

# CAUSE *of* ACTION

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Pursuing Freedom and Opportunity through Justice and Accountability

*Staff Report*

### **Sensitive Case Reports: A Hidden Cause of the IRS Targeting Scandal**

March 2017

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Cause of Action Institute (“CoA Institute”) is a government oversight group committed to ensuring that the federal regulatory process is open, honest, and fair. As part of its charitable mission, CoA Institute seeks judicial and legislative oversight of the federal regulatory state to protect against law enforcement abuses and arbitrary discretion, as well as to defend robust public access to government information.

### **Investigative Function:**

CoA Institute uses investigative tools to research federal government waste, fraud, and mismanagement, as well as overreach in the form of arbitrary and burdensome regulations. We employ “sunshine advocacy” tools, including document and information requests, lawsuits, ethics complaints, and requests for investigation to promote transparency, integrity, and accountability in government. Our investigations help to expose and prevent government mismanagement of federal funds and to educate the public on how government can be made more accountable.

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## **I. EXECUTIVE SUMMARY**

Beginning in February 2010, the Internal Revenue Service (“IRS”) singled out certain non-profit organizations for extra scrutiny when they applied for tax-exempt status. Numerous subsequent congressional investigations and media reports demonstrated that the targeting involved invasive questioning and years-long delays, and focused disproportionately on right-leaning groups, especially those with “Tea Party” in their name. These reports, however, have almost entirely overlooked a hidden cause of the targeting scandal, which remains in effect today. As a result, American taxpayers are at risk for similar treatment in the future.

Contrary to the conventional storyline, there exists an institutional policy that was the first impetus in prompting IRS employees to target groups based on their political viewpoints. That policy is embodied in an internal IRS rule—which is still on the books—that singles out applications from any group interested in issues that might garner attention from either the media or Congress. In such cases, the merits of the application are ignored as IRS employees develop “Sensitive Case Reports” for consideration by those above them in the IRS hierarchy. The result is a process that interferes with the unbiased review of applications for tax-exempt status designed to apply to all eligible organizations, regardless of their political viewpoints or affiliations.

Seven years after the targeting scandal began, the rule that enabled this inexcusable behavior still exists. Until that rule is removed from the internal manual used by all IRS employees, targeting of political opponents will remain a very real threat. Fortunately, removing the offending provisions is a simple process that can be started at any time and completed without the need for new legislation or formal notice-and-comment rule-making.

## **II. FINDINGS**

- *Targeting was—and is—IRS policy, not a violation of it.*
- *The employees who initiated the targeting cited an internal “Sensitive Case Report” process that singled out applications that might attract media or congressional attention.*
- *Sensitive Case procedures remain in effect today.*
- *The IRS has the authority to change its internal policy at any moment, which means it can remove the problematic rules at its discretion. Doing so would eliminate the agency procedure that enabled the targeting scandal. To date, the agency has not made the required changes to its rules.*

### III. INTRODUCTION

Much has been written about the targeting of “Tea Party” and “patriot” organizations by the IRS since the May 2013 revelation that the agency subjected conservative groups to unfair treatment in the processing of their applications for tax-exempt status.<sup>1</sup> In addition to extensive news coverage about the scandal, official investigative reports were produced by the Treasury Inspector General for Tax Administration (nearly 50 pages),<sup>2</sup> the House Committee on Oversight and Government Reform (three reports totalling close to 300 pages),<sup>3</sup> the Senate Permanent Subcommittee on Investigations (222 pages, including a robust Minority dissent),<sup>4</sup> and the Senate Finance Committee (a remarkable 5,384 pages).<sup>5</sup>

For all that has been written, however, a root cause of the IRS behavior has remained obscured: the targeting of specific groups was done *because* of IRS policy, not in violation of it. The origins of the scandal lie not simply in poor leadership or ideological bias—although both made the problem worse—but in misguided agency rules that required IRS employees to substitute external factors for their own judgment. And nearly seven years after it began, the official policy that contributed to the targeting remains in full force and effect.

