

# IRS REFORM: POLITICS AS USUAL?

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## *Abstract*

*The IRS is still reeling from accusations that it “targeted” Tea Party and other non-profit organizations. Although multiple government investigations found no politically motivated behavior—only mismanagement—Congressional hearings were quite inflammatory. Congress recently followed up those hearings with a set of IRS reforms. Congress’s approach is reminiscent of the late 1990s, when highly publicized Congressional hearings regarding alleged abuses by the IRS resulted in a major IRS reform and restructuring, although the allegations subsequently were largely debunked. This Article argues that the recent allegations against the IRS also were overblown. It looks to the aftermath of the 1998 IRS reform, which included a major downturn in enforcement, for lessons for the present day. The Article concludes that Congress as a whole can do a better job of keeping politics from undermining tax administration.*

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## I. INTRODUCTION

The Internal Revenue Service (IRS) recently experienced a major public humiliation, stemming from allegations, beginning in 2013, that it targeted Tea Party and other conservative non-profit organizations. The report that prompted the controversy, issued by the Treasury Inspector General for Tax Administration (TIGTA), found that the IRS delayed approval of Tea Party and other conservative groups' applications for a determination of tax-exempt status under Internal Revenue Code (Code) section 501(c)(4).<sup>1</sup> The Federal Bureau of Investigation (FBI)<sup>2</sup> and Department of Justice (DOJ) conducted criminal investigations and eventually found mismanagement but no criminal activity.<sup>3</sup> It turns out that the IRS also scrutinized and delayed the applications of some progressive groups.<sup>4</sup> Yet the message many taxpayers heard was that the IRS "targeted" conservative groups.<sup>5</sup>

Perhaps the worst part of the controversy for tax administration was the highly publicized hearings at least four Congressional committees held.<sup>6</sup> Congress's approach to the investigation was quite partisan.<sup>7</sup> The House Committee on Oversight and Government

<sup>1</sup> A May 2013 report of the Treasury Inspector General for Tax Administration (TIGTA) found that "[t]he 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." TREAS. INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW i (2013), <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf> [<https://perma.cc/S7MN-XYJ9>] [hereinafter 2013 TIGTA REPORT]. TIGTA's report did not use the word "target," but others did, including some Congress members. See Sandy Fitzgerald, *Rep. Issa: Conservative, Tea Party Groups Still Targeted for Scrutiny*, NEWSMAX (July 24, 2015), <http://www.newsmax.com/Newsfront/Darrell-Issa-tea-party-IRS-Lois-Lerner/2015/07/24/id/658797> [<https://perma.cc/LF99-4KYP>].

<sup>2</sup> See Kevin Johnson & Gregory Korte, *FBI to Investigate Tea Party Tax Affair*, USA TODAY (May 14, 2013), <http://www.usatoday.com/story/news/politics/2013/05/14/irs-tea-party-investigation/2158899> [<https://perma.cc/E72Q-GTBM>].

<sup>3</sup> See Devlin Barrett, *Criminal Charges Not Expected in IRS Probe*, WALL ST. J. (Jan. 13, 2014), <http://www.wsj.com/articles/SB10001424052702303819704579318983271821584> [<https://perma.cc/9JQR-2LMB>] (noting that the FBI announced that it did not plan to file charges because it found only mismanagement, not criminal behavior); Letter from U.S. Dep't of Just., Off. of Legis. Affairs to the Hon. Bob Goodlatte, Chairman, Comm. on the Judiciary 1 (Oct. 23, 2015), <http://online.wsj.com/public/resources/documents/IRS1023.pdf> [<https://perma.cc/D9CS-ZH8Q>] [hereinafter U.S. Dep't of Just., Letter to the Hon. Bob Goodlatte]. ("We found no evidence that any IRS official acted based on political, discriminatory, corrupt, or other inappropriate motives that would support a criminal prosecution."). The Senate Finance Committee's bipartisan investigation found numerous instances of IRS mismanagement. See S. REP. NO. 114-119 (2015), <http://www.finance.senate.gov/imo/media/doc/CRPT-114srpt119-pt1.pdf> [<https://perma.cc/YPV5-9BQ5>].

<sup>4</sup> See S. REP. NO. 114-119, at 255 (2015); see also *infra* note 132 and accompanying text.

<sup>5</sup> See Stephen Dinan, *Tea Party Targeting Accusations, Legal Issues Persist for IRS After Justice Ends Probe*, WASH. TIMES (Oct. 25, 2015), <http://www.washingtontimes.com/news/2015/oct/25/irs-tea-party-targeting-accusations-legal-issues-p/?page=all> [<https://perma.cc/7589-X5H5>] ("The American people deserve better than this. Despite the DOJ closing its investigation, the Ways and Means Committee will continue to find answers and hold the IRS accountable for its actions," said [Rep. Paul] Ryan . . .").

<sup>6</sup> See Josh Hicks, *Five and Counting: Yet Another IRS Hearing*, WASH. POST (June 4, 2013), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/06/04/five-and-counting-yet-another-irs-hearing> [<https://perma.cc/9GNV-BJFA>]. The committees included "the Senate Finance Committee, the House Ways and Means Committee, the House Committee on Oversight and Government Reform, and the House Appropriations Subcommittee on Financial Services and General Government." Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. 41A, 42A n.8 (2013).

<sup>7</sup> See Tom Cohen, *Partisan Views of IRS Targeting: Political Conspiracy or Overzealous Scrutiny*, CNN (Jun. 4, 2013), <http://www.cnn.com/2013/06/04/politics/irs-targeting/> [<https://perma.cc/4VA8-SBF5>] ("Like a partisan version of the proverbial blind men touching the elephant, members of Congress have

Reform hearings were particularly negative in tone<sup>8</sup> and have been dubbed “witch hunts” by some observers.<sup>9</sup>

Congress followed up the hearings with legislation. The Protecting Americans from Tax Hikes (PATH) Act of 2015, enacted in December, included a set of provisions entitled “Internal Revenue Service Reforms.”<sup>10</sup> The Consolidated Appropriations Act, 2016, of which PATH is a part,<sup>11</sup> contained other restrictions on the IRS.<sup>12</sup>

Reform following scandalizing Congressional hearings is all too familiar for the IRS. The last major IRS reform occurred in 1998, the product of the Internal Revenue Service Restructuring and Reform Act of 1998 (IRS Reform Act).<sup>13</sup> That reform followed Congressional hearings that were similar in tone to the hearings that began in 2013. The 1990s hearings accused IRS collections agents of abusive behavior.<sup>14</sup> The General Accounting Office (GAO)<sup>15</sup> ultimately found many of the witnesses’ horror stories unfounded or exaggerated.<sup>16</sup> However, that was after Congress enacted sweeping changes in the IRS Reform Act,<sup>17</sup> including restricting collection actions in various ways and requiring a major structural reorganization that diverted significant resources from enforcement.<sup>18</sup>

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starkly differing views of the scope and magnitude of the Internal Revenue Service targeting of conservative groups seeking tax-exempt status that dominates headlines and committee hearings.”); Elijah E. Cummings & Sander M. Levin, Editorial, *Reform the IRS, But Leave Politics Out of It*, WASH. POST (Aug. 12, 2013), [http://www.washingtonpost.com/opinions/reform-the-irs-but-leave-politics-out-of-it/2013/08/12/64c5d36c-0362-11e3-9259-e2aafe5a5f84\\_story.html](http://www.washingtonpost.com/opinions/reform-the-irs-but-leave-politics-out-of-it/2013/08/12/64c5d36c-0362-11e3-9259-e2aafe5a5f84_story.html) [<https://perma.cc/9BWB-RXLJ>] (editorial in the Washington Post by the ranking Democrats on the House Committee on Oversight and Government Reform and the House Ways and Means Committee, stating, in part, “For nearly three months, Republicans have engaged in a sustained and orchestrated campaign to accuse the White House and the Obama administration of using the IRS to target the president’s political enemies—without any evidence to support their claims.”).

<sup>8</sup> At one low point, “House Oversight and Government Reform Chairman Darrell Issa, R-Calif., cut off Rep. Elijah E. Cummings’ microphone and adjourned [the] morning’s hearing on the IRS while Cummings was still speaking . . . .” Steven T. Dennis, *Issa Cuts Off Cummings at IRS Hearing*, ROLL CALL (Mar. 5, 2014), <http://blogs.rollcall.com/218/issa-cuts-off-cummings> [<https://perma.cc/6TGK-9T4L>].

<sup>9</sup> See Kahng, *supra* note 6, at 43 n.13 (“Circus ringmaster Darrell Issa’s relentless attacks on the IRS and willful ignorance of any facts that might undermine his witch hunt have been truly impressive.”); Rebekah Metzler, *Democrats Accuse Rep. Darrell Issa of McCarthyism During Panel Vote on Lerner*, U.S. NEWS (Jun. 28, 2013), <http://www.usnews.com/news/articles/2013/06/28/democrats-accuse-rep-darrel-issa-of-mccarthyism-during-panel-vote-on-lerner> [<https://perma.cc/9X4G-4CPG>] (“Democrats said they were sick of Issa’s ‘witch hunts’ and ‘McCarthy-ite’ tactics . . . .”).

<sup>10</sup> Protecting Americans from Tax Hikes (PATH) Act of 2015, Pub. L. No. 114-113, tit. IV, subtit. A, <https://www.congress.gov/114/bills/hr2029/BILLS-114hr2029enr.pdf> [<https://perma.cc/QUX5-8E7T>].

<sup>11</sup> See Pub. L. No. 114-113.

<sup>12</sup> See *infra* text accompanying notes 282–283.

<sup>13</sup> Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

<sup>14</sup> See *Senate Panel Hears Stories of Alleged IRS Abuses*, CNN (Apr. 28, 1998), <http://www.cnn.com/ALLPOLITICS/1998/04/28/irs.hearings> [<https://perma.cc/X3X3-2RQD>].

<sup>15</sup> In 2004, the GAO was renamed the Government Accountability Office. *Our Name*, GOV’T ACCOUNTABILITY OFF., <http://www.gao.gov/about/namechange.html> [<https://perma.cc/YLE5-RUDE>].

<sup>16</sup> U.S. GEN. ACCT. OFF., GAO/GGD 99-82, GAO REPORT ON ALLEGATIONS OF IRS TAXPAYER ABUSE (1999). The Webster Commission similarly found “there was no pattern of misuse by the CID of search warrants, grand juries, informants, or undercover operators, although there were ‘one or two isolated abuses.’” Joe Spellman, *Conference Panel Ponders Finance Hearing Horror Stories*, 83 TAX NOTES 1854, 1855 (1999).

<sup>17</sup> Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

<sup>18</sup> See *infra* notes 244–247 and accompanying text. One commentator analogized the 1998 reorganization as akin to “trying to change a jet engine on a plane as it is flying over the ocean.”

Unlike the 1998 IRS reform, the 2015 reforms occurred after a full investigation—not only by the FBI and DOJ, but also a follow-up investigation by TIGTA.<sup>19</sup> Yet, although all three investigations reached positive conclusions for the IRS, Congress legislated “reforms” in the areas that were the subject of hearings. The 2015 reforms were nowhere near as sweeping as the large-scale IRS restructuring Congress mandated in 1998, but there could be calls for such a major IRS reform, particularly if current anti-IRS sentiment continues.<sup>20</sup>

The 1998 IRS reform took a major toll on tax enforcement activity.<sup>21</sup> Minimal enforcement does not help narrow the “tax gap”—the gap between taxes due and taxes collected.<sup>22</sup> The tax gap for the most recent year the IRS estimated it, 2006, was \$450 billion before enforcement actions and \$385 billion after late payments and enforced collections.<sup>23</sup> Enforcement is needed both for direct collection of taxes—such as the enforced collections portion of the \$65 billion the IRS collected after the due date for 2006—but also for the indirect or “shadow” effect it has on compliance.<sup>24</sup> Moreover, reduced enforcement primarily benefits those with greater opportunity to evade taxes—not those who receive income from visible sources such as employment and interest on bank accounts<sup>25</sup>—and provides greater benefits to those who have more tax liability to evade.

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*Modernization Update: New IRS Up and Running*, J. ACCT. (Feb. 29, 2000), <http://www.journalofaccountancy.com/issues/2000/mar/modernizationupdatenewirsupandrunning.html> [https://perma.cc/TYQ6-BD26].

<sup>19</sup> See TREAS. INSPECTOR GEN. FOR TAX ADMIN., STATUS OF ACTIONS TAKEN TO IMPROVE THE PROCESSING OF TAX-EXEMPT APPLICATIONS INVOLVING POLITICAL CAMPAIGN INTERVENTION (Mar. 27, 2015), <https://www.treasury.gov/tigta/auditreports/2015reports/201510025fr.pdf> [https://perma.cc/7UPW-7T7G] [hereinafter TIGTA, STATUS OF ACTIONS TAKEN].

<sup>20</sup> See *Most View the CDC Favorably; VA's Image Slips*, PEW RES. CTR. (Jan. 22, 2015), <http://www.people-press.org/2015/01/22/most-view-the-cdc-favorably-vas-image-slips> [https://perma.cc/DC6B-LJZM] (“The IRS is the lowest rated federal agency included in the survey. Overall, 45% hold a favorable view of the IRS, while about as many (48%) say they have an unfavorable view of the agency. Attitudes toward the IRS have changed little over the past several years.”).

<sup>21</sup> See *infra* text accompanying note 240 (reporting several enforcement statistics for fiscal years 1994 through 2005).

<sup>22</sup> See Joel Slemrod, *Cheating Ourselves: The Economics of Tax Evasion*, 21 J. ECON. PERSPECTIVES 25, 25 (2007) (“No government can . . . rely on taxpayers’ sense of duty to remit what is owed. . . . Over time the ranks of the dutiful will shrink, as they see how they are being taken advantage of by the others.”).

<sup>23</sup> See INTERNAL REVENUE SERV., TAX GAP “MAP” TAX YEAR 2006 (Dec. 2011), <https://www.irs.gov/pub/irs-soi/06rastg12map.pdf> [https://perma.cc/3HWD-QUWW].

<sup>24</sup> The Treasury estimates a 6:1 return on investment in IRS enforcement. DEP’T OF THE TREASURY, DEPARTMENTAL OFFICES 1035, <https://timedotcom.files.wordpress.com/2015/04/tre.pdf> [https://perma.cc/K64G-B78U]. An econometric study by an IRS employee estimated the indirect effect of a dollar spent on enforcement at over eleven times the direct effect. See Alan H. Plumley, *The Impact of the IRS on Voluntary Tax Compliance: Preliminary Empirical Results* ¶ 19 (Nov. 14, 2002), LEXIS, 2002 TNT 224-22 (IRS paper presented at the National Tax Association 95th Annual Conference on Taxation) (“The average indirect effect of . . . audits started in 1991 was about 11.7 times as large as the average adjustment directly proposed by audits closed that year.”). Cf. Jeffrey A. Dubin et al., *The Effect of Audit Rate on the Federal Individual Income Tax, 1977–1986*, 43 NAT’L TAX J. 395, 405 (1990) (finding that the indirect effect of audits is responsible for six out of every seven dollars of tax revenue).

<sup>25</sup> See INTERNAL REVENUE SERV., TAX YEAR 2001 INDIVIDUAL INCOME TAX UNDERREPORTING GAP (2007), [https://www.irs.gov/pub/irs-utl/tax\\_gap\\_update\\_070212.pdf](https://www.irs.gov/pub/irs-utl/tax_gap_update_070212.pdf) [https://perma.cc/C33H-VU9S] (estimating 98.8% reporting of amounts subject to substantial information reporting and withholding—wages and salaries—and 95.5% reporting of amounts subject to substantial information reporting, such as interest and dividend income, compared to 46.1% estimated reporting of amounts subject to little or no information reporting, such as self-employment income). The reason for these stark differences in underreporting levels

That is, in general, reduced tax enforcement likely is regressive.<sup>26</sup> Accordingly, we should proceed with caution before tying the hands of the IRS.

Government agencies, such as the IRS, certainly need supervision and to be held accountable for their actions.<sup>27</sup> However, agencies can receive “too much supervision or supervision of the wrong kind,”<sup>28</sup> which can actually be destructive.<sup>29</sup> Excessive oversight, like excessive disclosure, is not costless.<sup>30</sup> Congressional investigations into the IRS are enormously costly—not just in terms of taxpayer money,<sup>31</sup> but also in terms of both personnel time<sup>32</sup> at an already overextended agency<sup>33</sup> and IRS employee morale.<sup>34</sup>

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likely is the opportunity to evade taxes on amounts not reported to the IRS. Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 697–98 (2007).

<sup>26</sup> See Leandra Lederman, *The IRS, Politics, and Income Inequality*, 150 TAX NOTES 1329, 1332 (2016).

<sup>27</sup> See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1840 (2015) (“The central importance of supervision should not come as a surprise.”). The IRS receives constant supervision from numerous oversight bodies. See *infra* note 228 and accompanying text.

<sup>28</sup> Metzger, *supra* note 27, at 1839.

<sup>29</sup> See *id.* (providing examples of “managerial and supervisory failure” and stating that “[m]ost commonly, the problem is too little supervision, but sometimes the concern is too much supervision or supervision of the wrong kind.”).

<sup>30</sup> See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW* 169 (2014) (“Mandated disclosure is not harmless if its costs outweigh its benefits.”); see also Joshua D. Blank, *Overcoming Overdisclosure: Toward Tax Shelter Detection*, 56 UCLA L. REV. 1629, 1632 (2009) (“The overdisclosure response poses serious threats to tax administration. . . . [The] distraction [of disclosure of non-abusive transactions] slows the IRS’s investigations of truly abusive transactions, delaying statutory responses to tax avoidance strategies.”).

<sup>31</sup> See *Written Testimony of IRS Commissioner John A. Koskinen Before the House Oversight and Government Reform Committee on IRS Operations*, INTERNAL REVENUE SERV. (Mar. 26, 2014), <https://www.irs.gov/uac/Newsroom/Written-Testimony-of-Commissioner-Koskinen-before-the-House-Oversight-and-Government-Reform-Committee-on-IRS-Operations> [<https://perma.cc/RRJ7-7K8T>] [hereinafter *Koskinen March 2014 Testimony*] (stating that the personnel costs of complying with Committee requests over the preceding eight months amounted to nearly \$8 million, in addition to a comparable amount spent on supporting information-technology infrastructure); Press Release, *New IRS Inspector General Report Finds No Evidence That Lerner Intentionally Crashed Computer or Concealed Emails from Investigators*, COMM. ON OVERSIGHT AND GOV’T REFORM (July 2, 2015), <http://democrats.oversight.house.gov/news/press-releases/new-irs-inspector-general-report-finds-no-evidence-that-lerner-intentionally> [<https://perma.cc/4APV-V5AD>] (quoting Rep. Elijah E. Cummings as stating, “After spending more than \$20 million and three years investigating, the Inspector General’s conclusions remain the same: there is no evidence to substantiate Republican claims of political motivation, White House involvement, or intentional destruction of evidence.”).

<sup>32</sup> IRS Commissioner John Koskinen testified in 2014 that “[o]ver the last 8 months, the IRS has devoted significant resources to this committee’s investigation and requests for information, as well as those of other congressional committees. More than 250 IRS employees have spent nearly 100,000 hours working directly on complying with the investigations . . . .” *Koskinen March 2014 Testimony*, *supra* note 31.

<sup>33</sup> In recent years, Congress has required the IRS to do more (such as administer the ACA) with less. See *infra* note 301 and accompanying text.

<sup>34</sup> See George Guttman, *News Analysis—Evaluating the IRS: The Senate Finance Hearings in Retrospect*, 77 TAX NOTES 13, 13 (1997) (describing the three days of hearings by the Senate Finance Committee as “both unusual and traumatic” and “deeply embarrassing to the IRS”); Pete Kasperowicz, *The Next Big Problem at the IRS: Low Worker Morale*, THE BLAZE (July 23, 2013), <http://www.theblaze.com/stories/2014/07/23/the-next-big-problem-at-the-irs-low-worker-morale> [<https://perma.cc/9WDK-U6X5>] (noting that IRS Commissioner John Koskinen testified that “ongoing investigations by Congress into the IRS targeting scandal are having the effect of lowering morale at the tax-collection agency.”).

Excessive oversight can make IRS managers and other employees reluctant to take risks<sup>35</sup> and lower-level employees reluctant to report problems to managers.<sup>36</sup>

The tone of Congressional investigations may also affect the public's perception of the fairness of the federal tax system.<sup>37</sup> The federal income tax system relies in part on taxpayer self-reports, and citizens may be more likely to comply with legal authorities they view as legitimate.<sup>38</sup>

Accordingly, this Article turns the spotlight to Congress's treatment of the IRS, comparing the recent IRS hearings with the ones Congress conducted leading up to the 1998 IRS reform. Part II of the Article analyzes the 501(c)(4) controversy that is a principal factor in the IRS's current relationship with Congress. This Part examines the facts behind the headlines and argues that the controversy was much more banal than it often was portrayed in the media and by some in Congress. Next, Part III turns to the 1998 IRS reform. It explains that that the controversy that led to that reform similarly was not the scandal portrayed by Congress and the media.

Part IV considers each of these two IRS reforms as controversy-driven reforms. It first looks at the 1998 IRS reform and examines the negative effects that reform had on IRS collection activity. It then turns to the IRS reforms Congress enacted in 2015, briefly addressing how they relate to the 2013 IRS controversy. Finally, this Part looks at the costs of politicizing the IRS and argues that Congress's approach to the IRS needs reform.

## II. THE 2013 IRS CONTROVERSY

The most recent IRS controversy focused primarily<sup>39</sup> on whether the IRS delayed granting determination letters to Tea Party and other conservative organizations requesting

<sup>35</sup> Barry Bozeman reported that Commissioner Charles Rossotti told him in an interview that because of oversight of the IRS, “[w]e live in a fishbowl. It is difficult to make even a small mistake because it instantly gets magnified.” BARRY BOZEMAN, IBM CTR. FOR THE BUS. OF GOV'T, GOVERNMENT MANAGEMENT OF INFORMATION MEGA-TECHNOLOGY: LESSONS FROM THE INTERNAL REVENUE SERVICE'S TAX SYSTEMS MODERNIZATION 24 (Mar. 2002), <http://www.businessofgovernment.org/sites/default/files/BozemanReport.pdf> [<https://perma.cc/39N8-SVMM>] (explaining that much of the funding went into software and hardware the IRS was still using in 2002, and some of the funds went into renovating buildings) [hereinafter BOZEMAN, INFORMATION MEGA-TECHNOLOGY]. Bozeman also notes that an employee blamed Congress's oversight of the agency for part of the employees' fear of taking risks. Barry Bozeman, *Risk, Reform and Organizational Culture: The Case of IRS Tax Systems Modernization*, 6 INT'L PUB. MGMT. J. 117, 131 (2003) [hereinafter Bozeman, *Organizational Culture*].

