who are upset at him because he hasn't fixed these problems. . . . And the larger point of these ads is that the agenda he's pursued has not made things better."

Similarly, a recent article in *The Los Angeles Times* stated that "Crossroads GPS—along with its sister "super PAC," American Crossroads—is the biggest among a network of conservative groups that have led the charge against Obama on the airwaves. Together, the two

---

[1] The script of the "Basketball" ad states:

> Woman: "I always loved watching the kids play basketball. I still do, even though things have changed. It's funny, they can't find jobs to get their careers started and I can't afford to retire and now we are all living together again. I supported President Obama because he spoke so beautifully. He promised change, but things changed for the worse. Obama started spending like our credit cards have no limit. His health care law made health insurance even more expensive. We've had stimulus and bailouts. Obama added over $16,000 in debt for every American. How will my kids pay that off when they can't even find jobs? Now, Obama wants more spending and taxes. That won't fix things. I had so many hopes. Cutting taxes and debt and creating jobs. That's the change we need. Tell President Obama to cut the job killing debt and support the new majority agenda at newmajorityagenda.org.

The ad can be viewed at: http://www.youtube.com/watch?v=PdIKr_zX7FE.

Crossroads groups aim to spend $300 million for the 2012 campaign." M. Gold, "Crossroads GPS Fires Back at Obama with $25-million Ad Buy," *The Los Angeles Times* (May 16, 2012).

A legitimate section 501(c)(4) "social welfare" organization does not "engage in focus groups of undecided and sometimes torn voters" to determine the electoral weaknesses of a presidential candidate in order to run a $25 million ad campaign "in 10 swing states" five months before the presidential election.

A legitimate section 501(c)(4) "social welfare" organization does not participate in a combined campaign with its affiliated "super PAC" to spend "$300 million for the 2012 campaign."

There is little doubt that the $25 million ad campaign being conducted by Crossroads GPS constitutes intervention and participation in the presidential campaign under IRS standards. Even though the ad contains no express advocacy (it instead ends by saying "Tell President Obama to cut the job killing debt and support the new majority agenda"), the electoral message of the ad is clear and the circumstances surrounding the creation and placement of the ad plainly demonstrate its campaign purposes.

The IRS does not use an "express advocacy" test for judging whether an ad constitutes intervention or participation in a campaign. *See* Rev. Rul. 2004-06, Rev. Rul. 2007-41. Thus, any claim by Crossroads GPS that the "Basketball" ad is "issue advocacy," not campaign intervention, simply because it omits a tag line like "vote against Obama," is irrelevant for purposes of IRS review.

Any such argument also denies the reality of the ads run by Crossroads GPS, as well as the obvious purpose of the organization to influence federal elections.

While section 501(c)(4) groups are not prohibited from engaging in campaign activities, the law does impose a ceiling on the extent to which they can do so. In particular, the primary purpose of a section 501(c)(4) group must be to further its "social welfare" activities, which the IRS has determined do not include campaign activities. Under applicable court rulings, section 501(c)(4) groups cannot participate in political campaigns to more than an "insubstantial amount," as we have discussed at length in our previous letters.

As we have also previously noted, some believe that the IRS applies a "49 percent" test that permits a "social welfare" organization to spend up to nearly half of its resources on campaign-related activities. This test is contrary to law. But even if the IRS did apply this standard, Crossroads GPS would still not meet it. We believe that a review of the activities, operations and spending by Crossroads GPS will demonstrate that its overriding purpose is to participate in political campaigns. As such, Crossroads GPS is not eligible for section 501(c)(4) tax-exempt status.

Crossroads GPS has an affiliated section 527 group, American Crossroads, that is free to engage in an unlimited spending to influence political campaigns. Thus, American Crossroads

could use its funds without restriction to pay for anti-Obama campaign ads, such as the "Basketball" ad discussed above.

But there is a critical distinction between conducting campaign activities through a section 527 group, such as American Crossroads, and conducting such activities through a section 501(c)(4) group, such as Crossroads GPS.

While American Crossroads is subject to disclosure requirements under the federal campaign finance laws, Crossroads GPS takes the position that it need not make its donors public because of its claim to status as a "social welfare" organization. In its two recently filed tax returns, Crossroads GPS listed 23 separate donations of $1 million or more (with the largest being a single donation of $10.1 million), and did not disclose to the public the identity of any of these donors. Crossroads GPS is using these secret contributions to fund its campaign advertising and it is providing a shelter for donors who want to fund campaign ads, but seek to do so secretly by evading the disclosure requirements of the law.

According to the tax returns recently filed by Crossroads GPS, the IRS has not yet granted its application for tax-exempt status under section 501(c)(4).

In your continuing review of that application, we call on the IRS to act as promptly as possible. We also urge the IRS to conduct a thorough and searching examination of all spending by Crossroads GPS, and in particular its spending on political advertisements, such as the one discussed above. The IRS needs to obtain transcripts of all ads sponsored by Crossroads GPS and review the ads to determine whether they constitute participation or intervention in political campaigns under IRS standards, without regard to an express advocacy test. In light of that, the IRS must determine whether Crossroads GPS is engaged in more than an insubstantial amount of campaign activity, and whether its primary purpose is campaign intervention rather than social welfare activities.

Crossroads GPS is serving as a vehicle to funnel tens of millions of dollars of secret funds into the 2012 federal elections. By the end of the year, this may be hundreds of millions of dollars of secret contributions.

The IRS should deny the pending application submitted by Crossroads GPS to obtain section 501(c)(4) tax status. Crossroads GPS is anything but a "social welfare" organization. It must not be allowed to play fast and loose with the tax laws in order to deny the American people full disclosure of the money it is spending to influence federal elections.

Sincerely,

| | |
|---|---|
| */s/ Gerald Hebert* | */s/ Fred Wertheimer* |
| J. Gerald Hebert | Fred Wertheimer |
| Executive Director | President |
| Campaign Legal Center | Democracy 21 |

April 17, 2012

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Secret donations to "social welfare " organizations making campaign expenditures

Dear Commissioner Shulman and Director Lerner:

Democracy 21 and the Campaign Legal Center again call on the IRS to investigate and take appropriate enforcement action against Crossroads GPS regarding its claimed status as a section 501(c)(4) tax-exempt "social welfare" organization.

We also again call on the IRS to similarly investigate and take appropriate enforcement action against Priorities USA, American Action Network and Americans Elect, other organizations which we believe are improperly claiming status under section 501(c)(4).

It appears clear that Crossroads GPS is engaging in substantial spending to influence elections and is accordingly not eligible for section 501(c)(4) tax status under existing tax law and court interpretations of the law. It is also appears clear that Crossroads GPS is raising numerous secret million dollar and multi-million dollar donations to fund these expenditures.

In an article dated April 13, 2012 (copy enclosed), *The Washington Post* reported that Crossroads GPS received a secret donation of $10 million dollars to be used to make expenditures to attack President Obama's campaign for reelection.

According to the report:

> An anonymous donor has given $10 million to run ads attacking President Obama and his policies, escalating the money race that is defining the 2012 presidential campaign. And in the new, freewheeling environment of independent political giving, the identity of this donor, like many others, is likely to remain a permanent mystery.
>
> The donation went to Crossroads GPS, the conservative nonprofit group founded with support of political operative Karl Rove, which also reported another donor giving at least $10 million over the past two years, according to draft tax returns released by the organization.
>
> The group would not identify the donors, who could be individuals, groups or corporations, and under tax and campaign laws, is not required to disclose them.[1]

The new $10 million secret contribution to Crossroads GPS to run attack ads against President Obama as he runs for re-election is a stark illustration of the problem caused by groups engaged in campaign spending claiming eligibility as "social welfare" organizations under section 501(c)(4).

The report in *The Washington Post* stated that Crossroads GPS and its affiliated Super PAC, American Crossroads, together plan to spend an estimated $300 million in the 2012 elections. The expenditures by these two affiliated groups clearly appear to be for one overriding purpose: to elect and defeat candidates.

The *Washington Post* article also shows the huge size of the contributions from secret donors that are being used to finance campaign-related expenditures:

> The tax returns show that Crossroads GPS has collected the vast majority of its donations from the super-rich. The forms show that nearly 90 percent of its contributions through the end of 2011 had come from as few as two dozen donors, each giving $1 million or more.

In prior letters sent to you on October 5, 2010, September 28, 2011, December 14, 2011 and March 9, 2012, our organizations have called on the IRS to investigate and take appropriate enforcement action against Crossroads GPS and other similarly situated organizations improperly claiming tax-exempt status as section 501(c)(4) "social welfare" organizations.

In our earlier letters, we noted that the overriding purpose of these groups is to influence elections and that the groups are spending substantial amounts to do so. These groups appear to be spending far more to intervene and participate in campaigns than the law and court interpretations allow "social welfare" organizations to spend for such purposes.

---

[1] T.W. Farnum, "Mystery donor gives $10 million to Crossroads GPS group to run anti-Obama ads," *The Washington Post* (April 13, 2012).

It is apparent that these groups are claiming section 501(c)(4) tax status in order to keep secret from the American people the donors financing their campaign-related expenditures. If these organizations are not eligible for tax status under section 501(c)(4), then they are improperly using the tax laws to shield their donors from public disclosure and improperly using secret contributions to influence the 2012 national elections.

As we have previously noted, it appears that the overriding purpose of Crossroads GPS is to influence elections. The ads run by Crossroads GPS are campaign-related under IRS standards. The standards provide that ads do not have to contain express advocacy in order to be treated as intervention and participation in campaigns for purposes of determining eligibility for tax-exempt status as a section 501(c)(4) organization.

As we have stated in our previous letters, we are deeply concerned about the failure of the IRS to take any public steps to show that the agency is prepared to enforce the tax laws applicable to section 501(c)(4) "social welfare" groups.

The ongoing harm to the public from the agency's failure to act is that section 501(c)(4) groups are being used as vehicles to raise and spend secret contributions on a massive scale to influence the 2012 elections.

Unless the IRS acts, the public interest in transparent campaign finance activities – an interest that was strongly affirmed by the Supreme Court in the *Citizens United* case – will be greatly damaged by the agency allowing groups to misuse the tax laws to hide the identities of wealthy donors giving huge amounts to influence this year's presidential and congressional elections.

Sincerely,

| | |
|---|---|
| */s/ Gerald Hebert* | */s/ Fred Wertheimer* |
| J. Gerald Hebert<br>Executive Director<br>Campaign Legal Center | Fred Wertheimer<br>President<br>Democracy 21 |

March 22, 2012

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Petition for rulemaking on candidate election activities by Section 501(c)(4) groups

Dear Commissioner Shulman and Director Lerner:

On July 27, 2010, Democracy 21 and the Campaign Legal Center submitted to the Internal Revenue Service a "Petition for Rulemaking on Campaign Activities by Section 501(c)(4) Groups."

The Petition challenged as contrary to law the existing regulations that define eligibility for an organization to qualify for section 501(c)(4) tax-exempt status. The Petition called on the IRS to initiate a rulemaking proceeding to revise and clarify its regulations regarding the extent of candidate election activities that a "social welfare" organization can engage in under 26 U.S.C. § 501(c)(4).

Since then, we have heard nothing from the IRS to indicate that such a rulemaking is under consideration.

Meanwhile, developments in the course of the 2012 national elections have served to underscore the fact that inadequate and flawed IRS regulations are facilitating widespread misuse of the tax laws by organizations claiming tax-exempt status under section 501(c)(4) in order to keep secret the donors financing their candidate campaign-related expenditures.

This is seriously undermining the integrity of the tax laws and the credibility of the nonprofit sector. According to a column in *Roll Call*:

> "Charitable organizations depend on the confidence and trust of the public for support," said Diana Aviv, president and CEO of Independent Sector, which represents the nonprofit and philanthropic community. Campaign spending by nonprofits, she added, could pose "a serious reputational risk" to the sector.[1]

We are writing again to strongly urge the IRS to act on our Petition promptly and initiate a rulemaking proceeding. The IRS must take steps to properly interpret and enforce the tax law and stop these abuses from continuing to explode in our elections.

Recently, a group of Democratic Senators and a group of Republican Senators have each separately written to the IRS, both complaining about the agency's administration of section 501(c)(4). One group of Senators argues that the agency is too intrusive in its inquiries into the candidate election activities of applicants for 501(c)(4) "social welfare" status. The other group of Senators argues that the agency is too lax in enforcing the limits on candidate campaign activities by such groups.

The IRS has a statutory responsibility to administer and enforce the tax laws as interpreted by the courts, without regard to political pressure. These letters from the Senators, however, serve to confirm that it is essential for the IRS to initiate a rulemaking to provide clarity and a legally correct bright line standard for determining when a group is eligible to receive tax-exempt status under section 501(c)(4).

The Internal Revenue Code provides that section 501(c)(4) groups must engage "exclusively" in social welfare activities. 26 U.S.C. § 501(c)(4). The regulations implementing this provision state, however, that "social welfare" organizations must be "primarily engaged" in social welfare activities. 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i).

Although the IRS has clearly and correctly stated that "social welfare" activities do not include activities that constitute participation or intervention in candidate elections, it has not clearly or properly defined the "primarily engaged" standard that was established by the agency to serve as a cap on such candidate campaign activities.

In the absence of a proper regulation, the standard has been widely misinterpreted to mean that section 501(c)(4) groups can engage in candidate election activities so long as such activities do not constitute a majority of the group's spending – that is to say, they can spend up to 49 percent of their expenditures on candidate campaign-related activities.

This is in conflict with the statutory language and with court interpretations of this language which hold that "social welfare" organizations cannot engage in any "substantial" amount of non-exempt activity. This means that section 501(c)(4) organizations cannot do more than an *insubstantial amount of candidate election activity*, whether or not it is their "primary" purpose.

---

[1] E. Carney, "Rules of the Game: Bad News for Nation's Nonprofits," *Roll Call* (March 20, 2012).

However, as we documented in our Petition and in other letters we have sent to you,[2] a number of groups claiming tax exempt status under section 501(c)(4) are engaging in substantial candidate election activities this election cycle – spending tens of millions of dollars to directly influence the 2012 candidate elections, much as such groups also did to influence the 2010 elections. This candidate campaign activity is bound to increase as the 2012 general election draws closer.

For instance, as we discussed in our letter to you of December 14, 2011, one section 501(c)(4) group, American Action Network, reportedly spent $26 million on candidate campaign-related activities in 2010, which was approximately *87 percent* of the organization's total spending that year. Another supposed "social welfare" organization, Americans Elect, is seeking ballot access as a political party in all 50 states for the purpose of nominating and running its own presidential candidate. The group has already obtained this status as a political party in a number of states. A group cannot be a "political party" and a "social welfare" organization at the same time.

The extent of the candidate election activities by these and other groups appears on its face to violate even the current ineffectual regulatory standard that limits participation in candidate campaign-related activities by section 501(c)(4) "social welfare" organizations. The activities certainly violate both the statutory language of section 501(c)(4) and the court interpretations of that provision.

The IRS must act expeditiously to revise and clarify the "primarily engaged" standard and to conform its regulations to the statute as construed by the courts. Absent action by the IRS, it is a virtual certainty that candidate election activities by groups improperly claiming tax-exempt status under section 501(c)(4) will escalate.

The stakes here are very high for the country and for the integrity of our elections. Organizations are improperly claiming tax-exempt status under section 501(c)(4) in order to keep secret the donors financing their candidate campaign-related expenditures. Citizens have a basic right to know who is giving and spending money to influence their votes.

Since section 501(c)(4) groups (unlike section 527 "political organizations") are not required to publicly disclose their donors, the sources of the money such groups spend for candidate election activities are hidden from public scrutiny.

Recent press reports have taken note of the increased candidate campaign spending by section 501(c)(4) groups, and the use of such "social welfare" groups specifically for the purpose of keeping secret the donors financing their candidate election activities.

One report in *Politico* noted that corporations have generally not contributed to so-called "Super PACs," which are federally registered political committees that are required to report their donors to the FEC. The report explained:

---

[2] *See* Letters of October 5, 2010, September 28, 2011, December 14, 2011 and March 9, 2012.

> Instead, corporate lobbyists and others say companies have preferred to give to politically active nonprofits that allow their donations to stay anonymous. . . .
>
> Millionaires and others might see an advantage to giving to super PACs, but one in-house corporate lobbyist told POLITICO that "nondisclosure is always preferred" when it comes to any contribution to mitigate any public perception issues and shareholder controversy.
>
> It's unclear how much money is being directed to nonprofit advocacy organizations – 501(c)(4)s – which do not have to disclose their donors to the Federal Election Commission but are in many cases associated with Super PACs.[3]

By allowing groups to claim tax exempt status under section 501(c)(4) while also engaging in substantial candidate election activity, the IRS is serving to deny citizens essential campaign finance information about the money being spent to influence federal elections.

This is information that the Supreme Court in *Citizens United* said "permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

The widespread abuse of the tax laws by groups improperly claiming section 501(c)(4) tax-exempt status will continue and grow until the IRS revises its regulations to conform with the statutory provision in the Internal Revenue Code and with court interpretations holding that tax-exempt groups may not engage in more than an insubstantial amount of non-exempt activity.

The IRS must move promptly to set a new clear, bright-line and administrable standard for determining eligibility for 501(c)(4) tax status, and ensure that such standard complies with the statute. Absent such action by the IRS, the agency will bear direct responsibility for the misuse and abuse of the tax laws by groups that are flooding our elections with secret money.

We strongly urge the IRS to promptly institute a rulemaking proceeding to address this matter. We would appreciate receiving a response from the IRS to our letter regarding what action the agency is prepared to take.

Sincerely,

| | |
|---|---|
| */s/ Gerald Hebert* | */s/ Fred Wertheimer* |
| J. Gerald Hebert | Fred Wertheimer |
| Executive Director | President |
| Campaign Legal Center | Democracy 21 |

---

[3] A. Palmer and A. Phillip, "Corporations not funding super PACs," *Politico* (March 8, 2012).

March 9, 2012

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Request for IRS investigation into whether certain section 501(c)(4) organizations are operating in violation of tax-exempt status

Dear Commissioner Shulman and Director Lerner:

On September 28, 2011, Democracy 21 and the Campaign Legal Center called on the IRS to conduct an investigation into whether four groups claiming tax-exempt status under section 501(c)(4) of the Internal Revenue Code are ineligible for exemption under that provision because they are substantially engaged in campaign activities, not social welfare activities. The groups discussed in our letter are Crossroads GPS, Priorities USA, American Action Network and Americans Elect.

On December 14, 2011, we supplemented our request by providing additional information about the campaign activities conducted by three of these groups.

According to an article in *The New York Times* on March 6, 2012:

> In recent weeks, the I.R.S has sent dozens of detailed questionnaires to Tea Party organizations applying for nonprofit tax status, demanding to know their political leanings and activities. The agency plans this year to press existing nonprofits like American Crossroads, on the Republican side, and Priorities USA, on the Democratic side, to justify their tax-protected status as "social welfare" organizations, a status that many tax professionals believe is being badly abused. [1]

---

[1] J. Weisman, "Scrutiny of Political Nonprofits Sets Off Claim of Harassment," *The New York Times* (March 6, 2012). We believe the reference in the article to American Crossroads, which is a

The *Times* article also stated that there is "pushback" against any investigation by the IRS of whether groups that may be engaged in campaign-related activities are entitled to 501(c)(4) tax-exempt status, and that such resistance is likely to be "fierce." According to one attorney quoted in the article, the IRS is engaged in "'McCarthyism' tactics" and its investigation is "a coordinated effort by the I.R.S. . . . to stifle free speech activities."

We strongly urge the IRS not to succumb to such arguments, or to any public or political pressure to back away from carrying out the agency's statutory responsibilities to enforce the tax laws.

The IRS must enforce the law fairly and without partisan bias. The agency also must not shrink from enforcing the law against violations of the tax code by political groups. The stakes here – namely the integrity of our elections and of our tax laws – are much too high for the IRS to walk away from its responsibility to ensure that the tax laws are not being abused for political purposes.

The investigations we have urged the IRS to conduct involve organizations conducting substantial campaign activities that we believe are misusing the tax laws to keep secret from the American people the donors financing their campaign activities. We presented compelling evidence in our letters to show that these groups are primarily involved in campaign-related activities and, as such, do not qualify for exempt status under section 501(c)(4).

As we explained in our earlier letters, the law provides that section 501(c)(4) organizations are required to primarily engage in the promotion of social welfare in order to obtain tax-exempt status under section 501(c)(4). Court decisions have established that in order to meet this requirement, section 501(c)(4) organizations cannot engage in more than an insubstantial amount of any non-social welfare activity, including direct or indirect participation or intervention in elections.

The facts outlined in our earlier letters clearly demonstrate, we believe, that the four organizations we requested the IRS to investigate are engaged in far more than an "insubstantial" amount of campaign-related activities that do not qualify as "social welfare" activities. One of these organizations supports Democratic candidates, two of them support Republican candidates, and one of them is seeking to nominate and run its own candidate for President.

By claiming tax-exempt status under section 501(c)(4), these groups allow their donors to evade the public disclosure requirements that would apply if the organizations were registered under section 527 as "political organizations." In fact, as our previous letters demonstrated, it appears that avoiding disclosure of their donors is the basic reason that these groups chose to claim section 501(c)(4) tax status.

Absent enforcement of the law, the IRS will be countenancing an improper scheme that allows organizations engaged substantially in campaign activities to hide the sources of money being used to influence elections by claiming exempt status under section 501(c)(4). This is

---

section 527 group, is instead intended to be a reference to Crossroads GPS, an affiliated section 501(c)(4) organization.

contrary to the long established principle that citizens are entitled to know who is giving and spending money to influence their votes in order to protect the integrity of our elections and to safeguard against corruption. This principle is embodied in the Internal Revenue Code through the requirement that "political organizations" – those groups primarily organized and operated to influence elections – are subject to full disclosure of the sources of their funding. 26 U.S.C. § 527.

To the extent these organizations are operating improperly as section 501(c)(4) groups, the interests of the American people are being seriously harmed. The IRS has an obligation to enforce the tax laws as written and interpreted by the courts, and to ensure that tax-exempt groups substantially engaged in campaign activities are not allowed to misuse section 501(c)(4) to hide their donors from the public.

Such enforcement is not partisan, nor is it contrary to First Amendment values. Groups are free to obtain tax-exempt status and to engage in as much campaign activity as they wish – so long as they operate under section 527 and comply with its disclosure requirements.

We urge the IRS to move forward expeditiously to investigate the groups we have identified in our earlier letters and to conduct all other appropriate investigations to ensure proper compliance with the eligibility requirements of section 501(c)(4).

Sincerely,

| | |
|---|---|
| */s/ Gerald Hebert* | */s/ Fred Wertheimer* |
| J. Gerald Hebert | Fred Wertheimer |
| Executive Director | President |
| Campaign Legal Center | Democracy 21 |

December 14, 2011

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Request for IRS investigation into whether certain section 501(c)(4) organizations are operating in violation of tax exempt status

Dear Commissioner Shulman and Director Lerner:

We are writing to supplement our letter to the Internal Revenue Service of September 28, 2011.

In the September 28th letter, Democracy 21 and the Campaign Legal Center called on the IRS to investigate whether four organizations – Crossroads GPS, the American Action Network, Americans Elect and Priorities USA – are operating in violation of their claimed tax-exempt status under section 501(c)(4) of the Internal Revenue Code because each organization is engaging in far more political activity than the Code allows for "social welfare" organizations.

These groups are claiming section 501(c)(4) tax status in order to keep secret from the American people the donors financing their expenditures to influence federal elections

We previously wrote to the IRS on October 5, 2010 asking for an investigation of Crossroads GPS and its eligibility to receive section 501(c)(4) tax status. We also wrote to the IRS on July 27, 2011 challenging the IRS regulations on eligibility for section 501(c)(4) tax status as not properly implementing the law.

We are writing today to provide additional information on the political activities of three of the four groups addressed in our September 28th letter, the American Action Network, Americans Elect and Crossroads GPS that further demonstrates that these groups are not entitled to section 501(c)(4) tax-exempt status.

As you are aware, section 501(c)(4) "social welfare" organizations are not required to disclose their donors to the public. If the four organizations discussed in our September 28th letter are not eligible for the tax status they claim under section 501(c)(4), then they are improperly shielding their donors from public disclosure and improperly using secret contributions to influence the 2012 national elections.

We are deeply concerned about the failure of the IRS to take any public steps to show that the agency is prepared to enforce the tax laws applicable to section 501(c)(4) tax-exempt groups.

Since bringing these abuses of the tax laws to your attention, beginning more than a year ago, we have seen no evidence that the IRS is prepared to address what appear to be blatant abuses in order to keep secret from the American people the sources of money being spent to influence federal elections.

The failure of the IRS to carry out its statutory enforcement responsibilities to prevent the abuse of the tax laws could have a major impact on the 2012 elections, as we have stated in our previous letters to the IRS.

We urge the IRS in the strongest possible terms to expeditiously examine the matters we have brought to its attention and to address any possible abuses and violations of the tax laws before it is too late.

As our prior letters state, section 501(c)(4) "social welfare" organizations are required to primarily engage in the promotion of social welfare in order to obtain tax exempt status. Federal court decisions have established that in order to meet this requirement, section 501(c)(4) organizations cannot engage in more than an ***insubstantial*** amount of any non-social welfare activity, such as directly or indirectly participating or intervening in elections.

In our letter of September 28, 2011, we provided voluminous information demonstrating that each of the four organizations discussed in the letter are engaging in ***substantial*** campaign-related activity. Indeed, the facts relating to the formation and activities of the four organizations show that each group was organized and is operated for the overriding purpose of participating or intervening in elections.

By claiming tax-exempt status under section 501(c)(4), these groups allow their donors to evade public disclosure requirements that would apply if the organizations were registered under section 527 as "political organizations." In fact, it appears that avoiding disclosure of their donors is the reason that these groups have claimed section 501(c)(4) tax status.

**American Action Network**

An article from the Center for Public Integrity's *iWatch News* (October 31, 2011) reported that American Action Network spent $30 million in 2010. According to the article and federal campaign finance reports, $26 million of the $30 million spent by American Action

Network in 2010 was spent for "independent expenditures" and "electioneering communications," as defined by federal campaign finance laws. The article states:

> The conservative American Action Network, a leading independent player in last year's election, poured $26 million – out of some $30 million in spending – from secret donors into political ads and activities to help Republican candidates. . . .
>
> As required by law, the network reported the $26 million it spent on political activities to the Federal Election Commission before Election Day.[1]

This means that *87 percent* of American Action Network's expenditures in 2010 were made for campaign-related activities reported to the FEC under the nation's campaign finance laws. The article states:

> "If over 80 percent of a group's expenditures are for political purposes that require reporting to the FEC, then that organization will not qualify for tax-exempt status under section 501(c)(4)," Marc Owens, who was director of the IRS exempt organizations division for a decade, told *iWatch News*.

Under no one's understanding of the tax laws is an organization eligible for section 501(c)(4) tax-exempt status if *87 percent* of its expenditures are made for campaign-related activities reported under the nation's campaign finance laws.

Based on these facts, the IRS must move promptly in order to stop American Action Network from again abusing the tax laws in the 2012 elections.

According to the *iWatch News* article, former Senator Norm Coleman, the chairman of American Action Network, is quoted as stating that the group will be heavily involved in spending to influence the 2012 congressional campaign. If the IRS does not take action, it could be responsible for allowing campaign-related expenditures by American Action Network that are improperly financed with secret contributions to influence and possibly decide the outcome of targeted House and Senate races.

**Americans Elect**

Americans Elect, which we also addressed in our September 28th letter, continues to qualify for ballot access as a political party in states throughout the nation in order to run a presidential/vice-presidential candidate ticket in 2012. The organization is claiming section 501(c)(4) status in order to keep its donors secret from the American people.

A recent news story stated that Americans Elect "has raised $22 million and is likely to place a third presidential candidate on the ballot in every state next year."[2] According to this

---

[1] P. Stone, "Fine line between politics and issues spending by secretive 501(c)(4) groups," *iWatch News* (Oct. 31, 2011).

article, Americans Elect "has ballot slots in Florida, Michigan, Nevada, Ohio and five other states, with certifications pending in several others."

According to a recent *POLITICO* article, "Americans Elect this week announced that it qualified for the ballot in Colorado and Mississippi, bringing the total number of states in which it has access to 11 – including Alaska, Arkansas, Arizona, Kansas, Nevada, Michigan, Florida, Ohio and Utah. Certification is pending in California and Hawaii."[3]

The notion that this group qualifies as a section 501(c)(4) "social welfare" organization is absurd.

A group legally qualified in states as a political party in order to obtain ballot access to run a candidate for president cannot simultaneously be a tax-exempt "social welfare" organization under section 501(c)(4).

In this particular case, the failure of the IRS to act could have enormous consequences.

Just as third party candidates decided the 2000 presidential race, a third party candidate representing Americans Elect could decide the outcome of the 2012 presidential election. If that were to happen and the IRS has failed to take action here, the agency would be responsible for allowing secret money and a secretly financed organization to decide who is elected to be our next president.

The IRS must not allow this to happen. The agency must move immediately to address the apparent abuses of the tax laws.

**Crossroads GPS**

As we demonstrated in our September 28th letter, the overriding purpose of Crossroads GPS is to influence elections. In engaging in its campaign-related activities, Crossroads GPS works in tandem with American Crossroads, a so-called Super PAC, to elect Republicans and defeat Democrats running for federal office. That is the organization's purpose and that is what the organization is spending its money to do.

According to published reports, American Crossroads and its affiliated organization Crossroads GPS plan to spend a combined $240 million to influence the 2012 presidential and congressional elections.

---

[2] K. Thompson, "Moderate Americans Elect group hoping to add third candidate to 2012 election ballot," *The Washington Post* (November 24, 2011).

[3] T. Mak, "Christine Todd Whitman to Jon Huntsman: Run third party," *POLITICO* (December 2, 2011)

Based on the Internal Revenue Code, court decisions and even the flawed IRS regulations, Crossroads GPS is not entitled to the section 501(c)(4) tax-exempt status it has claimed in order to hide its donors. This is another clear case that demands prompt action.

A recent article in *The New York Times* shows that Crossroads GPS is continuing to spend substantial amounts of money to influence federal elections. According to the article:

> Crossroads GPS, a conservative advocacy group founded by Mr. Rove and other Republican strategists, has placed the biggest bet so far on negative messages. By its own count, it has spent about $20 million this year on political advertising. Much of its was broadcast during the debt-ceiling debate this summer, when it singled out members of Congress with advertisements that portrayed Democrats and Mr. Obama as fiscally irresponsible and unable to fix the economy.
>
> In recent weeks, the group has taken on Mr. Obama and his economic agenda, spending $2.6 million on a commercial that criticizes his support for an upper-income tax increase and suggests a split on the issue between Mr. Obama and former President Bill Clinton. . . .
>
> Many of the Crossroads advertisements have been running in swing states like Colorado, Florida, Ohio and Pennsylvania and have been timed to coincide with presidential trips.
>
> "It creates a scenario where the president's visit is greeted with a strong counterpoint to the argument he's making," said Jonathan Collegio, communications director for Crossroads GPS.
>
> "And in battleground states where the issue framing is going to impact 2012, it's critical to be making your point there early and often," Mr. Collegio said. "There may be some value in advertising now that will be impossible to achieve toward the end of the campaign, when virtually all of the advertising on television and radio is political."[4]

Similarly, a recent article in *National Journal* reported that Crossroad GPS has recently "reserved more than $500,000 on air time in Nebraska's two largest media markets," to run ads that are for the purpose of dissuading Senator Ben Nelson (D-NE) from running for reelection.[5] According to the article:

> "We want Ben Nelson to recognize that 2012 will be an extraordinarily grueling proposition in the case he decides to run," said Jonathan Collegio, a Crossroads spokesman, in confirming the buy.

---

[4] J. Peters, "TV Attack Ads Aim at Obama Early and Often," *The New York Times* (November 26, 2011) (emphasis added).

[5] R. Wilson, "Crossroads Will Drop Half Million Against Nelson," *National Journal* (Dec. 12, 2011).

> Crossroads began the two-week blitz last week with a spot blasting Nelson's vote in favor of health care reform legislation. *Id.*

The statement by the spokesman for Crossroads GPS makes clear that it is intending to make Senator Nelson's year "grueling," should he decide to run for re-election. The campaign focus of Crossroads GPS's activities could not be more overt.

In failing to properly enforce the tax laws that apply to section 501(c)(4) groups, the IRS is failing the American people.

The IRS is also creating the potential for this illegal activity to play a major role in influencing and possibly determining the outcome of the 2012 presidential election and individual congressional races.

We reiterate our request that the IRS move promptly to address whether the organizations detailed in our September 28th letter are improperly claiming tax-exempt status under section 501(c)(4) and are improperly using that status to keep secret the donors to these groups whose contributions are being spent to influence federal elections.

The IRS has an obligation to the American people to properly enforce the tax laws and thereby to protect the integrity of our elections. Democracy 21 and the Campaign Legal Center strongly urge the IRS to meet its obligation.

Sincerely,

| | |
|---|---|
| */s/ Gerald Hebert* | */s/ Fred Wertheimer* |
| J. Gerald Hebert<br>Executive Director<br>Campaign Legal Center | Fred Wertheimer<br>President<br>Democracy 21 |

September 28, 2011

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Request for IRS investigation into whether certain organizations are ineligible for tax exempt status under section 501(c)(4).

Dear Commissioner Shulman and Director Lerner:

Democracy 21 and the Campaign Legal Center call on the Internal Revenue Service (IRS) to conduct an investigation into whether Crossroads GPS, Priorities USA, American Action Network and Americans Elect, all of which claim to be tax exempt groups organized under section 501(c)(4) of the Internal Revenue Code (IRC), 26 U.S.C. § 501(c)(4), are ineligible for the tax exempt status provided to section 501(c)(4) organizations.[1]

Under the IRC, IRS regulations and court decisions interpreting the IRC, section 501(c)(4) organizations are required to primarily engage in the promotion of social welfare in order to obtain tax exempt status. Court decisions have established that in order to meet this requirement, section 501(c)(4) organizations cannot engage in more than an insubstantial amount of any non-social welfare activity, such as directly or indirectly participating or intervening in elections.

Thus, the claim made by some political operatives and their lawyers that section 501(c)(4) organizations can spend up to 49 percent of their total expenditures on campaign activity and maintain their tax exempt status has no legal basis in the IRC and is contrary to court decisions regarding eligibility for tax-exempt status under section 501(c)(4). An expenditure of 49 percent of a group's total spending on campaign activity is obviously far more than an insubstantial amount of non-social welfare activity.

---

[1] Last October, we asked for an investigation of Crossroads GPS on similar grounds. By this letter we re-state and supplement our earlier request for an investigation of Crossroads GPS.

The IRS applies the "primarily engaged" test on the basis of the "facts and circumstances" of an organization's formation and operations. Here, we believe, the "facts and circumstances" show that each organization has engaged in far more than an insubstantial amount of participation or intervention in elections and that the overriding purpose of each organization is to influence elections.

Thus, under the IRC and court decisions interpreting the IRC, these organizations are not eligible to receive section 501(c)(4) tax exempt status.

In a 2008 Letter Ruling, the IRS stated that a group is not eligible for tax exempt status under section 501(c)(4) where the facts and circumstances show that the group's "first and primary emphasis" is to get candidates elected to public office.

This standard is different than, and in conflict with, the standard applied by the courts. But even under this standard, we believe the "facts and circumstances" relating to the formation and activities of the four organizations discussed in this letter show that each group was organized and is operated for the overriding purpose of participating or intervening in elections.

Therefore, none of the four groups meets the standard for tax exempt status under section 501(c)(4) because they are not primarily engaged in "the promotion of social welfare."

By claiming tax-exempt status under section 501(c)(4), these groups allow their donors to evade the public disclosure requirements that would apply if the organizations were registered under section 527 as "political organizations." In fact, it appears that avoiding disclosure of their donors is the basic reason that these groups organized under section 501(c)(4).

Absent timely and appropriate action by the IRS, widespread abuses of the tax code by groups organized under section 501(c)(4) are likely to become commonplace in the 2012 presidential and congressional races. These abuses will come at the expense of the integrity and credibility of the tax laws and of the right of the American people to know the identity of the donors providing money to influence elections.

Accordingly, we request that the IRS promptly investigate the groups discussed in this letter and take appropriate enforcement action and impose appropriate penalties for any violations of section 501(c)(4) that the agency may find.

## I. Crossroads GPS

On October 5, 2010, Democracy 21 and the Campaign Legal Center filed a letter with the IRS requesting an investigation into whether Crossroads GPS was operating in violation of the requirements for obtaining tax-exempt status under section 501(c)(4). Here, we supplement the information set forth in that earlier letter and continue our request for an investigation.

Crossroads GPS was organized in June, 2010 under section 501(c)(4) of the IRC "as an organization for the promotion of social welfare." ("GPS" stands for "Grassroots Policy Strategies.")

Crossroads GPS is affiliated with American Crossroads, a non-profit political organization registered under section 527 of the IRC. American Crossroads is registered with the Federal Election Commission (FEC) as a political committee under the Federal Election Campaign Act. As such, the major purpose of American Crossroads is to raise and spend money to influence federal campaigns. As a registered political committee, American Crossroads must report all of its contributions and expenditures to the FEC under federal campaign finance laws. As a section 501(c)(4) organization, Crossroads GPS does not publicly disclose its donors.

An article in *Politico*, dated April 29, 2011, notes that Crossroads GPS was "founded under the guidance of GOP strategists [Karl] Rove and Ed Gillespie. . . ." and that it "accepts unlimited contributions from donors whose identities can be kept secret."[2] The article notes:

> In response to [the *Citizens United*] ruling, Rove and Gillespie helped form American Crossroads, which did disclose donors, and Crossroads GPS, which didn't. During last year's midterms, they raised a combined $70 million, of which the donors of about $43 million are still secret. The vast majority of that money was spent attacking Democratic candidates for the House and the Senate.

*Id.* According to another report:

> Crossroads GPS took advantage of elements of the tax code to collect unlimited donations from individuals and corporations to spend tens of millions of dollars against Democratic candidates in the 2010 election.[3]

Another report noted that Crossroads GPS was formed for the very purpose of avoiding donor disclosure:

> Meanwhile, section 501(c)(4) of the code, under which Crossroads GPS is incorporated, allows groups to shield their donors' identities, but requires them to spend a majority of their cash on apolitical purposes – an obligation Democratic critics say Crossroads GPS and other right-leaning groups flaunted during the campaign, when they bombarded Democratic candidates with bitingly critical ads.
>
> "Disclosure was very important to us, which is why the 527 was created," Forti said. "But some donors didn't want to be disclosed and, therefore, a (c)(4) was created," Forti explained, referring to Crossroads GPS.

---

[2] J. Cummings, "New Dem money group takes on GOP," *Politico* (April 29, 2011) (emphasis added).

[3] M. O'Brien, "Obama alumni launch new outside group to boost reelection," *The Hill* (April 29, 2011).

> Forti's frank explanation differs from that previously offered by the Crossroads team, which had asserted that they always intended to create a 501(c)(4) because it was better suited to facilitate issue-based advocacy.[4]

A report in *The Wall Street Journal* discussed the plans of Crossroads GPS (and American Crossroads) to play a significant role in the 2012 elections:

> Two conservative groups founded last year with the help of Republicans Karl Rove and Ed Gillespie have set a goal of raising $120 million in the effort to defeat President Barack Obama, win a GOP majority in the Senate and protect the party's grip on the House in the 2012 election. . . .
>
> If the conservative groups meet the target disclosed to *The Wall Street Journal*, they would establish their organizations – American Crossroads and Crossroads GPS – as possibly the largest force in the 2012 campaign, aside from the presidential candidates themselves and the political parties.[5]

According to another report, " '2010 was only Crossroads' opening act,' Steven Law, the group's president, told the Center for Public Integrity. These two groups hope to rake in $120 million for 2012 compared to $71 million last year."[6]

In February, 2011, Crossroads GPS launched a radio ad campaign that was specifically designed to counter ads run by the Democratic Congressional Campaign Committee. According to one report:

> Crossroads GPS, a 501(c)(4) group associated with GOP heavyweights Karl Rove and Ed Gillespie, is spending $90,000 on radio ads in 19 districts where the Democratic Congressional Campaign Committee (DCCC) launched ads this week.
>
> The group launched the ads to hit back against the DCCC ads, which accused the Republicans, many of whom are freshmen from swing districts, of wanting to slash spending for education and research and investment.[7]

---

[4] K. Vogel, "SEIU, American Crossroads look back at 2010 spending," *Politico* (Dec. 13, 2010) (emphasis added).

[5] B. Mullins, "2012 Election Spending Race Heats Up," *The Wall Street Journal* (March 1, 2011) (emphasis added).

[6] P. Stone, "Democrats desperately seeking their own Rove," *Center for Public Integrity –iWatch News* (March 14, 2011).

[7] M. O'Brien, "Rove-backed group spends to bolster 19 targeted Republicans," *The Hill* (Feb. 3, 2011).

Crossroads GPS also started to run ads attacking President Obama in key electoral battleground states:

> In an early sign of its financial strength, Crossroads GPS announced Friday that it was launching a two-month, $20 million television ad blitz attacking Obama's record on jobs, the deficit and the overall economy. The first ads will start June 27 and run in key battleground states such as Colorado, Florida, Missouri, Nevada and Virginia.[8]

A subsequent report stated that Crossroads GPS "is about midway through a two-month advertising binge attacking President Barack Obama and congressional Democrats that is expected to cost more than $20 million, alone."[9]

President Obama announced his candidacy for re-election in the 2012 presidential race on April 4, 2011, well before the Crossroads GPS ads were run.

One report notes that Crossroads GPS is already spending money in Missouri as part of an effort to defeat Senator Claire McCaskill, who is up for reelection in 2012:

> With nearly a year and a half to go before Election Day 2012, conservative-leaning national advocacy groups already have spent more than $500,000 on advertising in Missouri in hopes of unseating incumbent Democratic Senator Claire McCaskill. . . .
>
> The conservative groups, American Crossroads political action committee and its nonprofit affiliate, Crossroads GPS, already have hired southwest Missouri political operative Paul Mouton to help research and manage their efforts against McCaskill. Missouri is the only state with such an on-the-ground presence.
>
> "As long as the race remains competitive, we will remain highly involved," said Jonathan Collegio, communications director for both groups. "Having someone on the ground in Missouri is a testament to how important we view this race."
>
> When all is said and done, American Crossroads and Crossroads GPS expect to spend far and away more in Missouri than they did in 2010, when they spent around $2.4 million opposing Democrat Robin Carnahan during her unsuccessful campaign for the U.S. Senate.[10]

---

[8] P. Stone, "Obama groups raise $4-5 million in first two months," *Center for Public Integrity-iWatch News* (June 24, 2011).

[9] K. Vogel, "Both sides now in dash for anonymous cash," *Politico* (Aug. 9, 2011).

[10] J. Hancock, "Both sides spending big to win Missouri Senate seat," *St. Louis Post-Dispatch* (Aug. 15, 2011).

Jonathan Collegio, the spokesman for Crossroads GPS and American Crossroads, said "Crossroads will continue to spend heavily in many competitive races through next November."[11] According to this story, "'The Crossroads groups have stated that we'll be involved heavily in 2012, both in congressional races and the presidential side as well,' Collegio said." *Id.* (emphasis added).

Karl Rove, one of the founders of the Crossroads groups, was recently quoted at an appearance in Ohio as discussing their plans for campaign spending in Ohio in 2012:

> Speaking with reporters before addressing an audience last night at Cedarville University, Rove said American Crossroads and its sister group, Crossroads GPS, view Ohio as the battleground where President Barack Obama must be stopped and where it is crucial to defeat incumbent Democratic Sen. Sherrod Brown to help Republicans take control of the Senate.
>
> "Our objective is to be a strong presence in Ohio on the presidential contest, the Senate contest and wherever we might be needed in the House," Rove said. "We raised $72 million last time (in 2010); our goal is to raise $250 million this time."[12]

Another report indicates that the Crossroads groups may be shifting to emphasize spending through the section 501(c)(4) arm, Crossroads GPS. According to this report, "Crossroads Spokesman Jonathan Collegio said the group's nonprofit arm, registered as a 501(c)(4) social-welfare organization by the IRS would be 'more active' than Crossroad's main 527 group."[13]

This may reflect the fact that Crossroads has been more successful in its fundraising of undisclosed contributions through the section 501(c)(4) arm. According to one report, the section 527 arm "has seen its fundraising lag behind its non-disclosing sister group. In the first six months of 2011, . . .it raised only $3.9 million."[14]

The same report described the evolution of the Crossroads groups as moving toward reliance on the section 501(c)(4) arm as a way to shield donors from disclosure:

> [B]ack when Crossroads started out last year, it, too, shunned secret donations and extolled disclosure. Its chairman, Mike Duncan, described himself in May 2010

---

[11] D. Eggen, "Political groups, now free of limits, spending heavily ahead of 2012," *The Washington Post* (May 21, 2011).

[12] J. Hallett, "Rove-affiliated PACs to spend big in Ohio," *The Columbus Dispatch* (Sept. 21, 2011).

[13] J. Gillum, "Priorities USA Raises $5 Million to Counter Attack Ads From Karl Rove-Backed Crossroads GPS," *Associated Press* (July 31, 2011).

[14] K. Vogel, "Both sides now dash for anonymous cash," *Politico* (Aug. 9, 2011).

> as "a proponent of lots of money in politics and full disclosure in politics," and said Crossroads intended to "be ahead of the curve on" transparency.
>
> Less than one month later, with American Crossroads struggling to raise money from donors leery of having their names disclosed, operatives spun off Crossroads GPS, and its fundraising team, led by Rove, began emphasizing to prospective donors the ability to give anonymous contributions.
>
> Fundraising took off, and together, the groups ended up raising more than $70 in 2010, with the majority of it -- $43 million – going to Crossroads GPS.

*Id.*

On September 9, 2011, a published report stated that American Crossroads and Crossroads GPS have set a new fundraising goal that is at least twice the $120 million announced earlier this year.[15] According to the published report:

> We see a pathway to at least doubling our earlier projected goal," Steven Law, the president of Crossroads, told *iWatch News*. "Everyone is going to stretch as far as they can here because we all feel this is the most important election we have ever been involved with."
>
> To help achieve its new goal, the two groups have been talking to some prominent GOP figures, notably Mississippi Gov. Haley Barbour. The former Republican National Committee chairman has agreed to lend his Midas like rolodex to the Crossroads efforts.
>
> "Gov. Barbour's involvement with us gives us the capacity to focus on the presidential race, the Senate and the House at the same time," Law said.

*Id.* (emphasis added).

**II. Priorities USA.**

Priorities USA announced its formation as a social welfare organization under section 501(c)(4) of the tax code by a memorandum distributed "to interested parties" on April 29, 2011. The memorandum makes clear that Priorities USA (and its companion section 527 political organization, Priorities USA Action), are intended to work for the reelection of President Obama by mimicking the structure and function of Crossroads GPS (and American Crossroads). According to the Priorities USA memorandum:

> Our groups were formed to answer the hundreds of millions of dollars Karl Rove and the Koch brothers have dedicated to spending in the 2012 election. In 2010, Republicans spent millions distorting the debate on important issues and running

---

[15] P. Stone, "Karl Rove-linked Crossroads has more than doubled its earlier fundraising goal of $120 million," *Center for Public Integrity- iWatch News* (Sept. 8, 2011).

> vicious, dishonest attack ads. This is an effort to level the playing field and not allow right-wing activists to hijack the political system.[16]

One published report described Priorities USA as follows:

> A group of Democrats aligned with the Obama administration today announced that they are starting an outside spending group similar to the conservative groups that President Obama has decried.
>
> The new group has two arms: Priorities USA and Priorities USA Action. While one of the Priorities groups will disclose its donors, the other will not. The model is similar to that used by American Crossroads and Crossroads GPS, the conservative outside groups that raised more than $70 million in the midterm election cycle to spend on behalf of candidates with a "conservative free-market legislative agenda."[17]

Another report noted:

> A group of leading Democrats, including some with close connections to the White House, have officially formed what are expected to be the major outside groups to combat Republicans – and support President Obama – in the 2012 elections with help from huge donations from big money donors and corporations who will have the legal ability to stay in the shadows that Mr. Obama has previously so vocally criticized.
>
> The groups are to be called Priorities USA and Priorities USA Action, and, as such, are modeled after the Republican groups American Crossroads and Crossroads GPS that were started with help from the strategist Karl Rove and were credited with helping greatly in the party's takeover of the House of Representatives this year – and, it happens, with facilitating a waterfall of anonymous donations from moneyed interests in the November elections.[18]

As another report noted:

> Bill Burton and Sean Sweeney, two recently departed officials from the Obama White House, are forming Priorities USA, an organization that will seek to raise as much as $100 million in the 2012 cycle. The group will consist of two branches: a 501(c)(4) nonprofit and a 527 political action committee. The

---

16 B. Smith, "In memo, Priorities USA defends secret-money shift," *Politico* (April 29, 2011).

17 B. Montopoli, "Democrats launch outside spending group; conservatives charge hypocrisy," *CBS News* (April 29, 2011).

18 J. Rutenberg, "Democrats Form Fund-Raising Groups," *New York Times* (April 29, 2011).

> structure will allow the organization to keep some of its donors secret, a practice that Democrats previously deplored when it was used by Republicans.[19]

The money raised by Priorities USA and its sister organization, Priorities USA Action, is described as intended to assist President Obama's reelection:

> Two Democratic groups seeking big bucks to boost President Obama's re-election have tapped several high-powered fundraisers to help rope in $4 million to $5 million in the first two months. They've also snagged pledges for two to three times those sums towards their joint goal of raising at least $100 million.
>
> The two groups, Priorities USA Action and Priorities USA, are benefiting from the help of leading Democratic fundraisers and donors. . . .
>
> Priorities USA Action is a 527 Super PAC which must disclose its donors and file quarterly reports, but Priorities USA, is a 501(c)(4) group that doesn't have to reveal its donors or file regular reports. Both groups can accept unlimited checks and under law must operate separately from the Obama campaign.[20]

In discussing the spending plans of the Priorities USA organizations, Burton is quoted as emphasizing the impact on the election that the groups seek to have:

> In response to "Rove's negative ads on the economy," Burton said, "we choose to invest in only swing states and, within those states, the most efficient television markets. Dollar for dollar, our spending is having a much greater impact on the voters who will decide the 2012 race."[21]

Another article about Priorities USA highlighted the fact that the group is expressly intended to counter the campaign activities of the Crossroads groups:

> To fight his rivals, Burton has chosen to emulate them. His groups may take unlimited amounts, often from anonymous donors and will solicit money from political action committees, corporations and lobbyists that Obama's official election committee disavowed in 2008 and still shuns in the name of good government. . . .

---

[19] A. Kornblut, "Democrats gear up to match GOP fundraising effort," *The Washington Post* (April 29, 2011).

[20] P. Stone, "Obama groups raise $4-5 million in first two months," *Center for Public Integrity-iWatch News* (June 24, 2011) (emphasis added).

[21] J. Gillum, "Priorities USA Raises $5 Million to Counter Attack Ads From Karl Rove-Backed Crossroads GPS," *Associated Press* (July 31, 2011).

> "The pool of money available to Karl Rove and the Koch brothers is bottomless and limitless," said Paul Begala, a Democratic strategist who is advising Burton. [Pollster Geoff] Garin said Priorities USA "represents a way to level the playing field against Karl Rove and the Koch brothers". . . .
>
> Priorities USA and Priorities USA Action will focus on pointing to the weaknesses of Obama's opponents, Burton said. The first advertisement criticized former Massachusetts Governor Mitt Romney, the Republican frontrunner in early polling, for supporting a Republican plan to convert Medicare into a system of vouchers to buy health insurance.[22]

The same article makes clear that Priorities USA is part of a larger, coordinated campaign operation to support Democrats in the 2012 election:

> The Priorities USA organizations, which will focus on the presidential race, will coordinate with three other newly formed Democratic groups: House Majority PAC will focus on House races, Majority PAC will concentrate on the Senate, and American Bridge 21st Century, will conduct opposition research on Republican candidates that other groups can use in advertising or direct mail literature.

*Id.* Press reports also indicate that the use of section 501(c)(4) organizations for spending is because of the anonymity offered to donors:

> The three main anonymously funded Democratic outside groups – Priorities USA, American Bridge 21st Century Foundation and Patriot Majority – collected at least $3.7 million in untraceable contributions, and probably much more, in the first half of the year, according to voluntary disclosures and anecdotal information on ad buys.
>
> While that's not as much as the $5.8 million in fundraising reported in that same period by the sister organizations of those groups, which do disclose donors – Priorities USA Action, American Bridge 21st Century and Majority PAC – the feeling among some in Democratic fundraising circles is that the balance will likely tilt towards undisclosed donations as the groups seek to expand their donor bases. . . .
>
> Many such donors "feel more comfortable donating to groups that don't disclose," [a strategist] said, because some are publicity adverse and also because "as soon as their name appears in the paper as having contributed, their phone number goes on the speed dial of every congressman, committee and party that wants to raise money."[23]

---

[22] A Fitzgerald, "Rove Tops President Obama as Drawing Card in Democrat Burton's Fundraising," *Bloomberg News* (June 29, 2011).

[23] K. Vogel, "Both sides now in dash for anonymous cash," *Politico* (Aug. 9, 2011).

**III. American Action Network.**

American Action Network (AAN) was founded in 2010 by Fred Malek, a leading national Republican fundraiser, and is chaired by former Republican Senator Norm Coleman. According to published reports, AAN shares offices with Crossroads GPS and other related groups.[24] AAN made numerous independent expenditures in the 2010 elections. For instance, according to one report:

> [A] so-called Section 501(c)(4) group called American Action Network filed an independent expenditure report with the FEC Aug. 5 [2010] indicating that it is spending nearly $435,000 for cable television and radio ads in the New Hampshire campaign for an open U.S. Senate seat. . . .
>
> The new ad campaign attacks the Democratic Senate candidate, Rep. Paul Hodes (D-N.H.), and supports Republican Senate candidate Kelly Ayotte, New Hampshire's former attorney general.
>
> The American Action Network has indicated on its website that it also sponsored ad campaigns focused on Senate races in Washington state and Florida; however, it filed no reports with the FEC on its spending in those states. The group indicated in press releases that it considered its efforts in these races to be "issue advocacy" not subject to any FEC reporting rules.
>
> The ads that the American Action Network sponsored in Washington included an image of tennis shoes purportedly worn by Sen. Patty Murray (D-Wash.) stepping on the backs of business owners, taxpayers and children. The ad ends by telling Murray that "it's time you got off our backs."[25]

Another report states:

> While the group was intended to serve largely as a policy shop to rival the liberal Center for American Progress, it has mainly just been cutting ads attacking Democrats (including Feingold) who are currently engaged in tight races.
>
> In addition to infusing hundreds of thousands of dollars in outside cash into Feingold's Wisconsin race, Coleman's group has also spent $750,000 targeting Sen. Patty Murray (D-Wash.) in her tight contest against Republican Dino Rossi and $450,000 attacking Senate candidate Rep. Paul Hodes (D) in New Hampshire. And because it is incorporated as a 501(c)(4) "social welfare" nonprofit, the D.C.-

---

[24] H. Bailey, "A guide to the shadow GOP": the groups that may define the 2010 and 2012 elections," *Yahoo News-The Uphot* (August 5, 2010).

[25] K. Doyle, "Campaign Spending Reports Filed with FEC," *BNA Money in Politics Report* (Aug. 12, 2010).

> based AAN does not publicly disclose its donors and has not listed any contributors on the independent expenditure forms it is obliged to file with the FEC.[26]

In addition to spending on Senate races, in 2010, American Action Network also spent on "really tight" House races:

> The [Wall Street] Journal reported that American Action Network will air $1.7 million in ads boosting the cash-strapped bids of Republicans Ryan Frazier, who is taking on Democratic Rep. Ed Perlmutter (D-Colo), and Jackie Walorski, who is challenging Democratic Rep. Joe Donnelly (D-Ind.). . . .
>
> "The American Action Network has carefully calibrated really tight house races where there are candidates who strongly support our views of limited government and reduced deficits or on the other side candidates who really oppose our views," said the group's chairman, veteran GOP fundraiser Fred Malek.[27]

American Action Network shares space with American Crossroads and Crossroads GPS, and according to press reports, the groups coordinate their political activities:

> Sometimes that coordination is as easy as walking across the hall. Sharing office space with American Crossroads is the American Action Network (AAN), a group led by former Minnesota Senator Norm Coleman, a Republican, which may spend up to $25 million this year. Originally billed as a conservative think tank, the AAN has increasingly turned to raw politics, having spent more than $1 million on ad buys targeting Democrats such as Senators Patty Murray in Washington and Russ Feingold in Wisconsin. ("We definitely can't afford him," an AAN ad says of Feingold and his alleged free-spending record).[28]

The coordinated focus that American Action Network had on influencing the 2010 elections is illustrated by this quote from Rob Collins, the president of the organization, shortly before the 2010 election:

> Many of the conservative groups say they have been trading information through weekly strategy sessions and regular conference calls. They have divided up races to avoid duplication, the groups say, and to ensure that their money is spread around to put Democrats on the defensive in as many districts and states as possible – and more important, lock in whatever grains they have delivered for the Republicans so far.

---

[26] J. Zwick, "Coleman's American Action Network Infuses Cash into Close Senate Races," *Washington Independent* (Oct. 4, 2010).

[27] K. Vogel, "Rove: Obama's attacks are helping," *Politico* (Oct. 13, 2010).

[28] M. Crowley, "The New GOP Monday Stampede," *Time* (Sept. 16, 2010).

> "We carpet-bombed for two months in 82 races, now it's sniper time," said Rob Collins, president of American Action Network, which is one of the leading Republican groups this campaign season and whose chief executive is Norm Coleman, the former Senator from Minnesota. "You're looking at the battle field and saying, 'Where can we marginally push – where can we close a few places out?'"[29]

According to one report published after the 2010 election, American Action Network "ended up with Republican victories in about 56 percent of the contests it invested in."[30]

As one report notes, "Republican political operatives bestow immense credit for their party's competitiveness in 2010 on organizations such as Crossroads GPS and the American Action Network, both 501(c)(4) organizations. These groups can accept large donations that they do not have to disclose. . . ."[31]

American Action Network, like Crossroads GPS, also spent to influence a special congressional election in May, 2011. According to a published report, American Action Network spent $94,694 on an election in the New York 26th congressional district.[32]

In other spending in 2011, American Action Network has undertaken a $1 million direct mail and newspaper campaign that "charges Democrats with attempting to 'balance the budget on the backs of seniors'. . ."[33] The mail campaign "will reach 22 congressional districts in 14 states, all of them represented in Congress by Republicans. . . . Most of the 22 are freshmen first elected in November 2010." *Id.* According to another news report, the group subsequently "added 10 vulnerable freshmen House Republicans to its advocacy campaign defending Republicans on Medicare."[34] According to this report, the mailing sent to one Florida congressional district reads, "Florida seniors can count on Congressman Allen West to stand up against the Obama Medicare plan." *Id.*

---

[29] J. Rutenberg, "Pro-Republican Groups Prepare Big Push at End of Races," *New York Times* (Oct. 25, 2010).

[30] M. Luo and G. Palmer, "Who Got the Most Bang for their Bucks?" *New York Times* (Nov. 4, 2010).

[31] A. Becker and D. Drucker, "Members Weigh In on Draft Disclosure Order," *Roll Call* (May 24, 2011).

[32] P. Overby, "Outside Groups Spend Big in N.Y. Special Election," *NPR* (May 25, 2011).

[33] A. Burns, "Ads to back GOPers on Medicare," *Politico* (July 27, 2011).

[34] C. Joseph, "Conservative group defending 10 more House Republicans on Medicare," *The Hill* (Aug. 3, 2011).

## IV. Americans Elect

Americans Elect was initially organized as a "political organization" under section 527 of the tax code, but in October, 2010 changed its designation to a "social welfare" organization under section 501(c)(4) of the tax code.[35] It is seeking to gain a place on the 2012 ballot in all 50 states for a presidential candidate it intends to nominate.

According to one article, "Its mission is to upend the traditional party primary process by selecting an alternate presidential ticket through an online, open nominating convention." *Id.* This report also notes that the manner in which the group is pursuing its aims:

> . . . is highly unorthodox. Although it is attempting to qualify as a new party in California and other states, the group's legal designation is that of a nonpolitical, tax exempt social welfare organization.
>
> Under that designation, Americans Elect has been able to keep private its financiers, raising questions about what forces are driving the massive undertaking. The group has labored largely under the radar for the last 16 months, raising $20 million while successfully gaining ballot access in Arizona, Alaska, Kansas and Nevada. It is seeking certification in Michigan, Hawaii, Missouri and Florida besides California, with an additional 18 states in the pipeline before the end of the year.

*Id.* According to the same article, Americans Elect has raised $20 million, with no contribution exceeding $5 million. The report noted, "Elliot Ackerman said Americans Elect does not take any money from special interests or political action committees, adding that it is up to donors to determine whether they want to be identified." *Id.*

The same article notes that the organization plans to nominate a candidate for president:

> Americans Elect now plans to hold an online convention in June 2012 that will be open to any registered voters who sign up. They will select a presidential ticket from a slate of candidates, all of whom will have been required to pick a running mate from a different political party.

*Id.* Another article described Americans Elect as follows:

> Funded with at least $20 million, the majority from large, mostly unnamed donors, Americans Elect is vying to become the most serious third-party insurgency since industrialist H. Ross Perot nearly upended the 1992 presidential campaign.[36]

---

[35] M. Gold, "Americans Elect seeks to upend primary system," *Los Angeles Times* (July 28, 2011).

[36] P. Jonsson, "Americans Elect launches centrist third-party bid amid Washington dysfunction," *Christian Science Monitor* (July 29, 2011).

In an opinion piece published by *Politico,* Elliot Ackerman, the group's chief operating officer, described the group's purposes as follows:

> We have set up a non-partisan nominating process for the presidency. We plan to hold a secure online convention in June 2012, where any registered voter can participate as a delegate. At this national convention, party functions will become delegate functions. The delegates will draft candidates; develop a platform of questions the candidates must answer, and discuss and debate the convention rules.
>
> We are on our way, with our ballot access initiative, to ensure that our presidential ticket can be on the ballot in all 50 states... .
>
> The Americans Elect nominating convention will be the first time that American voters have gained direct access to the ballot to nominate and elect a presidential candidate.[37]

According to *The Arizona Daily Star* on July 30, 2011, "Americans Elect was recognized last week as a new political party by the state of Arizona and is eligible to have its presidential nominee on the ballot in the 2012 elections." [38]

According to *The Detroit Free Press* on September 9, 2011, "Bureau of Elections spokesman Fred Woodhams said American Elect submitted nearly 68,000 petition signatures in May, more than double the 32,261 needed to qualify for the Michigan ballot as a minor party."[39]

According to *The Oregonian* on September 19, 2011, Americans Elect "has already qualified for the ballot in six states and appears to have turned in enough signatures -- more than 1.6 million -- to make the 2012 ballot in California."[40]

As these examples show, American Elect is not only devoted to intervening in the 2012 elections, it is actually qualifying itself as a political party for purposes of state ballot access laws. A political party is not eligible to qualify as a section 501(c)(4) tax exempt organization.

---

[37] E. Ackerman, "An online political convention," *Politico* (Aug. 10, 2011).

[38] M. Casey, "Americans Elect party to appear on '12 ballot," *Arizona Daily Star* (July 30, 2011).

[38] D. Bell, "State to vote on certifying new group with 2012 presidential hopes," *The Detroit Free Press* (Sept. 9, 2011) (emphasis added).

[40] J Mapes, "New effort to establish centrist presidential campaign seeks to qualify for Oregon ballot," *The Oregonian* (September 19, 2011)

## V. The IRS Should Investigate Whether Each Organization Is Ineligible for Section 501(c)(4) Tax Status Because Each Is Engaged In More Than An Insubstantial Amount of Campaign Activity.

### A. General rule.

Section 501(c)(4) of the Internal Revenue Code establishes tax-exempt status for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare...." 26 U.S.C. § 501(c)(4) (emphasis added).

According to IRS regulations, "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." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i) (emphasis added).

Political activity – spending to influence campaigns – does not constitute promoting social welfare. Section 1.501(c)(4)-l(a)(2)(ii) of the regulations provides that political campaign activities do not promote social welfare as defined in section 501(c)(4). The regulation states, "The 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." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii) (emphasis added).

Although the promotion of social welfare does not include political campaign activities, IRS regulations do not impose a complete ban on such activities for section 501(c)(4) organizations. Thus, "an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare." Rev. Rul. 81–95, 1981–1 C.B. 332 (emphasis added).

### B. Section 501(c)(4), as construed by the courts, does not permit a "social welfare" organization to engage in more than an insubstantial amount of campaign activity.

Section 501(c)(4), as construed by the courts, does not permit a group organized under that section to engage in more than an insubstantial amount of campaign activity and still qualify for tax exempt status.

According to court decisions, the statutory requirement for a section 501(c)(4) organization to be "operated exclusively" for "the promotion of social welfare" means that the organization cannot engage in more than an insubstantial amount of activity that is not in furtherance of its social welfare function. This means that section 501(c)(4) organizations cannot engage in more than an insubstantial amount of campaign activities.

The "insubstantial" standard established by the courts certainly does not allow a section 501(c)(4) organization to spend up to 49 percent of its total expenditures in a tax year to participate or intervene in elections and still maintain its tax-exempt status, as some practitioners believe.

Under the statutory language of section 501(c)(4), a social welfare organization must be "operated exclusively" for social welfare purposes. The courts have interpreted this "operated exclusively" standard the same way they have interpreted a parallel provision of section 501(c)(3) that requires an organization that is tax exempt under that provision to be "organized and operated exclusively" for charitable, education or similar purposes.

In *Better Business Bureau v. U.S.*, 326 U.S. 279, 283 (1945), the Supreme Court construed a requirement that a non-profit organization be "organized and operated exclusively" for educational purposes to mean that "the presence of a single non-educational purpose, *if substantial in nature*, will destroy the exemption regardless of the number or importance of truly educational purposes." (emphasis added).

Based on the *Better Business Bureau* decision, the courts have concluded that the word "exclusively" in the context of sections 501(c)(3) and 501(c)(4) is "a term of art" that does not mean "exclusive" as that term is normally understood and used.

The courts instead have said that, in the context of section 501(c)(4) of the IRC, this term means "that the presence of a single substantial non-exempt purpose precludes tax-exempt status regardless of the number or importance of the exempt purposes." *Contracting Plumbers Coop. Restor. Corp. v. U.S.*, 488 F.2d 684, 686 (2d. Cir. 1973) (section 501(c)(4)); *American Ass'n of Christian Sch. Vol. Emp. v. U.S.*, 850 F.2d 1510, 1516 (11th Cir. 1988) ("the presence of a substantial non-exempt purpose precludes exemption under Section 501(c)(4)"); *Mutual Aid Association v. United States,* 759 F.2d 792, 796 (10th Cir. 1985) (same; section 501(c)(4)).

The courts have similarly held, in the context of section 501(c)(3) organizations, that the "operated exclusively" test means that "not more than an insubstantial part of an organization's activities are in furtherance of a non-exempt purpose." *Easter House v. United States,* 12 Ct. Cl. 476, 483 (1987) (group not organized exclusively for a tax exempt purpose under section 501(c)(3)); *New Dynamics Foundation v. United States;* 70 Fed. Cl. 782, 799 (Fed. Cl. Ct. 2006) (same); *Nonprofits Ins. Alliance of California v. U.S.,* 32 Fed. Cl. 277, 282 (Fed. Cl. Ct. 1994) (same).

Under these court rulings, a section 501(c)(4) organization cannot engage in more than an insubstantial amount of campaign activity and remain in compliance with the statutory requirements for tax-exempt status under section 501(c)(4). Any "substantial, non-exempt purpose" (such as campaign activity) will defeat an organization's tax-exempt status under section 501(c)(4). *Christian Sch. Vol. Emp., supra* at 1516.

There is nothing, furthermore, in these rulings, in IRS regulations or in other IRS actions to support the proposition that spending 49 percent of total expenditures on campaign activities constitutes an insubstantial amount of non-exempt activity.[41]

---

[40] On July 27, 2011, Democracy 21 and the Campaign Legal Center filed a petition for rulemaking with the IRS which seeks revisions in the regulations implementing section 501(c)(4). In particular, the petition contends that the "primarily engaged" standard in section 1.501(c)(4)-1(a)(2)(i) does not correctly

### C. Political campaign activity not limited to "express advocacy" communications under the Internal Revenue Code.

IRS regulations make clear that "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" is not limited to activities or communications which contain express advocacy or the functional equivalent of express advocacy. Thus, so-called "issue ads" that promote, attack, support or oppose a candidate fall with the meaning of direct or indirect participation or intervention in political campaigns.

Section 527(e)(2) of the Internal Revenue Code describes what constitutes political campaign (*i.e.*, "exempt function") activity for purposes of the tax code:

> The term "exempt function" means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected or appointed.

26 U.S.C. § 527(e)(2).

Revenue Ruling 2004–6, 2004–4 I.R.B. 328, provides a detailed explanation of what constitutes "exempt function" political campaign activity—illuminating the line between political activities and activities to promote social welfare. The IRS Revenue Ruling states:

> Section 1.527-2(c)(1) provides that the term "exempt function" includes all activities that are directly related to and support the process of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to public office or office in a political organization. Whether an expenditure is for an exempt function depends on all the facts and circumstances.

*Id.* (emphasis added)

Revenue Ruling 2004-6 explains that, because section 501(c)(4) public policy advocacy "may involve discussion of the positions of public officials who are candidates for public office, a public policy advocacy communication may constitute an exempt function (a political activity) within the meaning of § 527(e)(2)." Rev. Rul. 2004-6 at 1. The Ruling states:

> All the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function under § 527(e)(2). When an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under § 527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly

---

implement the statutory "operated exclusively" standard in section 501(c)(4) of the IRC, as interpreted by the courts.

> advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under § 527(e)(2).

*Id.* (emphasis added)

Thus, even if an ad discussing an issue does not express advocacy, it may nonetheless be treated as "exempt function" electioneering activity under IRS regulations, depending on the "facts and circumstances." Therefore, even where an ad discusses an "issue," and where the ad does not contain express advocacy or the functional equivalent of express advocacy, it can still be treated as "direct or indirect participation or intervention in political campaigns" under IRS standards for purposes of determining whether a 501(c)(4) organization is "primarily engaged" in the promotion of social welfare.

Rev. Rul. 2004-6 lists six factors that "tend to show" that an advertisement is "exempt function" political campaign activity, and five competing factors that "tend to show" that an advertisement is not. Rev. Rul. 2004-6 at 3-4. These factors are not in themselves dispositive. In the end, the regulations require a determination to be made based on "the facts and circumstances" of each advertisement.

The "factors that tend to show that an advocacy communication on a public policy issue is for an exempt function (political activity) under § 527(e)(2)" include the following:

a) The communication identifies a candidate for public office;

b) The timing of the communication coincides with an electoral campaign;

c) The communication targets voters in a particular election;

d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;

e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and

f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Rev. Rul. 2004-6 at 3.

The "factors that tend to show that an advocacy communication on a public policy issue is not for an exempt function under § 527(e)(2)" include the following:

a) The absence of any one or more of the factors listed in a) through f) above;

b) The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;

c) The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);

d) The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and

e) The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

*Id.*

Under this "facts and circumstances" test, each of the organizations discussed in the letter is engaged more than an insubstantial amount of campaign activity and, in fact, is primarily engaged in activities for the purpose of participating and intervening in political campaigns.

In the case of Crossroads GPS and American Action Network, both organizations were created just months before the 2010 congressional elections, and were conceived, organized and staffed by leading political party strategists and operatives. Both organizations defined their activities as spending money to influence the 2010 House and Senate races, and both were closely affiliated with other organizations similarly spending large sums to influence the 2010 elections.

The activities of both groups were targeted to battleground states involving key congressional races, and to supporting Republican candidates or opposing Democratic candidates in those elections.

The ads run by both organizations identified candidates by name, discussed their position on issues in the midst of a campaign, and did so in ways that supported those candidates or criticized their opponents.

Finally, the timing of the groups' activities did not correspond with external events outside the control of the groups, such as a legislative vote on an issue, but rather corresponded with congressional election campaigns.

With regard to Priorities USA, statements by the founders of the organization make clear that it is modeled on Crossroads GPS, and is to play a similar function with the overriding purpose of conducting campaign activities to support the re-election of President Obama.

Finally, with regard to Americans Elect, the sole thrust of the organization is to obtain

ballot access to use to nominate candidates for president and vice president. The organization is qualifying on ballots as a political party. These activities are *per se* campaign activities in connection with an election.

Accordingly, each of the section 501(c)(4) organizations discussed above has engaged in more than an insubstantial amount of campaign activity, has a "substantial, non-exempt purpose" of participating or intervening in elections and is not entitled to tax-exempt status under section 501(c)(4).

## VI. The IRS Also Should Investigate Whether Each Organization Is Ineligible for Section 501(c)(4) Tax Status Because the Organization Is "Primarily Engaged" in Campaign Activity

In a 2008 Letter Ruling, the IRS applied the "primarily engaged" standard to mean that a section 501(c)(4) organization's primary activities cannot constitute direct or indirect political intervention.

This interpretation of the statutory standard is in conflict with the court rulings interpreting section 501(c)(4), discussed above, that require an exempt organization to engage in no more than an insubstantial amount of campaign activity.

Nevertheless, the organizations discussed in this letter also fail to comply with the standard set forth in this Revenue Ruling. In the 2008 Ruling, the IRS found an organization did not qualify for tax exempt status under section 501(c)(4) because it was not primarily engaged in promoting "social welfare." The IRS said:

> Whether an organization is "primarily engaged" in promoting social welfare is a facts and circumstances determination. Relevant factors include the manner in which the organization's activities are conducted; resources used in conducting such activities, such as buildings and equipment; the time devoted to activities (by volunteers as well as employees); the purposes furthered by various activities; and the amount of funds received from and devoted to particular activities.

2008 TNT 160-33 (May 20, 2008) (emphasis added). The Letter Ruling continued:

> In Rev. Rul. 81-95, 1981-1 C.B. 332, we concluded that "an organization may carry on lawful political activities and remain exempt under section 501(c)(4) of the Code as long as it is primarily engaged in activities that promote social welfare." The corollary to this is that if an organization's primary activities do not promote social welfare but are direct or indirect political intervention, the organization is not exempt under section 501(c)(4). The key is to determine the character of the organization's primary activities by looking at all of the facts and circumstances.

*Id.* (emphasis added).

In the Letter Ruling, the IRS considered the organization's claim that it was primarily engaged in lobbying, not campaign intervention. The Letter Ruling states:

> A facts and circumstances test is to be used in determining whether an organization's activities primarily constitute political intervention or whether those activities constitute lobbying or educational activities. After reviewing all of the facts and circumstances presented in the administrative file as discussed above, we have concluded that your primary emphasis and primary activities constituted direct and indirect political intervention. While you engage in extensive lobbying activities, they are by no means your primary activity. Your first and primary emphasis is on getting people elected to public office.

*Id.* The IRS thus concluded:

> The emphasis throughout your materials is on electing to office * * * people in order to impact legislation and policy as insiders. The overwhelming majority of the evidence in the administrative record, and thus the facts and circumstances in this case, denotes an organization that is intent upon intervening in political campaigns. . . .While lobbying is usually mentioned, and we recognize that lobbying activities are being pursued, those activities are not your primary activity. An analysis of all of the facts and circumstances contained in the administrative file leads us to the conclusion that your primary activity constitutes political intervention.

*Id.* (emphasis added).

Therefore, the organization did not qualify for tax exemption under section 501(c)(4):

> Based upon the materials submitted in connection with your application, we have concluded that your activities primarily constitute direct and indirect participation or intervention in political campaigns on behalf of or in opposition to candidates for public office. Therefore, you are not primarily engaged in activities that promote social welfare and do not qualify for recognition of exemption under section 501(c)(4) of the Code.

*Id.*

Here, we believe that an IRS investigation will show that the "first and primary emphasis" of each of the four organizations discussed above is "on getting people elected to public office." In particular, the IRS should investigate whether the "facts and circumstances" show that each of the organizations discussed in the letter is primarily engaged in activities which constitute direct or indirect participation or intervention in political campaigns under IRS regulations. For reasons discussed above, we believe each organization has overriding purpose to engage in campaign activities, and thus is operating contrary to the requirements of section 501(c)(4).

**VII. Conclusion.**

In the 2010 congressional races, section 501(c) organizations spent more than $135 million on campaign activities that were financed by secret contributions. The bulk of these expenditures were made by section 501(c)(4) organizations. The amount of secret contributions funding campaign expenditures by section 501(c)(4) organizations is expected to grow dramatically in the 2012 presidential and congressional races.

Crossroads GPS, Priorities USA, American Action Network and Americans Elect are each organized under section 501(c)(4) of the Internal Revenue Code. Based on the information about each organization set forth above, the IRS should conduct an investigation of whether each such organization has engaged in more than an insubstantial amount of non-exempt activity by participating or intervening in political campaigns and accordingly is not primarily engaged in the promotion of social welfare. The IRS should also conduct an investigation of whether each organization's primary activity is campaign activity and is accordingly not primarily engaged in the promotion of social welfare.

If the IRS investigation determines that the facts and circumstances show that the organizations discussed above are not primarily engaged in "the promotion of social welfare," because they have engaged in more than an insubstantial amount of campaign activity or because the organization's primary activity is campaign activity, the organizations should be denied or should lose tax-exempt status. In addition, appropriate penalties should be imposed by the IRS for violations the agency finds. The penalties should take into account the need for strong deterrence to stop similar violations from occurring in the future.

Sincerely,

| | |
|---|---|
| /s/ Gerald Hebert | /s/ Fred Wertheimer |
| J. Gerald Hebert<br>Executive Director<br>Campaign Legal Center | Fred Wertheimer<br>President<br>Democracy 21 |

October 5, 2010

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Lois Lerner
Director of the Exempt Organizations Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Request for IRS investigation to determine whether "Crossroads GPS" is operating in violation of tax status

Dear Commissioner Shulman and Director Lerner:

Democracy 21 and the Campaign Legal Center call on the IRS to conduct an investigation into whether Crossroads GPS, a tax exempt group organized under section 501(c)(4) of the Internal Revenue Code, 26 U.S.C. § 501(c)(4), is operating in violation of its tax status because it has a primary purpose of participating in political campaigns in support of, or in opposition to, candidates for public office.

We urge the IRS to conduct its investigation and make its determination about whether the tax laws are being violated as expeditiously as possible, consistent with IRS procedures.

The status of Crossroads GPS as a section 501(c)(4) entity allows its donors to evade the public disclosure requirements that would apply if the organization was registered as a section 527 political organization. Section 527 groups are organizations that are "primarily organized and operated" to engage in political activities. By contrast, Section 501(c)(4) organizations are not permitted to be "primarily engaged" in activities to influence elections. They are not required to disclose their donors.

If, in fact, Crossroads GPS is impermissibly operating as a section 501(c)(4) organization in order to conceal its donors from the American people, the IRS has an obligation to take steps to protect the integrity of our tax laws and to make clear that such abuses will not be permitted in future elections.

Absent timely and appropriate action by the IRS, such abuses will become common place in the 2012 presidential and congressional races, at the expense of the credibility of the tax laws

and of the right of the American people to know the identity of the donors who are providing the money to influence their votes and the amounts they are giving.

The IRS applies a "facts and circumstances" test to determine whether a group like Crossroads GPS is in compliance with the requirements of its tax status under section 501(c)(4).

The known facts and circumstances surrounding the creation, operations and activities of Crossroads GPS in 2010 strongly warrant an IRS investigation to determine whether it is in violation of its tax status.

According to published reports, Crossroads GPS is the brainchild of leading Republican Party political operatives and is operated by former Republican Party operatives. Published reports indicate that Crossroads GPS was formed in order to support Republican candidates in the 2010 congressional races and that it is engaged primarily, if not exclusively, in activities to promote and support Republican candidates and to oppose and attack Democratic candidates in the 2010 congressional elections.

Under applicable IRS standards, there is no requirement that an organization's activities and communications contain express advocacy or the functional equivalent of express advocacy in order to determine that the organization is engaged in "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."

If, in fact, Crossroads GPS is primarily engaged in political campaign activity under applicable IRS standards, it does not qualify for section 501(c)(4) status. By cloaking itself in the status of a section 501(c)(4) social welfare organization, Crossroads GPS is avoiding the public disclosure obligations that the law imposes on nonprofit entities organized and operated primarily for the purpose of influencing elections.

*The New York Times* recently quoted Marcus S. Owens, former head of the IRS division that oversees section 501(c)(4) groups, as saying with regard to the new 501(c)(4)s being formed this year:

> "These groups are popping up like mushrooms after a rain right now, and many of them will be out of business by late November," Mr. Owens said. "Technically, they would have until January, 2012 at the earliest to file anything with the I.R.S. It's a farce."[1]

This "farce" harms both the American people's right to transparency regarding the financing of federal elections, and the integrity and credibility of the nation's tax law.

Past experience shows that such groups often organize during an election year and claim tax status under section 501(c)(4). During the election year, the groups raise huge amounts in unlimited contributions from corporations, wealthy individuals and labor unions that are spent on

---

[1] M. Luo and S. Strom, "Donors' Names Kept Secret as They Influence the Midterms," *The New York Times* (Sept. 21, 2010).

election activities, with no disclosure of the names of their donors and the amounts they gave. Thus, under cover of their section 501(c)(4) tax status, these groups spend millions or tens of millions of dollars on ads to influence the election, while at the same time hiding from the public information about the sources of the funds being used for these expenditures.

After the election, such 501(c)(4) groups either disband, lay dormant or shift to other activities. This practice is contrary to the letter, spirit and intent of the tax laws, which requires non-profit entities "organized and operated primarily" for election-influencing activities to operate as a 527 group and, thereby, to be subject to a comprehensive public disclosure regime. 26 U.S.C. § 527(j).

The IRS needs to determine whether Crossroads GPS has violated its section 501(c)(4) status by failing to comply with the requirements applicable to such groups, and whether the organization should instead be registered as a section 527 political organization subject to disclosure of its donations and disbursements, or whether it should be treated as a for-profit entity subject to the tax laws that apply to for-profit corporations.

More generally, the IRS needs to address the problem of whether section 501(c)(4) groups are being improperly used as vehicles for groups to spend money to influence federal elections while hiding the identities of the funders of these activities. This matter must be resolved on a timely basis because it will have a direct bearing on whether continuing widespread abuse of the tax laws will allow secret contributions to influence the 2012 elections.

The IRS has a responsibility and obligation to the public to protect the integrity and credibility of the nation's tax laws. It is the job of the IRS to ensure that the nation's tax laws are not being improperly used by political operatives and political activists to hide campaign finance information which citizens and voters have a right to know, as the Supreme Court affirmed in its decision in *Citizens United v.* FEC, 130 S.Ct. 876 (2010).

## I. Crossroads GPS

Crossroads GPS was organized in July, 2010 as a "non-profit social action organization" under section 501(c)(4) of the IRC. ("GPS" stands for "Grassroots Policy Strategies.")

Crossroads GPS is affiliated with American Crossroads, a non-profit political organization registered under section 527 of the IRC. American Crossroads is registered with the Federal Election Commission as a political committee under the Federal Election Campaign Act. As such, the major purpose of American Crossroads is to raise and spend money to influence federal campaigns. As a registered political committee, American Crossroads must report all of its contributions and expenditures to the FEC under federal campaign finance laws.

According to a report in *Time*, "American Crossroads was the brainchild of a group of top Republican insiders, including two of George W. Bush's closest White House political advisers, Karl Rove and Ed Gillespie, both of whom remain informal advisers."[2] Another published

---

[2] M. Crowley, "The New GOP Money Stampede," *Time* (Sept. 16, 2010).

report referred to American Crossroads and Crossroads GPS as "a political outfit conceived by Republican operatives Karl Rove and Ed Gillespie."[3] According to the *Los Angeles Times,* both groups "receive advice and fundraising support from Rove."[4]

American Crossroads and Crossroads GPS are, in turn, part of a larger network of Republican-groups that are working together to influence the 2010 congressional elections. According to one published report, four separate groups, including American Crossroads and Crossroads GPS "are collectively planning to spend at least $70 million to help Republicans win back control of Congress this November."[5]

According to this report:

> While dozens of former GOP lawmakers and seasoned Republican strategists are involved, the effort largely springs from the work of two former Bush aides: Ed Gillespie, the former Republican National Committee chairman who later served as White House counselor, and Karl Rove, the man Bush once described as the "architect" of his presidency.

*Id.* The article notes that "[a]ll of the organizations were founded separately and organized as individual groups. But each is working closely in concert – they share the same office space with the New York Ave. building. . . .They identify each other as 'sister' groups, even though officials involved in the effort are cagey about exactly how closely they are coordinating their efforts and message." *Id.*

According to one published report, the organizers of American Crossroads and Crossroads GPS intend "to raise a combined total of 'approximately $50 million' to attack Democrats and boost Republicans heading into the 2010 midterm elections."[6]

According to another published report, "Mike Duncan, chairman of American Crossroads, told *The Washington Times* that his group and [American] Crossroads Grassroots Policy Strategies (sic) plan to plow more than $49 million of it into 11 Senate races in anticipation that the Republican Party is within reach of a Senate majority."[7]

---

[3] K. Vogel, "Rove-tied group raises $2 million," *Politico* (Aug. 21, 2010).

[4] M. Reston and A. York, "Karl Rove-linked group launches new hit against Boxer," *The Los Angeles Times* (Aug. 25, 2010).

[5] H. Bailey, "A guide to the 'shadow GOP': the groups that may defined the 2010 and 2012 elections," *Yahoo News* (Aug. 5, 2010).

[6] K. Vogel, *supra.*

[7] R. Hallow, "Pro-GOP Nonprofits Kick in Millions; Cash to target 11 Senate races," *The Washington Times* (Aug. 19, 2010).

We note that former RNC Chairman Duncan is not quoted as saying the two groups plan to spend more than $49 million to promote lower taxes or reduced government spending, but rather to plow into 11 Senate races.

American Crossroads, functioning as a 527 political organization and registered as a federal political committee, is running broadcast ads that promote Republican candidates or attack Democratic candidates. According to a press report, for example, American Crossroads in late August, 2010 began running ads in Nevada and Missouri that "are designed to defeat Senate Majority Leader Harry Reid in Nevada and Democratic Senate candidate Robin Carnahan in Missouri. American Crossroads has already spent some $600,000 on ads in Nevada attacking Reid on different issues. . . ."[8] According to this same press report:

> The group will be stepping up its ad spending in other states this month to boost GOP Senate candidates, [spokesman Steven] Law said, and it expects to begin running ads to help a dozen or two House candidates in September. In coming weeks American Crossroads will also finalize plans for an ambitious get-out-the-vote effort aimed at bringing Republicans and conservative-leaning independents to the polls in November.

*Id.*

Just as American Crossroads is spending large sums for campaign ads to influence the 2010 congressional elections, so also is Crossroads GPS, its 501(c)(4) affiliate. According to a story in *USA Today* published on August 25, 2010:

> Crossroads GPS, a Republican nonprofit group that does not have to publicly disclose its donors, has pumped more than $2 million into another round of TV ads targeting Democrats.
>
> This brings to roughly $5 million the amount Crossroads GPS and an affiliated organization, American Crossroads, announced spending in the last week alone to influence November's midterm elections.
>
> This round of spending goes after Sen. Barbara Boxer of California; Rep. Joe Sestak, running for the Senate in Pennsylvania and Jack Conway, the party's Senate nominee in Kentucky.[9]

One published report describes a "concept paper" distributed to potential donors prior to the formation of Crossroads GPS as stating that Crossroads GPS intends "to deploy advertising and other issue information in August/September in key markets," right before the 2010

---

[8] P. Stone, "American Crossroads Spin-off Launches New Ads in Missouri, Nevada," *The Center for Public Integrity* (Aug. 20, 2010).

[9] F. Schouten, "Karl Rove-affiliated nonprofit unleashes more ads in three races," *USA Today* (Aug. 25, 2010).

congressional elections. *Id.* According to this concept paper, a "micro-targeting effort" also to be conducted by the group "is focused on seven states – Colorado, Florida, Missouri, New Hampshire, Nevada, Ohio and Washington," all states that have key contested Senate races in 2010.[10]

The ads themselves that have been run by Crossroads GPS leave little doubt that they are intended to influence the 2010 congressional elections and will have the effect of doing so. The organization is sponsoring ads in the weeks prior to the 2010 election which are highly critical of Democratic Senatorial candidates and attack those candidates on their positions. For instance, Crossroad GPS reports that the follow advertisement began running in California in the last week of August 2010:

> California seniors are worried. Barbara Boxer voted to cut spending on Medicare benefits by $500 billion. Cuts so costly to hospitals and nursing homes that they could stop taking Medicare altogether. Boxer's cuts would sharply reduce benefits for some and could jeopardize access to care for millions of others. And millions of Americans won't be able keep the plan or doctor they already have. Check the facts and take action. Call Boxer. Stop the Medicare cuts.[11]

Another ad run in Pennsylvania which started in the last week of August, 2010 attacks Democratic Senatorial candidate Joe Sestak:

> We're hurting, but what are they doing in Washington? Congressman Joe Sestak voted for Obama's big government health care scheme, billions in job-killing taxes, and higher insurance premiums for hard-hit families. Even worse, Sestak voted to gut Medicare, a $500 billion cut. Reduced benefits for 850,000 Pennsylvania seniors. Higher taxes and premiums, fewer jobs, Medicare cuts. The Sestak-Obama plan costs us too much. Tell Congressman Sestak stop the Medicare cuts.[12]

A second ad attacking Joe Sestak states:

> Over half a million Pennsylvanians unemployed. And what's Congressman Joe Sestak done? He voted to gut Medicare, slashing benefits for Pennsylvania seniors. The Obama-Sestak scheme could jeopardize access to care for millions. Sestak even voted to raise taxes over $525 billion, devastating small businesses, killing jobs, gutting Medicare, hurting seniors, killing jobs. Pennsylvania can't

---

10 K. Vogel, *supra.*

11 *See Crossroads GPS launches new issue ads in Pennsylvania, California and Kentucky*, Crossroads GPS (Aug. 25, 2010) at http://www.crossroadsgps.org/news/crossroads-gps-launches-new-issue-ads-pennsylvania-california-and-kentucky (last visited Sept. 30, 2010); *see also* Crossroads GPS website, *at* http://www.crossroadsgps.org/video/worried.

12 *See Crossroads GPS launches new issue ads in Pennsylvania, California and Kentucky, supra.*

> afford Joe Sestak. Crossroads GPS is responsible for the contents of this advertising.[13]

According to published reports, Crossroad GPS began running the following ad in Kentucky beginning on August 31, 2010:

> Obamacare is the wrong way for Kentucky. And Jack Conway is going the wrong way too. Obamacare means $525 billion in job killing taxes. It means higher insurance premiums. $500 billion cut from Medicare. Reduced benefits for 113,000 Kentucky seniors. And intrusive big-government government mandates. It's the wrong way, Conway. Crossroads GPS is responsible for the contents of this advertising.[14]

With regard to the Colorado Senate race, it was reported on August 17, 2010 that Crossroads GPS was broadcasting the following ad attacking Democratic candidate Michael Bennet:

> Michael Bennet's spending spree. Since his appointment, Bennett has voted to spend $2.5 billion every single day. Spending billions of your tax dollars on everything – from the failed stimulus, billions in government pork, even cash-for-clunkers. And to pay for some of it, Bennet voted twice in 35 days to increase the national debt. Bennet's way? Spend more, borrow more, and then raise our taxes. Michael Bennett's spending spree. Call Senator Bennet, stop the spending.[15]

With regard to the Missouri Senate race, Crossroads GPS began running the following ad in mid-August 2010 attacking Democratic candidate Robin Carnahan:

> Male announcer: The message is clear. Seventy-one percent of Missouri voters don't want government mandated health care. We want to make our own health care decisions.
>
> Female announcer: But Robin Carnahan disagrees, while seventy-one percent of us voted no, Carnahan sided with lobbyists, big unions, and Washington insiders to force Obamacare on us.
>
> Male announcer: Missouri's Lieutenant Governor is suing the federal government so we can keep our health care.

---

[13] Crossroads GPS website, *at* http://www.crossroadsgps.org/ (left sidebar) (last visited Sept. 30, 2010).

[14] Jeremy P. Jacobs, *Crossroads GPS Targets Obama in KY*, Hotline on Call (Aug. 31, 2010) *at* http://hotlineoncall.nationaljournal.com/archives/2010/08/american_crossr_1.php.

[15] Jeremy P. Jacobs, *American Crossroads Airs Ads in OH, CO*, Hotline on Call, (August 17, 2010), at http://hotlineoncall.nationaljournal.com/archives/2010/08/american_crossr.php; *see also* Crossroads GPS website, *at* http://www.crossroadsgps.org/video/bennet-calendar (last visited Sept. 30, 2010).

> Female announcer: Tell Carnahan to get in touch with Missourians and support the health care challenge.[16]

And in another closely contested Senate race, Crossroads GPS began running an ad attacking Democratic candidate Senator Harry Reid beginning in mid-August 2010:

> Obamacare is bad for healthcare in America. And worse for Nevada. Because when Senator Harry Reid needed votes to push Obamacare, he cut sweet deals across the country – to help Nebraska, to help Louisiana, to even help Florida. What has Nevada gotten from Senator Reid? Record foreclosures and the highest unemployment rate in the nation. And Reid's still pushing for even more government control of your healthcare. Really, Harry? How 'bout some help for Nevada.[17]

Although both American Crossroads and Crossroads GPS are closely affiliated organizations headed by the same person and both are the brainchild of Rove and Gillespie, and although both organizations are running ads promoting Republican candidates or attacking Democratic candidates in the 2010 congressional races, there is one very important difference between the two groups when it comes to the American people's right to know basic campaign finance information.

As a federal registered political committee, American Crossroads is required to make timely disclosure of its contributors to the Federal Election Commission. 2 U.S.C. § 434. But as a group claiming section 501(c)(4) status, Crossroads GPS has no obligation to disclose its donors to the public and is not doing so. Indeed, on its website, Crossroads GPS touts the fact that its "policy" is to shield its donors from public disclosure:

> Any person or entity that contributes more than $5,000 to a 501(c)(4) organization must be disclosed to the Internal Revenue Service on Form 990. However, the IRS does not make these donor disclosures available to the general public. Crossroads GPS's policy is to not provide the names of its donors to the general public.[18]

Indeed, it appears that the Crossroads GPS 501(c)(4) group was created in order to provide anonymity for donors providing money for campaign expenditures who otherwise might

---

[16] *See* Peter H. Stone, *American Crossroads Spin-off Launches New Ads in Missouri, Nevada* Center for Public Integrity (August 20, 2010), at http://www.publicintegrity.org/blog/entry/2359/ (last visited Sept. 30, 2010); *see also* Crossroads GPS website, *at* http://www.crossroadsgps.org/video/issue-ad-robin-carnahan (last visited Sept. 30, 2010).

[17] *See American Crossroads Spin-off Launches New Ads in Missouri, Nevada, supra*; *see also* Crossroads GPS website, *at* http://www.crossroadsgps.org/video/thanks-harry (last visited Sept. 30, 2010).

[18] https://www.icontribute.us/crossroadsgps.

resist making donations to the American Crossroads 527 group because donations to the 527 group would be subject to public disclosure.

As one published report states:

> A new political organization conceived by Republican operatives Karl Rove and Ed Gillespie formed a spin-off group last month that – thanks in part to its ability to promise donors anonymity – has brought in more money in its first month than the parent organization has raised since it started in March.[19]

The same article quotes Steven Law, the head of both American Crossroads and Crossroads GPS as saying that "the anonymity of the new 501(c)(4) GPS group was appealing for some donors." *Id.* Law said, "We're not inclined to get into much detail about the 501(c)(4) on the financial side given its different report status." *Id.* The article also states:

> [A] veteran GOP operative familiar with the group's fundraising activities said the spin-off was formed largely because donors were reluctant to see their names publicly associated with giving to a 527 group, least of all one associate with Rove, who Democrats still revile for his role in running former President George W. Bush's political operation.

In another article, Law stated, "I wouldn't want to discount the value of confidentiality to some donors."[20]

Another published report calls Crossroads GPS a "spinoff of American Crossroads" and states that "this 501-c-4 group can keep its donor list private – a major selling point for individuals and corporations who want to anonymously influence elections."[21]

## II. An Organization Which Primarily Engages in Political Campaign Activity Does Not Qualify for Section 501(c)(4) Tax-Exempt Status

### A. General rule.

Section 501(c)(4) of the Internal Revenue Code establishes tax-exempt status for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare...." 26 U.S.C. § 501(c)(4) (emphasis added).

According to IRS regulations, "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." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i) (emphasis added).

---

19 K. Vogel, *supra.*

20 K. Vogel, "Crossroads hauls in $8.5M in June," *Politico* (June 30, 2010).

21 H. Bailey, *supra.*

Political activity – spending to influence campaigns – does not constitute promoting the social welfare. Section 1.501(c)(4)-l(a)(2)(ii) of the regulations provides that political campaign activities do not promote social welfare as defined in section 501(c)(4). The regulation states, "The 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." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii) (emphasis added).

In other words, an organization primarily engaged in political campaign activity is not primarily engaged in the promotion of the social welfare of the community and, therefore, is not eligible for tax-exempt status under section 501(c)(4). For example, "[a]n organization whose primary activity is rating candidates for public office is not exempt from Federal income tax under section 501(c)(4) of the Internal Revenue Code of 1954 because such activity does not constitute 'promotion of the social welfare.'" Rev. Rul. 67–368, 1967–2 C.B. 194.

Although the promotion of social welfare does not include political campaign activities, IRS regulations do not impose a complete ban on such activities for section 501(c)(4) organizations. Thus, "an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare[,]" in other words, as long as it is not primarily engaged in political activities. Rev. Rul. 81–95, 1981–1 C.B. 332 (emphasis added).

**B. Political campaign activity under the Internal Revenue Code.**

IRS rules make clear that "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" is not limited to activities or communications which contain express advocacy or the functional equivalent of express advocacy.

Section 527(e)(2) of the Internal Revenue Code describes what constitutes political campaign (*i.e.*, "exempt function") activity for purposes of the tax code:

> The term "exempt function" means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected or appointed.

26 U.S.C. § 527(e)(2).

Revenue Ruling 2004–6, 2004–4 I.R.B. 328, provides a detailed explanation of what constitutes "exempt function" political campaign activity—illuminating the line between the political activities that may not be the primary activities of 501(c)(4) organizations, and those which may. The IRS there states:

> Section 1.527-2(c)(1) provides that the term "exempt function" includes all activities that are directly related to and support the process of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to public office or office in a political organization. Whether an expenditure is for an exempt function depends on all the facts and circumstances.

*Id.* (emphasis added)

Revenue Ruling 2004-6 explains that, because section 501(c)(4) public policy advocacy "may involve discussion of the positions of public officials who are candidates for public office, a public policy advocacy communication may constitute an exempt function (a political activity) within the meaning of § 527(e)(2)." Rev. Rul. 2004-6 at 1. The Ruling further states:

> All the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function under § 527(e)(2). When an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under § 527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under § 527(e)(2).

*Id.* (emphasis added)

Thus, regardless of whether an "issue ad" contains express advocacy, it may nonetheless be treated as "exempt function" electioneering activity under IRS regulations, depending on the "facts and circumstances."

Even if an ad discusses an "issue," and even if the ad does not contain express advocacy or the functional equivalent of express advocacy, it can still be treated as "direct or indirect participation or intervention in political campaigns" under IRS standards for purposes of determining whether a 501(c)(4) organization is "primarily engaged" in activities to influence elections.

Rev. Rul. 2004-6 lists six factors that "tend to show" that an advertisement is "exempt function" political campaign activity, and five competing factors that "tend to show" that an advertisement is not. Rev. Rul. 2004-6 at 3-4. The "factors that tend to show that an advocacy communication on a public policy issue is for an exempt function (political activity) under § 527(e)(2)" include the following:

a) The communication identifies a candidate for public office;

b) The timing of the communication coincides with an electoral campaign;

c) The communication targets voters in a particular election;

d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;

e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and

f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Rev. Rul. 2004-6 at 3.

The "factors that tend to show that an advocacy communication on a public policy issue is not for an exempt function under § 527(e)(2)" include the following:

a) The absence of any one or more of the factors listed in a) through f) above;

b) The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;

c) The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);

d) The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and

e) The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

*Id.*

Under this multi-part test, the "facts and circumstances" here certainly indicate that the ads and activities of Crossroads GPS involve "exempt function" activity that constitutes "participation or intervention in political campaigns."

First, the organization was created just months before the 2010 congressional elections, was conceived, organized and staffed by leading political party strategists and operatives, self-defined its activities as spending money in Senate races and is closely affiliated with other organizations similarly committed to spending large sums to influence the 2010 congressional races.

Second, the activities of the organization are targeted to battleground states involving key Senate races, and to supporting Republican candidates in those elections.

Third, the ads run by the organization identify candidates by name, discuss the candidates' position on issues in the midst of a campaign and do so in ways that criticize the positions of the Democratic candidates opposed by Crossroads GPS.

Fourth, the timing of the group's activities do not correspond with external events outside the group's control, such as a legislative vote on an issue, but rather correspond with congressional election campaigns.

**C. Primary purpose.** There is little question that Crossroads GPS is engaged in activities which constitute "exempt function" political intervention under the IRS standards. Although the organization can engage in some political participation or intervention under IRS regulations, it cannot be primarily engaged in such activity, consistent with its tax status under section 501(c)(4).

In a 2008 Letter Ruling, the IRS found an organization did not qualify for tax exempt status under section 501(c)(4) because it was primarily engaged in political intervention. The IRS said:

> Whether an organization is "primarily engaged" in promoting social welfare is a facts and circumstances determination. Relevant factors include the manner in which the organization's activities are conducted; resources used in conducting such activities, such as buildings and equipment; the time devoted to activities (by volunteers as well as employees); the purposes furthered by various activities; and the amount of funds received from and devoted to particular activities.

2008 TNT 160-33 (May 20, 2008) (emphasis added). The Letter Ruling continued:

> In Rev. Rul. 81-95, 1981-1 C.B. 332, we concluded that "an organization may carry on lawful political activities and remain exempt under section 501(c)(4) of the Code as long as it is primarily engaged in activities that promote social welfare." The corollary to this is that if an organization's primary activities do not promote social welfare but are direct or indirect political intervention, the organization is not exempt under section 501(c)(4). The key is to determine the character of the organization's primary activities by looking at all of the facts and circumstances.

*Id.* (emphasis added).

In the Letter Ruling, the IRS considered the organization's claim that it was primarily engaged in lobbying, not campaign intervention. The Letter Ruling states:

> A facts and circumstances test is to be used in determining whether an organization's activities primarily constitute political intervention or whether

> those activities constitute lobbying or educational activities. After reviewing all of the facts and circumstances presented in the administrative file as discussed above, we have concluded that your primary emphasis and primary activities constituted direct and indirect political intervention. While you engage in extensive lobbying activities, they are by no means your primary activity. Your first and primary emphasis is on getting people elected to public office.

*Id.* (emphasis added). The IRS thus concluded:

> The emphasis throughout your materials is on electing to office * * * people in order to impact legislation and policy as insiders. The overwhelming majority of the evidence in the administrative record, and thus the facts and circumstances in this case, denotes an organization that is intent upon intervening in political campaigns. . . .While lobbying is usually mentioned, and we recognize that lobbying activities are being pursued, those activities are not your primary activity. An analysis of all of the facts and circumstances contained in the administrative file leads us to the conclusion that your primary activity constitutes political intervention.

*Id.* (emphasis added).

Therefore, the organization did not qualify for tax exemption under section 501(c)(4):

> Based upon the materials submitted in connection with your application, we have concluded that your activities primarily constitute direct and indirect participation or intervention in political campaigns on behalf of or in opposition to candidates for public office. Therefore, you are not primarily engaged in activities that promote social welfare and do not qualify for recognition of exemption under section 501(c)(4) of the Code.

Similarly, the IRS needs to investigate in this case whether the "facts and circumstances" show that Crossroads GPS is primarily engaged in activities which constitute political participation or intervention in political campaigns under IRS regulations, and if it is, to find that the organization is a violation of its section 501(c)(4) status.

The "primarily engaged" test should be applied on the basis of the activities undertaken by Crossroads GPS during calendar year 2010. If a section 501(c)(4) group is found to have primarily engaged in campaign-related activities during an election year, it should not be permitted to dilute that finding by engaging in non-election related activities in subsequent years.[22]

---

[22] For example, the IRC uses a "taxable year" analysis – in other words, a calendar year analysis – to determine whether a section 501(c)(3) charitable group has complied with the limit on the amount of lobbying expenditures the group is permitted to engage in, consistent with its charitable status. 26 U.S.C. § 501(h).

Although we do not have access to the contribution and expenditure data that Crossroads GPS is required to file with the IRS, published reports indicate that the organization is primarily engaged in activities to influence the 2010 congressional elections. As part of its investigation, the IRS needs to examine the organization's financial data.

If the IRS examination of the facts and circumstances surrounding Crossroads GPS's formation and activities confirm that the organization is primarily engaged in section 527 "exempt function" political campaign activity in 2010, the IRS should find that Crossroads GPS is in violation of its tax status under section 501(c)(4).

**III. Conclusion.**

Crossroads GPS was organized under section 501(c)(4) of the Internal Revenue Code. Based on the discussion of the published reports set forth above, the facts and circumstances surrounding the formation and activities of Crossroads GPS show that the group was organized to participate and intervene in the 2010 congressional races while providing donors to the organization with a safe haven for hiding their role in funding expenditures to influence the 2010 congressional races.

For the reasons set forth above, the IRS should investigate whether Crossroads GPS has a primary purpose of "participation or intervention in political campaigns on behalf of or in opposition to" candidates for public office, which is not a permissible primary purpose for a section 501(c)(4) organization. *See* 26 C.F.R. § 1.501(c)(4)–1(a)(2).

If the IRS investigation establishes that the facts and circumstances show that Crossroads GPS is primarily engaged in participating or intervening in political campaigns, appropriate penalties should be imposed on the organization, including penalties that take into account the need to deter similar widespread violations from occurring in future elections. The penalties should apply to the organization's misuse of the nonprofit tax laws to improperly claim section 501(c)(4) tax status and its failure to operate as a nonprofit 527 group required to disclose its contributions and expenditures.

Sincerely,

| | |
|---|---|
| /s/ Gerald Hebert | /s/ Fred Wertheimer |
| J. Gerald Hebert<br>Executive Director<br>Campaign Legal Center | Fred Wertheimer<br>President<br>Democracy 21 |

Written Testimony of Edward D. Greim

United States Senate Committee on the Judiciary

Subcommittee on Oversight

July 29, 2015

---

Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee, thank you for inviting me here today to testify regarding the Internal Revenue Service Targeting, the Service's progress in confronting and remedying its past conduct, and possible legislative solutions. As I'll explain in a moment, there are lessons that we can already draw from some of the ongoing civil litigation against the IRS. Even though there is much more for us to learn in civil discovery, it is not too soon to consider legislation to ensure that this never happens again. As a modest first step, I will propose four legislative fixes.

First, allow me to explain my background in this area. My firm, Graves Garrett, LLC, of Kansas City, Missouri, is lead counsel for the Plaintiffs in the case of *NorCal, et al., v. Internal Revenue Service*. It is pending in the United States District Court for the Southern District of Ohio before Judge Susan Dlott. The case was filed in Cincinnati because that is the office to which the IRS originally claimed the targeting was confined. It is a putative class action, and NorCal is one of several lead plaintiffs. We filed our first complaint just after the scandal broke in May of 2013, but due to various delays, we have not moved as quickly as we would have liked. In fact, our motion for class certification is due in just a few days.

Despite the delays, we have had the opportunity in 2015 to conduct class discovery. We have deposed several IRS employees and executives in Cincinnati, here in Washington, and in other parts of the country. Some of these same officials have also testified before Congress. But unlike Congress, we were able to depose a representative of the IRS on a series of topics using Federal Rule of Civil Procedure 30(b)(6). The IRS produced two different witnesses, one of whom, John Waddell, testified that he has actually been involved in preparing testimony for the Commissioner before Congress and in preparing responses to Freedom of Information Act requests relating to the targeting scandal. Under Federal Rule 30(b)(6), the testimony of Mr. Waddell and the other witness is considered the testimony not of that witness, but of the IRS itself. The witness must give a binding answer for the IRS, not merely based on his own personal knowledge. For that

reason, this testimony would later be generally admissible as the admission of a party opponent. Some of what I will relate here comes from Mr. Waddell's testimony; other facts are from internal emails we have reviewed in discovery.

We have advanced two main legal theories, and these are important to understand in light of the points I'll make in just a minute. The first theory is that the government violated our clients' First Amendment rights by retaliating against them, or discriminating against them, because of their political viewpoint. We asked for injunctive relief, but we also asked for money damages against individual IRS employees under the venerable case of *Bivens v. Six Unnamed Agents*. The injunctive part of this claim remains alive, but the damages claim did not survive a motion to dismiss. The court held that individual damages suits are not available against IRS agents for violations of First Amendment rights. This holding could be appealed later in the case.

Our second theory is brought under a special remedial statute, 26 USC 6103. It was enacted in large part as a result of Watergate, and is intended to remedy two evils. The first evil is the inspection of taxpayers' files for wrongful reasons—reasons that do not advance the administration of the tax system. For example, IRS officials might browse the personal tax information of famous political figures, claiming that they were doing so just to make sure they had properly reported their income, but really doing so just because they were curious to learn about the finances of powerful people. The inspection by itself, even with nothing more, violates the statute. The second evil is disclosure: actually releasing tax return information to third parties who don't have a right to see it. Our main theory is one of wrongful inspection. What we're alleging is that the targeted groups had their applications for exempt status wrongfully inspected. We get to seek damages under that theory directly from the government. And we are asking for the court to certify a class.

I would like to focus on two points today, one factual and one legal. First, notwithstanding some halting reforms, we believe the evidence shows that the IRS remains ripe for political abuse. Second, we propose four discrete statutory fixes. These would help ensure that the Internal Revenue Code functions to serve and protect taxpayers—not to protect the IRS from litigation or public oversight.

## I. The IRS Remains Ripe for Political Abuse

The evidence indicates that the IRS remains ripe for political abuse. This is largely because of immutable characteristics of a tax-collecting agency, and cannot

be entirely fixed. The worst effects can simply be mitigated. Five key observations from NorCal's ongoing litigation lead me to this conclusion.

The first observation is simply this: the IRS's internal procedures promote uniform treatment of taxpayers. This is a virtuous goal. But like every virtue, the goal of uniform treatment can be perverted. At the IRS tax exempt organizations unit, the policy of uniform treatment was implemented through two tools. The first tool, the centralization of cases, was used to send apparently similar applications to special working groups. This policy was championed by Cindy Thomas, who was head of Cincinnati's Determinations Unit during the relevant time. The second tool was the issuance of informal guidance to workers; it includes not only a BOLO, or an informal be-on-the-lookout list, but also an even more informal set of criteria that further explained the issues on the list. The BOLO system was not only approved by Thomas, it was ratified by officials in Washington, D.C., including Holly Paz and Lois Lerner. These two tools—centralization and the informal BOLO—made it possible to use viewpoint-based criteria to screen applications. The screening was used to segregate groups that agents thought were part of the Tea Party movement, keep them in a holding pen for years. During the holding period, it allowed them to subject groups to multiple reviews of their file and multiple development letters, most of which ended up being unnecessary to process their applications.

Second, as John Waddell told us at the IRS's 30(b)(6) deposition, the IRS criteria for centralization and special treatment of cases, found in the Internal Revenue Manual, are murky. They allow senior and midlevel officials to use generic-sounding excuses to target and segregate groups of taxpayers for special treatment. So for example, the very fact that the Washington Post was covering Tea Party protests became an excuse to segregate all applications for specialized processing. As Lerner herself noted at the very outset of the targeting, the IRS was actually concerned that the Tea Party movement would become the vehicle to expand the *Citizens United* case to the IRS's review of political activities of 501(c)(3) and (c)(4) applicants. This specific worry was simply translated into the murky language of the Internal Revenue Manual to provide a basis for viewpoint-specific targeting.

Third, the IRS evidences a built-in distrust of conservative-leaning organizations. Two key players, Lois Lerner and Stephen Seok, who was the third Tea Party Coordinator for the Cincinnati Determinations Unit, were explicit in their distrust of conservative groups. As noted above, Lerner was particularly worried that *Citizens United* would be used by Tea Party groups to defang the IRS's

review of political activities of 501(c)(3) and (c)(4) groups. Seok has publicly stated his belief that groups wanting to limit government were inherently suspect, since, in his view, their ideology does not seek to deliver benefits to society. Additionally, when the criteria for the targeted groups was circulated and the list of groups was reviewed in the summer of 2011, Carter Hull, the employee at the IRS's Technical Unit who was responsible for working a handful of Tea Party test cases, made a telling observation. By email, he explained to a group of midlevel and senior officials that "[w]e noted that the list contained organizations that appeared to be a particular political ideology." No one on the email chain even responded to this remark. And finally, even after the IRS learned of a TIGTA investigation, an email indicates that Holly Paz was willing to allow unnecessary requests for donor information to go out to entities the IRS already knew it would approve. This was tantamount to a forced public disclosure, since application files are disclosed, while similar information on a return—Schedule B on Form 990—is not disclosed. The point is this: key officials within Tax Exempt Organizations displayed hostility to, if not a callous disregard for the rights of, conservative and Tea Party groups.

Fourth, vague standards for recognizing groups' status has become an excuse for the IRS's misconduct. While the vague standards certainly do not help and should be clarified by bright-line rules, internal emails suggest that they are not the proximate cause of what happened here. Emails show that officials on the firing line knew that at the application stage, the Service does not actually need to probe every last activity of a group, and learn every last fact about a group, before deciding whether to recognize the status claimed by the group. Instead, the process is representational. This means that unless representations in an application are internally inconsistent, implausible, or incomplete, the IRS does not second-guess by investigating further. Yet here, the burden was shifted, so that IRS officials presumed that all facts and circumstances needed to be first disclosed, over a period of multiple election cycles, before conservative groups' representations could be accepted. Nothing indicates that this view has changed.

Fifth, the Service views itself as under attack, and a vicious cycle is developing in which the Service fails to cooperate in making key disclosures. When TIGTA began its audit, Lois Lerner, Holly Paz, Judith Kindell, and others engaged in a concerted effort to shape the narrative and rewrite history. For example, Paz sat in on TIGTA's witness interviews. Even now, in civil discovery, the IRS is misusing Section 6103, which is supposed to keep prying eyes from viewing taxpayer return information for illegitimate purposes. The Department of Justice, which is serving as the IRS's counsel, is now using Section 6103 to keep from

disclosing to us, as plaintiffs' counsel, the Service's own list of the groups it targeted. Indeed, the IRS will not even admit that a list of about 160 groups, which it likely produced to Congress and was then publicly released in a USA Today article, is authentic. Other doctrines, such as the deliberative process privilege, will probably be the next line of defense for the Department of Justice and IRS in holding back documents in civil discovery.

## II. Four Proposed Legislative Remedies

These observations from our litigation lead us to propose four legislative remedies. The Internal Revenue Code should be amended in four ways that directly implicate the treatment of tax exempt organizations or political organizations. These fixes have one thing in common. They will help provide the means to taxpayers themselves, and groups outside of the IRS, to protect constitutional rights. One might say that these reforms are a step in the direction of restoring an important virtue for a constitutional, democratic republic: they promote citizen awareness and self-governance, while avoiding the creation of additional layers of federal bureaucracy. Taxpayer advocates and internal investigators, while they can be helpful, are all too often simply ignored by the IRS.

First, we need to ensure that future targeting is discovered much earlier. Any centralization of tax exempt organization review, and any grouping of three or more cases for review or audit, should be reported to the targeted groups, the Commissioner, and to the House and Senate tax-writing committees. There is also precedent for reports to Congress under other provisions of Section 6103, the return information statute. The Service's report should include the criteria being used to group entities for review, the number of groups being targeted, and the reason for centralization. A violation should be remediable in an Article III court without the necessity of any showing other than that the grouping occurred and was not reported.

Second, Congress should make it crystal clear that federal courts must be open to provide remedies to taxpayers who are harmed by any sort of viewpoint-based targeting. If these facts could be established, they would make out a claim under the *Bivens* case, which I alluded to above. In fact, we have asserted that claim in our case, and will eventually be able to argue it in the Sixth Circuit. We are confident about the prospects of this appeal. But now that it is focused on the particular harm we have identified, Congress should not forego the opportunity to make its intent clear.

This is important for several practical reasons. First, the availability of a *Bivens* remedy is not clear in every circuit. So long as there is at least some uncertainty, counsel for government employees will file dispositive motions claiming that Congress deliberately chose not to create a remedy, making *Bivens* liability inappropriate. This extra and unnecessary motion practice imposes unnecessary risk, uncertainty, and costs on injured taxpayers. Second, in cases where courts are unwilling to extend a *Bivens* remedy, taxpayers will be without any relief. Section 6103 only provides remedies for inspection and disclosure of return information, not the targeting itself. Third, Section 6103 doe not sufficiently deter wrongdoers, since the government pays the damages, not individual employees, as under *Bivens*. Finally, aside from the practicalities, it is emphatically the province of Congress to make the law; in contrast, it is the province judges to apply it in an actual case and controversy. If Congress is convinced that viewpoint-based targeting is wrong, it should define the wrongful conduct and provide a clear remedy, removing the task of policymaking from the judicial branch. *Bivens* liability exists to remedy clear constitutional violations in circumstances Congress may not have realized were open to wrongdoing. What happened here may have been unforeseeable and unthinkable the last time Congress provided new taxpayer remedies in the Internal Revenue Code, but now Congress has the facts before it. The searchlight of the legislative branch is powerful but it cannot remain fixed on any one spot for too long. While Congress remains focused on the IRS and this continually unfolding targeting scandal, we respectfully suggest that it is time to act.

My third and fourth points relate to specific procedures in civil cases involving the Internal Revenue Service. Section 6103 should explicitly allow for disclosure of return information in civil cases in ways that will allow for easier private enforcement of the statute. Where the return information, or any information about targeting, is directly relevant to an issue in the case, it should be disclosed. District courts should have the ability to enter a protective order as necessary to protect any privacy interest of the groups.

Finally, for my fourth recommendation, the Internal Revenue Code should be amended to waive the deliberative process privilege in discovery and in FOIA responses, at least for the next 5 years. The policy goals underlying this privilege are no longer being served. Whatever the usual balance of interests in litigation between agencies and citizens, the IRS has shown that it cannot be trusted, and at least for the next 5 years, the balance should fall on the side of disclosure. This is not inconsistent with case law suggesting that the deliberative privilege does not apply in cases of governmental misconduct.

Thank you for your consideration of these four proposals. By raising them today, I admit only that they will do much good in helping small, grassroots entities privately enforce their rights in the judicial and political process. I do not admit that they are anything close to sufficient to address the IRS's conduct. Indeed, as illustrated by the disturbing facts outlined in Cause of Action's July 23, 2015 letter to the Inspector General, we still need to understand the full extent of that misconduct. Additionally, I limit my proposal to these four items because they flow directly from my first-hand experience in investigating my clients' claims and in litigating with the IRS and Tax Division of the Department of Justice. Certainly, other reforms deserve serious consideration. These include a set of fair, bright-line rules for recognizing the status of tax exempt organizations. Further, we need to be aware of the next front in political lawfare by government agencies. As Cause of Action's letter outlines, this may include teamwork between the IRS and FEC, on the one hand, and the DOJ's Public Integrity Unit, on the other.

But again, the searchlight of this body has to scan the entirety of the federal leviathan. We well know that it cannot remain fixed on any one agency, and on any one pattern of wrongdoing, indefinitely. New crises will emerge elsewhere as agencies continually invent new ways to circumvent what they see as Congress's uncomfortable constraints and, in some cases, the Constitution itself. Now that the Senate has come to focus on the IRS and on the conduct of officials like Lois Lerner, Holly Paz, and Judith Kindell, some of whom still work at the Service today, it is time to implement an initial set of reforms that give taxpayers the legal tools to combat future targeting, whatever precise form it may take. We have to start somewhere, and I hope this Subcommittee, and your colleagues in the Senate, will consider these modest first steps.

**United States Senate**
**Committee on the Judiciary**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**

**Testimony of**
**Lawrence M. Noble**
**Senior Counsel**
**Campaign Legal Center**

***Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options***

**July 29, 2015**

Chairman Cruz, Ranking Member Coons and distinguished Members of the Subcommittee, I appreciate the opportunity to address the Subcommittee on the activities of the Internal Revenue Service (IRS) and progress of agency reforms regarding the oversight of political activity of tax exempt organizations. Specifically, I would like to talk about how the IRS's failure to enforce the laws governing political activity by nonprofit organizations has undermined compliance with our campaign finance laws—especially those requiring disclosure of the sources of campaign spending.

As Justice Kennedy wrote in *Citizens United v. FEC*:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[1]

Just last year, Chief Justice Roberts underscored the importance of transparency in *McCutcheon v. FEC*, where he reaffirmed that "[d]isclosure requirements are in part 'justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending.'"[2] Yet, the failure of the IRS to ensure nonprofit groups are complying with the tax code, combined with the Federal Election Commission's (FEC)

---

[1] 558 U.S. 310, 371 (2010).
[2] 572 U.S. ___, 134 S. Ct. 1434, 1459 (2014) (second alteration in original) (quoting *Citizens United*, 558 U.S. at 367).

unwillingness to enforce the disclosure laws, has resulted in a system that is anything but transparent.

According to the Center for Responsive Politics, $6 billion was spent during the 2012 presidential election cycle. Of that $6 billion, so-called "independent" groups, including SuperPACs and 501(c)(4) organizations using unlimited corporate, union and individual funds, spent around $1 billion on campaign related activity. In 2014, a non-presidential election year, $3.7 billion was spent in total, with over $750 million coming from these outside groups. Of that amount, groups claiming to be exempt under section 501(c)(4) of the Internal Revenue Code (IRC) reported spending over $257 million in 2012 and over $118 million in 2014. By comparison, 501(c)(4) organizations reported spending only $1.26 million in 2006.[3] It is important to note that these figures only represent activity that 501(c)(4) groups reported in connection with spending on independent expenditures[4] or electioneering communications[5]; they do not include spending by organizations that actively sought the election or defeat of candidates but never reported the making of political expenditures to the IRS or FEC. Very few of these politically active nonprofit organizations publicly disclose any of their donors, so even when they do report election-related spending, the informational benefit to voters is marginal. Compounding the problem is the fact that SuperPACs—which are required to report their contributors—often merely disclose receiving a large contribution from a 501(c)(4) organization (which likely bears an anodyne or unfamiliar name). Because the disclosed 501(c)(4)

[3] *See Political Nonprofits (Dark Money)*, Center for Responsive Politics, http://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited Jul. 26, 2015). Trade Associations (501(c)(6)) reported spending $55 million in 2012 and $41 million in 2014. Unions (501(c)(5)) reported spending almost $24 million in 2012 and over $2 million in 2014.

[4] An "independent expenditure" is an expenditure expressly advocating the election or defeat of a clearly identified Federal candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, candidate's authorized political committee, or their agents, or a political party. 52 U.S.C. § 30101(17).

[5] An "electioneering communication" is "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office," is made 60 days before a general election or 30 days before a primary election and is targeted to the relevant electorate, 52 U.S.C.§ 30104(f)(3)(A).

organization does not disclose who funded its own political activity, the true source of the funds remains hidden.

Already in the 2016 election cycle, these groups committed to hiding the sources of their money are breaking new ground. In some cases, the groups are closely affiliated with the candidates: They were set up by the candidates, are run by people who have worked on behalf of candidates and are financed through the fundraising of the candidates. To believe that they are independent of the candidates they support and do not have as their primary purpose the election of those candidates makes a mockery of the concept of independent political activity, as embraced by the Supreme Court almost 40 years ago in *Buckley v. Valeo*.[6]

In fact, campaign finance reports filed with the FEC by some of the presidential candidates already show these groups are being used to facilitate widespread disregard for the federal campaign finance laws. As this past Sunday's New York Times reported, while "presidential hopefuls have been romancing donors, hiring staff and haunting the diners and senior centers of Manchester and Dubuque" since last year, most of the candidates reported spending "virtually no money exploring a presidential bid until very recently."[7]

Instead, in many cases their extensive travel and other expenses were apparently paid for by their SuperPACs and 501(c)(4) organizations in an effort to avoid the contribution limits and prohibitions on campaign funds and hide the true identity of who is funding their efforts. Now that the candidates have officially announced, they are already talking about using these outside groups not only to produce campaign ads, but also to finance activity normally paid for by the candidate's campaign, such as grassroots outreach, opposition research and campaign strategic

[6] 424 U.S. 1 (1976).
[7] Nicholas Confessore, Sarah Cohen, and Eric Lichtblau, *Presidential Race Just Started? Not According to the Spending*, N.Y. Times, July 25, 2015, http://www.nytimes.com/2015/07/26/us/presidential-race-just-started-not-according-to-the-spending.html..

planning. At the same time, we can expect to see an increase in spending by 501(c)(4) organizations that are not as directly tied to the campaigns, but are no less dedicated to electing a specific candidate.

Whether they spend the money directly or make contributions to SuperPACs, the goal of these tax-exempt organizations will be to affect the outcome of our elections while hiding the true source of their funding. This means that we have no way of knowing whether the campaign activity of these groups is being funded by thousands of small donors, several wealthy individuals, corporations, or labor unions, or even foreign nationals or foreign governments.

Much of the blame for this collapse of transparency in the funding of our elections and the lack of enforcement of the contribution limits and prohibitions rests on the FEC. Due to deadlocked votes, the FEC has repeatedly failed to enforce the statutory "political committee" standard, which requires that any organization that receives contributions or makes expenditures in excess of $1,000 in a year and whose major purpose is to influence federal elections must register and report as a political committee. 52 U.S.C. § 30101. Moreover, the FEC refuses to enforce meaningful rules prohibiting coordination between these groups and candidates and the requirement that any organization making an independent expenditure or electioneering communication report the donors supporting that activity. 52 U.S.C. § 30104(c) & (f). This has allowed 501(c)(4) organizations to spend millions of dollars for the express purpose of influencing elections without complying with the rules applicable to political committees or even disclosing the sources of funds spent on independent expenditures or electioneering communication ads.

However, the growing use of these organizations as conduits for spending millions of dollars from unknown sources to elect candidates would not be possible if the IRS was not also

failing in its responsibility to enforce the requirements for organizations claiming to be exempt from taxation under section 501(c)(4) of the IRC. In order to qualify for 501(c)(4) status, an organization must be operated "*exclusively* for the promotion of social welfare." 26 U.S.C. § 501(c)(4)(A) (emphasis added). As the IRS has long recognized, the "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." Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii). Court decisions have established that in order to meet this requirement, section 501(c)(4) organizations cannot engage in more than an insubstantial amount of any non-social welfare activity, such as directly or indirectly participating or intervening in elections. If an organization wishes to engage in political activity, it should register with the IRS as a "political organization" under 26 U.S.C. § 527 and, if support of federal candidates becomes its major purpose, it should register with the FEC as a political committee. But that is not happening.

Rather than requiring that section 501(c)(4) organizations be operated "exclusively for the promotion of social welfare," the IRS allows section 501(c)(4) organizations to engage in substantial amounts of campaign activity. By regulation, the IRS replaced the statutory command that section 501(c)(4) organizations exclusively pursue social welfare goals with the very different requirement that they do so only "primarily." Treas. Reg. § 1.501(c)(4)-1(a)(2)(i). This regulation is not consistent with the plain language of the governing statute. Nor is it compatible with court decisions interpreting the requirement that an organization be "operated exclusively" for a specific exempt purpose to mean that any substantial non-exempt purpose is sufficient to disqualify an organization from exempt status under section 501(c)(4).[8] Thus, groups that should

[8] See *Contracting Plumbers Coop. Restor. Corp. v. United States*, 488 F.2d 684, 686 (2d Cir. 1973) (section 501(c)(4)); *American Ass'n of Christian Sch. Vol. Emp. v. United States*, 850 F.2d 1510, 1516 (11th Cir. 1988) ("the presence of a substantial non-exempt purpose precludes exemption under Section 501(c)(4)"); *Mutual Aid Ass'n v. United States*, 759 F.2d 792, 796 (10th Cir. 1985) (same; Section 501(c)(4)).

be registering under section 527 of the IRC as political organizations and reporting their donors are being allowed to claim 501(c)(4) status.

Moreover, the IRS has failed to give any concrete guidance as to what constitutes "direct or indirect participation or intervention in political campaigns," or when such activity becomes sufficient so an organization's purpose is no longer "primarily" social welfare. Instead, it has relied upon a vague "facts and circumstances" test. This has resulted in 501(c)(4) organizations self-defining what is "political" narrowly and deciding that, as long as they keep their campaign-related expenditures to 49% or less of their overall expenditures, they are still "primarily" engaged in social welfare activity. In fact, although the 49% standard has never been endorsed by the IRS, IRS Commissioner John Koskinen told reporters in March that "[i]f you spend, at this point, less than 49 percent of your money on politics, you can be a (c)(4)," and reportedly described 501(c)(4) organizations as able to "spend a significant amount on politics."[9]

Despite suggestions to the contrary, cases where the IRS has taken action against a 501(c)(4) group for excessive political activity have been few and far between, even as these groups have dramatically increased their political spending. Unfortunately, when the IRS finally did decide to take a closer look at the applications for tax exemption, it looked for certain words in the names of organizations as a shorthand to identify potentially political groups, which gave rise to serious allegations about political targeting and resulted in major ongoing congressional investigations of the agency. But, regardless of whether Congress determines that the IRS targeted groups for partisan purposes, the fact remains that the IRS has a continuing obligation to ensure the law is enforced.

[9] Paul Barton, *Koskinen's Comments on Political Spending of Nonprofits Disputed*, 147 Tax Notes 31, 31 (2015).

Instead, the IRS is likely to back off any enforcement of the 501(c)(4) rules to avoid new charges of political bias, which is giving a green light to the numerous groups exploiting the 501(c)(4) tax status while undertaking substantial political activity. Even IRS efforts to clarify the law have been attacked, and the agency has come under tremendous pressure from some organizations and members of Congress to withdraw its ongoing rulemaking to revise the 501(c)(4) rules. Thus, rather than being encouraged to develop clear rules and an enforcement program that avoids even the appearance of partisanship to ensure that 501(c)(4)s are meeting the requirements for their tax exemption, the IRS is being encouraged to let the past abuses of 501(c)(4) status flourish.

The ramifications of this inaction extend beyond the IRS. While the FEC and the IRS are responsible for enforcing different laws applicable to political activities, there is no question that 501(c)(4) status is sometimes used as a shield against charges that an organization is a political committee that should have to report its donors. Thus, not only is the IRS allowing organizations engaged in extensive political activity to claim 501(c)(4) tax exempt status, it is supporting the FEC's refusal to make these organizations comply with the campaign finance laws.

To be clear, no one is suggesting that organizations do not have a right to engage in political activity. But organizations do not have a right to claim a tax exemption while undertaking that activity, nor do they have a right to do so without complying with the laws enacted to ensure transparency in political funding. It is up to the IRS to ensure that the taxpayers are not subsidizing groups ineligible for the benefits that come with 501(c)(4) status, and to enforce the requirement that such groups, if they wish to undertake political activity, must register and report as 527 organizations and disclose their donors. Right now, the IRS has failed to protect taxpayers from what amounts to little more than tax fraud, and has enabled

organizations to undertake political activity without disclosing the sources of their funding. The dangers this presents to our democracy should not be underestimated.

STATEMENT FOR THE RECORD

DIANA L. AVIV
INDEPENDENT SECTOR, PRESIDENT AND CEO

SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON OVERSIGHT,
AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS

"HEARING ON REVISITING IRS TARGETING:
PROGRESS OF AGENCY REFORMS AND CONGRESSIONAL OPTIONS"

JULY 29, 2015

Chairman Cruz, Senator Coons, and distinguished Members of the Subcommittee, thank you for the opportunity to share the perspectives of Independent Sector as the Subcommittee examines Internal Revenue Service regulation of political activity by tax-exempt organizations.

I serve as the president and chief executive officer of Independent Sector, a national coalition of more than 500 public charities, foundations, and corporate giving programs whose members represent tens of thousands of organizations and individuals working locally, nationally, and globally. Our membership also includes a number of charitable organizations with affiliated 501(c)(4) social welfare organizations.

We envision a world of engaged individuals, robust institutions, and vibrant communities working together to improve lives and the natural world, and strengthen democratic societies. To help create this future, we lead and catalyze the charitable community, partnering with government, business, and individuals to advance the common good.

Importance of the Charitable Sector

Every day, charitable nonprofit organizations, among many other contributions, provide educational and economic opportunities for families in need; work to alleviate poverty and suffering at home and abroad; assist victims of disaster; enhance the cultural and spiritual development of individuals and communities; facilitate scientific advances; and foster worldwide appreciation for the democratic values of justice and individual liberty that are part of the American character.

The charitable sector is also a critical component of the nation's economy. Nearly one in 10 workers in the United States is employed by a nonprofit organization, and with 13.5 million paid workers, we employ more people than the finance and real estate sectors combined. Further, these organizations pay nearly $670 billion annually in wages and benefits, salaries that support families in communities across America. In 2010, 501(c)(3) organizations paid $35.2 billion in payroll taxes.[1]

[1] National Center for Charitable Statistics (NCCS), the Urban Institute, the Nonprofit Almanac 2012.

The charitable sector's broad community impact and public support is evidenced by the sheer number of people who volunteer with these organizations and the breadth of its funding sources. Millions of Americans make donations each year, collectively providing nearly $360 billion[2] to support the work of charitable nonprofit organizations. But charitable donations are only part of what is needed to ensure that the sector's programs and services can continue. More than 52 percent of revenue across the sector is derived from fees paid for services, ranging from tuition and patient care charges to event admission fees. Nearly one-third of nonprofit sector revenue is generated through partnering with all levels of government to deliver programs and services like after-school care, nutrition assistance, and nursing home care for elderly and disabled Americans.[3]

Good Governance: Importance and Background

Charitable nonprofit organizations understand that continued support from Americans who give of their time – 8.1 billion hours of volunteer service in 2013[4] – and money – $358.4 billion[5] in charitable giving in 2014 – depends upon the high level of public trust in our sector, and that any erosion of that trust will ultimately harm our missions and the people and causes. We are deeply committed to ensuring that public charities and private foundations are governed effectively and transparently, maintain maximum accountability, demonstrate the highest levels of ethical conduct, and fully comply with the law.

Independent Sector has long been at the forefront of efforts to promote good governance and ethical practice among tax-exempt charitable organizations. In October 2004, we convened the Panel on the Nonprofit Sector with the written encouragement of Congressional leaders of both parties. The Panel undertook a comprehensive review of governance and other aspects of nonprofit sector practice in order to develop recommendations for action by Congress, the IRS, and the sector itself that would help charitable organizations maintain the highest possible standards of ethical conduct.

The 24-member Panel conducted extensive outreach to solicit input and comments from the broader charitable community. This outreach included the creation of six committees[6] that met regularly; phone calls with thousands of participants; two public comment periods; and 15 field hearings that gave more than 2,500 people in communities ranging from Des Moines to Dallas the opportunity to provide input on the Panel's work. The Panel issued a *Final Report to Congress and the Nonprofit Sector* in June 2005, which contained an integrated package of more than 120

---

[2] Giving USA: The Annual Report on Philanthropy for the Year 2014 (2015). Chicago: Giving USA Foundation.
[3] National Center for Charitable Statistics (NCCS), the Urban Institute, the Nonprofit Almanac 2012. Sources of Revenue for Reporting Public Charities: NCCS calculations of IRS Statistics of Income Division Exempt Organizations Sample (2007); NCCS Core Files (2009); American Hospital Association (AHA) 2009 survey; and the National Health Accounts, produced by CMS.
[4] Urban Institute, National Center for Charitable Statistics. 2014. "The Non-profit Sector In Brief: Public Charities, Giving, and Volunteering, 2014." Sarah L. Pettijohn. http://www.urban.org/UploadedPDF/412923-The-Nonprofit-Sector-in-Brief.pdf
[5] Giving USA: The Annual Report on Philanthropy for the Year 2014 (2015). Chicago: Giving USA Foundation.
[6] Expert Advisory Group, Governance and Fiduciary Responsibilities Work Group, Government Oversight and Self-Regulation Work Group, Legal Framework Work Group, Transparency and Financial Accountability Work Group, and Small Organizations Work Group.

recommendations for improvements within the sector, more effective government oversight, and changes in the law.

Many of the Panel's legislative and regulatory recommendations were incorporated into the Pension Protection Act of 2006, widely considered to be the most comprehensive reform of the charitable sector since the 1969 Tax Reform Act. Among the key Panel recommendations adopted by Congress were:

- Doubling the excise taxes for charities, social welfare organizations, private foundations, and exempt organization managers found to be participating in abusive tax shelters;
- Requiring exempt organizations with annual gross receipts less than $50,000 to file an annual notice with the IRS containing basic contact and financial information;
- Clarifying that assets in donor advised funds may not be used in ways that confer substantial benefits on donor/advisors;
- Removing barriers that prevent information sharing between state charity officials and the IRS; and
- Improving the appraisal process to ensure more accurate deductions for donated property.

Additionally, Panel recommendations were an important part of the nonprofit community's input into the major redesign of the Form 990 subsequently undertaken by the IRS. The IRS worked closely with Independent Sector and conducted extensive outreach to members of the charitable community during the redesign process. Panel recommendations that were ultimately adopted by the IRS or incorporated in the Form 990 redesign included:

- The mandatory revocation of exempt status for organizations that fail to file an appropriate Form 990 for three consecutive years;
- Expanded Form 990 compensation reporting, to include listing names and reporting compensation for the organization's five most highly compensated employees;
- Requiring additional information, including a summary and statement of purpose on the first page, disclosure of which voting board members are independent, and disclosing the total amount of donor advised funds; and
- Asking whether an organization has a written conflict of interest policy.

The IRS's solicitation of input from the tax-exempt sector on the Form 990 redesign did not end with the release of the new form for tax year 2008, which had been designed with substantial input from the community. Indeed, as the IRS has continued working to improve the Form 990, the agency has continued to seek outside input. During a public comment period conducted in 2011 on several issues of concern that had come to the attention of the agency, Independent Sector conducted an online forum to gather input from exempt organizations, and submitted a number of specific recommendations to the IRS, including:

- Revising Part VIII of the Form 990 to better capture the full extent of government revenue received by nonprofit organizations by clarifying that government pay-for-service contracts also qualify as government contributions, and by including lines to record revenue received from Medicaid and Medicare payments;

- Adding lines to the Form 990 to inquire whether audited financial statements are made available to the public, and whether the audit includes an unqualified, qualified, adverse, or disclaimer of opinion; and
- Expanding mandatory electronic filing of the Form 990 to include more organizations.

Independent Sector and the broader charitable and philanthropic community have an extensive history working with the IRS and Congress to on specific issues related to the oversight and regulation of tax-exempt organizations. The charitable sector's deep commitment to ensuring this nation's laws and regulations are fair and effective while reflecting our priorities of accountability, transparency and good governance stems from an understanding that doing so enhances our effectiveness and ultimately improves our ability to better serve individuals, families, and communities.

Principles on Political Activity

Nonpartisan voter registration efforts, get-out-the vote campaigns, voter guides, and nonpartisan candidate forums are among the vital activities undertaken by both 501(c)(3) public charities and 501(c)(4) social welfare organizations to encourage civic participation and educate the general public.

These activities not only enhance the public's participation in our democracy, they are also one of the many ways these organizations advance their missions: helping the American public understand major issues facing our country in general and in particular during election cycles and encouraging them to register and cast their votes. Many communities also rely on the nonpartisan resources provided by tax-exempt organizations to assist in voter registration and increase voter turnout, understand the electoral process and the mechanics of voting, and inform the general public about policy issues and positions of candidates.

In 2012, only 59 percent of all eligible voters participated in the general election. A recent study by Nonprofit VOTE determined that nonpartisan voter engagement activities provided by nonprofit organizations increased participation across all registered voters, with the biggest impact on turnout among least-likely voters.[7]

These longstanding and widely accepted nonpartisan activities that encourage civic participation, strengthen our democracy and promote the common good and general welfare of our nation are often confused with partisan political activities aimed at influencing the outcome of elections. This confusion stems in large part because the definition and rules governing partisan political activity, which is permissible for certain tax-exempt organizations, are unclear.

The law states that 501(c)(4) organizations must be "operated exclusively to promote social welfare." Meanwhile, IRS regulations stipulate that political activities are permitted, so long as that is not the organization's "primary purpose." This has generally been interpreted by the courts and the IRS to mean that political campaign spending cannot exceed 49 percent of a social welfare

[7] "Can Nonprofits Increase Voting among their Clients, Constituents, and Staff: An evaluation of the track the vote program." Nonprofit Vote. 2013. http://www.nonprofitvote.org/documents/2013/08/can-nonprofits-increase-votingexecutive-summary.pdf

organization's total spending.[8] That vague limit, coupled with the absence of clear and consistent definitions of electoral campaign activity, has left the door open for the use of 501(c)(4) organizations for primarily political, rather than social welfare, purposes. The result has been confusion by the public on the role that the charitable community plays in the political arena.

These vague definitions and lack of clarity have has other consequences. Indeed, recent years have seen a significant infusion of money into political campaigns by 501(c)(4) organizations, with an investigation by the Center for Responsive Politics and the Center for Public Integrity finding that 501(c)(4)s outspent Super PACs by a 3-2 margin in the 2010 election.[9] News reports on such electoral campaign spending by 501(c)(4) organizations tend to use the broad term "nonprofits," without distinguishing between 501(c)(4) social welfare organizations and 501(c)(3) public charities.

Independent Sector, concerned about the potential impact on the public confidence in the sector that may result from both the lack of clarity in the rules as well as increasing political activity by 501(c)(4) organizations, convened a group of nonprofit sector leaders, scholars, and legal experts to develop a set of principles on political activity by social welfare organizations.

The following set of principles was adopted by the Independent Sector board of directors in December, 2012:

1. Registration: 501(c)(4) organizations that intend to engage in electoral campaign activity should be required to formally file an exemption application with the IRS upon commencing operations.

2. Expenditure and activity limits: 501(c)(4) organizations should be permitted to engage in a modest amount of electoral campaign activity, defined by a clear percentage and/or dollar limit (similar to the 501(h) limits on lobbying by 501(c)(3) organizations) that is indexed for inflation.

3. Donor disclosure:
    a. 501(c)(4) organizations that have a Board policy and organizational practice of not engaging in electoral campaign activity should not be subject to donor disclosure requirements.
    b. 501(c)(4) organizations that engage in electoral campaign activity (i) should be required to disclose the identity and contribution amount of donors who give more than a specific annual contribution threshold, unless the donor prohibits the use of his/her donated funds for electoral campaign activity, and (ii) should be required to be transparent with donors, members, and the public about their work on electoral campaign activity.
    c. If an organization has not notified a donor in writing at the time of solicitation that the funds may be used for electoral campaign activity and may subject the donor to disclosure, then it should be prohibited from using those funds for electoral

[8] Richard Briffault, "Updating Disclosure for the New Era of Independent Spending" http://ssrn.com/abstract=2040934 April 16, 2012
[9] Center for Responsive Politics and Center for Public Integrity, http://www.iwatchnews.org/2012/06/18/9147/nonprofits-outspent-super-pacs-2010-trend-may-continue, June 2012

campaign activity unless written consent is obtained from the donor to use the funds for that purpose and to disclose the donor's identity as required by law or regulation.

d. Organizations should not be subject to donor disclosure requirements if a federal regulatory body determines that the organization's exempt purpose involves issues for which donor disclosure would create a substantial likelihood of personal harm to donors.

4. Reporting of expenditures: 501(c)(4) organizations should be required to report to the IRS on a quarterly basis (and more frequently during federal election years) expenditures on electoral campaign activity, in addition to the quarterly FEC reports they are already required to file when engaging in express advocacy or electioneering communications, and should be required to make this information publicly available on their website in a timely manner.

5. Disclosure and reporting threshold: 501(c)(4) organizations that engage in a very minimal amount of electoral campaign activity should be exempt from donor disclosure and expenditure reporting requirements.

6. Applicability of gift tax: Consistent with the rules that apply to both 501(c)(3) charitable organizations and 527 political organizations, no gift tax should be imposed on donors who make contributions to 501(c)(4) social welfare organizations.

7. Accountability mechanisms (penalties): A 501(c)(4) organization that exceeds its expenditure limit, as well as organization leaders that violate the law knowingly or with reason to know, should be subject to penalties commensurate with the violation in order to deter future violations and the subversion of regulations. The IRS and FEC should promulgate rules in a timely fashion, and be appropriately staffed and funded to ensure expeditious and transparent enforcement.

Need for IRS Guidance

We applaud the IRS for recognizing the need for guidance to clarify federal rules governing political activity by tax-exempt organizations and transition beyond the ambiguous "facts and circumstances" approach to determine whether and to what extent an organization has engaged in political activity. It is precisely this lack of clarity, and the ambiguous facts and circumstances test which the IRS applies in making determinations about political activity that led to the improper handling of applications for exempt status by both conservative and liberal organizations.

A clear definition of candidate-related political activities and a clearly defined threshold for how much political activity is permissible will be a critical step toward providing regulators with a clear, unambiguous standard by which they review applications for tax-exempt status, and ensure transparency and consistent application of regulations for tax-exempt organizations. Following the 2013 revelations about the IRS mishandling of applications, we looked forward to the release of such guidance to provide much needed clarity for tax-exempt organizations to faithfully comply with regulations without fear of penalties and sanctions, while continuing to engage in the vital,

nonpartisan advocacy efforts that benefit and sustain the communities they serve and strengthen our democratic practices.

Unfortunately, the IRS's November 2013 proposed regulations failed to provide the necessary clarity for organizations engaging in candidate-related political activities and threatened to undermine the key role that charitable and social welfare organizations play in civic engagement work and public policy debates. Independent Sector voiced our specific concerns with the proposal, both in comments submitted to the IRS as well as in testimony before a House subcommittee.

Among our concerns with the initial IRS proposal was its overly broad definition of candidate-related political activities that conflated partisan and nonpartisan activities. Many communities rely on the nonpartisan resources provided by tax-exempt organizations to assist in voter registration and increasing turnout in elections, understand the electoral process and the mechanics of voting, and to inform the general public about policy issues and positions of candidates.

Particularly troubling about the initial IRS proposed guidance is that defining nonpartisan voter engagement activities as political for 501(c)(4) organizations may be interpreted by charities as having those limitations apply to them as well. Given the express prohibition for 501(c)(3) charitable organizations to engage in candidate-related political activity, risk-averse charities and their funders may be hesitant to engage in civic engagement activities defined as political in Section 501(c)(4) in order to avoid association with activities that the IRS views as political.

Federal guidance defining the scope of what it means to promote the common good versus engaging in political activity should recognize, if not support, the critical importance of nonpartisan voter engagement efforts that encourage the citizenry to fulfill their civic responsibilities. Our laws have long permitted tax-exempt organizations to encourage voter registration, urge eligible citizens to vote, and provide nonpartisan resources to assist the public in making informed judgments about candidates and their views. Our laws and regulations should facilitate more civic engagement, not less, and encourage the efforts of nonpartisan organizations working to achieve these outcomes.

The November 2013 proposal also failed to provide clarity around how much political activity is permissible. Without establishing a clear dollar or percentage limit for the amount of political activity in which 501(c)(4) social welfare organizations may engage, enforcement of the rules will remain subjective and require evaluations to be handled on a case-by-case basis. This will simply perpetuate the existing uncertainty on the part of organizations engaging in political activity. We believe that to maintain the integrity of social welfare organizations the percentage should be specific and modest.

Clarifying the rules will serve to increase compliance among those 501(c)(4) organizations attempting in good faith to comply with the laws and regulations, and reduce the opportunity for abuses by those who seek to circumvent them. Likewise, to prevent end-runs around rules designed to protect the integrity of 501(c)(4) social welfare organizations, the same parameters should be applied to 501(c)(5) labor unions, 501(c)(6) trade associations, and other tax classifications for which some political activity is permitted.

Recommendations

The 2013 proposed guidance for 501(c)(4) social welfare organizations on candidate-related political activities, while a welcome first step, should be substantially reworked to address the concerns outlined above.

Specifically, we urge the IRS in its upcoming proposed guidance to:

- Revise the definition of candidate-related political activities to avoid infringement on nonpartisan civic engagement work, voter registration activities, and candidate forums traditionally undertaken by tax-exempt organizations and avoid excessively restrictive blackout periods prior to elections that may undermine long-standing, nonpartisan issue advocacy;
- Create a universal definition of political activity across all 501(c) organizations in order to provide clarity and consistency for the consideration of tax-exempt status applications and to prevent the shifting of political activity to tax-exempt organizations not covered under the current proposed guidance; and
- Establish a clear limit of the amount of permissible political activity, defined either by a clear percentage or dollar amount. The permissible level should be insubstantial relative to an organization's size, and also indexed for inflation.

We also believe that IRS proposed guidance would be best served by moving away from the subjective facts and circumstances test in favor of a bright-line definition of political intervention that applies to all relevant 501(c) organizations, which the current guidance fails to provide. Independent Sector endorses the Bright Lines Project, whose recommendations include:

- Drawing a sharp, visible line to define the kind of speech in reference to a candidate that favors or disfavors their election;
- Creating safe harbors for genuine grassroots lobbying, fair comparisons of candidates that educate voters, and efforts to stimulate higher registration and turnout on election day;
- Applying stricter rules for paid mass media advertising and messages targeted to battleground districts and states;
- Adopting fair and sensible rules for the use and transfer of tax-exempt resources from one organization to another; and
- Cleaning up the ambiguities and inconsistences that have given the IRS too much discretion under the present "facts and circumstances" approach.

These recommendations outline a uniform set of rules that would apply across all tax-exempt categories, provide predictability and clarity for what constitutes political activity, and protect free speech and encourage civic engagement while preventing many prevalent abuses of the system.

A multitude of factors contribute to the current ambiguity and uncertainty on the part of exempt organizations, the lack of enforcement of the existing rules governing political activity, and the increasing misuse of 501(c)(4) social welfare organizations for partisan political purposes. We urge the IRS to consider in totality these contributing factors, including existing donor disclosure and

registration and reporting requirements. In evaluating these issues, we further recommend that reforms reflect the Independent Sector principles on political activity outlined above.

We encourage the IRS to engage tax-exempt organizations in a meaningful dialogue to address the many concerns expressed during this comment process. For this reason, Treasury and the IRS should release a second draft of proposed political activity regulations as soon as possible. A new public comment period should be opened and public hearings should be held. This is absolutely necessary so the public may have the opportunity to provide input on a revised rule that better defines permissible political activity while preserving the important advocacy role and vital voice of tax-exempt organizations in civic engagement and public policy work.

Mr. Chairman, Senator Coons, members of the Committee, thank you for inviting me to testify.

As I've considered over the last few weeks what it was I wanted to say to you today, I had many thoughts running through my mind, and I received thoughtful counsel from many colleagues and close advisors.

After much thought, and not a little bit of prayerful consideration, here's what I'd like to say:

As Americans, we enjoy rights granted to us by our Creator, rights protected by the limited government established by our Founding Fathers, rights guaranteed by our Constitution.

I am exercising at least two of those rights today – the right to free speech, and the right to petition my government for redress of grievances.

And I thank you for giving me this opportunity to exercise those rights.

Now, about those grievances …

What we've experienced at Tea Party Patriots over the last six years, and what we've learned over the past two years plus, leads me to the following:

For years, the most feared, most threatening, most coercive civil agency of the federal leviathan, the Internal Revenue Service, ran roughshod over the fundamental freedoms of speech and association enshrined in the very first amendment to our Constitution … and we're still waiting for someone in a position of authority and responsibility to actually do something about it.

Last week, the President of the United States sat for an interview on a popular comedy show and joked, laughed, and denied that any deliberate targeting had been undertaken, and shrugged off the suggestion that any conspiracy had taken place – even though documents released just a week earlier showed that Lois Lerner had met in 2010 with attorneys from the Justice Department and a representative of the Federal Bureau of Investigation to discuss using campaign finance laws to bring criminal charges against conservative non-profit organizations who were simply exercising their First Amendment rights.

Shame on you, Mr. President. You should know better.

Were we hurt by the decision to target us? Of course.

Groups and individuals were affected from east to west, north to south, and in between. The Albuquerque TP in New Mexico, founded by Rick Morlen … a West Point graduate, and an Army Cavalry veteran. The El Dorado Hills Educational Foundation in California … the West Jersey Tea Party in New Jersey, which had a board member who was a CPA with his own professional practice answering the IRS's questions. The Coalition for a Conservative Majority

in Colorado … the Maui Tea Party … the South Metro Tea Party in Minnesota. The IRS personally called out Justin Binnick Thomas from Ohio by name in one of the targeting questionnaires. The list goes on and on.

