WASHINGTON
LEGISLATIVE OFFICE

May 17, 2013

Honorable Dave Camp
Chairman
House Committee on Ways and Means
1101 Longworth HOB
Washington, DC 20515

Honorable Sander Levin
Ranking Member
House Committee on Ways and Means
1101 Longworth HOB
Washington, DC 20515

Re: ACLU Statement for Hearing on IRS Selective Enforcement

Dear Chairman Camp and Ranking Member Levin:

On behalf of the ACLU, a non-partisan organization with over half a million members, countless additional supporters and activists and 53 affiliates nationwide, we write to the committee regarding the recent revelations of selective enforcement at the Internal Revenue Service ("IRS") against conservative organizations seeking tax exempt status.

The ACLU is one of the nation's premiere organizations advocating on behalf of the freedoms guaranteed in the First Amendment, and we do so for everyone regardless of where they fall on the political spectrum. We have defended Planned Parenthood and the Susan B. Anthony List, members of the Communist Party and Oliver North, and atheist students and Jerry Falwell. We do so because the freedoms of speech and association mean nothing unless they apply to all equally. That conviction comes from our own history as a group formed to protect dissenters facing selective enforcement by a hostile White House during World War I.

Without qualification, the news last week that the IRS's Determinations Unit ("DU") at its Exempt Organizations ("EO") function used inappropriate, and politically freighted, criteria to identify Tea Party and other conservative groups for heightened scrutiny raises serious constitutional concerns.

That said, we welcome the Obama administration's swift condemnation of this activity. We also note the findings of the Treasury Inspector General for Tax Administration ("TIGTA") that the inappropriate criteria were developed and implemented by staff at the DU, and may very well have been

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the result of overwork and a lack of supervision (as TIGTA found).[1] Now is the time, however, to implement clear standards to prevent such selective enforcement from ever occurring again.[2] We also strongly support efforts by Congress, the administration and, if necessary, federal law enforcement to uncover exactly what happened here. We elaborate on these preliminary comments below.

1. Selective Enforcement Against Any Group Is Unacceptable and Unconstitutional

The IRS is one of the most powerful agencies in the United States government, and is supposed to be apolitical. Yet, it has a track record of politically biased enforcement going back decades.[3] Under President George W. Bush, for instance, the IRS sought to audit the NAACP because of highly critical statements made about the administration at an annual gathering of the group.[4] Although the statements were entirely about controversial issues of the day (including the economy and the Iraq War), and at no time did the NAACP expressly call for voters to oppose President Bush, the IRS initiated an audit of its tax exempt status to determine if these statements constituted impermissible partisan political activity.[5]

The NAACP case appears to be very similar to what occurred here. The Bush administration denied any partisan bias in the audit, and it is entirely feasible that the decision to initiate the

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[1] Treasury Inspector Gen. for Tax Admin., Final Audit Report – Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review 7 (2013) [hereinafter "TIGTA Report"]. Specifically, the TIGTA Report found:

> Instead, the Determinations Unit developed and implemented inappropriate criteria in part due to insufficient oversight provided by management. Specifically, only first-line management approved references to the Tea Party in the ["be-on-the-lookout"] listing criteria before it was implemented. As a result, inappropriate criteria remained in place for more than 18 months. Determinations Unit employees also did not consider the public perception of using politically sensitive criteria when identifying these cases. Lastly, the criteria developed showed a lack of knowledge in the Determinations Unit of what activities are allowed by I.R.C. § 501(c)(3) and I.R.C. § 501(c)(4) organizations.

[2] Indeed, though we do not express a firm view on the question, it may also be time to remove the IRS completely from the untenable position of having to engage in fact intensive and inherently subjective inquiries into the nature of political speech.

[3] *See* David Burnham, *Misuse of the I.R.S.: The Abuse of Power*, N.Y. Times (Sept. 3, 1989) ("The history of the I.R.S. is riddled with repeated instances of agents acting out of self-interest or pursuing their ideological agenda, as well as examples of Presidents, White House staff and Cabinet officials pressuring the tax agency to take political actions.").

[4] Kelly Brewington, *NAACP Blames Tax Audit on Criticism of Bush*, Balt. Sun, Oct. 29, 2004.