<sup>36</sup> See Bozeman, *Organizational Culture*, *supra* note 35, at 129; see also *id.* at 133 ([E]mployees “think they will get shot if they say their project has a problem . . .”) (quoting an anonymous IRS employee).

<sup>37</sup> See Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 KAN. L. REV. 971, 1010 (2003).

<sup>38</sup> Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 722–24 (2000). Even if negative taxpayer views of the IRS do not reduce tax compliance, restrictions on the IRS's ability to enforce the laws—whether through budget cuts or otherwise—likely will have that effect. See Leonard E. Burman & Joel Slemrod, *The IRS Scandal and Tax Compliance*, OUPBLOG (May 30, 2013), <http://blog.oup.com/2013/05/irs-scandal-tax-compliance-nonprofit> [<https://perma.cc/7L2V-3WCA>].

<sup>39</sup> In the same month that it released its report on the 501(c)(4) issue, TIGTA found that the IRS had spent too much money on conferences and on training videos that included a *Gilligan's Island* parody, a *Star Trek* parody, and IRS employees learning the “Cupid Shuffle.” TREAS. INSPECTOR GEN. FOR TAX ADMIN., REVIEW OF THE AUGUST 2010 SMALL BUSINESS/SELF-EMPLOYED DIVISION'S CONFERENCE IN ANAHEIM, CALIFORNIA (2013) [hereinafter TIGTA, REVIEW OF SB/SE CONFERENCE], <http://oversight.house.gov/wp-content/uploads/2013/06/201310037fr.pdf> [<https://perma.cc/VM79-TPPA>]; see also Paul Caron, *The Complete IRS Video Collection*, TAXPROF BLOG (June 10, 2013), [http://taxprof.typepad.com/taxprof\\_blog](http://taxprof.typepad.com/taxprof_blog)

a determination of tax-exempt status under Code section 501(c)(4). The controversy erupted in seemingly the least likely of venues: a meeting of the Tax Section of the American Bar Association. Lois Lerner, then-Director of the IRS's Exempt Organizations Division, apparently acting at the direction of then-Acting IRS Commissioner Steven Miller,<sup>40</sup> planted a question that she answered after prepared remarks at the Tax Section's Exempt Organizations Committee meeting on May 10, 2013.<sup>41</sup> IRS leadership had seen TIGTA's draft report on its investigation of alleged targeting of certain non-profit organizations and apparently wanted to get out ahead of it.<sup>42</sup> Of course, this approach quickly backfired.<sup>43</sup>

TIGTA issued its report four days later.<sup>44</sup> The fallout was fast and furious. The same day, President Obama directed the Secretary of Treasury to request the resignation of Steven Miller; Miller complied the next day.<sup>45</sup> Lois Lerner refused to resign and was put on paid administrative leave for several months, but announced her retirement in

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/2013/06/the-complete.html [https://perma.cc/SR9C-7NMJ] (also linking a *Mad Men*-themed training video). This issue did not get nearly the same amount of attention as the 501(c)(4) issue. *Gutfield: Small Government Is Back*, FOX NEWS (June 6, 2013), <http://www.foxnews.com/transcript/2013/06/06/gutfield-small-government-back> [https://perma.cc/K4WG-6ALU] (“IRS targeting groups. It’s a much bigger issue than some silly video.”). However, in recent appropriations bills, Congress restricted the IRS use of funds for videos. See *infra* notes 282–283 and accompanying text.

<sup>40</sup> See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIG., COMM. ON HOMELAND SECURITY & GOV'T AFFAIRS, IRS & TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY 6 (Sept. 5, 2014), <http://taxprof.typepad.com/m/files/senate-democrats.pdf> [https://perma.cc/7JLC-JAJG] [hereinafter U.S. SENATE, IRS & TIGTA MANAGEMENT FAILURES] (stating that “[a]t the Acting 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 subject to heightened review.”). The IRS apparently had considered having Lerner make a statement at a conference at Georgetown Law Center in April 2013. Darrell Issa, Chairman, *Lois Lerner’s Involvement in the IRS Targeting of Tax-Exempt Organizations* App. 4 at 43–44 (Mar. 11, 2014), <http://oversight.house.gov/wp-content/uploads/2014/03/Lerner-Report1.pdf> [https://perma.cc/ZS79-UXRR] [hereinafter Darrell Issa, Chairman, *Lois Lerner’s Involvement*].

<sup>41</sup> Abby Phillip, *IRS Planted Question About Tax Exempt Groups*, ABC NEWS (May 17, 2013), <http://abcnews.go.com/blogs/politics/2013/05/irs-planted-question-about-tax-exempt-groups> [https://perma.cc/2Z5L-2ZFH] (“Celia Roady, a prominent Washington lawyer in private practice . . . said that she received a call from Lerner the day before the May 10 conference, requesting that Roady ask a question about tax exempt groups.”).

<sup>42</sup> See U.S. SENATE, IRS & TIGTA MANAGEMENT FAILURES, *supra* note 40 (“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.”).

<sup>43</sup> See Jonathan Weisman & Jeremy W. Peters, *Republicans Expand I.R.S. Inquiry, With Eye on White House*, N.Y. TIMES (May 17, 2013), [http://www.nytimes.com/2013/05/18/us/politics/irs-scandal-congressional-hearings.html?\\_r=0](http://www.nytimes.com/2013/05/18/us/politics/irs-scandal-congressional-hearings.html?_r=0) [https://perma.cc/5EHH-QU4P] (noting that the “revelation [of a planted question to Lois Lerner] only underscored the ham-handed way the scandal has burst into view.”). The Senate report states that Ms. Lerner’s “apology triggered a public firestorm.” U.S. SENATE, IRS & TIGTA MANAGEMENT FAILURES, *supra* note 40, at 6.

<sup>44</sup> See 2013 TIGTA REPORT, *supra* note 1 (dated May 14, 2013).

<sup>45</sup> Bruce R. Hopkins, “Hot Stuff” for Exempt Organizations Geeks, CV018 ALI-ABA 1 (Nov. 2013), [http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/CV018\\_chapter\\_01\\_thumb.pdf](http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/CV018_chapter_01_thumb.pdf) [https://perma.cc/85WQ-6R2Y]. The previous Commissioner of the IRS, Douglas Shulman, had stepped down at the end of his term after testifying before the House that the IRS had not engaged in targeting. See Robert W. Wood, *Despite Lois Lerner Pass, Judge Orders IRS to Release Key Target List Administration Blocked*, FORBES (Apr. 6, 2015), <http://www.forbes.com/sites/robertwood/2015/04/06/despite-lois-lerner-pass-judge-orders-irs-to-release-key-target-list-administration-blocked>.



September of that year.<sup>46</sup> “Joseph Grant, the Commissioner of the Tax-Exempt and Government Entities (TE/GE) Division, announced his retirement eight days after being promoted,”<sup>47</sup> and Holly Paz, Director of Rulings and Agreements in the TE/GE Division, was put on administrative leave<sup>48</sup> and then removed from that position.<sup>49</sup>

At least four Congressional committees conducted investigations and hearings,<sup>50</sup> and the FBI and DOJ began criminal investigations.<sup>51</sup> TIGTA conducted a criminal investigation into Lois Lerner emails that the IRS said were lost.<sup>52</sup> “Politicians were quick to denounce the IRS. House Speaker John Boehner (R-Ohio), for one, didn’t bother with niceties. ‘Who is going to jail over this scandal?’ he asked.”<sup>53</sup> The House Ways and Means Committee opened a website entitled “The IRS Political Discrimination Investigation” to collect tax-exempt organizations’ stories.<sup>54</sup> Rep. Darrell Issa (R-CA), then-Chair of the House Oversight and Government Reform Committee, seemed to view Lois Lerner as a villain of the piece,<sup>55</sup> and he introduced a resolution<sup>56</sup> under which the House voted to hold her in contempt of Congress after she made a short statement proclaiming her innocence<sup>57</sup> before invoking the Fifth Amendment.<sup>58</sup>

<sup>46</sup> Michael Wyland, *Lois Lerner “Retires” From IRS as Scandal Investigations Continue*, NONPROFIT Q. (Sept. 24, 2013), <https://nonprofitquarterly.org/policysocial-context/22954-lois-lerner-retires-from-irs-as-scandal-investigations-continue.html> [<https://perma.cc/E6QU-YHUS>].

<sup>47</sup> Richard Rubin & Roxana Tiron, *IRS Chief Says 2010 Meeting Under Review Was Unfortunate*, BLOOMBERG BUS. (June 1, 2013).

<sup>48</sup> U.S. SENATE, IRS & TIGTA MANAGEMENT FAILURES, *supra* note 40, at 12.

<sup>49</sup> Associated Press, *IRS Supervisor Scrutinized Tea Party Cases*, FOX NEWS (June 17, 2013), <https://www.questia.com/newspaper/1P2-36649244/irs-supervisor-scrutinized-tea-party-cases> [<https://perma.cc/65DJ-JVAU>] (stating that Paz, “who until recently was a top deputy in the division that handles applications for tax-exempt status,” has been “replaced”). The people moved into these four positions had “Acting” status and were replaced in December 2013. See U.S. SENATE, IRS & TIGTA MANAGEMENT FAILURES, *supra* note 40, at 11–13 (separately discussing who was put in each of these positions).

<sup>50</sup> See *supra* note 6 and accompanying text.

<sup>51</sup> See *supra* text accompanying notes 2–3.

<sup>52</sup> Stephen Dinan, *IRS Watchdog Reveals Lois Lerner Missing Emails Now Subject of Criminal Probe*, WASH. TIMES (Feb. 26, 2015), <http://www.washingtontimes.com/news/2015/feb/26/irs-watchdog-reveals-lois-lerner-missing-emails-no/?page=all> [<https://perma.cc/N33S-5BMY>]; see also Stephen Dinan, *IRS Finds Yet Another Lois Lerner Email Account*, WASH. TIMES (Aug. 24, 2015), <http://www.washingtontimes.com/news/2015/aug/24/irs-finds-yet-another-lois-lerner-email-account> [<https://perma.cc/YHK7-Q2DG>].

<sup>53</sup> Sam Stein, *IRS Scandal Hearings Put Inspector General in the Spotlight*, HUFFINGTON POST (July 17, 2013), [http://www.huffingtonpost.com/2013/07/17/irs-scandal\\_n\\_3611460.html](http://www.huffingtonpost.com/2013/07/17/irs-scandal_n_3611460.html) [<https://perma.cc/D2D6-2WMS>].

<sup>54</sup> See Aaron Mercer, *House Committee Wants to Hear from IRS Targeting Victims*, NAT’L RELIGIOUS BROADCASTERS (June 7, 2013), [http://nrb.org/news\\_room/articles/house-committee-wants-to-hear-from-irs-targeting-victims/?ccm\\_paging\\_p\\_b33272=6](http://nrb.org/news_room/articles/house-committee-wants-to-hear-from-irs-targeting-victims/?ccm_paging_p_b33272=6) [<https://perma.cc/GPN6-M2F3>] (The website, which has since been removed, stated, “As the Committee continues to pursue this investigation, this website allows those affected by the IRS scandal to share their story. Your story is critical to moving the investigation forward. Taking a few minutes to fill out the form below and share your story will allow the Committee to identify key facts and take action to deal with the failures of the IRS.”).

<sup>55</sup> See *Lois Lerner’s Involvement*, *supra* note 40, at 10–11 (stating that Lerner “created unprecedented roadblocks for Tea Party organizations, worked surreptitiously to advance new Obama Administration regulations that curtail the activities of existing 501(c)(4) organizations—all the while attempting to maintain an appearance that her efforts did not appear, in her own words, “per se political.”).

<sup>56</sup> H.R. Res. 574, 113th Cong. (2014), <https://www.congress.gov/bill/113th-congress/house-resolution/574/all-actions> [<https://perma.cc/LCD8-Q6W3>].

<sup>57</sup> The statement is reproduced in a House Committee on Oversight and Government Reform document. See *Lois Lerner’s Involvement*, *supra* note 40, at 10–11.

<sup>58</sup> Kelly Phillips Erb, *House Finds Lerner, Central Figure in Tax Exempt Scandal, in Contempt of Congress*, FORBES (May 7, 2014), <http://www.forbes.com/sites/kellyphillipserb/2014/05/07/house-finds->

A determination letter from the IRS traditionally was not even required for tax exemption.<sup>59</sup> So, what brought about the IRS's actions and TIGTA's report? The next Section describes the forces that led to the controversy.

A. The Rise of Political 501(c)(4)s

A logical first question is why tax-exempt organizations involved in political activity might claim tax exemption under Code section 501(c)(4), given the existence of Code section 527 (titled "Political Organizations"). Section 501(c)(4) provides tax exemption for:

Civic leagues or organizations not organized for profit but *operated exclusively for the promotion of social welfare*, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.<sup>60</sup>

Read literally, the statute prohibits an organization engaging in any activity that does not promote social welfare from receiving exemption under Code section 501(c)(4). Treasury regulations interpret campaigning and similar political activity as not promoting social welfare.<sup>61</sup> However, the Treasury Department has long interpreted the statutory exclusivity requirement as requiring that a qualifying organization be "*primarily* engaged in promoting in some way the common good and general welfare of the people of the community."<sup>62</sup> Because the Treasury regulation requires only that a 501(c)(4) be primarily (not exclusively) engaged in the promotion of social welfare, it allows a 501(c)(4) to engage in a significant amount of political activity. Treasury's goal seems to have been to allow organizations that did not qualify under 501(c)(3) because of excessive lobbying activity to qualify under 501(c)(4)<sup>63</sup> as long as the primary purpose of the organization was

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lerner-central-figure-in-tax-exempt-scandal-in-contempt-of-congress ("The vote was 231 Yeas to 187 Nays. Of the votes, 225 of the Yeas were from Republicans; all of the Nays were from Democrats."). U.S. Attorney Donald C. Machen, Jr., subsequently found that Ms. Lerner had not waived her Fifth Amendment rights and refused to prosecute her. See Michael S. Schmidt, *Former I.R.S. Official Won't Be Charged for Refusing to Testify*, N.Y. TIMES (Apr. 1, 2015), <http://www.nytimes.com/2015/04/02/us/lois-lerner-former-irs-official-wont-be-charged-for-refusing-to-testify.html> [<https://perma.cc/352X-T65W>].

<sup>59</sup> See NAT'L TAXPAYER ADVOC., INTERNAL REVENUE SERV., SPECIAL REPORT TO CONGRESS, POLITICAL ACTIVITY AND THE RIGHTS OF APPLICANTS FOR TAX-EXEMPT STATUS 13 (2013), <http://www.taxpayeradvocate.irs.gov/userfiles/file/FullReport/Special-Report.pdf> [<https://perma.cc/4JRB-UNGB>] [hereinafter NATIONAL TAXPAYER ADVOCATE, SPECIAL REPORT] ("[O]rganizations can begin operating as tax-exempt under IRC § 501(c)(4) before receiving a determination letter from the IRS . . ."). The PATH Act of 2015 has since required nonprofits seeking exemption under Code section 501(c)(4) to file a one-page notice of registration within 60 days after the organization is formed. See *infra* note 260 and accompanying text.

<sup>60</sup> I.R.C. § 501(c)(4)(A) (emphasis added). Professor Lily Kahng explains that social welfare is "defined to be 'the common good and general welfare of the people of the community' and 'bringing about civic betterments and social improvements.'" Kahng, *supra* note 6, at 44–45A (footnote omitted).

<sup>61</sup> See Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) ("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.").

<sup>62</sup> *Id.* § 1.501(c)(4)-1(a)(2)(i) (emphasis added); T.D. 6391, 1959-2 C.B. 139, 145–46.

<sup>63</sup> See I.R.S. Gen. Couns. Mem. 33,495 (Apr. 27, 1967) ("The contemplated effect of this provision of the regulations is that even though an organization fails to achieve classification under section 501(c)(3) because it engages in . . . lobbying and propagandizing, it does not necessarily follow that it would not achieve exempt status under section 501(c)(4) as well."). Section 501(c)(3) organizations can receive deductible contributions but 501(c)(4)s cannot. See I.R.C. § 170(c)(2)(D) ("'charitable contribution' means a contribution or gift to . . . [a] corporation, trust, or community chest, fund, or foundation—which is not

not participation in political campaigns.<sup>64</sup> Section 501(c)(4) therefore encompasses both organizations that engage in no political activity at all<sup>65</sup> and advocacy groups such as “the Sierra Club and the National Rifle Association.”<sup>66</sup>

Professor Lloyd Mayer has explained that, in the 1960s, a corollary to the rule that political activity could not be a 501(c)(4)’s primary activity was that “organizations engaged primarily in political activity were taxable.”<sup>67</sup> However, as he observes, that principle did not specifically address the question of whether the donations received by political organizations should be included in taxable income. To resolve this issue, Congress enacted Code section 527 in 1975,<sup>68</sup> which provides tax-exemption for those organizations, as well, but only with respect to donated funds the organization sets aside for political use.<sup>69</sup>

Thus, until fairly recently, political organizations generally would simply use Code section 527.<sup>70</sup> However, in 2000, the law changed in an important way: it required organizations organized under section 527 to disclose who their donors are.<sup>71</sup> Experts predicted that a wholesale shift from 527 organizations to 501(c)(4)s would result.<sup>72</sup> However, that shift did not occur until 2010, after the Supreme Court decided *Citizens United*,<sup>73</sup> which allowed corporations to spend unlimited amounts of funds on election activity.<sup>74</sup> However, Treasury regulations still require that an organization be primarily engaged in promoting general welfare—not politics—in order to qualify for tax exemption under Code section 501(c)(4). That, in turn, calls for IRS screening of 501(c)(4) determination requests.

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disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”)

<sup>64</sup> See I.R.S. Gen. Couns. Mem. 33,495, *supra* note 63 (distinguishing permissible lobbying from involvement in political campaigns and stating, “It was our view that so long as activities of this [latter] type were clearly germane to a recognized social welfare purpose, and stop short of being an organization’s primary activity, then the regulation’s language would not operate to preclude exempt status for the organization.”).

<sup>65</sup> Kahng, *supra* note 6, at 47A (referencing “The Lumberjack World Championships Foundation and The Ballroom Latin and Swing Dance Association”).

<sup>66</sup> Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 639 (2007).

<sup>67</sup> *Id.*

<sup>68</sup> See Pub. L. 93-625, § 10(a) (1975).

<sup>69</sup> Mayer, *supra* note 66, at 640.

<sup>70</sup> *Id.*

<sup>71</sup> I.R.C. § 527(e)(5)(A)(ii), (iii) (“The term ‘qualified State or local political organization’ means a political organization . . . which [among other requirements] is subject to State law that requires the organization to report (and it so reports) . . . information regarding the person who makes such contribution or receives such expenditure . . . and . . . with respect to which the reports [above] . . . are . . . made public . . .”).

<sup>72</sup> Kahng, *supra* note 6, at 48A.

<sup>73</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding that the First Amendment of the U.S. Constitution prohibited the government from banning political speech based on the speaker’s identity as a non-profit or for-profit corporation).

<sup>74</sup> See Robert Maguire, Editorial, *A New Low in Campaign Finance*, N.Y. TIMES (Oct. 27, 2015), <http://www.nytimes.com/2015/10/27/opinion/a-new-low-in-campaign-finance.html> [<https://perma.cc/GZM6-G9PM>] (“Election-related spending by groups that don’t disclose their donors has grown exponentially in the last few years . . . . The expenditures reported by these groups rose from just under \$6 million in 2004 to \$308 million in the last presidential election.”); see also Kahng, *supra* note 6, at 48A (noting that “Crossroads GPS . . . was founded by Karl Rove in 2010 and spent at least \$70 million in the 2012 election cycle”).

### B. The Exempt Organizations Division's Challenges

During the rise of political 501(c)(4)s, the IRS's Exempt Organizations (EO) Division faced significant challenges. First, the EO Division experienced a spike in applications for a reason unrelated to *Citizens United*. That is because, starting in 2011, a change in the law resulted in automatic revocation of the tax-exempt status of organizations that had not filed returns in three years.<sup>75</sup> The result was a purge that led many organizations to reapply, resulting in a spike in requests for determination letters.<sup>76</sup> The spike consisted of approximately 30,000 applications in addition to the normal volume of approximately 60,000.<sup>77</sup> Thus, the EO Division was dealing with a significant backlog of cases. Moreover, the IRS's outdated technology made it difficult for managers to observe and handle the size of that backlog.<sup>78</sup>

The management issues seem to have been exacerbated by the geographic organization of the EO Division. The Division centralized in Cincinnati in the 1990s—far from IRS headquarters—because that city had a history of being able to hire employees at low pay.<sup>79</sup> The pay scale for those positions was such that the IRS could not find qualified people to fill them in larger cities.<sup>80</sup> Thus, IRS resources influenced the structure of the Division.

Most of the employees in Cincinnati screened applications to ascertain whether to grant a determination of tax-exempt status,<sup>81</sup> while people in positions like the one Lois Lerner held—Director of the EO Division—were located at headquarters in Washington.<sup>82</sup> The result was a geographic separation of upper-level management from the employees in Cincinnati actually doing the day-to-day screening of applications.

In addition, during the time period in which applications for determinations of tax-exempt status had increased dramatically, the IRS had experienced budget cuts that decreased the number of employees working in that area.<sup>83</sup> Fewer than 200 employees

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<sup>75</sup> U.S. GEN. ACCT. OFF., GAO-15-164, REPORT TO THE RANKING MEMBER, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, U.S. SENATE, TAX EXEMPT ORGANIZATIONS: BETTER COMPLIANCE INDICATORS AND DATA, AND MORE COLLABORATION WITH STATE REGULATORS WOULD STRENGTHEN OVERSIGHT OF CHARITABLE ORGANIZATIONS 30 (2014), <http://www.gao.gov/assets/670/667595.pdf> [<https://perma.cc/F5NF-TAE6>] [hereinafter GAO, BETTER COMPLIANCE INDICATORS]. Most tax-exempt organizations are required to file Form 990 annually. See 2014 INSTRUCTIONS FOR FORM 990 RETURN OF ORGANIZATION EXEMPT FROM TAX 2, <https://www.irs.gov/pub/irs-pdf/i990.pdf> [<https://perma.cc/3CGU-K3RH>].