When it became clear that the IRS had behaved inappropriately, both media outlets and elected officials searched for someone to hold accountable. Lois Lerner, the IRS official who oversaw the relevant agency division, soon became the focal point, and she responded by blaming a “very big uptick” in tax-exempt applications for the agency’s problems before ultimately invoking the Fifth Amendment and refusing to answer questions before Congress.<sup>6</sup> President Obama, when questioned about the scandal by a TV host, claimed the culprits were simultaneously “a crummy law” and employees who executed their duties “poorly and stupidly.”<sup>7</sup>

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<sup>1</sup> See, e.g., Fredreka Schouten & Gregory Korte, *IRS Apologizes for Targeting Conservative Groups*, USA TODAY, (May 12, 2013), available at <http://usat.ly/2m8Cxjy>.

<sup>2</sup> TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, REPORT: INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (May 14, 2013) [hereinafter “TIGTA REPORT”], available at <http://bit.ly/2l0rwMn>.

<sup>3</sup> See *infra* notes 25, 26, and 28.

<sup>4</sup> U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS: IRS AND TIGTA MANAGEMENT FAILURES RELATED TO 501(C)(4) APPLICANTS ENGAGED IN CAMPAIGN ACTIVITY 40 (Sep. 24, 2015), [hereinafter “Senate PSI REPORT”] available at <http://bit.ly/2lMlenT>.

<sup>5</sup> U.S. SENATE COMM. ON FINANCE, STAFF REPORT: THE INTERNAL REVENUE SERVICE’S PROCESSING OF 501(C)(3) AND 501(C)(4) APPLICATIONS FOR TAX-EXEMPT STATUS SUBMITTED BY “POLITICAL ADVOCACY” ORGANIZATIONS FROM 2010–2013 (Aug. 5, 2015), available at <http://bit.ly/2mmu3kY>.

<sup>6</sup> See Bob Adelman, *House Holds Former IRS Official Lois Lerner in Contempt*, THE NEW AMERICAN (May 8, 2014), available at <http://coainst.org/2lMfPNK>.

<sup>7</sup> Dan Friedman, *President Obama Orders Jon Stewart to Not Leave ‘Daily Show,’ Mocks Iran Nuclear Deal Critics*, NEW YORK DAILY NEWS (July 21, 2015), available at <http://nydn.us/2l9hkID>. The president eventually reversed his initial judgment, telling another TV host there wasn’t “even a smidgen of corruption” involved in the targeting scandal. See, e.g., Ian Schwartz, *Obama on IRS Scandal: “Not Even A Smidgen Of Corruption,”* REALCLEARPOLITICS (Feb. 2, 2014), available at <http://coainst.org/2mgHcNq>.

These statements and others by members of the administration obscured a more systemic problem, which is the subject of this report. The extensive targeting of ideological foes of the president was enabled by an official agency policy that instructs IRS employees to halt consideration of applications for tax-exempt status and prepare “Sensitive Case Reports” for review by higher-level supervisors whenever an applicant might “attract media or Congressional attention.”<sup>8</sup> In halting the applications, preparing such reports, and referring the matter to supervisors, including political appointees, IRS employees behaved exactly as agency rules dictated.

Existing IRS procedure, in other words, *requires* the elevation of tax-exempt applications to higher-level supervisors if the application implicates any issue that may be of interest to the media or Congress. The dangers in this approach are manifold. First, by focusing on media or congressional attention instead of looking at the merits of an application under the law, the IRS automatically politicizes the process in an attempt to avoid potential embarrassment, all at the expense of taxpayer rights. Second, the vague and open-ended standard used by the IRS allows partisan officials to selectively delay and obstruct those applications receiving higher scrutiny without a way to hold the officials accountable for their decisions. Third, given the power of the president to influence media coverage, no overt collusion or decision is necessary for the opponents of an administration to receive extra IRS scrutiny as a matter of course. Nor do the groups need to be ideological foes. Although conservative groups were, by far, the most numerous and serious victims of the IRS targeting scandal during the Obama administration, they were not the only ones.<sup>9</sup>

The accepted wisdom regarding the targeting scandal is thus incomplete, and needed changes have not been made as a result. If existing rules rather than, or in addition to, specific people are at the root of this problem, the departure of bad actors or a change of administration will not eliminate it. To date, the IRS has refused to disavow or even acknowledge the Sensitive Case procedures that enabled the targeting. Until those procedures are identified and amended, however, taxpayers will continue to have their rights violated by bureaucrats acting under color of official policy.