I cannot count the number of times supporters of our movement have come up to me in tears after a speech with fear in their voice, an envelope from the IRS in their hands, to ask me how they can work to make this out of control agency stop, and how to bring about constitutionally limited government.

Know this: I sit here today for these groups and individual Americans.

There are groups that gave up begging their government for approval to associate, and chose to exercise free speech independently instead.

The targeting forced us to spend time and money educating our members and supporters.

It forced us to spend time and money educating the press.

It forced us to spend time and money researching from inside our own network the information needed for the various House and Senate committees investigating the matter.

Two people on our support team made over 1,000 phone calls in the spring and summer of 2013 to make sure we had the details necessary to provide various Congressional Committees with the information and evidence they needed.

We arranged town hall meetings to discuss the issues, and we coordinated and paid for travel for our Local Coordinators to come to Washington to testify and/or talk to committee staff.

We filed FOIA requests, and we paid for smart lawyers to help us understand the gibberish and thousands of redacted pages of paper we got in response.

And, of course, we had to spend precious man-hours filling out all those crazy questionnaires from the IRS in the first place.

We estimate we spent at least 4,500 man-hours working on IRS targeting related issues. Think about that for a minute: 4,500 man-hours. That's the equivalent of 1 employee working 2 ½ years on this issue alone – just since 2013.

Some have asked us to put a price tag on what the IRS targeting cost us. But how do you put a price on free speech?

Whether it costs us $1 or $1 million, somewhere in between or more, it does not matter. Free speech in America should never be silenced, no matter the dollar amount.

Were we stopped by the decision to target us? Of course not.

None of these things were going to stop us.

Let me tell you – it has NOT been easy.

We were a threat to our political opposition. The tea party movement has been targeted by the White House and the President's henchmen in the IRS, maligned by the Republican establishment who talk a good game and want our votes – but are ready to ditch our principles the day they are sworn in.

The opposition did all they could to destroy us, to crush us.

They underestimated one thing: Our country is more important to us than the IRS with its intimidation tactics, more important to us than a President who thinks this is a laughing matter when nothing could be further from the truth, and more important to us than anyone else in any government agency or elected office who wants to stop us.

Our country, our freedom, and our future are more important than that.

Tea Party Patriots is doing just fine, Mr. Chairman – we have 665 active local chapters, over 600,000 email addresses, over 2 million people in our database, working every day for our principles and our mission.

NO ONE, from the President of the United States to the Commissioner of the IRS or any big cheese in Washington is going to trample on our rights without a fight.

We have had everything thrown at us, but we are still here. We are not going away, and we are living proof that when a FEW good people are willing to speak truth to power, we can change things.

The IRS, this administration, and anyone else in Washington can throw what they will at us … but we are not going away. We will not be deterred.

Because we are Americans.

And we are just getting started.

Again, Mr. Chairman, Sen. Coons, and members of the Committee … thank you for hearing me out.

Testimony to Senate Judiciary Subcommittee

on Oversight, Agency Action, Federal Rights and Federal Courts

July 29, 2015

Gregory L. Colvin, Adler & Colvin, San Francisco

Chair of the Drafting Committee, Bright Lines Project of Public Citizen

Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options

"Treasury/IRS Regulations on Political Activity: A Much-Needed and Constructive Process"

Chairman Cruz, Ranking Member Coons, and distinguished Members of the Subcommittee, good afternoon. I appreciate the chance to come before you and address the question of how to improve the fair and thorough administration of federal tax laws that govern intervention by tax-exempt organizations in campaigns of candidates for public office.

My law firm in San Francisco represents a broad range of nonprofits and their donors. For almost 40 years, I have formed tax-exempt corporations and advised them on their political activities under Internal Revenue Service rules. At this hearing, I am appearing on behalf of the Bright Lines Project, sponsored by Public Citizen.

History of IRS and Political Tax Law

Why is the IRS in the business of enforcing political rules? Because Congress, for more than 60 years, has placed that duty upon the IRS through the Internal Revenue Code. Unless Congress were to remove that mandate from the IRS, it must continue to exercise its judgment as to what is partisan and what is nonpartisan election activity.

Why is this the case? Politics in America necessarily involves the raising and spending of money. Every person, every entity, in the country has a federal tax existence. It must pay tax on its income unless it is exempt by statute. The determination of taxable income, throughout the Code, depends on distinguishing deductible from non-deductible expenses. Donations to charities are tax-deductible only if the organization does not intervene in political campaigns. On the other hand, donations to political organizations are not tax-deductible. Likewise, for-profit corporations cannot take a business expense deduction for political payments.[1]

The federal tax policy on this score is remarkably consistent throughout the Internal Revenue Code: politics must be paid for with "after-tax" income. The descriptions of political intervention for taxable businesses and for tax-exempt organizations are virtually identical. No changes are needed to the Code sections on political activity except for Section 527, which defines political organizations but departs from the rest of the Code by covering appointive as well as elective offices.[2]

The IRS has been making judgments on the political expenses of taxpayers and tax-exempt organizations for longer than the Federal Election Commission has been in existence. The prohibition on political intervention by 501(c)(3) charities was enacted by Congress in 1954 and extra limits on voter registration funded by private foundations were enacted in 1969.[3]

The pressure on the IRS worsened after the *Citizens United* decision in 2010 because independent expenditures affecting all elections, federal, state, and local, by any corporation (for-profit or nonprofit) could no longer be prohibited by any campaign finance legislation. The volume of exemption applications from grassroots organizations seeking influence on public policy and elections mushroomed. However, the IRS still retained the Congressional mandate to determine which organizations are entitled to tax-exemption, depending on the nature and size of their political candidate activity.

Suggestions have been made that political tax law compliance judgments should be made by the FEC instead of the IRS. That would be unwise. The FEC has been constructed so that, much too often, it can be stymied by partisan gridlock. We expect the IRS to adhere to a high standard of political neutrality and I believe it has done so over most of its existence.[4] Furthermore, the IRS' jurisdiction over political tax law reaches beyond federal elections to state, county, and city levels. Surely we would not want to see the FEC making judgments affecting local groups involved in city mayoral contests and thousands of other races for non-federal offices. The IRS is the only law enforcement system in a position to apply consistent rules on the tax treatment of political spending by Americans and their organizations at every level of government. That authority is derived from its power -- not to tell Americans what they may or may not say politically -- but to determine whether such speech should be subsidized by a federal income tax deduction. As in many areas of public and private life, the IRS articulates definitions (what is a church, what is a home office, what is lobbying) and -- if the rulemaking is done well -- then taxpayers, with the help of their tax advisors, are able to comply voluntarily.

Biggest Problem: Lack of Clear Standards

The fundamental problem affecting enforcement of the political tax rules on 501(c) tax-exempts is this: they are vague, unpredictable, and difficult to interpret.

What is political intervention? Without comprehensive new regulations, the IRS interpretation must be gleaned from a few old cases and rulings,[5] internal training materials,[6] and a few bursts of guidance[7] from the last decade. The current Treasury regulation defining political intervention has only 113 words; it is totally inadequate.[8] The IRS has insisted on an open-ended "facts and circumstances" approach rather than drawing bright lines between partisan politics and truly nonpartisan forms of voter education and engagement. Political intervention under tax law is more than express advocacy under election law, the IRS has said, but it has never clearly drawn that line.

This is not a partisan issue. Our law office has represented both liberal and conservative 501(c) organizations and donors affected by this uncertain IRS enforcement, many referred by our Democratic and Republican colleagues in the California Political Attorneys Association.

Let's consider what is perhaps the toughest political tax law enforcement problem and the one that involves the largest monetary expense: the difference between political campaign advertising and so-called "issue ads" that name a candidate, say something good or bad about them, and tell the viewer to contact the candidate about the issue.

The IRS began with Revenue Ruling 2004-6, listing a series of six bad factors and five good factors by which to judge "advocacy communications."[9] Three years later, it issued Ruling 2007-41, with a seven-factor test on "issue advocacy."[10] The two multi-factor tests are not the same, unfortunately.

Let's suppose a tax-exempt organization broadcasts a TV ad in March praising a Senator who is up for re-election in November, for something he or she did or said on its favorite issue.

Under the seven-factor IRS test, three factors look bad: it names a candidate, expresses approval of him or her, and is not connected to an event such as a scheduled vote on legislation. But three factors look good: the election is still eight months away, the ad makes no reference to the election or voting, and it mentions no "wedge" issues separating the candidates. The group can satisfy the seventh factor with an ongoing series of ads on the same issues.

What if the ad is targeted to a battleground state? Targeting is a factor in the 2004 IRS ruling but not the one issued in 2007.

With this kind of vague, uncertain, multi-factor approach, neither the 501(c) organization's lawyers nor an IRS auditor can be sure whether the ad is -- or is not -- political intervention under the IRS tests.

In September, 2012, I confronted Lois Lerner, then head of the IRS Exempt Organizations Division, at a meeting in Boston of the American Bar Association, Tax Section, about the difficulty reconciling these two rulings. She declined to provide any further guidance.[11] In light of subsequent events, I wish I had asked her: "if you can't explain to us how you judge issue advocacy under these rulings, what do you say to your own employees in Cincinnati when they review applications for tax exemption?" I mention her name not as a personal criticism, but to illustrate that the reluctance to clear up the political tax law standards has been systemic and institutional over decades within the IRS -- until now.

This kind of ambiguity and uncertainty in political tax law has made advising clients and resolving cases difficult, time-consuming, and costly. Eventually, I have found, the IRS decides the vast majority of close cases in favor of the organization and its freedom to speak, but justice delayed often feels like justice denied.

In my 37 years in this field, I have not seen the IRS deny or revoke the tax-exempt status of an organization for political activities without good justification. Yes, some IRS political activity audits have been protracted, mainly because of its approach that it must investigate "all the facts and circumstances." It has methodically handled cases involving high-profile individuals, including former House Speaker Newt Gingrich, NAACP Chairman Julian Bond, Jimmy Swaggart, and even President Obama, who spoke as a candidate in his own United Church of Christ. After many years, working with the Department of Justice, it settled the question of the Christian Coalition's 501(c)(4) exemption, including carefully-drawn procedures to ensure that its voter guides comparing candidates would be prepared in a nonpartisan fashion.[12]

In testimony I gave to another Senate Judiciary subcommittee in April, 2013, I recommended that the IRS and Treasury undertake an intensive regulatory project to establish bright lines defining political intervention—that wouldn't tolerate the disguise of targeted "issue ads" that refer to and reflect a view on candidates, and that would provide safe harbors for genuine lobbying and genuine voter education. As we all know, the crisis within the IRS that came to a head the next month, May, 2013, revealed the collapse of its ability to efficiently and consistently rule on 501(c) exemption applications. This created the historic opportunity for Treasury and the IRS to commence exactly the kind of regulations project that we have needed for decades.

The Bright Lines Project

As a pro bono service, I am chair of the Drafting Committee of the Bright Lines Project, which began in 2008, five years before the eruption of the IRS crisis in political tax law enforcement. The Bright Lines Project was formed for the purpose of pressuring the IRS in

every possible way to develop clearer guidance on tax-exempt political activities, and is currently housed at Public Citizen. We seek to overcome the problems and uncertainties of past IRS enforcement so that in the future we will have more predictable standards, separating those organizations that promote nonpartisan voter engagement from those that allow themselves to become instruments of partisan political campaigns.

The Drafting Committee is a diverse group of nine attorneys who specialize in handling political issues that arise with nonprofit tax-exempt organizations. Together, we have hundreds of years of experience advising clients and dealing with the IRS on this topic. We have consulted widely with others across the political spectrum, in academia, in the religious community, and among election lawyers. Our recommendations go right down the middle, between those concerned about corruption who want tighter rules and those concerned about free speech who want more latitude.

Treasury/IRS Rulemaking: What We Need

In the effort to remedy the problems that were uncovered in the spring of 2013 regarding the IRS treatment of tax-exempt political issues, Treasury and the IRS began a rulemaking process to define candidate-related political activity for 501(c)(4) organizations, a corrective recommended by the Inspector General (TIGTA). The proposed regulations released in November, 2013, came sooner than many of us expected and were roundly criticized as a threat to Americans' free speech, drawing clumsy lines that went too far in many respects and not far enough in others.

My best guess is that the IRS' first draft went overboard in trying to define political activity because it was focused only on 501(c)(4) organizations, which the IRS had historically permitted to engage in politics so long as it was not their "primary purpose." (Some interpreted

this to allow up to 49% of their total activities to be political.) The first draft may have assumed that a harsh definition would still leave them plenty of room to influence elections as a "secondary purpose." What it failed to recognize is that a separate set of definitions only for (c)(4)s would be unworkable and disruptive. It ignored the largest category, over a million 501(c)(3) charitable organizations for whom political intervention is totally prohibited, and ignored the tax-exempt (c)(5) labor unions and (c)(6) trade associations who have the same need for guidance on political activity as do the (c)(4)s.[13]

Whether this was deliberate or not, the first draft of IRS political regulations provoked a huge outpouring of public commentary and many constructive suggestions from major nonprofit groups that would be affected. There was a record number of public comments – more than 146,000 – reflecting the intensity of frustration in the nonprofit sector with the ambiguity and administration of the political intervention rules. Conservative, moderate and progressive nonprofit organizations alike opposed various elements of the proposed rules, but at the same time expressed support for addressing the current lack of clear standards. According to an analysis by the Bright Lines Project, at least 594 organizations from across the political spectrum commented or signed on to comments from others. Even though nearly none of them liked the rules exactly as proposed, 67 percent of them had no objection to the continuation of the IRS rulemaking.[14]

The American public is anxious for clarity in the tax rules on political intervention, too. A September 2014 survey commissioned by two polling firms, one Democratic and the other Republican, showed widespread support for a bright lines standard.[15] The telephone survey of 800 likely voters showed that 86 percent think it's important to have clear rules in place concerning the political activities that non-profit organizations can and cannot do, and 57 percent

feel that way strongly. Establishing clear rules finds overwhelming bipartisan support: 87 percent of Democrats, 84 percent of Independents, and 88 percent of Republicans agree that clear rules are important. In addition, voters are very concerned about some of the consequences of unclear rules. 80 percent say political operatives, wealthy donors, and organizations abusing and taking advantage of such vague rules is a problem. 72 percent of Republicans surveyed agree. Among voters who had an opinion, a majority favored changing the way nonprofit activities are regulated to establish clearer and fairer rules for what counts as political.

I have confidence that the IRS and Treasury can guide this process to a successful conclusion. We have been waiting for 18 months since the public comment period closed in February of 2014 for the next draft of regulations to be released by Treasury and the IRS. It was scheduled for release in June and it is now July. I would have been delighted to hear the Commissioner announce their release this afternoon. The tax-exempt bar is eager to see them -- let's hope by the next ABA Exempt Organizations meeting in Chicago on September 18th.

I have seen first-hand the IRS and Treasury produce bright line regulations in the political realm that have been well-crafted to guide tax-exempt organizations and achieve self-enforcement in the vast majority of situations. Between 1986 and 1990, with heavy input from the nonprofit sector, the Service developed **lobbying regulations** for public charities and private foundations with clear definitions and clear safe harbor exceptions. Like the current political regulations, the first draft was a rocky start, but the final result turned out quite well. Working outside of government, groups like the Alliance for Justice and Independent Sector have trained thousands of nonprofit executives on how to apply these lobbying rules, and for the last 23 years there have been virtually no law enforcement problems due to lack of clarity, no complaints of oppressive IRS prosecution.

But the ambiguity of the current IRS rules on political intervention has created confusion both within the nonprofit community and the IRS itself. The result has been poor administration of the rules by the IRS – even to the point of causing an outcry of political bias. The IRS has admitted to poor judgment in using shortcuts to select which organizations should receive further scrutiny in their applications for tax-exempt status. Conservative groups especially have objected to the agency's use of such terms as "Tea Party" and "Patriot" to select cases; it has also used terms such as "Progressive" and "Occupy." While a number of conservative organizations have gotten extra scrutiny in the application process, so have many liberal organizations, such as "Clean Elections Texas" and "Emerge America."[16]

Bright Lines Project Drafting Committee Vice Chair Elizabeth Kingsley, a Partner at Harmon, Curran, Spielberg & Eisenberg, testified last week before the House Ways and Means Subcommittee on Oversight that she has seen at least nine recent IRS audits of liberal nonprofit organizations. Kingsley noted: "These have included both 501(c)(3) and 501(c)(4) groups. They have ranged from small to mid-sized, with budgets from less than $100,000 to approximately $3,000,000. The groups selected for audit have included those that lobby for or otherwise promote progressive policy changes, some that affirmatively advocate for progressive political candidates, some that support civic engagement at the grassroots level, and others that conduct data-intensive research on technical policy issues."[17]

We all will be better served by bright line regulations that reduce the degree of discretion that the IRS may exercise in making political tax judgments. Nonprofit organizations across the political spectrum are frustrated with the current ambiguity of the political intervention rules and are concerned about the level of discretion that ambiguity gives to the IRS in deciding what is, and what is not, political intervention. The rulemaking process must continue. It is time for the

public to see the best thinking of the lawyers at the IRS and Treasury. We look forward to IRS public hearings across the country where the nonprofit community and the public at large can participate in this conversation.

There are some in Congress who want to pull the plug on the IRS rulemaking. That would be a tragic loss of a golden opportunity. Not only would that leave us in the dark ages with the murky "facts and circumstances" approach to IRS enforcement, but it would stifle the voices of thousands who sincerely want to see the next version and comment upon it. There must be no turning back this time.

The Commissioner has said that no new IRS rules would be put in place for the 2016 elections. Fair enough; they could be effective on January 1, 2017. But there's no reason to halt the conversation on the development of new rules through a second, maybe even a third and a fourth version, this year and next year. The process should be completed before the next change in administration, while the public is engaged and the hope and momentum for clear political tax rules remains alive.

The Bright Lines Project Solution

The Bright Lines Project has submitted detailed suggestions for IRS and Treasury consideration. We have made four major submissions: a First Reaction (December 2013), a Full Comment (February 2014), a Detailed Explanation of the Bright Lines alternative proposal (May 2014), and our own complete draft of Regulations (November 2014). Our approach is straightforward. We define nine forms of *per se* political intervention and eleven safe harbors to protect grassroots lobbying, voter engagement, other types of nonpartisan speech, and the proper use and transfer of organizational resources to others. We include a glossary of 28 specific definitions for terms such as candidate, election, targeting, self-defense, and comparative voter

education. We would drastically reduce the discretion the IRS could exercise, so that it could only use the "facts and circumstances" approach in situations that don't fit into predictable patterns of partisan and nonpartisan involvement in elections.

So, for instance, on the subject of issue ads, we would replace the two confusing IRS rulings from 2004 and 2007 with a definition of "paid mass media advertising" and ask whether the advertisement reflected a view, that is, a discernible preference for or against a person's candidacy. If so, and the ad either (a) referred to the election or (b) was targeted to a close contest within the election year, it would be classified as political intervention. On the other hand, if the communication was not a paid mass media ad, and was limited to trying to influence an action that an incumbent could take while in office, it would be protected by a safe harbor for grass roots lobbying.

Conclusion

I want to conclude by identifying eight decisions that Treasury and the IRS must make to achieve public acceptance of the regulations and a workable political tax law system:

1. Draw the right line dividing partisan and nonpartisan speech -- we suggest it be "reflect a view" on a candidate, the standard successfully used in the IRS lobbying regulations.

2. Differentiate among forms of communication -- we suggest tougher rules for paid mass media ads.

3. Distinguish communications by their target audiences -- we suggest messages directed toward close contests be viewed as partisan and those directed toward under-represented voters or an organization's natural constituency be viewed as nonpartisan.

4. Identify time periods in which rules could be more relaxed -- we recommend that line be drawn at one year before the election.

5. Create and preserve safe harbors for nonpartisan speech -- we suggest that grassroots lobbying, even-handed voter education, registration and GOTV, self-defense, and personal remarks not made on behalf of an organization be protected.

6. Greatly reduce, but don't eliminate, the role of "facts and circumstances" -- we believe some flexibility is needed to judge new or complex situations, but the review should be structured in an orderly way.

7. Revisit the question of "how much" is too much political intervention to be exempt under Sections 501(c)(4), (5), or (6) -- we recommend that a clear annual expenditure percentage limit be drawn, mindful that this will impact donor disclosure and the choice of 501(c) or 527 vehicles for election spending.

8. Issue regulations defining political intervention that go beyond 501(c)(4) organizations -- we strongly feel they must apply universally and consistently across the Internal Revenue Code, for 501(c)(3) charities, all tax-exempts, tax-paying businesses, and political organizations.

These reforms would go a long way toward restoring public confidence in the tax-exempt universe, toward preventing the corruption of hidden financial leverage in our elections, and toward liberating the speech of citizen groups who have too long been intimidated by the fear of losing tax-exemption due to the unpredictable specter of IRS enforcement.

Thank you.

---

[1] Internal Revenue Code (IRC) Sections 501(c)(3) and 170(c)(2)(D) apply to charities and their donors. IRC Section 162(e) prevents taxpayers from taking ordinary and necessary business tax deductions for political campaign expenditures, and Section 6033(e) reinforces that rule with a proxy tax on dues revenue received by trade associations and certain other 501(c) organizations.

[2] The Bright Lines Project has proposed amendments to Section 527 to bring it into alignment with the other sections of the Code that define political activity and to position it better as an alternative vehicle for political spending by groups wishing to exceed the limits on Section 501(c) organizations. See http://www.brightlinesproject.org/wp-content/uploads/2015/06/IRC-527-amendments-FINAL.pdf.

[3] IRC Section 4945(f). As further examples, the IRS ruled in the early 1970's that universities could require students in political science classes to work in a candidate's campaign of their choice for course credit, and student newspapers could endorse candidates as an educational exercise, both without jeopardizing the 501(c)(3) status of the university. Revenue Rulings 72-512 and 72-513, 1972-2 Cum. Bull. 246. Although such rulings have been too few and far between, they have been issued impartially and have been appreciated by the nonprofit sector.

[4] For instance, after a lengthy study, the Joint Committee on Taxation of the U. S. Congress found "no credible evidence" of political bias in IRS enforcement. JCS-3-00, February 25, 2000.

[5] Revenue Ruling 78-248, 1978-1 Cum.Bull. 154; Revenue Ruling 80-282, 1980-2 Cum.Bull. 178; Revenue Ruling 86-95, 1986-2 Cum.Bull. 73; Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988), cert. denied, 490 U.S. 1030 (1989); Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).

[6] Judith E. Kindell and John Francis Reilly, *Election Year Issues*, IRS Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 2002, p. 335, www.irs.gov/pub/irs-tege/eotopici02.pdf.

[7] Revenue Ruling 2004-6, 2004-1 Cum.Bull. 328; Revenue Ruling 2007-41, 2007-1 Cum.Bull. 1421.

[8] Treas. Reg. Section 1.501(c)(3)-1(c)(3)(iii) contains very little beyond what is in the statute, only that (a) political intervention can be direct or indirect, (b) a candidate is an individual who offers himself or is proposed by others as a contestant for elective public office, (c) such office may be federal, state, or local, and (d) statements for or against a candidate may be oral or written.

[9] Rev.Rul. 2004-6, 2004-1 Cum.Bull. 328, is limited to determining the 501(c) organization's liability for investment income tax under IRC Section 527(f).

[10] Rev.Rul 2007-41, 2007-1 Cum.Bull. 1421, is limited to 501(c)(3) charitable organizations.

[11] For a verbatim description of this encounter, see http://www.prwatch.org/news/2012/10/11783/colvin-questions-issue-ads-irstreasury-answers-oral-exchange. In May 2012, I had written the IRS asking for a single, consolidated ruling. No substantive response. In August I wrote again, asking four simple questions on how to reconcile the two rulings. This January, after the election, the Service finally replied, admitting there was no "well established interpretation or principle of tax law" to answer my questions. IRS Correspondence to Gregory L. Colvin, January 14, 2013.

[12] Gregory L. Colvin, IRS Gives Christian Coalition Green Light for New Voter Guides, *Tax Notes* Vol.109/No. 8, Page 1093, November 21, 2005.

[13] 501(c)(5) unions and (c)(6) trade associations must obey the same primary purpose rule as (c)(4)s do. IRS Gen.Couns.Mem. 34233 (December 3, 1969).

[14] Bright Lines Project, Most Organizations Support Changes to Rules Governing Nonprofits (March 25, 2014).

[15] Lake Research Partners, Recent Research on IRS Political Rulemaking (September 30, 2014).

[16] Julie Bykowicz and Jonathan Salant, IRS Sent Same Letter to Democrats that fed Tea Party Row, Bloomberg News, May 14, 2013. (Use of the single word "Party" to select 501(c) applicants for scrutiny would have been unobjectionable, since political parties would be expected to qualify for exemption only under IRC Section 527 as political organizations.)

[17] Testimony of Elizabeth Kingsley before the Oversight Subcommittee, House Committee of Ways and Means, hearing on the Internal Revenue Service's Audit Selection Process (July 23, 2015).

ACLJ
American Center for Law & Justice

**PREPARED WRITTEN TESTIMONY OF**

Jay Alan Sekulow, J.D., PhD
Chief Counsel, American Center for Law and Justice

**U.S. Senate Committee on the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**

July 29, 2015

**"Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options"**

Chairman Cruz, Ranking Member Coons, and distinguished Members of the Subcommittee, on behalf of the American Center for Law & Justice and 185,913 of our members who signed our Petition to End IRS Abuse - thank you for allowing me to address the subject of the IRS's ongoing targeting scandal and the many troubling developments that have recently come to light.

Last week, in an interview, the President "explained that accusations that [the IRS was] specifically targeting conservative organizations was false and that IRS employees were simply implementing laws passed by Congress 'poorly and stupidly.'"[1] He further stated that the "real scandal around the IRS is that they have been so poorly funded that they cannot go after these folks who are deliberately avoiding tax payments."[2]

To be clear, we are not here today because the IRS does not have enough money. We are here today to get to the truth about an unprecedented, well-orchestrated scheme to unlawfully target groups because of their political beliefs.

With the ACLJ currently engaged in litigation against the IRS and many of its current and former key officials on behalf of 38 conservative groups from 22 states, I am keenly aware of the importance of this hearing and the real issue at hand. The ACLJ is also pursuing another lawsuit against the IRS based on its failure to comply with its obligations under the federal Freedom of Information Act, so we are uniquely positioned to evaluate the sweeping scope of the IRS's wrongdoing.

Simply put, the IRS continues to deceive the public about the extent of its misconduct and maintains that deception to this day. In fact, the more we learn – the more evidence we uncover – the clearer it becomes that this scandal continues to grow and continues to threaten Americans even today. Just days ago, a new report from the Government Accountability Office (GAO) revealed that Americans

---

[1] *Obama: "Real" IRS Scandal is that It's "Poorly Funded,"* BREITBART, http://www.breitbart.com/big-government/2015/07/21/obama-real-irs-scandal-is-that-its-poorly-funded/ (last visited July 23, 2015).
[2] *Id.*

are still vulnerable to IRS audits. As the GAO put it: "Unfortunately, the IRS has not taken sufficient steps to prevent targeting Americans based on their personal beliefs."[3]

Even the current IRS leadership fails to take this matter seriously. No one has been fired. No one has been prosecuted. There is no accountability.

This is my fourth opportunity to testify before Congress in the last two years regarding the IRS targeting scandal. The necessity of repeated trips to Capitol Hill on behalf of my clients to bring national attention to this matter is reflective of the Obama Administration's incredible unwillingness to get to the bottom of this scandal. Rather than seek justice for my clients while holding those responsible accountable, this Administration has engaged in a strategy of stalling. They are trying to run out the clock.

Specifically in this scandal, the IRS admitted to intentionally targeting conservative groups as early as 2011. However, the targeting began as early as December 2009 – if not earlier.

Yet, despite our claims of suspicious practices occurring as early as 2012, followed by the IRS's repeated denials of any wrongdoing, the agency finally admitted to an unfair targeting practice that centered on searching tax applications for words like "Tea Party" and even "patriot," in May of 2013.

In this split second of attempted crisis management, the IRS did not give the American people the whole story. The IRS merely glossed over a few minor details, and then continued the harassment of many of the groups involved. Not only did nothing change, but the IRS grossly misrepresented what was actually happening.

The IRS used one of the most powerful arms of the government for a partisan advantage - targeting pro-life and conservative groups in swing states in an attempt to influence the 2012 election. In short, they violated a sacred trust.

One might ask – why am I still coming back to testify time and time again to bring this matter to the attention of Congress on behalf of my clients and our members? I do so because the IRS, from day one, has misled the American public at every turn about years of misconduct. The IRS has continued to ignore repeated requests for answers.

This scandal is not just limited to the IRS. The IRS was also actively engaged in a conspiracy with other government officials and agencies by using thug-like tactics to intimidate anyone who they felt was a threat to their political ideology and power. The IRS continues to this very day to destroy evidence as the Courts and Congress rush to catch up to, and fully address, their unconstitutional harassment of American citizens.

When Lois Lerner admitted the IRS's unlawful targeting in May of 2013, the IRS thought that it could get out in front of the looming TIGTA report.[4] Lerner and the IRS chose a Friday afternoon at an American Bar Association event to stage an apology. They hoped that it would all just go away.

---

[3] Elizabeth MacDonald, *GAO: "American's Still Vulnerable to IRS Audits Over Personal Beliefs,"* FOX BUS. (July 23, 2015), http://www.foxbusiness.com/economy-policy/2015/07/23/gao-americans-still-vulnerable-to-irs-audits-over-personal-beliefs/.

They were very wrong. More than two years later, evidence continues to emerge that confirms the tremendous scope of this inter-agency corruption.

**A SERIES OF CONTRADICTIONS:**

The same President who first reacted in "outrage"[5] to the news of this scandal with a promise that those responsible would be punished is the same President who argued thereafter that the IRS's targeting scheme was a "phony scandal"[6] and there was not a "smidgen of corruption"[7] to be found.

The same IRS that promised all Americans that the targeting had stopped is the same IRS that is still refusing to issue a determination on the tax-exempt application of one of my clients, five and a half years after their original submission.

The same Lois Lerner who pleaded the Fifth and said in front of a congressional committee, under oath, that she did nothing wrong[8] is the same Lois Lerner whose thousands and thousands of emails were lost, whose back-up tapes of those "lost" emails were also destroyed, and whose few emails that were recovered contained clear, convincing, and damning evidence of her intent to lead and conspire with her colleagues at the Federal Elections Commission (FEC) and the Department of Justice (DOJ) in the targeting of conservative groups and the development of a tactic by which they could effectively intimidate conservative groups with the threat of criminal prosecution based on trumped up charges.

The same DOJ that then-Attorney General Eric Holder announced would appoint a joint DOJ/FBI investigation into the IRS scandal is the same DOJ that has now been shown to have conspired with the IRS in this targeting scheme.

Some of the Members of Congress who wrote letter after letter and made call after call to the IRS after the 2010 midterm elections to encourage them to go after these conservative groups - organizations that they saw as a political threat – are the same Members of Congress who have now repeatedly said that this investigation is a waste of time.

To be very clear, the IRS was—and is still –used as a weapon against the Obama Administration's political enemies. Those responsible must be held accountable.

---

[4] TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW, Reference No. 2013-10-053 (May 14, 2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.
[5] Lucy Madison, *Obama: IRS Targeting "Outrageous" If True*, CBS NEWS (May 13, 2013, 10:21 PM), http://www.cbsnews.com/news/obama-irs-targeting-outrageous-if-true/.
[6] David Jackson, *Obama Denounces "Phony Scandals,"* USA TODAY (June 27, 2014, 7:23 AM), http://www.usatoday.com/story/theoval/2014/06/27/obama-phony-scandals-irs-benghazi-minneapolis-town-hall/11449373/.
[7] *"Not Even a Smidgen of Corruption": Obama Downplays IRS, Other Scandals*, FOX NEWS (Feb. 3, 2014), http://www.foxnews.com/politics/2014/02/03/not-even-smidgen-corruption-obama-downplays-irs-other-scandals/.
[8] Ed O'Keefe and William Branigin, *Louis Lerner Invokes Fifth Amendment*, THE WASHINGTON POST (May 22 2013), http://www.washingtonpost.com/politics/lois-lerner-invokes-fifth-amendment-in-house-hearing-on-irs-targeting/2013/05/22/03539900-c2e6-11e2-8c3b-0b5e9247e8ca_story.html.

**A TIME FOR ACTION:**

We have already called on multiple occasions for a Special Counsel to be appointed in this matter and I renew that request today.

There is no excuse or defense for turning the full power of the IRS or any other government agency on American citizens for the sole purpose of punishing them in order to remove them as a political threat.

This carefully crafted, and well-orchestrated plan by three of the largest agencies in the United States Government– the IRS, the DOJ, and the FEC – to target conservative organizations all across the country for more than five years and counting is abhorrent, unconstitutional, and illegal.

This Administration and its officials, once and for all, must be held accountable.

What more must happen for my clients to truly see those who targeted them brought to justice? In the course of the last three years of representing dozens of conservative groups from across the country who were targeted, we have uncovered specific instances and uncontestable evidence of wrongdoing.

The negative impacts on some of our clients are significant, and I again ask today for this subcommittee to take decisive action and ensure that something like this never happens again.

**THE ACLJ'S DISCOVERY OF IRS TARGETING:**

In early February 2012, our office began to receive requests for legal representation from dozens of conservative organizations from across the country.

By the end of 2012, the ACLJ ultimately represented more than two-dozen conservative groups, all of which faced profound delays in their tax-exempt applications and intrusive follow-up questioning.[9]

In examining the documents the IRS provided each of our clients, we were outraged at the types of intrusive questions that multiple IRS offices were sending to these groups.

Many of these questions were outside the scope of legitimate IRS inquiry. Further review and comparison of hundreds of documents that our clients began providing us in the weeks that followed revealed that a targeting scheme had been orchestrated by senior officials at the IRS and the Treasury.

In March 2012, immediately after commencing this representation, we also sent a letter to Congressman Darrell Issa, then-Chairman of the House Oversight and Government Reform Committee, regarding these IRS Information Requests to Tea Party and Related Conservative Organizations. In addition, we also sent a letter directly to each of the IRS agents who contacted

---

[9] *Tea Party Victory Report: Victory After Victory this Year – Nationwide*, AM. CTR. FOR LAW & JUSTICE (Dec. 17, 2012, 11:25 AM), http://aclj.org/free-speech-2/tea-party-victory-report-victory-nationwide.

our clients, putting them on notice that a number of their questions went well beyond constitutional bounds. We also noted that it appeared as if the letters had been sent as part of a coordinated effort.

We knew something improper was going on. We had the documents to prove it. We spent the next year working with our clients to get their applications in order, completed, and submitted to force the IRS to make a determination on their files.

Throughout this process, we spent thousands of hours filing response after response to the IRS's request for more information on behalf of 28 of our clients. In our responses, we made it very clear for the IRS what questions were legitimate under the IRC and what questions would go unanswered as they were either onerous, over burdensome, grossly intrusive, and/or unconstitutional.

**THE IRS ADMITTED WRONGDOING -**
**LERNER'S ADMISSION AND THE COVER UP THAT FOLLOWED:**

In response to early congressional inquiries in 2012, the IRS *adamantly denied* any wrongdoing. As we now know, the IRS maintained its denials even as agents across the country worked diligently to target conservative groups, and meeting after meeting was held internally at the IRS to refine and perfect that targeting.

On May 10, 2013, the IRS – through Lois Lerner, its former Director of Exempt Organizations – apologized for a systematic practice whereby the IRS selected nonprofit applications from groups bearing specifically conservative sounding names for additional scrutiny; they admitted that the IRS had in fact targeted groups with the words "Tea Party" and "Patriot" in their applications. This unannounced admission intentionally preempted the Treasury Inspector General for Tax Administration's release of a comprehensive report that followed days later on May 14, 2013 – which detailed the staggering extent of IRS wrongdoing.

In Lerner's attempt to get out in front of the Inspector General's forthcoming report, her words were clear. In answering a planted question, Lois Lerner admitted the IRS's guilt in targeting hundreds of groups who were applying for tax-exempt status:[10]

> However, in these cases, the way they did the centralization was not so fine. Instead of referring to the cases as advocacy cases, they actually used case names on this list. They used names like Tea Party or Patriots and they selected cases simply because the applications had those names in the title. That was wrong, that was absolutely incorrect, insensitive, and inappropriate — that's not how we go about selecting cases for further review. We don't select for review because they have a particular name.
>
> The other thing that happened was they also, in some cases, cases sat around for a while. They also sent some letters out that were far too broad, asking questions of these organizations that weren't really necessary for the type of application. In some cases you probably read that they asked for contributor names. That's not appropriate, not usual, there are some very limited times when we might need that

[10] Gregory Korte, *Planted Question Gambit Backfires on IRS Officials*, USA TODAY (May 18, 2013, 1:55 PM), http://www.usatoday.com/story/news/politics/2013/05/18/irs-scandal-planted-question/2216747/.

> but in most of these cases where they were asked they didn't do it correctly and they didn't do it with a higher level of review. As I said, some of them sat around for too long.
>
> . . . .
>
> So I guess my bottom line here is that we at the IRS should apologize for that . . . [11]

The IRS must have believed that its carefully staged apology would defuse the scandal. But this admission of guilt only confirmed what my legal team and I already knew – and what the rest of the country was about to find out.

At the American Center for Law and Justice (ACLJ), we were not surprised by Ms. Lerner's apology. Indeed, we had long been aware of the IRS's targeting scheme.

Once the Inspector General's report was released, all of our suspicions were confirmed and the Obama Administration went into full crisis management mode as it attempted to walk back this story by blaming any misconduct on "line workers" in Cincinnati.[12]

That excuse was patently false, and I could prove it. I had in my possession at that time a stack of IRS letters received by my clients. Those letters came not just from offices in Cincinnati, but also from at least two offices in California, and the Treasury Department in Washington, DC. ***See*** **ATCH A** for examples of these letters.

When we originally compared the voluminous and intrusive demands that the IRS made of these groups, we knew as early as March 2012 that we had evidence of a wide ranging and carefully orchestrated scheme to target American citizens for their perceived political beliefs. It was also clear the trail of evidence established that senior officials in Washington, D.C. were leading this effort to unlawfully target our clients.[13] After the TIGTA report, our evidence directly proved the corruption we originally believed to have existed.

The IRS went to great lengths to deny any wrongdoing before their staged admission. They even went so far as to issue a false response to an on-point FOIA request on January 6, 2011, by responding to a request for documents on the handling of Tea Party matters by declaring there were "no documents" responsive to the request. This was their official position at the same time that "Tea Party" targeting was fully in progress, organized by "BOLO" lists that explicitly named Tea Party groups. ***See*** **ATCH B** for a copy of this letter of response from the Department of Treasury regarding this FOIA request.

---

[11] Rick Hasen, *Transcript of Lois Lerner's Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 AM), http://electionlawblog.org/?p=50160.
[12] Deirde Shesgreen, *IRS Official Blasted Lerner for Blaming Cincinnati*, USA TODAY (Nov. 18, 2013, 5:57 PM), http://www.usatoday.com/story/news/politics/2013/11/18/irs-scandal-email-backbiting/3631047/.
[13] David French, *A Broad-Based Assault on the Tea Party?*, NAT'L REV. ONLINE (Mar. 2, 2012, 3:29 PM), http://www.nationalreview.com/corner/292475/broad-based-irs-assault-tea-party-david-french.

**OUR CALL FOR MORE OVERSIGHT:**

The ACLJ has long supported congressional oversight of IRS mistreatment of conservative organizations, and our clients' concerns were thoroughly validated by the IRS's admissions of wrongdoing. Comprehensive investigations were needed (and still are) to discover all the relevant facts and to hold responsible officials accountable.

We also welcomed the DOJ's criminal investigation into the matter before it was later implicated as a co-conspirator in this scheme. As discussed in more detail below, we now believe that a Special Counsel is necessary to fully resolve the matter.

The IRS's admission, and the Inspector General's report, was merely the start – a process that must fully grapple with the reality of our clients' ongoing ordeals.

**THE IRS UNDERSTATED ITS WRONGDOING:**

Oversight was needed because prior to its admissions, the IRS denied that its agents were targeting Tea Party groups, and many on the Left had ridiculed Tea Party groups' claims, passing off the IRS inquiries as "standard" and "much ado about nothing." For example, in an influential editorial, *The New York Times* claimed that the IRS was merely doing its job.[14]

A Friday afternoon apology, in a nearly empty room, when no one was really paying attention, is not enough to atone for the IRS's misconduct. Where is the compensation for thousands of hours spent by Tea Party groups compiling tens of thousands of pages of documents? Why are some groups still waiting five and a half years later for a determination with their tax-exempt status remaining in limbo?

Again, this unconstitutional targeting was compounded and magnified by unconstitutional intrusive demands for additional information, demands that violated our clients' First Amendment rights. These information demands followed the organizations' requests for 501(c)(3) or 501(c)(4) status and included questions like the following:

> *Do you directly or indirectly communicate with members of legislative bodies? If so, provide copies of the written communications and contents of other forms of communications.*
>
> *Do you have a close relationship with any candidate for public office or political party? If so, fully describe the nature of that relationship.*
>
> *Please describe the associate group members and their role with your organization in further detail. (a) How does your organization solicit members? (b) What are the questions asked of potential members? (c) What are the selection criteria for approval? (d) Do you limit membership to other organizations exempt under 501c4 of the Code? (e) Provide the name, employer identification number, and address of the organizations.*

[14] *The I.R.S. Does Its Job*, NEW YORK TIMES (Mar. 7, 2012), http://www.nytimes.com/2012/03/08/opinion/the-irs-does-its-job.html.

> *Please provide us with a temporary Username and Password that we could use to review your organization's website.*
>
> *Donations, contributions, and grant income for each year which includes the following information:*
>
> > *The names of the donors, contributors, and grantors. If the donor, contributor, or grantor has run or will run for a public office, identify the office. If not, please confirm by answering this question "No".*
>
> *List each past or present board member, officer, key employee and members of their families who:*
>
> > *a) Has served on the board of another organization.*
> > *b) Was, is or plans to be a candidate for public office. Indicate the nature of each candidacy.*
> > *c) Has previously conducted similar activities for another entity.*
> > *d) Has previously submitted an application for tax exempt status.*

Speaking of an educational pro-life organization, the IRS attacked its free speech by stating:

> *(1) The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications; (2) The facts that purport to support the viewpoints or positions are distorted; (3) The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations; and (4) The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.*

These requests and comments were far more intrusive than the information requests strongly condemned by the Supreme Court in *NAACP v. Alabama*, which declared: "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[15]

In addition to the problematic substance of many of the IRS's questions, they were often extraordinarily broad, presenting small organizations with document production demands that would have presented a challenge even to corporations much larger than my clients – and for no other reason than their ideological affiliation was not aligned with that of the current Administration's.

Each of these questions - in their content, breadth, and vagueness - implicated the free speech and associational rights of my clients and hundreds of other Tea Party and conservative groups across

[15] *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (holding the NAACP's right to freely associate and due process rights were implicated when the state scrutinized its membership lists).

the country.

Critically, these onerous demands were not in response to complaints of wrongdoing but instead in response to applications for tax-exemption. In other words, the IRS conditioned the grant of exemptions on the extensive violation of these Tea Party groups' fundamental First Amendment freedoms.

As was apparent to us after our initial review of case files, the IRS was using the routine process of seeking and granting tax-exemptions to undertake a sweeping, top-down review of the internal workings of the Tea Party movement in the United States – and they did so in the midst of one of the most significant Presidential elections in our history.

**Three Things Are Disturbingly Clear from the Record:**

1. **IRS abuse that was directed at Tea Party and conservative groups was not limited to one field office.**

When issuing its so-called apology for intentionally targeting conservative groups for onerous and unconstitutional inquiries, the IRS claimed the targeting was limited to "low-level" IRS agents in a single office in Cincinnati.

This is patently false. As stated previously, the ACLJ's targeted clients received inquiry demand letters from numerous IRS offices from coast to coast. The ACLJ dealt with IRS officials in Laguna Niguel, California, El Monte, California, Cincinnati, Ohio, and Washington, D.C. However, even if the targeting misconduct were limited to Cincinnati, which it was not, that would not mitigate IRS responsibility. The Cincinnati office is in fact responsible for much of the processing of tax-exempt applications in the country, and the agents based in this office are all tax-exemption specialists.

We have released to the public, members of the media, and Members of Congress multiple letters from not only the Cincinnati IRS office, but also two IRS offices in California, and the main IRS headquarters in Washington, D.C. These letters included inappropriate and intrusive inquiries received in 2012, well after senior IRS officials were aware of the inappropriate targeting.

For example, the Albuquerque Tea Party, which applied for tax-exempt status in 2009, received an intrusive questionnaire from an IRS agent in Washington, D.C. Years later, this same group received a communication from an IRS attorney in Washington, D.C., declining to inform the group about her recommendation on the group's pending status and declining to give a time estimate for a decision.

I served as a trial lawyer with the Office of the Chief Counsel for the IRS earlier in my career, and it is clear to me – based on my experience – that this targeting occurred on a very broad scale. This intimidation strategy required the approval of IRS superiors, and it was not just confined to a small office in Ohio. Furthermore, we have documentation proving that the IRS's original assertions were completely false.

This scandal has been an abhorrent breach of the public trust, and IRS officials at all levels must be held accountable for their dishonest and disgraceful conduct. The targeting scheme employed by the IRS not only violated the IRS's own rules and regulations, but it also resulted in a growing and

justifiable mistrust of the IRS by the American people. The resignation of the IRS's Acting Commissioner was only the beginning, not the end, of accountability and it provided no real answers to the questions the American people have been asking since knowledge of the scandal became public.

**2. The constitutional violations implicated in these cases were severe.**

The constitutional violations implicated in these cases are serious – extending not just to the targeting of the groups themselves - but also, as stated above, the IRS's document demands and other questions were unconstitutionally intrusive. From the beginning, we referred IRS agents to *NAACP v. Alabama*, 357 U.S. 449 (1958), to demonstrate the wrongful nature of their conduct.

At issue in *NAACP v. Alabama* was whether Alabama, consistent with the Due Process Clause of the Fourteenth Amendment, could have compelled the NAACP of Alabama to reveal to the State's Attorney General the "names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association."[16]

The government's attempt to obtain membership information was rejected unanimously by the Supreme Court of the United States. The Court held that it was "apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."[17]

The IRS took the same unconstitutional actions in the targeting scheme we are discussing today. Many of the questions presented in the letters sent to our clients from the IRS were requests for the same type of information that was requested by the state of Alabama in *NAACP v. Alabama*.

Furthermore, the IRS's requests went well beyond anything ever at issue in *NAACP v. Alabama*. The IRS, in one letter, actually demanded from one of our clients the personal resumés of each and every member of their organization's board of directors.

The Court in *NAACP v. Alabama* understood that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[18] The Court further recognized this "close nexus between the freedoms of speech and assembly" and stated that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[19] Therefore, the Court held the following:

> [I]mmunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to

[16] *NAACP v. Alabama*, 357 U.S. 449, 451 (1958).
[17] *Id.* at 462-63.
[18] *Id.* at 460.
[19] *Id.* at 460-61.

> come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have.[20]

In addition to the privacy concerns pursuant to *NAACP v. Alabama*, above, it is clear that the IRS violated the First Amendment rights of countless non-profit organizations. Targeting of non-profit groups because of the content of their viewpoints, whether entirely or in part, is a shocking violation of the First Amendment.

In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) the Supreme Court upheld the constitutionality of that portion of the IRS Code that prohibits non-profit, tax-exempt 501(c)(3) organizations from engaging in substantial lobbying efforts, applying it to a group that could have qualified to form a 501(c)(4) entity, thus enabling it to have pursued the desired legislative lobbying had it simply formed that entity in accord with IRS rules, with no free speech impediment.[21] However, the Court also recognized how that is a radically different situation from having the federal government targeting groups because of their viewpoints.The Supreme Court said "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[22]

"The case would be different if Congress were to discriminate invidiously in its [tax exemptions] in such a way to 'ai[m] at suppression of dangerous ideas.'"[23] The *Regan* Court emphasized: "We find no indication that the statute was intended to suppress any ideas or any demonstration that it had that effect."[24] The resulting corollary is that "if [the IRS] were to discriminate invidiously in its [tax exemptions] in such a way to aim at suppression of dangerous ideas," which is exactly what the record clearly portrays already, then a shocking First Amendment breach has been proven. Further, where the impeding of the processing of 501(c)(4) organizations is an outgrowth of viewpoint discrimination, the same constitutional violation results. In *Regan*, the Court strongly implied that a First Amendment violation in that case could have been found if the claimants showed that they were "unable to operate with the dual structure" of having both 501(c)(3) and 501(c)(4) entities.[25] In this investigation, it is clear that groups wanting to form 501(c)(4) lobbying groups were intimidated and harassed in a way where they "were unable to operate" within the IRS Code structure.

**The Supreme Court has spoken clearly:** the use of federal government power to frustrate groups holding opinions unpopular to federal bureaucrats from forming lawful entities that are recognized under the IRS Code is an outlandish constitutional violation.

---

[20] *Id.* at 466 (internal citations omitted).
[21] *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983).
[22] *Id.* at 596 (quoting *Speiser v. Randall*, 357 U.S. 513, 518 (1958)).
[23] *Regan*, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959) quoting *Speiser*, 357 U.S. at 519).
[24] *Regan*, 461 U.S. at 548.
[25] *Id.* at 544 n. 6.

**3. The IRS violated its Mission.**

"The mission of the Internal Revenue Service is to apply the tax law *with integrity and fairness*."[26] Federal employees (including IRS employees) "*shall act impartially* and not give preferential treatment to any private organization or individual."[27] Further, IRS "[e]mployees shall not engage in . . . dishonest, or notoriously disgraceful conduct . . . prejudicial to the Government."[28]

For years, these IRS agents had been violating each of these requirements – and they have done so under the direction of senior officials in Washington, D.C.

First, by singling out Tea Party and other grassroots groups for special scrutiny based on their political views, IRS agents violated the IRS mission to operate with integrity and fairness.

Second, by singling out Tea Party and related groups for special scrutiny based on their political views, IRS agents violated the requirement to act impartially.

Third, by singling out Tea Party and related groups for special scrutiny based on their political views, IRS agents engaged in dishonest, notoriously disgraceful conduct. The same can be said of IRS leaders who knew of, but failed to rein in, such biased, politically motivated, and unconstitutional conduct, thereby allowing the politicization of the IRS.

Each of these actions was prejudicial to the Government and negatively impacted the reputation of the IRS. It is no wonder that, in light of this open and notorious politicization of the IRS, many Americans view with outright alarm the called-for expansion of the IRS to implement the Affordable Care Act ("ObamaCare").

The IRS must be scrupulously neutral and apolitical to retain the confidence and trust of the American people. It has failed miserably.

**THE OBAMA ADMINISTRATION,**
**THE IRS, & THEIR REAL AGENDA:**

Simply put, from the beginning, the IRS deceived the public about its real agenda in targeting these conservative groups, the extent of its wrongdoing, and it maintains that deception to this day.

The initial IRS defense turned on three fundamental misstatements. First, that the misconduct was localized to low-level employees in one IRS office, in Cincinnati, which I have already discussed in detail above.[29] But further, that the misconduct was unrelated to the political point of view of the targeted groups and was merely a misguided effort to respond to a "big increase" of 501(c)(4) applications.[30] Third, that the misconduct had been identified and stopped. These assertions were all

---

[26] *IRS Internal Revenue Manual 39.1.1.1*, IRS, http://www.irs.gov/irm/part39/irm_39-001-001.html (last visited May 13, 2013) (emphasis added).
[27] 5 C.F.R. § 2635.101(8) (emphasis added).
[28] 31 C.F.R § 0.213.
[29] Stephen Ohlemacher, *IRS Apologizes for Targeting Tea Party Groups*, THE ASSOCIATED PRESS (May 10, 2013, 6:14 PM), http://bigstory.ap.org/article/irs-apologizes-targeting-conservative-groups.
[30] Rick Hasen, *Transcript of Lois Lerner's Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 AM), http://electionlawblog.org/?p=50160.

false.[31]

There was no "big increase" of applications at the time the targeting began. In fact, there were fewer 501(c)(3) and 501(c)(4) applications in fiscal year 2010 – when the targeting began – than in fiscal year 2009.[32]

Also, the IRS misconduct had not stopped but was instead ongoing and if anyone on this committee thinks "So what?" – I'd like for them to explain to me how long a group must wait for a determination. One of our clients is still waiting for an answer from the IRS – after more than five years.

If the IRS targeting scandal was not the result of a few overwhelmed low-level workers whose misconduct was stamped out as soon as it was discovered, then what truly happened?

While it was once difficult to answer this question definitively, since the IRS has failed to hand over all requested documents to Congressional investigators[33], and key IRS officials have been less-than-forthcoming (including asserting the Fifth Amendment privilege against self-incrimination) in response to questions from relevant Congressional Committees[34], the broad contours of the scandal are growing more apparent as evidence continues to be revealed.

The genesis of the IRS targeting lies not with overwhelmed workers facing a flood of unexpected applications but instead with alarmed politicians and partisan bureaucrats confronting the unexpected emergence of a new political movement – a movement they wanted to stop.

The rise of the Tea Party coincided with (though was independent of) the Supreme Court's decision in *Citizens United v. FEC*, a decision that affirmed the First Amendment rights of citizens speaking through corporations and thereby broadened free speech opportunities for people of all political persuasions.[35]

Stripped of the ability to explicitly limit corporate free speech, the Obama Administration launched a public-relations offensive against conservative groups with the President himself taking the lead role.

On August 21, 2010, the President warned of "attack ads run by shadowy-groups with harmless-sounding names." The President also said, "We don't know who's behind these ads and we don't know who's paying for them . . . you don't know if it's a foreign-controlled corporation . . . The

---

[31] *White House Claims False: IRS Targeting Ongoing*, AM. CTR. FOR LAW & JUSTICE (May 22, 2013, 9:23 AM), http://aclj.org/free-speech-2/white-house-claims-false-irs-targeting-ongoing.
[32] TREAS. INSPECTOR GEN. FOR TAX ADMIN., 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 9 (May 14, 2013), *available at* http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.html.
[33] Stephen Ohlemacher, *Rep. Issa Accuses IRS of Obstructing Investigation*, YAHOO! NEWS (Aug. 2, 2013, 3:24 PM), http://news.yahoo.com/rep-issa-accuses-irs-obstructing-investigation-171420153.html.
[34] Caitlin Dickson, *As Lois Lerner Pleads the Fifth, the IRS's Problems Aren't Just Political*, THE DAILY BEAST (May 23, 2013), http://www.thedailybeast.com/articles/2013/05/23/as-lois-lerner-pleads-the-fifth-the-irs-s-problems-aren-t-just-political.html.
[35] *Citizens United v. FEC*, 558 U.S. 310 (2010).

only people who don't want to disclose the truth are people with something to hide."[36]

On October 14, 2010, President Obama called organizations with "benign-sounding" names "a problem for democracy," and the next week he complained about individuals who "hide behind those front groups," called such groups a "threat to our democracy," and claimed that such groups were engaged in "unsupervised" spending.[37]

President Obama was hardly the only political leader to speak out against the free speech rights of conservative nonprofits. On February 16, 2012, several U.S. Senators sent a letter to the IRS demanding that the IRS investigate tax-exempt organizations for engaging in "political activities."[38] This demand came just as the IRS was issuing yet another round of intrusive questions to conservative groups.

**ENEMIES OF THE STATE - CONSERVATIVE GROUPS:**

Freedom of speech, freedom of assembly, and freedom of association – these are three freedoms the IRS disregarded as it systematically targeted grassroots groups. These grassroots groups consisted of average Americans, many of whom were new to politics, advancing the social welfare of their communities, often through local community education programs emphasizing constitutional education. Like any other social welfare educational group, they sought 501(c)(3) or 501(c)(4) tax-exempt status from the IRS.

Given the climate of political pressure present in 2011 and 2012 created, maintained, and encouraged by the Obama Administration, the nature of the questions the IRS later presented to conservative groups is hardly surprising and indeed appears calculated to answer each of the questions the President himself had raised on multiple occasions before.

It is difficult to overstate the extent and magnitude of federal government misconduct so far uncovered. As for the magnitude of the scandal, on June 20, 2013, Stan Veuger, writing for the American Enterprise Institute, cited a study showing the impact of the Tea Party's "ground game" on the 2010 election and noting that suppressing the Tea Party could well have provided President Obama his margin of victory in 2012.[39]

In other words, not only was the targeting scheme repugnant to the Constitution, it could well have had decisive real-world effects in a presidential election.

---

[36] *Remarks of President Barack Obama: Weekly Address* WHITEHOUSE.GOV (Aug. 21, 2010), http://www.whitehouse.gov/the-press-office/2010/08/21/weekly-address-president-obama-challenges-politicians-benefiting-citizen; *see also Remarks by the President on the DISCLOSE Act*, WHITEHOUSE.GOV (Jul. 26, 2010, 2:49 PM), http://www.whitehouse.gov/the-press-office/remarks-president-disclose-act (" [A] group can hide behind a name like 'Citizens for a Better Future,' even if a more accurate name would be 'Companies for Weaker Oversight.' These shadow groups are already forming and building war chests of tens of millions of dollars to influence the fall elections.").

[37] *An IRS Political Timeline*, WALL ST. J. (Jun. 6, 2013, 7:40 PM), http://online.wsj.com/news/articles/SB10001424127887323844804578529571309012846.

[38] Letter from Charles E. Schumer et al., U.S. Sen., to Douglas H. Shulman, IRS Comm'r (Mar. 12, 2012) (on file with author), *available at* http://www.schumer.senate.gov/record.cfm?id=336270.

[39] Stan Veuger, *Yes, IRS Harassment Blunted the Tea Party Ground Game*, AM. ENTER. INST. (Jun. 20, 2013), http://www.aei.org/article/economics/yes-irs-harassment-blunted-the-tea-party-ground-game.

Given this reality, it's hardly surprising that the Administration has proven over the last two years utterly incapable of policing itself. To the contrary – it has sought to do everything in its power to make this scandal go away.

In short, the IRS is institutionally incapable of self-correction.

According to report after report, this Administration has delayed turning over tens of thousands of relevant documents to Congressional investigators[40], has attempted in multiple district and circuit courts to dismiss litigation filed by groups it has already admitted its officials harmed, and its criminal investigation – announced with much fanfare in May of 2013 – was led by a large donor to President Obama's two presidential campaigns, a person so close to the President that she was invited to the White House to attend a bill-signing ceremony[41] – and her investigation has gone nowhere.

Millions of Americans with good reason perceive the IRS as inherently partisan, and they have long doubted the Obama Administration's good faith in faithfully executing the laws of the United States by defending the First Amendment rights of all American citizens. They are now understandably cynical when an avowed partisan accepts the assignment to investigate perhaps our nation's most politically-significant scandal.

Under such circumstances, Congressional oversight has been absolutely essential – and it still is required.

## THE ONLY THING PHONY ABOUT THIS SCANDAL WAS THE INVESTIGATION:

There has been no real investigation and no one held accountable. Those tasked with investigating were themselves involved in the targeting. Emails discovered last year directly linked the DOJ as potential co-conspirators in the crime that was the focus of its investigation.[42] The DOJ was, and still is, compromised.

The DOJ no longer has the credibility to argue that a Special Counsel should not be appointed.[43] Although former Attorney General Holder had previously denied that any conflict of interest had existed, the conflicts are plain.

The DOJ has previously removed officials from investigations due to their personal or political relationships. The only way for the DOJ to avoid a clear conflict of interest is for Attorney General Lynch to appoint a Special Counsel.

---

[40] Stephen Dinan, *Issa: FBI Impeding Inquiry into IRS Targeting of Conservative Groups*, WASH. TIMES (Dec. 2, 2013), http://www.washingtontimes.com/news/2013/dec/2/lawmakers-suspect-fbi-is-impeding-irs-inquiry-targ/?page=all.
[41] *Obama Backer Leading IRS Probe Visited White House in '09, Records Show*, FOXNEWS.COM (Jan. 13, 2014), http://www.foxnews.com/politics/2014/01/13/obama-backer-leading-irs-probe-visited-white-house-in-0-records-show/.
[42] *See* E-mail from Lois Lerner, Former Dir. of IRS Exempt Orgs., to Nikole Flax, Chief of Staff to Former IRS Comm'r Steven Miller et al. (May 8, 2013, 5:30 PM), *available at* http://www.judicialwatch.org/wp-content/uploads/2014/04/JW1559-0001051.pdf.
[43] *See* Bernie Becker, *Justice: No Need for IRS Special Prosecutor*, THE HILL (July 17, 2014, 12:15 PM), http://thehill.com/policy/finance/212559-justice-no-need-for-irs-special-prosecutor.

We were shocked to learn of the evidence that was uncovered last year in over 1,600 pages of emails that were produced in response to a Judicial Watch FOIA request.[44]

Within these emails were multiple exchanges between Lois Lerner and officials within the IRS where she referenced her conversations with DOJ officials that clearly established a motive, intent, and active scheme to manufacture evidence against conservative groups like our clients to ***"piece together"*** criminal prosecutions of law-abiding citizens in the absence of any complaints or evidence of wrongdoing.[45]

These emails suggested a troubling coordination between the IRS, FEC, DOJ, and United States Senators and their staff.[46] They also established a coordinated targeting effort between the IRS, DOJ, and certain U.S. Senators.[47] Since then, more emails continue to surface that further proves this collusion.

Again, this cauldron of corruption extends well beyond the IRS.

For example, on March 26, 2013, Ayo Griffin, Counsel for the U.S. Senate Committee on the Judiciary Subcommittee on Crime and Terrorism, sent an email to IRS Legislative Counsel, Suzanne Sinno stating that Senator Sheldon Whitehouse (D-RI) was "interested in investigation and prosecution of material false statements to the IRS regarding political activity by 501(c)(4) groups on form 990 and 1024 under 26 U.S.C. sections 7206."[48] On March 27, 2013, Lois Lerner sent an email to Nikole Flax (then chief of staff to then IRS Commissioner Steven Miller), Suzanne Sinno, Catherine Barre (IRS staffer), Scott Landes (IRS Legislative Affairs), Amy Amato (Affiliated with the IRS; position unknown), and Jennifer Vozne (Deputy Chief of Staff to then IRS Commissioner Steven Miller) stating that

> [T]here are several groups of folks from the FEC world that are pushing tax fraud prosecution for c4s who report they are not conducting political activity when they are (or these folks think they are). One is my ex-boss Larry Noble (former General Counsel at the FEC), who is now president of Americans for Campaign Reform. This is their latest push to shut these down. One IRS prosecution would make an impact and they wouldn't feel so comfortable doing the stuff.[49]

---

[44] *See Tainted Investigation into IRS Scandal Makes It Impossible for Targeted Groups to Meet with Federal Investigators*, AM. CTR. FOR LAW & JUSTICE (June 18, 2014, 10:34 AM), http://aclj.org/free-speech-2/aclj-tainted-investigation-into-irs-scandal-makes-it-impossible-for-targeted-groups-to-meet-with-federal-investigators.

[45] E-mail from Lois Lerner, Former Dir. of IRS Exempt Orgs., to Nikole Flax, Chief of Staff to Former IRS Comm'r Steven Miller et al. (May 8, 2013, 5:30 PM), (emphasis added) *available at* http://www.judicialwatch.org/wp-content/uploads/2014/04/JW1559-0001051.pdf.

[46] *See, e.g.*, E-mail from Nikole Flax, Chief of Staff to Former IRS Comm'r Steven Miller, to Lois Lerner, Former Dir. of IRS Exempt Orgs. (Feb. 5, 2013, 2:29 PM), *available at* http://www.judicialwatch.org/wp-content/uploads/2014/07/IRS-Production-3.pdf (located on p. 596 of PDF document).

[47] *See, e.g.*, E-mail from Ayo Griffin, Counsel for Senate Judiciary, Subcomm. on Crime and Terrorism, to Suzanne Sinno, IRS Leg. Counsel (Mar. 26, 2013, 7:44 PM), *available at* http://www.judicialwatch.org/wp-content/uploads/2014/04/JW1559-000243.pdf.

[48] *Id.*

[49] E-mail from Lois Lerner, Former Dir. of IRS Exempt Orgs., to Nikole Flax, Chief of Staff to Former IRS Comm'r Steven Miller et al. (Mar. 27, 2013, 12:39 PM), *available at* http://www.judicialwatch.org/wp-content/uploads/2014/05/IRS-HQ-FOIA-1559-Full-Production.pdf) (located on p. 39 of PDF document.

Finally, Richard Pilger, Director of Election Crimes Branch at the DOJ, contacted Lois Lerner. They spoke about the prospect of a DOJ investigation regarding the very organizations that the IRS had already improperly targeted. Lerner emailed a summary of the conversation to Nikole Flax, Joseph Grant (then Commissioner of the Tax Exempt and Government Entities Division), Nancy Marks (IRS Senior Technical Advisor), and Jennifer Vozne. The email stated,

> I got a call today from Richard Pilger Director Elections [sic] Crimes Branch at DOJ. I know him from contacts from my days there. He wanted to know who at IRS the DOJ folk s [sic] could talk to about Sen. Whitehouse idea at the hearing that DOJ could piece together false statement cases about applicants who "lied" on their 1024s --saying they weren't planning on doing political activity, and then turning around and making large visible political expenditures. DOJ is feeling like it needs to respond, but want [sic] to talk to the right folks at IRS to see whether there are impediments from our side and what, if any damage this might do to IRS programs. I told him that sounded like we might need several folks from IRS.[50]

To be clear, these emails were sent mere weeks before the IRS "apologized" for targeting Tea Party and other, similar organizations. Even worse, they were sent well after the time when the IRS claimed that all targeting had ceased. Not only was this statement false, IRS targeting was escalating – in active cooperation with the DOJ – into a concerted effort to manufacture criminal prosecutions.[51] These emails also show that the DOJ is not impartial; rather the DOJ was complicit in illegally targeting conservative groups in concert with the IRS.

I find it bizarre that, after all the revelations and disclosures since the IRS's "apology" in 2013, there are still some who call it a "phony scandal" or argue that this is much to do about nothing.

In many cases, these are the same people who suggest that there is nothing strange about a DOJ that has one team fighting my clients in federal court one day – aggressively arguing that none of my clients had a claim against the IRS – while another department is assuring our attorneys and clients that their investigation of the widespread targeting and wrongdoing was legitimate and not a sham.

**CALL FOR A SPECIAL COUNSEL:**

Because of this deception, I have previously joined many Members of Congress from both sides of the aisle in calling for an investigation by the DOJ. This seemed to be an obvious next step.[52] This situation had become more acute in light of the revelations that the DOJ was "seeking to piece together" criminal investigations against these groups without evidence to support its claims.[53]

---

[50] *New Documents Reveal DOJ, IRS, and FBI Plan to Seek Criminal Charges of Obama Opponents*, JUDICIAL WATCH (July 7, 2015), http://www.judicialwatch.org/press-room/press-releases/judicial-watch-new-documents-reveal-doj-irs-and-fbi-plan-to-seek-criminal-charges-of-obama-opponents/.
[51] *See* E-mail from Ayo Griffin, *supra* n. 47.
[52] Abby D. Phillip, *Tea Party Rejects IRS Apology, Republicans Vow Investigation*, ABCNEWS (May 10, 2013), http://abcnews.go.com/Politics/irs-admits-targeting-conservative-groups/story?id=19151646.
[53] *IRS Emails Indicate Tea Party Groups Could have Faced "Criminal" Charges, Republicans Say*, FOXNEWS.COM (Apr. 17, 2014), http://www.foxnews.com/politics/2014/04/16/uncovered-emails-show-lerner-talked-with-justice-about-irs-targeting/.

I have always had great respect for the DOJ and spent many years working with former Attorneys General. I served on the DOJ's teaching faculty, instructing their U.S. attorneys on matters involving First Amendment law. However, the issues surrounding the DOJ's investigations – and its involvement in the IRS scandal itself – caused me to lose confidence in Attorney General Holder and his Justice Department. Since Attorney General Lynch has not appointed one yet, my lack of confidence in the DOJ continues.

There is an immediate need for an appointment of a Special Counsel.

Though the authority to appoint a Special Counsel rests solely to the Attorney General, I must continue to underscore the seriousness of this scandal and the immediate need for a Special Counsel who would act independently of the DOJ, not subject to its appointed political leadership.

In my view, it is clear that the DOJ has thoroughly demonstrated that it can no longer fairly and justly oversee any further investigations, and the only opportunity for justice lies with an independent Special Counsel.

President Obama initially made it clear that he was outraged, and former Attorney General Holder said that the DOJ would investigate.[54] Now, more than two years later, where are we with those investigations? Where is the justice promised to us by the President and his former Attorney General? Why has Attorney General Lynch not appointed a Special Counsel to date?

It appears that these initial expressions of outrage were little more than contrived efforts at damage control.The Obama Administration never intended for this scandal to be fully and fairly investigated. Within months, Administration officials quickly retreated back to talking points that the IRS targeting was "just another phony scandal."[55]

## RECENT DEVELOPMENTS:

**Destroyed Emails:**

Last month, new information was produced by the Treasury Inspector General for Tax Administration (TIGTA) confirming that while the IRS has been engaged for months in a game of hide-and-seek with regard to documents concerning its targeting of conservative organizations, many of those documents may never be found because they were in fact destroyed by the agency in the midst of the ongoing congressional investigation into the targeting scandal.[56]

J. Russell George told the House Oversight and Government Reform Committee last month that TIGTA had confirmed the IRS's destruction of 422 backup tapes containing up to 24,000 emails in March 2014.[57]

---

[54] Lucy Madison, *Justice Dept. to Investigate IRS Targeting*, CBS NEWS (May 14, 2013, 3:47 PM), http://www.cbsnews.com/news/justice-dept-to-investigate-irs-targeting/.
[55] Dave Boyer, *Obama's 'Phony' Scandals Line Draws GOP Retort*, WASHINGTON TIMES (July 25, 2013), http://www.washingtontimes.com/news/2013/jul/25/obamas-phony-scandals-line-draws-gop-retort/?page=all.
[56] Peter Schroeder, *Watchdog: IRS Improperly Destroyed Lerner Email Backups*, THE HILL (June 25, 2015, 11:52 AM), http://thehill.com/policy/finance/246133-watchdog-irs-improperly-destroyed-backups-containing-lerner-emails.
[57] *Id.*

According to Mr. George's testimony, those tapes likely contained emails from 2010 and 2011 to and from Lois Lerner.[58] At the time of the destruction, the congressional investigation was still underway, with a clear order requiring the IRS to preserve those emails having been issued ten months earlier and a congressional subpoena in place for seven months.[59]

While these emails were at the front and center of the scandal investigation, the IRS had them in their possession but failed to take the appropriate steps to ensure that they were preserved and handed over to Congress per their order to do so.[60]

The TIGTA testimony further highlighted the depth of the agency's apathy and disregard for its legal obligations by revealing that the IRS never looked through the server storing the emails in order to retrieve them, nor any other place where they may have been backed-up.[61] Despite the recovery of tens of thousands of Lerner emails by TIGTA last November, the IRS, contrary to its legal obligations, did not even bother to search those before responding to our client's FOIA request.[62]

**Lerner and The DOJ:**

Recently, additional evidence was discovered to prove further that IRS officials, including Lois Lerner, colluded with the FBI and the DOJ on a plan to bring criminal charges against conservative groups as early as 2010.[63]

Evidence of this allegation was discovered in email exchanges between those officials before, but at that time, the evidence was limited only to a few emails. Now, a memo from October of 2010 exists that gives us a better understanding into how the conspiracy was planned.

As the memo details, Lois Lerner and officials at the DOJ and the FBI, were developing plans to criminally prosecute these nonprofit organizations.[64] The memo also revealed that the DOJ wanted IRS employees to turn over sensitive documents to them first before giving them to Congress.[65]

This transfer of sensitive information from the IRS to the DOJ and FBI supplied the FBI with 21 computer disks containing over a million pages of confidential tax-payer information from more than 113,000 tax returns.[66]

Discovered notes also detail an October 8, 2010, meeting held between Lois Lerner, several other IRS officials, the section chief and other attorneys from the DOJ Criminal Division's Public Integrity Section, and one representative from the FBI to discuss the attention that tax-exempt organizations were receiving due to their political activity.[67] The discussions detailed in these notes

---

[58] *Watchdog Reveals Evidence Was Destroyed During Probe of IRS Targeting*, FOXNEWS.COM (June 24, 2015), http://www.foxnews.com/politics/2015/06/24/watchdog-irs-erased-backups-after-loss-tea-party-emails/.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Supra*, n. 50.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

also focused on their desire to bring criminal charges against these conservative groups.[68] This is outrageous.

Even more outrageous, Lerner and the DOJ had participated in these conversations for years. Three years into this conspiracy, in fact two days before Lerner issued her faux "apology" for targeting conservatives, Lerner had written an email to the Chief of Staff for the acting Commissioner of the IRS explaining their ongoing discussions with senior DOJ officials to "piece together false statement cases about applicants."[69]

**Z Street Case:**

In a case involving the same constitutional issue as the ACLJ's pending Tea Party-related case—whether the IRS may lawfully delay processing tax-exempt applications because of the viewpoint espoused by the applicant—Z Street, a pro-Israel organization, sued the IRS alleging that the agency unconstitutionally subjected its tax-exempt application to special scrutiny in order to determine whether the group's activities and connection to Israel "contradict[ed] the Administration's public policies."[70] In its case, Z Street argued that the IRS had created a "special unit in Washington, D.C." to make these types of determinations.[71] The facts surrounding at least one of my client's files supports this assertion.

The Court of Appeal's ruling in this case has established the possibility that officials from the IRS could finally be held accountable. Now, they would have to answer, under oath, for their discriminatory conduct. As the United States Court of Appeals for the District of Columbia Circuit noted in the *Z Street* case: "The district court, assuming the truth of Z Street's allegations—as it must at this stage of the litigation—denied the motion, explaining that Z Street was not seeking to restrain the "assessment or collection" of a tax, but rather to prevent the IRS from delaying consideration of its application in violation of the First Amendment."[72]

Last month, the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's decision that rejected the IRS's motion to dismiss.[73] This ruling is a significant step forward in defense of the rights of those targeted in the IRS scandal.

In *Z Street*, the D.C. Circuit upheld the district court's decision to deny the IRS Commissioner's motion to dismiss and allow Z Street—a non-profit corporation awaiting determination regarding its 501(c)(3) tax-exempt application—to move forward with its constitutional challenge to an alleged IRS policy targeting Z Street on the basis of viewpoint and resulting in delay in the processing of Z Street's application.[74] The court's message in *Z Street* is crystal clear: "in administering the tax code, the IRS may not discriminate on the basis of viewpoint," and where an applicant for tax-exemption seeks to obtain relief from unconstitutional delay—and not to restrain the assessment or collection of a tax—the Anti-Injunction Act does not apply to bar a plaintiff from bringing suit.[75]

---

[68] *Id.*
[69] *Id.*
[70] *Z Street v. Koskinen*, 44 F. Supp. 3d 48, 52 (D.D.C. 2014) (quoting Complaint ¶¶ 24-25).
[71] *Id.*
[72] *Z Street v. Koskinen*, 2015 U.S. App. LEXIS 10326, at *2 (D.C. Cir. June 19, 2015).
[73] *Id.* at **1, 2.
[74] *Id. at* *2.
[75] *Id.* at *12, *15, *17-18.

It is precisely this type of conduct—the abuse of unfettered discretion by the IRS to discriminate in the administration of the tax code and its resulting harms—that our clients are challenging and from which they seek relief in their federal lawsuit against the IRS. Our clients, like Z Street, are all nonprofit organizations seeking tax-exempt status that have been victimized by a discriminatory policy—a "targeting scheme"—by which the IRS "intentionally and systematically targeted for additional and unconstitutional scrutiny conservative organizations applying for tax-exemption," because their conservative viewpoint is at odds with that of the current administration.[76]

The resounding message of the *Z Street* decision is that the IRS will not be permitted to discriminate on the basis of viewpoint in administering the tax code by cowering behind broad, obscure, or obsolete statutory interpretations, while American taxpayers continue to suffer blatant violations of their First Amendment rights. This holding is especially relevant in our clients' case, where (1) the IRS is not only alleged to have engaged in such unlawful conduct but has actually admitted that it did so: intentionally and systematically targeting for additional and unconstitutional scrutiny organizations applying for tax-exemption based on their conservative viewpoints; and (2) this disparate treatment has been independently confirmed by TIGTA.

The *Z Street* decision was clear that a taxpayer seeking recognition of its tax exempt status under section 501(c)(3) is not required to wait 270 days or until the IRS actually denies an exemption and assesses liability before challenging the agency's blatant constitutional violations.[77] In sum, the court concluded, for the IRS "to process exemption applications pursuant to different standards and at different rates depending upon the viewpoint of the applicants" would constitute "a blatant violation of the First Amendment."[78]

We were encouraged that the judges hearing the *Z Street* case were as outraged by the IRS's targeting scheme as we and our clients have been, as evidenced by the following remarks made by Chief Judge Garland during oral argument:

> I think if I were you I would go back and ask your superiors whether they want us to represent that the government's position in this case is that the government is free to unconstitutionally discriminate against its citizens for 270 days.
>
> I would be stunned if the current Attorney General agreed with that. Or the last Attorney General. Or the one before that, or the one before that. Or anyone. That can't be the position. Now, do you want to think about it again, whether you really want that to be your position.[79]

The attorney for the IRS during this oral argument reportedly responded that this was precisely the government's position.[80]

---

[76] *See id.* at *5 ("Z Street alleges that the IRS has an 'Israel Special Policy,' which mandates that applications from organizations holding views about Israel inconsistent with those espoused by the Obama administration be scrutinized differently and at greater length.").
[77] *Id.* at **12, 17.
[78] *Id.* at **16-17.
[79] *Honesty: A Refreshing, But Legally Lethal, Policy for IRS*, Am. AM. CTR. FOR LAW & JUSTICE (May 2015), http://aclj.org/free-speech/honesty-a-refreshing-but-legally-lethal-policy-for-irs.
[80] *Id.*

This contempt for the rule of law exemplified by a government attorney representing the Obama Administration in court only further reflects this Administration's brazen disregard for the constitutional rights of the citizens of this nation.

**Criteria for Auditing Tax-Exempts Organizations Still Defective:**

Just last Thursday, the Government Accountability Office (GAO) testified before the Subcommittee on Oversight in the House Ways & Means Committee.[81] As outlined in their report and Congressional testimony, the GAO found continuing deficiencies that have increased the risk that the IRS could continue to select organizations for examination in an unfair manner.[82]

Furthermore, the GAO also determined that some examination procedures are still not followed.[83] Important to our discussion today, referrals dealing with political activity allegations are reviewed by a three-person committee, with four out of those fifteen committee referrals reviewed - missing the required description of the allegation.[84] The GAO concluded that the problems observed create practices that cause the IRS to fall short of its goals of fairness and integrity.[85] My clients have suffered from this lack of fairness, integrity, and accountability for years. Yet, we are going to continue to see these problems continue until something is done to implement true reforms at the IRS.

**CONCLUSION:**

The IRS scandal – with its tentacles reaching deep into other federal agencies – is not going away. In fact, with each week, comes new revelations – new evidence – that continues to put a spotlight on the ever expanding unconstitutional targeting scheme.

This hearing is another vital step toward the truth as we learn what happened, hold responsible officials accountable, and take steps to ensure this abuse will never be repeated.

The ACLJ is actively pursuing two federal lawsuits against the IRS—one based on this unconstitutional targeting of conservative organizations, including our 38 clients from 22 different states, the other based on the IRS's failure to comply with its obligations under the federal Freedom of Information Act. In that case, the IRS has been ordered in the FOIA suit to turn over the documents it withheld so that the court can undertake its own independent review of them. We are working diligently to bring to light the IRS's flagrant abuses of power and to ensure it answers for its corruption.

The IRS, as well as this Administration, needs to understand that no matter how long it takes to get to the bottom of this scandal, the American People deplore the unconstitutional targeting of their First Amendment rights, continue to demand that it cease immediately, and insist that those

---

[81] *IRS EXAMINATION SELECTION, IRS Should Strengthen Internal Controls for Exempt Organization Selection: Testimony Before the Subcommittee on Oversight, Committee on Ways & Means, House of Representatives*, 114th Cong. (2015) (statement of Jay McTigue, Director, Strategic Issues, U.S. GAO).
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*

responsible be brought to justice. The American people deserve the truth.

Once again, we thank this subcommittee for putting a spotlight on the IRS and its unlawful actions. Only transparency and accountability to the Congress and the American public will root out corruption in the IRS.

The targeting of Americans based upon their personal beliefs or freedoms of association is repugnant to the Constitution. Americans have been outraged for quite some time, and it is time for a complete investigation. We need to know what happened. We need finality and closure. We need accountability. Those responsible for this scandal must be brought to justice.

In this case, the IRS and the DOJ have proven that they are completely compromised on this investigation.

The Constitution requires the President to faithfully execute the laws of the United States by defending the First Amendment rights of all American citizens. If my clients are going to find justice, we must have a Special Counsel.

I thank the Subcommittee and am happy to respond to any questions.

**PREPARED WRITTEN TESTIMONY OF**

**Toby Marie Walker, Waco Tea Party**

**U.S. Senate Committee on the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**

July 29, 2015

**"Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options"**

My name is Toby Marie Walker, I am the co-founder and president of the Waco Tea Party in Waco, Texas.

I am a grandmother, mother, wife, and friend, I am not a victim. I am, however, a target. I have been targeted by one of the most powerful agencies in the United States Government, the Internal Revenue Service. I may never know exactly who decided to harass me and others, I may never know why, all I know is that despite what President Obama claims: We were targeted!

I never planned on my life involving participation in setting up a non-profit social welfare organization; I was aware of issues in my community but not actively involved in policy or issue advocacy. I was an ordinary citizen who trusted my government; I exercised my right to vote and paid my taxes. I raised my children and led a normal life.

In October of 2008, I sat in my living room at watched Congress pass the TARP Act. I was shocked and stunned that no one seemed worried about what was actually in the bill. I was angry that my elected officials decided to put my country in debt to bail out bad actors. My husband told me to stop crying about it and do something, so a few months later I did.

I was watching the news one morning in February of 2009 when I heard Rick Santelli suggest that Americans throw a tea party in Chicago. I followed the topic online, and watched the birth of a movement. There were various websites to sign up and help organize a tea party in our local community. I had no idea that one submission on a website would change my life in a positive way with new friends and a new passion for community involvement. I also had no idea that instead of encouraging the freedom of expression of my first amendment rights of free speech and assembly, my government would instead treat these freedoms of mine as a taxable event. This misuse of tax law to first discourage, and later to disparage, demoralize, and ultimately disallow my participation in the public square was very troubling.

Within a week about a dozen of local citizens who never met before came together to plan our first tea party in Waco. We had no idea what we were doing; none of us had ever organized protests or rallies. We just wanted our voices to be heard.

After our first event people kept asking us "What's next" and we didn't know. We didn't have a long game plan; we didn't know it would lead to anything significant. We quickly realized that we needed a way to raise money to pay for expenses like websites, meeting venues, trainings, and other items.

We talked it over and met with accountants and attorneys. We formed a non-profit and filed for a 501(c)(4) tax-exempt status. We raised the money to pay for the application fee, and then filed with the IRS in July of 2010. We received a letter from the IRS confirming that they had received our application and payment, and that we could expect further contact within a few months. When we didn't hear from anyone at the IRS by the winter of 2010, we attempted to contact someone at the IRS office but were never given a clear, much less complete answer as to why it was taking so long.

In early 2012 we finally received a letter from the IRS. We were relieved to finally get a response and excited to move forward. Then we opened it and were shocked. The questions we were asked were not anything like what we had heard the process would be like. The IRS wanted every social media post we had ever made on Facebook and Twitter, and literally thousands of copies of our website pages, blog articles, newsletters, and web postings.

They wanted complete transcripts of ALL our Internet radio shows and videos; hundreds of hours of programming. They wanted us to provide copies of all stories and articles that had been published about us - whether we participated in an interview or not, they demanded it. When we Googled "Waco Tea Party" we came up with thousands results. There was no way we could possibly look at each one of those "hits" to determine if it really pertained to us. There was also no way we could possibly comply with the demand to be complete, in that we simply had no way to be certain that we could know about everything that had been said about us in publications we were not even aware of.

Even more incredible, the IRS wanted us to tell them what we planned to due in the future. For example they wanted us to list any events we might hold in the future, including the dates of those events we might hold. Under penalty of perjury, we were being asked to predict the future. Any change in schedule, beyond our control or not, raised the issue of whether or not we were incurring legal risk.

The IRS wanted a list of every candidate we knew and if we had a "close" relationship with them. We called to ask them for clarification of the meaning of "close relationship." They refused to explain what that meant. Instead the agent told us "that is subjective" and to send a list of every candidate we knew and describe the relationship.

Many of the questions were vague and impossible to answer, or were egregiously inappropriate. All totaled it would literally have taken a U-Haul truck filled to the brim to answer all the questions, and I believe that we still would have missed something somewhere that they wanted.

It seemed at best as if they were trying to bury us in paperwork, and at worst as if they were trying to entrap us.

We were shocked and discouraged. We didn't know how we could possibly answer all the questions let alone pay for the paper and postage to respond. We didn't know what to do or who to go to for help. That evening I spoke with a good friend who suggested that I call my Representative Bill Flores, who was also a certified public accountant and might be able to tell us if this was normal.

Congressman Flores did not think the letter was normal. He was concerned and promised to look into the matter. When his first letter to the IRS director went unanswered he rounded up some colleagues and sent a second letter to the IRS. The director's response was a boilerplate bureaucratic denial of any wrongdoing.

Keep in mind, calling us a small organization is an overstatement. We are a group of working-class friends with limited funds and limited resources. We are a "mom & pop" outfit, just average citizens trying to make a difference in our community. We are not funded by the government. We are not funded by wealthy individuals or special interest organizations. We operate on what we raise locally. Our budget is small, less than $10,000 a year. Contrary to popular belief, we are funded by blue-collar workers, retired soldiers, and schoolteachers, stay-at-home mothers who save up a little extra money by skipping Starbucks. We don't have high paid consultants, and we don't have any "dark money" from corporations or wealthy lobbyists. We do not have paid staff; we don't even have an office! We work out of our homes and garages. Yet, the most powerful agency in the Federal government was clearly using the application process to intimidate our supporters, scare our donors, and suppress our activity by delaying our tax status. We believe the evidence is clear that the wrongdoing by the IRS goes further than that. They were trying to tarnish our name, or worse, by entrapping us with complexity and ambiguity.

Why was the IRS so concerned about a tiny organization in Waco, Texas? What was so wrong about encouraging others to speak out about the over-regulation of citizens and businesses by our government? Encouraging and demanding that our elected officials be more fiscally responsible with our hard earned tax dollars isn't a crime, it is a right! Reminding the public to vote, giving them opportunities to meet candidates that they normally would never have a chance of speaking to about their concerns is part of our duty as good citizens. Holding town hall meetings where anyone can attend regardless of background or socioeconomic standing, and giving people an opportunity to address the issues most important to them should be encouraged not discouraged! We simply wanted people to engage with their representatives in government at all levels on the issues that they care about.

We had joked about "being on a list" during the first two years of the tea party movement. We never dreamed the IRS actually had one and that our names were on it.

We contacted the ACLJ and asked for their assistance, and thankfully they took our case. During the next year we worked on our response to the IRS, hoping to get our determination letter. We spent hundreds of man hours working on what should have been a very simple response. I know we would have received treatment more favorable if we had been an organization more friendly to the current Administration.

The stress it put on us, our families, and friends was more than some of our board members were prepared for. Some have since resigned. Our donors were afraid to donate. Our volunteers were afraid to have their names associated with us for fear of reprisals or personal audits. Our supporters stopped commenting as much on our social media sites.

When the IRS delayed our determination they cast a shadow of doubt on our organization. They effectively decimated our ability to fundraise. When you have a small donor base of local citizens - when one person stops donating - it hurts your bottom line. Every penny counts.

I have a hard time describing the emotional distress this has caused me. I am a pretty optimistic person; I can always see a light at the end of the tunnel. I'm strong willed and determined, I'm a fighter and a survivor, I don't give up or give in easily. I'm passionate and focused, and I took it very personally when we didn't get the tax-exempt status in a timely manner, as though I was letting down all my friends and supporters. My husband's job is our main income now. He is, rightly, worried about being audited, not because of anything we did wrong, but because of the cost of defending ourselves in a situation where we are guilty until proven innocent. Could we afford to prove our innocence? God bless him, he never asked me to give up, he stood by me, but there were times that I could tell he was angry at the situation our government had put us in.

In February of 2013 I ended up in the hospital for a heart issue, in March I had a minor heart surgery. My doctors made it clear to me: my stress level was mounting and it was taking a toll on my health.

On May 10th of 2013 I learned that Lois Lerner had admitted to the targeting of tea party groups, and gave a quasi-apology while blaming some low level workers in their Cincinnati offices. We knew that was untrue from the moment she said it.

Lois Lerner's admission vindicated in the sense that we now could point to evidence that we were in fact targeted, but it also made things even harder for fundraising. People now knew that we were right, but they were more frightened than relieved. What we had joked about we learned was now true. If you speak out, the government will come after you. If the IRS can do this to a small group in Waco, Texas, they obviously could go after our donors or supporters.

Since that day we have learned the IRS was sharing taxpayer information and our organization's information with other agencies. We learned that Lois Lerner wasn't satisfied with just delaying our determination; she wanted people to be prosecuted. For what, we still can't figure out, but the fact that she involved the FBI and DOJ is intimidating and unsettling.

We have also learned that members of Congress were encouraging the IRS to target citizens. The shameful actions of certain Senators have destroyed the faith I once had in our system. When the ruling class can treat the rest of us as pawns in their corrupted game, we are no longer a free society. When a Senator can use the IRS as a weapon, they have too much power. When a letter to the right bureaucrat in the IRS can cause the trust of the American people in their government to be shattered, it has lasting effects on a free society. We won the Cold War to stop that kind of oppression from being thrust upon us by foreign powers. We should not have to tolerate it now just because it is home grown.

Senators, you need us. You need our money to keep our government running. You forget that it isn't yours. You didn't earn it. You are not entitled to it.

You have no right to tax our right to assemble. You have no right to TAX our speech! You have no right to force the most powerful agency in the federal government on us because you don't like a Supreme Court ruling. Gentlemen, you have forgotten the basic principle of our government – it's supposed to be government OF, BY, AND FOR THE PEOPLE. You have forgotten that your duty is to protect our freedoms, not use government power to suppress it. Some have failed their oath of office. Our country suffers for it.

The very government that I trusted to protect its citizens - engaged in a scheme to harass and intimidate me and my organization. We did nothing more than apply for a tax-exempt status in order to educate and engage our community on the issues that mattered most to us. Citizens working together to improve our communities, educate its citizens, and empower them is not only good for the individuals, it is necessary in our republic. Yet, because the name of our organization included "tea party" we were put on an Orwellian list of the less-equal by an unelected and overzealous bureaucrat at the IRS. Why that list existed in the first place is something the American People deserve to know.

The American people deserve answers, they deserve to know that this will never happen again. They deserve to be protected from people who will use their power and influence to destroy lives. If we allow this to pass today, it stands as precedent for tomorrow. I do not want my children to live in such a country. I will never stop fighting to keep it from becoming that way.

We need legislation that will protect the taxpayers and their information. Most of all, we must have legislation that prohibits misuse of government office to reward friends and punish enemies. Such is the very definition of tyranny. It is explicitly un-American. Any elected official or bureaucrat or government employee who does such a thing should be subject to harsh and swift justice. No retirement plan, no paid vacation, no bonuses. They must face severe civil and criminal penalties. The punishment must be so onerous that no one would even consider violating the law this way.

When is Congress going to act? When are you going to hold those responsible for the targeting accountable? When will we see justice for the improper sharing of our information? When will

you demand that action be taken against those that violated our rights? I suspect you won't, I hope I am wrong.

If you cannot protect our citizens from our government, who can?

**Senator Cruz Questions for the Record for**
**Edward Greim, Partner at Graves Garrett LLC**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**General Question**

1. **Are there any other points or issues that were not explored (or adequately explored) during the hearing that you would like to bring to our attention?**

Senator Cruz, thank you for providing me with this opportunity. I would like to emphasize that the threat of criminal prosecution, although a focus of the hearing, is not by itself sufficient to deter the conduct of individual bureaucrats in an organization like the Internal Revenue Service. We applaud efforts to bring wrongdoers to justice. However, prosecutorial discretion (among many other considerations) often results in a free pass even when publicly-available information suggests that a potential target's conduct would support an indictment.

In contrast, citizen actions for money damages or other relief do not depend on the peculiar sensitivities or predispositions of a prosecutor. Any aggrieved citizen may file such actions in our federal courts. The burden of proof for establishing liability is usually a preponderance of the evidence—not beyond a reasonable doubt. Civil discovery can yield a bounty of information, and even a stonewalling agency is subject to the orders of a federal judge or magistrate, as shown by recent events in the U.S. District Court for the District of Columbia.

Of course, civil causes of action can certainly be clarified, and civil litigation and discovery can be streamlined for citizens who choose to act as "private attorneys general." This was the subject of my initial written testimony, which proposed four reforms: (1) notification requirements when tax exempt organizations are "grouped" by the IRS for any reason; (2) an explicit damages remedy for taxpayers harmed by viewpoint-based targeting; (3) a bar on the IRS's misuse of the return information statute (which was originally intended to protect taxpayers' confidential information) to "protect" itself from embarrassing disclosures; and (4) a waiver of the IRS's deliberative process privilege in Freedom of Information Act litigation and civil discovery. All of these reforms will make it more likely that an "Army of Davids," through their own efforts, will be able to uncover documents like the attachment to this response. This is the email between Carter Hull and several other IRS officials in which Mr. Hull openly admits that all of the targeted groups "appeared to be a particular political ideology."

In conclusion, we urge the Subcommittee to take up the cause of civil litigants who turn to the federal courts to vindicate their federal constitutional and statutory rights against rogue federal bureaucracies. Rather than waiting for a prosecutor who may never act (and who may be politically inclined or pressured not to act), these citizen-litigants are taking matters into their own hands. In a very real way, they are the last line of defense for holding the federal government accountable to the Constitution. It is time for the people's legislators—including this Subcommittee—to fortify and provision that line, for it may well be there that the decisive battles are finally fought and the tide is turned.

EDG

# EXHIBIT V

**From:** Thomas Cindy M
**Sent:** Friday, June 10, 2011 4:14 PM
**To:** Paz Holly O; Seto Michael C
**Subject:** FW: Coordination Question - For meeting tentatively scheduled for 6/13

---

**From:** Thomas Cindy M
**Sent:** Wednesday, June 08, 2011 4:46 PM
**To:** Seto Michael C
**Cc:** Esrig Bonnie A; Bowling Steven F; Bell Ronald D; Hull Carter C; Kastenberg Elizabeth C
**Subject:** Coordination Question

Mike,

Ron Bell received the email directly below from Chip regarding the 'tea party cases" and the criteria for identifying these cases. It appears there is some duplication of efforts because Holly already asked me for information last week. Refer to my email below dated 6/2/2011. If you would like to discuss, please feel free to call me. Thanks.

---

**From:** Hull Carter C
**Sent:** Wednesday, June 08, 2011 1:52 PM
**To:** Bell Ronald D
**Cc:** Bowling Steven F; Kastenberg Elizabeth C
**Subject:** Coordination Question
**Importance:** High

Hi Ron,

In order to present a balanced picture to Lois Lerner at our briefing, we have a couple of questions concerning how the cases on your list were identified to be included in your list.

The EO Determinations Screening Checksheet lists "Political Activities - Sensitive Issues" and the IRM 7.20.5.4 describes cases such as these as "impact cases." On screening, how were the cases on your list identified as political? For example, were specific identifying words used, people or location, etc.? Did any particular person within EO indicate that these types of cases should be set aside and included on the list? Or was there a memorandum of some kind requesting that EO take a closer look at these types of cases? We noted that the list contained organizations that appeared to be of a particular political ideology. Were any other political ideology cases included (e.g. liberal, conservative, well-known, particular people or identifying particular people or affiliations)?

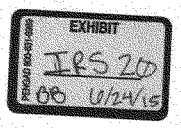
Thank you for your assistance. Any information you can gather on this would be most helpful. If you have any questions, you can contact me or Elizabeth Kastenberg at (202) 283-9468.

Chip

---

**From:** Thomas Cindy M
**Sent:** Thursday, June 02, 2011 10:35 PM
**To:** Paz Holly O
**Subject:** group of cases






IRSR0004116006

The email below from John Shafer, Screening Manager, outlines the criteria the screening group is using to identify cases as "tea party cases." This is criteria the screening group came up with based on cases they were seeing. If we don't want the screening group to include all of these type issues as "tea party cases," they would have no problem including or excluding certain cases. However, they need to be given the criteria to use. And, if we don't want certain cases included, then EOD still needs to know how the cases should be processed. I guess what I am trying to say is that it doesn't matter what the cases are called or how they are grouped, EOD needs guidance to ensure consistency.

Process: When the screening group starts seeing new type cases that have similar issues, they meet and come up with criteria to identify "emerging issue" and elevate information. "Emerging issue" cases are sent to Group 7822 (Steve Bowling's group) and we start coordinating with EOT to seek guidance.

Would you like for me to ask Bonnie Esrig, Steve Bowling, Group 7822 Manager, and Ron Bell, agent working "tea party cases" to participate in the briefing with Lois?

---

**From:** Shafer John H
**Sent:** Thursday, June 02, 2011 9:21 AM
**To:** Thomas Cindy M
**Cc:** Esrig Bonnie A; Bowling Steven F
**Subject:** RE: Tea Party Cases - NEED CRITERIA

Cindy,

The following are issues that could indicate a case to be considered a potential "tea party" case and sent to Group 7822 for secondary screening.

1. "Tea Party", "Patriots" or "9/12 Project" is referenced in the case file.
2. Issues include government spending, government debt and taxes.
3. Educate the public through advocacy/legislative activities to make America a better place to live.
4. Statements in the case file that are critical of the how the country is being run.

***John Shafer***
***Group Manager***
***SE:T:EO:RA:D:1:7838***
***Telephone: (513)263-3406***
***FAX: (513)263-5200***

---

**From:** Thomas Cindy M
**Sent:** Thursday, June 02, 2011 12:46 AM
**To:** Shafer John H
**Cc:** Esrig Bonnie A; Bowling Steven F
**Subject:** Tea Party Cases - NEED CRITERIA
**Importance:** High

John,

Could you send me an email that includes the criteria screeners use to label a case as a "tea party case?" BOLO spreadsheet includes the following:

Organizations involved with the Tea Party movement applying for exemption under 501(c)(3) or 501(c)(4).



IRSR0001116007

Do the applications specify/state "tea party?" If not, how do we know applicant is involved with the tea party movement?

I need to forward to Holly per her request below. Thanks.

---

**From:** Melahn Brenda
**Sent:** Wednesday, June 01, 2011 3:08 PM
**To:** Paz Holly O; Thomas Cindy M
**Subject:** RE: group of cases

Holly - we will UPS a copy of the case in #1 below to your attention tomorrow. It should be there Monday. I'm sure Cindy will respond to #2.

Brenda

---

**From:** Paz Holly O
**Sent:** Wednesday, June 01, 2011 2:21 PM
**To:** Thomas Cindy M
**Cc:** Melahn Brenda
**Subject:** group of cases

re: Tea Party cases

Two things re: these cases:

1. Can you please send me a copy of the [redacted] (EIN [redacted]) application? Lois wants Judy to take a look at it so she can summarize the issues for Lois.

2. What criteria are being used to label a case a "Tea Party case"? We want to think about whether those criteria are resulting in over-inclusion.

Lois wants a briefing on these cases. We'll take the lead but would like you to participate. We're aiming for the week of 6/27.

Thanks!

Holly

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**I. IRS Targeting Actors, Logistics, and Accountability**

**During your testimony, you indicated that you, in your capacity as Commissioner of the Internal Revenue Service (IRS), had had occasion to visit the White House "three or four times," and by your recollection, solely for the purpose of coordinating Patient Protection and Affordable Care Act implementation with the Secretaries of the Treasury and Health and Human Services. You expressed surprise, however, at the fact that former IRS employee Lois Lerner, who supervised the review of exempt organizations at IRS during her tenure, visited the White House approximately 35 times during her tenure. You also expressed to have no knowledge of a seven-hour White House visit by then and current IRS chief counsel William Wilkins.**

1. **Please provide the following information regarding former IRS Commissioner Douglas Shulman:**

   a. **The number of times Mr. Shulman visited the White House during his recent tenure as IRS Commissioner.**
   b. **The dates of each of those visits.**
   c. **A brief description of each of those visits.**
   d. **An agenda or summary for each of those visits.**
   e. **A list of IRS and non-IRS attendees at any meetings that took place during each of those visits.**

2. **Please provide the following information regarding Ms. Lerner:**

   a. **The number of times Ms. Lerner visited the White House during her tenure with IRS (which should be either 35 or in the vicinity of 35).**
   b. **The dates of each of those visits.**
   c. **A brief description of each of those visits.**
   d. **An agenda or summary for each of those visits.**
   e. **A list of IRS and non-IRS attendees at any meetings that took place during each of those visits.**

3. **Please provide the following information regarding Mr. Wilkins:**

   a. **The number of times Mr. Wilkins has visited the White House during his tenure with IRS.**
   b. **The dates of each of those visits.**
   c. **A brief description of each of those visits.**
   d. **An agenda or summary for each of those visits.**
   e. **A list of IRS and non-IRS attendees at any meetings that took place during each of those visits.**

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

Over the course of the last two years, the IRS has provided detailed information to the Treasury Inspector General for Tax Administration ("TIGTA") and to the four congressional committees that have conducted investigations concerning 26 U.S.C. § 501(c)(4) determinations (hereinafter, the "investigating committees")[1] concerning contacts and communications between IRS personnel and the Executive Office of the President ("EOP") – which includes, incidentally, not only the White House Office, but also such other entities as the Council of Economic Advisers and the Office of Management and Budget. The investigators also reviewed records from other sources, such as White House visitor access logs; and they interviewed several IRS employees who appeared on these logs between 2010 and 2013.

The investigators have uncovered no evidence of any White House contact or communication directing IRS personnel to "target" any taxpayer.

The report issued on August 5, 2015 by the Senate Finance Committee ("SFC") includes a series of detailed findings on this subject, particularly with respect to former Commissioner Douglas Shulman. We refer you to pages 198 through 200 of the report and to the exhibits cited therein. Of note, as stated in the "Additional Republican Views" section of SFC's report:

- "Shulman indicated that his meetings with White House staff concerned implementation of the Affordable Care Act; issues related to the IRS budget; tax provisions in the American Recovery and Reinvestment Act; economic roundtables and other high-level domestic policy matters involving the IRS; and events open to the general public, such as the Easter Egg Roll."

- "Shulman described four in-person meetings with President Obama: [1] a press conference with the President and Treasury Secretary Geithner about offshore tax proposals on May 4, 2009; [2] a meeting where Shulman presented the daily economic briefing to the President about general matters of the tax gap on October 21, 2009; [3] a meeting with the President and other heads of agencies about how to improve the government on June 6, 2011; and [4] a photo-op with the President on December 14, 2012 after Shulman's term as IRS Commissioner expired."

- "Shulman denied that the targeting of Tea Party organizations was ever discussed at any meeting with White House staff or the President."[2]

---

[1] The investigating committees are: the Senate Finance Committee; the Senate Homeland Security and Government Affairs Committee's Permanent Subcommittee on Investigations; the House Committee on Ways and Means; and the House Oversight and Government Reform Committee.

[2] In the above quotations, and unless otherwise noted in subsequent quotations from the Senate Finance Committee report, internal citations and quotations are omitted.

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

With respect to former Exempt Organizations ("EO") Director Lois Lerner, we have not identified any internal IRS records or publically available primary documents indicating that she attended any meetings or events at the White House or at other EOP components. We have seen reference in the media to Ms. Lerner having visited the White House "35 times," but we have seen nothing to substantiate this assertion.

With respect to Chief Counsel William Wilkins, as detailed in several prior submissions to the investigating committees, Mr. Wilkins attended one event at the White House, a meeting on April 23, 2012 that also included various officials from other agencies. The event was coordinated by the Presidential Personnel Office. According to materials sent to participants by the Presidential Personnel Office, the event concerned "improv[ing] the efficiency and effectiveness of the government"; participants were asked "to talk about creative and practical solutions to difficult issues to help your agency work more effectively." President Obama attended this event for a brief period.

**During your testimony, when I asked you if you had ever asked either former Attorney General Eric Holder or current Attorney General Loretta Lynch to appoint a special prosecutor who was not a donor to the Democratic Party, you stated that you had had "no conversations with either [Eric Holder or Loretta Lynch] *about this*" (emphasis added).**

4. **Have you ever had a live, telephone, or e-mail-based conversation with Eric Holder about any subject? If the answer is yes, please provide additional information.**

5. **Have you ever had a live, telephone, or e-mail-based conversation with Loretta Lynch about any subject? If the answer is yes, please provide additional information.**

While serving as IRS Commissioner, Commissioner Koskinen has had two communications with Attorney General Holder. Both were in-person communications at events attended by Messrs. Koskinen and Holder. These events were: (1) a press conference concerning a guilty plea in an offshore banking case in May 2014; and (2) a reception for the outgoing Assistant Attorney General for the Tax Division, also in May 2014. Mr. Koskinen had a number of other communications with Mr. Holder prior to becoming IRS Commissioner; many of these also predated Mr. Holder's tenure as Attorney General.

Commissioner Koskinen has not had any communications with Attorney General Lynch.

**During your testimony, when I asked you for additional information about how and why IRS settled with the National Organization for Marriage in the amount of $50,000 as a result of IRS's illegal leak of confidential taxpayer information to Matthew Meisel, Joe Solmonese, and/or other employees or associates of the Human Rights Campaign,[] you committed to providing that information after the hearing.**

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

6. **Please provide the following information regarding IRS's settlement with the National Organization for Marriage:**
   a. **The name or names of the IRS employee or employees who provided confidential taxpayer information to Mr. Meisel, Mr. Solmonese, or any other employee or associate of the Human Rights Campaign.**
   b. **All e-mail communications between IRS employees and Mr. Meisel, Mr. Solmonese, and/or any other employee or associate of the Human Rights Campaign.**
   c. **The details that led to the settlement with the National Organization for Marriage.**
   d. **Whether IRS made any criminal referrals to the Department of Justice regarding the conduct of any of its employees, given that that sharing of confidential taxpayer information is a violation of 26 U.S.C. 6103.**
   e. **All internal IRS investigation products into the unlawful leak of confidential Schedule B donor information of the National Organization for Marriage in 2012.**
   f. **The TIGTA report of the investigation into the unlawful leak of confidential Schedule B donor information of the National Organization for Marriage in 2012.**
   g. **All IRS responses to the Freedom of Information Act (FOIA) requests filed by the National Organization for Marriage seeking to learn how its Schedule B donor information was illegally released by IRS.**
   h. **All internal memoranda, e-mail communications, and other documents related to the FOIA requests from the National Organization for Marriage seeking to learn how and/or why its confidential donor schedule was released to the Human Rights Campaign.**
   i. **An explanation as to why IRS did not turn over to the National Organization for Marriage the responsive documents it had sought to obtain through its FOIA requests, thus forcing the National Organization for Marriage to sue IRS to learn how and/or why its confidential Schedule B donor information was illegally released.**
   j. **The name of the current or former IRS employee or employees who were in charge of the decision-making related to investigating the illegal release of the National Organization for Marriage donor schedules.**
   k. **Why this Committee should not view the mere fact of the settlement as definitive evidence that IRS believed that one or more IRS employees leaked confidential taxpayer information in violation of federal law.**
   l. **An explanation as to why IRS has failed to agree to pay the National Organization for Marriage attorney fees for the litigation that that organization was forced to file against IRS in order to learn the facts about the IRS violation of the taxpayer confidentiality provisions of 26 U.S.C. 6103.**

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

This has also been a subject of detailed submissions by the IRS to TIGTA and to the investigating committees over the last two years. Indeed, TIGTA conducted a separate investigation concerning the allegations of the National Organization for Marriage ("NOM") and reported its findings to the Senate Finance Committee (SFC), which in turn addressed them in its August 5, 2015 report. We refer you to pages 136 through 138 of the report and to the exhibits cited therein. In particular, according to the SFC's bipartisan findings:

- "TIGTA found that the 'disclosure was probably a work error by the IRS employee' and that its investigation 'did not identify any link between [the IRS employee] and the organizations or individuals involved in posting or publishing the unredacted forms.'"
- "In addition, TIGTA did not find any evidence that the disclosure was motivated by political animus."

As reflected in TIGTA's submission to the SFC, the Department of Justice ("DOJ") declined to prosecute the case criminally.

We note that in addition to the Senate Finance Committee's Report, a federal district court reviewed the evidence submitted by both parties following discovery and concluded that there was no material issue of fact that "[t]he record provides a specific timeline evidencing that NOM's Schedule B was released inadvertently as part of a single employee's mistake." *National Organization for Marriage v. United States*, 24 F.Supp.3d 518, 524 (E.D.Va. 2014), *appeal docketed* (4th Cir. No. 14-2363 December 15, 2014).

The IRS has improved its processes to reduce the risk of errant disclosures, like those in the NOM case, from recurring in the future. In particular, as described in the SFC report, Forms 4506-A (Requests for Public Inspection or Copy of Exempt or Political Organization IRS Forms) are processed through the IRS's Return and Income Verification Services (RAIVS) unit; the IRS has restricted RAIVS unit employees' access to only redacted Forms 990.

Certain of the questions that you pose – specifically, concerning the settlement of NOM's civil lawsuit – are best addressed to DOJ, which represents the government in federal courts litigation, makes the ultimate decisions as to the resolution of such lawsuits, and can speak most definitively as to whether the litigation-related material that you request is privileged or protected. The IRS does, however, reject the suggestion that a civil settlement inherently presupposes or reflects intentional misconduct on the part of its employees. As indicated above, and as multiple investigations to date have concluded, there was no such misconduct here.

**During your testimony, when I asked you for additional information about whether Republican Party campaign bundlers from the 2008 and/or 2012 presidential election cycles (whose names are publicly available) were disproportionately targeted for audits when compared to Democratic Party campaign bundlers for the same cycles, you committed to providing that information after the hearing.**

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

7. **Please provide the aggregate number of Republican Party presidential campaign bundlers from the 2008 presidential election cycle who were audited (and the year or years when those audits occurred).**

8. **Please provide the aggregate number of Republican Party presidential campaign bundlers from the 2012 presidential election cycle who were audited, either individually or whose business entities were audited (and the year or years when those audits occurred).**

9. **Please provide the aggregate number of donors to the general election campaign of Mitt Romney during the 2012 election cycle who were audited, either individually or whose business entities were audited (and the year or years when those audits occurred).**

10. **Please provide the aggregate number of donors to the Romney SuperPAC "Restore Our Future" during the 2012 election cycle who were audited, either individually or whose business entities were audited (and the year or years when those audits occurred).**

11. **Please provide the aggregate number of Democratic Party presidential campaign bundlers from the 2008 presidential election cycle who were audited (and the year or years when those audits occurred).**

12. **Please provide the aggregate number of Democratic Party presidential campaign bundlers from the 2012 presidential election cycle who were audited (and the year or years when those audits occurred).**

13. **Please provide the aggregate number of donors to the 2012 Obama campaign who were audited, either individually or whose business entities were audited (and the year or years when those audits occurred).**

14. **Please provide the aggregate number of donors to the pro-Obama SuperPAC, Priorities USA, who were audited, either individually or whose business entities were audited (and the year or years when those audits occurred).**

The IRS does not maintain information as to the political affiliations or preferences of individual taxpayers; nor does it track information showing to whom individual taxpayers donate funds or for whom they "bundle" funds. To the extent you are asking us to collect such information, we do not believe it would be proper to do so, and therefore we respectfully decline.

As indicated at the Subcommittee's hearing, if provided with lists of taxpayers, the IRS may be able to provide the aggregate audit rates pertaining to these taxpayer groups – provided that the

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

groups are large enough that the aggregation does not amount to a disclosure of confidential information pertaining to any particular taxpayers, which would violate 26 U.S.C. § 6103.

**15. Please answer the following question yes or no: Has the IRS at any time reviewed publicly disclosed campaign finance finance [*sic*] reports required by state or federal law to be filed and used donor information reflected in such campaign finance reports as one of the factors used by the IRS for purposes of selecting individuals, business entities, or other related entities for audit?**

**a. If the answer to the previous question is yes, please describe the process and procedures whereby such donor information is used to select such donors for IRS audits.**

**16. Please answer the following question yes or no: Has the IRS at any time reviewed an exempt organization's Schedule B donor information required by law to be filed as part of an exempt organization's Form 990 as one of the factors used by the IRS for purposes of selecting individuals, business entities, or other related entities for audit?**

**a. If the answer to the previous question is yes, please describe the process and procedures whereby such donor information is used to select such donors for IRS audits.**

The IRS does not, and ought not, care who a taxpayer votes for, contributes money to, or otherwise supports politically. However, for various reasons, the basic fact that a political contribution is made, and the amount of such a contribution, may be of significance to tax compliance. To begin with, tax-exempt organizations of various kinds must make representations as to their prior or prospective political activities, and a political contribution may bear upon the veracity of such representations. In addition, a contribution is ultimately a type of expenditure, and if a taxpayer spends a lot and yet reports very little income over time, that may be an indication of income tax evasion or other misconduct. As another example, there are specific rules regarding the deductibility of different types of expenditures – personal expenditures, general business expenditures, and gifts are all treated differently. Thus, the fact that an expenditure is political in nature may bear upon whether it was properly treated on a tax return, *i.e.*, whether a deduction was properly claimed.

In all events where it is called upon to assess tax compliance, the IRS must diligently review available and lawfully accessible information. This includes public records of various sorts, running the gamut from real estate records to business websites to securities filings. Of course, the IRS also routinely reviews information submitted on tax returns. When called upon, for reasons such as those described above, to determine whether or in what amount a political contribution was made, campaign finance reports are among the public records that may be consulted; and Schedule B donor information is among the tax information that may be

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

reviewed. As a practical matter, this information may not often be accessed at the audit selection phase; but there are circumstances where it may be relevant, for instance in the course of assessing the veracity of whistleblower claims or external audit referrals.

Ultimately, it is critical to ensure that this information is properly used – to assess the economics of a political contribution transaction and its tax implications – without regard for the manner in which the taxpayer(s) at issue exercise their political rights. In that regard, the IRS welcomed and supported the recent Government Accountability Office review of our EO audit selection processes. We were pleased to see that, in its thorough review of EO operations, the GAO found no evidence that any taxpayers were selected for audit in an unfair or biased manner. The GAO did, however, make recommendations for us to strengthen our internal controls to ensure that such abuse does not ever occur in the future. We have accepted and are working to implement the GAO's recommendations and similar measures throughout the agency.

Further, with respect in particular to tax forms and returns eliciting donor information, we are continually reviewing – as we do with all tax forms – whether our tax administration needs justify the reporting burdens imposed on taxpayers. As Commissioner Koskinen testified at the July 29, 2015 hearing, we are presently studying whether to revise or eliminate Form 990 Schedule B.

We wish to take this occasion to clarify two statements, on related subject matters, made at the July 29, 2015 hearing. First, Senators Sessions and Cruz inquired whether the IRS asks applicants for tax-exempt status for lists of members or donors. Commissioner Koskinen replied that we do not. This is correct – although as Commissioner Koskinen also noted, and as discussed above, there are tax forms that elicit information regarding donors and financial supporters. In addition, while the IRS will not request lists of *organization* members, it may, and often does, request information regarding *board* members and other persons who govern or exert control over organizations. We do so in the course of assessing whether there is any potentially improper private inurement or misappropriation of an organization's resources by the individuals who run it. For the same reasons, we may inquire as to whether and to what extent the organization provides payments or benefits to members.

Second, in an exchange with Senator Whitehouse, Commissioner Koskinen testified that he was not aware of any organization for which the IRS has revoked its tax-exempt status in the last two years. To clarify a point which may have been implicit in the questioning: There are a number of exempt organizations whose status was revoked in Fiscal Years 2014 or 2015, but none of these revocations was based on direct campaign activities.[3]

[3] With respect to one of these organizations, the revocation was based on the auditors' conclusion that the organization benefited a political party and its members, rather than the community as a whole. However, the activity at issue was not directly in the context of a campaign.

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**17. What is the IRS's Large Business and International Division, which purportedly "monitors" high wealth individuals and the networks of enterprises and entities they control?**

**18. Does "monitoring" high wealth individuals and networks of enterprises and entities they control include researching campaign finance reports of donors and Schedule B donor lists to track contributions to candidates, committees, and/or exempt organizations?**

**19. What other activities and research is involved in the IRS "monitoring" of high wealth individuals and networks of enterprises and entities they control?**

The IRS's Large Business and International Division ("LB&I") handles taxpayer services and enforcement initiatives focused on corporations, S-corporations, and partnerships with assets greater than $10 million, high-wealth individuals affiliated with such entities, and individuals with international attributes such as offshore sources of income. These are businesses that typically have certain attributes – they tend to employ large numbers of employees, deal with issues involving complicated tax law and accounting principles, and operate in a global environment – and LB&I personnel are specialized in working with such large organizations.

Beginning in 2009, LB&I began to take an enterprise examination approach to high-wealth individual taxpayers' examinations. Generally, these taxpayers have complex structures to manage business and investment activities, including interests in partnerships, trusts, S-corporations, private foundations, gifts, and other such arrangements. Tax return information is reviewed by revenue agents, along with industry data and other available public data, in order to ensure tax compliance.

Political activity does not factor into the selection or conduct of audits. LB&I does not ordinarily review campaign finance reports or Form 990 Schedule B donor lists,[4] nor are these organizations' or individuals' political contributions or activities tracked.

**During your testimony, when I asked you if IRS fired anyone who was involved in the targeting effort, you initially stated that five individuals were "dismissed." You subsequently, however, clarified that some "retired." It is unclear who, if anyone, was terminated for their involvement in the targeting effort.**

**20. Of the five unnamed individuals mentioned at the hearing, please provide the following:**

[4] As discussed above, in the rare instances where such information might be reviewed, it would be with an eye to the underlying transactions and their tax implications, without regard for the taxpayer's political preferences.

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

a. **The number of individuals who were involuntarily terminated from IRS employment (and their names).**
b. **The number of individuals who were permitted to retire from IRS employment (and their names).**
c. **The number of individuals who were transferred, or allowed to transfer, from IRS to another office within the Department of the Treasury (and their names).**
d. **The number of individuals who were transferred, or allowed to transfer, from IRS to another federal agency (and their names).**

**Holly Paz has been identified in other congressional investigative work into IRS's targeting efforts as the Acting Manager of the Exempt Organizations Technical Unit in Washington, D.C., at several key points during the scandal, and was the IRS employee in 2010 who was among the first, if not *the* first, to insist that IRS field offices send information about Tea Party groups applying for non-profit status to Washington for review.**

21. **Does Ms. Paz still work for IRS? If the answer is yes, please provide additional information about her title, office, and current salary (if higher than it was in 2010).**

**Judy Kindell has been identified in other congressional investigative work into IRS's targeting efforts as Ms. Lerner's senior technical advisor and *de facto* right hand throughout the latter's shepherding of the Tea Party targeting. Ms. Kindell appears in IRS communications about Tea Party targeting in 2011, as a result of specific instructions from Ms. Lerner to keep Ms. Kindell involved in updates about the targeting effort.**

22. **Does Ms. Kindell still work for IRS? If the answer is yes, please provide additional information about her title, office, and current salary (if higher than it was in 2011).**

**Carter Hull has been identified in other congressional investigative work into IRS's targeting efforts as one of the first IRS employees to be involved in the Tea Party application screening process.**

23. **Does Mr. Hull still work for IRS? If the answer is yes, please provide additional information about his title, office, and current salary (if higher than it was in 2010).**

Although the Privacy Act, 5 U.S.C. § 552a, precludes us from discussing personnel matters regarding particular employees in a public context, we can brief you or your staff on these matters in private, pursuant to § 552a(b)(9), as we have already done with the four investigating committees. However, prior to such a briefing, we would respectfully request a statement explaining the Subcommittee's jurisdiction underlying this line of inquiry, as subsection (b)(9)

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

provides that we may disclose personnel information to congressional (sub-)committees only "to the extent of matter within [their] jurisdiction."

**II. Details Regarding IRS Records Destruction**

**During your testimony, you used several different terms to explain what had happened to Ms. Lerner's hard drive. At different points in your testimony, you stated that her hard drive had "collapsed," "self-destructed," and "crash[ed]".**

**Recent congressional testimony indicates that Ms. Lerner's hard drive was rendered inoperable as a result of intentional, physical damage by unknown actors. On June 25, 2015, Treasury Inspector General for Tax Administration J. Russell George and Deputy Inspector General Timothy P. Camus testified before the House Committee on Oversight and Government Reform regarding the effort to recover Ms. Lerner's e-mail. In their joint written testimony,[] Messrs. George and Camus wrote the following:**

> **On Monday, June 13, 2011, Ms. Lerner reported that she found her computer inoperable when she entered her office, and the malfunction was reported to the IRS Information Technology (IT) staff. The assigned IT specialist determined the hard drive had crashed, and following standard protocol, he placed a new hard drive in Ms. Lerner's laptop. In addition to the hard drive, a Hewlett Packard (HP) contractor replaced the laptop's keyboard, track pad, heat sink, and fan. When interviewed, both the IRS IT technician and the HP technician reported that they did not note any visible damage to the laptop computer itself. When asked about the possible cause of the hard drive failure, the HP [presumably, Hewlett Packard] technician opined that heat-related failures are not seen often, and *based on the information provided to him, the hard drive more than likely crashed due to an impact of some sort.* However, because *the HP technician did not examine the hard drive* as part of his work on the laptop, it could not be determined why it crashed. (Emphasis added)**

1. **Please provide the following documents and information:**

   a. **All paperwork associated with the reporting of the damage to Ms. Lerner's laptop hard drive on or about June 13, 2011, including any e-mail communications (from Ms. Lerner or anyone else) specifically requesting assistance with the laptop hard drive.**
   b. **All written and/or photographic damage assessments of Ms. Lerner's laptop hard drive, as written or produced on, about, or after June 13, 2011, by**

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**either IRS personnel, Hewlett Packard technicians, or any other federal or non-federal personnel or entities.**

**c. All forensic analysis conducted or reports that were written or produced after June 13, 2011, by either IRS personnel, Hewlett Packard technicians, or any other federal or non-federal personnel or entities.**

**d. The name of the Hewlett Packard technician who inspected Ms. Lerner's laptop hard drive on or about June 13, 2011.**

**e. The whereabouts of Ms. Lerner's laptop prior to June 13, 2011 (i.e., whether it was in Ms. Lerner's office, or whether Ms. Lerner had it in her possession outside of IRS office space).**

**f. The justification for the destruction of Ms. Lerner's laptop hard drive after June 13, 2011.**

**g. Whether IRS procedure has since changed regarding the destruction of employee hard drives.**

**In April 2010, former head of the Office of Special Counsel (OSC) Scott J. Bloch was convicted in federal court of withholding information from congressional investigators by hiring a private computer service to erase the contents his office hard drive. Bloch was ultimately sentenced to prison time and community service for this violation of federal criminal law.**

**2. Would you agree that Ms. Lerner should be held criminally liable if it can be determined that she personally damaged her laptop hard drive in order to prevent the extraction of information from that hard drive?**

**3. Would you agree that Ms. Lerner should be held criminally liable if it can be determined that she asked someone to damage her laptop hard drive in order to prevent the extraction of information from that hard drive?**

**4. If your answer is no to either questions 2. or 3., please explain in detail how you would distinguish Ms. Lerner's case from Mr. Bloch's case.**

TIGTA, not the IRS, conducted a forensic investigation into the circumstances of Ms. Lerner's hard drive crash and the data loss arising therefrom. Once TIGTA began this investigation, in deference to TIGTA and per the requests of TIGTA and other law enforcement agencies, the IRS specifically refrained from interviewing certain of its employees, so as not to prompt or affect these employees' prospective testimony or otherwise interfere with or complicate the ongoing law enforcement efforts.

TIGTA produced an extensive report of investigation ("ROI") setting forth its findings on these data loss issues. TIGTA did not publish its ROI, but it did brief and provide the report to the IRS and to the four investigating committees, including the SFC. The SFC included the ROI and certain of the ROI exhibits in the appendix to its own August 5, 2015 report. We refer you to

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

these documents, which may be found in pages 4041 through 4111 of the SFC appendix. We also refer you to pages 19 through 21 of the SFC report, which summarize and discuss the evidence concerning Ms. Lerner's hard drive crash.

As you note, TIGTA could not, on the basis of this evidence, conclude that Ms. Lerner tampered with her hard drive. To the contrary, TIGTA reported that:

- The IRS IT specialist who initially responded to Ms. Lerner's complaint of a failed computer "did not observe any indications of tampering or physical damage to Lerner's laptop."

- The Hewlett-Packard employee referenced in your question, who also worked on Ms. Lerner's laptop, "did not recall, or note in his records, any damage to the laptop."

Your hypothetical questions regarding Ms. Lerner therefore assume facts well beyond those evidenced.

**During your testimony, you also indicated that the destruction of 422 backup tapes that contained as many as 24,000 archived e-mail messages sent to or from Ms. Lerner were magnetically erased by IRS employees at the IRS record storage facility in Martinsburg, West Virginia, on or about March 4, 2014. You specifically indicated that the erasure of these tapes was a "mistake," that it occurred despite the existence of instructions to not erase those tapes, that the erasure was conducted by "two [IRS] employees on the midnight shift in Martinsburg, West Virginia," and that you sincerely did not know about the erasure of these tapes until "almost a year later."**

5. **Please provide the names and contact information of the two "midnight shift" IRS employees at the Martinsburg facility so that Committee staff may interview them.[]**

As noted above, 5 U.S.C. § 552a precludes us from providing information regarding specific employees in this context; and pursuant to § 552a(b)(9), in advance of any non-public briefing, we would respectfully request a statement explaining the Subcommittee's jurisdiction underlying this inquiry. We also note that TIGTA has conducted multiple interviews of the employees in question, detailed its findings with respect to the degaussing of the tapes in its report of investigation (including in the parts of the report cited above), and briefed the four investigating committees on the matter.

Among TIGTA's findings: "Interviews of IRS employees… provided no evidence that the IRS employees involved intended to destroy data on the tapes or hard drives in order to keep this information from Congress, the DOJ or TIGTA. No evidence was uncovered that any IRS employees had been directed to destroy or hide evidence from Congress, the DOJ, or TIGTA."

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

6. **What specific steps did you personally initiate upon receipt of Chairman Darrell Issa's House Committee on Oversight and Government Reform subpoena on February 14, 2014, in order to ensure that Ms. Lerner's e-mails were not destroyed?[]**

7. **On what specific date were you specifically told that the 422 backup tapes in question were erased?**

8. **What was the name of the individual who told you that the 422 backup tapes in question were erased?**

9. **Prior to the date on which you were affirmatively told that the 422 backup tapes in question had been erased, had you ever made any inquiries either about the status of the tapes or about ensuring production of the tapes to the House Committee on Oversight and Government Reform? If the answer is yes, please provide the date or dates of such inquiries and the name or names of the individuals with whom you spoke about these tapes.**

    a. **If you did not make any inquiries either about the status of the tapes or about ensuring production of the tapes to the House Committee on Oversight and Government Reform prior to the date you were affirmatively told that the 422 backup tapes in question had been erased, please explain how it can reasonably be said that you were working to ensure production of these tapes or the information on these tapes to the House Committee on Oversight and Government Reform?**

Again, this matter was thoroughly investigated by TIGTA, and it has been thoroughly documented in TIGTA's report of investigation, including in the portions of the ROI appended to the Senate Finance Committee report. We refer you to those documents, which may be found in pages 4041 through 4111 of the SFC report appendix.

The SFC also documented the IRS's efforts to preserve documents in light of the congressional and law enforcement investigations. In particular, as noted on page 29 of the SFC's bipartisan findings:

- "The IRS issued litigation holds in May and June 2013 for records related to this matter."
- "In May 2013, IRS Chief Technology Officer Terrence Milholland sent an e-mail to his senior managers responsible for destroying media and asked them to preserve media that might contain e-mail or data related to 'investigations' that were occurring."
- "On February 3, 2014, [Counselor to the Commissioner Catherine] Duval sent a message to Deputy CIO [Steven] Manning confirming a previous conversation with him about an

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

> apparent lack of Lois Lerner email from before May 9, 2011. Per their earlier discussion, Duval asked Manning to take several steps, including to 'ensure that the earliest possible network back-up tapes are available for review' and 'confirm that no back-up tapes have been recycled since the hold on recycling was instituted last spring.'"

As TIGTA found in its ROI, notwithstanding these document retention directives, IRS personnel degaussed the disaster recovery tapes at issue: "Interviews of the IRS employees at Martinsburg and review of e-mails between employees revealed confusion relating to the CTO [document retention] policy," which "led to a staggered implementation of the [document holds] until June 2014, when [the degaussing of media] ceased at Martinsburg." Although, as discussed above, TIGTA found that this document destruction was not intentional, the IRS's failure to promptly implement a litigation hold is clearly unacceptable. With the benefit of TIGTA's report, which meticulously documents the communications breakdown among records management personnel, the IRS is implementing records management improvements, including those discussed at the Subcommittee's hearing.

**10. During your tenure as IRS Commissioner, have you ever e-mailed any IRS employee or contractor who works or worked at the IRS record storage center in Martinsburg, West Virginia, for any reason? If the answer is yes, please explain and provide those e-mail communications.**

With the exception of agency-wide messages and similar communications directed to broad groups of employees, and correspondence exchanged through the "Commissioner's Mailbox" (described below), Commissioner Koskinen has not emailed any employees or contractors at the Martinsburg, West Virginia facility.

The Commissioner's Mailbox is an account to which any IRS employee may submit a message, question, or idea, to which the Commissioner's Office ordinarily responds. We have identified five Commissioner's Mailbox submissions from Martinsburg employees, and in each instance the Commissioner responded. These include: (1) an August/September 2014 email exchange concerning processes for filling IRS vacancies; (2) a December 2014 email exchange concerning processes for filling IRS vacancies; (3) a January/February 2015 email exchange concerning IRS budget cuts and potential furloughs; (4) a February 2015 email exchange concerning IRS budget cuts and the early release of seasonal employees; and (5) a February 2015 email exchange concerning IRS budget cuts and potential furloughs.

**During your testimony, you also confirmed that you had told Congress on June 20, 2014, that all of Ms. Lerner's "email has been preserved. Nothing has been lost. Nothing has been destroyed." This statement during congressional testimony was made seven days after IRS sent Congress formal notification that the agency had destroyed e-mail communications sent and received by Ms. Lerner between January 2009 and April 2011, and four days after TIGTA launched a formal investigation into the lost or destroyed Lerner e-mail.**

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**11. Did you testify before Congress in June 20, 2014, without first verifying that Ms. Lerner's e-mail communications had in fact been preserved?**

**12. Did you personally approve the notification to Congress on or about June 13, 2014, regarding the destruction of Ms. Lerner's January 2009-April 2011 e-mail communications?**

**13. Were you personally notified about the launch of TIGTA's formal investigation into the lost or destroyed Lerner e-mail on or about June 16, 2014?**

Again, this matter has been thoroughly investigated and documented by TIGTA, and we refer you to the portions of the TIGTA ROI reproduced in the SFC report and appendix, cited above.

With respect to document preservation, we discussed above the various efforts undertaken through mid-2014 to retain potentially relevant records. We regret that these efforts failed with respect to the 422 disaster recovery tapes referenced in your prior questions, which pertained to an email server that the IRS had decommissioned years earlier. But TIGTA's investigation has made clear that these tapes were not erased in bad faith. As stated above, with the benefit of TIGTA's findings, and with additional input from the investigating committees and from the National Archives and Records Administration, we are implementing records management improvements.

Moreover, through the spring of 2014, the IRS undertook an expansive search for Lois Lerner emails in the locations where we believed such emails were most likely to be found – namely, within the email accounts of the IRS employees whom Ms. Lerner supervised and worked with.[5] In the course of several months, we were able through this process to locate approximately 24,000 emails from the period effected by Ms. Lerner's hard drive crash, and we promptly produced these materials to TIGTA and to the investigating committees. We also produced various additional documents requested by Congress, ultimately responding to over 80 separate congressional inquiries, and we made available over 50 employees for interviews. And when we reached the limits of what we could do on our own – for example, due to our IT department's limited ability to access disaster recovery tape data – we cooperated with the efforts of TIGTA and the other investigators. In fact, TIGTA's June 2015 congressional testimony (which you cite above) notes the cooperation provided by IRS personnel, including for instance the manager at the Martinsburg records facility who helped TIGTA investigators understand the disposition of media associated with the decommissioned email server.

[5] In particular, we searched the custodial accounts of 88 employees whom the investigating committee staffs deemed most relevant to their investigations. We periodically reviewed our custodian list and search methodology with the investigators, and over the course of the investigations, we added several additional custodians, including Ms. Lerner's secretaries and executive assistants, pursuant to the investigating committees' requests.

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

Ultimately, our document collection and production efforts were not perfect, and we accept responsibility for our shortcomings described above. But the IRS stands by our June 2014 assertions to Congress that we conducted a broad and thorough search, in good faith, for Lois Lerner emails and for other records pertaining to 26 U.S.C. § 501(c)(4) determinations.

**Despite your recent testimony and the full sweep of publicly available information on the IRS targeting scandal, it is arguably still unclear how much targeting-related information, including e-mail communications and other electronic documents, has been lost or destroyed. It is also unclear if the e-mail communications or documents of other IRS employees, other than Ms. Lerner, have been lost or destroyed. Absent additional information, it appears that most, if not all, of the lost or destroyed information occurred during your tenure as IRS Commissioner.**

14. **What is the total volume of IRS e-mail communications and other documents that might have shed light on this investigation but have been lost or destroyed?**

15. **Please confirm that the e-mail communications of the following IRS employees from the time period January 2009 to the present have been preserved and will continue to be preserved until such time as this Committee waives this preservation order:[]**

    a. **Douglas Shulman.**
    b. **William Wilkins.**
    c. **Holly Paz.**
    d. **Judy Kindell.**
    e. **Carter Hull.**

16. **Can you explain how most if not all of the lost or destroyed IRS e-mail communications that might have shed light on this investigation were lost or destroyed during your tenure as IRS Commissioner?**

We refer you to TIGTA's analysis of the data loss relating to the above hard drive crashes, which is reproduced in the SFC report appendix, beginning at page 4090.

Our existing document holds on this matter remain in effect, including with respect to the individuals referenced in your question. We implemented these holds in response to requests from the investigating committees and agencies. To date, we have not received a separate preservation request from the Senate Judiciary Committee.

**III. IRS Prioritization of Taxpayer Resources**

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**During your testimony, you indicated several times that the Internal Revenue Services [*sic*] generally lacked the resources to properly collect tax revenues and conduct audits of individuals who were potentially not paying taxes. At different points in your testimony, you commented that IRS was faced with "declining resources," and how its budget had declined by $1.2 billion over the last five years.[] You also implied at several points that IRS has poor information technology infrastructure, and that IRS's budget situation was to blame.**

**A recent House Committee on Ways and Means report[] demonstrates, however, that IRS has made strategic, internal spending decisions that have actually led to the availability of *less* funding for agency use, and that modest reforms could make approximately an additional $200 million available each year for agency purposes.[] The report also notes that IRS collects approximately $500 million in revenue a year, and that this revenue is deposited in an offsetting account called the User-Fee Account.[6]**

1. **Please review pages 5-7 the specific recommendations made by the cited House Committee Ways and Means report and explain why IRS has not opted to implement any or all of these suggestions (particularly given how making all of these changes could result in an additional $200 million for agency use).**

2. **Given that it is within IRS's capacity to reform its spending habits in order to generate more revenue, do you think it is accurate for you to claim in your recent testimony that IRS does not have the resources to do its job?**

3. **Given your refusal as IRS Commissioner to voluntarily pursue these wise spending reforms, should Congress mandate these spending reforms via legislation?**

The report that you reference was released on April 22, 2015. On that same day, Commissioner Koskinen testified before the Oversight Subcommittee of the Ways and Means Committee, and he explained that these recommendations were unlikely to create any efficiencies with respect to the IRS's budget. For example, the Way and Means Committee recommended outsourcing the collection of tax debts to private collections agencies. The IRS attempted this at various points in the past. It found that any increased revenue collected by the private agencies was offset – sometimes more than offset – by the costs IRS incurred to oversee and regulate the private collectors, including to ensure that they did not mislead or improperly coerce taxpayers. In the

---

[6] This is incorrect. The Ways and Means Committee report states that the IRS planned to *allocate* $481 million from the user-fee account for Fiscal Year 2015. This is greater than the amount of fees collected this year, because it includes carryover funds from previous years. We estimate the amount of user fees collected for Fiscal Year 2015 to be approximately $300 million, which is consistent with the average annual user fee collections over the last five years. Our use of user-fee account funds is discussed in response to your question below.

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

present day, with the unfortunate prevalence of scam artists pretending to be IRS agents in order to defraud taxpayers, overseeing private debt-collectors would be all the more challenging and resource-intensive. The IRS would have to be deeply engaged in helping taxpayers to distinguish between fraudsters and private collectors, and as Commissioner Koskinen explained to the Oversight Subcommittee, we believe that the costs associated with these efforts would render our tax collection operations *less* efficient, not more.

The Oversight Subcommittee also criticized the IRS's expenditure to retain outside legal counsel to assist in a large and complex tax controversy (which is further discussed in response to your questions below). But as Commissioner Koskinen explained at the April 22, 2015 hearing, this was a very small outlay relative to the tax amount in controversy, and we believe this expenditure is justified in light of the fact that it may help the IRS recover a large amount of additional tax revenue through the corporate audit in question.

We refer you to the transcript of the April 22, 2015 hearing, which details the IRS's responses to these and other recommendations made by the Ways and Means Committee.

4. **Please provide the following information regarding IRS's User-Fee Account:**

   a. **The total amount of funding currently available to IRS via the User-Fee Account.**
   b. **The sources of the funding in the User-Fee Account (i.e., penalties, fines, non-punitive fees, etc.).**
   c. **The spending limitations on the funding in the User-Fee Account.**
   d. **Line-item accounting for IRS use of User-Fee Account funding (broken down by Fiscal Year going back to Fiscal Year 2011).**
   e. **An explanation as to why the funding available via the User-Fee Account cannot be used to improve customer service, information technology infrastructure, or any of IRS's other asserted needs.**
   f. **An explanation why the User-Fee Account should not be statutorily eliminated, and all fee revenue that currently goes into that account be instead sent to the general fund of the Treasury.**

This issue was also discussed in detail at the April 22, 2015 hearing of the House Ways and Means Oversight Subcommittee, and we refer you to the transcript of that hearing.

As Commissioner Koskinen explained at that hearing, in the past, when Congress has underfunded taxpayer services, the IRS has attempted to fill that gap using funds from the user-fee account. This included spending: $168 million from the user-fee account on customer service for Fiscal Year 2012; $185 million for Fiscal Year 2013; and $179 million for Fiscal Year 2014. By contrast, for the Fiscal Year ending September 30, 2015, the IRS estimates that it will only have spent $45 million from the user-fee account on taxpayer services. This is in part because Congress directed the IRS to implement the Affordable Care Act ("ACA") and Foreign

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

Account Tax Compliance Act ("FATCA"), but did not allocate funds required to support ACA and FATCA implementation. In addition, Congress sharply reduced appropriations for IRS operations support for Fiscal Year 2015, including for such critical agency functions as sustaining the IT infrastructure that supports the filing and processing of tax returns. The original intent of the user-fee account was to fund critical needs and statutory mandates, and accordingly, the IRS directed a substantial portion of the user-fee account funds for Fiscal Year 2015 to fulfill these operational requirements and statutory mandates. As a result, regrettably, taxpayer service suffered. However, had we not allocated the user-fee account funds as described above, last year's tax-filing season would have been jeopardized.

Ultimately, as discussed at the April 22, 2015 hearing, we agree with the Ways and Means Committee's central premise – that customer service should not have to suffer in order to keep the filing season running smoothly. It is for this reason that we have respectfully asked Congress to fully fund all of the IRS's services and enforcement operations, as well as its information technology and other required operations support expenditures.

**During your testimony, you also indicated that the cost of IRS's response to both the TIGTA and congressional investigations was in the vicinity of $20 million. During a colloquy with Senator Richard Durbin (D-Illinois), you specified that the $20 million price tag was a result of resource use and employee costs (meaning in terms of lost productivity).**

5. **Please break down that $20 million federal investigation price tag, according to:**

   a. **How much was spent on material or resource support for IRS's investigation response (broken down by Fiscal Year going back to Fiscal Year 2011).**

   b. **How much was spent on the salaries or other compensation provided to federal IRS employees who have played a role in IRS's investigation response (broken down by Fiscal Year going back to Fiscal Year 2011).**

   c. **How much was spent on the salaries or other compensation provided to non-federal IRS contractors who have played a role in IRS's investigation response (broken down by Fiscal Year going back to Fiscal Year 2011).**

Of the approximately $20 million the IRS has spent on its efforts to comply with congressional and law enforcement requests and cooperate in the § 501(c)(4) determinations investigations, approximately $7 million was for IT-related expenditures, such as the development and maintenance of the database that we have used to store, search, review, and produce documents. The remaining sum – at this point, well over $13 million – is for labor costs, including for the attorneys and support personnel who have searched, reviewed, and produced documents, as well as for the IT personnel who have worked on the document collection and production. These are IRS and Office of Chief Counsel employees; contractor costs are not included in this "labor

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

costs" tabulation but rather in the above estimate for IT-related expenditures.[7] We reached this labor costs figure by pro-rating an hourly rate based on the annual salaries of the employees involved and multiplying the employees' rates by the hours they logged to the project.

6. **Has IRS calculated the cost to taxpayers for the multi-year IRS targeting effort by an unknown number of IRS employees? If the answer is yes, please provide that dollar figure.**

We acknowledge that taxpayers were burdened, unacceptably, as a result of the management failures documented by TIGTA and the investigating committees. We regret in particular the delays that many organizations experienced as they waited for their applications for tax-exemption to be processed. We do not minimize these burdens in the least, although we are unable to quantify them with a dollar figure. However, respectfully, we do not agree with your characterization of these events ("the multi-year IRS targeting effort…").[8]

7. **It has been documented in the above-cited House Committee on Ways and Means report that IRS has hired outside law firms to support ongoing litigation.[] Please inform the Committee if IRS has hired one or more law firms to assist IRS with its investigation response, providing the following details:**

   a. **If one or more law firms was retained, the name or names of those law firms.**
   b. **The amount of money spent on law firm(s) (broken down by Fiscal Year going back to Fiscal Year 2011).**
   c. **Why the hiring of law firm(s) was needed, given the number of attorneys employed by IRS.**
   d. **The IRS account or fund from which funding was drawn to cover the costs of law firm(s) (i.e., the User-Fee Account or a different account).**
   e. **The amounts paid to each of the private law firm(s) to defend the litigation filed against the IRS and individual IRS employees related to the IRS Targeting Scandal.**

8. **Please also inform the Committee if IRS has hired one or more outside consulting or public relations firms to assist IRS with its investigation response, providing the following details:**

   a. **If one or more consulting or public relations firms was retained, the name or names of those firms.**

---

[7] These costs pertained to the development and maintenance of the aforementioned database.

[8] Incidentally, we have not pointed out in this submission every instance where we disagree with your characterization of the facts. Please do not take our failure to object as acquiescence that we necessarily agree with the facts as you have stated them.

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**b. The amount of money spent on consulting or public relations firm(s) (broken down by Fiscal Year going back to Fiscal Year 2011).**
**c. Why the hiring of consulting or public relations firm(s) was needed, given the number of individuals employed by IRS.**
**d. The IRS account or fund from which funding was drawn to cover the costs of consulting or public relations firm(s) (i.e., the User-Fee Account or a different account).**

To begin with, we refer you to the transcript of the hearing conducted by the House Ways and Means Oversight Subcommittee on April 22, 2015, when the law firm expenditure that you reference was discussed. As noted at that hearing, the amount of this expenditure is far eclipsed by the tax amount in controversy in that case; and for the reasons stated at the hearing and in subsequent congressional briefings, we determined that this expenditure was: (a) legally authorized; and (b) justified from a tax administration standpoint, in that it advances the public's interest in assisting the IRS to recover a potentially very large amount of tax due.

With respect to the IRS's efforts in responding to the congressional and law enforcement investigations, no outside law firm, consulting firm, or public relations firm has been retained or consulted.

**During your testimony, you indicated that IRS was unable to properly retain and/or store [*sic*]**

**9. Please provide detailed information regarding IRS's expenditures on information technology, including:**

**a. IRS's information technology budget (broken down by Fiscal Year going back to Fiscal Year 2011).**
**b. Specific information technology contracts and/or equipment purchases that were made with information technology budget funds.**
**c. An explanation as to why these contracts and/or equipment purchases were prioritized over e-mail archiving and digital storage improvement.**
**d. A justification for current information technology budget levels if this funding is not being used for e-mail archiving and digital storage.**

We welcome the opportunity to brief you on our IT operations, on the growing list of challenges that we are facing in this arena, and on our efforts to efficiently provide high-quality services to taxpayers. We discussed these issues at length in a July 2, 2015 submission to the Senate Finance Committee, which we are ~~enclosing~~ separately delivering to you for your reference.

As detailed in that ~~the enclosed~~ correspondence, our IT operations have performed commendably in managing ever more complex tax-filing seasons, processing a growing number of tax returns and delivering refunds in a timely manner. As discussed above, this effort has included the

**Senator Cruz Questions for the Record for**
**John Koskinen, IRS Commissioner**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

implementation of various new provisions of law, including those contained within FATCA, the ACA, and biannual tax extenders, even where Congress has declined to allocate funds for such implementation. Through all of this, we are entrusted with the obligation to keep taxpayer information secure. As detailed in the ~~attached~~ above-referenced submission, this too has become ever more challenging, in light of the growing sophistication of criminal elements attempting to exploit our systems, and in light of the proliferation of data breaches in the public and private sectors, which have rendered personal information more vulnerable across the digital economy. Yet securing taxpayer data ranks among our highest priorities, and our efforts in this regard require the resources and attention of divisions throughout the Service. Finally, as discussed above, we are committed to improving our capacities to respond to requests for information from Congress, Freedom of Information Act requests, and discovery requests in civil litigation.

All of this, in turn, has required continuing our efforts to modernize our antiquated IT systems. Modernization will enable us not only to maintain, but to continue to improve, the services that we can offer our customers. As Commissioner Koskinen has testified on numerous occasions, our ultimate objective is to provide taxpayers with the sort of secure online services that they have come to expect from financial institutions in the digital age. Ultimately, this will not only improve the taxpayer experience, but also create efficiencies within our operations that will enable us to stretch our future budgets further. Accordingly, we have asked, and continue to ask, Congress to assist us by making the investments that will allow us to make these improvements.

**Senator Cruz Questions for the Record for**
**Cleta Mitchell, Partner at Foley & Lardner LLP**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**I. Possible False Testimony of Koskinen**

- During your testimony, when I asked you if you believed that IRS Commissioner John Koskinen had made any false statements or misstatements during his hearing testimony, you indicated you would need to review the hearing transcript and get back to the Committee.

1. **Please indicate if you believe if Mr. Koskinen made any false statements or misstatements during his hearing testimony on July 22, 2015, or during any prior congressional hearing testimony.**

2. **If you believe Mr. Koskinen made any false statements or misstatements during his hearing testimony on July 22, 2015, or during any prior congressional hearing testimony, do you believe any of those false statements or misstatements would subject him to criminal liability under:**

   a. **18 U.S.C. 1001?**

   b. **Any other provision of Title 18?**

**II. Federal Crime Statutes of Limitation**

- During your testimony, you specifically stated that you believed former and current IRS employees (and possibly other figures in this Administration) may have violated federal criminal laws.

3. **Please indicate what the respective statutes of limitation are for the federal criminal statutes you believe current and former IRS employees (and possibly others in this Administration) may have violated.**

**III. General Question**

4. **Are there any other points or issues that were not explored (or adequately explored) during the hearing that you would like to bring to our attention?**

**Senator Cruz Questions for the Record for**
**Cleta Mitchell, Partner at Foley & Lardner LLP**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**Responses from Cleta Mitchell, Esq. to Questions:**

**1. Please indicate if you believe if Mr. Koskinen made any false statements or misstatements during his hearing testimony on July 22, 2015, or during any prior congressional hearing testimony.**

Yes, it is my belief that Mr. Koskinen made false statements during his July 22, 2015 testimony before the Subcommittee. He made material misstatements and false testimony regarding a number of subjects, including but not limited to his false statements about the GAO Report regarding the procedures by which the IRS selects exempt organizations for audit.

*Factual background:*

At the request of Rep. Peter Roskam (R-IL), Chairman of the House Ways & Means Subcommittee on IRS Oversight, the GAO conducted an examination of the procedures and processes utilized by the IRS for purposes of selecting exempt organizations for audit by the IRS. See *US GAO – 15-514: IRS Examination Selection – Internal Controls for Exempt Organization Selection Should Be Strengthened,* Published: Jul 13, 2015. Publicly Released: Jul 23, 2015 ("GAO Report")

The GAO Report did not review the selection process related to audits of individual or business taxpayers; rather, the GAO Report reviewed the selection process related to audits of exempt organizations.

The GAO Report further did *not* review any specific audit or taxpayer; rather, the GAO Report reviewed the procedures followed by the IRS, and whether the procedures comply with formal IRS guidelines and whether the formal guidelines are adequate to ensure that no exempt organization could be subjected to political or other bias in being selected for an IRS audit.

The Executive Summary to the GAO Report stated as follows:

> "Exempt Organizations ("EO") uses various controls intended to help it select exempt organizations for examination, in an effort to adhere to TE/GE's mission of "applying the tax law with integrity and fairness to all." For example, EO maintains well-documented procedures for several examination selection processes in the Internal Revenue Manual (IRM), IRS's primary, official source of instructions to staff; staff can deviate from procedures that are included in the IRM only with executive management approval. In focus groups, EO staff generally told GAO that these procedures were valuable tools to help them administer the tax law."
>
> "<u>However, there are several areas where EO's controls were not well designed or implemented. The control deficiencies GAO found increase the risk that EO could select organizations for examination in an unfair manner—for example, based on an organization's religious, educational, political, or other views.</u>"

**Senator Cruz Questions for the Record for**
**Cleta Mitchell, Partner at Foley & Lardner LLP**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

*False Testimony of Mr. Koskinen Regarding the GAO Report.*

- Mr. Koskinen mischarachterized and testified (wrongly) that the GAO Report reviewed selection procedures for audits of individual taxpayers.
  - The GAO Report did not review audit selection procedures for individual taxpayers.

- Mr. Koskinen testified (wrongly) that the GAO reviewed the IRS process and issued a report on exam selection processes, with suggestions on 'how to make it better, but finding no examples of anyone who was improperly selected for an audit'.

  - Not only did the GAO Report not review the IRS selection process for individual IRS audits, the GAO Report did not review any specific audits or audit 'targets'. Rather, the GAO reviewed the procedures as to how exempt organizations become subject to an audit. And the GAO Report found that the IRS fails to follow its own procedures, fails to document management override of written protocols and lacks necessary internal controls to ensure that exempt organizations do not fall victim to political bias by IRS agents in being selected for audit.

- Mr. Koskinen testified (wrongly) that the IRS does "not track people by whether they're bundlers from (sic) one organization".

  - Not only did Mr. Koskinen flatly state that the IRS does not 'track people' who may be bundlers for one candidate, party or organization, he failed to disclose that the GAO Report specifically discussed the fact that the IRS *does* have a "Global High Wealth program" for which EO conducts some examinations. According to the GAO Report, "the Global High Wealth program is managed by IRS's Large Business and International Division, which monitors high wealth individuals and the networks of enterprises and entities they control."
  - Mr. Koskinen cannot state truthfully from his personal knowledge that the IRS does "not track people by whether they're bundlers…" The IRS clearly tracks ("monitors") high wealth individuals. How exactly *does* the IRS monitor high wealth individuals? What is the source of the surveillance the IRS conducts? Does the "Global High Wealth Program" rely upon publicly available lists of campaign donors and bundlers for purposes of conducting its "monitoring"? Does the Global High Wealth Program rely upon the donor information filed by exempt organizations as a factor in targeting such donors for audit? Mr. Koskinen clearly mislead the Subcommittee insofar as

**Senator Cruz Questions for the Record for**
**Cleta Mitchell, Partner at Foley & Lardner LLP**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

this line of questioning.by failing to disclose the existence and function of the Global High Wealth Program and what sources of information are used by the IRS agents and employees assigned to this division of the IRS.