<sup>76</sup> See NATIONAL TAXPAYER ADVOCATE, SPECIAL REPORT, *supra* note 59, at 27.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Kim Barker & Justin Elliott, *How the IRS's Nonprofit Division Got So Dysfunctional*, PROPUBLICA (May 17, 2013), <http://www.propublica.org/article/how-irs-nonprofit-division-got-so-dysfunctional> [<https://perma.cc/6DM6-NQS4>].

<sup>80</sup> See *id.* (quoting Marcus Owens, who ran the Exempt Organizations division from 1990 to 2000 as explaining that in New York City, “We had one accountant who just had gotten out of jail—that’s the sort of people who would show up for jobs.”).

<sup>81</sup> *Id.*

<sup>82</sup> 2013 TIGTA REPORT, *supra* note 1, at 29 (showing an organizational chart locating in Washington, D.C. management offices such as the Acting Commissioner of the Tax Exempt and Government Entities Division (EO) and Director, EO). Lois Lerner was the Director of the EO Division. See *supra* text accompanying note 40.

<sup>83</sup> GAO, BETTER COMPLIANCE INDICATORS, *supra* note 75, at 30.

worked directly on applications.<sup>84</sup> As a result, each Cincinnati employee would need to review an average of one application per day, and some of them were very time-consuming because of the need “to look through a group’s website, track down TV ads and so forth.”<sup>85</sup> Moreover, the limits on political participation are difficult to define and interpret,<sup>86</sup> and they call for a messy facts-and-circumstances test.<sup>87</sup> Because 501(c)(4) determination denials were not subject to judicial review, there was no case law to serve as a guide.<sup>88</sup>

### C. The Targeting Allegations

In February of 2012, the House Committee on Oversight and Government Reform received complaints that “the IRS was delaying the approval of conservative-oriented organizations for tax exempt status”<sup>89</sup> and began investigating.<sup>90</sup> Rep. Darrell Issa, then-Chair of the House Oversight and Government Reform Committee, “asked TIGTA to determine whether conservative groups were being targeted by the IRS.”<sup>91</sup> Note that the allegation was not that the IRS was denying 501(c)(4) applications of any organizations but rather focused on (1) delays and (2) negative effects on conservative groups.

The TIGTA report found both effects: It found that organizations the IRS selected for further review “experienced substantial delays. . . . *Some cases have been open during two election cycles (2010 and 2012),*”<sup>92</sup> and that the IRS inappropriately used key-word searches “that identified for review *Tea Party and other organizations.*”<sup>93</sup> Although TIGTA did not accuse the IRS of being biased, the language it used, such as the portions italicized above, could raise that concern.

<sup>84</sup> Internal Revenue Serv., *Questions and Answers on 501(c) Organizations*, INTERNAL REVENUE SERV., [https://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-501\(c\)-Organizations](https://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-501(c)-Organizations) [<https://perma.cc/H3WK-U7LW>] [hereinafter Internal Revenue Serv., *Questions and Answers*].

<sup>85</sup> Barker & Elliott, *supra* note 79.

<sup>86</sup> See Kahng, *supra* note 6, at 45–46A (courts might view that as “somewhere in the range of ten to fifteen percent of an organization’s expenditures” but “the IRS seems to take a more liberal position, although it has never set out a specific percentage, and some practitioners argue that the threshold is as high as forty or even forty-nine percent.”) (citing Mariam Galston, *Vision Service Plan v. U.S.: Implications for Campaign Activities of 501(c)(4)s*, 53 EXEMPT ORG. TAX REV. 165, 167 n.20 (2006)).

<sup>87</sup> *Id.* at 46A.

<sup>88</sup> NATIONAL TAXPAYER ADVOCATE, SPECIAL REPORT, *supra* note 59, at 2. The PATH Act of 2015 amended Code section 7428 to extend declaratory judgment actions, including on the initial qualification for tax-exempt status, to 501(c)(4) and other tax-exempt organizations. Pub. L. No. 114-113, § 406.

<sup>89</sup> *Lois Lerner’s Involvement*, *supra* note 40, at 6.

<sup>90</sup> *Id.* (“On February 17, 2012, Committee staff requested a briefing from the IRS about this matter. On February 24, 2012, Lerner and other IRS officials provided the Committee staff with an informal briefing.”).

<sup>91</sup> Teresa Ambord, *IRS Scandal Shifts Focus to Russell George*, ACCOUNTINGWEB (June 27, 2013), <http://www.accountingweb.com/tax/irs/irs-scandal-shifts-focus-to-russell-george> [<https://perma.cc/9AK8-JLFC>]. See also 2013 TIGTA REPORT, *supra* note 1, at 3 (stating that TIGTA “initiated this audit based on concerns expressed by members of Congress.”). See also Bernie Becker, *Treasury IG: Liberal Groups Weren’t Targeted by IRS like Tea Party*, THE HILL (June 27, 2013), <http://thehill.com/policy/finance/308131-ig-liberal-groups-not-targeted-like-tea-party> [<https://perma.cc/TUL3-H2NG>] (“[A] spokesman for the inspector general said they were only tasked with looking into whether conservative groups faced tough IRS scrutiny.”). A Senate Finance Committee report explains that “[t]he greater number of Tea Party applications resulted in a greater number of Tea Party applications being scrutinized” which could lead to a belief that they were targeted or even being used to support “an unproven narrative of bias against nonprofits on the conservative side of the political spectrum.” S. REP. NO. 114-119, at 249 (2015).

<sup>92</sup> 2013 TIGTA REPORT, *supra* note 1, at 11 (emphasis added).

<sup>93</sup> *Id.* at i (Highlights) (emphasis added). The report adds, “Subsequently, the Determinations Unit expanded the criteria to inappropriately include organizations with other specific names (Patriots and 9/12) or policy positions.” *Id.* at 5.

After TIGTA's report, some Republican lawmakers suggested that President Obama used the IRS to cloud the tax status of Tea Party organizations during the 2010 and 2012 elections.<sup>94</sup> Some commentators analogized to former President Richard Nixon's infamous "Enemies List."<sup>95</sup> However, as described below, neither TIGTA nor anyone else found involvement by President Obama, and in fact, the explanation both TIGTA and the Department of Justice have given for the delays is much more banal than these accusations suggest.<sup>96</sup>

### 1. Delays

TIGTA identified the delays as beginning in April 2010, when the IRS designated a "specialist"—later a team of specialists<sup>97</sup>—to process "potential political cases."<sup>98</sup> At that time, the Determinations Unit Program Manager, Lucinda (Cindy) Thomas,<sup>99</sup> who was located in Cincinnati,<sup>100</sup> requested assistance from the Technical Unit,<sup>101</sup> which is part of the Rulings and Agreements office in Washington, D.C.<sup>102</sup> She did not receive prompt guidance.<sup>103</sup>

In September 2010, Max Baucus (D-MT), Chair of the Senate Committee on Finance, wrote to then-IRS Commissioner Douglas Shulman, asking him to investigate whether 501(c)(4) organizations were complying with the Code, in light of media reports about politically active 501(c)(4) organizations.<sup>104</sup> Senator Orrin G. Hatch (R-UT) and

<sup>94</sup> See, e.g., COMM. ON OVERSIGHT & GOV'T REFORM, U.S. HOUSE OF REPRESENTATIVES, HOW POLITICS LED THE IRS TO TARGET CONSERVATIVE TAX-EXEMPT APPLICANTS FOR THEIR POLITICAL BELIEFS (2014), <http://oversight.house.gov/wp-content/uploads/2014/06/How-Politics-Led-to-the-IRS-Targeting-Staff-Report-6.16.14.pdf> [<https://perma.cc/S6MH-HD7D>] (alleging that "President Obama's Bully Pulpit led to the Internal Revenue Service's targeting of conservative tax-exempt applicants"); Lisa Rein & Juliet Elperin, *House GOP Leader's Final Report on IRS Targeting Accuses Agency of 'Culture of Bias,'* WASH. POST (Dec. 23, 2014), <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/12/23/house-gop-leaders-final-report-on-irs-targeting-accuses-agency-of-culture-of-bias> [<https://perma.cc/7JJT-8BVH>] ("House Republicans have alleged that the Obama administration used the IRS and other enforcement agencies to silence conservative critics during the 2010 and 2012 election cycles, when the targeting occurred.").

<sup>95</sup> See Matthew Vadum, *A President's Enemies List?: Add IRS-Gate to a Scandal-Ridden Administration*, FRONTPAGE MAG (May 13, 2013), <http://www.frontpagemag.com/fpm/189411/presidents-enemies-list-matthew-vadum> ("Some commentators draw parallels with President Richard Nixon, noting he came dangerously close to impeachment for unleashing the IRS on his enemies."). During his presidency, Richard Nixon "pressured the IRS to initiate tax audits and otherwise harass opponents of the administration or its policies." JOHN A. ANDREW III, *POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON* 201 (Ivan R. Dee ed. 2002).

<sup>96</sup> TIGTA's investigation is described immediately below. For the results of the Department of Justice's investigation, see *infra* text accompanying notes 138–139.

<sup>97</sup> 2013 TIGTA REPORT, *supra* note 1, at 5 & n.14 (stating that the team was expanded from one specialist to several specialists in December 2011).

<sup>98</sup> *Id.* at 13.

<sup>99</sup> U.S. SENATE, IRS & TIGTA MANAGEMENT FAILURES, *supra* note 40, at 12–13 (noting that in August 2013, Ms. Thomas moved out of that position, which she had held since 2005, and became a senior technical advisor to the EO Director).

<sup>100</sup> 2013 TIGTA REPORT, *supra* note 1, at 29 (showing an organizational chart with geographic locations).

<sup>101</sup> *Id.* at 13.

<sup>102</sup> *Id.* at 1.

<sup>103</sup> See *infra* note 107 and accompanying text.

<sup>104</sup> See Darrell Issa, Chairman, *Lois Lerner's Involvement*, *supra* note 40, at 2–3 (Letter from Max Baucus, Chairman, Senate Committee on Finance, to Douglas H. Shulman, Commissioner, Internal Revenue Service (Sept. 28, 2010)). Baucus's letter mentioned a *New York Times* article and a *Time Magazine* article. *Id.* at App. 4 at 3. It did not mention any 501(c)(4) organizations by name, although it referred to groups

then-Minority Whip Jon Kyl (R-AZ) soon reacted, asking “the IRS to make sure any such probe does not take political considerations into account and requested that an inspector general review any investigation to make sure it is not partisan.”<sup>105</sup> The result was pressure on the IRS from both the left and the right, which may have left some employees hesitant to take action.<sup>106</sup>

In October 2010, the specialists had 40 cases but stopped working on them through November 2011 while they waited for written guidance from the Technical Unit.<sup>107</sup> Compounding the problem, Cindy Thomas, the Determinations Unit Program Manager, was unaware that the specialists were not working on those cases for this 13-month period.<sup>108</sup>

## 2. Selection Criteria

The second part of the issue Republicans raised was the manner in which the IRS selected applications for further review. TIGTA’s report found that the “Be On the Lookout” (BOLO) list of words to watch for in 501(c)(4) applicants’ names<sup>109</sup> originated in May 2010 as a spreadsheet compiled by Determinations Unit specialists in Cincinnati. The Cincinnati office distributed the first formal BOLO listing in August of that year.<sup>110</sup>

The National Taxpayer Advocate describes the BOLO lists as resulting from IRS employee attempts to triage the tens of thousands of applications they were receiving.

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discussed in the *Time Magazine* article, entitled “The New GOP Money Stampede.” Darrell Issa, Chairman, *Lois Lerner’s Involvement*, *supra* note 40, at App. 4 at 3.

<sup>105</sup> Steven T. Dennis, *Battle Escalates Over Undisclosed Campaign Cash*, ROLL CALL (Oct. 6, 2010), <http://www.rollcall.com/news/76003-1.html> [<https://perma.cc/2XVE-XDF6>].

<sup>106</sup> TIGTA observed in its investigative report that “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.” 2013 TIGTA REPORT, *supra* note 1, at 12.

<sup>107</sup> NATIONAL TAXPAYER ADVOCATE, SPECIAL REPORT, *supra* note 59, at 12–13. Some organizations waited much longer because the IRS had requested further information from them and then did not act during that 13-month period. 2013 TIGTA REPORT, *supra* note 1, at 14.

<sup>108</sup> 2013 TIGTA REPORT, *supra* note 1, at 13. TIGTA reports that the Director of Rulings and Agreements later stated “that there was a miscommunication about processing the cases.” *Id.* That statement is ambiguous, in that it could refer to a miscommunication to TIGTA. However, in context, it appears to refer to a miscommunication between Ms. Thomas and the specialists. The Director of Rulings and Agreements at the time was Holly Paz. *See infra* note 122.

<sup>109</sup> *See* Stein, *supra* note 53.

<sup>110</sup> 2013 TIGTA REPORT, *supra* note 1, at 6. The BOLO lists apparently distinguished between “historical” and “emerging” issues. *See, e.g.*, Letter from J. Russell George, Inspector Gen., to Rep. Sander M. Levin, Comm. on Ways and Means, U.S. House of Representatives (June 26, 2013), <http://online.wsj.com/public/resources/documents/TIGTAFinalResponseToRepLevin06262013.pdf> [<https://perma.cc/RW4L-354K>] [hereinafter George Letter to Levin] (reporting that the term “Progressives” was categorized as a “TAG Historical” or “Potential Abusive Historical” term); Josh Hicks, *IRS BOLOs: What’s the Problem?*, WASH. POST (July 3, 2013), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/07/03/irs-bolos-whats-the-problem> [<https://perma.cc/7CSV-G9R7>] (“The list’s ‘emerging issues’ category included only conservative terms at the outset, raising questions about why the IRS prioritized conservative groups but none from the left.”). However, the Senate Finance Committee’s report explained in the section titled “Additional Views of Senator Wyden Prepared by Democratic Staff”:

According to IRS agent Ron Bell, who was responsible for the BOLO list, screening terms were placed on the “Tag Historical” tab after IRS employees were not seeing the cases as frequently. While the organizations with the name “progressive” in their name were not applying for tax-exempt status as frequently as conservative or Tea Party organizations, the IRS was still instructing its employees to screen and set aside cases because of potential political activity based on the word “Progressive.”

S. REP. NO. 114-119, at 253 (2015) (footnote omitted).

Those applications generally fell into three categories. The easiest applications, IRS screeners in the Cincinnati Determinations Unit would approve on “first read.”<sup>111</sup> Somewhat more complicated applications needed to be assigned to a Determinations Unit specialist.<sup>112</sup> The most complicated applications, such as those in which no established precedent applied, would be sent to an EO Technical Unit specialist in Washington, DC to work on before being returned to Cincinnati and assigned to a Determinations Unit specialist.<sup>113</sup>

Given the flood of applications and limited personnel, IRS employees began using key words to try to identify groups likely to be engaging in political activity.<sup>114</sup> As the National Taxpayer Advocate notes, “The employees presumably assumed that an application for tax exemption from an organization with ‘Tea Party’ or similar terms in its name was more likely to be focused primarily on political activity, rather than the common good and general welfare, as required by law.”<sup>115</sup> These “potential political cases” were referred to the Determinations Unit specialists for further review.<sup>116</sup> Although only approximately one-third of the cases sent for additional review contained these words,<sup>117</sup> the optics were disastrous. TIGTA subsequently found that “Determinations Unit employees . . . did not consider the public perception of using politically sensitive criteria when identifying these cases.”<sup>118</sup>

IRS management did not step in immediately to stop the Cincinnati employees’ efforts to simplify their jobs. The issue was not that IRS management endorsed the Cincinnati employees’ development of key-word criteria but rather that they were unaware that the employees had done so.<sup>119</sup>

The 2013 TIGTA report found that when Ms. Lerner was briefed on the criteria in June 2011, she “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.”<sup>120</sup> However, the Determinations Unit employees had trouble applying these fact-sensitive criteria and in January 2012, the Determinations Unit “changed the criteria . . . without executive approval because they believed the July 2011 criteria were too broad.”<sup>121</sup>

It took three months for Holly Paz, the Director of Rulings and Agreements<sup>122</sup> to learn that the Determinations Unit had changed the criteria.<sup>123</sup> She revised the criteria in

<sup>111</sup> NATIONAL TAXPAYER ADVOCATE, SPECIAL REPORT, *supra* note 59, at 11.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 12.

<sup>116</sup> 2013 TIGTA REPORT, *supra* note 1, at 5.

<sup>117</sup> *Id.* at 8.

<sup>118</sup> *Id.* at 7 (also stating that “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”).

<sup>119</sup> *Id.* (finding that IRS management exercised insufficient oversight).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Holly Paz was the Director of Rulings and Agreements from January 2011 to June 2013. U.S. SENATE, IRS & TIGTA MANAGEMENT FAILURES, *supra* note 40, at 12.

<sup>123</sup> 2013 TIGTA REPORT, *supra* note 1, at 7.



May 2012 and issued a memorandum requiring all subsequent changes to the BOLO lists to obtain prior executive-level approval.<sup>124</sup>

### 3. *The Political Controversy*

The idea that the civil servants in Cincinnati singled out Tea Party groups for further review may be surprising to some, given that the Determinations Unit employees are not political appointees. TIGTA's report found that Determinations Unit employees used the term "Tea Party" as "shorthand" for all potentially political cases.<sup>125</sup> Moreover, recall that the charge Congress gave TIGTA apparently was to "determine whether conservative groups were being targeted by the IRS."<sup>126</sup> It appears that Congress did not ask TIGTA to undertake a comparative study or to examine whether progressive groups experienced delays.<sup>127</sup>

TIGTA's report thus did not address the treatment of progressive groups. It did not provide a comparative analysis of the treatment of left-leaning and right-leaning groups. In addition, it did not mention that a July 2010 IRS "Screening Workshop" PowerPoint presentation lists under "Current Activities" both "Tea Party" and "Progressive" groups.<sup>128</sup> The report also did not mention that the IRS apparently denied tax-exempt status to at least one progressive organization but not to any conservative organizations.<sup>129</sup> In addition, one of TIGTA's "own investigators had concluded from a review of 5,500 emails that the targeting had not been politically motivated," but the report did not mention that.<sup>130</sup>

The U.S. Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs Majority Staff Report called out TIGTA for a flawed report, management failures in its audit, and failure to disclose for weeks that the IRS had included progressive key words on the BOLO lists, "even though it was directly

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Ambord, *supra* note 91.

<sup>127</sup> *See supra* note 91 and accompanying text.

<sup>128</sup> *See* Stein, *supra* note 53 ("Democrats on the House Ways and Means Committee turned up a 2010 IRS PowerPoint presentation that said both 'progressive' groups and 'tea party' organizations deserved extra scrutiny when applying for tax-exempt status."). The PowerPoint (with some redactions labeled "6103") is available at <http://democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/IRSR000006674.pdf> [<https://perma.cc/57KP-3XHH>]. "The notes from the meeting [at which the PowerPoint was shown] state that Gary Muthert indicated that the 'following names and/or titles were of interest and should be flagged for review:

- '9/12 Project,
- 'Emerge ["an organization that sought to train female Democratic political candidates"],
- 'Progressive,
- 'We The People,
- 'Rally Patriots, and
- 'Pink-Slip Program.'"

S. REP. NO. 114-119, at 252 (2015).

<sup>129</sup> Cummings & Levin, *supra* note 7 (referencing a statement of then-IRS Acting Commissioner Daniel Werfel).

<sup>130</sup> Sam Stein, *IRS Scandal Hearings Put Inspector General in the Spotlight*, HUFFINGTON POST (July 17, 2013, 2:24 PM), [http://www.huffingtonpost.com/2013/07/17/irs-scandal\\_n\\_3611460.html](http://www.huffingtonpost.com/2013/07/17/irs-scandal_n_3611460.html) [<https://perma.cc/5TPT-AV6N>]. The report did state, "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." 2013 TIGTA REPORT, *supra* note 1, at 8.

relevant to TIGTA's audit objective and could have helped alleviate public concern about potential IRS political bias."<sup>131</sup> The Majority Staff Report found that:

[T]he 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.<sup>132</sup>

In June 2013, Inspector General Russell George stated in a letter to Rep. Levin:

We reviewed all cases that the IRS identified as potential political cases and did not limit our audit to allegations related to the Tea Party. . . . From our audit work, we did not find evidence that the criteria you identified, labeled 'Progressives,' were used by the IRS to select potential political cases during the 2010 to 2012 timeframe we audited.<sup>133</sup>

The letter further stated that "[t]he 'Progressives' criteria appeared on a section of the 'Be On the Look Out' (BOLO) spreadsheet labeled 'Historical,' and, unlike other BOLO entries, did not include instructions on how to refer cases that met the criteria."<sup>134</sup> TIGTA's additional research reported in the June letter found that of the applications filed during the time period of the initial audit, six applications with "progress" or "progressive" in the organization's name were included in the IRS's "potential political cases" while fourteen were not.<sup>135</sup> It contrasted that with 100 percent inclusion of organizations with names that included the terms Tea Party, 9/12, or Patriot in their names, which were 96 of the 298 potentially political cases.<sup>136</sup>

Accordingly, it appears that the Cincinnati employees did not treat all of the liberal and conservative-sounding groups identically, leaving room for accusations of political

<sup>131</sup> U.S. SENATE, IRS & TIGTA MANAGEMENT FAILURES, *supra* note 40, at 8.

<sup>132</sup> *Id.* at 4. At some point, "medical marijuana" was included on the list. See Hicks, *supra* note 110 ("IRS documents released last week have complicated matters. They show that terms such as 'progressive,' 'blue' and 'medical marijuana' appeared on a multi-part 'Be on the Lookout' list . . .").

