Written Testimony of Edward D. Greim

United States Senate Committee on the Judiciary

Subcommittee on Oversight

July 29, 2015

Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee, thank you for inviting me here today to testify regarding the Internal Revenue Service Targeting, the Service's progress in confronting and remedying its past conduct, and possible legislative solutions. As I'll explain in a moment, there are lessons that we can already draw from some of the ongoing civil litigation against the IRS. Even though there is much more for us to learn in civil discovery, it is not too soon to consider legislation to ensure that this never happens again. As a modest first step, I will propose four legislative fixes.

First, allow me to explain my background in this area. My firm, Graves Garrett, LLC, of Kansas City, Missouri, is lead counsel for the Plaintiffs in the case of *NorCal, et al., v. Internal Revenue Service*. It is pending in the United States District Court for the Southern District of Ohio before Judge Susan Dlott. The case was filed in Cincinnati because that is the office to which the IRS originally claimed the targeting was confined. It is a putative class action, and NorCal is one of several lead plaintiffs. We filed our first complaint just after the scandal broke in May of 2013, but due to various delays, we have not moved as quickly as we would have liked. In fact, our motion for class certification is due in just a few days.

Despite the delays, we have had the opportunity in 2015 to conduct class discovery. We have deposed several IRS employees and executives in Cincinnati, here in Washington, and in other parts of the country. Some of these same officials have also testified before Congress. But unlike Congress, we were able to depose a representative of the IRS on a series of topics using Federal Rule of Civil Procedure 30(b)(6). The IRS produced two different witnesses, one of whom, John Waddell, testified that he has actually been involved in preparing testimony for the Commissioner before Congress and in preparing responses to Freedom of Information Act requests relating to the targeting scandal. Under Federal Rule 30(b)(6), the testimony of Mr. Waddell and the other witness is considered the testimony not of that witness, but of the IRS itself. The witness must give a binding answer for the IRS, not merely based on his own personal knowledge. For that

reason, this testimony would later be generally admissible as the admission of a party opponent. Some of what I will relate here comes from Mr. Waddell's testimony; other facts are from internal emails we have reviewed in discovery.

We have advanced two main legal theories, and these are important to understand in light of the points I'll make in just a minute. The first theory is that the government violated our clients' First Amendment rights by retaliating against them, or discriminating against them, because of their political viewpoint. We asked for injunctive relief, but we also asked for money damages against individual IRS employees under the venerable case of *Bivens v. Six Unnamed Agents*. The injunctive part of this claim remains alive, but the damages claim did not survive a motion to dismiss. The court held that individual damages suits are not available against IRS agents for violations of First Amendment rights. This holding could be appealed later in the case.

Our second theory is brought under a special remedial statute, 26 USC 6103. It was enacted in large part as a result of Watergate, and is intended to remedy two evils. The first evil is the inspection of taxpayers' files for wrongful reasons—reasons that do not advance the administration of the tax system. For example, IRS officials might browse the personal tax information of famous political figures, claiming that they were doing so just to make sure they had properly reported their income, but really doing so just because they were curious to learn about the finances of powerful people. The inspection by itself, even with nothing more, violates the statute. The second evil is disclosure: actually releasing tax return information to third parties who don't have a right to see it. Our main theory is one of wrongful inspection. What we're alleging is that the targeted groups had their applications for exempt status wrongfully inspected. We get to seek damages under that theory directly from the government. And we are asking for the court to certify a class.

I would like to focus on two points today, one factual and one legal. First, notwithstanding some halting reforms, we believe the evidence shows that the IRS remains ripe for political abuse. Second, we propose four discrete statutory fixes. These would help ensure that the Internal Revenue Code functions to serve and protect taxpayers—not to protect the IRS from litigation or public oversight.

I. The IRS Remains Ripe for Political Abuse

The evidence indicates that the IRS remains ripe for political abuse. This is largely because of immutable characteristics of a tax-collecting agency, and cannot

be entirely fixed. The worst effects can simply be mitigated. Five key observations from NorCal's ongoing litigation lead me to this conclusion.

The first observation is simply this: the IRS's internal procedures promote uniform treatment of taxpayers. This is a virtuous goal. But like every virtue, the goal of uniform treatment can be perverted. At the IRS tax exempt organizations unit, the policy of uniform treatment was implemented through two tools. The first tool, the centralization of cases, was used to send apparently similar applications to special working groups. This policy was championed by Cindy Thomas, who was head of Cincinnati's Determinations Unit during the relevant time. The second tool was the issuance of informal guidance to workers; it includes not only a BOLO, or an informal be-on-the-lookout list, but also an even more informal set of criteria that further explained the issues on the list. The BOLO system was not only approved by Thomas, it was ratified by officials in Washington, D.C., including Holly Paz and Lois Lerner. These two tools—centralization and the informal BOLO—made it possible to use viewpoint-based criteria to screen applications. The screening was used to segregate groups that agents thought were part of the Tea Party movement, keep them in a holding pen for years. During the holding period, it allowed them to subject groups to multiple reviews of their file and multiple development letters, most of which ended up being unnecessary to process their applications.