[5] *Id.* As then-Chairman Julian Bond said, "[t]hey are saying if you criticize the president we are going to take your tax exemption away from you. It's pretty obvious that the complainant was someone who doesn't believe George Bush should be criticized, and it's obvious of their response that the IRS believes this, too."

audit came from career employees who failed, as did the revenue agents here, to "consider the public perception of using politically sensitive criteria"[6] in identifying candidates for heightened scrutiny. Nevertheless, both the Tea Party and the NAACP case show the dangers of granting an agency as powerful as the IRS unbridled discretion to make determinations on how much political speech is too much.

Selective enforcement against any ideological group—which is necessarily invited by this discretion—is unacceptable on many levels. It is unsound law enforcement policy in that it immunizes favored groups who may actually be violating the law,[7] and it runs counter to basic constitutional principles of equality under the law and limited government. Discriminatory enforcement of any tax measure almost certainly violates settled law under the First and Fourteenth Amendments, which will void statutes that are so vague that they can be applied against some persons and not others when all have committed the same claimed harm.[8]

2. Clearer Rules Will Help Avoid Future Selective Enforcement

The fundamental problem here is that a small unit within the IRS—the DU—is forced to make extremely subjective decisions in its review of applications for 501(c) tax exempt status. The controversy originates in the relatively arcane area of exempt organizations tax law. As the committee knows, 501(c)(4) organizations, by statute, are required to operate "exclusively" for the promotion of "social welfare."[9] The implementing regulation, however, permits the "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office"—including the express advocacy for or against a candidate—so long as it is not the "primary" purpose of the group.[10] Despite public calls for clearer standards from both sides of the campaign finance reform debate, the IRS continues to insist on an open-ended "facts and circumstances" test (applicable to many 501(c) tax exempt groups, not just

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6 *See TIGTA Report*, *supra* note 1, at 7.

7 The TIGTA Report found exactly that. *See id.* at 5 ("[W]e identified some organizations' applications with evidence of significant political campaign intervention that were not forwarded to the team of specialists for processing but should have been.").

8 *See, e.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law.") (internal citations omitted); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections."); *Nat'l Ass'n. for the Advancement of Colored People v. Button*, 371 U.S. 415, 435 (1963) ("It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes.").

9 26 U.S.C. § 501(c)(4) (2006).

10 26 C.F.R. § 1.501(c)(4)-1(a)(1)-(2) (2013).

501(c)(4)s), which vests it with complete discretion to determine what constitutes impermissible partisan political activity, and how much is too much.[11]

This discretion was on stark display in the interim standard the DU adopted to identify applicants for heightened scrutiny, which instructed agents to "be on the lookout" for applications that, for instance, suggest a concern with government spending, debt or taxes, or "education of the public via advocacy/lobbying to 'make America a better place to live.'"[12] The presumed rationale behind this interim protocol (it was implemented following concerns by management over the partisan keyword searches) is that groups seeking smaller government or fiscal restraint are, in fact, partisan opponents of the president, even if the substance of their advocacy is itself not expressly partisan. It bears noting that advocacy on the debt or taxes is political speech worthy of the most stringent protection of the First Amendment.[13]

The proper response here is to finally limit the IRS's discretion, or to move the review of partisan activity to the ostensibly apolitical Federal Election Commission ("FEC"), which was created with structural checks to prevent politicization (a four-vote majority of a bipartisan six member panel is required for any action). At this time, we do not offer a view on which option—reforming the IRS review or moving the "primary purpose" inquiry to the FEC—is preferable. We do, however, urge Congress and the administration to collaborate on the formulation of clearer rules as to both the definition of partisan political activity and the quantum of such activity that requires the government to deny or revoke tax exempt status.

Given that the investigation into the current controversy is ongoing, we do not opine on exactly what these rules should look like, but we offer general thoughts below. Our views on this issue echo concerns raised by other campaign finance and tax law experts (many of whom do not agree with the ACLU in other aspects of campaign finance regulation).[14] We would urge the solution to incorporate two overriding principles:

- First, there should be a universal bright line test for the amount of partisan political activity that a 501(c)(4), (5) or (6) organization may engage in without losing its tax exempt status. We do not offer an opinion on how much is too much, but we would note that many 501(c)(4) groups already segregate about 15 percent of their contributions into a separate "527(f)(3)" account to allow them to endorse or oppose candidates without any

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[11] *See* Comments of the Individual Members of the ABA Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics (May 25, 2004), www.abanet.org/tax/pubpolicy/2004/040525exo.pdf.

[12] *See TIGTA Report*, *supra* note 1, at 35.