<sup>133</sup> George Letter to Levin, *supra* note 110, at 1.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1–2. Seventy-two of the ninety-six used the term "Tea Party" in the organization's name, eleven used "9/12," and thirteen used "Patriots." 2013 TIGTA REPORT, *supra* note 1, at 8 fig. 4. It is possible that some employees treated the "Tea Party" label as shorthand for all potentially political cases while others took the label literally and did not apply the same procedures to other groups. Cf. Philip Hackney, *An Examination of the IRS Tea Party Affair*, 49 VAL. L. REV. 453, 479 (2015) ("Some testimony indicates that some Service employees viewed the term Tea Party cases as a generic category, like someone might refer to coke as a generic term for soft drink. Other testimony seems to suggest that some employees understood in the early stage that they should be pulling and looking at only Tea Party-related organizations and should avoid looking at any others.") (footnote omitted). A Senate Report also explains that after two Tea Party cases were identified and subject to further review in Washington, D.C.:

[I]t can be argued that it was logical to develop a method of collecting all the Tea Party applications that continued to surface in Cincinnati. The BOLO list can be seen as an efficient procedure to use to make sure personnel in Cincinnati identified the right applications to set aside while Washington D.C. determined the best way to deal with these applications. Applications by left-leaning groups were also collected in this manner.

S. REP. NO. 114-119, at 251 (2015). However, this does not seem to explain why all of the organizations containing "9/12" or "Patriots" were treated as potentially political while only some of those using the term "Progress" were.

bias.<sup>137</sup> However, in October 2015, the DOJ, after a two-year investigation, found “no evidence that any IRS official acted based on political, discriminatory, corrupt, or inappropriate motives that would support a criminal prosecution.”<sup>138</sup> Instead, the DOJ found that IRS mismanagement was the culprit.<sup>139</sup> The FBI reached the same conclusion in its investigation.<sup>140</sup> The DOJ and FBI’s conclusions align with TIGTA’s finding of insufficient oversight by IRS management.<sup>141</sup>

#### D. The IRS’s Response to the Controversy

The IRS reacted quickly and extensively to the 501(c)(4) controversy. One day after TIGTA released its report, the IRS stated on its website that it had made mistakes.<sup>142</sup> The IRS also changed its procedures relating to determinations of tax-exempt status. Among other things, it suspended the use of watch lists, including BOLO lists.<sup>143</sup> TIGTA found in a follow-up audit in March 2015 that the IRS was no longer using BOLO lists.<sup>144</sup>

The IRS also directly addressed the delays many non-profits had experienced by instituting an expedited review process for all applications for tax-exempt status in which the organization had stated that it might be engaged in political activities.<sup>145</sup> Under an IRS procedure, if the application of such an organization had been pending for more than 120 days, the IRS would grant the application within two weeks if an authorized official from the organization made certain declarations about the organization’s planned activities, under penalty of perjury.<sup>146</sup>

This program succeeded in expediting the grant of applications for determinations of tax-exempt status. TIGTA found in its March 2015 follow-up audit that the IRS had “completed processing for 149 of the 160 applications for tax-exempt status that, as of December 2012, had been open for lengthy periods.”<sup>147</sup> The IRS reported that, as of July 2015, it had resolved 97 percent of the 145 organizations’ applications included in the new

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<sup>137</sup> See *supra* notes 133–136 and accompanying text. Republican minority staff included a dissent to the Senate’s report that argued, “Far fewer liberal groups were investigated by the IRS, and those that were received less intrusive questioning, the dissent said, adding that in some cases the liberal groups were affiliated with organizations that had behaved illegally in the past and as a result could expect extra scrutiny.” *Id.* See also *Media Prompted IRS to Target Conservative Groups, Oversight Committee Finds*, 2013 TAX NOTES TODAY 182-29 (Sept. 18, 2013) (stating that “The ACORN entry appears primarily on the Watch List tab of the BOLO spreadsheet whereas the Tea Party entry appears on the Emerging Issues tab of the spreadsheet. . . . [N]otes from the July 2010 screening group workshop state that while progressive applications should be ‘flagged,’ only Tea Party applicants were to be sent to a special coordinator.”).

<sup>138</sup> U.S. Dep’t of Just., Letter to the Hon. Bob Goodlatte, *supra* note 3.

<sup>139</sup> See *id.* at 1.

<sup>140</sup> See *supra* note 3 and accompanying text.

<sup>141</sup> See *supra* text accompanying note 119.

<sup>142</sup> See Internal Revenue Serv., *Questions and Answers*, *supra* note 84, at Q&A 12 (“Did mistakes occur in working the centralized cases? Yes. Applicants whose cases were centralized unfortunately experienced inappropriate delays and over-expansive information requests in some cases. This was caused by ineffective processes and not related to the selection criteria used for the centralization of a case.”). That document is dated May 15, 2013. TIGTA’s report is dated May 14, 2013. See 2013 TIGTA REPORT, *supra* note 1.

<sup>143</sup> See Daniel Werfel, *Charting a Path Forward at the IRS: Initial Assessment and Plan of Action* App. C (June 24, 2013), <https://www.irs.gov/PUP/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf> [<https://perma.cc/2GRF-BDZW>].

<sup>144</sup> TIGTA, STATUS OF ACTIONS TAKEN, *supra* note 19, at 3.

<sup>145</sup> See Lloyd Hitoshi Mayer, “*The Better Part of Valour is Discretion*”: Should the IRS Change or Surrender its Oversight of Tax-Exempt Organizations?, 7 COLUM. J. TAX L. 80, 103–04 (2016).

<sup>146</sup> *Id.* at 27.

<sup>147</sup> TIGTA, STATUS OF ACTIONS TAKEN, *supra* note 19, Highlights; see also *id.* at 16.

process, and by November 2015, it had resolved 98 percent.<sup>148</sup> Subsequently, as discussed below, Congress enacted a streamlined procedure that requires nonprofits seeking exemption under Code section 501(c)(4) to file a one-page notice of registration within 60 days after the organization is formed and for the IRS to acknowledge receipt of the form within 60 days.<sup>149</sup>

### III. THE 1997/1998 COLLECTIONS CONTROVERSY

The recent IRS hearings may strike a familiar chord for some observers: The IRS experienced hearings similar in tone in 1997 and 1998. The path to the earlier hearings was somewhat different because it started with IRS technology issues. However, as described below, perceived failures by the IRS were an important catalyst, and the end result was “reform” of the IRS.<sup>150</sup>

#### A. The Story Behind the IRS Reform Act of 1998

One of the initial forces behind the 1998 reform was the IRS’s perceived failure in implementing a multi-year computer project called “Tax Systems Modernization (TSM),”<sup>151</sup> which was designed to be “a complete business re-engineering of the IRS over a decade.”<sup>152</sup> In 1996, when TSM was shut down,<sup>153</sup> Representative Jim Lightfoot (R-IA), who chaired the House appropriations subcommittee responsible for IRS budgets said, “To date this has been a \$4 billion fiasco.”<sup>154</sup> That was an exaggeration, however, both because the IRS spent significantly less than that on TSM<sup>155</sup> and because a substantial portion of the IRS’s TSM expenditures went into infrastructure that continued to be useful even after TSM was cancelled.<sup>156</sup>

<sup>148</sup> *TIGTA Recommendation #7: Details and Status*, INTERNAL REVENUE SERV., <http://www.irs.gov/Charities-&-Non-Profits/TIGTA-Recommendation-7> [<https://perma.cc/7AJR-DADG>]. The IRS subsequently expanded the expedited-review program to provide the possibility of granting later applicants the same approach. See Mayer, *supra* note 145, at 103–04. However, that was superseded by new procedures in the PATH Act. See *infra* notes 260–261 and accompanying text.

<sup>149</sup> See *infra* notes 260–261 and accompanying text.

<sup>150</sup> Joseph J. Thorndike, *Annual Regulation of Business Focus: Reorganization of the Internal Revenue Service: Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 765 (2001).

<sup>151</sup> *Id.*

<sup>152</sup> COMPUTER SCI. & TELECOMM. BD. NAT’L RES. COUNCIL, CONTINUED REVIEW OF THE TAX SYSTEMS MODERNIZATION OF THE INTERNAL REVENUE SERVICE: FINAL REPORT 13 (1996), <http://www.nap.edu/read/10771/chapter/3> [<https://perma.cc/72N2-5LD4>] [hereinafter CONTINUED REVIEW OF TSM].

<sup>153</sup> Bozeman, *Organizational Culture*, *supra* note 35, at 131. The Treasury Department stepped in in early 1996 and halted work on TSM projects while it reviewed the program. NAT’L COMM’N ON RESTRUCTURING THE INTERNAL REVENUE SERV., REPORT OF THE NATIONAL COMMISSION ON RESTRUCTURING THE INTERNAL REVENUE SERVICE: A VISION FOR A NEW IRS 73–74 (June 25, 1997), <http://www.house.gov/natcommirs/final.htm> [<https://perma.cc/PEA6-WE2M>] [hereinafter REPORT OF THE NATIONAL COMMISSION].

<sup>154</sup> Robert D. Hershey, Jr., *A Technological Overhaul of I.R.S. is Called a Fiasco*, N.Y. TIMES (Apr. 15, 1996), <http://www.nytimes.com/1996/04/15/us/a-technological-overhaul-of-irs-is-called-a-fiasco.html> [<https://perma.cc/8MV2-R8QF>].

<sup>155</sup> The IRS responded that it had spent only \$2.7 billion on TSM. *Id.* The IRS’s figure is more plausible. GAO reported that the IRS had spent \$2.5 billion on TSM through 1995. U.S. GEN. ACCT. OFF., GAO/AIMD-95-156, TAX SYSTEMS MODERNIZATION: MANAGEMENT AND TECHNICAL WEAKNESSES MUST BE CORRECTED IF MODERNIZATION IS TO SUCCEED (1995), <http://www.gao.gov/assets/160/155115.pdf> [<https://perma.cc/4KD2-DKFJ>] [hereinafter GAO, TAX SYSTEMS MODERNIZATION]. Congress appropriated \$695 million for 1996 but held \$100 million of that appropriation back. See *infra* note 160. TSM was cancelled in 1996. See *supra* note 153 and accompanying text.

<sup>156</sup> See BOZEMAN, INFORMATION MEGA-TECHNOLOGY, *supra* note 35, at 7 (explaining that much of the funding went into software and hardware the IRS was still using in 2002, and some of the funds went into renovating buildings).

TSM was created because the IRS had been struggling for years to maintain systems that dated from the 1950s and 1960s.<sup>157</sup> Congress had frequently ignored the IRS's requests for information-technology funding.<sup>158</sup> In 1985, after the IRS introduced new technology for processing returns that had been insufficiently tested and simply did not work, it had a very public failure: a janitor at the IRS's Philadelphia Service Center reported finding mangled unopened returns in wastebaskets and in the bathroom, including checks made out to the IRS aggregating more than \$300,000.<sup>159</sup> In response to complaints from angry constituents, in 1989, Congress approved the IRS's TSM plan, which the IRS told Congress could cost several billion dollars over the course of a ten-year period.<sup>160</sup>

TSM was actually not a single project, but rather a group of projects that included more than 40 initiatives<sup>161</sup> such as Cyberfile, an experiment in filing over the Internet;<sup>162</sup> SCRIPS, the Service Center Recognition/Image Processing System, which was supposed to convert paper returns into digital images; and the Document Processing System (DPS), which was supposed to produce similar digitized information.<sup>163</sup> Many of these projects failed to produce technology that worked adequately.<sup>164</sup> Barry Bozeman describes the problem the IRS had developing and implementing TSM as resulting from the inadequacy of state-of-the-art technology at the time for many of the IRS's needs; failure of IRS management to recognize that failure was inevitable;<sup>165</sup> and an insular, distrusting agency culture that limited employees' willingness to take risks, such as by delivering bad news.<sup>166</sup> However, he also notes that TSM was less of a failure than generally believed, in that much of the funding went into software and hardware the IRS was still using in 2002, the time of his writing.<sup>167</sup>

<sup>157</sup> U.S. GEN. ACCT. OFF., GAO/IMTEC-90-13, TAX SYSTEMS MODERNIZATION: IRS' CHALLENGE FOR THE 21ST CENTURY 2 (1990), <http://www.gao.gov/assets/220/212210.pdf> [<https://perma.cc/C2RL-8JAT>] [hereinafter TSM: IRS' CHALLENGE]. The IRS had abandoned two previous efforts, the first, in 1978, due to Congressional concerns about cost and security and the second due to several factors, including frequent leadership changes at Treasury and IRS as well as inadequate technical expertise on the part of IRS management. *Id.* at 3.

<sup>158</sup> BOZEMAN, INFORMATION MEGA-TECHNOLOGY, *supra* note 35, at 46.

<sup>159</sup> Bozeman, *Organizational Culture*, *supra* note 35, at 125.

<sup>160</sup> GAO, TSM: IRS' CHALLENGE, *supra* note 157, at 3. In 1995, the GAO reported that the IRS had spent \$2.5 billion on TSM since 1986 and requested another \$1.1 billion for fiscal year 1996, with a total projected budget of \$8 billion through 2001. GAO, TAX SYSTEMS MODERNIZATION, *supra* note 155, at 2. Appropriations for TSM were annual, as part of the IRS's budget. *See* Bozeman, *Organizational Culture*, *supra* note 35, at 127 (referring to this as a perceived risk of the project from the IRS's perspective). Nonetheless, the IRS experienced the TSM appropriation as a significant influx of resources. BOZEMAN, INFORMATION MEGA-TECHNOLOGY, *supra* note 35. The IRS requested \$717 million for TSM for 1994. *Id.* at 1. Funding was cut for 1996: "Of the \$695 million in funding approved for TSM for this year, the conference committee restricts IRS from spending \$100 million until it receives a full accounting of the \$8 billion TSM program." Christopher J. Dorobek, *Tax Systems Modernization Gets \$300 Million Less Than IRS Wants*, GCN (Dec 11, 1995), <https://gcn.com/articles/1995/12/11/tax-systems-modernization-gets-300-million-less-than-irs-wants.aspx> [<https://perma.cc/3YXR-VNLC>].

<sup>161</sup> Bozeman, *Organizational Culture*, *supra* note 35, at 126–27.

<sup>162</sup> *Id.* at 127.

<sup>163</sup> *Id.* at 131.

<sup>164</sup> *Id.* at 127–28, 131.

<sup>165</sup> *Id.* at 132. For example, technology at the time was unable to digitize documents that might be partly typed, partly handwritten, and might include notes attached to them. *Id.*

<sup>166</sup> *See id.* at 129.

<sup>167</sup> *See* BOZEMAN, INFORMATION MEGA-TECHNOLOGY, *supra* note 35, at 7, 43.

The GAO issued numerous reports criticizing the IRS's management of the TSM project.<sup>168</sup> Congressional support for TSM declined.<sup>169</sup> In 1995, Congress approved a lower budget for TSM than the IRS requested<sup>170</sup> and appointed Senator Bob Kerrey (D-NE) and Representative Rob Portman (R-OH) co-chairs of a one-year commission to examine not only TSM but also consider restructuring the IRS.<sup>171</sup> The impetus for considering restructuring the IRS went beyond the problems with TSM. Taxpayers who were subject to line-by-line audits under the program the IRS used for research at the time, the Taxpayer Compliance Measurement Program (TCMP), objected to the burden it imposed.<sup>172</sup> Taxpayers also complained that it was hard to reach the IRS by telephone<sup>173</sup> and that IRS employees treated them rudely.<sup>174</sup>

Although the restructuring commission was bipartisan, IRS reform was a highly political process, and the ultimate “reform bore the distinct fingerprints of leading income tax antagonists.”<sup>175</sup> That is because, in 1994, Democrats had lost control of the House for the first time in decades,<sup>176</sup> significantly undermining support for progressive income

<sup>168</sup> See, e.g., GAO, TAX SYSTEMS MODERNIZATION, *supra* note 155; GAO, TSM: IRS' CHALLENGE, *supra* note 157; U.S. GEN. ACCT. OFF., GAO/GGD/AIMD-97-31, TAX SYSTEMS MODERNIZATION: IRS NEEDS TO RESOLVE CERTAIN ISSUES WITH ITS INTEGRATED CASE PROCESSING SYSTEM (1997), <http://www.gao.gov/assets/230/223536.pdf> [<https://perma.cc/M3XP-VXAP>] (hereinafter GAO, IRS NEEDS TO RESOLVE CERTAIN ISSUES). Cf. Thorndike, *supra* note 150, at 767 (GAO issued “more than 40 . . . reports between 1991 and 1997 that were critical of IRS management, procedures, and performance.”). In 1995, GAO added TSM to its list of high-risk areas—projects vulnerable to delays, cost overruns, and failure to meet goals. See GAO, IRS NEEDS TO RESOLVE CERTAIN ISSUES, *supra*, at 7.

<sup>169</sup> The negative reports by GAO and the National Research Council eroded Congress's support of TSM over a period of about three years. Elana Varon, *Congress Threatens TSM Funds*, FCW (Mar. 17, 1996), <https://fcw.com/articles/1996/03/17/congress-threatens-tsm-funds.aspx> [<https://perma.cc/U66A-HLL5>].

<sup>170</sup> Dorobek, *supra* note 160.

<sup>171</sup> *Id.* (“The role of the commission, proposed by Sen. Bob Kerrey (D-Neb.), will be broader than merely examining TSM, a Senate staff member said. ‘We want to look at the way IRS does its business,’ he said.”). See also Thorndike, *supra* note 150, at 768 n.189.

<sup>172</sup> CONG. RES. SERV. CRS REPORTS ON STATUS OF IRS RESTRUCTURING AND REFORM (Mar. 22, 2001), LEXIS, 2001 TAX NOTES TODAY 60-42 [hereinafter CRS REPORTS ON STATUS OF IRS RESTRUCTURING]. The IRS later replaced the TCMP with a less intrusive audit program, the National Research Program. See Sarah B. Lawsky, *Fairly Random: On Compensating Audited Taxpayers*, 41 CONN. L. REV. 161, 167 (2008) (“A[] TCMP was scheduled for the 1994 tax year, but the study was postponed in response to anti-IRS political pressure, and then was cancelled in 1995 after Congress significantly reduced the IRS budget. In 2002, the IRS began its National Research Program, or ‘NRP.’ Like the TCMP, the NRP selects returns randomly, but it reviews even fewer returns and does so with less intensity than the TCMP.” (footnote omitted)).

<sup>173</sup> CRS REPORTS ON STATUS OF IRS RESTRUCTURING, *supra* note 172. Through 1996, the IRS's call center technology was geographically based, so a caller would have to wait until an employee at a specific geographic location became available. TREAS. INSPECTOR GEN. FOR TAX ADMIN., THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998 WAS SUBSTANTIALLY IMPLEMENTED BUT CHALLENGES REMAIN 17 (2010), <https://www.treasury.gov/tigta/ireports/2010reports/2010IER002fr.pdf> [<https://perma.cc/YZ9A-BZF8>]. “Between October 1995 and September 1996, the IRS answered 21 percent of all calls.” *Id.*

<sup>174</sup> CRS REPORTS ON STATUS OF IRS RESTRUCTURING, *supra* note 172.

<sup>175</sup> Thorndike, *supra* note 150, at 766. See also Ryan J. Donmoyer, *Three Days of Hearings Paint Picture of Troubled IRS*, 76 TAX NOTES 1655, 1658 (1997) (“Although Roth took pains to say his investigation was not politically biased and that he did not intend to merely bash the IRS, Democrats remained suspicious. On numerous occasions they quoted from Republican fund-raising letters that recommended bashing the agency.”).

<sup>176</sup> Thorndike, *supra* note 150, at 768.

taxation.<sup>177</sup> Former IRS Commissioner Donald Alexander noted that pollster Frank Luntz recommended that political candidates score points by vilifying the IRS, an approach some Congressional leaders adopted.<sup>178</sup>

That political context ultimately hijacked the IRS reform process. The bipartisan commission started its work in 1996, and, after a year of research and hearings, released its recommendations.<sup>179</sup> The recommendations included “restructuring Congressional oversight of the IRS, providing the IRS with a Board of Directors, updating the IRS’s technology, requiring the IRS to develop a strategic plan for increasing electronic filing of tax returns, increasing taxpayers’ ability to recover damages in appropriate cases, and simplification of the tax law.”<sup>180</sup> The commission also blamed the laws enacted by Congress for some of the IRS’s problems, and urged Congress to consider the effects on tax administration before changing the laws.<sup>181</sup>

The House responded very favorably, and House Ways and Means Chair Bill Archer introduced a bill in 1997 that the House quickly passed in early November.<sup>182</sup> However, while the Senate was still working on the bill,<sup>183</sup> Senator William Roth (R-DE), then-Chair of the Senate Finance Committee, took the reins and “sought to make the legislation his own.”<sup>184</sup> The vivid parade of horrors in his fall hearings—a moral panic over the actions of IRS collections employees—“effectively altered the tenor of the legislation.”<sup>185</sup>

#### B. Hearings and Horror Stories

In the fall of 1997, Senator Roth oversaw a hearing<sup>186</sup> that focused primarily on horror stories of IRS abuses of taxpayers.<sup>187</sup> The House Ways and Means Committee, not

<sup>177</sup> *Id.* at 766.

<sup>178</sup> Donald C. Alexander, *Some Musings About the IRS*, 83 TAX NOTES 297, 297 (1999) (citing Frank Luntz, *1997 Instructions to Candidates*); see also Donmoyer, *supra* note 175, at 1658 (“Pollster Frank Luntz . . . observed that ‘nothing guarantees more applause and more support than the call to abolish the IRS.’”).

<sup>179</sup> Thorndike, *supra* note 150, at 768.

<sup>180</sup> Lederman, *supra* note 37, at 978 (footnotes omitted).

<sup>181</sup> Thorndike, *supra* note 150, at 772.

<sup>182</sup> *Id.* at 774.

<sup>183</sup> CRS REPORTS ON STATUS OF IRS RESTRUCTURING, *supra* note 172.

<sup>184</sup> Thorndike, *supra* note 150, at 774.

<sup>185</sup> CRS REPORTS ON STATUS OF IRS RESTRUCTURING, *supra* note 172.

<sup>186</sup> *Id.* Then-Senator David Pryor (D-AR), who headed the Oversight Subcommittee of the Senate Finance Committee, was also involved. See Daniel L. McClain, *United States v. Leach and Internal Revenue Code Section 7521(c): Applying A Text-Based Analysis to Provisions of the Tax Code*, 77 IOWA L. REV. 371, 372 (1991) (describing the “horror stories” of IRS abuse that were revealed during hearings conducted by Senator David Pryor).