#### **IV. THE HIDDEN CAUSE OF THE TARGETING IS ROOTED IN EXISTING IRS POLICY**

- ***Finding:*** *Targeting was—and is—IRS policy, not a violation of it.*
- ***Finding:*** *The employees who initiated the targeting cited an internal “Sensitive Case Report” process that singled out applications that might attract media or congressional attention.*

When IRS employees need guidance on any aspect of agency operations, they turn to the Internal Revenue Manual (“IRM”). As the manual itself explains, the IRM is “the primary, official source of instructions to staff that relate to the administration and operation of the

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<sup>8</sup> See Internal Revenue Manual 7.29.3.2.2(3) (July 14, 2008) [hereinafter “IRM”].

<sup>9</sup> See *infra* § IV.C.

IRS.”<sup>10</sup> Over the course of its 39 parts, the IRM “details the policies, delegations of authorities, procedures, instructions and guidelines for daily operations for all IRS organizations.”<sup>11</sup> Part 7 of the IRM deals specifically with requests for tax-exempt status, and the procedures it contains enabled the targeting of taxpayers based upon their political beliefs.<sup>12</sup>

#### **A. The Five Criteria for a “Sensitive Case Report”**

All applications to the IRS for the kind of tax-exempt status at issue in the targeting scandal<sup>13</sup> are first considered by an entry-level tax law specialist. The official procedure is fairly simple: “generally, cases are worked in a first in – first out manner, except for approved expedited cases.”<sup>14</sup> This overall instruction leaves out another category of applications, however, namely those that are stopped during their initial review so that a “Sensitive Case Report” or SCR can be prepared.<sup>15</sup>

These reports begin with entry-level employees, who must notify their supervisors of any application that seems “unique or significant.”<sup>16</sup> Such notification need only be a short memorandum, but these can quickly attract a great deal of attention. The first report filed regarding one Tea Party applicant reached the Washington, D.C. headquarters of the IRS less than 10 hours after it was filed by a low-level specialist in the agency’s Cincinnati field office.<sup>17</sup>

Whether a memo goes beyond a front-line supervisor and becomes an official Sensitive Case Report depends on whether it meets any of five criteria specified in the IRM.<sup>18</sup> Three of the reasons listed are technical in nature and fall comfortably within the agency’s area of expertise: whether an application affects a large number of taxpayers, presents unique tax issues, or involves \$10 million or more.<sup>19</sup>

The remaining two criteria are significantly different in nature: whether an application “is likely to attract media or Congressional attention” or whether it falls within a longer list of issues

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<sup>10</sup> IRM 1.11.2.2(1) (May 8, 2014).

<sup>11</sup> *Id.*

<sup>12</sup> *See* IRM 7.29.3 (July 14, 2008).

<sup>13</sup> The organizations in question were applying for approval to operate as a 501(c)(4) entity, or Social Welfare Organization. Such groups are exempt from taxes on income but may not have a primary purpose of engaging in political campaigns. *See* SOCIAL WELFARE ORGANIZATIONS (Aug. 9, 2016), *available at* <http://bit.ly/2lq06Da>.

<sup>14</sup> IRM 7.29.3.2(1) (July 14, 2008).

<sup>15</sup> SCRs are also referred to as “Significant Case Reports” in some IRS e-mails; this is incorrect per the IRM, which primarily defines a “significant case” as one formally in the court system and involving the legal validity of a statute or regulation. *See* IRM 31.2.1 (July 14, 2008).

<sup>16</sup> IRM 7.29.3.2(3) (July 14, 2008).

<sup>17</sup> *See* E-mail chain between Jack Koester, John Shafer, Sharon Camarillo, and others (Feb. 25, 2010), *available at* <http://bit.ly/2mmhQga>.

<sup>18</sup> IRM 7.29.3.2(3) (July 14, 2008).

<sup>19</sup> *Id.*

that “warrant attention,”<sup>20</sup> a list which included anything “newsworthy” when the scandal began in 2010.<sup>21</sup> It now includes the nearly-identical criterion of anything that might “generate significant publicity or controversy.”<sup>22</sup>

## **B. The Pervasive Targeting of Conservative Groups**

On February 25, 2010, Jack Koester, a tax specialist in the Cincinnati IRS office, came across an application for tax-exempt status from a Tea Party-affiliated group.<sup>23</sup> It was almost exactly a year since Tea Party groups had first begun to stage protest rallies, and this application would be “patient zero” for the problems that would follow. Rather than processing the application on its merits, Mr. Koester contacted his supervisor to report a “high profile” case caused by “recent media attention” on the Tea Party movement.<sup>24</sup> As discussed, in elevating the application to his supervisor, Mr. Koester was following IRM protocol.