- Further to this point, Mr. Koskinen, in response to questions from the Ranking Member, continued to fabricate both what the GAO Report reviewed and what it found, even as Sen. Coons seemed to be extending a 'lifeline' to Mr. Koskinen with respect to whether the IRS has (as many suspect) audited more Republican and conservative donors and bundlers than those who donate to and bundle for President Obama's campaign.
    - Sen. Coons: "If it seems, as you review this aggregate data, that more of one group of bundlers than others (have) been audited, it would also be instructive if you would suggest whether there are neutral IRS-based previously approved auditing principles that might lead towards one group being more heavily audited than the other'.
    - Response from Mr. Koskinen: "...As I say, GAO has looked at our audits of individuals, are all selected automatically. They've looked at it and determined that while we need to monitor that to make sure our—we khow what our objectives are in how we're proceeding, they found no evidence that that system, in any way, biases the audit process and the audit selection process."
    - Mr. Koskinen repeatedly mischaracterized the GAO Report which did not 'look at the IRS audits of individuals" .
    - The GAO Report did NOT find that exempt organizations subjected to audit were 'automatically selected" and, in fact, spent most of the report describing the various ways in which an exempt organization might be selected for audit and reviewing those protocols and procedures – and concluded the systems *are* susceptible to abuse and political targeting and recommended needed changes to guard against that in the future.

*Other False Statements by Mr. Koskinen during his Testimony / Response to Questions from the Subcommittee:*

- Mr. Koskinen stated that the "major attraction of a c4, if you are a social welfare organization, primarily is you don't reveal your donors."
    - That statement is false and indicative of a political bias espoused by the left wing radicals who wish to silence their political opponents.
    - A social welfare organization whose members wish to be involved in grassroots lobbying and the public policy process, then formation as a 501(c)(4) entity is the appropriate legal mechanism and the *primary*

**Senator Cruz Questions for the Record for**
**Cleta Mitchell, Partner at Foley & Lardner LLP**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

attraction is that contributions to the organization are not subject to income tax.

- Mr. Koskinen did not truthfully describe the history of his role and statements regarding the 'missing' Lois Lerner emails.
  - A complete timeline of Mr. Koskinen's various statements and misstatements regarding the Lois Lerner emails is included in the record from the House Oversight and Government Reform Committee, placed in the record of the hearing by Sen. Cruz.
  - Mr Koskinen has continued to testify to "facts" about which he has no personal knowledge regarding the fact that the emails were missing, the search for the emails, and that the emails were "destroyed" and could not be retrieved. To this Subcommittee, Mr. Koskinen testified that he was unaware about the investigation into the missing Lerner emails and did not learn of the 'investigation' into the missing emails until April (2014). However, he testified under oath to the House Oversight & Government Reform Committee in late March 2014 that 'all of Lois Lerner's emails would be turned over to the Committee".

- Mr. Koskinen testified to the Subcommittee that he had been "advised" that all records relevant to the investigation by Congress into the IRS scandal were "intact" and "would be turned over".
  - Mr. Koskinen repeatedly testifies based on hearsay and staff representations to him, but testifies as though it is from his personal knowledge. ("That's what I had been advised. That's what I believed. I testified *at the time* truthfully to what I knew"). But the point is that Mr. Koskinen has made no effort to avail himself of facts and personal, first-hand knowledge.
  - Mr. Koskinen *failed* to disclose to the Subcommittee on July 29, 2015 that yet another personal email address used by Lois Lerner during her tenure at the IRS has been discovered. When did he learn about this additional email account? Why did he not advise the Subcommittee of its existence during the hearing on July 29, 2015? What has he done since learning of the additional email address to search the IRS records and turn over all emails to/from the newly discovered personal email account used by Lois Lerner? NONE of the emails turned over to Congress have previously included emails using this account. Mr. Koskinen has repeatedly stated that 'all the emails from Lois Lerner have been turned over to the Congress." That is simply not true.

- Mr. Koskinen testified that 'there's no evidence that anybody outside the IRS had …any conversations with her (Lois Lerner) about that (targeting of tea party groups) or that she even had directives internally."

**Senator Cruz Questions for the Record for**
**Cleta Mitchell, Partner at Foley & Lardner LLP**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

- However, Mr. Koskinen also testified that he has conducted *no* investigations or reviews of the targeting scandal.
- Mr. Koskinen's statements that there is "no evidence" that anyone outside the IRS had involvement with the targeting cannot be truthful when he has admitted that he has conducted no separate inquiry. He testified that he has "no information" about the meeting on April 23, 2012 attended by the IRS Chief Counsel William Wilkins at the White House, a meeting with President Obama and 12 others, that lasted seven hours. If Mr. Koskinen has 'no information' about that meeting, how can he truthfully testify to the Subcommittee that there is 'no evidence' that anyone outside the IRS had 'any conversations' with Lois Lerner or that she had any internal directives.'The point is that he is not truthfully testifying to the Congress on this subject. He has made it a point NOT to ask questions about what transpired and then testifies in blanket statements that no evidence exists regarding the subject about which he refuses to inquire. His testimony is false. The correct statement is that he does not know the answers because he has not asked the questions.

- Mr. Koskinen falsely stated during the hearing that the 21 disks containing information about more than 12,000 exempt organizations were 'shared with the public' and not turned over solely to the Department of Justice.
  - The House committees investigating the IRS targeting of conservative and tea party groups discovered during the course of its investigation that Lois Lerner communicated with the Public Integrity Section of the Department of Justice regarding possible criminal investigation of citizens groups, which was followed by the delivery by the IRS to the FBI of millions of pages of files regarding these organizations, including information and materials that are confidential under the statute and which should not have been disseminated by the IRS to another agency.
  - There is *no* evidence that these files were 'publicly released' and Mr. Koskinen's testimony to the contrary is false.

**2. If you believe Mr. Koskinen made any false statements or misstatements during his hearing testimony on July 22, 2015, or during any prior congressional hearing testimony, do you believe any of those false statements or misstatements would subject him to criminal liability under:**

**a. 18 U.S.C. 1001?**

**b. Any other provision of Title 18?**

**Senator Cruz Questions for the Record for**
**Cleta Mitchell, Partner at Foley & Lardner LLP**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

**Response:** It is my belief that Mr. Koskinen has repeatedly violated 18 U.S.C. §1001 in his testimony to various congressional committees, including this Subcommittee, as indicated above. It is also my belief that Mr. Koskinen has violated the general perjury statutes 18 U.S.C. §1621.

**II. Federal Crime Statutes of Limitation**

- During your testimony, you specifically stated that you believed former and current IRS employees (and possibly other figures in this Administration) may have violated federal criminal laws.

**5. Please indicate what the respective statutes of limitation are for the federal criminal statutes you believe current and former IRS employees (and possibly others in this Administration) may have violated.**

**Response:**

1. The statute of limitations for violation of 18 U.S.C. §1001 is five years from when the crime was committed: which would be the date of the false statement or the date a false document is submitted to a federal official.

2. The statute of limitations for violation of 18 U.S. C. §1621 is also five years from the date of the false statement.

**III. General Question**

**6. Are there any other points or issues that were not explored (or adequately explored) during the hearing that you would like to bring to our attention?**

**Response:**

The Subcommittee should inquire further into the existence, role, activities and purposes of the "Global High Wealth Program" within the IRS.

What is it?
What does it do?
How does it "monitor" taxpayers?

**Senator Cruz Questions for the Record for**
**Cleta Mitchell, Partner at Foley & Lardner LLP**
**Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts**
**Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options**
**Wednesday, July 29, 2015**

Has that program – or *any* program within the IRS – searched, obtained, reviewed, or relied upon publicly available lists of campaign donors and bundlers for purposes of conducting its "monitoring" and selecting individuals or entities for audit?

Does the Global High Wealth Program rely upon the donor information filed by exempt organizations as a factor in targeting such donors for audit?

What other units of the IRS 'monitor' high wealth individuals and entities?
What is the definition of 'high wealth' and what is the impact of such monitoring?

What other "surveillance" is conducted by the IRS regarding taxpayers?

In other words, Mr. Koskinen testified to the Subcommittee that the IRS relies solely on the tax return for purposes of determining who is selected for an IRS audit. That is clearly false, and Mr. Koskinen mislead the Subcommittee.by failing to disclose the existence and function of the Global High Wealth Program and the sources of information and procedures used by the IRS agents and employees assigned to this division of the IRS to monitor and subject certain taxpayers to "surveillance".

The existence of this 'unit' should be investigated by the Subcommittee and its tactics and activities carefully reviewed.

If the IRS is obtaining and reviewing campaign finance reports to identity donors and bundlers to candidates, campaigns – and if the IRS is using the confidential donor schedules required to be filed by exempt organizations – as a basis for subjecting those donors to additional scrutiny, audit and IRS targeting, that is a clear violation of the First Amendment and must be stopped.

ACLJ
American Center
for Law & Justice

August 11, 2015

The Honorable Charles E. Grassley
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Ted Cruz
Chairman
United States Senate Committee on the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
Washington, D.C. 20510

Dear Chairman Grassley and Chairman Cruz:

Thank you for allowing me to testify about the targeting of my clients at the hands of the Internal Revenue Service. I am grateful for your continued interest in the matter.

I appreciate the invitation to respond to the following question for the record:

1. **Are there any other points or issues that were not explored (or adequately explored) during the hearing that you would like to bring to our attention?**

I am grateful for a thorough hearing, and the opportunity to submit my entire testimony for the record. While we did not have an opportunity to discuss all aspects of that testimony during the hearing, I request your review of the entire submission. I have nothing further for the record at this time.

Again, thank you for the invitation to appear before the subcommittee.

Sincerely,

Jay Alan Sekulow

Jay A. Sekulow
Chief Counsel

FOLEY
FOLEY & LARDNER LLP

ATTORNEYS AT LAW
WASHINGTON HARBOUR
3000 K STREET, N.W.
SUITE 600
WASHINGTON, D.C. 20007-5109
202.672.5300 TEL
202.672.5399 FAX
WWW.FOLEY.COM

WRITER'S DIRECT LINE
202.295.4081
cmitchell@foley.com EMAIL

CLIENT/MATTER NUMBER
999100-0130

August 5, 2015

The Honorable Ted Cruz, Chairman
Senate Judiciary Subcommittee on Oversight,
Agency Action, Federal Rights and Federal Courts
185 Dirksen Senate Office Bldg
Washington, DC 20510

Re: Correcting the Record – Sen. Whitehouse Misstatements Regarding Tea Party Patriots During July 29, 2015 Subcommittee Hearing

Dear Chairman Cruz:

The undersigned serves as legal counsel to Tea Party Patriots ("TPP") and to Tea Party Patriots Citizens Fund ("TPPCF"). We hereby request that this letter and the accompanying documents be placed in the record of the hearing conducted by the Subcommittee last Wednesday, July 29, 2015 ("the hearing"), to formally correct the erroneous and incorrect statements and inferences regarding Tea Party Patriots by Sen. Whitehouse during the hearing. Please also find enclosed documentation that clearly demonstrate that Sen. Sheldon's comments and statements during the hearing regarding Tea Party Patriots were false and misleading.

During the hearing, Sen. Whitehouse directed a series of questions to Ms. Jenny Beth Martin, President and Co-Founder of Tea Party Patriots, beginning by asking whether Tea Party Patriots had told the IRS on its Form 1024 application for exempt status that it was not planning to involve itself in political campaign intervention. He then proceeded to read an excerpt from an article that appeared in *Forbes* that discussed certain political involvement related to Tea Party Patriots in 2014 and inferred that Tea Party Patriots and Ms. Martin had made a false statement to the IRS on its application for exempt status.

Sen. Whitehouse's inferences and statements are <u>incorrect.</u>

The facts are as follows:

1. Tea Party Patriots as a 501(c)(4) organization is allowed to engage in partisan political activity, but has not engaged in such activities. Thus, there is no false statement on the organization's Form 1024.

FOLEY

FOLEY & LARDNER LLP



2. The email referenced by Sen. Whitehouse (attached to this letter) was a fundraising email sent on November 1, 2014, by the TPPCF, the independent expenditures only PAC, established by Tea Party Patriots for the purpose of engaging in partisan political campaign activities. In fact, the *reason* TPPCF was formed was to carry out the political functions in which Tea Party Patriots does not engage. *See November 1, 2014 email from Tea Party Patriots Citizens Fund*

3. Ms. Martin advised Sen. Whitehouse that the email to which he referred was likely from TPPCF, and not Tea Party Patriots. That, in fact, was exactly the case. *See Transcript of Hearing, pp. 93-95*

4. However, Sen. Whitehouse returned to the issue just prior to the conclusion of the hearing, now referring to a September 1, 2014 email from Tea Party Patriots and a project in which it engaged during 2014 called "Make Harry Reid Cry". There were a variety of communications in this project – including a fundraising effort for non-partisan get-out-the-vote efforts during the fall of 2014. Harry Reid was NOT a candidate for office in 2014. The email did not reference any political party or other candidate on the ballot in 2014. It is not, therefore, a partisan political communication, Sen. Whitehouse's inferences to the contrary. *See September 1, 2014 Email from Tea Party Patriots.*

Sen. Whitehouse has been one of the leading critics of 501(c)(4) organizations who exercise their First Amendment rights to engage in political activities, going so far as to demand that the Department of Justice *prosecute* 501(c)(4) organizations and their leaders who engage in partisan campaign activities. Sen. Whitehouse's inferences at the hearing are, therefore, puzzling to say the least. Tea Party Patriots does not engage in partisan campaign intervention and established a PAC to conduct such activities. Then, when its PAC (TPPCF) communicates about partisan political topics, Sen. Whitehouse suggests that Tea Party Patriots has done something improper.

We believe that perhaps it is the messenger AND the message to which Sen. Whitehouse objects, as he is a staunch opponent of the mission, programs and values of Tea Party Patriots - and has made every effort to silence groups such as TPP and citizens philosophically aligned with the tea party movement.

Tea Party Patriots has long believed that the IRS targeting scandal arose in no small part because of people like Sen. Whitehouse who were and continue to be intent upon misusing government power and agencies to destroy critics of big government, such as Tea Party Patriots.

FOLEY

FOLEY & LARDNER LLP



In fact, in 2014 Tea Party Patriots filed an ethics complaint against Sen. Whitehouse and other Senators for their abuse of power and their misuse of taxpayer dollars to silence citizens and citizens groups and to keep us from being able to criticize what we believe to be an erosion of American freedom and the undermining of our constitutional rights and framework. Specifically, Tea Party Patriots complained to the Senate Ethics Committee that Sen. Whitehouse had demanded, through his position as Chairman of the Senate Judiciary Subcommittee on Crime and Terrorism, that the Department of Justice investigate and prosecute *citizens groups* for engaging in political activities. A copy of the Ethics Complaint filed by Tea Party Patriots against Sen. Whitehouse last year is attached to this letter.

Tea Party Patriots has conducted itself in 100% compliance with both the letter and the spirit of the laws governing 501(c)(4) organizations. Despite the fact that the law *allows* Tea Party Patriots to engage in partisan campaign activities, Tea Party Patriots has elected not to do so. It has made one contribution of its treasury funds to TPPCF, which was a very small percentage of Tea Party Patriots program expenditures for the year in which the contribution was made. Other than that contribution, there have been no expenditures by Tea Party Patriots for campaign and political activities.

The inferences by Sen. Whitehouse to the contrary are unacceptable and false.

We will appreciate the inclusion of this information in the formal record of the hearing, in order that the record is fully corrected to reflect the facts.

Please contact me if you have additional questions. Thank you for conducting the hearing and for the opportunity to appear and participate in this important proceeding.

Sincerely,

*/S/ Cleta Mitchell*

Cleta Mitchell, Esq., Counsel
Tea Party Patriots

cc: Sen. Shelden Whitehouse

Obtained by Judicial Watch, Inc. via FOIA

**From:** Paz Holly O
**Sent:** Monday, July 23, 2012 3:04 PM
**To:** Seidell Thomas F TIGTA; Medina Cheryl J TIGTA
**Subject:** FW: TIGTA DOCUMENT REQUEST

---

**From:** Thomas Cindy M
**Sent:** Thursday, July 19, 2012 3:51 PM
**To:** Paz Holly O
**Subject:** TIGTA DOCUMENT REQUEST

---

**From:** Thomas Cindy M
**Sent:** Wednesday, March 17, 2010 4:14 PM
**To:** Shafer John H
**Cc:** Camarillo Sharon L
**Subject:** RE: High Profile Case --- EO Technical Would Like It

Sounds good. Thanks John.

---

**From:** Shafer John H
**Sent:** Wednesday, March 17, 2010 1:48 PM
**To:** Thomas Cindy M
**Cc:** Camarillo Sharon L
**Subject:** RE: High Profile Case --- EO Technical Would Like It
**Importance:** Low

I will sent 2 of these cases to EO Technical , one 501(c)(4) & one 501(c)(3). I can hold the remaining cases in my group "75" number unless you want them held some ot her place.

***John Shafer***
***Group Manager***
***SE:T:EO:RA:D:2:7838***
***Telephone: (513)263-3406***
***FAX: (513)263-5200***

---

**From:** Thomas Cindy M
**Sent:** Wednesday, March 17, 2010 1:21 PM
**To:** Shafer John H
**Cc:** Camarillo Sharon L
**Subject:** FW: High Profile Case --- EO Technical Would Like It

Obtained by Judicial Watch, Inc. via FOIA

John,

Per Holly's e-mail directly below, EOT does not want all of the tea party cases. They only want 2 of them and want us to hold the remainder. We can discuss who should hold them if you would like. Let me know. Thanks.

---

**From:** Paz Holly O
**Sent:** Wednesday, March 17, 2010 12:40 PM
**To:** Thomas Cindy M
**Cc:** Grodnitzky Steven
**Subject:** RE: High Profile Case --- EO Technical Would Like It

Cindy,

Thanks for the heads up. We have one Tea Party case up here - that was sent up from Determs just a few weeks ago - but had not yet heard that there were more. I think we should take a few more cases (I'd say 2) and would ask that you hold the rest until we get a sense of what the issues may be. Then when we will work with Determs in working the other cases.

FYI - I will be on b(6) and b(7)(C)\personal information Steve will be acting as head of EO Tech.

Holly

---

**From:** Thomas Cindy M
**Sent:** Wednesday, March 17, 2010 12:10 AM
**To:** Paz Holly O
**Subject:** FW: High Profile Case --- EO Technical Would Like It
**Importance:** High

Holly,

Did you know about these additional 10 tea party cases? Do you want all of them or do you only want a few and then give us advice as to what to do with the remaining?

---

**From:** Shafer John H
**Sent:** Tuesday, March 16, 2010 9:35 AM
**To:** Thomas Cindy M
**Cc:** Camarillo Sharon L
**Subject:** RE: High Profile Case --- EO Technical Would Like It
**Importance:** Low

Cindy,

We have identified a total of 10 Tea Party cases. Three case have been approved, two 501(c)(4) and one 501(c)(3). I have collected the other cases and will forward them to EO Technical.

Obtained by Judicial Watch, Inc. via FOIA

***John Shafer***
***Group Manager***
***SE:T:EO:RA:D:2:7838***
***Telephone: (513)263-3406***
***FAX: (513)263-5200***

---

**From:** Thomas Cindy M
**Sent:** Friday, February 26, 2010 8:36 AM
**To:** Shafer John H
**Cc:** Camarillo Sharon L
**Subject:** FW: High Profile Case --- EO Technical Would Like It

EO Technical would like the case. Please thank Jack for identifying the issue and elevating it. Thanks.

---

**From:** Paz Holly O
**Sent:** Friday, February 26, 2010 8:23 AM
**To:** Thomas Cindy M
**Subject:** RE: High Profile Case --- Does EO Technical Want It?

I think sending it up here is a good idea given the potential for media interest. Thanks.

---

**From:** Thomas Cindy M
**Sent:** Thursday, February 25, 2010 10:00 PM
**To:** Paz Holly O
**Subject:** High Profile Case --- Does EO Technical Want It?

Holly,

We have a Form 1024 for: [redacted] b(3)\6103

We're wondering whether EO Technical wants this case because of recent media attention. More specifics about activities is in the original e-mail below. Let me know your thoughts. Thanks.

---

**From:** Camarillo Sharon L
**Sent:** Thursday, February 25, 2010 5:19 PM
**To:** Thomas Cindy M
**Subject:** FW: Case # [redacted] b(3)\6103
**Importance:** Low

Cindy: Please let 'Washington' know about this potentially politically embarassing case involving a 'Tea Party' organization. Recent media attention to this type of organization indicates to me that this is a "high profile" case. In addition to 501(c)(4) typical legisslative activities,

Obtained by Judicial Watch, Inc. via FOIA

the applicant, in answer to Part II, item 15 of the of the 1024 application indicates possible future political candidate support. Shown below are excerpts from the application describing its legislative and possible future political activities.

The case is currently being held in the Screening group, pending a response from EOT.

**Sharon L. Camarillo**
**EO Determinations Manager, Area 1**

**9350 E. Flair Drive**
**El Monte, CA 91731-2885**

**Telephone: 626-312-3608 ext 5026**
**Fax: 626-312-2928**

---

**From:** Shafer John H
**Sent:** Thursday, February 25, 2010 10:14 AM
**To:** Camarillo Sharon L
**Cc:** Koester John J
**Subject:** FW: Case # [redacted] b(3)\6103
**Importance:** Low

Sharon, this case will be sent to inventory for further development. Political campaigns on behalf or or in opposition to any political candidat e do not promote social welfare, but an exempt 501(c)(4) may intervene in political campaigns as long as its primary activity is the promotion of social welfare and would be subject to the tax imposed by IRC 527. I will hold this case for a decision conce rning this type of organization may be considered a "High Profile Case".

Thanks,

***John Shafer***
***Group Manager***
***SE:T:EO:RA:D:2:7838***
***Telephone: (513)263-3406***
***FAX: (513)263-5200***

---

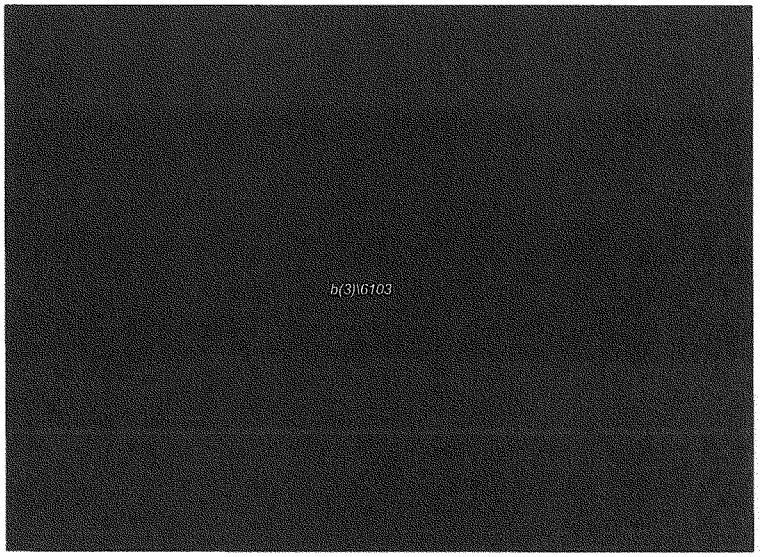
Obtained by Judicial Watch, Inc. via FOIA

**From:** [redacted]
**Sent:** Thursday, February 25, 2010 12:51 PM
**To:** Shafer John H
**Subject:** Case # b(3)\6103
**Importance:** Low

John
Here is the case number for the "Tea Party" application for 501(c)(4) exemption that we discussed this morning. Recent media attention to this type of organization indicates to me that this is a "high profile" case. In addition to 501(c)(4) typical legisslative activities, the applicant, in answer to Part II, item 15 of the of the 1024 application indicates possible future political candidate support. Shown below are excerpts from the application describing its legislative and possible future political activities.
Thanks
Jack

Part II. Activities and Operational Information (Must be completed by all applicants)

Provide a detailed narrative description of all the activities of the organization —past, present, and planned. Do not merely refer to or repeat the language in the organizational document. List each activity separately in the order of importance based on the relative time and other resources devoted to the activity. Indicate the percentage of time for each activity. Each description should include, as a minimum, the following: (a) a detailed description of the activity including its purpose and how each act ivity furthers your exempt purpose; (b) when the activity was or will be initiated; and (C) where and by whom the activity will be conducted.



Obtained by Judicial Watch, Inc. via FOIA

**From:** Morgan Marc J
**Sent:** Tuesday, May 14, 2013 7:36 AM
**To:** Paz Holly O; Neuhart Paige
**Subject:** RE: URGENT: data question
**Attachments:** Form 1023 & 1024 Receipts - IRC 3-4-5-6 FY2008-2009.xls

---

**From:** Paz Holly O
**Sent:** Monday, May 13, 2013 5:23 PM
**To:** Neuhart Paige; Morgan Marc J
**Subject:** FW: URGENT: data question

Actually I do need something as soon as you get it - I have been asked to update the chart below to include FY 12. Thanks!

---

**From:** Paz Holly O
**Sent:** Monday, May 13, 2013 5:07 PM
**To:** Neuhart Paige; Morgan Marc J
**Subject:** FW: URGENT: data question

Nevermind! You had already done this last year!

---

**From:** Paz Holly O
**Sent:** Monday, May 13, 2013 5:02 PM
**To:** Wallbaum Jeffrey S
**Subject:** RE: URGENT: data question

Jeff,

FY 2008 data on number of c4 applications received is below.

EO Determination **501(c)(4)** Application Receipts by Fiscal Year and Case Type

| Year | A | F | I | P | R | S | T | Invalid | Total |
|---|---|---|---|---|---|---|---|---|---|
| 2008 | 19 | 0 | 1,410 | 0 | 2 | 99 | 101 | 0 | 1631 |
| 2009 | 21 | 0 | 1,571 | 0 | 0 | 97 | 62 | 0 | 1751 |
| 2010 | 22 | 0 | 1591 | 0 | 0 | 118 | 4 | 0 | 1735 |
| 2011 | 8 | 0 | 2,242 | 0 | 1 | 13 | 1 | 0 | 2265 |

Initial (New) applications received highlighted in yellow

**Case Types:**
I: Initial
A: Amendment

T: Termination of Exempt Status
P: Termination of Private Foundation Status
F: Private Foundation Follow-UP
R: Returned, Post Review
S: Re-Opening of FTE (Failure to Establish) Case

---

**From:** Wallbaum Jeffrey S
**Sent:** Monday, May 13, 2013 4:52 PM
**To:** Paz Holly O
**Subject:** RE: URGENT: data question

Hey, just checking if we'll be able to get this today. Thanks,

*Jeffrey S Wallbaum*
*Senior Advisor, DCSE*
*202/927.0242*

---

**From:** Paz Holly O
**Sent:** Monday, May 13, 2013 2:24 p
**To:** Wallbaum Jeffrey S
**Subject:** RE: URGENT: data question

I will have my analyst pull those and will send them to you.

---

**From:** Wallbaum Jeffrey S
**Sent:** Monday, May 13, 2013 2:20 PM
**To:** Paz Holly O
**Subject:** Re: URGENT: data question

Good exp. It would be great to get fiscal numbers for 08 so we have a single set out there.

Jeffrey S Wallbaum
Program Advisor, DCSE
202/927.0242

---

**From:** Paz Holly O
**Sent:** Monday, May 13, 2013 02:07 PM Eastern Standard Time
**To:** Wallbaum Jeffrey S
**Cc:** Flax Nikole C
**Subject:** RE: URGENT: data question

I will go back through email and double check but I believe TIGTA numbers are FY numbers and the numbers I gave Nikole (which were given in response to a Congressional) where calendar year.

---

**From:** Wallbaum Jeffrey S
**Sent:** Monday, May 13, 2013 1:59 PM
**To:** Paz Holly O
**Cc:** Flax Nikole C
**Subject:** URGENT: data question

Holly -- Do you know why these application counts differ from the ones in the Tigta report? (Tigta shows FY09=1751, FY10=1735, FY11=2265 and FY12=3357.)

Thanks!

*Jeffrey S Wallbaum*
*Senior Advisor, DCSE*
*202/927.0242*

**From:** Flax Nikole C
**Sent:** Monday, May 13, 2013 11:13 a
**To:** Wallbaum Jeffrey S
**Subject:** FW: data question

**From:** Paz Holly O
**Sent:** Thursday, May 09, 2013 4:26 PM
**To:** Flax Nikole C; Lerner Lois G
**Subject:** RE: data question

Increase in section 501c4 applications
2008 - 1410
2009 - 1571
2010 - 1591
2011 - 2242
2012 - 3398
2013 - 2,092 (through March 26, 2013)

**From:** Flax Nikole C
**Sent:** Thursday, May 09, 2013 4:21 PM
**To:** Lerner Lois G; Paz Holly O
**Subject:** Re: data question

Right - this is fine - just need the application numbers.

**From:** Lerner Lois G
**Sent:** Thursday, May 09, 2013 04:01 PM Eastern Standard Time
**To:** Paz Holly O; Flax Nikole C
**Subject:** RE: data question

**Don't think we need that--we're focusing on the 300--so don't kill your self**

*Lois G. Lerner*
Director of Exempt Organizations

**From:** Paz Holly O
**Sent:** Thursday, May 09, 2013 3:30 PM
**To:** Lerner Lois G; Flax Nikole C
**Subject:** RE: data question

136 c4 approvals as of 5/9/13

23 c4 withdrawn (I think the reference to 30 must have been to all withdrawn apps - c3 and c4 as that number now stands at 37)

Will get back to you as to total number of c4 apps shortly. Have a meeting I have to do.

---

**From:** Lerner Lois G
**Sent:** Thursday, May 09, 2013 2:32 PM
**To:** Flax Nikole C; Paz Holly O
**Subject:** RE: data question

**Have sent Cindy the question**

*Lois G. Lerner*
Director of Exempt Organizations

---

**From:** Flax Nikole C
**Sent:** Thursday, May 09, 2013 2:30 PM
**To:** Lerner Lois G; Paz Holly O
**Subject:** RE: data question

Yes

---

**From:** Lerner Lois G
**Sent:** Thursday, May 09, 2013 2:23 PM
**To:** Flax Nikole C; Paz Holly O
**Subject:** RE: data question

**I assume you want you want to know about whether the 120 or 30 have increased, not whether we've received more applications**

*Lois G. Lerner*
Director of Exempt Organizations

---

**From:** Flax Nikole C
**Sent:** Thursday, May 09, 2013 1:59 PM
**To:** Paz Holly O; Lerner Lois G
**Subject:** data question

Is the following the most recent or has there been any movement we should recognize. Thanks

- Of the approximately 300 section 501(c)(4) advocacy cases, more than 120 have been approved and nearly 30 have withdrawn.

| Fiscal Year | I.R.C. Subsection | | | |
|---|---|---|---|---|
| | 501(c)(3) | 501(c)(4) | 501(c)(5) | 501(c)(6) |
| 2008 | 81,730 | 1,631 | 330 | 1,648 |
| 2009 | 65,179 | 1,751 | 543 | 1,828 |
| 2010 | 59,486 | 1,735 | 290 | 1,637 |
| 2011 | 58,712 | 2,265 | 409 | 1,836 |
| 2012 | 66,543 | 3,357 | 1,081 | 2,338 |

A 501(c)(3) Nonprofit Corporation
August 5, 2015

**STATEMENT FOR THE RECORD**

BEFORE THE SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

*Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options*

July 29, 2015

Dirksen Senate Office Building
Washington, D.C.
Room 106

**Erica L. Marshall**
**Counsel, Cause of Action**

My name is Erica L. Marshall and I am a Counsel at Cause of Action, a non-profit government oversight group committed to ensuring that the regulatory process is transparent, fair, and accountable.[1] Cause of Action uses various investigative and legal tools to educate the public about the importance of transparency and accountability in the Federal government. We consider our efforts to be a vital form of public oversight that supplements the important efforts of Congress. Cause of Action expresses its sincere thanks to Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee for the opportunity to submit this Statement for the Record.

Cause of Action has expended significant resources and time investigating the origins of targeting at the Internal Revenue Service ("IRS") and believes that, despite efforts taken at the IRS to date, further congressional oversight is needed to prevent targeting of tax-exempt applicants in the future.

**The TIGTA Audit Report Failed to Identify the True Origins of the Targeting**

On May 14, 2013, the Treasury Inspector General for Tax Administration ("TIGTA") issued a report (hereinafter, the "TIGTA Report") concluding that the IRS Tax Exempt and Government Entities ("TEGE") Division used inappropriate criteria to identify tax-exempt

[1] CAUSE OF ACTION, http://causeofaction.org.

applications for review.[2] While the TIGTA Report was valuable insofar as it alerted the public to issues plaguing the IRS, it improperly focused on the use of "Be on the Lookout" ("BOLO") lists to identify applicants for extra scrutiny and cited the BOLO lists as the primary mechanism by which the IRS flagged applicants with "Tea Party" in their name for disparate treatment.[3]

The TIGTA Report failed, however, to identify the true origin of IRS targeting and in doing so did the IRS and American taxpayers a great disservice. In fact, the first Tea Party applicants were selected for heightened scrutiny on February 25, 2010, when an employee in Cincinnati notified his supervisor about an incoming Tea Party application.[4] In contrast, the first BOLO list was not circulated until August 2010, more than six months later, and therefore clearly did not initiate the targeting.[5]

Similarly, while politically-motivated bureaucrats (*e.g.*, Lois Lerner, Director, Exempt Organizations) exacerbated the targeting of conservative groups, these individuals did not, at least initially, trigger the targeting at IRS. Ms. Lerner, the focus of most inquiries, did not direct subordinates to place the Tea Party cases through multi-tiered review until early 2011, or nearly one year *after* the first Tea Party application had been selected for extra scrutiny.[6] Specifically, on February 1, 2011, two months after meeting with Jack Smith, Chief of the Public Integrity Section within the Department of Justice about "possible theories to bring criminal charges under FEC law,"[7] Lerner referred to the Tea Party as "very dangerous," stated that "this could be the vehicle to go to court on whether Citizens United overturning the ban on corporate spending applies to tax exempt rules," and directed that "Counsel and Judy Kindell [an advisor for Lerner] need to be in on this."[8] Ms. Lerner further stated that "Cincy should probably NOT have these cases."[9] However, Cause of Action has not seen any evidence that Ms. Lerner actually directed the Cincinnati employee who flagged the first Tea Party case in February, 2010, to treat it differently or provide it extra review.

---

[2] Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, at 6 (May 14, 2013) (hereinafter, the "TIGTA Report"), *available at* http://www.treasury.gov/tigta/auditreports /2013reports/201310053fr.pdf.

[3] *Id.*

[4] Email from Jack Koester, IRS, to John Shafter, IRS (Feb. 25, 2010) (Exhibit 1).

[5] *See* Tom Curry, IRS Chief Reveals Additional Targeting of Groups, NBC News (June 24, 2013), *available at* http://nbcpolitics.nbcnews.com/_news/2013/06/24/19119331-irs-chief-reveals-additional-targeting-of-groups?lite; Congressman Larry Bucshon, Two Year Timeline on Ways and Means Investigation into IRS Scandal, http://bucshon.house.gov/two-year-timeline-ways-and-means-committee-investigation-irs (last visited Aug. 3, 2015).

[6] *See* U.S. H. COMM. ON OVERSIGHT & GOV'T REFORM, LOUIS LERNER'S INVOLVEMENT IN THE IRS TARGETING OF TAX-EXEMPT ORGANIZATIONS, at APP. 70 (2014) (hereinafter, the "OGR Lerner Report") (citing Transcribed Interview with Michael Seto, IRS, in Washington, D.C. (July 11, 2013)), *available at* http://www.judicialwatch.org/wp-content/uploads/2014/07/Lerner-Report1.pdf.

[7] *See* IRS Memorandum Recapping Oct. 8, 2010 Meeting, JUDICIAL WATCH, Freedom of Information Act Production, at JW-FOIA-000032, http://www.judicialwatch.org/wp-content/uploads/2015/06/IRS-Consultation-14-cv-1956-32.pdf.

[8] *See* OGR Lerner Report, *supra* note 6, at App. 56-58 (citing Email from Lerner, IRS, to Michael Seto, IRS (Feb. 1, 2011)).

[9] *Id.*

**IRS Internal Mechanisms Triggered the Targeting**

While Congress,[10] the media,[11] and TIGTA[12] all focused on the actions of a few politically-motivated individuals (including Ms. Lerner) and the BOLO lists, Cause of Action's investigation reveals that longstanding IRS procedures actually triggered the scandal.[13] The Internal Revenue Manual (the procedural handbook guiding IRS employees) requires that IRS personnel flag applications for tax exempt status from organizations or about issues that are "newsworthy, or [have] the potential to become newsworthy."[14] Employees also must create a "sensitive case report" for all applications that the employee deems as "likely to attract media or Congressional attention."[15]

On February 25, 2010 (months before Ms. Lerner was involved and before any employee circulated a BOLO list), Jack Koester, a Cincinnati screener, flagged a Tea Party application for extra scrutiny, stating in an email to his supervisor, John Shafer, that, due to media attention on the Tea Party, the application was a high profile case.[16] Mr. Shafer forwarded Mr. Koester's email to his supervisor, Sharon Camarillo, who, in turn, elevated the issue to Cindy Thomas, Exempt Organizations Determinations Manager.[17] In her email, Ms. Camarillo wrote:

> Please let Washington know about this potentially politically embarrassing case involving a "Tea Party" organization. Recent media attention to this type of organization indicates to me that this is a "high profile" case."[18]

On February 25, 2010, Ms. Thomas forwarded the string of emails to Holly Paz, Manager of the Exempt Organizations Technical Unit ("EO Technical"), asking whether EO Technical would like the case because of "recent media attention."[19] Ms. Paz stated that sending the email to Washington would be a good idea because of the "potential for media interest."[20]

Moreover, on April 1, 2010, Steve Grodnitzky, again focused on the media attention that the Tea Party cases were receiving, stated that "these are high profile cases as they deal with the Tea Party so there may be media attention . . . [m]ay need to do an SCR [Sensitive Case Report]

---

[10] *See, e.g.*, U.S. H. COMM. ON OVERSIGHT & GOV'T REFORM, THE INTERNAL REVENUE SERVICE'S TARGETING OF CONSERVATIVE TAX-EXEMPT APPLICANTS: REPORT OF FINDINGS FOR THE 113TH CONGRESS (2014) (hereinafter, "OGR Final Report"), *available at* http://oversight.house.gov/wp-content/uploads/2014/12/December-2014-IRS-Report.pdf; OGR Lerner Report, *supra* n. 6.

[11] Robert Wood, *19 Facts on IRS Targeting President Obama Can't Blame on Republicans*, FORBES (July 23, 2015), *available at* http://www.forbes.com/sites/robertwood/2015/07/23/19-facts-on-irs-targeting-president-obama-cant-blame-on-republicans/; Josh Hicks, *House Republican Slams Lois Lerner in Report on IRS Targeting*, WASHINGTON POST (Mar. 11, 2014), *available at* http://www.washingtonpost.com/blogs/federal-eye/wp/2014/03/11/house-republicans-slam-lois-lerner-in-report-on-irs-targeting/.

[12] *See* TIGTA Report, *supra* n. 2.

[13] *See* Eliana Johnson, *Conservative Group Uncovers New Root of IRS Scandal*, NATIONAL REVIEW (May 19, 2015), *available at* http://www.nationalreview.com/human-exceptionalism/418575/maybe-irs-scandal-wasnt-lois-lerners-fault?target=author&tid=901597. Ms. Johnson's article was published after she received a draft Cause of Action report regarding the origins of IRS targeting.

[14] IRM 1.54.1.4 (12-20-2013), *available at* http://www.irs.gov/irm/part1/irm_01-054-001.html.

[15] IRM 7.29.3.2 (07-14-2008), *available at* http://www.irs.gov/irm/part7/irm_07-029-003.html#d0e85.

[16] *See* Email from Jack Koester, IRS, to John Shafter, IRS (Feb. 25, 2010) (Exhibit 1).

[17] *See* Emails between John Shafer, IRS, Sharon Camarillo & Cindy Thomas, IRS (February 25, 2010) (Exhibit 1).

[18] *See* Emails between John Shafer, IRS, Sharon Camarillo & Cindy Thomas, IRS (February 25, 2010) (Exhibit 1).

[19] Email from Cindy Thomas, IRS, to Holly Paz, IRS (Feb. 25, 2010) (Exhibit 1).

[20] Email from Holly Paz, IRS, to Cindy Thomas, IRS (Feb. 26, 2010) (Exhibit 1).

on them."[21] Accordingly, IRS employees flagged Tea Party organizations who were getting extensive media attention in February 2010 and created a sensitive case report (which immediately subjected the applicants to delay, extra scrutiny, and possible determination by an appointee) two months before Ms. Lerner got involved and five months before the first BOLO list was circulated.[22]

Contrary to President Obama's recent statements, targeting at the IRS was not the result of some "bonehead decisions out of a local office."[23] Nor was it the result of IRS employees implementing the Internal Revenue Code "poorly and stupidly."[24] Rather, the fact remains that under the Internal Revenue Manual and its mandatory employee operating procedures, these conservative applicants would have received disparate scrutiny and multi-tiered review solely based on the fact that, due to media attention, their cases had been elevated and were the subject of a Sensitive Case Report. Indeed, these IRS employees executed their duties under the Internal Revenue Manual with precision - not poorly, and not stupidly.

**The Small Increase in the Number of 501(c)(4) Applications Does Not Explain the Delay**

While the IRS attempted to blame the delay some applicants faced on an increase in the number of 501(c)(4) applications the IRS received,[25] the facts do not support this position. The IRS received 1,631 501(c)(4) applications in 2008 (with 1,410 of these being new), 1,751 in 2009 (with 1,571 of these being new), 1,735 in 2010 (with 1,591 of these being new), and 2,265 in 2011 (with 2,242 of these being new).[26] In 2012, IRS received 3,398 new 501(c)(4) applications.[27] In 2013, as of March 26, 2013, IRS had received 2,092 new applications for 501(c)(4) status.[28]

Although the IRS did experience a small annual increase in 501(c)(4) applications in 2011, the targeting began in early 2010. Moreover, the small influx of 501(c)(4) applications in 2011 was counterbalanced by a reduction in the 501(c)(3) applications that the Tax Exempt

---

[21] *See* OGR Lerner Report, *supra* n. 6, at App. 65-66 (citing Email from Steve Grodnitzky, IRS, to Donna Elliot-Moore & Ronald Shoemaker, IRS (Apr. 1, 2010)).

[22] *See* Tom Curry, IRS Chief Reveals Additional Targeting of Groups, NBC NEWS (June 24, 2013), *available at* http://nbcpolitics.nbcnews.com/_news/2013/06/24/19119331-irs-chief-reveals-additional-targeting-of-groups?lite; Congressman Larry Bucshon, Two Year Timeline on Ways and Means Investigation into IRS Scandal, http://bucshon.house.gov/two-year-timeline-ways-and-means-committee-investigation-irs (last visited Aug. 3, 2015).

[23] President Barack Obama, Bill O'Reilly Interview, FOX NEWS (Feb. 2, 2014), *available at* http://www.foxnews.com/ politics/2014/02/03/not-even-smidgen-corruption-obama-downplays-irs-other-scandals/.

[24] President Barack Obama, The Daily Show with Jon Stewart, COMEDY CENTRAL (July 21, 2015), *available at* http://thedailyshow.cc.com/extended-interviews/qhcj6g/exclusive-barack-obama-extended-interview.

[25] U.S. S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY, at 168, n. 978 (2014) (hereinafter "HSGAC Report"), *available at* http://www.hsgac.senate.gov/subcommittees/investigations/media/ subcommittee-releases-report-and-dissenting-views_on-irs-handling-of-501c4-applications.

[26] *See* Email from Holly Paz, IRS, to Jeffrey Wallbaum, IRS, JUDICIAL WATCH PRODUCTION (May 13, 2013) (Exhibit 2).

[27] *See* Email from Holly Paz, IRS, to Nikole Flax & Lois Lerner, IRS, JUDICIAL WATCH PRODUCTION (May 9, 2013) (Exhibit 2).

[28] *See* Email from Holly Paz, IRS, to Jeffrey Wallbaum, IRS, JUDICIAL WATCH PRODUCTION (May 13, 2013) (Exhibit 2).

group received that same year. Notably, 501(c)(3) applications decreased from 81,730 in 2008, to 59,486 in 2010, down to 58,712 in 2011.[29]

The relatively small number of total 501(c)(4) applications that the IRS received in the relevant years further demonstrates the seriousness of the delays impacting many applicants. During its Fiscal Year 2010, although the IRS only received 1,591 new 501(c)(4) applications, by the end of the fiscal year, it had done nothing to evaluate approximately 45 of these applications.[30]

By fall 2011, only one year later, the numbers were even worse. Shortly after the close of Fiscal Year 2011, the backlog of bucketed cases had grown to 162 organizations.[31] Of these 162 organizations, 80% were conservative organizations and 128 constituted (c)(4) applications, as compared to 34 (c)(3) applications. At this point, over two years the IRS had only received 3,833 (c)(4) applications but failed to even address or begin to process over 3% of its inventory. By February 2012, the backlog grew to over 300 applications.[32]

Moreover, that the years'-long delay and overly broad information requests experienced by many 501(c)(4) applicants was an affront to First Amendment freedoms is further evidenced by the IRS's record, or lack thereof, of denying organizations tax exempt status at this point in time. According to IRS records, from 2007 to 2012, the IRS issued only ten adverse determination letters to 501(c)(4) applicants for the same reason these organizations were flagged- purported involvement with campaign activities.[33]

Continued oversight work is needed to ensure that targeting never happens again at the IRS. This work should include a review of internal IRS policies and procedures. Thank you for the opportunity to submit this Statement for the Record and for your consideration of our views. We would be pleased to provide the Subcommittee with any further information it needs or to answer any questions raised by this Statement.

Sincerely,

Erica L. Marshall

ERICA L. MARSHALL
COUNSEL

---

[29] *See* Email from Nikole Flax, IRS, to Holly Paz and Lois Lerner, IRS, JUDICIAL WATCH PRODUCTION (May 9, 2013) (Exhibit 2).
[30] *See* OGR Final Report, *supra* n. 10, at 14 (citing Email from Cindy Thomas, IRS, to Holly Paz, IRS (Oct. 26, 2010)).
[31] *See* OGR Final Report, *supra* n. 10, at 25 (citing Gregory Korte, *IRS List Reveals Concerns over Tea Party 'Propaganda'*, USA TODAY, Sept. 18, 2013).
[32] *See* HSGAC Report, *supra* n. 25, at 115.
[33] *See* HSGAC Report, *supra* n. 25, at 22 (citing Letter from IRS to Permanent Subcommittee on Investigations (Nov. 23, 2012)).

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

The Hon. Ted Cruz
The Hon. Christopher Coons
Senate Judiciary Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts
United States Senate
Washington, D.C. 20510

July 29, 2015

# Testimony of Public Citizen
# Regarding Hearing on "Revisiting IRS Targeting"

***The Need to Move Forward with Treasury/IRS Rulemaking and Promulgate a Clear, Bright Lines Definition of 'Political Intervention' for Nonprofit Organizations***

In order to take advantage of nonprofit status under the tax code, organizations are required to pursue a specified social purpose and either avoid or limit political intervention activities, depending on the particular 501(c) nonprofit class. Any organization may choose instead to pursue political activity as a primary purpose, but it then must register as a section 527 political organization rather than a 501(c) nonprofit organization. On this, the tax code is clear.

However, two key problems plague the administration of nonprofit status. **First**, there is no clear, objective definition of what constitutes "political intervention" subject to limits. **Second**, the Internal Revenue Service's existing practices and regulations are inconsistent and unclear as to how much political intervention is permissible for an organization and still qualify for nonprofit status.

These problems of ambiguity have recently combined into an explosive eruption of allegations of abuse and/or intimidation. Many nonprofit groups have seized upon this ambiguity to wage extensive electioneering activities; other nonprofit organizations charge that they are subject to undue scrutiny for their political leanings; and still others are frustrated by not knowing what is, and what is not, permissible nonprofit activity.

It is imperative the Department of Treasury and Internal Revenue Service (IRS) squarely address the causes of this latest firestorm. Public Citizen strongly encourages the agencies to proceed with rulemaking in close consultation with the nonprofit community and promulgate:

- A clear and concise definition of political intervention along the standards proposed by the Bright Lines Project so as to minimize IRS discretion in determining what constitutes political activity; and

- Reevaluate the primary purpose standard consistent with the statutory threshold on the amount of political activity permitted for an organization to qualify for nonprofit status.

**A. The Chilling Effect of Ambiguity**

More than six years ago – prior to the recent IRS scandal over nonprofit electioneering activity – several nonprofit organizations and tax lawyers initiated a project to provide clarity to the tax code as to what constitutes political intervention and to minimize to the greatest extent possible the discretion of the IRS in making such determinations. This became known as the Bright Lines Project, which is now housed at Public Citizen.

The IRS has been and continues making such determinations largely through an 11-point subjective quiz called the "facts and circumstances" test. Under this test, the IRS considers all the relevant "facts and circumstances" when determining whether a nonprofit organization has engaged in restricted political activity. There are six criteria in this test that suggest an activity is political intervention, and five that suggest it is not.[1]

Do any particular criteria carry more weight than others? When is a communication considered issue advocacy as opposed to intending to affect a campaign? In applying this facts and circumstances test, the answers to these 11 criteria are entirely the subjective call of the IRS. Within the nonprofit community and among tax lawyers, as well as within the IRS, there is no consensus on how to apply and interpret the facts and circumstances test. During a 2013 congressional hearing, for example, former acting IRS Commissioner Steven Miller was asked if he could define when a group applying for 501(c)(4) tax status as a "social welfare organization"

---

[1] The criteria for the IRS "facts and circumstances" test to determine what activity constitutes political intervention are below.
*The six factors suggesting political intervention are:*
(a) The communication identifies a candidate for public office;
(b) The timing of the communication coincides with an electoral campaign;
(c) The communication targets voters in a particular election;
(d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;
(e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications, and
(f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.
*The five factors that suggest a communication is not political intervention are:*
(a) The absence of any one or more of the factors listed in a) through f) above;
(b) The communications identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;
(c) The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);
(d) The communication identifies the candidate solely as a government official who is in position to act on the public policy issue in connection with the public event (such as a legislator who is eligible to vote on the legislation, and
(e) The communication identifies the candidate solely in the list of key or principal sponsors that is the subject of the communication.

was too extensively involved in political activity using the facts and circumstances test. Miller admitted that he could not say for sure.[2]

As a result, a group may either choose to stick its neck out when discussing issues of the day and lawmakers, or choose to play it safe and withdraw from any such discussions. While a growing number of groups are willing to take the risk after seeing that the IRS has grown increasingly shy on enforcing the tax code, other groups shy away from any discussions of political issues or lawmakers. The first course of action may or may not draw consequences from the IRS and is the course being chosen by larger numbers of nonprofit groups willing to abuse the tax code. The second course of action is simply an unfortunate chilling of free speech rights.

The nonprofit community needs clarity – objective standards that do not depend on the subjective judgments of the IRS.

**B. The Growing Abuse of the Tax Code**

The tax codes zealously protect the anonymity of the sources of funds for legitimate nonprofit charities, social welfare organizations and trade associations, as should be the case. However, in order to warrant such protections and nonprofit tax status, tax laws explicitly state that 501(c)(3) charity organizations may "not participate in, or intervene in" any political campaign. Furthermore, 501(c)(4) social welfare organizations are to be "operated exclusively for the promotion of social welfare," and 501(c)(6) trade associations are nonprofits in which "no part of the net earnings" benefit any private shareholder or individual.

Despite the statutory language restricting, if not eliminating, electioneering activities by nonprofit organizations, the IRS proffered a "primary purpose" standard for nonprofits about 50 years ago. According to IRS regulations, social welfare organizations and trade associations may participate in some electioneering activity so long as campaign intervention is not their primary purpose.[3]

The IRS has never defined its "primary purpose" standard, leading to ambiguity in guidance as well as enforcement. Some claim that the primary purpose standard is violated only when a majority of an organization's resources is allocated to electioneering activities; others assert it means that no more than a de minimis, or at most insubstantial, amount of resources may be used for campaign intervention. Several U.S. senators have recently submitted a letter to the IRS challenging the agency's regulation that defines the statutory term "exclusively" as "primarily."[4]

---

[2] Gary Bass and Elizabeth Kingsley, "Nonprofits Need Better Guidance on Exempt Standards," Washington Post (May 23, 2013), available at: https://www.washingtonpost.com/opinions/nonprofits-need-better-guidance-on-tax-exempt-standards/2013/05/23/b5014924-c3b6-11e2-914f-a7aba60512a7_story.html

[3] See, Treas. Reg. §1.501(c)(4)-1(a)(2)(ii); Rev. Rul. 81-95, 1981-1 C.B. 332; and Gen. Counsel Mem. 34233 (Dec. 30, 1969).

[4] Diana Freda, "IRS Examining 70 Section 501(c)(4) Groups," *BNA Money and Politics Report* (Sep. 20, 2012). Public Citizen also joined in a lawsuit against the IRS for failing to enforce the "exclusively" standard for 501(c)(4) social welfare organizations, but has since withdrawn the lawsuit awaiting the results of the current IRS rulemaking addressing this issue. Statement of Democracy 21, Public Citizen and the Campaign Legal Center on Withdrawal of Lawsuit Calling for New IRS Regulations on 501(c)(4) Groups and their Campaign Activities (Dec. 6, 2013), available at: http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=4038

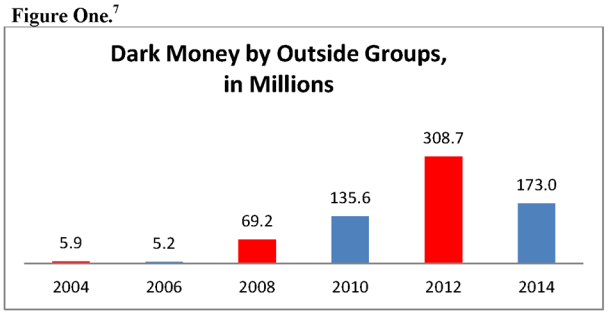
As a result, many electioneering groups that want to conceal the sources of their campaign funds have found an avenue for doing so in the tax code. The abuses have sharply escalated since the 2008 *Wisconsin Right to Life v. FEC* decision, allowing corporations to finance electioneering communication "issue ads," and the 2010 *Citizens United v. FEC* decision, allowing corporations to finance both electioneering communications and even explicit independent expenditures for and against candidates. This laundering of "dark money" through nonprofit organizations is now the principal vehicle for masking the sources of funds flowing into federal and state elections.

These abuses of the tax code have become so widespread that the 2012 and 2014 federal elections even saw some nonprofits collect secret campaign cash and then contribute the same funds to a political committee that must report its donors, preserving the anonymity of the original donors.[5] The American Bankers Association (ABA) filed with the IRS an application to set up a 501(c)(4) social welfare organization largely for the purpose of raising secret campaign cash from banks and then laundering that money to super PACs to support or oppose candidates for U.S. Senate. According to ABA General Counsel Dawn Causey, one of the reasons for creating a nonprofit group to carry out this function is so that the sources of the electioneering expenditures will not be disclosed to the public.

General Counsel Causey emphasized the importance of using nonprofit tax status to conceal donors from the public on a September 4th, 2012, conference call briefing member firms. But she also warned members that the Internal Revenue Service or another agency could conceivably craft rules requiring disclosure of electioneering finances. "Today, we're OK; tomorrow, I don't know," she said. "There is a risk."[6]

Each election since the *Wisconsin Right to Life* and *Citizens United* decisions has seen increasing amounts of "dark money" laundered through nonprofit organization influence campaigns (*see* Figure One). The 2016 election promises to be the darkest ever in terms of secret money being laundered into campaigns through electioneering nonprofit organizations.

**Figure One.**[7]




[5] Michael Beckel, "Pennsylvania Super PAC Gets Dark Money Infusion," Center for Public Integrity (Oct. 22, 2014), available at: http://www.publicintegrity.org/2014/10/22/15997/pennsylvania-super-pac-gets-dark-money-infusion

[6] Robert Schmidt and Phil Mattingly, "Banker Plan Would Fund Super-PACs to Sway Senate Races," *Businessweek* (Sep. 5, 2012).

[7] Data for Figure One comes from the Center for Responsive Politics.

### C. Conclusion: IRS Rulemaking Needs to Proceed and Address the Problems of Ambiguity and Abuse

Following the eruption of the 2013 scandal involving improper scrutiny of nonprofit organizations for excessive political intervention, the IRS initiated rulemaking to address this problem. The agency's first set of proposed rules, released in November 2013, were met with widespread criticism from across the ideological spectrum of the nonprofit community. The proposed rules were seen as both over-inclusive, in that they would have stifled legitimate participation by nonprofit groups in the political sphere, and under-inclusive, in that they applied only to 501(c)(4) social welfare organizations rather than all nonprofits.

The IRS withdrew its original set of recommendations and has gone back to the drawing board, bolstered by a record-setting number of constructive public comments. The agency is expected to issue a second round of proposed rules for public discussion soon, though the Commissioner has stated that the agency will not adopt any new rules until after the 2016 elections.

Public Citizen strongly encourages the IRS to proceed with the rulemaking process, to involve the nonprofit community and the public in that rulemaking, and to pay close attention to the advice and comments that will be offered by the public. Public Citizen further recommends that the problem of *ambiguity* in the regulations be addressed by recommendations comparable to those offered in the Bright Lines Project; and that the problem of *abuse* of the tax code from excessive electioneering by some nonprofit groups be addressed by drawing a clear distinction as to when a group should file for 501(c) nonprofit status or section 527 political organization status.

#### 1. Addressing Ambiguity: the Bright Lines Project

The Bright Lines Project is all about clarity in the tax code and regulations defining political intervention. Transparency of dark money in our elections is not an objective of the Bright Lines Project. The Project's end game is to provide the nonprofit community with explicit standards as to what type of activity is considered political intervention and to minimize the role of the IRS in exercising discretion over such determinations. Once clear definitions are established, Congress and the IRS may then determine how much, if any, political intervention should be permissible for nonprofit organizations.

The Bright Lines Project proposes six new bright lines rules. "Political intervention" is defined throughout the Internal Revenue Code (IRC) as participation or intervention in a campaign in support of or opposition to any candidate for public office.

The Bright Lines Project proposes that the definition of "political intervention" be modified consistently throughout the tax code. The proposal adopts the bright line rule that it is political intervention to "expressly advocate" for the election, defeat, nomination, or recall of a clearly identified candidate or candidates affiliated with a specific party. It would also be deemed political intervention under the Bright Lines Project if a communication (a) refers to a clearly identified candidate and (b) reflects a view on that candidate.

Importantly, the Bright Lines Project proposes four safe harbor exceptions to such speech if the organization is attempting to influence an official's actions in his or her current term of office, comparing candidates in a voter education effort, responding in self-defense to a candidate's statement about the organization, or when the statements are personal, oral remarks at official meetings. In order for a safe harbor to apply, the communications generally cannot be disseminated through paid mass media.[8]

By spelling out what constitutes political intervention in regulations, the nonprofit community and the IRS itself will have a clearer picture of permissible political activities.

**2. Addressing Abuse: Set Appropriate Thresholds**

In addition to providing the nonprofit community with clear guidance on their activities, clarifying the definition of political intervention would go a long way toward weeding out the most egregious abusers of the tax code – groups whose primary purpose is to elect or defeat candidates but who also want to conceal the sources of their funds.

Nevertheless, the IRS should heed the spirit, if not the letter, of the tax code and draw a clear distinction as to when a group qualifies for 501(c) nonprofit status or should be classified as a section 527 political organization. Absolutely no effort should ever be made to discourage any organization from pursuing political activities, but a group that wants to spend significant resources on political intervention should properly assume section 527 status. There is no tax penalty associated with section 527 status; the biggest difference is that section 527 mandates disclosure of funds used to influence elections. The 501(c) section of the tax code should not function as a haven for political organizations to launder undisclosed money into elections.

It is not the role of the IRS to regulate elections. That is the responsibility for the Federal Election Commission (FEC). But it is the role of the IRS to protect the integrity of nonprofit status under the tax code. Nonprofit status should be all about pursuing social welfare and the public interest, not the private interest or a specific electoral outcome.

Respectfully Submitted,

Craig Holman, Ph.D.
Government affairs lobbyist
Public Citizen

Lisa Gilbert,
Director
Public Citizen's Congress Watch division

[8] For a full discussion of the Bright Lines Project recommendations, go to: http://www.brightlinesproject.org/solutions/regulatory/

Gmail by Google

Jenny Beth Martin <jennybethm@gmail.com>

## A personal note from Jenny Beth Martin

**Tea Party Patriots** <newsletter@teapartypatriots.org> Mon, Sep 1, 2014 at 8:11 AM
Reply-To: Tea Party Patriots <newsletter@teapartypatriots.org>
To: jennybeth@teapartypatriots.org

You are receiving this email on behalf of Tea Party Patriots. 100% Grassroots, 100% of the Time.

Is this email not displaying correctly? View it in your browser.

TEA PARTY PATRIOTS
PURSUE YOUR AMERICAN DREAM

Dear Patriot,

For the past week, the National Support Team here at Tea Party Patriots has been asking for your help to "Make Harry Reid Cry" as part of our **$800,000** fall fundraising push.

**And today, the last day of this funding drive, I wanted to personally ask you for your help.**

**Will you please make a generous donation of $25, $50, $100, $250, $500, or more right now by clicking here?**

You see, we've been having some fun with Harry Reid this week (especially by posting some great "Harry" cartoons on our landing page), but in reality, this is a very serious

situation.

**Harry Reid is one of the most vitriolic and outspoken opponents of the Tea Party movement.**

He has contempt for average Americans like you and me who want to take our country back from him and his Ruling Class allies.

And that's why he will stop at nothing to destroy us - and why we must stop at nothing to defeat him this fall.

**Please, help us do that by making your very best gift right now.**

**Tea Party Patriots is preparing to launch a historic grassroots get-out-the-vote initiative this fall.**

**We have examined the numbers and the polls, and we have laid out a plan that will enable us to fire Harry Reid before he can do any more damage to our country.**

In 2010, we fell short of the Senate majority by a relatively few 175,000 votes in four states. In 2012, we fell short by 433,000 votes in six states.

This year, we're prepared to go after every single one of those votes. We have identified the undecided voters in each of the most contentious swing states, and we're prepared to do whatever we have to do to move them to the polls!

**But we still need your help to do it. We have a goal of $800,000 because it will cost about $2 to contact each voter by mail, by phone, and in-person.**

That's why it is absolutely imperative that we hit this $800,000 goal.

**Please, click here to make your gift right now.**

Your gift today will be sent immediately to the front lines to enable our grassroots volunteers and staffers to contact these voters and move them to the polls to fire Harry Reid.

**If we succeed this year, we will shock the political world. And most importantly, we will halt the Obama agenda for the next two years.**

But if we fail, Harry Reid will have carte-blanche to run rampant during Barack

Obama's "lame duck" period.

He'll make good on his promise to ram amnesty through Congress. He'll fight like crazy to amend the 1st Amendment to target political free speech from conservatives and Tea Party activists. And he'll cement Obamacare into law forever.

**I can't bear the thought of Harry Reid getting another two years. That's why he's in our crosshairs this fall - and that's why we must hit this goal.**

**Friend and fellow patriot, today is the last day of the "Make Harry Reid Cry" fundraising drive. I hope you'll help us make it count by making your very best gift right now.**

**Simply click here to make your generous gift.**

Thank you so much for your support!

Donate

For Liberty,

Jenny Beth Martin
Co-Founder and National Coordinator

*Contributions to Tea Party Patriots, Inc. are not tax deductible as charitable contributions for federal income tax purposes.*

*Copyright © Tea Party Patriots, Inc. 2014*
Tea Party Patriots
1025 Rose Creek Drive | Ste 620-322 | Woodstock, GA 30189
Support: 404-593-0877
http://www.tppsupport.org

unsubscribe from this list | update subscription preferences

Gmail by Google

Jenny Beth Martin <jennybethm@gmail.com>

## Which of our candidates will have to lose?

**Jenny Beth** <team@teapartypatriotscitizensfund.com> Sat, Nov 1, 2014 at 9:12 AM
Reply-To: team@teapartypatriotscitizensfund.com
To: jennybethm@gmail.com

Jenny Beth,

I have an urgent and agonizing decision to make.

We still don't have enough money to fund all our grassroots efforts in all the critical Senate elections.

**That means that unless I can raise additional funds right now, I'm going to have to cut some of our activities off just three days before the election.**

And that means at least one or more of our candidates for U.S. Senate may have to lose!

**Please make an urgent donation right now. Your gift will immediately be sent to the front lines to help our grassroots volunteers get out the vote.**

I'm told that this type of "political triage" has to happen all the time in political campaigns.

**There just isn't enough money to go around. "We can't afford to win everywhere," someone just told me.**

I don't accept that fact. I don't accept that I have to literally cut back on some of our grassroots efforts and let a liberal Obama Democrat win.

That's why I just sat down and wrote this quick email. Please pardon any of my typos.

**I didn't get involved in the Tea Party movement for fun. Like you, I got involved to stop Barack Obama and to help save America.**

Now I'm being told by my staff that we're probably going to have to let

some leftist like Bruce Braley in Iowa or Kay Hagan in North Carolina win because we can't afford to fight back in every important state.

I understand the problem.

We cannot and will not borrow money to fund these campaigns. But the math doesn't lie. We can't spend money we don't have. We're not the federal government, after all!

So please, please contribute whatever you can immediately.

**Whether it's $5, $15, $30, $50, $100, or whatever other amount you can afford, please pitch in right now.**

I don't like to lose. I'm sure you don't either. Especially to one of these liberals.

**However, unless we turn things around fast, at least one of these left-wing Obama radicals will survive Election Day.**

And I pray that one seat doesn't cost us a majority in the Senate.

**Please donate whatever you can. I know I'm asking a lot, but this really is an emergency.**

**Election Day is only *three days* away. Let's make them count!**

Thank you in advance for everything you do.

- Jenny Beth

PAID FOR BY THE TEA PARTY PATRIOTS CITIZENS FUND
NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE
HTTP://TEAPARTYPATRIOTSCITIZENSFUND.COM

Contributions to the Tea Party Patriots Citizens Fund are not tax deductible as charitable contributions for federal income tax purposes.

While the Tea Party Patriots Citizens Fund does not earmark contributions for individual candidates, your contribution will be used to support only those Tea Party candidates who have met our exacting standards for endorsement.

Unsubscribe

TEA PARTY PATRIOTS
PURSUE YOUR AMERICAN DREAM

June 2, 2014

**VIA HAND DELIVERY**

Honorable Barbara Boxer, Chair
Honorable Johnny Isakson, Vice Chair
Senate Select Committee on Ethics
Hart Building, Room 220 Washington, DC 20510

Re: Request for Investigation of Senator Sheldon Whitehouse

Dear Chairwoman Boxer and Vice Chairman Isakson:

Tea Party Patriots, Inc., a national grassroots citizens organization whose members are American citizens and taxpayers who are committed to economic freedom, personal freedom and a debt free future for America, respectfully requests that the Senate Select Committee on Ethics investigate whether Senator Sheldon Whitehouse (D-RI) violated Senate rules by unlawfully and unethically exerting pressure on federal agencies to investigate and target tea party, conservative and free-market non-profit organizations and to criminally prosecute groups such as ours because of our philosophical differences with and opposition to his liberal policy views.

Background

Senator Whitehouse was the lead sponsor of the DISCLOSE Act, a failed bill that would have compelled nonprofit organizations who make political campaign expenditures, even as a minority of their program activities, to disclose their donors. That bill failed after widespread recognition that it would undermine core First Amendment protections of political speech and of anonymity, and to chill the speech of conservative organizations. *See, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 343 (1995) (there is a "respected tradition of anonymity in the advocacy of political causes. This tradition is best exemplified by the secret ballot, the hard won right to vote one's conscience without fear of retaliation."); *cf. NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (the Constitution protects freedom to engage in anonymous association for the advancement of beliefs and ideas).

Although the DISCLOSE Act failed, Senator Whitehouse has consistently sought to achieve his goal of silencing organizations and groups with which he disagrees. Indeed, Sen. Whitehouse took the extreme measure of improperly using his position as a United States Senator in an attempt to pressure federal agencies to *criminally* target and prosecute

conservative groups in his ongoing efforts to silence them. In particular, he has demanded that federal agencies strip citizens groups of their First Amendment rights to engage in political debate and activity.

In furtherance of his scheme, Senator Whitehouse has publicly berated the Internal Revenue Service ("IRS") and the Department of Justice ("DOJ") for purportedly not reviewing or prosecuting 501(c)(4) conservative organizations for engaging in political activity.[1] He has waged this campaign even though such groups are entitled by federal law to engage in political activity.

Senator Whitehouse ramped up these efforts last year. In an April 2013 hearing of the Senate Judiciary Committee's Subcommittee on Crime and Terrorism, for example, Senator Whitehouse summoned representatives of the Criminal Division of the IRS and the DOJ to appear before him and stated that 501(c)(4) organizations have committed federal crimes by stating on applications for tax exempt status that they would not engage in political activity and, that by not reviewing the applications and the activities of the organizations, the IRS and the DOJ were condoning criminal violations. "The responsible federal agencies, primarily the IRS and DOJ," he contended, "appear somewhat complicit in the mockery that is made of these tax laws. The DOJ maintains the policy of deference to the IRS and does not investigate or prosecute."[2] And in a May 15, 2013 speech on the Senate floor, Senator Whitehouse warned Congress that the IRS was "allowing big shadowy forces to meddle in elections anonymously through front groups that file false statements."[3]

Notably, Senator Whitehouse's criticisms of these agencies are groundless. The Internal Revenue Code and current IRS regulations allow 501(c)(4) groups to engage in political activity.[4] It therefore appears that Senator Whitehouse has called upon federal agencies to target organizations for engaging in activities that are perfectly legal but which he finds objectionable because of their philosophical leanings in opposition to his own.

---

[1] *See, e.g.*, Senator Whitehouse, et al., Letter to Hon. Douglas H. Sherman (Feb. 16, 2012) (Senator Whitehouse and others asking the Internal Revenue Service to investigate tax-exempt 501(c)(4) organizations' political activities). *See* Appendix

[2] Sen. Sheldon Whitehouse Holds A Hearing On Current Issues In Campaign Finance Law Enforcement, Transcript 2 (Apr. 9, 2013). *See* Appendix

[3] *The Two Scandals At The IRS*, As Prepared for Delivery on the Senate Floor (May 15, 2013), http://www.whitehouse.senate.gov/news/speeches/the-two-scandals-at-the-irs.

[4] *See Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities*, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013) (setting out the current regulations).

What is worse, Senator Whitehouse's unlawful and unethical pressure has been effective. For example, about a month after the April 2013 hearing, DOJ officials contacted IRS Exempt Organizations Division Director Lois Lerner to determine "whether tax exempt groups could be criminally prosecuted for 'lying' about political activity." In an e-mail to the former IRS Acting Commissioner's Chief of Staff, Ms. Lerner stated: "I got a call today from Richard Pilger Director Elections Crimes Branch at DOJ . . . . He wanted to know who at IRS the DOJ folks could talk to about *Sen. Whitehouse's idea at the hearing* that DOJ could piece together false statement cases about applicants who 'lied' on their [tax forms]."[5]

Those e-mails are only the tip of the iceberg in demonstrating Senator Whitehouse's deep-seated involvement in the ongoing scandal concerning impermissible IRS targeting of conservative and free-market groups.

Violations

Senator Whitehouse's conduct—which is pervaded by his unlawful and unethical use of his power to pressure federal agencies to target conservative groups—appears to violate Senate Rules. The Committee should investigate these potential violations promptly.

*First*, Senator Whitehouse's inflammatory attacks appear to constitute "improper conduct which may reflect upon the Senate." *Senate Ethics Manual*, Appendix E at 432. Indeed, even when the Committee has stopped short of finding that alleged conduct was ''improper conduct reflecting upon the Senate," it has found that it should criticize the conduct in a public statement. *Id.* at 436; *see*, *e.g.*, Decision of the Committee Concerning Senator Glenn (exercised poor judgment in arranging a meeting with Congressman); Statement of the Committee Regarding Senator D'Amato (conducting the business of his office in an improper and inappropriate manner, negligent in failing to establish appropriate standards for operation of office); *see also Senate Ethics Manual*, Appendix E at 433 (the Committee will consider whether a Senator has engaged in "improper conduct which may reflect upon the Senate by reference to generally accepted standards of conduct, the letter and spirit of laws and Rules, and by reference to past cases where the Senate has disciplined its Members for conduct that was deemed improper, regardless of whether it violated any law or Senate rule or regulation"). All of Senator Whitehouse's efforts (as detailed above) appear to be motivated by an intention to silence his opposition and force federal agencies to target his political opponents, pressuring such agency action by these illegitimate means. His actions

[5] Katie Palvic, *BREAKING: New Emails Show Lois Lerner Was in Contact With DOJ About Prosecuting Tax Exempt Groups*, Townhall (Apr. 16, 2014), http://townhall.com/tipsheet/katiepavlich/2014/04/16/breaking-new-emails-show-lois-lerner-contacted-doj-about-prosecuting-tax-exempt-groups-n182529??2 (emphasis added).

also plainly violate separation of powers principles whereby he has repeatedly attempted to force at least two executive agencies to disregard the law and to impose a different legal standard on his political opponents. He has tried to force the IRS and DOJ to criminally prosecute organizations for engaging in perfectly legal political activities, without any intervening change in the statute or federal regulation, by bullying the agencies to adopt his personal views and positions regarding his interpretation of federal law.

*Second*, Senator Whitehouse's attacks appear to violate the Senate's prohibition against using congressional space to engage in campaign activities. "The use of federal office space, including congressional office space, official government equipment and supplies paid for from federal tax dollars for purposes of soliciting campaign contributions or for other clearly political campaign activities could involve violations of other federal laws, congressional regulations and standards." *Senate Ethics Manual* 146. The evidence suggests that Senator Whitehouse improperly used taxpayer-funded resources to further his electoral fortunes.

* * *

Senator Whitehouse should not be using his position to intimidate, harm, and silence his political opponents. Under Senate Resolution 338, this Committee must "investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct, and violations of rules and regulations of the Senate, relating to the conduct of individuals in the performance of their duties as Members of the Senate . . . ." In light of the abundant evidence that Senator Whitehouse acted unethically and unlawfully, the Committee should promptly investigate this matter and sanction Senator Whitehouse as warranted.

I look forward to the Committee's response. *See* Rules of Procedure Select Committee on Ethics, Rule 3(g).

Respectfully,

Jenny Beth Martin
National Co-Founder
Tea Party Patriots

Enclosures

# APPENDIX

1 of 1 DOCUMENT

Copyright 2013 CQ Transcriptions, LLC
All Rights Reserved
CQ Transcriptions

All materials herein are protected by United States copyright law and may not be reproduced, distributed, transmitted, displayed, published or broadcast without the prior written permission of CQ Transcriptions. You may not alter or remove any trademark, copyright or other notice from copies of the content.

# SEN. SHELDON WHITEHOUSE HOLDS A HEARING ON CURRENT ISSUES IN CAMPAIGN FINANCE LAW ENFORCEMENT

April 9, 2013 Tuesday

**EVENT DATE:** April 9, 2013

**TYPE:** COMMITTEE HEARING

**LOCATION:** WASHINGTON, D.C.

**COMMITTEE:** SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CRIME AND TERRORISM

**SPEAKER:** SEN. SHELDON WHITEHOUSE, CHAIRMAN

**WITNESSES:**
SEN. SHELDON WHITEHOUSE, D-R.I. CHAIRMAN
SEN. TED CRUZ, R-TEXAS
WITNESSES: ACTING ASSISTANT ATTORNEY GENERAL MYTHILI RAMAN, JUSTICE DEPARTMENT'S CRIMINAL DIVISION
PATRICIA HAYNES, DEPUTY CHIEF FOR CRIMINAL INVESTIGATION, INTERNAL REVENUE SERVICE
LAWRENCE NOBLE, PRESIDENT, AMERICANS FOR CAMPAIGN REFORM
GREGORY COLVIN, PRINCIPAL, ADLER & COLVIN, SAN FRANCISCO, CALIF.
BRADLEY SMITH, CHAIRMAN, CENTER FOR COMPETITIVE POLITICS, PROFESSOR OF LAW, CAPITAL UNIVERSITY LAW SCHOOL, COLUMBUS, OHIO

**TEXT:**

**WHITEHOUSE**: Good morning. The hearing will come to order. I appreciate the witnesses being here, and the order of proceeding will be that any senators who are present before the testimony will be invited to make any opening statements that they care to make.

We will take the testimony from these witnesses and then have a Q&A session, and I think we'll start with 7 minute rounds if it does not appear, given everything that's going on in the Senate today, that we're have a great number of senators here.

So I think we can go with 7 minute rounds, and we'll switch then to the other panel and continue the same way, and we have to be done at noon. So I appreciate the witnesses who are here, and I'll lead with my opening statement.

In a country of laws, when the laws are made a mockery, it is a serious matter. This hearing will explore the mockery our campaign finance laws have become. With particular emphasis on what appears to be flagrantly false statements made, with impunity, in official documents.

We note Section 1001 of the U.S. Criminal Code which makes it a criminal offense, "Any materially false, fictitious or fraudulent statement or representation in official business with the government."

And Section 7206 of the internal revenue code, which makes it a crime to willfully make a false material statement on a tax document filed under penalty of perjury.

The false statements we look at relate, among other things, to Section 501 (c) (4) of the tax code, which gives non-profit status to entities that are, "Operated exclusively to promote social welfare."

This promotion of social welfare is specifically forbidden to include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. It seems clear enough.

But after the Superior Court opened the floodgates to big money in elections and it's disgraceful citizens united decision, big donors like to use these non-profit entities to launder campaign spending and hide their identities.

As the head of one such non-profit admitted, for big donors, "The anonymity was appealing."

So the tax filings, then, begin to get creative. There are several areas of mischief. Discrepancies in reporting to the IRS and to the FEC, discrepancies between reported and actual political activity, characterizing political TV ads as, "Educational activities," or," Legislative activities."

Characterizing as nonpolitical, donations made to other groups would then spend it on political advertising, and disbanding and reforming, under another names before the reporting is due for the disbanded organization.

The responsible federal agencies, primarily the IRS and DOJ, appear somewhat complicit in the mockery that is made of these tax laws. The DOJ maintains the policy of deference to the IRS and does not investigate or prosecute false statements in campaign financial tax reporting without a case have been brought to it by the IRS.

As we'll hear from some of the witnesses, this creates problems. DOJ maintains this policy despite 18 U.S.C. Section 1001, the well- known law against false statements that spans all federal agencies in addition to the false statement law specific to tax filings.

The IRS, on its part, is an organization as to which, according to press reports, quoting its own previous director of non-profit organizations, and I quote here, "Chasing political non-profits isn't the organizations primary function nor one for which it is staffed."

Thus, from a systems point of view, we have DOJ deferring for enforcement to an effectively toothless organization with the predictable result that zero cases appear to have been brought. Indeed, as far as I know, not one person has been put before investigative grand jury.

To make matters worse, the IRS has taken one of the clearest statutes passed by Congress and through it's regulations has so defanged and confused the law as to make it virtually unenforceable by the agency.

The IRS did this by saying that, "exclusively," the word in the statute, meant primarily. By then accepting that primarily meant 51 percent and further, by pursuing a policy of conspicuous nonenforcement even of that watered-down standard.

If the IRS had affirmatively wished to defeat this law and permit rampant false statements to go unpunished, it could hardly have done a better job.

As a Notre Dame law professor who specializes in this area has said, the IRS seems to blink if you push them, and yet, DOJ defers to the IRS.

The result is of statements that are plainly false by any common lay definition of the term, "Go unpunished." A clear congressional statute goes unenforced. An industry that launders immense amounts of anonymous money into our elections, grows like a weed, and in politics, only the big donors and the candidates and their intermediaries know who's beholden to whom and for how much.

As Senator McCain and I pointed out in a brief to the Superior Court recently, this latter condition is a prescription for corruption. As even the Superior Court pointed out in Citizens United, it is disclosure of donors' identities that allows, "Citizens to hold corporations and elected officials accountable for their positions and supporter," so that citizens can, "See whether elected officials are in the pocket of so-called muddied interests."

And, of course, under this regime, nothing prevents foreign interests from influencing American elections if there's no investigation and no enforcement of whose money is really hiding behind the nonclosure provisions that give Section 501 (c) (4) its appeal to big donors.

The relevant federal IRS form includes question 15, which asks, under penalty of perjury, has the organization spent or does it plan to spend any money attempting to influence the selection nomination election or appointment of any person to any federal, state or local public office or to an office in any political organization.

In one investigation, ProPublica have found 32 organizations that answered no to this question and then went out and spent money on political races, and that was out of 72 IRS filings they reviewed, nearly half appear to be false.

Some organizations had ads running on the day they mailed their filings in. Some had run them before. Many spent millions on political ads. Looked at the other way, in the ProPublica investigation, they found 104 organizations that told state or federal election officials they'd spent money on candidates' specific political ads, what the FEC calls, "Electioneering communications."

Thirty-two of those 104 had told the IRS they've spent no money to influence elections. Even when information is provided it may be false. One organization said it would spent 50 (ph) percent of it's effort on a website and 30 percent on conferences. Investigations showed its website consisted of one photograph and one paragraph and no sign of any conferences.

The same group declared it would take contributions from individuals only and then took $2 million from Pharma, the pharmaceutical lobby. Another declared to the IRS that it spent $5 million on political activities but told the FEC it had spent $19 million on political ads.

Another pledged its political spending would be limited in amount and will not constitute the organizations primary purpose and then went out and spent $70 million on ads and robo-calls in one election season.

And some never even apply, they just start spending and file a tax return after the tax, potentially as their last act before they disband, so they're gone before the mail brings their filing to the IRS.

One never filed at all, even after the fact.

No enforcement action has been taken as far as I know.

As Melanie Sloan, executive director of CREW, has said, "You can go into business and violate the law and then go out of business and what's ever going to happen that. There's no consequence."

Let me close on this issue by reading from at article describing the reaction of a state election official.

"When ProPublica read the groups description of its activities on its IRS application, to Ann Ravel, the chairwoman of the California Fair Elections Commission, she laughed, "Wow," she said, upon hearing that the group said it would not try to influence election. That's simply false.

So this hearing is directed to the mechanisms and machinations by which such false statements are allowed to go unpunished.

During this hearing, we also examine enforcement issues pertaining to coordination between candidates and outside groups, where the FEC has so weakened the limitations as to make so-called, "Independent expenditures," functionally equivalent to campaign contributions.

Also the use of shell corporations to hide donor identities and the risk of foreign money influencing our elections that comes with secret fund raising and spending by 501 (c) (4)'s and other groups.

I look forward to hearing from the witnesses on these and other issues. I see that Senator Cruz has joined us, and I invite him to make any opening statement he cares to make at this time.

**CRUZ**: I'm happy at this point just to hear from the witnesses.

**WHITEHOUSE**: (inaudible). Let me introduce both witnesses.

Mythili Raman is acting assistant attorney general for the criminal division of the Department of Justice. In this role, Ms. Raman oversees nearly 600 attorneys who prosecute federal criminal cases across the country.

Previously, Ms. Raman was the principal deputy assistant attorney general for the criminal division. Ms. Raman has been with the department since 1996 and previously served as an assistant United States attorney in the U.S. Attorneys Office for the district of Maryland.

Patricia J. Haynes is the IRS deputy chief of criminal investigation. In this role, Ms. Haynes directs worldwide programs for investigating potential criminal violations of the Internal Revenue Code and related financial crimes.

Previously, Ms. Haynes was the executive director of investigative and enforcement operations and before that, director of field operations for the Southeast area. She began her career as a special agent in Virginia in 1983.

If I could ask the two witnesses to stand and be sworn, we'll begin the hearing.

Do you confirm that the testimony you're about to give before committee will be the truth, the whole truth and nothing but the truth, so help you God.

Thank you very much.

Ms. Raman, welcome. We will begin with you. Thank you very much for being on the part of the Department of Justice.

Is your microphone on?

**RAMAN**: Let me start again.

**WHITEHOUSE**: Before you start again, let me just make clear that, for those who have prepared testimony, your entire testimonies will be included in the record. We do call on our witnesses to restrict their presentations in terms of time here, but the full statement becomes a part of the record of the proceeding.

Again, Ms. Raman, thank you.

**RAMAN**: Thank you very much. Thank you, Chairman Whitehouse and distinguished members of the subcommittee. Thank you for inviting me here today to share the views of the Department of Justice on challenges to the criminal enforcement of our campaign finance laws posed by the growing activity of super PACS and certain 501 (c) organizations.

I'm honored to represent the department at this hearing and to have the opportunity to oversee the important work of the criminal division.

Protecting the integrity of our elections is one of the departments most important tasks, and enforcement of our campaign finance laws is a top priority. There is no question that private contributions to political campaigns are a fundamental part of the electoral process.

And that, under the Constitution, the ability to make political contributions is a protected component of our citizens political speech.

At the same time, Congress and the federal courts have long recognized the importance of transparency and fairness in campaign finance to avoid any individual or entity exercises undue influence over elections or over our elected officials.

The Justice Department is fully committed to investigating and prosecuting those who willfully violate the disclosure requirements and the contribution limits established by our campaign finance laws.

Indeed, since 2010, we have successfully prosecuted more than a dozen cases involving campaign finance violations. In the time since the Superior Court's decision in Citizens United versus FEC; however, the manner in which individuals and entities raise and spend money in our elections has changed dramatically and continues to change.

The two most important developments affecting our ability to enforce the campaign finance laws are the rise of super PACS and the growing political activity of certain types of organizations created under 501 (c) of the Internal Revenue Code, such as, 501 (c) (4) social welfare groups.

We face certain investigative and prosecutorial challenges as a result of this new landscape. With regard to super PACS, the primary challenge we face is establishing illegal coordination between a super PAC and a campaign.

As described more fully in my written testimony, as a result of certain FEC advisory opinions for regulation and matters under review. We believe it will be exceedingly difficult for prosecutors to prove, beyond a reasonable doubt, whether and when super PACS and campaigns willfully engage in illegal coordination.

With regard to designated classes of 501 (c) organizations, we are hampered by the fact that unlike PACS -- super PACS and other political organizations, these 501 (c) are not required to publicly disclose their donors to the FEC, even though those donors contributions may be used as expenditures to seek to influence federal elections.

Instead, 501 (c) organizations donors are disclosed only to the IRS as part of their tax returns which can be filed a year or more after an election and are subject to the traditional restrictions on public disclosure imposed by tax laws.

Thus, for example, a donor seeking to bribe a corrupt official, could potentially use a 501 (c) organization to hide his identity, and we would, thus, be unlikely to every receive the warning signals we would need to investigate further.

Vigorous enforcement of our campaign finance laws is essential to preserving both the integrity of our elections and the publics confidence in these elections.

The Justice Departments prosecutors and federal law enforcement agents work tirelessly to uncover, investigate and prosecute campaign finance offense, but the recent changes in our campaign finance laws have made it easier for individuals and entities to buy influence over elections and conceal their conduct.

And our ability to successfully combat these threats is hindered by the current law regarding what constitutes coordination between super PACS and candidates and by the loss of transparency arising from the use of designated 501 (c) organizations in connection with elections. Despite these challenges, we are committed to vigorously rooting out corruption and ensuring fairness of our elections through the robust enforcement of our campaign finance laws.

Thank you for the opportunity to appear before you, and I am pleased to answer any questions you may have.

**WHITEHOUSE**: Thank you very much.

Ms. Haynes, welcome and thank you for being here.

**HAYNES**: Thank you, Chairman Whitehouse and members of the subcommittee.

My name is Patricia Haynes, and I'm the deputy chief of IRS criminal investigation. Thank you for the opportunity to testify at this hearing on the criminal enforcement of our campaign finance laws.

My purpose here today is not to discuss the campaign finance laws themselves or how violations of those laws are prosecuted which is not my area of expertise. Rather, I'm here to explain how IRS criminal investigation helps to enforce the tax laws of the United States, and specifically, Internal Revenue Code Section 7206.

The mission of criminal investigation is to foster compliance in our tax system and compliance in our tax system and compliance with the tax laws by investing potential criminal violations of the Internal Revenue Code and related financial crimes.

Criminal investigation consist of approximately 2400 special agents worldwide who investigate violations of the tax code as well as statutes related to money laundering and the Bank Secrecy Act.

Criminal investigation works closely with the Department of Justice and the United States Attorneys offices around the country to bring criminal offenders to justice. The work being done by our special agents is a critical component of the IRS overall effort to encourage voluntary tax compliance.

Under IRS Code Section 7206, it is a felony to make false or fraudulent statements to the IRS or to file false or fraudulent returns or other documents with the IRS. The most common prosecutions under this code section involve the under reporting of income or the fraudulent inflation of deductions on federal tax returns.

But violations of 7206 may also be charged in cases involving other types of false statements made to the IRS on an array of IRS forms, applications and schedules.

The government must prove four key elements in order for a return or statement to be deemed in violation of Section 7206. The defendant making the statement declared that it to be true, that the statement was materially false, that the defendant signed the statement willfully and with the knowledge that it was false, and that the statement was accompanied by a written declaration that it was made under the penalty of perjury.

Let me turn now to an explanation of how criminal investigation investigates potential tax law violations. In general, criminal investigation conducts two types of investigations.

The first type, known as an administrative investigation, is worked outside of the grand jury process. An administrative investigation can be initiated where criminal investigation receives or develops information indicating possible violations of laws related to tax, money laundering or bank secrecy.

If a special agent determines that the information supports the potential for criminal prosecution, the special agent will launch an investigation to gather evidence with the special agent involved using the broad spectrum of techniques available to him and or her.

The second type of investigation arises when criminal investigation submits a request to the Justice Department to initiate a grand jury investigation either before, during or after an administrative investigation. This type of investigation is initiated when the use of a grand jury would be more efficient or would strengthen the potential for prosecution.

At the conclusion of an administrative or grand jury investigation, IRS criminal tax council evaluates the evidence gathered and provides advice on whether to recommend prosecution by the Department of Justice.

Criminal investigation also works with other law enforcement agencies that investigate campaign finance related offenses. In the past, such cases have involved allegations of public corruption, improper use of campaign contributions and the concealment of conduit or straw contributions.

Mr. Chairman, that concludes my testimony. Thank you, again, for the opportunity to appear before the subcommittee and describe the role that IRS criminal investigation plays in helping enforce tax laws and campaign finance laws.

I would be happy to answer any questions.

**WHITEHOUSE**: Thank you very much. Let me begin first by thanking and highlighting -- thanking Ms. Raman and highlighting the point that she makes in her testimony that the current state of affairs impedes investigation into political corruption.

That is a point that the Superior Court has simply failed to address, both in Citizens United and in the cases that followed, and it's a point that Senator McCain and I made in our brief to the United States Supreme Court, and it's an area I think they need to provide some attention.

But what I'd like to focus in my questions are some very specific acts that appear to be happening fairly frequently and that appear to be happening with impunity.

The first is a violation of the false statements laws and the -- specifically in response to this question on the IRS form. Has the organization spent or does it plan to spend any money attempting to influence the selection nomination election or appointment of any person to any federal, state or local public office.

The other -- so that's one sort of fact pattern that I think is quite clear and relatively simple. We have numerous instances where the answer to that question was a plain no, and then, very significant political activity was then accomplished by the entity that had said that it would not do that.

So that's one. The second is the -- now -- I'm looking for other one with the -- I'll just describe it. A super PAC has no ability to shield the identity of its donor. And, in fact, disclosure is part of the reason that there is a super PAC.

And yet we often say, "Here we go," individuals or corporations, any (inaudible) some anonymous entity making a donation to a, what appears to be a completely shell corporation designed just for the purpose of laundering money into a super PAC and violating the law that would require disclosure of the true identity which would seem to be a pretty clear 441 F violation making a contribution in the name of another.

And I'm wondering why it is that the Justice Department doesn't appear to bring any of those cases, and I think the immediate answer to that question, you can correct me if I'm wrong, but I think the immediate answer to that question is that, it's because you defer to the IRS to bring those cases to the department because they come out of the tax world.

And I don't know why, particularly the false statements, let me focus on that because that comes off the IRS report. I can see why the Department of Justice would want to defer to the IRS on criminal prosecutions involving complex tax matters. Making a false statement is something the department prosecutes all the time.

It doesn't take particular tax expertise to recognize a false statement when you see one or to prosecute one when you see one.

What are the inhibiting factors that prevent DOJ from going forward. Are you rethinking deferring so much to the IRS in these matters where it's not a tax specific underlying issue and is something as simple as making a false statement, and are you satisfied with the state of play right now with the lack of prosecution in this area.

**RAMAN**: Thank you, Senator Whitehouse, for asking those questions. I should start by saying 18 U.S.C. 1001 is a bread and butter statute that we use in corruption cases and our fraud cases. It's an important statute. It's one of the best ways for us to get to the heart of people who are trying defraud the United States or lie to an agency of the United States.

So we fully embrace and understand the importance of a robust enforcement of 1001 in appropriate circumstances ...

**WHITEHOUSE**: But I'm correct that no 1001 cases have been brought about question 15 and the answers to it that appear to be false.

**RAMAN**: And you've highlighted, I think, some of the problems that we encounter, particularly in the last several years, regarding how to get to the bottom of some of the activities and the flow of money that goes through 501 (c) (4) 's super PACS.

One of your charts described a scenario in which an anonymous donor provides -- and provides money to a shell company and then contributes to a super PAC. That is, in fact, something we could and would prosecute under 441 F.

**WHITEHOUSE**: But haven't.

**RAMAN**: Not yet. Without discussing ongoing investigations, we can assure you that we are incredibly vigilant about the use of these organizations as an end run around the contribution limits.

**WHITEHOUSE**: Well that's -- I fully respect the constraints, particularly of Grand Jury rule 6 (c) that you can't discuss ongoing investigations and you can't discuss matters that are before the Grand Jury, but I believe it's perfectly legitimate to say whether a category of offense is being prosecuted or not anywhere in the department, and whether or not the department has grand jury investigations addressing a category of offense underway without going into the details of who or where or --

And, as I understand it, there's no activity at this point within the Department of Justice either on false statements made in response to question 15 or under 441 F for the shell identity laundering into a super PAC.

**RAMAN**: Well, I actually can't comment on any ongoing grand jury matters, but setting that aside, I do want to assure you, Senator Whitehouse, that ...

**WHITEHOUSE**: Can I insist (ph) on that, that there actually is a grand jury matter that might be going on or can you not even say that?

**RAMAN**: I wouldn't want to tell you that.

**WHITEHOUSE**: OK. So as far as I'm -- as far as I can know, there's zero activity.

**RAMAN**: And I do want to assure you, Senator Whitehouse, that our public integrity section within the criminal

division and the 94 U.S. Attorneys offices are focused on these kinds of activities. Four forty-one F is a statute that our public integrity section has used repeatedly over the last several years.

We used it prior to Citizens United 441 F in the context of conduit contributions where essentially people were using shell donors or straw donors to funnel money to candidates. Post Citizens United, those people don't need to use those kinds of conduit (inaudible) anymore.

They simply donate directly to a super PAC because there are no limits on individual expenditures. So our ...

**WHITEHOUSE**: Unless they want to hide identity, and then they do the shell corporation thing, and if that's the 441 F case, I would think that that's something that could be brought.

There's nothing that would legally inhibit bringing a 441 F prosecution in a fact pattern in which a donor creates a shell corporation exclusively for the purpose of hiding their identity and then has the shell corporation, which they control and which is for the exclusive purpose of hiding their identity, make their contribution in its name to a super PAC, correct?

**RAMAN**: I absolutely agree.

**WHITEHOUSE**: OK.

Senator Cruz?

**CRUZ**: Thank you, Mr. Chairman. I want to thank both of the witnesses for joining us this morning.

In my view, whenever Congress acts in the area of political speech, there's a touch stone for everything we do, should be the first amendment to the Constitution. And I think that the public should be particularly skeptical when you have elected politicians of either part enacting rules limiting the ability of public citizens to criticize the behavior of their elected officials.

In my view, the first amendment was created precisely to ensure that the citizens could speak without the men and women who sit in this body restricting what they say. And I think there are few areas that are more dangerous to have the government engaged in prior restraint or punishment after the fact for private citizens who would choose to speak out on politics.

Indeed, of all the areas of speech, we have long lines of cases extending free speech protections to all sorts of questionable activities including things like nude dancing, and that's a well- established line of cases from the Superior Court.

But of every possible area of speech, I think there is none more central to the core purposes of the first amendment then political speech, than the ability of every American to speak up and express his or her views on the direction of this country.

And I would point out that, in saying this, I am not unfamiliar with the downsides. In Texas, I just came through a campaign where I was on the receiving of $35 million in attack ads and was out spent 3:1. And let me say, those who choose to put resources into launching attacks against me, had a first amendment right to do so. And God bless them for speaking out and being involved in politics.

And I think we should all be concerned about those who are elected to office and immediately want to prevent anyone from speaking and being engaged in the political process or saying something they don't like.

Now, Ms. Raman, I'd like to ask you a few questions about your testimony.

The first thing I'd like to ask is, in the Department of Justices opinion, what is the government interest in regulating the independent expenditures of private citizens.

**RAMAN**: Well, we obviously understand ...

**WHITEHOUSE**: I think your microphone needs to come on.

**RAMAN**: I'm sorry. We understand fully the holdings of the Superior Court in this area, and we are not suggesting regulation of independent expenditures. Our challenge as corruption prosecutors is something altogether different. Our challenge as corruption prosecutors is to be able to understand when those independent expenditures really aren't independent.

Where is the kind of illegal coordination where the expenditures become contributions and become an end run around the contribution limits that have long been recognized by both Congress and courts around the country, and that is our concern.

We want to be able to have the tools that we have always had to be able to follow the trail of money, to be able to follow the paper trail, to be able to determine whether there are bad actors who are illegally trying to influence our elected officials through -- by providing donations to the PACS that are illegally coordinating with the campaign.

And that is our challenge now. It's simply a different challenge post Citizens United.

**CRUZ**: Ms. Raman, I want to make sure I understand your question. If I understood you correctly, you said that the government interest was in investigating and/or prosecuting expenditures that were not independent, that were coordinated directly with a candidate or a campaign.

Is it fair then to infer that the answer to the question I asked about, does the Justice Department -- is there a government interest in regulating independent expenditures. In other words, those expenditures that are not coordinated. Is it fair to infer that the your statement is, there isn't a government interest or is there a government interest.

I don't want to put words in your mouth, so I'd like to know what the departments view is.

**RAMAN**: Well, I'm not going to speak holistically for every circumstance in which there may be some -- some law or regulation passed that may be viewed as affecting independent expenditures, but I am here to tell you that our primary purpose is to ensure that our campaign contribution limits are robustly enforced.

And we are simply hampered from doing that now, given that, we just simply don't have the tools that we used to have to determine whether or not super PACS are illegally coordinating with -- with campaigns ...

**CRUZ**: Today, the Justice Department is not articulating any government interests in regulating independent expenditures of private citizens. Is that correct?

**RAMAN**: Today, I am here to tell you that our interest is two- told. One, we want clear and common sense understanding of what coordination is so that we can do our job as robustly as we have been able to.

And number 2, we need transparency in the way our campaign finance system works so that if a donor is, in fact, using an organization like a 501 (c) (4) to hide their identity, that we somehow be able to get that information ...

**CRUZ**: Let me focus on the second part of your answer there. You said that the department has an interest in transparency. Does the department have a view on whether the first amendment protects a right to anonymous speech?

**RAMAN**: Again, I cannot get into every hypothetical in which we might have some interest in talking about

anonymous speech. And I'm certainly not here to suggest that our goal is to impede the lawful ability of individuals to speak on behalf of a ...

**CRUZ**: Ms. Raman, I'm asking what I think should be a fairly straightforward question. I mean, the department is testifying today in support of legislation forcing disclosure of political speech. And my question is, does the department believe the first amendment protects a right to anonymous speech. That's a question that goes right to the heart of your testimony.

**RAMAN**: I think, Senator Cruz, more important than what the Justice Department thinks, Citizens United, the Supreme Court upheld a disclosure regime and found it fully consistent with the first amendment. And we believe that the kind of disclosure regime that the Supreme Court upheld in Citizens United is critical to our ability to continue to understand ...

**CRUZ**: Does the department think it would be permissible under the Constitution for the federal government to require the NAACP to disclose a list of all its members?

**RAMAN**: I am certainly not here to suggest that that is what we're asking for.

**CRUZ**: I mean, as you know, the Supreme Court held that can't be required.

**RAMAN**: And, Senator Cruz, I'm certainly not here to suggest otherwise. What I am suggesting is that there is a risk that we have seen of bad actors using the anonymity that's given to them when they disclose to 501 (c) (4) 's to hide the true purpose of their donation.

And we need to be vigilant about that. We need to be able to determine when those donors are acting with bad intent, and frankly, when a campaign or an elected official may be knowingly allowing that kind of donation to occur, intending to be influenced in some corrupt way, that is our job.

We need to ensure that we are robustly and vigorously enforcing the Title 2 of the campaign finance laws, but also that we vigorously enforce our corruption laws, and it is not -- it's certainly been the case that we've had several cases in which campaign contributions are, in fact, as part of the quid pro quo that goes into the heart of the bribery case.

**CRUZ**: Thank you very much. I appreciate your being here this morning.

**RAMAN**: Thank you.

**WHITEHOUSE**: Well first, let me thank my friend, Senator Cruz, for bringing new dancing into what was a very dry and technical hearing. That's going to raise the profile of us quite a lot.

I wanted to just follow up. There is nothing in the first amendment that would protect threatening or corrupt speech even if it's anonymous.

**RAMAN**: That's right.

**WHITEHOUSE**: And there's nothing in the first amendment that protects false statements and the prosecution of false statements when -- provided under penalty of perjury.

**RAMAN**: Of course not.

**WHITEHOUSE**: And there's nothing in the first amendment that protects anybody's right to violate disclosure laws through a shell corporation.

**RAMAN**: No.

**WHITEHOUSE**: Yeah. And that so far has been the focus. Let me ask, Ms. Haynes, a question.

We have -- this is an issue where there's obviously often partisan disagreement, but we have some interesting partisan agreement in the witnesses -- among the witness who will follow, which is that, as professional as your organization is, you're not well-suited to doing this particular work.

Mr. Noble says, "It does not appear that there's any effort to target donors to super PACS who use front organizations. There appears to be little effort being given to making sure politically groups claiming 501 (c) (4) status are complying with the law. It appears that the agency rarely challenges a groups 501 (c) (4) designation based on political activity."

And ultimately, it does not appear that the law is being enforced. Mr. Smith says that, "This is a mission for which the IRS lacks knowledge and expertise and which is tangential to its core responsibilities. The service has long been particularly prickly about being dragged into political warheads," and the agency, "Is not equipped or structured to do the job it was asked to do."

Let me ask both of you. Does it make sense, you know, to have the IRS right now to get from the Department of Justice the deference that it does with respect to those two narrow, particular kinds of cases.

The false statement case, under question 15, or the 441 F case in which you have a clear shell corporation manufactured for the purpose of violating a disclosure law. I don't believe I asked Ms. Raman on this question, that the Department of Justice has ever made a case where it's even investigating any case in either of those areas.

I don't know if the IRS is either. If you're not, is that a signal that maybe the DOJs policy of deference to the IRS in this particular set of areas which aren't text law specific, have nothing to do with understanding the tax code and are all about false statement and shell corporation behavior, which is, as Ms. Raman pointed out, frequent in many areas of criminal behavior.

And whether that should be re-thought and whether you're confident that the IRS is doing a good enough job on its own in making adequate referrals.

**HAYNES**: Well, Senator, I can say that the IRS criminal investigation has been -- has been involved in violations of campaign finance laws using -- with the statutes that we have. In fact, one of the cases that we were involved in, was mentioned in Ms. Raman's written testimony out of New Jersey.

I don't ...

**WHITEHOUSE**: A donor case?

**HAYNES**: Pardon me?

**WHITEHOUSE**: A straw donor case.

**HAYNES**: Yes.

**WHITEHOUSE**: Yes.

**HAYNES**: Yes, it was. So ...

**WHITEHOUSE**: It's not one of the shell corporation the super PAC cases. There's never been one of those done.

**HAYNES**: I don't have any information that I can share on any case like that.

**WHITEHOUSE**: More of false statement in answer to what the ...

**HAYNES**: I ...

**WHITEHOUSE**: No on question 15, and then subsequent immense political activity.

**HAYNES**: I don't have any information I can share on a 501 (c) (4) related false statement case, you're correct.

But the IRS is still engaged in these types of investigations. In the course of a criminal investigation, the special agents gather all the facts and circumstances and make a recommendation based on what they feel has the strongest likelihood of prosecution. Whether that it is a 7206 charge or a 7212 A charges was in the prior case that I mention.

That recommendation is reviewed by our criminal tax council, and then ultimately, when it's referred to the Department of Justice, the discretion lies with the prosecutor on what violations to charge.

So the IRS is involved in these types of cases, just we haven't one that I can speak of with that particular charge.

**WHITEHOUSE**: Well I guess under the circumstance of the testimony that we have from the subsequent panel on what we've heard today, I would urge that the department and the service get together and re- think, whether in these two specific areas, which I think they are little resemblance to traditional tax violations, and are, in fact, various --

I think you used the word "plain vanilla," criminal cases whether or not that deference to the IRS is actually serving the public interest at this point or whether the department could not proceed to investigate and panel (ph) grand juries bring people before them so to generate evidence and put together a criminal case showing a fairly straightforward false statement or a fairly false statement shell corporation disclosure violation.

And I don't need you to answer that right now because I know that question is going to be answered -- if it's answered at all -- by people above you in both organizations, but I would ask you to take that away from this hearing.

**HAYNES**: Sure, Senator.

**WHITEHOUSE**: I had another round. Senator Cruz, you are welcome to another round.

**CRUZ**: Thank you, Mr. Chairman. Ms. Haynes, does the IRS have any position on whether additional campaign finance legislation should be passed by Congress?

**HAYNES**: Senator, I don't have an official position on that matter. I leave -- I leave those decisions up to our criminal tax council -- or our tax council -- in the Department of Treasury to establish those types of regulations or improvements.

**CRUZ**: Thank you.

Ms. Raman, I'd like to go back to the conversation we were having a few minutes ago. And to understand, as best I can, the departments position with regard to the Constitution of protections on independent expenditures by private citizens.

As I understood, our discussion, that the principal basis you were pointing to additional disclosure requirements on private political activity, is that that transparency would aid in discovering if there is corruption or bribery. Is that -- am I understanding you correctly?

**RAMAN**: That corruption and bribery and if there are other violations of our campaign contribution limits.

**CRUZ**: Now you would certainly agree that there are limits, and I would think significant limits, to the theory that

additional government information would be helpful for discovering crime. That that's a theory that has the potential to require government disclosure of virtually everything. And I'm sure you would agree. There are limits to that theory.

**RAMAN**: Of course, and we obviously just want a reasonable disclosure regime that balances the need for people to speak freely and have their voices heard in the political arena while assuring us that we are able to compact both corruption and the appearance of corruption.

**CRUZ**: Now when I asked about a constitutional right to anonymous speech, you made reference to Supreme Court decisions. Does the Department of Justice maintain that the Supreme Court has been wrong in concluding that there is a first amendment right to anonymous speech?

**RAMAN**: It is not the governments position to second guess the Supreme Court. I am here, however, to clearly describe what some of our challenges are in light of Citizens United. Obviously, the government took a particular position before the Supreme Court and Citizens United, but now we have a law, and we intend to follow it.

That having been said, there are real challenges. There are real challenges to our ability to enforce the campaign contribution laws, and there are real challenges to our ability to determine when and whether there is the type of corruption that is rooted in campaign contributions in exchange for official acts.

**CRUZ**: Well, and I think everyone, on both sides of the aisle, would agree that preventing corruption and preventing bribery is an important governmental interest and deserves serious focus.

And you mentioned though in your prepared testimony that you were concerned, also, not just about corruption and bribery, but what you characterized as undue influence. And I guess I have a little bit of difficulty understanding what undue influence means.

Because if it's not corruption or bribery which is a very different thing. It strikes me that the citizens are due all the influence they can get in a democratic process. So I'm curious with what you mean by undue influence. If it's any different from corruption or bribery.

**RAMAN**: I don't think I intend to suggest that it's something different from illegal acts such as corruption or bribery or extortion by officials. What it is does -- what it is that I am focusing, however, on the fact that undue influence often translate into those kinds of activities.

I think it's axiomatic that contributions lead to influence and the larger the contributions, the larger the influence, and we have seen, in certain of our corruption cases, that public officials succumb to that influence and agree to take official action in exchange for campaign contributions.

And we just want to be vigilant about ensuring that we get to the heart of those kinds of cases when and if we encounter them.

**CRUZ**: Well the Supreme Court has certainly recognized the distinction between contributions and independent expenditures. And there are a great many organizations, on the left and on the right, that devote real resources to try convince their fellow citizens that they're right on particular issues of public importance.

I assume it is not, for example, the Department of Justice's position that a group like the Sierra Club exercises undue influence. Am I right in that?

**RAMAN**: And again, Senator Cruz, I want to be absolutely clear, my concern is about -- not about any one particular group or about undue influence in and of itself, what I am concerned about is that, given the rise of super PACS, our ability to understand when there's the type of coordination that causes an expenditure to become a contribution and that kind of contribution is over the contribution limits that have long been established by Congress.

That we want to be able to get to that -- get to the bottom of that.

**CRUZ**: So is it right then, that to get to the bottom of it, that the department would like to know every political contribution made to every private group? Is -- again, I don't want to put words in your mouth so I'm trying understand what your testimony is.

**RAMAN**: There are two things that would aid us as prosecutors. Greater transparency, in general, and we are happy to work with Congress or your staffs to talk further about the particulars.

And number 2, a more common sense understanding and definition about what constitutes coordination. And those two things would assist us as prosecutors in being able to continue to do the jobs that we've always done in terms of rooting our corruption.

**CRUZ**: You know, we've seen in recent news reports, instances of bribery and corruption of public officials receiving bribes. I think one, it was alleged received a bribe in a box of Cheerios.

Another public official recently was alleged to have kept a bribe in his freezer. So corruption is a real problem, but I think it is qualitatively different from regulating the efforts of private citizens to speak out in the political process. And I'll make clear at least my views, I asked about the Sierra Club, and I can happily say no, I don't think they exercise undue influence.

I don't think Planned Parenthood exercises undue influence. I don't think the unions exercise undue influence. I don't think the NRA exercises undue influence. I think every one of them has a constitutional right to speak out in our democracy.

I think their members care passionately about the values that are spousing, and that's the way our system is supposed to work, and I think we should be very cautious about the federal government restricting the ability of private citizens to express their views on the direction of our country.

Thank you.

**WHITEHOUSE**: If I might add because I think Senator Cruz makes a very good point, and I want the record of the hearing to reflect that, I think we have agreement amongst everyone, that it is never the governments position or proper role to determine, based on the amount of influence that a political group or interest or individual has, that they have too much.

That is a role, I think, for the voters to determine. And in that regard, I think it is important that the record of the hearing reflect that it is not just corruption and bribery that are of concern in this area.

But as the Supreme Court has clearly established, making sure that citizens are informed is an important public goal as the Supreme Court said, to hold corporations and elected officials accountable for their positions and supporters of citizens can see whether elected officials are "in the pocket of so-called muddied interest."

And to the extent that there are laws that provide that disclosure, I think the government then does have an interest, if it's not to be made a mockery, in enforcing the laws that we have created for that disclosure.

And clearly, there are appropriate limits on that, but I think that disclosure is an important element in this discussion. And with that, I will release these two witness. Let me thank you both for the work you do on behalf of the people of the United States.

I spent four years as a United States attorney and had great pride and satisfaction in working with people at the Department of Justice, at Main Justice and with the IRS criminal investigative agents, and you do great work and I'm glad you came here today and I thank you.

**RAMAN**: Thank you.

**HAYNES**: Thank you.

**WHITEHOUSE**: And we'll take about a two or three minute break while the (inaudible) gets reset for the second panel of witnesses and come back into session in just a moment.

(RECESS)

**WHITEHOUSE**: If the witnesses are present, can I ask them to take their seats and we can proceed with the remainder of the hearing? While we're waiting the arrival of Mr. Colvin who, I understand, has been seen and must be nearby, so we'll have him here in a moment. Indeed, here comes somebody with a determined approach to the chair.

There we go. Thank you very much.

Let me introduce the witnesses then have them sworn and then ask you each to make your statements.

First on our left, on the witnesses right is, Lawrence M. Noble. He is the president and CEO of Americans for Campaign Reform, which is a non-partisan organization supporting public funding for federal election.

He is also an adjunct professor at the George Washington University Law School, where he teaches campaign finance law. Previously, Mr. Noble served for 13 years as the general council for the federal election commission.

Our second witness, front and center, is Gregory L. Colvin. He is chairman of the board of Adler & Colvin, a San Francisco law firm that specializes in representing non-profit organizations and their donors.

Mr. Colvin has written widely on the political activities of tax exempt organizations. From 1991 to 2009, he served as co-chair of the Subcommittee of Political and Lobbying Organizations and Activities of the Exempt Organizations Committee of the ABA tax section.

And furthest to my right is Bradley A. Smith, a professor of law at Capital University Law School in Columbus, Ohio, and founder and chairman of the Center for Competitive Politics.

Mr. Smith served as a commissioner on the Federal Election Commission from 2000 to 2005, including service as its chairman in 2004.

I welcome all the witness and ask if you would please stand and be sworn.

You affirm that the testimony you're about to give, before the committee, will be the truth, the whole truth and nothing but the truth, so help you God.

Thank you very much and please be seated.

Mr. Noble, we begin with you. Thank you very much for being here.

**NOBLE**: Thank you. Chairman Whitehouse, Senator Cruz, I want to thank you for inviting to testify at this committee on this very important issue of the enforcement of the campaign finance laws.

It is estimated that over $6 billion, well over $6 billion, was spent on the last elections. With so-called independent groups. That's the super PACS, the 501 (c) (4) organizations and the others, spending somewhere around a billion dollars, or at least that was what was reported.

We also know that a tremendous amount of the money was not reported. So we have a situation here now where our elections are being funded by these independent groups which is constitutional.

But there are also laws surrounding how those groups should operate, and those, are not being followed. Many point to the Supreme Court's decision that Citizens United and other decisions as saying it has hampered the ability of at least the Department of Justice, the Federal Election Commission and the IRS to enforce the laws.

And that is true, in some ways it has. The Supreme Court has recognized the constitutional right to make independent expenditures by individuals and corporations, but that overstates the case.

Because those who say that often say that, "Well there's no point in trying to do anything. There's no point trying to do any reform because the power of corporations, unions, wealthy individuals cannot be affected under what the Supreme Court has said.

But the reality is, that the FEC, the Federal Election Commission, the IRS and the Department of Justice are not enforcing the laws on the books. And if they would enforce the laws on the books, a number of the issues that we have, would go away or at least would be more manageable.

First of all, super PACS are required to report their donors as has been discussed. They are political actions committees. It seems logical that if they're required to report their donors, that they should actually report the person who really gives to them.

And, therefore, you should have a law, it would seem, that would prevent somebody from giving through a straw donor to a super PAC to hide identity. That's' logic.

And fortunately, there is such a law. And that's 2 ERC Section 441 F, which allows the government to prosecute the giver, the intermediary organization and the super PAC, if they knowingly give money through that intermediary organization, the super PAC, knows about it for the purpose of hiding the identity of the donor.

That's illegal right now. That is not being prosecuted.

Even beyond super PACS, 501 (c) (4) organizations do not have to report their donors. That's absolutely true. But it they make independent expenditures, they do have to report. And they have to report anybody who gives over $200, for the purpose of furthering an independent expenditure.

That would sound like, if I gave to a super 501 (c) (4) organization and said, "Here's money to make independent expenditures," my name would be reported. It's not happening. Why? Because FEC commissioners have determined or some have determined that, unless you give for a specific ad, you don't have to be disclosed.

It is very difficult to prove anybody has given for a specific ad. Beyond that, any organization, whether it's 501 (c) (4) or a 501 (c) (3), any organization, or any group of persons, that makes expenditures over $1,000, and has, as its major purpose, the political activity -- the federal election activity, has to report as a political committee, report all its donors.

That is the current law. Given the statements made by many of the 501 (c) (4) organizations, given what we know about their funding, it's hard to see how there's at least not an investigation as into why some of these are not political committees.

But the federal election commission has basically given up on trying to define what is a political committee because of a dispute on the commission, or enforcing any group to report as a political committee if it decides not to.

As to the coordination issue, this is an area where reality and the law have separated. Under the law, these expenditures are allowed because they're independent. The Supreme Court said very explicitly, the constitutional right for independent expenditure comes from the fact that because it is independent, it can hurt the candidate as well help the candidate, and there is virtually no chance of a quid pro quo or any potential corruption because of that separation.

Put that statement up against what we saw in the last election, whether candidates have their own super PACS, raise funds for their own super PACS. Call them their super PACS. Their staff, their former staff go to work on the super PACS.

And it's not surprising that neither the candidates, the public or anybody else seems to think that these are truly independent organizations. So they are not independent organizations.

Why is this happening? Because the FEC, the Federal Election Commission, is not enforcing the law on the books. The Department of Justice is not independently enforcing the law on the books, and as it was discussed in the previous panel, the IRS is not taking a serious look at what these 501 (c) (4) organizations are doing.

Thank you.

**WHITEHOUSE**: Thank you very much, Mr. Noble.

Mr. Colvin? Welcome. Please proceed.

You need to turn on microphone, sir.

**COLVIN**: I appreciate the chance to come before you and address the question why we've seen so little enforcement, civil or criminal, of the Federal Tax Laws that apply political activities of 501 (c) (4) organizations.

My law firm represents a broad range of non-profits and their donors. For 35 years, formed tax exempt organizations, including (c) (4) 's advise them on their activities. Why is the IRS in the business of enforcing political rules.

You see, every person, every entity in the country have a federal tax life. It must pay tax on its income unless it is exempt by a statute. The only entity allowed to have a primary political purpose is the 527 organization. It has a partial tax exemption and must disclose its donors over $200.

All other tax exempts must have a primary purpose that does not include politics. Therefore, the IRS cannot avoid the law enforcement duty to, one, quantitatively define political activity and quantitatively determine what is too much to keep your exemption.

The annual form 990 has a question under penalty and perjury, did the organization engage in direct or indirect political campaign activities, on behalf of or in opposition to, candidates for public office.

If you answer yes, you must report the amount spent, the number of volunteer hours and describe what you did.

There is, though, a fundamental problem affecting enforcement on the 501 (c) (4) non-profits. The tax rules are vague, unpredictable and unevenly applied. Only the most flagrant violations could be knowing willful or deliberate and subject to criminal prosecution.

What is political intervention? The IRS interpretation must be gleaned from a few old cases and rulings, internal training materials and a few first of guidance from the last decade.

The IRS insist on using an open-ended facts and circumstances approach rather than drawing bright lines. Political intervention under tax law has more than expressed advocacy under election law, we're told, but what is it?

Reasonable minds could differ and they do. How much political intervention is too much for tax exempt (c) (4)? It's primary operations must promote social welfare, the common good of the community.

The IRS, therefore, deduces that non-qualifying activities must be, "Less than primary." While the service has never

pinned down to an annual level of expenditures, it has tacitly accepted 49 percent as a defensible figure, yet, because of the IRS facts and circumstances approach, we can never be sure.

So the speech of some (c) (4) groups is chilled. They avoid the risk and stay far below the 49 percent level while their advisories may go right up to the edge.

Two things I want to say about the focus of this hearing on (c) (4) is, first of all, there is well over 100,000 registered with the IRS. They include well-known organizations, such as, rotary, Kiwanis and the Disabled American Veterans, as well as, the Sierra Club and the NRA.

Most are highly reputable and do very little or no political activity. They don't present a law enforcement problem.

Secondly, enforcing these tax laws is not limited to the (c) (4) class. The vagueness of these rules affects (c) (3) charities, (c) (5) unions and (c) (6) trade associations that have the same primary purpose rule.

Here's the most difficult political tax law enforcement problem. What is the difference between a political campaign ad and an issue ad that names a candidate, says something good or bad about them, and tells the viewer to contact the candidate about the issue.

(inaudible) in 2002 required disclosure to the FEC of spending on electionary communications, defined basically as, paid advertising, the names of candidate and is broadcast within 30 or 60 days before an election.

The IRS went in a different direction. It issued revenue ruling 2004-6 listing a series of six bad factors and five good factors by which to judge advocacy communications. Then three years later, it issued Ruling 2007-41 as a seven factor test on issue advocacy.

The two multifactor tests are not the same. Neither of them applies directly to the key question in this hearing, what political speech by a (c) (4) would count against its exemption.

So how can a lawyer advise his or her client. How can a prosecutor evaluate a case in which a (c) (4) denies it will engage in candidate politics in its federal tax form, and on the same day in March, it broadcast a TV ad praising a senator who is up for re- election in November.

Under the seven factor IRS test, three factors look bad. It names the candidate and expresses approval and is not connected to an event, such as, the vote on legislation. But three factors look good.

The election is still eight months away, the ad makes no reference to the election or voting, and it mentions no wedge issues separating the candidates.

What if the ad is targeted to a battleground state. Targeting is a factor in one rule but not the other.

With this kind of vague, uncertain, multifactor approach, the (c) (4) can find a reputable lawyer to advise that the ad is not political intervention under the IRS test. Therefore, an officer of the (c) (4) entity could sign a tax return believing that it's true and correct.

I want to conclude by suggesting that the IRS itself can solve both the qualitative and quantitative problems. The IRS and Treasury could establish a regulatory project to define bright lines for political intervention. I chair a drafting committee. We have a bright lines project sponsored by Public Citizen which is attempting to do exactly that.

Finally, the IRS could reconsider its position on the less than primary ceiling for (c) (4)'s, (5)'s and (6)'s. It could establish a percentage of 10 percent as an insubstantial level of political activity.

These reforms go a long way to restoring public confidence in the tax exempt universe. Thank you.

**WHITEHOUSE**: Thank you, Mr. Colvin.

And now we -- I don't know if is appropriate to call you Commissioner Smith so ... does the title stick with you after you're gone? Mr. Smith, in any event, we'll go that way.

Mr. Smith, welcome.

**SMITH**: Thank you, Chairman Whitehouse and Senator Cruz, and thank you for inviting me to testify today.

I want to actually be the one who challenges some of the assumptions that have underlined this hearing. For example, it's been said at the beginning, that there are a massive amount of monies flooding into the system because of Citizens United.

It's true, for example, that spending in 2012 was up about 37 or 35 percent from 2008, but between 2008 and 2004, spending rose by about 30 percent. Spending has gone up in every presidential election in lifetime, usually by a substantial amount.

And to suggest that this is the consequence of one decision, I think, is incorrect. In fact, when we look numbers, it appears that an absolute maximum, about 5 percent of the spending came from corporations -- for profit corporations, and we get there only by suggesting that everything non-profit spent, (c) (4) spent, was from corporations. And we know that that's not true. We know that much of that came from unions, and much of it came from other individuals and so on.

Secondly, I do not agree that there's a huge crisis of enforcement here. For example, we talk about the disclosure aspect. That's gotten a lot of attention today. In fact, it appears that about 5 percent of political spending in the last election went, "Undisclosed."

OK. Now $380 million sounds like a lot, 5 percent doesn't sound like maybe it's such a dominate problem in American politics.

And even that overstates it. Much of that spending was, in fact, done directly by groups that are well-known public. If we're trying to inform the public, I think most people know what the agenda of the Chamber of Commerce is, or most people know what the agenda of most of the types of groups that were given, happened to be.

We've talked some about shell corporations. You know, people go over these super PAC contribution list in great detail, that's what CREW exists to do, and do some of these other groups.

And, to my knowledge, I may have missed one or two, but to my knowledge, there have been two recorded episodes of "shell corporations." In both cases, it revealed within a matter of hours, if not days, at the most that, who was the spender behind those shell corporations.

And this has been pointed out, that activity is probably already legal -- although -- illegal; although, the people did seem recognize it because so many people have been going around suggesting that, in fact, you could use shell corporations in this way.

Next I want to address the issue of shifting enforcement to other agencies than the FEC, which has been the big creature here in the room.

It's kind of surprised me to hear all this talk about, should the IRS be enforcing campaign finance laws and so on.

Much of what is talked about and claimed about with the FEC is not a bug. It truly is a feature. People complain all the time, "Oh, the FEC is probably gridlocked. It's 3:3."

Actually it doesn't deadlock very much 3:3. When it does, that usually decides the issue, but beyond that, it's designed that way intentionally so that one party cannot take over the political system and ram things through on a 3:2 vote of commissioners.

That's precisely what Congress said we were not going to have, and I don't think there's any member of this chamber who would be willing to stand on the floor and say, "I am willing to give the opposition party the ability to decide who speaks when on politics without input from the by-party."

I don't think any member of this chamber would do that.

We need to recognize as well, for example, on coordination. The rules are complex, and it is hard to prove coordination, but that is, as well, a design because coordination investigations are extremely sensitive.

I can guarantee you -- I can't guarantee you -- but I'm pretty sure that at some point in the next 30 days, you know, all the senators are likely to meet with somebody who is from the super PAC, an interest group, a union, a trade association, right.

At this point, if it's a coordination investigation, we should then be able to investigate that meeting. Who knows what they talked about. Maybe if that trade association or union did any election expenditures. Maybe it was coordinated.

And this is what we find with these coordinated hearings. They are extremely intrusive into political strategy, into political tactics and into the ongoing goals and efforts that folks make.

So I want to conclude by suggesting that we need to be very careful about trying to get aggressive enforcement out of justice. We have seen that in the past. We've seen that at the IRS in the past. The IRS for many years, under pretty much every president up through Richard Nixon, of both parties, was used for political purposes.

And for that reason, it has fought hard to stay out of politics and Congress is trying to drag it back in as a campaign enforcement mechanism because it's unhappy with the fact that the FEC is set up to guarantee a bipartisan regime.

I might suggest here that, if you really want to shatter confidence in government, if you really want to build this trust. If you want to create the appearance of corruption, right, then what you want to do is use a straight party line political vote, either in this congress or at the administrative agencies that have party line majorities, and use that vote to attack the other side politically with no bipartisan support.

I can think of nothing more that would shatter public confidence in government and the impartiality of the government agencies including justice and the IRS than taking that approach.

Thank you very much.

**WHITEHOUSE**: Would that apply to the Supreme Court and the 5:4 decision with the republican judges all holding with no support from the minority?

**SMITH**: I'm not sure how that actually relates to the question, but I guess I would say that, no, I don't think that holds there at all. I don't think the judges are sitting in partisan roles, and they're not running for election and they're not worried about who's going to be the next ...

**WHITEHOUSE**: They're not running for election anyway.

Mr. Noble, I wanted to ask you, I am who believes that the FEC is log-jammed. I am one who believes it's deliberately log jammed by outside forces that are come to bear on the commission itself to stop actions that interfere practices that are useful in the political world but may actually be unlawful if the FEC would act.

And in that regard, we spent, I don't know, close to $70 million on this commission. Would it be useful to, and will you recommend, establishing a private right of action for a candidate or campaign that believes that it's had the law violate against it, can't get an answer from the FEC and now has the right to go the traditional constitutional locus for adjudication in the American system of government which is a jury and have that heard.

And perhaps, if there was that alternative, then the satisfaction of blockading the FEC would dissipate, and it would become more of an active and responsive body again.

**NOBLE**: I think a private right of action is important. There is one right now in the FEC. There are cases that certain complainants to bring if the FEC doesn't act. Now, there are a lot of hoops you have to go through but ...

**WHITEHOUSE**: It's very rarely done, isn't it?

**NOBLE**: It's very rarely done, and there are constitutional reasons including standing concerns about whether people can actually sue another party.

While I think it's an important factor, I would hate to rely on it too much because that's only available to major players. The people who can afford lawyers, the party committees, the candidates. It's not available to the average citizen who cannot afford to sue the agency.

And I agree with Commissioner Smith on something which is very important, that I think the Department of Justice needs to do much more, but I do agree that the locus should be at the FEC.

I think the problems is the FEC is not enforcing law, and it has deteriorated tremendously since Commission Smith was there, and there have always been difference on the commission.

But right now what you see are true ideological differences. We have three commissioners who just don't believe much of the law. And I appreciate Commission Smith saying that these are not bugs. These are -- these are features. I do think it's a bug that, as of the end of this April, all six seats on the commission will have expired, and no appointments have been made to the commission.

I do think that's a bug. I think it's a bug that since 2010 when (inaudible) came out, the FEC has been trying, actually, it's given up to come up with regulations to explain how Citizens United affects the law. It's been unable to do that.

It's kind of like saying, when I had a sports car that ran half the time that was actually a feature from stopping you from using gas. No, it was a bug. And it is not acceptable.

The FEC is broken. It does not work and something has to be done about that. And I agree with Commission Smith, you have to be concerned about the political ramifications. But I think that if you had an effective FEC, a lot of these issues would go away.

And obviously, there will always be issues that exist, but I do think (inaudible) action is part of it. You have to address the FEC.

**WHITEHOUSE**: Mr. Colvin, in your testimony, you addressed the Vision Service Plan case, and the insubstantiality standard. Could you elaborate a little bit further on the insubstantial standard as it came through Vision Service and how that conforms or doesn't conform with the political activity standard and whether that should conform.

I think you reached the conclusion that it should conform. Could you explain your argument there and describe Vision Service Plan a little bit more.

**COLVIN**: Certainly. The Vision Service Plan did not involve political activity. It involved a health insurance plan

that had, in the IRS's view, too much private benefit to certain members of the plan. The test that it used to determine what was too much was an insubstantial test.

Insubstantial doesn't have a precise ...

**WHITEHOUSE**: ... in quotes.

**COLVIN**: That's right.

**WHITEHOUSE**: Yeah.

**COLVIN**: It doesn't have a precise percentage to it, but there have been cases in other areas law affecting both political and lobbying activity that have said somewhere around 5 or 10 percent would be considered insubstantial.

The legal precedent for this is that when the IRS interprets words like "exclusively" and "primarily." It means all but insubstantial.

So the presence of one activity or one purpose, if it is substantial, destroys the tax exemption. However, the IRS has not taken that stance clearly in the case of political activity.

Instead, in this revenue ruling 81-95, provides that, a 501 (c) (4) organization can engage in political activity so long as they are less than primary. And in the absence of any percentage, many have interpreted that to be 49 percent.

So really the IRS and the Department of Justice, for that matter, if they were to pursue a case of political activity under 501 (c) (4), (c) (5), or (c) (6), and the Department of Justice got a hold of that case, could very well determine that the same standard ought to apply as in the Vision Service Plan, a private benefit, insubstantial 5 to 10 percent and no more.

**WHITEHOUSE**: And they're both articulating the statutory requirement of 501 (c) (4) that these entities be operated exclusive to promote social welfare. So in the case of Vision Service Plan, they said it wasn't exclusively to promote social welfare because there was a more than insubstantial amount of private benefit being taken out of the organization.

And your hypothesis is that you could take that same standard that you used for private benefit and apply it to the political side, the political benefit and apply the insubstantial standard.

**COLVIN**: Absolutely. That's correct. And when Miriam Galston is here today who has written an article arguing exactly that point, and I agree with it.

**WHITEHOUSE**: Great.

Let me ask Mr. Smith a question. I think we have agreement so far in this hearing that with respect to the first amendment which clearly is a significant consideration in all of this discussion, that two things. One. False statements under oath do not enjoy first amendment protection.

And second, where there is a constitutional requirement, not a requirement in the Constitution, but one that meets constitutional muster, by law, that fraudulent use of a shell corporation to defeat that law is also not protected by the first amendment.

Would you agree with both of those hypotheses?

**SMITH**: Certainly I would agree with the first. The second, I'm not quite sure, I mean, what you're talking about. If you're saying is it illegal to make a contribution in the name of another, you know, that's -- yeah I think that can withstand.

**WHITEHOUSE**: And despite the fact that making a contribution as political speech that is protected by the first amendment, making it in the name of another is not protected by the first amendment and can be prosecuted properly.

**SMITH**: I think the court would uphold that, but it's important for us to recognize that, generally, it's not for the discussion about disclosure in this case. As people kind of say, "Well the courts endorse disclosure in Citizens United."

But it did, but remember, the court has not endorsed anything called disclosures. In fact, place huge limits on disclosure, even in Buckley (ph) versus (inaudible), it struck down more, of (inaudible), the federal reduction campaign as to the disclosure regime that it upheld.

And there's a long line of cases suggesting that you have to be very sensitive in that area.

So you've raise what, again, I think is a very minor problem. We don't really see many examples of it. People are calling me saying ...

**WHITEHOUSE**: But there's no -- you don't have any dispute that a contribution in the name of another, that is frequently done, not innocently done ...

**SMITH**: Well if you, you know, if you put the circumstance that you have which is that it is the name of another and it is fraudently done, and those that are questions that will often come up in our investigation.

**WHITEHOUSE**: And did a false statement under oath enjoying our first amendment protection.

**SMITH**: Well I don't think they under -- I'll under the Stone and (inaudible) case, maybe even there you might have some, but I think the under oath would probably take that away.

**WHITEHOUSE**: Yeah. It would seem that way. It would be a novel theory if it weren't.

Senator Cruz?

**CRUZ**: Thank you, Mr. Chairman. And I'd like to thank all three witness for being here today.

Commissioner Smith, I'd like to ask several questions.

As we sit here today, organizing for America, which is President Obama's 501 (c) (4), indeed that their website is, BarackObama.com, they are currently, today, running online ads criticizing me. Now Commissioner Smith, would you agree that that is their first amendment right to do so, that should be entirely protected under the Bill of Rights?

**SMITH**: I think it's a terrible thing to run ads criticizing (inaudible), but I probably would agree that it's protected by the first amendment.

**CRUZ**: And that a standard should obviously apply across the board regardless of the partisan affiliation of the speaker or the person being praised or criticized?

**SMITH**: I would apply to the criticism of Chairman Whitehouse as well, yes.

**CRUZ**: Very good.

**SMITH**: One of the things, Commissioner Smith, you talked about was the structure of the Federal Elections Commission, in particular, that you've got three democrat commissioners, three republican commissioners and the role that plays as a check on partisan excesses.

And you mentioned that there has been a long history when campaign activities have been located purely in the executive branch, located in, say, the IRS, there has been a long history of abuse and abuse on both sides of the aisle.

There were allegations of abuse under President Nixon. There were allegations of abuse under President Johnson. Can you share your views on the importance of the structural check of the FEC's organization to limit either party abusing the executive branch to punish their political enemies?

**SMITH**: Well, I mean, I think, obviously, it's very, very important, you know, and the history I've outlined some of it in my prepared remarks, we see cases like the very first prosecution brought into the Federal Election Campaign ad was brought against a group of people, ordinary citizens basically, kind of upper middle-class folks who had a little bit of money to pool, some professors and so on, who ran an ad in the New York Times criticizing Richard Nixon and calling for him to be impeached.

This was before Watergate, and the Nixon folks said, "Well, if somebody is convinced we ought to be impeached, maybe they'll be convinced not to vote for me. We ought to be able to go after these folks."

And so I really do think that it's very important that we, you know, a long history under both parties, that we -- that's why Congress set up a bipartisan agency. Not bipartisan like many agencies with a 3:2 majority or something, but a true 3:3.

The commission has historically deadlocked as people say, gone to 3:3 on about 1 to 4 percent of its votes.

In recent years, it has spiked up to about 10 percent of its votes. One thing I point out is that it typically resolves the issue, and it's important to note that that spike may be precisely due to the fact that over the last couple of years, we've seen, I think, strong attempts by partisans to use, you know, disclosure in the campaign finance rules in that way.

You know, Media Matters has, for example, said a very liberal group has said, that its goal is to attack corporations that might make political contributions of any kind which would contributions to a trade association that then makes political expenditures.

And then use its allies to then attack that same corporation for the damage done to its reputation which is created by Media Matters itself.

We have Candace Nichols (ph) an opponent of Proposition Eight out in California, who made the comment afterwards when the -- that they were blacklisting and boycotting a number of folks and she said, years ago, they used the campaign finance regulations disclosures to get that.

She said years ago, we would never have been able to get a blackout list that fast and quickly. Apparently, this is considered progress since the McCarthy era. We're now much more efficient at creating black lists.

There's a group called Accountable America that sent letters to thousands of conservative donors threatening to dig through their lives if they continue to do that. As the New York Times reported, it was, "Hoping to create a chilling effect that will dry up contributions."

There are groups such as Huffington Post and eight maps -- they put maps to donors homes right on the web, so what the purpose of that? I've strayed a bit from your question, but I'm saying is when you're in this kind of environment, it's really important that you have some degree of bipartisan support before acting.

**CRUZ**: Well and I think the examples you gave about the potential for partisan retribution are particularly chilling. And they are most dangerous, it seems to me, for those who would have the temerity to criticize those in power.

That a system that requires full disclosure of any citizens activity in the political sphere, enables those in power to very directly exact punishment for any who dare criticize them.

**SMITH**: Well the purpose of disclosure laws as I've always seen them is to inform citizens about their government, but not to inform the government about their citizens.

Now those are often two sides of the same coin, so it's hard to tease them apart, but I do think when we look at, you know, organizations that are not working with candidates, for example, that we need to start thinking about being careful about what it is that we're doing.

When we're talking about direct contributions to candidates or parties as historically where we've allowed more disclosure, and that where the Supreme Court upheld in Buckley (ph).

Remember in Buckley (ph), the Supreme Court struck down most of the disclosure regime that otherwise existed. It was a very broad disclosure regime. It would have taken in almost anybody who spoke about politics at all, whether they were giving to a candidate or not, and the court struck most of that down.

**CRUZ**: And I guess the threat of retribution for political speeches, as you just described, is not hypothetical. We seen it for donors who supported Proposition Eight in California and lost their job because they engaged in political speech.

I guess we recently saw, with respect to another constitutional right, in New York, a number of gun owners being publicly identified in the newspaper and potentially subject to retribution for exercising their second amendment right to keep and bear arms.

And would you agree that part of the reason the first amendment protects the right to anonymous speech, is precisely to prevent retribution for citizens engaging in speech and, indeed, that was much of the reason why, perhaps, the most example of anonymous political speech in history was the Federalist State first published under the pseudonym Publius.

**SMITH**: Right. Well as the Supreme Court said in the NAACP case that you mentioned earlier, Senator, it's hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy that may constitute an effective restraint on freedom of association.

I think it's very definitely something -- I've said sometimes -- imagine if the government said," We're going to make sure that terrorists aren't infiltrating our government for foreigners that are going to infiltrate our government. We're going to require you to report your political activity to the government, and they're going to keep it in a big data base, and it will be made available to creditors, mortgage lenders, potential employers, your nosy neighbor, Haliburton, whomever wants it," right.

Most people I know get very, very upset, and I point out to them that that's exactly what the Federal Election Campaign Act does, and we're talking about doing more of it, and I want to emphasis that we already have broader disclosure in America now than we have had at any time in our nations history.

We're in the greatest disclosure age of our history. And I think when we look, we don't see that it's really achieving its goals, and I wonder if the real solution is that we got have more on crackdown or, if it's really to change the idea and try to create different senates for people to participate.

**CRUZ**: Thank you very much, Commissioner, and thank you to all of you.

**WHITEHOUSE**: Let me ask one additional question and that is, your opinion -- we'll start with you, Mr. Noble, you've made the observation that there is conspicuous nonenforcement of a variety of laws in situations in which the enforcement of the law actually would be reasonably straightforward.

A false statement case is not a complicated thing to make and the 441 F shell corporation, you know, use of shell corporations to violate the law occurs in all sorts of areas of the law, so why the nonenforcement? And let me add an asterisk to that, I know that the DOJ will say, "Well why the nonenforcement is because we haven't been referred cases by the IRS."

But that really begs the question because the attorney general and the secretary of treasury and the commissioner of the Internal Revenue Service all work for the same person, and the attorney general can perfectly well say to his colleagues, "Look. These are laws that I'm supposed to enforce. We prosecute false statements all across the board. Why aren't you referring these to us? What is going on with your regulations that makes this difficult."

And you might then see some of the progress that Mr. Colvin has suggested towards the IRS redoing the regulations to the extent that that is described as the problem. So that's really, I think, when you describe -- when that's the answer to the question, that's really another way of asking the question.

So I wanted to make sure that you looked at it that way. Why the nonenforcement and if the reason is because the IRS doesn't referrals and has adopted confusing and difficult regulations, why are they satisfied with that as the status quo?

**SMITH**: I think there are several reasons and I've to say up front, I have tremendous respect for the staff of federal agencies of the IRS and the Department of Justice. I think they try very hard to do what the right thing is.

I think there's a certain amount of fear. There's a fear of getting involved politics. There's a fear of being accused of being partisan when you're not being partisan. When you're calling it as you see it, but people are going to say, "You did that just for partisan reasons."

I think as you move up the chain, I think then you get into a power issue. Frankly, the current system helps those in power. The current system, the lack of enforcement, favors those who are writing the laws right now who are enforcing the laws right now.

It favors this administration to keep a system by which they want in place. They don't want frankly any more disclosure. They're not poling (ph) this is a great disappointment, but this administration right now is not calling to redo the FEC, not calling for much stricter enforcement of these laws, not calling for a crackdown on OFA, Organizing For America.

They're not doing any of it. Why? Because I think the problem we face is that we're fundamentally dealing about a power issue here and about the right of voters. It is a very critical first amendment issue, no doubt about that.

It is paramount in this area and everything we do in this area involves the first amendment, but there's also an issue about democracy, about our right to know what the government is doing, about our right to know where members of Congress or senators are getting their funding, who they may be beholden to, and these are the issues the Supreme Court has upheld.

These are the -- these are the things the Supreme Court has said the government has a compelling interest in. And when it says the government, it means the people, have a compelling interest in knowing who are funding of the campaigns.

And when the Supreme Court says these expenditures have to be independent or that 501 (c) (4) organizations that don't get involved in political activity don't have to disclose. There are caveats that go along with that.

That means that they are not involved in political activity. And we're not talking about every issue. We're not talking about arguing about gun control. There are very specific according to (inaudible) -- they're very specific types of ads. Expressed advocacy ads. Election -- or communication ads or things that are done in coordination with a candidate.

These are very, very specific issues in very specific areas where the public has a right to know. The public has a right to have a law enforced as it is. And yes, the public has a right to be protected, but the -- just to put the first amendment and say that that bar is doing anything, I think is really to present the public with a false -- with a false

option.

You can have the strongest first amendment and in a very strong representative democracy that actually is responsive to the people and the people understand and make the decisions about what they feel about where the contributions are going or who is supporting who.

So I think it's fear, and I think it's politics and power.

**WHITEHOUSE**: Senator Cruz?

All right. Let me thank the witness for coming. I really appreciate the effort that went into the testimony. I think that each one of you provided very thoughtful and extensive testimony. Mr. Smith, I thought some of the historical examples that you brought out were particularly instructive and helpful. And I'm delighted that you all shared your time with us. I know you're very busy people.

Senator Leahy has a statement for the record that - our chairman that, without objection, I will add to the record of these proceedings, and I want to thank Senator Cruz for attending. He brings a very valuable and well honed perspective, but I do think that there has emerged an area of agreement that really translates across all of the participants in this hearing.

And that is that a traditional prosecutable false statement under oath is not protected by the first amendment, and that the use of shell corporations fraudulently to violate the law is not protected by the first amendment, and yet, those specific things within the much larger context of campaign finance reform, those specific things, seem to be happening a lot.

And that neither the Department of Justice nor the Internal Revenue Service could identify a single case they had ever made, either in the circumstance of a false statement made to the famous question 15, or in the case of a shell corporation used to obscure the origin, unlawfully, of a contribution to a super PAC that would otherwise have to be disclosed.

Those seem like very straightforward cases, and it appears, and I now venture into my own personal opinion at this point, it appears that the deference of the Department of Justice to the tax authorities with respect to those specific matters is not merited.

They are not the kind of case that a prosecutor looks at and say, "Oh my gosh, I better bring the tax guys in on this one. This is a complicated question of tax law."

No. A false statement is a false statement. If you take people into a grand jury they pretty well find out very quickly what the intent was and prove the materiality and move on.

So it appears to me that if there is at least one flaw in what we're doing right now, it is respect to those matters, the willingness of the Department of Justice to allow itself to be constrained by this policy of deference, which is its own policy to the Internal Revenue Services, which I think all of the witness -- many of the witness at least agree is not particularly well suited. It is not particularly well staffed, and it is not particularly well disposed toward this sort of a matter.

So I will close the hearing with my personal commentary and look forward to continuing to work on this issue with all of the witnesses and all of the members of the subcommittee.

Again, my gratitude to Senator Cruz for his helpful participation in this hearing.

Thank you and we are -- the record will be open for -- what are we doing. The record will be open for one week for additional matter that anybody wants to add to the hearing, and with that, we are adjourned.

END

**LOAD-DATE:** April 10, 2013

United States Senate
WASHINGTON, DC 20510

February 16, 2012

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Commissioner Shulman:

We write to inquire if the Internal Revenue Service ("IRS") is investigating or intends to investigate whether groups designated as "social welfare" organizations, and thus receiving tax and other advantages under section 501(c)(4) of the Internal Revenue Code (IRC), 26 U.S.C. § 501(c)(4), are improperly engaged in a substantial or even a predominant amount of campaign activity. In section 501(c)(4), Congress created a tax preference for social welfare organizations because the nation benefits greatly from their social welfare activities. It is contrary to the letter and the spirit of the statute for political organizations formed primarily to advocate for a political candidate or to run attack ads against other candidates to take advantage of section 501(c)(4).

Under the IRC and IRS regulations, section 501(c)(4) organizations are required to primarily engage in the promotion of social welfare to obtain tax exempt status. Section 501(c)(4) establishes tax-exempt status for nonprofits "operated exclusively for the promotion of social welfare . . . ." 26 U.S.C. § 501(c)(4). IRS regulations state that a nonprofit operates "exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare for the people of the community." 26 U.S.C. § 501 (c)(4), 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) (emphasis added). The regulations require that a social welfare organization "is one which is operated primarily for the purpose of bringing about civic betterments and social improvements." *Id.*

Even more to the point is what the regulations say about campaign activities: "The 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." *Id.* § 1.501(c)(4)-1(a)(2)(ii). This standard is clear, and it appears to preclude the formation of 501(c)(4) organizations for campaign-related purposes.

Courts have interpreted section 501(c)(4) to prohibit a group organized under that section from engaging in more than an insubstantial amount of campaign activity. Courts have consistently found that the presence of a single substantial non-exempt purpose precludes exempt status, regardless of the number or importance of the exempt purposes. *See Contracting Plumbers Coop. Restor. Corp. v. U.S.*, 488 F.2d 684, 686 (2d. Cir. 1973); *see also American*

PRINTED ON RECYCLED PAPER

*Ass'n of Christian Sch. Vol. Emp. v. U.S.*, 850 F.2d 1510, 1516 (11th Cir. 1988). The IRS is tasked with applying this strict statutory interpretation of 501(c)(4) by the courts.

IRS regulations, however, appear more permissive than the statute as interpreted by the courts. For example, the IRS authorizes section 501(c)(4) social welfare organizations to engage in federal election activities, including electioneering communications, as long as such activities do not constitute the "primary" activity of the organization. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i). Some political organizations argue that section 501(c)(4) organizations can spend up to forty-nine percent of their total expenditures on campaign activities without such activities constituting the "primary" activity of the organization. While this forty-nine percent threshold appears to violate the language of the statute and the subsequent interpretation of several courts, we are concerned that some political organizations may still be violating this exceptionally high threshold.

We are aware that non-profit organizations have filed a petition for rulemaking with the IRS to revise existing regulations governing whether an organization that intervenes or participates in elections is entitled to obtain or maintain an exemption from taxation under section 501(c)(4). We urge you to investigate these allegations and to seriously consider launching a rulemaking to prevent this type of abuse of the tax code.

We urge you to protect legitimate section 501(c)(4) entities by preventing non-conforming organizations that are focused on federal election activities from abusing the tax code. We thank you for your prompt attention to this matter and look forward to your response.

Sincerely,

Michael F. Bennet
U.S. Senator

Al Franken
U.S. Senator

Jeff Merkley
U.S. Senator

Charles E. Schumer
U.S. Senator

Jeanne Shaheen
U.S. Senator

Tom Udall
U.S. Senator

Sheldon Whitehouse
U.S. Senator

610.664.1184
WWW.ZSTREET.ORG

My name is Lori Lowenthal Marcus, and I am the president and founder of the pro-Israel educational organization Z STREET, which applied for tax exempt status in late 2009.

Just over five years ago the IRS agent assigned to review Z STREET's tax-exemption application provided our organization's tax lawyer with an astonishing admission: our application had to be given special "scrutiny" by the IRS because it was connected to Israel. That admission was dwarfed by the agent's next statement: That such files would be sent to a "special unit in Washington, D.C. to determine whether the activities of the organization contradicted the positions of this administration."

The lawsuit Z STREET filed, based on those statements, in August, 2010, was the first of the cases alleging the IRS had engaged in viewpoint discrimination, by an organization whose views are inconsistent with those of the Obama administration.

Although the IRS has raised various, and contradictory, claims in an effort to defeat our litigation, every court which has heard our case has concluded that it raises a valid claim of constitutional violations by the IRS and has rejected every defense raised by the IRS.

We also know, from BOLO documents released by Congress, that the IRS created a special category of review for organizations applying for tax exempt status which engage in "Occupied Territory Advocacy," a purely ideological view, one over which the IRS has no jurisdiction and one which should never be a consideration for tax exemption purposes.

That "Occupied Territory Advocacy" IRS category was created just as the IRS was reviewing our file. The category disappeared from the BOLO lists when the IRS, invoking a discretionary regulation, froze our application because we had brought our lawsuit.

*Z STREET v. Koskinen* has survived the government's Motion to Dismiss and an appeal to the D.C. Circuit Court of Appeals.
http://www.cadc.uscourts.gov/internet/opinions.nsf/E74A468E32FDE53385257E69004FB541/$file/15-5010-1558566.pdf

The D.C. Circuit Court of Appeals excoriated the Department of Justice lawyer representing the IRS at the oral argument this past May, for daring to suggest that the IRS was entitled to engage in discrimination against Z STREET. (See http://www.wsj.com/articles/the-irs-goes-to-court-1430953480)

The members of Z STREET's board include Americans, Israelis, Democrats and Republicans. The only threads uniting us is a staunch pro-Israel position, and the belief that the U.S. government is not entitled to discriminate against organizations on the basis of our political viewpoint regarding the Arab-Israeli conflict.

*United States Senate*
*PERMANENT SUBCOMMITTEE ON INVESTIGATIONS*
*Committee on Homeland Security and Governmental Affairs*

*Carl Levin, Chairman*
*John McCain, Ranking Minority Member*

# IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(c)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY

**MAJORITY STAFF REPORT**
**WITH**
**MINORITY STAFF DISSENTING VIEWS**

**PERMANENT SUBCOMMITTEE**
**ON INVESTIGATIONS**

**UNITED STATES SENATE**

**September 5, 2014**

**SENATOR CARL LEVIN**
**Chairman**

**SENATOR JOHN McCAIN**
**Ranking Minority Member**

## PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

**ELISE J. BEAN**
Staff Director and Chief Counsel
**AHMAD SARSOUR**
Detailee

**HENRY J. KERNER**
Staff Director and Chief Counsel to the Minority
**MICHAEL LUEPTOW**
Counsel to the Minority
**ELISE MULLEN**
Research Assistant to the Minority

**MARY D. ROBERTSON**
Chief Clerk
**ADAM HENDERSON**
Professional Staff Member

**Former Subcommittee Staff Who Contributed**
**LAURA E. STUBER**
Senior Counsel
**HEIDI KELLER**
Congressional Fellow
**MOHAMMAD ASLAMI**
Law Clerk
**BENJAMIN DRISCOLL**
Law Clerk
**KATHERINE ERNST**
Law Clerk
**THARUNI JAYARAMAN**
Law Clerk
**REBECCA PSKOWSKI**
Law Clerk
**JACOB ROGERS**
Law Clerk
**ALEX ZERDEN**
Law Clerk
**KATHRYN BUSCAGLIA**
Law Clerk to the Minority
**DANICA HAMES**
Law Clerk to the Minority



*Permanent Subcommittee on Investigations*
199 Russell Senate Office Building – Washington, D.C. 20510
Majority: 202/224-9505 – Minority: 202/224-3721
Web Address: http://www.hsgac.senate.gov/subcommittees/investigations

THOMAS R. CARPER, DELAWARE, CHAIRMAN

CARL LEVIN, MICHIGAN
MARK L. PRYOR, ARKANSAS
MARY L. LANDRIEU, LOUISIANA
CLAIRE McCASKILL, MISSOURI
JON TESTER, MONTANA
MARK BEGICH, ALASKA
TAMMY BALDWIN, WISCONSIN
HEIDI HEITKAMP, NORTH DAKOTA

TOM COBURN, OKLAHOMA
JOHN McCAIN, ARIZONA
RON JOHNSON, WISCONSIN
ROB PORTMAN, OHIO
RAND PAUL, KENTUCKY
MICHAEL B. ENZI, WYOMING
KELLY AYOTTE, NEW HAMPSHIRE

GABRIELLE A. BATKIN, STAFF DIRECTOR
KEITH B. ASHDOWN, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510–6250

September 5, 2014

The Honorable Thomas R. Carper
The Honorable Tom Coburn
Committee on Homeland Security and Governmental Affairs
Washington, D.C. 20510

Dear Chairman and Ranking Member:

Today, after more than a year of work, the Permanent Subcommittee on Investigations is releasing this report summarizing the Subcommittee's bipartisan investigation into problems with how the Internal Revenue Service (IRS) has processed applications for tax exempt status under Section 501(c)(4) of the tax code. The Subcommittee Majority staff report is entitled, "IRS and TIGTA Management Failures Related to 501(c)(4) Applicants Engaged in Campaign Activity." The Subcommittee Minority staff, which did not join the Majority staff report, has filed dissenting views entitled, "IRS Targeting Tea Party Groups." In connection with the report, the Subcommittee is also releasing over 1,700 pages of documents from the IRS and Treasury Inspector General for Tax Administration (TIGTA), including emails, correspondence, memoranda, charts, handwritten notes, reports, and analyses.