<sup>187</sup> McClain, *supra* note 186, at 372 (describing the “horror stories” of IRS abuse that were revealed during hearings conducted by Senator David Pryor); Guttman, *supra* note 34, at 13 (“In 1987 and 1988, then-Senator David Pryor, who was head of the Finance Committee’s Oversight subcommittee, held hearings on taxpayer problems in dealing with the IRS.”). Senator Roth also co-authored a provocatively titled book. See WILLIAM V. ROTH, JR. & WILLIAM H. NIXON, *THE POWER TO DESTROY: HOW THE IRS BECAME AMERICA’S MOST POWERFUL AGENCY, HOW CONGRESS IS TAKING CONTROL, AND WHAT YOU CAN DO TO PROTECT YOURSELF UNDER THE NEW LAW* (1999). The dust jacket states, in part, “In 1997 William Roth . . . initiated an investigation into the IRS and chaired congressional hearings that uncovered horrifying stories of abuses against taxpayers that shocked the nation.” *Id.* (front dust jacket).

to be left out,<sup>188</sup> held similar hearings.<sup>189</sup> The House actively solicited these tales. In a theatrical move, it opened a website on the symbolic date of Halloween, linked to the House Republican Conference's website, expressly "to collect taxpayer horror stories."<sup>190</sup> Ryan J. Donmoyer quoted Rep. John Boehner, then-Chair of the House Republican Conference, as stating, "This Halloween, the Republican Congress is unmasking the IRS for what it really is: a bureaucratic monster stalking the American taxpayer."<sup>191</sup>

The hearings received extensive media coverage,<sup>192</sup> with some broadcast on national television<sup>193</sup> and featuring IRS employees testifying behind screens to hide their identities, implying that they feared imminent retaliation.<sup>194</sup> Representative Michael Forbes (NY)<sup>195</sup> made that link as vivid as possible, stating, "We saw current and former IRS agents who *had to testify in secret because they feared for their lives.*"<sup>196</sup>

Congress apparently carefully selected its witnesses.<sup>197</sup> They included "Lawrence Ballweg, an angry 79-year-old priest, [who] alleged that while administering his mother's estate, the IRS improperly assessed him personally more than \$18,000 in taxes."<sup>198</sup> The owner of a Virginia restaurant called "The Jewish Mother," John Colaprete, detailed a raid involving armed agents "pulling his manager's [teenaged] daughter out of a shower at gunpoint."<sup>199</sup>

Some used the rhetoric of criminal law, not just to refer to how the IRS allegedly treated taxpayers, but also how the IRS should be treated. For example, Representative Forbes stated:

We saw a government agency totally out of control, lacking accountability, an agency where *one is guilty until proven innocent.*

<sup>188</sup> Alexander, *supra* note 178, at 299 (stating that "[t]he Ways and Means Committee, not to be left behind, promptly took up the restructuring commission's bill and made it much stricter . . .").

<sup>189</sup> See *Taxpayer Rights: Written Comment and Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 105th Cong. 12 (1997) (statement of Rep. Bill Archer) ("[T]here are too many instances in which taxpayers are denied their fundamental rights. Money is coerced from people who do not owe it. And the defenseless and the weak can become IRS targets.").

<sup>190</sup> Ryan J. Donmoyer, *GOP Opens IRS Horror Story Web Site*, 77 TAX NOTES 667, 667 (1997).

<sup>191</sup> *Id.*

<sup>192</sup> See Lederman, *supra* note 37, at 1010 (discussing the media's focus on horror stories and the need to reform the IRS); see also Thorndike, *supra* note 150, at 774 ("The hearings drew widespread media coverage.").

<sup>193</sup> See Donmoyer, *supra* note 175, at 1655 ("By the end of the high-profile Senate Finance Committee oversight hearings on alleged IRS abuses of taxpayers, the agency was issuing apologies to taxpayers who related their horror stories on live television and promising to clean up its act. Again.").

<sup>194</sup> Thorndike, *supra* note 150, at 774.

<sup>195</sup> Mr. Forbes was a member of the Republican Party until July 17, 1999, when he switched to the Democratic Party. *Rep. Forbes Loses Aides Over Switch to Democrats*, L.A. TIMES (July 20, 1999), <http://articles.latimes.com/1999/jul/20/news/mn-57768> [<https://perma.cc/8E8L-3DD4>].

<sup>196</sup> JOINT REVIEW OF THE STRATEGIC PLANS AND BUDGET OF THE INTERNAL REVENUE SERVICE, AS REQUIRED BY THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, JCS-4-99, at 9 (May 25, 1999) (opening statement of Rep. Forbes) (emphasis added), <https://www.jct.gov/publications.html?func=startdown&id=2912> [<https://perma.cc/EQ93-8MSN>] [hereinafter Opening Statement of Rep. Forbes].

<sup>197</sup> See Spellman, *supra* note 16, at 1854 (former IRS Commissioner Mortimer Caplin said at a conference, "Roth 'brought six people up—these miserable collection cases. He had studied thousands and thousands of cases and came up with six extreme charges against the IRS.'").

<sup>198</sup> Leslie Book, *The New Collection Due Process Taxpayer Rights*, 86 TAX NOTES 1127, 1127 (2000).

<sup>199</sup> *Id.* See also Ryan J. Donmoyer, *Judge May Dismiss Jewish Mother Lawsuit*, 83 TAX NOTES 1696, 1696 (1999).



We saw and heard all this and we acted to put a stop to it. . . .

In a sense, the Internal Revenue Service Restructuring and Reform Act put the IRS on probation.<sup>200</sup>

The hearings effectively put the IRS on trial<sup>201</sup> but, largely because Congress—perhaps intentionally—did not obtain waivers from the witnesses<sup>202</sup> of their statutory right to confidentiality of their tax return information,<sup>203</sup> the IRS was essentially a voiceless and thus helpless defendant.<sup>204</sup> In fact, the bona fides of many of the shocking stories told at the IRS hearings are questionable. John Colaprete famously “has ‘recanted all this—he happened to be out of the country’ when this was said to have occurred.”<sup>205</sup> The GAO ultimately found many of the witnesses’ horror stories unfounded or exaggerated.<sup>206</sup> However, that was after Congress enacted sweeping changes in the IRS Reform Act.<sup>207</sup> During the hearings that preceded the Act, many Congressmen were horrified by the witnesses’ testimony.<sup>208</sup>

### C. Alleged Targeting of Conservative Tax-Exempt Organizations

In 1997, the heyday of IRS horror stories and Congressional hearings, the IRS encountered another problem: The press accused the IRS of targeting the applications for tax-exempt status of organizations perceived to be antithetical to the views of the Clinton Administration.<sup>209</sup> The seven allegations included the following two:

<sup>200</sup> Opening Statement of Rep. Forbes, *supra* note 196.

<sup>201</sup> *See id.* (“In 1997, Congress held a series of hearings where the American people saw the Internal Revenue Service almost literally on trial. They saw a parade of witness [sic] come before Congress to testify about the naked abuse of power over at the Internal Revenue Service.”).

<sup>202</sup> *See* Alexander, *supra* note 178, at 299 (“Presumably aware that the IRS was powerless to respond or correct the record without waiver of the strict privacy rules under section 6103, the committee did not obtain waivers of confidentiality from the witnesses telling their lurid stories or give the IRS the right to respond.”). *Cf.* George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public’s Right to Know*, 100 VA. L. REV. 1115, 1133 (2014) (noting that “[w]ith JCT [Joint Committee on Taxation] approval, the IRS has a limited ability to disclose return information in order to correct a misstatement of fact. *See* I.R.C. § 6103(k)(3).”).

<sup>203</sup> *See* I.R.C. § 6103.

<sup>204</sup> *See, e.g.*, Donmoyer, *supra* note 175, at 1659 (referring to “a squabble [with Senator Roth] as [IRS Acting Commissioner Michael] Dolan declined to answer questions about the case because he said he did not have all of the necessary waivers required under the tax code’s confidentiality provisions.”); *cf.* Alexander, *supra* note 178, at 299 (“Perhaps under instructions to limit its response, the IRS made little effort to rebut claims of misdeeds or to explain its actions.”).

<sup>205</sup> Spellman, *supra* note 16, at 1854 (quoting former IRS Commissioner Mortimer Caplin). *See also* Mom’s, Inc. v. Weber, 82 F. Supp. 2d 493, 524 & n.62 (E.D. Va. 2000), *rev’d in part sub nom.* Mom’s, Inc. v. Willman, 109 Fed. App’x 629 (4th Cir. 2004) (“While the restaurants were being searched, agents simultaneously searched the homes of [Jewish Mother manager Richard] Miller and Colaprete as well. There was no one home at Colaprete’s house at the time of the search except Colaprete’s two dogs. Colaprete was in Jamaica at the time. . . .”).

<sup>206</sup> U.S. GEN. ACCT. OFF., GAO REPORT ON ALLEGATIONS OF IRS TAXPAYER ABUSE (May 24, 1999), LEXIS, 2000 TAX NOTES TODAY 80-13. The Webster Commission similarly found, “there was no pattern of misuse by the CID of search warrants, grand juries, informants, or undercover operators, although there were ‘one or two isolated abuses.’” Spellman, *supra* note 16, at 1855.

<sup>207</sup> Pub. L. No. 105-206, 112 Stat. 685.

<sup>208</sup> CRS REPORTS ON STATUS OF IRS RESTRUCTURING, *supra* note 172.

<sup>209</sup> JOINT COMM. ON TAXATION, REPORT OF INVESTIGATION OF ALLEGATIONS RELATING TO INTERNAL REVENUE SERVICE HANDLING OF TAX-EXEMPT ORGANIZATION MATTERS, JCS-3-00, at 12 (Mar. 2000), <http://www.jct.gov/s-3-00.pdf> [<https://perma.cc/L68C-3DCL>] (“[A]llegations were made through certain media reports that the IRS was engaged in politically targeted examinations of tax-exempt organizations.”).

(1) [T]he IRS delayed or refused to issue determination letters to certain organizations either because the organization was perceived to represent views that were opposed to the Clinton Administration or because individual IRS employees were opposed to the views of the organization; [and]

(2) [T]he IRS inappropriately granted determination letters or expedited the granting of determination letters for organizations whose political views were in line with those of the Clinton Administration . . . .<sup>210</sup>

At the request of Senator Roth and others, the Joint Committee on Taxation investigated the allegations and issued a report.<sup>211</sup> It found no evidence to support the allegations.<sup>212</sup> Instead, the Joint Committee found that, for technical reasons, some determination letter applications took longer than others for the IRS to process. Specifically, those that were not “approved by a technical screener on the basis of information contained in the application” and those that were forwarded to the IRS’s National Office in Washington, D.C. took much longer.<sup>213</sup>

The report also found no evidence that the screening process was used selectively or in a manner intended to subject organizations with views contrary to the Clinton Administration to more scrutiny.<sup>214</sup> According to the report, although determination-letter applications followed different paths, these differences were not politically motivated. Rather, they resulted from:

(1) [D]ifferences in the statements made by organizations on their determination letter applications as to the organizations’ purposes, (2) the failure of IRS employees to understand the circumstances under which determination letter applications should be forwarded to the IRS National Office, and (3) differences in information provided to the IRS relating to potential operations of the organizations in question.<sup>215</sup>

However, the report noted its concern that the different paths the applications took could create the appearance of bias.<sup>216</sup>

The Joint Committee determined that “the move by the IRS to centralize the processing of determination letter requests in a single IRS Key District Office may address certain of the problems identified by the Joint Committee staff.”<sup>217</sup> Ironically, sixteen years later, TIGTA found that IRS employees in that office in Cincinnati had created exactly the problem the Joint Committee thought in 2000 a centralized office would solve.<sup>218</sup>

#### IV. IRS REFORM IN CONTROVERSY

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<sup>210</sup> *Id.* at 12–13.

<sup>211</sup> *Id.* at 1.

<sup>212</sup> *Id.* at 14–15.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 15.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 16.

<sup>217</sup> *Id.*

<sup>218</sup> *See supra* text accompanying notes 91–93. In fact, the 1998 reform may have contributed to the problem because “[f]ollowing reorganization, many highly trained lawyers in Washington who previously handled the most sensitive nonprofit applications were reassigned to focus on special projects . . . .” Barker & Elliot, *supra* note 79 (reporting statement of Paul Streckfus, a former IRS attorney).

It is too soon to tell what the long-term effect on the IRS will be from the recent Congressional hearings and 2015 IRS reform legislation. However, the outcome of the 1998 IRS reform, which followed similarly inflammatory hearings, may provide some useful lessons. Before turning to the IRS reforms Congress made at the end of 2015, the next Section examines the effects of the 1998 IRS reform.

#### A. The 1998 Reform

Not surprisingly, the highly publicized 1997 and 1998 hearings, with their allegations of shocking abuses perpetrated by the IRS, resulted in strong public support for major changes in IRS procedures and operations.<sup>219</sup> The hearings deeply embarrassed the IRS and “did little to assure respect for either the income tax or the agency assigned to collect it.”<sup>220</sup> The hearings also proved very profitable for Republicans, “attracting attention and campaign contributions.”<sup>221</sup> They also resulted in the creation of a commission, headed by William Webster, to investigate the Criminal Investigation Division of the IRS.<sup>222</sup>

##### 1. Changes Made by the IRS Reform Act

The IRS Reform Act itself did many things. First and foremost, it required the IRS to undertake a major structural reorganization, moving from a geography-based structure to one organized into four operating divisions based on taxpayer groups.<sup>223</sup> This aligned with the vision of the incoming IRS Commissioner, Charles Rossotti.<sup>224</sup> The 1998 Act also enacted the Taxpayer Bill of Rights III, which has over seventy provisions, including restrictions on certain tax collections,<sup>225</sup> and created a statutory list of “Ten Deadly Sins” for which an IRS employee would be fired.<sup>226</sup>

The IRS Reform Act also established two new IRS oversight bodies, the IRS Oversight Board and TIGTA,<sup>227</sup> bringing the total number of non-Congressional IRS watch

<sup>219</sup> Albert B. Crenshaw, *Senate Passes IRS Overhaul*, WASH. POST, May 8, 1998, at A01, <http://www.washingtonpost.com/wp-srv/politics/special/tax/stories/irs050898.htm> [<https://perma.cc/S4ER-WPAV>].

<sup>220</sup> Guttman, *supra* note 34, at 13.

<sup>221</sup> *Senate Panel Hears Stories of Alleged IRS Abuses*, ALL POLITICS (Apr. 28, 1998), <http://www.cnn.com/ALLPOLITICS/1998/04/28/irs.hearings> [<https://perma.cc/Z6LM-CWWJ>].

<sup>222</sup> See Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 KAN. L. REV. 1065, 1144 n.144 (2003) (discussing William Webster’s report, which found that “no evidence of systematic or repeated disclosure violations by the IRS Criminal Division existed”). For the report, see WILLIAM H. WEBSTER, REVIEW OF THE INTERNAL REVENUE SERVICE’S CRIMINAL INVESTIGATION DIVISION (April 1999), <http://permanent.access.gpo.gov/lps19053/27623d99.pdf> [<https://perma.cc/M9BD-YFF8>].

<sup>223</sup> Thorndike, *supra* note 150, at 775–76. The geography-based structure that existed prior to the 1998 reform was the result of the previous restructuring, in 1952. *Id.* at 762. Before that, the IRS had been organized by type of tax. *Id.*

<sup>224</sup> *Statement of Charles O. Rossotti, Commissioner of Internal Revenue, Before the Senate Finance Committee, January 28, 1998*, at 12, INTERNAL REVENUE SERV. (Jan. 28, 1998), <https://www.irs.gov/pub/irs-news/ir-98-3.pdf> [<https://perma.cc/EW6X-68VV>] (“[O]ne logical way to organize the IRS is into four units, each charged with end-to-end responsibility for serving a particular group of taxpayers with similar needs.”).

<sup>225</sup> Thorndike, *supra* note 150, at 775–76. For examples of such restrictions, see Pub. L. No. 105-206, 112 Stat. at 758–63 §§ 3421 (“Approval Process for Liens, Levies, and Seizures”), 3433 (“Levy Prohibited During Pendency of Refund Proceedings”), 3441 (“Prohibition of Sales of Seized Property at Less Than Minimum Bid”), 3445 (“Procedures for Seizure of Residences and Businesses”).

<sup>226</sup> Pub. L. No. 105-206, § 1203, 112 Stat. at 720–22; see also Lederman, *supra* note 37, at 981.

<sup>227</sup> See IRS Oversight Bd., *FAQ, Q&A 1*, DEP’T OF THE TREASURY, <http://www.treasury.gov/IRSOB/faqs/Pages/default.aspx#Q1> [<https://perma.cc/ARZ2-GQWF>]; TIGTA, *Home Page*, DEP’T OF THE TREASURY, <http://www.treasury.gov/tigta> [<https://perma.cc/WED4-Y53Z>] (“The Treasury Inspector General for Tax Administration (TIGTA) was established under the IRS Restructuring and Reform Act of 1998 to provide independent oversight of IRS activities.”) [hereinafter TIGTA, *Home Page*].

dogs to nine.<sup>228</sup> TIGTA's website states that it was established, among other things, "to provide independent oversight of IRS activities" and to prevent "fraud, waste, and abuse within the IRS and related entities."<sup>229</sup> It was TIGTA's 2013 report that gave rise to the 501(c)(4) controversy.<sup>230</sup>

The 1998 Act also took a few steps to address the technology problems that served as the initial catalyst for reform.<sup>231</sup> Commissioner Rossotti was particularly concerned about the technology issue.<sup>232</sup> Under Rossotti's leadership, the IRS launched a computer modernization effort, outsourcing the project to Computer Sciences Corp. (CSC) in 1999.<sup>233</sup> However, at a 2004 congressional hearing, testimony suggested that although the modernization project had produced some results, it had been beset with "significant delays and cost over-runs."<sup>234</sup> In the same year, then-Commissioner Rossotti admitted in an

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<sup>228</sup> The IRS lists its non-Congressional oversight organizations as including the following eight entities: (1) the GAO; (2) the Office of Management and Budget; (3) TIGTA; (4) the Electronic Tax Administration Advisory Committee (ETAAC); (5) the Information Reporting Program Advisory Committee (IRPAC); (6) Internal Revenue Service Advisory Council (IRSAC); (7) the Taxpayer Advocacy Panel (TAP); and (8) the IRS Oversight Board. Internal Revenue Serv., *IRS Oversight Organizations*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/IRS-Oversight-Organizations> [<https://perma.cc/A7KF-4FVP>] (last updated Feb. 23, 2015) (listing ETAAC, IRPAC, IRSAC, TAP, and the IRS Oversight Board as "Advisory/Advocacy Organizations"). The National Taxpayer Advocate also exercises an oversight function. See Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, 14 FLA. TAX REV. 223, 245 (2013) ("The principal oversight mechanisms Congress has established [for the IRS] are the Office of the Taxpayer Advocate and the Internal Revenue Service Oversight Board."). The IRS Oversight Board is now largely defunct because the U.S. Senate has not filled vacancies on the Board, so it does not currently have enough members to constitute a quorum. See U.S. Treasury, *IRS Oversight Board*, DEP'T OF THE TREASURY, <http://www.treasury.gov/irsob/Pages/default.aspx> [<https://perma.cc/AB85-G9L6>]. However, other oversight bodies are quite active. For example, the GAO released at least 15 reports on the IRS from January to September 2015. See U.S. GOV'T ACCOUNTABILITY OFFICE, Search for "IRS", [http://www.gao.gov/search?rows=10&now\\_sort=score+desc&page\\_name=main&search\\_type=Solr&o=0&path=&facets=&adv\\_begin\\_date=&adv\\_end\\_date=&adv=0&advanced=&q=irs](http://www.gao.gov/search?rows=10&now_sort=score+desc&page_name=main&search_type=Solr&o=0&path=&facets=&adv_begin_date=&adv_end_date=&adv=0&advanced=&q=irs) [<https://perma.cc/AB85-G9L6>]. During the same 9-month period in 2015, TIGTA released at least 47 audit reports. TIGTA, *Audit Reports: FY – 2015*, DEP'T OF THE TREASURY, [https://www.treasury.gov/tigta/oa\\_auditreports\\_fy15.shtml](https://www.treasury.gov/tigta/oa_auditreports_fy15.shtml) [<https://perma.cc/Z2XU-3NKY>] (last updated Oct. 15, 2015).

<sup>229</sup> TIGTA, *Home Page*, *supra* note 227 (also stating that it was established to "promote[] the economy, efficiency, and effectiveness in the administration of the internal revenue laws").

<sup>230</sup> See *supra* Part II.

<sup>231</sup> The IRS Reform Act amended Code section 7802 to provide that members of the IRS Oversight Board would be selected on the basis of factors including their professional experience and expertise in the area of information technology. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, § 1101(a). It amended section 7803 to require TIGTA to annually evaluate the "adequacy and security" of IRS technology. *Id.* § 1102(a). It also instructed the Secretary of the Treasury to convene an electronic commerce advisory group to advise on the development of e-filing. *Id.* § 2001(b)(2). In addition, it required the Joint Committee on Taxation to report annually between 1998 and 2004 on the status of the IRS technology modernization project. *Id.* § 4002.

<sup>232</sup> Karen Kaplan, *Bringing the IRS Into the 21st Century*, L.A. TIMES (June 27, 1999), <http://articles.latimes.com/1999/jun/27/business/fi-50556> [<https://perma.cc/P2UY-MZW8>] (discussing how Commissioner Rossotti's technological "vision represents a dramatic change from the hodgepodge of computer systems that store taxpayer records today").

<sup>233</sup> *Id.* (stating below the headline, "Computer Sciences embarks on modernizing the computer systems that enable the agency to collect \$1.7 trillion and deal with its millions of taxpaying 'customers.'").