Mr. Koester’s supervisor forwarded the e-mail to his own supervisor, again as required by the IRM, who in turn elevated it further and requested that the Washington, D.C. office be told about this “potentially politically embarrassing case.”<sup>25</sup> The same e-mail also repeated the description of the application as “high profile” because of “media attention,” explaining that it would therefore be held until the next level of management determined how to proceed. This same procedure was followed in the numerous Tea-party applications that followed. In most of those matters, the higher-level decision on how to proceed would not come for several years.

As the original targeting case made its way through IRS channels, one theme was consistent: concern about media attention. Five separate levels of management cited that concern specifically, including the reference to potential embarrassment, while no mention at all was made of workload concerns, novel legal questions, or other similar rationales for holding the application indefinitely and sending it to Washington D.C.<sup>26</sup>

Over the next several months, the mechanics of the targeting grew more elaborate and the burden placed on affected applicants became greater. To meet the IRM Sensitive Case Report

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<sup>20</sup> *Id.*

<sup>21</sup> IRM 1.54.1.3.1 (Aug. 31, 2016). The index of material changes for this section of the IRM notes the replacement of “newsworthy” with “may generate significant publicity or controversy.”

<sup>22</sup> *Id.*

<sup>23</sup> See SENATE PSI REPORT, *supra* note 4, at 40.

<sup>24</sup> *Id.*

<sup>25</sup> U.S. H. COMM. ON OVERSIGHT & GOV’T REFORM, STAFF REPORT: HOW POLITICS LED THE IRS TO TARGET CONSERVATIVE TAX-EXEMPT APPLICANTS FOR THEIR POLITICAL BELIEFS 49 (June 14, 2014) [hereinafter “HOUSE OGR REPORT 1”], available at <http://bit.ly/2IM53a6>.

<sup>26</sup> See, e.g., E-mail chain between Jack Koester, John Shafer, Sharon Camarillo, and others, *supra* note 17; see also U.S. H. COMM. ON OVERSIGHT & GOV’T REFORM, STAFF REPORT: MAKING SURE TARGETING NEVER HAPPENS: GETTING POLITICS OUT OF THE IRS AND OTHER SOLUTIONS 11 (Sep. 5, 2014) [hereinafter “HOUSE OGR REPORT 2”], available at <http://bit.ly/2IMm4Bn> (When interviewed, IRS manager Cindy Thomas was asked if, “other than the media attention, was there any other reason to – to send this case to Washington?” Her reply was “No.”).

requirements, the agency created “Be on the Lookout” (or BOLO) lists dictating that every “Tea Party” or “patriot” application be halted.<sup>27</sup> IRS Exempt Organization Section head Lois Lerner then escalated things significantly, calling Tea Party applications “very dangerous” and demanding a multi-tiered review, ignoring the advice of an expert assigned to the issue and eventually pushing the backlog to above 300 applications.<sup>28</sup> But even as the targeting became overtly politicized, the original Sensitive Case procedures remained in place. At the same time Ms. Lerner was ordering more elaborate review, a Sensitive Case Report cited the fact that “‘tea party’ organizations are being followed closely in national newspapers (such as The Washington Post) almost on a regular basis” as the justification for treating such groups differently.<sup>29</sup>

### C. Problems Beyond the Tea Party

The overwhelming majority of targeting was aimed at conservative organizations,<sup>30</sup> and they were consistently treated in a more invasive manner than other similarly-situated applicants.<sup>31</sup> Such groups, however, were not the only ones subject to additional scrutiny in ways approved by the IRM and later deemed inappropriate by Treasury investigators. Their common thread was media attention.

In 2010, just two weeks after the first Tea Party application was flagged, an IRS specialist noted that “there is a lot of internet traffic about ACORN reinventing itself”<sup>32</sup> and referred an application from a similar group to his supervisor. By the time the first BOLO list was created later that year, the term “ACORN successors” was on it.<sup>33</sup> The IRS manager who suggested this BOLO addition did so for broad reasons, going so far as to recommend pulling any application that mentioned “the low-income/disenfranchised.”<sup>34</sup> The ACORN entry would

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<sup>27</sup> TIGTA REPORT, *supra* note 2, at 6.

