



June 2, 2014

Honorable Barbara Boxer, Chairman
Honorable Johnny Isakson, Vice Chairman
Senate Select Committee on Ethics
United States Senate
Hart Building, Room 220
Washington, DC 20510

***Re: Request for Investigation of Senator Carl Levin;
Senator Richard Durbin;
Senator Charles Schumer;
Senator Jeanne Shaheen;
Senator Tom Udall;
Senator Sheldon Whitehouse;
Senator Al Franken;
Senator Michael Bennet; and
Senator Jeff Merkley***

Dear Chairman Boxer and Vice Chairman Isakson,

The Center for Competitive Politics (the “Center”) respectfully requests that the United States Senate Select Committee on Ethics undertake an investigation of Senators Carl Levin, Richard Durbin, Charles Schumer, Jeanne Shaheen, Tom Udall, Sheldon Whitehouse, Al Franken, Michael Bennet, and Jeff Merkley to determine whether any of them violated Senate rules and standards of conduct by improperly interfering with the administrative proceedings of the Internal Revenue Service (“IRS”) for the purpose of suppressing the First Amendment speech rights of certain nonprofit organizations. As explained below, these Senators appear to have violated Senate rules and norms, and abused the power of their office in an effort to advance their political party’s campaign and electoral objectives between 2010 and 2012.

The seriousness of such behavior cannot be understated. Attempting to use the IRS for partisan campaign purposes undermines its core revenue function, gravely threatens public confidence in the impartial administration of government, and reflects unfavorably upon the Senate. Indeed, one of the Articles of Impeachment during the Watergate scandal was that the President had “endeavoured to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purpose[s] not authorized by law, and to cause, in violation of the constitutional rights of

citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.”¹

To varying degrees, each of the Senators named in this complaint has engaged in exactly this type of conduct, in violation of Senate rules. This Committee must act to ensure that this course of conduct is not repeated, lest it become an accepted political campaign practice.

By directing the IRS to investigate, examine, or audit specific nonprofit organizations, requesting confidential taxpayer information, and interfering in ongoing tax-exempt application processes by instructing the IRS to reach certain conclusions, these Senators misused official resources for campaign purposes in violation of 31 U.S.C. § 1301(a), interfered with executive branch agency proceedings, created the appearance of impropriety, and engaged in conduct that reflects discreditably upon the Senate. There is also reason to believe that in the course of these activities, these Senators may have engaged in improper *ex parte* communications with the IRS regarding ongoing agency matters.

Pursuant to the Rules of Procedure of the Select Committee on Ethics, Part II, Rule 3(b), “[t]he Committee *shall* promptly commence a preliminary inquiry whenever it has received a sworn complaint, or other allegation of, or information about, alleged misconduct or violations pursuant to Rule 2.” (emphasis added) Rule 3(c) requires that “[t]he preliminary inquiry shall be of such duration and scope as is necessary to determine whether there is substantial credible evidence which provides substantial cause for the Committee to conclude that a violation within the jurisdiction of the Committee has occurred.”

While there is a substantial likelihood that additional, relevant evidence exists that has not yet been made public,² there is already ample evidence available to require the Committee

¹ Articles of Impeachment of Richard M. Nixon, Art. II at 4 (1974), <http://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc3/pdf/GPO-CDOC-106sdoc3-19-3.pdf>.