We hope this report and the accompanying documents provide useful information. Although the Majority and Minority were unable to reach agreement on an analysis of the issues, the Subcommittee maintained its tradition of bipartisan fact-finding throughout the investigation, conducting joint interviews, performing detailed document reviews, and engaging in productive consultations to advance the Subcommittee's oversight work.

Sincerely,

John McCain
Ranking Minority Member
Permanent Subcommittee on Investigations

Carl Levin
Chairman
Permanent Subcommittee on Investigations

# IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY

## TABLE OF CONTENTS


I. **EXECUTIVE SUMMARY** ..... 1
- **A. Subcommittee Investigation** ..... 2
- **B. Investigation Overview** ..... 4
- **C. Findings and Recommendations** ..... 7

Findings
- (1) IRS Management Failures ..... 7
- (2) Inadequate Guidance ..... 7
- (3) Flawed Test ..... 8
- (4) No Political Bias ..... 8
- (5) Flawed Audit Report ..... 8
- (6) TIGTA Management Failures ..... 8
- (7) TIGTA Failure to Disclose ..... 8

Recommendations
- (1) Restore Statutory Standard ..... 8
- (2) Replace Facts and Circumstances Test ..... 9
- (3) Use FEC Data ..... 9
- (4) Improve FEC Forms ..... 9
- (5) Amend TIGTA Report ..... 9

II. **BACKGROUND** ..... 10
- **A. IRS Organizational Responsibilities** ..... 10
- **B. Social Welfare Groups** ..... 13
- **C. IRS Oversight of Section 501(c)(4) Organizations** ..... 21
- **D. Federal Election Law and Increased 501(c)(4) Campaign Involvement** ..... 26

III. **IRS 501(c)(4) SCREENING** ..... 32
- **A. Screening 501(c) Applications Generally** ..... 33
- **B. Flagging Tea Party and Other Groups** ..... 40
- **C. Reviewing Test Cases** ..... 44
- **D. Handling Other Tea Party Cases in Cincinnati: February to October 2010** ..... 53
- **E. Delaying Tea Party Cases Another Year: November 2010 to November 2011** ..... 60
- **F. Processing Applications from Liberal Groups** ..... 69
  - (1) ACORN ..... 70
  - (2) Occupy ..... 77
  - (3) Emerge America ..... 82
  - (4) Progressive Groups ..... 86

**G. Developing 501(c)(4) Guidance** ..... 89
(1) Seeking Increased Guidance ..... 90
(2) Failing to Agree on a Guidesheet ..... 94
(3) Disagreeing on Development Letters ..... 101
(4) Failing to Agree on Effective Screening Criteria ..... 109
**H. Addressing the Backlog** ..... 114
(1) Backlog Discovered ..... 115
(2) Bucketing Begins ..... 116
(3) Case Resolutions ..... 117
**I. Evaluating Campaign and Social Welfare Activities** ..... 119
**J. Analysis** ..... 128

**IV. TIGTA AUDIT** ..... 130
**A. TIGTA In General** ..... 132
**B. Requesting the Audit** ..... 133
**C. Conducting the Audit** ..... 136
(1) Determining the Audit Focus ..... 137
(2) Initiating the Audit ..... 139
(3) Collecting and Analyzing Information ..... 142
(4) Looking for Political Bias ..... 154
(5) Communicating the Audit Results ..... 161
(6) Drafting the Audit Report ..... 163
(7) Apologizing for IRS Conduct ..... 167
(8) Releasing the Audit Report ..... 172
(9) Testifying on the Audit Results ..... 174
**D. Analysis** ..... 185

## MINORITY STAFF DISSENTING VIEWS: IRS TARGETING TEA PARTY GROUPS

**I. EXECUTIVE SUMMARY** ..... 187
**A. Question of Political Bias and Disparate Impact** ..... 187
**B. Unresolved Factual Issues Meriting Further Investigation** ..... 189
**C. IRS Scrutiny of Liberal Groups Differed in Justification and Extent From Its Scrutiny of Conservative Groups** ..... 192
**D. The TIGTA Audit Accurately Represented the IRS's Mistreatment of Conservative Groups** ..... 195

**II. CONSERVATIVE GROUPS TARGETED SIGNIFICANTLY MORE OFTEN AND PERVASIVELY THAN LIBERAL GROUPS** ..... 197
**A. Conservative Groups on the BOLO Spreadsheet** ..... 197
**B. Liberal Groups on the BOLO Spreadsheet** ..... 200
(1) Progressive and "Progress" Groups ..... 201

(2) ACORN Successors . . .. . . . . . 204
(3) "Occupy" Groups . . .. . . . . . 204
(4) Emerge . . .. . . . . . 205
**C. Disparate Impact on Conservative Groups** . . .. . . . . . 206
**III. TIGTA AUDIT**. . .. . . . . . 214
**A. Scope of the Audit** . . .. . . . . . 214
**B. Office of Investigations Email Review** . . .. . . . . . 217
**C. Advocacy Case List** . . .. . . . . . 219
**D. Conclusion of TIGTA Section: Audit Was Accurate and Proper.** . . .. . . . . . 220
**IV. CONCLUSION OF SUBCOMMITTEE MINORITY STAFF REPORT** . . .. . . . . . 222

✧ ✧ ✧

# IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY

## I. EXECUTIVE SUMMARY

On May 10, 2013, the Internal Revenue Service (IRS) apologized for having used the phrase, "Tea Party," to identify 501(c)(4) applications filed by organizations involved with campaign activities and then subjecting those applications to heightened scrutiny. That apology triggered a firestorm of criticism of the IRS centered on a concern that the IRS might have shown political bias in selecting groups for review. An audit report released by the Treasury Inspector General for Tax Administration (TIGTA) a few days later intensified that criticism by reporting that the IRS had used "inappropriate criteria" in selecting applications for review and otherwise mismanaged the 501(c)(4) program. In response, President Obama required the Acting IRS Commissioner to resign, and replaced the leadership of the IRS division handling Exempt Organizations.

For over a year, the U.S. Senate Permanent Subcommittee on Investigations has conducted an investigation into the facts that led to widespread condemnation of how the IRS handled 501(c)(4) applications. That work came on top of a Subcommittee review, already underway, into how the IRS was generally enforcing the law pertaining to groups claiming tax exempt status under Section 501(c)(4) of the tax code.

The Subcommittee investigation has reached many of the same conclusions as the TIGTA audit of the 501(c)(4) application process. The Subcommittee investigation found that the IRS used inappropriate screening criteria when it flagged for increased scrutiny applications based upon the applicants' names or political views rather than direct evidence of their involvement with campaign activities. The Subcommittee investigation also found significant program mismanagement, including years-long delays in processing 501(c)(4) applications; inappropriate, intrusive, and burdensome questioning of groups; and poor communication and coordination between IRS officials in Washington and Cincinnati. At the same time, like TIGTA, the Subcommittee investigation found no evidence of IRS political bias in selecting 501(c)(4) applications for heightened review, as distinguished from using poor judgment in crafting the selection criteria. Based on investigative work that went beyond what TIGTA examined, the Subcommittee investigation also determined that the same problems affected IRS review of 501(c)(4) applications filed by liberal groups.

In addition, the Subcommittee investigation found that, by focusing exclusively on how the IRS handled 501(c)(4) applications filed by conservative groups and excluding any comparative data on applications filed by liberal groups, the TIGTA audit produced distorted audit results that continue to be misinterpreted. The TIGTA audit engagement letter stated that the audit's "overall objective" was to examine the "consistency" of IRS actions in identifying and reviewing 501(c)(4) applications, including whether "conservative groups" experienced "inconsistent treatment." Instead, the audit focused solely on IRS treatment of conservative groups, and omitted any mention of other groups. For example, while the TIGTA report criticized the IRS for using "Tea Party," "9/12," and "Patriot" to identify applications filed by

conservative groups, it left out that the IRS also used "Progressive," "ACORN," "Emerge," and "Occupy" to identify applications filed by liberal groups. While the TIGTA report criticized the IRS for subjecting conservative groups to delays, burdensome questions, and mismanagement, it failed to disclose that the IRS subjected liberal groups to the same treatment. The result was that when the TIGTA audit report presented data showing conservative groups were treated inappropriately, it was interpreted to mean conservative groups were handled differently and less favorably than liberal groups, when in fact, both groups experienced the same mistreatment. By excluding any analysis of how liberal groups were handled and failing to provide critical context for its findings, the TIGTA audit inaccurately and unfairly damaged public confidence in the impartiality of the IRS.

The Subcommittee investigation also determined that, by using a "facts and circumstances" test to evaluate 501(c)(4) applications for excessive campaign involvement, the IRS relied upon a time-consuming, case-by-case, non-transparent, subjective, and unpredictable method of evaluation that not only confused and delayed IRS processing of individual applications, but also invited public suspicion that IRS decisionmaking may have been influenced by politics. An overarching problem was the IRS' ongoing failure to enforce the law's requirement that tax-exempt 501(c)(4) groups be operated "exclusively for the promotion of social welfare." To restore compliance with the law as well as public confidence in the impartial resolution of requests for tax exempt status, the IRS needs to establish a more objective and transparent set of standards for evaluating 501(c)(4) applications filed by groups engaged in campaign activities.

### A. Subcommittee Investigation

In accordance with its longstanding rules and traditions, the Subcommittee conducted a bipartisan investigation into the 501(c)(4) application process, with joint interviews and document analysis. The Subcommittee collected and reviewed over 800,000 pages of documents produced by the IRS and TIGTA, including emails, correspondence, memoranda, and analyses. It also reviewed relevant IRS regulations, revenue rulings, private letter rulings, court proceedings, and a number of publicly available Form 1024 applications and Form 990 tax returns filed by 501(c) organizations involved with campaign activities. The Subcommittee also obtained information from the IRS in response to a series of detailed letter requests by Senator Levin, the Subcommittee chairman, and through multiple briefings. In addition, the Subcommittee received a detailed briefing from the Federal Election Commission (FEC) and reviewed FEC regulations and filings, including some independent expenditure and electioneering communication reports filed by 501(c) groups.

During the course of the investigation, the Subcommittee conducted 22 interviews of current and former IRS and TIGTA personnel. The Subcommittee also spoke with and reviewed materials provided by representatives of the FEC and a range of nonprofit groups, as well as academics and other experts in campaign finance, election law, and nonprofit tax requirements. IRS, TIGTA, and FEC personnel, as well as other parties contacted during the course of the investigation, generally cooperated with Subcommittee requests for information.

The Subcommittee investigation proceeded under one key restriction. Unlike the Senate Finance Committee, the Permanent Subcommittee on Investigation does not have statutory authority to view tax return information related to specific taxpayers. For that reason, both the IRS and TIGTA removed from the documents they produced to the Subcommittee all taxpayer-specific return information, requiring the Subcommittee to review documents that included redactions. In addition, the Subcommittee was not permitted to review the actual 501(c)(4) applications selected by the IRS for heightened scrutiny and was also, at times, unable to determine how certain applications were finally resolved. The Subcommittee's inability to get actual taxpayer submissions to the IRS did not, however, preclude the Subcommittee from reviewing hundreds of thousands of IRS documents, including emails, correspondence, memoranda, and analyses; identifying and evaluating the criteria used by the IRS to select applications for heightened review; and examining and evaluating the steps taken by the IRS to manage its review of the 501(c)(4) applications.

On April 30, 2013, as part of its investigation, the Subcommittee conducted a bipartisan, wide-ranging, six-hour inquiry into various aspects of the 501(c) application process with a team of eight IRS employees specializing in issues related to groups seeking tax exempt status. The IRS team was led by Exempt Organizations head Lois Lerner. During that briefing, Ms. Lerner did not mention the audit then underway by the Treasury Inspector General for Tax Administration (TIGTA) or the upcoming TIGTA audit report that would be released two weeks later. Ms. Lerner also failed to disclose or downplayed the many substantive and administrative problems plaguing the 501(c)(4) application process. After the TIGTA report was released in May 2013, Subcommittee Chairman Levin and Ranking Member McCain sent a letter to the IRS calling for Ms. Lerner's immediate suspension from office due to her failure to disclose "crucial information ... leading to an incomplete account of the full operations of her unit."[1] When the Subcommittee later requested an interview to examine her role in the 501(c)(4) review process, Ms. Lerner asserted her rights under the Fifth Amendment of the U.S. Constitution not to answer questions. The requested interview did not take place. For that reason, the Subcommittee's investigation was unable to obtain Ms. Lerner's testimony about key events, and its investigative results do not reflect any information she might have provided through interviews.

In June 2014, the IRS disclosed that, in the course of producing emails sent to or by Ms. Lerner from 2009 to 2014, the agency discovered that an unknown additional number of Lerner emails over a two-year period from June 2009 to June 2011 – including the period from February 2010 to May 2011 when Tea Party applications were being flagged for review – may have been lost due to a failure of Ms. Lerner's computer hard drive.[2] Since then, an intensive effort has been undertaken by multiple parties to understand how Ms. Lerner's hard drive failed in June 2011, what efforts were made by the IRS at the time to recover emails from her failed hard drive, how the IRS disposed of the hard drive, whether the agency's backup tapes had been recycled and erased the emails, and whether the emails could be recovered in some other manner.[3] In

[1] 5/23/2013 letter from Subcommittee Chairman Levin and Ranking Member McCain to Acting IRS Commissioner Daniel Werfel.

[2] See, e.g., 6/30/2014 letter from IRS Commissioner John Koskinen to the Subcommittee, with attachment entitled, "Description of IRS Email Collection and Production," at 7. The Subcommittee has already received and reviewed more than 67,000 Lerner emails produced by the IRS to date.

[3] See, e.g., 7/9/2014 letter from IRS Commissioner John Koskinen to the House Committee on Ways and Means, with a copy to the Subcommittee (describing IRS and TIGTA investigations and multiple Congressional hearings);

July 2014, TIGTA informed the Subcommittee that it had located several backup tapes that may contain the emails, and that a forensic analysis of those tapes was underway.[4] In addition, the IRS was able to recover many of the Lerner emails from other IRS personnel who had sent or received them.

Because resolution of the issues related to Ms. Lerner's emails is likely to require additional months to resolve, the Subcommittee has already reviewed over 67,000 Lerner emails, and the Subcommittee investigation provides information relevant to an ongoing IRS effort to issue revised regulations for evaluating 501(c)(4) applications filed by groups engaged in campaign activities, Senators Levin and McCain have jointly determined to release this Report, together with the Minority Staff's Dissenting Views, at this time.

### B. Investigation Overview

Using documents and interviews, the Subcommittee has conducted an extensive examination of the actions taken by the IRS to review and resolve 501(c)(4) applications filed by groups engaged in political campaign activities. The IRS flagged the first Tea Party application in February 2010. For the next three years, the IRS used a series of screening criteria to identify similar applications from both conservative and liberal groups, subjected those applications to individualized reviews, and determined whether the groups should be granted tax exempt status despite their involvement with campaign activities.

During the first half of that three-year period, the screening criteria used to select applications for heightened review used key phrases taken from the names of some of those organizations or from materials indicating their political views, rather than direct indicators of the groups' involvement with campaign activities. From February 2010 to May 2011, the cases selected for heightened review were referred to as "Tea Party" cases; beginning in June 2011, at the direction of IRS officials in Washington, the name of the category of cases was changed to "advocacy" cases. During both phases, the IRS subjected not only conservative groups with "Tea Party," "9/12," or "Patriot" in their names to heightened scrutiny, but also liberal groups with "Progressive," "Progress," "ACORN," "Emerge," or "Occupy" in their names. The evidence also shows that, from 2010 to mid-2013, more conservative groups than liberal groups applied for tax exempt status, underwent IRS scrutiny, and ultimately won tax exempt status.

All of the cases were handled by the IRS Exempt Organizations Determinations (EOD) Unit in Cincinnati, where IRS agents reviewed the applications to determine whether they should be approved, denied, or suspended pending receipt of more information. Work to resolve the applications was often interrupted, delayed, or halted, while senior IRS Determinations personnel sought guidance from the Exempt Organizations Technical (EOT) Unit in Washington, D.C. about how to handle the cases. Guidance was sought, because EOD personnel were uncertain about how to apply the required "facts and circumstances" test, which mandated consideration of all relevant, material factors to determine whether an applicant was engaged primarily in social

---

IRS declarations filed in True The Vote, Inc. v United States, Civil Action No. 1:13-cv-00734-RBW (USDC DC), "Federal Defendants' Notice of Filing the Declarations of Timothy P. Camus, Stephen L. Manning, and Todd O. Egaas," (filed on 7/18/2014).

[4] 7/29/2014 briefing by TIGTA of Congressional staff.

welfare activities. Despite constant pressure for additional guidance, EOT personnel took more than three years to resolve two test cases and drafted, but never finalized, additional guidance on how to screen, develop, and evaluate the applications.

While awaiting the promised EOT guidance, the backlog of 501(c)(4) cases awaiting IRS action grew to about 320 cases. The affected groups could and generally did continue to operate while awaiting disposition of their applications, but they were forced to act without certainty over their tax exempt status, sometimes for years. While waiting for an IRS decision on their tax exempt status, some of the groups had difficulty obtaining contributions from donors or lost funding opportunities, many spent funds on legal representation, and all were unable to exercise appeal rights to advance their cases. When in December 2011, almost two years after the first case was flagged, a newly appointed advocacy case coordinator approved sending out "development letters" to obtain additional information needed to apply the facts and circumstances test, some of the recipients objected to some of the questions as inappropriate, burdensome, or intrusive. Some critics also complained that the letters singled out Tea Party groups for heightened scrutiny. Negative media reports and Congressional inquiries followed. In response, in the first quarter of 2012, the IRS established a special "bucketing" process intended to reduce the backlog of cases, but a year later hundreds of cases remained unresolved.

**TIGTA Audit.** The audit conducted by the Treasury Inspector General for Tax Administration (TIGTA) was initiated in March 2012, in the midst of the negative media reports about IRS treatment of 501(c)(4) applications filed by organizations engaged in campaign activity, in particular groups aligned with the Tea Party. TIGTA's Office of Audit undertook the audit at the request of the House of Representatives Committee on Oversight and Government Reform. The work was conducted over the following year, and a final audit report was issued in May 2013.

The official TIGTA audit engagement letter stated that the audit's "overall objective" was to "assess the consistency of the Exempt Organizations function's identification and review of applications for tax-exempt status involving political advocacy issues." It also stated: "Several accusations of inconsistent treatment towards conservative groups have been made." Despite being charged with examining the "consistency" of the IRS' actions, TIGTA auditors examined how the IRS handled applications filed by conservative groups, but did not perform any comparative analysis of how the IRS handled applications filed by liberal groups. In response to later media inquiries about why information about liberal groups was excluded, a TIGTA spokeswoman initially said, "we were asked to narrowly focus on Tea Party organizations," but later indicated she had been given incorrect information.

During the audit, TIGTA auditors focused on actions taken by IRS screeners to identify applications filed by groups whose names or application materials contained the phrases, "Tea Party," "9-12," or "Patriot," noting that the selection criteria focused on the groups' names or political views, rather than on their participation in campaign activities. The TIGTA auditors also focused on a single entry in a broader "Be-on-the-Lookout" (BOLO) list whose wording changed over time, moving from language which urged IRS personnel to identify applications filed by groups affiliated with the "Tea Party movement," to language urging them to identify applications containing "indicators of significant amounts of political campaign intervention."

While the IRS admitted the earlier selection criteria were inappropriate, IRS personnel also attempted to demonstrate the criteria were not the result of political bias, by showing TIGTA that the IRS used similar BOLO listings for liberal groups, with screening criteria using the phrases "Progressive," "ACORN," and "Occupy" to identify applications of interest. Despite the IRS' repeatedly drawing attention to those BOLO entries, the TIGTA auditors failed to examine either how the IRS used those BOLO entries or how the IRS handled 501(c)(4) applications filed by liberal groups in comparison to applications filed by conservative groups.

In February 2013, after receiving an allegation that an IRS email had directed IRS employees to "target" Tea Party groups, the Assistant Inspector General responsible for exempt organization issues, Gregory Kutz, asked the TIGTA Office of Investigations to conduct an email search of certain IRS employees. The Office of Investigations then searched over 2,200 emails and other documents from the email accounts of five IRS employees involved with processing 501(c)(4) applications. The Office of Investigations concluded that the 2,200 IRS emails and other documents contained "no indication" that the pulling of Tea Party applications for additional scrutiny by IRS personnel was "politically motivated," advising that the IRS actions were instead the result of inadequate guidance on how to process the applications. Even though that finding by the TIGTA Office of Investigations analysis directly addressed the central issue TIGTA was auditing, whether there was political bias at the IRS, the documentary analysis performed by the Office of Investigations was not included in TIGTA's audit report.

In February 2013, the audit team submitted a draft audit report to the TIGTA Chief Counsel and Office of Audit head. The Chief Counsel suggested removing the word "targeted" from the report, because "targeted has a connotation of improper motivation that does not seem to be supported by the information presented in the audit report." The audit team removed the word from the report except when describing the allegations that led to the audit. Later that month, TIGTA provided a draft of the report to the IRS.

As the release date for the TIGTA audit report neared, Acting IRS Commissioner Steven Miller decided to try to preempt news coverage of the negative audit results by having the head of the Exempt Organizations division, Lois Lerner, disclose the audit before it was released and apologize for the agency's conduct during a conference she was scheduled to address. On May 10, 2013, at the Acting IRS Commissioner's direction and in response to a planted question, Ms. Lerner apologized for the IRS' having used "Tea Party" to identify 501(c)(4) applications subjected to heightened review. Her apology triggered a public firestorm centered on the allegation that the IRS had shown political bias against conservative groups seeking tax exempt status. The Acting IRS Commissioner and other senior IRS officials were required to resign.

The apology generated intense interest in the TIGTA audit report which was released the following week, on May 14, 2013. The audit report found that the IRS had used "inappropriate criteria" to flag 501(c)(4) applications for heightened review, and "ineffective management" had caused delays and subjected applicants to burdensome information requests. TIGTA Inspector General George was asked to testify at multiple Congressional hearings about the audit findings. When pressed about whether the IRS had unfairly targeted conservative groups, Mr. George testified that TIGTA had found no sign of political bias at the IRS, but offered as evidence only the denials of the IRS officials involved. He made no mention of the email review conducted by

the TIGTA Office of Investigations or its conclusion that the documents contained "no indication" that the IRS' actions were "politically motivated," even though that investigative finding directly addressed the issue of political bias at the IRS. Mr. George told the Subcommittee that he did not mention the Office of Investigations' finding, because no one on his staff had told him about it. On June 6, 2014, Mr. George confirmed in a letter to the Subcommittee that the TIGTA audit had "found no evidence of political bias," also stating "it is important to note that the matter is being further reviewed."

On May 21, 2013, the night before the third Congressional hearing at which the Inspector General testified about the audit, the TIGTA Chief Counsel decided to review the IRS BOLOs before providing copies to Congress. During his review, he saw, for the first time, BOLO entries naming two liberal groups, ACORN and Occupy. He promptly informed Inspector General George and Assistant Inspector General Kutz, both of whom told the Subcommittee they had previously been unaware of any BOLO listings for liberal groups, even though the IRS had provided copies and repeatedly informed the TIGTA audit team about them. Even after learning about them, the senior TIGTA officials remained silent for weeks about the BOLO entries for liberal groups, and provided incomplete and inaccurate testimony about them at Congressional hearings. When the BOLO listings for liberal groups were finally disclosed by Members of Congress and the media, senior TIGTA officials insisted that the IRS had not disclosed those listings during the TIGTA audit, despite ample evidence to the contrary.

During their Subcommittee interviews, Mr. George and Mr. Kutz indicated they had since reconsidered how the TIGTA audit report treated 501(c)(4) applications filed by liberal groups. Mr. George told the Subcommittee that the audit report should have acknowledged the existence of the BOLO entries that named liberal groups and that TIGTA auditors should have looked into those other groups. Mr. Kutz indicated TIGTA potentially should have included the BOLO listings for progressive, ACORN, and Occupy groups in its analysis, although he thought it might have delayed completion of the audit for another year. TIGTA has since initiated an audit into how those and other BOLO entries were used, but has put that audit on hold pending other law enforcement investigative efforts related to Lois Lerner and IRS.

### C. Findings and Recommendations

**Findings.** The Subcommittee investigation makes the following findings of fact.

(1) **IRS Management Failures.** From 2010 through 2013, the IRS mismanaged the 501(c)(4) applications process for both conservative and liberal groups engaged in campaign activities, using inappropriate selection criteria based on the applicants' names or policy views to flag applications for heightened review, subjecting some applicants to burdensome questions, and delaying disposition of some applications for years.

(2) **Inadequate Guidance.** The IRS provided insufficient guidance and training to IRS personnel on how to process 501(c)(4) applications filed by groups engaged in campaign activities, and failed to finalize a proposed set of

guidesheets with additional guidance for IRS personnel despite nearly one year of work on the project.

(3) **Flawed Test.** The facts and circumstances test used by the IRS was criticized as difficult to administer by every IRS official interviewed, from most to least senior; it required IRS agents to ask wide ranging and intrusive questions, slowed the processing of 501(c)(4) applications, and produced subjective and inconsistent decisions on applications.

(4) **No Political Bias.** A review of nearly 800,000 pages of documents and the conduct of nearly two dozen IRS and TIGTA employee interviews produced no evidence of political bias by the IRS against conservative groups that filed 501(c)(4) applications, a finding which is consistent with TIGTA's June 2014 letter stating that the TIGTA audit "found no evidence of political bias."

(5) **Flawed Audit Report.** The TIGTA audit report presented a distorted description of how the IRS handled 501(c)(4) applications, by omitting TIGTA's determination that the audit had "found no evidence of political bias"; by restricting its analysis to conservative groups and omitting comparative data for nonconservative groups; by failing to disclose the BOLO listings for liberal groups; and by omitting mention of the email review by the TIGTA Office of Investigations which, after conducting a thorough review of over 2,200 emails and other documents, found "no indication" that IRS actions in pulling Tea Party applications for heightened scrutiny were politically motivated.

(6) **TIGTA Management Failures.** TIGTA management failed to adequately supervise and ensure a balanced audit process, excluded key information from the audit report, omitted the key determination that the audit had "found no evidence of political bias," and inaccurately and unfairly damaged public confidence in the impartiality of the IRS.

(7) **TIGTA Failure to Disclose.** After TIGTA senior officials learned that the audit report omitted important information about IRS BOLO listings for liberal as well as conservative groups, TIGTA failed to disclose the new information for weeks, even though it was directly relevant to TIGTA's audit objective and could have helped alleviate public concern about potential IRS political bias.

**Recommendations.** Based upon the Subcommittee's investigation, the Report makes the following recommendations.

(1) **Restore Statutory Standard.** The IRS should revise its rules to comply with the statutory requirement that 501(c)(4) organizations engage "exclusively" in social welfare activities, including by applying an "insubstantial" test to limit other activities, similar to the one already applied to 501(c)(3) charities, and by applying a percentage test to ensure campaign activities comprise no more than an insubstantial portion of a tax-exempt social welfare organization's activities.

(2) **Replace Facts and Circumstances Test.** The IRS should replace the "facts and circumstances test" with objective standards and bright line rules that would produce more consistent, timely, transparent, and predictable treatment of 501(c)(4) applications filed by groups that engage in campaign activities.

(3) **Use FEC Data.** The IRS should require 501(c)(4) groups to provide a copy of any FEC filing within a few days of submitting it to the FEC, and use the FEC data to help identify 501(c)(4) groups warranting heightened review for campaign activity, since the FEC data provides direct evidence of campaign involvement.

(4) **Improve FEC Forms.** The FEC should amend its forms to include the filer's 501(c) status, including whether it has been approved by the IRS for tax exemption under a specific 501(c) subsection or has a pending application.

(5) **Amend TIGTA Report**. To provide a more complete and balanced analysis of how the IRS identified and reviewed 501(c)(4) applications for groups engaged in campaign activities, TIGTA should amend its audit report to include its determination that the audit "found no evidence of political bias" and add information about IRS BOLO entries and IRS processing of applications filed by groups with "Progressive," "Progress," "ACORN," "Occupy," or "Emerge" in their names.

## II. BACKGROUND

Section 501(c) of the U.S. tax code exempts from taxation over two dozen types of nonprofit organizations, including charities, social welfare groups, business associations, and labor unions.[5] The tax code also exempts from taxation "political organizations," such as campaign committees, under Section 527.[6] Today, within the United States, about 1.6 million tax exempt organizations report about $2.4 trillion in assets.[7]

### A. IRS Organizational Responsibilities

Tax-exempt organizations, under both Section 501(c) and Section 527, are overseen by a number of offices and organizations within the IRS. The following chart depicts the key IRS offices involved with overseeing 501(c) applications and organizations.[8]

---

[5] Charities are exempt from taxation under Section 501(c)(3), social welfare organizations under Section 501(c)(4), labor unions under Section 501(c)(5), and business groups under Section 501(c)(6). More specifically, Section 501(c)(3) exempts "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." 26 U.S.C. § 501(c)(3) (2012). Section 501(c)(4) exempts "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." Id. at 501(c)(4)(A). Section 501(c)(5)(a)(2) exempts labor, agricultural, and horticultural organizations that "have as their objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations." 26 C.F.R. § 1.501(c)(5)-1(a)(2) (2012). Section 501(c)(6) exempts "[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(6) (2012).

[6] Section 527(e)(1) defines a political organization as a "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." Section 527(e)(2) defines an "exempt function" as "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed." Unlike 501(c) organizations, Section 527 organizations must disclose "[t]he name and address ... of all contributors which contributed an aggregate amount of $200 or more to the organization during the calendar year and the amount and date of the contribution." Section 527(j)(3)(B).

[7] "Tax Exempt & Government Entities Division At-a-Glance," IRS (2/21/2014), http://www.irs.gov/uac/Tax-Exempt-&-Government-Entities-Division-At-a-Glance.

[8] This chart, which was prepared by the Subcommittee, is based upon an organizational chart and other information supplied by the IRS. See, e.g., IRS chart, http://www.irs.gov/pub/irs-news/irs_org_chart_2012_.pdf.; undated "FY 2012 Annual Report & FY 2013 Workplan," IRS Exempt Organizations, at 2, http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf. See also 5/14/2013 TIGTA Audit Report, at 29; "Tax Exempt & Government Entities Division At-a-Glance," prepared by IRS (2/21/2014), http://www.irs.gov/uac/Tax-Exempt-&-Government-Entities-Division-At-a-Glance, reprinted in "IRS Org Chart Puts Ingram, Lerner at Center of Power," Breitbart, Wynton Hall (5/23/2013), http://www.breitbart.com/Big-Government/2013/05/23/EXCLUSIVE-IRS-Org-Chart-Puts-Ingram-and-Lerner-At-Center-of-Power.

Prepared by U.S. Senate Permanent Subcommittee on Investigations, August 2014

The lead organization is the IRS Tax Exempt and Government Entities (TEGE) Division, which oversees all "Exempt Organizations."[9] The head of the TEGE Division reports to the Deputy Commissioner for Services and Enforcement who, in turn, reports to the IRS Commissioner. From 2004 to 2009, the TEGE Division head was Steven T. Miller. When he was promoted in 2009, he was replaced by Sarah Hall Ingram.[10] In December 2010, after Ms. Ingram was also promoted, she was replaced by her deputy Joseph Grant who served as the Acting and then full TEGE Commissioner until May 2013, when he retired. Mr. Grant was replaced by Acting Commissioner Michael Julianelle, who was, in turn, replaced in December 2013, by the current TEGE Commissioner Sunita Lough.

Within the TEGE Division, a subdivision called Exempt Organizations (EO) is charged with handling all entities claiming tax exempt status.[11] The EO mission statement requires it to help exempt organizations "to understand and comply with applicable tax laws, and to protect the public interest by applying the tax law with integrity and fairness to all."[12] Its responsibilities include overseeing the disposition of applications for tax exempt status, and

[9] "Tax Exempt & Government Entities Division At-a-Glance," prepared by IRS, http://www.irs.gov/uac/Tax-Exempt-&-Government-Entities-Division-At-a-Glance. The TEGE Division was established in late 1999, as part of an IRS modernization effort, replacing a group headed by an Assistant Commissioner for Employee Plans and Exempt Organizations, established in 1974. Id. It also oversees "Employee Plans" and "Government Entities." Id.
[10] In April 2009, Mr. Miller was promoted to Commissioner of the Large and Mid-Sized Business Division; in September 2009, he was promoted to Deputy Commissioner for Services and Enforcement, where he remained until appointed Acting IRS Commissioner in November 2012.
[11] "Tax Exempt & Government Entities Division At-a-Glance," prepared by IRS, http://www.irs.gov/uac/Tax-Exempt-&-Government-Entities-Division-At-a-Glance. EO oversees organizations exempt from income tax under Section 501, Section 527, and other tax code provisions. Id.
[12] Id.

overseeing existing tax-exempt organizations to ensure ongoing compliance with the legal requirements for tax exemption. From 1999 to 2004, the EO Director was Steven Miller, who served in that position until he was promoted to TEGE Commissioner. In 2006, Lois Lerner was appointed EO Director and served in that post until May 2013, when she was replaced by Acting Director Ken Corbin.[13] In December 2013, Mr. Corbin was replaced by Tamera Ripperda, the current EO Director.

Within the EO, the Rulings and Agreements Unit has "jurisdiction over processing determination letters and ruling letters on applications for recognition of tax exempt status under sections 501(a) and 521."[14] From 2006 to December 2010, the Acting and then full Director of the Rulings and Agreements Unit was Robert Choi. In January 2011, he was promoted and replaced by Holly Paz.[15] Ms. Paz held that position until June 2013, when she was placed on administrative leave,[16] and Karen Schiller became the Acting Director. In December 2013, Ms. Schiller was replaced by Stephen Martin who is the current Acting Director of the Rulings and Agreements Unit.[17]

Within the Rulings and Agreements Unit, the EO Determinations Unit is responsible for the initial handling of tax exempt applications.[18] Each year, the IRS receives approximately 70,000 applications from groups seeking tax exempt status under Section 501(c), most of which are filed by Section 501(c)(3) applicants.[19] From 2005 until 2013, the head of the EO

---

[13] Ms. Lerner retired from the IRS in September 2013. See, e.g., "Lois Lerner still Hill's favorite piñata," Politico, Lauren French, (9/23/2013), http://www.politico.com/story/2013/09/lois-lerner-retires-irs-97217.html.

[14] Internal Revenue Manual, § 7.20.1.1 (12-20-2012), Part 7. Rulings and Agreements, IRS, http://www.irs.gov/irm/part7/irm_07-020-001.html.

[15] Prior to becoming Rulings and Agreements Director, Ms. Paz worked in the EO Technical Unit. At the request of Mr. Choi, she became Acting Director in charge of EO Technical in September 2009, and then, a year later in September 2010, she had become the full Director. In January 2011, she was promoted to Acting Director of Rulings and Agreements, taking over from Mr. Choi. In May 2012, she became the permanent Director of Rulings and Agreements. In June 2013, she was placed on administrative leave pending an investigation into the matters covered by this Report. Subcommittee interview of Holly Paz, IRS (10/30/2013).

[16] 4/23/2012 email from Kim Barczak to IRS Staff (Executives All), "Executive Announcement," TIGTA Bates No. 012554.

[17] "About Exempt Organizations," IRS (3/27/2014), http://www.irs.gov/Charities-&-Non-Profits/About-IRS-Exempt-Organizations.

[18] "2012 Annual Report & 2013 Work Plan," IRS (2013), http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf.

[19] "SOI Tax Stats – Annual Extract of Tax-Exempt Organization Financial Data," prepared by IRS, http://www.irs.gov/uac/SOI-Tax-Stats-Annual-Extract-of-Tax-Exempt-Organization-Financial-Data; 5/15/2013 "Questions and Answers on 501(c) Organizations," IRS, http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-501(c)-Organizations (stating EO Determinations "receives approximately 70,000 applications for tax-exempt status of all kinds each year"). The following is a statistical breakdown of 501(c) applications, including for 501(c)(4) tax exempt status, the IRS received over 7 fiscal years. **Fiscal Year 2007 Applications:** Section 501(c) total applications = 91,689; Social welfare applications = 1,867; **Fiscal Year 2008 Applications:** Section 501(c) total applications = 84,180; Social welfare applications = 1,492; **Fiscal Year 2009 Applications:** Section 501(c) total applications = 77,221; Social welfare applications = 1,922; **Fiscal Year 2010 Applications:** Section 501(c) total applications = 65,548; Social welfare applications = 1,741; **Fiscal Year 2011 Applications:** Section 501(c) total applications = 60,980; Social welfare applications = 1,777; **Fiscal Year 2012 Applications:** Section 501(c) total applications = 60,780; Social welfare applications = 2,774; **Fiscal Year 2013 Applications:** Section 501(c) total applications = 53,179; Social welfare applications = 2,253. 6/4/2012 letter from the IRS responding to the Subcommittee, prepared by the IRS, PSI-IRS-02-000001 - 026, at 022 - 026 (providing the 2007 to 2011 statistical breakdown); "2012 IRS Internal Revenue Service Data Book, prepared by the IRS, (October 1, 2011 to September

Determinations Unit was Program Manager Lucinda (Cindy) Thomas. Ms. Thomas was located at an IRS office in Cincinnati which housed the EO Determinations Unit, and reported to the Director of Rulings and Agreements who was located in Washington, D.C. In August 2013, Ms. Thomas became a senior technical adviser to the EO Director. The position of EO Determinations head is currently vacant.

From 2008 to November 2012, the IRS Commissioner was Douglas H. Shulman. After he completed his five-year term, Mr. Shulman was replaced by Steven Miller who served as the Acting IRS Commissioner until his resignation in May 2013. Mr. Miller was replaced by Acting IRS Commissioner Daniel Werfel until, on December 20, 2013, John Koskinen was confirmed by the Senate as the new IRS Commissioner and sworn into office a few days later.

### B. Social Welfare Groups

Within Section 501(c), which grants tax exempt status to a variety of organizations and entities, Section 501(c)(4) focuses on civic groups dedicated to the "promotion of social welfare." Since the law permits but does not require social welfare groups to obtain prior IRS approval before holding themselves out as tax exempt, the IRS does not have a comprehensive list of all 501(c)(4) organizations.[20] As of 2013, the total number of tax-exempt social welfare groups was estimated to exceed 82,000 organizations.[21]

**History of Tax Exemption.** The origins of Section 501(c)(4) date back to the Revenue Act of 1913, which created the modern Federal income tax system.[22] The 1913 provision granted tax exempt status to "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare."[23] Those same words remain in the law today. In 1986, Section 231(8) was re-designated Section 501(c)(4) as part of a comprehensive tax

---

30, 2012), at 55, http://www.irs.gov/pub/irs-soi/12databk.pdf (providing the 2012 statistical breakdown); "SOI Tax Stats – Closures of Applications for Tax-Exempt Status – IRS Data Book," prepared by the IRS, http://www.irs.gov/uac/SOI-Tax-Stats-Closures-of-Applications-for-Tax-Exempt-Status-IRS-Data-Book-Table-24 (providing the 2013 statistical breakdown). See also Subcommittee interview of John Shafer, IRS (1/17/2013).

[20] See "Contributions to Organization with IRS Application Pending," IRS (4/18/2014), http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Contributions-to-Organization-with-IRS-Application-Pending.

[21] "Number of Nonprofit Organizations in the United States, 2003 - 2013," National Center for Charitable Statistics, http://nccsweb.urban.org/PubApps/profileDrillDown.php?state=US&rpt=CO.

[22] See Revenue Act of 1913, also known as the Underwood Tariff Act of 1913, ch. 16, § II (G)(a), 38 Stat. 114 (1913); "501(c)(4) Organizations," IRS, John Francis Reilly, Carter C. Hull, and Barbara A. Braig Allen, at 2 (2003), http://www.irs.gov/pub/irs-tege/eotopici03.pdf. The Committee Reports for the 1913 Revenue Act do not discuss the reason behind providing tax exempt status to civic leagues. See also "Social Welfare: What Does it Mean? How Much Private Benefit is Permissible? What is Community?" IRS, at 1, http://www.irs.gov/pub/irs-tege/eotopicg81.pdf. Some commentators suggest that the section was designed to address organizations which did not qualify based on religious, educational, or charitable grounds, but still provided benefits to the public. See "The History of the 501(c)(4) Exemption," Wall Street Journal, Jacob Gershman, (11/26/2013), http://blogs.wsj.com/law/2013/11/26/the-history-of-the-501c4-exemption/ (quoting "Exempt Organizations Advocacy: Matching the Rules to the Rationales," 63 Ind. L. Rev. 201, 290, Laura B. Chisolm (1988)).

[23] Revenue Act of 1913, ch. 16, § II (G)(a), 38 Stat 114 (1913). In 1924, the provision was amended to add certain local associations of employees, but retained the same wording for civic leagues and organizations. See Revenue Act of 1924, ch. 234, § 231(8), 43 Stat. 253 (1924).

reform bill enacted that year.[24] In 1996, the statutory provision was amended by adding a clarification that a social welfare organization's net earnings may not inure to the benefit of private shareholders or individuals.[25]

**Promoting Social Welfare.** The initial implementing regulations did not explain the meaning of the phrase "promotion of social welfare."[26] In 1924, revised regulations explained that organizations seeking exemption under Section 501(c)(4)'s predecessor section were required to operate "exclusively for purposes beneficial to the community as a whole," and included "organizations engaged in promoting the welfare of mankind."[27] Those regulations remained substantially unchanged until 1959, when they were revised again. The 1959 regulations stated for the first time that 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," including organizations operated "primarily for the purpose of bringing about civic betterments and social improvements."[28] A 1973 IRS Revenue Ruling explained that an organization which is "operated essentially for the benefit of its members" does not promote social welfare.[29]

Over time, a small group of court cases have applied the statutory and regulatory provisions to specific organizations and further addressed their meaning. One case held that "the organization must be a community movement designed to accomplish community ends."[30] Others explained that organizations do not qualify for tax exemption under Section 501(c)(4) if they provide primarily a private benefit, even in instances where such private benefits contribute substantial benefits to the public.[31]

**Exclusively v. Primarily.** A second key issue is the extent to which a social welfare organization may engage in unrelated activities and still retain its tax exempt status. Section 501(c)(4) states: "Civic leagues or organizations not organized for profit but operated

---

[24] See Tax Reform Act of 1986, P.L. 99-514, 100 Stat. 2085 (1986); Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230, at 71535 (2013), http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28492.pdf (describing history of Section 501(c)(4)).

[25] See Taxpayer Bill of Rights II, P.L. 104-168, 110 Stat. 1452, § 1311(a) (1996), http://www.irs.gov/pub/irs-utl/doc7394.pdf. See also Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230, at 71535 (2013), http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28492.pdf.

[26] See Regulations 33 (Rev.), art. 67 (1918) (cited in 11/29/2013 "Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230, http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28492.pdf.).

[27] Treas. Reg. 65, Art. 519, T.D. 3640, 26 Treas. Dec. Int. Rev. 745. 897 (1924).

[28] Treas. Reg. § 1.501(c)(4)-(1)(a)(2)(i).

[29] Rev. Rul. 73-306, 1973-2 C.B., http://www.irs.gov/pub/irs-tege/rr73-306.pdf.

[30] Erie Endowment v. United States, 316 F.2d 151, 156 (3d Cir. 1963).

[31] See, e.g., Commissioner v. Lake Forest, Inc., 305 F.2d 814, 818 (4th Cir. 1962) (denying tax exempt status to an organization which was a "public-spirited but privately devoted endeavor" and provided only incidental benefits to the community); Contracting Plumbers Cooperative Restoration Corp. v. United States, 488 F.2d. 684, 687 (2d Cir. 1974), cert. denied , 419 U.S. 827 (1974) (determining that the "substantial and different benefits to both the public and its private members" meant the cooperative was not primarily devoted to the common good, and was therefore excluded from tax-exempt status).

**exclusively** for the promotion of social welfare" are exempt from taxation.[32] However, the 1959 implementing regulation states: "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."[33] The 1959 regulation essentially substituted the word "primarily" for the word "exclusively," contrary to the plain wording of the statute and the plain meaning of the word "exclusively." This mismatch between the statute and regulation has been the subject of debate within the IRS for decades.[34] Despite the clear contradiction, the IRS regulation has been upheld in court.[35]

An internal IRS analysis also highlights a difference between the implementing regulations for 501(c)(4) and 501(c)(3) organizations.[36] Although both statutory provisions require covered organizations to be engaged "exclusively" in a specified activity, and both regulations then replace "exclusively" with "primarily," the 501(c)(3) regulation goes on to impose a restriction that the 501(c)(4) regulation does not. It states that a 501(c)(3) organization "will not be so regarded *if more than an insubstantial part* of its activities is not in furtherance of an exempt purpose."[37] The courts have interpreted this regulatory provision to bar 501(c)(3) charities from engaging in a "substantial non-exempt purpose."[38] In contrast, the IRS has determined that 501(c)(4) social welfare organizations "may engage in more non-exempt activity than (c)(3) organizations … reasoning that the §501(c)(4) regulations lack the 'insubstantial part' language that is present in the §501(c)(3) regulations."[39] It concludes that a "§501(c)(4) exempt organization may engage in substantial non-exempt activities,"[40] and may engage in "as much non-exempt activity as it wants so long as it is 'short of being the organization's primary activity.'"[41]

---

[32] 26 U.S.C. § 501(c)(4) (2012) (emphasis added).
[33] 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) (2012) (emphasis added).
[34] See, e.g., undated legal analysis entitled, "Exclusively Standard Under § 501(c)(4)," prepared by IRS, IRSR0000410696 - 711, circulated with a 3/21/2012 email from Justin Lowe to David Fish, "c4 history," IRSR0000410695 (hereinafter "Exclusively Standard Under § 501(c)(4)") (citing, among other materials, a 3/31/1978 Interpretative Division Memorandum that "'prompted a reexamination of a perennially troublesome question: Should the Regulations implementing 501(c)(4) be changed?' because the regulatory language ('primarily') differs from the statutory language ('exclusively').").
[35] See, e.g., Democratic Leadership Council, Inc. v. United States, 542 F. Supp.2d 63, 69 (D.D.C. 2008) ("Federal courts have long interpreted the statute consistently with the regulations: a § 501(c)(4) organization must *primarily* operate to bring about social improvements. … Though the Supreme Court has not explicitly held that the somewhat counterintuitive definition of 'exclusively' as 'primarily' is permissible, the parties agree that this is the applicable definition." (emphasis in original)); Vision Serv. Plan v. United States, 96 A.F.T.R.2d 2005-7440 (E.D. Cal 2005), aff'd 265 Fed. Appx. 650 (9th Cir. 2008) ("Although the words 'exclusively' and 'primarily' have different meanings, courts interpret the word 'exclusively' to mean 'primarily.'"). See also "Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare," 36 Seattle U. L. Rev. 1337, 1346, Terence Dougherty (2013).
[36] See "Exclusively Standard Under § 501(c)(4)," prepared by IRS, IRSR0000410696 - 711.
[37] Id. at 1-2, citing Treas.Reg. § 1.501(c)(3)-1(c)(1) (emphasis in original).
[38] Id. at 4-9, citing among other cases, Contracting Plumbers Cooperative Restoration Corp. v. United States, 488 F.2d. 684 (2d Cir. 1974), cert. denied, 419 U.S. 827 (1974) ("the presence of a single substantial non-exempt purpose precludes exempt status regardless of the number or importance of the exempt purposes").
[39] Id. at 10.
[40] Id.
[41] Id. at 12.

The 1959 regulation did not define either "exclusively" or "primarily," and neither term has been defined by the IRS since then, despite debate on the topic within the IRS over the years.[42] Instead, the IRS engages in a "facts and circumstances test" in order to determine whether an organization is engaged primarily in social welfare activities.[43] Under that test, the IRS considers multiple factors in assessing an organization's activities, and "no one factor is determinative."[44] Factors considered by the IRS include the "manner in which the organization's activities are conducted; resources used in conducting such activities, such as buildings and equipment; the time devoted to such activities (by volunteers and employees); the purposes furthered by various activities; and the amount of funds received from and devoted to particular activities."[45]

**Percentage Test.** One recurrent issue is whether the IRS uses a "percentage test" to determine whether an organization is engaged primarily in social welfare activities. Under this approach, the IRS would determine the percentage of an organization's funds or resources spent on social welfare activities and, if that percentage were to exceed a specified level, would then find the organization to be engaged primarily in social welfare activities.

The IRS informed the Subcommittee that it does not use a percentage test: "The IRS has taken no position on a fixed percentage or any one factor in precedential guidance."[46] At the same time, the investigation uncovered several internal documents suggesting that the IRS has, at least at times, used a 50% or 51% test.[47] In addition, several senior IRS officials told the

---

[42] See, e.g., undated "Proposals to Alter the 501(c)(4) Regulations," prepared by the IRS, IRSR0000508181 (citing G.C.M. 32395 (1962); G.C.M. 33495 (1967); and G.C.M. 38215 (1979)).

[43] See, e.g., Rev. Rul. 68-45, 1968-1 C.B. 259 (ruling that the principal source of income does not determine an organization's primary activity under § 501(c)(4); all facts and circumstances must be considered).

[44] 6/4/2012 IRS letter responding to the Subcommittee, PSI-IRS-02-000008. See also 4/20/2012 email from Lois Lerner to Nalee Park, [no subject line], IRSR0000411359.

[45] Priv. Ltr. Rul. 201224034 (3/21/2012), prepared by IRS. See also Rev. Rul. 74-361, 1974-2 C.B. 159; Rev. Rul. 68-45, 1968-1 C.B. 259.

[46] 6/4/2012 IRS letter responding to the Subcommittee, PSI-IRS-02-000001 - 026, at 008. The IRS cited a number of sources supporting its position:

> "Treas. Reg. § 1.501 (c)(4)-1 (a)(2) (No percentage test established). Rev. Rul. 68-45, 1968-1 C.B. 259 (Principal source of income does not determine an organization's primary activity under § 501 (c)(4); all the facts and circumstances are considered). See, generally Haswell v. United States, 500 F.2d 1133, 1142, 1147 (CI. CI. 1974) ("A percentage test ... is not appropriate. Such a test obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances in the context of the totality of the organization."). See, Contracting Plumbers v. United States, 488 F.2d 684, 686 (2d Cir. 1973) (multiple factors relevant in applying this standard, including formative history, stated purposes, and actual operations). See generally Seasongood v. Commissioner, 227 F.2d 907, 909, 912 (6th Cir. 1955) (expenditures, employees, and organization's time and effort considered)."

Id. at footnote 12. See also Exclusively Standard Under § 501(c)(4), prepared by IRS, at 14 ("The IRS has not published a precise method of measuring exempt activities or purposes in any of its published guidance, though three revenue rulings have stated that all of the organization's activities must be considered and that there is no pure expenditure test.").

[47] See, e.g., 7/2009 "Instructor Guide, Exempt Organizations Determinations Unit 1b," prepared by IRS, IRSR0000540412 - 545, at 436 (stating "exclusively only means primary for (c)(4) and primary is generally understood to mean 51%"); 7/28/2010 "Screening Workshop Notes," prepared by IRS, IRSR0000006723 (including

Subcommittee that the IRS uses a percentage test.[48] Many in the tax exempt community have also indicated that they view "primarily" to mean the organization's social welfare activities must consume at least 50% of its spending and resources.[49]

Over the years, some courts have interpreted the terms "exclusively" and "primarily," but those cases have not been dispositive with respect to social welfare organizations.[50] Most of the court decisions have interpreted the law with respect to 501(c)(3) charities as opposed to social welfare organizations, or examined the term "exclusively" in other contexts.[51]

**Social Welfare v. Campaign Activities.** A third key issue, which has gained urgency in recent years, is distinguishing between social welfare activities and campaign activities which do not qualify an organization for tax exempt status under Section 501(c)(4). The law's 1959 implementing regulations state: "[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."[52] The provision makes it clear that participating in political campaigns on behalf of or against a candidate is not considered a social welfare activity.

The wording of Section 501(c)(4)'s regulatory restriction on campaign activities is similar to the wording of a statutory restriction on Section 501(c)(3) charitable organizations, which states that a tax exempt charity may "not participate in, or intervene in (including the

---

a presentation indicating that if an organization engaged in "more than 50% political" activity, it might be a political action committee, rather than a social welfare organization).

[48] Subcommittee interview of Steven Miller, IRS (12/11/2013) (indicating it was common knowledge at the IRS that a 501(c)(4) organization was permitted to engage in campaign activities up to 49% of its total expenditures) and Cindy Thomas, IRS (11/13/2013) (indicating the IRS used a 51% test to establish whether an organization was engaged primarily in social welfare activities).

[49] See, e.g., 5/25/2004 letter from Richard Shaw to IRS Commissioner Mark Everson, IRSR0000507273; 5/25/2004 "Comments of the Individual Members of the Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics," Greg Colvin and Miriam Galston, IRSR0000507274, at 307 - 309, "501(c)(4) and Campaign Activity: Analysis Under Tax and Campaign Finance Laws," Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 5 (5/17/2013).

[50] See, e.g., People's Educ. Camp Society, Inc. v. Commissioner, 39 T.C. 756, 768 (1963) (applying an unrelated Supreme Court interpretation of "exclusively" as lacking any other substantial purpose to 501(c)(4) status determination). See also G.C.M. 33495 (1967); "Vision Service Plan v. U.S.: Implications for Campaign Activities of 501(c)(4)s," 53 Exempt Org. Tax Rev. 165, Miriam Galston (2006).

[51] See, e.g., Better Business Bureau v. United States, 326 U.S. 279, 283 (1945) (the Supreme Court, when asked to determine whether an organization was operating "exclusively" as required by a provision in the Social Security Act, wrote that the exclusivity requirement "plainly means that the presence of a single [non-exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purpose"). Several courts have analyzed the meaning of the word "substantial" and "insubstantial" in the context of Section 501(c)(3) charities which may lose their tax exempt status "if a substantial part of [their] activities is attempting to influence legislation (commonly known as lobbying)." IRS document entitled, "Lobbying," on IRS website, http://www.irs.gov/Charities-%26-Non-Profits/Lobbying. Case law has determined that lobbying activities may be treated as "insubstantial" if they use no more than 5 to 15% of the charitable organization's expenditures. See, e.g., Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974) (spending between 16.6% and 20.5% of an organization's time on lobbying is substantial); Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955) (devoting less than 5% of activities to lobbying is not substantial). See also "501(c)(4) and Campaign Activity: Analysis Under Tax and Campaign Finance Laws," Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 3-4 (5/17/2013).

[52] Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[53] Section 501(c)(3) imposes a complete statutory ban on charities participating in campaign activities. Section 501(c)(4)'s regulation appeared to have attempted to impose the same ban on social welfare groups by stating that campaign activities do not qualify as social welfare activities. But because of the regulation's substitution of the word "primarily" for "exclusively," the end result has been that the IRS has allowed social welfare organizations to engage in campaign activities while retaining their tax exempt status, so long as the organization remained engaged "primarily" in social welfare activities.[54]

Determining when an organization is engaged in social welfare versus campaign activity can be difficult, since some educational and issue advocacy activities that might qualify as promoting social welfare could also be seen as advocating for a particular candidate or party.[55] The IRS has issued several revenue rulings that provide limited guidance on identifying campaign activities.[56] A June 2013 report by the IRS after a review of 501(c)(4) tax-exempt applications concluded: "One of the significant challenges with 501(c)(4) review process has been the lack of clear and concise definition of 'political campaign intervention.'"[57]

In the past, the IRS has denied tax exempt status to organizations that have an explicit partisan purpose and engage in openly partisan activities, holding that their activities seek to benefit a private group – the favored political party – rather than the broader community. A 1997 letter denying tax exempt status under Section 501(c)(4) for the National Policy Forum

---

[53] 26 U.S.C. § 501(c)(3) (2012). See also 26 C.F.R. § 1-501(c)(3) - 1(b)(3)(ii) (2008).

[54] See Rev. Ruling 81-95, 1981-1 C.B. 332 ("[A]n organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote the social welfare."). See also Rev. Rul, 2007-41, 2007-25 I.R.B (describing activities that qualify as intervening on behalf of or in opposition to a specific candidate); 1995 "Political Organizations and IRC 501(c)(4)," IRS, Raymond Chick and Amy Henchey, http://www.irs.gov/pub/irs-tege/eotopicm95.pdf (stating that "an organization exempt under IRC 501(c)(4) may engage in political activities if those activities are not the organization's primary activity.").

[55] See, e.g., 6/24/2013 "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action," issued by Acting IRS Commisioner Daniel Werfel, at 28, http://www.irs.gov/PUP/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf; 1995 "Political Organizations and IRC 501(c)(4)," prepared by IRS, Raymond Chick and Amy Henchey, http://www.irs.gov/pub/irs-tege/eotopicm95.pdf (providing additional information about political versus educational activities by 501(c)(4) organizations); Priv. Ltr. Rul. 20044008E (12/2/2003), prepared by IRS (discussing prior revenue rulings and private letter rulings on what activities qualify as social welfare activities).

[56] See, e.g., Rev. Ruling 2004-6, 2004-1 C.B. 328, http://www.irs.gov/irb/2004-04_IRB/ar10.html (discussing whether certain activities qualify as political campaign activities); Rev. Ruling 81-95, 1981-1 C.B. 332. Another revenue ruling provides guidance in the context of Section 501(c)(3) charitable organizations, but is generally viewed as also applying to 501(c)(4) organizations. See Rev. Rul, 2007-41, 2007-1 C.B. 1421. See also "Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare," 36 Seattle U. L. Rev. 1337 Terence Dougherty (2013), http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2182&context=sulr (providing an analysis of IRS revenue rulings and private letter rulings); 1995 "Political Organizations and IRC 501(c)(4)," prepared by IRS, Raymond Chick and Amy Henchey, http://www.irs.gov/pub/irs-tege/eotopicm95.pdf ("IRC 501(c)(4) does not define political campaign activities; instead, the definition and interpretation of terms used has occurred principally under IRC 501(c)(3).").

[57] 6/24/2013 "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action," prepared by Acting IRS Commissioner Daniel Werfel, at 20, http://www.irs.gov/PUP/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf. See also 11/29/2013 "Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230.

explained: "partisan political activity does not promote social welfare as defined in section 501(c)(4)," because it "benefit[s] select individuals or groups, instead of the community as a whole."[58] In reaching its decision, the denial letter noted that the National Policy Forum's Articles of Incorporation stated that the organization intended to encourage the development of ideas through forums and exchanges with the public, and to develop a "national Republican policy agenda."[59] The letter also noted partisanship elements in the composition of the organization's board members; the organization's participants and speakers at forums; publications that the organization disseminated or distributed; and the financial support it received; concluding that the National Policy Forum was a "partisan issues-oriented organization."[60] In 2011, the IRS made a similar decision, discussed in more detail below, to deny tax exempt status to organizations associated with Emerge America, a group dedicated to training Democratic women candidates to run for elective office.[61] Today, however, many 501(c)(4) applicants do not engage in openly partisan activities, making it more difficult for the IRS to determine when organizations are seeking to intervene on behalf or in opposition to particular candidates.

**Facts and Circumstances Test.** To resolve questions about whether a particular activity qualified as a social welfare versus campaign activity, and whether an organization was engaged primarily in social welfare activities, the IRS elected to use a "facts and circumstances" test. That test required IRS personnel to consider all relevant material facts when making a determination and to refrain from treating any one factor as determinative.[62] Due to its fact-specific nature, the facts and circumstances test required IRS personnel to gather detailed information about each 501(c)(4) applicant, so that all relevant material factors could be identified and evaluated.[63]

At the same time, the IRS provided few objective standards or bright line rules, and little written guidance to its agents to address common fact patterns.[64] For example, the IRS did not instruct its agents to treat all candidate contributions as campaign activity; instead, agents were required to make an individualized analysis of each contribution.[65] While federal campaign law treated television advertisements that mentioned a candidate and were broadcast to the candidate's electorate within 30 days of a primary or 60 days of a general election as electioneering communications, IRS agents were not allowed to use those same objective criteria to reach a decision about whether a television advertisement constituted campaign activity;

---

[58] 2/21/1997 National Policy Forum Denial Letter, PSI-IRS-01-000001 - 013, at 010 - 012.
[59] Id. at 001.
[60] Id. at 010 - 013.
[61] See, e.g., 5/26/2011 email from Siri Buller to Jason Kall, "Referral to ROO," IRSR0000196739 - 758, at 739, ("Recently, we denied the 1024 applications of three state chapters of … a Democratic candidate training school for women. We denied the applications on the basis that their primary activity confers a private benefit to a political party.").
[62] See, e.g., 6/4/2012 IRS letter from the IRS responding to the Subcommittee, PSI-IRS-02-000001 - 026, at 008.
[63] See, e.g., 4/30/2013 "Memorandum for Deputy Inspector General for Audit," from Joseph H. Grant, Acting IRS Commissioner, Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 43-44.
[64] Id. at 44 ("There are no bright line tests for what constitutes political campaign intervention (in particular, the line between such activity and education) or whether an organization is primarily engaged in social welfare activities.").
[65] See, e.g., 6/4/2012 letter from IRS responding to Subcommittee, PSI-IRS-02-000001 - 026, at 009-010 (indicating, when asked whether a cash contribution to a political organization would be considered campaign activity, that all the facts and circumstances would have to be considered).

instead, each agent was required to develop the facts and then evaluate the timing, audience, wording, and context of each televised advertisement on a case-by-case basis.[66] The IRS also provided little training to agents handling 501(c)(4) applications on how to apply the facts and circumstances test.[67]

The result was that IRS personnel were required to ask detailed questions about many aspects of a group's organization and activities, and spend long hours analyzing the information. Critics complained that the IRS inquiries were inappropriate, burdensome, and intrusive. In addition, the IRS analysis took place in a nontransparent setting, leading to complaints about how particular facts were treated. In addition, because the analysis was so fact specific and required consideration of all relevant material facts, it produced case-by-case determinations with limited precedential effect. Moreover, because the IRS provided few objective standards, bright line rules, or detailed guidance, IRS agents were put in the position of having to make essentially subjective determinations about how individual applications should be viewed. Hesitancy about making those determinations led to inaction on many 501(c)(4) applications, some of which sat unresolved for years at a time.[68]

**Proposed Rulemaking.** In an attempt to address these and related problems, in November 2013, in response to a recommendation in the audit report by the Treasury Inspector General for Tax Administration, the Treasury Department and IRS issued a Notice of Proposed Rule Making with proposals for clarifying what activities qualified as "candidate-related campaign activities" under Section 501(c)(4).[69] One of the goals of the proposed rule was to reduce IRS reliance on the inherently time-consuming, non-transparent, and subjective facts and circumstances test and instead move towards more objective standards and bright line rules. As IRS Commissioner John Koskinen put it, the proposed rule would benefit the agency by taking it out of any "political judgment position."[70] The IRS Commissioner also stated:

> "[E]veryone would gain and we would avoid issues that we've had in the past if it were clearer what the definition of political activity is and how much of it [organizations] are allowed to engage in with as much clarity as possible and if it was clearer to whom those rules apply."[71]

---

[66] See, e.g., Rev. Rul. 2007-41; 4/25/2012 draft guide sheet, "Reviewing Section 501(c)(3) and 501(c)(4) Exemption Applications (Political Campaign Intervention and Lobbying)," PSI-TIGTA-01-000146 - 199, at 160 ("Guide Sheet 4: Issue Advocacy vs. Political Campaign Intervention").
[67] Subcommittee interviews of Gary Muthert, IRS (1/15/2014) and Elizabeth Hofacre, IRS (10/25/2013). See also 5/14/2013 TIGTA Audit Report, at 11, 17 (recommending increased training).
[68] 5/14/2013 TIGTA Audit Report, at 14 (stating that "[m]any organizations waited much longer than 13 months for a decision," with several cases that experienced delays of "more than 1,000 calendar days").
[69] 11/29/2013 "Proposed Guidance for Tax-Exempt Social Welfare Organizations On Candidate-Related Political Activities," Prop. Treas. Reg. § 1.501(c)(4), 78 Fed. Reg. 230. The NPRM was undertaken in response to a TIGTA recommendation that the Treasury Department place a priority on developing 501(c)(4) guidance. See 5/14/2013 TIGTA Audit Report, at 17.
[70] 1/6/2014 "New IRS Chief Sees End to Tea Party Investigation," USA Today, Kendall Breitman, http://www.usatoday.com/story/news/politics/2014/01/06/irs-commissioner-koskinen-tea-party/4344465/.
[71] Id.

The proposed IRS rule generated over 150,000 comments and is now under review.[72] The IRS has indicated that it is likely to revise the proposed rule and will hold a public hearing on it.[73]

### C. IRS Oversight of Section 501(c)(4) Organizations

IRS oversight of the 501(c)(4) tax exempt community relies principally upon two sets of documents, applications filed by organizations seeking IRS approval of their tax exempt status and tax returns filed annually by existing 501(c)(4) organizations. While organizations are not required to do so, many choose to file applications with the IRS to obtain official recognition of their tax exempt status. To maintain their tax exemption, all 501(c)(4) organizations must also file an annual tax return. The IRS reviews all submitted applications to determine whether an applicant meets the legal requirements for social welfare organizations. It also reviews some annual tax returns and uses other means to monitor existing 501(c)(4) organizations' ongoing compliance with the tax code.

**Self-Declared Tax Exempt Organizations.** Neither the tax code nor the IRS requires 501(c)(4) social welfare organizations to file a formal application or obtain prior IRS approval before holding themselves out as tax exempt.[74] Any group may simply declare its tax exempt status and initiate operations. In instances where an organization does not file an application prior to claiming tax exempt status, the IRS categorizes these entities as "non-declaring" or "self-declaring" social welfare organizations.[75]

**1024 Applications.** Despite the absence of any statutory or regulatory requirement, many organizations choose to file a Form 1024 application with the IRS to obtain official recognition as a tax exempt 501(c)(4) social welfare organization.[76] The IRS notes several reasons why organizations may decide to file an application: to obtain public recognition of its tax exempt status, assure donors of the group's tax exempt status, and gain "exemption from certain state taxes."[77]

---

[72] See, e.g., "IRS Update on the Proposed New Regulation on 501(c)(4) Organizations," IRS press release, (5/22/2014), http://www.irs.gov/uac/Newsroom/IRS-Update-on-the-Proposed-New-Regulation-on-501(c)(4)-Organizations ("The proposal generated over 150,000 written comments — the most comments ever received by Treasury and IRS on a proposed tax regulation.").

[73] Id.

[74] See, e.g., 5/17/2013 "501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws," Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 2; 5/20/2013 "FAQs on 501(c)(4) Social Welfare Organizations," prepared by Donald Tobin, Ohio State University – Moritz College of Law, at 2, http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf.

[75] See, e.g., 5/20/2013 "FAQs on 501(c)(4) Social Welfare Organizations," prepared by Donald Tobin, Ohio State University – Moritz College of Law, at 2, http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf.

[76] See "Application for Recognition of Exemption," IRS Form 1024, http://www.irs.gov/pub/irs-pdf/f1024.pdf. See also 5/20/2013 "FAQs on 501(c)(4) Social Welfare Organizations," prepared by Donald Tobin, Ohio State University – Moritz College of Law, at 3, http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf.

[77] See "Instructions for Form 1024," IRS publication, http://www.irs.gov/pub/irs-pdf/i1024.pdf.

To apply for formal tax-exempt recognition under section 501(c)(4), an organization must request a federal Tax Identification Number and fill out an application on IRS Form 1024.[78] Form 1024 requests basic identification information as well as specific information designed to help IRS personnel determine whether the group qualifies for tax exemption. For example, the form asks the organization to list its activities, the percentage of time devoted to each activity, its sources of income, and other financial information.[79] With respect to campaign activity, Form 1024 asks:

> "Has the organization spent or does it plan to spend any money attempting to influence the selection, nomination, election, or appointment of any person to any Federal, state, or local public office or to an office in a political organization?"[80]

When filed, 1024 applications are sent to a centralized IRS Submission Processing Center, entered into an IRS database for exempt organizations, and then forwarded to the IRS Exempt Organizations Determinations Unit in Cincinnati, Ohio, for further processing.[81] The review process is detailed below. At the conclusion of the review process, the application is either approved or denied.

An organization whose application is denied is given an "adverse determination" letter. According to the IRS, "[a]n adverse determination is a written ruling denying tax-exempt status to an organization that has applied for tax exemption, but has failed to meet the applicable requirements."[82] The IRS also told the Subcommittee that, in many cases, if an organization perceives that its application may be denied, it will withdraw the application prior to denial and determine later whether to resubmit a modified version.[83]

If an application is actually denied, the applicant can seek review from the IRS Office of Appeals, an independent office within the IRS which will review the administrative record associated with the organization, and make an independent determination on whether the organization meets the requirements for tax exempt status.[84] If the Appeals Office approves the application, the organization is officially designated as tax exempt. If the Appeals Office agrees that the application should be denied, the applicant can challenge that determination in court.[85]

According to the IRS, from 2007 to 2012, it issued ten adverse determination letters to 501(c)(4) applicants which denied them tax exempt status due to involvement with campaign activities.[86] Since September 2012, the IRS has indicated that it has issued nine additional adverse determinations to organizations applying for 501(c)(4) status, but some of those denials

---

[78] "Exempt Organizations – Exempt Application," prepared by IRS, http://www.irs.gov/Charities-&-Non-Profits/Exempt-Organization-Exemption-Application.
[79] See "Form 1024—Application for Recognition of Exemption Under Section 501(a)," IRS form, http://www.irs.gov/pub/irs-pdf/f1024.pdf .
[80] Id., at 4, Part II, line 15.
[81] 6/4/2012 letter from IRS responding to Subcommittee, PSI-IRS-02-000001 - 026, at 002.
[82] 3/15/2013 letter from IRS responding to Subcommittee, PSI-IRS-08-000001 - 010, at 001.
[83] 4/30/2013 briefing by IRS of Subcommittee.
[84] 6/4/2012 letter from IRS responding to Subcommittee, PSI-IRS-02-000001 - 026, at 003.
[85] Id.
[86] 11/23/2012 letter from IRS responding to Subcommittee, PSI-IRS-07-000001 - 119, at 002 - 003.

may not have involved campaign activities.[87] Organizations that receive an adverse determination letter can voluntarily surrender their tax exempt status, dissolve, invoke another type of tax exemption, reorganize, or take other action.

**990 Tax Returns.** Whether or not a tax exempt social welfare organization files a Form 1024 application, it is required to file an annual tax return using IRS Form 990, "Return of Organization Exempt for Income Tax."[88] This tax return must be filed by all organizations claiming tax exemption under Section 501(c). It is the key mechanism used by the IRS to monitor tax exempt organizations and determine whether they continue to comply with the legal requirements for tax exemption, including in the case of 501(c)(4) organizations that they continue to be engaged primarily in social welfare activities.[89]

Form 990 requires organizations to provide basic identification and financial information about their operations during the covered period. It requires, for example, information about the number of individuals employed by the group, the number of volunteers employed, and any contributions or grants. With respect to campaign activity, Form 990 asks the following question: "Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office?"[90] If an organization provides an affirmative response, it is required to provide additional information on "Schedule C."

Form 990 has several Schedules that may need to be completed, depending on the applicant's finances and activities. For any donation of $5,000 or more, Schedule B requires the recipient organization to disclose the donor's name, address, and the type and amount of the contributions.[91] While tax exempt organizations are required to provide copies of their 990 tax returns to the public upon request, the release of Schedule B donor information is optional and is generally not made publicly available.[92] Schedule C requires the organization, if it has provided an affirmative response to the question about political campaign activities, to provide additional information about those activities. The IRS established Schedule C in 2008, as a part of a significant revision of Form 990 to ensure better "tax compliance, accountability, and transparency."[93] It requires organizations to answer questions about the direct and indirect

---

[87] 4/22/2014 letter from IRS responding to Subcommittee, PSI-IRS-50-000001 - 002.
[88] "Form 990 – Return of Organization Exempt from Income Tax," IRS form, http://www.irs.gov/pub/irs-prior/f990--2012.pdf.
[89] See, e.g., 5/17/2013 "501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws," Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 7.
[90] "Form 990 – Return of Organization Exempt from Income Tax," IRS form, at 3, Part IV, line 3, http://www.irs.gov/pub/irs-prior/f990--2012.pdf.
[91] "Form 990 – Schedule of Contributors (Schedule B)," IRS form, http://www.irs.gov/pub/irs-prior/f990ezb--2012.pdf. See also 5/20/2013 "FAQs on 501(c)(4) Social Welfare Organizations," prepared by Donald Tobin, Ohio State University – Moritz College of Law, http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf.
[92] See Treas. Reg. 1.6104(b)-1(b), allowing Schedule B to be withheld from the public. See also 5/20/2013 "FAQs on 501(c)(4) Social Welfare Organizations," prepared by Donald Tobin, Ohio State University – Moritz College of Law, http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf.
[93] 5/17/2013 "501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws," Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 10.

campaign activities of the group, any campaign expenditures made by the group, and the number of volunteer hours related to carrying out campaign activities.[94]

A major concern related to the 990 tax returns involves the long period of time before they have to be filed and the difficulty of using the returns to obtain timely information about an organization's activities. Organizations are required to file the return by the 15th day of the fifth month following the close of an organization's taxable year.[95] An organization may obtain an automatic three-month extension from the initial due date by filing Form 8868, "Application for Extension of Time to File an Exempt Organization Return." The organization may request a second extension for another three months by filing a second Form 8868 and explaining why more time is needed.[96] If a newly formed organization uses the full time permitted to file the 990 return, its first tax return may be filed 22.5 months after its creation.[97] An organization may time its formation to enable it to engage in campaign activities prior to an election, and not file a 990 return disclosing its activities until after the election has concluded.[98]

**Ongoing IRS Oversight and Enforcement.** To conduct ongoing oversight of tax exempt groups' compliance with the tax code, the IRS has instituted several methods to monitor existing tax exempt organizations, including social welfare groups.

One option is for an EO unit called Review of Operations (ROO) to conduct a review of an existing tax exempt organization to determine whether it is in compliance with the law.[99] A so-called "ROO review" is not an audit, and the tax exempt entity is not contacted when the IRS conducts the evaluation.[100] Applications are either randomly selected or referred by other IRS offices to determine if an organization has complied with its stated exempt purpose, and the ROO specialist typically assesses the organization's latest Form 990, website, and publicly available information.[101] When a ROO review determines that an organization may be out of

---

[94] "Form 990 – Political Campaign and Lobbying Activities (Schedule C)," Internal Revenue Service, http://www.irs.gov/pub/irs-prior/f990sc--2012.pdf .

[95] Treas. Reg. § 1.6033-1(3). See also "501(c)(4) and Campaign Activity: Analysis Under Tax and Campaign Finance Law," at 10. See also 5/20/2013 "FAQs on 501(c)(4) Social Welfare Organizations," prepared by Donald Tobin, Ohio State University – Moritz College of Law, http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf.

[96] "Exempt Organizations Filing Requirements: Extending Due Date for Form 990," prepared by IRS, http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations/Exempt-Organization-Filing-Requirements:---Extending-Due-Date-for-Form-990.

[97] See 5/20/2013 "FAQs on 501(c)(4) Social Welfare Organizations," prepared by Donald Tobin, Ohio State University – Moritz College of Law, http://moritzlaw.osu.edu/electionlaw/analysis/documents/FAQs%20on%20501(c)(4)%20Social%20Welfare%20Organizations%20v.6.pdf.

[98] See, e.g., 5/17/2013 "501(c)(4)s and Campaign Activity: Analysis Under Tax and Campaign Finance Laws," Congressional Research Service, Erika K. Lunder and L. Paige Whitaker, at 7.

[99] See "IRS Exempt Organizations FY 2012 Annual Report and FY 2013 Workplan," prepared by IRS, at 12, http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf.

[100] 8/4/2012 letter from IRS to Subcommittee, PSI-IRS-04-000001 – 008, at 004.

[101] Id.

compliance with the tax code, it typically refers the organization to examinations personnel for an audit.[102]

A second option involves "Compliance Checks." A compliance check is an IRS review of an entity's filing information and tax returns, which the filer permits on a voluntary basis.[103] An IRS specialist initiates a compliance check by issuing a letter to the tax exempt entity, typically after IRS personnel discover an error in a tax return, or determine the IRS needs to obtain clarification with respect to an issue of importance.[104] Compliance checks provide a more limited review than an audit, and are typically restricted to verifying the timely, complete, and accurate filing of tax return documents and deposits.[105] After reviewing the tax information, cases are either closed or recommended for further examination, which requires approval from a Field Manager.[106]

The third option is a traditional examination or audit. Section 7602 of the tax code authorizes the IRS to conduct an audit to determine whether an organization still qualifies for tax exempt status.[107] The IRS conducts two types of audits of tax exempt entities. In a "Field Examination," an EO revenue agent will "perform the work at the organization's place of business."[108] In a "Correspondence Examination," the revenue agent asks the organization to send documents to the agent's location, where they are reviewed.[109]

If, after an examination, the IRS determines that a tax exempt organization is out of compliance with the law, the agency can issue the organization a "revocation notice," revoking its tax exempt status. According to the IRS, "[a] revocation notice is a written notice that tax exempt status is being revoked, as a result of an examination."[110] In a letter to the Subcommittee, the IRS reported that, from 2007 to 2014, it issued 42 revocation notices to 501(c)(4) organizations for involvement with campaign activities, five of which were not sustained on appeal.[111] The IRS also told the Subcommittee that, from 2007 to 2012, it sent 18 written advisories to 501(c)(4)s citing "irregularities."[112]

---

[102] Id. Since mid-July 2012, ROO examination recommendations must also be reviewed by the Political Activities Referral Committee, an IRS unit which makes the final determination on whether an examination is warranted.

[103] See IRM 4.90.3.2 (2/1/2008) ("A compliance check is a contact with the customer that involves a review of filed information and tax returns of the entity. A compliance check is NOT an examination and the customer may legally choose not to participate. A compliance check does not directly relate to determining a tax liability for any particular period. The check is a tool to help educate government entities about their reporting requirements and increase voluntary compliance.").

[104] IRM 4.90.3.4 (12/16/2011); 8/24/2012 letter from IRS responding to Subcommittee, PSI-IRS-04-000001 - 008, at 004.

[105] The Internal Review Manual identifies a limited list of documents that should be reviewed during the compliance check: Forms 941, 945, W-2, W-3, W-4, W-9, 1099, 1096, 1042, 1042-S, or others as applicable. IRM 4.90.3.5 (12/16/2011).

[106] IRM 4.90.3.7 (12/16/2011); IRM 4.90.3.12.1 (2/21/2013).

[107] See "IRS Exempt Organizations FY 2012 Annual Report and FY 2013 Workplan," prepared by IRS, http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf.

[108] Id. at 5. In fiscal year 2012, over three-fourths of the IRS examinations were field examinations. Id.

[109] Id.

[110] Id.

[111] See 11/23/2012 letter from IRS responding to Subcommittee, PSI-IRS-07-000001 - 004. See also 4/22/2014 letter from IRS to Subcommittee, PSI-IRS-50-000001 - 002 (indicating that 5 of the 42 revocations were not sustained on appeal and, in addition, from October 2012-February 2014, the IRS revoked the tax exempt status of 5

When the IRS revokes an organization's 501(c)(4) tax exempt status, the organization can voluntarily surrender its tax exempt status, dissolve, invoke another type of tax exemption, reorganize, or take other action.

### D. Federal Election Law and Increased 501(c)(4) Campaign Involvement

Over the last decade, 501(c)(4) organizations have become increasingly involved with campaign activities, and some have incurred filing obligations under the Federal Election Campaign Act (FECA).

The FECA, first enacted in 1971, and subsequently amended in 1974, 1976, and 1979, "remains the foundation of the nation's campaign finance law."[113] Among other provisions, it created the Federal Election Commission (FEC), and imposed a set of detailed disclosure requirements for candidates, parties, and others involved with federal elections. The FEC is an independent federal regulatory agency tasked with administering and enforcing the FECA. It maintains the law's campaign finance disclosure systems, accepts and reviews all FECA filings, and enforces compliance with the law's disclosure obligations.

The FEC requires persons involved with campaign activities to file periodic reports. Candidate political committees, political action committees, and political parties must disclose their campaign contributions and expenditures on Form 3, while non-candidate organizations – including 501(c)(4) groups – are required to disclose any independent expenditures on Form 5, and any electioneering communications expenditures on Form 9.[114]

Although the FEC filings provide direct evidence of the involvement of a 501(c)(4) group in campaign activity, contain information supplied directly by the filing group under penalty for submitting false information, and do not require any intrusive inquiries by the IRS, the FEC told the Subcommittee that it was unaware of the IRS making routine use of the filings to screen or evaluate 501(c)(4) applications.[115] The FEC also told the Subcommittee that the IRS had not asked the FEC to include Taxpayer Identification Numbers or 501(c) status information on the

---

additional 501(c)(4) organizations for a variety of reasons, which could have included political activity). For a set of revocation letters to 10 groups, with the names redacted, see attachments to 11/23/2012 IRS letter, PSI-IRS-07-000005 - 119.

[112] See 11/23/12 IRS letter responding to the Subcommittee, PSI-IRS-07-000001 - 004, at 003.

[113] 4/22/2014 "The State of Campaign Finance Policy: Recent Developments and Issues for Congress," Congressional Research Service, R. Sam Garrett, at 4.

[114] An independent expenditure is "an expenditure by a person – (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17) (2012). "Electioneering communications" are communications which are broadcast within 30 days of a primary or 60 days of a general election and mention a clearly identified candidate to the electorate. 2 U.S.C. § 434(f)(3) (2012).

[115] 6/12/2013 briefing by the FEC of the Subcommittee.

FECA filing forms, even though that information would increase the forms' usefulness to the IRS and the IRS had a statutory role in developing those FEC forms.[116]

The IRS told the Subcommittee that, while it used FEC filings in its 501(c)(4) oversight work, including when evaluating 501(c)(4) applications, it did not have a system that formally tracked FEC filings made by 501(c)(4) organizations.[117] In addition, the IRS indicated that it did not make routine use of FEC filings to identify 501(c) applications of groups involved with campaign activities.[118] The IRS explained that its rules require it to use the facts and circumstances test to evaluate each electioneering communication or independent expenditure made by a 501(c)(4) organization, which meant that the organization's FEC filings were not dispositive evidence of its involvement with campaign intervention activities.[119]

**2010 Citizens United Decision.** In January 2010, in the landmark Citizens United v. Federal Election Commission case, the U.S. Supreme Court authorized political action committees (PACs) for the first time to accept unlimited contributions from donors, including businesses, unions, and individuals, as long as they made independent campaign expenditures that were not coordinated with any candidate.[120] PACs which determined to make such independent expenditures became known as "Super PACs," due to their ability to accept unlimited donations and engage in massive campaign spending.[121] At the same time Super PACs began to operate, according to the Center for Responsive Politics, the number of tax-exempt groups engaged in campaign spending also increased, including Section 501(c)(4) social welfare groups.[122]

Senior officials at the IRS were aware that the Citizens United case could affect tax-exempt groups, including 501(c)(4) organizations, some of which had already increased their campaign activities.[123] On January 22, 2010, soon after the Citizens United decision, Lois Lerner, head of Exempt Organizations, sent an email to senior IRS officials, including then TEGE Commissioner Steven Miller, with the following observation:

> "I'm sure you've heard about the S. Ct.'s decision in Citizen's United that corporations have first amendment rights and the prohibitions on corporate spending in elections are unconstitutional. While I don't think that changes our legal position—that tax-exemption

---

[116] Id. See also 2 U.S.C. § 438(f) (requiring the FEC and IRS to "consult and work together to promulgate rules, regulations, and forms which are mutually consistent").
[117] See 3/15/2013 IRS letter responding to Subcommittee, PSI-IRS-08-000001 - 108, at 009.
[118] 4/30/2013 IRS briefing of the Subcommittee.
[119] See 3/15/2013 IRS letter responding to Subcommittee, PSI-IRS-08-000001 - 108, at 009.
[120] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
[121] The FEC also refers to them as independent-expenditure-only committees (IEOCs). See "Quick Answers to PAC Questions," Federal Election Commission, http://www.fec.gov/ans/answers_pac.shtml.
[122] See "Outside Political Spending Surging in 2010 Midterms," Center for Responsive Politics OpenSecrets Blog, David Levinthal (10/14/2010), http://www.opensecrets.org/news/2010/10/outside-political-spending-skyrocke.html; "Outside Spending: Frequently Asked Questions About 501(c)(4) Groups," Center for Responsive Politics, https://www.opensecrets.org/outsidespending/faq.php.
[123] See, e.g., "The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds," 147 University of Pennsylvania Law Review 971, Robert Paul Meiert (1999), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3414&context=penn_law_review.

> is a privilege and if you want the privilege you have to play by the rules, I do think we need to be prepared to respond to inquiries about c3 and c4 spending in elections."[124]

Ms. Lerner also stated: "I know this is a very sensitive issue."[125] Despite this acknowledgement of the likely impact of the Citizens United decision in 2010, the IRS did not put any new procedures or safeguards in place at the time to identify, evaluate, or resolve questions about 501(c) applicants planning to engage or engaged in campaign spending.

**Increased 501(c)(4) Campaign Involvement.** Since the 2010 Citizens United decision, it has become common for a Super PAC to have an affiliated 501(c)(4) organization which, under the tax code, can accept unlimited contributions from all types of donors, including businesses, unions, and individuals, and can engage in campaign activity as long as it is not the organization's primary activity.[126] In addition, unlike Super PACs, 501(c)(4) organizations are not legally obligated to publicly disclose the names of their donors or the amounts of the donations, although all donations over $5,000 must be reported confidentially to the IRS on Schedule B of their annual 990 tax returns.[127] The ability of 501(c)(4) groups to keep donor information confidential has, in some cases, made those groups attractive to donors interested in financing campaign activities without publicly disclosing their identities. Some 501(c)(4) organizations have used confidential donations to directly fund campaign activities.[128] Others have contributed donated funds to other 501(c)(4) organizations, Super PACS, or other political organizations involved with campaign activities, without disclosing the names of the donors who originated the funds.[129]

---

[124] 1/22/2010 email from Lois Lerner to Sarah Ingram, Steven Miller, and Nancy Marks, IRSR0000444375 - 377.

[125] Id.

[126] See, e.g., "American Crossroads/Crossroads GPS," FactCheck.org (2/7/2014), http://www.factcheck.org/2014/02/american-crossroadscrossroads-gps-2/ (American Crossroads, a Republican leaning Super PAC that is affiliated with Crossroads GPS, a 501(c)(4) group, raised a combined $325 million in the 2012 election); "Priorities USA/Priorities USA Action," FactCheck.org (3/3/2014), http://www.factcheck.org/2014/03/priorities-usapriorities-usa-action-3/ (Priorities USA Action, a Democrat leaning Super PAC affiliated with Priorities USA, a 501(c)(4) group, raised a combined $88 million in the 2012 election). See also "Crossroads GPS and Priorities USA were created for the purpose of hiding donors," Washington Post, Dylan Matthews (5/15/2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/15/wonkbook-all-the-latest-on-all-the-scandals/?tid=up_next.

[127] See "Form 990 – Schedule of Contributors (Schedule B)," IRS form, http://www.irs.gov/pub/irs-prior/f990ezb--2012.pdf. Schedule B is not released by the IRS to the public.

[128] For more information about these activities, see Report section on Deepening Campaign Involvement, below.

[129] See, e.g., Fair Political Practices Commission v. The Center to Protect Patients Rights and Americans for Responsible Leadership, https://www.propublica.org/documents/item/809469-arl-cppr-stipulation-final-with-ag.html (referencing a settlement between the California Fair Political Practices Commission (FPPC) and the California Attorney General on one side with two 501(c)(4) organizations on the other side that received $15 million in donations from undisclosed donors and contributed the same amount to political action committees involved with campaign activities); 10/24/2013 "FPPC Announces Record Settlement in $11 Million Arizona Contribution Case," California Fair Political Practices Commission Press Release, http://www.fppc.ca.gov/press_release.php?pr_id=783. See also, e.g., "Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch," Fox News, (7/19/2012), http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/ (describing a letter alleging that a 501(c)(3) ACORN successor group had collected $640,000 in donations from undisclosed donors and funneled the money to a related 501(c)(4) ACORN successor group which was using the funds to support a Democratic candidate for the Texas legislature).

Campaign spending data corroborates increased campaign involvement by 501(c)(4) groups. According to the Center for Responsive Politics, in 2010, a federal election year, 501(c) organizations, including social welfare, business, and labor groups, spent about $170 million on independent campaign expenditures and electioneering communications that required filings with the FEC; in 2012, the next federal election year, that number nearly doubled to $336 million.[130] The growth in campaign spending by social welfare groups alone has reportedly been even more explosive, rising 80 fold over the last decade.[131]

According to the IRS, from 2010 to 2012, the number of applications filed to obtain 501(c)(4) status nearly doubled, from about 1,700 in 2010, to more than 3,300 in 2012.[132] In addition, from 2008 to 2010, the same year the Citizens United decision was issued, the number of 501(c)(4) groups reporting campaign activities to the IRS doubled, while the amount of campaign-related expenditures during that period almost tripled.[133] The IRS also reported that while all 990 tax returns for 2012 were not yet in, "large 501(c)(4)s with political campaign activities expenditures in TY 2010 reported a large increase in spending to the FEC between 2010 and 2012."[134] At the same time, the IRS reported receiving "numerous referrals from the public, media, watchdog groups, and members of Congress alleging that specific section 501(c)(4) organizations were engaged in political campaign activity to an impermissible extent."[135] Former IRS Commissioner Steven Miller, in handwritten notes, commented on the increased levels of campaign spending as follows: "Then along came a wave of cash – unleashed by Citizens' United and that cash chose a favorable port due to disclosure and underenforced gift tax rules."[136]

**More Conservative Groups.** The evidence also indicates that, from 2010 to mid-2013, more conservative groups than liberal groups filed applications for 501(c)(4) tax exempt status, underwent scrutiny by the IRS during the application process, and won tax exempt status. For example, when the House Committee on Ways and Means reviewed 298 501(c)(4) cases that had been provided to TIGTA, it determined that, as of September 2013, 111 "right-leaning" groups had received tax exempt status, while only 20 "left-leaning" groups did, meaning more than five

---

[130] See undated graph, "Political Nonprofits," prepared by the Center for Responsive Politics, http://www.opensecrets.org/outsidespending/nonprof_summ.php.

[131] See 12/5/2013 "IRS Targets Money Transfers In Social-Welfare Politicking," National Public Radio, http://www.npr.org/2013/12/05/248934819/irs-targets-money-transfers-among-politically-active-groups ("The IRS is taking aim at the growing political role of tax-exempt social welfare groups. It's a category of American politics where spending has increased 80-fold in the last decade.").

[132] See 6/3/2013 testimony of Acting IRS Commissioner Daniel Werfel before House Appropriations Subcommittee on Financial Services and General Government, "Oversight Hearing – Internal Revenue Service," 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014, (6/3/2013), 219-284 at 263; 5/14/2013 TIGTA Audit Report, at 3.

[133] See 5/7/2013 "Updated Baseline Analysis of 501(c)(4) Form 990 Filers with Political Campaign Activities," prepared by the IRS, IRSR0000507010 - 044, at 013. The analysis of 501(c)(4) groups also states: "For filers with Political Campaign Activities, those with over $10M in revenue represent 95% of total expenses (by filers with PCA) and present a small universe to explore." Id. at 015.

[134] Id. at 020. According to the IRS, a large 501(c)(4) is one with revenue of over $10 million.

[135] 4/30/2013 "Memorandum for Deputy Inspector General for Audit," from Joseph H. Grant, Acting IRS Commissioner for Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 43.

[136] 5/9/2013 handwritten notes of Steven Miller, ABA Closed Door, IRSR0000506548. See also 1/28/2014 letter from the IRS National Director for Legislative Affairs to the Subcommittee, PSI-IRS-40-000001 - 002 (noting that Steven Miller is the custodian of the ABA Closed Door document).

times as many conservative as liberal groups had gained tax exemption.[137] Rather than demonstrate IRS favoritism of conservative groups, however, those disparate numbers likely reflect the fact that many more conservative than liberal groups had requested tax exempt status.

Similarly, when the IRS released a list of 176 501(c)(4) organizations that had been approved for tax exempt status from 2010 through May 2013,[138] an analysis of those organizations by Tax Analysts, a publication specializing in tax issues, found that just over two-thirds were associated with conservative groups, while nearly one-third were not.[139] The analysis determined that, of the 176 groups approved for tax exempt status from 2010 to 2013, 46 had Tea Party, Patriot, or 9/12 in their names; 76 were associated with other conservative organizations; 48 were non-conservative organizations; and 6 were organizations about which no determination could be made.[140] In addition, the analysis showed that the IRS had granted tax exempt status to twice as many conservative groups as other groups during that time period, while also indicating that groups across the political spectrum obtained exemptions.[141]

Consistent with the data from the list of 176 groups released by the IRS, IRS employees told the Subcommittee that, from 2010 to 2013, the IRS saw a surge in tax exempt applications filed by conservative groups.[142] Spending data in FEC filings also showed that, in the election years of 2010 and 2012, conservative 501(c)(4) groups spent almost ten times as much as liberal 501(c)(4) groups, suggesting that conservative groups may have outnumbered their liberal counterparts during that time period.[143] In addition, media reports depicted conservative groups

---

[137] See Opening Statement of Congressman Boustany, "Internal Revenue Service's Exempt Organizations Division," hearing before House Committee on Ways and Means (9/18/2013), http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126.

[138] See 5/15/2013 "Approved Tax-Exempt Applications For Advocacy Organizations through May 9, 2013," prepared by IRS, http://www.irs.gov/PUP/newsroom/Approved%20Tax%20Exempt%20Applications%20For%20Advocacy%20Organizations%20through%20May%209%202013.pdf. The IRS has interpreted the law as allowing it to release the names of 501(c) applicants that have been approved for tax exempt status, but not the names of those denied a tax exemption.

[139] See "Substantial Minority of Scrutinized EOs Were Not Conservative," Tax Analysts, Martin Sullivan, (5/30/2013), http://www.taxanalysts.com/www/features.nsf/Articles/D2A6C735EAFA7A9085257B7B004C0D90?OpenDocument ("[T]he list suggests that the majority of groups selected for extra scrutiny probably matched the political criteria the IRS used and backed conservative causes, the Tea Party, or limited government generally. But a substantial minority – almost one-third of the subset – did not fit that description.").

[140] Id.

[141] Id. Similarly, a list of about 160 organizations whose 501(c) applications were undergoing review in November 2011, allegedly compiled by the IRS and leaked to USAToday two years later, also indicated that more applications had been filed by conservative groups than other groups. See "IRS list reveals concerns over Tea Party 'propaganda,'" USAToday, Gregory Korte (9/17/2013), http://www.usatoday.com/story/news/politics/2013/09/17/irs-tea-party-target-list-propaganda/2825003/ (attaching list of 160 organizations with pending applications as of November 16, 2011).

[142] See, e.g., Subcommittee interviews of Holly Paz, IRS (10/30/2013) and Judith Kindell, IRS (11/5/2013).

[143] An analysis conducted by the Center for Responsive Politics found, for example, that in 2010, conservative 501(c)(4) spending was $115.2 million (88.1%), liberal 501(c)(4) spending was $10.7 million (8.2%) and "other" spending was $4.8 million (3.6%). In 2012, the Center determined that conservative 501(c)(4) spending was $265.2 million (85.3%), liberal spending was $34.7 million (11.2%) and "other" spending was $10.9 million (3.5%). "2010 Outside Spending, by Group," and "2012 Outside Spending, by Group," Center for Responsive Politics,

as the leaders in the 501(c)(4) area at the time, with liberal groups working to catch up.[144] Together, the evidence indicates that more conservative than liberal groups filed for 501(c)(4) tax exempt status from 2010 to 2013, underwent IRS scrutiny, and ultimately won tax exempt status.

---

http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U, and http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U.

[144] See, e.g., 11/6/2013 "Secret Persuasion: How Big Campaign Donors Stay Anonymous," National Public Radio, Peter Overby, Viveca Novak and Robert Maguire, http://www.npr.org/2013/11/06/243022966/secret-persuasion-how-big-campaign-donors-stay-anonymous ("So far, conservatives have predominated in social welfare politics. In the 2012 federal campaigns, 20 groups on the right ran up a million dollars or more in disclosed spending, compared with seven on the left. Now liberals are working to catch up.").

## III. IRS 501(C)(4) SCREENING

The IRS identified the first application for 501(c)(4) tax exempt status from a group affiliated with the Tea Party in February 2010. For the next three years, the IRS used a series of screening criteria to identify similar applications from both conservative and liberal groups, subject those applications to heightened scrutiny, and determine whether the groups should be granted tax exempt status despite their involvement with campaign activities.

During the first half of that three-year period, to identify applications of interest, the IRS employed screening criteria that used key phrases from the names of some organizations and from materials indicating their political views, rather than any direct indicators of the groups' involvement with campaign activities. From February 2010 to May 2011, the cases were referred to as "Tea Party" cases; beginning in June 2011, at the direction of IRS officials in Washington, the name of the category of cases was changed to "advocacy" cases. During both phases, the IRS subjected not only conservative groups with "Tea Party," "9/12," or "Patriot" in their names to heightened scrutiny, but also liberal groups with "Progressive," "ACORN," "Emerge," or "Occupy" in their names.

All of the cases were handled by the IRS Exempt Organizations Determinations (EOD) Unit in Cincinnati, where IRS agents reviewed the applications to determine whether they should be approved, denied, or suspended pending receipt of more information. Work to resolve the applications was often interrupted, delayed, or halted, while senior Determinations personnel sought guidance from the Exempt Organizations Technical (EOT) Unit in Washington, D.C. about how to handle the cases. Guidance was sought, because EOD personnel were uncertain how to apply the required "facts and circumstances" test, which mandated consideration of all relevant, material factors to determine whether an applicant was engaged primarily in social welfare activities. Despite constant pressure for additional guidance, EOT personnel took more than three years to resolve two test cases and drafted, but never finalized, additional guidance on how to screen, develop, and evaluate the applications.

While awaiting the promised EOT guidance, the backlog of 501(c)(4) cases awaiting IRS action grew to about 320 cases. The affected groups could and generally did continue to operate while awaiting disposition of their applications, but they were forced to act without certainty over their tax exempt status, sometimes for years. While waiting for an IRS decision on their tax exempt status, some of the groups had difficulty obtaining contributions from donors or lost funding opportunities, many spent funds on legal representation, and all were unable to exercise appeal rights to advance their cases. When, in December 2011, almost two years after the first case was flagged, a newly appointed case coordinator approved sending out "development letters" to obtain additional information needed to apply the facts and circumstances test, some of the recipients criticized some of the questions as inappropriate, burdensome, or intrusive. Some critics also complained that the letters singled out Tea Party groups for heightened scrutiny. Negative media reports and Congressional inquiries followed. In response, in the first quarter of 2012, the IRS established a special "bucketing" process which reduced the backlog of cases, but a year later still left hundreds of cases unresolved.

### A. Screening 501(c) Applications Generally

In recent years, of the 70,000 applications filed each year by groups seeking tax exemption under Section 501(c), between 1,700 and 2,700 – less than 5% of the total – were filed each year by applicants seeking tax exempt status under Section 501(c)(4).[145] Each of those applications had to be assigned, screened, and evaluated by IRS revenue agents assigned to the Exempt Organization Determinations Unit. Key mechanisms used by the Determinations Unit to resolve the 501(c) applications included a general screening group, specialty groups focused on particular categories of applications, a general inventory of cases awaiting determination, and Be-on-the-Lookout (BOLO) lists to flag applications raising particular concerns.

During the three-year period reviewed by the Subcommittee, from 2010 to 2013, all 501(c) applications were filed with a centralized IRS Submission Processing Center in Kentucky, entered into an IRS database for exempt organizations, and then forwarded to the EO Determinations Unit in Cincinnati, Ohio.[146] Generally, each application was assigned to a Determinations Unit revenue agent who could seek more information from the applicant, approve the application, or deny it with the concurrence of a manager.[147] According to the head of the EO Screening Group, in recent years, about 30% to 40% of the 501(c) applications were quickly approved or denied; about 40% to 50% of the cases required some additional information, such as missing documentation, before they could be processed; and about 20% were assigned to a specialty group for more indepth scrutiny.[148]

**Screening Group.** The typical first stop for 501(c) applications sent to the Cincinnati EOD Unit was the "Screening Group." According to the Screening Group's manager, John Shafer, the IRS formed the Screening Group in 2003, to centralize and standardize the screening

---

[145] See 3/21/2014 "SOI Tax Stats – Closures of Applications for Tax-Exempt Status – IRS Data Book Table 24," prepared by the IRS, http://www.irs.gov/uac/SOI-Tax-Stats-Closures-of-Applications-for-Tax-Exempt-Status-IRS-Data-Book-Table-24. The IRS data shows that, over a four-year period from 2010 through 2013, 501(c)(4) applications filed with the IRS increased by at least 25%: in 2010, the IRS received 1,741 501(c)(4) applications; in 2011, the IRS received 1,777; in 2012, the IRS received 2,774; and in 2013, the IRS received 2,253. Id.

[146] 6/4/2012 IRS letter to the Subcommittee, PSI-IRS-02-000001 - 026, at 002; Subcommittee interview of Cindy Thomas, IRS (11/13/2013). See also Internal Revenue Manual, Part 7, Rulings and Agreements, § 7.21.3.3.1 (8/01/2003), "Exemptions and Determinations," http://www.irs.gov/irm/part7/irm_07-021-003.html ("Organizations seeking exemption (including group exemptions) from Federal income tax must submit an application for recognition of exemption to the Cincinnati Submission Processing Center (CSPC)."). The CSPC was located in Kentucky. See Internal Revenue Manual, Part 7, Rulings and Agreements, § 7.20.2.1 (8/24/2012), "Determination Letter Processing Overview," http://www.irs.gov/irm/part7/irm_07-020-002r.html#d0e11 ("[A]pplications for tax exempt status under sections 501 and 521 (Forms 1023, 1024, and 1028), as well as group exemption requests (controlled as Form 1026), are submitted to the Cincinnati Submission Processing Center (CSPC), PO Box 12192, Covington, KY.").

[147] See, e.g., Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

[148] Subcommittee interview of John Shafer, IRS (1/17/2014). TIGTA referenced similar percentages in an internal summary of an early meeting with IRS personnel about the 501(c) applications process. See 5/1/2012 "Review of [IRS]'s Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4) - (6) Organizations," prepared by TIGTA, PSI-TIGTA-05-000892 - 898, at 897 (indicating that the IRS told TIGTA that about 35% of the screened cases were "closed on merit"; about 45% required limited additional information; and about 20% required "full development"). The TIGTA audit report also stated that, in fiscal year 2012, "70% of all closed applications for tax-exempt status were approved during an initial review with little or no additional information from the organizations." See 5/14/2013 TIGTA Audit Report, at 1.

process for 501(c) applications.[149] Mr. Shafer served as the Screening Group's head from its inception in 2003 until 2013.[150] He explained that revenue agents assigned to the Screening Group were called "screeners" and used a screening guide sheet, called a "Be-on-the-Lookout" (BOLO) List, to identify 501(c) applications requiring heightened scrutiny.[151] As the screeners completed work on incoming applications, they were supposed to inform the group manager who would then provide them with new applications as they came in, typically sent in hard copy form from the processing center in Kentucky.[152]

According to the Screening Group manager, the training for the screeners consisted of instructing them about the applications and relevant tax code sections, and providing them with guidance from more senior personnel.[153] He explained that most of the screeners were "senior people" who had worked at the IRS for 10 to 30 years.[154] He indicated that, when a new agent joined the Screening Group, that person received training from a more senior screener who then reviewed the new person's work until the new screener was comfortable with the process.[155]

Mr. Shafer said that the Screening Group typically had about a dozen screeners at a time, together with an administrative assistant and a secretary.[156] According to Gary Muthert, a senior revenue agent who worked in the Screening Group and served at times as the acting manager, the group manager assigned the incoming applications on an electronic, random basis to screeners requesting new cases.[157] He explained that, once a screener received a new application, the screener made one of six initial determinations:

1) If the application was covered by a specialty group, the screener was unable to work on it and was required to send it to the specialty group in charge of those cases.
2) If the application was not subject to a specialty group and the screener found the case file to be complete, the screener could immediately approve it, or could recommend denial of the application and submit the case to the group manager for review. The manager then reviewed the application and, if appropriate, could concur in the denial, completing the application process.
3) If the application was not subject to a specialty group and the case file was incomplete, the screener could send the application back to the applicant with a request for the missing documentation. The applicant was generally given 90 days to respond.
4) If the application was very close to being complete but missing only one or two items, the screener could send it to the Accelerated Processing (AP) group.
5) If the application was too large for the AP group or needed information beyond one or two items, the screener could send it to the Intermediate Processing (IP) group.

---

[149] Id. Mr. Shafer told the Subcommittee that the idea to centralize the screening process had been his.
[150] Id.
[151] Id.
[152] Subcommittee interview Stephen Sock, IRS (11/22/2013).
[153] Subcommittee interview of John Shafer, IRS (1/17/2014).
[154] Id.
[155] Id.
[156] Id.
[157] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

6) If the application did not fall into any of the above five categories and the screener was unsure how to process it, the screener could send it to what was called "general inventory." The application then remained in general inventory until it was assigned to an EOD revenue agent for review.[158]

Each EO group outside of the Screening Group also had what was called a "secondary screener" who doublechecked that the first screener had made the correct determination in sending the application to the group; if the secondary screener determined that the application should not have been sent to the group, that screener returned it to the Screening Group for further processing.[159]

Whether an application was sent to a specialty group, AP, IP, or general inventory, it was reviewed by an EO revenue agent, called a "determinations specialist." During the review process, the determinations specialist was required to consider the facts and circumstances depicted in the information contained in the application, as well as any applicable precedent for how the group should be handled.[160] If an application presented questions that required further development, the determinations specialist was authorized to engage in a dialogue with the applicant to obtain additional information.

**Specialty Groups.** During the time period reviewed by the Subcommittee, the Exempt Organizations (EO) group had about 12 specialty groups reviewing 501(c) applications, each of which was assigned to evaluate certain types of applications.[161] In a 2011 email to a colleague, the head of the Determinations Unit, Cindy Thomas, described some of the specialty groups as well as the reasoning behind establishing them:

"In fact, most of the groups have more than one category of cases assigned to them. For example, one group works charter schools and farmers' co-ops, another group works foreclosure assistance/downpayment assistance/credit counseling cases, another group works potential emerging issues and potential auto revocation cases, another carbon credit cases/VEBAs/foreign organizations, and on and on. The reason we took this step was to improve quality, decrease time per case, improve customer satisfaction, and

[158] Id. See also 6/4/2012 letter from IRS to Subcommittee, PSI-IRS-02-000001 - 026, at 002 - 003; Internal Revenue Manual, § 7.20.2.3.2, http://www.irs.gov/irm/part7/irm_07-020-002r.html#d0e4446, (providing a description of how cases are screened).

[159] Subcommittee interview of Stephen Seok, IRS (11/22/2013). The recent TIGTA audit found that the EO screeners were not always accurate; they forwarded to specialists some 501(c) applications that had no "indications of significant political campaign intervention," and failed to forward other applications with "evidence of significant political campaign intervention." 5/14/2013 TIGTA Audit Report, at 5.

[160] 6/4/2012 letter from IRS to Subcommittee, PSI-IRS-02-000001 - 026, at 002.

[161] Subcommittee interview of Cindy Thomas, IRS (11/13/2013). Some of the cases handled by the EOD specialty groups were applications filed by credit counseling groups; groups handling health care issues such as hospital status requests and community service centers for pregnant or parenting teenagers; groups handling anti-terrorism matters; hedge funds; medical marijuana groups; groups handling carbon credits; donor advised funds; groups involved with conservation easements; foreign organizations; housing down payment groups; partnerships; and school-charter groups. See, e.g., 9/30/2013 "Memorandum For All Employees – Exempt Organizations Determinations Unit," prepared by IRS, http://www.irs.gov/pub/foia/ig/spder/TEGE-07-0913-15%5b1%5d.pdf (listing case categories).

improve employee/manager satisfaction so that everyone did not need to be a technical expert in every area."[162]

Applications subject to specialty group review were required to be evaluated by the relevant EOD group and generally were not supposed to be resolved outside of it.[163]

**General Inventory.** If a case wasn't within the subject matter of any specialty group, but could not be quickly resolved, a screener could assign the case to "general inventory."[164] "General inventory" was not the name of a review group, but referred to cases that had been assigned to sit in a queue until an EOD revenue agent became available to review them. Any EOD manager of a group could assign cases from the general inventory to the agents within the manager's group if they had time to work on the cases.

**EO Technical.** If an application raised issues for which there was no established precedent and involved concerns that could produce inconsistent outcomes, the EOD Unit could refer the case to the EO Technical (EOT) Unit.[165] EOT is an Exempt Organizations subdivision whose personnel work in Washington, D.C. It is staffed with higher graded tax law specialists who work with the IRS Office of Chief Counsel to interpret and provide guidance on the law governing tax exempt entities; provide technical advice on complex issues affecting the tax exempt community; and assist EO revenue agents with spotting issues and handling cases in a consistent manner.[166] EOT specialists had the authority to review applications and seek additional information from applicants to complete the administrative record.[167] If, upon review, an EOT specialist concluded that an applicant did not meet the requirements for tax-exempt status, the specialist could issue a proposed denial explaining why and provide a copy to the applicant. The applicant could then request a "conference of right" to address the issues. Following the conference, the EOT specialist typically issued a final determination. "If the application is approved, the administrative record is made publicly available" for inspection.[168] If the application is denied, the applicant may challenge that determination in court.

**501(c) BOLOs.** One of the key issues confronting the IRS was screening and categorizing the 70,000 501(c) applications that were filed each year so that similar groups were handled in a consistent manner, including, if appropriate, by being assigned to the proper specialty group. The Subcommittee was told that, in recent years, a key mechanism used by the Exempt Organizations Determinations (EOD) Unit to help with those tasks involved the development of "Be-On-the-Lookout" Lists, referred to as "BOLOs."

BOLOs represented an IRS effort to identify and aggregate groups of similar 501(c) applications that required special scrutiny and to subject them to a more standardized process of

---

[162] 3/16/2011 email from Cindy Thomas to Holly Paz, "TAG info," IRSR0000008593.
[163] Subcommittee interview of Gary Muthert, IRS (1/15/2014).
[164] Id.
[165] 6/4/2012 IRS letter to the Subcommittee, PSI-IRS-02-000001 - 026, at 003.
[166] Id. See also Internal Revenue Manual Part 7, Rulings and Agreements, §7.29.1.2 (02-01-2008), "EO Technical Responsibilities," http://www.irs.gov/irm/part7/irm_07-029-001.html.
[167] See Internal Revenue Manual Part 7, Rulings and Agreements, §7.29.3.2 (07-14-2008), "Processing of Cases by Tax Law Specialists (TLS)", http://www.irs.gov/irm/part7/irm_07-029-003.html.
[168] 6/4/2012 letter from IRS responding to Subcommittee, at PSI-IRS-02-000001 - 026, at 003.

review.[169] According to the Determinations Unit head, the groups identified on the BOLO lists were generally ones which had raised concerns in the past over whether they qualified for tax exemption, or which IRS employees had reason to believe could raise tax exemption problems in the future.[170] The BOLOs were emailed periodically – usually on a monthly basis – to all EO determination specialists and managers to alert them to the highlighted cases and ensure they were treated in the same way.[171]

The first BOLO was issued by email in August 2010.[172] Prior to that, IRS employees had sent one another email alerts about various types of entities to be aware of when processing applications.[173] According to Determinations head Cindy Thomas, EO personnel had found it too difficult to keep track of the numerous email alerts they were receiving, and the alerts were instead consolidated into a single document, resulting in the "BOLO" list.[174] The BOLO list consisted of a number of spreadsheets circulated as a single document.[175] As one senior EO official explained to another in a 2011 email: "The BOLO spreadsheet is disseminated to managers and specialists so that they have a consolidated list to reference and don't need to keep individual emails, etc."[176]

EO determinations specialist Ronald Bell was the keeper of the BOLO lists, from their inception in 2010 through approximately August 2012, and then from approximately April 2013 until the BOLOs stopped being used later that year.[177] He told the Subcommittee that he retained the BOLOs that were sent to him, but generally did not author individual BOLO entries, with one exception explained below.[178] According to the EOT head, for the first two years the BOLOs were issued, the process for adding new entries to the BOLO list was informal and, at times, entries were added, revised, or updated without the knowledge or participation of senior EO personnel.[179] In May 2012, the process was formalized to require management approval of BOLO revisions and additions.[180] According to the Screening Group manager, the BOLOs were not seen as "a critical part" of the training process for new screeners, and he was unsure to what extent the screeners used the BOLOs.[181] However, one senior screener told the Subcommittee that he used the BOLOs extensively and always checked to see if he had any cases on the BOLO list.[182]

---

[169] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[170] Id.
[171] Id.; 2/18/2011 email from Holly Paz to Cindy Thomas, "TAG info," IRSR0000008593 - 602, at 595.
[172] Subcommittee interview of Holly Paz, IRS (10/30/2013); 5/14/2013 TIGTA Audit Report, at 6. The TIGTA audit report stated that the Determinations Unit first began developing the BOLO list in May 2010. Id.
[173] Subcommittee interview of Holly Paz, IRS (10/30/2013). The "Touch and Go" or TAG list appears to have been a predecessor to the BOLO list.
[174] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[175] See, e.g., August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 - 515.
[176] 2/18/2011 email from Holly Paz to Cindy Thomas, "TAG info," IRSR0000008593 - 602, at 595.
[177] Subcommittee interview of Ronald Bell, IRS (1/15/2014).
[178] Id.
[179] Subcommittee interview of Holly Paz, IRS (10/30/2013).
[180] Id.; 5/14/2013 TIGTA Audit Report, at 41.
[181] Subcommittee interview of John Shafer, IRS (1/17/2014).
[182] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

The BOLO list was divided into a handful of subsections that sometimes varied. The subsections typically included these five categories: "TAG," "TAG Historical," "Watch List," "Coordinated Processing," and "Emerging Issues."[183] "TAG" stood for "Touch-and-Go," a term which was used in earlier email alerts about problematic organizations to look for in 501(c) applications and which generally referred to organizations suspected of involvement with tax avoidance, fraud, or terrorism.[184] "TAG Historical" referred to cases that had been historically problematic for the IRS; entries in the section cautioned IRS agents to be on the lookout for related cases. The Subcommittee was told that all screeners and determination specialists were supposed to review the names in the TAG and TAG Historical sections and run searches and check their files for those entities.[185] Applications involving organizations listed in the two sections were supposed to be sent to a TAG specialty group and processed only by that group.[186]

The "Watch List" section was a "general term for issues or cases in need of special handling" such as a request from the IRS Criminal Investigation Division to look for a specific application, or a request from EOT to look for applications filed by certain groups.[187] It was also used to alert IRS agents to problematic applications that were expected, but not yet received.[188]

The "Coordinated Processing" section of the BOLO was used as "the mechanism for promoting uniform case handling by assigning multiple related cases to a particular specialist or group when there is existing precedent and procedures that cover the issues involved."[189] It was used, for example, to flag applications involving "multiple entities related through a complex business structure such as a senior housing management company and separate senior housing properties."[190]

---

[183] See 5/10/2010 email from Cindy Thomas to Joseph Herr, "Emerging Issue follow-up," IRSR0000485854 - 860, at 857 - 860. See also 2/18/2011 email from Holly Paz to Cindy Thomas, "TAG info," IRSR0000008593 - 602, at 595. Some subsections appeared in only a few BOLOs. For example, in the inaugural BOLO list prepared in August 2010, the "Watch List" section was entitled, "BOLO list." See August 2010 BOLO Spreadsheet, prepared by IRS, IRS0000002503 - 515 (containing sections entitled, "TAG," "TAG Historical," "Emerging Issues," "Coordinated Processing," and "BOLO List"); June 2012 BOLO Spreadsheet, prepared by IRS, IRS0000001423 - 438 (containing sections entitled, "Potential Abusive Historical," "Potential Abusive," "Emerging Issues," "Coordinated Processing," and "Watch List"); February 2012 BOLO Spreadsheet, prepared by IRS, IRS0000001500 - 511 and IRSR0000006705 - 709 (containing sections entitled, "Potential Abusive Historical," "Potential Abusive," "Emerging Issues," "Coordinated Processing," and "Watch List").

[184] See 5/10/2010 email from Cindy Thomas to Joseph Herr, "Emerging Issue follow-up," IRSR0000485854 - 860, at 857 - 860. See also undated "Heightened Awareness Issues," prepared by the IRS, IRSR0000195600 - 617, at 604 (explaining various BOLO sections).

[185] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

[186] Id.

[187] 5/10/2010 email from Cindy Thomas to Joseph Herr, "Emerging Issue follow-up," at IRSR0000485858.

[188] See undated "Heightened Awareness Issues," prepared by the IRS, IRSR0000195600 - 617, at 612 - 614.

[189] 5/10/2010 email from Cindy Thomas to Joseph Herr, "Emerging Issue follow-up," at IRSR0000485857 - 858.

[190] Id. at 858. Additional examples included "a break-up of a large group ruling resulting in the subordinates seeking individual exemptions," and organizations subject to a "change in state law requiring instrumentalities to change their form 990 filing requirement." Id. See also undated "Heightened Awareness Issues," prepared by the IRS, IRSR0000195600 - 617, at 609 - 610.

Finally, the "Emerging Issues" section of the BOLO was used to flag "an issue identified in a group of cases for which no standard practice for handling has been established."[191] As one senior EO official explained to a colleague in a 2011 email:

> "Most new emerging issues [were] identified by screeners through the initial screening process, for example tea party cases. When these potential emerging issue cases [were] identified, they [were] assigned to the group designated to work emerging issues."[192]

The Emerging Issues section of the BOLO was used, for example, to flag applications filed by "Tea Party" organizations, "Pension trust 501(c)(2) non-traditional investment" organizations, credit counseling groups, and hedge funds seeking tax exempt status as entities whose applications should be sent to the Emerging Issues specialty group.[193]

The evidence reviewed by the Subcommittee investigation indicates that the IRS used at least three of the BOLO sections to identify 501(c)(4) organizations engaged in campaign or other advocacy activities requiring heightened review. For example, as explained below, the Emerging Issues section led to hundreds of cases being selected for heightened review by EOD personnel, including groups with "Tea Party," "9/12," or "Patriot" in their names.[194] In addition, the TAG Historical section included an entry for "Progressive political activities"[195] that, together with the Emerging Issues section, contributed to groups with "Progressive" or "Progress" in their names being subjected to heightened scrutiny for advocacy activities.[196] Further, as explained below, the Watch List section included entries for "ACORN successor" groups[197] and "Occupy" groups[198] which were also identified and subjected to heightened review for their advocacy activities.[199] In June 2012, an Emerging Issues entry was revised to

---

[191] 5/10/2010 email from Cindy Thomas to Joseph Herr, "Emerging Issue follow-up," at IRSR0000485857. See also undated "Heightened Awareness Issues," prepared by the IRS, IRSR0000195600 - 617, at 605-608.

[192] 2/18/2011 email from Holly Paz to Cindy Thomas, "TAG info," at IRSR0000008595.

[193] See undated "Heightened Awareness Issues," prepared by the IRS, IRSR0000195600 - 617, at 609 - 610. See also, e.g., November 2010 BOLO spreadsheet, prepared by IRS, IRS0000001349 - 364, at 357.

[194] See TIGTA Audit Report at 10 ("We reviewed all 298 applications that had been identified as potential political cases as of May 31, 2012."). All of those 298 applications had been identified through the Emerging Issues section of a BOLO. Id. at 24; 6/11/2012 email from Holly Paz to Cheryl Medina, "TIGTA request – updated case data," TIGTA Bates No. 011102 - 103. About one-third of those applications had been filed by groups with "Tea party," "9/12," or "Patriot" in their names. TIGTA Audit Report at 8.

[195] See, e.g., August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515, at 513; August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; July 2012 BOLO spreadsheet, prepared by the IRS, at IRS000001484 - 499. See also 8/10/2010 email from Elizabeth Hofacre to Cindy Thomas and others, "Watch List Alerts," IRSR0000014013 - 028, at 018.

[196] See, e.g., an analysis of 501(c)(4) advocacy cases as of 6/5/2012, prepared by the IRS Chief Risk Officer David Fisher (hereinafter "IRS analysis of 501(c)(4) advocacy cases as of 6/5/2012"), PSI-IRS-37-000004 - 014, at 011 - 012 (listing applications filed by groups with "Progressive" or "Progress" in their names, some of which had been included in lists of Emerging Issues cases and others of which had been otherwise identified); Subcommittee interview of David Fisher, IRS (12/6/2013). See also Report section on Processing Applications from Liberal Groups, below.

[197] See August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515, at 513; August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; June 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000014253 - 258 (BOLO expanded by the IRS to make it readable for the Subcommittee); 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, "BOLO Tab Update," IRSR0000410433 - 434.

[198] See January 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000630285 - 289, at 285.

[199] See Report section on Processing Applications from Liberal Groups, below.

encompass all of the advocacy groups in a single BOLO entry, combining the Tea Party, ACORN successor, and Occupy groups, among others. At the same time, while the evidence indicates the BOLO listings played a major role in identifying the 501(c)(4) advocacy groups subjected to heightened review, they were not the only way the groups were identified.[200]

### B. Flagging Tea Party and Other Groups

In February 2010, an IRS screener working in the Cincinnati office flagged the first application in which the applicant used the phrase "Tea Party" in its name, and asked the head of the Screening Group how to handle the case. The Screening Group head forwarded an email from the screener describing the application to more senior Determinations personnel who alerted the EO Technical Unit to the potentially high profile case. By March, a senior screener had flagged ten similar cases. He also highlighted what he called an "equal Democratic 'tea party' type entity, called Emerge" and later suggested flagging applications filed by groups with either "Emerge" or "Progressive" in their names. The head of the EOT agreed to provide technical advice on how to handle the applications and requested two test cases. Also in April 2010, at a regular meeting of IRS screeners to discuss emerging issues, the senior screener gave a presentation about the "Tea Party" category of cases and asked the screeners to send the cases to the Screening Group manager.

**First Tea Party Group Flagged.** In February 2010, Jack Koester, a senior member of the EO Screening Group, reviewed an application for tax exempt status from an organization with the words "Tea Party" in its name.[201] Characterizing the application as a "high profile case" due to "media attention" to those types of organizations, he sent an email to the Screening Group manager, Mr. Shafer, asking him how to handle it.[202] His action was apparently the first to flag a 501(c) application from an organization that included "Tea Party" in its name. Mr. Shafer responded by telling Mr. Koester that he would forward the issue to his supervisor. Mr. Shafer told the Subcommittee that, at the time he received the Koester email, he was not familiar with the Tea Party, but had heard of it and thought it was a conservative group.[203] Mr. Shafer said that he forwarded the Koester email to his supervisor, Sharon Camarillo, who, in turn, forwarded the email to the head of the Determinations Unit, Cindy Thomas.[204]

---

[200] For example, dozens of 501(c)(4) groups were selected for heightened review before the first BOLO was issued in August 2010, as indicated below. See also 9/8/2008 email from Donna Abner to Cindy Westcott and others, "Political Case Alert," IRSR0000011493 - 494 (recommending an email alert for Emerge groups). Emerge groups were selected for heightened scrutiny by EOD personnel even though they had no separate BOLO listing and were not identified through the Emerging Issues entry. See Report section on Processing Applications from Liberal Groups, below.

[201] Subcommittee interview of John Shafer, IRS (1/17/2014); 2/25/2010 email from Jack Koester to John Shafer, "Case # [REDACTED BY IRS]," IRSR0000195553 - 554, at 553.

[202] 2/25/2010 email from Jack Koester to John Shafer, "Case # [REDACTED BY IRS]," at IRSR0000195553. (Mr. Koester wrote: "Here is the case number for the 'Tea Party' application for 501(c)(4) exemption that we discussed this morning. Recent media attention to this type of organization indicates to me that this is a 'high profile' case.").

[203] Subcommittee interview of John Shafer, IRS (1/17/2014).

[204] Id. See also 2/25/2010 email from John Shafer to Sharon Camarillo, "Case # [REDACTED BY IRS]," IRSR0000181003 - 007, at 005; 2/25/2012 email from Sharon Camarillo to Cindy Thomas, "Case # [REDACTED BY IRS]," IRSR0000195549 - 554, at 551 (The email sent by Ms. Camarillo forwarding Mr. Koester's email to Cindy Thomas included this comment: "Cindy: Please let 'Washington' know about this potentially politically

Ms. Thomas sent an email to the acting manager of the EO Technical Unit, Holly Paz, located in Washington, D.C., asking whether "EO Technical wants this case because of recent media attention."[205] Ms. Paz told the Subcommittee that, according to the Internal Revenue Manual, EO application cases that were without precedent and cases that had national media impact were supposed to be handled by EO Technical.[206] Ms. Paz responded to Ms. Thomas' inquiry in the affirmative: "I think sending it up here is a good idea given the potential for media interest."[207] Ms. Paz told the Subcommittee that her plan was to have EOT work on the case and develop a template for how to handle future determinations in the area although, ultimately, no template was developed.[208]

**Ten Cases Flagged.** By mid-March 2010, the Screening Group had identified ten applications that raised issues similar to the application Mr. Koester had flagged in February from the organization with "Tea Party" in its name.[209] Mr. Muthert, a senior revenue agent who worked in the Screening Group and sometimes served as its acting manager, told the Subcommittee that he had found the additional cases by conducting searches of the IRS database, TEDS, using the following words: "Tea Party," "9-12," and "Patriot."[210] He said that he presented the cases to the Screening Group manager, Mr. Shafer.[211]

---

embarrassing case involving a 'Tea Party' organization. Recent media attention to this type of organization indicates to me that this is a 'high profile' case.").

[205] 2/25/2010 email from Cindy Thomas to Holly Paz, "High Profile Case – Does EO Technical Want It," IRSR0000195549 - 554, at 551. Ms. Thomas told the Subcommittee that it was not unusual for EOT to take cases from Cincinnati. Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

[206] Subcommittee interview of Holly Paz, IRS (10/30/2013).

[207] 2/26/2010 email from Holly Paz to Cindy Thomas, "High Profile Case – Does EO Technical Want It," IRSR0000195551. See also 4/1/2010 email from Steven Grodnitzky to Donna Elliot-Moore and Ronald Shoemaker, "two cases," IRSR0000443984 ("These are high profile cases as they deal with the Tea Party so there may be media attention.").

[208] Subcommittee interview of Holly Paz, IRS (10/30/2013).

[209] Subcommittee interview of Gary Muthert, IRS (1/15/2014). See also 5/14/2013 TIGTA Audit Report, at 31.

[210] Subcommittee interview of Gary Muthert, IRS (1/15/2014). According to Mr. Muthert, Mr. Shafer did not ask how he found these cases. Id. When asked if he had a negative view of the Tea Party, Mr. Muthert replied: "No, I align with them." Id. It is also important to note that the term "Patriot" was not used exclusively by conservative groups. In 2010, for example, a 501(c)(4) group called "Patriot Majority USA" began operations, supporting views and candidates affiliated with the Democratic Party. In the 2012 election cycle, the Center for Responsive Politics characterized it as one of the largest spending, Democratic- leaning 501(c)(4) groups. See "2012 Outside Spending, by Group: Non-Disclosing Groups," prepared by Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U. For more information about Patriot Majority USA, see the Report section on Evaluating Campaign and Social Welfare Activities, below.

[211] Subcommittee interview of Gary Muthert, IRS (1/15/2014). Mr. Muthert and Mr. Shafer disagreed on how the ten cases came to be identified. According to Mr. Muthert, in March 2010, Mr. Shafer asked him to find as many Tea Party groups as possible so Mr. Muthert conducted a search and found four applications with Tea Party in the organizations' names, two of which were open and two of which were closed. Id. Mr. Muthert told the Subcommittee that, about a week later, Mr. Shafer asked him to find ten Tea Party applications which he did by expanding the search terms to also include "Patriot" and "9-12." Mr. Shafer, however, disputes that he asked Mr. Muthert to look for Tea Party groups. Instead, he contends that Mr. Muthert came to him with a list of ten Tea Party cases; Mr. Shafer told the Subcommittee that he was "surprised [there wer]e so many cases." Subcommittee interview of John Shafer, IRS (1/17/2014). See also undated "Timeline," a document prepared by Mr. Muthert, IRSR0000487175 (stating that, from 2/26 to 4/5/2010, "I was asked by John to query our system and find any Tea

On March 16, 2010, Mr. Shafer sent an email to the EO Determinations head, Ms. Thomas, stating: "We have identified a total of 10 Tea Party cases. Three cases have been approved, two 501(c)(4) and one 501(c)(3). I have collected the other cases and will forward them to EO Technical."[212] Ms. Thomas forwarded Mr. Shafer's email to the EOT head, Ms. Paz. The next day, March 17, 2010, Ms. Thomas wrote to Ms. Paz: "Did you know about these additional 10 tea party cases? Do you want all of them or do you only want a few and then give us advice as to what to do with the remaining?"[213]

Ms. Paz responded that EOT would take "a few more cases, (I'd say 2) and would ask that you hold the rest until we get a sense of what the issues may be."[214] In response, Mr. Shafer sent two cases to EOT and held the remaining case files in his office.[215]

**Democratic Equivalents Flagged.** At the same time the Tea Party cases were being presented to the EOT, on March 16, 2010, Mr. Muthert sent an email to Mr. Shafer about what he called "an equal Democratic 'tea party' type entity, called Emerge," and offered to provide information on applications filed by that group as well.[216] Mr. Muthert wrote:

> "I just looked at CNN.com. There is a major TEA Party protest in Washington D.C. today. I watched the video. It appears the TEA party is a Republican based entity. I am now a resident expert on the TEA Party. However, that being said, there is also an equal Democratic 'tea party' type entity, called 'Emerge.' If you want more info, just ask."[217]

Mr. Shafer replied: "What's the [REDACTED BY IRS] movement?"[218] The Subcommittee was unable to identify any substantive response made by Mr. Muthert to Mr. Shafer at the time.

As detailed further below, other evidence shows that, by the time of Mr. Muthert's 2010 email, the IRS had already flagged multiple applications submitted by Emerge groups, which were affiliated with a national organization, Emerge America, dedicated to encouraging and training Democratic women candidates to run for office. Beginning in 2008, the applications had been set aside for heightened review due to their political activities and apparent private benefits for the Democratic Party. According to IRS materials released by the House Committee on Ways and Means, the Emerge groups were the subject of a Significant Case Report in April 2010, the same month a similar report discussed the Tea Party cases; the Emerge cases were

---

Party application and similar cases. John asked me to secure 10 Tea Party cases and transfer them to EOT for review. I conducted TEDS research and found 10 TP cases.").

[212] 3/16/2010 email from John Shafer to Cindy Thomas, "[REDACTED BY IRS] – EO Technical Would Like [REDACTED BY IRS]," PSI-IRS-09-000041.

[213] 3/17/2010 email from Cindy Thomas to Holly Paz, "[REDACTED BY IRS] – EO Technical Would Like [REDACTED BY IRS]," PSI-IRS-09-000041.

[214] 3/17/2010 email from Holly Paz to Cindy Thomas, "[REDACTED BY IRS] – EO Technical Would Like [REDACTED BY IRS]," PSI-IRS-09-000040.

[215] See 3/17/2010 email from John Shafer to Cindy Thomas, "[REDACTED BY IRS] – EO Technical Would Like [REDACTED BY IRS]," PSI-IRS-09-000040. (Mr. Shafer: "I will sen[d] [REDACTED BY IRS] to EO Technical, [REDACTED BY IRS]. I can hold the remaining cases in my group '75' number unless you want them held some other place."); Subcommittee interview of John Shafer, IRS (1/17/2014).

[216] 3/16/2010 email from Gary Muthert to John Shafer, "TEA PARTY," IRSR0000482737.

[217] Id.

[218] 3/16/2010 email from John Shafer to Gary Muthert, "TEA PARTY," IRSR0000482737.

subjected to the same level of heightened scrutiny, including EOT reviews; and the Emerge groups ultimately were either denied tax exempt status or lost their 501(c)(4) tax exempt status due to engaging in partisan advocacy activities.[219] More information about these cases is provided below.

In addition to conducting searches for Tea Party groups, Mr. Muthert suggested conducting searches using the term "Emerge" and "Progressive" to identify other groups warranting heightened review, both before and after the August 2010 BOLO urged screeners to look for those organizations.[220] Mr. Muthert explained to the Subcommittee that "Progressive" was one of the entries in the BOLO spreadsheet, in the section called "TAG Historical."[221] Mr. Muthert told the Subcommittee that all EO screeners were obligated to be on the lookout for groups described in the BOLO TAG Historical section, including by running searches for those entities and checking their files to see if they had any of those cases.[222] Mr. Muthert told the Subcommittee that, just as he did with the Tea Party, he ran electronic queries using the word "Progressive" and would have sent any cases he found to the relevant specialty group handling them.[223] According to an analysis by the IRS Chief Risk Officer, over a period running from May 2010 to December 2012, 20 applications were filed by groups with the words "Progressive" or "Progress" in their names, most of which were subjected to heightened scrutiny by the IRS, demonstrating that, at the same time the agency began to focus on Tea Party groups, it also began to examine progressive groups.[224]

**Other Screeners Notified about Cases.** According to Mr. Muthert, he continued to run searches to find "Tea Party" cases and found additional examples which were held within his Screening Group, while awaiting word from EOT on how to handle them.[225] On April 5, 2010, the head of the Determinations Unit, Cindy Thomas, asked Mr. Muthert, then acting manager of the Screening Group while Mr. Shafer was on vacation, to compile a list of the Tea Party cases that had been identified.[226] In response, Mr. Muthert provided a list of 18 organizations, almost double the number from a few weeks earlier.[227]

---

[219] See, e.g., "3 Groups Denied Break by IRS are Named," New York Times, Stephanie Strom, (7/21/2011), http://www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?_r=0.

[220] Subcommittee interview of Gary Muthert, IRS (1/15/2014); 7/28/2010 "Screening Workshop Notes," prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 - 704, at 703 (indicating that at a July 2010 workshop, Mr. Muthert had urged his fellow IRS screeners to flag applications filed by both Emerge and Progressive groups).

[221] See August 2010 BOLO Spreadsheet, prepared by IRS, IRS0000002503 - 515, in TAG Historical section.

[222] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

[223] Id.

[224] See IRS analysis of 501(c)(4) advocacy cases as of 6/5/2012, PSI-IRS-37-000004 - 019, at 011 - 012 (showing that at least 11 groups with "Progressive" or "Progress" in their names had filed 501(c)(4) applications that had been subjected to IRS reviews lasting six months or longer). This evidence shows that from 2010 to 2012, progressive groups were applying for tax exempt status and were being identified and subjected to heightened review by IRS personnel, countering the assertion in the Minority Staff's Dissenting Views that cases involving progressive groups "were inactive during the time period of the TIGTA audit." Dissenting Views at 194, 196, 202.

[225] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

[226] 4/5/2010 email from Cindy Thomas to Gary Muthert, "Tea Party Cases – ACTION," IRSR0000443983.

[227] See 4/6/2010 email from John Shafer to Cindy Thomas, "Tea Party Cases – ACTION," IRSR0000443982 (providing Mr. Muthert's list of Tea Party cases).

On April 14, 2010, Mr. Muthert gave a presentation on the cases at a routine Screening Group meeting designed to alert screeners to a variety of applications and emerging issues.[228] The minutes from the meeting provided this summary of the presentation:

> "Gary Muthert gave a presentation on 'Tea Party Cases.' He stated that 3 cases have been approved including one as a 501(c)(3). We are waiting guidance from HQ on these cases. John Shafer is h[o]lding these cases in his office if you identify one. Give case information to Gary Muthert as well."[229]

Mr. Muthert told the Subcommittee that after giving this presentation, he stopped running electronic searches for the applications, because he believed that the other screeners had been put on notice to look for the cases and would turn them over to Mr. Shafer.[230] Mr. Muthert told the Subcommittee that he did not believe the other screeners had been running queries like he had been doing to find the cases, but were identifying the cases as they came in and were assigned to the screeners for review.

On April 24, 2010, Ms. Thomas sent the list of 18 cases to Steven Grodnitzky, then acting EOT head while Ms. Paz was on maternity leave, and noted: "None of these cases have been assigned. They have been sitting in our Screening Group waiting for guidance from EOT."[231] Her email was sent about two months after the first Tea Party application had been flagged by the Screening Group.

### C. Reviewing Test Cases

The EO Screening Group sent two "test cases" involving applications filed by Tea Party groups to the EO Technical Unit in early 2010, which left them unresolved for more than three years. The initial EOT specialist assigned to the cases, Carter Hull, took a year to obtain information from the applicants, analyze the issues, and propose how the applications should be handled, recommending that a 501(c)(4) application be approved and a 501(c)(3) application be denied. On the instruction of EO head Lois Lerner, his analysis of the test cases was then forwarded to the Tax Exempt and Government Entities (TEGE) division within the IRS Chief Counsel's office for analysis and advice. Even though the cases had been pending for over a year and other development letters had been sent, the TEGE legal counsel advised obtaining additional information from the applicants before deciding the cases, including reviewing any campaign activities undertaken in 2010. In response, the EOT specialist drafted a new letter requesting the additional information, but failed to send it after the cases were reassigned to a new EOT specialist in August 2011, about 18 months after the applications were first filed with the IRS. The new EOT specialist, Hilary Goehausen, recommended denying both applications, but those recommendations were not acted on, and both test cases remained unresolved for another two years. During the course of their work, both EOT specialists prepared Significant Case Reports that provided monthly updates on the two test cases to senior EO management.

---

[228] Subcommittee interview of Gary Muthert, IRS (1/15/2014).
[229] 4/14/2010 "Minutes of Group Meeting - Group 7838," prepared by the IRS, IRSR0000168256 - 257.
[230] Subcommittee interview of Gary Muthert, IRS (1/15/2014).
[231] 4/24/2010 email from Cindy Thomas to Steven Grodnitzky, "SCR," IRSR0000165439 - 440.

**Initial EOT Review of Test Cases.** In late February 2010, Holly Paz, EOT head, told Determinations head Cindy Thomas that it would be a good idea to send the first Tea Party case to EOT for review.[232] In mid-March, Ms. Paz suggesting sending two Tea Party cases to EOT to "get a sense of what the issues may be."[233] On March 31, 2010, Ms. Paz accepted two "tea party" cases.[234]

In April 2010, Ronald Shoemaker, the manager of EOT Group II, assigned the two Tea Party cases to Carter (Chip) Hull, a senior EOT Tax Law Specialist who had been with the IRS for decades, and told him they were test cases intended to help provide guidance to the Cincinnati office on how to handle those types of applications.[235] Around the same time, Steven Grodnitzky, then acting head of the EOT, asked Mr. Hull to begin preparing "Significant Case Reports" for the test cases, which is a type of monthly report that the IRS uses to monitor cases with significant issues.[236] The report information was provided to senior management, including EO head Lois Lerner.[237]

Mr. Hull told the Subcommittee that, after the two test cases were assigned to him, he read and analyzed the case files, one of which involved a 501(c)(4) organization and the other of which involved a 501(c)(3) organization.[238] He said that the cases fit "broadly" within the Tea Party category but, at the time he was analyzing them, he did not know why they were called Tea Party cases or why the IRS was interested in them.[239] When Ms. Thomas, the head of the Determinations Unit, was asked why the category used for the cases was called "Tea Party," she explained that the first case involved an organization with Tea Party in its name.[240]

Mr. Hull sent a development letter to the 501(c)(3) applicant, but never received a reply from the group and closed the file.[241] He also sent a development letter to the 501(c)(4)

---

[232] See 2/26/2010 email from Holly Paz to Cindy Thomas, "High Profile Case – Does EO Technical Want It," IRSR0000195551 (indicating sending a test case to EOT "is a good idea").

[233] 3/17/2010 email from Holly Paz to Cindy Thomas, "[REDACTED BY IRS] – EO Technical Would Like [REDACTED BY IRS]," PSI-IRS-09-000040.

[234] See 3/31/2010 email from Donna Elliot-Moore to Steven Grodnitzky, "two cases," IRSR0000443985 ("Re: Two 'tea party' cases .... Holly accepted the cases for EO Technical.").

[235] Subcommittee interview of Carter Hull, IRS (11/19/2013).

[236] 4/23/2010 email from Steven Grodnitzky to Ronald Shoemaker, "SCR," IRSR0000165439 - 440 (Mr. Grodnitzky wrote: "Can you or Chip [Carter Hull] make up the SCR [Significant Case Report], and confer with Cindy [Thomas] to include their information in the SCR?"); Subcommittee interview of Holly Paz, IRS (10/30/2013). See also 4/5/2010 email from Steven Grodnitzky to Ronald Shoemaker and Cindy Thomas, "two cases," IRSR0000443984 ("Can you assign these cases to one person and start an SCR for this month on the cases?"). In some IRS documents, a "Significant Case Report" is referred to as a "Sensitive Case Report." See also 5/14/2013 TIGTA Audit Report, at 31.

[237] See 5/14/2013 TIGTA Audit Report, at 32 ("Sensitive Case Reports are shared with the Director, Rulings and Agreements, and a chart summarizing all Sensitive Case Reports is provided to the Director, EO.").

[238] Subcommittee interview of Carter Hull, IRS (11/19/2013). See also 4/6/2010 email from Carter Hull to Siri Buller, "Political Issues," IRSR0000012133 (Mr. Hull wrote: "I was just assigned a couple of cases on Tea Party organizations, one seeking exemption under 501(c)(3) and one under 501(c)(4).").

[239] Subcommittee interview of Carter Hull, IRS (11/19/2013). In response to a question, Mr. Hull told the Subcommittee that he had no animosity towards the Tea Party nor did anyone else at the IRS. Id.

[240] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

[241] Subcommittee interview of Carter Hull, IRS (11/19/2013); 5/17/2011 Significant Case Report, prepared by Carter Hull, IRSR0000165721 - 722. (indicating that, with respect to "Organization (1)" of the Tea Party cases, "closed FTE [Failed to Establish] for failure to respond to a development letter").

applicant and received the requested information.[242] At some point, Mr. Hull requested another case to take the place of the closed 501(c)(3) case, and Mr. Shoemaker sent him another 501(c)(3) Tea Party case.[243]

In October 2010, Mr. Hull sent a memorandum to Mr. Shoemaker providing an update on the two test cases, explaining that he was working on those as well as other similar applications in coordination with the Cincinnati office.[244] That memorandum was dated about seven months after the test cases had first been referred to EOT. During that period, Mr. Hull had been working with Elizabeth Hofacre, a Determinations specialist who had been tasked with coordinating the Tea Party cases and who had sought his advice with respect to developing the facts associated with those cases while awaiting resolution of the two test cases.[245]

On November 20, 2010, Determinations head Cindy Thomas sent an email to Steven Bowling, head of the EOD group handling Tea Party cases, to update him on the EOT review of the test cases. She wrote:

> "I had a discussion with Holly Paz on Wednesday (11/17) afternoon to again discuss the tea party cases. She advised me that we were sending applicable parts of the application package to EOT along with the additional information letter and that based on this information they are finding that not all the tea party cases have the same issues. This is why they have not been able to prepare a template [development] letter with additional questions. EOT is putting together a briefing paper and going to discuss the various issues in these cases with Judy Kindell [Senior Technical Advisor to EO Director]. If Judy does not believe they have a basis for denial for the egregious situations, then they will most likely recommend all cases be approved. In the meantime, the specialist(s) need to continue working the applications as they have and will need to advise applicants that the cases are still under review. If this has not been finalized by 12/13/2010, please follow up with me and I will ask for a status report from Holly."[246]

In December 2010, the test cases were still unresolved, and Ms. Thomas asked Ms. Paz for an update: "Has there been any update regarding the tea party cases as far as the discussion with Judy Kindell?"[247] Ms. Paz responded:

---

[242] Subcommittee interview of Carter Hull, IRS (11/19/2013); 5/17/2011 Significant Case Report, prepared by Mr. Hull, IRSR0000165721 - 722. Mr. Hull told the Subcommittee that the organization requested additional time to respond to the development letter, and he gave the group 30 additional days. He also indicated that the group submitted additional information in response to the letter, but a few items were still missing. He indicated that the group ultimately provided all of the missing information. Subcommittee interview of Carter Hull, IRS (11/19/2013).
[243] Subcommittee interview of Carter Hull, IRS (11/19/2013).
[244] 10/18/2010 memorandum from Carter Hull, IRS, to Ronald Shoemaker, IRS, "Coordinating Tea Party Cases Update Memorandum," IRSR0000168087 - 091; Subcommittee interview of Carter Hull, IRS (11/19/2013).
[245] Subcommittee interviews of Carter Hull, IRS (11/19/2013) and Elizabeth Hofacre, IRS (10/25/2013). Ms. Hofacre eventually had about 40 cases that she was supposed to develop while awaiting resolution of the two test cases, as detailed further below.
[246] 11/20/2010 email from Cindy Thomas to Steven Bowling and Sharon Camarillo, "Political Cases – Information," IRSR0000014069 - 070, at 070.
[247] 12/13/2010 email exchange between Holly Paz and Cindy Thomas, "Political Cases – Status," IRSR0000014069 -070, at 070.

> "We will be going to Judy shortly with the proposal to grant exemption to the c4 applicant .... The c3 application is not yet ready for discussion with Judy – TP's [taxpayer's] response to development letter is under review. We expect to move that to Judy sometime in January."[248]

In January 2011, Lois Lerner, head of Exempt Organizations, reviewed a Significant Case Report for that month which included a discussion of the two Tea Party test cases. On February 1, 2011, Ms. Lerner warned Holly Paz, EOT head, about the dangers involved with those cases and suggested the cases should not be left in the Cincinnati office:

> "Tea Party Matter very dangerous. This could be the vehicle to go to court on the issue of whether Citizen's United overturning the ban on corporate spending applies to tax exempt rules. Counsel and Judy Kindell need to be in on this one .... Cincy [Cincinnati office] should probably NOT have these cases – Holly please see what exactly they have please."[249]

Ms. Paz responded that the Cincinnati agents were being carefully supervised and were not making any final decisions on the cases until the two test cases were resolved by EOT:

> "Cases in Determs are being supervised by Chip Hull at each step – he reviews info from TPs [taxpayers], correspondence to TPs, etc. No decisions are going out of Cincy until we go all the way through the process with the c3 and c4 cases here. I believe the c4 will be ready to go over to Judy soon."[250]

Ms. Paz told the Subcommittee that, after this email exchange, she communicated Ms. Lerner's instructions that the two test cases be elevated to Judith Kindell and legal counsel in the Tax Exempt and Government Entities (TEGE) division of the IRS Chief Counsel's office.[251] Ms. Kindell, along with Siri Buller and Justin Lowe, were then the EOT subject matter experts on political advocacy and campaign issues.[252] The TEGE division was a key source of legal advice on tax exempt issues for EO personnel.

Mr. Hull told the Subcommittee that, at some point in late 2010 or early 2011, he discussed the Tea Party test cases with his "reviewer," Elizabeth Katzenberg, and she suggested sending the cases to Judith Kindell for her review.[253]

In late 2010 or the first quarter of 2011, Mr. Hull finally reached a decision on how the two test cases should be handled, recommending that tax exemption be approved for the 501(c)(4) group, but denied for the 501(c)(3) group.[254] A later briefing paper prepared for EO

---

[248] Id.
[249] 2/1/2011 email from Lois Lerner to Holly Paz, "SCR Table for Jan. 2011," IRSR0000168020 - 023, at 022.
[250] 2/2/2011 email from Holly Paz to Lois Lerner, "SCR Table for Jan. 2011," IRSR0000168020 - 023, at 021.
[251] Subcommittee interview of Holly Paz, IRS (10/30/2013). See also IRS organizational chart for the Chief Counsel office. "Office of the Chief Counsel," prepared by the IRS, http://www.irs.gov/irm/part1/30379001.html.
[252] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).
[253] Subcommittee interview of Carter Hull, IRS (11/19/2013).
[254] See, e.g., 4/7/2011 email from Judith Kindell to Lois Lerner and Holly Paz, "sensitive (c)(3) and (c)(4) applications," IRSR0000350220 - 221.

head Lois Lerner indicated that his favorable recommendation on the 501(c)(4) group was because the group would "conduct advocacy and political intervention, but political intervention will be 20% or less of activities."[255] The briefing paper indicated that his recommended denial of the 501(c)(3) application was based on the group's "ties to politically active (c)(4)s and 527s."[256] The paper also noted: "A proposed denial is being revised by TLS [Tax Law Specialist] to incorporate the org.'s response to the most recent development letter."[257]

The meeting between Mr. Hull and Ms. Kindell took place on or around April 7, 2011, about two months after it was first proposed and a full year after Mr. Hull first received the test cases;[258] the reason why the meeting was so delayed is unclear. Mr. Hull met at the time with both Ms. Katzenberg and Ms. Kindell, and discussed his analysis and recommendations for approving the 501(c)(4) application and denying the 501(c)(3) application.[259] Ms. Kindell responded by recommending that additional information be obtained regarding both cases, and that the cases be sent to TEGE counsel for review.[260]

After the meeting, Ms. Kindell wrote to Lois Lerner, EO head, and Ms. Paz, EOT head, proposing that all of the Tea Party cases collected by the Determination Unit in Cincinnati be moved to the EOT office in Washington, D.C., "[g]iven the sensitivity of the issue."[261] Ms. Paz responded that the EOT staff was busy with other work which precluded them from being able to work on the Tea Party cases.[262] Ms. Paz noted that, by then, the inventory of Tea Party cases had grown to 102.[263]

---

[255] 6/27/2011 email from Justin Lowe to Holly Paz, "Briefing Paper on c3/4 Advocacy Orgs," prepared by staff for Lois Lerner, IRSR0000002734 - 735, at 735. Mr. Hull told the Subcommittee that he could not confirm the information in the email or discuss his recommendations with respect to either group due to the confidentiality requirements of Section 6103 of the tax code. Subcommittee interview of Carter Hull, IRS (11/19/2013).

[256] 6/27/2011 email from Justin Lowe to Holly Paz, "Briefing Paper on c3/4 Advocacy Orgs," prepared by staff for Lois Lerner, IRSR0000002734 - 735, at 735.

[257] 6/27/2011 email from Justin Lowe to Holly Paz, "Briefing Paper on c3/4 Advocacy Orgs," prepared by staff for Lois Lerner, IRSR0000002734 - 735, at 735. Donald Spellmann, one of the legal experts within TEGE Counsel's office on campaign activity issues, told the Subcommittee that he recalled the case, but did not recall there being a recommendation accompanying it when it was forwarded. Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

[258] 4/7/2011 email from Judith Kindell to Lois Lerner and Holly Paz, "sensitive (c)(3) and (c)(4) applications," IRSR00000350220 - 221 (Ms. Kindell wrote: "I just spoke with Chip Hull and Elizabeth Katzenberg" about the test cases).

[259] See 5/12/2011 email from Michael Seto to Holly Paz, Tea Party – Email from TAS," IRSR0000429362 - 363; Subcommittee interview of Carter Hull, IRS, (11/19/2013).

[260] Subcommittee interview of Carter Hull, IRS (11/19/2013); 4/7/2011 email from Judith Kindell to Lois Lerner and Holly Paz, "sensitive (c)(3) and (c)(4) applications," IRSR0000350220 - 221 (Ms. Kindell wrote: "I just spoke with Chip Hull and Elizabeth Katzenberg about [REDACTED BY IRS] cases they have that are related to the Tea Party [REDACTED BY IRS] a (c)(3) application and the [REDACTED BY IRS] a (c)(4) application. I recommended that they develop the private benefit argument further and that they coordinate with Counsel."); 5/12/2011 email from Michael Seto to Holly Paz, "Tea Party – Email from TAS," IRSR0000429362 - 363 (Mr. Seto wrote: "The current status is: Judy [Kindell] has reviewed our proposed (c)(3) denial and (c)(4) favorabl[y] and requested the staff to ask for more information from the taxpayers.").

[261] 4/7/2011 email from Judith Kindell to Lois Lerner, Holly Paz, and others, "sensitive (c)(3) and (c)(4) applications," IRSR0000350219.

[262] 4/7/2011 email from Holly Paz to Judith Kindell, Lois Lerner, and others, "sensitive (c)(3) and (c)(4) applications," IRSR0000350219. (Ms. Paz wrote that the EOT and Guidance staffs were "tied up with ACA (cases

In May 2011, Mr. Hull included this observation in his Sensitive Case Report:

> "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 501(c)(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."[264]

His report indicated that the total number of related, pending applications had reached 25, and that his office had "not seen" those case files but were in the process of requesting them. The total cited in his report conflicted with the larger total given to EO head Lois Lerner in the prior month of 102 cases. At the time of his report, the two Tea Party test cases had been pending for over one year without resolution.