<sup>28</sup> See U.S. H. COMM. ON OVERSIGHT & GOV'T REFORM, STAFF REPORT: THE INTERNAL REVENUE SERVICE'S TARGETING OF CONSERVATIVE TAX-EXEMPT APPLICANTS: REPORT OF FINDINGS FOR THE 113TH CONGRESS 17 (Dec. 13, 2014), available at <http://1.usa.gov/1tyX94r>. (“As 2011 opened, veteran employee Carter Hull had made recommendations on how to resolve the two test cases in Washington based on his decades of experience and expertise. His recommendations were not carried out. Instead, in February 2011, Exempt Organizations Director Lois Lerner ordered the Tea Party test applications to undergo an unprecedented “multi-tier” review.”)

<sup>29</sup> See *id.* at 49 (quoting a May 2011 SCR from IRS tax specialist Carter Hull).

<sup>30</sup> See SENATE PSI REPORT, *supra* note 23, at 187. (“Of the groups applying for tax-exempt status that were pulled from normal processing and received additional scrutiny by the IRS, 83% (or 248 out of 298) of the groups were ‘right leaning’ organizations.”)

<sup>31</sup> See *id.* at 188 (“Conservative groups were asked on average more than triple the number of questions posed to progressive organizations.”)

<sup>32</sup> *Id.* at 70. ACORN stands for “Association of Community Organizations for Reform Now.” See also [www.acorn.org](http://www.acorn.org).

<sup>33</sup> SENATE PSI REPORT, *supra* note 23, at 57.

<sup>34</sup> SENATE PSI REPORT, *supra* note 23, at 72.

remain on the BOLO list for two years, and applications affected by that entry were held for over three years.<sup>35</sup>

The “Occupy Wall Street” movement, which began in September of 2011, also appeared on a BOLO list after making headlines. One of the same IRS managers involved in keeping Tea Party applications on hold testified before a Senate subcommittee that she heard about Occupy organizations “when an IRS agent saw the group in the news and elevated the related case to her.”<sup>36</sup> Only a small number of Occupy groups ever applied for tax-exempt status, but they were flagged and placed in the same IRS working group to which Tea Party cases were assigned, with one group forced to wait nearly two years for a decision.<sup>37</sup>

## V. SEVEN YEARS LATER, NOTHING HAS CHANGED

- ***Finding:*** *Sensitive Case procedures remain in effect today.*

Given the amount of criticism the IRS has received regarding its targeting practices, it is hard to believe the agency has not yet taken the steps needed to remedy the problem. Yet even now, as courts are criticizing the agency for continuing its practice of targeting conservative groups,<sup>38</sup> the policy at the root of the scandal remains in effect.

### A. Previous Recommendations Have Been Ineffective

There has been no shortage of recommendations provided to the IRS since it was revealed that the agency was targeting specific, primarily conservative groups for scrutiny. Unfortunately, these recommendations have failed to address the underlying IRS policy that required agency officials to consider “media or Congressional attention” in the first place.

The main report produced by the Treasury Inspector General for Tax Administration criticized the IRS for pulling applications based on “names and policy positions” rather than evaluating how the groups behaved in practice.<sup>39</sup> But it did not examine the agency policy that mandated that behavior and specified how such “names and policy positions” were selected, overlooking not only the requirements of the IRM but also the e-mails sent by IRS employees as they followed the targeting procedures. As a result, the report’s recommendations focus on items such as training workshops and a faster evaluation process.<sup>40</sup> Without changing the underlying

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<sup>35</sup> *Id.* at 77.

<sup>36</sup> *Id.* at 78.

<sup>37</sup> *Id.* at 81.

<sup>38</sup> *See, e.g., True the Vote, Inc. v. Internal Revenue Serv.*, 831 F.3d 551 (D.C. Cir. 2016); *Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015); *see also* Jerome M. Marcus, *How the Trump Administration Can Stop IRS Abuse of Political Groups*, JEWISH PRESS (Dec. 11, 2016) available at <http://bit.ly/2m8KXaQ> (“I represent the plaintiff in one of these cases... the IRS has produced virtually nothing that sheds light on its decision-making process. Other organizations in court against the IRS have been given the same treatment...”).