² This complaint is based upon the available evidence, which is widely known to be incomplete. The IRS has not been forthcoming with respect to releasing documents. For example, it was only on March 7, 2014, that the IRS finally agreed to provide all of Lois Lerner’s emails and other documents to the U.S. House Committee on Ways and Means. Bernie Becker, *IRS agrees to hand over Lerner emails*, THE HILL (Mar. 7, 2014), <http://thehill.com/policy/finance/200193-irs-agrees-to-turn-over-lerner-documents>. The IRS has also reportedly failed, for over a year, to respond to a Freedom of Information Act request for correspondence between top IRS officials and eleven U.S. Senators and two U.S. Representatives. Katie Pavlich, *IRS Stonewalling FOIA Request Surrounding Correspondence With Democratic Members of Congress*, TOWNHALL.COM (May 16, 2014), <http://townhall.com/tipsheet/katiepavlich/2014/05/16/exclusive-irs-stonewalling-foia-request-for-information-about-agent-correspondence-with-congress-n1839060> (“Since that request was received by the IRS nearly one year ago, IRS Tax Law Specialists Robert Thomas and Denise Higley have asked for more time to fulfill the request six times.”) An investigation by the Department of Justice and Federal Bureau of Investigation is being led by an individual with an obvious conflict of interest and is supposedly “pending,” but the Department of Justice long ago announced it had no interest in bringing any charges against anyone. See Josh Hicks, *Obama donor leading Justice Department’s IRS investigation*, WASHINGTON POST (Jan. 9, 2014), http://www.washingtonpost.com/politics/federal_government/obama-donor-leading-justice-departments-irs-investigation/2014/01/09/980c010a-796a-11e3-8963-b4b654bcc9b2_story.html; Kelly Riddell, *Ted Cruz scolds FBI director on handling of IRS probe*, WASHINGTON TIMES (May 21, 2014),

to undertake a thorough preliminary inquiry, including, as provided by Rule 3(c)(2), “inquiries, interviews, sworn statements, depositions, or subpoenas.” It is vitally important for public confidence in the IRS and the Senate that the Committee undertakes a thorough investigation, impose appropriate sanctions, and take the further action necessary to ensure that such conduct is never repeated.

This complaint is divided into three parts. Part I provides background information about the political context of the Senators’ actions, which were undertaken for the purpose of improving the electoral prospects of their political party. Part II outlines specific actions by the Senators; and Part III sets forth the violations that must command this Committee’s attention.

I. The Political Context around the Genesis of the IRS Scandal in 2010

On January 21, 2010, the United States Supreme Court issued its decision in *Citizens United v. Federal Election Commission*.³ Six days later, President Obama criticized that decision in his State of the Union address, stating that the Court’s decision “will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities....”⁴ Within weeks, Congressional Democrats introduced legislation, titled the “DISCLOSE Act”⁵, which was expressly designed to chill and silence the presumptive beneficiaries of the Supreme Court’s ruling. Senator Schumer said the DISCLOSE Act would target certain speakers, and “make them think twice,” before making political expenditures, emphasizing that this “deterrent effect should not be underestimated.”⁶ The DISCLOSE Act subsequently passed the U.S. House of Representatives on a largely party-line vote,⁷ but twice failed to break a Senate filibuster, with all Democrats in favor and all Republicans opposed. Campaign finance legislation has often been used to attempt to silence political opponents, stifle competition, and gain electoral advantage, and it appears to many Americans – in accordance with Senator Schumer’s own statements – that the DISCLOSE Act was intended for these improper purposes.⁸ Nevertheless, Democratic efforts to pass the

<http://www.washingtontimes.com/news/2014/may/21/ted-cruz-scolds-fbi-director-handling-irs-probe/>; Devlin Barrett, *Criminal Charges Not Expected in IRS Probe*, WALL STREET JOURNAL (Jan. 13, 2014), <http://online.wsj.com/news/articles/SB10001424052702303819704579318983271821584>.

³ 558 U.S. 310 (2010).

⁴ The White House, Office of the Press Secretary, *Remarks of the President in State of the Union Address*, Jan. 27, 2010, <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

⁵ The Democracy is Strengthened by Casting Light on Spending in Elections Act, introduced as H.R. 5175 and in the Senate as S. 3628 in the 110th Congress.

⁶ Jess Bravin and Brody Mullins, *New Rules Proposed on Campaign Donors*, WALL STREET JOURNAL (Feb. 12, 2010), <http://online.wsj.com/news/articles/SB10001424052748703382904575059941933737002>.