[13] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . . .").

[14] *See, e.g.*, *Current Issues in Campaign Finance Law Enforcement: Hearing before the Senate Subcomm. on Crime and Terrorism of the Senate Comm. on the Judiciary*, 113th Cong. (2013) (statement of Gregory L. Colvin, Adler & Colvin, San Francisco).

risk to their tax exempt status. Similarly, the American Bar Association's Exempt Organization's 501(c)(4) and Politics Task Force has suggested a cut-off of 40 percent of total program service expenditures during the tax year. We emphasize: ***the precise percentage is less important than the precision of the percentage.***

- Second, and just as important, Congress and/or the administration must formulate a qualitative definition of partisan political activity that is clear, easy to understand and easy to apply. To the extent the definition ranges beyond express advocacy for or against a candidate or party (and it should not range too far, if at all), covered activity must be clearly and narrowly delineated. The lodestar should be to limit IRS discretion, assuming tax exempt review remains at the IRS, to the greatest extent possible. These limits would provide greater clarity to tax exempt organizations, and would temper self-censorship and the chill on political speech currently created by vague and ill-defined rules and regulations.[15]

3. The IRS Must Immediately Address the Invasive and Burdensome Inquiries at the Application Stage, and Must Vigorously Protect Taxpayer and Donor Privacy

Perhaps the most troubling revelation in the TIGTA Report is that the DU both delayed processing of the singled out applications for an extended period of time,[16] and subjected the targeted applicants to extremely invasive and inappropriate requests for information. The TIGTA Report listed seven questions, posed to applicants by revenue agents, identified as unnecessary by the EO function:

- Requests for donor names;
- Requests for lists of issues important to the organization and the organization's position on such issues;
- Requests concerning public activities and audience reactions and discussions;
- Queries on whether the officer or director has or will run for office;
- Requests for information about the political affiliation of various stakeholders;
- Requests for information regarding employment, other than for the applicant;
- Requests for information about organizations other than the applicant.

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[15] This definition would also provide added clarity for 501(c)(3) charities, which may not engage in *any* partisan political activity. These groups often, however, engage in non-partisan election related activities such as voter education, issue advocacy and even get-out-the-vote drives. The lack of clarity in when these election-related activities cross the line into partisanship creates a chill on 501(c)(3) political speech. *See* Elizabeth J. Kingsley, *Bright Lines, Safe Harbors?*, 20 Tax'n of Exempts 38 (2008).

[16] *TIGTA Report*, *supra* note 1, at 11-12.

Notably, the request for donor information is perhaps the most troubling of these requests. The protection of donor anonymity implicates core associational rights. The disclosure of donor identities on Form 990 is subject to strict confidentiality rules. The disclosure during the application process is not, and there has long been a concern that requests for donor names as part of the application process could infringe on protected associational rights.[17]

Many of these questions—especially those concerning political affiliation—directly implicate constitutionally protected associational rights. Furthermore, the IRS's ability to even *ask* these questions is a direct result of the uncertainty surrounding the definition of partisan political activity. Clear, easy to apply rules would streamline the review process, and prevent inappropriate requests such as these.

4. Conclusion

It is entirely possible that the political targeting was an unintended consequence of the IRS trying to streamline its review process. Nonetheless, the fact that the targeting was able to occur *at all* is a civil liberties concern, and a very serious one. The best way for the administration or Congress to ensure this does not happen again is to remove subjectivity from the equation, and to provide DU agents with clear guidance on both what constitutes political activity and how much of such activity will warrant denial of tax exempt status. We stand ready to assist the committee, the Congress and the administration in their efforts to do just that.

Please do not hesitate to contact Legislative Counsel/Policy Advisor Gabe Rottman at 202-675-2325 or grottman@dcaclu.org if you have any questions or comments.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Michael W. Macleod-Ball
Chief of Staff and First Amendment Counsel

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[17] *See* Letter from Senator Orrin Hatch et al. to the Honorable Douglas H. Shulman, Commissioner, IRS (June 18, 2012); *see also Brown v. Socialist Workers Campaign Comm.*, 459 U.S. 87, 91 (1982) ("The Constitution protects against the compelled disclosure of political associations and beliefs."); *Nat'l Assoc. for Advancement of Colored People v. State of Alabama*, 357 U.S. 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").

Gabriel Rottman
Legislative Counsel/Policy Advisor

cc: Members of the Committee