<sup>234</sup> *IRS Efforts to Modernize its Computer Systems: Hearing Before the S. Comm. on Oversight of the Comm. on Ways and Means*, 108th Cong. (2004) (Statement of Rep. Amo Houghton, Chairman, S. Comm. on Oversight), <http://www.gpo.gov/fdsys/pkg/CHRG-108hhrg93550/html/CHRG-108hhrg93550.htm> [<https://perma.cc/8DWC-4A7N>].

interview that IRS computer modernization remained a “serious problem.”<sup>235</sup> The IRS has not made significant strides in this regard since, as discussed below.<sup>236</sup>

## 2. *The Fallout of the 1998 Reform*

One result of the IRS Reform Act was a sharp downturn in collection activity for several years. Audit rates, tax lien filings, levy notices served on third parties, and seizures<sup>237</sup> all dropped dramatically starting around the 1998 fiscal year, as shown in Table 1.<sup>238</sup> In addition, as Professor Leslie Book has explained, in 1999, the IRS started to defer collection activity on billions of dollars in taxes, and, by September 2002, had deferred action on approximately one in three cases.<sup>239</sup>

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<sup>235</sup> Interview with Charles Rossotti, *IRS Commissioner, on PBS Frontline* (Feb. 19, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/tax/interviews/rossotti.html> [<https://perma.cc/4MFN-8YBR>]. In 2007, the IRS recognized “limitations of [its] existing computer systems and technical infrastructure,” and detailed its information-technology development plan for the next several years. INTERNAL REVENUE SERV., *IT MODERNIZATION VISION & STRATEGY 6* (2007), <http://www.irs.gov/pub/newsroom/mvs-10-07.pdf> [<https://perma.cc/AJ4Z-2MD6>]. In 2012, the IRS discontinued its contract with CSC. Jonathon O’Connell, *Computer Sciences Corp. Shedding Hundreds of Jobs in Prince George’s County*, WASH. POST (Nov. 1, 2013), [http://www.washingtonpost.com/business/capitalbusiness/computer-sciences-corp-shedding-hundreds-of-jobs-in-prince-georges-county/2013/10/31/c34e2de8-4175-11e3-8b74-d89d714ca4dd\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/computer-sciences-corp-shedding-hundreds-of-jobs-in-prince-georges-county/2013/10/31/c34e2de8-4175-11e3-8b74-d89d714ca4dd_story.html) [<https://perma.cc/AKW2-PZJN>].

<sup>236</sup> See *infra* text accompanying notes 316–320.

<sup>237</sup> “In [Internal Revenue] Service jargon, a ‘seizure’ is what is done to something that can be sold, usually tangible realty or personalty, while a ‘levy’ is done to something that cannot be sold, generally intangible property such as payments due the taxpayer from a third party, or money.” Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 67 n.45 (2008).

<sup>238</sup> For similar statistics for fiscal years 2006 through 2014, see *infra* text accompanying note 249. For additional tables showing collection figures over a multi-year period spanning the enactment of the 1998 Act, see Lederman, *supra* note 37, at 984–88.

<sup>239</sup> Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1148 n.9 (2004).

**Table 1: IRS Enforcement Statistics for Fiscal Years 1994–2005<sup>240</sup>**

Fiscal year	Audit Rate for Individual Income Tax Returns	Notices of Federal Tax Lien (rounded)	Notices of Levy (rounded)	Seizures
1994	1.07%	813,000	2,935,000	10,000 (rounded)
1995	1.67%	799,000	2,722,000	11,000 (rounded)
1996	1.67%	750,000	3,109,000	10,000 (rounded)
1997	1.28%	544,000	3,659,000	10,090
1998	0.99%	383,000	2,503,000	2,259
1999	0.90%	168,000	504,000	161
2000	0.49%	288,000	220,000	74
2001	0.58%	428,000	447,000	255
2002	0.57%	483,000	1,284,000	296
2003	0.54%	544,000	1,681,000	399
2004	0.62%	534,000	2,030,000	440
2005	0.75%	523,000	2,744,000	512

As this table reflects, the most dramatic decline was in seizures of property: The IRS went from approximately 10,000 seizures per year in the mid-1990s to just *seventy-four* at the low point in 2000. Seizures have never returned to their pre-1998 levels.<sup>241</sup> Although the drop in seizures was particularly dramatic, it is just part of a general picture of a reduction in IRS enforcement activities during this time period. The perception that the IRS was toothless probably contributed to the proliferation of aggressive tax shelters in

<sup>240</sup> For the sources of the Table's statistics, see INTERNAL REVENUE SERV., SOI TAX STATS - DELINQUENT COLLECTION ACTIVITIES - IRS DATA BOOK TABLE 16 (2002-2010), <https://www.irs.gov/uac/SOI-Tax-Stats-Delinquent-Collection-Activities-IRS-Data-Book-Table-16> [https://perma.cc/U2N5-4RLG]; INTERNAL REVENUE SERV., SOI TAX STATS - EXAMINATION COVERAGE: RECOMMENDED AND AVERAGE RECOMMENDED ADDITIONAL TAX AFTER EXAMINATION - IRS DATA BOOK TABLE 9A (2002), <https://www.irs.gov/uac/SOI-Tax-Stats-Examination-Coverage-Recommended-and-Average-Recommended-Additional-Tax-After-Examination-IRS-Data-Book-Table-9a> [https://perma.cc/8369-BTUA]; INTERNAL REVENUE SERV., SOI TAX STATS ARCHIVE - 1863 TO 1999 ANNUAL REPORTS AND IRS DATA BOOKS TABLE 11 (1995), <https://www.irs.gov/uac/SOI-Tax-Stats-Archive-1863-to-1999-Annual-Reports-and-IRS-Data-Books> [https://perma.cc/6YX7-4LT2]; INTERNAL REVENUE SERV., SOI TAX STATS - DELINQUENT COLLECTION ACTIVITIES - IRS DATA BOOK TABLE 16 (1994-2001), <https://www.irs.gov/uac/SOI-Tax-Stats-Delinquent-Collection-Activities-IRS-Data-Book-Table-16> [https://perma.cc/5G6M-96LU]; INTERNAL REVENUE SERV., SOI TAX STATS - 2003 IRS DATA BOOK - TABLE 10 (REVISED) (2003), <https://www.irs.gov/pub/irs-soi/03db10ex.xls>; INTERNAL REVENUE SERV., SOI TAX STATS - 2004 IRS DATA BOOK - TABLE 10 (REVISED) (2004), <https://www.irs.gov/pub/irs-soi/04db10ex.xls>; INTERNAL REVENUE SERV., SOI TAX STATS - 2005 IRS DATA BOOK - TABLE 10 (REVISED) (2005), <https://www.irs.gov/pub/irs-soi/05db10ex.xls>; GOV'T ACCT. OFF., REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, TAX ADMINISTRATION: AUDIT TRENDS AND RESULTS FOR INDIVIDUAL TAXPAYERS 18 tbl. I.1 (1996), <http://www.gao.gov/archive/1996/gg96091.pdf> [https://perma.cc/UB2Y-C5RN].

<sup>241</sup> See *infra* text accompanying note 249 (reporting seizure statistics for fiscal years 2006 through 2014).

the late 1990s.<sup>242</sup> David Cay Johnston has aptly described the IRS Reform Act as having “handcuffed the tax police.”<sup>243</sup>

There were several reasons for the decline in IRS enforcement activity. First, the restructuring itself took years and significant resources.<sup>244</sup> Second, the IRS needed to shift substantial resources from collection to “customer service” to comply with the requirements of the Act.<sup>245</sup> In part, it detailed employees from enforcement to service positions,<sup>246</sup> resulting in a substantial reallocation of staff from enforcement to service for several years.<sup>247</sup> Third, some collections employees feared the strict penalty of the Ten Deadly Sins and found it safer to do nothing than to try to collect taxes from recalcitrant taxpayers.<sup>248</sup>

Subsequently, there was an uptick in enforcement during the 2009 through 2011 fiscal years, then enforcement statistics began declining again. Those statistics are not only at lower levels than they were in 2006, as shown in the next table, they are below where they were in the mid-1990s, before the IRS Reform Act.<sup>249</sup>

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<sup>242</sup> See TANINA ROSTAIN & MILTON C. REGAN, JR., *CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY* 244 (2014) (noting that IRS reform “created an environment in which any attempt to identify and challenge tax shelters would run into both resource constraints and concern about engaging in activity that could anger taxpayers and get the agency hauled before Congress once again”); *id.* at 331 (“Treasury officials were preoccupied with dealing with a hostile Congress and attempting to modernize IRS operations. . . . For some tax professionals involved in shelter activity, the fact that shelters were low on the government’s priority list meant that they were not going to be caught if they engaged in promoting highly questionable deals.”).

<sup>243</sup> DAVID CAY JOHNSTON, *PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE* 150 (2003).

<sup>244</sup> See William Hoffmann, *15 Years After RRA ‘98: Time to Re-structure the IRS?*, 140 TAX NOTES 647 (2013) (describing how the process took years, as each new division and function “stood up” at different times).

<sup>245</sup> Patti Mohr, *Compliance Problems Top Priority, Rossotti Says*, 91 TAX NOTES 206, 206 (2001) (“The agency’s ability to enforce compliance fell [in 2000] because of a long-term decline in staffing and a shift toward staffing customer service positions.”).

<sup>246</sup> See JAMES R. WHITE, GEN. ACCT. OFF., GAO-02-674, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, TAX ADMINISTRATION: IMPACT OF COMPLIANCE AND COLLECTION PROGRAM DECLINES ON TAXPAYERS (May 22, 2002), LEXIS, 2002 TNT 126-60 (“In response to the . . . demands, and with a declining pool of staff resources, IRS reallocated staff from compliance (other than returns processing) and collection programs to provide additional support to taxpayer assistance services.”).

<sup>247</sup> DEP’T OF THE TREASURY, MANAGEMENT ADVISORY REPORT: ANALYSIS OF TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2001, Ref. No. 2002-30-184, at 14 (Sept. 2002). A staff year is 2000 hours. DEP’T OF THE TREASURY, MANAGEMENT ADVISORY REPORT: THE INTERNAL REVENUE SERVICE’S RESPONSE TO THE FALLING LEVEL OF INCOME TAX EXAMINATIONS AND ITS POTENTIAL IMPACT ON VOLUNTARY COMPLIANCE, Ref. No. 2002-30-092, at 9 n.9 (June 2002) (reporting such reallocation of 265 staff years in 1997; 491 in 1998; 755 in 1999; and 974 in 2000).

<sup>248</sup> See JOINT COMM. ON TAX’N, NO. JCX-53-03, REPORT RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF 1998, at 45 (2003), <http://www.jct.gov/x-53-03.pdf> [<https://perma.cc/444X-7LS8>] (“The IRS reports that since enactment of section 1203, IRS employees frequently report that fear of a section 1203 allegation causes reluctance to take appropriate enforcement actions.”). See also Hoffman, *supra* note 244 (“[N]ot only did you have the prohibition on using enforcement statistics to evaluate employees, but you also had these 10 deadly sins where the employees were very concerned that if they tried to do their job or they tried to take enforcement, then an allegation would be made about them and they would be fired,” according to a senior TIGTA official.”).

<sup>249</sup> See *supra* text accompanying note 238.

**Table 2: IRS Enforcement Statistics for Fiscal Years 2006–2014<sup>250</sup>**

Fiscal year	Audit Rate for Individual Income Tax Returns	Notices of Federal Tax Lien	Notices of Levy	Seizures
2006	0.80%	629,813	3,742,276	590
2007	0.90%	683,659	3,757,190	676
2008	1.00%	768,168	2,631,038	610
2009	1.00%	965,618	3,478,181	581
2010	1.11%	1,096,376	3,606,818	605
2011	1.11%	1,042,230	3,748,884	776
2012	1.03%	707,768	2,961,162	773
2013	0.96%	602,005	1,855,095	547
2014	0.86%	535,580	1,995,987	432

### B. The 2015 Legislative Reforms

Congress followed up the inflammatory hearings that began in 2013 with legislation at the end of 2015. The Consolidated Appropriations Act, 2016, contained various restrictions on the IRS, including a subtitle termed “Internal Revenue Service Reforms,” part of the included PATH Act of 2015.<sup>251</sup> Although some reforms focused on other issues,<sup>252</sup> several of the reforms focus on issues aired in Congressional hearings, including alleged “targeting” by the IRS based on political views.

In particular, the PATH reforms include an amendment to the Ten Deadly Sins, for which the sanction is termination of employment, to add to the tenth sin a prohibition of “performing, delaying, or failing to perform (or threatening to perform, delay, or fail to perform) any official action (including any audit) with respect to a taxpayer for purpose of extracting personal gain or benefit or for a political purpose.”<sup>253</sup> This amendment directly links the 2015 reform to a provision of the 1998 IRS reform that was widely criticized as deterring IRS collection employees from doing their job.<sup>254</sup>

<sup>250</sup> INTERNAL REVENUE SERV., SOI TAX STATS - DELINQUENT COLLECTION ACTIVITIES - IRS DATA BOOK TABLE 16, <https://www.irs.gov/uac/SOI-Tax-Stats-Delinquent-Collection-Activities-IRS-Data-Book-Table-16> [<https://perma.cc/UM7S-BHSQ>] (individual spreadsheets for 2011-2014 and combined spreadsheet for 2002-2010); INTERNAL REVENUE SERV., SOI TAX STATS EXAMINATION COVERAGE: INDIVIDUAL INCOME TAX RETURNS EXAMINED - IRS DATA BOOK TABLE 9B, <https://www.irs.gov/uac/SOI-Tax-Stats-Examination-Coverage-Individual-Income-Tax>Returns-Examined-IRS-Data-Book-Table-9b> [<https://perma.cc/7Z8R-QNFG>] (individual spreadsheets for 2008-2014); INTERNAL REVENUE SERV., SOI TAX STATS - 2007 IRS DATA BOOK - TABLE 9 (REVISED), [https://www.irs.gov/uac/SOI-Tax-Stats---2007-IRS-Data-Book---Table-9-\(Revised\)](https://www.irs.gov/uac/SOI-Tax-Stats---2007-IRS-Data-Book---Table-9-(Revised)) [<https://perma.cc/M465-3DVJ>]; INTERNAL REVENUE SERV., SOI TAX STATS - 2006 IRS DATA BOOK - TABLE 10 (REVISED) (2006), <https://www.irs.gov/pub/irs-soi/06db10revised.xls>.

<sup>251</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. Q, tit. IV, subtit. A (2015), <https://www.congress.gov/114/bills/hr2029/BILLS-114hr2029enr.pdf> [<https://perma.cc/QUX5-8E7T>].

<sup>252</sup> For example, the PATH Act allows victims of IRS wrongdoing, such as unauthorized disclosure of confidential tax information, to find out facts such as whether the case has been referred to the Department of Justice for criminal prosecution. *Id.* § 403.

<sup>253</sup> *Id.* § 407.

<sup>254</sup> See Barton Massey, *Uncertainty, “Deadly Sins” Sink Morale at IRS, Ex-Official Claims*, 85 TAX NOTES 1364, 1364 (1999); *supra* note 248 and accompanying text.



The 2015 appropriations law also includes a restriction on using funds made available in the bill “to target citizens of the United States for exercising any right guaranteed under the First Amendment to the Constitution of the United States”<sup>255</sup> and a similar prohibition on the use of such funds “to target groups for regulatory scrutiny based on their ideological beliefs.”<sup>256</sup> The wording of these reforms could suggest that Congress believes that the IRS engaged in politically motivated targeting despite the findings of the DOJ, FBI, and TIGTA.<sup>257</sup>

The PATH Act reforms also include several sections applicable to tax-exempt organizations. One of these is the provision mentioned above,<sup>258</sup> which provides an expedited process for determination of exempt status under section 501(c)(4).<sup>259</sup> It requires nonprofits seeking exemption under Code section 501(c)(4) to file a one-page notice of registration within 60 days after the organization is formed.<sup>260</sup> That provision also requires the IRS to respond within 60 days acknowledging receipt of the form.<sup>261</sup>

The new process seems directed at the IRS’s delays in approving the applications of potentially political groups. It adopts a different approach than the IRS did to expediting applications.<sup>262</sup> The one-page notice apparently is not intended to allow the IRS to vet the organization’s qualification under Code section 501(c)(4). Instead, the new law requires the organization to submit with its first return such information as the IRS may require to support the organization’s claim to exemption under section 501(c)(4).<sup>263</sup> The new procedure will thus generally delay consideration of the organization’s qualifications until after the organization files its first return.

The new law also creates some rights for tax-exempt organizations. One provision requires the IRS to create a procedure under which an organization facing a determination that it fails to qualify (or to continue to qualify) as tax-exempt under section 501(c) may appeal to the IRS Appeals Office.<sup>264</sup> This creates a procedural right in the form of an administrative appeal. Another provision allows section 501(c)(4) and other exempt organizations to seek a declaratory judgment in federal court regarding their initial qualification or revocation of tax-exempt status.<sup>265</sup> This is an extension of a provision applicable to other tax-exempt organizations, such as 501(c)(3) organizations.<sup>266</sup> The declaratory judgment procedure requires exhaustion of administrative remedies.<sup>267</sup>

The bill also contains a moratorium during 2016 on issuing or revising “guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for

<sup>255</sup> Pub. L. No. 114-113, div. E, tit. I, § 107 (2015).

<sup>256</sup> *Id.* § 108.

<sup>257</sup> *See supra* text accompanying notes 138–141.

<sup>258</sup> *See supra* text accompanying note 149.

<sup>259</sup> Pub. L. No. 114-113, div. Q, tit. IV, subtit. A, § 405 (2015) (“Organizations Required To Notify Secretary Of Intent To Operate Under 501(c)(4)”).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *See supra* text accompanying notes 145–146.

<sup>263</sup> Pub. L. No. 114-113, div. Q, tit. IV, subtit. A, § 405(b) (2015).

<sup>264</sup> *Id.* § 404. Another reform in the PATH Act provides that the federal gift tax does not apply to transfers to 501(c)(4), 501(c)(5), and 501(c)(6) organizations. *Id.* div. Q, tit. IV, subtit. A, § 408.

<sup>265</sup> *Id.* § 406.

<sup>266</sup> *See* I.R.C. § 7428(a)(1)(A) (2012) (referring to “an actual controversy . . . with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3)”).

<sup>267</sup> *Id.* § 7428(b)(2).

purposes of section 501(c)(4).<sup>268</sup> The bill further provides that the standards as in effect on January 1, 2010 are to apply.<sup>269</sup> Congress has imposed moratoria on the development of substantive law in the past.<sup>270</sup> Such restrictions may impose difficulties on the IRS, such as “undermining public confidence in the fairness of the tax laws.”<sup>271</sup>

The PATH Act also prohibits IRS employees from using personal email accounts for government business.<sup>272</sup> Lois Lerner apparently had done so.<sup>273</sup> A report accompanying H.R. 1152 stated: “Notwithstanding internal IRS policy, the Committee’s investigation of the agency’s targeting practices revealed that the former Director of the IRS Exempt Organizations Division, Lois Lerner, among others, conducted official business involving taxpayer information, using a personal email account.”<sup>274</sup> The report explained that IRS policies restrict the use of personal email accounts because of concerns about IRS accountability and the confidential and sensitive nature of IRS information.<sup>275</sup> Nonetheless, because the Committee was concerned that IRS employees continued to use personal email accounts for official business in spite of IRS policy, “a statutory ban on use of nongovernmental email accounts by IRS employees conducting official business is necessary.”<sup>276</sup> However, the PATH Act fails to provide a penalty for violation of the prohibition.<sup>277</sup>

The PATH Act reforms also include codification of the Bill of Rights the IRS adopted in 2014, in that the PATH Act requires the Commissioner of the IRS to “ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights” that include the ten listed.<sup>278</sup> These rights include such things as “The Right to Be Informed” and “The Right to Quality Service.”<sup>279</sup> These statutory rights are different than the provisions Congress included in the Taxpayer Bill of Rights III, which was part of the IRS Reform Act and generally related to procedural issues.<sup>280</sup> The

<sup>268</sup> Pub. L. No. 114-113, div. E., tit. I, § 127. In 2013, Treasury had proposed a regulation attempting to provide more definitive guidance on what constitutes political activity that does not promote social welfare. See Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) & (iii), 78 Fed. Reg. 71535-42 (Nov. 29, 2013), <https://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28492.pdf> [<https://perma.cc/W3CM-QMES>].

<sup>269</sup> Pub. L. No. 114-113, div. E., tit. I, § 127.

<sup>270</sup> See Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1370-72 (1980) (providing several examples).

<sup>271</sup> *Id.* at 1375.

<sup>272</sup> Pub. L. No. 114-113, div. Q, tit. IV, subtit. A, § 402 (2015) (“No officer or employee of the Internal Revenue Service may use a personal email account to conduct any official business of the Government.”).

<sup>273</sup> See Stephen Dinan, *Lois Lerner Had Yet Another Private Email!*, WASH. TIMES (Sept. 1, 2015), <http://www.washingtontimes.com/news/2015/sep/1/irs-reveals-another-private-email-account-for-lois/?page=all> [<https://perma.cc/5C2Z-N3ZY>] (“Lois G. Lerner used yet another private email account to do government business, the IRS revealed in a court filing late Monday . . . . The lawyers withheld the name and address of the new account but said it’s different than the ‘Toby Miles’ account they revealed in a previous court filing last week.”).

<sup>274</sup> Report to Accompany H.R. 1152, IRS Email Transparency Act, 114 H. Rep. 69, 2 (2015).

<sup>275</sup> *Id.* at 4.

<sup>276</sup> *Id.*

<sup>277</sup> See Pub. L. No. 114-113, div. Q, tit. IV, subtit. A, § 402 (2015).

<sup>278</sup> *Id.* § 401; *IRS Adopts “Taxpayer Bill of Rights;” 10 Provisions to be Highlighted on IRS.gov*, in *Publication 1*, IR-2014-72 (June 10, 2014), <https://www.irs.gov/uac/Newsroom/IRS-Adopts-Taxpayer-Bill-of-Rights%3B-10-Provisions-to-be-Highlighted-on-IRSgov,-in-Publication-1> [<https://perma.cc/W4TR-3JLF>].

<sup>279</sup> *IRS Adopts “Taxpayer Bill of Rights*, *supra* note 278.

<sup>280</sup> Pub. L. No. 105-206, 112 Stat. 685, § 3000 (“This title may be cited as the ‘Taxpayer Bill of Rights 3’”; Title included such things as a new burden of proof statute, an increase in the dollar limit for U.S.

codification of rights recently adopted by the IRS means that Congress wanted to elevate those rights to statutory law, perhaps indicating that it did not want the IRS to have the power to change them.