Second, as John Waddell told us at the IRS's 30(b)(6) deposition, the IRS criteria for centralization and special treatment of cases, found in the Internal Revenue Manual, are murky. They allow senior and midlevel officials to use generic-sounding excuses to target and segregate groups of taxpayers for special treatment. So for example, the very fact that the Washington Post was covering Tea Party protests became an excuse to segregate all applications for specialized processing. As Lerner herself noted at the very outset of the targeting, the IRS was actually concerned that the Tea Party movement would become the vehicle to expand the *Citizens United* case to the IRS's review of political activities of 501(c)(3) and (c)(4) applicants. This specific worry was simply translated into the murky language of the Internal Revenue Manual to provide a basis for viewpoint-specific targeting.

Third, the IRS evidences a built-in distrust of conservative-leaning organizations. Two key players, Lois Lerner and Stephen Seok, who was the third Tea Party Coordinator for the Cincinnati Determinations Unit, were explicit in their distrust of conservative groups. As noted above, Lerner was particularly worried that *Citizens United* would be used by Tea Party groups to defang the IRS's

review of political activities of 501(c)(3) and (c)(4) groups. Seok has publicly stated his belief that groups wanting to limit government were inherently suspect, since, in his view, their ideology does not seek to deliver benefits to society. Additionally, when the criteria for the targeted groups was circulated and the list of groups was reviewed in the summer of 2011, Carter Hull, the employee at the IRS's Technical Unit who was responsible for working a handful of Tea Party test cases, made a telling observation. By email, he explained to a group of midlevel and senior officials that "[w]e noted that the list contained organizations that appeared to be a particular political ideology." No one on the email chain even responded to this remark. And finally, even after the IRS learned of a TIGTA investigation, an email indicates that Holly Paz was willing to allow unnecessary requests for donor information to go out to entities the IRS already knew it would approve. This was tantamount to a forced public disclosure, since application files are disclosed, while similar information on a return—Schedule B on Form 990—is not disclosed. The point is this: key officials within Tax Exempt Organizations displayed hostility to, if not a callous disregard for the rights of, conservative and Tea Party groups.

Fourth, vague standards for recognizing groups' status has become an excuse for the IRS's misconduct. While the vague standards certainly do not help and should be clarified by bright-line rules, internal emails suggest that they are not the proximate cause of what happened here. Emails show that officials on the firing line knew that at the application stage, the Service does not actually need to probe every last activity of a group, and learn every last fact about a group, before deciding whether to recognize the status claimed by the group. Instead, the process is representational. This means that unless representations in an application are internally inconsistent, implausible, or incomplete, the IRS does not second-guess by investigating further. Yet here, the burden was shifted, so that IRS officials presumed that all facts and circumstances needed to be first disclosed, over a period of multiple election cycles, before conservative groups' representations could be accepted. Nothing indicates that this view has changed.

Fifth, the Service views itself as under attack, and a vicious cycle is developing in which the Service fails to cooperate in making key disclosures. When TIGTA began its audit, Lois Lerner, Holly Paz, Judith Kindell, and others engaged in a concerted effort to shape the narrative and rewrite history. For example, Paz sat in on TIGTA's witness interviews. Even now, in civil discovery, the IRS is misusing Section 6103, which is supposed to keep prying eyes from viewing taxpayer return information for illegitimate purposes. The Department of Justice, which is serving as the IRS's counsel, is now using Section 6103 to keep from

disclosing to us, as plaintiffs' counsel, the Service's own list of the groups it targeted. Indeed, the IRS will not even admit that a list of about 160 groups, which it likely produced to Congress and was then publicly released in a USA Today article, is authentic. Other doctrines, such as the deliberative process privilege, will probably be the next line of defense for the Department of Justice and IRS in holding back documents in civil discovery.

II. Four Proposed Legislative Remedies

These observations from our litigation lead us to propose four legislative remedies. The Internal Revenue Code should be amended in four ways that directly implicate the treatment of tax exempt organizations or political organizations. These fixes have one thing in common. They will help provide the means to taxpayers themselves, and groups outside of the IRS, to protect constitutional rights. One might say that these reforms are a step in the direction of restoring an important virtue for a constitutional, democratic republic: they promote citizen awareness and self-governance, while avoiding the creation of additional layers of federal bureaucracy. Taxpayer advocates and internal investigators, while they can be helpful, are all too often simply ignored by the IRS.