**Consultation with TEGE Counsel.** In May or June 2011, at the suggestion of Ms. Kindell, Mr. Hull forwarded the two test case files to the TEGE division of the IRS Chief Counsel's office for its review.[265] He included his recommendations for approving one application and denying the other.[266]

---

and Guidance) and the possibility looming that we may have to work reinstatement cases up here to prevent a backlog in Determs," and that she had "serious reservations about our ability to work all of the Tea Party cases out of this office.").

[263] Id. When asked about that total, Ms. Paz told the Subcommittee that she had always understood that the phrase "Tea Party" was being used generically, and that the total of 102 pending cases included both conservative and liberal groups. Subcommittee interview of Holly Paz, IRS (10/13/2013).

[264] 5/17/11 Sensitive Case Report, prepared by Carter Hull, IRSR0000165721 - 722.

[265] Mr. Hull told the Subcommittee that he forwarded the cases in May 2011. Subcommittee interview of Carter Hull, IRS (11/19/2013). Donald Spellmann, from the TEGE legal counsel's office, told the Subcommittee the case files were forwarded in June 2011. Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

[266] See 5/17/2011 Sensitive Case Report, prepared by Carter Hull, IRSR0000165721 - 722 (indicating he had sent his recommendation for a favorable ruling on the 501(c)(4) group to TEGE Counsel and also sought additional information on the 501(c)(3) group); 8/17/2011 "Sensitive Case Report," prepared by Carter Hull, IRSR0000164559 - 561, at 560 (indicating his proposed denial of the 501(c)(3) group had been "forwarded for review 07/19/2011," while also removing his proposed approval of the 501(c)(4) group and indicating that an additional development letter would be prepared for that group). See also 6/27/2011 email from Justin Lowe to Holly Paz, "Briefing Paper on c3/4 Advocacy Orgs," prepared by staff for Lois Lerner, IRSR0000002734 - 735, at 735 (noting a proposed favorable recommendation for the 501(c)(4) group and a proposed denial for the 501(c)(3) group); 1/31/2013 EO Technical Significant Case Report, prepared by the IRS, IRSR0000161237. Mr. Spellmann told the Subcommittee that he did not recall seeing any recommendation with regard to approving or denying the applications, nor did he receive the related Significant Case Reports. Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

On June 26, 2011, Lois Lerner, head of Exempt Organizations, met with lawyers from the TEGE Counsel's office.[267] The meeting participants included EO senior personnel Holly Paz and Nan Marks, and TEGE legal counsel Don Spellmann and Janine Cook. According to Mr. Spellmann, at the meeting, Ms. Lerner explained that, by then, EO had 100 "advocacy cases," and she wanted to find a way to process them.[268] Mr. Spellmann told the Subcommittee that his office had suggested drafting a model development letter.[269] He said that Ms. Lerner told TEGE counsel that EOT would forward them the two pending test cases to demonstrate what the cases looked like and what issues were involved.[270]

Mr. Spellmann told the Subcommittee that, after the meeting with Ms. Lerner, the TEGE Counsel's office discovered that the two test cases had already been provided to them by Mr. Hull, and that one had been assigned to Amy Franklin and the other to David Marshall.[271] Mr. Spellmann told the Subcommittee that he personally reviewed the case files and saw that both organizations had been engaged in some campaign activities.[272] He indicated that he planned to recommend that EOT take a closer look at the organizations' campaign activities in 2010, since it had been an election year, to determine the extent of their campaign involvement.[273]

Two months later, on August 4, 2011, a brief meeting took place between TEGE Counsel and EOT staff in which TEGE recommended that EOT "factually develop the election year of 2010."[274] Invited participants were TEGE counsels Don Spellmann, Amy Franklin, David Marshall, and Ken Griffin; and EOT staff Carter Hull, Hilary Goehausen, Justin Lowe, Andy Megosh, and Elizabeth Kastenberg.[275] In an email discussing the upcoming meeting, EOT head Ms. Paz wrote that the meeting would be helpful to coordinate with counsel on the two test cases, a guidesheet – referred to as a "checksheet" – to help determinations specialists develop and evaluate the cases, and a research paper defining "exclusively."[276] Mr. Spellmann told the Subcommittee that he recalled attending the meeting with Michael Seto and Amy Franklin, but did not recall anything else about the meeting other than it was brief.[277]

---

[267] Subcommittee interview of Donald Spellmann, IRS (12/18/2013).
[268] Id. Mr. Spellmann told the Subcommittee that Ms. Lerner had called the cases "advocacy cases" and did not refer to them as "Tea Party" cases. Id.
[269] Id. Mr. Spellmann told the Subcommittee that he did not get the sense from the meeting that there was an urgency to processing the cases, but that managers were trying to figure out how to handle them. Id.
[270] Id. According to Mr. Spellmann, it was not uncommon for TEGE Counsel to receive cases from EOT or from Cincinnati to help evaluate particular types of cases. Id.
[271] Id.
[272] Id.
[273] Id.
[274] Id. See also 8/2/2011 email from Donald Spellmann to Holly Paz, "Mtg on Advocacy Cases," IRSR0000013066 - 067, at 067 (referencing August 4, 2011 meeting).
[275] 8/2/2011 email from Donald Spellmann to Holly Paz, "Mtg on Advocacy Cases," IRSR0000013067. It is unclear if all invited participants actually attended the meeting.
[276] 8/2/2011 email from Holly Paz to Donald Spellmann, "Mtg on Advocacy Cases," IRSR0000013066.
[277] Subcommittee interview of Donald Spellmann, IRS (12/18/2013). Mr. Spellmann told the Subcommittee that after the TIGTA report was issued, an article was written about an item in the report citing an IRS meeting on August 4, 2011, attended by the IRS "Chief Counsel." Id. See 5/14/2013 TIGTA Audit Report, at 36; "IRS Knew Tea Party Targeted In 2011," Associated Press, Stephen Ohlemacher (5/11/2013), http://bigstory.ap.org/article/irs-apologizes-targeting-tea-party-groups. Mr. Spellmann explained that the meeting was not attended by the actual

On August 10, 2011, TEGE counsel participated in a larger and longer meeting with Carter Hull and other EOT staff to discuss the two test cases and "advocacy case development."[278] The invited participants were Carter Hull; the three TEGE lawyers, Donald Spellmann, Amy Franklin, and David Marshall; and other EOT personnel, including Elizabeth Kastenberg, Hilary Goehausen, Justin Lowe, Andy Megosh, and Ronald Shoemaker.[279] According to Mr. Hull, at the meeting, TEGE counsel recommended collecting additional information about both test cases by sending another development letter to the groups and reviewing the groups' 2010 election activities since that election cycle had recently concluded.[280] Mr. Hull told the Subcommittee that he was surprised by the recommendation for additional development letters, since the applications had already been pending for more than a year, and he had already sent at least one development letter to each group.[281]

Mr. Spellmann told the Subcommittee that his office had offered to help Mr. Hull prepare the suggested development letters, but never heard back from Mr. Hull or anyone else with regard to the test cases.[282] Mr. Spellmann also told the Subcommittee that although the TEGE counsel's office had offered to draft a model development letter, the EOT head, Holly Paz, told him not do so.[283] When asked whether TEGE counsel had caused a delay with regard to processing the test cases, William Wilkins, IRS Chief Counsel, told the Subcommittee that he had instructed his staff to look into the matter and his staff had found there was no delay.[284] Mr. Spellmann concurred there was no delay on TEGE Counsel's end, contending that his office

---

IRS Chief Counsel, William Wilkins, but by attorneys from the TEGE Counsel's office which is a division of the Chief Counsel's office. Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

[278] Subcommittee interview of Donald Spellmann, IRS (12/18/2013). See also 8/4/2011 email from Donald Spellmann, IRS, to Elizabeth Kastenberg, IRS, and others, "Advocacy Case Development," IRS0000001341 (regarding scheduling a meeting on August 10, 2011); 8/8/2011 email from Donald Spellman, IRS, to David Marshall, Amy Franklin, and others, IRS, "Wednesday Meeting," IRSR0000015566 (requesting their presence at the August 10th meeting); 8/17/2011 Sensitive Case Report, prepared by Carter Hull, IRSR0000164559 - 561, at 560 (noting that Mr. Hull "[m]et with Chief Council on August 10, 2011 to discuss further development of Organization (2)").

[279] 8/4/2011 email from Donald Spellmann, IRS, to Elizabeth Kastenberg and others, IRS, "Advocacy Case Development," IRS0000001341; Subcommittee interview of Carter Hull, IRS (11/19/2013). It is unclear if all invited participants actually attended the meeting.

[280] Subcommittee interviews of Carter Hull, IRS (11/19/2013) and Donald Spellmann, IRS (12/18/2013). See also July 2011 email exchange between Donald Spellmann, Amy Franklin, Janet Gitterman, Kenneth Griffin, and David Marshall, "Case referred from EO," IRS0000001330 - 331 (On July 26, 2011, Janet Gitterman, senior EOT tax law specialist, emailed Amy Franklin, TEGE counsel, requesting an "estimate on timeframe for review by your office." Mr. Spellmann, TEGE counsel, responded: "Let's talk about this. But my suggestion from the meeting with Lois is that we go ahead and send it back with the advice that they develop 2010.").

[281] Subcommittee interview of Carter Hull, IRS (11/19/2013).

[282] Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

[283] Id. See also 8/3/2011 email from Holly Paz to Donald Spellmann, "Mtg on Advocacy Cases," IRSR0000013066 - 067 (Ms. Paz advised Mr. Spellmann that "there are several moving pieces connected to this issue, my folks think it would still be helpful to coordinate as to: . . . [t]he checksheet (not a model development letter) EOT is writing for Determs specialists working the advocacy cases.").

[284] Subcommittee interview of William Wilkins, IRS (12/4/2013). Mr. Wilkins also told the Subcommittee that he had been unaware at the time that TEGE legal counsel had been consulted about the test cases in 2011, and said he learned of their role only when the TIGTA report was published in 2013. Id.

received the applications from Mr. Hull in June 2011, met with Mr. Hull in August 2011, and then never heard anything further about the cases.[285]

According to Mr. Hull, in August 2011, after the meeting with TEGE counsel's office, Michael Seto, EO Quality Assurance Manager, told Mr. Hull that his Tea Party cases were being reassigned to another EOT specialist.[286] Holly Paz, EOT head, told the Subcommittee that she made the decision to reassign the cases after speaking with Mr. Seto about Mr. Hull's work.[287] Other EO personnel had apparently also questioned the quality of Mr. Hull's work.[288]

Ms. Paz told the Subcommittee that she assigned the two test cases to both Hilary Goehausen, a new attorney in EOT, and Justin Lowe, a more senior EOT specialist with expertise on political advocacy and campaign issues.[289] Ms. Goehausen, an attorney who had started at the IRS in the EOT Unit earlier in 2011, told the Subcommittee that Mr. Seto had asked her to take on the cases, because one of the subject matter experts on campaign activities, Siri Buller, was leaving the IRS.[290] Ms. Goehausen also told the Subcommittee that she believed that the backlog of cases needing action had accumulated due to a cessation of work on them in the Cincinnati office while awaiting EOT guidance.[291] When asked during an interview by staff from two House Committees, Ms. Goehausen described herself as a registered Republican.[292]

---

[285] Subcommittee interview of Donald Spellmann, IRS (12/18/2013). Aside from the August 2011 meeting on the two test cases, Mr. Spellmann told the Subcommittee that the TEGE Counsel's office had no other role in specific advocacy cases aside from two brief matters that took place in 2012 and 2013. Id. According to Mr. Spellmann, in April 2012, EOT transferred to the TEGE Counsel's office an application involving an applicant with Tea Party in its name, but TEGE Counsel did not review the case and returned it to EOT, because TEGE Counsel knew that those cases were supposed to be handled through a special "bucketing process" that had recently been established, as described further below. Also according to Mr. Spellmann, on another occasion in early 2013, prior to publication of the TIGTA report, Sharon Light, EO Senior Technical Advisor, sent a proposed 501(c)(4) denial to TEGE counsel for review involving a 501(c)(4) organization advocating on behalf of Democratic candidates. On that occasion, TEGE counsels Don Spellmann and Susan Brown agreed with the recommendation to deny the exemption. Id.

[286] Subcommittee interview of Carter Hull, IRS (11/19/2013). Mr. Hull told the Subcommittee that he had known Mr. Seto a long time, and when he was told about the reassignment of the cases, he didn't want to ask why and did not ask why. Id.

[287] Subcommittee interview of Holly Paz, IRS (10/30/2013). Ms. Paz told the Subcommittee that Mr. Hull had gotten "complacent" and "was not as thorough as he used to be." Id.

[288] Cindy Thomas, Determinations Unit head, told the Subcommittee that the reason for Mr. Hull's removal was that he was not handling the cases quickly enough. Subcommittee interview of Cindy Thomas, IRS (11/13/2013). Three months earlier, on May 26, 2011, Lois Lerner, EO head, wrote to Holly Paz, EOT head, as well as other colleagues about a 501(c)(4) organization: "Looks to me like [REDACTED BY IRS] is simply an acronym for [REDACTED BY IRS] (-: Joseph, Cindy also believes there is an application in Cincy [Cincinnati] on this as part of a larger look — it is being coordinated with EO Tech." 5/26/2011 email from Lois Lerner to Nanette Downing, Joseph Grant, and others, "C 4," IRSR0000222949 - 950. On the same day, thirty minutes later, Ms. Lerner wrote to Ms. Paz and David Fish: "I'm told Chip Hull is heading up the up [sic] – scaring me – can I get a briefing?" 5/26/11 email from Lois Lerner to Holly Paz and David Fish, "C 4," IRSR0000222949 - 950.

[289] Subcommittee interview of Holly Paz, IRS (10/30/2013).

[290] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

[291] Id.

[292] According to a transcript of Ms. Goehausen's July 2, 2013 interview with the House Ways and Means Committee and the House Oversight and Government Reform Committee, Ms. Goehausen provided the following testimony:
Q: Do you have a party affiliation when you're voting, registration?
A: Yes.

According to Ms. Goehausen, Mr. Hull's two cases were transferred to her, but no one described them as "test cases."[293] Mr. Hull told the Subcommittee that he provided Ms. Geohasuen with a great deal of information about the two cases, but did not speak with her about them after they were transferred.[294] Mr. Hull told the Subcommittee that he also drafted an additional development letter, but did not send it because he no longer had the test cases.[295]

Ms. Goehausen told the Subcommittee that, after researching the law and reviewing the case files, she prepared proposed denials on both applications.[296] She indicated that she did not consult with TEGE counsel prior to making the recommendations. Ms. Goehausen told the Subcommittee that she asked to be taken off of the cases nearly a year later, in the summer of 2012.[297] She also told the Subcommittee that, as of the end of 2013, the two Tea Party test cases still had not been closed, more than three years after they were first flagged in early 2010.[298]

### D. Handling Other Tea Party Cases in Cincinnati: February to October 2010

At the same time the Tea Party test cases were sent to EOT for guidance on how to handle them, the EO Screening Group continued to identify additional applications raising similar concerns. To collect and analyze those cases, the Determinations Unit designated Elizabeth Hofacre, an EO determinations specialist in the Emerging Issues Specialty Group in the Cincinnati office, as the "Tea Party Coordinator." For the next eight months, the evidence indicates that the screeners and Ms. Hofacre had different views as to what types of organizations fit into the Tea Party category, leading to confusion over what cases should be sent to her. Although most screeners thought the category included both conservative and liberal groups, Ms. Hofacre viewed her job as analyzing only conservative groups and redirected any other cases referred to her to the general inventory of tax exempt cases. At the same time, internal EO presentations clearly included both conservative and liberal groups within the Tea Party category of cases.

While serving as the case coordinator, Ms. Hofacre attempted to develop and resolve the 40 or so cases she collected, including by sending development letters and seeking guidance

---

Q: What is your party affiliation?
A: Republican Party.
See "Leaked Document Undermines its Case and Highlights Lack of IRS Political Motivation," Committee on Ways and Means – Democrats, (9/18/2013), http://democrats.waysandmeans.house.gov/press-release/gop-leaked-document-undermines-its-case-and-highlights-lack-irs-political-motivation.

[293] Id.

[294] Subcommittee interview of Carter Hull, IRS (11/19/2013).

[295] Id. Mr. Hull, who had been employed by the IRS for decades and was in his seventies, retired from the agency in June 2013. "Written Testimony of Carter Hull Before the House Oversight and Government Reform Committee: Carter Hull Biographical Summary," (7/18/2013), http://oversight.house.gov/wp-content/uploads/2013/07/Hull-Testimony-Final.pdf.

[296] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013). See also 11/19/2012 Sensitive Case Report, prepared by Hilary Goehausen, IRSR0000162544 - 546 (noting proposed denials for two 501(c) organizations).

[297] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

[298] Id. See also 1/31/2013 EO Technical Significant Case Report, prepared by the IRS, IRSR0000161237 - 249, at 237 (noting Hilary Goehausen and Steve Grodnitzky were responsible for the two cases, and "proposed denials [were] with Judy and Sharon for review").

from EOT Carter Hull, but ongoing delays over the test cases stymied her efforts. In October 2010, Ms. Hofacre asked to move to a different IRS division, and her cases were reassigned.

**First Tea Party Coordinator.** After identifying the first Tea Party case in February 2010, Cincinnati continued to amass similar cases. From February 2010 to October 2010, about 40 cases falling into the Tea Party category were assigned to Elizabeth Hofacre, a determinations specialist for Emerging Issues.[299] When she first began collecting the cases, Ms. Hofacre worked in Group 7825, headed by Joseph Herr.[300] Later in 2010, after the EO groups were reorganized, Ms. Hofacre moved to Group 7822, bringing her Emerging Issues cases with her.[301] Group 7822 was headed by Steven Bowling.[302]

**Confusion Over Relevant Applications.** As screeners in the Screening Group identified potential "Tea Party" cases, they forwarded them to Ms. Hofacre who retained the case files. The evidence indicates that the screeners as well as other EO personnel were confused as to what types of organizations fit into the Tea Party category and should be sent to Ms. Hofacre. Ms. Hofacre told the Subcommittee that screeners sent her all types of organizations, both liberal and conservative.[303] She also told the Subcommittee that she kept the conservative ones and sent the liberal ones to the general inventory, because she understood that the phrase, "Tea Party," meant she was responsible for reviewing only the conservative organizations.[304] Many of her colleagues, however, viewed the term, "Tea Party," as including both conservative and liberal groups.[305]

On July 28, 2010, at a routine "Screening Workshop" designed to alert screeners to a variety of issues, both Mr. Muthert and Ms. Hofacre made presentations to explain what types of cases should be sent to her as part of the "Tea Party" category of cases. The presentations reflect their division of opinion over what cases were included in that category, with Mr. Muthert

---

[299] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).
[300] Id.
[301] Id. See also 5/14/2013 TIGTA Audit Report, at 33.
[302] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[303] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).
[304] Id.
[305] In interviews conducted by TIGTA, for example, most IRS employees said the term "Tea Party" included both conservative and liberal groups. See, e.g., 7/30/2012 TIGTA interview of Justin Lowe, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity," PSI-TIGTA-03-000669 (According to Mr. Lowe, "Cincinnati referred to cases as Tea Party, but it was just a shorthand for all advocacy cases."); 7/31/2012 TIGTA interview of Holly Paz, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity," PSI-TIGTA-03-000678 - 682, at 679 (According to Ms. Paz, "[c]ases were commonly referred to as Tea Party cases in Cincinnati and by Chip Hull. It did not occur to Determinations not to use this 'short hand' for the types of cases they were identifying. Other issues have been referred to by particular names in the past."); 7/31/2012 TIGTA interview of Sharon Light, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity," PSI-TIGTA-03-000685 ("She has always referred to these cases as advocacy cases, but prior to her involvement they were probably referred to as Tea Party cases. People understood that Tea Party referred to a range of issues, not the Tea Party specifically."); 8/7/2012 TIGTA interview of Cindy Thomas, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity," PSI-TIGTA-03-000705 - 707 (According to Ms. Thomas, "Determinations should also not have used the term Tea Party to refer to advocacy cases. They did not think about how it would look to outsiders. Tea Party was just used as a shorthand for political advocacy cases."). IRS employees provided similar statements to the Subcommittee.

identifying both conservative and liberal groups involved with "political activities," and Ms. Hofacre identifying only conservative groups.

Two key documents describe what was discussed at the July 2010 workshop, the official IRS notes summarizing the issues addressed and a powerpoint presentation shown to IRS screeners. The official IRS "Notes" summarizing the issues discussed at the workshop included this summary of Mr. Muthert's presentation:

"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 [Group] 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.'"[306]

The named groups included both conservative and liberal groups. The conservative groups were 9/12 Project, We The People, Rally Patriots, and Pink-Slip Program; the liberal groups were Emerge, a group that helped Democratic women candidates run for office, and Progressive.[307] This IRS document shows that, even before the first BOLO was issued, IRS screeners were being advised to be on the lookout for both conservative and liberal groups.

The Screening Workshop Notes followed the Muthert summary with this summary of Ms. Hofacre's presentation:

"Elizabeth Hofacre, Tea Party Coordinator/Reviewer

- Re-emp[has]ize that applications with Key Names and/or Subjects should be transferred to [Group] 7822 for Secondary Screening. Activities must be primary.
- 'Progressive' applications are not considered 'Tea Parties.'"[308]

Ms. Hofacre's presentation showed that, contrary to Mr. Muthert, she did not consider applications filed by "Progressive" groups to be within the "Tea Party" category of cases and advised against sending her applications filed by those groups.[309]

---

[306] 7/28/2010 "Screening Workshop Notes," prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 - 704, at 703 (circulating the "Screening Workshop meeting minutes).
[307] The Minority Staff's Dissenting Views state, at 202-203, that only groups with "Tea Party," "9/12," or "Patriot" in their names were flagged for enhanced review, but this IRS document shows that, in July 2010, the IRS was also using the names "Emerge" and "Progressive" to flag groups for review.
[308] Id.

In addition to summarizing the two presentations, the Screening Workshop Notes attached a 25-page powerpoint presentation that was shown at the meeting addressing a variety of issues.[310] Six of those pages addressed the cases discussed by Mr. Muthert and Ms. Hofacre.[311] The first page presented images of an elephant and a donkey, symbols of the Republican and Democratic political parties, suggesting that the cases were portrayed as involving groups across the political spectrum.[312] Other pages named the conservative and liberal groups listed in the Muthert summary above.[313] None of the pages contained any indication that the Tea Party category of cases was limited to conservative groups; the presentation's overall message was, indeed, the opposite.

Mr. Muthert told the Subcommittee there was a great deal of confusion at the meeting about which cases should be considered "Tea Party" cases.[314] The meeting minutes themselves note, on the one hand, that both liberal and conservative groups should be flagged for additional screening, while on the other hand, that "Progressive" applications were not to be considered "Tea Parties." At the same time, the powerpoint presentation indicated that both liberal and conservative groups should be flagged. In contrast to Mr. Muthert, the Screening Group manager, John Shafer, told the Subcommittee that he did not recall a great deal of confusion by the screeners at the July meeting; he indicated that if an applicant appeared to engage in campaign activity that did not adhere to the 501(c)(4) law, the application was supposed to be sent to Ms. Hofacre, regardless of whether it had a liberal or conservative character.[315] All of the EO personnel interviewed by the Subcommittee agreed that, in 2010, IRS management did not intervene to clarify what applications were intended to be included in the new category of Tea Party cases.

**August 2010 BOLO.** In August 2010, the month after the screeners' meeting, the EO Determinations Unit sent out the first BOLO to help screeners identify applications warranting additional scrutiny. That BOLO included an entry using the phrase "Tea Party" and urged EO employees to be on the lookout for applicants using that phrase in their names or application materials.[316] Ms. Hofacre told the Subcommittee that she authored the BOLO language, with assistance from and the approval of more senior personnel, John Waddell and Steve Bowling.[317] The BOLO entry, which appeared in the "Emerging Issues" section, stated:

---

[309] While Ms. Hofacre advised against sending progressive cases to her, no evidence indicates that she thought subjecting progressive cases to heightened review was inappropriate or opposed flagging those applications for heightened review by another EOD specialist.
[310] "Screening Workshop July 28, 2010," powerpoint prepared by IRS, IRSR0000006674 - 699.
[311] Id. at 687 - 692. Neither Mr. Muthert nor Ms. Hofacre clearly recalled the powerpoint presentation, and neither could remember who had prepared it. Subcommittee interviews of Gary Muthert, IRS (1/15/2014) and Elizabeth Hofacre, IRS (10/25/2013).
[312] "Screening Workshop July 28, 2010," powerpoint prepared by IRS, IRSR0000006674 - 699, at 687.
[313] Id. at 688 - 690.
[314] Subcommittee interview of Gary Muthert, IRS (1/15/2013).
[315] Subcommittee interview of John Shafer, IRS (1/17/2014).
[316] 2010 BOLO spreadsheet, prepared by IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503-515, at 509.
[317] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

> "These cases involve various local organizations in the Tea Party movement [that] are applying for exemption under 501(c)(3) or 501(c)(4)."[318]

As indicated earlier, "Tea Party" was not the only political group named in the August BOLO. In addition, the BOLO's "TAG Historical" section contained an entry urging EO employees to be on the lookout for applicants using "Progressive" in either their names or their applications. The TAG Historical entry for "Progressive political activities" stated:

> "[C]ommon thread is the word 'progressive.' Activities appear to lean towards a new political party. Activities are partisan and appear anti-Republican. You see references to 'blue' as being 'progressive.'"[319]

This description of the progressive groups focused on their "political activities" as the central concern.

In addition, as indicated earlier, another BOLO section called the "BOLO List" – later renamed the "Watch List" – urged EO employees to be on the lookout for "ACORN successor" groups. The BOLO's description of those groups was mostly redacted by the IRS, but stated in part: "ACORN successors, Following the breakup of ACORN [REDACTED BY IRS]."[320] A later email urged EOD personnel to focus on the names and political views of those ACORN successor groups.[321] These two BOLO entries show that, from the first BOLO, the IRS did not single out only conservative groups for greater scrutiny, but also spotlighted liberal groups.

Ms. Hofacre told the Subcommittee that she was the person who actually sent the email containing the first BOLO in August 2010.[322] She also explained that, by mistake, instead of sending the BOLO only to the EO Determinations email list, she sent the BOLO to everyone on the EO's email list, including EOT.

After the August 2010 BOLO was issued, screener Gary Muthert told the Subcommittee that if an organization had the words "Tea Party" in its name, the screeners automatically sent

---

[318] 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 - 515, at 509.

[319] See June 2011 BOLO spreadsheet, prepared by IRS, IRS0000001423 - 438, at 426. See also 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 - 515, at 507. The Minority Staff's Dissenting Views state that the "progressive cases, unlike their Tea Party counterparts, were not selected for additional scrutiny because of the group's name," see Dissenting Views at 195, 202, but this BOLO entry explicitly directed IRS screeners to focus on "the word 'progressive.'"

[320] 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 - 515, at 513. ACORN stands for Association of Community Organizations for Reform Now, a decades-old, openly liberal organization discussed in more detail below. The August BOLO did not reference any "Emerge" groups, possibly because they were already referenced in another email alert, a copy of which was not provided by the IRS due to Section 6103 barring IRS disclosure of individual taxpayer information.

[321] See 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, "BOLO Tab Update," IRSR0000410433 - 434 (urging EOD personnel to look for "[t]he name(s) Neighborhoods for Social Justice or Communities Organizing for Change" and for groups whose activities included mention of "Voter Mobilization or the Low-Income/Disenfranchised," or which included advocating for "the poor").

[322] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).

the application to Ms. Hofacre, but "anything else was a guess."[323] In contrast, the Screening Group manager, John Shafer, told the Subcommittee that it was common knowledge that all organizations involved with campaign activity or political advocacy had to be sent to Ms. Hofacre, whether conservative or liberal.[324] At the same time, Ms. Hofacre continued to view her job as coordinating only those applications whose organizations were conservative in nature. The diverging views of these three key individuals demonstrate the ongoing confusion about what groups were supposed to be included in the "Tea Party" category of cases.

**Development Letters.** In addition to identifying and retaining "Tea Party" applications, Ms. Hofacre was responsible for developing them and, if possible, resolving them. Ms. Hofacre told the Subcommittee that, even though she was the Tea Party coordinator, the IRS provided no special training or guidance to help her determine how to develop or evaluate an organization that appeared to be involved with campaign activity or political advocacy.[325] Ms. Hofacre's manager, Joseph Herr, told her that she needed to get guidance from EOT on how to handle the applications, and she contacted Carter Hull, the EOT specialist handling the two test cases.[326]

According to Ms. Hofacre, she initially sent Mr. Hull examples of some of the cases she was collecting and asked for his suggestions on appropriate development letters.[327] She also supplied him with initial drafts of those development letters and at times supplied copies of the case files.[328] Mr. Hull told the Subcommittee that, at the direction of his supervisor, Ronald Shoemaker, he contacted Steve Grodnitzky who was then acting EO Director, and they worked together on a draft for the first development letter which Mr. Hull then sent to Ms. Hofacre.[329]

Mr. Hull told the Subcommittee that Ms. Hofacre contacted him seeking advice on about 40 cases total.[330] Ms. Hofacre told the Subcommittee that she contacted Mr. Hull regarding 30 to 40 cases, of which she sent out about 20 development letters to the organizations.[331] One IRS document produced to the Subcommittee indicates that, from May 2010 to October 2010, Mr. Hull reviewed and, in most instances, provided comments on, approximately 26 applications and development letters.[332] Ms. Hofacre told the Subcommittee that she recalled one issue in connection with those development letters; the letters asked for copies of the applicants'

---

[323] Subcommittee interview of Gary Muthert, IRS (1/15/2014). Mr. Muthert said that when screeners were in doubt, they generally sent the application to Ms. Hofacre and let her figure it out. Id.
[324] Subcommittee interview of John Shafer, IRS (1/17/2014).
[325] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).
[326] Subcommittee interviews of Elizabeth Hofacre, IRS (10/25/2013) and Carter Hull, IRS (11/19/2013). Mr. Hull told the Subcommittee that his manager, Ronald Shoemaker, told him to discuss the cases with Ms. Hofacre. Subcommittee interview of Carter Hull, IRS (11/19/2013).
[327] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).
[328] Id.
[329] Subcommittee interview of Carter Hull, IRS (11/19/2013). According to Mr. Hull, for first five cases or so, Mr. Shoemaker advised Mr. Hull to coordinate with Mr. Grodnitzky. Mr. Hull indicated that, after their collaboration on the first letter, Mr. Godnitzsky told Mr. Hull that he did not need to show him any more. Id.
[330] Id.
[331] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).
[332] See "Timeline for informal technical assistance which was provided by EOT Personnel to EOD between May 2010 to October 2010," prepared by the IRS, IRSR0000222967 - 971, at 970.

Facebook and Twitter pages which upset some Tea Party organizations, but Ms. Hofacre said she had asked for the same information from other groups she had evaluated.[333]

At one point in October 2010, Determinations head Cindy Thomas wrote to EOT head Ms. Paz expressing concern about EOT's ongoing involvement with the Tea Party cases, which was slowing down the review process:

> "I have a concern with the approach being used to develop the tea party cases we have here in Cincinnati. Apparently, an additional information letter is prepared for each case and the letter is faxed to Chip Hull for him to review. After he reviews, we send out the letter. In some instances, the organizations have responded and we are just 'sitting' on these cases. Personally, I don't know why Chip needs to look at each and every additional information letter. It seems to me that if he reviewed the template letter and approved it, we should be good to go."[334]

Ms. Hofacre told the Subcommittee that, during the eight-month period she served as the Tea Party case coordinator, she continued to call Mr. Hull to ask him how she should handle the applications aside from sending development letters, and he continued to respond that she had to wait until the test cases were resolved before going any further.[335] Mr. Hull told the Subcommittee that, at some point, although he couldn't recall exactly when, he stopped advising Ms. Hofacre on the cases, because he was waiting for guidance on the test cases from the TEGE Counsel's office and felt that he couldn't advise her without that advice.[336] His explanation does not, however, fit the timeline of the cases, since he was not instructed to contact the TEGE Counsel's office until mid-2011, and Ms. Hofacre ceased handling the cases in October 2010.

Ms. Hofacre told the Subcommittee that she found the Tea Party cases frustrating, because the applicants kept calling her to get their applications resolved, and she couldn't help them; she said she felt like she was "working in lost luggage."[337] Ms. Hofacre said it was that frustration that, in October 2010, caused her to move to a different part of the IRS, the Quality Assurance division.[338] Her cases were then reassigned to a new Tea Party case coordinator, Ronald Bell.

Mr. Hull told the Subcommittee that he wasn't frustrated by the delay in getting guidance from the TEGE Counsel's office about the Tea Party test cases, and never mentioned it to his supervisors, because he had too much other work to do.[339] Ms. Goehausen accepted reassignment of the cases from Mr. Hull in August 2011.[340]

---

[333] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).
[334] 10/26/2010 email from Cindy Thomas to Holly Paz, "Political Cases – Need to Discuss," IRSR0000014070.
[335] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).
[336] Subcommittee interview of Carter Hull, IRS (11/19/2013).
[337] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013).
[338] Id.
[339] Subcommittee interview of Carter Hull, IRS (11/19/2013). Mr. Hull also told the Subcommittee that he never told Ms. Hofacre he was waiting for TEGE Counsel. In addition, Mr. Hull said that Ms. Hofacre never expressed any frustration regarding the cases to him. Id.
[340] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

### E. Delaying Tea Party Cases Another Year: November 2010 to November 2011

In November 2010, eight months after the first Tea Party case was flagged by the IRS, about 40 of the cases were reassigned to the new case coordinator, Ronald Bell. For the next year, Mr. Bell essentially took no action to resolve the cases, while awaiting guidance from EOT on how to handle them. EO head Lois Lerner and EOT head Holly Paz in Washington, and Determinations head Cindy Thomas in Cincinnati were in general agreement that the applications being held in Cincinnati should wait for EOT guidance on the test cases to ensure that all of the cases were resolved in a consistent manner. At the same time, Ms. Thomas expressed impatience with how long EOT was taking to resolve the two test cases. By April 2011, the inventory of Tea Party cases had grown to 102. In June 2011, EOT raised questions about the criteria being used to identify the relevant cases, and Ms. Lerner instructed the Determinations Unit to stop referring to them as "Tea Party" cases and instead call them "advocacy cases." In response, in July 2011, the Determinations Unit revised the language used in the BOLOs to flag the cases, dropping the reference to "Tea Party."[341]

By the fall of 2011, about 160 advocacy cases had been identified. In September 2011, EOT proposed developing "informal guidance" on how to handle the cases and spent months working on a "guidesheet" for the cases, before abandoning the effort. In the meantime, EOT initiated a review of the backlogged cases to remove any lacking campaign issues. EOT specialist Hilary Goeshausen conducted that review in October 2011, and prepared a list of the 160 cases with comments about how each should be handled, but her list was seen as unhelpful by the Determinations Unit in Cincinnati and was not used to close any cases. In November 2011, the advocacy cases awaiting action in the Determinations Unit were transferred from Ronald Bell to Stephen Seok, who became the third EOD coordinator of the cases in three years.

**Reassignment of Tea Party Cases in Cincinnati.** In November 2010, Steven Bowling, head of Group 7822 which included the Emerging Issues cases, reassigned the Tea Party cases from Ms. Hofacre to Ronald Bell.[342] Mr. Bell told the Subcommittee that Ms. Hofacre "briefly briefed" him on the cases, and it was his understanding that as Tea Party coordinator he was focusing only on conservative groups.[343] Like Ms. Hofacre, Mr. Bell reported that he always received a mix of both liberal and conservative cases from the screeners, but kept only the conservative ones.[344] Mr. Bell said that if he received a case that didn't fall into the Tea Party category as he understood it, he returned the case to the agent who had sent it to him who then had to decide how to handle the case.[345]

**Instruction to Wait.** Ms. Hofacre had sent development letters to some of the Tea Party groups and when the requested information began arriving at the Cincinnati office, Mr. Bell told the Subcommittee that he asked Mr. Bowling how to proceed.[346] He said that Mr. Bowling told

---

[341] That change was made nearly two years before the TIGTA audit report criticized the IRS for the earlier practice.
[342] Subcommittee interview of Ronald Bell, IRS (1/15/2014); 5/14/2013 TIGTA Audit Report, at 33.
[343] Subcommittee interview of Ronald Bell, IRS (1/15/2014).
[344] Subcommittee interviews of Elizabeth Hofacre, IRS (10/25/2013) and Ronald Bell, IRS (1/15/2014).
[345] Subcommittee interview of Ronald Bell, IRS (1/15/2014).
[346] Id.

him to wait to get guidance "from headquarters," meaning the EOT office in Washington, D.C., before moving forward.[347] Mr. Bowling's instruction to Mr. Bell led to essentially a one-year delay in the resolution of the Tea Party cases, from approximately November 2010 to November 2011, while Mr. Bell awaited guidance from EOT on how to handle the cases.[348]

Mr. Bell told the Subcommittee that during that waiting period he received numerous complaints from organizations asking about the status of their applications, conveyed the complaints to Mr. Bowling, and was told by Mr. Bowling to say that the cases were under review.[349] According to Mr. Bell, over the year, he repeatedly asked Mr. Bowling about when the EOT guidance on the cases would be available, and Mr. Bowling repeatedly told him that they were still waiting for it.[350]

On November 16, 2010, Mr. Bowling wrote to his supervisor, Sharon Camarillo, to alert her to the delay in processing the cases:

> "I know Cindy has contacted Holly Paz about the tea party cases but I don't know or remember if a game plan was established. I believe when this all started the idea was to have EOT take a look at some of these and provide us with a development letter similar to how we handled Credit Counseling cases. I'm not sure how everyone wants to proceed but I think we need to get a handle on this. Ron is getting phone calls on these cases and his typical answer is 'the case is under review.'"[351]

Ms. Camarillo forwarded his email to the Determinations Unit head, Cindy Thomas, who responded: "I called Holly [Paz] a couple of weeks ago and she indicated she was going to check into this matter and would get back with me."[352] In December 2010, Ms. Thomas asked Ms. Paz for another status report and was told that the cases had yet to be presented to Judy Kindell who would be reviewing them.[353]

Five months later, in April 2011, the 501(c)(4) cases were still sitting idle awaiting EOT guidance. That month, Ms. Thomas wrote to Steven Bowling:

> "Judy [Kindell] also recommended that all tea party cases be sent to EOT (tell Ron Bell not to get too excited!), but Mike Seto does not believe this should happen. He thinks

---

[347] Id.

[348] Id. See also 5/14/2013 TIGTA Audit Report, at 33 ("The specialist did not work on the cases while waiting for guidance from the Technical Unit."); Subcommittee interview of Hilary Goehausen, IRS (12/13/2013) (indicating she had been told that EO agents in Cincinnati had stopped working the cases while waiting for guidance from Washington).

[349] Subcommittee interview of Ronald Bell, IRS (1/15/2014).

[350] Id.

[351] See 11/16-17/2010 email exchange among Steven Bowling, Sharon Camarillo, and Cindy Thomas, "emerging issue cases," PSI-TIGTA-03-000134 - 135.

[352] Id. See also 11/20/2010 email from Cindy Thomas to Steven Bowling, "Political Cases – Information," IRSR0000014069 - 070 (providing him with an update, that the test cases were going to be discussed with Judith Kindell).

[353] See 12/13/2010 email from Cindy Thomas to Holly Paz, "Political Cases – Status," IRSR0000014069 - 070 ("Has there been any update regarding the tea party cases as far as the discussion with Judy Kindell?"); 12/13/2010 email from Holly Paz to Cindy Thomas, "Political Cases – Status," IRSR0000014069 - 070.

> EOT should give us a template letter for the c3 denials and share developmental questions, etc., for the c4's. Holly will be meeting with Lois to discuss this. Stay tuned."[354]

That same month, Ms. Paz assured EO head Lois Lerner that the Cincinnati office had "been told not to issue determs" until EOT "work[ed] through the test cases we have here."[355]

Mr. Bell told the Subcommittee that over the course of the year from November 2010 to November 2011, he spoke on a few occasions with Mr. Hull, the EOT specialist then handling the test cases.[356] Mr. Bell told the Subcommittee that when he asked Mr. Hull when he would be receiving guidance about the cases, Mr. Hull indicated that he didn't know.[357] Ms. Goehausen told the Subcommittee that when she took over the test cases in August 2011, she received only a few calls from the Determinations Unit about them.[358] Mr. Bell told the Subcommittee that he did not contact Ms. Goehausen about the cases.

While Mr. Bell waited for guidance from EOT, EO screeners continued to identify additional cases falling within the Tea Party category. By April 2011, the inventory of Tea Party cases had grown to 102.[359] When asked about those cases, Ms. Paz told the Subcommittee that she had always understood that the phrase "Tea Party" was being used generically, and that the total of 102 pending cases included both conservative and liberal groups.[360]

In May 2011, Mr. Bell received a request from another IRS revenue agent about how to handle a Tea Party case, and he wrote to the Determinations head, Ms. Thomas, inquiring how he should respond.[361] Ms. Thomas sent Mr. Bell's inquiry to Ms. Paz, the EOT head, who forwarded it to Michael Seto, the EO Quality Assurance Manager. Mr. Seto responded:

> "Okay. The current status is: Judy [Kindell] has reviewed our proposed (c)(3) denial and (c)(4) favorabl[y] and requested the staff to ask for more information from the taxpayers. We are waiting for the information from the taxpayers. The cases have not gone to Counsel yet."[362]

---

[354] 4/13/2011 email from Cindy Thomas to Steven Bowling, "Tea Party Cases – DUE 5/31/2011," IRSR0000013882.
[355] 4/7/2011 email from Holly Paz to Lois Lerner, Judith Kindell, and others, "sensitive (c)(3) and (c)(4) applications," IRSR0000350220 - 221.
[356] Subcommittee interview of Ronald Bell, IRS (1/15/2014).
[357] Id.
[358] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013). A July 2011 email from Michael Seto, EO Quality Assurance Manager, stated that Justin Lowe was "the contact person for EOT for all political advocacy cases pending in EOD [Exempt Organizations Determinations Unit]," and that Mr. Lowe would work with "Hilary Goehausen and Chip Hull, who are initiators on political advocacy cases pending in EOT." 7/23/2011 email from Michael Seto to Justin Lowe, Hilary Goehausen, Carter Hull, and others, "Contact Person for EOD Political Advocacy Cases," IRSR0000002738.
[359] 4/7/2011 email from Holly Paz to Lois Lerner, Judith Kindell, and others, "sensitive (c)(3) and (c)(4) applications," IRSR0000350219.
[360] Subcommittee interview of Holly Paz, IRS (10/30/2013).
[361] See 5/12/2011 email from Ronald Bell to Cindy Thomas, "exempt application," IRSR0000429362 - 363.
[362] 5/12/2011 email from Michael Seto to Holly Paz, "Tea Party – Email from TAS," IRSR0000429362.

It would be another three months until Mr. Hull met with TEGE counsel in August 2011, after which his test cases were transferred to Ms. Goehausen.

**Focus on Tea Party Selection Criteria.** In June 2011, for the first time, IRS personnel in Washington asked IRS personnel in Cincinnati to describe exactly how they were identifying applications falling within the category of "Tea Party" cases. On June 1, 2011, Ms. Paz, EOT head, asked Ms. Thomas, Determinations head, to tell her "[w]hat criteria are being used to label a case a 'Tea Party case?'"[363] On June 2, 2011, Ms. Thomas conveyed that inquiry to the Screening Group manager, John Shafer, writing: "Could you send me an email that includes the criteria screeners use to label a case a 'tea party case?'"[364]

In response, Mr. Shafer emailed his top three screeners, Gary Muthert, Roger Vance, and Dale Schaber, and asked them to provide him with "what issues may indicate an organization is involved with the tea party movement."[365] Mr. Muthert promptly responded: "I myself look for cases with the names, such as 'Tea Party', 'Patriots', or the '9/12 Project'."[366] Mr. Vance responded: "Some of the cases do contain references to the tea party and other cases that I have identified are organizations concerned with government spending, government debt, and taxes."[367] The IRS was unable to locate the email response from Mr. Schaber. Later that same day, June 2, 2011, after hearing from his agents, Mr. Shafer sent Ms. Thomas an email summarizing the criteria being used to identify Tea Party cases:

> "The following are issues that could indicate a case to be considered a potential 'tea party' case and sent to Group 7822 for secondary screening.
>
> 1."Tea Party", "Patriots" or "9/12 Project" is referenced in the case file.
>
> 2. Issues include government spending, government debt and taxes.
>
> 3. Educate the public through advocacy/legislative activities to make America a better place to live.
>
> 4. Statements in the case file that are critical of how the country is being run."[368]

These emails indicate that, as of June 2011, more than one year after the first Tea Party case was flagged, the IRS office in Cincinnati did not have any official criteria for identifying

---

[363] 6/1/2011 email from Holly Paz to Cindy Thomas, "group of cases," PSI-IRS-09-000093 (Ms. Paz wrote: "What criteria are being used to label a case a 'Tea Party case'? We want to think about whether those criteria are resulting in over-inclusion.").
[364] 6/2/2011 email from Cindy Thomas to John Shafer, "Tea Party Cases – NEED CRITERIA," PSI-IRS-09-000092.
[365] 6/2/2011 email from John Shafer to Gary Muthert, Roger Vance, and Dale Schaber, "Tea Party Cases – NEED CRITERIA," PSI-IRS-09-000092; Subcommittee interview of John Shafer, IRS (1/17/2014).
[366] 6/2/2011 email from Gary Muthert to John Shafer, "Tea Party Cases – NEED CRITERIA," IRSR0000706928. Mr. Muthert was the only IRS screener to report using those three search terms to identify 501(c)(4) applications for heightened review. When asked if he had a negative view of the Tea Party, Mr. Muthert replied: "No, I align with them." Subcommittee interview of Gary Muthert, IRS (1/15/2014).
[367] 6/2/2011 email from Roger Vance to John Shafer, "Tea Party Cases – NEED CRITERIA," IRSR0000706930.
[368] 6/2/2011 email from John Shafer to Cindy Thomas, "Tea Party Cases – NEED CRITERIA," PSI-IRS-09-000048.

which cases fell within the Tea Party category. Instead, when asked, the Screening Group head surveyed his screeners to find out how they were identifying the cases, compiled their uncoordinated and divergent approaches into a list, and forwarded the list to the Determinations Unit head, explaining that the proffered criteria "could indicate a case to be considered a potential 'tea party' case."

The emails also indicate that, prior to June 2011, IRS officials in Washington were unaware of the criteria being used by EO screeners in Cincinnati to identify cases falling within the Tea Party category. In fact, Ms. Paz, located in Washington, D.C., had to ask Ms. Thomas, the EO Determinations head in Cincinnati, and Ms. Thomas had to ask Mr. Shafer, the Screening Group head in Cincinnati, for the specific criteria being used. He, in turn, had to ask his screeners. These internal emails demonstrate that no Washington IRS official had directed any IRS personnel in Cincinnati to single out Tea Party groups for special scrutiny.[369] To the contrary, the evidence indicates that the screeners themselves had first identified the Tea Party cases as raising sensitive issues and then came up with their own selection criteria to identify similar cases, without any input from IRS personnel in Washington.[370] The Subcommittee investigation found no evidence that any IRS official directed, pressured, or encouraged any IRS personnel in Cincinnati to subject applications filed by Tea Party or other conservative groups to heightened review.

When asked about the four selection criteria listed in the Shafer email, Ms. Thomas told the Subcommittee that she didn't know whether the criteria were conservative or liberal in nature, and observed that they had picked up liberal leaning organizations as well as conservative ones.[371] During the TIGTA audit, when asked by a TIGTA auditor who had "sanctioned" the four criteria listed in the Shafer email, Ms. Paz stated that "[n]o one in the EO management chain sanctioned the use of the four criteria."[372]

To the contrary, the criteria listed in the Shafer email stirred up both questions and concerns among IRS officials in Washington. On June 6, 2011, Determinations head Cindy Thomas sent an email to Steven Bowling, manager of the group handling the Tea Party cases, indicating that questions had been raised about the criteria; she also expressed a willingness to

---

[369] For allegations that Washington politicians pressured the IRS to scrutinize Tea Party groups, see, e.g., Linchpins of Liberty v. Internal Revenue Service, Case No. 1:13-cv-00777 (D.D.C. filed May 29, 2013), http://media.aclj.org/pdf/second-amended-complaint-filed-redacted.pdf.

[370] See, e.g., 2/25/2010 email from Jack Koester to John Shafer, "Case # [REDACTED BY IRS]," IRSR0000195549 - 554, at 553 (indicating that it was a screener in Cincinnati, Jack Koester, who first identified an applicant using the Tea Party name and sent his manager, Mr. Shafer, an email asking how he should handle the case); 6/2/2011 email from John Shafer to Cindy Thomas, " Tea Party Cases – NEED CRITERIA," PSI-IRS-09-000048 (indicating the screeners identifying the Tea Party cases had devised their own search terms and selection criteria).

[371] Subcommittee interview of Cindy Thomas, IRS (11/13/2013). For example, Patriot Majority USA, a 501(c)(4) group that began operation in 2010, used the word "Patriot" in its name, but supported views and candidates affiliated with the Democratic Party. In the 2012 election cycle, the Center for Responsive Politics characterized it as one of the largest spending Democratic-leaning 501(c)(4) groups. See "2012 Outside Spending, by Group: Non-Disclosing Groups," prepared by Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U. For more information about the Patriot Majority USA, see the Report section on Evaluating Campaign and Social Welfare Activities, below.

[372] 11/19/2012 email from Holly Paz to Troy Paterson, "Responses," IRSR0000188490 - 493, at 490.

change the criteria and a need to get official guidance on what selection criteria should be used to ensure consistent treatment of the cases. Ms. Thomas wrote:

> "Holly [Paz] sent an email and asked questions about criteria being used to identify cases as 'tea party cases.' The D.C. office thinks the criteria being used may be resulting in over-inclusion. [REDACTED BY IRS]. My response was that we have no problem including or excluding any type of case, as long as they come up with the criteria so we can provide it to the Screening Group. And, it doesn't matter what the cases are called or how they are grouped, EOD still needs guidance to ensure consistency."[373]

A week later, on June 14, 2011, Ms. Thomas sent an email to Steven Bowling about an upcoming meeting to discuss the selection criteria for Tea Party cases:

> "Discussion probably won't be about specific cases but more of a general discussion about criteria for determining the cases that are in this group, figuring out if there are like kinds that can be grouped into buckets, changing the label we have assigned to these cases, i.e., tea party cases, to something that is more descriptive for the wide net we are using to capture these cases (all cases included in the net are not tea party cases), etc."[374]

**Changing Case Label and BOLO Description.** On June 29, 2011, Lois Lerner, EO head, convened a meeting of senior EO staff in Washington, D.C. to discuss the Tea Party cases. Participants included Ms. Lerner, Ms. Paz, Mr. Hull, Michael Seto, Hilary Goehausen, Justin Lowe, and Elizabeth Kastenberg, with Ms. Thomas participating by telephone from Cincinnati.[375] A briefing paper prepared in anticipation of the meeting described the category of cases as "advocacy" cases instead of "Tea Party" cases, while also including the criteria listed in the Shafer email.[376] The briefing paper also noted that two "sample" cases had been transferred to EOT, and a total of about 100 cases had been identified by the Determinations Unit.[377]

Ms. Thomas told the Subcommittee that, during the meeting, Ms. Lerner expressed concern about using the phrase "Tea Party" in the BOLO lists to describe the cases that required additional review.[378] According to Ms. Thomas, Ms. Lerner said that she knew Tea Party organizations weren't being singled out, but the term still needed to be changed since it could be misperceived by others.[379] According to Ms. Paz, Ms. Lerner directed that the cases be referred to in the future as "advocacy cases," rather than "Tea Party" cases.[380] Ms. Thomas told the

---

[373] 6/6/2011 email from Cindy Thomas to Steven Bowling, "[REDACTED BY IRS]," PSI-TIGTA-03-000156.
[374] 6/14/2011 email from Cindy Thomas to Steven Bowling, "C3 AND C4 APPLICATIONS BRIEFING," IRSR0000440089.
[375] Subcommittee interviews of Holly Paz, IRS (10/30/2013) and Cindy Thomas, IRS (11/13/2013).
[376] 6/27/2011 email from Justin Lowe to Holly Paz, "Briefing Paper on c3/4 Advocacy Orgs," prepared by staff for Lois Lerner, PSI-TIGTA-03-000165.
[377] Id.
[378] Subcommittee interview of Cindy Thomas, IRS (11/13/2013). See also 5/14/2013 TIGTA Audit Report, at 30 ("Criteria changed ... based on the concerns the Director, EO, raised in June 2011.").
[379] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[380] Subcommittee interview of Holly Paz, IRS (10/30/2013). Ms. Paz also told the Subcommittee that when she first learned that the relevant BOLO used by the screeners listed "Tea Party," she found it surprising and told Lois Lerner about it as soon as she could. Id.

Subcommittee that she agreed with Ms. Lerner and thought "that makes sense."[381] Ms. Paz said that during the discussion, various participants explained that the Determinations Unit had not been looking just at Tea Party groups, even though that was the phrase used in the BOLO, and agreed the focus should be on all groups involved with campaign activity.[382]

Ms. Thomas told the Subcommittee that, in response to the June meeting, she revised the BOLO entry flagging the cases, and on July 5, 2011, Ronald Bell, the keeper of the BOLO lists, distributed the revised version.[383] The new description, which appeared in the Emerging Issues section, omitted any mention of the Tea Party and instead described the cases as follows:

> "Advocacy Orgs[:] Organizations involved with political, lobbying, or advocacy for exemption under 501(c)(3) or 501(c)(4)."[384]

The BOLO indicated that covered cases should be forwarded to "Group 7822," and identified Mr. Bell as the case coordinator.[385]

The revised description did not please everyone. EO screener Gary Muthert told the Subcommittee that, because the new BOLO entry used much broader terms than the prior version, it no longer offered useful search terms to conduct electronic reviews of incoming applications; instead he had to look at each application and determine whether the applicant was engaged in political advocacy or campaign activities.[386]

**Ongoing Delays.** In Cincinnati, despite the focus by senior EO management on changing the case label and BOLO description, the advocacy cases continued to sit idle through the summer and fall of 2011, with no EOT guidance about how they should be resolved. The number of cases also continued to increase, reaching 160 cases by the fall.[387] Ms. Thomas and Mr. Bell continued to ask EOT in Washington, D.C. for guidance on the cases.

On July 19, 2011, Holly Paz sent an email outlining a plan for processing the cases:

> "Lois would like to discuss our planned approach for dealing with these cases. We suspect we will have to approve the majority of the c4 applications. Given the volume of applications and the fact that this is not a new issue (just an increase in frequency of the issue), we plan to [have] EO Determinations work the cases. However, we plan to have

---

[381] Subcommittee interview of Cindy Thomas, IRS (11/13/2013). Two EO employees told the Subcommittee that they did not understand why using "Tea Party" was a bad idea. Subcommittee interviews of Hilary Goehausen (12/13/2013) and Carter Hull (11/19/2013).

[382] Subcommittee interview of Holly Paz, IRS (10/30/2013).

[383] Subcommittee interview of Cindy Thomas, IRS (11/13/2013). See also 5/14/2013 TIGTA Audit Report, at 35. This change was made nearly two years before the TIGTA report was issued.

[384] 7/27/2011 BOLO spreadsheet, prepared by IRS, IRS0000002540 - 552, at 547. The revised language was promptly put into effect. See, e.g., 7/15/2011 email from Laurice Ghougasian to Michael Seto, "July SCRs due 07/22/11," IRSR0000159751 - 752 (Ms. Ghougasian wrote: "Should we reassign the 'Tea Party' SCR [Significant Case Report] to Hilary (and change its name)? Thank you." Mr. Seto responded : "Yes. We should call it 'political advocacy organization' henceforth.").

[385] 7/27/2011 BOLO spreadsheet, prepared by IRS, IRS0000002540 - 552, at 547.

[386] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

[387] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

> EO Technical compose some informal guidance re: development of these cases (e.g., review websites, check to see whether org is registered with FEC, get representations re: the amount of political activity, etc.) EO Technical will also designate point people for Determs to consult with questions. We will also refer these organizations to the Review of operations for follow-up in a later year."[388]

This email was written about 18 months after the first Tea Party case was flagged by the EO screeners, and six months after Ms. Lerner wrote that the Cincinnati office "should probably NOT" handle the cases.[389] It indicates that, even then, neither the EOT nor the Determinations Unit in Cincinnati had an established process or clear guidance as to how to handle those cases.

Two months later, in September 2011, Holly Paz and Sharon Light, senior EOT personnel based in Washington, happened to be in the Cincinnati office, and Ms. Thomas shared with them an application filed by an advocacy group and asked how to handle it.[390] Ms. Light reviewed the application and determined that it could be approved.[391] Ms. Thomas asked them for help in resolving the growing backlog of advocacy cases, and Ms. Paz offered to assist by having EOT personnel review all of the pending cases to weed out those that did not involve lobbying or campaign activities.[392]

On September 21, 2011, Ms. Paz sent an email to EOT personnel announcing that review effort:

> "We have now have over 100 advocacy cases on hold in determs awaiting guidance from EOT/EOG in the form of a list of areas to be developed. Justin [Lowe] has been overseeing Hillary [Goehausen] on this. In meeting with Cindy [Thomas] in Cincy [Cincinnati] last week and looking at some of the cases, it is clear to me that we cast the net too wide and have held up cases that have nothing to do with lobbying or campaign intervention (e.g., org distributing educational material on the national debt). We are tasking Hilary with the task of looking at these cases on TEDs and triaging them – identifying those that clearly are advocacy cases and those that are clearly not."[393]

Ms. Goehausen told the Subcommittee that, when she was given the assignment, about 160 advocacy cases were pending.[394] According to Ms. Goehausen, she went through the list of advocacy cases in the TEDS system, looked at the "facts and circumstances" of each case, and made comments on each application in a document she provided to the Determinations Unit.[395] Her document listed each case with her comments after each organization's name.

---

[388] 7/19/2011 email from Holly Paz to Janine Cook, "Advocacy orgs," IRSR0000428420.
[389] 2/1/2011email from Lois Lerner to Holly Paz, "SCR Table for Jan. 2011," IRSR0000168020 - 023.
[390] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[391] Id.
[392] Id.
[393] 9/21/2011 email from Holly Paz to David Fish and Andy Megosh, "advocacy cases," IRSR0000010132.
[394] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).
[395] Id.

Ms. Thomas, the Determinations Unit head, told the Subcommittee that she did not find Ms. Goehausen's list particularly helpful,[396] writing in an email at the time: "Not sure where this leaves us and I'm unclear as to what action is being suggested for some of these cases."[397] Ms. Thomas told the Subcommittee that even after Ms. Goehausen's effort, her team struggled to decipher a confusing set of IRS regulations on how to handle applications involving campaign activity.[398] According to Ms. Goehausen, a few weeks later, Michael Seto, EO Quality Assurance Manager, instructed Ms. Goehausen to rework the document, which she did, but it appears that it was never used by the Determinations Unit to close cases.[399]

Two years later, USAToday published what it claimed was a 2011 IRS list of 160 501(c)(4) organizations that were reviewed by "IRS lawyers in Washington."[400] The title of the published document is "EOD Political Advocacy Cases – Screened by EO Technical 11/16/11." According to the article, while most of the organizations on the list were conservative in nature, at least eleven were on the liberal side of the political spectrum.[401] It is possible that the published document was the list prepared by Ms. Goehausen.[402]

**Cases Transferred to Third Coordinator.** In the late fall of 2011, the advocacy cases awaiting action in the Determinations Unit were transferred again, from Ronald Bell to Stephen Seok, who became the third coordinator of the cases in three years.[403] Ms. Thomas told the Subcommittee that Mr. Bowling put Mr. Seok in charge of the cases instead of Mr. Bell, because Mr. Bowling thought Mr. Seok would be a better leader.[404] Mr. Seok told the Subcommittee that he transferred to IRS Determinations Group 7822 in August of 2011, and when he asked his manager, Steven Bowling, about the cases he'd be handling, Mr. Bowling said he would have an assignment for him later.[405] Mr. Seok told the Subcommittee that he later received an email from Mr. Bowling assigning him the advocacy cases.[406]

According to Mr. Seok, after receiving the email, he met with Mr. Bowling and Ms. Thomas to determine how to develop the cases.[407] He said they discussed creating an "advocacy

---

[396] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[397] 10/25/2011 email from Cindy Thomas to Theodore Lieber and Michael Seto, "Advocacy Orgs_Cincinnati.xls," IRS0000000285 - 316, at 288.
[398] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[399] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013). See also 4/17/2012 email from Cindy Thomas, IRS, to Nancy Marks and others, IRS, "Advocacy Orgs Guidesheet from EOT and Listing of Cases," IRS0000000285.
[400] "IRS list reveals concerns over Tea Party 'propaganda,'" USAToday, Gregory Korte (9/17/2013), http://www.usatoday.com/story/news/politics/2013/09/17/irs-tea-party-target-list-propaganda/2825003/.
[401] Id. The liberal groups apparently included the following: Arkansans for Common Sense, Californians for Regulatory Reform, Coffee Party USA, Corporate Accountability Project, Delawareans for Social and Economic Justice, Louisiana Progress Action Fund, Inc., Progress Texas, Progressives United, Inc., and New York Civic Action, Inc.
[402] See "EOD Political Advocacy Cases," prepared by the IRS, IRSR0000063025 - 037 (providing the Subcommittee with a case list in redacted form).
[403] Subcommittee interview of Stephen Seok, IRS (11/22/2013).
[404] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[405] Subcommittee interview of Stephen Seok, IRS (11/22/2013).
[406] Id. Mr. Seok didn't recall exactly what was in the email, and the Subcommittee was unable to locate it.
[407] Id.

team" to handle the cases, which he would lead.[408] Mr. Seok told the Subcommittee that, in December 2011, he called the first advocacy team meeting to discuss the cases which then numbered around 170.[409] He said that, in January 2012, he also introduced himself by email to the EOT specialists who were assigned to the test cases, Ms. Goehausen and Mr. Lowe, and asked for their technical assistance.[410] Mr. Seok told the Subcommittee, when asked, that he thought most of the advocacy cases assigned to him were conservative groups, but wasn't certain.[411] Mr. Seok said that he wasn't concerned about the type of cases he had; his objective was to work all of the cases in the inventory, as he did when he worked credit counseling cases, his previous assignment.[412]

### F. Processing Applications from Liberal Groups

While the TIGTA audit report provided systematic information about IRS treatment of conservative groups, comparative information about IRS treatment of liberal groups has emerged through isolated IRS documents, liberal organization complaints, and media reports suggesting liberal groups encountered many of the same IRS processing problems as conservative groups.[413]

---

[408] Id.

[409] Id. Mr. Seok said that the team members were taken from different groups around the IRS.

[410] Id. See also 1/31/2012 email from Stephen Seok to Hilary Goehausen and Justin Lowe, "Advocacy team in EOD," IRSR0000011217 - 218 (Mr. Seok wrote: "Hello, Justin and Hilary, My name is Stephen Seok in Group 7822 in Cincinnati. Steve graciously put me in charge of the Advocacy Team recently formed in EOD. As you are our contacts in EOT, I would like to introduce myself to you. So far, we are in the stage of developing cases and forging template questions and developmental guidance. Once they are done, I would like to send them to you for your input and feedback. Please let me know that is ok with you.").

[411] Subcommittee interview of Stephen Seok, IRS (11/22/2013).

[412] Id.

[413] See, e.g., 6/5/2012 IRS analysis of 501(c)(4) advocacy cases, PSI-IRS-37-000004 - 19, at 011-012 (listing 24 progressive advocacy cases reviewed by the IRS, some of which took six months or longer to resolve); "Does the IRS really have it in for tea party groups?" Colorado Independent, Teddy Wilson (3/28/2012), http://www.coloradoindependent.com/116361/does-the-irs-really-have-it-in-for-tea-party-groups (describing conservative and progressive groups in Texas experiencing application delays and intrusive questions); "IRS Sent Same Letter to Democrats That Fed Tea Party Row," Bloomberg News, Julie Bykowicz and Jonathan Salant (5/14/2013), http://www.bloomberg.com/news/2013-05-15/irs-sent-same-letter-to-democrats-that-fed-tea-party-row.html (describing intrusive letters sent to Progress Texas and Clean Elections Texas); "IRS approved liberal groups while Tea Party in limbo," USAToday, Gregory Korte (5/15/2013), http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-progressive-groups/2158831/ (indicating Bus for Progress, Progress Florida, and Action for a Progressive Future experienced delays of 9 to 18 months and at least one group received "intrusive questions" before obtaining tax exempt status); "Nonconservative Groups Say IRS Scrutinized Them, Too," National Public Radio, Brian Naylor (5/19/2013), http://www.npr.org/2013/05/19/185206908/nonconservative-groups-say-irs-scrutinized-them-too (describing progressive groups experiencing application delays and intrusive questions, including Progress Texas and the Chicago News Cooperative); "Dems unhappy IRS screened for progressive groups, upset investigator didn't tell lawmakers," Associated Press, Stephen Ohlemacher and Henry Jackson (6/24/2013), http://news.yahoo.com/dems-unhappy-irs-screened-progressives-071941069.html (describing BOLO entries for liberal groups in 15 IRS BOLOs); "In IRS Scandal, Spat Over Level of Scrutiny," Wall Street Journal, John McKinnon (6/25/2013) (describing a liberal group, Alliance for a Better Utah, whose affiliate experienced intrusive questions and a two-year delay in processing a still pending application); "IRS Scrutiny Went Beyond the Political," New York Times, Jonathan Weisman (7/4/2013), http://www.nytimes.com/2013/07/05/us/politicas/irs-scrutiny-went-beyond-the-political.html?pagewanted=all&_r=0 (describing delays and intrusive questions directed to two liberal groups seeking tax exempt status, Minnesota Break the Bonds, a group promoting Palestinian rights, and Chi Eta Phi, a black nurses' sorority advocating social change); "IRS scrutinized some liberal groups," Politico, David Nather

To determine whether liberal groups had, in fact, experienced the same mismanagement as conservative groups, the Subcommittee examined how the IRS processed applications filed by groups associated with three nationwide, liberal organizations: ACORN, Occupy, and Emerge America, and by groups with "Progressive" or "Progress" in their names. The evidence shows that some of those liberal groups underwent the same types of inappropriate IRS screening, lengthy EOT reviews, intrusive questions, and years-long delays as some conservative groups.

### (1) ACORN

As explained earlier, "ACORN" stands for Association of Community Organizations for Reform Now, a decades-old, openly liberal organization that advocated for the poor, especially in the area of housing. At its peak, it claimed more than 1,200 community-based affiliates. On November 2, 2010, the national association declared bankruptcy, leading to the termination of the ACORN network of groups. When it appeared that some ACORN affiliates were reorganizing under new names, questions arose about whether those successor organizations might be disqualified from tax exempt status, in part due to issues involving political advocacy or campaign activities. Like Tea Party groups, applications filed by ACORN successor groups were singled out for heightened scrutiny, resolution of the applications was suspended pending EOT review of the issues, and the ACORN successor cases sat idle for more than three years awaiting final disposition.

**First ACORN Case Flagged.** The first ACORN successor case was flagged by the IRS in February 2010, the same month as the first Tea Party case. On February 26, 2010, an IRS ROO examinations specialist wrote:

> "There is a lot of internet traffic about ACORN reinventing itself. [REDACTED BY IRS] office is now occupied by [REDACTED BY IRS]. They have formed a new corporation and will be applying for exemption under 501(c)(4). ... These cases probably should be handled by the TAG group if they can be identified."[414]

He and others noted that an earlier ACORN successor group had been the subject of a Sensitive Case Report.[415]

---

(7/22/2013), http://www.politico.com/story/2013/07/irs-scrutinized-liberal-groups-94556.html (indicating Progress Texas' 501(c)(4) application had been subjected to intrusive questions and an 18-month delay before the group obtained tax exempt status); "New Records: IRS Targeted Progressive Groups More Extensively Than Tea Party," Think Progress website, Josh Israel and Adam Peck (4/23/2014), http://thinkprogress.org/politics/2014/04/23/3429722/ire-records-tea-party/ (providing a chart showing that IRS BOLOs issued between August 2010 and April 2013, "included more explicit references to progressive groups, ACORN successors, and medical marijuana organizations than to Tea Party entities").

[414] 2/26/2010 email from Richie Heidenreich to Nancy Todd, "Investigation," IRSR0000458439 - 447, at 441. As explained earlier, "ROO" stands for "Review of Operations," and refers to an IRS review of an existing tax exempt organization to gauge its compliance with the tax code. Seven months earlier, in August 2009, Congressman Darrell Issa, Chairman of the House Government Reform Committee, wrote to the IRS voicing concerns regarding ACORN's tax-exempt status due to alleged violations of the tax code and Federal Election Campaign Act. See 8/11/2009 letter from Committee Chairman Issa to the IRS, IRSR0000469223 - 228.

[415] See 3/28/2010 email from Cindy Thomas to Robert Choi and others, "ACTION by 12 noon 3/29/10: Investigation," IRSR0000458456 (attaching a copy of the sensitive case report).

By March 2010, the examiner's email had been forwarded to Steven Grodnitzky, then acting head of the EO Technical Unit, who forwarded it to the head of the EO Rulings and Agreements Unit, Robert Choi, with this note:

> "Just a heads up that it appears that ACORN is morphing into new organizations. According to Cincy [Cincinnati], there was one organization that came in for exemption, but they believe it was closed FTE [Failure to Establish]. Will keep you updated as to new developments in this area. May cause some press attention."[416]

A few days later, Mr. Choi indicated to his EO colleagues that he was scheduled to meet with IRS officials from headquarters in Washington, D.C., to discuss the ACORN cases. In an email dated March 26, 2010, Mr. Choi wrote to Determinations head Cindy Thomas and others: "I need a summary from Cincy regarding this issue of ACORN morphing into new entities. I have a meeting Monday afternoon, 3/29, to discuss this issue with HQ folks."[417] Jon Waddell, a manager in the Determinations Unit, responded to Mr. Choi that no ACORN successor applications had recently been approved or denied, but managers and screeners had been told that ACORN groups were changing their names and they should be on the lookout for successor organizations.[418]

**ACORN BOLO Entry.** Five months later, in August 2010, an ACORN entry was included in the first BOLO issued by the Determinations Unit in Cincinnati asking EO employees to be on the lookout for certain applications. That BOLO included entries for both conservative and liberal groups; a section called "Emerging Issues" contained the entry for "Tea Party" groups, while a separate section called "BOLO List" (later renamed "Watch List") contained the entry for "ACORN successor" groups.[419] The entry describing the ACORN cases has been largely redacted by the IRS so that all that is disclosed in the BOLO is as follows: "ACORN successors, Following the breakup of ACORN [REDACTED BY IRS]."[420]

IRS screeners used the BOLO list to conduct searches for the listed groups, including ACORN successor organizations. Gary Muthert, a senior IRS screener, told the Subcommittee that, as he did with the Tea Party groups, he ran electronic searches for applications filed by ACORN successor groups.[421] Mr. Muthert told the Subcommittee that he ran searches for ACORN successor organizations even before the August 2010 BOLO, because he had received

---

[416] 3/24/2010 email from Steven Grodnitzky to Robert Choi, "Investigation," IRSR0000458430 - 432. "Failure to Establish" means that the group failed to provide the information needed to establish its tax exemption.
[417] 3/26/2010 email from Robert Choi to Cindy Thomas and others, "ACTION by 12noon 3/29/2010: Investigation," IRSR0000458439. A week earlier, on March 21, 2010, the ACORN Board of Directors had met and approved steps to close its operations, amid media speculation about ACORN successor groups. See, e.g., ACORN Board statement reprinted in "ACORN Board Approves Shutdown," National Public Radio, Frank James (3/22/2010), http://www.npr.org/blogs/thetwo-way/2010/03/acorn_board_approves_groups_sh.html; "Acorn Disbanding, Housing Offshoot to Remain," Wall Street Journal, James Hagerty and Brody Mullins, (3/23/2010), http://online.wsj.com/news/articles/SB10001424052748704117304575138161112658930.
[418] 3/26/2010 email from Jon Waddell to Cindy Thomas and Sharon Camarillo, "ACTION BY 12noon 3/29/10: Investigation," IRSR0000458456 - 459, at 456-457.
[419] August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515, at 509 (for Tea Party) and 513 (for ACORN); August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196.
[420] Id.
[421] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

an earlier email alert asking screeners to be on the lookout for those organizations.[422] Mr. Muthert told the Subcommittee that he recalled personally finding about two ACORN successor cases which he sent to the specialty group handling them.[423] Mr. Muthert also observed that ACORN had been featured in an internal IRS presentation as a "watch for example" which included a picture of a smiling acorn.[424]

The BOLOs used by the EOD Unit continued to carry the ACORN successor entry for nearly two years until approximately June 2012, when multiple entries were consolidated in the Emerging Issues section of the BOLO and were referred to by this single entry: "501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit)."[425] When that new entry was included in the June 2012 BOLO for groups involved with campaign activity, the separate ACORN entry was eliminated and ACORN successor groups were intended to be included in the new one.

**ACORN Selection Criteria.** Just as they had for the Tea Party cases, EOD personnel in the Cincinnati office created selection criteria to identify the cases that should be included within ACORN successors category. In October 2010, a determinations manager, Jon Waddell, advised that he had identified two applications for ACORN successor groups based in Pennsylvania that were in addition to two pending applications for ACORN successor groups in New York.[426] He recommended issuing an email alert asking EO personnel to be on the lookout for similar cases, and proposed adding the following criteria to the BOLO Watch list section for ACORN:

1. "The name(s) Neighborhoods for Social Justice or Communities Organizing for Change.
2. Activities that mention Voter Mobilization or the Low-Income/Disenfranchised.
3. Advocating for Legislation to Provide for Economic, Healthcare, and Housing Justice for the poor.
4. Educating Public Policy Makers (i.e. Politicians) on the above subjects."[427]

The proposed criteria were very similar in style and in their use of organization names and political views to the criteria used to identify the Tea Party cases.[428] John Shafer, the

---

[422] Id.

[423] Id.

[424] Id. See also undated "Heightened Awareness Issues," prepared by IRS, IRSR0000195600 - 617, at 613-614 (containing the cartoon picture of a smiling acorn and referencing the ACORN successor groups issue).

[425] See June 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000013252. See also 5/17/2012 email from Holly Paz to Lois Lerner, Nancy Marks, Judith Kindell, Sharon Light, and Cindy Thomas, "Potential revised BOLO language," IRS0000000492 (Ms. Paz wrote: "I would like your thoughts on the language below. I would like this language to replace the current advocacy org language on the BOLO as well as the separate references to ACORN successors and Occupy groups[:]

> 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention or excess private benefit to organizations or individuals.").

[426] 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, "BOLO Tab Update," IRSR0000410433 - 434.

[427] Id.

[428] Compare with 6/6/2011 email from John Shafer to Cindy Thomas, "Tea Party cases – NEED CRITERIA," PSI-IRS-09-000048 (providing the following selection criteria for Tea Party cases:

manager of the Screening Group, forwarded the proposed ACORN criteria to the IRS screeners and asked them to be on the lookout for the ACORN successor cases.[429]

**ACORN EOT Review.** Like the Tea Party cases, once the ACORN cases were identified, action on the applications was delayed pending receipt of guidance from the EO Technical Unit in Washington D.C. on how to handle the cases. Carter Hull, the EOT specialist who handled the Tea Party cases, also handled the ACORN cases.[430] He told the Subcommittee that he did not know why he had been designated as the EOT contact person for the ACORN cases.[431] According to Mr. Hull, his only involvement with the ACORN cases was that he received a phone call from someone asking about an ACORN successor case, and advised treating the group as a new organization.[432] Ronald Bell, a determinations specialist who, from November 2010 to November 2011, served as the coordinator for the Tea Party cases, told the

---

"1.'Tea Party,' 'Patriots' or '9/12 Project' is referenced in the case file.
2. Issues include government spending, government debt and taxes.
3. Educate the public through advocacy/legislative activities to make America a better place to live.
4. Statements in the case file that are critical of how the country is being run.").

[429] See 10/8/2010 email from John Shafer, IRS, to Gary Muthert and others, IRS, "FW: BOLO Tab Update," IRSR0000410433; 10/8/2010 email from Sharon Camarillo, IRS, to John Shafer, IRS, "BOLO Tab Update," IRSR0000410433 - 434 (including the ACORN successor selection criteria and asking: "John: Please ask your screeners to be on the lookout for these cases."). The Minority Staff's Dissenting Views suggest that ACORN successor groups were placed on the BOLO list because of concerns about illegality, rather than advocacy activities, writing that the groups were "not flagged for their political beliefs, but rather because of a specific association to a group known to have legal problems." Dissenting Views at 204. That assertion, however, is at odds with the actual selection criteria used by the IRS to flag ACORN successor cases; those criteria make no mention of illegality or fraud, and instead focus exclusively on the successor groups' names and political views. Attributing the flagging of ACORN successor groups as solely the result of IRS concerns about illegality or fraud is also inconsistent with the actions taken by the IRS in June 2012, to combine the ACORN, Occupy, and Tea Party cases under a single, new Emerging Issues entry focused on indicators of campaign activity.

[430] See 11/26/2010 email from Holly Paz to Cindy Thomas, "ACORN Successor," IRSR0000054942 -944 (Ms. Paz wrote: "I apologize for the delay – I thought I had already responded but, in going through the emails today, I realized I had not. Please work with Chip Hull on these cases."); Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

[431] Subcommittee interview of Carter Hull, IRS (11/19/2013). A year later, in July 2011, Mr. Hull told at least one EO determinations specialist that he was no longer handling ACORN cases. That specialist sent an email to a colleague as follows: "I am working a case that has a board member who is also serving on the board of an ACORN organization. Per the instructions on the BOLO list and your instruction, I called Chip Hull in EO Technical for guidance in developing the case. Mr. Hull informed me that he should not be on a list as contact person for ACORN related organizations. While he previously provided guidance to a Determ manager re: ACORN successors, his manager informed him that he should not be doing research for our cases. Mr. Hull requested that his name be removed from the BOLO list as a contact person." 7/11/2011 email from Melissa Conley to William Angner, "BOLO List Issue," IRSR0000054946. The next month, in August 2011, his Tea Party cases were transferred to a new EOT specialist, Hilary Goehausen, as explained earlier, but his name continued to be listed as the contact for ACORN cases until June 2012, when the ACORN cases were folded into the category of tax exempt groups with campaign activities. See June 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000013252. See also 5/17/2012 email from Holly Paz to Lois Lerner and others, "potential revised BOLO language," IRS0000000492 (recommending a revision of the BOLO entry for advocacy groups in part to eliminate "the separate references to ACORN successors and Occupy groups").

[432] Subcommittee interview of Carter Hull, IRS (11/19/2013). Mr. Hull told the Subcommittee that he could not recall who had contacted him about the ACORN case or when. Mr. Hull also said that he had heard of ACORN, but was unaware of the screening criteria used to identify ACORN cases.

Subcommittee that he also worked on ACORN cases, including with Mr. Hull, and knew other people who had as well.[433]

The Determinations Unit in Cincinnati waited years for ACORN EOT guidance, just as it waited years for Tea Party guidance. As with the Tea Party cases, EO senior management explicitly suspended resolution of the ACORN cases pending issuance of EOT guidance on them. In June 2010, for example, Steven Grodnitzky, then acting head of EO Technical, wrote to Determinations head Cindy Thomas about the ACORN-related cases:

> "Just want to make sure we are all on the same page as to the ACORN-related cases. We should not be developing or resolving them at this point. I had spoken to Rob [Choi] about a successor to one of the ACORN orgs in NY and he mentioned that some activity is going on in the TEGE Commissioner's office with respect to ACORN and to hold off."[434]

Internal IRS documents confirm that limited action was taken on the ACORN cases while awaiting EOT guidance. A July 2010 document, for example, reported that one ACORN group's application had been awaiting guidance from EO Technical for over 60 days.[435] Emails exchanged among EO personnel three months later, in October 2010, described two more pending ACORN successor cases that were sitting idle in Cincinnati, awaiting EOT guidance.[436] On March 8, 2011, one year after the ACORN successor cases were first flagged, Donna Abner, in Quality Assurance, sent this email to her team:

> "Today I received a call from Jon Waddell regarding specifically Acorn related cases and Tea Party cases. In brief, guidance from EO Technical is pending and EO Technical has advised that no determination letters be issued – favorable or unfavorable – until guidance is received."[437]

This email shows that ACORN and Tea Party cases were being handled by the same IRS personnel in the same way.

---

[433] Subcommittee interview of Ronald Bell, IRS (1/15/2014). See also 5/13/2012 email from Ronald Bell to Carter Hull, "ACORN Successor org's," IRSR0000054963 (Mr. Bell wrote: "Hi Chip – I've got a case that I believe is an acorn successor org. I googled the name of the org and that is where several websites (such as the capital research center) indicate that it is an acorn successor. The BOLO list states to contact you.").

[434] 6/8/2010 email from Steven Grodnitzky to Cindy Thomas and Donna Abner, "High Profile orgs," IRSR0000054937.

[435] See 7/2/2010 "June Briefing Notes, Group 7830," prepared by the IRS, IRSR0000054918 - 923, at 920 ("[o]ne case exceeds 60 days which is [REDACTED BY IRS but previously identified as ACORN successor organization]. We are awaiting guidance from EO Technical on next action with this case.").

[436] See October/November 2010 email chain among Sharon Camarillo, Cindy Thomas, Holly Paz, and others, "ACORN Successor," IRSR0000054942 - 944; 7/15/2010 email from Cindy Thomas to Robert Choi, "Potential Successor to Acorn," IRSR0000054948 ("It appears as though we have another case that may be a potential successor to Acorn. Refer to Jon's email below. We placed the other case in suspense pending guidance from the Washington Office and are doing so with this case.").

[437] 3/8/2011 email from Donna Abner to her Quality Assurance team, "politically sensitive cases," IRSR0000453023.

**Proposed ACORN Denials.** Almost two years after the first ACORN case was flagged, in January 2012, Ms. Abner proposed denying tax exempt status for one of the ACORN successor organizations. She wrote: "[B]ecause this is the first such letter we've prepared I'd like to have someone in EO Technical review before it is issued. (I also think that this might receive some attention)."[438]

Ms. Abner submitted the proposed denial to EOT in February 2012, and provided the case file in March.[439] In March 2012, EOT advised that the ACORN "denial need[ed] additional facts to support the legal conclusion that the organization doesn't qualify as a (c)(3)."[440] In response, Ms. Abner revised the denial.[441]

On April 6, 2012, Holly Paz, by then Director of the Rulings and Agreements Unit, indicated that EOT needed to review the revised denial.[442] That same day, Ms. Abner asked Michael Seto, then EOT Acting Manager, for an estimate on how long the review would take, in particular because the Determinations Unit wanted to issue a second ACORN denial and wanted EOT's advice before proceeding.[443] Mr. Seto responded that he would reassign the case to another EOT specialist whose review would take about two weeks.[444] In fact, the review took months, and the case remained unresolved for more than another year.

In July 2012, according to press reports, a group called Cause of Action urged review of two ACORN successor groups in Texas, the Texas Organizing Project and the Texas Organizing Project Education Fund, for what it said was "a scheme to collect donations and divert them for political use" to support Democratic candidates for office.[445] One article stated that the Texas groups provided the third occasion in which Cause of Action had asked for ACORN successor

---

[438] 1/30/2012 email from Donna Abner to David Fish and Michael Seto, "Review requested," IRSR0000458064 - 065. Ms. Abner also noted: "This case has a March 2010 control date," which suggests it had been pending for nearly two years. See also proposed ACORN denial letters, with IRS redactions: 1/30/2012 email from Donna Abner to David Fish and Michael Seto, "Review requested," IRSR0000457889 - 899.

[439] See 4/6/2012 email from Donna Abner to Michael Seto, with a copy to Holly Paz, "Denial – advocacy," IRSR0000617103.

[440] 3/26/2012 email from Michael Seto to Donna Abner, "Review requested," IRSR0000458064.

[441] The IRS did not supply a copy of the revised denial, citing Section 6103 barring disclosure of taxpayer information.

[442] 4/6/2012 email from Holly Paz to Donna Abner and Michael Seto, "Denial – advocacy," IRSR0000617102 ("I would like EOT to look at this proposed denial Donna just sent.").

[443] 4/6/2012 email from Donna Abner to Michael Seto, "Denial – advocacy," IRSR0000617103 ("I want to follow up on the status of the review of the Acorn successor denial (originally forwarded denial letter early February and copy of case March). Determs has another proposed denial for an almost identical Acorn successor. So, the decision on the first will help with the second. Any idea on when we might receive feedback?").

[444] 4/6/2012 email from Michael Seto to Donna Abner, "Denial – advocacy," IRSR0000617102.

[445] "Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch," Fox News, (7/19/2012), http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/; "ACORN Political Money Laundering," Front Page Magazine, Matthew Vadum (7/26/2012), http://www.frontpagemag.com/2012/matthew-vadum/acorn-political-money-laundering-in-texas/. See also "Texas Organizing Project says it's 'not ACORN with a new name,'" Dallas Morning News, Kim Horner (7/23/2010, updated 1/18/2011), http://www.dallasnews.com/news/community-news/coppell/headlines/20100723-texas-organizing-project-says-it_s-not-acorn-with-a-new-name.ece. TIGTA's auditors took note of the 2012 Fox News article. See 7/23/2012 email from Troy Paterson to Thomas Seidell and others, "Article on Political Advocacy," TIGTA Bates No. 010433 - 434 (referencing the Fox News article).

groups to be investigated.[446] The IRS and TIGTA declined at the time to discuss either organization.[447]

In October 2012, Jon Waddell, an IRS determinations manager, noted in a monthly briefing report that two ACORN cases with proposed denials were still pending at EOT:

> "These are advocacy cases (similar to Tea Parties) where we have proposed denial and QA [Quality Assurance] has agreed. There are two cases that are involved and both currently reside in EO Tech for review of the denial letters – cases have been in EO Tech for at least six months. At some point (months from now), the cases will ultimately return to the group to issue the denial letters and communicate with the applicants. When the denial letters are ultimately issued, media attention will almost certainly follow."[448]

Mr. Waddell's report directly compared the ACORN and Tea Party cases, both of which were then undergoing extended EOT review.

At another point in 2012, at least one ACORN case was included in the so-called "bucketing" effort, described further below, which was a 2012 effort by the IRS to process a large number of the advocacy cases quickly.[449] But in March 2013, at least two ACORN cases were still pending, awaiting guidance from EOT on the proposed denials.[450] When the IRS received a new application from still another ACORN successor organization in March 2013, this summary was prepared regarding the pending ACORN cases:

> "I'm elevating a case identified in Vicki's group related to the political advocacy area. While the development issues within Vicki's group are straightforward, any type of ruling on this case could be impactful. Below is the background on the Acorn-related cases:
>
> 1. Acorn-related cases were previously reflected on the BOLO and subsequently folded into the political advocacy category over a year ago.
>
> 2. Currently, we have two proposed denials under review in D.C. involving Acorn-related cases. One is assigned to Ed Pomerantz and the other to April Garrett[.]

---

[446] See "Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch," Fox News, (7/19/2012), http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/. In August 2012, Cause of Action released a list of what it alleged were 174 ACORN successor groups across the country. See "174 Hidden ACORN Chapters Still Exist," Cause of Action website (8/27/2012), http://causeofaction.org/174-hidden-acorn-chapters-still-exist/.

[447] "Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch," Fox News, (7/19/2012), http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/.

[448] "Area 1 Monthly Briefing, October 2012," prepared by Jon Waddell, IRS, IRSR0000167847 - 851, at 851.

[449] Subcommittee interview of Holly Paz, IRS (10/30/2013); 3/21/2013 email from Cindy Thomas to Sharon Light and David Fish, "Advocacy Case – Congressional Inquiry," IRSR0000444264 (identifying case "like the Acorn successor cases" as "a bucket 3 case").

[450] See 3/26/2013 email from Jon Waddell to Cindy Thomas, "Sensitive Case," IRSR0000054977.

> 3. These cases contain the same characteristics as other identified political advocacy cases as the applications contain instances of partisan political activity and excessive legislative and mobilization activities precluding approval under c(3)."[451]

This email indicates that the IRS viewed the ACORN-related cases as involving the "same characteristics as other identified political advocacy cases."

In April 2013, Rulings and Agreements Director Holly Paz indicated that the EOT review of the ACORN cases continued unabated: "These cases are still going back and forth between the initiator and reviewer. I have asked Mike to get these cases to Virginia ASAP for a fast track review so we can reach a decision."[452]

**Over Three Year Delay.** When Determinations head Cindy Thomas was asked about the status of the ACORN successor cases during her Subcommittee interview in November 2013, she indicated that the proposed denial letters still had not been sent and the cases were still pending more than three years after the ACORN successor applications were first submitted to the IRS in February 2010.[453] The evidence shows that those ACORN cases experienced the same inappropriate selection criteria focused on their names and political views, the same EOT reviews, and the same delays and mismanagement as the Tea Party cases being considered at the same time.

### (2) Occupy

A second example of IRS treatment of liberal groups involves applications filed by groups associated with "Occupy." Occupy, sometimes called "Occupy Wall Street," has described itself as "a people-powered movement that began on September 17, 2011 in Liberty Square in Manhattan's Financial District, and has spread to over 100 cities in the United States and actions in over 1,500 cities globally."[454] Occupy has described its mission as "fighting back against the corrosive power of major banks and multinational corporations over the democratic process, and the role of Wall Street in creating an economic collapse that has caused the greatest recession in generations."[455] A loose affiliation of organizations using the word "Occupy" in their names began forming across the country in late 2011. The groups were generally viewed as liberal or progressive organizations, sometimes described as having opposing or overlapping interests with the Tea Party.[456] Like Tea Party groups, applications filed by Occupy groups were singled out for heightened scrutiny by the IRS due to advocacy issues, they were identified using

---

[451] Id.
[452] 4/2/2013 email from Holly Paz to Cindy Thomas, "Sensitive Case," IRSR0000054976. See also 5/7/2013 emails between Cindy Thomas and Holly Paz, "Sensitive Case," IRSR0000444805 (indicating Determinations continued to hold an ACORN case while waiting for EO Examinations to finish its audit).
[453] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[454] "About Occupy Wall Street," prepared by Occupy Wall Street, http://occupywallst.org/about/.
[455] Id.
[456] See, e.g., "A Very Simple Venn Diagram of Where the Tea Party and Occupy Wall Street Agree," The Atlantic, Alexis C. Madrigal (10/14/2011), http://www.theatlantic.com/politics/archive/2011/10/a-very-simple-venn-diagram-of-where-the-tea-party-and-occupy-wall-street-agree/246687/.

screening criteria that focused on the groups' names and political views, the applications were subjected to extended EOT review, and resolution of the cases was delayed for years.

**First Occupy Case Flagged.** On January 20, 2012, the first Occupy case was flagged within the IRS by EOD personnel. An email was sent to Determinations head Cindy Thomas under the subject line, "Potential Watch List/BOLO item - Occupy Groups Applying for (c)(3)."[457] Ms. Thomas told the Subcommittee that she first heard about the Occupy organizations when an IRS agent saw the group in the news and elevated the related case to her.[458] She also told the Subcommittee that she wasn't sure at the time whether Occupy organizations were conservative or liberal, but viewed their applications as ones that should be treated in the same manner as other advocacy cases.[459] A few days after the case was flagged, Jon Waddell, a senior EOD manager, advised that he saw the Occupy cases as falling into the same "advocacy cases" category as the Tea Party and ACORN successor cases.[460]

Issues involving the Occupy cases were handled by Steven Bowling, head of Group 7822 which was already handling the Tea Party cases. In an email, Mr. Bowling indicated that he viewed the Occupy cases as falling within the advocacy category, but also expressed confusion over how to alert screeners to be on the lookout for them: "I know we don't want to use the words 'tea party' or 'occupy' but I'm not sure how we could weed out a simple advocacy type organization."[461] This email suggests that, from the initial effort to alert IRS personnel to Occupy applications, EO managers viewed the Occupy cases as comparable to the Tea Party cases. EO personnel debated how to adequately capture the Occupy groups on the BOLO list without referring to them as "Occupy," with one agent noting: "We wouldn't want to miss this one if it comes in so it needs to be pretty clear."[462]

**Occupy BOLO Entry.** In January 2012, a separate entry for Occupy organizations was added to the BOLO in the "Watch List" section. The entry read as follows:

> "Occupy Organizations involve organizations occupying public space protesting in various cities, call people to assemble (people's assemblies) claiming social injustices due to 'big money' influence, claim the democratic process is controlled by wall street/banks/multinational corporations, could be linked globally. Claim to represent the

---

[457] 1/20/2012 email from Peggy Combs to Cindy Thomas, "Potential Watch List/BOLO item – Occupy Groups Applying for (c)(3)," IRSR0000013419. See also 5/25/2012 email from Peggy Combs to Tyler Chumney, "Watch List Case Identified," IRSR0000013430 - 433, at 432 (Ms. Combs: "Are these cases considered advocacy cases per the BOLO?").

[458] Subcommittee interview of Cindy Thomas, IRS (11/13/2013). See also "Which 'Occupy' Movements are Seeking, Considering Nonprofit Status?" Huffington Post (11/18/2011, updated 11/21/11), http://www.huffingtonpost.com/2011/11/18/occupy-wilmington-files-f_n_1097351.html (discussing efforts by Occupy Las Vegas, Occupy Denver, Occupy Wilmington, and Occupy Portland to obtain nonprofit status).

[459] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

[460] 1/24/2012 email from Jon Waddell to Steven Bowling, "Advocacy Cases—Clarification," IRSR0000645603.

[461] 1/20/2012 email from Steve Bowling to Cindy Westcott, "Potential Watch List/BOLO item – Occupy Groups Applying for (c)(3)," IRSR0000013418 - 419.

[462] Id. at 418.

> 99% of the public that are interested in separating money from politics and improving the infrastructure to fix everything from healthcare to the economy."[463]

The BOLO entry instructed IRS agents to send any Occupy applications to Group 7822, the same group handling the Tea Party cases.[464]

The January 2012 BOLO also contained a revised entry for "current political issues," in the Emerging Issues section, which read as follows:

> "[C]urrent political issues: Political action type organizations involved in limiting/expanding government, educating on the constitution and bill of rights, $ocial economic reform/movement."[465]

In a January 25, 2012 email, Ronald Bell, the keeper of the BOLO lists for the Determinations Unit, wrote to his manager, Steven Bowling, asking why there was a separate Occupy entry: "I thought the $ocial economic reform in the updated current political issues was our 'code word' for the occupy organizations."[466] Mr. Bell told the Subcommittee that he had met with Mr. Bowling and Stephen Seok about revising the BOLO entry for political issues, and thought that the group had agreed to use "$ocial economic reform" as a "code" for identifying Occupy cases.[467] Mr. Bowling responded: "I think we can leave it in. Some of the orgs are pushing that other than occupy groups."[468]

Gary Muthert, a senior EO screening agent, told the Subcommittee that once he received the January 2012 BOLO, he would have been on the lookout for Occupy cases and would have sent any to Group 7822.[469] He said that he didn't recall receiving any of those cases nor did he recall if he used "Occupy" as a search term.[470] He also noted that he did not know why Occupy had its own separate BOLO entry, and wasn't simply included in the advocacy issues entry.[471]

In June 2012, at the direction of Lois Lerner and Holly Paz, the BOLO entry for current political issues, which appeared in the Emerging Issues section, was revised to encompass all types of political groups, including Occupy and ACORN, with campaign activity.[472] At that

---

[463] January 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000630285 - 289, at 285.
[464] Id.
[465] Id. at 287.
[466] 1/25/2012 email from Ronald Bell to Steven Bowling, "BOLO," IRSR0000013187.
[467] Subcommittee interview of Ronald Bell, IRS (1/15/2014). Mr. Bell told the Subcommittee that he did not recall the use of any other code words in the BOLO entries.
[468] 1/25/2012 email from Steven Bowling to Ronald Bell "BOLO," IRSR0000013187.
[469] Subcommittee interview of Gary Muthert, IRS (1/15/2014).
[470] Id.
[471] Id.
[472] See 6/14/2012 email from Ronald Bell to Tyler Chumney, "BOLO ALERT 06/13/2012," IRSR0000013251, attaching "BOLO Spreadsheet 06132012.xls" (Mr. Bell wrote: "Attached is the latest BOLO updates. … The issue description for **Current Political Issues** located in the Emerging Issue Tab has been revised and the new coordinator is Sharon Light. Watch list issues #2 [REDACTED BY IRS] and #21 'Occupy' Organizations from the last BOLO Alert dated 3-26-12 have been removed and now are to be included in the description for Current Political Issues.")(emphasis in original). The redacted portion of the email was later disclosed as referring to ACORN successor groups.

time, the BOLO dropped the separate entry for Occupy cases.[473] From then on, the political issues entry was the sole entry used to identify Occupy as well as other advocacy cases.[474]

**Occupy Applications.** In February 2012, Mr. Bowling assigned the first Occupy case to Stephen Seok, who was then the Tea Party case coordinator, explaining that it was similar to the other "political type cases" he was handling.[475] The IRS received a second Occupy application in May 2012.[476] Ronald Bell, the prior Tea Party coordinator, told the Subcommittee that he also worked on the Occupy cases, which he perceived as involving liberal organizations.[477]

Mr. Seok told the Subcommittee that he helped develop the Occupy case he was assigned.[478] Hilary Goehausen, the EOT specialist who began handling the Tea Party cases in 2011, told the Subcommittee that she was also assigned an Occupy case as part of her work on the advocacy cases.[479] She told the Subcommittee that she did not recall the details of the Occupy case, but would have treated it like any other advocacy case and helped put together development questions for the group.[480] In addition, at least one Occupy case was included in the 2012 so-called "bucketing" effort, described further below, which was an IRS attempt to quickly process a large number of the advocacy cases then pending.[481] In short, the Occupy cases went through the same processing, using the same IRS personnel, as the Tea Party cases.

---

[473] Id.

[474] Id. The wording, as indicated earlier, was as follows: "[C]urrent political issues: 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit))." See 6/13/12 BOLO spreadsheet, prepared by IRS, IRS0000013252 - 256, at 254.

[475] 2/292012 email from Steven Bowling to Stephen Seok, "BOLO case," IRSR0000014171 – 174, at 173 - 174 (Mr. Bowling wrote: "We have our first 'occupy' type organization. We were thinking that these could be worked by the same agents working the political type cases."). See also 5/24/2012 email from Tyler Chumney to Peggy Combs, "Watch List Case Identified," IRSR0000013420 (Ms. Combs wrote: "There is one other 'Occupy' case, Steve Bowling just called to let me know this. He also told me it is assigned to Stephen Seok who is developing the case.").

[476] See 5/24/2012 email from Tyler Chumney, IRS, to Peggy Combs, IRS, "Watch List Case Identified," IRSR0000014175 - 189, at 177; 7/19/2013 letter from TIGTA to Congressman Sander Levin, at 2, http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/TIGTA%20Response%20Letter%20to%20the%20Honorable%20Sander%20Levin%207-19-13.pdf (noting 0 Occupy organizations in the political advocacy list from May 2010 to May 2012, and two Occupy organizations after May 2012).

[477] Subcommittee interview of Ronald Bell, IRS (1/15/2014). The Minority Staff's Dissenting Views note that the Occupy cases were not included in the IRS list of advocacy cases reviewed by IRS specialists from May 2010 to May 2012. See Dissenting Views at 204 - 205. The evidence shows, however, that whether or not they appeared on that list, Occupy cases were flagged using a BOLO entry that focused on the groups' names and political views, were later combined with Tea Party cases under a revised BOLO Emerging Issues entry, and were assigned to the same EOD and EOT personnel handling Tea Party cases. In addition, the first Occupy application was filed in February 2012, more than a year before the TIGTA audit report was released in May 2013, and the IRS repeatedly brought the Occupy BOLO entry and cases to the attention of TIGTA auditors who failed to examine them.

[478] Subcommittee interview of Stephen Seok, IRS (11/22/2013).

[479] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).

[480] Id. She told the Subcommittee that she did not recall whether development letters were actually sent out.

[481] See 5/31/2012 email from Tyler Chumney to Stephen Seok, "Occupy Case," IRSR0000014190 ("You indicated you had an Occupy case. This case [ ] needs to go to the bucketing team today. Would you let me know where it is so I can get it to them, thanks.").

The current status of the Occupy applications is unclear. Applications filed in the first half of 2012 were still unresolved by the end of the year, but whether or how they may have been resolved in 2013 or 2014 has not been publicly disclosed. When asked, the IRS told the Subcommittee that it was barred by Section 6103 of the tax code from discussing individual cases and could not disclose the current status of the Occupy applications. The IRS personnel interviewed by the Subcommittee indicated that they did not know the current status of the cases.

On the internet, Occupy Solidarity Network, Inc., which operates the OccupyWallSt.org website, "the oldest and most trusted online resource for the Occupy Movement," describes itself as a "New York 501(c)(4) non-for-profit organization."[482] Another group, Occupy.com, Inc., which operates the Occupy.com website, describes itself as a nonprofit corporation "currently awaiting our tax-exempt, 501(c)(3) status."[483] Friends of Occupy Portland has described itself as a nonprofit "social welfare/civic organization for the purpose of tax laws."[484] It is unclear whether these or other Occupy groups submitted the applications described in IRS documents.

One Occupy group which does not appear to have filed one of the applications already discussed has provided public information on its website about its nearly two-year effort to obtain tax exempt status from the IRS. On its website, Occupy the Roads, a group whose self-described mission is "to educate Americans about the social and economic injustices which oppress people or destroy resources of the earth for profit," indicates that it first applied for 501(c)(3) status from the IRS in August 2012.[485] More than a year later, in September 2013, the group's application was still pending.[486] In January 2014, hoping to expedite the process, Occupy the Roads divided its operations and sought approval as two tax-exempt organizations — one under Section 501(c)(3) and one under Section 501(c)(4).[487] Both applications were finally approved in April 2014, 21 months after the initial application was filed.[488] According to Occupy the Roads, its activities were curtailed during the prolonged review process, because its uncertain tax status did not permit it to apply for grants or accept tax-deductible donations. After approval was granted, on June 6, 2014, the group's director called the IRS to ask why the group's approved 501(c)(3) status was still not listed on the IRS website. According to the director, the IRS informed her that the group's approved application had been "lost," and it

---

[482] See "About Occupy Wall Street," prepared by Occupy Wall Street, www.Occupywallst.org/about/.
[483] "Donate," prepared by Occupy.com, www.occupy.com/donate.
[484] "How to Support FO OP," prepared by Friends of Occupy Portland, www.foopdevelopment.blogspot.com.
[485] See "About Us," prepared by Occupy the Roads, http://www.occupytheroads.com/blog/about/; 1/23/2014 "Weekly Update," Janet Wilson, Occupy the Roads, http://www.occupytheroads.com/blog/2014/01/11326/.
[486] 9/24/2013 "Parkersburg on hold while IRS play politics for 501c3 status," Janet Wilson, Occupy the Roads, http://www.occupytheroads.com/blog/2013/09/10322/ (discussing group's effort to establish its headquarters in Parkersburg, West Virginia). According to Occupy the Roads executive director Janet Wilson, "The agent at the IRS has said we don't educate enough…. We are fighting back with the help of a tax advocate and a Senator from Colorado." Id. See also 6/30/2013 "Ready to roll on to Parkersburg," Occupy the Roads, http://www.occupytheroads.com/blog/2013/06/ready-to-roll-on-to-parkersburg/.
[487] 1/14/2014 "Ready for Final Inspection at Pueblo House," Occupy the Roads, http://www.occupytheroads.com/blog/2014/01/11291/. According to Occupy the Roads, the IRS asked it to file a second 501(c)(3) application, and converted its initial August 2012 application to a 501(c)(4) application. 1/23/2014 "Weekly Update," Janet Wilson, Occupy the Roads, http://www.occupytheroads.com/blog/2014/01/11326/.
[488] 4/23/2014 "OTR gives birth to OTR Foundation," Janet Wilson, Occupy the Roads, http://www.occupytheroads.com/blog/2014/04/otr-otr-foundation/; 6/6/2014 "Lost in space but surely this cant be?", Janet Wilson, Occupy the Roads, http://www.occupytheroads.com/blog/2014/06/lost-in-space-but-surely-this-cant-be/.

might take up to eight more weeks for the listing to appear, during which time potential grantors and donors would be unable to easily verify Occupy the Roads' tax-exempt status.[489]

The evidence shows that Occupy cases were handled by the same IRS personnel who handled Tea Party cases and, like Tea Party groups, were flagged using BOLO entries that at first focused on the groups' names and political views, and later employed the same Emerging Issues criteria used to flag Tea Party cases. Occupy groups also underwent the same EOT reviews and experienced the same lengthy delays and mismanagement as their Tea Party counterparts.

**(3) Emerge America**

A third example of IRS treatment of liberal groups involves organizations associated with Emerge America. Emerge America characterizes itself as an organization dedicated to encouraging and training Democratic women candidates to run for office.[490] It currently operates in 14 states and has affiliates across the country.[491]

Emerge organizations began applying for 501(c)(4) tax exempt status in 2008. Documents reviewed by the Subcommittee discuss at least eight Emerge organizations whose tax exempt applications have undergone IRS review since then. Like Tea Party groups, the Emerge applications were singled out for heightened scrutiny by the IRS using inappropriate screening criteria focused on their names, and the applications were subjected to extended EOT review. In 2011, after a three-year wait, the IRS denied tax exempt status to three Emerge organizations and approved tax exempt status for five others, demonstrating ongoing confusion within the IRS on applying the law to groups involved with partisan campaign activity. In 2012, the IRS revoked the tax exemptions that had been granted to the five Emerge organizations in the prior year.

**Emerge Applications Flagged.** The first Emerge application appears to have been flagged for heightened review in January 2008.[492] By September 2008, two Emerge applications had been sent to the EO Technical Unit for review. Donna Abner, in the IRS Quality Assurance division, wrote:

> "Because of the partisan nature of the cases – guidance from EO Technical is pending. … Per IRM [Internal Revenue Manual] 7.20.5 – 'sensitive political issue' cases were designated as subject to mandatory review in 2007. Please note the two case[s] above closed in 2008 that did not come through QA [IRS Quality Assurance]. I recommend an

---

[489] 6/6/2014 "Lost in space but surely this cant be?", Janet Wilson, Occupy the Roads, http://www.occupytheroads.com/blog/2014/06/lost-in-space-but-surely-this-cant-be/.

[490] According to Emerge America's website: "Emerge America is changing the face of American politics by identifying, training and encouraging women to run for office, get elected and to seek higher office. Our intensive, cohort-based seven-month training program is unique. As the number of elected Democratic women remains flat or even declines, the need for our work is growing across the country." "About Emerge America," prepared by Emerge America, http://www.emergeamerica.org/about.

[491] Id.

[492] See 4/28/2010 EO Technical Significant Case Report, Exhibit 21, House Ways and Means Committee, http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf.

> alert be issued regarding this type of case as well as a reminder that 'sensitive political issue' cases are subject to mandatory review."[493]

Her email indicated that two other Emerge cases had already been "closed," in addition to the two cases then undergoing review, but did not indicate whether those applications had been approved or denied.[494] The Subcommittee was told that, at some point, an email alert was issued to EO personnel as Ms. Abner had requested, asking them to be on the lookout for Emerge cases.[495]

In November 2008, two Emerge applications were the subject of an EO Sensitive Case Report.[496] The report was prepared by Jon Waddell, a senior EOD manager who also worked on Tea Party and ACORN cases. He wrote:

> "Two organizations from 2 different states applied for exemption under section 501(c)(4) for the purpose of training women to run for political office. The services are only provided to women affiliated with the Democratic Party and focus on a variety of subjects such as public speaking and press relations, as well as how to conduct fund raising activities. The applications appear to represent potential partisan political activity."[497]

**EOT Review.** At EOT, the two Emerge cases were originally assigned to Justin Lowe, an EOT tax law specialist who handled a variety of 501(c)(4) cases involving political and campaign activities, including Tea Party cases.[498] Mr. Waddell coordinated with Mr. Lowe on the Emerge cases.[499] In February 2009, when a third case, described as "another Emerge Case (political Case)," was identified, and Mr. Waddell learned that Mr. Lowe had been temporarily

---

[493] 9/8/2008 email from Donna Abner to Cindy Westcott and others, "Political Case Alert," IRSR0000011493 - 494. Under IRM 7.20.5.4, IRS Quality Assurance conducts mandatory reviews of certain activities, including:

> "Applications that present sensitive political issues, including the following types of activities:
> • Voter registration
> • Inaugural and convention host committees
> • Post-election transition teams (to assist the elected official prior to officially assuming the elected position)
> • Voter guides
> • Voter polling
> • Voter education
> • Other activities that may appear to support or oppose candidates for public office."

Internal Revenue Manual, § 7.20.5.4 (03-0-2008), "Cases Subject to Review," http://www.irs.gov/irm/part7/irm_07-020-005.html.

[494] 9/8/2008 email from Donna Abner to Cindy Westcott and others, "Political Case Alert," IRSR0000011493 - 494. The IRS told the Subcommittee that Section 6103 of the tax code barred the IRS from discussing the closed cases.

[495] The IRS told the Subcommittee that Section 6103 of the tax code barred the IRS from providing a copy of the email alert. When the first official BOLO list was issued almost two years later, in August 2010, it did not include a separate entry for Emerge groups, perhaps because of this earlier email alert.

[496] See 11/14/2008 Sensitive Case Report, prepared by Jon Waddell, IRS, IRSR0000444824 - 825. See also 11/19/2008 Sensitive Case Report, IRSR0000444817 - 829.

[497] 11/14/2008 Sensitive Case Report, prepared by Jon Waddell, IRS, IRSR0000444824 - 825. See also 11/19/2008 email from Cindy Westcott to Oksana Xenos, "Sensitive Case Report for November," IRSR0000444817.

[498] See 12/12/2008 emails exchanged between Jon Waddell and Justin Lowe, "Emerge Case Correspondence," IRSR0000640307 - 308.

[499] Id.

detailed to another office, he contacted the EOT head, Steven Grodnitzky, about what to do. Mr. Grodnitzky advised Mr. Waddell to consult with EOT tax law specialists Siri Buller and Andy Megosh, who handled "political activity cases."[500]

Ms. Buller became the lead EOT contact for the three Emerge cases.[501] In at least one of them, she sent a development letter to gather more information about the group and its application.[502] In April 2010, another EOT specialist Janet Gitterman, working on still another Emerge case, also worked on a development letter.[503]

On April 28, 2010, an EOT Sensitive Case Report indicated that Emerge applications were then pending from four organizations: Emerge Maine, Emerge Nevada, Emerge Massachusetts, and Emerge Oregon.[504] The report indicated that the groups were being reviewed to determine "[w]hether orgs that recruit women belonging to [the] Democratic party to schools that teach campaign-related skills qualify for C4 status."[505] April 2010 was also the first month that a Sensitive Case Report was prepared for two Tea Party groups.[506]

In July 2010, as described earlier, at a routine "Screening Workshop" to alert EOD screeners to a variety of issues, a presentation urging IRS personnel to look for groups involved with "political activities" listed "Emerge" groups along with "Tea Party" groups.[507] The presentation stated that "the following names … were of interest and should be flagged for review," and listed Emerge along with six other groups.[508] This presentation showed that, like

---

[500] 2/6/2009 email from Steven Grodnitsky to Jon Waddell, "Emerge Case Correspondence," IRSR0000640307.
[501] See 4/28/2010 EO Technical Significant Case Report, Exhibit 21, House Ways and Means Committee, http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf.
[502] See 4/23/2010 email exchange between Siri Buller and Janet Gitterman, "scr case," IRSR0000626700 - 701.
[503] Id.
[504] The Significant Case Report contains specific taxpayer information that the IRS is prohibited from disclosing under Section 6103 of the tax code, but the report was released in unredacted form by the House Ways and Means Committee, which has independent authority to release taxpayer information. See 4/28/2010 EO Technical Significant Case Report, Exhibit 21, House Ways and Means Committee, (referencing Emerge Maine, Emerge Nevada, Emerge Massachusetts, and Emerge Oregon), http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf. For the redacted version provided to the Subcommittee, see 4/28/2012 email from Steven Grodnitzky to Lois Lerner and Robert Choi, "SCR Chart," IRSR0000141809 - 811.
[505] 4/28/2010 Significant Case Report, Exhibit 21, House Ways and Means Committee, http://waysandmeans.house.gov/uploadedfiles/4.9.14_lerner_referral_and_exhibits.pdf.
[506] 4/19/2010 TEGE Division Sensitive Case Report, submitted by Carter Hull, IRSR0000165382 - 383. ("The various 'tea party' organizations are separately organized, but appear to be a part of a national politically conservative movement that may be involved in political activities."). As explained earlier, the prior month, Gary Muthert, a senior EO screener, had directly compared the Emerge and Tea Party cases, calling Emerge "an equal Democratic 'tea party' type entity." 3/16/2010 email from Gary Muthert to John Shafer, "TEA PARTY," IRSR0000482737.
[507] See 7/28/2010 "Screening Workshop Notes," prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 - 704, at 703; "Screening Workshop July 28, 2010," powerpoint presentation prepared by IRS, IRSR0000006674 - 699, at 689.
[508] 7/28/2010 "Screening Workshop Notes," prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 - 704, at 703 (stating that, in addition to Tea Party groups, "the following names and/or titles were of interest and should be flagged for review: o 9/12 Project, o Emerge, o Progressive, o We The People, o Rally Patriots, and o Pink-Slip Program").

Tea Party groups, IRS screeners were instructed to look for Emerge groups by name and, due to their "political activities," ensure they were subjected to heightened review.[509]

**Emerge Denials.** In the first half of 2011, three years after the first Emerge application was flagged, the IRS denied tax exempt status to three Emerge organizations due to the groups' engaging in partisan political activity benefiting the Democratic party.[510] Emerge America publicly acknowledged at the time that three state organizations, Emerge Nevada, Emerge Maine, and Emerge Massachusetts, had been denied tax exemption.[511]

At the same time the IRS denied those three applications, which had undergone EOT review, the IRS approved five other Emerge applications which had apparently been processed by EO screeners without EOT input.[512] The executive director of one of the groups granted tax exemption, Emerge California, was quoted as saying: "It's just bizarre. Nevada has been around and waiting for approval for the last five years, and in the interim, Oregon and Kentucky are established and file for their approval – and Kentucky gets it but Nevada, Maine and Massachusetts don't."[513]

When Lois Lerner learned that the five Emerge applications had been approved by EOD screeners in the Cincinnati office without EOT input, she wrote: "How in the world did this get screened in Cincy?"[514] That IRS EO personnel approved some Emerge cases and disapproved others in the same year provides another indicator of the subjective nature of the decisionmaking

---

[509] Id. The Minority Staff's Dissenting Views contend that the IRS treated the Emerge groups differently from Tea Party groups due to their partisan activities, but the facts indicate that, in both cases, the groups were flagged for heightened review due to their involvement in political activities, were flagged in part due to their names, were sent to Washington, D.C. for EOT review, were subjected to development letters, and underwent years of review. See Dissenting Views at 205-206.

[510] See 5/26/2011 email from Siri Buller to Jason Kall, "Referral to ROO," IRSR0000196739 - 758, at 739 ("Recently, we denied the 1024 applications of three state chapters of [REDACTED BY IRS], a Democratic candidate training school for women. We denied the applications on the basis that their primary activity confers a private benefit to a political party. In the course of reviewing these applications, we learned that Determinations had already approved the 1024 applications of several other state chapters and the national organization."). See also 2011 IRS letters to the Emerge groups denying their applications. Id.

[511] "3 Groups Denied Break by IRS are Named," New York Times, Stephanie Strom, (7/21/2011), http://www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?_r=0. See also 7/20/2011 email from Stephanie Strom, New York Times to Grant Williams, IRS, "Bazinga," IRSR0000640490 (asked why some Emerge organizations had been approved, while others hadn't); 7/22/2011 email from Lois Lerner to Holly Paz, "New York Times – 501(c)(4)s," IRSR0000350749.

[512] See 5/26/2011 email from Siri Buller to Jason Kall, "Referral to ROO," IRSR0000196739 ("In the course of reviewing these [Emerge] applications, we learned that Determinations had already approved the 1024 applications of several other state chapters and the national organization."); 7/21/2011 email from Donna Abner to Holly Paz, "IRM 7.20.5," IRSR0000429501 ("I'm also concerned with the cases approved in screening. The screening checksheet does not include 'Political Activities-Sensitive Issues' among the types of cases 'not' suitable for screening. Despite this, the cases were closed on merit with no contact. It might be helpful to pull the admin file to see if the applicant fully disclosed their operations - or - if the screeners/specialists need a reminder regarding political/sensitive cases.").

[513] "3 Groups Denied Break by IRS are Named," New York Times, Stephanie Strom, (7/21/2011), http://www.nytimes.com/2011/07/21/business/advocacy-groups-denied-tax-exempt-status-are-named.html?_r=0.

[514] 7/20/2011 email from Lois Lerner to Holly Paz, "website info," IRSR0000196659. See also 10/21/2011 email from David Fish to Nanette Downing, Holly Paz, and others, "previously referred cases," IRSR0000636330 (discussing plans to revoke the approval of "5 or 6 Emerge cases").

process as well as ongoing IRS confusion over how the rules related to campaign activities should be applied to 501(c)(4) organizations.

In 2012, the IRS reversed course and revoked the tax exemptions that had been granted to the five Emerge organizations in the prior year.[515] To prevent a repetition of the problem, two training sessions were provided to IRS screeners and determinations specialists.[516]

These facts show that Emerge groups, like Tea Party groups, were identified using inappropriate selection criteria focused on their names and political views, were subjected to EOT analysis and development letters, and in some cases, waited three years for their applications to be resolved. Worse yet, the applications were decided by the IRS in an inconsistent manner, and five groups that were granted tax exemptions lost those exemptions within a year. No Tea Party group experienced that same level of case mismanagement.

**(4) Progressive Groups**

A final example of IRS treatment of liberal groups involves organizations with "Progressive" or "Progress" in their names. Like some Tea Party groups, a number of these groups were identified using inappropriate selection criteria focused on their names and political views, were subjected to EOT reviews, and experienced lengthy delays and intrusive questions.

**Inappropriate Selection Criteria.** The earliest occasion identified by the Subcommittee in which "Progressive" was used as a selection criteria for groups involved with political activity was in connection with a July 2010 IRS "Screening Workshop," described earlier, which directed EOD screeners to look for certain applications and send them to the same IRS group handing Tea Party cases. The official IRS summary of the workshop included these notes:

"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 [Group] 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

[515] See 7/17/2012 draft document from Lois Lerner to Steven Miller, "Recent section 501(c)(4) activity," IRSR0000468978 - 980, at 979 ("Emerge cases were worked in 2008. Recent activity was revoking the 5 organizations that were wrongly approved.").

[516] See 8/1/2011 email from Holly Paz to Justin Lowe, "Sensitive Political Issues – CENTRA Session," IRSR0000435473 (indicating Judith Kindell conducted a training session with EO employees in September 2011, and Siri Buller provided a training presentation sometime in 2011; in her email, Ms. Paz stated: "[t]he private benefit analysis of Emerge should also be discussed.").

- Pink-Slip Program.'"[517]

This IRS document shows that at the earliest stages of the effort to subject Tea Party groups to heightened review, in July 2010, IRS screeners were also advised to look for progressive groups, using the groups' names as the key selection criteria.[518]

When the IRS issued the first Be On the Lookout (BOLO) list in August 2010, progressive groups were again spotlighted. As indicated earlier, the BOLO's "TAG Historical" section included an entry urging EO employees to look for applications filed by groups involved with "Progressive political activities," explaining:

> "[C]ommon thread is the word 'progressive.' Activities appear to lean towards a new political party. Activities are partisan and appear anti-Republican. You see references to 'blue' as being 'progressive.'"[519]

This BOLO description urged screeners to focus on the "the word 'progressive,'" described the groups' political views, and identified their "political activities" as the central concern.[520] Like the BOLO entry for Tea Party groups, it urged IRS personnel to flag a set of groups solely because of their names and political views and subject them to heightened review.

**Heightened Reviews and Lengthy Delays.** Gary Muthert, a senior EOD screener interviewed by the Subcommittee, confirmed that, in 2010, he conducted searches using the term "progressive" to identify groups for heightened review.[521] Mr. Muthert explained that, due to the progressive entry in the BOLO TAG Historical section, all EOD screeners were obligated to be on the lookout for those groups, including by running searches for those entities and checking their files to see if they had any of those cases.[522] Mr. Muthert told the Subcommittee that, just as he did with the Tea Party, he ran electronic queries using the word "progressive" and would have sent any cases he found to the relevant specialty group handling them.[523] That specialty group, Group 7822, was also handling the Tea Party cases.

---

[517] 7/28/2010 "Screening Workshop Notes," prepared by IRS, attached to 7/29/2010 email from Nancy Heagney to multiple IRS colleagues, IRSR0000006700 - 704, at 703 (circulating the "Screening Workshop meeting minutes). See also "Screening Workshop July 28, 2010," powerpoint prepared by IRS, IRSR0000006674 - 699, at 690 (also indicating that IRS screeners should look for "Progressive" groups). The Minority Staff's Dissenting Views state that the "progressive cases, unlike their Tea Party counterparts, were not selected for additional scrutiny because of the group's name," Dissenting Views at 195, but this document shows that, in fact, IRS screeners were explicitly instructed to use certain "names," including "Progressive," to identify groups that "should be flagged for review."

[518] In the same presentation, while the Tea Party case coordinator, Elizabeth Hofacre, advised against sending progressive cases to her, she did not suggest that heightened review of those cases was inappropriate or that the cases should not be sent to Group 7822, which was also handling the Tea Party cases. Id.

[519] August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515, at 513; August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196. Because the 2010 BOLO has been partially redacted by the IRS, see also July 2012 BOLO spreadsheet, prepared by the IRS, at IRS0000001484 - 499.

[520] Again, in contrast to the Minority Staff's Dissenting Views statement that "progressive cases, unlike their Tea Party counterparts, were not selected for additional scrutiny because of the group's name," Dissenting Views at 195, this BOLO entry directed IRS personnel to focus on "the word 'progressive.'"

[521] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

[522] Id.

[523] Id.

The evidence shows that groups with "Progressive" or "Progress" in their names were, in fact, subjected to heightened scrutiny by the IRS. For example, a list compiled by the IRS Chief Risk Officer, David Fisher, looking at 501(c)(4) groups reviewed by the IRS from May 2010 through December 2012, identified 20 applications filed by groups with the words "Progressive" or "Progress" in their names.[524] Of those 20 applications, nine were included in the same advocacy case list as the Tea Party groups and four others were otherwise subjected to EOT review, for a total of 13 cases out of 20, or 65%.[525] The list also showed that at least eleven of the cases had been under IRS review for six months to a year.[526] Five other applications on the list appear to have been processed relatively quickly.[527] The final four applications had been under consideration for just one to five months before the analysis was undertaken, making it difficult to determine whether they were undergoing heightened scrutiny.[528]

Several groups with "Progressive" or "Progress" in their names have publicly disclosed the difficulties they experienced in obtaining tax exempt status from the IRS. A group called Progress Texas, for example, reported that it had been subjected to intrusive questions and underwent an 18-month delay before it obtained a 501(c)(4) exemption.[529] Another group known as Action for a Progressive Future had a similar experience, undergoing both extensive questioning and an 18-month delay.[530] While some dismiss concerns involving Progressive

---

[524] See IRS analysis of 501(c)(4) advocacy cases as of 6/5/2012, PSI-IRS-37-000004 - 019, at 011 - 012. The total does not include four groups that appear to have been processed prior to May 2010. Although the Minority Staff's Dissenting Views suggest, at 201-202, that the IRS limited its review to progressive groups seeking 501(c)(3) status, all of the cases on the list compiled by the IRS Chief Risk Officer sought (c)(4) status. Id.

[525] IRS analysis of 501(c)(4) advocacy cases as of 6/5/2012, PSI-IRS-37-000004 - 019, at 011 (indicating that nine cases were included in a May or December 2012 advocacy case list, and four cases underwent "other tech/group screening" as shown by the "6" or "9" designation in the column showing "Current EDS Status"). A TIGTA letter has indicated that seven, rather than nine, progressive groups appeared on the advocacy case list, but TIGTA's smaller number is due to TIGTA's considering only the May 2012 advocacy case list and not the December 2012 advocacy case list which included two additional progressive groups. See 7/19/2013 letter from TIGTA to Congressman Sander Levin of the House Committee on Ways and Means, http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/TIGTA%20Response%20Letter%20to%20the%20Honorable%20Sander%20Levin%207-19-13.pdf.

[526] Id.

[527] Id.

[528] Id.

[529] See, e.g., "Nonconservative Groups Say IRS Scrutinized Them Too," National Public Radio, Brian Naylor (5/19/2013), http://www.npr.org/2013/05/19/185206908/nonconservative-groups-say-irs-scrutinized-them-too; "IRS scrutinized some liberal groups," Politico, David Nather (7/22/2013), http://www.politico.com/story/2013/07/irs-scrutinized-liberal-groups-94556.html (discussing Progress Texas and Progress Now), providing a link to an IRS letter at http://www.scribd.com/doc/141747252/IRS-Request-for-More-Information-Progress-Texas-Feb-2012. See also "Does the IRS really have it in for tea party groups?" Colorado Independent, Teddy Wilson (3/28/2012), http://www.coloradoindependent.com/116361/does-the-irs-really-have-it-in-for-tea-party-groups (providing copies of IRS letters sent to a conservative group and a progressive group in Texas and indicating the two letters were equally intrusive).

[530] See "IRS approved liberal groups while Tea Party in limbo," USAToday, Gregory Korte (5/15/2013), http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-progressive-groups/2158831/ (discussing Action for a Progressive Future as well as mentioning Bus for Progress and Progress Florida). Another liberal group that did not have "Progressive" or "Progress" in its name, but reported similar experiences was Alliance for a Better Utah, a "multi-issue education and advocacy organization promoting progressive ideas and causes." See Alliance for a Better Utah website, http://betterutah.org/about/; "In IRS Scandal, Spat Over Level of Scrutiny," Wall Street Journal, John McKinnon (6/25/2013), http://online.wsj.com/news/articles/SB10001424127887323998604578567963466211132 (indicating Alliance for a

groups by noting that all of the Progressive groups on the IRS case advocacy list eventually obtained tax exempt status, during the same period 111 conservative groups – more than five times as many – also received approval, while others continued to wait for resolution of their applications. Eventual approval of an application does not mean that the application approval process itself was appropriate or timely.

The following chart summarizes some of the common negative experiences among the liberal groups that filed 501(c)(4) applications with the IRS.

**IRS PROCESSING OF 501(C)(4) APPLICATIONS**
**2010 - 2013**

| | ACORN Successors | Occupy Groups | Emerge Groups | Progressive Groups | Tea Party Groups |
|---|---|---|---|---|---|
| Inappropriate selection criteria focusing on name or political views | X | X | X | X | X |
| BOLO searches | X | X | | X | X |
| IRS reviews in Cincinnati and Washington | X | X | X* | X* | X* |
| Intrusive questions | | | X* | X* | X* |
| At least one year of delay | X* | X* | X* | X* | X* |
| At least three years of delay | X* | | X* | | X* |
| Tax exemption reversed | | | X* | | |

*Affected some but not all groups.

Together, the evidence of how the IRS treated 501(c)(4) applications filed by ACORN successor, Occupy, Emerge America, and progressive groups offers additional proof that the IRS subjected liberal groups to the same types of inappropriate selection criteria, heightened scrutiny, delayed processing, and mismanagement that affected conservative groups.

### G. Developing 501(c)(4) Guidance

The Subcommittee investigation found that applications filed by both conservative and liberal groups were put on hold for years while IRS revenue agents awaited guidance from the EO Technical Unit on how to proceed. The IRS' inability to provide timely and effective guidance for EO employees on how to develop and evaluate 501(c)(4) cases involving campaign

---

Better Utah affiliate had waited almost two years for action on a still pending application). Still other liberal groups were the subject of other BOLO listings, including groups promoting medical marijuana, Palestinian rights, and implementation of President Obama's health care law. See, e.g., "New Records: IRS Targeted Progressive Groups More Extensively Than Tea Party," Think Progress website, Josh Israel and Adam Peck (4/23/2014), http://thinkprogress.org/politics/2014/04/23/3429722/ire-records-tea-party/ (providing a chart showing that IRS BOLOs issued between August 2010 and April 2013, "included more explicit references to progressive groups, ACORN successors, and medical marijuana organizations than to Tea Party entities"); "I.R.S. Scrutiny Went Beyond the Political," New York Times, Jonathan Weisman (7/4/2013), http://www.nytimes.com/2013/07/05/us/politics/irs-scrutiny-went-beyond-the-political.html?pagewanted=all&_r=0 (discussing Minnesota Break the Bonds, a group promoting Palestinian rights, that underwent intrusive questioning and a two-year delay in the processing of its then still pending application).

activities was a major contributor to the casework delays. Missed opportunities included the IRS' inability to produce a 501(c)(4) guidesheet for EO employees; failure to provide templates for or detailed guidance on development letters; and repeated changes in the key screening criteria. In large part, the IRS' difficulties revolved around its decision to use a facts and circumstances test to evaluate the cases rather than provide more objective criteria and bright line rules to guide EO deliberations.

### (1) Seeking Increased Guidance

A primary reason the advocacy applications were delayed for years was IRS hesitation and confusion over how to apply the 501(c)(4) requirements to organizations involved with campaign activities. Because the agency mandated use of a facts and circumstances test that sought to take into account all relevant material factors, whatever they might be, the IRS required EO employees to make case-by-case determinations with multiple interpretation issues and few objective standards or bright line rules.[531]

One key issue was determining what activities qualified as campaign intervention. Questions included how to evaluate issue ads, legislative campaigns, voter educational materials, voter guides, and donations to other 501(c)(4) groups. A second issue was that the law governing 501(c)(4) organizations stated unequivocally that they should be used "exclusively" to promote social welfare, but the key implementing regulation stated that 501(c)(4) organizations may be used "primarily" for social welfare activity.[532] That statutory-regulatory mismatch required EO personnel to determine when an organization was engaged "primarily" in social welfare activities. The issues included how to categorize various expenditures, how to quantify volunteer efforts, and whether to use a percentage test.

The IRS provided limited regulatory guidance and revenue rulings on those and other issues, leaving EO personnel struggling to interpret how the facts and circumstances test should be applied. In addition, because the facts and circumstances test, by its nature, considered a wide range of unspecified factors, applicants often criticized it as inherently time consuming, intrusive, unpredictable, nontransparent, or subjective.[533] EO agents had to operate under that

---

[531] See, e.g., 4/30/2013 "Memorandum for Deputy Inspector General for Audit," from Joseph H. Grant, Acting IRS Commissioner, Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 44 ("There are no bright line tests for what constitutes political campaign intervention (in particular, the line between such activity and education) or whether an organization is primarily engaged in social welfare activities.").

[532] Compare 26 U.S.C. § 501(c)(4) (2012) with 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) (2012). An internal TIGTA memorandum took note of this contradiction: "It appears that the Treasury regulation contradicts the I.R.C. [Internal Revenue Code]. If an organization is required by law to operate exclusively for the promotion of social welfare, its activities cannot be properly assessed using a lesser standard of primarily engaged in promoting the common good and general welfare of the people of the community and still meet the requirements of the law." 1/28/2013 TIGTA Memorandum for the Office of the Chief Counsel, by the Assistant Inspector General for Audit (Management Services and Exempt Organizations), "Request for Assistance Regarding Internal Revenue Code Section 501(c)(4) and Treasury Regulation Section 1.501(c)(4)-1," PSI-TIGTA-16-000006 - 009, at 007.

[533] The problems with the facts and circumstances test were described in one publication, the National Review, as follows: "The proposed rule [to revise the regulation] is not entirely without merit. It would do away with the broad, indeterminate 'facts and circumstances' test that was a major contributing factor to the IRS scandal. Under that rule, it was left to IRS agents, considering all the 'facts and circumstances,' to decide whether an organization's activities constituted 'social welfare activities' (good) or 'electioneering' (bad). Obviously, that gave huge discretion to the

constant barrage of criticism as well as broader skepticism about the ability of IRS revenue agents to evaluate campaign activities in a fair, consistent, and unbiased manner.

**Consensus on Lack of Clear Standards.** Virtually all of the IRS personnel interviewed by the Subcommittee, from the most to least senior, described the facts and circumstances test as difficult to administer and made more difficult by a lack of objective criteria or bright line rules.

Defining campaign intervention activities was widely acknowledged as a problem. Former IRS Commissioner Steven Miller told the Subcommittee that determining campaign intervention was a "very difficult area."[534] In 2008, when Mr. Miller was Commissioner of Tax Exempt and Government Entities, he wrote a draft memo to Lois Lerner about the "2008 Political Campaign Season" and advocated issuing additional guidance due to "the limited and somewhat flawed statutory tools available to us to address instances of political intervention."[535] When asked about the revenue rulings used by agents to determine political advocacy and campaign intervention, IRS Chief Counsel William Wilkins said they were "better than nothing," but "not that helpful."[536]

EO head Lois Lerner wrote to a colleague: "I personally have been up to the Hill at least 8 times this past year to explain the complexities of the rules — they are not black and white and they are not always intuitive."[537] She made the same point at a January 2013 meeting with TIGTA officials. A summary of that meeting stated:

---

IRS agents .... Replacing the 'facts and circumstances' test with more objective criteria is a plus." "Silenced by the Taxman," National Review Online, Bradley A. Smith (11/30/2013), http://nationalreview.com/node/365143/print.

[534] Subcommittee interview of Steven Miller, IRS (12/11/2013).

[535] 1/24/2008 memorandum from Steven Miller to Lois Lerner, "2008 Political Campaign Season," IRSR0000379714 -719 (Mr. Miller wrote: "This leads to the third goal for this year. I believe we must clarify our interpretation of the law in certain areas, and act to obtain certainty with respect to several of our legal positions. We can do some of this by issuing additional guidance, or, where our guidance is challenged, by seeking confirmation of our position in the courts. But guidance is preferred.").

[536] Subcommittee interview of William Wilkins, IRS (12/4/2013). Mr. Wilkins noted that the lack of helpful guidance was one of the motivating factors behind the IRS's November 2013 proposed regulation on political activity. Id. See also 7/25/2011 meeting invitation from Justin Lowe, an attorney in the Chief Counsel's office, "Advocacy Orgs Meeting," IRSR0000428433 (Mr. Lowe: "David Marshall and Amy Franklin, who are working on the advocacy organization cases in Chief Counsel, suggested that we meet so that they can gain a better understanding of the big picture surrounding these cases and so that we can discuss some of the broad legal issues together. This sounds like a good idea to me as the issue is a tricky one and the more collaboration we have, the better.").

[537] 1/31/2012 email from Lois Lerner to Christopher Wagner, "A Couple Items," IRSR0000122863. See also 12/21/2012 email from Lois Lerner to Nancy Marks, "501(c)(4) question in Senate Finance Committee Nomination Hearing," IRSR0000408471 (Ms. Lerner: "Just got back from lunch with my old FEC boss, Larry Noble who now works for Americans for Campaign Reform. Informed me that Congress is pretty mad at the IRS for not doing anything about the c4s – I'm shocked! But what really got me is the expectation that not only should we be revoking them, we should be prosecuting them for tax fraud! Hadn't heard that before. It was disappointing to me that Larry didn't recognize that determining what is political activity is not easy – he thought IRS should have provided 'clearer' guidance – you can't win."); 8/16/2012 email exchange between Sharon Light and Lois Lerner, "Lungren (2012-30473)," IRSR0000221479 (Ms. Light: "[A group hasn't] demonstrated they qualify for c/3. I'm not sure they can, but we figured one more development letter that educated them (in the absence of having their own counsel) would be more appropriate (and understandable) than a denial." Ms. Lerner responded: "Nothing is ever sure under IRS rules (:").

> "Lois noted that it is difficult for non-lawyers (like our exams and determs agents) who are looking for clear rules to operate in areas where there are no clear rules. In this situation you can't apply black and white rules."[538]

Ms. Lerner later complained to TIGTA officials that in their report: "[T]here was no recognition about how difficult these cases were and the fact that there is no bright line test for making determinations on applications involving these issues."[539] At another point, Ms. Lerner wrote to an attorney in the Chief Counsel's office: "We need guidance on c4, we need guidance on c4, we need guidance on C4. … IRS is getting hammered!"[540]

Other EO personnel made similar points. Former EOT head and later head of the Rulings and Agreements Unit Holly Paz told the Subcommittee that determining campaign intervention was difficult and confusing for the Cincinnati revenue agents working the cases.[541] Cindy Thomas, Determinations Unit head, told the Subcommittee that IRS agents struggled with determining what political advocacy and campaign intervention were, also describing it as a difficult and confusing area.[542] Hilary Goehausen, an EOT specialist who worked on the advocacy cases, told the Subcommittee that, under "the facts and circumstances [test] two people can come to different conclusions" on the same case.[543] Carter Hull, another EOT specialist who worked on the advocacy cases, described "political activity" as "a complicated area."[544] One of the Cincinnati determinations specialists, Stephen Seok, told the Subcommittee that, from his own experience, it was "almost impossible" to define campaign activity and the work was made harder by the absence of useful guidance.[545] Two other Cincinnati EOD employees, Gary Muthert and Elizabeth Hofacre, each told the Subcommittee that their jobs were made harder by the fact that they had received no training on how to apply the facts and circumstances test.[546]

**Defining Primarily.** IRS officials acknowledged a lack of clarity, not only with respect to what activities qualified as campaign intervention, but also as to what was meant by "exclusively" and "primarily." On September 19, 2012, Ms. Lerner wrote to two of her advocacy experts, Justin Lowe and Judith Kindell: "I am going up on the Hill today – I know both of you have given me insight about why the Reg say primarily instead of exclusively – like the statute, but I have no recollection of the reasons. Can you remind me ASAP please!?"[547] Mr. Lowe responded:

> "There is nothing public about why the regs say primarily instead of exclusively. In the old drafting files from when the regs were written, both (c)(3) and (c)(4) regs originally

---

[538] 1/31/2013 Minutes from meeting between IRS and TIGTA, prepared by IRS, IRSR0000428195 - 203, at 202.
[539] 3/26/2013 email from Troy Paterson, TIGTA, to Gregory Kutz, TIGTA, "EO Applications Report," TIGTA Bates No. 008440 (summarizing Mr. Paterson's conversation with Lois Lerner).
[540] 4/4/2013 email from Lois Lerner to Janine Cook, copying Holly Paz, "EO Enforcement Guidance Priority," IRSR0000054399.
[541] Subcommittee interview of Holly Paz, IRS (10/30/2013).
[542] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[543] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).
[544] Subcommittee interview of Carter Hull, IRS (11/19/2013).
[545] Subcommittee interview of Stephen Seok, IRS (11/22/2013).
[546] Subcommittee interviews of Gary Muthert, IRS (1/15/2014) and Elizabeth Hofacre, IRS (10/25/2013).
[547] 9/19/2012 email from Lois Lerner to Justin Lowe and Judith Kindell, "c4," IRSR0000184248 - 250, at 249.

> said primarily. During the editing process, a reviewer commented on the (c)(3) regs that the primarily language was overbroad and should be restricted, so the insubstantial wording was added. There was no similar comments or changes made to (c)(4) regs, so we don't know what the thinking was there."[548]

On another occasion in 2012, Joseph Urban, TEGE Tax Law Specialist, discussed the lack of a clear benchmark for the "primarily" standard:

> "FYI, among the questions I would ask an IRS witness at a hearing is why, after all these years, the IRS has not defined primary, or given any indication as to what facts and circumstances the IRS uses in determining whether a (c)(4)'s activities primarily benefit public or private interests. Mr/Ms Witness, don't you think vagueness might scare honest folks away from doing things they are permitted to do, but be exploited by those who want to take advantage of (c)(4) although they are not legitimate social welfare orgs? Doesn't vagueness leave the IRS open to charges of arbitrary enforcement?"[549]

In 2013, when asked about these issues during a hearing before the Senate Finance Committee, former IRS Commissioner Douglas Shulman testified:

> "I think everybody knew that it was very difficult to administer the (c)(4) laws, and so I do not have any memory of it, but there very well could have been conversations [between the IRS and the Treasury Department] about policy, the policy matters that members of this committee have talked about: should the 'primary purpose' test be changed?"[550]

Together, these statements suggest that senior IRS officials were well aware that the lack of guidance was inhibiting IRS enforcement efforts with regard to 501(c)(4) organizations.

**Percentage Standard.** Another ongoing source of debate and confusion, both within and outside of the IRS, was whether the agency used a percentage test to determine whether a group was engaged "primarily" in social welfare activities and, if so, what the percentage was.

When the Subcommittee asked about this issue in 2012, the IRS replied: "The IRS has taken no position on a fixed percentage or any one factor in precedential guidance."[551] When asked about the issue during a briefing, the IRS told the Subcommittee that the agency did not have an official percentage test that was used to decide cases.[552] Yet former Acting IRS

---

[548] 9/19/2012 email from Justin Lowe to Lois Lerner and Judith Kindell, "c4," IRSR0000184248 - 250, at 249. See also 3/21/2012 email from Justin Lowe to David Fish, "c4 history," IRSR0000410695 (attaching a legal analysis of the issue entitled, "Exclusively Standard Under §501(c)(4)," detailing decades of disputes within the IRS over the definition of "primarily").

[549] 4/20/2012 email from Joseph Urban to Lois Lerner and Nancy Marks, "Sen. Levin—Draft Response # 4," IRSR0000410028.

[550] Testimony of Douglas Shulman, "A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny," Senate Committee on Finance, S. Hrg. 113-232, (5/21/2013) , at 30.

[551] 6/4/2012 letter from IRS responding to Subcommittee, PSI-IRS-02-000001 - 026, at 008. See also earlier discussion of this issue in the Report's Background section.

[552] 4/30/2013 IRS briefing of the Subcommittee.

Commissioner Steven Miller told the Subcommittee that it was common knowledge at the IRS that a 501(c)(4) organization was permitted to engage in campaign activities up to 49% of its total expenditures.[553] Cindy Thomas, the Determinations head, told the Subcommittee that the IRS used a 51% test to establish whether an organization was engaged primarily in social welfare activities, although she didn't recall why that number was used or where the number came from.[554] Elizabeth Hofacre told the Subcommittee that the test was 51% social welfare activity and up to 49% campaign activity, while Carter Hull told the Subcommittee that "everyone assumed a 50% dividing line." During the 2012 special bucketing effort to reduce the advocacy case backlog, Holly Paz told the Subcommittee that she had instructed IRS employees to use a 51/49% test for permissible social welfare/campaign activity.[555]

The investigation also found several IRS documents suggesting that the agency was using a 51% test. For example, a July 2009 Instructor Guide for determinations specialists stated: "[E]xclusively only means 'primary' for (c)(4) and 'primary' is generally understood to mean 51%."[556] A summary of a 2010 briefing on Tea Party cases noted that when determining political activity, if that activity was "more than 50% political, possible PAC (Political Action Committee)."[557] On the other hand, an undated document from the IRS Quality Assurance Division stated:

> "There is no absolute 51% primary activity test. Because the law is so grey, the conclusion that the organization qualifies for exemption under 501(c)(4) is ultimately a professional assertion of the specialist."[558]

Together, these statements and documents show conflicting guidance and ongoing ambiguity over use of a percentage test in 501(c)(4) cases; the result was confusion for the Cincinnati determinations specialists who repeatedly requested clarifying guidance.

**(2) Failing to Agree on a Guidesheet**

In the summer of 2011, more than a year after the first Tea Party application was filed and as the number of advocacy cases collected by the IRS exceeded 100 for the first time, the Exempt Organizations Technical (EOT) Unit undertook an effort to produce a "guidesheet" to

---

[553] Subcommittee interview of Steven Miller, IRS (12/11/2013).
[554] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[555] Subcommittee interviews of Elizabeth Hofacre, IRS (10/25/2013), Carter Hull, IRS (11/19/2013), and Holly Paz, IRS (10/30/2013).
[556] 9/2009 Instructor Guide, "Exempt Organizations Determinations Unit 1b," prepared by the IRS, IRSR0000540412 - 545, at 436. See also 7/28/2010 Screening Workshop Notes, prepared by IRS, IRSR0000006723 (including a powerpoint presentation indicating that if an organization engaged in more than 50% campaign activity, it could be a political action committee: "Concerns: May be more than 50% political, possible PAC (Political Action Committee)").
[557] 7/28/2010 "Screening Workshop" powerpoint presentation, prepared by IRS, IRSR0000006674 - 699, at 692
[558] Undated "Advocacy Feedback from QA," prepared by IRS Quality Assurance, IRSR0000415066. See also 3/21/2012 email from Justin Lowe to David Fish, "c4," IRSR0000410695 (attaching an undated draft analysis of the issue entitled, "Exclusively Standard Under §501(c)(4)," prepared by the IRS, IRSR0000410696 - 711, at 709 ("The IRS has not published a precise method of measuring exempt activities or purposes in any of its published guidance, though three revenue rulings have stated that all of the organization's activities must be considered and that there is no pure expenditure test.")).

help EOD employees identify, develop, and evaluate the cases assigned to them. In September 2011, EOT circulated a draft, but multiple rounds of comments, criticisms, and suggested edits from the Chief Counsel's office slowed and eventually halted work on the draft. In May 2012, after about ten months of effort and despite ongoing requests for guidance, EO stopped working on the guidesheet, which was never finalized.

**Initiating the Guidesheet.** The EO Determinations (EOD) Unit had been pressing EOT to develop additional written guidance on how to handle advocacy cases since 2010.[559] According to EOT head Holly Paz, the effort to develop a guidesheet was finally undertaken, because the determination specialists in Cincinnati were struggling with how to handle the advocacy cases; understanding the activities that qualified as campaign intervention was generally difficult for the agents who were confused about how to make those determinations; and making those determinations was time consuming and complex.[560]

In July 2011, the Exempt Organizations division decided that additional written guidance on advocacy cases should be developed for the Determinations Unit.[561] An attorney in the IRS Chief Counsel's office later summarized the "three principal objectives" of the guidesheet as follows:

> "To help agents (1) screen applications for possible political campaign intervention or lobbying, (2) decide which cases require further development and which facts to develop, and (3) make a determination whether a particular activity is political campaign intervention or lobbying."[562]

**Circulating the Draft Guidesheet.** According to EOT specialist Hilary Goehausen, around the same time she took over the advocacy case duties from Carter Hull, then Acting EOT head Michael Seto directed her to draft the advocacy "guidesheet" that the Determinations Unit had been requesting.[563] Ms. Goehausen told the Subcommittee that she worked to model the guidesheet after ones the IRS had previously created for other issues like health care.[564] She said that she was the primary author of the initial draft, with help from Justin Lowe.[565]

In September 2011, Ms. Goehausen circulated the draft guidesheet to a number of EOT managers and specialists to obtain their comments, including Judith Kindell, Thomas Miller, Carter Hull, and Elizabeth Kastenberg.[566] On October 25, 2011, Determinations head Cindy

---

[559] See 5/14/2013 TIGTA Audit Report, at 12-13. See also 4/24/2010 email from Cindy Thomas to Steven Grodnitzky, "SCR," PSI-IRS-09-000045 - 046 (Ms. Thomas: "None of these cases have been assigned. They have been sitting in our Screening Group waiting for guidance from EOT.").
[560] Subcommittee interview of Holly Paz, IRS (10/30/2013).
[561] 5/14/2013 TIGTA Audit Report, at 13, 36.
[562] 4/20/2012 email from Janine Cook to Lois Lerner and others, "Retooled Advocacy Guidesheet," IRSR0000057184.
[563] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).
[564] Id.
[565] Id.
[566] Id. See also 9/21/2011 email from Hilary Goehausen to EOT colleagues, "Advocacy Orgs Guidesheet Draft – updated," IRSR0000011220 - 221 (alerting them to the revised draft); and accompanying draft guidesheet, "Advocacy Organizations Guidesheet," prepared by the IRS, IRS0000000289 - 300.

Thomas asked for an update on the effort, noting the IRS was "starting to get a lot of heat" to resolve the cases:

> "[W]here do we stand with the document Justin Lowe or others from D.C. were putting together with lessons learned, suggested developmental questions for those applying under c3 and for those applying under c4, sample denial letter, etc.? We're starting to get a lot of heat from the public on these cases sitting idle and now have Congressionals on some of these. What is the plan of action and estimated completion date?"[567]

Five days later, on October 30, 2011, Ms. Thomas sent an email with the subject line, "Congressionals Coming! WE NEED TO MOVE ON THIS," in which she urged swift action on the guidesheet:

> "I'm not sure what the hold is on the document/guidance EOT is supposed to be providing for us, but I've received a phone call from an individual who was previously an EO Determinations specialist. He is working with one of these organizations [REDACTED BY IRS] and is threatening to go to his Congressional Office regarding this organization and others. That is only going to create even more work for us and we need to get letters out to these organizations ASAP. Please let me know when we can expect to get the document from EOT."[568]

By that point, Ms. Thomas had been pressing EOT to issue guidance for nearly 18 months.[569]

On November 3, 2011, after incorporating suggested edits, Ms. Goehausen circulated a revised draft, writing: "Attached is an updated version of the draft Advocacy Org Guidesheet that Cincinnati requested and has been asking us for."[570] A copy was provided to Ms. Thomas by Michael Seto later in November.[571] In December, the draft was also given to the members of a newly formed "advocacy team" of determinations specialists.[572]

The draft guidesheet was summarized by a TEGE attorney as a document that had been drafted:

> "for organizations that engage in lobbying, political intervention and general issue advocacy. It summarizes the law for applicable organizations (social welfare, labor, business leagues and political organizations), explains how to distinguish politics from

---

[567] 10/25/2011 email from Cindy Thomas to Theodore Lieber and Michael Seto, "Advocacy Orgs – Where Do We Stand?," IRSR0000013911.
[568] 10/30/2011 email from Cindy Thomas to Michael Seto, "Advocacy Orgs – Congressionals Coming! WE NEED TO MOVE ON THIS," IRSR0000013910.
[569] See, e.g., 4/24/2010 email from Cindy Thomas to Steven Grodnitzky, "SCR," PSI-IRS-09-000045 - 046 (Ms. Thomas: "None of these cases have been assigned. They have been sitting in our Screening Group waiting for guidance from EOT.").
[570] 11/3/2011 email from Hilary Goehausen to Judith Kindell and others, "Advocacy Orgs Guidesheet – [U]pdated," IRSR0000011220 (circulating the revised draft "Advocacy Org Guidesheet").
[571] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).
[572] Subcommittee interview of Stephen Seok, IRS (11/22/2013); 12/12/2011 email from Stephen Seok to advocacy team members, "Advocacy Org. Guide Sheet (Draft), IRSR0000069334 (forwarding draft "Advocacy Org Guidesheet").