<sup>39</sup> TIGTA REPORT, *supra* note 2, at 4-7.

<sup>40</sup> *Id.* at 46-48.

Sensitive Case review policy, however, any such changes will simply result in more efficient targeting, not its elimination.

In contrast, the July 2014 report by the House Committee on Oversight and Government Reform mentioned the underlying problem, stating that using media attention as a justification for extra scrutiny “runs contrary to idea [sic] that applications are judged on their merits.”<sup>41</sup> Its proposed solution, however, involved “considering legislative proposals that would establish transparent and objective criteria for applying additional scrutiny to tax-exempt applicants.”<sup>42</sup> That recommendation is laudable but overly complex. It is also unnecessary, as the ability to solve the problem is well within IRS control, as discussed below in Section VI.

## **B. The IRS Continues to Protect its Right to Target**

One of the more controversial aspects of the targeting scandal was the creation of BOLO lists, which formalized the targeting process by compiling the names and political viewpoints of organizations featured in the news. These lists allowed IRS personnel to halt the processing of new applications from such organizations without any examination of the applications on their merits.

Under increasing pressure from both Congress and the public, the IRS announced in June 2013 that it was suspending “until further notice” any use of BOLO lists for groups applying for tax-exempt status.<sup>43</sup> That decision came amidst the confirmation, from a newly-appointed senior IRS official, that the agency was still using lists in inappropriate ways.<sup>44</sup> Rather than disavowing any future use of the lists, however, the IRS promised “a comprehensive review of screening and identification of critical issues . . . [to] develop proper procedures and uses for these types of documents.”<sup>45</sup>

Over three and a half years later, the promised “further notice” remains pending, and a court case from last summer demonstrates how little progress has in fact been made. On August 5, 2016, a federal appeals court refused to dismiss a lawsuit against the IRS because the agency still reserves the right to return to using BOLO lists and targeting taxpayers in the same manner as previously.<sup>46</sup> As the court recognized, this approach only means “you’re alright for now, but there may be another shoe falling” in the future.<sup>47</sup> The court also faulted the IRS for re-suspending the applications of anyone who was targeted if they had chosen to file a lawsuit to

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<sup>41</sup> See HOUSE OGR REPORT 2, *supra* note 26, at 11.

<sup>42</sup> *Id.*

<sup>43</sup> See Internal Revenue Service, *Report Outlines Changes for IRS to Ensure Accountability, Chart a Path Forward; Immediate Actions, Next Steps Outlined* (June 24, 2013), available at <http://bit.ly/2m8MtcO>.

<sup>44</sup> See Daniel Werfel, *Charting a Path Forward at the IRS: Initial Assessment and Plan of Action*, INTERNAL REVENUE SERVICE 9 (June 24, 2013), available at <http://bit.ly/2lwefNu>.

<sup>45</sup> *Id.*

<sup>46</sup> *True the Vote, Inc. v. Internal Revenue Serv.*, 831 F.3d 551 (D.C. Cir. 2016).

<sup>47</sup> *Id.* at 563.

secure their rights.<sup>48</sup> By again letting external events dictate whether an application is processed, the IRS continues to repeat its prior misconduct.

### C. The Perfect Opportunity for Partisan Interference

As both the Senate and House conducted their hearings into the targeting scandal, questions arose as to what role political bias played in how the IRS behaved. That included concerns about both overt bias by IRS employees and whether President Obama’s criticism of the *Citizens United* decision resulted in the IRS feeling pressure to scrutinize similar groups.<sup>49</sup>

Although those important questions were never fully answered by the Obama administration, the fact that targeting arose out of the IRM Sensitive Case procedures means that any partisan employee can inject his political beliefs—consciously or not—into the approval process. Issues that attract “media or congressional attention” are usually political in nature, and reliance on such a criterion means that the process itself cannot avoid partisan bias. As it stands, regardless of who occupies the White House, a single low-level IRS employee may watch a TV news story about a particular applicant or related topic and be obligated to stop processing tax-exempt applications as a result. The fact that a network chooses to run a news story, and that an IRS employee happens to watch or become aware of that story, has nothing to do with the application’s merits. The preferences of network news, its viewers, and the political whims of the day should not be relevant criteria for that application’s consideration under the law.