First, we need to ensure that future targeting is discovered much earlier. Any centralization of tax exempt organization review, and any grouping of three or more cases for review or audit, should be reported to the targeted groups, the Commissioner, and to the House and Senate tax-writing committees. There is also precedent for reports to Congress under other provisions of Section 6103, the return information statute. The Service's report should include the criteria being used to group entities for review, the number of groups being targeted, and the reason for centralization. A violation should be remediable in an Article III court without the necessity of any showing other than that the grouping occurred and was not reported.

Second, Congress should make it crystal clear that federal courts must be open to provide remedies to taxpayers who are harmed by any sort of viewpoint-based targeting. If these facts could be established, they would make out a claim under the *Bivens* case, which I alluded to above. In fact, we have asserted that claim in our case, and will eventually be able to argue it in the Sixth Circuit. We are confident about the prospects of this appeal. But now that it is focused on the particular harm we have identified, Congress should not forego the opportunity to make its intent clear.

This is important for several practical reasons. First, the availability of a *Bivens* remedy is not clear in every circuit. So long as there is at least some uncertainty, counsel for government employees will file dispositive motions claiming that Congress deliberately chose not to create a remedy, making *Bivens* liability inappropriate. This extra and unnecessary motion practice imposes unnecessary risk, uncertainty, and costs on injured taxpayers. Second, in cases where courts are unwilling to extend a *Bivens* remedy, taxpayers will be without any relief. Section 6103 only provides remedies for inspection and disclosure of return information, not the targeting itself. Third, Section 6103 doe not sufficiently deter wrongdoers, since the government pays the damages, not individual employees, as under *Bivens*. Finally, aside from the practicalities, it is emphatically the province of Congress to make the law; in contrast, it is the province judges to apply it in an actual case and controversy. If Congress is convinced that viewpoint-based targeting is wrong, it should define the wrongful conduct and provide a clear remedy, removing the task of policymaking from the judicial branch. *Bivens* liability exists to remedy clear constitutional violations in circumstances Congress may not have realized were open to wrongdoing. What happened here may have been unforeseeable and unthinkable the last time Congress provided new taxpayer remedies in the Internal Revenue Code, but now Congress has the facts before it. The searchlight of the legislative branch is powerful but it cannot remain fixed on any one spot for too long. While Congress remains focused on the IRS and this continually unfolding targeting scandal, we respectfully suggest that it is time to act.

My third and fourth points relate to specific procedures in civil cases involving the Internal Revenue Service. Section 6103 should explicitly allow for disclosure of return information in civil cases in ways that will allow for easier private enforcement of the statute. Where the return information, or any information about targeting, is directly relevant to an issue in the case, it should be disclosed. District courts should have the ability to enter a protective order as necessary to protect any privacy interest of the groups.

Finally, for my fourth recommendation, the Internal Revenue Code should be amended to waive the deliberative process privilege in discovery and in FOIA responses, at least for the next 5 years. The policy goals underlying this privilege are no longer being served. Whatever the usual balance of interests in litigation between agencies and citizens, the IRS has shown that it cannot be trusted, and at least for the next 5 years, the balance should fall on the side of disclosure. This is not inconsistent with case law suggesting that the deliberative privilege does not apply in cases of governmental misconduct.

Thank you for your consideration of these four proposals. By raising them today, I admit only that they will do much good in helping small, grassroots entities privately enforce their rights in the judicial and political process. I do not admit that they are anything close to sufficient to address the IRS's conduct. Indeed, as illustrated by the disturbing facts outlined in Cause of Action's July 23, 2015 letter to the Inspector General, we still need to understand the full extent of that misconduct. Additionally, I limit my proposal to these four items because they flow directly from my first-hand experience in investigating my clients' claims and in litigating with the IRS and Tax Division of the Department of Justice. Certainly, other reforms deserve serious consideration. These include a set of fair, bright-line rules for recognizing the status of tax exempt organizations. Further, we need to be aware of the next front in political lawfare by government agencies. As Cause of Action's letter outlines, this may include teamwork between the IRS and FEC, on the one hand, and the DOJ's Public Integrity Unit, on the other.

But again, the searchlight of this body has to scan the entirety of the federal leviathan. We well know that it cannot remain fixed on any one agency, and on any one pattern of wrongdoing, indefinitely. New crises will emerge elsewhere as agencies continually invent new ways to circumvent what they see as Congress's uncomfortable constraints and, in some cases, the Constitution itself. Now that the Senate has come to focus on the IRS and on the conduct of officials like Lois Lerner, Holly Paz, and Judith Kindell, some of whom still work at the Service today, it is time to implement an initial set of reforms that give taxpayers the legal tools to combat future targeting, whatever precise form it may take. We have to start somewhere, and I hope this Subcommittee, and your colleagues in the Senate, will consider these modest first steps.