> issue advocacy, and provides comprehensive case development questions. EO will use the guide to process exemption applications and provide general guidance to the public on irs.gov."[573]

At that point, the guidesheet was composed of an overview and eight individual guidesheets on specific activities, including how to distinguish between issue advocacy versus campaign intervention. Generally, the specific guidesheets set out some general principles, provided a list of facts tending to show that an activity did or did not qualify as campaign intervention, and offered a list of questions that could be directed to an applicant to develop the facts needed to apply the facts and circumstances test.[574]

According to Ms. Goehausen, in late 2011, she learned that the Determinations Unit viewed the draft guidesheet as unhelpful because it was "too lawyerly."[575] She also learned that attorneys in the TEGE Counsel's office had a copy and were working on revisions.[576] In February 2012, Donald Spellmann, one of the TEGE attorneys, also alerted his supervisor, Victoria Judson, to the guidesheet project. Ms. Judson worked directly for IRS Chief Counsel William Wilkins.[577] Ms. Goehausen told the Subcommittee that the draft guidesheet then began going back and forth between her office, attorneys who worked directly for the Chief Counsel, and attorneys in the TEGE section of the Chief Counsel's office.[578] Various changes were made without the participants coming to a final agreement on the document.[579]

IRS Chief Counsel Wilkins told the Subcommittee that the attorneys who worked directly for him, Victoria Judson and Janine Cook, told him about the guidesheet effort, explained that EO head Lois Lerner had asked them to review the draft due to the sensitive topics, and indicated the draft needed some fine tuning. Mr. Wilkins also said that Ms. Judson and Ms. Cook had indicated that they thought the guidesheet should not stray from existing law, and he agreed with that assessment.[580]

Mr. Wilkins told the Subcommittee that he did not share a copy of the draft guidesheet with anyone at Treasury or the White House, nor did he talk to anyone there about it.[581] When asked about an email in which he asked his staff about whether the draft guidesheet should be shared with Treasury, Mr. Wilkins told the Subcommittee that he thought Treasury was concerned primarily about public guidance, and the guidesheet was intended to be used internally

---

[573] 2/28/2012 email from Donald Spellmann to Victoria Judson and others, "Advocacy Org Guide Sheet," IRSR0000014377.
[574] See, e.g., 4/25/2012 email from Donald Spellmann to Lois Lerner and others, "Clean-ups & Revisions to Guide Sheet," PSI-TIGTA-01-000145 - 199 (attaching the draft guidesheet with revisions suggested by TEGE).
[575] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013); 5/14/2013 TIGTA Audit Report, at 37.
[576] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).
[577] See 2/28/2012 email from Donald Spellmann to Victoria Judson and others, "Advocacy Org Guide Sheet," IRSR0000014377 ("[w]e wanted you to be aware that the EO client asked us for an accelerated review of a guide sheet they drafted"). See also Subcommittee interviews of Donald Spellmann, IRS (12/18/2013) and William Wilkins, IRS (12/4/2013).
[578] Subcommittee interview of Hilary Goehasusen, IRS (12/13/2013).
[579] Id.
[580] Subcommittee interview of William Wilkins, IRS (12/4/2013).
[581] Id.

within the IRS.[582] Mr. Wilkins said that he learned his staff was exchanging comments on the draft with EOT and TEGE attorneys, and that Ms. Lerner began having intense conversations with Ms. Judson and others about how the guidesheet should look.[583]

The key participants from the TEGE Counsel office were Donald Spellmann, Susan Brown, and David Marshall.[584] Mr. Spellmann told the Subcommittee that Lois Lerner gave his office the draft in February 2012, and the TEGE attorneys viewed it as needing additional work.[585] On February 24, 2012, Ms. Lerner wrote to Mr. Spellmann and others: "The guidance provided to Cincy [Cincinnati] that Don reviewed – I'm hoping you can let us know your concerns as soon as possible so we can finalize the draft. We will be sending it over to them and putting it out on the web with other check sheets/guide sheets."[586] On February 28, 2012, Mr. Spellmann wrote to his supervisor, Victoria Judson, that EO had asked the TEGE Counsel's office "for an accelerated review of the guide sheet" and that they viewed the draft as "good, but needs a fair amount of work throughout."[587]

Mr. Spellmann told the Subcommittee that his office returned preliminary comments on the draft to Ms. Lerner in early March 2012.[588] On March 7, 2012, after reviewing TEGE's suggested changes, Ms. Lerner made the following comments:

> "I looked quickly last night and overall like the approach. I do think, however, that we need more upfront text explaining why this is a difficult determination. You[r] papers [are] great for lawyers who understand the facts and circumstances grayness, but I think we need to add a more 'practical' piece in the introduction, as well. Also, I noticed you took out the chart on different types of orgs and what they can do – I'd like that added back in – I think it clearly illustrates to the non-expert that this isn't even on[e] size fits all for the requirements – we have given it to the press with good results in the past."[589]

On March 26, 2012, Ms. Lerner tried to explain to Victoria Judson of the Chief Counsel's office the importance of providing practical guidance to the IRS agents analyzing 501(c)(4) applications:

> "I also think we live in 2 different worlds. I live in a more 'real' world than yours where my staff can't wait for formal guidance to do their jobs. … These are live cases and if all

---

[582] 3/7/2012 and 3/8/2012 email exchange between William Wilkins, Janine Cook, and Victoria Judson, "Heads up on Draft Guide Sheet for advocacy organizations," IRSR0000428427 - 428 (Mr. Wilkins: "Isn't this the kind of subreg guidance that Treasury is complaining about not seeing in advance?" Ms. Judson: "In their discussion, Treasury has been focusing on items that are published in the I.R.B., so this is not what they have been talking about. However, my guess is that they would also want to be seeing items like this one.").
[583] Subcommittee interview of William Wilkins, IRS (12/4/2013).
[584] Subcommittee interview of Donald Spellmann, IRS (12/18/2013).
[585] Id.
[586] 2/24/2012 email from Lois Lerner to Donald Spellman and others, "Congressional Follow-Up," PSI-IRS-09-000027.
[587] 2/28/2012 email from Donald Spellman to Victoria Judson and Janine Cook, "Advocacy Org Guide Sheet," IRSR0000014377.
[588] Subcommittee interview of Donald Spellmann, IRS (12/18/2013).
[589] 3/7/2012 email from Lois Lerner to Donald Spellmann and others, "Corrections to Draft Guide Sheet," IRSR0000333194.

we can give them is published guidance on the extreme ends of the spectrum, they will get themselves in trouble."[590]

Attorneys from EOT, the TEGE section of the Chief Counsel's office, and the attorneys who worked directly for the Chief Counsel continued to exchange comments on the guidesheet. The TEGE and Chief Counsel attorneys carefully reviewed the existing IRS revenue rulings and attempted to ensure that the guidesheet did not break new ground, even though the purpose of the guidesheet was to provide additional guidance beyond what already existed. In late March, the TEGE and Chief Counsel's attorneys discussed cutting out certain parts of the draft to ensure it didn't exceed existing guidance.[591] Mr. Spellman noted at one point that striking the right balance between the existing and new guidance was "super tricky."[592] On April 4, 2012, Susan Brown wrote that she and Mr. Spellman were thinking about deleting the specific guidesheet on lobbying, due to difficulties associated with distinguishing between lobbying communications and campaign activities.[593] Ms. Cook responded:

"I think Lois [Lerner] will react very strongly against that, particularly on the theory that this is fact gathering focused. I think we need to leave them in if at all possible; she is already pushing back a lot on [501(c)] 5/6s deletion and if we take out lobbying, I'm concerned we'll lose any remaining credibility in their eyes in giving them something they can conceivably use."[594]

In fact, the next day, Ms. Lerner wrote to Ms. Cook, opposing the suggestion that the guidesheet address only 501(c)(3) and (4) organizations, and omit any mention of 501(c)(5) or (6) groups, since applications were being filed by all four groups, and EO determinations specialists were going to be confronted with campaign activity issues with respect to all of them:

"I know you suggested just including c3 and c4 information in the guide sheet – that just won't work. So, if – as we initially agreed – you can tell me specifically what parts of the draft we sent give you heart burn and why, we will try to lessen the heartburn. Ignoring pieces or not speaking to them because Counsel is not comfortable is NOT an option for me. The work is here, my folks need to do it, and they will regardless of what we give them. Our job is to provide them with the best tool we can."[595]

---

[590] 3/26/2012 email from Lois Lerner to Victoria Judson, "Thanks," IRSR0000411078.
[591] 3/26/2012 email exchange between Donald Spellman and Janine Cook, "Do you have original draft guidesheet that you can send me," IRSR0000057111. The TEGE attorneys also considered bringing in the Treasury Department, but decided against it since they didn't think the guidesheet was "breaking much new ground." Id.
[592] Id.
[593] See 4/4/2012 email from Susan Brown to Donald Spellmann and Janine Cook, "Advocacy guide," IRSR0000057166 ("Just to let you know Don and I are struggling with lobbying questions because we're concerned that agents that put a communication in the 'lobbying' bucket might think their job is done and not look further at whether the lobbying is disguised campaign activity. Could be a problem if the lobbying is 'Stop the wrongheaded legislation (sponsored by Candidate X)!' For that reason we plan to delete the lobbying guide sheets (which applied to (c)(3)s only anyway). These issues don't get easier!").
[594] See 4/4/2012 email from Janine Cook to Susan Brown and Donald Spellmann, "Advocacy guide," IRSR0000057166.
[595] 4/3/2012 email from Lois Lerner to Janine Cook, "Follow-up," IRSR0000428403 - 404.

Ms. Cook responded:

> "I do have a sense of the challenges you are under here and that frankly you're being caught between a rock and a hard place. … While much of what you do every day falls into the highly sensitive category, I venture to say that this has got to be one of the top at this time. Accordingly, our legal advice is to follow as closely to the guidance line as possible in what is disseminated and thus publicly available – formal or not, we all know it will be scrutinized."[596]

A few weeks later, on April 25, 2012, Mr. Spellmann provided Ms. Lerner with still another revised version of the guidesheet, explaining: "We just can't keep our hands off this thing (or stop thinking about it)."[597] At the end of May, Ms. Lerner expressed frustration with the edits made by the attorneys, in particular the proposed deletion of substantive portions of the draft guidesheet, given the pressing need for guidance to ensure IRS agents treated cases in a consistent manner in accordance with the law.[598] Ms. Lerner expressed her concerns in an email to Nancy Marks, who worked for then TEGE Commissioner Steven Miller:

> "Counsel has been very uncomfortable about applying c3 stuff even to c4 and wasn't willing to include the c5 and 6s. They also were unwilling to use the c4, 5 and 6 rev rule because it was designed to talk about 527 political activity, which has a slightly different articulation. I find that silly since the entire regulated community has been relying on that guidance as a look at how the irs might think about specific factual scenarios. Nikole [Flax] asked me whether I thought this would actually help our guys practically – for example does it provide direction in how the determine which activity is primary. I told her I think it is cumbersome and not the best practical tool, but – with some discussion about where to focus – could work. … Perhaps could add language that reminds them it's a look at all the facts and circumstances including, but not limited to, expenditures, volunteer activity, communications, etc."[599]

**Abandoning the Guidesheet Project.** Mr. Spellmann told the Subcommittee that after supplying the revised version of the draft guidance at the end of April 2012, he didn't hear back from Ms. Lerner, and eventually learned EO had decided it wasn't going to issue the document.[600] After ten months of effort, EO gave up trying to finalize the draft guidesheet.[601]

The documents suggest that the biggest issue dividing IRS personnel over the guidesheet was how much guidance to provide beyond the regulations and revenue rulings already available. Determinations personnel wanted more guidance; the Chief Counsel's office apparently did not

---

[596] 4/3/2012 email from Janine Cook to Lois Lerner, "Follow-up." IRSR0000428403 - 404.
[597] 4/25/2012 email from Donald Spellmann to Lois Lerner, and others, "Clean-Ups & Revisions to Guide Sheet," PSI-TIGTA-01-000145. See also 4/20/2012 email from Janine Cook to Lois Lerner and others, "Retooled Advocacy Guide Sheet," IRSR0000057184.
[598] 5/30/2012 email from Lois Lerner to Nancy Marks, Sharon Light, and Joseph Urban, "Revised Guide Sheet," IRSR0000198670 - 671.
[599] Id.
[600] Subcommittee interview of Donald Spellmann, IRS (12/18/2013).
[601] See 6/4/2012 IRS letter responding to the Subcommittee, PSI-IRS-02-000001 - 026; Subcommittee interview of Donald Spellmann, IRS (12/18/2013).

want to use the guidesheet to expand the existing guidance, despite acknowledging gray areas and interpretation difficulties. The inability of the IRS to provide the guidance repeatedly requested by the Determinations Unit is more evidence of the difficult issues and ongoing confusion and disagreements over how to apply the law to 501(c)(4) organizations.

**Initial Refusal to Provide Guidesheet.** The Subcommittee first learned of the draft guidesheet when it was mentioned in a June 2012 letter from the IRS.[602] In that letter, the IRS wrote: "In connection with recent cases, EO Technical prepared a draft educational guide sheet on the issue of political activity for section 501(c)(4) applications that was shared for comment with some employees in EO Determinations. That guide sheet was neither mandated nor finalized."[603] The Subcommittee requested a copy of the guidesheet on several occasions in 2012 and 2013, but the IRS refused to provide it. After the TIGTA report was issued in May 2013, however, the IRS finally provided a copy to the Subcommittee.

### (3) Disagreeing on Development Letters

The draft guidesheet was intended to provide guidance not only on how to apply the law, but also on how to use development letters to gather the information needed to apply the facts and circumstances test requiring consideration of all relevant, material factors. Development letters were the primary tool used by EO determinations specialists to obtain additional information about pending 501(c)(4) applications. Early on, EOT specialists had reviewed some of the development letters before they went out and sometimes promised to develop templates for them, but never did so. In January 2012, in an effort to reduce a growing backlog of 501(c)(4) applications, some of which had been sitting idle for more than a year, a newly designated advocacy case coordinator, Stephen Seok, used the draft guidesheet to develop sample questions, encouraged the determinations specialists to draft development letters, and approved the sending of dozens of development letters to applicants. Some recipients of those letters criticized some questions as inappropriate, burdensome, or intrusive, resulting in negative media stories and Congressional inquiries. The new coordinator was removed from his post, despite having consulted his supervisor beforehand, demonstrating the ongoing division of opinion within the agency and lack of reliable guidance on how to develop 501(c)(4) cases.

**Early Development Letters.** For the first eight months that IRS was reviewing Tea Party cases, from February to November 2010, as explained earlier, Elizabeth Hofacre acted as the case coordinator and worked with EOT specialist Carter Hull who reviewed her development letters. Her caseload was then reassigned to Ronald Bell, who acted as the case coordinator from November 2010 to November 2011. He took little action on the cases, while awaiting guidance from EOT. In December 2011, he was replaced by Stephen Seok who became the third coordinator of what, by then, were called the "advocacy" cases.

That same month, in consultation with his supervisors, Mr. Seok formed an "advocacy team" composed of determinations specialists who would be working on the advocacy cases,

---

[602] 6/4/2012 IRS letter responding to the Subcommittee, PSI-IRS-02-000001 - 026, at 013.
[603] Id.

and, on December 16, 2011, called a team meeting to discuss how to handle the cases.[604] According to the meeting minutes, the team faced a backlog of about 170 pending cases, which were described in the following manner: "30 Something Tea party, Several 912, Repeal PPACT (Patient Protection and Affordable Care Act), Enact Universal Single-Payer Health Care System, etc."[605] While that list was not all inclusive, it suggested that the team was processing both conservative and liberal leaning organizations.

Mr. Seok told the Subcommittee that, at the advocacy team meeting, he emphasized the need to treat the cases in a consistent manner, and discussed the use of development letters to develop key facts, including developing a template letter which the team hoped EOT would provide.[606] He said that Ms. Hofacre also attended the meeting, gave a history of the cases, and provided copies of the development letters she had sent out.[607] Mr. Seok said that, after the meeting, he sent the team members a copy of the draft guidesheet which had recently been sent to him and which included guidance on developing 501(c)(4) cases.[608]

**January 2012 Development Letters.** Mr. Seok told the Subcommittee that he used the draft guidesheet to develop a list of questions that could be included in development letters sent to advocacy organizations.[609] According to a later email, Mr. Seok circulated to the advocacy team a 12-page list of possible questions, which he later described as a "reference" list, not a "template" for development letters.[610] In January 2012, EOD revenue agents began sending a new round of development letters to organizations with pending 501(c)(4) applications. Many of those letters contained questions from the list circulated by Mr. Seok.[611]

According to a later email, a total of 59 development letters were sent by multiple IRS revenue agents to organizations with pending 501(c)(4) applications.[612] Mr. Seok told the

---

[604] Subcommittee interview of Stephen Seok, IRS (11/22/2013). The team members were taken from different EOD groups in the IRS. See also 5/14/2013 TIGTA Audit Report, at 38.
[605] 12/16/2011 "Advocacy Team Meeting Minutes," IRS0000000386 - 387.
[606] Subcommittee interview of Stephen Seok, IRS (11/22/2013).
[607] Id.
[608] Id. See also 12/12/2011 email from Stephen Seok to Advocacy Team, "Advocacy Org. Guide Sheet (Draft)," IRSR0000069334 (forwarding draft "Advocacy Org Guidesheet"). Although the guidesheet was only in draft form, Mr. Seok expressed his appreciation to the authors for the guidance. 2/2/2012 email from Stephen Seok to Hilary Goehausen and Justin Lowe, "Advocacy Team in EOD", IRSR0000011217-218, ("Note: Advocacy Organizations Guide Sheet and Comments on BOLO Advocacy cases from you are excellent and extremely helpful. We sincerely thank you.").
[609] Subcommittee interview of Stephen Seok, IRS (11/22/2013).
[610] See 4/17/2012 email from Cindy Thomas to Nancy Marks, and others, "Advocacy Org Questions – Shared with Team for Reference," IRS0000000271 - 284 ("Attached are sample questions that were shared with team members. These questions were developed based on the Advocacy Organization Guidesheet given to EOD from EOT."). Ms. Thomas attached a copy of a 3/23/2012 email sent to her by Stephen Seok, "ADVOCACY QUESTIONS – REFERENCE," IRS0000000271 - 284 (containing Mr. Seok's donor related questions).
[611] See 5/14/2013 TIGTA Audit Report, at 18-19, 38.
[612] 4/25/2012 email from Judith Kindell to Holly Paz and Sharon Light, "Determs Review", IRSR0000006583 - 584. See also 5/13/2013 email from Judith Kindell to Holly Paz, Sharon Light and Nancy Marks, "Review of Determinations Development Letters," IRSR0000168062 (indicating that 59 development letters had been sent); Subcommittee interview of Ronald Bell, IRS (1/15/2014) (indicating that Mr. Bell, who sent out one of the development letters, had based his letter on the list of questions provided by Mr. Seok).

Subcommittee that development letters were not sent to all 170 of the pending applicants in early 2012, due to resource constraints.[613]

IRS personnel later summarized some of the troubling development letter questions as follows:

> "A. Requests Names of Donors.
>
> B. Provide a list of all issues that are important to your organization. Indicate your position regarding such issue[s].
>
> C. In list of questions soliciting details about activity ask[s] about the following: (1) the roles and activities of audience and participants other than members in the activity and (2) what type of conversations and discussions did your members and participants have during the activity
>
> D. Asks whether officer, director, etc. has run or will run for public office
>
> E. Requests political affiliation of officer, director, speakers, candidates supported, etc. or otherwise refers to relationship with identified political party-related organizations
>
> F. Requests info re employment other than for org, including hours worked
>
> G. Letter requests information regarding activities of another org – not just relationship of other org to applicant."[614]

The TIGTA audit report reprinted the following set of questions seeking detailed donor information, which it indicated were included in some of the development letters:

> "Provide the following information for the income you received and raised for the years from inception to the present. Also, provide the same information for the income you expect to receive and raise for 2012, 2013, and 2014.
>
> a. Donations, contributions, and grant income for each year, which includes the following information:
>
> 1. The names of the donors, contributors, and grantors. If the donor, contributor, or grantor has run or will run for a public office, identify the office. If not, please confirm by answering this questions 'No.'
> 2. The amounts of each of the donations, contributions, and grants and the dates received them.
> 3. How did you use these donations, contributions, and grants? Provide the details."[615]

---

[613] Subcommittee interview of Stephen Seok, IRS (11/22/2013).

[614] 4/25/2012 email from Judith Kindell to Holly Paz and Sharon Light, "Determs Review," IRSR0000006583 - 584. See also 5/14/2013 TIGTA Audit Report, at 20.

In addition, some of the development letters asked applicants to provide printed copies of all of their information on their websites, Twitter, or Facebook.[616]

EOT head Holly Paz told the Subcommittee that, for the most part, the development letters issued by the new advocacy team in January and February 2011, were not reviewed by anyone other than Mr. Seok before they went out.[617] The TIGTA Audit Report, which conducted a review of all of the development letters sent by the IRS to the 170 organizations, many of which received more than one letter and many of which received letters prior to 2012, determined that 98 of the applicants received requests for "unnecessary" information.[618]

**Negative Reaction to Information Requests.** A few weeks after the first development letters were mailed in January 2011, as word of the letters spread, some recipients objected to some of the questions as inappropriate, burdensome, or intrusive, criticizing in particular requests for donor information and copies of materials on the organizations' websites, Twitter, and Facebook. Negative media stories followed.[619] A March 2012 New York Times article, which was circulated among IRS officials, expressed alarm about IRS inquiries into the groups' politics: "In recent weeks, the IRS has sent dozens of detailed questionnaires to Tea Party organizations applying for nonprofit tax status, demanding to know their political leanings and activities."[620]

Members of Congress also expressed concern. On February 28, 2012, Mr. Spellmann from the IRS Chief Counsel's office sent an email to his colleagues noting: "Lois [Lerner] told me the Hill gripes include the applications are taking too long to process, the requests for information are too burdensome, and some types of organizations (like Tea Party) are being singled out for greater scrutiny."[621] A number of Members of Congress expressed concern about the requests for donor names. Although 501(c)(4) organizations were already required to disclose the names of donors of $5,000 or more on Schedule B of their Form 990 tax returns, that information was filed after the close of the covered year, and Schedule B was normally kept confidential unless an organization elected to make it public. A March 2012 letter signed by twelve Senators stated in part: "A number of our constituents have raised concerns that the

---

[615] 5/14/2013 TIGTA Audit Report, at 19.
[616] Subcommittee interview of Holly Paz, IRS (10/30/2013).
[617] Id.
[618] 5/14/2013 TIGTA Audit Report, at 20, 28.
[619] See, e.g., "Numerous Tea Party chapters claim IRS attempts to sabotage nonprofit status," Fox News Online, Perry Chiaramonte, (2/28/2012), http://www.foxnews.com/politics/2012/02/28/numerous-tea-party-chapters-claim-irs-attempting-to-sabotage-non-profit-status/; "Tea Party Groups Question IRS Requests For Information," CBS News, Bud Gillett (2/29/2012), http://dfw.cbslocal.com/2012/02/29/tea-party-groups-question-irs-requests-for-information/.
[620] "Scrutiny of Political Nonprofits Sets Off Claim of Harassment," New York Times, Jonathan Weisman (3/6/2012). This article was included in a number of press clips circulated within the IRS. See, e.g., 3/7/2012 email from Steven Miller to Catherine Barre, "In the News –March 7, 2012," IRSR0000210445 - 464.
[621] 2/28/2012 email from Donald Spellmann to Victoria Judson, Janine Cook, and Susan Brown, "Advocacy Org Guide Sheet," IRSR0000014377.

recent IRS inquiries sent to civic organizations exceed the scope of typical disclosures required under IRS Form 1024 and accompanying Schedule B."[622]

**Intrusive Questions to Conservative and Liberal Groups.** On March 26, 2012, an article was circulated to Ms. Lerner and others reporting that the Landmark Legal Foundation had sent a letter to TIGTA calling for an investigation into the IRS' "inappropriate and intimidating investigation tactics in the administration of applications for exempt status submitted by organizations associated with the Tea Party movement."[623] A TIGTA analysis later determined, however, that of the development letters sent to the 170 organizations, only 27 letters included donor questions, and of those 27, only 13 were sent to groups with Tea Party, Patriots, or 9/12 in their names.[624]

The evidence indicates that burdensome development letters were sent to both conservative and liberal groups.[625] For example, an article examining IRS review of two Texas groups seeking tax exempt status analyzed IRS development letters sent to a Tea Party

---

[622] 3/14/2012 letter from twelve Senators to the IRS, IRSR0000468544 - 547. See also 6/18/2012 letter from eleven Senators to IRS, IRSR0000462281 (expressing concerns over IRS requests for donor information); 4/23/2012 letter from 63 Members of Congress to IRS, IRSR0000465030.

[623] 3/26/2012 email from Joseph Urban to Lois Lerner and others, "Referral to TIGTA on (c)(4)," IRSR000218372 - 375. See also 3/27/2012 email from Joseph Grant to Nancy Marks, "Referral to TIGTA on (c)(4)," IRSR0000218372 (circulating the article and recommending that TIGTA investigate the allegations: "This may already have been decided by now, but, for my part, I think it would be a good idea to have TIGTA review this."). See also 3/23/2012 letter from the Landmark Legal Foundation to the IRS, "REQUEST FOR INVESTIGATION INTO IRS AGENCY MISCONDUCT," http://www.landmarklegal.org/uploads/IRS%20IG%20Letter%20without%20attachments.pdf.

[624] 5/14/2013 TIGTA Audit Report, at 18 and footnote 43. See also 9/25/2012 "Consistency in Identifying and Reviewing Applications for Tax-exempt Status Involving Political Advocacy Cases, Audit Status Meeting," prepared by TIGTA, TIGTA Bates 003084 - 085. At least some liberal groups also received requests for donor information. See, e.g., "In IRS Scandal, Spat Over Level of Scrutiny," Wall Street Journal, John McKinnon (6/25/2013), (indicating a liberal affiliate of Alliance for a Better Utah was asked for donor information); "Scrutiny Went Beyond the Political," New York Times, Jonathan Weisman, (7/4/2013), http://www.nytimes.com/2013/07/05/us/politics/irs-scrutiny-went-beyond-the-political.html?pagewanted=all (indicating Minnesota Break the Bonds, a group promoting Palestinian rights, and Chi Eta Phi Sorority, a black nurses' society advocating "social change," were subjected to intrusive questions, including regarding "fees" and "any voluntary contributions"); "IRS scrutinized some liberal groups," Politico, David Nather (7/22/2013), http://www.politico.com/story/2013/07/irs-scrutinized-liberal-groups-94556.html (indicating Progress Texas, a progressive group, was subjected to questions about its "membership fees"), providing a link to the IRS letter at http://www.scribd.com/doc/141747252/IRS-Request-for-More-Information-Progress-Texas-Feb-2012.

[625] See, e.g., "IRS Sent Same Letter to Democrats That Fed Tea Party Row," Bloomberg News, Julie Bykowicz and Jonathan Salant (5/14/2013), http://www.bloomberg.com/news/2013-05-15/irs-sent-same-letter-to-democrats-that-fed-tea-party-row.html (describing intrusive letters sent to Progress Texas and Clean Elections Texas); "IRS approved liberal groups while Tea Party in limbo," USAToday, Gregory Korte (5/15/2013), http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-progressive-groups/2158831/ (indicating Action for a Progressive Future received "intrusive questions" before obtaining tax exempt status); "Nonconservative Groups Say IRS Scrutinized Them, Too," National Public Radio, Brian Naylor (5/19/2013), http://www.npr.org/2013/05/19/185206908/nonconservative-groups-say-irs-scrutinized-them-too (describing progressive groups that received intrusive questions, including Progress Texas and the Chicago News Cooperative).

organization and a progressive group, making copies of both letters publicly available.[626] The article concluded:

> "A comparison of the letter from the IRS released by the Waco Tea Party and of a letter provided by the progressive Texas organization found that both are extensively detailed, asked similar questions, and were tailored to each organization. Both letters asked for copies of the organization's board meeting minutes and for copies of each organization's web sites. Questions also addressed specific concerns that the IRS had with each organization but, on the whole, did not appear to treat the organizations differently."[627]

While the article indicated that the letters did not treat the conservative and liberal groups differently, it indicated that both were subjected to extensive, detailed questions.

**Prior Approval of Donor Questions.** Mr. Seok told the Subcommittee that, before the development letters went out, he had sought guidance on asking for donor names and related information and received permission to include the questions.[628] Mr. Seok indicated that he had shown a draft development letter with the donor questions to his manager, Steve Bowling, and they had discussed the donor questions with EOD manager Jon Waddell.[629] Mr. Seok told the Subcommittee that Mr. Waddell had advised against including the donor questions, but Mr. Seok had explained it was important, because it would indicate whether a Super PAC involved with campaign activities was funding the proposed 501(c)(4) organization.[630] Mr. Seok told the Subcommittee that his manager, Mr. Bowling, agreed that the donor questions should be included in the development letters.[631]

**Development Letters Halted.** According to Mr. Seok, he held a second advocacy team meeting in February 2012.[632] At that meeting, he noted the negative media reports raising concerns about the IRS asking inappropriate questions, and urged his advocacy team to be very careful when sending out their development letters.[633]

---

[626] See "Does the IRS really have it in for the tea party groups?" The Colorado Independent, Teddy Wilson, (3/28/2012), http://www.coloradoindependent.com/116361/does-the-irs-really-have-it-in-for-tea-party-groups). Copies of both letters are included as exhibits to this Report.
[627] Id.
[628] Subcommittee interview of Stephen Seok, IRS (11/22/2013).
[629] Id.
[630] Id.
[631] Id. See also draft guidesheet, IRSR0000069334 - 346, at 338 (advising IRS agents to ask about a group's fundraising activities, including requesting "copies of all documents related to the organization's fundraising events including pamphlets, flyers, brochures, webpage solicitations," determining "[h]ow much of the organizations' budget is spent on fundraising," and determining "the sources of fundraising expenses"); 3/23/2012 email from Stephen Seok to Cindy Thomas, "ADVOCACY QUESTIONS – REFERENCE," IRS0000000271 - 284, at 277 (containing Mr. Seok's donor related questions, including questions asking for "[t]he names of the donors, contributors and grantors," "[t]he amounts of each of the donations, contributions, and grants and the dates" received, and how the organization "use[d] these donations, contributions, and grants").
[632] Subcommittee interview of Stephen Seok, IRS (11/22/2013). There are no notes summarizing that meeting.
[633] Id.

Due to the criticism, confusion arose over whether EOD determinations specialists in the Cincinnati office were supposed to stop issuing new development letters. On February 27, 2012, one EOD manager wrote to Mr. Seok:

> "Do we have any idea on when we might be able to issue developmental letters again. I have four un-reviewed cases. It does not make sense to review them if we cannot issue letters. If it will be a while, I should request some non-advocacy case[s] to work."[634]

The same day, Determinations head Cindy Thomas emailed Mr. Seok's manager, Mr. Bowling: "A question though: Why are we not issuing development letters? Who instructed folks to stop? The only thing I heard from Holly is that we shouldn't be asking organizations to submit their entire website."[635] Mr. Bowling responded: "I told Stephen [Seok] to hold off on any further development of template questions, not to stop developing cases. I'll straighten it out. I understood that Washington is looking at the letters that went public and would provide guidance."[636]

In March 2012, then TEGE Commissioner Steven Miller approved giving some of the advocacy groups that had received development letters an additional 60 days to respond.[637] Ms. Thomas sent an email to EOT head Holly Paz, protesting: "I don't understand why an organization who is not being compliant is getting special treatment. But obviously, we'll do what we are told."[638] Ms. Paz responded: "The theory is that when we have had a case for a long time without taking action and are asking for a lot of stuff, we have to give more time. I hear you on fairness but I also do what I am told."[639]

Mr. Seok told the Subcommittee that, in early March 2012, Mr. Bowling sent him an email directing him to stop his team from sending out any more development letters on the advocacy cases, and Mr. Seok relayed this message to his team.[640] On March 6, 2012, EO head Lois Lerner wrote: "Cincy [Cincinnati] is on hold for the time being on sending anymore questions out on these cases."[641] A few days later, according to Mr. Seok, Mr. Bowling reversed course and told him to instruct his team to continue sending out development letters.[642] Mr. Seok said that, two weeks later, Mr. Bowling reversed course again and told him to stop developing the cases entirely.[643]

---

[634] 2/27/2012 email from Joseph Herr to Stephen Seok, "Guidance on developing advocacy cases," PSI-TIGTA-02-000067.
[635] 2/27/2012 email from Cindy Thomas to Steven Bowling, "Guidance on developing advocacy cases," PSI-TIGTA-02-000065.
[636] 2/28/2012 email from Steven Bowling to Cindy Thomas, "Guidance on developing advocacy cases," PSI-TIGTA-02-000065.
[637] Subcommittee interviews of Cindy Thomas, IRS (11/13/2013) and Holly Paz, IRS (10/30/2013).
[638] 3/8/2012 email from Cindy Thomas to Holly Paz, "EDS Letter 4587 (modified) (3).doc," PSI-TIGTA-01-000206-209; Subcommittee interview of Cindy Thomas (10/30/2013).
[639] 3/8/2012 email from Holly Paz to Cindy Thomas, "EDS Letter 4587 (modified) (3).doc," PSI-TIGTA-01-000206 - 209, at 206.
[640] Subcommittee interview of Stephen Seok, IRS (11/22/2013).
[641] 3/6/2012 email from Lois Lerner to Nikole Flax, "Cinc. template questions," IRSR0000198415.
[642] Subcommittee interview of Stephen Seok, IRS (11/22/2013).
[643] Id.

**Team Leader Removed.** On April 11, 2012, William Angner, an EOD manager, sent an email to Mr. Seok and others announcing an upcoming TIGTA audit of how the agency was handling 501(c)(4) cases:

> "FYI: Holly Paz and TIGTA employees will be here in Cincy 4/30-5/1/2012 to review advocacy cases (ie TIGTA audit). There will also be Congressional hearings about how we handle those cases as well. Glad those are in another group worked by other agents! Please give Stephen all the morale support you can muster :)"[644]

Mr. Seok responded to Mr. Angner: "Boss, You are going to save me, right?" Mr. Angner replied: "pawns in chain of command are either overlooked or sacrificed … some one up the chain should take the heat for you :)."[645] In May 2012, then Deputy Commissioner for Services and Enforcement Steven Miller removed Mr. Seok from his position as advocacy team leader.[646]

**Lack of Development Guidance.** Development letters are the primary mechanism used by EOD determinations specialists to obtain additional information needed to apply the facts and circumstances test to 501(c)(4) cases, but the IRS failed to provide its agents with clear guidance on permissible questions. The draft guidesheet, which included guidance on appropriate questions, was never finalized. Although the advocacy team leader used the draft guidesheet to develop a list of sample questions, obtained explicit permission from his supervisors to include questions about donor information in his team's development letters, and sought donor information that is routinely supplied in organizations' tax returns, he was removed from his post for encouraging the inclusion of allegedly inappropriate and burdensome questions. Rattled by public criticism, senior IRS officials then went back and forth over whether to allow any 501(c)(4) development letters to be issued at all. Together, the facts demonstrate that, within the IRS in 2012, confusion and a lack of consensus about the types of information that should be obtained through development letters continued to roil the agency.

The issue that received the most attention in early 2012 involved development letters with requests for donor information. The IRS did not keep a list of the 27 organizations that received donor questions, but noted that most of those organizations did not provide the requested information in any event.[647] In the few cases where donor information was provided, the IRS expunged the information from the files and notified the affected organizations accordingly.[648] Although Mr. Seok was removed from his post for asking donor questions, both

---

[644] 4/11/2012 email from William Angner to Stephen Seok and others, "TIGTA audit 4/30-5/1/2012," IRSR0000484246.

[645] 4/11/2012 emails between William Anger and Stephen Seok, "TIGTA audit 4/30-5/1/2012," IRSR0000484246.

[646] Subcommittee interview of Steven Miller, IRS (12/11/2013).

[647] See 8/16/2012 email from Holly Paz to Cheryl Medina, "Bucketing Results List," TIGTA Bates No. 010755 ("[T]here is no list of the organizations who were sent the letter indicating that the donor information was expunged from the file. My understanding is that that letter has only been sent in one or two cases as most organizations did not provide this information.").

[648] Id.; Subcommittee interview of Holly Paz, IRS (10/30/2013). Ms. Paz noted that IRS Chief Counsel's office was involved in in approving the destruction of the donor information. See also, e.g., 6/5/2012 email from Holly Paz to Cindy Thomas, "donor info letter.doc," IRSR0000462238 ("Attached is the letter to applicants that sent us donor info in response to our requests. We will need to destroy the information."); 7/17/2012 draft document from Lois Lerner to Steven Miller, "Recent section 501(c)(4) activity," IRSR0000468978 - 980, at 979 ("In cases in which the donor names were not used in making the determination, the donor information was expunged from the file.").

Steven Miller and Judith Kindell told the Subcommittee that situations existed where asking for donor information would be appropriate, for example, if a group were potentially controlled by a 527 political organization or if someone in the group was receiving a private benefit from the group.[649] The donor issue is just one among many development letter issues that appear to remain unresolved.

Under current practice, the facts and circumstances test requires IRS agents to consider a wide range of material facts affecting 501(c)(4) applications. To gain an understanding of those facts, IRS agents are required to ask detailed questions that, by their nature, are likely to generate criticisms that the IRS inquiries are inappropriate, burdensome, or intrusive. To avoid that outcome, the IRS should consider replacing the facts and circumstances test with more objective standards and bright line rules that would relieve its agents of the need to ask wide-ranging, detailed questions of 501(c)(4) applicants.

**(4) Failing to Agree on Effective Screening Criteria**

In addition to failing to provide needed guidance on substantive issues and development letters, the IRS failed to provide effective guidance to its agents about how to screen incoming 501(c) applications to identify those that should be subject to heightened scrutiny. From 2010 to 2012, the primary BOLO entry for advocacy cases was changed four times in three years without producing consensus support for the screening criteria. Some of the screening criteria were criticized for relying on organizations' names or political views rather than indicators of campaign activity. Other criteria were criticized for being so broadly worded, that they did not facilitate electronic searches for relevant cases or convey the types of campaign and advocacy activities that warranted subjecting an application to heightened scrutiny. In addition to providing ineffective guidance to EOD screeners through the BOLOs, the IRS failed to make routine use of FEC filings that provided more direct indicators of campaign activity and less intrusive means for identifying relevant cases.

**2010 Tea Party Screening Criteria.** As explained earlier, the IRS receives about 70,000 applications for tax exempt status each year, only a small percentage of which – typically much less than 1% – involve 501(c)(4) organizations involved with campaign activities. The IRS is required by law to determine whether 501(c)(4) organizations have engaged in too much campaign activity to retain their tax exempt status. The evidence reviewed by the Subcommittee indicates, however, that identifying the 501(c)(4) cases that ought to be subjected to that analysis is difficult. From the time that the first Tea Party application was flagged in February 2010, the IRS used primarily two tools to identify advocacy cases: (1) screening criteria which was included in email alerts or Be-on-the-Lookout (BOLO) lists; and (2) case-by-case reviews of individual applications when filed.

As explained earlier, the first BOLO, issued in August 2010, included an entry instructing EO screeners and determination specialists to be on the lookout for applications filed by "local organizations in the Tea Party movement."[650] Screeners then used that BOLO entry to look for a

[649] Subcommittee interviews of Steven Miller, IRS (12/13/2013) and Judith Kindell, IRS (11/5/2013).
[650] August 2010 BOLO spreadsheet, prepared by IRS, IRS0000002503 - 515, at 509; August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196

variety of advocacy cases, both conservative and liberal, finding more than 40 the first year and over 100 by June 2011. When, in June 2011, senior EO officials asked for the exact criteria being used to identify "Tea Party" cases, as explained earlier, John Shafer, head of the EO Screening Group, surveyed three of his screeners, compiled their various approaches into a list, and provided the following four "issues that could indicate a case to be considered a potential 'tea party' case":

> "1. 'Tea Party', 'Patriots' or '9/12 Project' is referenced in the case file.
> 2. Issues include government spending, government debt and taxes.
> 3. Educate the public through advocacy/legislative activities to make America a better place to live.
> 4. Statements in the case file that are critical of how the country is being run."[651]

The Shafer email shows that, more than one year after the first case was flagged, the IRS still did not have official or widely accepted criteria to identify cases falling within the Tea Party category; instead, IRS agents were using their own individual criteria to identify the cases.

**July 2011 BOLO Change.** Also as explained earlier, on June 29, 2011, EO head Lois Lerner convened a meeting of senior EO staff to discuss the advocacy cases.[652] Among other matters, Ms. Lerner expressed concern about using "Tea Party" to refer to the category of cases at issue and directed that, from then on, the cases should be referred to as "advocacy cases."[653] In response to her instruction, beginning in July 2011, the BOLO dropped any reference to the "Tea Party" and instead described the cases, in the Emerging Issues section, as follows: "Advocacy Orgs[:] Organizations involved with political, lobbying, or advocacy for exemption under 501(c)(3) or 501(c)(4)."[654]

**January 2012 BOLO Change.** Six months after that change was made, however, in January 2012, the BOLO entry was altered a third time. The Subcommittee was told that, in January 2012, Stephen Seok, the newly appointed advocacy case coordinator; Ronald Bell, the keeper of the BOLO lists and former Tea Party case coordinator; and their supervisor, Steven Bowling, met to "brainstorm" about the BOLO entry for advocacy cases.[655] According to Mr. Seok and Mr. Bell, the three believed the BOLO language was so broad that it did not effectively help screeners identify 501(c)(4) groups involved with campaign activities, and all three wanted to revise the wording.[656] Mr. Bell told the Subcommittee that, at the same time, none of them wanted to use "insensitive words" in the BOLO.[657] Mr. Bell said that the objective of their

---

[651] 6/2/2011 email from John Shafer to Cindy Thomas, "Tea Party Cases – NEED CRITERIA," PSI-IRS-09-000048.
[652] Subcommittee interviews of Cindy Thomas, IRS (11/13/2013) and Holly Paz, IRS (10/30/2013).
[653] Id. See also 5/14/2013 TIGTA Audit Report, at 30 ("Criteria changed … based on the concerns the Director, EO, raised in June 2011).
[654] 7/27/2011 BOLO spreadsheet, prepared by IRS, IRS0000002540 - 552, at 547.
[655] Subcommittee interviews of Stephen Seok, IRS (11/22/2013) and Ronald Bell, IRS (1/15/2014).
[656] Id. See also 5/14/2013 TIGTA Audit Report, at 30 ("Criteria changed … based on Determinations Unit concerns that the July 2011 criteria was too generic.").
[657] Subcommittee interview of Ronald Bell, IRS (1/15/2014).

discussion was to create a revised BOLO entry that would help identify 501(c)(4) applicants that might be involved with campaign activities.[658]

The January 2012 BOLO circulated among the Determinations Unit in Cincinnati contained, for the first time, the following new language to describe advocacy cases:

> "Current political issues. Political action type organizations involved in limiting/expanding government, educating on the constitution and bill of rights, $ocial economic reform/movement."[659]

The new language replaced the prior language that had been in use since June 2011.[660]

Both Mr. Seok and Mr. Bell, two of the three participants in the January 2012 "brainstorming session," denied authoring the revised BOLO language.[661] Mr. Seok told the Subcommittee that he saw the new language when he received the January 2012 BOLO, but said he did not draft or approve the change.[662] Mr. Bell told the Subcommittee he had not authored the new BOLO language, and did not know who did.[663] Cindy Thomas told the Subcommittee that she reviewed the January 2012 BOLO before it was sent out, saw the new language, and sent an email to Holly Paz alerting her to it, but when she didn't hear back, Ms. Thomas assumed that Ms. Paz did not have a problem with it and allowed the BOLO to go forward.[664] Ms. Paz told the Subcommittee that she learned during the course of the TIGTA audit that she had received the email from Ms. Thomas, but did not recall looking at the revised BOLO language.[665]

Mr. Muthert, a screening agent, told the Subcommittee that he saw the revised entry in the January 2012 BOLO language and, thereafter, if he saw an application with the exact language used in the BOLO, sent the organization's application to Mr. Bell.[666] According to Mr.

---

[658] Id.

[659] 1/26/2012 email from Ronald Bell circulating the BOLO, IRSR0000013533 - 538 [including redactions by IRS]; January 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000630285 - 289.

[660] Id. See also February 2012 BOLO spreadsheet, prepared by IRS, IRS0000001500 - 511 and IRSR0000006705 - 709.

[661] Subcommittee interviews of Stephen Seok, IRS (11/22/2013) and Ronald Bell, IRS (1/15/2014). The Subcommittee staff did not interview the third participant, Mr. Bowling.

[662] Subcommittee interview of Stephen Seok, IRS (11/22/2013).

[663] Subcommittee interview of Ronald Bell, IRS (1/15/2014). As explained earlier, however, on January 25, 2012, Mr. Bell sent an email to Mr. Bowling asking why a new BOLO entry had been added for Occupy organizations, stating: "I thought the $ocial economic reform in the updated current political issues was our 'code word' for the occupy organizations." 1/25/2012 email from Ronald Bell to Steven Bowling, "BOLO," IRSR0000013187. Mr. Bell told the Subcommittee that he had met with Mr. Bowling and Stephen Seok about revising the BOLO entry for advocacy groups, and thought that the group had agreed to use "$ocial economic reform" as a "code" for identifying Occupy cases. Subcommittee interview of Ronald Bell, IRS (1/15/2014). His explanation suggests that the three had reached at least some level of agreement on specific BOLO language.

[664] Subcommittee interview of Cindy Thomas, IRS (11/13/2013). Ms. Thomas told the Subcommittee that she elevated the BOLO entry to Ms. Paz, because she knew that the D.C. headquarters wanted to be kept informed about the advocacy cases, and that Cincinnati "wasn't doing anything without letting D.C. know." Id. Ms. Thomas also told the Subcommittee that she couldn't tell if the new language was left-leaning or right-leaning. Id.

[665] Ms. Paz indicated she was on maternity leave from October 2011 to February 2012. Subcommittee interview of Holly Paz, IRS (10/30/2013).

[666] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

Muthert, however, the January 2012 language was still very broad, it was difficult to use to search for relevant organizations electronically, and he did not receive any guidance as to what was a "Political action type organization."[667] Mr. Muthert said that he did not view the entry as limited to Tea Party groups.[668]

**May 2012 BOLO Change.** Five months later, the BOLO language was changed a fourth and final time. Ms. Paz told the Subcommittee that, in April 2012, she asked Ms. Thomas for a copy of all of the past BOLOs, reviewed the latest BOLO, and only then realized that the entry for advocacy cases had been changed to include references to the political views of applicants.[669] She told the Subcommittee that she immediately informed EO head Lois Lerner, and worked to revise the entry so that it would, once again, use more generic language.[670]

Ms. Paz also told the Subcommittee that she not only authored the new language, but also, because the advocacy entry was intended to cover all types of political groups, both conservative and liberal, directed that separate BOLO entries for two other types of advocacy groups, ACORN successor and Occupy groups, be eliminated.[671] The ACORN successor entry had been included in the BOLO list since 2010;[672] the Occupy entry had been included in the BOLO Watch List section since January 2012.[673]

On May 17, 2012, Ms. Paz sent the revised BOLO language to Ms. Lerner and others, explaining:

> "I would like your thoughts on the language below. I would like this language to replace the current advocacy org language on the BOLO as well as the separate references to ACORN successors and Occupy groups.
>
> > Current Political Issues: 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit)."[674]

Her suggested language was approved and incorporated into the Emerging Issues section of the June 2012 BOLO. The June 2012 BOLO accordingly provided a single entry for all advocacy cases.[675] It also omitted the separate entries for Occupy and ACORN successor groups.[676] In

---

[667] Id.
[668] Id.
[669] Subcommittee interview of Holly Paz, IRS (10/30/2013); 5/14/2013 TIGTA Audit Report, at 40.
[670] Subcommittee interview of Holly Paz, IRS (10/30/2013).
[671] Id.
[672] See 10/8/2010 email from Sharon Camarillo to John Shafer, IRSR0000410433 - 434 (including the ACORN successor selection criteria and asking: "John: Please ask your screeners to be on the lookout for these cases.").
[673] See January 2012 BOLO spreadsheet, prepared by IRS, IRSR0000630285.
[674] 5/17/2012 email from Holly Paz to Lois Lerner, Nancy Marks, and others, "potential revised BOLO language," IRS0000000492.
[675] See June 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000013251, at 252. See also 5/14/2013 TIGTA Audit Report, at 30.
[676] See, e.g., 6/14/2012 email from Ronald Bell to Tyler Chumney, "BOLO Alert 06/13/12," IRSR0000013251 (Mr. Bell wrote: "Attached is the latest BOLO updates. … The issue description for Current Political Issues located in

addition to revising the Emerging Issues entry and eliminating the separate Occupy and ACORN entries, Ms. Paz instituted a new procedure requiring management approval of all new or updated BOLO entries.[677]

The revised advocacy case entry remained in place for another year, until the TIGTA report was released in May 2013, after which the IRS suspended use of all EOD BOLOs.[678] According to screening agent Gary Muthert, the final version of the advocacy case BOLO entry used language that was so broad it could not be used effectively to search pending applications by electronic means to locate groups involved with campaign activities.[679] Instead, he indicated that every application had to be reviewed individually as it came in to see whether it fit within the BOLO screening criteria for groups involved with campaign activities.[680] In addition, according to Mr. Muthert, the BOLO screening criteria failed to provide sufficient guidance to help EO personnel determine whether an individual application should be selected for heightened scrutiny due to involvement with campaign intervention. In other words, while the BOLO entry had become inoffensive, it had also become ineffective.

**Failure to Make Use of FEC Filings.** A key criticism of the IRS has been its use of 501(c)(4) selection criteria that focused on organizations' names or political views instead of direct indicators of campaign involvement to trigger heightened review by IRS personnel. The revised criteria were also criticized for providing ineffective search terms to identify groups that were involved with campaign activities. One available alternative that would have cured both problems would have been for the IRS to make greater use of the FEC filings submitted by groups seeking 501(c)(4) status, since those filings provided direct evidence of campaign activities, but the IRS failed to make effective use of those FEC filings to identify relevant cases.

As explained earlier, the Federal Election Campaign Act (FECA) requires persons involved with campaign activities to file certain periodic reports. Non-candidate organizations, including 501(c)(4) groups, that engage in certain campaign-related spending, are required to file reports disclosing "independent expenditures" on Form 5, and expenditures on "electioneering

---

the Emerging Issue Tab has been revised and the new coordinator is Sharon Light. Watch list issues #2 [REDACTED BY IRS] and #21 'Occupy' Organizations from the last BOLO Alert dated 3-26-12 have been removed and now are to be included in the description for Current Political Issues."); 3/26/2013 email from Jon Waddell to Cindy Thomas, "Sensitive Case," IRSR0000054976 - 978, at 977 ("Acorn-related cases were previously reflected on the BOLO and subsequently folded into the political advocacy category over a year ago.").

[677] See 5/17/2012 email from Holly Paz to Cindy Thomas, "BOLO," includes attachment "Memorandum for Manager, EO Determinations," signed by Holly Paz, IRSR0000177228 - 230 (creating a new instruction for adding or changing BOLO entries: "The procedures provide that any new entries and updates to the BOLO list must first be approved by the Emerging Issues group manager, then the EO Determinations manager and finally the EO R&A director."). Prior to this change, BOLO entries could be updated by the manager of a particular EOD group sending an email to the manager of Group 7822, the screening group. 5/11/2012 email from Cindy Thomas to Holly Paz, "BOLO Spreadsheet Description," PSI-TIGTA-01-000210 - 211.

[678] See 6/24/2013 "Report Outlines Changes for IRS To Ensure Accountability, Chart a Path Forward; Immediate Actions, Next Steps Outlined, the IRS announced," IRS press release, http://www.irs.gov/uac/Newsroom/Report-Outlines-Changes-for-IRS-To-Ensure-Accountability,-Chart-a-Path-Forward;-Immediate-Actions,-Next-Steps-Outlined (indicating that, on June 12, 2013, the IRS "suspended the use of any 'be-on-the-lookout,' or BOLO lists in the application process for tax-exempt status").

[679] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

[680] Id.

communications" on Form 9.[681] The FEC told the Subcommittee, however, that it was unaware of the IRS making routine use of those filings to identify 501(c)(4) groups involved with campaign activities.[682] The FEC also told the Subcommittee that the IRS had never asked the FEC to include Taxpayer Identification Numbers (TINs) or 501(c) status information on its forms, even though that information would have increased the usefulness of those forms in IRS oversight efforts related to tax exempt groups engaged in campaign activities.[683] In addition, the FEC told the Subcommittee that it had never been asked to set up any special procedures for the IRS to obtain FECA reports of interest on an automated basis.[684] In a briefing, the IRS told the Subcommittee that while its agents often made use of FEC filings, it had not set up automated procedures to obtain the filings and match them to pending case files, nor had its agents routinely used FEC filings as a screening device to identify 501(c)(4) applications warranting heightened review.[685]

If the IRS were to ask 501(c)(4) applicants and exempt organizations to provide copies of any Form 5, Form 9, or other relevant forms filed with the FEC within a specified period of time, such as within ten days of filing an independent expenditure or electioneering communications report, the IRS would become the recipient of timely information regarding two of the largest categories of campaign spending. Receiving copies of those filings would immediately alert the agency to those campaign-related expenditures, without IRS agents having to conduct any inquiries of its own. If the IRS were to ask the 501(c)(4) organizations submitting copies of those forms to also include their TINs and 501(c) status information, EO agents could easily match the forms to any existing case files. If the IRS were also to establish a bright line rule treating those expenditures as evidence of campaign intervention activities, it would relieve EO agents of any need to perform a facts and circumstances analysis of the expenditures, and enable them to consider the total amount of expenditures when evaluating whether the organization was engaged primarily in social welfare activities.

The failure of the IRS to make efficient use of FEC filings as a screening device deprived EO agents of a useful mechanism to identify 501(c)(4) applications warranting heightened scrutiny due to campaign activities.

### H. Addressing the Backlog

After the January 2012 development letters focused media and Congressional attention on IRS treatment of 501(c)(4) applications, senior IRS managers learned of the growing backlog

---

[681] Independent expenditure is "an expenditure by a person – (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." Federal Election Campaign Act of 1971, 2 U.S.C. § 431(17) (2012). "Electioneering communications" are communications which are broadcast within 30 days of a primary or 60 days of a general election and mention a clearly identified candidate to the electorate. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 434 (f)(3) (2012).

[682] 6/12/13 briefing by the FEC of the Subcommittee.

[683] Id.

[684] Id. The FEC also said that the IRS could set up automatic feeds to obtain reports of interest without consulting the FEC, but was unaware of the IRS' having done so. Id.

[685] 4/30/2013 briefing by the IRS of the Subcommittee.

of unresolved cases and the internal confusion and hesitancy about how to resolve them. In April 2012, in an effort to reduce the backlog, the TEGE Commissioner, with the approval of the IRS Deputy Commissioner, sent a task force of EOT specialists from Washington headquarters to the Cincinnati office to tackle the backlog. The team reviewed and categorized the pending cases, which by then had hit a peak of about 320 cases, in what was called a "bucketing" effort. The EOT specialists also conducted training to help the Cincinnati determinations specialists resolve the cases. A year after the special bucketing and training effort, however, the majority of 501(c)(4) cases remained unresolved, demonstrating the ongoing difficulties within the IRS over how to handle the cases.

### (1) Backlog Discovered

According to Steven Miller, then IRS Deputy Commissioner for Services and Enforcement, it was in February 2012, that he read the negative press reports and saw the letters from Members of Congress asking about 501(c)(4) organizations being unfairly questioned by the IRS, and asked EO head Lois Lerner to brief him on the issues.[686] Mr. Miller told the Subcommittee that it was around then that he learned for the first time that a backlog of advocacy cases was awaiting IRS action, some since 2010, and that the number of cases had climbed to over 300.[687] Mr. Miller told the Subcommittee that because the press had referred to "Tea Party" cases, he asked Ms. Lerner and EOT head Holly Paz if the cases were limited to Tea Party applicants, and learned that they instead encompassed "a wide spectrum" of groups.[688] According to Mr. Miller, he was told the cases involved primarily conservative groups, but some applications had also been filed by liberal groups.[689]

Mr. Miller told the Subcommittee that he tasked Nancy Marks, then a Senior Technical Adviser to Acting TEGE Commissioner Joseph Grant, with taking a close look at the 501(c)(4) applications process for advocacy cases.[690] Mr. Miller indicated that Ms. Marks put together a team of specialists who travelled to the Cincinnati office on a "fact finding tour."[691] Around the same time, in March 2012, the Treasury Inspector General for Tax Administration (TIGTA) initiated an audit of the application process for advocacy cases, which also included a visit to the Cincinnati office.[692]

---

[686] Subcommittee interview of Steven Miller, IRS (12/11/2013).

[687] Id. See also 2/22/2012 email from Holly Paz to Cindy Thomas, "Tea Party application," IRSR0000013739 - 741, (Ms. Paz: "Can you get me number of advocacy cases by 11 tomorrow? Also I think all meeting bolo criteria go to full development. Is that right? How do we currently have this described on the bolo? Sorry for the rush. Steve Miller now wants to meet with Lois tomorrow at 1.").

[688] Subcommittee interview of Steven Miller, IRS (12/11/2013).

[689] Id. Mr. Miller told the Subcommittee that it is likely he spoke to IRS Commissioner Shulman about the cases at that time, but did not recall the conversation. Id.

[690] Id. See also 5/14/2013 TIGTA Audit Report, at 19, 40.

[691] Subcommittee interview of Steven Miller, IRS (12/11/2013). See also 5/14/2013 TIGTA Audit Report, at 19, 40.

[692] For more information about the TIGTA audit, see below.

On April 20, 2012, Determinations head Cindy Thomas sent an email to her staff announcing both upcoming visits:

> "Because of the hearings involving advocacy cases in which Steve Miller will need to testify, several folks from TEGE Headquarters will be in Cincinnati next week to take a tour of our operations, review advocacy cases, etc., in order to prep Steve for the hearings. While the folks from D.C. are in Cincinnati, they plan to review all of the advocacy cases. A separate email will be sent regarding these cases.
>
> The following week three representatives from TIGTA … will be in Cincinnati to take a tour, etc."[693]

The email explained that the TIGTA representatives would visit Cincinnati on April 30 and May 1, 2012, to examine the process for screening 501(c) applications and developing cases.[694] The Washington team led by Ms. Marks visited the Cincinnati office on April 23, 2012, and examined about half of the advocacy cases.[695]

Mr. Miller told the Subcommittee that Ms. Marks reported to him in early May 2012, and indicated that what she and her team had seen in Cincinnati "wasn't a pretty sight."[696] Mr. Miller said that, among other issues, he learned that Ms. Lerner had changed the wording of the BOLO entries used to identify advocacy cases from using the phrase "Tea Party" to more generic language a year earlier, but that the language had been changed again since then, and TIGTA was looking into the issue.[697] Mr. Miller told the Subcommittee that he recognized there was a problem with the cases, decided that an effort should be made to accelerate their processing to reduce the backlog, and instituted weekly meetings on the project.[698]

### (2) Bucketing Begins

In May 2012, with Mr. Miller's approval, Joseph Grant, then Acting TEGE Commissioner, ordered a team of EO experts from the Washington, D.C. office, led by Nancy Marks and Sharon Light, to return to the Cincinnati office to "bucket" the pending advocacy cases, meaning divide the 320 cases into categories, and help train the Cincinnati EOD

---

[693] 4/20/2012 email from Cindy Thomas to Determinations staff, "Schedule for Next Two Weeks Including Tours and Action Items," IRSR0000003152 - 155, at 153. Despite the email's reference to upcoming hearings on advocacy cases, Mr. Miller was not asked to testify on that subject until a July 25, 2012 hearing before the House Committee on Ways and Means. See "Public Charity Organizational Issues, Unrelated Business Income Tax, and the Revised Form 990," House Ways and Means Subcommittee on Oversight, House Serial No. 112-OS14, (7/25/2012), http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg80340/pdf/CHRG-112hhrg80340.pdf.

[694] 4/20/2012 email from Cindy Thomas to Determinations staff, "Schedule for Next Two Weeks Including Tours and Action Items," IRSR0000003152 - 155, at 154 - 155.

[695] 5/14/2013 TIGTA Audit Report, at 40.

[696] Subcommittee interview of Steven Miller, IRS (12/11/2013).

[697] Id.; Subcommittee interview of Holly Paz, IRS (10/30/2013).

[698] Subcommittee interview of Steven Miller, IRS (12/11/2013). See also 6/28/2012 email from Lois Lerner to Sharon Light and others, "Hearing prep," IRSR0000178714 - 715, at 714 ("I just got clarification from Nikole [Flax] that [Steven] Miller was talking about getting a briefing on how the referral process works, what issues TIGTA raised in its audit and what we have done to meet the concerns.").

determinations specialists to process the cases in each of the buckets.[699] In addition, Mr. Miller directed that progress in resolving the cases be reviewed in weekly staff meetings to be attended by himself, Ms. Lerner, Ms. Paz, and Mr. Miller's chief of staff, Nikole Flax.[700] Mr. Miller said that he attended the weekly meetings on a regular basis at first, but then only sporadically.[701]

On or around May 14, 2012, a group of eight advocacy experts from Washington, D.C. traveled to the Cincinnati office to bucket all of the pending cases and help train the Cincinnati employees to work them.[702] They spent the first two days training a team of determinations specialists in the Cincinnati office. Then the Washington and Cincinnati employees worked together to bucket the 320 cases. They used four categories of buckets: Bucket 1 – favorable decision on the application likely; Bucket 2 – minor information needed; Bucket 3 – more development needed; and Bucket 4 – denial of application likely.[703]

According to one participant in the effort, to categorize the pending cases, each case was reviewed by two different people on the bucketing team, usually one from Washington and one from Cincinnati.[704] Initially, each reviewer decided how a particular case should be bucketed. If the reviewers agreed, the case was referred to that bucket; if they disagreed, they attempted to reach consensus on the appropriate bucket; if they were unable to reach agreement, Ms. Light made the final decision.[705] One of the Washington participants, Hilary Goehausen, told the Subcommittee that categorizing the cases was difficult, because under "the facts and circumstances [test,] two people can come to different conclusions" about how a case should be handled.[706] Ms. Goehausen indicated that, despite the disagreements, the group completed reviewing all of the cases in about three weeks.[707]

### (3) Case Resolutions

After the cases were bucketed, they had to be reviewed and resolved. Some of the cases placed in Bucket 1 were immediately approved, including some organizations that had failed to

---

[699] Subcommittee interview of Holly Paz, IRS (10/30/2013). See also 5/14/2013 TIGTA Audit Report, at 41.
[700] Subcommittee interview of Steven Miller, IRS (12/11/2013). See also 7/10/2012 email from Cindy Thomas to Cincinnati employees, "Advocacy Cases – Data Needed COB Every Wednesday," IRSR000005273 ("Holly Paz and others in D.C. have regular meetings with Steve Miller regarding the political advocacy cases and they typically need data for these meetings because Steve wants to make sure these cases continue to move.").
[701] Subcommittee interview of Steven Miller, IRS (12/11/2013).
[702] The Washington employees who traveled to Cincinnati were Matthew Giuliano, Hilary Goehausen, Judith Kindell, Sharon Light, Justin Lowe, Andy Megosh, and Holly Paz, under the leadership of Nancy Marks and Sharon Light. The Cincinnati employees who participated in the bucketing were Janine Estes, Jodi Garuccio, Joseph Herr, Grant Herring, Faye Ng, Mitch Steele, and Carly Young. Two individuals from the Quality Assurance office in Cincinnati, Daniel Dragoo and Mike Ludwig, also participated. See email from Cindy Thomas to John Shafer and others, "Advocacy Cases – Next Steps – Update," PSI-IRS-09-000064 - 065. See also 5/14/2013 TIGTA Audit Report, at 41.
[703] Subcommittee interview of Holly Paz, IRS (10/30/2013). See also 5/14/2013 TIGTA Audit Report, at 41.
[704] Subcommittee interview of Holly Paz, IRS (10/30/2013). See also 6/8/2012 email from Holly Paz to Cindy Thomas, "advocacy cases – next steps – revised," IRSR0000168059 - 061 (outlining bucketing process).
[705] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013). See also 6/8/2012 email from Holly Paz to Cindy Thomas, PSI-TIGTA-03-000661 - 663, at 663 (outlining bucketing process, "Sharon will be involved in any reconciliation discussions needed if Mitch [Steele] and Joseph [Herr] place cases in different buckets.").
[706] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).
[707] Id. See also 5/14/2013 TIGTA Audit Report, at 41.

respond to development letters.[708] Over a dozen other applications were withdrawn. In July 2012, Lois Lerner, EO head, provided an update to Mr. Miller, then Deputy Commissioner for Services and Enforcement.[709] She indicated that the IRS had begun with 320 advocacy cases pending, including 97 501(c)(3) groups and 223 (c)(4) groups. She indicated in the document that 55 of the applications had been approved, including 51 (c)(4) applications, while 15 applications had been withdrawn; and that "no denials" had been issued other than the revocation of approvals that had been "wrongly" granted to five Emerge organizations the prior year.[710] Her report indicated that 70 of the 320 cases had been resolved within two months.

Resolving many of the 250 remaining advocacy cases took much longer.[711] In October 2012, Determinations head Cindy Thomas sent EOT head Holly Paz an email expressing her fear that: "with the pace that is taking place that they'll be working the bucket 4 cases until they retire (this isn't intended to be a flip comment, but rather a sincere concern)."[712]

One key issue was whether organizations engaged in lobbying rather than campaign activities should be included in the advocacy category of cases. In February 2013, the advocacy team leader Sharon Light contacted other EO personnel about a particular case which had initially been labeled as an advocacy case; after a flurry of email traffic analyzing the case, it was determined that the case involved lobbying rather than campaign activities and should not be considered an advocacy case.[713] On March 12, 2013, however, Donna Abner, head of the IRS Quality Assurance Division, wrote: "This is no different than other cases we have seen bucketed that supported or opposed particular legislation. Sorry – I'm confused as to what is and is not bucketed. Will you please clarify?" Ms. Light responded: "There has been confusion about this issue."[714] Ms. Abner replied that she was satisfied that the case at issue had been adequately analyzed, but was unsure that future cases would be appropriately classified.[715]

---

[708] See 5/24/2012 email exchange among Holly Paz, Cindy Thomas, and others, IRSR0000005338 - 342. (Ms. Thomas wrote to Kenneth Bibb: "The wording for the favorable determination letters is attached. Per Steve Miller's request, these cases need to be closed by COB 5/25/2012."); 5/23/2012 email exchange among Lois Lerner, Judith Kindell, Nancy Marks, and others, IRSR0000210032 - 034 (discussing a script to use when calling groups whose applications had been approved); 5/23/2012 email from Lois Lerner to Holly Paz, Nancy Marks, Sharon Light, and Judith Kindell, "Phone Script favorable advocacy case," IRSR0000210035 - 036 (attaching telephone script).
[709] 7/17/2012 draft document from Lois Lerner to Steven Miller, "Recent section 501(c)(4) activity," IRSR0000468978 - 980. Mr. Miller told the Subcommittee that it was his handwriting at the top of the document indicating the document was "from Lois." Subcommittee interview of Steven Miller, IRS (12/11/2013).
[710] Id. at 979.
[711] Subcommittee interview of Hilary Goehausen, IRS (12/13/2013).
[712] October 30, 2012 email from Cindy Thomas to Holly Paz, "Issue from Advocacy Team Held 10/30/2012," IRSR0000005935.
[713] 3/12/2013 emails between Donna Abner and Sharon Light, "Case Returned from EODQA – Potential Political Advocacy," IRSR0000012122 - 126.
[714] Id. Ms. Light continued, "Some cases that only involved lobbying got bucketed and worked as advocacy cases because it wasn't clear from screening that political intervention wasn't a problem. Cases got identified as 'advocacy cases' if they mentioned lobbying and someone felt the lobbying was a sign of political intervention. And sometimes cases that vaguely mentioned 'advocacy' got identified because it wasn't clear on screening whether they were talking about lobbying or political intervention. But when it's clear that lobbying, not political intervention, is the issue then they don't fit the criteria." Id. at 123.
[715] Ms. Abner wrote, "I'm ok with the explanation below that this one particular case did not need to now go through bucketing because the case has been adequately developed to the point where we now know that political

According to the TIGTA Audit Report, a decision was also made "to refer cases to the Review of Operations Unit for follow-up if there were indications of political campaign intervention but not enough to prevent approval of tax-exempt status."[716]

Senior IRS officials continued to follow the advocacy cases, including Steven Miller after his November 2012 appointment as Acting IRS Commissioner. In February 2013, for example, his Chief of Staff Nikole Flax received a detailed data report on the number of advocacy cases that had come in, how the cases had been bucketed and resolved, and how many remained pending.[717] In May 2013, one year after the special bucketing effort was launched, about 259 advocacy cases from across the political spectrum remained unresolved, some dating back to 2010.[718] That so many cases remained unresolved after the concerted bucketing effort a year earlier offers additional evidence that the cases were difficult to resolve using the facts and circumstances test and more objective standards, bright line rules, and useful guidance were needed.

## I. Evaluating Campaign and Social Welfare Activities

During the three-year period from 2010 through 2012, as the IRS struggled with the growing backlog of 501(c)(4) applications raising advocacy issues, many 501(c)(4) groups deepened their involvement in campaign activities. Those activities raised a number of difficult issues for IRS agents charged with using the facts and circumstances test to evaluate the nature and extent of those activities and ensure compliance with the tax code. A brief discussion of some of the campaign-related issues helps explain why IRS agents moved so slowly to resolve the cases, and what impact those issues could have on an organization's tax exempt status.

**Increased Campaign Expenditures.** As discussed earlier, the IRS reported that "[s]tarting in 2010," it saw "a significant increase" in the number of section 501(c)(3) and (c)(4) applications from groups "that appeared to be, or planned to be engaged in political campaign activity."[719] IRS data shows that, from 2008 to 2012, the number of 501(c)(4) applications filed with the IRS more than doubled.[720] IRS data also indicates that during the two-year period from 2008 to 2010 alone, the amount of campaign-related expenditures reported by 501(c)(4) groups

---

intervention is not a problem. However, will this treatment be consistent? If a similar case was received by specialists today and screener noted the 'political consultant' issue would it/should it be bucketed? Or, would we only send to bucketing if development uncovered significant or clear political intervention? And, if so, would this be consistent?" Id. at 122.

[716] 5/14/2013 TIGTA Audit Report, at 42.

[717] See 2/8/2013 email from Holly Paz to Nikole Flax, Lois Lerner, and others, "Advocacy Data Request," IRSR0000468937 - 938

[718] See undated notes by Steven Miller, Acting IRS Commissioner, "Fact sheet-6:30 p.m.," IRSR0000468916 - 920, at 920 (believed to be from 2013) ("Through May 9, IRS identified 472 applications for exemption for review of potential advocacy issues (including 301 §501(c)(4) applications). The balance of applications are for section 501(c)(3) status. To date, 176 applications have been approved (136 of which [are] §501(c)(4) applications). There have been 37 withdrawals, inclusive of both §501(c)(3) and (4) organizations.") In the same document, Mr. Miller wrote: "Moreover, while it is impossible based on name alone to determine with specificity the political alignment of all organizations, in their totality it is clear that they span the entire political spectrum." Id.

[719] 4/30/2013 "Memorandum for Deputy Inspector General for Audit," from Joseph H. Grant, Acting IRS Commissioner, Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 43.

[720] Id.

almost tripled.[721] Spending data in filings with the Federal Election Commission (FEC) are consistent. They show that, in 2010 and 2012, two years in which federal elections took place, 501(c)(4) tax exempt groups spent millions of dollars on independent expenditures and electioneering communications. An analysis of FEC filings conducted by the Center for Responsive Politics found that, in 2010 alone, conservative and liberal 501(c)(4) groups reported campaign spending that totaled about $126 million.[722] Two years later, in 2012, the Center determined that conservative and liberal 501(c)(4) groups reported spending twice as much, totaling nearly $300 million.[723]

Press reports of 501(c)(4) organizations sponsoring election advertisements, bankrolling get-out-the-vote efforts, or making large contributions to groups engaged in campaign activities also increased. Media stories included descriptions of campaign activities and expenditures by liberal 501(c)(4) groups such as the League of Conservation Voters,[724] Patriot Majority USA,[725] Women's Voices Women Vote Action Fund,[726] and VoteVets Action Fund,[727] as well as by conservative groups such as the American Action Network[728] and Crossroads Grassroots Policy

---

[721] See 5/7/2013 "Updated Baseline Analysis of 501(c)(4) Form 990 Filers with Political Campaign Activities," prepared by the IRS, IRSR0000507010 - 044, at 013.

[722] "2010 Outside Spending, by Group," Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U.

[723] "2012 Outside Spending, by Group: Non-Disclosing Groups," Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U.

[724] According to the Center for Responsive Politics, the League of Conservation Voters (LCV), which works to elect pro-environment candidates, was the largest spending, Democratic leaning 501(c)(4) group in the 2012 election cycle. See "2012 Outside Spending, by Group: Non-Disclosing Groups," Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U. The League of Conservation Voters is affiliated with one 501(c)(3) group, League of Conservation Voters Education Fund; one other 501(c)(4) group, Federation of State Conservation Voter Leagues; and three 527 political organizations which primarily focus on "federal electoral activity," League of Conservation Voters Action Fund, LCV Political Engagement Fund, and League of Conservation Voters Victory Fund. See LCV 2011 Form 990, Schedule R, at 1-cont. 1, Part II.

[725] According to the Center for Responsive Politics, Patriot Majority USA was the second largest spending, Democratic leaning 501(c)(4) group in the 2012 election cycle. See "2012 Outside Spending, by Group: Non-Disclosing Groups," Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U. While "Patriot" has been characterized as a criteria used by the IRS to identify conservative 501(c)(4) groups, here it is part of the name of a major Democratic-leaning group. Patriot Majority USA's stated mission is to "create jobs, promote economic development and preserve the American Dream for all families." "America Back on Track," Patriot Majority, http://www.patriotmajority.org/about.

[726] Women's Voices Women Vote Action Fund is a Democratic leaning 501(c)(4) group whose stated mission is: "to promote social welfare ... including but not limited to, conducting research on determining how to increase the share of unmarried women in the electorate, developing public education campaigns that motivate the voter registration and participation of unmarried women, advocating for public policy issues that affect the lives of unmarried women, and publicizing the position of elected officials concerning these issues." Women's Voices Women Vote Action Fund Form 1024, Exhibit 2, Articles of Incorporation, at 1.

[727] VoteVets Action Fund is a 501(c)(4) group affiliated with VoteVets Political Action Committee, a 527 political organization. See VoteVets Action Fund 2010 Form 990, Schedule R, at 1, Part II, line 1. The stated mission of VotesVets Action Fund is to use "public issue campaigns and direct outreach to lawmakers to ensure that troops abroad have what they need to complete their missions, and receive the care they deserve when they get home." "About Us," VoteVets, http://www.votevets.org/about?id=0001.

[728] The American Action Network is a Republican leaning 501(c)(4) organization affiliated with the Congressional Leadership Fund, a 527 political organization, and the American Action Forum, a 501(c)(3) charitable organization. American Action Network's stated mission is to "create, encourage and promote center-right policies based on the

Strategies.[729] Their FEC filings, 1024 application forms, and 990 tax returns illustrate some of the problems that IRS agents have encountered, why many sought guidance on how to resolve them, and why the processing of these cases slowed as the IRS sought ways to ensure the cases were treated consistently.

**Issue Ads Versus Campaign Ads.** One key issue often confronting IRS agents handling 501(c)(4) applications filed by groups involved with campaign activities was distinguishing between spending on issue advocacy versus campaign activities. The IRS required its agents to use the facts and circumstances test to determine, for example, whether a broadcast advertisement sponsored by a 501(c)(4) organization should be treated as a campaign or social welfare activity.[730] The IRS did not allow its agents to rely on the Federal Campaign Finance Act (FECA) provision which treated any ad that is broadcast on radio or television with 30 days of a primary or 60 days of an election, and mentions a candidate to the electorate, as an "electioneering communication."[731] Instead, the IRS required its agents to consider all of the facts and circumstances surrounding the advertisement, including its timing, wording, broadcast medium, audience, and context.[732]

One of the most difficult aspects of the required analysis involved the ad's wording. If the ad used words that were campaign related, such as "vote for," "elect," or "defeat," an IRS agent would likely treat it as evidence of a campaign activity. For example, a television ad aired by the League of Conservation Voters in October 2012, within a month of an election, urged viewers to "Help us defeat [a Republican candidate] and the Flat Earth Five."[733] But other ads

---

principles of freedom, limited government, American exceptionalism, and strong national security." "About," American Action Network, http://americanactionnetwork.org/about.

[729] Crossroads Grassroots Policy Strategies (Crossroads GPS) is a Republican-leaning 501(c)(4) group affiliated with American Crossroads, a 527 political organization. See Crossroads GPS 2011 Form 990, Schedule R, at 1, Part II. According to the Center for Responsive Politics, in 2012, Crossroads GPS spent the largest amount on political activity of any 501(c)(4) group, reporting nearly $71 million in political expenditures. See 2012 "American Crossroads/Crossroads GPS," prepared by Center for Responsive Politics, http://www.opensecrets.org/outsidespending/detail.php?cmte=American+Crossroads%2FCrossroads+GPS&cycle=2012.

[730] Rev. Rul. 2007-41.

[731] 2 U.S.C. § 434 (f)(3)(A)(i).

[732] See Rev. Rul. 2007-41. See also 4/25/2012 draft guidesheet, "Reviewing Section 501(c)(3) and 501(c)(4) Exemption Applications (Political Campaign Intervention and Lobbying), at PSI-TIGTA-01-000146 - 199, at 159 - 162.

[733] Transcript of advertisement aired by the League of Conservation Voters, naming Congressman Dan Benishek (R) of Michigan's 1st Congressional District:

| | |
|---|---|
| Written on Screen: | Meet the Flat Earth Five |
| Female Voice: | Is global warming a major threat to the Great Lakes? |
| Written on Screen: | Candidate Debate<br>North Central Michigan College Library<br>October 15, 2012<br>Dan Benishek MI-01 |

aired by 501(c)(4) groups did not explicitly call for the election or defeat of a candidate, while still conveying a message about an individual running for office. For example, in September 2012, Patriot Majority USA aired an ad that named a Republican Congressman and, without using the words "defeat" or "vote against," discussed his position on Medicare in very negative terms, ending with the statement: "He's for them. Not us."[734] It is possible that an IRS agent

---

| | |
|---|---|
| Dan Benishek: | "Well frankly, I'm not sure…umm… how significant global warming is. [booing in the background] uuhh… Well, I don't know, I'm a scientist." [laughter in background] |
| Written on Screen: | The National Academy of Sciences found that 98% of climate scientists accept that humans are contributing to climate change. |
| Written on Screen: | Help us defeat Dan Benishek and the Flat Earth Five.<br>lcv.org/FlatEarthFive<br>Paid for by the League of Conservation Voters, www.lcv.org, and not authorized by any candidate or candidate's committee |

[734]Transcript of advertisement aired by Patriot Majority USA, naming Congressman Tom Latham (R) of Iowa's 3rd Congressional District:

| | |
|---|---|
| Male Announcer: | Republicans in Congress. What are they dishing out for Iowans? |
| Written on Screen: | Republican Diner<br>Today's Special |
| Male Announcer: | They voted to end Medicare as we know it. |
| Written on Screen: | Republicans in Congress voted to end Medicare as we know it.<br>H Con Res 34, Vote #277, 4/15/11; Wall Street Journal, 4/4/11 |
| Male Announcer: | Forcing seniors to pay $6,400 dollars more |
| Written on Screen: | Republicans in Congress<br>Seniors pay $6,400 more<br>USA Today, 10/3/11; Congressional Joint Economic Committee, 5/20/11 |
| Male Announcer: | While serving the average millionaire a tax break of nearly $265,000 dollars. |
| Written on Screen: | Republicans in Congress<br>$265,000 tax break for millionaires<br>Center for Budget and Policy Priorities, 3/27/12 |
| Male Announcer: | And here's Tom Latham. A top chef in Congress said, quote, he'd do anything for his close friend House Speaker John Boehner. |
| Written on Screen: | "I'd do anything he asked."<br>*Politico, 9/21/10*<br>Congressman Tom Latham |
| Male Announcer: | Tom Latham. He's for them. Not us. Patriot Majority USA is responsible for the content of this advertising. |
| Written on Screen: | Congressman Tom Latham. He's for them. Not us. |

would view the wording of that ad as representative of issue advocacy, in particular if Medicare legislation were under consideration in the House or a vote took place in the House on a Medicare issue around the time the ad aired. But another IRS agent might treat it as a campaign ad due to its negative tone and its being broadcast within two months of an upcoming election. Either decision would be supportable under current IRS practice. By requiring consideration of all material factors when evaluating an ad, the facts and circumstances test required IRS agents to make judgments based upon a subjective analysis of a collection of various issues related to the advertisement, rather than a dispassionate analysis of objective facts not open to dispute.

**Inconsistent Tax and FEC Spending Totals.** A second issue confronting IRS agents involved inconsistent spending reports. On its 990 tax return for 2010, Women's Voices Women Vote Action Fund (WVWVAF), a Democratic-leaning group, checked a box indicating that it did not engage in any "direct or indirect political campaign activities," but reported on filings with the FEC for 2010, that it had spent nearly $880,000 on electioneering communications and nearly $250,000 on independent expenditures.[735] When questioned about the discrepancy, WVWAF reported it had made an inadvertent error and would amend its 2010 tax return, which it did.[736] In its amended 990 tax return for 2010, WVWVAF changed its "no" response to a "yes" on political campaign activities; added a Schedule C for "Political Campaign and Lobbying Activities;" and reported about $250,000 in political expenditures, representing about 9% of its total reported expenses for the year of $2.73 million.

Assuming WVWVAF, in fact, made an inadvertent mistake on its tax return, a second issue is why WVWVAF then reported substantially less campaign related spending on its tax return – $250,000 – compared to its FEC filings – $1.1 million. A related issue is whether the IRS agent reviewing the 990 tax return would, as a standard practice, compare the group's spending totals on its tax return versus those on its FEC filings and, if so, ask about the difference. Still another issue is how the agent will treat the information provided on the FEC filings. If the IRS had a bright line rule requiring agents to treat electioneering communications and independent expenditures as campaign spending, then the IRS, 501(c)(4) group, and tax exempt community would know how the IRS would analyze the facts. Instead, under the facts and circumstances test, the IRS, the group, and the tax exempt community cannot be sure how the group's expenditures will be treated.

In addition, if the IRS were to determine that all of WVWVAF's FEC reported spending, totaling about $1.1 million, must be treated as campaign activity, then that campaign spending

---

Paid for by Patriot Majority USA, www.patriotmajority.org. Not authorized by any candidate or candidate's committee. Patriot Majority USA, which opposes Tom Latham for re-election, is responsible for the content of this advertising.

[735] See 2010 Women's Voice Women Vote Action Fund Form 990 at 3, Part IV, line 3; "Women's Voice Women Vote Action Fund," Center for Responsive Politics, http://www.opensecrets.org/outsidespending/detail.php?cycle=2010&cmte=C30001754.

[736] Women's Voice Women Vote Action Fund 2010 990 and amended 990. See amended 2010 990 for Women's Voice Women Vote Action Fund 2010, at 3, Part IV, line 3; Schedule C, at 1, Part I-C, line 3. See "How Nonprofits Spend Millions on Elections and Call it Public Welfare," ProPublica, Kim Barker, (8/18/2012), http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare.

would represent about 41% of the group's total spending for 2010.[737] Since the IRS does not have a clear percentage test in place and instead relies on the facts and circumstances test to determine when a group is primarily engaged in social welfare activities, it is unclear whether the IRS would treat the 41% figure as evidence of excessive campaign activity, thereby disqualifying the group for a tax exemption. It is also easy to see why an IRS agent might delay resolving these issues pending receipt of written guidance about how to proceed.

This issue is not confined to WVWVAF. The American Action Network, a Republican-leaning organization, reported on its 990 tax return for 2010, that it had spent a total of about $25.7 million during the year, of which $5.5 million, or about 21%, was spent on political campaign activities.[738] On its FEC filings for 2010, however, American Action Network reported spending about $18.9 million on electioneering communications and independent expenditures, which represented about 73% of its total expenditures for the year.[739] Again, the reasons for the disparate spending totals and how the IRS would treat them are unclear. In addition, under the facts and circumstances test, it is unclear whether the IRS would view American Action Network's campaign spending as representing 21% or 73% of its total expenditures for the year, and whether it would view its campaign activities as having become the group's primary activity, in violation of its tax exempt status.

The IRS has reported that, beginning in 2010, "[m]any applications included what appeared to be incomplete or inconsistent information," with some organizations indicating that they "did not plan to conduct political campaign activity, but elsewhere described activities that appeared in fact to be such activity."[740] The IRS attributed the problem in part to organizations not understanding "what activities would constitute political campaign intervention under the tax law."[741] The IRS also explained that the discrepancies required its agents to "gather additional information,"[742] which slowed the case resolution process.

**Vague Spending Explanations.** A third issue confronting the IRS agents involved how to categorize particular group expenditures. The IRS has reported that the applications it began to receive in 2010, "were in many cases vague as to the activities the applicants planned to conduct."[743] Those activities were described not only on the groups' 1024 application forms, but also on their 990 tax returns, at times using broad or vague terms that made it difficult for IRS agents to determine whether the related spending should be treated as evidence of campaign or social welfare activities.

---

[737] "Women's Voice Women Vote Action Fund," Center for Responsive Politics, http://www.opensecrets.org/outsidespending/detail.php?cycle=2010&cmte=C30001754.
[738] See 2010 American Action Network Form 990, at 1, Part I, line 18; at 3, Part IV, line 3; and Schedule C, at 1, Part I-C, line 3.
[739] "American Action Network," Center for Responsive Politics, http://www.opensecrets.org/outsidespending/detail.php?cycle=2010&cmte=American Action Network.
[740] 4/30/2013 "Memorandum for Deputy Inspector General for Audit," from Joseph H. Grant, Acting IRS Commissioner, Tax Exempt and Government Entities, reprinted in 5/14/2013 TIGTA Audit Report, 43-48, at 44.
[741] Id.
[742] Id.
[743] Id.

For example, Crossroads GPS reported on its 2010 tax return that it compensated its largest independent contractor, Crossroads Media, $18.3 million for "media services."[744] In another section of the tax return, Crossroads GPS listed expenses of $8.2 million spent on "grassroots issue advocacy," without explaining what that phrase covered, who received the funds, or how those funds related to its contractor expenditures.[745] Crossroads GPS also reported on its 2010 tax return that it engaged in political campaign activities, and spent about $15.9 million on campaign expenditures from June 2010 to June 2011, representing about 37% of its total expenses for that time period.[746] Crossroads GPS reported even larger figures two years later. On its 2012 tax return, Crossroads GPS reported paying about $118.7 million for "media services" to Crossroads Media, and $74.5 million for "grassroots issue advocacy."[747] Crossroads GPS also reported spending a total of over $74 million on campaign expenditures, or about 39% of its total expenses of $189 million for the covered time period.[748] Because IRS agents must operate under the facts and circumstances test with few bright line rules, they would have to identify and analyze each of the expenditures included within the terms, "media services" and "grassroots issue advocacy," and make case-by-case determinations about what qualified as campaign versus social welfare spending.

Another example involved VoteVets Action Fund, which reported on its 990 tax return for 2010, that it had engaged in political campaign activities, and spent about $3.5 million on those activities, representing about 48% of its total expenses of $7.3 million for the year.[749] Of the $3.5 million spent on political campaign activities, VoteVets Action Fund indicated it had contributed $250,000 to Patriot Majority PAC, a Super PAC, for "voter education," and a total of $110,000 to three other 501(c)(4) groups, including in one instance $45,000 to WVWAF for "general support."[750] In addition, it spent about $1.1 million on "communications/media" and about $855,000 on "consulting."[751] An IRS agent would have to determine what activities were included within the terms, "communications/media," "consulting," and "general support," how to categorize each type of expenditure, and then determine how to evaluate the 48% total. Again, it is easy to see why an IRS agent might want guidance on how to proceed.

**Categorizing Grants and Donations.** A fourth issue confronting the IRS involved how to categorize "grants" and "donations." In recent years, many 501(c)(4) organizations made large grants or donations to other nonprofit groups, raising a host of difficult questions about whether the funds were being used on campaign activities. For example, in 2010, according to its 990 tax return, Patriot Majority USA, a Democratic-leaning group, spent the majority of its revenue on grants to ten 501(c)(4) groups and one 527 political organization, describing the funds as spent on "general support for grassroots advocacy," "general support for direct

---

[744] See 2010 Crossroads GPS Form 990, at 8, Part VII, Section B, line 1

[745] See id. at 10, Part IX, line 24b.

[746] See id. at 1, Part I, line 18; at 3, Part IV, line 3; Schedule C at 1, Part I-A, line 1.

[747] See 2012 Crossroads GPS Form 990, at 8, Part VII, Section B, line 1; at 10, Part IX, line 24a.

[748] See id. at 1, Part I, line 18; Schedule C, at 1, Part I-A, line 1.

[749] See 2010 VoteVets Action Fund Form 990, at 1, Part I, line 18; at 3, Part IV, line 3; Schedule C at 1, Part I-A, line 1.

[750] See id., Schedule I at 1, Part II.

[751] See id. at 10, Part IX, lines 24a-b.

advocacy," or "general support for nonpartisan voter turnout."[752] Its tax return contained no information about how the recipients actually used the funds, including whether they were ultimately spent on campaign activities. In its 2012 tax return, Crossroads GPS reported providing over $35 million in grants to three 501(c)(3) organizations, five 501(c)(4) organizations and two 501(c)(6) organizations, all for "social welfare purposes."[753] Under the facts and circumstances test with few bright line rules in place, an IRS agent required to evaluate these tax returns would have to analyze each grant, determine how far to go in finding out how the recipient used the funds that were provided, decide whether to categorize the grants as campaign spending, and analyze how that spending would affect an analysis of the group's primary activity.

In California, the settlement of a recent case illustrated how some 501(c)(4) groups have functioned as intermediaries to transfer funds from undisclosed donors to campaign organizations. The case involved two Arizona 501(c)(4) groups, the Center to Protect Patient Rights and Americans for Responsible Leadership, which settled with the California Fair Political Practices Commission (FPPC) and the California State Attorney General's office in 2013.[754] The Center to Protect Patient Rights was alleged to have accepted a total of $15 million in contributions from undisclosed donors, and then transferred the funds to intermediary groups – either Americans for Responsible Leadership or a group called the American Future Fund – each of which, in turn, donated the funds to political action committees engaged in campaign activities.[755] Only the immediate contributor – Americans for Responsible Leadership or American Future Fund – was listed as a PAC contributor; in the words of the FPPC, the groups' intermediary roles deprived "the public of the initial source of the contribution[s]."[756] Under the terms of the settlement, the Center to Protect Patient Rights and Americans for Responsible Leadership paid fines totaling $1 million, but did not have to disclose the original donors. California has since enacted legislation to prevent similar situations in the future.[757]

**Discontinuities.** Still another issue involved how the IRS treated organizations that changed their names or employer identification numbers over time. For example, since its inception, Patriot Majority USA, a Democratic leaning group, has gone through five different

---

[752] Of $5.2 million in total revenue, Patriot Majority USA spent about $2.9 million on grants. See 2010 Patriot Majority USA Form 990, at 1, 2, Part I, line 13; at 17, Schedule I, Part II.

[753] See 2012 Crossroads GPS Form 990, at 2, Part III, line 4b; at 38, Schedule I, Part II, line 1a. In 2010, Crossroads GPS reported over $15.8 million in grants, distributed to eleven 501(c)(4) organizations and one 501(c)(6) organization. See 2010 Crossroads GPS Form 990, at 2, Part III, line 4b; at 38, Schedule I, Part II.

[754] See "FPPC Announces Record Settlement in $11 Million Arizona Contribution Case," prepared by California Fair Political Practices Commission (10/24/2013), http://www.fppc.ca.gov/press_release.php?pr_id=783.

[755] See Fair Political Practices Commission v. The Center to Protect Patients Rights and Americans for Responsible Leadership, https://www.propublica.org/documents/item/809469-arl-cppr-stipulation-final-with-ag.html. See also "Dark Money Groups Pay $1 Million in Fines in California Case," ProPublica, (10/24/2013), http://www.propublica.org/article/dark-money-groups-pay-1-million-dollars-in-fines-in-california-case.

[756] See Fair Political Practices Commission v. The Center to Protect Patients Rights and Americans for Responsible Leadership, https://www.propublica.org/documents/item/809469-arl-cppr-stipulation-final-with-ag.html.

[757] See California Senate Bill 27, introduced by State Senator Lou Correa, (12/3/2012), http://fppc.ca.gov/SUNCenter/wp-content/uploads/2013/10/California-SB-27-amended-PDF1.pdf; "Jerry Brown signs law requiring political nonprofits identify donors," The Sacramento Bee, (5/14/2014), http://blogs.sacbee.com/capitolalertlatest/2014/05/jerry-brown-signs-law-requiring-political-nonprofits-identify-donors.html.

iterations.[758] It started out, in 2006, as the Midwest Alliance for Better Government, and changed its name a year later, in 2007, to Patriot Majority For a Stronger America, while operating under the same employer identification number, mission statement, and president, Craig Varoga.[759] In 2008, Mr. Varoga terminated Patriot Majority for a Stronger America, and formed a new 501(c)(4) group, the American Alliance for Economic Development, with a new employer identification number but located in the same office as the previous organization.[760] Two years later, in 2010, he formed Patriot Majority USA, using the same employer identification number as the American Alliance for Economic Development.[761] In 2011, Patriot Majority USA liquidated and reincorporated under the same name, changing its address and employer identification number.[762] Clearly, all five organizations were successors to each other, but the details were and are complex.[763] Since these types of changes are not unusual among

---

[758] See, e.g., "Shape-Shifting by Liberal Dark Money Groups Seems Meant to Confuse," Center for Responsive Politics, Robert Maguire and Viveca Novak (5/22/2013), https://www.opensecrets.org/wp/2013/05/shape-shifting-by-liberal-dark-mone/.

[759] Compare 2006 Midwest Alliance for Better Government Form 990 (initial return), with 2007 Patriot Majority for a Stronger America Form 990 (name change) (each listing the group's purpose as "education of the public regarding the elimination of corruption in government.")

[760] Compare 2007 Patriot Majority for a Stronger America Form 990, with 2008 American Alliance for Economic Development Form 990 (initial return) (both listing an address of "300 M St. SE, 1102, Washington, DC"). It is unclear whether American Alliance for Economic Development or Midwest Alliance for Better Government ever filed applications with the IRS for tax exempt status, since no application for either group is publicly available. However, a 2011 application for tax-exempt status by a successor organization indicates that American Alliance for Economic Development received recognition of its 501(c)(4) status on May 12, 2009. See 2011 Patriot Majority USA Form 1024 at 3, Part II, line 4. The law allows section §501(c)(4) organizations to hold themselves out as tax-exempt whether or not they have applied for such status with the IRS. See 6/4/2012 Letter from the IRS to Subcommittee, at 1.

[761] See 2010 Patriot Majority USA Form 990 (name change) at 1, letters B, D.

[762] See 2011 Patriot Majority USA Form 990-EZ; 2011 Patriot Majority USA Form 990; and 2011 Patriot Majority USA Form 1024 application. Two organizations named Patriot Majority USA filed 2011 tax returns as tax exempt organizations, one using the old employer identification number and one using a new number, since both were in operation that year. Both organizations listed the same mailing address, officers, and records custodian. The predecessor Patriot Majority USA filed a Form 990-EZ for the time period January 1-April 26, 2011, indicating that the group had terminated, liquidated its assets and made a grant of about $17,000 to the successor Patriot Majority USA. The successor Patriot Majority USA filed a Form 990 for the time period March 17-December 31, 2011, designated as an initial return. Its 2011 Form 990 listed the predecessor Patriot Majority USA as a "related tax-exempt group." Also in 2011, the successor Patriot Majority USA filed articles of incorporation in the District of Columbia, and submitted a form 1024 application to the IRS for 501(c)(4) tax exempt status, using the new employer identification number and a new address. Its application explained the group's history as follows: "Patriot Majority USA, Inc. (PMUSA) is a successor organization to the American Alliance for Economic Development, Inc. ... which was incorporated on April 29, 2008, received its recognition of tax-exempt status under section 501(c)(4) of the Code on May 12, 2009. AAED wound down its affairs, distributed its assets in accordance with section 501(c)(4), and dissolved as of January 14, 2011. PMUSA was originally started as an unincorporated nonprofit association and was the recipient of AAED's remaining assets. It was then incorporated in March 2011 to continue the mission of AAED, with substantially similar activities and goals." See 2011 Patriot Majority USA Form 990-E-Z at 1, letters A-D; at 2, Part IV; at 3, Part V, lines 36, 42a; Schedule N; 2011 Patriot Majority form 990 at 1, letters A-D; at 6, Part VI, Section C, line 20; at 7, Part VII; Schedule R, at 1, Part II; at 3, Part V, line 2; 2011 Patriot Majority USA form 1024, at 1, Part I; at 3, Part II, line 4; attached Articles of Incorporation of Patriot Majority USA, Inc.

[763] See, e.g., "Shape-Shifting by Liberal Dark Money Groups Seems Meant to Confuse," Center for Responsive Politics, Robert Maguire and Viveca Novak (5/22/2013), https://www.opensecrets.org/wp/2013/05/shape-shifting-by-liberal-dark-mone/ ("'It's hard to tell what is going on here,' said Marcus Owens, former head of the Internal

nonprofits, it illustrates the importance of the IRS having clear standards and bright line rules about how to track and analyze reorganizations, asset transfers, activities and expenditures.

These examples of issues that have recently confronted IRS agents assigned to 501(c)(4) advocacy cases illustrate some of the challenges they faced. They also help explain why so many cases were delayed while IRS agents awaited guidance from more senior managers on how to process the applications for tax exempt status.

### J. Analysis

The Subcommittee investigation into how the IRS handled 501(c)(4) applications filed by organizations engaged in campaign activity exposed extensive IRS mismanagement. The litany of management failures included delayed disposition of many applications for as long as three years; unauthorized and troubling changes in the BOLO screening criteria; use of inappropriate screening criteria; use of an inappropriate descriptor for the category of cases being subjected to heightened scrutiny; yearly turnover in the key case coordinator; slow approval of development letters; inclusion of inappropriate, intrusive, or burdensome questions in some development letters; poor coordination between IRS personnel in Cincinnati and senior managers and legal counsel in Washington, D.C.; delayed casework pending the resolution of two test cases that remained unresolved for at least three years; confusion over the standards for identifying campaign activities and determining primary activities; inadequate guidance for IRS personnel confronting complex and sensitive issues involving issue advocacy and campaign intervention; failure to finalize additional written guidance despite nearly a year of work; inadequate training on how to apply the facts and circumstances test; failure to resolve the growing backlog of advocacy cases; failure to disclose the nature and extent of the management problems in response to Congressional inquiries; and failure to develop regulations that faithfully reflected the statutory requirement that 501(c)(4) groups engage "exclusively" in social welfare activities. A number of these same management failures are described in the audit report issued by the Treasury Inspector General for Tax Administration (TIGTA).

The Subcommittee investigation also found evidence that the IRS management failures affected both conservative and liberal applicants for tax exempt status. Years-long delays, intrusive questions, and poorly coordinated reviews by IRS personnel in Cincinnati and Washington, D.C. impeded the disposition of 501(c)(4) applications filed by groups across the political spectrum, including conservative-leaning groups associated with the Tea Party, 9/12, and Patriot organizations, and liberal-leaning groups associated with ACORN, Occupy, Emerge America, and progressive organizations.

The Subcommittee investigation found no evidence that political bias influenced the decisions made by IRS personnel processing 501(c)(4) applications. A review of nearly 800,000 pages of documents and nearly two dozen interviews produced no evidence of political bias influencing IRS decisionmaking about how to process 501(c)(4) applications filed by conservative organizations, and no evidence that the IRS singled out conservative groups for harsher treatment than other groups. In fact, key IRS personnel involved with processing

---

Revenue Service's Exempt Organizations division, 'but starting and terminating organizations makes it more difficult for the IRS to identify who did what when.'").

501(c)(4) applications turned out to be registered Republicans or politically aligned with the Tea Party, with no apparent animus against conservative groups. TIGTA reached the same conclusion about the lack of political bias at the IRS in processing 501(c)(4) applications, as indicated in more detail below.

Finally, the Subcommittee investigation determined that one of the key contributors to the IRS management failures was the agency's reliance on the facts and circumstances test to identify campaign activities and determine whether a 501(c)(4) group was engaged primarily in social welfare activities. Because that test was fact-intensive and led to case-by-case determinations, and because the IRS did not provide its agents with objective standards or bright line rules on how to handle common fact patterns, IRS agents were often forced to exercise discretion over how to develop and evaluate the facts of a case and apply the law. Delays were common as some IRS agents or their supervisors hesitated over how to proceed and sought guidance to ensure they were acting appropriately. In other instances, IRS agents made decisions on pending applications that, at times, produced inconsistent results, most easily seen in the cases involving Emerge America affiliates, which sought to help Democratic women candidates run for office. In 2011, different IRS agents approved tax exempt status for five Emerge organizations, and denied tax exempt status for three Emerge organizations, exposing the confusion and subjective decisionmaking over how to process those cases; in 2012, the IRS revoked the tax exempt status of the five groups previously approved. The evidence indicates that the facts and circumstances test, when applied to 501(c)(4) applications, led to lengthy delays, intrusive questions, subjective analysis regarding the relative importance of various factors, and inconsistent results. Given the sensitivities surrounding IRS treatment of politically active groups, the ongoing management problems, and the public distrust of IRS actions in this area, the evidence indicates that the facts and circumstances test should be replaced with more objective standards and bright line rules to produce more predictable and trustworthy results.

## IV. TIGTA AUDIT

The audit conducted by the Treasury Inspector General for Tax Administration (TIGTA) was initiated in March 2012, in the midst of negative media reports about IRS treatment of 501(c)(4) applications filed by organizations engaged in campaign activity, in particular groups aligned with the Tea Party. TIGTA's Office of Audit undertook the audit at the request of the House of Representatives Committee on Oversight and Government Reform. The work was conducted over the following year, and a final audit report was issued in May 2013.

The official TIGTA audit engagement letter stated that the audit's "overall objective" was to "assess the consistency of the Exempt Organizations function's identification and review of applications for tax-exempt status involving political advocacy issues." It also stated: "Several accusations of inconsistent treatment towards conservative groups have been made." Despite being charged with examining the "consistency" of the IRS' actions, TIGTA auditors examined how the IRS handled applications filed by conservative groups, but did not perform any comparative analysis of how the IRS handled applications filed by liberal groups. In response to later media inquiries about why information about liberal groups was excluded, a TIGTA spokeswoman initially said, "we were asked to narrowly focus on Tea Party organizations," but later indicated she had been given incorrect information.

During the audit, TIGTA auditors focused on actions taken by IRS screeners to identify applications filed by groups whose names or application materials contained the phrases, "Tea Party," "9-12," or "Patriot," noting that the selection criteria focused on the groups' names or political views, rather than on their participation in campaign activities. The TIGTA auditors also focused on a single entry in a broader "Be-on-the-Lookout" (BOLO) list whose wording changed over time, moving from language which urged IRS personnel to identify applications filed by groups affiliated with the "Tea Party movement," to language urging them to identify applications containing "indicators of significant amounts of political campaign intervention." While the IRS admitted the earlier selection criteria were inappropriate, IRS personnel also attempted to demonstrate the criteria were not the result of political bias, by showing TIGTA that the IRS used similar BOLO listings for liberal groups, with screening criteria using the phrases "Progressive," "ACORN," and "Occupy" to identify applications of interest. Despite the IRS' repeatedly drawing attention to those BOLO entries, the TIGTA auditors failed to examine either how the IRS used those BOLO entries or how the IRS handled 501(c)(4) applications filed by liberal groups in comparison to applications filed by conservative groups.

In February 2013, after receiving an allegation that an IRS email had directed IRS employees to "target" Tea Party groups, the Assistant Inspector General responsible for exempt organization issues, Gregory Kutz, asked the TIGTA Office of Investigations to conduct an email search of certain IRS employees. The Office of Investigations then searched over 2,200 emails and other documents from the email accounts of five IRS employees involved with processing 501(c)(4) applications. After conducting a thorough review, the Office of Investigations concluded that the 2,200 IRS emails and other documents contained "no indication" that the pulling of Tea Party applications for additional scrutiny by IRS personnel was "politically motivated," advising that the IRS actions were instead the result of inadequate guidance on how to process them. Even though that finding by the TIGTA Office of

Investigations analysis directly addressed the central issue TIGTA was auditing, whether there was political bias at the IRS, the documentary analysis performed by the Office of Investigations was not included in TIGTA's audit report.

In February 2013, the audit team submitted a draft audit report to the TIGTA Chief Counsel and Office of Audit head. The Chief Counsel suggested removing the word "targeted" from the report, because "targeted has a connotation of improper motivation that does not seem to be supported by the information presented in the audit report." The audit team removed the word from the report except when describing the allegations that led to the audit. Later that month, TIGTA provided a draft of the report to the IRS.

As the release date for the TIGTA audit report neared, Acting IRS Commissioner Steven Miller decided to try to preempt news coverage of the negative audit results by having the head of the Exempt Organizations division, Lois Lerner, disclose the audit before it was released and apologize for the agency's conduct during a conference she was scheduled to address. On May 10, 2013, at the Acting IRS Commissioner's direction and in response to a planted question, Ms. Lerner apologized for the IRS' having used "Tea Party" to identify 501(c)(4) applications subjected to heightened review. Her apology triggered a public firestorm centered on the allegation that the IRS had shown political bias against conservative groups seeking tax exempt status. The Acting IRS Commissioner and other senior IRS officials were required to resign.

The apology generated intense interest in the TIGTA audit report which was released the following week, on May 14, 2013. The audit report found that the IRS had used "inappropriate criteria" to flag 501(c)(4) applications for heightened review, and "ineffective management" had caused delays and subjected applicants to burdensome information requests. TIGTA Inspector General Russell George was asked to testify at multiple Congressional hearings about the audit findings. When pressed about whether the IRS had unfairly targeted conservative groups, Mr. George testified that TIGTA had found no sign of political bias at the IRS, but offered as evidence only the denials of the IRS officials involved. He made no mention of the email review conducted by the TIGTA Office of Investigations or its conclusion that the documents contained "no indication" that the IRS' actions were "politically motivated," even though that investigative finding directly addressed the issue of political bias at the IRS. Mr. George told the Subcommittee that he did not mention the Office of Investigations' finding, because no one on his staff had told him about it. On June 6, 2014, Mr. George wrote in a letter to the Subcommittee that the TIGTA audit had "found no evidence of political bias," also stating "it is important to note that the matter is being further reviewed."

On May 21, 2013, the night before the third Congressional hearing at which the Inspector General testified about the audit, the TIGTA Chief Counsel decided to review the IRS BOLOs before providing copies to Congress. During his review, he saw, for the first time, BOLO entries naming two liberal groups, ACORN and Occupy. He promptly informed Inspector General George and Assistant Inspector General Kutz, both of whom told the Subcommittee they had previously been unaware of any BOLO listings for liberal groups, even though the IRS had provided copies and repeatedly informed the TIGTA audit team about them. Even after learning about them, the senior TIGTA officials remained silent for weeks about the BOLO entries for liberal groups, and provided incomplete and inaccurate testimony about them at Congressional

hearings. When the BOLO listings for liberal groups were finally disclosed by Members of Congress and the media, senior TIGTA officials insisted that the IRS had not disclosed those listings during the TIGTA audit, despite ample evidence to the contrary.

During their Subcommittee interviews, Mr. George and Mr. Kutz indicated they had since reconsidered how the TIGTA audit report treated 501(c)(4) applications filed by liberal groups. Mr. George told the Subcommittee that the audit report should have acknowledged the existence of the other BOLO entries and the auditors should have looked into the other groups; Mr. Kutz indicated TIGTA potentially should have included the Progressive, ACORN, and Occupy BOLO listings in its analysis, although he thought it might have delayed completion of the audit for another year. TIGTA has since initiated an audit into how those and other BOLO entries were used, but has put that audit on hold pending other law enforcement investigative efforts related to Lois Lerner and the IRS.

### A. TIGTA In General

The office of the Treasury Inspector General for Tax Administration (TIGTA), first established in 1999, is charged with overseeing the IRS.[764] TIGTA's stated mission is to "[p]rovide quality professional audit, investigative, and inspections and evaluations services that promote integrity, economy, and efficiency in the administration of the Nation's tax system."[765] While the TIGTA office is organizationally part of the U.S. Department of the Treasury, the TIGTA Inspector General has authority to act independently in its audits.[766]

The current TIGTA Inspector General is J. Russell George, who has been in office since November 2004.[767] Mr. George oversees a staff of about 960 employees, including auditors, investigators, attorneys, and support staff.[768] Two key TIGTA subdivisions are the Office of Audit and the Office of Investigations.[769] The Office of Audit is charged with conducting "performance and financial audits of IRS programs, operations, and activities" to identify "opportunities to improve the administration of the nation's tax laws," while the Office of Investigations is charged with conducting investigations to combat "fraud, waste, abuse and mismanagement" in IRS activities as well as attempts to "corrupt or threaten" IRS personnel.[770]

During the three-year period reviewed by this Report, 2010 to 2013, the Office of Audit was led first by Deputy Inspector General for Audit Michael Phillips and then, starting in June 2012, by Deputy Inspector General for Audit Michael McKenney. Within the office, five Assistant Inspectors General oversaw various aspects of the IRS, including an Assistant

---

[764] TIGTA was created by the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, 112 Stat. 685, to provide independent oversight of the IRS. See "Introducing the Treasury Investigator General for Tax Administration," prepared by TIGTA, http://www.treasury.gov/tigta/about/tigta_brochure.pdf; "What is TIGTA," prepared by TIGTA, http://www.treasury.gov/tigta/about_what.shtml.
[765] "About TIGTA," prepared by TIGTA, http://www.treasury.gov/tigta/about.shtml.
[766] See Inspector General Act of 1978, 5 U.S.C. App. 3, § 8D (2012).
[767] "Meet the IG: J. Russell George," prepared by TIGTA, http://www.treasury.gov/tigta/about_ig.shtml.
[768] "Introducing the Treasury Investigator General for Tax Administration," prepared by TIGTA, http://www.treasury.gov/tigta/about/tigta_brochure.pdf.
[769] Id.
[770] Id.

Inspector General for Audit, Management Services, and Exempt Organizations, a position which Gregory Kutz assumed in 2012.[771] The Office of Investigations was led by Deputy Inspector General for Investigations Timothy Camus.[772] A third Deputy Inspector General in charge of Inspections and Evaluations was David Holmgren. In addition, TIGTA obtained legal advice from its Chief Counsel Michael McCarthy and from Counselor Matthew Sutphen.[773]

**TIGTA Audit Plans.** Each year, the TIGTA Office of Audit develops and publishes an Annual Audit Plan.[774] As part of that plan, TIGTA identifies major management and performance challenges confronting the IRS, and develops audits to focus on those concerns.[775] In addition, TIGTA performs audits mandated by statute or regulation, as well as audits requested by Congress, the IRS, or the IRS Oversight Board.[776] TIGTA uses the Annual Audit Plan as a guide, but may modify its audit plans in response to staffing needs or unforeseen risk areas that require immediate attention.[777] In recent years, TIGTA has allocated roughly 10% of its staff days to suggested audits, 14% to mandatory audits, and the remaining 76% to risk-based audits.[778]

### B. Requesting the Audit

The TIGTA audit of how the IRS processed 501(c)(4) applications filed by groups associated with the Tea Party was initiated at the request of the House of Representatives Committee on Oversight and Government Reform (OGR). On March 8, 2012, three senior TIGTA officials, Matthew Sutphen, Counselor to the Inspector General, Nancy Nakamura, Assistant Inspector General for Audit, Management Services, and Exempt Organizations, and Troy Paterson, an Audit Director in the TIGTA Office of Audit, traveled to Capitol Hill and met with OGR staff.[779] The Committee staff expressed concern "that the IRS is biased in how it is processing 501(c)(4) applications from Tea Parties versus other organizations."[780] OGR staff

---

[771] "Organizational Chart," prepared by TIGTA, http://www.treasury.gov/tigta/about_orgchart.shtml.
[772] Id.
[773] Id.
[774] "Introducing the Treasury Investigator General for Tax Administration," prepared by TIGTA, http://www.treasury.gov/tigta/about/tigta_brochure.pdf.
[775] See "Fiscal Year 2014 Annual Audit Plan," TIGTA Office of Audit, at 1-4, http://www.treasury.gov/tigta/auditplans/auditplans_fy2014.pdf.
[776] Id.
[777] Subcommittee interview of Greg Kutz, TIGTA (3/26/2014).
[778] "Fiscal Year 2014 Annual Audit Plan," TIGTA Office of Audit, at 11, http://www.treasury.gov/tigta/auditplans/auditplans_fy2014.pdf ; "Fiscal Year 2013 Annual Audit Plan," TIGTA Office of Audit, at 13, http://www.treasury.gov/tigta/auditplans/auditplans_fy2013.pdf ; "Fiscal Year 2012 Annual Audit Plan," TIGTA Office of Audit, at 15, http://www.treasury.gov/tigta/auditplans/auditplans_fy2012.pdf; "Fiscal Year 2011 Annual Audit Plan," TIGTA Office of Audit, at 70, http://www.treasury.gov/tigta/auditplans/auditplans_fy2011.pdf.
[779] See "Note to File," prepared by Troy Paterson, TIGTA Bates No. 007221 - 222 (describing meeting with House Committee on Oversight and Government Reform staff). See also Subcommittee interview of Troy Paterson, TIGTA (3/21/2014); 3/22/2014 email from Troy Paterson to Russell Martin, TIGTA Bates No. 004297 - 299 (indicating the meeting took place in the OGR Committee offices).
[780] "Note to File," prepared by Troy Paterson, TIGTA Bates No. 007221 - 222. See also Subcommittee interview of Troy Paterson, TIGTA (3/21/2014); 3/22/2014 email from Troy Paterson to Russell Martin, TIGTA Bates No. 004297 - 299.

highlighted, in particular, concerns that the IRS was targeting Tea Party organizations by asking inappropriate, burdensome, and intrusive questions.[781]

After the March 8, 2012 meeting, TIGTA personnel in the Office of Audit began looking into the concerns raised by the OGR Committee. A June 2012 letter signed by OGR Committee Chairman Darrell Issa and Subcommittee Chairman Jim Jordan acknowledged those inquiries at the time and described them as a result of the March meeting.[782] A letter by the TIGTA Inspector General in response noted: "As stated in your letter, after our meeting with the Committee staff, our Office of Audit recently began work on this issue."[783] The TIGTA audit report also stated: "TIGTA initiated this audit based on concerns expressed by members of Congress,"[784] without mentioning OGR Committee Chairman Issa or Subcommittee Chairman Jordan. At another point, the audit report stated TIGTA had initiated the audit "based on concerns expressed by Congress and reported in the media regarding the IRS's treatment of organizations applying for tax-exempt status."[785] In testimony before that Committee, TIGTA Inspector General George testified that the audit was initiated as a result of Chairman Issa's concerns.[786]

Although the OGR Committee allegations appear to have been the primary motivator for the TIGTA audit, the Landmark Legal Foundation also asked TIGTA to look into the allegations

---

[781] "Note to File," prepared by Troy Paterson, TIGTA Bates No. 007221 - 222. ("The staffers are concerned about whether the questions being asked of potential 501(c)(4) organizations have gone over the line (e.g., requests for names of donors and future speakers). The staffers are also concerned about the application process for 501(c)(4)s. What is the IRS trying to achieve with the actions it is taking?").

[782] 6/28/2012 letter from Committee Chairman Issa and Subcommittee Chairman Jordan to TIGTA, PSI-TIGTA-03-001404 - 405 ("On March 8, 2012, Committee staff and Treasury Inspector General for Tax Administration (TIGTA) staff discussed potential problems with IRS's recent effort to increase scrutiny of organizations operating under 501(c)(4) status. We understand that because of our March meeting, TIGTA is conducting ongoing work to better understand this IRS initiative."). Congressman Jordan was the Chairman of the OGR Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs.

[783] 7/11/2012 letter from TIGTA Inspector General George to Chairman Issa, with an identical letter to Subcommittee Chairman Jordan, PSI-TIGTA-03-001409 - 410.

[784] 5/14/2013 TIGTA audit report, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," (hereinafter "5/14/2013 TIGTA Audit Report"), at Highlights, http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

[785] Id. at 3.

[786] Testimony of J. Russell George, "The IRS: Targeting Americans for Their Political Beliefs," hearing before U.S. House Committee on Oversight and Government Reform, Serial No. 113-33, (5/22/2013), at 10, http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81742/pdf/CHRG-113hhrg81742.pdf ("[A]s you are aware, Mr. Chairman, our audit was initiated based on concerns that you expressed due to taxpayer allegations that they were subjected to unfair treatment by the IRS."). See also 4/19/2013 email from Matthew Sutphen to Russell George, "Congressional Update," TIGTA Bates No. 015966 (TIGTA Counselor Matthew Sutphen: "[T]his report was initiated as a result of meeting with the committee staff last spring, and Chairman Issa sent a follow-up letter expressing his interest in the matter."). The week prior to the release of the TIGTA audit report, the head of the TIGTA Audit Office, Michael McKenney, questioned why the TIGTA audit report did not clearly state that it had been performed at Congressman Issa's request. See 5/8/2013 email from Michael McKenney to Gregory Kutz, "Final Report 201210022 – Inappropriate Criteria Were Used to Identify Tax Exempt Applications for Review," TIGTA Bates No. 016072 ("Greg, why is it that that we don't say that this review was performed at the request of the Chairman of the House Oversight and Government Reform Committee?") See also 5/7/2013 email from John Anderson, TIGTA, to Michael McKenney, "Final Report 201210022 – Inappropriate Criteria Were Used to Identify Tax Exempt Applications for Review," TIGTA Bates No. 016073 ("TIGTA initiated this audit based on concerns expressed by members of Congress.").

that Tea Party groups were being unfairly targeted.[787] According to TIGTA, its decision to initiate the audit was also influenced by negative media reports on the IRS' handling of Tea Party applications.[788] TIGTA told the Subcommittee that none of the Tea Party groups themselves requested an audit of the IRS.[789]

In addition to inducing the TIGTA audit, OGR Committee staff apparently asked the TIGTA audit team to provide regular briefings about the status of its work, but TIGTA told the Subcommittee that it declined to provide those briefings. As the director of the TIGTA 501(c) audit, Troy Paterson, noted in an email to his supervisor, Russell Martin:

> "Hmm … I've never provided regular updates on audits where we have not issued a report. Are we allowed to say what we are finding to outside stakeholders, such as staffers, without issuing a report? I've never heard of us doing that before. From our previous meeting with Mr. Hixon and other staffers, I'm certain the first question in the meeting will be 'Have you found any indications that the IRS is targeting Tea Party groups?' If we are not prepared to provide an answer to that question without issuing a report, I think we should limit the request to providing a briefing on the scope of our review and providing a copy of the final report."[790]

Mr. Paterson told the Subcommittee that TIGTA decided not to provide ongoing briefings to the OGR Committee staff on the audit work, but to wait until the audit was complete and a report prepared.[791] When asked about a TIGTA audit log entry stating: "Office of Audit agreed to brief the Government Oversight Sub-committee by September 2012,"[792] Mr. Paterson stated that the proposed briefing did not occur.[793]

---

[787] TIGTA auditor Thomas Seidell told the Subcommittee that he recalled Landmark Legal Foundation's writing to TIGTA with a request to look into the allegations that the Tea Party was being targeted by the IRS. Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014). See also 3/26/2012 email from Karen Kraushaar to Russell George, "TIGTA in the News March 26, 2012 (revised)," TIGTA Bates No. 015855 (sending a copy of a press article about the Landmark Legal Foundation's letter to TIGTA); 3/26/2012 email from Joseph Urban to Lois Lerner, and others, "Referral to TIGTA on (c)(4)," IRSR0000218372 - 375 (circulating copy of Landmark Legal Foundation letter); 3/23/2012 letter from Landmark Legal Foundation to TIGTA, "REQUEST FOR INVESTIGATION INTO IRS AGENCY MISCONDUCT," http://www.landmarklegal.org/uploads/IRS%20IG%20Letter%20without%20attachments.pdf.

[788] Subcommittee interview of Russell George, TIGTA (4/22/2014).

[789] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

[790] 6/22/2012 email from Troy Paterson to Russell Martin, "TIGTA Letter," TIGTA Bates No. 011343.

[791] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

[792] "TIGTA OA: Process for Reviewing Applications for Tax Exemption," TIGTA Audit Log, PSI-TIGTA 05-000909 - 949, at 927.

[793] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014). See also 1/14/2013 email from Lois Lerner to Troy Paterson, with copies to Holly Paz and Dawn Marx, "Advocacy discussion," IRSR0000441700 - 701 (indicating the TIGTA auditors appeared to be "preparing for a meeting with Congressman Issa, where they may be opining on their preliminary take on the review").

### C. Conducting the Audit

Troy Paterson, one of three senior directors in the Office of Audit's division of Audit, Management Services, and Exempt Organizations, was given responsibility for heading up the 501(c) audit effort.[794] He asked four TIGTA employees to conduct the audit, Thomas Seidell who served as the "Audit Manager"; Cheryl Medina who served as the "Lead Auditor"; and Michael McGovern and Evan Close who served as the "Auditors."[795]

According to Mr. Paterson, the TIGTA auditors began by conducting general research into 501(c)(4) issues, and then focused on the allegations of unfair treatment of Tea Party groups, which had been made by the OGR Committee and were also the subject of ongoing media reports.[796] On March 19, 2012, in one of the earliest emails TIGTA produced to the Subcommittee, Mr. Paterson circulated a report to his team and recommended their reading it for background, with the following explanation:

> "Proving that there is nothing new under the sun, here is a March 2000 report from the Joint Committee on Taxation regarding allegations that the IRS was biased when reviewing applications and conducting examinations of politically active organizations that were tax-exempt or applying to be tax-exempt. Sound familiar? I haven't read this yet, but I'm thinking we might be able to glean some bits of wisdom from an investigation that has already been down the path we are heading."[797]

The report circulated by Mr. Paterson described an extensive investigation by the Joint Committee on Taxation (JCT) into allegations of "politically motivated treatment" of 501(c) applications by the IRS; after an examination that included reviews of organizations across the political spectrum, the JCT found "no credible evidence" of political bias at the IRS.[798]

On March 29, 2012, Ms. Medina sent Mr. Paterson and Mr. Seidell a press article noting that, while conservatives were denouncing the IRS for targeting Tea Party organizations, progressive groups were complaining about similar experiences. The article stated in part:

> "Conservative activists and some Republican lawmakers are up in arms about what they describe as the Internal Revenue Service conducting a partisan and ideologically driven campaign against tea party groups around the country. They claim that progressive organizations are not experiencing the same level of scrutiny. However, some

---

[794] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

[795] Id. See also 5/1/2012 Memorandum of Discussion, "Review of Internal Revenue Service's Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) Organizations," prepared by TIGTA, PSI-TIGTA-05-000892 - 898, at 892 (listing participating auditors).

[796] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

[797] 3/19/2012 email from Troy Paterson to Cheryl Medina, Thomas Seidell, and Michael McGovern, "JCT Report on Allegations of Bias Surrounding Applications for Tax Exemption and Examinations of Tax-Exempt Organizations," TIGTA Bates No. 003991.

[798] 3/16/2000 Joint Committee on Taxation Press Release No. 00-02, http://www.jct.gov/pr00-02.pdf.; 3/6/2000 "Report Of Investigation Of Allegations Relating To Internal Revenue Service Handling Of Tax-Exempt Organization Matters," Report No. JCS-3-00, prepared by Joint Committee on Taxation, https://www.jct.gov/publications.html?func=startdown&id=2545.

> progressive groups say they have had similar experiences with the IRS, and at least one expert dismisses the notion that the government is engaged in an ideological witch hunt."[799]

Ms. Medina commented: "Here is the first article I've seen that actually compares letters from the IRS to both conservative and progressive groups – letters ask similar questions."[800] This email indicates that, from the inception of the audit, the TIGTA audit team was aware that a factual question at issue was whether liberal groups had experienced the same treatment as conservative groups and that at least some evidence suggested they had.

### (1) Determining the Audit Focus

Mr. Paterson told the Subcommittee that he originally recommended conducting two audits, one looking at how the IRS managed the 501(c)(4) application process and the other looking at how the IRS monitored tax exempt groups engaged in campaign activity, but was given approval for only the audit of the application process.[801] On March 22, 2012, Mr. Paterson sent the following email to his supervisor, Russell Martin:

> "Nancy [Nakamura] and I were up on the hill about a week and a half ago to discuss concerns one of the House Ways and Means subcommittees had with the way the IRS is processing requests from tax exemption from potential section 501(c)(4) organizations related to the Tea Party. Basically, the staffers we met with allege that the IRS has been sitting on requests for a long time and, during an election year, asking a massive amount of unreasonable questions before deciding on whether to grant tax exemption to Tea Party-related groups. At the same time, the IRS is getting a lot of heat from the Democrat side who allege that the IRS is not cracking down hard enough on organizations funneling money to super PACS that are masquerading as tax-exempt social welfare organizations (section 501(c)(4) organizations). In response, we've decided to look at both sides of it (how the IRS is processing applications for tax exemption by potential 501(c)(4) organizations and how the IRS is overseeing 501(c)(4) organizations that are already in business and filing information returns)."[802]

The TIGTA Audit Plan for Fiscal Year 2013 included an entry indicating that TIGTA planned to conduct both audits.[803] According to Mr. Paterson, however, due to resource

---

[799] 3/29/2012 email from Cheryl Medina to Troy Paterson, Thomas Seidell, and Michael McGovern, "Articles on Determs," TIGTA Bates No. 004603 - 606 (forwarding copy of "Does the IRS really have it in for the tea party groups?" The Colorado Independent, Teddy Wilson, (3/28/2012), http://www.coloradoindependent.com/116361/does-the-irs-really-have-it-in-for-tea-party-groups).

[800] Id.

[801] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

[802] 3/22/2012 email from Troy Paterson to Russell Martin, "501(c)(4) Briefing Paper," TIGTA Bates No. 004297 - 299. Although his email references "Ways and Means subcommittees," TIGTA indicted that Mr. Paterson meant to refer to the House OGR Committee, the only Committee that TIGTA staff met with prior to the audit.

[803] See "Fiscal Year 2013 Annual Audit Plan," TIGTA Office of Audit, at 18, 22, http://www.treasury.gov/tigta/auditplans/auditplans_fy2013.pdf (stating TIGTA would be conducting two audits: 1) "*Oversight of 501(c)(4)–(6) Organizations That Are Politically Active* (FY 2013 – New Start – Audit Number: 201310016) Audit Objective: Assess how the EO Function monitors Internal Revenue Code § 501(c)(4), (c)(5), and (c)(6) organizations to ensure political advocacy activities do not constitute their primary activity." 2) "*Consistency*

constraints and concern that the audit scope would be too large if the issues were combined, Nancy Nakamura, then Assistant Inspector General for Audit, Management Services, and Exempt Organizations, actually approved only the audit focusing on the application process.[804] TIGTA's subsequent "engagement letter" providing official internal notice of the audit, its scope, and what the auditors hoped to accomplish, stated in part:

> "Our overall objective is to assess the consistency of the Exempt Organizations function's identification and review of applications for tax-exempt status involving political advocacy issues. … Several accusations of inconsistent treatment towards conservative groups have been made."[805]

After the audit report was released more than a year later, in May 2013, media questions arose regarding the scope of the audit, which examined only 501(c)(4) organizations associated with the Tea Party and did not consider 501(c)(4) applications filed by liberal groups, despite information indicating that some liberal groups may have experienced the same treatment as some conservative organizations.

As part of TIGTA's effort to respond to those media questions, on June 25, 2013, TIGTA's Director of Communications, Karen Kraushaar and her staff sent emails to some reporters stating that "TIGTA was asked to narrowly focus on Tea Party organizations."[806] When pressed by a Washington Post reporter to explain who asked TIGTA to focus narrowly on Tea Party organizations, Ms. Kraushaar responded by email that her statement had been based on "erroneous information."[807] Ms. Kraushaar told the Subcommittee that she had made her original statement after asking the TIGTA auditors how to respond to a question concerning the scope of the audit, and the auditors told her they had been asked to look at Tea Party organizations and the delays those groups encountered.[808] Ms. Kraushaar told Subcommittee that, in hindsight, the information she received from the auditors was not erroneous but "imprecise."[809] Ms. Kraushaar stated that when she said "narrowly," she meant "intensively," and that the word "narrowly" had been misconstrued, adding that she had not intended for

---

*in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Advocacy Issues* (FY 2012 – Work in Process – Audit Number: 201210022) Audit Objective: Assess the consistency of the EO function's identification and review of applications for tax-exempt status involving potential political advocacy issues.").

[804] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

[805] 6/22/2012 memorandum from Michael McKenney, TIGTA Auditor, to TIGTA Acting Commissioner, Tax Exempt and Government Entities Division, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status involving Political Advocacy Issues (Audit # 201210022)," IRSR0000444445 - 447, at 445. See also 6/22/2012 email from Russell Martin to Michael McKenney, TIGTA Audit Office head, "TIGTA letter," TIGTA Bates No. 010384 ("I just signed the audit plan and Engagement Letter will be coming up for your review and signature. … (We will now be focusing on whether the identified applicants were treated inconsistently with applicants that did not relate to a Tea Party Organization.)").

[806] 6/25/2013 email from Karen Kraushaar, TIGTA, to Sam Stein, Huffington Post, "Response to your inquiry," TIGTA June 2013 emails Bates No. 000307 - 308; 6/25/2013 email from TIGTA Media Liaison, David Barnes, to Bernie Becker, The Hill, "TIGTA Statement on 'Be On the Look Out' Listings," TIGTA June 2013 emails Bates No. 000241 – 245, at 242 ("TIGTA was asked to narrowly focus on Tea Party organizations.").

[807] 6/27/2013 email from Karen Kraushaar, TIGTA, to Josh Hicks, Washington Post, "Tax-Exempt audit objective," TIGTA June 2013 emails Bates No.000434 – 437, at 434 (Ms. Kraushaar wrote: "Regrettably, erroneous information was provided to my office. It happens.").

[808] Subcommittee interview of Karen Kraushaar, TIGTA (4/11/2014).

[809] Id.

"narrowly" to be interpreted as "exclusively."[810] On July 18, 2013, at a Congressional hearing, TIGTA Inspector General Russell George testified that Ms. Kraushaar's original statement had been "incorrect" and that she "misspoke."[811]

### (2) Initiating the Audit

On March 29, 2012, Mr. Paterson sent an email to the IRS informing it of TIGTA's plan to audit the application process. The email stated that the audit would examine "the IRS's process for reviewing applications for tax exemption by potential section 501(c)(4), 501(c)(5), and 501(c)(6) organizations."[812] Holly Paz, who was by then head of the Exempt Organization's Rulings and Agreements Unit, described herself as the "point person" at the IRS for the TIGTA audit, with responsibility to provide TIGTA with the documents and information it requested.[813]

On May 1, 2012, three TIGTA auditors, Thomas Seidell, Cheryl Medina, and Michael McGovern, began the 501(c) audit by conducting what they described as a "walkthrough" of the Cincinnati IRS office to better understand the process by which the IRS reviews 501(c) applications for tax exempt status.[814] According to Mr. Seidell, as part of the site visit to the Cincinnati office, senior EO personnel, including Holly Paz, Cindy Thomas, and John Shafer, explained the application process.[815] The auditors also revewed the relevant law, regulations,

---

[810] Id.

[811] Testimony of J. Russell George, "The IRS's Systematic Delay and Scrutiny of Tea Party Applications," hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 81-82, http://oversight.house.gov/wp-content/uploads/2014/02/2013-07-18-Ser.-No.-113-51-FC-IRS-Systematic-Delay-and-Scrutiny-of-Tea-Party-Applications.pdf. ("Mr. CONNOLLY: Mr. George, there have been reports with respect to the scope of your audit or review, including by the spokesperson in your office, that you met with the chairman of this committee and, essentially, he helped limit the scope of the review. Mr. GEORGE: That's incorrect, sir. Mr. CONNOLLY: That is incorrect? Mr. GEORGE: The report I did see, but that did not occur. Mr. CONNOLLY: So Karen Kraushaar, your spokesperson who quoted – who said, and I quote, that Darrell Issa had specifically requested that investigators, 'narrowly focus on Tea Party organizations,' so they did just that, according to Kraushaar, that is an inaccurate statement? Mr. GEORGE: That is correct. Mr. CONNOLLY: On what basis would she make such a statement on your behalf to the press? Mr. GEORGE: Well, it was not without my authorization, and she misspoke, sir.").

[812] See 3/29/2012 email from Troy Paterson to Joel Rutstein, "Planning/Research Activities: Review of Internal Revenue Service's Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) organizations," IRSR0000168115 - 116 ("This email is to inform you of an audit we plan to conduct of the IRS's process for reviewing applications for tax exemption by potential section 501(c)(4), 501(c)(5), and 501(c)(6) organizations, which will be included in our Fiscal Year 2013 Annual Audit Plan."); 3/26/2012 email from Cheryl Medina to Michael McGovern, "c4s," TIGTA Bates No. 004451 ("Tom [Seidell] called me this morning to say that Nancy [Nakamura] has given Troy [Paterson] the ok to contact legislative affairs informing them of this review."). Although Mr. Paterson indicated that the audit would examine applications filed by 501(c)(5) and (6) organizations, TIGTA did not review any of those applications during the audit.

[813] Subcommittee interview of Holly Paz, IRS (10/30/2013).

[814] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014). See also 5/1/2012 Memorandum of Discussion, "Review of Internal Revenue Service's Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) Organizations," prepared by TIGTA, PSI-TIGTA-05-000892 - 898.

[815] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).

court rulings, and a draft "guidesheet" that the EO Technical Unit had been working on. After the site visit, the auditors prepared a memorandum summarizing what they had learned.[816]

On May 4, 2012, in response to the auditors' request, Ms. Paz provided a copy of the BOLO list then being used to identify 501(c) applications of interest.[817] At that time, the BOLO did not include the phrase "Tea Party"; instead it asked screeners to look for "[p]olitical action type organizations involved in limiting/expanding government, educating on the constitution and bill of rights, $ocial economic reform / movement."[818] The BOLO also included listings asking IRS screeners to look for applications filed by "progressive" groups, "ACORN successors," "Occupy" groups, "Medical Marijuana" groups, and "Green Energy Organizations," among others.[819] Later, some TIGTA officials claimed that the IRS had failed to disclose to the TIGTA auditors the BOLO entries for liberal groups; this email and the BOLO attachment show that the IRS provided copies of those entries from the beginning of the audit.

After receiving the BOLO, the TIGTA auditors asked the IRS for earlier versions of the BOLO listings and received, among others, the original August 2010 BOLO asking screeners to be on the lookout for "organizations in the Tea Party movement."[820] The TIGTA auditors examined that original BOLO entry, and traced the changes in its wording over time. As explained earlier, that BOLO entry was changed four times in three years, from the original version in August 2010, to a more generic version in June 2011, then a January 2012 version using the language in the BOLO that was first provided to TIGTA on May 4, and finally to another generic version that began to be circulated in June 2012.[821] The TIGTA documentation contains no evidence that the auditors conducted a similar analysis of any other BOLO entries, despite being aware the BOLO had multiple sections with entries asking screeners to be on the lookout for a variety of applications and organizations, including liberal groups.

On May 17, 2012, the TIGTA auditors held a conference call with the IRS to discuss possible audit issues, including the BOLO entries related to the Tea Party.[822] The participants

---

[816] See 5/3/2012 Memorandum of Discussion, "Review of Internal Revenue Service's Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) Organizations," prepared by TIGTA, PSI-TIGTA-05-000892 - 898.

[817] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014); 5/4/2012 email from Holly Paz to Cheryl Medina, Thomas Seidell, and Michael McGovern, with copy to Cindy Thomas, "BOLO Alert," IRSR0000014253, attaching a copy of "BOLO Spreadsheet 03262012.xls." See also 5/1/2012 Memorandum of Discussion, "Review of Internal Revenue Service's Process for Reviewing Applications for Tax Exemption by Potential 501(c)(4)-(6) Organizations," prepared by TIGTA, PSI-TIGTA-05-000892 - 898, at 897 (showing the auditors were already aware that the BOLO contained multiple sections, citing the "Watch List, Coordinated Processing, Emerging Issues, and Potential Abusive Transactions" sections).

[818] "BOLO Spreadsheet 03262012.xls," IRSR0000014254 - 258 (later reproduced to the Subcommittee in an enlarged format), provided to TIGTA as an attachment to 5/4/2012 email from Holly Paz to Cheryl Medina, Thomas Seidell, and Michael McGovern, with copy to Cindy Thomas, "BOLO Alert," IRSR0000014253.

[819] Id.

[820] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).

[821] See, e.g., 5/13/2013 email from Holly Paz to Nikole Flax, and others, "Be on the Lookout List (BOLO) description of advocacy cases over time (including phrases and issues treated as falling within the BOLO description," IRSR0000168058. For more information on the BOLO wording changes, see Report section on Failing to Agree on Effective Screening Criteria. See also 5/14/2013 TIGTA Audit Report at 6-7, 30.

[822] See 5/17/2012 "Memo of Contact," prepared by Cheryl Medina, TIGTA, "Determinations Process Planning," PSI-TIGTA-04-000016 - 018.

were Thomas Seidell and Cheryl Medina from TIGTA, and Holly Paz and David Fish from the IRS. A summary of the conference call, prepared by TIGTA lead auditor, Ms. Medina, stated:

> "AM [Audit Manager] Seidell then turned to our concerns with the nature of the criteria in the briefing paper. Based upon this criteria, it appears the complaints being made in the media by certain groups are valid. In addition, it appears to contradict the testimony of the Commissioner before Congress. Ms. Paz agreed that the initial criteria was not a good way to identify advocacy cases. However, it is common to refer to certain groups by name for identification purposes in Determinations. For example, the 'Occupy' and [REDACTED BY TIGTA] groups are listed specifically on the BOLO."[823]

This summary indicates, in the words of TIGTA's own lead auditor, that on May 17, 2012, IRS personnel explicitly drew the attention of TIGTA auditors to the liberal groups identified in the BOLOs that had been provided to the audit team, explained that names of both conservative and liberal groups were used to flag applications for heightened scrutiny, and pointed out that the BOLOs had not singled out only conservative groups. While senior TIGTA officials later claimed that the IRS had not disclosed the BOLO entries for liberal groups to the audit team during the audit period, this conference call summary shows that the IRS identified those BOLO entries to the audit team in the earliest stages of the audit process.

On May 22, 2012, the director of the TIGTA 501(c) audit, Troy Paterson, called EO head Lois Lerner to inform her that the audit team viewed the BOLO entries related to the Tea Party and other conservative groups as a concern, because they "targeted" those groups for added scrutiny. In his notes of the conversation, Mr. Paterson wrote that he told Ms. Lerner the following:

> "I'm just calling to let you know that we will be raising an issue to our IG [Inspector General] regarding § 501(c)(4) applications. We have received documentation showing that certain organizations (Tea Party, organizations criticizing how the country is being run) were targeted for additional scrutiny in part of the EO function."[824]

Mr. Paterson's notes contained no acknowledgement of the existence of the BOLO entries for liberal groups or of the contention made by the IRS that the BOLO's many entries demonstrated the IRS was not singling out conservative groups.

On May 30, 2012, the auditors gave Russell Martin, who had become Acting Assistant Inspector General for Audit, Management Services, and Exempt Organizations after Ms. Nakamura took another position, a briefing paper discussing the key audit issues that had been identified and describing the audit's objective as focusing on "the process used by the IRS when

---

[823] Id. at 017. See also TIGTA Audit Log, at PSI-TIGTA-05-000909 - 949, at 913. The redacted group is believed to be the ACORN successor groups.

[824] 5/22/2012 memorandum prepared by Troy Paterson, TIGTA, "To Document Discussion of the IG Briefing Paper that we Prepared on Certain § 501(c)(4) Application Being 'Targeted,'" TIGTA Bates No. 006699 (describing discussion between Mr. Paterson and Lois Lerner).

reviewing applications for tax-exempt status by §501 (c)(4) organizations."[825] The briefing paper did not mention 501(c)(5) or (c)(6) organizations, even though they had been part of the initial audit planning.

On June 22, 2012, the then acting head of the TIGTA Office of Audit, Michael McKenney, issued the official engagement letter for the 501(c)(4) audit.[826] The two-page engagement letter stated that the audit's "overall objective" was "to assess the Internal Revenue Service (IRS) Exempt Organizations function's consistency in the identification and review of applications for tax-exempt status involving political advocacy issues."[827] The engagement letter also stated: "Several accusations of inconsistent treatment towards conservative groups have been made."[828] By focusing on "consistency" and "inconsistent treatment towards conservative groups," the engagement letter seemed to indicate that the audit would focus on how conservative groups were treated compared to non-conservative groups, although it contained no explicit direction to gather comparative data.

In July 2012, according to TIGTA's official audit log, the auditors held an "opening conference" with IRS officials to outline the steps the Office of Audit planned to take to complete the audit.[829] By then, however, the TIGTA auditors had already conducted a site visit, obtained key documents, and identified the key issues of concern.

### (3) Collecting and Analyzing Information

For a one-year period, from May 2012 until May 2013, the TIGTA auditors collected and analyzed information in connection with the 501(c) audit.[830] Among other steps, the auditors obtained from the IRS a list of 298 501(c)(4) applications that had been referred for heightened scrutiny over a two-year period, reviewed two groups of closed 501(c)(4) cases to determine whether they should have been referred for heightened scrutiny, conducted multiple interviews of IRS personnel, and submitted written questions to the IRS. Throughout the audit period, IRS personnel repeatedly pointed out to the TIGTA auditors that the Exempt Organizations Determinations (EOD) Unit subjected both conservative and liberal groups to heightened review, and did not single out Tea Party organizations, but the TIGTA auditors failed to provide any audit analysis focused on how the IRS processed applications filed by non-conservative groups.

**Analysis of 298 Cases.** An early step taken by the TIGTA audit team during the audit period was to ask the IRS for a list of all of the advocacy cases that were subjected to heightened scrutiny by EOD determinations specialists over the prior two years. On June 1, 2012, TIGTA

---

[825] 5/30/2012 "Process for Reviewing Applications for Tax Exemption," TIGTA Office of Audit Briefing Paper, TIGTA Bates No. 006651 - 652. See also "TIGTA OA: Process for Reviewing Applications for Tax Exemption," TIGTA Audit Log, PSI-TIGTA 05-000909 - 949, at 913.
[826] 6/22/2012 memorandum from Michael McKenney to TIGTA Acting Commissioner, Tax Exempt and Government Entities Division, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status involving Political Advocacy Issues (Audit # 201210022)," IRSR0000444445 - 447.
[827] Id. at 445.
[828] Id.
[829] See "TIGTA OA: Process for Reviewing Applications for Tax Exemption," TIGTA Audit Log, PSI-TIGTA 05-000909 - 949, at 920.
[830] See 5/14/2013 TIGTA Audit Report, at 4.

lead auditor Cheryl Medina sent an email to Determinations Unit head Cindy Thomas requesting "an updated copy of the advocacy case tracking sheet used by the advocacy team."[831] In response, the IRS supplied a list of 298 advocacy cases with 501(c)(4) and (c)(3) applications that had been flagged under the "Emerging Issues" section of the BOLO as of May 2012.[832] At other times, as indicated above and below, IRS personnel asked the TIGTA auditors also to consider cases involving liberal groups, such as the ACORN successor and Occupy groups, but TIGTA failed to do so, and the IRS did not supply a list of those additional advocacy cases.

TIGTA examined all 298 cases on the Emerging Issues list to determine their status as open or closed, and how long each case took to be processed. In addition, of those 298 cases, TIGTA determined that 96, or about one-third of the cases, involved applications filed by organizations with "Tea Party," "9-12," or "Patriot" in their names.[833] The audit report did not categorize or characterize the remaining 202 cases, however, explain how they were selected, or acknowledge that they included non-conservative groups. When asked why, Mr. Paterson told the Subcommittee that TIGTA concentrated on the cases that were flagged using what looked to be inappropriate selection criteria using the three names, and did not characterize the other 200 cases.[834] Mr. Seidell told the Subcommittee that the auditors were uncertain why the other cases had been flagged for heightened scrutiny, couldn't tell much from their names, and so did not analyze them, other than to determine their status and how long each case took to be processed.[835] At a hearing, Inspector General George said that the "vast majority of the other organizations" had names that "were so innocuous that we did not deem it possible to determine whether or not they were conservative groups, or whether or not they were groups that might be on the other side of the political spectrum."[836]

---

[831] 6/1/2012 email from Cheryl Medina to Cindy Thomas, "TIGTA request –updated case data," TIGTA Bates No. 011102 - 103.

[832] 6/11/2012 email from Holly Paz to Cheryl Medina, "TIGTA request – updated case data," TIGTA Bates No. 011102 - 103. TIGTA was unable to review two of the 298 cases due to incomplete documentation in the case files. See 5/14/2013 TIGTA Audit Report, at 10, footnote 27. TIGTA later disclosed that 89 of the 298 cases, or nearly one-third, involved 501(c)(3) rather than (c)(4) applications, which was significant since 501(c)(3) groups are not allowed to engage in any substantial campaign activities and their applications would have been denied on that basis. See testimony of J. Russell George, "Oversight Hearing – Internal Revenue Service," hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013), 219-284, at 262-263.

[833] See 5/14/2013 TIGTA Audit Report, at 8. At a hearing, TIGTA also disclosed that, of those 96 cases, "[t]here were 72 Tea Party groups, there were 13 groups identified under the Patriot category, and there were 11 that were identified under the 9/12 category." Testimony of J. Russell George, "Oversight Hearing – Internal Revenue Service," hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013), 219-284, at 264.

[834] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

[835] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014). See also 1/31/2013 email from Lois Lerner to Troy Paterson, "Follow-Up," IRSR0000466814 - 815, at 815 (noting the TIGTA auditors were aware of and had "acknowledged that there are both conservative and liberal organizations on the list of advocacy cases"). The TIGTA Audit Report contained no specific information about the other 202 cases, and no acknowledgement that they included potentially liberal groups as well as conservative groups. See 5/14/2013 TIGTA Audit Report.

[836] Testimony of J. Russell George, "Oversight Hearing – Internal Revenue Service," hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013) 219-284, at 263.

Six months later, when drafting the audit report, two senior TIGTA officials noted the audit team's lack of knowledge about why the category of 298 advocacy cases included 202 groups that did not have "Tea Party," "9-12," or "Patriot" in their names. In an internal draft of the audit report, TIGTA Assistant Inspector General Gregory Kutz wrote a comment that the team needed "to discuss whether the other 200 (100 tea party/9/12/patriot) and other 200 – how the 'other 200' were selected?"[837] TIGTA audit director Troy Paterson responded:

> "We do not know. Either the IRS was using 'Tea Party' as shorthand and selecting any organization that was involved in political campaign intervention or the other 200 had something to do with the 'values' in the criteria. We could not determine either way."[838]

This exchange indicates that, after spending nearly a year on the audit, two of the senior TIGTA officials realized the IRS was using "Tea Party" as "shorthand" for a broader category of groups, but still had no clear idea why many of those other groups had been selected for heightened scrutiny.

The final version of the audit report explicitly acknowledged that IRS personnel used the "Tea Party" phrase as "shorthand" for a broader category of cases.[839] The report also observed that, according to the IRS, "the fact that the team of specialists worked applications that did not involve the Tea Party, Patriots, or 9/12 groups demonstrated that the IRS was not politically biased in its identification of applications for processing by the team of specialists."[840] The TIGTA audit team did not take the next step, however, and present an analysis of the remaining 202 cases, explain how they were selected, or acknowledge that they likely included liberal groups.

A later outside analysis shed more light on the composition of the 298 advocacy cases. In May 2013, the IRS released a list of 176 501(c)(4) organizations that had been approved for tax exempt status since 2010.[841] Tax Analysts, a publication specializing in tax issues, reasoned that, given the time period covered and number of groups included, the list of 176 organizations likely substantially overlapped with the list of 298 cases analyzed by TIGTA.[842] Tax Analysts

---

[837] Undated TIGTA draft of the audit report, "Ineffective Oversight Resulted in Delayed Processing of Tax-Exempt Applications DRAFT," prepared by TIGTA, PSI-TIGTA-06-000686 - 754, at 702.
[838] Id. at 702.
[839] See, e.g., 5/14/2013 TIGTA Audit Report, at 7 ("Determinations Unit employees stated that they considered the Tea Party criterion as a shorthand term for all potential political cases.").
[840] Id. at 8.
[841] 5/15/2013 "Approved Tax-Exempt Applications For Advocacy Organizations through May 9, 2013," prepared by IRS, http://www.irs.gov/PUP/newsroom/Approved%20Tax%20Exempt%20Applications%20For%20Advocacy%20Organizations%20through%20May%209%202013.pdf. The IRS has interpreted the law as allowing it to release the names of 501(c) applicants that have been approved for tax exempt status, but not the names of those denied tax exemption. For that reason, the IRS has never released the names of all of the 298 groups reviewed by the IRS from May 2010 to May 2012, since some of them may have been denied tax exempt status or are still pending resolution.
[842] See 5/30/2013 "Substantial Minority of Scrutinized EOs Were Not Conservative," Tax Analysts, Martin Sullivan, http://www.taxanalysts.com/www/features.nsf/Articles/D2A6C735EAFA7A9085257B7B004C0D90?OpenDocument ("Because the IRS is prohibited by law from releasing information on applications either denied or not yet approved, we will probably never know the political persuasions of all of the 298 advocacy cases selected for extra scrutiny and of the additional 170 or so applications selected since then. We can, however, try to assess the political persuasion of the 176 approved organizations that the IRS identified on May 15.").

then analyzed the 176 groups and concluded that, while most involved conservative groups, nearly one third did not.[843] It found that, of the 176 groups, only 46 had Tea Party, Patriot, or 9/12 in their names; 76 were associated with other conservative organizations; 48 were non-conservative – including liberal – organizations; and 6 were organizations about which no determination could be made.[844] The analysis also showed that the IRS had granted tax exempt status to groups across the political spectrum.[845] Had TIGTA done a similar analysis as part of its audit, the audit would have found that the IRS had not singled out only conservative groups for heightened scrutiny.

In addition, had TIGTA researched the issue, it might have determined that the list of 298 cases contained more conservative than liberal groups, not because conservative groups were being singled out, but because during the relevant time period, more conservative 501(c)(3) and 501(c)(4) organizations were being formed and applying for tax exempt status. The list of 176 organizations released by the IRS showed that twice as many conservative organizations as non-conservative organizations obtained tax exempt status from 2010 to May 2013.[846] A later analysis by the House Committee on Ways and Means determined that, of the 298 cases provided to TIGTA, by September 2013, 111 "right-leaning" groups had received tax exempt status, while only 20 "left-leaning" groups did, meaning more than five times as many conservative as liberal groups had gained tax exemption.[847] Rather than demonstrate IRS favoritism of conservative groups, however, those disparate numbers likely reflect the fact that many more conservative than liberal groups had requested tax exempt status.

In addition to the data on the groups that obtained tax exempt status, several IRS employees told the Subcommittee that the IRS saw a surge in applications from conservative groups from 2010 to 2013.[848] Spending data in FEC filings showing that, in 2010 and 2012, conservative groups spent almost ten times as much as liberal groups, also suggest conservative

---

[843] Id. ("[T]he list suggests that the majority of groups selected for extra scrutiny probably matched the political criteria the IRS used and backed conservative causes, the Tea Party, or limited government generally. But a substantial minority – almost one-third of the subset – did not fit that description.").

[844] Id. TIGTA later acknowledged that six of the 298 cases subjected to heightened scrutiny by the IRS had the word "progress" or "progressive" in their names. See 6/26/2013 letter from TIGTA to Congressman Sander Levin, at 1-2, http://online.wsj.com/public/resources/documents/TIGTAFinalResponseToRepLevin06262013.pdf. TIGTA justified ignoring those cases in its analysis, by asserting that the audit did not find evidence that the term "Progressives," was actually used by the IRS to select cases for heightened review during the 2010 to 2012 timeframe, even though the term was included in the BOLOs and groups with "progress or "progressive" in their names were included in the 298 cases. Id. TIGTA admitted that it "did not audit" the Progressives entry to determine how that entry was developed, whether it included inappropriate criteria, or whether the affected groups were subjected to the same delays and intrusive questioning as the conservative groups. Id.

[845] See 5/30/2013 "Substantial Minority of Scrutinized EOs Were Not Conservative," Tax Analysts, Martin Sullivan.

[846] Id.

[847] See Opening Statement of Congressman Charles Boustany, "Internal Revenue Service's Exempt Organizations Division," hearing before House Committee on Ways and Means (9/18/2013), http://waysandmeans.house.gov/news/ documentsingle.aspx?DocumentID=350126; chart entitled, "Review of Applications Subject to Inappropriate Scrutiny (May 2010-May 31, 2012)," prepared by the House Committee on Ways and Means Majority Staff, reprinted at House Republicans website, "Accountability: Investigation of the IRS," section entitled, "House Committee on Ways and Means," under "Reports," through link entitled, "Committee on Ways and Means Majority Staff Statistical Overview – 'IRS Targeting By the Numbers' Slideshow," http://www.gop.gov/solution_content/irs-investigation/.

[848] Subcommittee interviews of Holly Paz, IRS (10/30/2013) and Judith Kindell, IRS (11/5/2013).

groups may have outnumbered their liberal counterparts during that time period.[849] In addition, media reports depicted conservative groups as the leaders in the 501(c)(4) area at the time, with liberal groups working to catch up.[850] TIGTA did not, however, look into whether more conservative groups versus liberal groups had filed applications with the IRS.[851]

It is difficult to understand why TIGTA did not, when it was provided with a list of 298 cases, create a randomly selected, statistically valid subset containing both conservative and non-conservative groups, which it could have then used to develop comparative data on how the two groups were handled by the IRS. TIGTA could have used those cases to meet the stated audit objective of determining whether "conservative groups" experienced "inconsistent treatment." Instead, TIGTA failed to analyze IRS treatment of any non-conservative cases.

**Statistical Analysis of Closed Cases.** TIGTA also conducted an analysis of two sets of closed 501(c)(4) cases to test whether the IRS had accurately identified applications with "indications of significant political campaign intervention" that should have been subjected to heightened review.[852] TIGTA found that the IRS should have but failed to identify 2 out of 94 cases in one statistical sample and 14 out of 244 cases in a second sample as cases warranting heightened scrutiny, while noting that none of the cases that avoided scrutiny involved groups with the words "Tea Party," "9/12," or "Patriot" in their names.[853] The audit report also

---

[849] An analysis conducted by the Center for Responsive Politics found, for example, that in 2010, conservative 501(c)(4) spending was $115.2 million (88.1%), liberal 501(c)(4) spending was $10.7 million (8.2%) and "other" spending was $4.8 million (3.6%). In 2012, the Center determined that conservative 501(c)(4) spending was $265.2 million (85.3%), liberal spending was $34.7 million (11.2%) and "other" spending was $10.9 million (3.5%). "2010 Outside Spending, by Group," and "2012 Outside Spending, by Group," Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U .