Although the main focus of the IRS controversy was the IRS treatment of 501(c)(4) organizations, TIGTA had also issued a negative report regarding the IRS's spending on conferences and videos.<sup>281</sup> Recent funding bills include restrictions on spending on those activities. With respect to conferences, the funds Congress appropriated for 2015 and 2016 cannot be spent on "conferences that do not adhere to the procedures, verification processes, documentation requirements, and policies issued by the Chief Financial Officer, Human Capital Office, and Agency-Wide Shared Services."<sup>282</sup> The appropriations bills for 2014 through 2016 prohibit any use of the bill's funding for IRS videos "unless the Service-Wide Video Editorial Board determines in advance that making the video is appropriate, taking into account the cost, topic, tone, and purpose of the video."<sup>283</sup>

### C. Political Reform

A well-known problem with crisis-based reform is that it is ill-suited to deliberation and moderation, so it is prone to producing an overcorrection.<sup>284</sup> The 1998 IRS reform manifested that tendency in such things as the Ten Deadly Sins, which reportedly chilled IRS employee motivation to collect taxes.<sup>285</sup>

IRS reform following a perceived scandal is also likely to be focused on reining in the IRS, not on looking at the whole picture, including whether the IRS has sufficient funding to effectively carry out all of the duties Congress has given it. As in 1998, Congress followed up the sensational IRS hearings of 2013 with cuts to an already declining IRS's budget.<sup>286</sup> Congress gave the IRS less funding for 2015 than it requested, less funding than it had the prior year, and less funding in absolute dollars than it had in 2010.<sup>287</sup> For 2016, Congress left the IRS's base funding unchanged but added \$290 million

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Tax Court cases to be heard as small tax cases, and a new statute providing relief from joint and several liability for "innocent spouses.").

<sup>281</sup> See *supra* note 39.

<sup>282</sup> Pub. L. No. 114-113, div. E, tit. I, § 109; Pub. L. 113-235, 128 Stat. 2130, 2338-39, div. E, tit. I, § 109.

<sup>283</sup> Pub. L. No. 114-113, div. E, § 105; Pub. L. 113-235, div. E, tit. I, § 105 (2014); Pub. L. 113-76, 128 Stat. 5, 190 div. E, tit. I, § 105 (2014). The IRS created the Service-Wide Video Editorial Board in February 2013. TIGTA, REVIEW OF SB/SE CONFERENCE, *supra* note 39, at 15 (IRS Management's Response to TIGTA Recommendation 6).

<sup>284</sup> Cf. *Dodd-Frank Act and Regulatory Overreach: Hearing Before the Subcomm. on Oversight and Investigations*, 114th Cong. 5 (2015) (prepared Statement of Paul G. Mahoney) (discussing the perils of crisis-based financial reform); J.R. Spencer, *Legislate in Haste, Repent at Leisure*, 69 CAMBRIDGE L.J. 19, 19 (2010) ("In response to Monday's 'scandal' comes Tuesday's ministerial 'pledge' and on Wednesday this is followed by an instant Bill, rushed through Parliament with inadequate debate.").

<sup>285</sup> See Massey, *supra* note 254.

<sup>286</sup> See *infra* note 291 for figures on the IRS's budget in absolute dollars, which show a decline after 1995 each year through 1998.

<sup>287</sup> See *IRS Must Use Resources More Efficiently, Inspector General Says*, 15 TAX NOTES TODAY 38-42 (Feb. 25, 2015) ("In FY 2014, the IRS budget was approximately \$11.3 billion in appropriated resources, \$850 million less than its FY 2010 level. . . . The IRS's approved budget for FY 2015 was further reduced to \$10.9 billion, resulting in a cut of approximately \$346 million in appropriated resources from FY 2014.").

directed to taxpayer services, prevention of tax refund fraud, and enhanced cybersecurity.<sup>288</sup> This did not bring the IRS's funding even up to its 2014 level.<sup>289</sup>

In inflation-adjusted dollars, the IRS's 2015 budget was approximately eighteen percent lower than it was in 2010.<sup>290</sup> In fact, in inflation-adjusted dollars, the IRS's budget is comparable to 1998.<sup>291</sup> In 2014, the Internal Revenue Service Advisory Council

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<sup>288</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 tit. IV, div. E, tit. I, § 113; *see also* House Appropriations Committee, *FY 2016 Omnibus – Financial Services Appropriation*, [http://appropriations.house.gov/uploadedfiles/12.15.15\\_fy\\_2016\\_omnibus\\_-\\_financial\\_services\\_-\\_summary.pdf](http://appropriations.house.gov/uploadedfiles/12.15.15_fy_2016_omnibus_-_financial_services_-_summary.pdf) [<https://perma.cc/9J8M-G59C>] (“The legislation includes the 2015 level of \$10.9 billion for base IRS activities, but provides an additional \$290 million targeted solely for taxpayer services . . . . In total, this is a reduction of \$1.7 billion from the President’s request for the agency.”).

<sup>289</sup> The IRS’s 2016 budget is \$11.235 billion (\$290 million over its 2015 budget). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. E, tit. I, § 113; *see also* House Appropriations Committee, *FY 2016 Omnibus – Financial Services Appropriation*, [http://appropriations.house.gov/uploadedfiles/12.15.15\\_fy\\_2016\\_omnibus\\_-\\_financial\\_services\\_-\\_summary.pdf](http://appropriations.house.gov/uploadedfiles/12.15.15_fy_2016_omnibus_-_financial_services_-_summary.pdf) [<https://perma.cc/9J8M-G59C>]. The IRS’s budget for 2014 was slightly higher, at \$11.291 billion. *See* U.S. DEP’T OF TREAS., BUDGET IN BRIEF FY 2015, at 1 (2014), [https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/Treasury\\_FY\\_2015\\_BIB.pdf](https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/Treasury_FY_2015_BIB.pdf) [<https://perma.cc/S9YN-HRZN>]. Its budget for 2015 was \$10.945 billion. INTERNAL REVENUE SERV., PROGRAM SUMMARY BY APPROPRIATIONS ACCOUNT AND BUDGET ACTIVITY 1 (2015), <https://www.irs.gov/PUP/newsroom/IRS%20Budget%20in%20Brief%20FY%202016.pdf> [<https://perma.cc/B8XB-KTCZ>].

<sup>290</sup> Chuck Marr et al., *IRS Funding Cuts Continue to Compromise Taxpayer Service and Weaken Enforcement*, CTR. ON BUDGET & POLICY PRIORITIES (Sept. 30, 2015), <http://www.cbpp.org/research/federal-tax/irs-funding-cuts-continue-to-compromise-taxpayer-service-and-weaken-enforcement> [<https://perma.cc/GGE5-3T6R>].

<sup>291</sup> *Written Testimony of John A. Koskinen, Commissioner, Internal Revenue Service, Before the Senate Finance Committee on IRS Budget and Current Operations*, INTERNAL REVENUE SERV. (Feb. 3, 2015), [https://www.irs.gov/PUP/newsroom/Written\\_Testimony\\_of\\_Commissioner\\_Koskinen\\_before\\_the\\_Senate\\_Finance\\_Committee\\_on\\_IRS\\_Budget\\_and\\_Current\\_Operations.pdf](https://www.irs.gov/PUP/newsroom/Written_Testimony_of_Commissioner_Koskinen_before_the_Senate_Finance_Committee_on_IRS_Budget_and_Current_Operations.pdf) [<https://perma.cc/YR37-3VCT>].

The chart below shows the IRS’s budget over the past 22 years in both absolute and constant (2016) dollars.

Fiscal Year	IRS Budget (absolute dollars, in thousands)	IRS Budget in Inflation-Adjusted (2016) Dollars (in thousands)
1994	\$7,340,000	\$11,743,554
1995	\$7,474,000	\$11,628,396
1996	\$7,348,000	\$11,104,472
1997	\$7,206,000	\$10,645,619
1998	\$7,804,829	\$11,353,441
1999	\$8,245,797	\$11,735,709
2000	\$8,256,272	\$11,368,484
2001	\$9,003,000	\$12,060,510
2002	\$9,485,000	\$12,501,378
2003	\$9,845,000	\$12,686,727
2004	\$10,185,000	\$12,784,413
2005	\$10,236,000	\$12,427,385
2006	\$10,573,706	\$12,436,220
2007	\$10,597,065	\$12,118,532
2008	\$10,892,384	\$11,995,672
2009	\$11,522,598	\$12,735,028
2010	\$12,146,123	\$13,207,522
2011	\$12,121,830	\$12,777,772
2012	\$11,816,696	\$12,203,579
2013	\$11,198,611	\$11,398,300
2014	\$11,290,612	\$11,308,497
2015	\$10,945,000	\$10,949,341
2016	\$11,235,000	\$11,235,000

The IRS budget figures are from the following sources: U.S. GEN. ACCT. OFF., GAO/GGD-94-129, ANALYSIS OF IRS' BUDGET REQUEST FOR FISCAL YEAR 1995, at 8 (1994), <http://www.gao.gov/assets/220/219481.pdf> [<https://perma.cc/SY2C-5BN6>] (1994 budget, rounded); *IRS Budget Proposal for Fiscal Year 1996 and 1995 Tax Return Filing Season: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 104th Cong. 2-3 (1995), <https://www.gpo.gov/fdsys/pkg/CHRG-104hhrg90652/pdf/CHRG-104hhrg90652.pdf> [<https://perma.cc/99T7-YB52>] (1995 budget, rounded); U.S. GEN. ACCT. OFF., GAO/T-GGD/AIMD-97-66, IRS' FISCAL YEAR 1997 SPENDING, 1997 FILING SEASON, AND FISCAL YEAR 1998 BUDGET REQUEST 5 (1997), <http://www.gao.gov/assets/110/106787.pdf> [<https://perma.cc/86BB-LTM5>] (1996 and 1997 budgets, rounded); U.S. GEN. ACCT. OFF., GAO/T-GGD/AIMD-98-114, IRS' FISCAL YEAR 1999 BUDGET REQUEST AND FISCAL YEAR 1998 FILING SEASON 26 (1998), <http://www.gao.gov/assets/110/107350.pdf> [<https://perma.cc/A7XN-CCNR>] (1998 budget); U.S. GEN. ACCT. OFF., GAO/T-GGD/AIMD-99-140, IRS' FISCAL YEAR 2000 BUDGET REQUEST AND 1999 TAX FILING SEASON 28 (1999), <http://www.gao.gov/assets/110/107859.pdf> [<https://perma.cc/GC3B-LQN5>] (1999 budget); U.S. GEN. ACCT. OFF., GAO/T-GGD/AIMD-00-133, IRS' 2000 TAX FILING SEASON AND FISCAL YEAR 2001 BUDGET REQUEST 24 (2000), <http://www.gao.gov/assets/110/108348.pdf> [<https://perma.cc/V9HC-BN2K>] (2000 budget); U.S. DEP'T OF TREAS., THE BUDGET FOR FISCAL YEAR 2005, at 279, <https://www.gpo.gov/fdsys/pkg/BUDGET-2005-BUD/pdf/BUDGET-2005-BUD-25.pdf> [<https://perma.cc/4WWG-B26U>] (2001 and 2003 budgets) (amounts rounded); U.S. DEP'T OF TREAS., THE BUDGET FOR FISCAL YEAR 2004, at 242, <https://www.gpo.gov/fdsys/pkg/BUDGET-2004-BUD/pdf/BUDGET-2004-BUD-22.pdf> [<https://perma.cc/36FL-XW6Z>] (2002 budget, rounded); U.S. DEP'T OF TREAS., THE BUDGET FOR FISCAL YEAR 2006, at 260, <https://www.gpo.gov/fdsys/pkg/BUDGET-2006-BUD/pdf/BUDGET-2006-BUD-24.pdf> [<https://perma.cc/C4RP-J5UV>] (2004 budget, rounded); U.S. DEP'T OF TREAS., THE BUDGET FOR FISCAL YEAR 2007, at 236, <https://www.gpo.gov/fdsys/pkg/BUDGET-2007-BUD/pdf/BUDGET-2007-BUD-22.pdf> [<https://perma.cc/MAZ3-JZ8T>] (2005 budget,

(IRSAC)<sup>292</sup> said, “In IRSAC’s view, the IRS is in the midst of an existential funding crisis.”<sup>293</sup>

The GAO reported that IRS budget cuts resulted in an 11 percent decline in staffing between 2010 and 2014, with most of the reduction in enforcement.<sup>294</sup> TIGTA—the same organization that conducted the 2013 investigation into the IRS’s treatment of Tea Party groups—has reported that the reduction in the IRS’s budget of almost \$1.2 billion (in absolute dollars) between 2010 and 2015<sup>295</sup> resulted in a smaller work force,<sup>296</sup> reduced tax collections,<sup>297</sup> reduced case closures by revenue officers,<sup>298</sup> and reduced service to

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rounded); U.S. DEP’T OF TREAS., BUDGET IN BRIEF FY 2008, at 1, <https://www.irs.gov/pub/newsroom/budget-in-brief-2008.pdf> [<https://perma.cc/RK77-4QBJ>] (2006 budget); U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-719T, ASSESSMENT OF THE 2008 BUDGET REQUEST AND AN UPDATE OF 2007 PERFORMANCE 7, <http://www.gao.gov/assets/120/116547.pdf> [<https://perma.cc/9VWB-L42F>] (2007 budget); U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-567, FISCAL YEAR 2009 BUDGET REQUEST AND INTERIM PERFORMANCE RESULTS OF IRS’S 2008 TAX FILING SEASON 16, <http://www.gao.gov/assets/280/273727.pdf> [<https://perma.cc/FX9X-BSBN>] (2008 budget); U.S. DEP’T OF TREAS., BUDGET IN BRIEF FY 2011, at 65, <https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/IRS%20FY11%20508.pdf> [<https://perma.cc/S4R8-3BUD>] (2009 and 2010 budgets); U.S. DEP’T OF TREAS., BUDGET IN BRIEF FY 2013, at 1, [https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/11.%20IRS\\_508%20-%20passed.pdf](https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/11.%20IRS_508%20-%20passed.pdf) [<https://perma.cc/VJB6-65L3>] (2011 and 2012 budgets); INTERNAL REVENUE SERV. OVERSIGHT BD., FY 2015 IRS BUDGET RECOMMENDATION SPECIAL REPORT 19 (2014), <https://www.treasury.gov/IRSOB/reports/Documents/IRSOB%20FY2015%20Budget%20Report-FINAL.pdf> [<https://perma.cc/AL8H-USUC>] [hereinafter IRS OVERSIGHT BOARD, FY 2015] (fiscal year 2013 budget after sequestration); U.S. DEP’T OF TREAS., BUDGET IN BRIEF FY 2015, at 61 (2014), [https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/Treasury\\_FY\\_2015\\_BIB.pdf](https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/Treasury_FY_2015_BIB.pdf) [<https://perma.cc/S9YN-HRZN>] (2014 budget); INTERNAL REVENUE SERV., PROGRAM SUMMARY BY APPROPRIATIONS ACCOUNT AND BUDGET ACTIVITY 1 (2015), <https://www.irs.gov/PUP/newsroom/IRS%20Budget%20in%20Brief%20FY%202016.pdf> [<https://perma.cc/B8XB-KTCZ>] (2015 budget); House Appropriations Committee, *FY 2016 Omnibus – Financial Services Appropriation*, [http://appropriations.house.gov/uploadedfiles/12.15.15\\_fy\\_2016\\_omnibus\\_-\\_financial\\_services\\_-\\_summary.pdf](http://appropriations.house.gov/uploadedfiles/12.15.15_fy_2016_omnibus_-_financial_services_-_summary.pdf) [<https://perma.cc/9J8M-G59C>] (2016 budget). Inflation calculations were performed using US INFLATION CALCULATOR, <http://www.usinflationcalculator.com> [<https://perma.cc/T3FB-SPM3>] (as of February 2016).

<sup>292</sup> IRSAC was “[c]hartered to convey the public’s perception of the Internal Revenue Service and its activities to the Commissioner . . . .” INTERNAL REVENUE SERV. ADVISORY COUNCIL, 2014 IRSAC GENERAL REPORT, <https://www.irs.gov/Tax-Professionals/2014-IRSAC-General-Report> [<https://perma.cc/RJ8K-7U3B>] (last updated Oct. 6, 2015).

<sup>293</sup> *Id.*

<sup>294</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-732, LARGE PARTNERSHIPS: WITH GROWING NUMBER OF PARTNERSHIPS, IRS NEEDS TO IMPROVE AUDIT EFFICIENCY 11 (2014), <http://www.gao.gov/assets/670/665886.pdf> [<https://perma.cc/V6XR-H8Z5>] [hereinafter GAO, IRS NEEDS TO IMPROVE AUDIT EFFICIENCY].

<sup>295</sup> TREAS. INSPECTOR GEN. FOR TAX ADMIN., REDUCED BUDGETS AND COLLECTION RESOURCES HAVE RESULTED IN DECLINES IN TAXPAYER SERVICE, CASE CLOSURES, AND DOLLARS COLLECTED 1, DEP’T OF THE TREASURY (May 8, 2015), <https://www.treasury.gov/tigta/auditreports/2015reports/201530035fr.pdf> [<https://perma.cc/4FN4-KER4>] [hereinafter TIGTA, REDUCED BUDGETS]. The \$1.2 billion reduction is more than a ten-percent decline in absolute dollars. *Id.* In inflation-adjusted dollars, the IRS’s funding in fiscal year 2015 is approximately seventeen percent below 2010. See Catherine Rampel, *As Congress Cripples the IRS, Tax Rates Are Likely to Rise*, WASH. POST (Dec. 15, 2014), [http://www.washingtonpost.com/opinions/catherine-rampel-as-congress-cripples-the-irs-tax-rates-are-likely-to-rise/2014/12/15/a7a30754-8476-11e4-b9b7-b8632ae73d25\\_story.html](http://www.washingtonpost.com/opinions/catherine-rampel-as-congress-cripples-the-irs-tax-rates-are-likely-to-rise/2014/12/15/a7a30754-8476-11e4-b9b7-b8632ae73d25_story.html) [<https://perma.cc/TM3A-JKAL>] (citing data from the Center on Budget and Policy Priorities).

<sup>296</sup> See TIGTA, REDUCED BUDGETS, *supra* note 295, at 2 (noting that in fiscal year 2012, the IRS offered buyouts to 7,000 employees and 1,200 accepted, and that “[t]he IRS also instituted an ‘exception-only’ hiring freeze, leaving many vacancies unfilled.”).

<sup>297</sup> *Id.* at 8.

<sup>298</sup> *Id.* at 13, 16.

taxpayers.<sup>299</sup> Moreover, the IRS's per-employee expenditure on employee training in 2014 was less than 18 percent of what it was in 2010, in constant dollars.<sup>300</sup>

The IRS is thus operating with a smaller workforce that also receives less training. Meanwhile, its workload has increased. It is not only that the agency is dealing with new responsibilities such as those occasioned by the Affordable Care Act.<sup>301</sup> The IRS also has more taxpayers to deal with.<sup>302</sup> The number of individual tax returns filed increased by 6.6 million returns (4.67 percent) between 2010 and 2014.<sup>303</sup> Over the past twenty years, the number of returns filed by partnerships has increased 142 percent.<sup>304</sup> From 2002 through 2011, the number of S corporations increased 32 percent, the total number of partnerships grew by 47 percent—and the number of large partnerships grew 257 percent—while the number of C corporations decreased only 22 percent.<sup>305</sup> GAO reported that the IRS conducts few audits of large partnerships,<sup>306</sup> despite their potential high risk of noncompliance.<sup>307</sup>

The IRS is also combatting a troubling wave of identity theft tax refund fraud.<sup>308</sup> For example, the agency estimated that for 2013, it prevented approximately \$24.2 billion in identity theft-based fraudulent refund claims but actually paid out \$5.8 billion that it later determined had been fraudulently claimed.<sup>309</sup> In fiscal year 2014, the IRS assigned

<sup>299</sup> *Id.* at 10. Reduced service includes increased telephone wait times. *Id.*

<sup>300</sup> David Cay Johnston, *The Cost of the Shrinking IRS Budget*, 2015 TNT 105-11 (June 2, 2015) (“Adjusted to 2014 dollars, the IRS spent \$1,926 on training per employee in 2010, but just \$339 last year.”).

<sup>301</sup> See Bryan Camp, *Overlooked Costs of IRS Budget Cuts Will Hit Taxpayers Hardest*, THE CONVERSATION (April 14, 2015), <http://theconversation.com/overlooked-costs-of-irs-budget-cuts-will-hit-taxpayers-hardest-39762> [<https://perma.cc/3J4P-LFZF>] (“FY10 was . . . the year Congress really began piling on the acronymic workload: PPACA (the official acronym for Obamacare) and FATCA (which required the IRS to start investigating taxpayer foreign bank accounts).”).

<sup>302</sup> Since 1998, “the number of additional taxpayers the agency must help and oversee grew by some 16 million.” *Id.*

<sup>303</sup> See INTERNAL REVENUE SERV., 2014 ANNUAL REPORT TO CONGRESS—VOL. 1, NAT’L TAXPAYER ADVOCATE 9 (2014), <http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2014-Annual-Report/Volume-One.pdf> [<https://perma.cc/PS2Z-BQ76>] (141.2 million individual tax returns were filed in fiscal year 2010, and 147.8 million filed in fiscal year 2014).

<sup>304</sup> Johnston, *supra* note 300.

<sup>305</sup> GAO, IRS NEEDS TO IMPROVE AUDIT EFFICIENCY, *supra* note 294, at 13–14 (2002 calculation performed by the author).

<sup>306</sup> *Id.* at 19 & n.24 (reporting a 4 percent audit rate when including “campus audits” and 0.8 percent rate of audits that involve looking at the partnership’s books and records).

<sup>307</sup> *Id.* at 21. In the 2015 budget bill, Congress changed the audit procedures for large partnerships, to try to facilitate these audits. See Bipartisan Budget Act of 2015, Pub. L. 114-74, tit. XI, § 1101; Michael Cohn, *Budget Deal Makes It Easier for IRS to Audit Large Partnerships*, ACCT. TODAY (Nov. 2, 2015), <http://www.accountingtoday.com/blogs/debits-credits/news/budget-deal-makes-it-easier-for-irs-to-audit-large-partnerships-76285-1.html>. However, Congress did not provide additional funds for increased audits. See generally Bipartisan Budget Act of 2015.

<sup>308</sup> See *IRS Intensifies Work on Identity Theft and Refund Fraud; Criminal Investigation Enforcement Actions Underway Across the Nation*, INTERNAL REVENUE SERV. (Apr. 10, 2014), <https://www.irs.gov/uac/Newsroom/IRS-Intensifies-Work-on-Identity-Theft-and-Refund-Fraud%3B--Criminal-Investigation-Enforcement-Actions-Underway-Across-the-Nation> [<https://perma.cc/W74V-FAM8>].