The Sensitive Case review policy also creates a natural bias against the political opponents of whoever is currently in power. It is a fact of politics that the policies, programs, and people in power will be criticized by those on the opposite side, and those criticisms often become newsworthy. When the Tea Party groups formed and started to rally against specific policies of the Obama administration, the press inevitably covered the story, giving the IRS not only an opportunity to scrutinize those groups but, under the IRM, an obligation to do so. The same will be true regarding new groups formed in opposition to positions taken by President Donald J. Trump.

## VI. RECOMMENDATION – A SIMPLE FIX TO THE IRM

- ***Finding:*** *The IRS has the authority to change its internal policy at any moment, which means it can remove the problematic rules at its discretion. Doing so would eliminate the agency procedure that enabled the targeting scandal. To date, the agency has not made the required changes to its rules.*

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<sup>48</sup> *Id.* at 562 (“Parallel to Joseph Heller’s catch, the IRS is telling the applicants in these cases that ‘we have been violating your rights and not properly processing your applications. You are entitled to have your applications processed. But if you ask for that processing by way of a lawsuit, then you can’t have it.’”).

<sup>49</sup> *See, e.g.,* HOUSE OGR REPORT 1, *supra* note 25, at 5 (“The President’s public campaign against *Citizens United*... had a causal effect on how the IRS treated tax-exempt applicants”); SENATE PSI REPORT, *supra* note 23, at 187 (“Question of Political Bias and Disparate Impact” section).

The internal IRS policy at the root of the targeting scandal has not remained unsolved because it is complicated. A fix is possible through a simple change to the applicable provisions of the IRM. Senior officials at the IRS are responsible for managing sections of the manual that affect their programs,<sup>50</sup> and any particular section can be revised and republished whenever necessary. Formal requirements are minimal. Unfortunately, no such change has yet been made.

Unlike many other regulatory rules, changing the IRM does not require releasing a draft version and soliciting public comments. Because the IRM dictates the behavior of agency employees, not the general public, revisions need only be circulated with the following information: a statement of purpose, dissemination date, effective date, approving official, and a description of the material changes to the IRM.<sup>51</sup>

What should those changes be? As discussed, IRS targeting began not with rogue or ill-informed agency employees but with intentional conformity to specific IRM criteria about what types of applications warranted extra scrutiny as a Sensitive Case. The two problematic criteria in question—those referencing possible “media or congressional attention”<sup>52</sup> and “significant publicity or controversy”<sup>53</sup>—could and should be deleted.<sup>54</sup> No organization should be subjected to special examination by the IRS simply because the media or Congress might take an interest in their cause. Such an approach introduces an inherent political element into what should be an apolitical, nonpartisan decision.<sup>55</sup>

In the long term, broader efforts to prevent the IRS from being used as a political weapon will require congressional action, as amending IRM provisions will not prevent a new administration from implementing other policies designed to weaponize the agency. Yet the effort can begin now with the simple step of updating the IRM so as to encourage a culture of accountability to taxpayers rather than to the dictates of the day’s news cycle. The rights of taxpayers must be paramount, not the desire of the IRS to avoid embarrassment or to further a particular official’s political agenda.

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<sup>50</sup> IRM 1.11.1.6(1) (Nov. 1, 2011).

<sup>51</sup> IRM 1.55.2.6.1 (June 17, 2015).

<sup>52</sup> IRM 7.29.3.2(2)(3)(i) (July 14, 2008).

<sup>53</sup> IRM 1.54.1.4(2) (Aug. 31, 2016).

<sup>54</sup> The second of these is contained by reference. Item v on the list in IRM 7.29.3.2(2)(3) is a catch-all (any other “issue that warrants attention”) and cross-references IRM 1.54.1.4(2), which lists the criterion of “may generate significant publicity or controversy.” The catch-all “warrants attention” provision is vague and subject to abuse; it also should be eliminated or amended to prevent its misuse.

<sup>55</sup> See *United States of America v. NorCal Tea Party Patriots, et al.*, 817 F.3d 953, 955 (6<sup>th</sup> Cir. 2016) (“Among the most serious allegations a federal court can address are that an Executive agency has targeted citizens for mistreatment based on their political views. No citizen—Republican or Democrat, socialist or libertarian—should be targeted or even have to fear being targeted on those grounds.”).