[850] See, e.g., 11/6/2013 "Secret Persuasion: How Big Campaign Donors Stay Anonymous," National Public Radio, Peter Overby, Viveca Novak and Robert Maguire, http://www.npr.org/2013/11/06/243022966/secret-persuasion-how-big-campaign-donors-stay-anonymous ("So far, conservatives have predominated in social welfare politics. In the 2012 federal campaigns, 20 groups on the right ran up a million dollars or more in disclosed spending, compared with seven on the left. Now liberals are working to catch up.").

[851] Tax Analysts has observed: "[I]f there were a surge in the creation of potentially political conservative organizations in the last few years (that was disproportionate to the creation of nonconservative organizations), more conservative groups would be targeted than nonconservative groups even if there were no political bias among IRS officials." 5/30/2013 "Substantial Minority of Scrutinized EOs Were Not Conservative," Tax Analysts, Martin Sullivan, http://www.taxanalysts.com/www/features.nsf/Articles/D2A6C735EAFA7A9085257B7B004C0D90?OpenDocument.

[852] 5/14/2013 TIGTA Audit Report, at 9.

[853] Id. at 8, 9, footnotes 21 and 23. In its audit report and in a later letter to Ways and Means Ranking Member Sander Levin, TIGTA asserted that all groups with "Tea Party," "9/12," or "Patriot" in their names were subjected to heightened IRS review. See TIGTA Audit Report, at 8; 6/26/2013 letter from TIGTA to Congressman Sander Levin, at 2, http://online.wsj.com/public/resources/documents/TIGTAFinalResponseToRepLevin06262013.pdf ("[O]ur 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."). Those assertions, however, were incorrect. A subsequent analysis by the IRS Chief Risk Officer identified a dozen instances in which groups with the words "Tea Party," "9/12" or "Patriot" were not referred to an IRS specialist for heightened review, including two groups with "Tea Party" in their names, three groups with "9/12," "9-12," "9 12," or "912" in their names, and seven groups with "patriot" in their names. See 6/11/2012 "PA6.ee EDS 501c4 Case Universe Open and Closed," prepared by IRS Chief Risk Officer David Fisher, PSI-IRS-37-000004 - 014. In a later letter to Congressman Levin, TIGTA justified its earlier assertion by explaining: "100 percent of the Section 501(c)(4) tax-exempt applications in our *statistical samples* with the words 'Tea Party,' 'Patriots,' or '9/12' in their names were processed as potential

determined that 91 out of the 298 advocacy cases, about one-third, that had been subjected to heightened scrutiny by the IRS should not have been, because, in TIGTA's view, their application materials did not contain "indications of significant political campaign intervention."[854] Of those 91 cases, the audit report noted that 17 "involved Tea Party, Patriots, or 9/12 organizations," which meant that 74 of the cases did not.

The report did not explain how TIGTA determined which applications contained or did not contain evidence of "significant political campaign intervention," in light of the facts and circumstances test requiring activities to be evaluated on a fact-intensive, case-by-case basis. In January 2013, EO head Lois Lerner sent an email to TIGTA challenging TIGTA's methodology and legal analysis of cases that allegedly did not require heightened scrutiny, explaining:

> "Because the legal analysis of whether specific advocacy is political intervention requires analyzing all the facts and circumstances surround that advocacy in light of the formal guidance provided in this area, we included all organizations indicating they were engaged in potentially problematic advocacy, so that they would be worked by specialists who have a better understanding of the facts and circumstances to be considered, and who would be able to analyze the cases in a consistent manner."[855]

The next day, Mr. Paterson responded that, to facilitate the discussion of the cases, he was forwarding the criteria used by the audit team to analyze whether the closed cases should have been treated as advocacy cases and subjected to heightened scrutiny.[856] According to the TIGTA auditors, to analyze the closed cases, they had gone through the hard copy file for each application as well as any supporting documentation.[857] In his email, Mr. Paterson provided what appeared to be essentially a checklist of nine factors that the audit team had taken into consideration when evaluating a group's application materials. Most posed factual questions, such as whether or not a particular activity, such as a voter drive, voter guide, or candidate forum, had failed to state that it was nonpartisan; whether the group's funds had been commingled with funds from a political organization; and whether the group had answered certain tax return or application questions with a "yes," "no," or a blank. The ninth and final factor was whether the audit team had determined that the group had engaged in "[a]ny political campaign activity that totals 35 percent or more," with no further explanation of how specific activity was identified as campaign related or how expenditures were determined.[858] If at the end of the review of each case, the auditors could not determine how the IRS had decided that the application presented indications of "significant political campaign intervention," the auditors concluded it had not been properly forwarded to IRS personnel for enhanced scrutiny.

---

political cases." 7/19/2013 letter from TIGTA to Congressman Sander Levin, at 2 (emphasis in original), http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/TIGTA%20Response%20Letter%20to%20the%20Honorable%20Sander%20Levin%207-19-13.pdf.

[854] Id. at 10.

[855] 1/14/2013 email from Lois Lerner to Troy Paterson, with copies to Holly Paz and Dawn Marx, "Advocacy discussion," IRSR0000441700 - 701.

[856] 1/15/2013 email from Troy Paterson to Lois Lerner, "TIGTA Case Review Criteria," IRSR0000354397. See also Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).

[857] Subcommittee interviews of Troy Paterson, TIGTA (3/21/2014) and Thomas Seidell, TIGTA (3/19/2014).

[858] 1/15/2013 email from Troy Paterson to Lois Lerner, "TIGTA Case Review Criteria," IRSR0000354397.

Neither the TIGTA email nor audit report acknowledged that, under IRS regulations, finding "significant political campaign intervention" was a complex determination that did not permit the decisionmaker to use a checklist of objective factors. Nevertheless, using its own checklist criteria, the TIGTA Audit Report concluded that the IRS had made a number of incorrect decisions on which applications should have been subjected to enhanced scrutiny, while noting IRS disagreement with its analysis.[859] The audit report did not offer any comparative analysis of how the IRS treated the 17 "Tea Party, Patriots, or 9/12 organizations" that the audit team concluded should not have been subjected to heightened review versus the 74 other organizations that were also, in TIGTA's view, incorrectly selected for heightened review. Nor did the audit report acknowledge or offer any explanation of why four times as many groups were allegedly incorrectly subjected to heightened scrutiny by the IRS compared to groups with "Tea Party, Patriots, or 9/12" in their names.

**TIGTA Interviews of IRS Personnel.** In addition to its statistical analyses, in July and August 2012, TIGTA auditors interviewed a number of IRS employees in both Cincinnati and Washington, regarding why the BOLO entries had been changed over time, how 501(c)(4) cases were selected for heightened review, and whether political bias at the IRS had motivated its decisionmaking with respect to Tea Party cases.[860] During the course of those interviews, several IRS employees told the TIGTA auditors that the BOLOs sought to identify all types of advocacy groups suspected of involvement with campaign activity, not just Tea Party groups. For example, in his interview with TIGTA auditors, Stephen Seok, who became the advocacy case coordinator in late 2011, pointed out that the BOLO identifying advocacy groups contained both Tea Party groups and Occupy organizations, which were liberal groups.[861] The head of the Rulings and Agreements Unit Holly Paz told the Subcommittee that, on several occasions, she told TIGTA auditors Thomas Seidell and Cheryl Medina that ACORN and other liberal groups were also subjected to specialist reviews.[862] Both Ms. Paz and EOT specialist Judith Kindell

---

[859] 5/14/2013 TIGTA Audit Report, at 10.

[860] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014). See also handwritten notes and typed transcripts of TIGTA interviews conducted on various dates during July and August 2012, IRSR0000168024 – 054, including TIGTA interviews of Carter Hull (7/30/2012), PSI-TIGTA-03-000666-667; Michael Seto (7/30/2012), PSI-TIGTA-03-000668; Justin Lowe (7/30/2012), PSI-TIGTA-03-000669; Nancy Marks (7/31/2012), PSI-TIGTA-03-000673-677; Holly Paz (7/31/2012), PSI-TIGTA-03-000678-681; Steven Grodnitzky (7/31/2012), PSI-TIGTA-03-000683; Sharon Light (7/31/2012), PSI-TIGTA-03-000685-686; Judith Kindell (7/31/2012), PSI-TIGTA-03-000687-688; Ron Shoemaker (7/31/2012), PSI-TIGTA-03-000689; Hilary Goehausen (7/31/2012), PSI-TIGTA-03-000690; John Shafer (8/6/2012 and 8/7/2012), PSI-TIGTA-03-000691-692; Elizabeth Hofacre (8/6/2012), PSI-TIGTA-03-000693-694; Joseph Herr (8/6/2012), PSI-TIGTA-03-000695-696; Steven Bowling (8/7/2012), PSI-TIGTA-03-000699-700; Ronald Bell (8/7/2012), PSI-TIGTA-03-000701-702; Tyler Chumney (8/7/2012), PSI-TIGTA-03-000703-704; Cindy Thomas (8/7/2012), PSI-TIGTA-03-000705-707; and Gary Muthert (8/15/2012), PSI-TIGTA-03-000710-711.

[861] See 8/9/2012 "Memo of Contact" prepared by Cheryl Medina, TIGTA, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity," PSI-TIGTA-05-000002 - 003, at 003 (summarizing Seok interview: "He had input to the January 2012 BOLO criteria change. It was discussed during a meeting. The BOLO changes as issues arise during case reviews. Other types of cases may be identified as participating in political activities. For example, it started with Tea Party cases, but eventually included Occupy cases.").

[862] Subcommittee interview of Holly Paz, IRS (10/30/13).

told the Subcommittee that during the course of the audit, TIGTA auditors even acknowledged that the cases contained both conservative and liberal organizations.[863]

According to Ms. Paz, she asked the TIGTA auditors outright whether they would be reporting that liberal groups and organizations with all kinds of political leanings were subjected to heightened scrutiny by IRS personnel, and was told by the auditors that wasn't the focus of the audit and that the auditors were not in a position to determine what groups were conservative or liberal.[864] Mr. Seidell told the Subcommittee that he recalled discussing liberal groups with Ms. Paz, but did not recall specifically what was discussed.[865]

During its interviews, the TIGTA auditors did not inquire into the political leanings of the IRS personnel and so failed to discover that self-declared Republicans played key roles in the review of Tea Party and other advocacy cases. For example, the manager of the IRS screening group in Cincinnati that conducted the initial screenings of 501(c)(4) applications was a self-described "conservative Republican" who said there was no bias in the IRS treatment of Tea Party cases.[866] The senior IRS screener who took the lead role in identifying applications filed by Tea Party and other conservative groups described himself as aligned politically with the Tea Party.[867] The EO Technical Unit attorney who conducted a 2011 assessment of the advocacy cases was a registered Republican.[868] Still another IRS attorney in the Chief Counsel's office told the Subcommittee there was no reason to believe one side was being singled out over the other because, from 2010 to 2013, he was asked to work on seven 501(c) cases, and four involved groups associated with the Democratic party.[869]

**Another Set of BOLOs.** During July and August 2012, Ms. Paz sent TIGTA additional copies of the BOLOs used by the EOD to flag applications for heightened scrutiny, from the earliest BOLO in August 2010, through the latest in July 2012.[870] As mentioned earlier, those

---

[863] Subcommittee interviews of Holly Paz, IRS (10/30/2013) and Judith Kindell, IRS (11/5/2013). See also 1/31/2013 email from Lois Lerner to Troy Paterson, "Follow-Up," IRSR0000466813 - 815, at 815 (noting TIGTA auditors "have also acknowledged that there are both conservative and liberal organizations on the list of advocacy cases").

[864] Subcommittee interview of Holly Paz, IRS (10/30/2013). See also TIGTA interview of Holly Paz (7/31/2012), PSI-TIGTA-03-000678.

[865] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).

[866] Transcript of 6/6/2013 interview of John Shafer, IRS, by House Committee on Oversight and Government Reform, at 28, http://democrats.oversight.house.gov/images/user_images/gt/stories/IRS_Screening_Manager_Part_I.pdf. See also Subcommittee interview of John Shafer, IRS (1/17/2014).

[867] Subcommittee interview of Gary Muthert, IRS (1/15/2014).

[868] See transcript of 7/2/2013 interview of Hilary Goehausen, IRS, by House Committee on Ways and Means and House Committee on Oversight and Government Reform, http://democrats.waysandmeans.house.gov/press-release/gop-leaked-document-undermines-its-case-and-highlights-lack-irs-political-motivation. Ms. Goehausen's testimony was as follows:

Q: Do you have a party affiliation when you're voting, registration?
A: Yes.
Q: What is your party affiliation?
A: Republican Party.

[869] Subcommittee interview of Donald Spellman, IRS (12/18/2013).

[870] See 7/23/2012 email from Holly Paz to Thomas Seidell and Cheryl Medina, "TIGTA Document Request," IRSR0000066973 (providing BOLOs with ACORN and Occupy entries at IRSR0000066977 - 981); 8/8/2012 email

BOLOs included entries for not only Tea Party organizations, but also progressive, ACORN, and Occupy groups, offering concrete evidence that the IRS was using screening criteria to flag both conservative and liberal groups. TIGTA officials later claimed the IRS had not alerted its audit team to the BOLO entries for liberal groups included in those lists, but even a cursory review of the BOLOs would have provided notice of those entries.

On July 23, 2012, TIGTA audit director Troy Paterson forwarded his audit team a press article recounting how a "watchdog" group was urging TIGTA to investigate two ACORN successor groups in Texas,[871] demonstrating again the auditors' awareness of issues related to liberal groups filing 501(c)(4) applications. The next day, July 24, 2012, Ms. Paz forwarded to the audit team an email she had written two months earlier, in May 2012, showing that she had insisted on the use of generic language in the BOLO entry to identify advocacy cases and that the generic entry was intended to include both conservative and liberal groups, referring to ACORN successor and Occupy groups by name.[872] Her email again provided the audit team with documentary evidence that the EOD was flagging applications filed by both conservative and liberal groups, and again attempted to draw their attention to the BOLO entries for liberal groups.

**Briefing New Audit Leadership.** In August 2012, Gregory Kutz joined the TIGTA Audit Office as the new Assistant Inspector General for Audit handling Management Services and Exempt Organizations, replacing Russell Martin.[873] Soon after, Troy Paterson briefed Mr. Kutz on the status of the 501(c) audit. In an email to Mr. Martin, Mr. Paterson summarized his discussion with Mr. Kutz as follows:

> "Greg called me this morning to introduce himself. … He also asked if there was anything 'big' going on that he should know about right away. I told him that the biggest thing on the horizon in our directorate had to do with a commitment we made to meet with congressional staff before September 30th on the political advocacy applications

---

from Holly Paz to Thomas Seidell and Cheryl Medina, "Watch List Alerts," IRSR0000014013 (supplying August 2010 BOLO with Tea Party and Progressive entries at IRSR0000014014 - 028, 016, 018, 021). See also 8/8/2012 emails from Holly Paz to Thomas Seidell and Cheryl Medina, "BOLO Alerts," TIGTA Bates No. 010609 - 611 (noting BOLO spreadsheets dated 6/16/2012, 6/25/2012, 7/10/2012, 07/11/2012, 08/12/2010, and 12/13/2010 were supplied to TIGTA).

[871] See 7/23/2012 email from Troy Paterson to Thomas Seidell, and others, "Article on Political Advocacy," TIGTA Bates No. 010433 - 434 (forwarding a copy of "Taxpayer Watchdog Calls on IRS to Probe Re-Branded Texas ACORN Branch," a 7/19/2012 article from Fox News, http://www.foxnews.com/politics/2012/07/19/taxpayer-watchdog-calls-on-irs-to-probe-re-branded-texas-acorn-branch/). See also 5/31/2012 letter from Cause of Action to TIGTA requesting the investigation of two Texas nonprofit groups, reprinted at http://www.foxnews.com/politics/interactive/2012/07/18/cause-action-call-for-investigation-into-acorn-spin-off-texas-organizing/.

[872] 7/24/2012 email from Holly Paz, IRS, to Thomas Seidell and Cheryl Medina, TIGTA, "potential revised BOLO language," IRSR0000013981 (forwarding 5/17/2012 email from Holly Paz to Lois Lerner and others, "potential revised BOLO language," in which Ms. Paz wrote: "I would like your thoughts on the language below. I would like this language to replace the current advocacy org language on the BOLO as well as the separate references to [REDACTED BY IRS] and Occupy groups."). See also 5/17/2012 email from Holly Paz to Lois Lerner, "potential revised BOLO language," IRS0000000492 (containing an unredacted version of the Paz email which indicates the redacted words were "ACORN successors").

[873] Subcommittee interview of Greg Kutz, TIGTA, (3/26/2014). Prior to working at TIGTA, Mr. Kutz had been a long time auditor at the Government Accountability Office. Id.

> job. I gave him some background on the job and suggested that we would need to get together and determine the timing of the briefing and what we would like to discuss. He agreed that this would be something we would need to plan in advance due to the political sensitivity of the issue and the fact that we are in fieldwork."[874]

In September 2012, the TIGTA auditors met with Mr. Kutz to discuss the audit and a plan to issue an interim report.[875] The meeting participants were Mr. Kutz and audit team members Troy Paterson, Thomas Seidell, Cheryl Medina, Michael McGovern, and Evan Close.[876] Among other issues, the meeting discussed whether the interim report should include information on liberal groups as well as Tea Party organizations in its analysis. A meeting summary described the discussion as follows:

> "Director Paterson mentioned the interim report we plan on issuing. It would include information on whether the IRS targeted Tea Party organizations, whether more liberal organizations were referred to the advocacy group. A discussion on how to word issues in the report was had. It was decided we need to state the facts – other organizations with political campaign intervention issues were not sent to the advocacy group (objective IIIA and IIIB). We cannot definitively identify liberal vs. conservative organizations, so we want to stay away from using 'heated' jargon."[877]

This meeting summary indicates that the TIGTA auditors were not only aware of, but also discussed, the issue of whether liberal groups were being referred to the advocacy group for heightened review. The summary also suggests that the auditors may have decided not to discuss liberal groups in the audit report, to avoid having to label certain groups as liberal or conservative.

In October 2012, Mr. Kutz wrote directly to the TIGTA Inspector General about the sensitivity of the ongoing audit. He wrote: "[G]iven the highly sensitive nature of this ongoing audit (politically active non-profits) a more in depth discussion would be useful for you."[878]

**Written Questions and Answers.** In November 2012, EO head Lois Lerner provided written responses to questions posed by the TIGTA auditors.[879] In response to a question about why the BOLO entries had been changed over time, Ms. Lerner explained what happened, while also reminding the TIGTA auditors once more that the BOLO lists had included entries for liberal groups as well as conservative groups: "The separate entries for Occupy groups and

---

[874] 8/14/2012 email from Troy Paterson to Russell Martin, "Discussion with Greg," TIGTA Bates No. 010710. Mr. Paterson told the Subcommittee that the September briefing of Congressional staff was later cancelled. Subcommittee interview of Troy Paterson (3/21/2014).
[875] See 9/25/2012 "Memo of Contact," prepared by TIGTA , "Consistency in Identifying and Reviewing Applications for Tax-exempt Status Involving Political Advocacy Cases," TIGTA Bates No. 003084 - 085.
[876] Id.
[877] Id. at 085.
[878] 10/23/2012 email from Gregory Kutz to Russell George, "Greetings to you from Emilia," TIGTA Bates No. 016007. Mr. Kutz told the Subcommittee that he and Mr. Paterson personally briefed the Inspector General about the audit in January 2013. Subcommittee interviews of Gregory Kutz (3/26/2014) and Troy Paterson (3/21/2014).
[879] See 11/2/2012 email from Lois Lerner to Troy Paterson, "Responses," IRSR0000013545 - 565.

ACORN successors were deleted and the advocacy organization description was revised ...."[880] She also wrote:

> "In addition, in light of the diversity of applications selected under this 'tea party' label (e.g., some had 'tea party' in their name but others did not, some stated that they were affiliated with the 'tea party' movement while others stated they were affiliated with the Democratic or Republican party, etc.), the Acting Director, EO Rulings & Agreements sought clarification as to the criteria being used to identify these cases."[881]

Ms. Lerner asked TIGTA to include that information in the audit report, but TIGTA declined.[882]

**TIGTA Failure to Examine Liberal Groups.** During the audit period, TIGTA auditors were repeatedly exposed to issues related to whether liberal groups, such as the Progressive, ACORN, and Occupy organizations, were subjected to the same heightened scrutiny as Tea Party and other conservative groups. The TIGTA auditors failed, however, to examine any BOLO entry that named a group other than the one that named the Tea Party.[883] The TIGTA auditors also failed to acknowledge that groups in the 298 cases with "Progressive" or "Progress" in their names were subjected to inappropriate selection criteria and other improper treatment.

When asked why, the TIGTA auditors offered a number of reasons. The TIGTA audit director, Troy Paterson, told the Subcommittee that the auditors did not actually make a decision not to analyze the progressive, ACORN, and Occupy BOLO entries, but viewed them as not relevant to the audit.[884] He did not explain, however, why BOLO entries with overtly political search terms were seen as irrelevant to an audit designed to "assess the consistency of the Exempt Organizations function's identification and review of applications for tax-exempt status involving political advocacy issues."[885]

The BOLO entry for "progressive" organizations urged EOD personnel to be on the lookout for groups with "progressive political activities" that "appear to lean towards a new political party. Activities are partisan and appear anti-Republican. You see references to 'blue' as being 'progressive.'"[886] The BOLO entry for Occupy groups urged EOD personnel to be on the lookout for groups claiming "social injustices due to 'big money' influence" or concerns that

---

[880] Id. at 548.
[881] Id. at 547. See also Audit Log, prepared by TIGTA, PSI-TIGTA-05-000909 - 949, at 934 (entry dated 11/9/2012 noting receipt of the same information).
[882] Ms. Lerner proposed including the identical sentence she had written in the timeline prepared for the TIGTA audit report, but TIGTA chose not to include it. See comments by EO Director Lois Lerner on a draft timeline supplied by TIGTA, PSI_TIGTA-03-000081 - 098, at 089.
[883] See TIGTA Audit Report, at 6, footnote 16 ("We did not review the use of other named organizations on the BOLO listing to determine if their use was appropriate."). The footnote did not explain why.
[884] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).
[885] 6/22/2012 memorandum from Michael McKenney, TIGTA Office of Audit, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status involving Political Advocacy Issues (Audit # 201210022)," IRSR0000444445 - 447, at 445 (providing the official "engagement letter" for the audit).
[886] 2010 August BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196; August 2010 BOLO spreadsheet, prepared by the IRS, IRS0000002503 - 515.

"the democratic process is controlled by wall street/banks/multinational corporations."[887] While the IRS redacted most of the wording of the BOLO entry for ACORN successor groups, a 2010 email indicated that EOD personnel were looking for groups called "Neighborhoods for Social Justice" or "Communities Organizing for Change," as well as groups advocating for "Voter Mobilization of the Low-Income/ Disenfranchised" or "Housing Justice for the poor."[888] IRS personnel repeatedly urged the audit team to examine those BOLO entries, since they would have helped demonstrate that the IRS was not unfairly singling out conservative groups, but TIGTA failed to do so.

Several of the TIGTA auditors told the Subcommittee staff that the audit team had simply examined the BOLO entries that the IRS advised them to examine.[889] That explanation ignores the evidence cited above, however, showing that the IRS also asked the auditors to examine the BOLO entries for Progressive, Occupy, and ACORN groups. One auditor told the Subcommittee that the audit team did not look at the BOLO entries for liberal groups because no organizations had pending applications.[890] In fact, as shown earlier, applications were pending from both ACORN successor and Progressive groups during the entire period Tea Party groups were under review, and the first Occupy group application was filed in February 2012, more than one year before the release of the TIGTA audit.[891]

Two of the auditors told the Subcommittee that the Tea Party cases were the only groups with potentially problematic screening criteria used to search for additional cases.[892] But IRS screeners named liberal groups, including Progressive, ACORN and Occupy groups, in the BOLO entries just as they had named the Tea Party groups. They also used screening criteria for ACORN successor organizations which cited the groups' political positions in ways that both the

---

[887] February 2012 BOLO spreadsheet, prepared by the IRS, IRSR0000006705 -719, at 710 (The BOLO Watch List entry for Occupy organizations read in its entirety: "Occupy Organizations involve organizations occupying public space protesting in various cities, call people to assemble (people's assemblies) claiming social injustices due to 'big money' influence, claim the democratic process is controlled by wall street/banks/multinational corporations, could be linked globally. Claim to represent the 99% of the public that are interested in separating money from politics and improving the infrastructure to fix everything from healthcare to the economy.").

[888] 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, "BOLO Tab Update," IRSR0000410433 (The BOLO Watch list entry for ACORN successor groups was described as including these selection criteria:

1. "The name(s) Neighborhoods for Social Justice or Communities Organizing for Change.
2. Activities that mention Voter Mobilization of the Low-Income/Disenfranchised.
3. Advocating for Legislation to Provide for Economic, Healthcare, and Housing Justice for the poor.
4. Educating Public Policy Makers (i.e. Politicians) on the above subjects.").

[889] Subcommittee interviews of Gregory Kutz, TIGTA (3/26/14); Thomas Seidell, TIGTA (3/19/2014); and Troy Paterson, TIGTA (3/21/2014).

[890] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).

[891] See Report section on "Handling Liberal Groups." The first ACORN case was assigned in February 2010. See 2/26/2010 email from Richie Heidenreich to Nancy Todd, "Investigation," IRSR0000458439 - 447, at 441. The first Occupy case was assigned in February 2012. See 2/29/2012 email from Steven Bowling to Stephen Seok, "BOLO case," IRSR000 00014173 - 174 (Mr. Bowling wrote: "We have our first 'occupy' type organization. We were thinking that these could be worked by the same agents working the political type cases."). See also Report section on Flagging Tea Party Groups, which shows that, from the beginning in 2010, IRS personnel urged EO screeners to look for "Progressive" groups at the same time and in the same documents used to urge them to look for Tea Party groups, and which discusses how the IRS actively flagged applications from groups with "Progressive" or "Progress" in their names and subjected them to heightened review.

[892] Subcommittee interviews of Thomas Seidell, TIGTA (3/19/2014) and Troy Paterson, TIGTA (3/21/2014).

TIGTA auditor director and TIGTA Chief Counsel acknowledged looked similar to the criteria used for Tea Party groups.[893] The Occupy and Progressive criteria also used phrases taken from the groups' political views. The TIGTA auditors told the Subcommittee that they had not seen the ACORN screening criteria during the audit, nor had they looked for any screening criteria other than what was used for the Tea Party groups,[894] even though one key focus of the audit had been to identify problematic screening criteria.[895]

The TIGTA auditors took one year to collect and analyze information related to the IRS review of 501(c)(4) applications. They did not examine how the IRS processed applications filed by liberal organizations engaged in advocacy activities, despite being continually asked by the IRS to do so. Since the audit was designed to identify and review how the IRS handled "applications for tax-exempt status involving political advocacy issues," sought to evaluate the "consistency" of IRS actions, and was undertaken amid allegations that the IRS had unfairly targeted Tea Party groups, TIGTA's failure to obtain and examine comparative data related to how the IRS handled liberal groups is inexplicable.

### (4) Looking for Political Bias

In February 2013, Assistant Inspector General Gregory Kutz in the TIGTA Office of Audit asked the TIGTA Office of Investigations to search the email of ten IRS employees in the EOD Unit to look for an email that allegedly directed IRS employees to "target" Tea Party groups. The Office of Investigations declined to conduct the search, until directed to do so by the TIGTA Inspector General who also caused Mr. Kutz to reduce the number of IRS employees subject to the email search to five individuals. After a subsequent search of over 2,200 IRS emails and other documents, the Office of Investigations concluded that the documents contained "no indication" that the pulling of the Tea Party applications for additional scrutiny by IRS personnel was "politically motivated," advising that they instead appeared to be the result of inadequate guidance on how to process the cases. That conclusion by the Office of Investigations was not mentioned in TIGTA's audit report, however, even though it was directly relevant to the issue of political bias at the IRS and was based on a documentary review of key emails.

**Involving the Office of Investigations.** At some point during early 2013, a TIGTA auditor was told that an email existed at the IRS directing IRS employees to "target" Tea Party

---

[893] See 10/7/2010 email from Jon Waddell to Steven Bowling and Sharon Camarillo, "BOLO Tab Update," IRSR0000410433 - 434 (recommending ACORN selection criteria) cited in footnote 888 above. When asked about the ACORN criteria, TIGTA Chief Counsel Michael McCarthy said that it "looks very similar" to the Tea Party criteria. Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014). See also Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

[894] Subcommittee interviews of Thomas Seidell, TIGTA (3/19/2014) and Troy Paterson, TIGTA (3/21/2014).

[895] See, e.g., 7/13/2012 email from Cheryl Medina, TIGTA, to Michael McGovern, TIGTA, "case review criteria," TIGTA Bates No. 010404 ("The focus is on the bad criteria used and if it caused cases to be missed or misidentified.").

organizations; the auditor passed on that information to Gregory Kutz, the Assistant Inspector General.[896] In response, Mr. Kutz took action to try to find the alleged "smoking gun" email.[897]

On February 13, 2013, Mr. Kutz sent a memorandum to Timothy Camus, head of the TIGTA Office of Investigations, the agency's law enforcement arm, asking for assistance in looking for the email.[898] He sought Mr. Camus' assistance, because the Office of Audit did not have the authority to retrieve IRS emails from the agency's servers that had not been produced to it by the IRS.[899] The memorandum provided ten names of IRS personnel and specific search terms that Mr. Kutz wanted the Office of Investigations to use to search and retrieve the IRS employee emails.[900]

Mr. Camus told the Subcommittee that he had felt "uncomfortable" conducting the type of IRS email search, retrieval, and review that Mr. Kutz wanted, describing it as a "fishing expedition."[901] Mr. Camus told the Subcommittee that, at the time, he responded to Mr. Kutz by indicating that he did not feel comfortable using law enforcement tools to search and retrieve the emails of ten IRS employees, until Mr. Kutz provided more specificity as to who wrote or received the "smoking gun" email.[902] Mr. Camus indicated that Mr. Kutz was unable to provide the name of any IRS employee who was suspected of writing or receiving the email.[903] When asked about Mr. Camus' reaction, Mr. Kutz disagreed that the request was a "fishing expedition," explaining that it was "prudent to look through emails for the reasons stated in the February referral letter."[904]

---

[896] Mr. Kutz told the Subcommittee that either Mr. Seidell or Mr. Paterson had been told about the email. Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014). See also 5/3/2013 email from Timothy Camus to Gregory Kutz, and others, "Review of E-mails," PSI-IRS-37-000001 (stating that the Office of Investigations had been asked to determine "[i]f an e-mail existed that directed the [IRS] staff to 'target' Tea Party and other political organizations").

[897] Both TIGTA Inspector General Russell George and Office of Investigations head Timothy Camus told the Subcommittee that Mr. Kutz had described the email as a "smoking gun" email. Subcommittee interviews of Russell George, TIGTA (4/22/2014) and Timothy Camus, TIGTA (4/7/2014). See also testimony of J. Russell George, "The IRS's Systematic Delay and Scrutiny of Tea Party Applications," hearing before the House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 99 ("I was told by my staff that there was a smoking gun email.").

[898] See 2/13/2013 memorandum from Gregory Kutz to Timothy Camus, "Memorandum for Deputy Assistant Inspector General for Investigations," PSI-IRS-37-000002 - 003 (asking the Office of Investigations to "determine who at the Internal Revenue Service (IRS) EO function Determinations Unit in Cincinnati, Ohio originally developed and who authorized the policy to improperly target applications of certain organizations based on their names and political views").

[899] Subcommittee interviews of Gregory Kutz, TIGTA (3/26/2014) and Timothy Camus, TIGTA (4/7/2014).

[900] Id.

[901] Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).

[902] Id.

[903] Mr. Camus told the Subcommittee that he viewed the proper course of action to be that the Office of Audit finish its pending audit and then, if an issue warranted review by the Office of Investigations, to task his office with that review. Subcommittee interview of Timothy Camus, TIGTA (4/7/2014). Mr. Camus also stated that he thought the Office of Audit could have conducted the email search itself, a point that was disputed by Mr. Kutz. Subcommittee interviews of Timothy Camus, TIGTA (4/7/2014) and Gregory Kutz, TIGTA (3/26/2014).

[904] 4/24/2014 email from TIGTA counsel to the Subcommittee, "HSGAC PSI Question," PSI-TIGTA-21-000001-002.

In early April 2013, Mr. Kutz set up a meeting with Inspector General Russell George and Mr. Camus to discuss his request for the Office of Investigations email review.[905] According to Mr. Camus, at the meeting, he expressed his concern about using law enforcement tools to search and retrieve IRS employee emails without the knowledge or consent of the IRS, and his hesitance to act without getting additional specificity regarding who and what to search for from Mr. Kutz.[906] Mr. Camus told the Subcommittee that Inspector General George directed the Office of Investigations to conduct the requested email review, but also brokered a "compromise" in which Mr. Kutz agreed to narrow the list of IRS employees whose emails would be searched from ten to five individuals.[907] When asked about the meeting, the TIGTA Inspector General told the Subcommittee that he did not recall a disagreement between the Office of Audit and the Office of Investigations over the matter, but did recall asking the Office of Investigations to undertake the review.[908] Mr. Camus told the Subcommittee that he was not pleased with having to conduct the review, but felt it had been narrowed so that it was "not a broad fishing expedition."[909]

**Conducting the Review.** Mr. Camus told the Subcommittee that he tasked one of his technical experts, James Jackson, with conducting the search, retrieval, and review of the specified emails from the five IRS employees.[910] According to Mr. Jackson, Mr. Camus instructed him to review the IRS employees' emails, using the key search terms provided by Mr. Kutz, and look for any political direction related to delaying or targeting the processing of 501(c) applications, for example, in response to direction from the White House.[911] Using Mr. Kutz's search terms of "Tea," "Patriots," "9/12", and "(c)(4)," Mr. Jackson's email search produced 5,617 total hits involving 2,277 emails and other documents.[912] Mr. Jackson told the Subcommittee that he personally reviewed all 2,277 emails and documents, but did not find a "smoking gun" email.[913] He said that, instead, he found the emails and documents demonstrated a great deal of confusion about the application process, with IRS employees "begging for guidance" as to how to determine whether organizations were engaged in campaign activity.[914]

Mr. Jackson told the Subcommittee that he found no evidence of political bias in the IRS' processing of the 501(c)(4) applications.[915] Mr. Jackson summarized his findings in a memorandum dated May 3, 2013, which he prepared after concluding his review and emailed to Mr. Camus, head of the Office of Investigations:

---

[905] Subcommittee interviews of Timothy Camus, TIGTA (4/7/2014) and Russell George, TIGTA (4/22/2014). Other meeting participants included Lori Creswell from the TIGTA Chief Counsel's office, Randy Silvis from the TIGTA Office of Investigations, and Michael Phillips from the TIGTA Office of Audit. Id.
[906] Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).
[907] Id.
[908] Subcommittee interview of Russell George, TIGTA (4/22/2014).
[909] Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).
[910] Id. The five individuals identified by Mr. Kutz and whose emails were reviewed by Mr. Jackson were Joseph Herr, Elizabeth Hofacre, Gary Muthert, John Shafer, and Cindy Thomas. See undated "EO Email Review," prepared by James Jackson, PSI-TIGTA-04-000015. All five of the IRS employees selected by Mr. Kutz for the email search worked in the Cincinnati office; none worked in Washington, D.C.
[911] Subcommittee interview of James Jackson, TIGTA (4/2/2014).
[912] Id.
[913] Id.
[914] Id.
[915] Id.

> "This review revealed that there was a lot of discussion between the employees identified above, as well as other EO employees on how to process 'Tea Party' and other political organization's tax exempt applications. The search also revealed that there was a Be On the Lookout (BOLO) list specifically naming these groups; however, the e-mails indicated the organizations needed to be pulled because the group charged with reviewing these applications was not sure how to process them, not because they wanted to stall or hinder the application process. There was no indication from this electronic mail review that the pulling of these selected applications was politically motivated. The electronic mail traffic available indicated that there were unclear processing directions and the group wanted to make sure they had guidance on processing the applications, so they pulled them in order to ensure they were all processed in a consistent manner."[916]

**Conveying the Review Results.** That same day, May 3, 2013, Mr. Camus summarized the findings of the review in an email he sent to other senior TIGTA executives, Gregory Kutz, Michael McCarthy, Michael Phillips, and Michael McKenney:

> "As a result of our meeting with Russell [George] a couple of weeks ago, we agreed to pull e-mails from identified staff members of the EO organization in Cincinnati to find out 1). If an e-mail existed that directed the staff to 'target' Tea Party and other political organizations and 2). If there was a conspiracy or effort to hide e-mails about the alleged directive. ... Review of these e-mails revealed that there was a lot of discussion between the employees on how to process the Tea Party and other political organization applications. There was a Be On the Lookout (BOLO) list specifically naming these groups; however, the e-mails indicated the organizations needed to be pulled because the IRS employees were not sure how to process them, not because they wanted to stall or hinder the application. There was no indication that pulling these selected applications was politically motivated. The e-mail traffic indicated there were unclear processing directions and the group wanted to make sure they had guidance on processing the applications so they pulled them. This is a very important nuance."[917]

The Camus email was sent eleven days before the audit report was released to the public. According to TIGTA Inspector General George, none of the senior TIGTA managers who received the email forwarded it to him or informed him of the review's results.[918]

**Excluding the Finding from the Audit Report.** Although the Office of Investigations found in its review that "there was no indication that pulling these selected applications was politically motivated," addressing an issue that was central to the TIGTA audit, its finding was not included in the TIGTA audit report. When asked why, Mr. Kutz told Subcommittee that the TIGTA report had already shown there was no evidence of political bias in the application

---

[916] 5/3/2013 memorandum from James Jackson, "Memorandum of Interview or Activity," PSI-TIGTA-18-000002 - 003.

[917] 5/3/2013 email from Timothy Camus to Gregory Kutz, Michael McCarthy, Michael Phillips, and Michael McKenney, "Review of E-mails," PSI-IRS-37-000001. TIGTA Inspector General George told the Subcommittee that he did not see this email at the time it was sent, and learned of the Office of Investigation's finding for the first time when the email was made public by a Member of Congress. Subcommittee interview of Russell George, TIGTA (4/22/2014).

[918] Subcommittee interview of Russell George (4/22/2014).

process, and the Office of Investigations had simply confirmed the audit results, so there was no need to include its finding in the report.[919]

The TIGTA audit report did not contain, however, an explicit finding that there was no political bias in the IRS application process. When the Subcommittee examined the part of the audit report which Mr. Kutz indicated already showed there was no political bias at the IRS in the application process, it consisted of a description by TIGTA of statements made by IRS employees regarding the absence of political bias, rather than an analysis or statement by TIGTA itself concluding that no political bias had been present.[920]

When asked about the issue in Congressional hearings, TIGTA Inspector General George repeatedly testified that the audit had found no evidence of political bias at the IRS.[921] At the same time, he cited little or no evidence to support that conclusion. Had TIGTA included the TIGTA Office of Investigations finding in the audit report, it would have included information directly relevant to the audit and provided important additional evidence to support TIGTA's conclusion regarding the absence of political bias at the IRS. Given that the Office of Investigations finding was among the strongest evidence developed by the audit on the issue of whether the IRS had shown political bias in processing 501(c)(4) applications, it is difficult to understand why it was excluded from the report.[922]

Documents reviewed by the Subcommittee show that an earlier draft of the TIGTA audit report, a copy of which was sent to EO head Lois Lerner and IRS Chief Counsel William Wilkins in early April 2013, had included two references to the Office of Investigations

---

[919] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014). See also testimony of Mr. Kutz, "The IRS's Systematic Delay and Scrutiny of Tea Party Applications," hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 102 ("[W]e were told that what they found validated the facts in our report, and we thought that made us feel good that our report was accurate. And we didn't say something in addition to what we already said, because we'd already said what he found.").

[920] Mr. Kutz referred the Subcommittee to the following statements in the TIGTA audit report as showing the lack of political bias at the IRS:

> "We asked the Acting Commissioner, Tax Exempt and Government Entities Division; the Director, EO; and Determinations Unit personnel if the criteria were influenced by any individual or organization outside the IRS. All of these officials stated that the criteria were not influenced by any individual or organization outside the IRS. ... According to the Director, Rulings and Agreements, the fact that the team of specialists worked applications that did not involve the Tea Party, Patriots, or 9/12 groups demonstrated that the IRS was not politically biased in its identification of applications for processing by the team of specialists."

5/14/2013 TIGTA Audit Report, at 7-8.

[921] More information about TIGTA testimony on this point during Congressional hearings is provided below.

[922] The Minority Staff's Dissenting Views state at one point that the email review was "a limited search of only five employees' emails," "did not include a search of *any* emails from *any* DC based employees," and "was not a general search for evidence of political bias." Dissenting Views at 196 (emphasis in original). That reasoning, however, misses the point of TIGTA's explanation for omitting the review from the audit report, which is not that the email review was too limited, but that it reached the same conclusion that the Office of Audit had already reached after considering all of the available information – that there was no evidence of political bias in how the IRS treated the 501(c)(4) applications. Subsequent broader email productions have not changed TIGTA's view. In June 2014, TIGTA sent a letter to the Subcommittee confirming Mr. George's testimony that the TIGTA audit "found no evidence of political bias" at the IRS. 6/6/2014 letter from TIGTA to the Subcommittee, PSI-TIGTA-22-000001 - 004, at 001.

review.[923] Since the draft was sent to the IRS before that review had concluded, neither reference described what the Office of Investigations had found. In an email, Ms. Lerner expressed concern to TIGTA personnel about what she thought were two separate referrals to the Office of Investigations described in the draft report.[924] Mr. Camus told the Subcommittee that he had asked that the final audit report remove any reference to an Office of Investigations referral, because he viewed any reference to be misleading, since his office had not conducted a formal investigation in connection with the audit.[925] The footnotes referencing the Office of Investigations were removed from the final report.[926]

**Making the Investigative Results Public.** The existence of the Office of Investigations review and its conclusion were finally made public, not by TIGTA, but by a Member of Congress. On July 12, 2013, Congressman Elijah Cummings, Ranking Member of the House Committee on Oversight and Government Reform, released a letter disclosing that the Committee had received new TIGTA documents, and those documents had disclosed that TIGTA's Office of Investigations had conducted an email review of IRS employees and found "no indication" that the pulling of 501(c)(4) applications was "politically motivated."[927]

---

[923] See 4/12/2013 draft audit report, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review DRAFT," prepared by TIGTA, IRSR0000014721, at 732, footnotes 15 and 17 ("Initially, EO function officials stated that the Determinations Unit sent out an informal e-mail to all Determinations Unit specialists in May 2010 instructing them to forward all Tea Party applications to another specialist. Since EO function officials could not locate a copy of this e-mail, we requested assistance from our Office of Investigations in the matter. EO function officials later determined that an e-mail was not distributed to Determinations Unit specialists in May 2010. ... During interviews with Determinations Unit specialists and managers, we could not specifically determine who had been involved in creating the criteria. EO function officials later clarified that the expanded criteria were a compilation of various Determinations Unit specialist responses on how they were identifying Tea Party cases. Since we could not determine specifically who was involved in creating the expanded criteria, we referred this matter to our Office of Investigations.").

[924] See 4/2/2013 email from Lois Lerner to Greg Kutz and Troy Paterson, "TIGTA report – draft email," IRSR0000195635 ("As you know, we are a bit concerned about the 2 referrals for investigation in the draft report, and want to do all we can to clear up your concerns.").

[925] Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).

[926] See 5/14/2013 TIGTA Audit Report. See also 5/7/2013 email from Gregory Kutz to Troy Paterson and Thomas Seidell, "Review of E-mails," PSI-IRS-37-000001 ("I forgot to ask, but did we remove reference to OI [Office of Investigations] in the footnotes and the related referral?"). Mr. Kutz also provided the Subcommittee with another reason the Office of Investigations' finding was not included in the final audit report. His memorandum requesting the Office of Investigations review indicated that, if the review discovered "material" evidence, that information might be disclosed in the audit report. See 2/13/2013 memorandum from Gregory Kutz, TIGTA, "Memorandum for Deputy Assistant Inspector General for Investigations," PSI-IRS-37-000002 - 003 ("If you identify evidence material to our audit report before it is issued, we will work with you on any additional disclosures we should make."). Mr. Kutz told the Subcommittee that he did not view the Office of Investigations' finding regarding a lack of evidence of politically motivated actions by the IRS to be material evidence, since he believed it simply confirmed what the audit report already said, and so did not include it in the audit report for that reason. Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

[927] See 7/12/2013 letter from Oversight of Government Reform Committee Ranking Member Cummings to Chairman Issa, at 1-2, http://democrats.oversight.house.gov/images/user_images/gt/Letter.pdf ("New documents obtained by the Committee indicate that Mr. George did not disclose to the Committee – either in his report or during his testimony – that he met personally with his top investigator and tasked him to conduct a review of 5,500 emails of IRS employees, and that this official concluded after this review that there was 'no indication that pulling these selected applications was politically motivated' – a fact this official reported was 'very important.' New

By that time, TIGTA Inspector General George had testified at four Congressional hearings about the audit's results, but had not disclosed the existence of the Office of Investigations email review or the conclusion it had reached.[928] Mr. George told the Subcommittee that he had not brought it up in his testimony, because while he was aware of the email review, he had been unaware that the Office of Investigations had reached a conclusion that the IRS documents showed the IRS had not been politically motivated when it subjected applications from conservative groups to additional review, until Congressman Cummings released the key TIGTA email.[929] Mr. George told the Subcommittee that no one on his staff had informed him of the Office of Investigations conclusion or forwarded the Camus email to him, even though the finding directly addressed an issue central to the TIGTA audit, whether there had been political bias at the IRS.[930]

The TIGTA personnel who knew about the Office of Investigations finding, not only excluded the finding from the May 2013 audit report and failed to inform the Inspector General about the finding, they remained silent about the review's results for another two months, despite mounting public and Congressional concern about allegations that the IRS had showed political bias in the processing of tax-exempt applications. Had TIGTA personnel briefed Inspector General George during his hearing preparation about the Office of Investigations' finding, Mr. George could have used it to buttress TIGTA's conclusion about a lack of political bias at the IRS. For example, on May 21, 2013, at a Senate Finance hearing, when asked whether TIGTA was basing its conclusion that "there was no political motivation" in how the IRS processed Tea Party applications on "simply the statement of those engaging in the conduct," the Inspector General responded, "yes."[931] According to Mr. George, he did not also cite the TIGTA Office of Investigation's email review that found no indication of political bias, because his staff had not informed him of that conclusion. Mr. George also told the Subcommittee that, when he finally reviewed Mr. Camus' email, he had been "very disappointed" with it.[932] He indicated that, in his view, the email contained a conclusion that Mr. Camus should not have reached; instead, Mr.

---

documents also indicate that all references to work conducted by this official and his team of investigators were scrubbed from an earlier draft of the Inspector General's report.").

[928] TIGTA Inspector General Russell George had testified on 5/17/2013 before the House Ways and Means Committee, on 5/21/2013 before the Senate Finance Committee, on 5/22/2013 before the House Oversight and Government Reform Committee, and on 6/3/2013 before the House Appropriations Subcommittee on Financial Services and General Government.

[929] Subcommittee interview of Russell George, TIGTA (4/22/2014).

[930] Id. See also testimony of Inspector General George before the House Appropriations Subcommittee on Financial Services and General Government (2/26/2014) (Congressman Serrano: "This was a member of your staff who came to this conclusion but didn't tell you?" Mr. George: "Did not tell me directly, correct. That is correct.").

[931] See testimony of J. Russell George, "A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny," hearing before Senate Committee on Finance, S. Hrg. 113-232, (5/21/2013) at 19-20, http://www.finance.senate.gov/hearings/hearing/?id=9b0a1cc8-5056-a032-5219-3e11fc44d504 (providing this testimony:

> "Senator Crapo: So, in other words, you have simply the statements of those who were engaging in the conduct saying they were not politically motivated?
> Mr. George: That is correct, sir.
> Senator Crapo: And based on that, and statements not under oath, you have reached the conclusion there was no political motivation.
> Mr. George: Yes.").

[932] Subcommittee interview of Russell George, TIGTA (4/22/2014).

George indicated that the documentary review should have confined itself to determining whether or not a "smoking gun" email existed at the IRS.[933]

### (5) Communicating the Audit Results

By January 2013, the TIGTA auditors had tentatively concluded that, when the EO Determinations Unit used "Tea Party," "9/12," "Patriot," or phrases reflecting the political views of those organizations, the IRS used inappropriate criteria to identify applications that were then subjected to heightened scrutiny.[934] The auditors had also analyzed several groups of applications and reached a preliminary conclusion that the IRS had failed to identify some applications that should have been treated as advocacy cases, and treated others as advocacy cases when they should not have been. The TIGTA auditors informed IRS officials of their preliminary conclusions and discussed those and other audit issues in a series of meetings.

On January 14, 2013, EO head Lois Lerner sent an email to TIGTA audit director Troy Paterson expressing concern about some of the preliminary audit results and urging that the discussion include more senior personnel.[935] On January 25, 2013, TIGTA auditors Troy Paterson, Thomas Seidell, and Cheryl Medina met with IRS officials Holly Paz, Judith Kindell, and Hilary Goehausen to discuss the audit.[936] Six days later, on January 31, 2013, TIGTA auditors Thomas Seidell and Cheryl Medina met with IRS officials Lois Lerner, Holly Paz, Judith Kindell and Hilary Goehausen.

IRS personnel were taken aback by TIGTA's analysis which they interpreted as indicating that IRS personnel had shown political "bias" against Tea Party organizations by "targeting" them for heightened scrutiny. According to contemporaneous notes of the January 31 meeting taken by IRS personnel, Ms. Lerner objected to that characterization of IRS actions:

> "[T]here was never institutional IRS bias. There was never direction from anyone in management to target anyone. She said it was less targeting than not providing them [EOD personnel] with the tools needed early on."[937]

That same day, January 31, 2013, Ms. Lerner sent a long email to Audit Director Troy Paterson, who wasn't present at the January 31 meeting she had attended. Her email described the audit as "the toughest one you and I have worked on together," and asserted that the TIGTA

---

[933] Id.
[934] See, e.g., 1/16/2013 Memorandum of Discussion, "Overall Concerns with Case Review Results," prepared by Troy Paterson, TIGTA, PSI-TIGTA-05-000441.
[935] 1/14/2013 email from Lois Lerner to Troy Paterson, copies to Holly Paz and Dawn Marx, "Advocacy discussion," IRSR0000441700 - 701 ("As you know, the issues here are very sensitive and I know we both recognize that they are not as black and white as some of the issues we deal with, so I think it is important that higher levels on both sides hear the discussion to ensure the best result.").
[936] 1/25/2013 memorandum, "Consistency in Identifying and Reviewing Applications for Tax-Exempt Status Involving Political Activity," prepared by TIGTA, PSI-TIGTA-05-000443 (discussing the meeting).
[937] IRS Notes from Meeting with TIGTA on January 31, 2013, prepared by Megan Biss, IRS Technical Advisor, IRSR0000428195 - 203, at 203.

auditors could not explain how they defined "targeting" or what they meant by saying that the targeting under review "wasn't necessarily political."[938] Ms. Lerner wrote:

> "We feel your folks are being too narrow in their view and have decided that because of the language on the earlier BOLO list regarding Tea Party, everything that followed was tainted. They seem to believe that if a case was initially sent to the advocacy group, but ultimately determined to be an approval, that our action in putting it into the advocacy group in the first place is incorrect, and illustrates 'targeting.' I think they remain confused about the purpose of screening vs. bucketing – and we have tried to explain several time[s]. They also don't seem to be taking a big picture look at what we have done. That is, we've already owned up to the fact that we recognized in mid-process that Cincinnati was struggling with the issues. That is why we sent our experts in this area to Cincinnati for 3 weeks to work hand in hand with the Determ folks to train them and then walk through their post training assessments to ensure they understood and we were getting the right treatment for the cases. When we describe that process, they acknowledge that that approach sounds reasonable, but seem to be saying that reasonableness is overshadowed by the fact that the criteria look bad to folks on the outside, so there is no way we could cure the initial bad impression. …
>
> "I met with the group today and asked your folks what they thought the TIGTA audit was all about. The response was that they were here because there allegations that the IRS was 'targeting.' When asked, they didn't seem able to provide me with a clear definition of what they meant by targeting, and they confused me when they said it wasn't necessarily political. I told them my understanding is that the audit was to determine whether the IRS was acting in a politically motivated manner – not whether the earlier articulation of the criteria looked bad. However, that doesn't seem to be the focus. They have said they aren't looking at whether the organizations are conservative or liberal because that is too difficult to figure out. They have also acknowledged that there are both conservative and liberal organizations on the list of advocacy cases.
>
> "So, I'm not sure how they are looking at whether we were politically motivated, or what they are looking for with regard to targeting. They didn't seem to understand the difference between IRS acting in a politically motivated manner and front line staff people using less than stellar judgment. I am willing to take the blame for not having provided sufficient direction initially, which may have resulted in front line staff doing things that appeared to be politically motivated, but I am not on board that anything that occurred here shows that the IRS was politically motivated in the actions taken."[939]

This January 2013 email shows that the IRS again brought its treatment of liberal groups to the attention of senior TIGTA personnel, noting that the TIGTA auditors had "acknowledged that there are both conservative and liberal organizations on the list of advocacy cases."[940]

---

[938] 1/31/2013 email from Lois Lerner to Troy Paterson, "Follow-Up," IRSR0000466814 - 815.

[939] Id.

[940] Id. at 815. The Minority Staff's Dissenting Views state that, when given opportunities to comment on drafts of the audit report, the IRS "did not assert that it had impartially targeted both conservative and liberal groups,"

The same day that TIGTA auditors met with the IRS, on January 31, 2013, Mr. Kutz and Mr. Paterson briefed the TIGTA Inspector General about the audit. Mr. Kutz told the Subcommittee that he and Mr. Paterson personally met with Inspector General George and described the audit findings, including the changes in the wording of the BOLO entries used to flag applications filed by the Tea Party and other conservative groups.[941]

On February 5, 2013, Ms. Lerner sent an email about the TIGTA audit to senior EO officials, including Joseph Grant, then head of the Tax Exempt and Government Entities division, and Nikole Flax, Chief of Staff to then Acting IRS Commissioner Steven Miller, warning them about the audit outcome. Ms. Lerner wrote:

> "We have met with TIGTA on this several times. … I think we have a basic difference in our view of their audit. We thought it was to determine whether IRS has a biased program, which would include looking at every aspect. [T]hey seem to think the question is narrower – did we 'target based on the articulation of the BOLO?'[942]

Her email indicates that, by early February 2013, the Acting IRS Commissioner's office had been alerted to the potentially negative audit report.

### (6) Drafting the Audit Report

By February, the TIGTA audit team had prepared a draft audit report. On February 25, 2013, Audit Director Troy Paterson wrote to a colleague: "Everyone is a bit anxious about this report due to its subject matter."[943] Due to the perceived sensitivity regarding the report, TIGTA asked the TIGTA Chief Counsel to review the draft prior to providing it to the IRS, which was not generally done, and later provided the IRS with the opportunity to comment on three different drafts of the audit report prior to its issuance, instead of the usual two.[944]

**TIGTA Chief Counsel Comments.** On February 25, 2013, Mr. Paterson sent the draft audit report to TIGTA Chief Counsel Michael McCarthy and the head of the Office of Audit, Assistant Inspector General Michael McKenney, explaining: "Greg [Kutz] mentioned that, due

---

Dissenting Views at 193, but in this email to the senior TIGTA auditor as well as in other instances recounted earlier, the IRS did make that assertion, only to be told that the TIGTA auditors were not "looking at whether the organizations are conservative or liberal." This email as well as other evidence showed that the IRS clearly and repeatedly objected to the failure of the TIGTA audit to mention the inclusion of liberal organizations in the list of advocacy cases.

[941] According to Mr. Kutz, the issue of whether liberal groups were also identified using inappropriate criteria and then subjected to heightened scrutiny by the IRS did not come up at the meeting. Subcommittee interviews of Gregory Kutz (3/26/2014) and Troy Paterson (3/21/2014). See also TIGTA Audit log, at PSI-TIGTA-05-000944.

[942] 2/5/2013 email from Lois Lerner to Joseph Grant, Nancy Marks, with copy to Nikole Flax and Holly Paz, "Follow-Up," IRSR0000202644. See also 2/8/2013 email from Lois Lerner to Nikole Flax, "Follow-Up," IRSR0000202703.

[943] 2/25/2013 email from Troy Paterson to Thomas Dori, "Audit # 2012100022 – Outcome Measure Review," TIGTA Bates No. 009498.

[944] Subcommittee interviews of Greg Kutz, TIGTA (3/26/2014) and Troy Paterson, TIGTA (3/21/2014).

to the sensitivity of the attached report, he would like for us to obtain your feedback before we issue a discussion draft report to the IRS."[945]

After reading the draft audit report, TIGTA's Chief Counsel Michael McCarthy wrote to Mr. Kutz and Mr. Paterson expressing several concerns.[946] First, Mr. McCarthy counseled against the draft's using the word "targeted," explaining: "[T]argeted has a connotation of improper motivation that does not seem to be supported by the information presented in the audit report."[947] Mr. McCarthy was also curious about why TIGTA made the claim that the IRS "used inappropriate criteria," since without using some type of identifier: "[t]hat would seem to make it difficult for the IRS to identify potential political applications for referral to the specialized unit."[948] Mr. McCarthy recommended that TIGTA focus more attention on the fact that the IRS used identifying names for non-political groups as well as political ones, "since it suggests both that the IRS was not politically motivated in this case, and that our recommendation might need to be broader."[949] Finally, Mr. McCarthy expressed concern about whether the TIGTA auditors had looked at whether the IRS had named "similarly situated groups from the left side of the political spectrum."[950] Mr. McCarthy told the Subcommittee that when he asked the auditors if the IRS had used any BOLO entries that named liberal groups, the auditors told him there were none,[951] which was inaccurate.

On March 8, 2013, the TIGTA auditors met with the TIGTA Chief Counsel to discuss his concerns with the draft report.[952] Mr. Kutz told the Subcommittee that the meeting was "part of the iterative process of a report."[953] Auditor Thomas Seidell told the Subcommittee that he recalled the TIGTA Chief Counsel asking about whether the IRS looked at liberal groups, but did not recall how the matter was resolved.[954] TIGTA Inspector General George told the Subcommittee that the Chief Counsel's comments on the report and his concern about whether

---

[945] 2/25/2013 email from Troy Paterson to Michael McCarthy and Michael McKenney, "Tax-Exempt Applications Audit Report for your Review and Feedback," TIGTA Bates No. 008273.
[946] See 2/28/2013 email from Michael McCarthy to Gregory Kutz, Troy Paterson, and others, "Tax Exempt Applications Audit Report for your Review and Feedback," TIGTA Bates No. 008272 - 273.
[947] Id.
[948] Id.
[949] Id.
[950] Id. Mr. McCarthy wrote: "Or are we saying it was inappropriate because the use of names was one sided, i.e. name criteria included only certain types of groups seen as conservative, and names of other political groups with different policies should have also been included? If that is the rationale, do we have evidence that similarly situated groups from the left side of the political spectrum should have been included by name in the criteria, but were not? The later sections of the report seem to suggest this, but it is not clear." Id.
[951] Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014).
[952] After the meeting, Mr. Kutz wrote to Mr. Seidell and Mr. Paterson: "I thought we had a good meeting with Counsel today." 3/8/2013 email from Gregory Kutz to Thomas Seidell and Troy Paterson, "EO Draft," TIGTA Bates No. 008136. Mr. Paterson wrote to Mr. Seidell and Ms. Medina: "I took off for lunch and tried to clear my head after the Counsel meeting. How do you think we should proceed?" 3/8/2013 email from Troy Paterson to Thomas Seidell and Cheryl Medina, "Well…," TIGTA Bates No. 008185. Three days later, Mr. Paterson wrote to his auditors: "I reviewed the revised report over the weekend and have some minor revisions throughout and a few questions. Fortunately, I believe it will not be difficult to make any needed changes and get this up to Greg today!" 3/11/2013 email from Troy Paterson to Thomas Seidell and Cheryl Medina, "Well…," TIGTA Bates No. 008185.
[953] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).
[954] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2013).

the IRS also looked at "similarly situated groups from the left side of the political spectrum" were not made known to him at the time.[955]

Ten days later, on March 18, 2013, the TIGTA Chief Counsel signed off on the report. Lori Creswell of Mr. McCarthy's staff sent an email to Troy Paterson thanking the audit team for making requested changes:

> "We wanted to thank you all for meeting with us to discuss Counsel's comments concerning the draft audit report pertaining to applications for tax-exempt status. We have reviewed the revised draft that you provided to our office last week and appreciate the changes that have been made to the draft report. We believe that the revisions address and/or resolve the comments and concerns that we have offered. At this time, we have no further comments to offer concerning this matter."[956]

One key change made to the draft was to remove the word "targeted" from the text, except when describing the allegations made by the initiators of the report who thought Tea Party groups were being targeted.[957] Mr. McCarthy told the Subcommittee that he signed off on the report, because his concerns had been addressed.[958]

**Draft Provided to IRS.** On March 19, 2013, TIGTA provided copies of the revised draft audit report to the IRS.[959] On March 25, 2013, EO Rulings and Agreements Head Holly Paz sent an email to EO head Lois Lerner criticizing the draft:

> "The report lacks any reference to or information regarding the broader context (such as how difficult it is to determine what constitutes political activity and whether political activity is a c4's primary activity). Without this broader context, the report could appear slanted in one direction."[960]

That same day, March 25, 2013, Ms. Lerner and Meghan Biss, a Technical Advisor at the IRS, met with Mr. Kutz, Mr. Paterson, Mr. Seidell, and Ms. Medina from TIGTA to discuss the draft.[961] Later that day, Ms. Lerner described the meeting to Ms. Paz, who was unable to attend. Ms. Lerner wrote:

> "I asked Greg [Kutz] and [T]roy [Paterson] to stay on afterwards. I told them flat out the report felt politically motivated with some of the inflammatory descriptions. … Greg

---

[955] Subcommittee interview of Russell George, TIGTA (4/22/2014).
[956] 3/18/2013 email from Lori Creswell to Troy Paterson, "Tax-Exempt Applications Audit Report for your Review and Feedback," TIGTA Bates No. 008271.
[957] See 5/14/2013 " Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," prepared by TIGTA (hereinafter "5/14/2013 TIGTA Audit Report"), http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf
[958] Subcommittee interview of Mike McCarthy, TIGTA (4/30/2014).
[959] See "TIGTA OA: Process for Reviewing Applications for Tax Exemption," TIGTA Audit Log, PSI-TIGTA 05-000909 - 949, at 948 (noting a pre-discussion draft of the report had been sent to Lois Lerner and Holly Paz).
[960] 3/25/2013 email from Holly Paz to Lois Lerner, "TIGTA," IRSR0000428212.
[961] See March 25, 2013, "Memo of Contact," prepared by TIGTA, "Process for Reviewing Applications for Tax Exemption Closing Conference," PSI-TIGTA-05-000957 - 958; 3/26/2013 email from Lois Lerner to Nikole Flax "TIGTA," IRSR0000182659.

> and I had a longer conversation in general, and I think he gets what's been going on and where this sits in the middle of things. Not sure he can do a whole lot, but I did feel like he was going to go back and think about this. All we can ask for."[962]

The next day, March 26, 2013, Ms. Lerner sent an email to the Acting IRS Commissioner's Chief of Staff Nikole Flax warning her about the draft:

> "I'll send the draft – don't freak out because we had a good talk and I believe there will be another draft to comment on – we had a higher up guy this time. I told him that there were several areas where the way they had provided the information made the report look political. He said it isn't political. I said, I didn't think it was, but they may want to take another look because it was coming across that way. We talked a bit about the larger context of what was going on in the world – I think he got it, but we'll have to see."[963]

On April 2, 2013, Ms. Lerner sent a lengthy email to the TIGTA auditors expressing concerns about the draft report.[964] Among other matters, she expressed concern about references to apparent referrals to TIGTA's Office of Investigations. She also forwarded a presentation that included a smiling picture of an acorn – a reference to ACORN successor groups – providing TIGTA with another document showing that the IRS was looking at liberal as well as conservative groups.[965]

**Concealing the Audit.** During the first quarter of 2013, TIGTA informed the IRS about the negative 501(c) audit results and provided a copy of the draft audit report. In the meantime, the IRS continued to struggle with how to process the 501(c)(4) applications amid negative press reports and Congressional inquiries. On April 30, 2013, a team of eight IRS EO employees, led by Lois Lerner, met with Subcommittee staff for six hours to discuss the 501(c)(4) application process, how the IRS determined when activities qualified as campaign intervention and when a group was engaged primarily in social welfare activities, and how the IRS enforced the legal constraints on tax exempt groups.[966] During the meeting, neither Ms. Lerner nor her staff mentioned the Tea Party, the TIGTA audit, or the upcoming TIGTA audit report.

Ms. Lerner and her staff also downplayed the ongoing problems with the 501(c)(4) cases. When Subcommittee staff asked about how the IRS analyzed campaign activity by 501(c)(4) groups and determined whether groups were engaged primarily in social welfare activities, Ms. Lerner told the Subcommittee that additional guidance in those areas was not necessary, because additional training had been provided to the IRS employees. She dismissed the value of bright line rules, stating: "If I have 10 bright line rules, someone will come up with 11."[967] Yet three weeks earlier, in an April 4, 2013 email to the EO Technical Unit, Mr. Lerner had written: "We need guidance on c4, we need guidance on c4, we need guidance on c4 … IRS is getting

---

[962] 3/25/2013 email from Lois Lerner to Holly Paz, "TIGTA," IRSR0000180969.
[963] 3/26/2013 email from Lois Lerner to Nikole Flax, IRS, "TIGTA," IRSR0000182659.
[964] 4/2/2013 email from Lois Lerner to Gregory Kutz and Troy Paterson, "TIGTA report – draft email," IRSR0000195585 - 586.
[965] Id., forwarding "Heighted Awareness Issues," prepared by the IRS, IRSR0000195600 - 617, at 613.
[966] IRS participants included Lois Lerner, Nikole Flax, Nancy Marks, Judith Kindell, Susan Brown, Janine Cook, Suzanne Sinno, and Catherine Barre.
[967] 4/30/2013 IRS briefing of Subcommittee, led by Lois Lerner.

hammered!"[968] A year earlier, in March 2012, Ms. Lerner pleaded with the Chief Counsel's attorneys to complete work on a draft guidesheet: "[M]y staff can't wait for formal guidance to do their jobs. … These are live cases and if all we can give them is published guidance on the extreme ends of the spectrum, they will get themselves in trouble."[969]

### (7) Apologizing for IRS Conduct

As the release date for the TIGTA audit report neared, Acting IRS Commissioner Steven Miller decided to try to preempt news coverage of the negative audit results by having Lois Lerner disclose the audit before it was released and apologize for the agency's conduct during a conference she was scheduled to address. On May 10, 2013, at the direction of Mr. Miller and in response to a planted question, Ms. Lerner apologized for the IRS' having used "Tea Party" to identify 501(c)(4) applications that were then subjected to heightened scrutiny. Her apology triggered a firestorm of criticism centered on the concern that the IRS may have shown political bias against conservative groups seeking tax exempt status. The Acting IRS Commissioner was asked to resign and most of the EO senior leadership was replaced. The apology also generated intense interest in the TIGTA audit report which was released the following week.

**Planning the Apology.** Acting IRS Commissioner Miller was given a copy of the draft TIGTA audit report in April 2013.[970] Mr. Miller told the Subcommittee that he wanted to release information about the audit results before the TIGTA report was actually issued, because he knew it would be a negative report and he wanted the IRS to get out in front of the report.[971] He said that, at the time, although the report seemed to suggest that the IRS had been targeting Tea Party groups when it wasn't, he did not fully recognize the "toxic nature" of the report and the impact it would have on the reputation of the IRS.[972]

Mr. Miller told the Subcommittee that he knew Ms. Lerner was speaking at a conference sponsored by the American Bar Association (ABA) on May 10, 2013, and he thought it might make sense to plant a question for her at the conference which she could use to mention the audit report and apologize for agency missteps.[973] According to Mr. Miller, he realized that the Lerner apology was "not my best management performance."[974]

Mr. Miller told the Subcommittee that he spent several weeks prior to the ABA conference working on the apology language with senior level IRS officials. Mr. Miller indicated that he discussed the apology with members of his staff, including his Chief of Staff

---

[968] 4/4/2013 email from Lois Lerner to Janine Cook, copy to Holly Paz, "EO Enforcement Guidance Priority," IRSR0000054399.
[969] 3/26/2012 email from Lois Lerner to Victoria Judson, "Thanks," IRSR0000411078.
[970] Subcommittee interview of Steven Miller, IRS (12/11/2013).
[971] Id.
[972] Id. See also undated "Steven Miller Hand-written Notes," prepared by Steven Miller, IRSR0000380096 ("[f]ront line folk collected based on name – Tea Party and Patriot were used").
[973] Subcommittee interview of Steven Miller, IRS (12/11/2013). Mr. Miller apparently also considered using an April 25 conference where Ms. Lerner was scheduled to speak. See 4/18/2013 email exchange between Steven Miller and Nikole Flax, "speech," IRSR0000468870 - 871 (Mr. Miller wrote that Ms. Lerner "can apologize for undermanaging.").
[974] Subcommittee interview of Steven Miller, IRS (12/11/2013).

Nikole Flax, EO head Lois Lerner, Director of Legislative Affairs Catherine Barre, and Chief of IRS National Media Relations Michelle Eldridge, and did not receive any negative feedback.[975] He said that Ms. Lerner suggested having tax attorney, Celia Roady, ask the planted question.[976]

IRS documents indicate that, in the three weeks leading up to the conference, several IRS officials worked on the apology language. For example, on April 21, 2013, draft apology language was circulated among Chief of Staff Nikole Flax, Director of Specialty Operations Jennifer Vozne, and Chief of the Communications and Liaison office Terry Lemons. Mr. Lemons wrote at the time: "So it's close .... But I don't think it's quite there."[977] On May 9, 2013, the day before the conference, Mr. Miller sent another version of the apology to his staff for their review.[978] The final apology given by Ms. Lerner was similar to the final draft.[979] According to Holly Paz, Ms. Lerner told her about the apology prior to the conference, and Ms. Paz advised against it.[980]

IRS Chief Counsel, William Wilkins, told the Subcommittee that Mr. Miller informed him that Ms. Lerner would be making an apology at the upcoming ABA conference.[981] Mr. Wilkins told the Subcommittee that Mr. Miller had indicated to him that a controversial TIGTA audit report would be issued concerning "a provocative subject matter that would portray the IRS in a bad light."[982] According to Mr. Wilkins, a few days before the ABA conference, Mr. Miller told Mr. Wilkins he was going to tell Congressman Boustany's staff about the TIGTA report on the same day as the Lerner apology.[983] Mr. Miller told the Subcommittee that, while he had

---

[975] Id.
[976] Id.
[977] 4/21/2013 email from Terry Lemons, IRS, to Steven Miller, Nikole Flax, and Jennifer Vozne, IRS, "Emailing: draft c4 comments 4-18-13.doc," IRSR0000468891 - 894. Mr. Lemons continued: "For the people in the room at Georgetown, it's fine. But it's not clear enough for people who won't be there and will be combing through the speech afterward. Think current version will create a lot of questions coming in after the speech and actually amplify attention on the upcoming report. Think we need to frame up better – goal should be having a text that stands on its own for reporters and others coming in later and minimizing follow-up questions." Id.
[978] See 5/9/2013 email from Steven Miller to Nikole Flax, Terry Lemons, Jennifer Vozne, and Michelle Eldridge, "050613C4 talking points STM version.doc," IRSR0000468907 - 909. The email provided the following draft statement: "Between 2010 and 2012, the IRS saw the number of applications for section 501(c)(4) status double. As a result, local career employees in Cincinnati sough[t] to centralize work and assign cases to designated employees in an effort to promote consistency and quality. This approach has worked in other areas. However, the IRS recognizes we should have done a better job of handling the influx of advocacy applications. While centralizing cases for consistency made sense, the way we centralized did not. Mistakes were made, but they were in no way due to any political or partisan rationale. We have fixed the situation and worked to move the centralized cases through the system." Id. at 908. This draft did not mention the Tea Party by name.
[979] See "Transcript of the May 2010, 2013, ABA Tax Section's Exempt Organizations Committee Meeting," Exempt Organization Tax Review, August 2013 Vol. 9, No. 2, Tax Analysts, http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest_files/may_2013_aba.pdf.
[980] Subcommittee interview of Holly Paz, IRS (10/30/2013).
[981] Subcommittee interview of William Wilkins, IRS (12/4/2013).
[982] Id.
[983] Id. Mr. Wilkins told the Subcommittee that he received a copy of the draft report on April 29, 2013, but could not recall if he read the report then or after it was publicly released. See 4/29/2013 email from Christopher Sterner to William Wilkins, "TIGTA Draft (c)(4) Report," IRSR0000014719 (providing a copy of the TIGTA draft report). Mr. Wilkins also told the Subcommittee that he did not provide advance notice of the TIGTA report to Treasury General Counsel, Christopher Meade. Subcommittee interviews of William Wilkins, IRS (12/4/2013) and Christopher Meade, Treasury (2/20/2014).

intended the IRS to inform key Congressional committees at the same time the information was released at the ABA conference, that did not happen, which he attributed to having not provided his staff with enough time to contact the committees.[984]

Mr. Miller told the Subcommittee that, at some point prior to May 10, 2013, he also spoke by telephone with Mark Patterson, the Chief of Staff to the Secretary of the Treasury, alerting him to the upcoming TIGTA report and indicating his plan to release information about the report prior to its issuance.[985] Mr. Miller told the Subcommittee that he asked Mr. Patterson for his reaction to the idea of a planted question at the ABA conference, and read to Mr. Patterson over the telephone a draft question and possible answer.[986] Mr. Miller said that Mr. Patterson did not give him a reaction, but told him he wanted to think about it, and the two did not discuss the matter again.[987]

Mr. Miller told the Subcommittee that he also talked to Mark Mazur, Treasury Assistant Secretary for Tax Policy, about the upcoming TIGTA report and his idea of planting a question at the ABA conference, but Mr. Mazur did not give Mr. Miller a reaction to the idea.[988] Mr. Miller acknowledged that, as Acting IRS Commissioner, he did not need the approval of Mr. Mazur or Mr. Patterson, but he said that had they objected, he probably would not have gone forward with his plan.[989] Mr. Miller told the Subcommittee that he did not speak with anyone at the White House about the planned apology.[990]

**Giving the Apology.** On May 10, 2013, EO head Lois Lerner spoke before the Exempt Organizations Committee of the Tax Section of the American Bar Association in Washington, D.C. After her remarks, as planned, a member of the audience asked her the following question:

> "Lois, a few months ago there was some concern about IRS review of 501(c)(4) organizations, 501(c)(4) applications by Tea Party organizations. And I'm just wondering if you can provide any update on any of that."[991]

---

[984] Subcommittee interview of Steven Miller, IRS (12/11/2013).
[985] Id.
[986] Id.
[987] Id.
[988] Id.
[989] Id.
[990] Id.
[991] "Transcript of the May 2010, 2013, ABA Tax Section's Exempt Organizations Committee Meeting," Exempt Organization Tax Review, August 2013 Vol. 9, No. 2, Tax Analysts, http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest_files/may_2013_aba.pdf. The question was asked by Celia Roady, a Washington tax attorney. After the conference, Ms. Roady released the following statement: "On May 9, I received a call from Lois Lerner, who told me that she wanted to address an issue after her prepared remarks at the ABA Tax Section's Exempt Organizations Committee Meeting, and asked if I would pose a question to her after her remarks. I agreed to do so, and she then gave me the question that I asked at the meeting the next day. We had no discussion thereafter on the topic of the question, nor had we spoken about any of this before I received her call. She did not tell me, and I did not know, how she would answer the question."
5/18/2013 "Here's How the IRS Planted the Question That Sparked the Tea Party Scandal," Business Insider, Brett Logiurato, http://www.businessinsider.com/irs-scandal-celia-roady-planted-question-tea-party-conservatives-obama-2013-5 (reprinting Roady statement).

Ms. Lerner responded as follows:

> "So our line people in Cincinnati that handle the applications did what we call centralization of these cases. They centralized work on these in one particular group. … So centralization was perfectly fine. However, in this case the way they did the centralization was not so fine. Instead of referring to the cases as advocacy cases, they actually used case names on this list. They used names like Tea Party, or Patriots. They selected cases simply because the application had those names in the title. That was wrong, that was absolutely incorrect, it was insensitive, and it was inappropriate. That's not how we go about selecting cases for further review. We select them for further review because they need further review, not because they have a particular name. … So I guess my bottom line here is, we, I think the IRS, would like to apologize for that. It was not intentional."[992]

**Reacting to the Apology.** Ms. Lerner's apology generated an immediate press reaction, with numerous negative press stories written about the IRS' inappropriate scrutiny of Tea Party organizations.

In addition, the Subcommittee was told that many IRS employees in the Cincinnati office were furious at Ms. Lerner's apology, believing she sought to blame lower level workers instead of management for the agency's missteps.[993] A few hours after the apology, Determinations head Cindy Thomas sent the following email to Ms. Lerner:

> "As you can imagine, employees and managers in EO Determinations are furious. … [I]t appears as though all the blame is being placed on Cincinnati. Joseph Grant and others who came to Cincinnati last year specially told the **low-level workers** in Cincinnati that no one would be 'thrown under the bus.' Based on the articles, Cincinnati wasn't publicly 'thrown under the bus' instead was hit by a convoy of mack trucks."[994]

Ms. Thomas told the Subcommittee that she also spoke with Ms. Lerner to convey her anger, but Ms. Lerner did not express regret at giving the apology.[995]

On the day of the apology, May 10, 2013, Ms. Lerner sent an email to senior IRS officials about the negative press coverage:

> "As you both know, we are getting beaten up in the press for all the wrong reasons. Not sure there is much we can do about it – other than hang in and ride it through. When the

---

[992] "Transcript of the May 2010, 2013, ABA Tax Section's Exempt Organizations Committee Meeting," Exempt Organization Tax Review, August 2013 Vol. 9, No. 2, Tax Analysts, http://meetings.abanet.org/webupload/commupload/TX319000/sitesofinterest_files/may_2013_aba.pdf.

[993] EOD employees Ronald Bell, Elizabeth Hofacre, Gary Muthert, Stephen Seok, John Shafer, and Cindy Thomas all reported deep disappointment with the Lerner apology. Subcommittee interviews of Ronald Bell, IRS (1/15/2014), Elizabeth Hofacre, IRS (10/25/2013), Gary Muthert, IRS (1/15/2014), Stephen Seok, IRS (11/22/2013), John Shafer, IRS (1/17/2014), and Cindy Thomas, IRS (11/13/2013).

[994] 5/10/2013 email from Cindy Thomas to Lois Lerner, "Low-Level Workers thrown under the Bus," IRSR0000218202 (emphasis in original).

[995] Subcommittee interview of Cindy Thomas, IRS (11/13/2013).

> report comes out, it will start all over again. We need to keep remembering, we did not do what they are alleging."[996]

On May 12, 2013, prior to leaving for a previously scheduled trip to Canada, Ms. Lerner wrote to a colleague: "I'm afraid I have little confidence that most folks making the stink care about what is true. They've already decided they know without regard to the facts."[997]

TIGTA personnel had a mixed reaction to the apology that had been arranged by Acting IRS Commissioner Miller. At least some at TIGTA initially believed the apology represented a well designed response to the audit report. On May 10, 2013, after the apology, David Holmgren, then TIGTA Deputy Inspector General for Inspections and Evaluations, wrote to a colleague: "Mike, this is a brilliant preemptive strike by the IRS; when we release next week it will be old news."[998] On May 12, 2013, TIGTA's Communications Director Karen Kraushaar sent an email to TIGTA Inspector General George recommending a quick release of the audit report in response to the apology:

> "I have not responded to any reporters this weekend. At this point I do not see the merit in engaging with reporters until we have something concrete to share, such as a date and time for a media briefing. I am hopeful that TIGTA may be able to offer that tomorrow or Tuesday, and have suggested expedited disclosure review so that we can schedule briefings on the final report in an orderly fashion for congressionals and media as soon as possible. By jumping the gun with its public apology, the IRS created some confusion and inaccuracy about the nature of our report and findings, which we can set straight by releasing the final report without delay. Should be an interesting week!"[999]

The next day, after receiving a request for Mr. George to appear on a television show, Ms. Kraushaar wrote: "I recommend a strategy of politely declining until such time as we are ready to release our report. I think it is important that you be able to remain above the political fray until then." Mr. George responded: "I agree with you."[1000]

**Dismissing IRS Leadership.** On May 15, 2013, Acting IRS Commissioner Miller met with Congressional staff on Capitol Hill, and blamed what was becoming a full-blown scandal on two "rogue agents" in the IRS Cincinnati office, whom he said had been disciplined.[1001] Mr.

---

[996] 5/10/2013 email from Lois Lerner to Nannette Downing, Holly Paz, and others, "Stuff," IRSR0000411586.
[997] 5/12/2013 email from Lois Lerner to Sharon Light, "Congressional Response with SHORT Turnaround," IRSR0000411587.
[998] 5/10/2013 email from David Holmgren to Michael Phillips, "[MARKETING] News Alert: IRS apologizes for inappropriately targeting conservative political groups," TIGTA Bates No. 007751. Gladys Hernandez, TIGTA's Deputy Chief Counsel, also viewed the apology as a "smart strategy on their part." 5/10/2013 email from Gladys Hernandez to Michael Phillips, "[MARKETING] News Alert: IRS apologizes for inappropriately targeting conservative political groups," TIGTA Bates No. 007791.
[999] 5/12/2013 email from Karen Kraushaar to Russell George "Communication Report 05-12-2013," TIGTA Bates No. 007794 - 795.
[1000] 5/13/2013 email exchange between Karen Kraushaar and Russell George, "Cavuto Request," TIGTA Bates No. 007840.
[1001] See "Source: Two 'rogue' workers principally behind IRS targeting of conservatives," CNN, Dana Bash and Thomas Cohen, http://politicalticker.blogs.cnn.com/2013/05/15/breaking-irs-acting-commissioner-says-two-employees-off-reservation/. Mr. Miller indicated to the Subcommittee that he did not recall using the terms "rogue"

Miller told the Subcommittee that, in hindsight, it was a mistake to have tried to blame lower level IRS employees.[1002] He also said that, in retrospect, the IRS should not have mentioned only conservative groups in its apology, since liberal groups had been subjected to heightened scrutiny in the same ways.[1003]

Later on May 15, 2013, President Obama announced Mr. Miller's resignation.[1004] That evening, President Obama addressed the nation on television, calling the IRS' actions "inexcusable." He stated: "Americans are right to be angry about it, and I'm angry about it," adding that he "will not tolerate this kind of behavior in any agency, but especially in the IRS, given the power that it has and the reach that it has." He continued: "[A]s I said earlier, it should not matter what political stripe you're from. The fact of the matter is the I.R.S. has to operate with absolute integrity."[1005]

On May 23, 2013, Ms. Lerner was placed on administrative leave.[1006] Later that month, Ken Corbin replaced her as EO Director.[1007] By June, most of the IRS leadership responsible for exempt organizations had been replaced.[1008]

### (8) Releasing the Audit Report

On May 14, 2013, TIGTA released its 501(c)(4) audit report, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review." The report's primary findings were as follows:

> "The IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention. Ineffective management 1) allowed inappropriate criteria to be developed and stay in place for more than 18 months, 2) resulted in substantial delays in processing certain applications, and 3) allowed unnecessary information requests to be issued."[1009]

The audit report noted that some 501(c) applications had been pending for more than three years.[1010] It also found that, while the IRS had failed to subject some applications to heightened

---

or "off the reservation" during the meeting, as indicated in the article, nor did he believe he would have done so. 4/11/2014 response by Mr. Miller's legal counsel to Subcommittee questions.

[1002] Subcommittee interview of Steven Miller, IRS (12/11/2013).

[1003] Id.

[1004] Mr. Miller was permitted to retire from the IRS. Subcommittee interview of Steven Miller, IRS (12/11/2013).

[1005] 5/15/2013 Statement by the President, White House Office of the Press Secretary, http://www.whitehouse.gov/the-press-office/2013/05/15/statement-president.

[1006] "Lois Lerner Placed on Administrative Leave", ABC News, John Parkinson, (5/23/2013), http://abcnews.go.com/blogs/politics/2013/05/lois-lerner-placed-on-administrative-leave/.

[1007] Id.

[1008] See testimony of Acting IRS Commissioner Daniel Werfel, "Oversight Hearing – Internal Revenue Service," hearing before the House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014, (6/3/2013), 219-284, at 257-258.

[1009] 5/14/2013 TIGTA Audit Report, at Highlights.

[1010] Id.

scrutiny when it should have, the IRS had also subjected others to heightened scrutiny when it should not have.[1011] In addition, the audit report observed that "there appeared to be some confusion by Determinations Unit specialists and applicants on what activities are allowed by I.R.C. § 501(c)(4) organizations ... due to the lack of specific guidance on how to determine the 'primary activity' of an I.R.C. § 501(c)(4) organization."[1012]

Although the TIGTA audit engagement letter had indicated that the audit's "overall objective" was to "assess the consistency of the Exempt Organizations function's identification and review of applications for tax-exempt status involving political advocacy issues," including whether "conservative groups" experienced "inconsistent treatment," the audit report did not contain any explicit finding on whether political bias had influenced the IRS' actions.[1013] In a June 6, 2014 letter responding to a Subcommittee question asking about political bias, TIGTA Inspector General George wrote: "I also testified before Congress that TIGTA found no evidence of political bias during this audit. However, it is important to note that the matter is being further reviewed."[1014] Despite that determination by TIGTA addressing the most important issue under examination, the TIGTA audit report inexplicably failed to include that finding.

The report did contain a number of recommendations to remedy problems with the 501(c) application process, which TIGTA summarized as follows:

> "TIGTA recommended that the IRS finalize the interim actions taken, better document the reasons why applications potentially involving political campaign intervention are chosen for review, develop a process to track requests for assistance, finalize and publish guidance, develop and provide training to employees before each election cycle, expeditiously resolve remaining political campaign intervention cases (some of which have been in process for three years), and request that social welfare activity guidance be developed by the Department of the Treasury."[1015]

After its release, the TIGTA audit report was the subject of thousands of media reports, most critical of the IRS. Many media reports indicated that the TIGTA audit report had found that the IRS had targeted conservative groups and subjected them to harsher treatment than other groups,

---

[1011] Id. at 9-10.
[1012] Id. at 14.
[1013] TIGTA's failure to provide an explicit finding on political bias stood in sharp contrast to the 2000 report on the same subject prepared by the Joint Committee on Taxation, which TIGTA's auditors had consulted prior to conducting their work. See 3/16/2000 Joint Committee on Taxation Press Release No. 00-02, http://www.jct.gov/pr00-02.pdf; 3/6/2000 "Report Of Investigation Of Allegations Relating To Internal Revenue Service Handling Of Tax-Exempt Organization Matters," Report No. JCS-3-00, prepared by Joint Committee on Taxation, https://www.jct.gov/publications.html?func=startdown&id=2545; 3/19/2012 email from Troy Paterson to Cheryl Medina, Thomas Seidell, and Michael McGovern, "JCT Report on Allegations of Bias Surrounding Applications for Tax Exemption and Examinations of Tax-Exempt Organizations," TIGTA Bates No. 003991.
[1014] 6/6/2014 letter from TIGTA Inspector General George to the Subcommittee, PSI-TIGTA-22-000001 - 004, at 001.
[1015] 5/14/2013 TIGTA Audit Report, at ii.

even though the TIGTA personnel interviewed by the Subcommittee uniformly stated that the report had found no evidence of political bias or politically motivated actions at the IRS.[1016]

### (9) Testifying on the Audit Results

After the audit report was released, TIGTA Inspector General George was asked to testify at six Congressional hearings about its findings. He testified on May 17, 2013, before the House Committee on Ways and Means;[1017] on May 21, 2013, before the Senate Committee on Finance;[1018] on May 22, 2013, before the House Committee on Oversight and Government Reform;[1019] and on June 3, 2013, before the House Appropriations Subcommittee on Financial Services and General Government.[1020] He testified a second time before the House Committee on Oversight and Government Reform on July 18, 2013,[1021] and a second time before the House Appropriations Subcommittee on Financial Services and General Government on February 26, 2014.[1022]

**No Political Bias.** One of the key issues raised in the hearings was whether IRS personnel had unfairly targeted Tea Party groups for special scrutiny and did so because of political bias against conservative groups. TIGTA Inspector General repeatedly testified that the audit had found no evidence of IRS political bias. As explained earlier, however, he made no mention of the strongest evidence of IRS impartiality, the finding made by the TIGTA Office of Investigations that thousands of IRS emails and other documents contained "no indication" that IRS actions had been "politically motivated," because, according to Mr. George, no one on his staff had informed him of that finding.

At his first Congressional hearing about the audit report, which took place before the House Committee on Ways and Means on May 17, 2013, the Inspector General offered this unqualified testimony:

> "Congressman Sander Levin: Did you find any evidence of political motivation in the selection of the tax exemption applications?

---

[1016] In their interviews with the Subcommittee, for example, both Mr. George and Mr. Kutz made unqualified statements that the TIGTA audit had found no evidence of political bias at the IRS. Subcommittee interviews of Russell George, TIGTA (4/22/2014) and Gregory Kutz, TIGTA (3/26/2014). Mr. George also expressed regret that the report had been misinterpreted. Subcommittee interview of Russell George, TIGTA (4/22/2014).

[1017] See "IRS Tax-Exempt Investigation," hearing before House Committee on Ways and Means, (5/17/2013), unofficial transcript available at http://www.cq.com/doc/congressionaltranscripts-4278171.

[1018] See "A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny," hearing before Senate Committee on Finance, S. Hrg. 113-232, (5/21/2013).

[1019] See "The IRS: Targeting Americans for Their Political Beliefs," hearing before House Committee on Oversight and Government Reform, Serial No. 113-33, (5/22/2013).

[1020] See "Oversight Hearing – Internal Revenue Service," hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014, at 219-284, (6/3/2013).

[1021] See "The IRS's Systematic Delay and Scrutiny of Tea Party Applications," hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013).

[1022] See "Oversight Hearing – Internal Revenue Service," hearing before House Appropriations Subcommittee on Financial Services and General Government, (2/26/2014), unofficial transcript available at http://www.cq.com/doc/congressionaltranscripts-4433073.

Mr. George: We did not, sir."[1023]

Later in the hearing, Mr. George offered a more qualified statement:

"Congressman Reed: [Y]ou made some comments in your testimony about the partisanship determination. You kept referencing [w]hat I've seen many times in my legal career, 'at this time.' That implies to me that there are additional investigations coming down the – the pipeline that potentially could uncover such information. Isn't that correct?"

Mr. George: That is an accurate statement, sir."[1024]

Four days later, at a hearing before the Senate Committee on Finance on May 21, 2013, the Inspector General implied that the audit report's finding was based solely on denials of political bias made by the IRS personnel involved with the 501(c)(4) application process:

"Senator Crapo: Mr. George – is it seems that there is an argument being made that there was no political motivation in these actions. Is that a conclusion that you have reached?

Mr. George: In the review that we conducted thus far, Senator, that is the conclusion that we have reached.

Senator Crapo: And how do you reach that kind of a conclusion?

Mr. George: In this instance, it was as a result of the interviews that were conducted ....

Senator Crapo: So, in other words, you have simply the statements of those who were engaging in the conduct saying they were not politically motivated?

Mr. George: That is correct, sir.

Senator Crapo: And based on that, and statements not under oath, you have reached the conclusion there was no political motivation.

Mr. George: Yes.

Senator Crapo: Now, have you reached the conclusion that there was none, or that you have not found it?

Mr. George: It is the latter, that we have not found any, sir."[1025]

---

[1023] Transcript of "IRS Tax-Exempt Investigation," hearing before House Committee on Ways and Means, (5/17/2013), unofficial transcript available at http://www.cq.com/doc/congressionaltranscripts-4278171. Mr. George had similar exchanges with Committee Members Becerra, Kind, and McDermott. Id.
[1024] Id.

In his testimony, Inspector General George began by saying TIGTA had reached the conclusion that there was no political motivation behind the IRS' actions, but then qualified that finding by stating it was based on the TIGTA review "conducted thus far," and relied "simply" on denials made by IRS personnel. In four Congressional appearances, the Inspector General made no mention of the documentary review that had been conducted by the TIGTA Office of Investigation of over 2,200 internal IRS emails and other documents, and its finding that the documents contained "no indication" that IRS actions in pulling 501(c)(4) applications for heightened review had been "politically motivated." Mr. George told the Subcommittee that he did not mention the documentary review, because no one on his staff had informed him of the TIGTA Office of Investigations finding, even though it addressed a central issue in the audit, whether the IRS had shown political bias in handling 501(c)(4) applications.

**BOLO Entries for Liberal Groups.** A related issue at the hearings involved the question of whether the IRS had used BOLOs to flag 501(c)(4) applications filed by liberal groups in addition to conservative groups. Evidence recited earlier shows that the IRS had repeatedly brought the BOLO entries for liberal groups to the attention of the TIGTA auditors to demonstrate that the agency had treated all groups in the same way.[1026] The Subcommittee was told by senior TIGTA officials, however, that the TIGTA auditors had failed to convey that information to TIGTA senior management until after the release of the report. In fact, as indicated earlier, TIGTA Chief Counsel Michael McCarthy told the Subcommittee that when he had explicitly asked about BOLO entries for liberal groups during his review of the draft audit report in February 2013, the TIGTA auditors had told him none existed.[1027]

The Subcommittee was told that the senior TIGTA officials first learned of the BOLO entries for liberal groups after the Congressional hearings were already underway. The key event took place on May 21, 2013, after the Inspector General had testified earlier in the day before a Congressional committee about the audit report, and before he was due to testify a third time before a different committee on the following day.[1028] Mr. McCarthy told the Subcommittee that, because there had been a Congressional request for copies of the BOLOs, he had decided to personally review the documents to ensure appropriate information had been redacted. He indicated that, about 7 p.m. on the evening of May 21, 2013, he opened the BOLO document on his computer screen at the office, and began to review the individual excel spreadsheets used for the various BOLO sections, including the spreadsheet for the Watch List section. He told the Subcommittee that when he reviewed the Watch List section and saw for the first time the BOLO entries for ACORN and Occupy groups, he was "surprised and confused."[1029]

---

[1025] "A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny," hearing before Senate Committee on Finance, S. Hrg. 113-232, (5/21/2013) at 19-20, http://www.finance.senate.gov/hearings/hearing/?id=9b0a1cc8-5056-a032-5219-3e11fc44d504.

[1026] See the Report section on Conducting the Audit, in particular the subsections on Initiating the Audit and Collecting and Analyzing Information.

[1027] Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014).

[1028] Id.

[1029] Id. Mr. McCarthy told the Subcommittee that he did not see the BOLO entry for progressive groups at that time because of the confusing way in which the excel spreadsheets were arranged. Id.

Inspector General George told the Subcommittee that Mr. McCarthy informed him about the two liberal group BOLO entries that same night, which was the night before he was supposed to testify before the House Committee on Oversight and Government Reform.[1030] The Inspector General indicated that Mr. McCarthy had approached him, said "you'd better sit down for this," and then relayed that the IRS had two BOLO listings naming liberal groups in addition to the one naming Tea Party groups.[1031] Mr. George told the Subcommittee that he asked Mr. McCarthy and Mr. Kutz, who was also present, how the IRS had used those entries to identify 501(c)(4) applications, and both responded that they didn't know the answer.[1032] The Inspector General said that he immediately told Mr. Kutz to look into those BOLO entries and how they were used by the IRS.[1033]

Mr. Kutz told the Subcommittee that, like Mr. McCarthy and the Inspector General, he first learned of the two BOLO listings naming liberal groups on the evening of May 21, 2013.[1034] Mr. Kutz told the Subcommittee that after he was directed by the Inspector General to find out more, he immediately asked his audit team about the BOLO entries for the liberal groups and was told by his team that those entries had not come up during the audit.[1035] That assertion is at odds, however, with the evidence presented earlier showing that, from the beginning of the audit, TIGTA personnel were aware of issues related to IRS treatment of liberal groups and, throughout the audit, IRS personnel repeatedly drew the attention of the TIGTA auditors to the BOLO entries listing ACORN, Occupy, and Progressive groups.[1036]

Mr. George told the Subcommittee that, at the Congressional hearing the next day, May 22, 2013, he did not disclose the existence of the BOLO entries naming the ACORN and Occupy groups, due to concerns that he didn't know how those BOLO entries had been used by the IRS and might violate Section 6103, the tax code provision barring IRS disclosure of individual

---

[1030] Subcommittee interview of Russell George, TIGTA (4/22/2014). The Inspector General did not recall the exact date, but Gregory Kutz recalled that it was May 21, 2013. Subcommittee interviews of Russell George, TIGTA (4/22/2014) and Gregory Kutz, TIGTA (3/26/2014).

[1031] Subcommittee interview of Russell George, TIGTA (4/22/2014).

[1032] Id.

[1033] Id. See also testimony by J. Russell George, "Oversight Hearing – Internal Revenue Service," hearing before the House Appropriations Subcommittee on Financial Services and General Government, (2/26/2014), unofficial transcript available at http://www.cq.com/doc/congressionaltranscripts-4433073?23 (Mr. George: "And it was litera[ll]y 6:30 p.m. the night before my first testimony before the Senate Finance Committee in which my former chief council indicated that there was a hidden tab in one of the documents the IRS had supplied to us that indicated that there were other 'Be On the Look Out' list. This list – at that time we had no idea until then, at least I didn't, that it existed but we certainly did not have any indication as to how they were being used.").

[1034] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

[1035] Id.

[1036] See Report section on Conducting the Audit. For example, as documented in that section, the BOLOs containing entries for liberal groups were provided to the TIGTA auditors in March 2012, and again in the summer of 2012. At the same time, the documentation does not demonstrate that the auditors conveyed the information about the BOLO entries for liberal groups to senior TIGTA officials. One TIGTA summary of a September 2012 meeting between Mr. Kutz and the TIGTA auditors indicated that they discussed the issue of 501(c)(4) applications filed by liberal groups, but did not indicate that they discussed, in particular, the BOLO entries for liberal groups. See 9/25/2012 "Memo of Contact," prepared by TIGTA, "Consistency in Identifying and Reviewing Applications for Tax-exempt Status Involving Political Advocacy Cases," TIGTA Bates No. 003084 (indicating Mr. Kutz and the auditors discussed "whether more liberal organizations were referred to the advocacy group" at IRS, and the difficulty of distinguishing between conservative and liberal groups).

taxpayer information.[1037] At the hearing, when asked about BOLO listings for liberal groups, Mr. George testified that TIGTA had "recently identified some other BOLOs that raised concerns about political factors," but declined to provide specific information about them:

> "Chairman Issa. Were there any BOLOs issued for progressive groups, liberal groups? Because I'm assuming that your investigation – we can't see them – but your investigation showed liberal groups that flew right through during the same time and got their 501(c)(4)s. They were not stopped; isn't that correct?
>
> Mr. George. Sir, this is a very important question. Please, I beg your indulgence.
>
> Chairman Issa. Of course.
>
> Mr. George. The only 'be on the lookout,' that is, BOLO, used to refer cases for political review were the ones that we described within our report. There were other BOLOs used for other purposes. For example, there were lookouts for indicators of known fraud schemes so that they could be referred to the group that handles those issues. For nationwide organizations, there were notes to refer State and local chapters to the same reviewers. As we continue our review of this matter, we have recently identified some other BOLOs that raised concerns about political factors. I can't get into more detail at this time as to the information that is there because it's still incomplete – that we've uncovered, rather, because it's still incomplete. And there are 6103 issues –
>
> Chairman Issa. Of course.
>
> Mr. George. – involved here, too. I hope that provides context[.]"[1038]

Mr. George was then asked whether the IRS had a BOLO entry for "progressive" groups and if he was aware of any other group, other than the Tea Party, that had been "targeted politically" in a BOLO. After initially declining to answer and then being pressed for a response, Mr. George answered there were no such BOLO entries, which he should have known was inaccurate, given the BOLO entries he had learned about the night before:

> "Chairman Issa. So, clearly, it's fair to say, though, that there was a BOLO for Tea Party but not a BOLO for MoveOn or Progressive?
>
> Mr. George. I'm not in a position to give you a definitive response on that question at this time, Mr. Issa – Mr. Chairman.

---

[1037] Subcommittee interview of Russell George, TIGTA (4/22/2014). Unlike the IRS, TIGTA has taken the position that disclosing IRS actions related to "ACORN successor" groups would violate Section 6103 of the tax code which requires the IRS to keep specific taxpayer information confidential, even though that phrase does not name any specific taxpayer.

[1038] Testimony of J. Russell George, "The IRS: Targeting Americans for Their Political Beliefs," hearing before House Committee on Oversight and Government Reform, Serial No. 113-33, (5/22/2013) at 64, http://oversight.house.gov/wp-content/uploads/2014/02/2013-05-22-Ser.-No.-113-33-FC-The-IRS-Targeting-Americans-for-Their-Pol-Beliefs.pdf.

> Chairman Issa. So are you saying today that there were other 501(c)(4)s, not specific, so much as one other 501(c)(4) not previously identified during your IG audit that were, in fact, targeted and held in a similar way?
>
> Mr. George. I cannot give you a definitive answer, sir, at this time. But I certainly will when –
>
> Chairman Issa. I only asked you if there's at least one. Are you aware of at least one that was targeted using a BOLO that was a 501(c)(4) in which they were targeted politically but did not fall into this current report we have before us? I'm not asking for privileged information. I'm asking –
>
> Mr. George. No, no, no.
>
> Chairman Issa. – for one.
>
> Mr. George. Under the report, the review – the purposes of the audit that we conducted, which was to determine whether they were looked for in the context of political campaign intervention, there were no others."[1039]

Mr. George testified that there were no other groups that had been "targeted politically" in a BOLO despite having learned the night before that the BOLO lists named ACORN and Occupy groups in the same manner as Tea Party groups. In addition, as indicated earlier, a BOLO entry for "progressive" groups had been included in the BOLO lists since 2010.[1040]

Mr. George told the Subcommittee at the time of his testimony on May 22, 2013, he had become aware of the BOLO entries for the two liberal-leaning groups, ACORN and Occupy, but remained unaware of the BOLO entry for "progressive" groups.[1041] TIGTA Chief Counsel Michael McCarthy told the Subcommittee that, at the time of the May 22, 2013 hearing, he was also unaware of the BOLO entry for Progressive groups, since during his review of the BOLO lists the evening before, he had not seen the specific spreadsheet containing that entry.[1042] Mr. Kutz told the Subcommittee that he, too, was unaware of the Progressive BOLO entry at the time of the May 22 hearing.[1043] That all three senior TIGTA officials professed to the Subcommittee to have no knowledge of the BOLO entry for Progressive groups, despite its being listed in the BOLOs reviewed the night before, does not excuse the failure of Mr. George to disclose the existence of the BOLO listings for the two liberal-leaning groups, ACORN and Occupy, either at the hearing or to correct his testimony in the weeks that followed.

---

[1039] Id.

[1040] See, e.g., August 2010 BOLO spreadsheet, prepared by the IRS, IRSR0000455182 - 196 and at IRS0000002503 - 515 (including "TAG Historical" section containing an entry for "Progressive political activities" described as follows: "[C]ommon thread is the word 'progressive.' Activities appear to lean toward a new political party. Activities are partisan and appear as anti-Republican. You see references to blue."').

[1041] Subcommittee interview of Russell George, TIGTA (4/22/2014).

[1042] Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014).

[1043] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

TIGTA's silence about the BOLO listings for liberal groups continued for weeks after its senior leadership learned about them, despite ongoing media and Congressional inquiries and public consternation about possible political bias at the IRS. According to TIGTA, on May 28, 2013, the TIGTA Office of Audit asked the TIGTA Office of Investigations to examine how the IRS used BOLO listings on the Watch List section, which includes the ACORN and Occupy listings, but still did not reveal the existence of those BOLO entries to the public.[1044]

**Disclosure of BOLO Entries for Liberal Groups.** Ultimately, the Progressive, ACORN, and Occupy BOLO listings were publicly disclosed by Members of Congress and the media, rather than TIGTA. On June 24, 2013, six weeks after the TIGTA audit report was released and a month after the House hearing at which the TIGTA Inspector General denied the existence of BOLO listings for liberal groups, Congressman Sander Levin, Ranking Member of the House Committee on Ways and Means, released a letter disclosing publicly, for the first time, the existence of the Progressive BOLO entry.[1045] TIGTA Chief Counsel Michael McCarthy told the Subcommittee that he learned about the Progressive BOLO entry from the Levin letter for the first time; he said it had not been disclosed to him by TIGTA's audit team, and he had missed it during his personal review of the BOLO listings.[1046] That same day, the Associated Press reported on a number of other BOLO listings, including one for Occupy groups.[1047] A month after that, on August 20, 2013, Congressman Sander Levin released documents disclosing the existence of the BOLO entry for ACORN successor groups.[1048]

---

[1044] See June 26, 2013 letter from TIGTA to Congressman Sander Levin, http://online.wsj.com/public/resources/documents/TIGTAFinalResponseToRepLevin06262013.pdf ("TIGTA's Office of Audit made a referral to our Office of Investigations on May 28, 2013 stating that our recently issued audit report noted the use of other named organizations on the BOLO listings that were not related to potential political cases reviewed as part of our audit. TIGTA's Office of Audit requested the Office of Investigations investigate to determine: 1) whether cases meeting the criteria on the 'watch list' [a particular section of the BOLO listings] were routed for any additional or specialized review, or were simply referred to the same group for coordinated processing; 2) how many (if any) applications were affected by use of these criteria; 3) who was responsible for the inclusion of these criteria on the BOLO lists; and 4) whether these criteria were added to the BOLO for an improper purpose." Mr. Kutz told the Subcommittee that as part of this review, the Office of Investigations was asked to look at the "progressive" BOLO listing. Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014). During the Subcommittee interviews, however, no one from TIGTA had any information about whether the referral had been accepted by the Office of Investigations or whether an investigation into IRS processing of applications filed by liberal groups was ongoing.

[1045] 6/24/2013 letter from Congressman Sander Levin to TIGTA, http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/TIGTA%20Letter%20FINAL.pdf.

[1046] Subcommittee interview of Michael McCarthy, TIGTA (4/30/2014).

[1047] See "Documents Show IRS Also Screened Liberal Groups," Associated Press, Alan Fram, (6/24/2013), http://bigstory.ap.org/article/new-irs-chief-inappropriate-screening-was-broader. In response to the BOLO disclosures, on June 24, 2013, the IRS "suspended the use of any 'be-on-the-lookout,' or BOLO lists in the application process for tax-exempt status." "Report Outlines Changes for IRS To Ensure Accountability, Chart a Path Forward; Immediate Actions, Next Steps Outlined," prepared by the IRS, http://www.irs.gov/uac/Newsroom/Report-Outlines-Changes-for-IRS-To-Ensure-Accountability,-Chart-a-Path-Forward;-Immediate-Actions,-Next-Steps-Outlined.

[1048] 8/20/2013 letter from Congressman Sander Levin to TIGTA, described in "New Documents Highlight IRS Scrutiny of Progressive Groups," Ways and Means Committee Democrats, (8/20/2013), http://democrats.waysandmeans.house.gov/press-release/new-documents-highlight-irs-scrutiny-progressive-groups. The IRS determined that information could be disclosed about "ACORN successor" groups without violating

Each of these BOLO entries could have been easily found by the TIGTA audit team or TIGTA senior managers had they carefully reviewed the BOLO lists already in their possession. Had the TIGTA Inspector General disclosed during his Congressional testimony the existence of the BOLO listings for two liberal-leaning groups – ACORN and Occupy – even without naming them, it would have addressed a central issue in the TIGTA audit, whether the IRS had shown political bias in the 501(c)(4) application process or was treating liberal groups the same way it treated conservative groups.

Instead, the TIGTA Inspector General continued to make statements implying that the IRS had unfairly singled out the Tea Party and other conservative groups in the 501(c)(4) application process. For example, at a June 3, 2013 hearing before the House Appropriations Subcommittee on Financial Services and General Government, in response to a question about whether TIGTA had "found any political motivation in reviewing tax-exempt applications," Mr. George testified:

> "[B]ut in the instance of the political activity matter, we did not uncover instances of groups that could readily be identified as being liberal, for lack of a better term, that were treated in the manner that these Tea Party cases were."[1049]

The factual basis for his testimony is unclear, given that the TIGTA audit team deliberately chose not to audit how liberal groups were treated by the IRS in the 501(c)(4) application process; if that audit work had taken place, TIGTA would have discovered that liberal groups like ACORN, Occupy, and Emerge were subjected to the same types of inappropriate screening criteria, delays, and mismanagement as the conservative groups.

When asked about his testimony, the TIGTA Inspector General wrote the following in a letter to the Subcommittee:

> "In the audit report, TIGTA did not characterize any organizations as liberal or conservative. Nor did we assess whether liberal groups were treated in a manner different than Tea Party groups. … In my testimony before the House Appropriations Subcommittee on Financial Services and General Government, I was conveying that, in the audit report, we did not characterize the political views of any organizations. Many of the names of the organizations used terms not readily categorized on the political spectrum, and we did not identify any objective criteria that we could use to label these groups in a manner that meets government auditing standards."[1050]

Later in the June 3, 2013 hearing, when asked if he had been surprised by what the audit found, Inspector General George responded "very much so," and then compared the IRS'

---

Section 6103 of the tax code which requires the IRS to keep specific taxpayer information confidential, since that phrase does not disclose the name of any specific taxpayer. In contrast, TIGTA has determined that disclosures related to ACORN successor groups would violate Section 6103 and has been unwilling to discuss those groups.

[1049] Testimony of J. Russell George, "Oversight Hearing – Internal Revenue Service," hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013) 219-284, at 263.

[1050] 6/6/2014 letter from TIGTA Inspector General George to the Subcommittee, PSI-TIGTA-22-000001 - 004, at 003.

mishandling of 501(c)(4) applications filed by conservative groups to President Nixon's misuse of the IRS to harm political opponents:

> "This is unprecedented, Congressman. And again, during the Nixon administration, there were attempts to use the Internal Revenue Service in manners that might be comparable in terms of misusing it. I am not saying that what the actions that were taken are comparable, but I'm just saying that the misuse of the – causing a distrust of the system occurred sometime ago, but this is unprecedented."[1051]

When asked about those comments, Mr. George told the Subcommittee that he was noting that the IRS had been abused in the past by the Nixon Administration, but did not equate that with the 501(c)(4) situation.[1052] He also stated: "There is no connection between the White House and this."[1053]

On June 25, 2013, TIGTA's "spokeswoman," presumably TIGTA Communications Director Karen Kraushaar, told National Public Radio that TIGTA was "not aware of any BOLOs listing progressive organizations when it conducted its review."[1054] That statement was, again, contrary to the documents cited earlier showing IRS personnel repeatedly brought information about the BOLO entries for liberal groups to the attention of TIGTA auditors.

On July 18, 2013, both Inspector General George and Assistant Inspector for Audit General Kutz testified before the House Committee on Oversight and Government Reform and denied that TIGTA had known about the BOLO entries for liberal groups during the audit period.[1055] In his opening statement, Inspector General George testified:

> "I know you have questions and so do we on the other Be On the Look Out listings, but from the date of the May 17, 2012 document until we issued our report one year later, IRS staff at multiple levels concurred with our analysis citing Tea Party, Patriot, and 9/12 and certain policy positions as the criteria the IRS used to select potential political cases .... In fact, as previously noted, we provided IRS officials with several opportunities to

---

[1051] Testimony of J. Russell George, "Oversight Hearing – Internal Revenue Service," hearing before House Appropriations Subcommittee on Financial Services and General Government, 113th Congress, Part 7 - Financial Services and General Government Appropriations for 2014 (6/3/2013) 219-284, at 268, in an exchange with Congressman Womack.

[1052] Subcommittee interview of Russell George, TIGTA (4/22/2014).

[1053] Id. See also "No Evidence of White House Involvement or Political Motivation in IRS Screening of Tax-Exempt Applicants," Democratic Staff report, House Committee on Oversight and Government Reform, (5/6/2014), http://democrats.oversight.house.gov/uploads/Cummings%20Report%20on%2039%20IRS%20Transcripts%20050614.pdf, (showing that the White House had no role in the 501(c)(4) application process).

[1054] 6/25/2013 "Democrats Want Answers on 'Progressives' Targeted by IRS," National Public Radio, Tamara Keith, http://www.npr.org/blogs/itsallpolitics/2013/06/25/195599362/Democrats-Want-Answers-On-Progressives-Targeted-By-IRS (noting that "the BOLOs that Democrats have released contain the term 'progressives.' This raises some questions. For instance: Why wasn't this mentioned sooner? The IRS inspector general's report is clear: Tea Party groups were targeted by the IRS for extra scrutiny simply because they had 'Tea Party' or 'patriot' in their names. But the audit didn't mention progressive groups.").

[1055] See "The IRS's Systematic Delay and Scrutiny of Tea Party Applications," hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), http://oversight.house.gov/wp-content/uploads/2014/02/2013-07-18-Ser.-No.-113-51-FC-IRS-Systematic-Delay-and-Scrutiny-of-Tea-Party-Applications.pdf.

> comment on our findings and they consistently agreed that, 'Tea Party,' and related criteria described in our report were the criteria that the IRS used to select cases for review of potential political campaign intervention during the 2010 to 2012 time frame that we reviewed."[1056]

While the evidence shows that Mr. George was correct – the IRS did agree with TIGTA that it had used "Tea Party," "Patriot," and "9/12" as screening criteria – what he left out was that the IRS also repeatedly informed TIGTA auditors that it had used screening criteria for liberal groups as well, which demonstrated that the IRS had not singled out conservative groups or acted out of political bias. Since the July hearing took place nearly two months after Mr. George and Mr. Kutz were told by the TIGTA Chief Counsel about the BOLO listings for liberal groups, it is difficult to understand why TIGTA's senior management had not conducted by then an intensive review of what their auditors had known about the BOLO entries for liberal groups. That type of review would have uncovered, for example, the May 17, 2012 meeting summary prepared by the lead TIGTA auditor, cited earlier, indicating that IRS personnel had drawn the auditors' attention to the BOLO listings for liberal groups in the earliest stage of the audit.[1057]

Nevertheless, during the July 18, 2013 hearing, Mr. Kutz insisted that the IRS had not told the TIGTA auditors about the BOLO entries for liberal groups, despite ample evidence to the contrary. Mr. Kutz testified:

> "I just want to say, I mean, what Mr. George submitted at the beginning of the hearing is called the BOLO advocacy cases iterations. It was given to us May 17, 2012, and represented by the IRS to be the entire set of BOLOs that were used for political advocacy. We're not making this up. We've submitted it for the record. If IRS was doing something beyond that, they never made it apparent to us in an entire year of doing an audit. So I just want to make that clear. If other people were misused, we're very concerned about that, but IRS is the one that asserted to us in this email and a document Mr. George submitted for the record that the entire population of BOLOs used for political advocacy is on the document that says Tea Party until Lois Lerner changed it to advocacy in July of 2011."[1058]

The head of the EO Rulings and Agreements Unit at the IRS, Holly Paz, told the Subcommittee that when she heard Mr. Kutz's testimony, she was "surprised," given her repeated actions in bringing the BOLO entries for liberal groups to the attention of the TIGTA audit team.[1059]

---

[1056] Id. at 62-63.

[1057] See 5/17/2012 "Memo of Contact," prepared by Cheryl Medina, TIGTA, "Determinations Process Planning," PSI-TIGTA-04-000016 - 018 (containing the lead auditor's meeting notes: "Ms. Paz agreed that the initial criteria was not a good way to identify advocacy cases. However, it is common to refer to certain groups by name for identification purposes in Determinations. For example, the 'Occupy' and [REDACTED BY IRS] groups are listed specifically on the BOLO.").

[1058] Testimony of Gregory Kutz, "The IRS's Systematic Delay and Scrutiny of Tea Party Applications," hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 115, http://oversight.house.gov/wp-content/uploads/2014/02/2013-07-18-Ser.-No.-113-51-FC-IRS-Systematic-Delay-and-Scrutiny-of-Tea-Party-Applications.pdf.

[1059] Subcommittee interview of Holly Paz, IRS (10/30/2013).

At times during the hearing, the TIGTA officials seemed to suggest that IRS personnel had deliberately withheld documents from TIGTA auditors about the BOLOs for liberal groups, even though the IRS had been urging TIGTA to consider those same BOLO entries:

> "Congressman Jordan: I'm looking at your testimony, Mr. George. You said, 'New documents from July 2010 listing the term, "progressive" were provided to TIGTA last week on July 9th, 2013.' You're disturbed that these weren't provided earlier. I get that. 'We are currently reviewing the issue.' What can you tell us? Without violating 6103, what can you tell us?
>
> Mr. George: Great question, sir. I don't know whether they were withheld intentionally. I don't know—I don't know the circumstances. Again, I may defer to Mr. Kutz, if he has additional information on that. But I don't know because I just learned about this.
>
> Mr. Kutz: We don't know. But, Congressman, throughout the entire audit, starting May 17, and the document Mr. George submitted to the record, we were given a listing of the BOLOs that were —
>
> Congressman Jordan: ... So they had all kinds of opportunities to tell you this was there. They didn't tell you. Suddenly it appears, because the Democrats keep talking about it, appears out of nowhere. You're currently reviewing it. I mean, is there anything else you can tell us about the current review?
>
> Mr. George: It tells me I'm concerned that there may be additional pieces of information that we don't have. I am very concerned about that, sir."[1060]

The testimony provided by Mr. George and Mr. Kutz implied that the IRS had attempted to conceal information from TIGTA about the BOLO entries for liberal groups when, in fact, the IRS had been pleading with TIGTA auditors for nearly a year to consider, not only those BOLO entries, but also IRS treatment of 501(c)(4) applications filed by liberal groups, to show that conservative groups were not singled out for less favorable treatment. In response, the TIGTA auditors failed to investigate any information related to liberal groups.

**TIGTA Reconsideration.** Mr. George and Mr. Kutz indicated to the Subcommittee during their interviews that they had since reconsidered how the audit report treated 501(c)(4) applications filed by liberal groups. During his interview, TIGTA Inspector General George told the Subcommittee that, although the TIGTA audit report contained a footnote noting that TIGTA did not review "the use of other named organizations on the BOLO listing to determine if their use was appropriate," in hindsight, TIGTA should have elaborated on that footnote.[1061] Mr. George told the Subcommittee that the failure to explain more about the decision to exclude other BOLO entries was a "judgment call" by the auditors, and that the report could have been

---

[1060] "The IRS's Systematic Delay and Scrutiny of Tea Party Applications," hearing before House Committee on Oversight and Government Reform, Serial No. 113-51, (7/18/2013), at 84-85, http://oversight.house.gov/wp-content/uploads/2014/02/2013-07-18-Ser.-No.-113-51-FC-IRS-Systematic-Delay-and-Scrutiny-of-Tea-Party-Applications.pdf.

[1061] Subcommittee interview of Russell George, TIGTA (4/22/2014).

"better."[1062] He indicated that the audit report should have acknowledged the existence of the other BOLO entries and the auditors should have looked into the other groups.[1063]

During his interview, Mr. Kutz acknowledged to the Subcommittee that "now that we know the interest in it," TIGTA should have potentially looked into or included the Progressive, ACORN, and Occupy BOLO listings in its analysis.[1064] He also noted, however, that to do so would have taken another year which would have delayed the report's issuance.[1065] Mr. Kutz also told the Subcommittee that the evidence indicated that all 501(c)(4) applications within the 298 cases provided by the IRS for the two-year period, May 2010 to May 2012, appeared to have been treated the same by IRS personnel, subjected to the same screening, delays, and problematic questions from the IRS, regardless of their politics.[1066]

### D. Analysis

By excluding information about how the IRS handled 501(c)(4) applications filed by liberal groups, the TIGTA audit report presented a distorted analysis of how the IRS processed 501(c)(4) applications. The audit determined that no political bias was involved in the IRS decisionmaking process, but the audit report contained no explicit finding on that central issue. The report discussed the BOLO listing naming the Tea Party and other conservative groups, but made no mention of the BOLO listings naming Progressive, ACORN, or Occupy groups. After receiving a pool of 298 501(c)(4) applications subjected to heightened scrutiny by the IRS over a two-year period, the report analyzed how many applications were filed by groups with the words "Tea Party," "9/12," or "Patriot" in their names, with no mention of cases filed by non-conservative or liberal groups. The audit report also made no mention of the Office of Investigations email review and its conclusion that IRS documents contained "no indication" that IRS decisions to select the 501(c)(4) applications for heightened review were politically motivated. Those omissions, as well as TIGTA's overall decision to exclude any comparative data on how the IRS handled 501(c)(4) applications filed by liberal groups, resulted in a report that failed to present a full and fair picture of IRS actions.

After the audit report was issued, and senior TIGTA officials learned that it had omitted key information about BOLO entries for liberal groups, those TIGTA officials remained silent for weeks about the existence of those BOLO entries, until they were disclosed by Members of Congress or the media. Senior TIGTA officials also gave incomplete and inaccurate testimony at Congressional hearings about the BOLO entries for liberal groups, initially denying they existed despite having been informed of them prior to testifying, later denying TIGTA auditors had known about those BOLO entries, and at one point suggesting that the IRS may have deliberately withheld information about them when, in fact, the IRS had repeatedly supplied information about those BOLO entries to the TIGTA auditors.

---

[1062] Id.
[1063] Id.
[1064] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).
[1065] Id.
[1066] Id.

TIGTA's failure to include an official finding in its audit report that the IRS showed no political bias and its failure to present information about how the IRS treated liberal as well as conservative groups filing 501(c)(4) applications damaged public confidence in a critical government agency, undermined public faith in IRS neutrality, and encouraged public suspicions about the IRS despite the absence of any evidence that the IRS or any of its employees engaged in politically motivated actions. Given public concerns about political bias and the potential damage to the reputation and standing of an important public agency, the TIGTA audit report should have provided a more balanced and comprehensive picture of how the IRS handled 501(c)(4) applications filed by both conservative and liberal groups.

One positive outcome from the TIGTA audit report is that it spurred a comprehensive review of the role of the IRS in processing 501(c)(4) applications for organizations involved with political advocacy and campaign activities. The audit report recommended and the IRS has responded by drafting proposed rules to revamp the agency's approach and provide the guidance needed to process applications in a more objective, transparent, consistent, and timely manner. The proposed rules should reduce IRS use of the facts and circumstances test, which is inherently time-consuming, intrusive, nontransparent, and subjective, and make greater use of objective standards and bright line rules to determine when an organization is engaged in campaign activities. The proposed rules should also reduce use of the facts and circumstances test to determine when an organization is engaged primarily in social welfare activities, moving closer toward the statutory requirement of exclusivity and using more objective standards that, among other measures, should establish a clearly defined percentage test. The IRS is now considering more than 150,000 public comments on how the proposed rules should be shaped and has indicated that it intends to continue to press forward to address the mismanagement and public distrust that now taint the 501(c)(4) applications process.

# MINORITY STAFF DISSENTING VIEWS: IRS TARGETING TEA PARTY GROUPS

## I. EXECUTIVE SUMMARY

The Majority staff on the Permanent Subcommittee on Investigations has issued the foregoing report titled *IRS and TIGTA Management Failures Related to 501(c)(4) Applicants Engaged in Campaign Activity*. The primary conclusion of the Majority staff report is that, contrary to common understanding and widespread reporting, the Internal Revenue Service (IRS) actually exhibited no bias in its review of conservative groups. The Majority staff report claims that the IRS targeted liberal and conservative groups equally and that a Treasury Inspector General for Tax Administration (TIGTA) report on the targeting of conservative groups was fundamentally flawed.

The Subcommittee Minority staff sharply disagrees with the conclusions reached by the Majority staff report. While some liberal groups were examined by the IRS from May 2010 to May 2012, there were far fewer such groups, they were systematically separate from the review of conservative groups, their questioning was far less intrusive, and, in some cases, the liberal groups were affiliates of specific organizations like ACORN that had behaved illegally in the past and could reasonably expect additional scrutiny. The inclusion of a scant few liberal groups by the IRS does not bear comparison to the targeting of conservative groups.

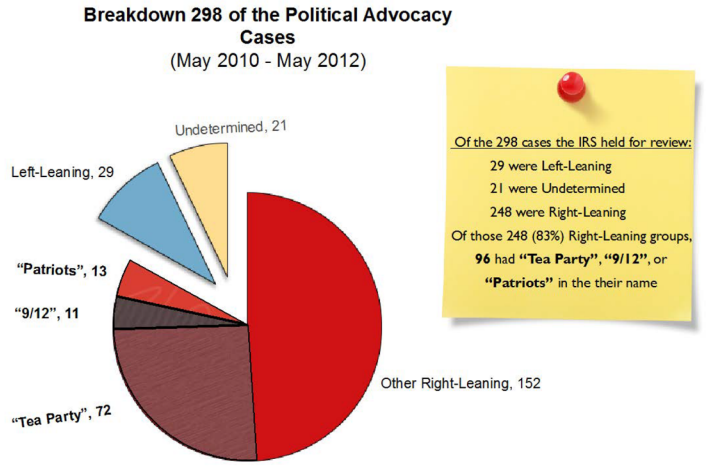
Although the Majority and Minority have profound differences and were unable to come to an agreement in their analysis of this matter, the Subcommittee conducted its investigation through joint interviews and document requests, and continued its tradition of in-depth fact-finding and frequent consultations that are the hallmark of the Subcommittee's oversight work and lead to a deepened understanding of key issues.

### A. Question of Political Bias and Disparate Impact

The Majority report asserts that there was no political bias in the way the IRS selected groups for additional scrutiny and that conservative and liberal groups were treated equally. This is simply untrue. The IRS screening resulted in a clearly disparate impact on conservative group applications. Of the groups applying for tax-exempt status that were pulled from normal processing and received additional scrutiny by the IRS, 83% (or 248 out of 298) of the groups were "right leaning" organizations.[1067]

---

[1067] Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, (9/18/2013) http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126




On July 30, 2014, the House Committee on Ways and Means published a study detailing the number of questions posed to conservative and progressive applicants for tax-exempt status.[1068] The IRS asked conservative groups 1,552 questions, an average of 14.9 questions per group. Meanwhile, the 7 progressive groups were asked a mere 33 questions in total, or 4.7 per group.[1069] Conservative groups were asked on average more than triple the number of questions posed to progressive organizations.

**IRS Targeting Statistics of Files Produced by IRS Through July 29, 2013**

| Organization Names | Total | Questions Asked | Average Questions Asked | Approved | Approved % | Outstanding or Withdrawn |
|---|---|---|---|---|---|---|
| Conservative | 8 | 100 | 12.5 | 3 | 38% | 5 |
| Tea Party | 72 | 1012 | 14.1 | 33 | 46% | 39 |
| Patriot, 9/12 | 24 | 440 | 18.3 | 12 | 50% | 12 |
| Subtotal of Conservative Organizations | 104 | 1552 | 14.9 | 48 | 46% | 56 |
| Progressive | 7 | 33 | 4.7 | 7 | 100% | 0 |
| | | | | | | |

*1 file in the enumerated categories has not been provided by the IRS despite numerous requests.

[1068] http://www.npr.org/blogs/itsallpolitics/2013/07/30/207080580/report-irs-scrutiny-worse-for-conservatives
[1069] *Id.*

In addition, the chart above shows that the progressive groups examined by the IRS were all approved, while less than half of the conservative groups were approved.

The Majority report further attempts to diminish the disparate impact of the IRS targeting on conservative groups by stating that "more conservative than liberal groups filed for 501(c)(4) tax exempt status from 2010 to 2013, underwent IRS scrutiny, and ultimately won tax exempt status."[1070] The Majority report's interpretation of the evidence fails, however, to accurately account for the impact of the targeting on conservative groups. The true impact on conservative groups becomes clear when comparing the percentage of liberal and conservative applicants ultimately approved for tax-exempt status. This analysis shows that 70% of liberal group applicants placed on a separate list and scrutinized by the IRS were approved, whereas only 45% of conservative group applicants were granted tax-exempt status.[1071] When the vast disparity in the number of questions asked of and the far lower tax-exempt approval rate for conservative groups are considered, it is clear that conservative and liberal groups were not treated equally. In fact, it plainly evidences that there was a sharp disparate impact on conservative groups as a result of the targeting.

### B. Unresolved Factual Issues Meriting Further Investigation

The Majority's report claims to be able to draw definitive conclusions based on the available evidence. However, although the Subcommittee has spent over a year on this investigation, two major questions have yet to be resolved: whether there was political bias motivating the targeting and to what extent outside actors influenced the IRS's actions. The Majority's report purports to answer these questions, but does not take into account the recent release of Lois Lerner's emails containing disparaging remarks about conservatives. Many relevant IRS emails are also still missing, key documents have not been produced, and Lois Lerner – the former Director of the IRS Office of Exempt Organizations and a key witness – continues to refuse to testify. These factual gaps indicate that this Subcommittee's investigation is necessarily incomplete.

At the same time, in the Minority's view, substantial evidence shows political bias was involved in this matter and further investigation is necessary to ascertain the precise extent of it and to find out who besides Ms. Lerner was involved in the targeting. Drawing any definitive conclusion before fully resolving all of the factual issues, at this point, is unwise.

**Missing Sources of Information**. The IRS learned in February 2014, that the IRS had lost two years of emails belonging to Ms. Lerner and six additional employees. These missing emails were from the time period when the IRS was targeting conservative group applications and would likely prove vital to the investigation. With critical information missing from the relevant time period the targeting occurred and from the head of the division responsible for the inappropriate targeting, the likelihood is more incriminating information will be found.

---

[1070] Majority Report at 31. This assertion is based on the U.S. House Committee on Ways and Means analysis of the 298 cases reviewed by TIGTA.

[1071] Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126. The 298 cases represent all cases pulled from the standard screening process and listed on a separate Advocacy List created by IRS employees.

Additionally, very recently produced emails demonstrate the presence of political bias by Ms. Lerner. Lerner revealed her animus towards conservatives in one of these recently released email exchanges from November 2012 with an unnamed sender. In the exchange, the sender complained about the "whacko wing of the GOP" and "scary" "right wing radio shows."[1072] The sender replied that conservative critics as being the reason that the "U.S. is through."[1073] Ms. Lerner responded, "[G]reat. Maybe we are through if there are that many [redacted]holes." Ms. Lerner called conservatives "our own crazies" and compared them to "teRrorists [sic]."[1074]

**From:** Lerner Lois G
**Sent:** Friday, November 09, 2012 12:04 PM
**To:** [redacted]
**Subject:** Re: Suspension of Retention

So we don't need to worry about alien teRrorists. It's our own crazies that will take us down.
Lois G. Lerner---------- Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From [redacted]
Sent: Friday, November 09, 2012 12:19 PM
To: Lerner Lois G
Subject: RE: Suspension of Retention

And I'm talking about the hosts of the shows. The callers are rabid.

[redacted]

-----Original Message-----
From: Lerner Lois G [mailto:Lois.G.Lerner@irs.gov]
Sent: Friday, November 09, 2012 12:17 PM
To [redacted]
Subject: Re: Suspension of Retention

Great. Maybe we are through if there are that many [redacted]holes.
Lois G. Lerner---------- Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From [redacted]
Sent: Friday, November 09, 2012 12:02 PM
To: Lerner Lois G
Subject: RE: Suspension of Retention

Well, you should hear the whacko wing of the GOP. The US is through; too many foreigners sucking the teat; time to hunker down, buy ammo and food, and prepare for the end. The right wing radio shows are scary to listen to.

The IRS allowed four months to pass before revealing the loss of two years of Ms. Lerner's emails to the House Ways and Means Committee. While the IRS revealed the loss of Ms. Lerner's emails on June 13, 2014, it took four more days until June 17 to inform the committee about the other missing emails.[1075]

The day before the June 17 Ways and Means announcement, IRS Commissioner John Koskinen met with Senate Finance Committee Chair Ron Wyden and Ranking Member Orrin Hatch.[1076] During this meeting Commissioner Koskinen discussed Ms. Lerner's unrecoverable hard drive, but failed to inform them that additional employees' documents were also

[1072] http://waysandmeans.house.gov/uploadedfiles/lerner_email_a.pdf
[1073] Id.
[1074] Id.
[1075] http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=384708
[1076] http://www.finance.senate.gov/newsroom/ranking/release/?id=479df47f-b3cd-4f58-9c64-118f92c254e8

lost.[1077] Some of these unrecoverable emails belonged to three Washington, D.C.-based employees directly involved in the management and analysis of the Tea Party cases.[1078] These recent revelations and repeated failures to provide relevant information to congressional committees demonstrate an unacceptable culture of secrecy within the IRS. The investigation of these matters cannot be completed until all the facts about the supposed "lost" emails are uncovered.

The "lost" emails may still be recoverable, yielding important new facts. In mid-2011, Ms. Lerner's computer reportedly crashed and the information stored on her computer's hard drive was deemed unrecoverable.[1079] The IRS stated that any "email that was only stored on that computer's hard drive would have been lost," but some emails may have been stored on the IRS's central servers.[1080] It might be possible, therefore, to retrieve Ms. Lerner's emails from the IRS's network. TIGTA is currently investigating whether Ms. Lerner's emails can be recovered and produced to the relevant congressional committees.

**Lack of Lerner's Testimony**. Lois Lerner's refusal to testify represents a second crucial gap in information. Ms. Lerner is the former Director of the IRS Exempt Organizations division and a key figure in the scandal. As Director, Ms. Lerner was likely in the best position to know precisely what lead to the disparate treatment of conservative groups. Without her testimony, drawing a definitive conclusion is a mistake.

**Ongoing Litigation and Investigations**. Additional relevant information may be made available through ongoing litigation brought by the some of the targeted groups. One such group's case will soon begin the discovery process.[1081] This process may lead to the production of additional documents the IRS has thus far resisted disclosing and may shed further light on other unanswered questions. One such question may involve the frequent trips by former IRS Commissioner Douglas Shulman and then-acting Commissioner Steven Miller to the White House.[1082] Additionally, the Federal Bureau of Investigation and Department of Justice have

---

[1077] http://www.finance.senate.gov/newsroom/ranking/release/?id=479df47f-b3cd-4f58-9c64-118f92c254e8; The IRS indicated that Mr. Koskinen's failure to inform the committee stemmed from the fact that he had not yet been briefed on the issue. This once again shows that the IRS is slow in communicating relevant information to the investigative committees.

[1078] The three D.C.-based employees in which the IRS determined email data was lost are Judy Kindell, Justin Lowe, and Ron Shoemaker. *See also* http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=384708.

[1079] http://www.irs.gov/PUP/newsroom/IRS%20Letter%20to%20Senate%20Finance%20Committee.pdf at 7.

[1080] Id. at 7.

[1081] *Z Street v. Shulman*, Civil Action No. 2012-0401. U.S. District Court for the District of Columbia, Memorandum Opinion, May 21, 2014 at 4 (located at: http://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2014/05/ZStreet.pdf); *see also* IRS Judgment Day: The Untalkative Agency Comes Under Scrutiny from a Federal Judge, Wall Street Journal (5/28/2014) http://online.wsj.com/articles/irs-judgment-day-1401318881.

[1082] *See* IRS Chief's 118 White House Visits Must Be Explained, Investor's Business Daily (5/28/2013) http://news.investors.com/ibd-editorials/052813-657927-irs-heads-118-white-house-visits-suspicious.htm?ref=HPLNews.

been conducting investigations with alacrity into the IRS targeting scandal.[1083] Their findings will likely provide further relevant information.

### C. IRS Scrutiny of Liberal Groups Differed in Justification and Extent From Its Scrutiny of Conservative Groups

The Subcommittee Majority claims that the IRS targeted liberal groups and conservative groups equally.[1084] As shown in section A, that claim does not have statistical merit. In addition, liberal groups were targeted by the IRS for different reasons and in a different manner than conservative groups, which were placed on a separate listing for additional scrutiny.

The liberal groups mentioned on the "be-on-the-lookout" (BOLO) spreadsheet were selected for legitimate reasons. The BOLO spreadsheet was an IRS guidance document that alerted agents to potentially problematic types of cases. For example, the BOLO instructed IRS personnel to look out for groups associated with centrally-controlled organizations like ACORN.[1085] These organizations would also naturally be expected to undergo additional scrutiny because of previous controversies associated with their parent organizations.[1086] By contrast, the conservative groups in question were overwhelmingly independent and had no comparable history warranting heavy scrutiny.

The scrutiny endured by conservative groups also differed in kind from the scrutiny accorded to liberal groups. The IRS selected conservative groups out of normal processing, placed them on a separate list, stopped work on their applications completely, forced them to answer intrusive questions about their behavior and demeanor at meetings, and delayed their applications for multiple years. Our investigation has uncovered no evidence that liberal groups received the same expansive inappropriate treatment that conservative groups received.

Furthermore, had liberal groups been targeted in a similarly inappropriate manner, they would have likely voiced their concerns to the IRS and Congressional leaders. Instead, we have uncovered no evidence indicating that liberal groups were writing to their members of Congress to complain about targeting by the IRS during the relevant period. All of the known complaints regarding IRS targeting and burdensome treatment came from conservative groups. These

---

[1083] *See* John D. McKinnon, FBI Launces Probe of IRS: Treatment of Tea-Party Groups Eyed; Internal Review Blames Higher-Ups, Wall Street Journal (5/14/2013) http://online.wsj.com/news/articles/SB10001424127887324216004578483203153773048 ("Attorney General Eric Holder said Tuesday the Justice Department has opened a criminal probe of the Internal Revenue Service's treatment of tea-party groups").

[1084] Majority Report, Part I, Executive Summary, at 7 ("From 2010 through 2013, the IRS mismanaged the 501(c)(4) applications process for both conservative and liberal groups engaged in campaign activities, using inappropriate selection criteria to flag applications for heightened review, subjecting applicants to burdensome questions, and delaying disposition of their applications for years.").

[1085] IRSR0000196739 - 758 (eight Emerge applicants related to national Emerge America organization and denied for private benefit); Matthew Bigg, Scandals Weaken Liberal Group ACORN, Reuters (2/22/2010) http://www.reuters.com/article/2010/02/23/us-usa-acorn-idUSTRE61M09L20100223; ACORN Hopes New Image Can Save Disgraced Advocacy Group, Fox News (2/23/2010).

[1086] Matthew Bigg, Scandals Weaken Liberal Group ACORN, Reuters (2/22/2010) http://www.reuters.com/article/2010/02/23/us-usa-acorn-idUSTRE61M09L20100223; ACORN Hopes New Image Can Save Disgraced Advocacy Group, Fox News (2/23/2010).

concerns spurred the TIGTA audit[1087] and ultimately led to congressional investigations by four committees and subcommittees.[1088]

The assertion that the IRS targeted liberal and conservative groups equally is further undermined by the IRS's response to the TIGTA audit. The TIGTA audit detailed the pervasive use of inappropriate criteria by the IRS that led to the targeting of conservative groups' applications. Prior to releasing its audit report, TIGTA provided multiple drafts to the IRS for comment. One would expect that, had the IRS been impartially targeting liberal and conservative groups equally, it would have raised that argument in its comments. In its official response, however, the IRS did not assert that it had impartially targeted both conservative and liberal groups. Instead, the IRS responded by accepting seven of the nine TIGTA recommendations.[1089] The IRS's tacit admission to targeting only conservative groups suggests that the liberal groups were not targeted in a similar manner.

To support its conjecture that the IRS targeted liberal groups, the Subcommittee Majority staff report offers the IRS's BOLO spreadsheet as evidence. Because the BOLO spreadsheet lists liberal groups such as ACORN, Progressive, and Occupy as well as "Tea Party" cases, the Majority staff report concludes that liberal and conservative groups were targeted equally. However, the liberal organizations were grouped in different parts of the BOLO spreadsheet, meaning that the agents responsible for screening were supposed to treat them differently than they did the "Tea Party" cases.

The criteria flagging "Tea Party" groups were included on the spreadsheet tab labeled "Emerging Issues." The Emerging Issues tab was the only spreadsheet on the BOLO associated with an actual, separate list of cases referred from the BOLO. IRS screeners pulled cases based on the criteria described and placed these applications on the Advocacy Case List. These applications were then referred to a specialist for additional scrutiny.

It was the "Emerging Issues" tab, and not any other BOLO tab, that IRS agents utilized to target tax-exempt applications for additional scrutiny; even though the BOLO spreadsheet had other criteria contained in different tabs.

Other BOLO entries, like those on the Watch List tab, included criteria for identifying ACORN successors. The BOLO Watch List tab contained recommendations for processing applications, not yet received, which might present concerns. ACORN successor cases were

---

[1087] TIGTA Report, Memorandum from Michael E. McKenney, Acting Deputy Inspector General for Audit, at 1 (5/14/2013) ("This audit was initiated based on concerns expressed by members of Congress and reported in the media regarding the IRS's treatment of organizations applying for tax-exempt status.").

[1088] The four committees investigating the IRS's targeting of conservative groups are: 1)The House Committee on Ways and Means, 2) the House Committee on Oversight and Government Reform, 3) the Senate Committee on Finance, and 4) the Senate Permanent Subcommittee on Investigations.

[1089] *See generally*, TIGTA Report. The IRS agreed that it should: implement the memorandum requiring the Direct of Rulings and Agreements to approve all BOLO entries and changes prior to formalization; Develop training on proper identification of political activity in applications; develop a process for Determinations to formally request assistance from the Technical and Guidance Units; Provide oversight to ensure expedient approval or denial of political cases; Have IRS Chief Counsel and Treasury develop guidance on how to measure "primary activity". Two additionally accepted recommendations involved the specifics of what the training on proper identification and handling of political cases should entail.

placed on the "Watch List" because of reports that ACORN successors (i.e., groups that had once been ACORN-affiliates and had spun off after the central organization closed in 2010) might file for 501(c)(3) or (c)(4) status following the breakup of the parent organization due to fraud and misconduct.[1090] That past conduct suggested a need to continue monitoring affiliates applying for tax-exempt status to prevent a fraudulent scheme. The reference to ACORN on the "Watch List" also considered that organizations would be applying for both 501(c)(3) and 501(c)(4) status. Thus, the IRS needed to monitor incoming ACORN applications to prevent potential tax fraud and abuse.

The "Watch List" also contained a 2012 listing for "Occupy" organizations affiliated with the Occupy Wall Street movement. However, the "Occupy" criteria were not added until almost two years after the initial targeting of "Tea Party" groups began. TIGTA determined that, during the timeframe that was the scope of its audit, no Occupy cases ever made it onto a list of political advocacy cases. TIGTA found no evidence to show that Occupy groups ever received the same treatment or delay that conservative groups received.[1091] Thus, it appears that the inclusion of Occupy organizations on the "Watch List" did not indicate similar targeting by the IRS.

Finally, the BOLO spreadsheet included a "Historical" tab representing types of cases that were no longer active and were thus "[h]istorical" for the purposes of IRS screening. "Progressive" was listed on the "Historical" tab, and the evidence shows that the listing was for 501(c)(3) cases only. While Progressive was still listed on the BOLO, the cases relating to this tab were inactive during the time period of the TIGTA audit.[1092] The greatest likelihood is that the Progressive 501(c)(4) cases were targeted for inclusion in the Advocacy Case List due to potential political activities, not based on the applicant's name.

Although the IRS was fully aware of the other BOLO tabs, it **specifically directed** TIGTA only to the relevant "Emerging Issues" tab and the corresponding applications during the audit of political targeting. The other BOLO spreadsheet entries did not fit the scope of TIGTA's audit.[1093]

---

[1090] IRSR0000410433 ("The officers of the organizations had prior affiliations with Acorn as members of boards on various chapters."); *see also* Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 40-42 (4/7/2014); ACORN dissolved as a National Structure, Politico (2/22/2010) http://www.politico.com/blogs/bensmith/0210/ACORN_dissolved_as_a_national_structure.html.

[1091] Subcommittee interview of Thomas Seidell, TIGTA (3/29/2014); Subcommittee interview of Troy Paterson, TIGTA (3/31/2014).

[1092] IRS0000001354; Subcommittee interview of Troy Paterson, TIGTA (3/21/2014); Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014). According to the interviews with TIGTA, the Progressive listing on the Historical Tab of the BOLO Spreadsheet was a reference to 501(c)(3) Progressive organizations that had applied for tax-exempt status pre-2010 and were no longer being received. It was determined that all of the Progressive cases listed on the Advocacy Case List were 501(c)(4) organizations and it can be inferred that those cases were selected after the Emerging Issue criteria for political advocacy cases was expanded in June 2011.

[1093] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014); Letter from J. Russell George, Treasury Inspector General for Tax Administration to Rep. Sander Levin, at 2 (6/26/2013) ("Our audit did not find evidence that the IRS used the "Progressives" identifier as selection criteria for potential political cases between May 2010 and May 2012.").

How IRS employees used the BOLO spreadsheet shows the IRS's targeting had a disparate impact on conservative groups, and that liberal groups were not targeted in the same manner as conservative groups. Unlike the liberal groups that were selected out for non-political reasons or merely noted as historical, "Tea Party" cases were actively targeted inappropriately using political criteria. As a result, all "Tea Party" cases had their applications flagged for additional scrutiny by the IRS. Based on the directions of the political advocacy entry on the Emerging Issues tab, a few progressive groups were caught up in the predominately conservative list of advocacy cases. However, these progressive cases, unlike their Tea Party counterparts, were not selected for additional scrutiny because of the group's name.

### D. The TIGTA Audit Accurately Represented the IRS's Mistreatment of Conservative Groups

The Subcommittee Majority staff report claims the TIGTA audit distorted the truth because it exclusively focused on conservative groups, not liberal groups. However, documentary evidence and Subcommittee interviews with TIGTA officials disprove this point. TIGTA officials did not consider the political leanings of the organization when they examined whether groups were inappropriately targeted.[1094] Instead, TIGTA audited the controls and procedures the IRS itself claimed it used when processing applications with political activity for 501(c)(4) tax-exempt status. The impartial audit validated the concerns raised by the media, members of Congress, and others that the IRS was using inappropriate criteria and targeting groups by name or policy position. Thus, the Majority report's claim that both liberal and conservative groups experienced the "same mistreatment" is clearly not supported by the evidence. It is incorrect to assert that the TIGTA audit was biased or factually flawed.

TIGTA auditors consulted the IRS to identify which, if any, cases received additional scrutiny through the IRS screening process. When asked by TIGTA if the IRS was tracking any cases separately, the IRS provided a list of applications identified as requiring "further scrutiny." For the purposes of this report, this new Excel spreadsheet will be referred to as the "Advocacy Case List." The Advocacy Case List consisted of applications singled-out according to criteria set out in the corresponding "Emerging Issues" BOLO tab. The scope of the TIGTA audit focused on those applications that the IRS identified as being set aside for further review based on perceived political intervention.[1095] The IRS directed TIGTA auditors only to the "Emerging Issues" tab and the corresponding Advocacy Case List. In doing so, the IRS deliberately declined to direct the auditors to the ACORN successors and "Progressive" references made on other BOLO tabs.[1096]

In their interviews, TIGTA officials Gregory Kutz and Troy Paterson made it clear that they looked at the Advocacy Case List because those were the cases the IRS indicated were relevant to the audit.[1097] Additionally, Mr. Kutz said he did not think adding references to

---

[1094] Subcommittee interview of Russell George, TIGTA (4/22/ 2014).
[1095] TIGTA Report at 10 ("we reviewed all of the applications identified as potential political cases as of May 31, 2012"), *Id.* at 22 ("Detailed Objective, Scope and Methodology").
[1096] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).
[1097] Id. Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014)..

Occupy or ACORN in the report would have changed the outcome of the audit.[1098] Furthermore, the Advocacy Case List included only those cases active during the May 2010-May 2012 time period that TIGTA examined in its audit. The BOLO spreadsheet entry mentioning "Progressive" only referenced cases that were not active during the time period of the TIGTA audit. Thus, the TIGTA audit team concluded that the other BOLO spreadsheets were not relevant to its audit.[1099]

The Subcommittee Majority report places extra emphasis on the fact that the TIGTA audit was initiated at the request of the House Committee on Oversight and Government Reform (OGR). However, the Majority report's assertion fails to present the whole story. While OGR did make a request, this alone did not spur TIGTA to audit the targeting. TIGTA began its audit in response to several media reports, an audit request letter sent by the Landmark Legal Foundation, and the OGR request.[1100] Moreover, the Subcommittee Majority staff report claims that TIGTA auditors only examined the treatment received by Tea Party and other conservative groups. In actuality, TIGTA audited the "actions taken by the EO function in response to the increase in applications" and "whether changes to procedures and controls" led to problems processing political advocacy cases.[1101]

The Subcommittee Majority staff report suggests that TIGTA failed to examine liberal groups' treatment even after the IRS made TIGTA aware of the liberal groups in BOLO listings. The reality is that the IRS had three opportunities to edit the TIGTA report and never urged the inclusion of the liberal groups referenced on the other BOLO listings.[1102] Also, TIGTA reviewed every hard copy application file for the 298 cases on the IRS's Advocacy Case List.[1103]

The Subcommittee Majority report places great weight on the email review conducted by TIGTA's Deputy Inspector General for Investigations, Timothy Camus. The review Mr. Camus conducted allegedly showed that IRS personnel were not politically motivated. The email review was a limited search of only five employees' emails designed to find a smoking gun email; it was not a general search for evidence of political bias. Furthermore, the email review did not include a search of *any* emails from *any* DC based employees. Therefore, the email review cannot be cited for the proposition that this very limited investigation proves that there was no political bias on the part of IRS officials. Also, denial of political motivation is not determinative of there being no political motivation. Finally, TIGTA Inspector General Russell George and Mr. Kutz have indicated they are conducting a new audit into the entire BOLO spreadsheet to determine if the IRS acted improperly in other respects, too.

---

[1098] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).
[1099] Id.; Subcommittee interview of Troy Paterson, TIGTA (3/21/2014); TIGTA Report, at 6, footnote 16 ("We did not review the use of other named organizations on the BOLO listing to determine if their use was appropriate.").
[1100] *See* TIGTA Report; *see also* Letter from Landmark Legal Foundation to TIGTA (3/23/2012), http://www.landmarklegal.org/uploads/IRS%20IG%20Letter%20without%20attachments.pdf (The Landmark letter also requested TIGTA look into whether IRS employees acted at the command of "politically motivated superiors.").
[1101] TIGTA Report at 22.
[1102] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).
[1103] TIGTA Report at 24 ("Obtained and reviewed all 298 application cases identified for processing by the team of specialists").

## II. CONSERVATIVE GROUPS TARGETED SIGNIFICANTLY MORE OFTEN AND PERVASIVELY THAN LIBERAL GROUPS

### A. Conservative Groups on the BOLO Spreadsheet

The IRS, using a Microsoft Excel spreadsheet referred to as the "Be-On-the-Lookout" Spreadsheet ("BOLO"), flagged conservative groups applying for tax-exempt status for additional scrutiny. One of the main mistaken contentions in the Majority's report is that liberal groups, especially those listed on the BOLO Spreadsheet were treated equally poorly as Tea Party and conservative groups.[1104] In order to support this assertion, the Subcommittee Majority report attempts to draw tenuous comparisons between the different BOLO tabs. The evidence, however, strongly contradicts this finding. Instead, the evidence indicates that the systematic targeting of Tea Party and other conservative groups by the IRS was substantially different from the IRS's treatment of liberal groups. The IRS's treatment of Tea Party cases cannot be boiled down to an apples-to-apples comparison to liberal groups. Only one tab, labeled "Emerging Issues," dealt with political advocacy groups under then-current review by the IRS for tax-exempt status. The other tabs with liberal groups listed were intended to alert IRS screeners only to watch out in the event they receive any tax-exempt status requests from groups like ACORN successors, Progressive or Occupy.

The Subcommittee Minority analyzed the way the IRS utilized the BOLO and found that groups in the "Emerging Issues" BOLO spreadsheet tab – most notably Tea Party groups – were treated differently than groups listed in other BOLO spreadsheet tabs.