<sup>309</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-119, IDENTITY THEFT AND TAX FRAUD: ENHANCED AUTHENTICATION COULD COMBAT REFUND FRAUD, BUT IRS LACKS AN ESTIMATE OF COSTS, BENEFITS AND RISKS (2015), <http://www.gao.gov/assets/670/667965.pdf> [<https://perma.cc/53DY-9WZ9>] (GAO Highlights preceding page 1). More recently, the IRS announced that from January through November of 2015, it halted processing of 4.8 million suspicious returns and rejected 1.4 million identity theft returns claiming a total of \$8 billion. *States and Tax Industry Combat Identity Theft and Refund Fraud on Many Fronts*, FS-2016-1, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/Newsroom/IRS,-States-and-Tax-Industry-Combat-Identity-Theft-and-Refund-Fraud-on-Many-Fronts> [<https://perma.cc/9NLG-35J2>].

3,000 employees to work on identity theft issues.<sup>310</sup> Budget cuts have hindered the IRS in modernizing its fraud-detection systems,<sup>311</sup> however, so this remains an ongoing problem.<sup>312</sup> Moreover, this problem not only burdens the federal fisc, it burdens the taxpayers whose identities were used to claim fraudulent refunds.<sup>313</sup>

Budget insufficiencies may also exacerbate the IRS's longstanding deficiencies in technology infrastructure. Much of the IRS's current technology expenditures are still used for upgrades to systems built in the 1950s and 1960s.<sup>314</sup> A lot of its newer technology is outdated, too. "Thousands of employees are still using the Windows XP operating system, which Microsoft no longer supports."<sup>315</sup>

IRS technology limitations pose real problems for tax administration and confidential taxpayer data. A 2014 TIGTA report on the IRS's information technology found weaknesses in programs relating to risk management and the protection of federal tax information, among other things.<sup>316</sup> It also found that while some of the IRS's technology projects are on schedule and within budget, budget cuts may be negatively affecting other critical systems.<sup>317</sup> The IRS requested \$3.2 billion, about 23 percent of its 2016 budget request, for information technology.<sup>318</sup> In its 2016 appropriations bill,

<sup>310</sup> *IRS Combats Identity Theft and Refund Fraud on Many Fronts*, FS-2014-1, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/Newsroom/IRS-Combats-Identity-Theft-and-Refund-Fraud-on-Many-Fronts-2014> [<https://perma.cc/DA7A-8765>].

<sup>311</sup> See Matt Hunter, *Tax-Refund Fraud to Hit \$21 Billion, And There's Little the IRS Can Do*, CNBC (Feb. 11, 2015), <http://www.cnbc.com/2015/02/11/tax-refund-fraud-to-hit-21-billion-and-theres-little-the-irs-can-do.html> [<https://perma.cc/4HLP-AVBE>].

<sup>312</sup> The Consolidated Appropriations Act, 2016 reflects concern about tax-related identity theft. It requires at least \$5 million of the \$206 million given to Taxpayer Advocate Services be spent on identity theft casework. Pub. L. No. 114-113, div. E, tit. I. It also requires the IRS to "institute and enforce policies and procedures that will safeguard the confidentiality of taxpayer information and protect taxpayers against identity theft." *Id.* div. E, tit. I, § 103. In addition, the PATH Act permits employers to use "identifying numbers" instead of Social Security numbers on W-2 forms. *Id.* div. Q, tit. IV, subtit. A, § 409. The intention seems to be to permit the use of truncated Social Security numbers: the heading of Section 409 of the bill is "Extend Internal Revenue Service Authority to Require Truncated Social Security Numbers on Form W-2." *Id.*

<sup>313</sup> See Steve Weisman, *What the IRS Isn't Telling You About Identity Theft*, USA TODAY (Jan. 30, 2016), <http://www.usatoday.com/story/money/columnist/2016/01/30/what-irs-isnt-telling-you-identity-theft/79306984> [<https://perma.cc/YV9Z-DK56>] (pointing out that, among the issues is the fact that, "[i]f you are the victim of income tax identity theft, it still takes an average of 278 days to resolve your claim and get your refund").

<sup>314</sup> Jeanne Sahadi, *IRS Says It's Using Technology from JFK's Time*, CNN MONEY (Feb. 3, 2015, 6:38 PM), <http://money.cnn.com/2015/02/03/pf/taxes/irs-budget-cuts> [<https://perma.cc/A3AD-XK56>].

<sup>315</sup> David Sherfinksi, *Technology Problems at IRS Go Far Beyond Loss of Lois Lerner's Email*, WASH. TIMES (July 2, 2014), <http://www.washingtontimes.com/news/2014/jul/2/technology-problems-at-irs-goes-far-beyond-loss-of/?page=all> [<https://perma.cc/Y9TM-2DCW>] (also reporting that "[t]he IRS has a backlog of up to \$500 million in requested technology upgrades").

<sup>316</sup> TREAS. INSPECTOR GEN. FOR TAX ADMIN., NO. 2014-20-095, ANNUAL ASSESSMENT OF THE INTERNAL REVENUE SERVICE INFORMATION TECHNOLOGY PROGRAM i (2014) (Highlights), <http://www.treasury.gov/tigta/auditreports/2014reports/201420095fr.pdf> [<https://perma.cc/XLA5-VNXX>].

<sup>317</sup> *Id.* at 20. TIGTA also expressed concern that the IRS's existing fraud detection systems may be insufficient to detect fraud before the IRS issues claimed tax refunds. *Id.*

<sup>318</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *IRS IS SCALING BACK ACTIVITIES AND USING BUDGET FLEXIBILITIES TO ABSORB FUNDING CUTS 1* (June 2015), <http://www.gao.gov/assets/680/670969.pdf> [<https://perma.cc/9TYQ-AVE9>] ("IRS requested \$3.2 billion for information technology (IT) investments. This accounted for 23 percent of IRS's budget request for fiscal year 2016.").



Congress provided the IRS with \$290 million for business systems modernization,<sup>319</sup> a little more than 9 percent of the \$3.2 billion the IRS requested.<sup>320</sup>

Some in Congress have stated that the IRS budget cuts, which began in 2011,<sup>321</sup> are punishment for bad behavior.<sup>322</sup> Regardless of the reason, it is very hard for any organization to run effectively when its funding drops suddenly and in unpredictable amounts.<sup>323</sup> In 2014, the Taxpayer Advocate Service, whose role is to “ensure that every taxpayer is treated fairly,”<sup>324</sup> identified the inadequate funding of the IRS as the number one most serious problem for taxpayers.<sup>325</sup>

It may not be surprising that a Congress that has vilified the IRS in public hearings has also cut its budget. In theory, IRS reform could give the IRS political support for a time, as seems to have happened in 1998. But, in that situation, Congress portrayed the institution of the IRS as the villain, with a possible savior, Charles Rossotti, the new IRS Commissioner, waiting in the wings.<sup>326</sup> Congress and the media viewed Mr. Rossotti as someone who could restructure the IRS to behave like a private-sector business.<sup>327</sup> The

<sup>319</sup> Financial Services and General Government Appropriations Act, 2016, Pub. L. No. 114-113, div. E, tit. I. The funds will remain available until September 30, 2018. *Id.*

<sup>320</sup> Congress also required quarterly reports to the Committees on Appropriations of the House of Representatives and the Senate and the Comptroller General of the United States regarding such things as the costs and schedules for the IRS’s major information technology investments. *Id.* at 187–88.

<sup>321</sup> See TIGTA, REDUCED BUDGETS, *supra* note 295 (showing IRS expenditures over a period of years that includes 2011).

<sup>322</sup> For example, the 2015 report by the Committee on Ways and Means stated, after discussing IRS conference spending and the 501(c)(4) investigation, “As a result of the IRS’s blatant misconduct, Congress significantly reduced the agency’s budget.” H.R. COMM. ON WAYS & MEANS MAJORITY STAFF REPORT, DOING LESS WITH LESS: IRS’S SPENDING DECISIONS HARM TAXPAYERS 2 (Apr. 22, 2015), [http://waysandmeans.house.gov/UploadedFiles/4.22.15\\_Tax\\_Filing\\_Report.pdf](http://waysandmeans.house.gov/UploadedFiles/4.22.15_Tax_Filing_Report.pdf) [<https://perma.cc/49XM-WG8S>].

<sup>323</sup> Unlike a private-sector organization, the IRS cannot put aside funds for potential future lean years.

<sup>324</sup> *Taxpayer Advocate Service*, INTERNAL REVENUE SERV., <https://www.irs.gov/Advocate> [<https://perma.cc/SL2C-SCEK>].

<sup>325</sup> INTERNAL REVENUE SERV., ANNUAL REPORT TO CONGRESS VOL. I, NAT’L TAXPAYER ADVOCATE 3 (2014), <http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2014-Annual-Report/Volume-One.pdf> [<https://perma.cc/VCW9-4HQJ>] [hereinafter NATIONAL TAXPAYER ADVOCATE, 2014 ANNUAL REPORT] (“As we begin 2015, the widening imbalance between the IRS’s increasing workload and its shrinking resources leads us to designate it the #1 problem for taxpayers.”). The National Taxpayer Advocate identified insufficient IRS funding as the number 1 most serious problem in 2011, number 3 most serious problem in 2012, and number 2 most serious problem in 2013. See NATIONAL TAXPAYER ADVOCATE, SPECIAL REPORT, *supra* note 59, at xi (referring to 2011 and 2012); TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE 2013 ANNUAL REPORT TO CONGRESS, MOST SERIOUS PROBLEMS, <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/Most-Serious-Problems.html> [<https://perma.cc/YZ6J-2UEA>] (listing the 10 most serious problems for 2013).

<sup>326</sup> Mr. Rossotti was IRS Commissioner from 1997 to 2002. The Carlyle Group, *Charles O. Rossotti*, <http://www.carlyle.com/about-carlyle/team/charles-o-rossotti> [<https://perma.cc/88MM-7WWW>].

<sup>327</sup> See Robert D. Hershey, Jr., *Nominee for I.R.S. Vows to Serve Taxpayers*, N.Y. TIMES (Oct. 24, 1997), <http://www.nytimes.com/1997/10/24/us/nominee-for-irs-vows-to-serve-taxpayers.html> [<https://perma.cc/3SKZ-XYR9>] (quoting Senator Roth as calling Rossotti a “successful businessman, in touch with the needs, concerns and risk-taking mindset of entrepreneurs” who made his mark as a “management consultant and expert on computer systems”); see also President William J. Clinton, Remarks at the Signing of IRS Reform Legislation (July 22, 1998), <http://www.cnn.com/ALLPOLITICS/1998/07/22/irs.signing/transcript.html> [<https://perma.cc/YDB2-5XDF>] (praising Rossotti as a “seasoned private sector CEO” who could “reshape the agency, expanding office hours and phone hours, making it easier to file taxes over the telephone or by computer”). Mr. Rossotti helped design the IRS’s new structure and emphasized the IRS mission of providing service to taxpayers. See, e.g., Hal G. Rainey & James Thompson, *Leadership and the Transformation of a Major Institution: Charles Rossotti and the Internal Revenue Service*, 66 PUB. ADMIN.

present situation is quite different. President Obama replaced the previous IRS Commissioner with John Koskinen, but Congress has not portrayed him as the IRS's savior. Instead, in October 2015, nineteen house Republicans, led by Rep. Jason Chaffetz (R-UT), filed a resolution seeking Commissioner Koskinen's impeachment.<sup>328</sup> The House Committee on Oversight and Government Reform alleged that Mr. Koskinen failed to preserve emails of Lois Lerner.<sup>329</sup>

Ultimately, a core problem is that the IRS is an easy target for politicians. Opprobrium for tax collectors has a long history,<sup>330</sup> although it is about as helpful as killing the messenger upon receiving bad news.<sup>331</sup> Most people do not like to pay taxes, so it is rare for a politician to jump to the defense of the IRS.<sup>332</sup> Politicians therefore have an opportunity both to criticize the IRS for simple political gain and to try to undermine the IRS as a way to undermine the effectiveness of a federal tax system they oppose.<sup>333</sup>

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REV. 596 (2006) (arguing that Rossotti and his team implemented reforms that substantially improved taxpayer service and effective tax administration); *Rossotti Appoints New IRS Team*, J. ACCT. (Nov. 1, 1998), <http://www.journalofaccountancy.com/issues/1998/nov/rossottiappointsnewirsteam.html> [<https://perma.cc/9XV7-YMMH>] (describing Rossotti's "effort to place the right people in the right jobs to help move . . . toward the creation of a new, taxpayer-focused IRS").

<sup>328</sup> M. Alex Johnson, *Republicans Seek to Impeach IRS Chief Over Alleged Tea Party Targeting*, MSNBC (Oct. 27, 2015), <http://www.msnbc.com/msnbc/republicans-seek-impeach-irs-chief-over-alleged-tea-party-targeting> [<https://perma.cc/K2Z5-PHGE>].

<sup>329</sup> See S.A. Miller, *Republicans Demand Obama Fire IRS Chief John Koskinen*, WASH. TIMES (Jul. 27, 2015), <http://www.washingtontimes.com/news/2015/jul/27/john-koskinen-irs-chief-must-resign-say-house-repu/?page=all> [<https://perma.cc/7M43-LDCM>]. TIGTA stated in a June 2015 report that "the investigation did not uncover evidence that the IRS and its employees purposely erased the [back-up magnetic] tapes in order to conceal responsive e-mails from the Congress, the DOJ and TIGTA." TREAS. INSPECTOR GEN. FOR TAX ADMIN., REPORT OF INVESTIGATION 3 (2015), <http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/TIGTA%20Report.pdf> [<https://perma.cc/L5CU-U3D5>]. The report further stated, "No evidence was uncovered that any IRS employees had been directed to destroy or hide information from Congress, the DOJ or TIGTA." *Id.* at 18. It found that "the IRS did not put forth an effort to uncover additional responsive emails." *Id.*

<sup>330</sup> "The tax-collector . . . is never esteemed a lovable man. His methods are too blunt, and his powers too obnoxious. He comes to us, not with a 'please,' but with a 'must.'" WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 100 (Johns Hopkins Univ. Press 1981) (1885); see also Brunson, *supra* note 228, at 224–25 ("Taxpayers dislike and distrust tax collectors. These feelings transcend time and culture. . . . In eighteenth-century Wales, tax men attempting to collect the excise tax on spirits found themselves attacked, horsewhipped, robbed, killed, and disfigured.").

<sup>331</sup> The IRS could, in theory, work on trying to improve its public image. However, a media campaign about taxes may backfire, as the recent AirBnB advertisements—though different in context—may suggest. See *Airbnb Issues Apology After Tone-Deaf New Ads Debut in San Francisco*, MOTHER JONES (Oct. 23, 2015), <http://www.motherjones.com/mixed-media/2015/10/airbnb-ads-san-francisco> [<https://perma.cc/QFH4-KJRB>] (also showing a photo of such an AirBnB ad, which states, "Dear Parking Enforcement, Please use the \$12 million in hotel taxes to feed all the expired parking meters. Love, Airbnb"). Most important, a public relations campaign likely would not affect Congress's actions.

<sup>332</sup> Occasionally, a member of the media defends the IRS when the public is hearing a largely one-sided story. *Last Week Tonight* host John Oliver made a humorous case for increasing the IRS's budget that included an ode to the IRS sung by Grammy award winner Michael Bolton. See Jacob Davidson, *450 Billion Reasons Why John Oliver Is Right About the IRS*, MONEY (Apr. 13, 2015), <http://time.com/money/3819382/john-oliver-and-irs-tax-gap> [<https://perma.cc/5KRZ-9V9C>].

<sup>333</sup> For example, during the 1997 IRS hearings, Rep. Bob Riley (R-AL) stated:

The IRS has too much muscle, too much money, and too little oversight. The agency is out of control and it is not going to fix itself. Only Congress can do that. In my view, we should overhaul—if not eventually abolish—the IRS.

Then we should scrap the Tax Code and replace it with one that is fairer and flatter.

Experience has shown that if Congress finds IRS enforcement or service inadequate, it need not conclude that the IRS needs more resources—such as more personnel or better technology—to carry out that function. Instead, Congress can discipline the IRS for perceived failures in service or enforcement by decreasing its funding. The reduction in resources may also pose challenges for management, increasing the likelihood of mistakes.<sup>334</sup> In other words, Congress can set a struggling IRS up for further failures.

There are limited checks on Congress's behavior toward the IRS: "The power of Congress to investigate the IRS is wide-ranging and may effectively be limited only by discretion and prudence. Congress's oversight entities possess an almost unwieldy power to inquire into, prod, and make suggestions to the Service."<sup>335</sup> Thus, Congress needs to exercise that power appropriately. The U.S. Supreme Court has stated:

Congress [is not] a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.<sup>336</sup>

Ultimately, if some politicians are disinclined to restrain themselves, the best hope for overall Congressional restraint may lie within the halls of Congress. Although the IRS has few natural supporters,<sup>337</sup> some in Congress no doubt support a progressive income tax or other aspects of our current federal tax system. Congressional supporters of progressive taxation could link the IRS's enforcement of the tax laws with a fight against increasing income inequality.<sup>338</sup> That is, progressive taxation generally reduces income inequality, but if the tax system is not adequately enforced, the net effect may be to increase income

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143 CONG. REC. E2306-01 (daily ed. Nov. 10, 1997) (remarks of Rep. Riley). This approach reverses the order one might expect from the perspective of administration of the laws—the size and existence of an enforcement and service agency would seem to depend on the needs of the substantive law, rather than vice versa.

<sup>334</sup> The effectiveness of management depends in part on resources, such as adequate staff and technology, and on structural decisions such as where employees and their managers are located. Congress may take those decisions away from the IRS by mandating a certain organizational structure, as it did in the 1998 Act, *see supra* text accompanying note 223, or simply by underfunding it.

<sup>335</sup> Parnell, *supra* note 270, at 1360.

<sup>336</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957) (appeal from a conviction for contempt of Congress during testimony before a Subcommittee of the House of Representatives Committee on Un-American Activities for refusal to answer questions regarding whether certain other people had belonged to the Communist Party in the past).

<sup>337</sup> *See supra* note 332 and accompanying text. The IRS does have stakeholders, including business people who rely on IRS guidance—both published guidance such as Revenue Rulings and private guidance such as Advance Pricing Agreements and Letter Rulings—to get deals done. Tax writer David Cay Johnston reports that "There is hope. While few of us are willing to stand up for the tax police, tax practitioners are starting to complain that they cannot serve their clients when the IRS lacks enough staff to resolve problems." David Cay Johnston, *The Cost of the Shrinking IRS Budget*, 2015 TNT 105-11 (June 2, 2015). He added that "On May 17 the council that sets policy for the American Institute of Certified Public Accountants passed a resolution advocating that Congress provide enough money so that the IRS is able to fulfill its mission . . . ." *Id.*

<sup>338</sup> The United States rose in 2005 to among the highest levels of income inequality in developed countries. *See* Anthony B. Atkinson et al., *Top Incomes in the Long Run of History*, 49 J. ECON. LITERATURE 3, 45 tbl.6 (2011); Leonard E. Burman, *Taxes and Inequality*, 66 TAX L. REV. 563, 566 fig. 2 (illustrating top income shares of various countries using the Atkinson et al. data).

inequality.<sup>339</sup> If the IRS had vocal supporters within Congress, that might help temper the one-sidedness both the recent IRS hearings and those of the late 1990s evidenced.

## V. CONCLUSION

The IRS, though central to the collection of the taxes that support our federal government,<sup>340</sup> is unfortunately no stranger to controversy. Allegations of wrongdoing by the IRS certainly warrant investigation. TIGTA's 2013 report, which launched the latest controversy, was the result of an investigation requested by Congress's House Oversight Committee. TIGTA made recommendations and it followed up with a subsequent investigation that found that the IRS was no longer delaying the applications of 501(c)(4) organizations. The FBI and DOJ also investigated. Like TIGTA, they found no politically motivated actions by the IRS.<sup>341</sup>

By contrast, some in Congress seem to have political motivations for vilifying the IRS. The nation's experience with the 1998 IRS reform suggests that a moral panic over IRS employees' behavior poses risks for tax administration, and particularly for enforcement of the tax laws.

Allegations of IRS wrongdoing can also provide an excuse to cut the IRS's budget. IRS resources are a critical issue, because, as Milka Casanegra de Jantscher and Richard Bird have pointed out, in the context of their work on tax administration in developing countries, three ingredients are necessary for effective tax administration: "the political will to implement the tax system effectively; a clear strategy as to how to achieve this goal; and adequate resources for the task at hand."<sup>342</sup> Lack of Congressional support threatens at least the first and third ingredients of this formula.

Of course, how to keep Congress from treating the IRS as a political football is a very difficult problem. It may help for supporters of progressive taxation to stand up to defend our nation's tax collector against one-sided attacks.<sup>343</sup> Regardless, reforming the IRS does not address an important and fundamental problem: Congress's lack of support for enforcement of the tax laws it has legislated.

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<sup>339</sup> Denvil Duncan & Klara Sabirianova Peter, *Unequal Inequalities: Do Progressive Taxes Reduce Income Inequality?*, IZA Discussion Paper No. 6910 3–4, 34–35 (Oct. 2012), <http://ftp.iza.org/dp6910.pdf> [<https://perma.cc/L49C-3MBQ>].

<sup>340</sup> See Johnston, *supra* note 300 ("The real costs of not spending enough to run the IRS properly include threatening the foundation of the United States, its wealth, and its liberties. All of those are built on a foundation of taxes. Without a sound tax system our economy and society will wither, not flourish. Proper tax administration is as much a part of that as how Congress chooses to tax us.").

<sup>341</sup> See *supra* note 3. The Senate's Permanent Subcommittee on Investigations Comm. on Homeland Security & Gov't Affairs, Majority Staff Report reached similar findings, but the Minority dissented. See *supra* notes 132–137 and accompanying text.

<sup>342</sup> Richard M. Bird, *Improving Tax Administration in Developing Countries*, 1 J. TAX ADMIN. 28 (2015) (citing Casanegra de Jantscher & Bird, *The Reform of Tax Administration*, in RICHARD M. BIRD & MILKA CASANEGRA DE JANTSCHER, *IMPROVING TAX ADMINISTRATION IN DEVELOPING COUNTRIES* (1992)).

<sup>343</sup> See Lederman, *supra* note 26, at 1333.