In August 2010, IRS employees in Cincinnati created the BOLO spreadsheet to alert employees to certain cases.[1105] The BOLO spreadsheet had five sheets or tabs. The sheets or tabs of the spreadsheet varied over time. The original five tabs were: "TAG," "TAG Historical," "Emerging Issues," "Coordinated Processing," and "BOLO List."[1106] TAG stands for "Touch-and-Go" and the cases referenced on the "TAG" tab indicated potential fraud, terrorism or other sensitive issues.[1107] "TAG Historical" referenced cases that were no longer active in the IRS's system and had similar indications of fraud, terrorism or other sensitive issues.[1108] Later versions of the BOLO spreadsheet replaced "TAG" with "potential abusive" and "TAG Historical" with "potential abusive historical."[1109] The "BOLO List" tab was a precursor to the "Watch List" tab. The "Watch List" tab was designed to draw attention to cases not yet received

---

[1104] *See* Majority Report, at 69 ("liberal groups encountered many of the same IRS processing problems as conservative groups").
[1105] IRS0000002503 - 515.
[1106] Id.
[1107] IRSR0000006659
[1108] Subcommittee interview of Gary Muthert, IRS (1/15/2014); *see also* Letter from J. Russell George, Treasury Inspector General for Tax Administration to Rep. Sander Levin, at 1 (6/26/2013) ("The "Progressives" criteria appeared on a section. . . labeled 'Historical,' and, unlike other BOLO entries, did not include instruction on how to refer cases that met the criteria." Also, TIGTA "found no indication in any of these materials that 'Progressives' was a term used to refer cases for scrutiny for political campaign intervention.").
[1109] IRS0000001500 - 511.

by the IRS that agents should be watching for.[1110] The "Emerging Issues" tab was used to flag newly received cases on which there was no precedent.[1111]

The "Emerging Issues" tab explicitly referred to the "Tea Party" movement. The tab contained no mention of any other political organization.[1112] In August 2010, the entry on the BOLO Spreadsheet for Tea Party read: "Tea Party: These case[s] involve various local organizations in the Tea Party movement are applying for exemption under 501(c)(3) or 501(c)(4)."[1113] The specific Tea Party reference was an umbrella term for conservative groups, designed to draw attention to a national movement that more often than not included organizations with Tea Party, Patriots, and 9/12 in the group name. On February 1, 2011, head of IRS Exempt Organizations, Lois Lerner emailed several of her employees and stated that the "Tea Party Matter [is] very dangerous."[1114]

**From:** Lerner Lois G
**Sent:** Tuesday, February 01, 2011 5:28 PM
**To:** Seto Michael C
**Cc:** Paz Holly O; Trilli Darla J; Douglas Akaisha; Letourneau Diane L; Kindell Judith E
**Subject:** RE: SCR Table for Jan. 2011

Thanks--a couple comments

1. Tea Party Matter very dangerous. This could be the vehicle to go to court on the issue of whether Citizen's United overturning the ban on corporate spending applies to tax exempt rules. Counsel and Judy Kindell need to be in on this one please needs to be in this. Cincy should probably NOT have these cases--Holly please see what exactly they have please.

The Tea Party description contained in the "Emerging Issues" tab was used by the IRS to flag cases from August 2010 until July 2011. In July 2011, the description of cases to flag was altered to state the following: "Advocacy Orgs: Organizations involved with political, lobbying, or advocacy for exemption under 501(c)(3) or 501(c)(4)."[1115] This change was requested by Lois Lerner, the Washington, D.C.-based Director of Exempt Organizations, in an attempt to broaden the criteria and prevent the inappropriate selection of cases based on their name only.[1116] Even after this effort, the IRS continued to target **all** Tea Party cases for heightened scrutiny.[1117] The "Emerging Issues" tab relating to political advocacy cases changed again in January 2012. The description was altered to read: "Current Political Issues: Political action type organizations involved in limiting/expanding government, educating on the constitution and bill of rights,

[1110] IRSR0000006667 ("Typically Applications Not Yet Received").
[1111] IRSR0000006660.
[1112] IRS0000002509.
[1113] Id.
[1114] IRSR0000156541.
[1115] IRS0000001494 (it goes on to read: "Note: advocacy action type issues (e.g., lobbying) that are currently listed on the Case Assignment Guide (CAG) do not meet this criteria.").
[1116] TIGTA Report at 35 ("During the briefing, the Director, EO, raised concerns over the language of the BOLO listing criteria. The Director, EO, instructed that the criteria be immediately revised.").
[1117] PSI-IRS-37-000004 - 014 (In an assessment of all cases with Tea Party in the name received by June 5, 2012, every case was forwarded to the Advocacy Case List for additional scrutiny).

$ocial [*sic*] economic reform/movement."[1118] The January 2012 change was initiated because IRS employees in the Cincinnati office found that the July 2011 broad criteria caused too many cases unrelated to political activity to be sent to the advocacy group for processing. Finally, in May 2012, the Emerging Issues tab entry was changed for a fourth time, back to a broader, more-inclusive set of criteria by IRS management in Washington, D.C.[1119]

The active targeting of Tea Party applications began in February 2010.[1120] At that time, revenue agents screening applications began forwarding *every* Tea Party application to a specialist group handling the Emerging Issue cases. The informal criteria created and used by revenue agents in Cincinnati screening applications related to the Tea Party Emerging Issue entry included:

1) "Tea Party, Patriots or 9/12 Project is referenced in the case file
2) Issues include government spending, government debt or taxes
3) Education of the public by advocacy/lobbying to 'make America a better place to life'
4) Statement in the case file criticize how the country is being run"[1121]

It is clear that all of these criteria were designed to scrutinize conservative applicants, especially considering the political climate of the time. Any application that fit these criteria was sent to the specialist group in Cincinnati handling Emerging Issues cases. Upon receipt of the first few Tea Party cases by the specialist group, a revenue agent created an entirely new Microsoft Excel spreadsheet to track progress on the applications. The spreadsheet, called the Advocacy Case List, recorded the organization's name, the date the IRS received the application, the IRS assigned tracking number, whether it was a 501(c)(3) or (4) application and other information about the case.[1122] The Advocacy Case List was separate and distinct from the BOLO Spreadsheet. Whereas the BOLO contained criteria for flagging applications, the Advocacy Case List consisted of the actual cases being scrutinized by the IRS as a result of its political targeting. Between May 2010 and May 2012, the IRS accumulated 298 applications for tax-exemption, all of which were placed on the Advocacy Case List.[1123] This list of 298 cases was identified by the IRS as the cases the IRS itself had selected for further scrutiny and provided to TIGTA for its audit.[1124]

Although IRS employees in Cincinnati developed the Advocacy Case List, it was not the only IRS office ultimately involved. In March 2010, senior management in Washington, D.C. put the Tea Party cases on hold, while two Tea Party test cases were reviewed by the Washington, D.C. office. These cases were reviewed by the EO Technical department, which

---

[1118] IRS0000001507 (it goes on to read: "Note: typical advocacy type issues that are currently listed on the Case Assignment Guide (CAG) do not meet these criteria unless they are also involved in activities described above").
[1119] IRS0000001494 ("Current Political Issues: 501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit").
[1120] Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013); PSI-IRS-37-000013 - 014.
[1121] TIGTA Report, at 6, figure 3. *See also*, Lerner Briefing Document (June 2011).
[1122] IRSR0000006585.
[1123] TIGTA Report at 24.
[1124] Id. at 10.

was overseen by Holly Paz at the time.[1125] Both of these test cases were Tea Party groups.[1126] While a total of 6 cases from the 298 on the Advocacy Case List were approved between May 2010 and May 2012, not a single one of the approved cases had Tea Party in their name.[1127] The remaining 292 groups either withdrew their applications due to the lengthy delays or continued to await either an approval or denial.[1128] By being kept in limbo, these groups were severely hampered in their ability to raise funds. The IRS's failure to provide decisions on the 292 remaining applications also functionally denied these groups the right to appeal their treatment in federal court.

### B. Liberal Groups on the BOLO Spreadsheet

The Subcommittee's primary focus should be on the burdensome treatment of groups targeted via the Tea Party entry on the BOLO spreadsheet's "Emerging Issues" tab. The Majority report, however, attempts to draw attention away from the "Emerging Issues" tab by directing it toward unrelated tabs. It then attempts to draw tenuous similarities in the treatment of liberal organizations such as Progressive, ACORN, Occupy and Emerge to conservative groups by the IRS.[1129] Based on evidence discovered during this investigation the Majority's assertion is completely unsubstantiated. The treatment of these four liberal groups was dramatically and fundamentally different from that of Tea Party, Patriot and 9/12 groups applying for tax-exempt status. Furthermore, the disparate impact on conservative groups far outweighed any impact that the IRS treatment may have had on liberal groups. The comparison chart below shows that the Tea Party groups were systematically selected-out by name by utilizing the Tea Party entry on the BOLO spreadsheet. After being selected-out, the cases were assigned to the Tea Party Coordinator to manage processing and placed on a separate Advocacy Case List. Additionally, during the period of review, two Tea Party test cases were singled out and sent to Washington, D.C. for review. These two cases were also eventually reviewed by the IRS legal counsel's office. Based on these test cases, a sensitive case report was developed to inform senior IRS management of the cases. As is shown below, these actions all happened to Tea Party groups while only sporadically occurring to liberal groups.

---

[1125] PSI-IRS-09-000040; Subcommittee interview of Holly Paz, IRS (10/30/2013).

[1126] IRSR0000430436; *see also* Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 4 (4/7/2014) ("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."). There were actually three cases used for the test cases, one of the original two cases was closed for failure to respond, so a third was selected.

[1127] TIGTA Report at 14 ("Prior to the hands-on training and independent review, the team of specialists only approved six (2 percent) of 298 applications."); Gregory Korte, IRS Approved Liberal Groups While Tea Party in Limbo, USA Today (5/15/2013) ("There wouldn't be another Tea Party application approved for 27 months" starting in March 2010.).

[1128] TIGTA Report at 14 (Of the 298 applications, TIGTA determined that 28 groups withdrew the application and 160 continued to wait).

[1129] Majority Report, at 1, 2.

**Comparison Chart of Tea Party Group Treatment versus Occupy, Emerge, ACORN successors, and Progressive/Progress**

| | Tea Party (incl. 9-12 and Patriot | Occupy | Emerge | ACORN Successors | Progressive BOLO (c3s) | Progressive/ Progress c4s |
|---|---|---|---|---|---|---|
| Listed on the BOLO Spreadsheet | X | X | | X | X | |
| Sensitive Case Report | X | | X | | | |
| Test Cases sent to Washington | X | | X | X | | |
| IRS's office of Legal Counsel's review | X | | | | | |
| Listed on the Advocacy Case List | X | | | ?* | | X |
| Assigned a specific Coordinator (i.e. Tea Party Coordinator) | X | | | | | |
| Development Letters | X | | X | | | X |

* Due to 6103 restrictions on releasing individual taxpayer information, TIGTA officials were unable to confirm or deny the addition of a single ACORN group on the Advocacy Case List.

### (1) Progressive and Progress Groups

In the original BOLO Spreadsheet, on the TAG Historical tab, there was an entry that read:

> "Progressive: Political Activities: Common thread is the word 'progressive'. Activities appear to lean toward a new political party. Activities are partisan and appear as anti-republican. You see references to 'blue' as being 'progressive.'"[1130]

According to our interviews with TIGTA employees, this entry refers to the IRS's previous handling only of 501(c)(3) applications for tax-exempt status from groups with Progressive in their name.[1131] As a result, it is highly unlikely that this entry was used to select progressive 501(c)(4) groups for review. Instead, 501(c)(4) cases that contained the name progressive or progress were included in the Advocacy Case List only because they fit the expanded criteria for scrutiny articulated by Lois Lerner in June 2011.

The fact that the Progressive cases referenced on the Historical tab of the BOLO Spreadsheet related only to 501(c)(3) cases is an important distinction to the Tea Party entry on the BOLO that referenced 501(c)(3) and (4) cases. Applicants applying for 501(c)(3) charity status are held to a stricter standard under the law than 501(c)(4) groups. That status requires 501(c)(3) charity organizations to *exclusively* conduct themselves for their stated charitable purpose.[1132] On the other hand under IRS regulations, 501(c)(4) organizations must *primarily*

---

[1130] IRS0000001354.

[1131] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014). *See also* Subcommittee interview of Elizabeth Hofacre, IRS (10/25/2013) (Ms. Hofacre informed Subcommittee staff that EO technical had instructed her to send along 501(c)(3) applications and not (c)(4), as well as the fact that progressive cases were handled in a different manner than Tea party cases once flagged.)

[1132] *See* 26 C.F.R. § 1.501(c)(3)-1(c)(1).

operate for their social welfare purpose. The difference between *exclusively* and *primarily* allows 501(c)(4) organizations to participate in some political advocacy activities.[1133] As such, the IRS must carefully examine **all** groups, including explicitly partisan groups, applying for 501(c)(3) status to determine if its activities are at all related to improper political advocacy. However, based on the evidence available, taken together, these facts indicate, and the Subcommittee's interviews confirm, there were no active cases relating to the Historical tab of the BOLO Spreadsheet Progressive entry at the time TIGTA completed its review.

According to the House Committee on Ways and Means, there were only seven applications with Progress or Progressive in the name included on the Advocacy Case List. This Subcommittee's investigation determined that of the seven groups, four groups included "progress" in the name and three groups included Progressive in the name. All seven were groups applying for 501(c)(4) tax-exempt status and all seven were eventually approved.[1134] No Progressive 501(c)(3) cases ever made it onto the Advocacy Case List. There were also 14 organizations with Progressive or Progress in their name that were not sent to the Advocacy Case List.[1135] Unlike the Progress or Progressive groups, *all* Tea Party cases filed between February 2010 and March 2012 were scrutinized and delayed.[1136] Progressive cases were not identified specifically by name in the Emerging Issues tab of the BOLO Spreadsheets used by revenue agents. Further, it is unlikely that progressive cases appeared on the Advocacy Case List until after the Tea Party BOLO was expanded in July 2011. Fewer than 38 percent of applicants with Progress or Progressive in their name were sent to the Advocacy Case List.[1137]

The Subcommittee Majority report utilizes the existence of the seven total 501(c)(4) applications with either Progress or Progressive in the name to show that liberal groups were targeted and placed on the Advocacy Case List. The seven Progress or Progressive 501(c)(4) applications did not relate to the Progressive BOLO spreadsheet entry because they are not 501(c)(3) organizations. Also, all seven of these groups were likely not targeted for inclusion in the Advocacy Case List based on the applicant's name, but rather due to their potential political activities. Only Tea Party, 9/12 and Patriot groups were specifically targeted based on the applicant's name. Publicly available information released in a *USA Today* article revealed that

---

[1133] *See* 26 C.F.R. § 1.501(c)(4).

[1134] The House Committee on Ways and Means has statutory authority to view individual taxpayer information under 26 U.S.C. § 6103. With the ability to view and analyze this information, it was able to make statistical determinations by reviewing individual applications for tax-exempt status. *See* Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, (9/18/2013) http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126 ("One hundred percent of the groups with 'Progressive' in their name were approved"); PSI-IRS-37-000004 - 014 (Of the cases with the word Progress or Progressive in the applicant's name, seven cases were on the Advocacy Case List by May 2012 when TIGTA completed its analysis); *see also* Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 34 (4/7/2014).

[1135] PSI-IRS-37-000004 - 014.

[1136] Id. (In an assessment of all cases with Tea Party in the name received by June 5, 2012, every case was forwarded to the Advocacy Case List for additional scrutiny).

[1137] PSI-IRS-37-000004 - 014 (Of the cases with the word Progress or Progressive in the applicant's name, seven cases were on the Advocacy Case List by May 2012 when TIGTA completed its analysis. Two additional Progress or Progressive cases were added to the December 2012 Advocacy Case List. Of the total 24 Progress or Progressive cases, 9 eventually ended up on the Advocacy Case List. Thus, 15 Progress or Progressive cases were not included on the Advocacy Case List.

the earliest a Progress or Progressive application was listed on the Advocacy Case List was *after* March 2011. Therefore, it very likely the case was not actually added to the Advocacy Case List until after the criteria were broadened to include all advocacy groups in July 2011, not just the Tea Party. While at least 33 "Tea Party", six "9/12", and 13 "Patriot" cases languished on the Advocacy Case List, nearly 18 months passed before a single "Progress" or "Progressive" case was added to the list.

Notes taken during a July 28, 2010 screening workshop held in the IRS EO Determinations unit in Cincinnati further underscore the distinction between the Tea Party cases and Progressive cases.[1138] The workshop notes explicitly state Elizabeth Hofacre's role as the senior IRS revenue agent assigned the title Tea Party Coordinator/Reviewer, was only to process Tea Party groups. The notes even go so far as to explicitly exclude progressive groups from her jurisdiction.[1139]

**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"

1140

The Subcommittee has identified *no* evidence to suggest the treatment and handling of Progressive cases was the same as the Tea Party cases. Unlike Tea Party cases, Progressive cases were not identified by name in the "Emerging Issue" criteria used by revenue agents nor were they likely to have appeared on the Advocacy Case List until July 2011. Finally, every single one of the mere seven cases with Progress or Progressive in their name was approved.[1141]

---

[1138] IRSR0000168721 - 723.

[1139] IRSR0000168722 ("'Progressive' applications are not considered 'Tea Parties').

[1140] IRSR0000168722 (emphasis added by Subcommittee Minority).

[1141] Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA (9/18/2013), http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126 ("One hundred percent of the groups with 'Progressive' in their name were approved"); Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 34 (4/7/2014).

### (2) ACORN Successors

The BOLO spreadsheet also contained an entry referencing "ACORN successors" that appeared on the "Watch List" tab.[1142] The listing has been partially redacted by the IRS for 26 U.S.C. § 6103 protection, but it states "ACORN Successors: Following the breakup of ACORN [Redacted Information]."[1143]

Unlike Tea Party groups, ACORN successor organizations were properly on the BOLO Spreadsheet because ACORN itself had been involved in a number of fraudulent transactions assisting tax evasion.[1144] After a series of scandals, which led to Congress revoking its funding of the organization, the national ACORN organization disbanded.[1145] The ACORN groups were thus not flagged simply for their political activities, but also because of a specific association to a group known to have legal problems.[1146] That rationale bears no relation to the Tea Party cases, which appear to have been singled out and targeted based solely on their name or political beliefs.

Based on the information available to the Subcommittee during its review, the IRS's concern about potential ACORN successors never materialized.[1147] Documents show that of the initial four cases identified, the applications possibly came from only two groups applying for both 501(c)(3) and (c)(4) status.[1148] This further indicates the focus of IRS agents was on whether new entities would attempt to succeed ACORN after the national organization disbanded and not the organization's name or policy positions.

### (3) "Occupy" Groups

A third group, "Occupy", was only listed on the BOLO spreadsheet late in the processing of the Tea Party and Advocacy cases and related to the Occupy Wall Street movement.[1149] "Occupy" was listed on the "Watch List" tab of the BOLO spreadsheet beginning on February 8, 2012.[1150] IRS agents listed Occupy because media reports suggested this possible national

---

[1142] IRS0000002513.
[1143] Id.
[1144] Matthew Bigg, Scandals Weaken Liberal Group ACORN, Reuters (2/22/2010) http://www.reuters.com/article/2010/02/23/us-usa-acorn-idUSTRE61M09L20100223; ACORN Hopes New Image Can Save Disgraced Advocacy Group, Fox News (2/23/2010).
[1145] Matthew Bigg, Scandals Weaken Liberal Group ACORN, Reuters (2/22/2010) http://www.reuters.com/article/2010/02/23/us-usa-acorn-idUSTRE61M09L20100223; ACORN Hopes New Image Can Save Disgraced Advocacy Group, Fox News (2/23/2010); Sarah Wheaton, Acorn Sues Over Video as I.R.S. Severs Ties, New York Times (9/23/2009) http://www.nytimes.com/2009/09/24/us/politics/24acorn.html?_r=0 (ACORN "has faced a deluge of criticism after a series of videos from hidden cameras caught staff members giving advice about **tax evasion**, human smuggling and child prostitution").
[1146] *See* Subcommittee interview if Troy Paterson, TIGTA (3/21/2014); Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 42.
[1147] The IRS revenue agents seemed more worried about the fact the applicants applying for 501(c)(3) status were the same as an applicant applying for 501(c)(4) status because they shared an address. *See* IRSR0000410433.
[1148] IRSR0000410433.
[1149] IRSR0000006710.
[1150] Id.

movement might lead to applications by groups from various cities.[1151] At no point between May 2010 and May 2012 did the "Occupy" cases make it onto the Advocacy Case List. There is also no evidence suggesting that these cases were subjected to the same level of severe scrutiny as the Tea Party cases.[1152]

The first Occupy case was received in 2012, two years after the targeting of Tea Party groups had begun. The Occupy listing on the Watch List tab read as follows:

> "Occupy Organizations: Involve organizations occupying public space protesting in various cities, call people to assemble (people's assemblies) claiming social injustices due to 'big money' influence, claim the democratic process is controlled by was street/banks/multinational corporations, could be linked globally. Claim to represent the 99% of the public that are interested in separating money from politics and improving the infrastructure to fix everything from healthcare to the economy."[1153]

The Occupy listing is substantially different than the Tea Party listing for a number of reasons. First, Occupy was listed on the "Watch List" entry, which meant that it served as an advance notification in the event a possible application came in. The listing was not used by IRS employees to screen and select out applications from a known "emerging issue."[1154] Also, unlike the then purely theoretical Occupy applications, the Tea Party cases were clearly already active. Although two Occupy groups eventually did apply for tax-exempt status, it was not until 2012; roughly two years after the Tea Party targeting began.[1155]

### (4) Emerge

The final group cited by the Majority in support of the assertion that liberal groups were targeted by the IRS is "Emerge."[1156] Emerge America is a national organization dedicated to the election of Democrat women with affiliate state-based organizations.[1157] The organization was explicitly a campaign organization for the private benefit of the Democratic Party.[1158] Emerge groups therefore clearly and blatantly did not qualify for tax-exempt status. As a result, all eight applications filed by Emerge affiliates were ultimately and properly denied tax-exempt status. Three of the eight Emerge cases were denied after review by EO Technical in Washington, D.C. because of their clear participation in political campaigns to benefit the Democratic Party.[1159]

---

[1151] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).
[1152] *See* Subcommittee Interviews with TIGTA employees.
[1153] IRSR0000006710.
[1154] IRSR000000669 (Watch List was for "World Events that ***Could*** Result in an Influx of Applications" (emphasis in original)).
[1155] *See* IRSR0000014173 - 174; IRSR0000014175 - 189.
[1156] Majority Report, at 82.
[1157] http://www.emergeamerica.org/.
[1158] IRSR0000012211 - 221, at 219 ("Based on the information you submitted with your application, you are not operated exclusively for the promotion of social welfare within the meaning of section 501(c)(4) of the Code because your activities primarily serve private interests."); *see also* Staff Report, Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment, Committee on Oversight and Government Reform, U.S. House of Representatives, at 32-33.
[1159] IRSR0000196739 - 758.

The other five cases were initially approved, but later had their tax-exempt status revoked by the IRS for the same reasons the other three groups were denied.[1160]

When the Emerge cases were received by the IRS, the cases were sent to the Washington office and IRS agents created a Sensitive Case Report (SCR) on the Emerge groups, similar to the SCR for Tea Party cases.[1161] That, however, is where the similarities end. Unlike the Tea Party groups, Emerge was never added to the BOLO Spreadsheet and it did not have a separate list in Cincinnati that held Emerge cases. On top of this, it was clear that all of the Emerge cases did not meet the requirement to primarily engage in the group's social welfare activity.

Any attempt to compare the severe scrutiny of conservative groups seeking tax-exempt status to these few liberal groups is untenable. Conservative groups were systematically targeted by the IRS, listed on a separate spreadsheet than the BOLO Spreadsheet, had their applications put on hold by IRS management, and asked obtrusive questions to a significantly greater degree.

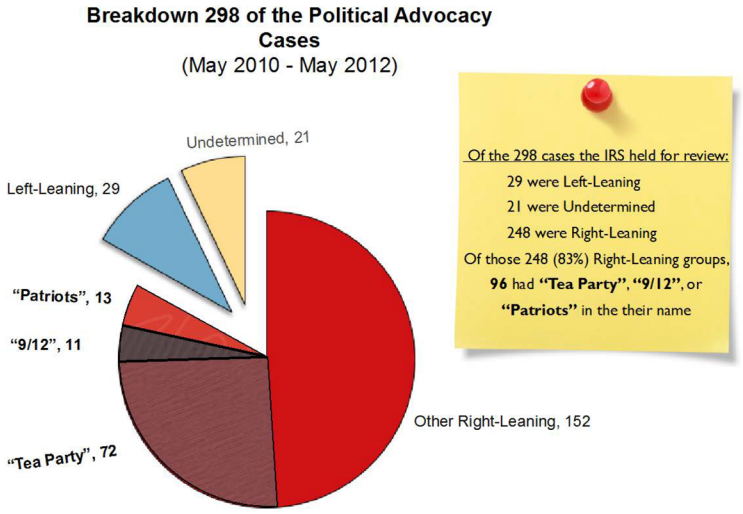
### C. Disparate Impact on Conservative Groups

TIGTA's report on the IRS's processing of advocacy cases provides an illuminating look at the extent of the IRS's disparate impact on conservative groups. According to TIGTA's analysis, between May 2010 and May 2012, the IRS removed a total of 298 applications from normal processing and placed them on a special Advocacy Case List for additional scrutiny.[1162] Of the 298 groups, 72 had Tea Party in their name, 11 had 9/12 in their name and 13 had Patriots in their name.[1163] Thus, out of the 298 groups, 96 applications contained Tea Party, 9/12, or Patriot in their names and were placed on the Advocacy Case List as a result.[1164] Of the 298 cases, TIGTA auditors looked at the entire, hard-copy application file for 296 applications because two cases were incomplete and could not be reviewed.[1165]

Although the Subcommittee does not have authority to view individual taxpayer data under 26 U.S.C. § 6103, the House Committee on Ways and Means does. It reviewed the 298 applications the IRS provided to TIGTA.[1166] According to the Committee's analysis, 83 percent – 248 of the 298 groups – were "right leaning."[1167] In the same analysis, the Committee found that only 29 of the 298 groups, or 10 percent, were "left leaning."[1168]

---

[1160] IRSR0000468978 - 980.
[1161] IRSR0000141809 - 811.
[1162] Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, www.Waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126
[1163] TIGTA Report at 8.
[1164] Id.
[1165] Id at 10.
[1166] Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126.
[1167] Id.
[1168] Id.

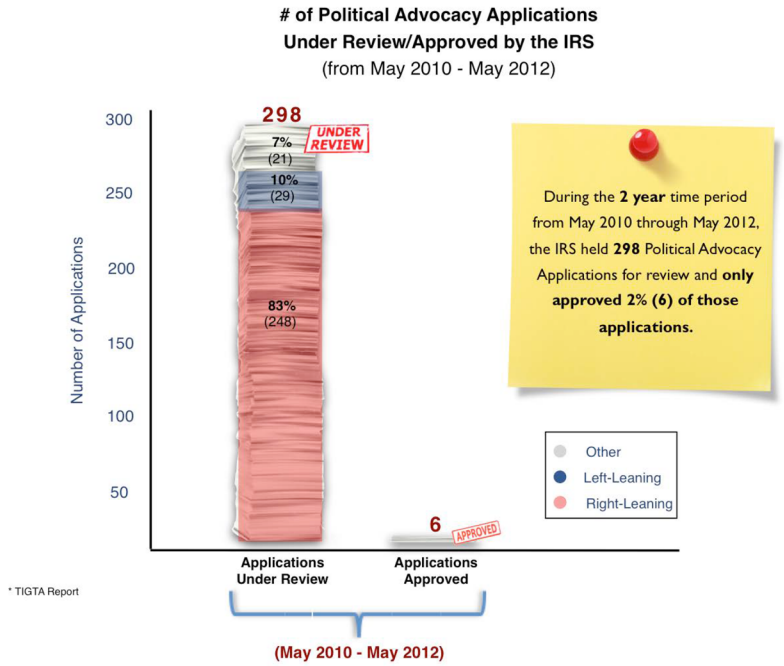



The full story becomes even clearer when the percentage of approvals is considered. The Committee on Ways and Means found that 45 percent, or 111 applications, of the 248 right-leaning groups were eventually approved.[1169] Liberal groups, on the other hand, enjoyed a 70 percent approval rate. Thus, of 29 left-leaning groups, 20 groups were approved while 9 groups withdrew their application or the application is still pending.[1170]

Additionally, according to TIGTA's audit, only six cases from the Advocacy Case List were approved in the span of two years.[1171] Amazingly, after TIGTA initiated its audit, 102 applications were approved from May to December 2012.[1172]

---

[1169] Id.
[1170] Id.
[1171] TIGTA Report at 14.
[1172] Id. at 14-15.




Of these "hastily approved applications," the Ways and Means Committee determined that many "were flagged for IRS surveillance by Washington, D.C."[1173] As is consistent with the IRS's treatment of conservative groups, "[o]f those flagged, more than eighty percent of the groups were right leaning."[1174] Moreover, Ways and Means determined that of the organizations sent to the IRS Exempt Organizations Examinations unit, 94 percent were right-leaning. That 94 percent of flagged groups being found to be right-leaning is certainly telling, but Ways and Means' other discovery demonstrates the disparate impact on conservative groups even further. The Committee found that "of the organizations referred for audit from this process, 100 percent were right leaning."[1175]

---

[1173] Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126.
[1174] Id. ("The IRS surveillance program, called the "Review of Operations," is conducted by the EO Examinations unit in Dallas and involves the monitoring of a group's activity. The consequence of being in the program is that surveillance can lead to an audit.").
[1175] Analysis by U.S. House Committee on Ways and Means staff of 298 cases analyzed by TIGTA, http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126.

As it reviewed each of the applications, TIGTA attempted to discern whether an application had "indications of significant political campaign intervention," the qualifier the IRS identified as the reason a case would need additional scrutiny.[1176] TIGTA auditors determined that 91 applications, or 31 percent, of the 296 applications reviewed did not have "indications of significant political campaign intervention."[1177] This means that the auditors could not find any activities in the case file that suggested the group would participate in campaign-related events that may have disqualified them from 501(c)(4) status.[1178]

During the course of the audit, TIGTA determined that a number of groups received intrusive questions by the IRS in the form of development letters.[1179] A development letter is drafted by the revenue agent processing the application to obtain additional information from the group prior to its approval or denial of tax-exempt status. According to the TIGTA report, 170 organizations in the Advocacy Case List received a development letter.[1180] Of those 170, TIGTA found that 98 organizations, or 58 percent, received burdensome and unnecessary questions.[1181]

One inappropriate question the IRS asked related to requesting an applicant's list of donors. In all, 27 applicants received that request, [1182] of which TIGTA determined that "13 had Tea Party, Patriots, or 9/12 in their names."[1183] Thus, 48 percent of organizations receiving inappropriate donor questions had been selected solely on the basis of having Tea Party, Patriot, or 9/12 in their name. The donor list questions are particularly disturbing because after a 501(c)(4) group is approved, it does not need to publicly disclose its donor list. The approved tax-exempt organization only needs to privately provide the IRS with this information in its tax returns and the IRS is obligated not to make this public. However, the IRS is required to make information that is part of an approved tax-exempt application publicly available.[1184] As result, if a group submits its donor list and the IRS relies on this information to grant 501(c) status, then that otherwise nonpublic donor list is required to be publicly released.[1185] Thus, the request for donor lists from these conservative groups could be used as an indirect means to force the release of the donor lists of these organizations to the public.

The IRS provided to the Subcommittee a document showing that all Tea Party applications submitted from February 2010 to June 2012, experienced delays in processing, were

---

[1176] TIGTA Report, at 10.
[1177] Id.
[1178] *See* Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).
[1179] TIGTA Report, at 18.
[1180] Id..
[1181] Id.
[1182] Id.
[1183] Id. at 18, fn. 43.
[1184] http://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations-Returns-and-Applications:-Public-Disclosure-Requirements-in-General. *See also*, http://www.irs.gov/Charities-&-Non-Profits/Public-Disclosure-and-Availability-of-Exempt-Organizations-Returns-and-Applications:-Documents-Subject-to-Public-Disclosure (describing the tax exempt application as including all supporting documents and any letter issued by the IRS.).
[1185] TIGTA Report, at 18. According to the IRS, the requirement to disclose all information used to approve a tax-exempt organization's application has changed. The new, current position is that the IRS has discretion to withhold sensitive information such as donor lists or social security numbers.

placed on the special Advocacy Case List for further scrutiny, and forced to linger in limbo.[1186] By contrast, 24 applications with the word "Progressive" or "Progress" were filed with the IRS during the same time period, but only seven of those were added to the advocacy listing.[1187]

In September 2013, *USA Today* published the 2011 list of applications that IRS employees sent to advocacy specialists for additional scrutiny.[1188] The *USA Today* analysis determined that beginning in March 2010, the IRS failed to approve any organizations with "Tea Party" in their name for 27 months.[1189] Left-leaning groups, however, continued to gain tax-exempt status approvals during that time.[1190]

According to the Majority staff report's analysis of the *USA Today* list, 11 of the 162 organizations listed are likely liberal groups.[1191] This fact is cited to suggest that liberal groups were also treated poorly by the IRS and thus no political bias could have occurred. However, even if 11 liberal groups were included on the list published by *USA Today*, it would still fail to show equal treatment by the IRS of conservative groups and liberal organizations. This is clearly shown by comparing the *USA Today* document to the tax news website, Tax Analysts, report of the 170 cases approved by the IRS between 2010 and 2013.[1192] This analysis showed that all of the liberal groups listed by the Majority were ultimately approved by the IRS for tax-exempt status. Further, that the number of "likely" liberal groups on the list represents just slightly more than 6 percent of the listed organizations only serves to further underline the disparate impact of the targeting on conservative groups.

In addition to using inappropriate criteria to identify Tea Party cases for increased review, the IRS also subjected these groups to invasive, unnecessary, and irrelevant questions. In fact, some groups preferred to remove their applications from consideration rather than comply with the burdensome requests for additional facts.[1193] As has been detailed in the Ways and Means Committee analysis, 89 percent of the groups that were asked donor questions were "right leaning."[1194] One particularly inappropriate and invasive set of questions was directed to a pro-life group.[1195] That group was asked to "please explain [if]…activities, including the prayer meetings held outside of Planned Parenthood, are considered educational," as well as to explain the "activities at these prayer meetings" and to estimate the "percentage of time spent on prayer meetings as compared with other activities of the organization."[1196]

---

[1186] PSI-IRS-37-000004 - 014.
[1187] Id. Based on interviews with TIGTA staff, the Subcommittee has determined that of the seven applications with Progressive or Progress in their name, four cases had the word "Progress" in the name and 3 cases had the word "Progressive in the name."
[1188] http://www.usatoday.com/story/news/politics/2013/09/17/irs-tea-party-target-list-document/2827925/.
[1189] http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-progressive-groups/2158831/.
[1190] Id.
[1191] Majority Report, at 68.
[1192] *See* Martin A. Sullivan, News Analysis: Substantial Minority of Scrutinized Eos were Not Conservative, Tax Analysts (May 30, 2013).
[1193] http://www.newsmax.com/Newsfront/irs-targeting-tea-party/2014/02/06/id/551274/.
[1194] http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=350126.
[1195] https://news.yahoo.com/blogs/the-ticket/irs-conservative-group-2009-members-pray-193833144.html.
[1196] Id.

The treatment of Catherine Englebrecht, by multiple agencies in response to her founding a tax-exempt organization, represents a specific example of an individual being subjected to excess enforcement and targeting. According to a *Forbes* article, Ms. Engelbrecht has seen:

> "[t]he organization [she founded]has been questioned by the FBI on numerous occasions; she has had her personal tax returns audited by the IRS; and has also had her small manufacturing business tax returns audited by the IRS. In addition, her business has been subjected to two unscheduled audits by the U.S. Bureau of Alcohol, and Tobacco and Firearms (BATF) and has undergone another unscheduled business audit by the Occupational Safety and Health Administration (OSHA)."[1197]

In another example of IRS overreach, Ms. Lerner, head of the Exempt Organizations division, took it upon herself to review referrals sent to the IRS by non-profit watchdog group, Democracy 21. [1198] These referrals urged the IRS to examine a conservative group's 501(c)(4) status.[1199] After reviewing the Democracy 21 referral, she found that "the allegations in the documents [against the conservative group] were really damning, so [she] wondered why [the IRS] hadn't done something with the org."[1200]

---

[1197] http://www.forbes.com/sites/larrybell/2013/05/30/why-you-should-care-that-the-u-s-government-has-targeted-catherine-engelbrecht-and-her-organizations/.

[1198] Democracy 21 is a nonprofit organization and its stated mission seeks to "eliminate the undue influence of big money in American politics, prevent government corruption, empower citizens in the political process and ensure the integrity and fairness of government decisions and elections." *See* http://www.democracy21.org/our-mission/.

[1199] IRSR0000122549 - 551; *see also* Letter from Chairman Dave Camp to Attorney General Eric Holder, at 2-6 (4/9/2014).

[1200] IRSR0000122549 - 551 (The IRS has the ability to take referrals from outside groups and process them through its Referral Committee to determine if an IRS examination of a 501(c)(4) group is necessary. In the instance described, an organization was looked at by the referral committee twice, but the committee twice voted unanimously to not recommend the group for examination.).

**From:** Lerner Lois G
**Sent:** Friday, January 04, 2013 4:50 PM
**To:** Downing Nanette M
**Subject:** FW: Referral organization

I had a meeting today with an organization that was asking us to consider guidance on the c4 issue. To get ready for the meeting, I asked for every document that had sent in over the last several years because I knew they had sent in several referrals. I reviewed the information last night and thought the allegations in the documents were really damning, so wondered why we hadn't done something with the org. The first complaint came in 2010 and there were additional ones in 2011 and 2012.

I asked Tom Miller whether he recalled seeing referral committee notes on the referrals when he and Judy went down to look at the referrals. He looked them up, and as you can see below, the referral committee unanimously non-selected the case twice. I don't know where we go with this--as I've told you before--I don't think your guys get it and the way they look at these cases is going to bite us some day. 6103

6103

6103 Yet--twice we rejected the referrals for somewhat dubious reasons and never followed up once the 990s were filed.

1201

As the email shows, Lerner agreed with the Democracy 21 complaint and was agitated that the conservative group had not been denied or revoked 501(c)(4) status. An IRS referral committee specifically set up to decide on the need for referrals to the Examinations Unit of Exempt Organizations *unanimously* found, in two separate reviews, the allegations from Democracy 21 were not sufficient for referral.[1202] Nevertheless, despite acknowledging the committee's reviews, Ms. Lerner called for reexamination of the group in question. Ms. Lerner directly stepped in to seek additional scrutiny when the system designed to refer tax-exempt organizations for examination failed to reach the result she wanted. Ms. Lerner even went so far as to inform her senior advisor that "you should know that we are working on a denial of the application, which may solve the problem because we probably will say it isn't exempt."[1203] Ms. Lerner knew full well that a system was in place to handle referrals to the Examinations Unit. Instead of allowing the system to work, she made the decision to actively target a single group and push for additional scrutiny.[1204]

[1201] IRSR0000122549 - 551.
[1202] Id. at 550 ("…the referral committee unanimously non-selected the cases twice").
[1203] Id.
[1204] *See* Staff Report, Lois Lerner's Involvement in the IRS Targeting of Tax-Exempt Organizations, Committee on Oversight and Government Reform, page 10 (3/11/2014) (Lerner's testimony was necessary to understand the rationale for and extent of the IRS's practice of targeting certain tax-exempt groups for heightened scrutiny. By then, it was well known that Lerner had extensive knowledge of the scheme to target conservative groups.).

National Public Radio (NPR), on July 30, 2014, published a House Committee on Ways and Means study detailing the disparity in the number of questions posed to conservative applicants for tax exempt status versus the number posed to progressive organizations.[1205] What the House Committee found perfectly highlights the disparate impact that the IRS targeting had on conservative organizations. The analysis determined conservative groups were asked 1,552 questions, an average of 14.9 questions per group. Meanwhile, the seven progressive groups were asked a mere 33 questions in total or 4.7 per group.[1206] This means that conservative groups were asked on average more than three times the number of questions posed to progressive organizations. This tremendous discrepancy in the number of question posed to conservative and progressive groups emphasizes the difference in treatment that liberal and conservative groups' received at the hands of the IRS.

[1205] http://www.npr.org/blogs/itsallpolitics/2013/07/30/207080580/report-irs-scrutiny-worse-for-conservatives; *see also* http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=344485.
[1206] Id.

## III. TIGTA AUDIT

### A. Scope of the Audit

The Subcommittee Majority staff report raises concern that the scope of the TIGTA audit was inadequate. The Majority report asserts that the audit should have been broadened to include additional information, especially information related to the purported targeting of liberal groups.[1207] Based on its review, the Subcommittee Minority finds that the scope of the audit adequately covered the relevant material and the TIGTA findings are valid. The IRS raised no objection to the underlying scope of the audit,[1208] including accepting seven of the nine recommendations TIGTA made.[1209] Additionally, the audit followed standard auditing principles[1210] and all members of the TIGTA audit team have stood by the accuracy of its findings.[1211]

TIGTA initiated the IRS targeting audit for three reasons: (1) concerns articulated by members of Congress and the House Committee on Oversight and Government Reform (OGR);[1212] (2) media reports alleging unfair treatment of certain organizations applying for tax-exempt status;[1213] and (3) receipt of a letter from the Landmark Legal Foundation requesting an investigation to determine whether IRS employees acted inappropriately in their assessment of applications applying for tax-exempt status.[1214]

---

[1207] Majority Report, at 185 ("By excluding information about how the IRS handled 501(c)(4) applications filed by liberal groups, the TIGTA audit report presented a distorted analysis of how the IRS processed 501(c)(4) applications.").

[1208] The IRS reviewed three drafts of the TIGTA report and never once raised the issue of scope. Additionally, the Subcommittee interviewed multiple witnesses from both the IRS and TIGTA and they all stated they did not have a problem with the audit's scope. *See* Subcommittee interview of Troy Paterson, TIGTA (3/21/2014), Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

[1209] TIGTA Report, Highlights page; Note: In May 2013, President Obama directed Treasury SecretaryJack Lew to make sure the IRS carried out all of TIGTA's recommendations. *See* http://www.whitehouse.gov/the-press-office/2013/05/14/statement-president.

[1210] Government auditing standards "require that [TIGTA] plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on [their] audit objective." *See* TIGTA Report, at 4.

[1211] Subcommittee interview of Troy Paterson, TIGTA (3/21/ 2014); Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014); Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

[1212] PSI-TIGTA-03-001404: Letter from House Committee on Oversight and Government Reform to J. Russell George, Treasury Inspector General for Tax Administration (6/28/2012) ("On March 8, 2012, Committee staff and [TIGTA] staff discussed potential problems with IRS's recent effort to increase scrutiny of organizations operating under 501(c)(4) status. We understand that…TIGTA is conducting ongoing work to better understand this IRS initiative. We would greatly appreciate if you provided Committee staff periodic updates and a copy of TIGTA's final report on this matter.").

[1213] Written testimony of J. Russell George for The House Committee on Ways and Means (May 17, 2013), The House Committee on Oversight and Government Reform (5/22/2013), and The House Appropriations Subcommittee on Financial Services and General Government (6/3/2013), at 3; TIGTA Report, at 3; *See e.g.* Pat Holmes, *Agency Questions Tea Party group calls IRS intrusive'*, The Columbus Dispatch (2/16/2012) http://www.dispatch.com/content/stories/local/2012/02/16/tea-party-group-calls-irs-intrusive.html.

[1214] Letter from Landmark Legal Foundation to TIGTA, (3/23/2012) http://www.landmarklegal.org/uploads/IRS%20IG%20Letter%20without%20attachments.pdf (The Landmark letter

The scope of the audit focused on the internal controls the IRS used to review applications from organizations "potentially involved in political campaign intervention."[1215] With this focus in mind, the auditors requested all information from the IRS relating to the matter.[1216] Russell George, Inspector General for TIGTA, stated in his testimony to multiple Congressional Committees, "[w]e focused our efforts on reviewing the processing of applications for tax exempt status and determining whether allegations made against the IRS were founded."[1217] TIGTA did not, as it has been suggested, look only at how "Tea Party" cases were treated.[1218] In actuality, TIGTA looked at the entire group of cases the IRS selected for special review from the Emerging Issues tab and put on the Advocacy Case List.

The audit specifically focused on the IRS's own criteria, which it directed TIGTA to use, that singled out "Tea Party," "9/12," and "Patriot" groups for special scrutiny.[1219] TIGTA reviewed both open[1220] and closed[1221] cases from the period of May 2010 through May 2012. TIGTA did so because this was the time period in which the IRS developed and implemented the "inappropriate criteria," which "focused narrowly on the names and policy position of organizations."[1222] The criteria were modified from July 2011 to January 2012 and again in May 2012 to look at an organization's political activities and not their names or policy positions.[1223]

While the Subcommittee Majority staff report criticized TIGTA for only evaluating the "Emerging Issues" tab on the BOLO spreadsheet and not the other tabs such as "Watch List" or "TAG Historical,"[1224] the Subcommittee Minority has found that TIGTA's actions were appropriate. Auditors reviewed the "Emerging Issues" tab on the BOLO spreadsheet because the IRS stated this was the only tab used to identify potential political cases for additional scrutiny.[1225] The Subcommittee Majority staff report points to an email from Lois Lerner to TIGTA officials, asserting that "the IRS again brought its treatment of liberal groups to the

---

also requested TIGTA look into whether IRS employees acted at the command of "politically motivated superiors.").

[1215] TIGTA Report, at 22.

[1216] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014); Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

[1217] Written testimony of J. Russell George for The House Committee on Ways and Means (May 17, 2013), The House Committee on Oversight and Government Reform (5/22/2013), and The House Committee on Appropriations Subcommittee on Financial Services and General Government (6/3/2013), at 3.

[1218] Letter from J. Russell George, Treasury Inspector General for Tax Administration to Rep. Sander Levin (6/26/2013).

[1219] Subcommittee interview of Russell George, TIGTA (4/22/ 2014); Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

[1220] "Open cases" refer to cases in which their tax exempt status had not yet been determined.

[1221] "Closed cases" refer to cases in which their tax exempt status had been determined.

[1222] TIGTA Report, at 6-7 and 22; Written testimony of J. Russell George for The House Committee on Ways and Means (5/17/2013), The House Committee on Oversight and Government Reform (5/22/2013), and The House Committee on Appropriations Subcommittee on Financial Services and General Government (6/3/2013), at 4-5.

[1223] Id. In January 2012, the criteria was altered to again focus on organizations policy positions and remained in place until May 2012. *See* TIGTA Report, at 7.

[1224] Majority Report, at 185.

[1225] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014); Subcommittee interview of Mike McCarthy, TIGTA (4/30/2014).

attention of senior TIGTA personnel."[1226] The email, however, shows that Ms. Lerner did not feel that there is any political motivation and shows her misunderstanding of the purpose of the audit. In addition, the Majority conflates being on the BOLO list with being selected for additional scrutiny.[1227] The BOLO list itself does not signal any additional attention paid to a particular group.

The Lerner email referenced also shows that Ms. Lerner *believed* TIGTA's audit related to the question whether the IRS was politically motivated, and that was her focus. TIGTA auditors attempted to persuade her that the audit was about whether certain groups were *targeted* by the IRS. Ms. Lerner ignored this and instilled her own view of the audit's purpose into the conversation when the auditors explicitly stated they were not attempting to determine if groups were liberal or conservative.

The Subcommittee Majority staff report indicates that the TIGTA audit was done solely at the behest of the House Oversight and Government Reform Committee to look into whether the IRS was specifically targeting "Tea Party" groups.[1228] That allegation is unfounded. Staffers from OGR met in early 2012 with TIGTA to discuss concerns raised by constituent "Tea Party" groups.[1229] Around the same time, the media aired multiple reports regarding the same issue.[1230] TIGTA then completed its standard preliminary review to determine the need for an audit and concluded it would begin a full audit into the IRS's handling of political cases.[1231] During interviews with Subcommittee staff, every TIGTA employee stated that at no time was the audit done for, or at the directive of, OGR Chairman Issa, nor did he or his staff influence the audit

---

[1226] Majority Report, at 162 (quoting Ms. Lerner's email "I told them my understanding is that the audit was to determine whether the IRS was acting in a politically motivated manner – not whether the earlier articulation of the criteria looked bad. However, that doesn't seem to be the focus. They have said they aren't looking at whether the organizations are conservative or liberal because that is too difficult to figure out. They have also acknowledged that there are both conservative and liberal organizations on the list of advocacy cases. So, I'm not sure how they are looking at whether we were politically motivated, or what they are looking for with regard to targeting. They didn't seem to understand the difference between IRS acting in a politically motivated manner and front line staff people using less than stellar judgment.").

[1227] Majority Report, at 185-186.

[1228] Id. at 5 ("TIGTA's Office of Audit undertook the audit at the request of the House of Representatives Committee on Oversight and Government Reform.").

[1229] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014); Subcommittee interview of Russell George, TIGTA (4/22/2014).

[1230] Republican Senators expressed concern that the IRS targeted conservative groups. *See* Christopher Santarelli, *GOP Senators Call on IRS to Explain Tea Party Bullying*, The Blaze (3/14/2012) http://www.theblaze.com/stories/2012/03/14/gop-senators-call-on-irs-to-explain-tea-party-treatment/; Mike Zapler, *GOP senators to IRS: Don't pick on Tea Party groups*, Politico (3/14/2012) http://www.politico.com/blogs/on-congress/2012/03/gop-senators-to-irs-dont-pick-on-tea-party-groups-117460.html. Tea party and other conservative groups claim the IRS is preventing them from gaining tax-exempt status. *See* Alan Fram, *IRS Battling Tea Party Groups Over Tax-Exempt Status*, The Huffington Post (3/1/2012) http://www.huffingtonpost.com/2012/03/01/irs-tea-party-tax-exempt_n_1314488.html; Perry Chiaramonte, *Numerous Tea Party chapters claim IRS attempts to sabotage nonprofit status*, Fox News (2/28/2012) http://www.foxnews.com/politics/2012/02/28/numerous-tea-party-chapters-claim-irs-attempting-to-sabotage-non-profit-status/. IRS sends Tea Party groups extensive questionnaires. *See* Janie Lorber, *IRS Oversight Reignites Tea Party Ire*, Roll Call (3/8/2012) http://www.rollcall.com/issues/57_106/IRS-Oversight-Reignites-Tea-Party-Ire-212969-1.html; David Martosko, *Congressional investigations sought over IRS 'assault' on Tea Party groups*, The Daily Caller (2/22/2012) http://dailycaller.com/2012/02/22/congressional-investigations-sought-over-irs-assault-on-tea-party-groups/.

[1231] Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).

process. During his interview, the Audit Director, Troy Paterson consistently rejected the idea that TIGTA's audit narrowly focused on processing of Tea Party groups.[1232] Instead, Mr. Paterson stated that TIGTA's audit looked at the full history of the Tea Party/Advocacy Organization case listing.[1233] At no point during the audit process did TIGTA brief any congressional members or staffers as to the progress of the audit, including those staffers with the Oversight Committee.[1234]

Multiple TIGTA officials confirmed the audit was completed and only released earlier than planned due to Lois Lerner's statement and apology at an American Bar Association conference on May 10, 2013.[1235] It was *not* due to pressure from OGR and Congressional Representatives.[1236] TIGTA has verified that the audit was complete and the report in the final editing stages for release in the next week or two.[1237] Moreover, prior to the report's release, TIGTA gave the IRS three opportunities to comment on the draft report to ensure its accuracy.[1238]

Careful analysis of the TIGTA report proves that it properly found that the IRS's internal controls for processing political applications caused systematic delays and burdensome questioning of groups. The TIGTA audit was pursued based on standard procedures and completed at the time of its release.

### B. Office of Investigations Email Review

One primary contention in the Subcommittee Majority report is that TIGTA's Deputy Inspector General for Investigations Timothy Camus's findings and analysis from a limited email review should have been included in the audit report.[1239] The Majority report erroneously believes that including this information would have definitively shown no explicit directive existed and no political bias was present. TIGTA's Assistant Inspector General for Audit Gregory Kutz and Mr. Camus, however, both agreed that the email search only confirmed the findings in the report and did not add anything new.[1240]

During the audit of the IRS's controls and procedures for processing 501(c)(4) applications, TIGTA's Office of Investigations (OI) played a very minor role. In spite of this,

---

[1232] Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).
[1233] Id.
[1234] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).
[1235] Subcommittee interview of Troy Paterson, TIGTA (3/212014); Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).
[1236] Id.
[1237] Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014); Subcommittee interview of Troy Paterson, TIGTA (3/21/2014); Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).
[1238] Id.
[1239] *See* Majority Report at 158 ("it is difficult to understand why [the Office of Investigations review] was excluded from the report."). It has been suggested that Mr. Camus's statements are definitively conclusive that there was no political motivation in the selection of applications. The Subcommittee Minority cannot conclude the same as this was a very narrow review of a very few email accounts. Moreover, the Subcommittee Minority believes that if there were a political directive, it is unlikely that it would have been put in an email.
[1240] Subcommittee interview of Timothy Camus, TIGTA (4/7/2014); Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).

the Subcommittee Majority report relies heavily on the Office of Investigation's supposed email search findings. Mr. Kutz stated in an interview with the Subcommittee that at some point during the audit process, an IRS employee told the auditors about an email that could be a "smoking gun" directive to target specific political organizations.[1241] Since the TIGTA auditors had previously requested all relevant emails from IRS employees and could not locate this particular email in the produced documents, Mr. Kutz was concerned his team was not receiving all relevant emails.[1242]

In an attempt to locate the possible "smoking gun" email, Mr. Kutz requested that Mr. Camus use OI's technical capabilities to perform a keyword search of relevant employee emails in order to locate this email.[1243] The request for assistance from the investigative division was necessary because auditors do not have the ability to retrieve emails not voluntarily provided to them by the IRS.[1244] After discussions between Inspector General George, Mr. Camus, and Mr. Kutz, OI pulled the emails from the actual IRS servers for five IRS employees and ran a keyword search to narrow the total number of documents and emails. The review pulled 2,277 emails or documents that had a keyword "hit". These pulled emails were then reviewed by a member of Mr. Camus's team.[1245] No email containing an explicit directive was found.[1246] After the review was completed, Mr. Camus detailed his findings and provided an analysis on the content of the emails.[1247] As mentioned above, Mr. Camus believed the email search results did not add anything new to the TIGTA report and did not require inclusion in the report.

One additional point of concern was the removal of a footnote in the draft report that referenced the referral to OI by the audit team.[1248] According to witness testimony, the footnote was removed at the request of Mr. Camus.[1249] He sought removal because this was not an official investigation request and, typically, it is inappropriate to disclose law enforcement practices.[1250] Overall, the email search that was conducted was a limited search of only four keywords and five IRS employee email accounts, none of which were employees in Washington, D.C.[1251] According to former TIGTA Chief Counsel, Michael McCarthy, the OI email search was not a "definitive statement," but instead was a very limited review to locate a purported

---

[1241] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014).
[1242] PSI-IRS-37-000002 - 003.
[1243] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014); Subcommittee interview of Timothy Camus, TIGTA (4/7/2014); Subcommittee interview of Russell George, TIGTA (4/22/2014).
[1244] Id.
[1245] PSI-TIGTA-04-000015 (TIGTA Office of Investigations Email Review results).
[1246] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014); Subcommittee interview of Timothy Camus, TIGTA (4/7/2014); Subcommittee interview of Russell George, TIGTA (4/22/2014).
[1247] PSI-IRS-37-000001.
[1248] IRSR0000014719 - 769 (Draft TIGTA Report, at 6 n. 15).
[1249] Subcommittee interview of Timothy Camus, TIGTA (4/7/2014).
[1250] Subcommittee interview of Gregory Kutz, TIGTA (3/26/2014); Subcommittee interview of Timothy Camus, TIGTA (4/7/2014); Subcommittee interview of Russell George, TIGTA (4/222014); Subcommittee interview of Mike McCarthy, TIGTA (4/30/2014).
[1251] The OI email review searched the email account of five IRS employees located in the Exempt Organizations Determinations Unit in Cincinnati. The search looked for the keywords: "Tea," "Patriots," "9/12," and "(c)(4)." The email review searched a total 16,691 emails, resulting in 5,617 total "hits" found in 2,277 emails/documents. Jim Jackson reviewed the 2,277 emails to look for a directive to target conservative groups. *See* OI Email Review results PSI-TIGTA-04-000015.

document.[1252] This limited search, combined with recent news of the loss of Lois Lerner's emails from 2009 to 2011 and the loss of six other IRS employee's hard drives, further underscores the inability to conclude no political bias was involved in the IRS's targeting of conservative groups.[1253]

### C. Advocacy Case List

According to the Majority report, "TIGTA failed to analyze IRS treatment of any non-conservative cases."[1254] This assertion is misleading for a number of reasons. During the audit, TIGTA requested the IRS provide all applications for 501(c)(4) tax-exempt status that the IRS sent off for additional scrutiny for the period in which the improper criteria were in place. In response, the IRS provided TIGTA the list of all "potential political cases" selected for heightened scrutiny from the period of May 2010 to May 2012.[1255] The 298 cases contained in the list, although referred to as "Advocacy Cases" by the time of the audit, had been referred to as "Tea Party Cases" until July 2011.[1256] Of these 298 cases, 72 included "Tea Party" in their name, 11 included "9/12" in their name, and 13 included "Patriots" in their name. The remaining 202 applications were listed as "other" and two applications were incomplete.[1257] The criteria that caused an application to be routed to an IRS specialists group for processing these applications related only to the "Emerging Issues" tab on the BOLO spreadsheet.[1258] Cases identified as using these criteria then went on to receive a heightened review by a team of specialists to determine whether or not the organization was engaged in "significant political campaign intervention."[1259]

TIGTA first reviewed the hard copy application for every case listed in the Advocacy Case List, a total of 298 applications. TIGTA categorized the 298 applications based on the exact same criteria used by the IRS.[1260] The IRS specifically stated that it looked for the names "Tea Party," "9/12," and "Patriots" to determine whether or not a case was "potentially political."[1261] The IRS did not explicitly use any other names to select applications for additional scrutiny.[1262] The IRS also used criteria related to an applicant's policy positions, including: "issues include government spending, government debt or taxes" and "statement in the case file

---

[1252] Subcommittee interview of Mike McCarthy, TIGTA (4/30/2014).
[1253] The OI email review searched the email account of five IRS employees located in the Exempt Organizations Determinations Unit in Cincinnati. The search looked for the keywords: "Tea," "Patriots," "9/12," and "(c)(4)." The email review searched a total 16,691 emails, resulting in 5,617 total "hits" found in 2,277 emails/documents. Jim Jackson reviewed the 2,277 emails to look for a directive to target conservative groups. *See* OI Email Review results PSI-TIGTA-04-000015; *See e.g.* Stephanie Condon, IRS Official Says Lois Lerner's Missing Emails May not be Lost, CBS News (7/22/2014) http://www.cbsnews.com/news/irs-official-says-lois-lerners-missing-emails-may-not-be-lost/
[1254] Majority Report, at 146.
[1255] TIGTA Report, at 10.
[1256] Id. at 5 n.13.
[1257] Id. at 8.
[1258] Id. at 6; Subcommittee interview of Thomas Seidell, TIGTA (3/19/2014).
[1259] TIGTA Report, at 5.
[1260] Subcommittee interviews of TIGTA employees.
[1261] Id.
[1262] Id.

criticize how the country is being run."[1263] After categorizing the cases using the specific names, TIGTA placed the remaining cases in the "other" category.[1264]

TIGTA did not identify, by name, the 202 "other" cases in the report for good reason.[1265] First, given the IRS criteria, TIGTA would have had to subjectively decide how to potentially list the 202 different names. It opted instead to objectively use only the IRS's own criteria. Second, 26 U.S.C. § 6103 prevents TIGTA from releasing individual taxpayer information. Thus any group with a name that, if released would violate Section 6103 protections, TIGTA would have had to redact or withhold.[1266] Third, it was too difficult to break the groups out by policy positions. During interviews with the Subcommittee, TIGTA auditors explained that the IRS revenue agents often failed to indicate why an application was forwarded to the Advocacy Case List.[1267] This made it difficult for TIGTA to objectively provide a further breakdown of the remaining 202 other applications.

The Subcommittee Majority staff report argues that TIGTA did not have the resources to complete a review of all 298 cases.[1268] That conclusion is inconsistent with the available facts. TIGTA was able to and did in fact review all 298 applications that were found on the Advocacy Case List. On top of reviewing the 298 cases, TIGTA reviewed an additional 331 cases to determine if the IRS failed to identify cases for additional review.[1269] Again, TIGTA reviewed the entire application for each of the 298 cases and discussed these cases with the IRS.

### D. Conclusion of TIGTA Section: Audit Was Accurate and Proper

TIGTA's audit was a focused review of whether "the IRS targeted specific groups applying for tax-exempt status, delayed the processing of targeted groups' applications, and requested unnecessary information from targeted groups."[1270] TIGTA's auditors looked at the IRS's processing of potential political cases to determine if IRS personnel improperly forwarded cases for review. The auditors found that the IRS used inappropriate criteria to select certain groups by using a group's name or policy position. In doing so, the IRS improperly forwarded their applications for review. Simply stated, the IRS treated these conservative and Tea Party groups differently from other non-conservative groups.

The Subcommittee Majority report draws a false equivalency. The Majority report alleges that had TIGTA looked into the IRS's treatment of liberal groups, TIGTA would have

---

[1263] TIGTA Report, at 6, figure 3. *See also*, IRSR0000002737 (Lois Lerner Briefing Document (June 2011)).
[1264] Subcommittee interviews of TIGTA employees.
[1265] *See* TIGTA Report, at 8.
[1266] *A Review of Criteria Used by the IRS to Identify 501(c)(4) Applications for Greater Scrutiny: Hearing before the S. Comm. on Finance*, 113th Cong. 26-27 (2013) (statement of J. Russell George, Treasury Inspector General for Tax Administration and statement of Steven Miller, Acting Commissioner, Internal Revenue Service); Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).
[1267] Subcommittee interviews of TIGTA employees.
[1268] Majority Report, at 143 (The Subcommittee Majority staff report states that "Mr. Paterson told the Subcommittee that TIGTA concentrated on the cases that were flagged using what looked to be inappropriate selection criteria, and didn't have the resources to analyze the other 200 cases.").
[1269] *See* TIGTA Report at 9, 22-23 (The auditors created two statistical samples to review open or closed 501(c)(4) applications from the general inventory of cases the IRS received).
[1270] TIGTA Report, Highlights page.

found that liberal groups were treated the same or similarly as conservative groups. The evidence, however, points to the contrary.[1271] Only conservative groups were inappropriately selected for additional scrutiny solely by their name or policy positions. A selection that often occurred irrespective of the activities listed in the group's application. Finally, the ratio of conservative groups to liberal groups selected for scrutiny, plus the absence of complaints by liberal groups to TIGTA and elected officials, demonstrates that these groups were not targeted *en masse* or treated unfairly.[1272]

Overall, Subcommittee staff interviewed eight people from TIGTA regarding the audit and reviewed 20,000 pages of documents produced by TIGTA. It is clear that the TIGTA audit was unbiased, proper and, most importantly, accurate. The audit in this case has withstood all of the criticisms to remain an accurate depiction of the faulty processes used by the IRS.

[1271] *See e.g.*, Letter from J. Russell George, Treasury Inspector General for Tax Administration to Rep. Sander Levin (6/26/2013) at 2-3 ("Progressive" was found in TAG Historical section of BOLO and no evidence was found that this section was used as selection criteria between May 2010 and May 2012).
[1272] Subcommittee interview of Russell George, TIGTA (4/22/2014); Subcommittee interview of Troy Paterson, TIGTA (3/21/2014).

## V. CONCLUSION OF SUBCOMMITTEE MINORITY STAFF REPORT

Based on the facts identified in the Subcommittee's investigation, the IRS used inappropriate criteria to target specific conservative groups for increased scrutiny and delay. While the Majority report attempts to draw similarities between the IRS's treatment of liberal and conservative groups, the vast distinctions in treatment prove that conservative groups received the bulk of unfair and burdensome treatment. The IRS failed to use its own "facts and circumstances" test, leading IRS employees to focus on a group's name or policy positions instead of the group's potential political activities. This significant bias created a disparate impact on conservative groups. As shown above, the numbers and analysis by TIGTA and others clearly demonstrate that TIGTA's conclusions were proper and the objections raised by numerous conservative groups valid. TIGTA's audit provided a prudent statistical analysis of the inappropriate treatment of conservative groups by the IRS.

###

**TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION**

# *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*

**May 14, 2013**

**Reference Number: 2013-10-053**

This report has cleared the Treasury Inspector General for Tax Administration disclosure review process and information determined to be restricted from public release has been redacted from this document.

**Redaction Legend**:
1 = Tax Return/Return Information

***Phone Number / 202-622-6500***
***E-mail Address / TIGTACommunications@tigta.treas.gov***
***Website / http://www.treasury.gov/tigta***

**HIGHLIGHTS**

**INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW**

# Highlights

**Final Report issued on May 14, 2013**

Highlights of Reference Number: 2013-10-053 to the Internal Revenue Service Acting Commissioner, Tax Exempt and Government Entities Division.

## IMPACT ON TAXPAYERS

Early in Calendar Year 2010, the IRS began using inappropriate criteria to identify organizations applying for tax-exempt status to review for indications of significant political campaign intervention. Although the IRS has taken some action, it will need to do more so that the public has reasonable assurance that applications are processed without unreasonable delay in a fair and impartial manner in the future.

## WHY TIGTA DID THE AUDIT

TIGTA initiated this audit based on concerns expressed by members of Congress. The overall objective of this audit was to determine whether allegations were founded that the IRS: 1) targeted specific groups applying for tax-exempt status, 2) delayed processing of targeted groups' applications, and 3) requested unnecessary information from targeted groups.

## WHAT TIGTA FOUND

The IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention. Ineffective management: 1) allowed inappropriate criteria to be developed and stay in place for more than 18 months, 2) resulted in substantial delays in processing certain applications, and 3) allowed unnecessary information requests to be issued.

Although the processing of some applications with potential significant political campaign intervention was started soon after receipt, no work was completed on the majority of these applications for 13 months. This was due to delays in receiving assistance from the Exempt Organizations function Headquarters office. For the 296 total political campaign intervention applications TIGTA reviewed as of December 17, 2012, 108 had been approved, 28 were withdrawn by the applicant, none had been denied, and 160 were open from 206 to 1,138 calendar days (some for more than three years and crossing two election cycles).

More than 20 months after the initial case was identified, processing the cases began in earnest. Many organizations received requests for additional information from the IRS that included unnecessary, burdensome questions (*e.g.*, lists of past and future donors). The IRS later informed some organizations that they did not need to provide previously requested information. IRS officials stated that any donor information received in response to a request from its Determinations Unit was later destroyed.

## WHAT TIGTA RECOMMENDED

TIGTA recommended that the IRS finalize the interim actions taken, better document the reasons why applications potentially involving political campaign intervention are chosen for review, develop a process to track requests for assistance, finalize and publish guidance, develop and provide training to employees before each election cycle, expeditiously resolve remaining political campaign intervention cases (some of which have been in process for three years), and request that social welfare activity guidance be developed by the Department of the Treasury.

In their response to the report, IRS officials agreed with seven of our nine recommendations and proposed alternative corrective actions for two of our recommendations. TIGTA does not agree that the alternative corrective actions will accomplish the intent of the recommendations and continues to believe that the IRS should better document the reasons why applications potentially involving political campaign intervention are chosen for review and finalize and publish guidance.

TREASURY INSPECTOR GENERAL
FOR TAX ADMINISTRATION

**DEPARTMENT OF THE TREASURY**
**WASHINGTON, D.C. 20220**

May 14, 2013

**MEMORANDUM FOR** ACTING COMMISSIONER, TAX EXEMPT AND GOVERNMENT ENTITIES DIVISION

**FROM:** Michael E. McKenney
Acting Deputy Inspector General for Audit

**SUBJECT:** Final Audit Report – Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review (Audit # 201210022)

This report presents the results of our review to determine whether allegations were founded that the Internal Revenue Service (IRS): 1) targeted specific groups applying for tax-exempt status, 2) delayed processing of targeted groups' applications for tax-exempt status, and 3) requested unnecessary information from targeted groups. This audit was initiated based on concerns expressed by members of Congress and reported in the media regarding the IRS's treatment of organizations applying for tax-exempt status. This review is included in our Fiscal Year 2013 Annual Audit Plan and addresses the major management challenge of Tax Compliance Initiatives.

We would like to clarify a few issues based on the IRS response to our report. The response states that our report views approvals as evidence that the Exempt Organizations function should not have looked closely at those applications. We disagree with this statement. Our objection was to the criteria used to identify these applications for review. We believe all applications should be reviewed prior to approval to determine whether tax-exempt status should be granted. The IRS's response also states that issues discussed in the report have been resolved. We disagree with this statement as well. Nine recommendations were made to correct concerns we raised in the report, and corrective actions have not been fully implemented. Further, as our report notes, a substantial number of applications have been under review, some for more than three years and through two election cycles, and remain open. Until these cases are closed by the IRS and our recommendations are fully implemented, we do not consider the concerns in this report to be resolved. Management's complete response to the draft report is included as Appendix VIII.

Copies of this report are also being sent to the IRS managers affected by the report recommendations. If you have any questions, please contact me or Gregory D. Kutz, Assistant Inspector General for Audit (Management Services and Exempt Organizations).

## Table of Contents

**Background** ..... Page 1

**Results of Review** ..... Page 5

The Determinations Unit Used Inappropriate Criteria to Identify Potential Political Cases ..... Page 5

Recommendation 1: ..... Page 10

Recommendations 2 and 3: ..... Page 11

Potential Political Cases Experienced Significant Processing Delays ..... Page 11

Recommendations 4 and 5: ..... Page 16

Recommendations 6 through 8: ..... Page 17

The Determinations Unit Requested Unnecessary Information for Many Potential Political Cases ..... Page 18

Recommendation 9: ..... Page 21

**Appendices**

Appendix I – Detailed Objective, Scope, and Methodology ..... Page 22

Appendix II – Major Contributors to This Report ..... Page 25

Appendix III – Report Distribution List ..... Page 26

Appendix IV – Outcome Measures ..... Page 27

Appendix V – High-Level Organizational Chart of Offices Referenced in This Report ..... Page 29

Appendix VI – Timeline of Written Criteria for Identifying Potential Political Cases ..... Page 30

Appendix VII – Comprehensive Timeline of Events ..... Page 31

Appendix VIII – Management's Response to the Draft Report ..... Page 44

## Abbreviations

| | |
|---|---|
| BOLO | Be On the Look Out |
| EO | Exempt Organizations |
| I.R.C. | Internal Revenue Code |
| IRS | Internal Revenue Service |

## Background

Organizations, such as charities, seeking Federal tax exemption are required to file an application with the Internal Revenue Service (IRS). Other organizations, such as social welfare organizations, may file an application but are not required to do so. The IRS's Exempt Organizations (EO) function, Rulings and Agreements office, which is headquartered in Washington, D.C., is responsible for processing applications for tax exemption. Within the Rulings and Agreements office, the Determinations Unit in Cincinnati, Ohio, is responsible for reviewing applications as they are received to determine whether the organization qualifies for tax-exempt status.

In Fiscal Year 2012,[1] 70 percent of all closed applications for tax-exempt status were approved during an initial review with little or no additional information from the organizations. If substantial additional information is needed, the application is placed in unassigned inventory until it can be assigned to a specialist in the Determinations Unit for further processing. The specialist develops a letter(s) requesting the additional information and issues it to the organization. Once the specialist receives all the necessary information to determine whether an organization should be afforded tax-exempt status, a final determination letter is issued to the organization either approving or denying the request for tax-exempt status.

If the Determinations Unit needs technical assistance processing applications, it may call upon the Technical Unit in the Rulings and Agreements office in Washington, D.C.[2] The IRS's goal for processing all types of applications for tax-exempt status was 121 days in Fiscal Year 2012; however, some cases may take substantially longer. For example, the EO function states in its *Fiscal Year 2013 Work Plan* that applications requiring additional information are not assigned for review until an average of five months after they are received.

Most organizations requesting tax-exempt status must submit either a Form 1023, *Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*, or Form 1024, *Application for Recognition of Exemption Under Section 501(a)*, depending on the type of tax-exempt organization it desires to be. For example, a charitable organization would request exemption under Internal Revenue Code (I.R.C.) Section (§) 501(c)(3),[3] whereas a social welfare organization would request exemption under I.R.C. § 501(c)(4).[4]

---

[1] A 12-consecutive-month period ending on the last day of any month. The Federal Government's fiscal year begins on October 1 and ends on September 30.
[2] For a high-level organizational chart of offices referenced in this report, see Appendix V.
[3] I.R.C. § 501(c)(3) (2012).
[4] I.R.C. § 501(c)(4) (2012).

The I.R.C. section and subsection an organization is granted tax exemption under affects the activities it may undertake. For example, I.R.C. § 501(c)(3) charitable organizations are prohibited from directly or indirectly participating in or intervening in any political campaign on behalf of or in opposition to any candidate for public office (hereafter referred to as political campaign intervention).[5] However, I.R.C. § 501(c)(4) social welfare organizations, I.R.C. § 501(c)(5)[6] agricultural and labor organizations, and I.R.C. § 501(c)(6)[7] business leagues may engage in limited political campaign intervention. Figure 1 highlights certain characteristics of common types of tax-exempt organizations.

***Figure 1: Characteristics of Certain Common Types of Tax-Exempt Organizations***

| Characteristic | I.R.C. § 501(c)(3) | I.R.C. §§ 501(c)(4), (c)(5), and (c)(6) |
|---|---|---|
| May receive tax deductible charitable contributions. | Yes | No |
| May engage in political campaign intervention. | No | Limited (must not constitute primary activity of organization) |
| Must publicly disclose the identity of its donors. | No | No |
| May engage in lobbying[8] (*i.e.*, legislative activity). | Limited (must not be substantial) | Yes (unlimited amount if in furtherance of tax-exempt purposes) |
| May engage in general advocacy[9] not related to legislation or the election of candidates. | Yes (permitted as an educational activity) | Yes (unlimited amount if in furtherance of tax-exempt purposes) |
| Must apply with the IRS. | Yes | No |

*Source: Draft Advocacy Guide Sheet and Internal Revenue Manual.*

[5] Political campaign intervention is the term used in Treasury Regulations §§ 1.501(c)(3)-1, 1.501(c)(4)-1, 1.501(c)(5)-1, and 1.501(c)(6)-1.
[6] I.R.C. § 501(c)(5) (2012).
[7] I.R.C. § 501(c)(6) (2012).
[8] An organization engages in lobbying, or legislative activities, when it attempts to influence specific legislation by directly contacting members of a legislative body (Federal, State, or local) or encouraging the public to contact those members regarding that legislation. An organization also engages in lobbying when it encourages the public to take a position on a referendum. Lobbying is distinguished from political campaign intervention because lobbying does not involve attempts to influence the election of candidates for public office.
[9] An organization engages in general advocacy when it attempts to 1) influence public opinion on issues germane to the organization's tax-exempt purposes, 2) influence nonlegislative governing bodies (*e.g.*, the executive branch or regulatory agencies), or 3) encourage voter participation through "get out the vote" drives, voter guides, and candidate debates in a nonpartisan, neutral manner. General advocacy basically includes all types of advocacy other than political campaign intervention and lobbying.

During the 2012 election cycle, the activities of tax-exempt organizations received media coverage concerning the amount of money spent on influencing elections. According to the Center for Responsive Politics, tax-exempt groups, such as I.R.C. § 501(c)(4), I.R.C. § 501(c)(5), and I.R.C. § 501(c)(6) organizations, spent $133 million in Calendar Year 2010 on Federal candidate-oriented expenditures. In Calendar Year 2012, this figure increased to $315 million.[10] In addition, as shown in Figure 2, the number of applications for tax-exempt status has increased over the past four fiscal years.[11]

***Figure 2: Number of Applications for I.R.C. §§ 501(c)(3)–(6) Tax-Exempt Status Received by the IRS***

| Fiscal Year | I.R.C. Subsection | | | |
|---|---|---|---|---|
| | 501(c)(3) | 501(c)(4) | 501(c)(5) | 501(c)(6) |
| 2009 | 65,179 | 1,751 | 543 | 1,828 |
| 2010 | 59,486 | 1,735 | 290 | 1,637 |
| 2011 | 58,712 | 2,265 | 409 | 1,836 |
| 2012 | 66,543 | 3,357 | 1,081 | 2,338 |

*Source: These data were provided by the EO function as background and were not validated for accuracy or reliability.*

During the 2012 election cycle, some members of Congress raised concerns to the IRS about selective enforcement and the duty to treat similarly situated organizations consistently. In addition, several organizations applying for I.R.C. § 501(c)(4) tax-exempt status made allegations that the IRS 1) targeted specific groups applying for tax-exempt status, 2) delayed the processing of targeted groups' applications for tax-exempt status, and 3) requested unnecessary information from targeted organizations. Lastly, several members of Congress requested that the IRS investigate whether existing social welfare organizations are improperly engaged in a substantial, or even predominant, amount of campaign activity.

***This audit focused on allegations that the IRS targeted specific groups applying for tax-exempt status, delayed the processing of targeted groups' applications, and requested unnecessary information from targeted organizations.***

We initiated this audit based on concerns expressed by Congress and reported in the media regarding the IRS's treatment of organizations applying for tax-exempt status. We focused our

[10] The Center for Responsive Politics obtained its information from the Federal Election Commission. We only included expenditures reported to the Federal Election Commission specifically for advocating the election or defeat of clearly identified Federal candidates.
[11] Some of this increase may be due to the reapplication of those organizations whose tax-exempt status was revoked as a result of not filing information returns for three consecutive years.

efforts on reviewing the processing of applications for tax-exempt status and determining whether allegations made against the IRS were founded.[12] Tax-exempt application case files were selected for review in June 2012 and were reviewed as provided by the EO function between July and November 2012. We did not review whether specific applications for tax-exempt status should be approved or denied.

This review was performed at the EO function Headquarters office in Washington, D.C., and the Determinations Unit in Cincinnati, Ohio, during the period June 2012 through February 2013. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. Detailed information on our audit objective, scope, and methodology is presented in Appendix I. Major contributors to the report are listed in Appendix II.

[12] A future audit is being considered to assess how the EO function monitors I.R.C. §§ 501(c)(4)–(6) organizations to ensure that political campaign intervention does not constitute their primary activity.

# Results of Review

## The Determinations Unit Used Inappropriate Criteria to Identify Potential Political Cases

The Determinations Unit developed and used inappropriate criteria to identify applications from organizations with the words Tea Party in their names. These applications (hereafter referred to as potential political cases)[13] were forwarded to a team of specialists[14] for review. Subsequently, the Determinations Unit expanded the criteria to inappropriately include organizations with other specific names (Patriots and 9/12) or policy positions. While the criteria used by the Determinations Unit specified particular organization names, the team of specialists was also processing applications from groups with names other than those identified in the criteria. The inappropriate and changing criteria may have led to inconsistent treatment of organizations applying for tax-exempt status. For example, we identified some organizations' applications with evidence of significant political campaign intervention that were not forwarded to the team of specialists for processing but should have been. We also identified applications that were forwarded to the team of specialists but did not have indications of significant political campaign intervention. All applications that were forwarded to the team of specialists experienced substantial delays in processing. Although the IRS has taken some action, it will need to do more so that the public has reasonable assurance that applications are processed without unreasonable delay in a fair and impartial manner in the future.

### Criteria for selecting applications inappropriately identified organizations based on their names and policy positions

The Determinations Unit developed and began using criteria to identify potential political cases for review that inappropriately identified specific groups applying for tax-exempt status based on their names or policy positions instead of developing criteria based on tax-exempt laws and Treasury Regulations.

**********1**********
**********1**********
*1***. According to media reports, some organizations were classified as I.R.C. § 501(c)(4) social welfare organizations but operated like political organizations. ********1**********

[13] Until July 2011, the Rulings and Agreements office referred to these cases as Tea Party cases. Afterwards, the EO function referred to these cases as advocacy cases.
[14] Initially, the team consisted of one specialist, but it was expanded to several specialists in December 2011. The EO function referred to this team as the advocacy team.

**********[redacted]**********. Soon thereafter, according to the IRS, a Determinations Unit specialist was asked to search for applications with Tea Party, Patriots, or 9/12 in the organization's name as well as other "political-sounding" names. EO function officials stated that, in May 2010, the Determinations Unit began developing a spreadsheet that would become known as the "Be On the Look Out" listing (hereafter referred to as the BOLO listing),[15] which included the emerging issue of Tea Party applications. In June 2010, the Determinations Unit began training its specialists on issues to be aware of, including Tea Party cases. By July 2010, Determinations Unit management stated that it had requested its specialists to be on the lookout for Tea Party applications.

In August 2010, the Determinations Unit distributed the first formal BOLO listing. The criteria in the BOLO listing were Tea Party organizations applying for I.R.C. § 501(c)(3) or I.R.C. § 501(c)(4) status. Based on our review of other BOLO listing criteria, the use of organization names on the BOLO listing is not unique to potential political cases.[16] EO function officials stated that Determinations Unit specialists interpreted the general criteria in the BOLO listing and developed expanded criteria for identifying potential political cases.[17] Figure 3 shows that, by June 2011, the expanded criteria included additional names (Patriots and 9/12 Project) as well as policy positions espoused by organizations in their applications.

***Figure 3: Criteria for Potential Political Cases (June 2011)***

| |
|---|
| "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" |
| Statement in the case file criticize how the country is being run |

*Source: EO function briefing dated June 2011.*

The mission of the IRS is to provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all. According to IRS Policy Statement 1-1, IRS employees accomplish this mission by being impartial and handling tax matters in a manner that will promote public confidence. However, the criteria developed by the Determinations Unit gives the appearance that the IRS is not impartial in conducting its mission. The criteria focused narrowly on the names and policy

[15] The BOLO listing includes a consolidated list of emerging issues the EO function identifies for dissemination to Determinations Unit specialists.
[16] We did not review the use of other named organizations on the BOLO listing to determine if their use was appropriate.
[17] During interviews with Determinations Unit specialists and managers, we could not specifically determine who had been involved in creating the criteria. EO function officials later clarified that the expanded criteria were a compilation of various Determinations Unit specialists' responses on how they were identifying Tea Party cases.

positions of organizations instead of tax-exempt laws and Treasury Regulations. Criteria for selecting applications for the team of specialists should focus on the activities of the organizations and whether they fulfill the requirements of the law. Using the names or policy positions of organizations is not an appropriate basis for identifying applications for review by the team of specialists.

We asked the Acting Commissioner, Tax Exempt and Government Entities Division; the Director, EO; and Determinations Unit personnel if the criteria were influenced by any individual or organization outside the IRS. All of these officials stated that the criteria were not influenced by any individual or organization outside the IRS. Instead, the Determinations Unit developed and implemented inappropriate criteria in part due to insufficient oversight provided by management. Specifically, only first-line management approved references to the Tea Party in the BOLO listing criteria before it was implemented. As a result, inappropriate criteria remained in place for more than 18 months. Determinations Unit employees also did not consider the public perception of using politically sensitive criteria when identifying these cases. Lastly, the criteria developed showed a lack of knowledge in the Determinations Unit of what activities are allowed by I.R.C. § 501(c)(3) and I.R.C. § 501(c)(4) organizations.

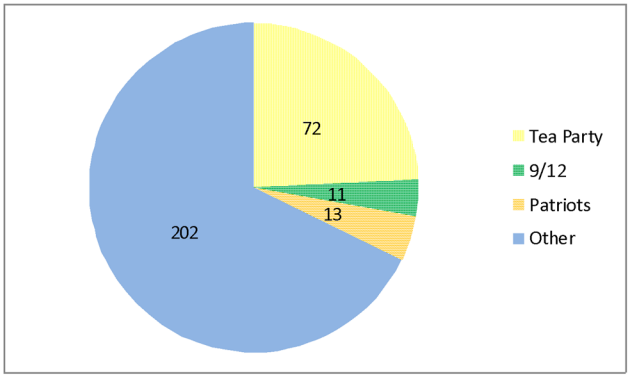
Determinations Unit employees stated that they considered the Tea Party criterion as a shorthand term for all potential political cases. Whether the inappropriate criterion was shorthand for all potential political cases or not, developing and using criteria that focuses on organization names and policy positions instead of the activities permitted under the Treasury Regulations does not promote public confidence that tax-exempt laws are being adhered to impartially. In addition, the applications for those organizations that were identified for processing by the team of specialists experienced significant delays and requests for unnecessary information that is detailed later in this report.

After being briefed on the expanded criteria in June 2011, the Director, EO, immediately directed that the criteria be changed. In July 2011, the criteria were changed to focus on the potential "political, lobbying, or [general] advocacy" activities of the organization. These criteria were an improvement over using organization names and policy positions. However, the team of specialists subsequently changed the criteria in January 2012 without executive approval because they believed the July 2011 criteria were too broad. The January 2012 criteria again focused on the policy positions of organizations instead of tax-exempt laws and Treasury Regulations. After three months, the Director, Rulings and Agreements, learned the criteria had been changed by the team of specialists and subsequently revised the criteria again in May 2012. (See Appendix VI for a complete timeline of criteria used to identify potential political cases). The May 2012 criteria more clearly focus on activities permitted under the Treasury Regulations. As a result of changes made to the criteria without management knowledge, the Director, Rulings and Agreements, issued a memorandum requiring all original entries and changes to criteria included on the BOLO listing be approved at the executive level prior to implementation.

### The team of specialists processed applications by organizations with names other than Tea Party, Patriots, and 9/12

To determine if organizations other than those specifically identified in the inappropriate criteria were processed by the team of specialists, we reviewed the names on all applications identified as potential political cases.[18] Figure 4 shows that approximately one-third of the applications identified for processing by the team of specialists included Tea Party, Patriots, or 9/12 in their names, while the remainder did not. According to the Director, Rulings and Agreements, the fact that the team of specialists worked applications that did not involve the Tea Party, Patriots, or 9/12 groups demonstrated that the IRS was not politically biased in its identification of applications for processing by the team of specialists.

**Figure 4: Breakdown of Potential Political Cases by Organization Name**




*Source: EO function Potential Political Case Tracking Sheet as of May 31, 2012.*

While the team of specialists reviewed applications from a variety of organizations, we determined during our reviews of statistical samples of I.R.C. § 501(c)(4) tax-exempt applications that all cases with Tea Party, Patriots, or 9/12 in their names were forwarded to the team of specialists.[19]

[18] We could not determine which potential political cases may have been identified based on an organization's policy positions.

[19] We determined this through two statistical samples of 338 (7.5 percent) from a universe of 4,510 I.R.C. § 501(c)(4) tax-exempt applications filed during May 2010 through May 2012 that were not forwarded to the team of specialists. See Appendix I for details on our sampling methodology.

## *Some applications with indications of significant political campaign intervention were not identified for review by the team of specialists*

In May 2012, the Director, Rulings and Agreements, approved the current criteria for identifying potential political cases. The criteria are "501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention…." To determine if all cases with indications of significant political campaign intervention were sent to the team of specialists, we reviewed two statistical samples of I.R.C. § 501(c)(4) applications.

- **Applications That the IRS Determined Required Minimal or No Additional Information for Processing** – We reviewed a statistical sample of 94 I.R.C. § 501(c)(4) cases closed from May 2010[20] through May 2012 from a universe of 2,051 applications that the IRS determined required minimal or no additional information from the organizations (also referred to by the EO function as merit closures). We determined that two (2 percent) of 94 approved applications had indications of significant political campaign intervention and should have been forwarded to the team of specialists.[21] Based on our statistical sample, we project an estimated 44 merit closure applications were not appropriately identified as potential political cases during this time period.[22]
- **Applications Identified by the IRS That Required Additional Information for Processing** – We reviewed a statistical sample of 244 I.R.C. § 501(c)(4) cases closed from May 2010 through May 2012 or open as of May 31, 2012, from a universe of 2,459 applications that the IRS determined required additional information from the organizations applying for tax-exempt status (also referred to by the EO function as full development applications) but were not forwarded to the team of specialists. For the applications that were available for our review, we found that 14 (6 percent)[23] of 237 applications[24] included indications of significant political campaign intervention and should have been processed by the team of specialists.[25] We project an estimated 141 full development applications were not appropriately identified as potential political cases during this time period.[26]

[20] May 2010 was chosen because it is the first date that we were informed that the Determinations Unit was using criteria which identified specific organizations by name.
[21] Neither of the two cases involved a Tea Party, Patriots, or 9/12 organization.
[22] See Appendix IV.
[23] None of the 14 cases involved a Tea Party, Patriots, or 9/12 organization.
[24] We could not analyze seven sampled application case files because of incomplete documentation in the case files (six applications) or the case file could not be located (one application). See Appendix IV.
[25] We determined that eight applications were appropriately forwarded to the team of specialists. Five of the eight application case files involved Tea Party, Patriots, or 9/12 organizations.
[26] See Appendix IV.

To determine if cases without indications of significant political campaign intervention were sent to the team of specialists, we reviewed all of the applications identified as potential political cases as of May 31, 2012.

- **Applications That the IRS Determined Should Be Processed by the Team of Specialists** – We reviewed all 298 applications that had been identified as potential political cases as of May 31, 2012. In the majority of cases, we agreed that the applications submitted included indications of significant political campaign intervention. However, we did not identify any indications of significant political campaign intervention for 91 (31 percent) of the 296 applications[27] that had complete documentation.[28]

  We discussed our results with EO function officials, who disagreed with our findings. Although EO function officials provided explanations about why the applications should have been identified as potential political cases, the case files did not include the specific reason(s) the applications were selected. EO function officials also stated that applications may not literally include statements indicating significant political campaign intervention.[29] According to EO function officials, organizations may not understand what constitutes political campaign intervention or may provide vague descriptions of certain activities that the EO function knows from past experience potentially involve political campaign intervention. In these cases, the EO function believes it is important to review the applications to ensure that political campaign intervention is not the organizations' primary activity. To provide further assurance that Determinations Unit employees are handling tax matters in an impartial manner, it would be helpful to document specifically why applications are chosen for further review.

## Recommendations

The Director, EO, should:

***Recommendation 1:*** Ensure that the memorandum requiring the Director, Rulings and Agreements, to approve all original entries and changes to criteria included on the BOLO listing prior to implementation be formalized in the appropriate Internal Revenue Manual.

> ***Management's Response:*** The IRS agreed with this recommendation and will ensure that the procedures set forth in the memorandum requiring the Director,

[27] We could not complete our review of two cases due to inadequate documentation in the case files. See Appendix IV.
[28] Seventeen (19 percent) of the 91 applications involved Tea Party, Patriots, or 9/12 organizations.
[29] It should also be noted that, in some cases, specialists obtained additional information after the application was received that indicated the organizations were involved in political campaign intervention which was not available in the initial application documentation we reviewed.

Rulings and Agreements, to approve in advance all original entries and changes to the BOLO listing are made part of the Internal Revenue Manual.

***Recommendation 2:*** Develop procedures to better document the reason(s) applications are chosen for review by the team of specialists (*e.g.*, evidence of specific political campaign intervention in the application file or specific reasons the EO function may have for choosing to review the application further based on past experience).

> ***Management's Response:*** The IRS proposed an alternative corrective action to our recommendation. The IRS stated it will review its screening procedures to determine whether, and to what extent, additional documentation can be implemented without having an adverse impact on the timeliness of case processing.
>
> ***Office of Audit Comment:*** We do not believe this alternative corrective action fully addresses the recommendation. Developing procedures to better document the reasons applications are chosen for further review would help ensure that applications are being handled in an impartial manner. In addition, as detailed in the next section of this report, the average time these applications have been open is 574 days as of December 17, 2012. We do not believe documenting a brief explanation about why applications are chosen for review would have an adverse impact on the timeliness of case processing.

***Recommendation 3:*** Develop training or workshops to be held before each election cycle including, but not limited to, the proper ways to identify applications that require review of political campaign intervention activities.

> ***Management's Response:*** The IRS agreed with this recommendation and will develop training on the topics described in Recommendations 3, 5, 6, and 9. Because election cycles are continuous, the IRS will develop a schedule which ensures that staff have the training as needed to handle potential political intervention matters.

## Potential Political Cases Experienced Significant Processing Delays

Organizations that applied for tax-exempt status and had their applications forwarded to the team of specialists experienced substantial delays. As of December 17, 2012, many organizations had not received an approval or denial letter for more than two years after they submitted their applications. Some cases have been open during two election cycles (2010 and 2012). The *IRS Strategic Plan 2009–2013* has several goals and objectives that involve timely interacting with taxpayers, including enforcement of the tax law in a timely manner while minimizing taxpayer burden. The EO function does not have specific timeliness goals for processing applications, such as potential political cases, that require significant follow-up with the

organizations.[30] The time it takes to process an application depends upon the facts and circumstances of the case.

Potential political cases took significantly longer than average to process due to ineffective management oversight. Once cases were initially identified for processing by the team of specialists, the Determinations Unit Program Manager requested assistance via e-mail from the Technical Unit to ensure consistency in processing the cases. However, EO function management did not ensure that there was a formal process in place for initiating, tracking, or monitoring requests for assistance. In addition, there were several changes in Rulings and Agreements management responsible for overseeing the fulfillment of requests for assistance from the Determinations Unit during this time period. This contributed to the lengthy delays in processing potential political cases. As a result, the Determinations Unit waited more than 20 months (February 2010 to November 2011) to receive draft written guidance from the Technical Unit for processing potential political cases.

As a result, the IRS delayed the issuance of letters to organizations approving their tax-exempt status. For I.R.C. § 501(c)(3) organizations, this means that potential donors and grantors could be reluctant to provide donations or grants.[31] In addition, some organizations withdrew their applications and others may not have begun conducting planned charitable or social welfare work. The delays may have also prevented some organizations from receiving certain benefits of the tax-exempt status. For example, if organizations are approved for tax-exempt status, they may receive exemption from certain State taxes and reduced postal rates. For organizations that may eventually be denied tax-exempt status but have been operating while their applications are pending, the organizations will be required to retroactively file income tax returns and may be liable to pay income taxes for, in some cases, more than two years.

To analyze the delays, we: 1) reviewed the events that led to delays in processing potential political cases, 2) compared the amount of time cases assigned to the team of specialists were open to applications that were not assigned to the team of specialists, and 3) determined if organizations were eligible to sue the IRS due to delays in processing certain applications.

### Potential political cases experienced long processing delays

The team of specialists stopped working on potential political cases from October 2010 through November 2011, resulting in a 13-month delay, while they waited for assistance from the Technical Unit. Figure 5 illustrates significant events and delays concerning potential political cases. For a comprehensive timeline of events related to potential political cases, see Appendix VII.

[30] The EO function, however, had an overall goal to process merit and full development tax-exempt applications in 121 days for Fiscal Year 2012.
[31] Of 298 cases reviewed, 89 were I.R.C. § 501(c)(3) organizations.

*Figure 5: Timeline of Events and Delays Involving the Processing of Potential Political Cases (*****1******* Through May 2012)*

| Date | Events and Delays |
|---|---|
| ******1****** | **********1**********. |
| April 2010 | The team of specialists is formed with one specialist who is assigned potential political cases and begins working on them with the assistance of a Technical Unit employee. |
| October 2010 | The team of specialists stops processing potential political cases while waiting for assistance from the Technical Unit. |
| July 2011 | The EO function decides to develop written guidance for the Determinations Unit to process the potential political cases. |
| November 2011 | Draft written guidance is provided to the Determinations Unit. |
| December 2011 | Additional specialists are added to the team of specialists. |
| January 2012 | Specialists begin issuing additional information request letters to organizations applying for tax-exempt status, requesting that the information be provided in two to three weeks. These time periods are standard response times given for any information request and are included in the Internal Revenue Manual. |
| February 2012 | Concerns are raised in the media regarding requests for significant amounts of information from organizations applying for tax-exempt status. The Director, EO, stops specialists from issuing any more letters requesting information. Instead, letters allowing extensions of 60 days to respond to previous additional information letters were developed and issued in March and April 2012. These letters also noted that applicants should contact the IRS if they needed longer than 60 days to respond. |
| May 2012 | A workshop is given to Determinations Unit specialists assigned to potential political cases. Afterwards, a review of all the open cases is completed to recommend whether additional processing is necessary or whether the cases can be closed (as of December 17, 2012, 160 applications were still being processed). |

*Source: Interviews of EO function employees and our review of EO function e-mails.*

Ineffective oversight by management led to significant delays in processing potential political cases. **********1**********. In April 2010, the Determinations Unit Program Manager requested via e-mail a contact in the Technical Unit to provide assistance with processing the applications. A Technical Unit specialist was assigned this task and began working with the team of specialists. The team of specialists stopped processing cases in October 2010 without closing any of the 40 cases that were begun. However, the Determinations Unit Program Manager thought the cases were being processed. Later, we were informed by the Director, Rulings and Agreements, that there was a miscommunication about processing the cases. The Determinations Unit waited for assistance from the Technical Unit instead of

continuing to process the cases. The Determinations Unit Program Manager requested status updates on the request for assistance several times via e-mail. Draft written guidance was not received from the Technical Unit until November 2011, 13 months after the Determinations Unit stopped processing the cases. As of the end of our audit work in February 2013, the guidance had not been finalized because the EO function decided to provide training instead.[32]

Many organizations waited much longer than 13 months for a decision, while others have yet to receive a decision from the IRS. For example, as of December 17, 2012, the IRS had been processing several potential political cases for more than 1,000 calendar days. Some of these organizations received requests for additional information in Calendar Year 2010 and then did not hear from the IRS again for more than a year while the Determinations Unit waited for assistance from the Technical Unit. For the 296 potential political cases we reviewed,[33] as of December 17, 2012, 108 applications had been approved, 28 were withdrawn by the applicant, none had been denied, and 160 cases were open from 206 to 1,138 calendar days (some crossing two election cycles).

In March 2012, the Deputy Commissioner, Services and Enforcement, asked the Senior Technical Advisor to the Acting Commissioner, Tax Exempt and Government Entities Division, to look into concerns raised by the media about delays in processing applications for tax-exempt status from Tea Party groups and the nature of the questions being asked related to the applications. In April 2012, the Senior Technical Advisor to the Acting Commissioner, Tax Exempt and Government Entities Division, along with a team of EO function Headquarters office employees, reviewed many of the potential political cases and determined that there appeared to be some confusion by Determinations Unit specialists and applicants on what activities are allowed by I.R.C. § 501(c)(4) organizations. We believe this could be due to the lack of specific guidance on how to determine the "primary activity" of an I.R.C. § 501(c)(4) organization. Treasury Regulations state that I.R.C. § 501(c)(4) organizations should have social welfare as their "primary activity"; however, the regulations do not define how to measure whether social welfare is an organization's "primary activity."

As a result of this confusion, the EO function Headquarters employees provided a two-day workshop to the team of specialists in May 2012 to train them on what activities are allowable by I.R.C. § 501(c)(4) organizations, including lobbying and political campaign intervention. After this workshop, potential political cases were independently reviewed by two people to determine what, if any, additional work needed to be completed prior to making a decision to approve or deny the applications for tax-exempt status. This review continued on any newly identified potential political cases. Prior to the hands-on training and independent reviews, the team of specialists had only approved six (2 percent) of 298 applications. After the hands-on training

[32] In response to the National Taxpayer Advocate's *2007 Annual Report to Congress*, the IRS commented that putting guide sheets for processing applications for tax-exempt status on its Internet site would result in fewer delays.

[33] **********1**********.

and independent reviews began, the Determinations Unit approved an additional 102 applications by December 2012.[34] In addition, it was decided that applications could be approved, but a referral for follow-up could be sent to another unit,[35] which could review the activities of an organization at a later date to determine if they were consistent with the organization's tax-exempt status.

### Potential political cases were open much longer than similar cases that were not identified for processing by the team of specialists

For Fiscal Year 2012, the average time it took the Determinations Unit to complete processing applications requiring additional information from organizations applying for tax-exempt status (also referred to by the EO function as full development cases) was 238 calendar days according to IRS data. In comparison, the average time a potential political case was open as of December 17, 2012, was 574 calendar days (with 158 potential political cases being open longer than the average calendar days it took to close other full development cases).[36] Figure 6 shows that more than 80 percent of the potential political cases have been open more than one year.

**Figure 6: Number of Calendar Days Potential Political Cases Were Open (as of December 17, 2012)**

| Total Cases | Number and Percentage[37] of Potential Political Cases Open by Calendar Day Range | | | | |
|---|---|---|---|---|---|
| | 0–120 Calendar Days | 121–180 Calendar Days | 181–270 Calendar Days | 271–365 Calendar Days | More Than 365 Calendar Days |
| 160 | 0 (0%) | 0 (0%) | 3 (2%) | 28 (18%) | 129 (81%) |

*Source: Our analysis of EO function documentation.*

[34] Of the 102 applications, 29 (28 percent) involved Tea Party, Patriots, or 9/12 organizations.
[35] The Review of Operations Unit completes compliance reviews on tax-exempt organizations to determine whether they are operating in accordance with their tax-exempt purposes and are current with their filing requirements. Unit personnel review information available on IRS systems, filed returns, applications for tax exemption, and the Internet to assess the organizations' operations and make recommendations for further actions.
[36] See Appendix IV.
[37] Percentages may not equal 100 percent due to rounding.

### *Some charitable organizations were eligible to sue the IRS for declaratory judgment due to the delays in processing applications*

The Determinations Unit did not always timely approve or deny the applications for I.R.C. § 501(c)(3) tax-exempt status for potential political cases. However, the tax law provides organizations with the ability to sue the IRS to force a decision on their applications if the IRS does not approve or deny their applications within 270 calendar days.[38]

As of May 31, 2012,[39] 32 (36 percent) of 89 I.R.C. § 501(c)(3) potential political cases were open more than 270 calendar days, and the organizations had responded timely to all requests for additional information, as required. As of the end of our fieldwork, none of these organizations had sued the IRS, even though they had the legal right. In another 38 open cases, organizations were timely in their responses to additional information requests, but the 270-calendar-day threshold had not been reached as of May 31, 2012. These 38 organizations may have the right to sue the IRS in the future if determinations are not made within the 270-calendar-day period.

## *Recommendations*

The Director, EO, should:

***Recommendation 4:*** Develop a process for the Determinations Unit to formally request assistance from the Technical Unit and the Guidance Unit.[40] The process should include actions to initiate, track, and monitor requests for assistance to ensure that requests are responded to timely.

> ***Management's Response:*** The IRS agreed with this recommendation and will develop a formal process for the Determination Unit to request assistance and to monitor such requests.

***Recommendation 5:*** Develop guidance for specialists on how to process requests for tax-exempt status involving potentially significant political campaign intervention. This guidance should also be posted to the Internet to provide transparency to organizations on the application process.

> ***Management's Response:*** The IRS proposed alternative corrective action to our recommendation. The IRS will develop training on the topics described in Recommendations 3, 5, 6, and 9. Because election cycles are continuous, the IRS

[38] Revenue Procedure 2012-09 provides further guidance on the implementation of this right.
[39] Tax-exempt application case files were selected for review in June 2012 based on a May 31, 2012, listing of applications being processed by the team of specialists.
[40] The Guidance Unit provides formal and informal guidance that explains how certain laws, such as regulations, revenue rulings, revenue procedures, notices, and announcements, may apply to exempt organizations.

noted that it will develop a schedule which ensures that staff have the training as needed to handle potential political intervention matters.

***Office of Audit Comment:*** We do not believe that this alternative corrective action fully addresses our recommendation. We believe that specific guidance should be developed and made available to specialists processing potential political cases. Making this guidance available on the Internet for organizations could also address a concern raised in the IRS's response that many applications appear to contain incomplete and inconsistent information.

***Recommendation 6:*** Develop training or workshops to be held before each election cycle including, but not limited to: a) what constitutes political campaign intervention versus general advocacy (including case examples) and b) the ability to refer for follow-up those organizations that may conduct activities in a future year which may cause them to lose their tax-exempt status.

***Management's Response:*** The IRS agreed with this recommendation and will develop training on the topics described in Recommendations 3, 5, 6, and 9. Because election cycles are continuous, the IRS reported that it will develop a schedule which ensures that staff have the training as needed to handle potential political intervention matters.

***Recommendation 7:*** Provide oversight to ensure that potential political cases, some of which have been in process for three years, are approved or denied expeditiously.

***Management's Response:*** The IRS agreed with this recommendation and stated that, while this is an ongoing project, it is closely overseeing the remaining open cases to ensure that it reaches determinations as expeditiously as possible.

The Acting Commissioner, Tax Exempt and Government Entities Division, should:

***Recommendation 8:*** Recommend to IRS Chief Counsel and the Department of the Treasury that guidance on how to measure the "primary activity" of I.R.C. § 501(c)(4) social welfare organizations be included for consideration in the Department of the Treasury Priority Guidance Plan.[41]

***Management's Response:*** The IRS agreed with this recommendation and will share this recommendation with the IRS Chief Counsel and the Department of Treasury's Office of Tax Policy.

[41] The Department of the Treasury issues a Priority Guidance Plan each year to identify and prioritize the tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance.

## *The Determinations Unit Requested Unnecessary Information for Many Potential Political Cases*

The Determinations Unit sent requests for information that we later (in whole or in part) determined to be unnecessary for 98 (58 percent) of 170 organizations that received additional information request letters.[42] According to the Internal Revenue Manual, these requests should be thorough, complete, and relevant. However, the Determinations Unit requested irrelevant (unnecessary) information because of a lack of managerial review, at all levels, of questions before they were sent to organizations seeking tax-exempt status. We also believe that Determinations Unit specialists lacked knowledge of what activities are allowed by I.R.C. § 501(c)(3) and I.R.C. § 501(c)(4) tax-exempt organizations. This created burden on the organizations that were required to gather and forward information that was not needed by the Determinations Unit and led to delays in processing the applications. These delays could result in potential donors and grantors being reluctant to provide donations or grants to organizations applying for I.R.C. § 501(c)(3) tax-exempt status. In addition, some organizations may not have begun conducting planned charitable or social welfare work.

After receiving draft guidance in November 2011, the team of specialists began sending requests for additional information in January 2012 to organizations that were applying for tax-exempt status. For some organizations, this was the second letter received from the IRS requesting additional information, the first of which had been received more than a year before this date. These letters requested that the information be provided in two or three weeks (as is customary in these letters) despite the fact that the IRS had done nothing with some of the applications for more than one year. After the letters were received, organizations seeking tax-exempt status, as well as members of Congress, expressed concerns about the type and extent of questions being asked. For example, the Determinations Unit requested donor information from 27 organizations[43] that it would be required to make public if the application was approved, even though this information could not be disclosed by the IRS when provided by organizations whose tax-exempt status had been approved. Figure 7 shows an example of requests sent to organizations applying for tax-exempt status regarding donors.

[42] See Appendix IV.
[43] Of the 27 organizations, 13 had Tea Party, Patriots, or 9/12 in their names.

*Figure 7: Example of Requests for Information Regarding Past and Future Donors in Letters Sent in January/February 2012*

> Provide the following information for the income you received and raised for the years from inception to the present. Also, provide the same information for the income you expect to receive and raise for 2012, 2013, and 2014.
>
> a. Donations, contributions, and grant income for each year, which includes the following information:
>
> 1. The names of the donors, contributors, and grantors. If the donor, contributor, or grantor has run or will run for a public office, identify the office. If not, please confirm by answering this question "No."
>
> 2. The amounts of each of the donations, contributions, and grants and the dates you received them.
>
> 3. How did you use these donations, contributions, and grants? Provide the details.
>
> If you did not receive or do not expect to receive any donation, contribution, and grant income, please confirm by answering "None received" and/or "None expected."

*Source: Application case files.*

After media attention, the Director, EO, stopped issuance of additional information request letters and provided an extension of time to respond to previously issued letters. The Deputy Commissioner for Services and Enforcement then asked the Senior Technical Advisor to the Acting Commissioner, Tax Exempt and Government Entities Division, to find out how applications were being processed and make recommendations. The Senior Technical Advisor and a team of specialists visited the Determinations Unit in Cincinnati, Ohio, and began reviewing cases. As part of this effort, EO function Headquarters office employees reviewed the additional information request letters prepared by the team of specialists and identified seven questions that they deemed unnecessary. Subsequently, the EO function instituted the practice that all additional information request letters for potential political cases be reviewed by the EO function Headquarters office before they are sent to organizations seeking tax-exempt status. In addition, EO function officials informed us that they decided to destroy all donor lists that were sent in for potential political cases that the IRS determined it should not have requested. Figure 8 lists the seven questions identified as being unnecessary.

*Figure 8: Seven Questions Identified As Unnecessary by the EO Function*

| Number | Question |
|---|---|
| 1 | Requests the names of donors. |
| 2 | Requests a list of all issues that are important to the organization and asks that the organization indicate its position regarding such issues. |
| 3 | Requests 1) the roles and activities of the audience and participants other than members in the activity and 2) the type of conversations and discussions members and participants had during the activity. |
| 4 | Asks whether the officer, director, *etc.*, has run or will run for public office. |
| 5 | Requests the political affiliation of the officer, director, speakers, candidates supported, *etc.*, or otherwise refers to the relationship with identified political party–related organizations. |
| 6 | Requests information regarding employment, other than for the organization, including hours worked. |
| 7 | Requests information regarding activities of another organization – not just the relationship of the other organization to the applicant. |

*Source: EO function review of additional information request letters.*

We reviewed case file information for all 170 organizations that received additional information request letters and determined that 98 (58 percent) had received requests for information that was later deemed unnecessary by the EO function. Of the 98 organizations:

- 15 were informed that they did not need to respond to previous requests for information and, instead, received a revised request for information.
- 12 either received a letter or a telephone call stating that their application was approved and they no longer needed to respond to information requests they had received from the IRS.

Figure 9 shows excerpts from the approval letter developed for organizations that did not need to respond to a previous additional information request letter.

***Figure 9: Excerpts From a Template Approval Letter, Which Includes a Statement That Previously Requested Information Is No Longer Needed***

**Dear Applicant:**

**We are pleased to inform you that upon review of your application for tax-exempt status we have determined that you are exempt from Federal income tax under section 501 (c) (4) of the Internal Revenue Code. Because this letter could help resolve any questions regarding your exempt status, you should keep it in your permanent records.**

**Please note that we have just completed another review of your request to be recognized as tax-exempt under section 501 (c) (4) of the Internal Revenue Codes. Based on that review, we concluded that we do not need the additional materials previously requested because your application and materials provide sufficient information.**

*Source: IRS template approval letter.*

## Recommendation

***Recommendation 9:*** The Director, EO, should develop training or workshops to be held before each election cycle including, but not limited to, how to word questions in additional information request letters and what additional information should be requested.

***Management's Response:*** The IRS agreed with this recommendation and will develop training on the topics described in Recommendations 3, 5, 6, and 9. Because election cycles are continuous, the IRS reported that it will develop a schedule which ensures that staff have the training as needed to handle potential political intervention matters.

## Appendix I

# *Detailed Objective, Scope, and Methodology*

The overall objective was to determine whether allegations were founded that the IRS: 1) targeted specific groups applying for tax-exempt status, 2) delayed processing targeted groups' applications for tax-exempt status, and 3) requested unnecessary information from targeted groups. To accomplish our objective, we:

I. Assessed the actions taken by the EO function in response to the increase in applications for tax-exempt status from organizations potentially involved in political campaign intervention.

   A. Interviewed EO function management to identify steps taken and who authorized them. We also developed a timeline of events.

   B. Obtained a list of applications that were identified for processing by the team of specialists and determined the status of the identified cases (open, approved, denied, *etc.*) through May 31, 2012. We also received an updated list of identified cases through December 17, 2012, to determine the status of each initial case as of this date.

   C. Determined whether procedures and controls in place since May 2010 resulted in inconsistent treatment of applications potentially involving political campaign intervention.

II. Determined whether changes to procedures and controls since May 2010 affected the timeliness of reviewing applications potentially involving political campaign intervention.

   A. Interviewed EO function personnel to determine whether there were any outside influences that affected the timeliness of reviewing potential political cases.

   B. Reviewed all 89 I.R.C. § 501(c)(3) potential political cases to determine whether they were processed within the 270-day standard required by law.

III. Determined whether the actions taken by the EO function to identify applications for tax-exempt status of organizations potentially involved in political campaign intervention were consistent.

   A. Selected a statistical sample of 244 open and closed I.R.C. § 501(c)(4) application cases from a universe of 2,459 cases that the IRS determined needed significant additional information (full development) on the Employee Plans/Exempt Organizations Determination System from May 2010 through May 2012 to determine whether they should have been identified for processing by the team of specialists.

We selected our statistical sample using the following criteria: 90 percent confidence level, 50 percent error rate,[1] and ± 5 percent precision rate. We used a random sample to ensure that each application case had an equal chance of being selected, which enabled us to obtain sufficient evidence to support our results. A contracted statistician reviewed our projections.

1. Obtained the universe of 2,459 cases from the Employee Plans/Exempt Organizations Determination System and performed validity checks to ensure that the data were accurate. We found the data could be relied on for this review.
2. Obtained a statistical sample of open and closed application cases.
3. Determined whether application cases with potential political campaign intervention issues were identified for processing by the team of specialists.
4. Interviewed EO function personnel to obtain their perspective on any application cases we identified that should have been identified for processing by the team of specialists but were not.

B. Selected a statistical sample of 94 closed I.R.C. § 501(c)(4) application cases from a universe of 2,051 cases that the IRS determined did not need significant additional information (merit cases) on the Employee Plans/Exempt Organizations Determination System from May 2010 through May 2012 to determine whether they should have been identified for processing by the team of specialists. We selected our statistical sample using the following criteria: 90 percent confidence level, 10 percent error rate,[2] and ± 5 percent precision rate. We used a random sample to ensure that each application case had an equal chance of being selected, which enabled us to obtain sufficient evidence to support our results. A contracted statistician reviewed our projections.

1. Obtained the universe of 2,051 cases from the Employee Plans/Exempt Organizations Determination System and performed validity checks to ensure that the data were accurate. We found the data could be relied on for this review.
2. Obtained a statistical sample of closed application cases.
3. Determined whether application cases with potential political campaign intervention issues were not identified for processing by the team of specialists.

[1] An expected error rate of 50 percent was chosen because we determined that cases needing significant additional information had criteria that included the names of specific groups.
[2] An expected error rate of 10 percent was chosen because procedures require that cases with political issues generally need significant additional information.

4. Interviewed EO function personnel to obtain their perspective on any applications we identified that should have been identified for processing by the team of specialists but were not.

C. Obtained and reviewed all 298 application cases identified for processing by the team of specialists as of May 31, 2012, to determine whether they were correctly identified.

1. Determined whether application cases were correctly identified for processing by the team of specialists.

2. Interviewed EO function personnel to obtain their perspective on any cases we identified that should not have been identified for processing by the team of specialists.

D. Computed the average cycle time of processing potential political cases and compared it to the average cycle time for processing similar cases that were not processed by the team of specialists.

E. Determined the number of organizations that may have been adversely affected by inconsistent treatment.

IV. Determined whether the EO function consistently had a reasonable basis for requesting information from organizations seeking tax-exempt status that were potentially involved in political campaign intervention.

A. Reviewed all 170 potential political cases that were issued additional information request letters to determine whether the letters included questions deemed unnecessary by the EO function.

B. Interviewed EO function personnel to obtain their perspective on additional information that was requested that may not have been necessary to help make a determination decision.

C. Determined the number of taxpayers that may have been adversely affected.

***Internal controls methodology***

Internal controls relate to management's plans, methods, and procedures used to meet their mission, goals, and objectives. Internal controls include the processes and procedures for planning, organizing, directing, and controlling program operations. They include the systems for measuring, reporting, and monitoring program performance. We determined the following internal controls were relevant to our audit objective: EO function policies, procedures, and practices for identifying and processing applications for tax-exempt status with indications of political campaign intervention. We evaluated these controls by interviewing personnel, reviewing documentation, reviewing statistical samples of applications for tax-exempt status, and reviewing applications identified as involving potential political campaign intervention.

## Appendix II

# *Major Contributors to This Report*

Gregory D. Kutz, Assistant Inspector General for Audit (Management Services and Exempt Organizations)
Russell P. Martin, Acting Assistant Inspector General for Audit (Management Services and Exempt Organizations)
Troy D. Paterson, Director
Thomas F. Seidell, Audit Manager
Cheryl J. Medina, Lead Auditor
Julia Moore, Senior Auditor
Michael A. McGovern, Auditor
Evan A. Close, Audit Evaluator

## Appendix III

# *Report Distribution List*

Acting Commissioner C
Office of the Commissioner – Attn: Chief of Staff C
Chief Counsel CC
Deputy Commissioner for Services and Enforcement SE
National Taxpayer Advocate TA
Acting Deputy Commissioner, Tax Exempt and Government Entities Division SE:T
Director, Exempt Organizations, Tax Exempt and Government Entities Division SE:T:EO
Director, Office of Legislative Affairs CL:LA
Director, Office of Program Evaluation and Risk Analysis RAS:O
Office of Internal Control OS:CFO:CPIC:IC
Audit Liaison: Director, Communications and Liaison, Tax Exempt and Government Entities Division SE:T:CL

## Appendix IV

# Outcome Measures

This appendix presents detailed information on the measurable impact that our recommended corrective actions will have on tax administration. These benefits will be incorporated into our Semiannual Report to Congress.

***Type and Value of Outcome Measure:***

- Reliability of Information – Actual; nine application case files that were either incomplete or could not be located for us to review (see page 5).

***Methodology Used to Measure the Reported Benefit:***

During our review of applications for tax-exempt status that were not identified for the team of specialists, we were unable to review seven case files because the case file lacked complete documentation (six cases) or the case file could not be located (one case). In addition, during our review of all identified potential political cases through May 31, 2012, we were unable to analyze two case files because of incomplete documentation.

***Type and Value of Outcome Measure:***

- Reliability of Information – Potential; 44 organizations whose tax-exempt applications were not appropriately identified as having significant potential political campaign intervention (see page 5).

***Methodology Used to Measure the Reported Benefit:***

We selected a simple random sample of 94 I.R.C. § 501(c)(4) cases closed from May 2010 through May 2012 from a universe of 2,051 applications that the IRS determined required minimal or no additional information from organizations applying for tax-exempt status. During our case reviews, we determined that two cases were not appropriately identified as having significant potential political campaign intervention. We projected, with 90 percent confidence, an actual error rate of between 0.38 percent and 6.55 percent[1] and that between eight and 134 applications[2] were not properly identified for processing by the team of specialists.

[1] The point estimate error rate for the sample is 2.13 percent. The 90 percent confidence interval was calculated using the Exact Binomial Method.
[2] The point estimate number of error applications is 44. The 90 percent confidence interval was calculated using the Exact Binomial Method.

***Type and Value of Outcome Measure:***

- Reliability of Information – Potential; 141 organizations whose tax-exempt applications were not appropriately identified as having significant potential political campaign intervention (see page 5).

***Methodology Used to Measure the Reported Benefit:***

We selected a simple random sample of 244 I.R.C. § 501(c)(4) cases closed from May 2010 through May 2012 or open as of May 31, 2012, from a universe of 2,459 applications that the IRS determined required additional information from organizations applying for tax-exempt status.[3] During our case reviews, we determined that 14 cases were not appropriately identified as having significant potential political campaign intervention. We projected, with 90 percent confidence, an actual error rate of between 3.38 percent and 8.43 percent[4] and that between 84 and 198 applications[5] were not properly identified for processing by the team of specialists.

***Type and Value of Outcome Measure:***

- Taxpayer Burden – Potential; 158 organizations that waited longer than average for the IRS to make a decision regarding their tax-exempt status (see page 11).

***Methodology Used to Measure the Reported Benefit:***

We obtained data from the EO function on the average number of days it took to determine whether an application for tax-exempt status was approved or denied. In Fiscal Year 2012, it took on average 238 days to close a case that needed additional information from the organization prior to approving or denying the application. As of December 17, 2012, there were 158 potential political cases that were open more than 238 calendar days.

***Type and Value of Outcome Measure:***

- Taxpayer Burden – Potential; 98 organizations that received additional information request letters with questions that were later deemed unnecessary by the EO function (see page 18).

***Methodology Used to Measure the Reported Benefit:***

We reviewed 170 potential political cases that had received additional information request letters from the Determinations Unit. Using a list of seven questions/topics that the EO function categorized as unnecessary, we identified 98 potential political cases that included additional information request letters asking questions deemed unnecessary by the EO function.

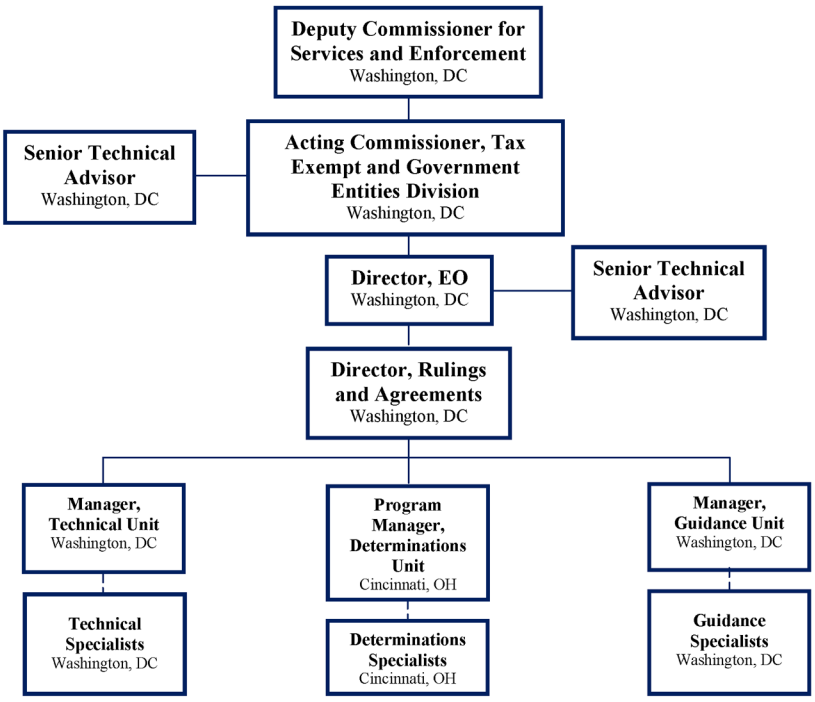
---

[3] We found that seven cases from the sample of 244 were not reviewable because of incomplete documentation.
[4] The point estimate error rate for the sample is 5.91 percent with a precision of ± 2.52 percent.
[5] The point estimate number of error applications is 141 with a precision of ± 57 applications.

## Appendix V

# *High-Level Organizational Chart of Offices Referenced in This Report*

The following is a high-level organizational chart of offices we discuss in this report, starting with the Deputy Commissioner for Services and Enforcement, who reports to the IRS Commissioner.



## Appendix VI

# *Timeline of Written Criteria for Identifying Potential Political Cases*

The following illustrates the changes to the written criteria provided to Determinations Unit employees for identifying applications for the team of specialists.

| Date | Criteria Developed or Actions Taken |
|---|---|
| February 2010 | **********[1]********** **********[1]**********. |
| March–April 2010 | The Determinations Unit began searching for other requests for tax exemption involving the Tea Party, Patriots, 9/12, and I.R.C. § 501(c)(4) applications involving political sounding names, *e.g.*, "We the People" or "Take Back the Country." |
| July 2010 | Determinations Unit management requested its specialists to be on the lookout for Tea Party applications. |
| August 2010 | First BOLO listing issued with criteria listed as "…various local organizations in the Tea Party movement…applying for exemption under 501(c)(3) or 501(c)(4)." |
| July 2011 | Criteria changed to "Organizations involved with political, lobbying, or advocacy for exemption under 501(c)(3) or 501(c)(4)" based on the concerns the Director, EO, raised in June 2011. |
| January 2012 | Criteria changed to "Political action type organizations involved in limiting/expanding government, educating on the constitution and bill of rights, social economic reform/movement" based on Determinations Unit concerns that the July 2011 criteria was too generic. |
| May 2012 | Criteria changed to "501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit)." |

## Appendix VII

# *Comprehensive Timeline of Events*

The following chart illustrates a timeline of events from February 2010 through July 2012 involving the identification and processing of potential political cases. It shows that there was confusion about how to process the applications, delays in the processing of the applications, and a lack of management oversight and guidance. The timeline was developed using documentation provided by the EO function as well as numerous interviews with EO function personnel.

| Date | Event | Additional Details | Source |
|---|---|---|---|
| February 25, 2010 | **********1********** | | E-Mail |
| Around March 1, 2010 | The Determinations Unit Group Manager asked a specialist to search for other Tea Party or similar organizations' applications in order to determine the scope of the issue. The specialist continued to complete searches for additional cases until the precursor to the BOLO listing was issued in May 2010. | Determinations Unit personnel indicated that they used the description Tea Party as a shorthand way of referring to the group of cases involving political campaign intervention rather than to target any particular group. The specialist used Tea Party, Patriots, and 9/12 as part of the criteria for these searches. | Interview |
| March 16–17, 2010 | Ten Tea Party cases were identified. The Acting Manager, Technical Unit, requested two more cases be transferred to Washington, D.C.<br>**********1********** | Not all of the ten cases had Tea Party in their names. | E-Mail |
| April 1–2, 2010 | The new Acting Manager, Technical Unit, suggested the need for a Sensitive Case Report on the Tea Party cases. The Determinations Unit Program Manager agreed. | | E-Mail |
| April 5, 2010 | **********1********** | | E-Mail |
| April 5, 2010 | A Determinations Unit specialist developed a list of 18 identified Tea Party cases during a search of applications. Three had already been approved as tax-exempt. | While the heading of the document listing these 18 cases referred to Tea Party cases, not all of the organizations listed had Tea Party in their names. | E-Mail |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| April 19, 2010 | The first Sensitive Case Report was prepared by the Technical Unit. | Sensitive Case Reports are shared with the Director, Rulings and Agreements, and a chart summarizing all Sensitive Case Reports is provided to the Director, EO. | Documentation |
| April 25–26, 2010 | The Determinations Unit Program Manager requested Technical Unit contacts for the specialist assigned to work other Tea Party cases. Contacts were received. **********1********** | | E-Mail |
| May 17, 2010 | The Determinations Unit specialist will send additional information request letters to the Technical Unit for review prior to issuance as part of the Technical Unit's attempt to provide assistance to the Determinations Unit. | | E-Mail |
| May 26, 2010 | **********1********** | | E-Mail |
| May 27, 2010 | The Technical Unit began reviewing additional information request letters prepared by the Determinations Unit. | | Interview and E-Mail |
| June 7, 2010 | Determinations Unit began training its specialists on emerging issues to watch for, including an emerging issue referred to as Tea Party Cases. | | Documentation |
| June 14, 2010 | **********1********** | | E-Mail |
| June 30, 2010 | **********1********** | **********1********** | E-Mail |
| July 2010 | Determinations Unit management requested its specialists to be on the lookout for Tea Party applications. | | E-Mail |
| July 2, 2010 | **********1********** | | E-Mail |
| July 27, 2010 | Prior to the BOLO listing development, an e-mail was sent updating the description of applications involving potential political campaign intervention and providing a coordinator contact for the cases. The description was changed to read, "These cases involve various local organizations in the Tea Party movement [that] are applying for exemption under 501(c)(3) or 501(c)(4)." | | Interview and Documentation |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| August 12, 2010 | The BOLO listing was developed by the Determinations Unit in order to replace the existing practice of sending separate e-mails to all Determinations Unit employees as to cases to watch for, potentially abusive cases, cases requiring processing by the team of specialists, and emerging issues. The description of applications involving potential political campaign intervention on the BOLO listing was the same description used in the July 27, 2010, e-mail. | | Interview and Documentation |
| August 2010 | The responsibility for applications involving potential political campaign intervention was moved to a different team of specialists as part of a group realignment within the Determinations Unit. | | Interview and Documentation |
| October 2010 | Applications involving potential political campaign intervention were transferred to another Determinations Unit specialist. The specialist did not work on the cases while waiting for guidance from the Technical Unit. | Per the Director, Rulings and Agreements, there was a miscommunication about not working the cases while waiting for guidance. | Interviews |
| October 19, 2010 | Technical Unit personnel forwarded a memorandum to their Acting Manager describing the work completed on the Tea Party cases by the Technical Unit. Included was a list of the cases the Technical Unit had assisted the Determinations Unit with. | The list included 40 cases, 18 of which did not have Tea Party in their names. | E-Mail |
| October 26, 2010 | Determinations Unit personnel raised concerns to the Technical Unit with the approach being used to develop the Tea Party cases: Why does the Technical Unit need to review every additional information request letter when a template letter could be approved and used on all the cases? | | E-Mail |
| November 16, 2010 | A new coordinator contact for potential political cases was announced. | | Interview and Documentation |
| November 16–17, 2010 | A Determinations Unit Group Manager raised concern to the Determinations Unit Area Manager that they are still waiting for an additional information request letter template from the Technical Unit for the Tea Party cases. The coordinator had received calls from taxpayers checking on the status of their applications. | | E-Mail |
| November 17, 2010 | The Determinations Unit Program Manager discussed Tea Party cases with the Technical Unit manager. Review of the cases by the Technical Unit found that not all of the cases had the same issues so a template letter had not been developed. | | E-Mail |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| December 13, 2010 | The Determinations Unit Program Manager asked the Technical Unit manager for a status on the Tea Party cases. The Technical Unit manager responded that they were going to discuss the cases with the Senior Technical Advisor to the Director, EO, shortly. | | E-Mail |
| January 28, 2011 | The Determinations Unit Program Manager requested an update on the Tea Party cases from the Technical Unit Acting Manager. | | E-Mail |
| January 2011 | A new person took over the Technical Unit Acting Manager role. | | Interview |
| February 3, 2011 | The Technical Unit Acting Manager provided an update to the Determinations Unit Program Manager on the cases being worked by the Technical Unit. Letters were being developed and would be reviewed shortly. | | E-Mail |
| March 2, 2011 | A Determinations Unit Group Manager reminded the Determinations Unit Program Manager to follow up with the Technical Unit on the status of the Tea Party cases. | | E-Mail |
| March 30, 2011 | **********1**********.[1] | | E-Mail |
| March 31, 2011 | The Determinations Unit Program Manager stated that, while waiting for assistance from the Technical Unit, the Determinations Unit still needed to work Tea Party cases to the extent possible. | This contradicts the October 2010 decision not to work cases until assistance is received from the Technical Unit and supports the statement of the Director, Rulings and Agreements, that there was a miscommunication about not working the cases while awaiting assistance. | E-Mail |
| April 13, 2011 | **********1**********. | | E-Mail |
| June 1–2, 2011 | The Acting Director, Rulings and Agreements, requested criteria used to identify Tea Party cases from the Determinations Unit Program Manager. The Determinations Unit Program Manager requested criteria from a Determinations Unit Group Manager. | | E-Mail |

[1] The Taxpayer Advocate Service is an independent organization within the IRS that provides assistance to taxpayers whose tax problems have not been resolved through normal IRS channels. Taxpayer Advocate Service employees must, at times, rely on assistance from employees assigned to other IRS functions. To request assistance, the Taxpayer Advocate Service issues an Operations Assistance Request specifying the actions needed to help resolve the taxpayer's problem.

| Date | Event | Additional Details | Source |
|---|---|---|---|
| June 2, 2011 | A Determinations Unit Group Manager provided criteria for identifying potential Tea Party cases to the Determinations Unit Program Manager. Information was then forwarded to the Acting Director, Rulings and Agreements. | These criteria are very different than the BOLO listing criteria available at the time. | E-Mail |
| June 6, 2011 | **********1********** | | E-Mail |
| June 6, 2011 | The Acting Director, Rulings and Agreements, commented that the criteria being used to identify Tea Party cases may have resulted in over-inclusion. **********1********** | | E-Mail |
| June 6, 2011 | The Determinations Unit Program Manager mentioned that the Determinations Unit needed assistance from the Technical Unit to ensure consistency. | | E-Mail |
| June 29, 2011 | A briefing was held with the Director, EO. The briefing paper noted that the Determinations Unit sent cases that met any of the criteria below to a designated team of specialists to be worked:<br>• "Tea Party," "Patriots," or "9/12 Project" is referenced in the case file.<br>• Issues include Government spending, Government debt, or taxes.<br>• Education of the public via advocacy/lobbying to "make America a better place to live."<br>• Statements in the case file criticize how the country is being run.<br>Over 100 applications were identified by this time. It was decided to develop a guide sheet for processing these cases. | The briefing paper for the Director, EO, was prepared by Tax Law Specialists in the Technical Unit and the Guidance Unit and was reviewed by the Acting Manager, Technical Unit. A Guidance Unit specialist was the primary author of the briefing paper.<br>During the briefing, the Director, EO, raised concerns over the language of the BOLO listing criteria. The Director, EO, instructed that the criteria be immediately revised. | Documentation and E-Mail |
| July 5, 2011 | A conference call was held with the Technical Unit; the Director, EO; and the Determinations Unit Program Manager. They developed new criteria for identifying cases. The Determinations Unit Program Manager made changes to the BOLO listing. The criteria were changed to "organizations involved with political, lobbying, or advocacy for exemption under 501(c)(3) or 501(c)(4)." | | E-Mail |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| July 5, 2011 | The EO function Headquarters office would be putting a document together with recommended actions for identified cases. | | E-Mail |
| July 23, 2011 | The Technical Unit was assigned a new person to coordinate with the Determinations Unit. | | E-Mail |
| July 24, 2011 | Work commenced on the guide sheet when the Acting Manager, Technical Unit, asked tax law specialists to draft a list of things for Determinations Unit specialists to look for when working these cases. | | E-Mail |
| August 4, 2011 | Rulings and Agreements office personnel held a meeting with Chief Counsel so that everyone would have the latest information on the issue. | | E-Mail |
| August 4, 2011 | A Guidance Unit specialist asked if Counsel would review a check sheet prior to issuance to the Determinations Unit. The Acting Director, Rulings and Agreements, responded that Counsel would review it prior to issuance. | | E-Mail |
| August 10, 2011 | **********1********** | | Documentation |
| September 15, 2011 | The Determinations Unit Program Manager sent a list of all identified cases to the Acting Director, Rulings and Agreements, so that the Technical Unit could complete a limited "triage" of the cases using available information from the electronic case files. A Technical Unit specialist reviewed the list to determine if any cases could be closed on merit or closed with an adverse determination letter. This triage was considered a third screening. | | E-Mail |
| September 21, 2011 | The draft guide sheet was sent for review and comment to various EO function Headquarters office employees. | | E-Mail |
| October 2011 | A new person took over as the Acting Director, Rulings and Agreements. | | Interview |
| October 24, 2011 | A Technical Unit manager forwarded initial triage results to the Determinations Unit. | | E-Mail |
| October 25, 2011 | Based on the categories and terminology used in the triage results spreadsheet, the Determinations Unit Program Manager was unclear what the Determinations Unit should do with the triage results – close cases, develop further, *etc.* – and requested the status on the guidance from the Technical Unit. | | E-Mail |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| October 26, 2011 | A Technical Unit specialist provided further explanation of the triage results in an e-mail to the Determinations Unit Program Manager. | | E-Mail |
| October 30, 2011 | The Determinations Unit Program Manager contacted the Acting Manager, Technical Unit, asking additional questions regarding the triage results and requesting a status update on the Technical Unit guidance. ********** 1 ********** ********** 1 ********** | | E-Mail |
| November 3, 2011 | An updated draft version of the guide sheet was sent to EO function employees for comment. | | E-Mail |
| November 6, 2011 | The Acting Manager, Technical Unit, had a Technical Unit specialist provide more details on the triage results, and informed the Determinations Unit Program Manager that the guidance was being reviewed prior to issuance. | | E-Mail |
| November 6, 2011 | The Acting Director, Rulings and Agreements, informed the Acting Manager, Technical Unit, and the Determinations Unit Program Manager that, based on feedback received, the guidance developed would not work in its present form – it was "too lawyerly" to be useful and needed the Determinations Unit input. | | Interview and E-Mail |
| November 15, 2011 | The Determinations Unit Program Manager forwarded the Technical Unit specialist's triage results to the Senior Technical Advisor to the Director, EO, per the Director's request. | | E-Mail |
| November 22, 2011 | The Acting Manager, Technical Unit, forwarded the clarified triage results to the Determinations Unit Program Manager. | | E-Mail |
| November 23–30, 2011 | A new Determinations Unit coordinator was assigned oversight of the cases by a Determinations Unit Group Manager. The draft Technical Unit guidance was provided to the Group Manager. The coordinator began working cases after receiving the guidance in anticipation of a team being assembled to work the cases. | | Interview and E-Mail |
| November 2011 | The Determinations Unit specialist assigned the cases began working them after receiving the draft Technical Unit guidance. | | Interview |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| December 7–9, 2011 | A team of Determinations Unit specialists was created to review all the identified cases. An employee from Quality Assurance was also part of the team. The Technical Unit provided contacts for them. | | E-Mail |
| December 16, 2011 | The first meeting was held by the team of specialists. | | Interview and E-Mail |
| January 2012 | The first batch of letters requesting additional information for applications containing incomplete or missing information was issued by Determinations Unit specialists based, in part, on their reading of the draft guidance issued by the Technical Unit. | | Interview and E-Mail |
| January 2012 | A Determinations Unit specialist was tasked with performing a secondary screening of identified potential political cases to ensure that they involved political activities and not just general or lobbying advocacy. | | Interviews |
| January 25, 2012 | The BOLO listing criteria were again updated. The criteria was revised as "political action type organizations involved in limiting/expanding Government, educating on the Constitution and Bill of Rights, social economic reform/movement." The coordinator contact was changed as well. | | Interview and Documentation |
| February 27, 2012 | A member of the team of specialists asked when to start issuing additional information request letters to applicants again. | | E-Mail |
| February 27, 2012 | The Determinations Unit Program Manager questioned why the team of specialists was not issuing additional information request letters. The Determinations Unit Group Manager for the team of specialists had told the team coordinator to stop developing template questions, not to stop issuing additional information request letters. The miscommunication was corrected on February 29, 2012. | | E-Mail |
| February 29, 2012 | The Director, EO, requested that the Acting Director, Rulings and Agreements, develop a letter to clearly inform applicants what was going to happen if they did not respond to the additional information request letters and giving them more time for their responses. | | E-Mail |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| February 29, 2012 | The Director, EO, stopped any more additional information request letters from being issued on advocacy cases until new guidance was provided to the Determinations Unit. In addition, the Acting Director, Rulings and Agreements, discussed with the Determinations Unit Program Manager about having specialists print out website information and asking the organizations to verify the information instead of asking for applicants to print out the website information. | | E-Mail |
| February–March 2012 | Numerous news articles began to be published with complaints from Tea Party organizations about the IRS's unfair treatment. Congress also began to show interest in the IRS's treatment of Tea Party organizations. | | Documentation |
| March 2012 | A new person became Acting Group Manager of the team of specialists. | | Interview |
| March 1, 2012 | A draft list of template questions was prepared by the team of specialists and forwarded to the Guidance Unit. | Questions included asking for donor information. | E-Mail |
| March 5, 2012 | The Acting Manager, Technical Unit, established procedures for reviewing the first favorable determination letter drafted by the Determinations Unit. | | E-Mail |
| March 6, 2012 | **********[1]********** | | E-Mail |
| March 8, 2012 | The Deputy Commissioner for Services and Enforcement requested that, if a taxpayer called about having to provide donor information, the Determinations Unit would allow them to not send the donor names but would inform them that the IRS may need it later. | | E-Mail |
| March 8, 2012 | The Acting Director, Rulings and Agreements, sent to the Determinations Unit Program Manager for comment a draft letter on giving applicants additional time to respond to the additional information request letters. The Determinations Unit Program Manager raised a concern of giving organizations that were not compliant with standard response timelines special treatment. | | E-Mail |
| March 15, 2012 | The Determinations Unit received guidance on how to handle different scenarios based upon the status of their cases. Those I.R.C. § 501(c)(4) organizations that had not responded to an additional information request letter were issued another letter giving them an additional 60 days to respond. Those letters were to be issued by March 16, 2012. This additional time letter was a one-time occurrence. | | Interview and E-Mail |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| March 23, 2012, and March 27, 2012 | The Senior Technical Advisor to the Acting Commissioner, Tax Exempt and Government Entities Division, and the Deputy Commissioner for Services and Enforcement discussed concerns with the media attention the Tea Party applications were receiving. The Deputy Commissioner for Services and Enforcement asked the Senior Technical Advisor to look into what was going on in the Determinations Unit and make recommendations. | | Interview |
| April 2012 | The Acting Director, Rulings and Agreements, learned that the BOLO listing criteria had been changed on January 25, 2012, and informed the Director, EO. | | Interview |
| April 4, 2012 | The Determinations Unit received the extension letter for issuance to I.R.C. § 501(c)(3) organizations that had not responded to a previous additional information request letter. | | E-Mail |
| April 17, 2012 | Tax Exempt and Government Entities Division Headquarters office employees received the Technical Unit triage results and the draft guidance provided by the Technical Unit. Template questions developed by the team of specialists were also provided. | | E-Mail |
| April 23, 2012 | Senior Technical Advisor to the Acting Tax Exempt and Government Entities Division Commissioner visited the Determinations Unit in Cincinnati, Ohio, with a group of EO function employees, and reviewed about half of the identified cases. | | Interview |
| April 24, 2012 | The Acting Director, Rulings and Agreements, requested that the Senior Technical Advisor to the Director, EO, review all the additional information request letters issued and identify troubling questions, which organizations received them, and which members of the team of specialists asked them. | | E-Mail |
| April 25, 2012 | The Senior Technical Advisor to the Director, EO, provided results of the additional information request letter review, including a list of troubling questions. | The results included the names of donors as a troubling question. | E-Mail |
| April 25, 2012 | Chief Counsel's office provided additional comments on the draft guidance developed for the Determinations Unit. | | E-Mail |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| May 8, 2012 | The Determinations Unit Program Manager was informed that EO function Headquarters office employees planned to visit Cincinnati, Ohio, to provide training on cases and perform a review of the cases to recommend what additional actions, if any, were needed to make a determination. | | E-Mail |
| May 9, 2012 | The Director, Rulings and Agreements, asked about the process for updating the BOLO listing. | | E-Mail |
| May 14–15, 2012 | Training was held in Cincinnati, Ohio, on how to process identified potential political cases. The Senior Technical Advisor to the Director, EO, took over coordination of the team of specialists from the Determinations Unit. | | E-Mail |
| May 16, 2012 | A joint team of Determinations Unit specialists and EO function Headquarters office employees began reviewing all potential political cases began in Cincinnati, Ohio. Cases were divided into four groups with recommendations for how to proceed: favorable determination, favorable with limited development, significant development, and probably adverse. This took around three weeks to complete. A worksheet was used to document the reviews. | | E-Mail |
| May 17, 2012 | The Director, Rulings and Agreements, issued a memorandum outlining new procedures for updating the BOLO listing. The BOLO listing criteria were updated again. New criteria reads: "501(c)(3), 501(c)(4), 501(c)(5), and 501(c)(6) organizations with indicators of significant amounts of political campaign intervention (raising questions as to exempt purpose and/or excess private benefit)." | Suggested additions and changes must be approved by a Determinations Unit coordinator, the Determinations Unit Program Manager, and the Director, Rulings and Agreements. | Interview and E-Mail |
| May 21, 2012 | The EO function determined that the requested donor information could be destroyed or returned to the applicant if not used to make the final determination of tax-exempt status. It does not need to be kept in the administrative file. A letter would be issued to the organizations informing them that the donor information was destroyed. | | Interview and E-Mail |
| May 24, 2012 | A telephone call script was developed to inform some organizations that had not responded to the additional information requests that it was not necessary to send the requested information and that their applications had been approved. Also, an additional paragraph was developed for the determination letter. | | E-Mail |

| Date | Event | Additional Details | Source |
|---|---|---|---|
| May 2012 | After the review of identified cases was completed, each Determinations Unit specialist working cases was assigned a Technical Unit employee to work with on the cases. The Technical Unit employee reviewed all additional information request letters prior to issuance. The Quality Assurance Unit began reviewing 100 percent of the cases prior to closure. The Quality Assurance Unit review will shift from 100 percent review to a sample review once a comfort level with the results of the quality review was achieved. | | Interview |
| May 2012 | A decision was made to refer cases to the Review of Operations Unit for follow-up if there were indications of political campaign intervention but not enough to prevent approval of tax-exempt status. | | Interview and E-Mail |
| June 4, 2012 | A draft letter was developed to send to organizations that provided donor information. The letter would inform the organizations that the information was destroyed. | | E-Mail |
| June 7, 2012 | The Director, Rulings and Agreements, provided guidance on how to process cases now that they had been reviewed and divided into categories. Any new cases received would go through the same review process prior to assignment. | | E-Mail |
| July 15, 2012 | A new Acting Determinations Unit Group Manager was overseeing the team of specialists. | | Interview |

## Appendix VIII

# *Management's Response to the Draft Report*

COMMISSIONER
TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

APR 30 2013

MEMORANDUM FOR DEPUTY INSPECTOR GENERAL FOR AUDIT

FROM: Joseph H. Grant, Acting Commissioner, Tax Exempt and Government Entities

SUBJECT: "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review"

Thank you for the opportunity to review the draft report and for your review of this issue. We appreciate your recommendations for improvements to our processes.

We recognize that some errors occurred in the handling of the influx of advocacy cases and we appreciate TIGTA's acknowledgment of our steps to improve the process. As further outlined below, significant improvements in this area are in place and we are confident that what transpired here will not recur.

We believe it is important to put this matter into context. Starting in 2010, Exempt Organizations (EO) observed a significant increase in the number of section 501(c)(3) and section 501(c)(4) applications from organizations that appeared to be, or planned to be, engaged in political campaign activity. Between 2008 and 2012, the number of applications for section 501(c)(4) status more than doubled. We also received numerous referrals from the public, media, watchdog groups, and members of Congress alleging that specific section 501(c)(4) organizations were engaged in political campaign activity to an impermissible extent.

Similar to our approach in other areas (e.g., credit counseling, down payment assistance organizations, etc.), EO sought to assign cases to designated employees. Centralization of like cases ensures that specific employees who have been trained on the relevant issues can adequately review the applications. In this way the IRS learns of new trends (as was the case in credit counseling), and can approach cases in a uniform way to promote consistency and quality. While this is the correct approach for handling certain classes of cases, centralization does slow the progress of some applications (at least initially). Therefore, it is important to take this action only in appropriate situations and to designate cases for centralization in an equitable manner.

It is our view that centralization was warranted in this situation. First, it is important to recognize the intensely fact-specific nature of the determination of whether an

organization is described in section 501(c)(4). To be recognized as exempt under section 501(c)(4), an organization must be engaged primarily in the promotion of social welfare. This requires a review of all activities, a classification of activities into those that promote social welfare and those that do not, and a balancing of both classes of activities. Note that the promotion of social welfare does not include political campaign intervention. And in cases where there is the potential of political campaign intervention, the application process becomes even more difficult. EO must first determine whether any activities described in the application constitute political campaign intervention and must also determine whether the applicant is primarily engaged in social welfare activity in light of any political campaign intervention and any other non-exempt activity. There are no bright line tests for what constitutes political campaign intervention (in particular, the line between such activity and education) or whether an organization is primarily engaged in social welfare activities.

The second reason that centralization was warranted in this case is that the applications EO began to receive in 2010 were in many cases vague as to the activities the applicants planned to conduct. Many applications included what appeared to be incomplete or inconsistent information. For example, a number of applications indicated that the organization did not plan to conduct political campaign activity, but elsewhere described activities that appeared in fact to be such activity. It was also clear that many organizations did not understand what activities would constitute political campaign intervention under the tax law. For these reasons, it was necessary in many cases for us to gather additional information. And we believe it was important that we be consistent in how we developed these cases.

While centralization was warranted, the manner in which we initially designated cases for centralization was inappropriate. We should centralize like cases by a review of the facts contained in the application and not just by name. While it is necessary to consider a variety of information in the screening process (including flags for current emerging issues) we recognize that selection based on organization name was not appropriate for these cases. As the report discusses, we have a new approval process by which we designate a class of cases for centralization. Decisions with respect to the centralized collection of cases must be made at a much higher level of the organization. We believe this will prevent a recurrence of what happened in this case.

The report also describes mistakes that were made in the process by which these applications were worked. The IRS recognizes that there were delays and, in some instances, information requests that were overbroad. As the report notes, we took steps to modify the original approach. First, we reviewed all cases to determine the appropriate scope of review for each case. We also established a process by which each assigned revenue agent works in coordination with a specific technical expert. With respect to information requests, in some cases the Internal Revenue Manual prescribed deadlines for applicants to respond were too short, and we requested donor names unnecessarily. In these instances, we informed organizations that they had more time and that we would work with them if they could provide the

information we requested in an alternative manner. In cases in which the donor names were not used in making the determination, the donor information was expunged from the file.

It is important to understand that centralization of these cases did not dictate how the case ultimately was or will be resolved. As the report illustrates, EO's selection of an organization for further development does not mean that EO will deny the application, but means that EO needs to resolve questions arising from the application before we can grant tax-exemption. Moreover, the majority of cases selected for full development were not selected based on the organizations' names. Finally, all cases, whether selected by name or not, were worked in the same fashion.

The results to date support our approach. Of the nearly 300 section 501(c)(4) advocacy cases, to date we have approved more than 120 (nearly 30 have withdrawn their requests). Note that the report appears to view approvals as evidence that EO should not have looked closely at those applications. That is not the case. Many of these organizations did not supply enough information in their initial applications to merit approval so that further development was necessary. In many cases, this further development and back-and-forth discussion with the taxpayer allowed EO to conclude that the legal requirements were satisfied and allowed the applicant to better understand its responsibilities and the law.

EO is dedicated to reviewing applications for tax-exempt status in an impartial manner. Centralization of like cases furthers quality and consistency. The mistakes outlined in the report resulted from the lack of a set process for working the increase in advocacy cases and insufficient sensitivity to the implications of some of the decisions made. We believe the front line career employees that made the decisions acted out of a desire for efficiency and not out of any political or partisan viewpoint. And as the report discusses, these issues have been resolved.

Our response to your recommendations is found in the attachment. If you have any questions about this response, please contact Lois G. Lerner, Director, Exempt Organizations, at 202-283-8848.

Attachment

**Attachment**

**Recommendation 1:** Ensure that the memorandum requiring the Director, Rulings and Agreements, to approve all original entries and changes to criteria included on the BOLO listing prior to implementation be formalized in the appropriate Internal Revenue Manual.

**Corrective Action:** We will ensure that the procedures set forth in the memorandum requiring the Director, Rulings and Agreements, to approve in advance all original entries and changes to the BOLO are made part of the Internal Revenue Manual.

**Implementation Date:** September 30, 2013

**Responsible Official:** Director, Exempt Organizations

**Recommendation 2:** Develop procedures to better document the reason(s) applications are chosen for review by the team of specialists (e.g., evidence of specific political campaign intervention in the application file or specific reasons the EO function may have for choosing to review the application further based on past experience).

**Corrective Action:** We will review our screening procedures to determine whether, and to what extent, additional documentation can be implemented without having an adverse impact on the timeliness of our case processing.

**Implementation Date:** September 30, 2013

**Responsible Official:** Director, Exempt Organizations

(*Note: We consolidate here the text of Recommendations 3, 5, 6 and 9, and we provide a single, consolidated response to these recommendations following the text of Recommendation 9, below.*)

**Recommendation 3:** Develop training or workshops to be held before each election cycle including, but not limited to, the proper ways to identify applications that require review of political campaign intervention activities.

**Recommendation 5:** Develop guidance for specialists on how to process requests for tax-exempt status involving potentially significant political campaign intervention. This guidance should also be posted to the Internet to provide transparency to organizations on the application process.

**Recommendation 6:** Develop training or workshops to be held before each election cycle including, but not limited to: a) what constitutes political campaign intervention versus general advocacy (including case examples) and b) the ability to refer for follow-up those organizations that may conduct activities in a future year which may cause them to lose their tax-exempt status.

**Recommendation 9:** The Director, EO, should develop training or workshops to be held before each election cycle including, but not limited to, how to word questions in additional information request letters and what additional information should be requested.

**Corrective Action:** We will develop training on the topics described in the recommendations 3, 5, 6, and 9. Because election cycles are continuous, we will develop a schedule that ensures staff have the training as needed to handle potential political intervention matters.

**Implementation Date:** January 31, 2014

**Responsible Official:** Director, Exempt Organizations

**Recommendation 4:** Develop a process for the Determinations Unit to formally request assistance from the Technical Unit and the Guidance Unit. The process should include actions to initiate, track, and monitor requests for assistance to ensure that requests are responded to timely.

**Corrective Action:** We will develop a formal process for Determinations to request assistance and to monitor such requests.

**Implementation Date:** June 30, 2013

**Responsible Official:** Director, Exempt Organizations

**Recommendation 7:** Provide oversight to ensure that potential political cases, some of which have been in process for three years, are approved or denied expeditiously.

**Corrective Action:** While this is an ongoing project, we are closely overseeing the remaining open cases to ensure that we reach determinations as expeditiously as possible.

**Implementation Date:** April 30, 2013

**Responsible Official:** Director, Exempt Organizations

**Recommendation 8:** Recommend to IRS Chief Counsel and the Department of the Treasury that guidance on how to measure the "primary activity" of I.R.C. § 501(c)(4) social welfare organizations be included for consideration in the Department of the Treasury Priority Guidance Plan.

**Corrective Action:** We will share this recommendation with the IRS Chief Counsel and Treasury Office of Tax Policy.

**Implementation Date:** May 3, 2013

**Responsible Official:** Acting Commissioner, Tax Exempt and Government Entities