⁷ Democrats voted 217-36 for the legislation; Republicans voted 170-2 against.

⁸ See e.g. Ben Pershing, *House Passes Campaign Finance Bill*, WASHINGTON POST (June 24, 2010) (quoting Bruce Josten, calling the bill a “misguided mission to protect unpopular incumbents in Congress from losing their jobs”);

DISCLOSE Act – like efforts by Republicans to defeat it – were permissible, and violated no rules or standards over which the Select Committee on Ethics has jurisdiction. It is the actions of the named U.S. Senators, however, following the failure of the DISCLOSE Act, which warrant the Committee’s attention. These actions, undertaken in apparent frustration over the failure to pass the DISCLOSE Act, were conducted in order to gain for their party a campaign advantage in the 2010 elections, and then carried over to the 2012 and even 2014 electoral campaigns.

By summer 2010, the Democratic Party had developed and adopted a campaign strategy that involved denouncing and running against “shadow groups [that] are already forming and building war chests of tens of millions of dollars to influence the fall elections.”⁹ The DISCLOSE Act was first defeated in the Senate on July 27, 2010. On August 9, 2010, at a fundraising event for the Democratic National Committee, President Obama said:

Right now all around this country there are groups with harmless-sounding names like Americans for Prosperity, who are running millions of dollars of ads And they don’t have to say exactly who the Americans for Prosperity are. You don’t know if it’s a foreign-controlled corporation.¹⁰

On August 27, 2010, the Democratic Congressional Campaign Committee announced that it had filed a complaint with the IRS regarding the activities of Americans for Prosperity Foundation.¹¹

quoting Rep. John Boehner (R-OH), calling the bill an attempt by the majority “to silence their political opponents, pure and simple.”); American Civil Liberties Union, *Letter to U.S. House of Representatives* (June 17, 2010), available at https://www.aclu.org/files/assets/Ltr_to_House_re_ACLU_opposes_DISCLOSE_Act.pdf, (stating that the DISCLOSE Act “aim[s] to silence businesses with government connections while allowing speech by labor unions and non-profits with comparable monetary links to the government.”).

⁹ The White House, Office of the Press Secretary, *Remarks by the President on the DISCLOSE Act* (July 26, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-disclose-act>.

¹⁰ The White House, Office of the Press Secretary, *Remarks by the President at a DNC Finance Event in Austin, Texas* (Aug. 9, 2010), <http://www.whitehouse.gov/the-press-office/2010/08/09/remarks-president-a-dnc-finance-event-austin-texas>. On August 11, 2010, the Democratic Congressional Campaign Committee issued a fundraising email echoing President Obama’s campaign speech, and warned supporters about “Karl Rove-inspired shadow groups.” See Center for Competitive Politics, *The IRS Harassment Scandal: A Timeline of “Reform”* (May 28, 2014), http://www.campaignfreedom.org/wp-content/uploads/2013/06/2014-05-28_Timeline_IRS-Scandal_Documenting-Efforts-By-The-Regulatory-Community-To-Police-Political-Speech-Full-Version.pdf; Paul Roderick Gregory, *The Timeline of IRS Targeting of Conservative Groups*, FORBES (June 25, 2013), <http://www.forbes.com/sites/paulroderickgregory/2013/06/25/the-timeline-of-irs-targeting-of-conservative-groups/>. On September 2, 2010, the Democratic Congressional Campaign Committee warned on its website that the Koch brothers were “funnel[ing] their money into right-wing shadow groups.” *Id.*

¹¹ Jim Kuhnhehn, *Democrats File IRS Complaint Against Conservative Group*, ASSOCIATED PRESS (Aug. 27, 2010), http://www.huffingtonpost.com/2010/08/30/americans-for-prosperity- n_698785.html; Eric Lichtblau, *Group Is Accused on Tax Exemption*, NEW YORK TIMES (Aug. 27, 2010), <http://www.nytimes.com/2010/08/28/us/politics/28irs.html>.

On September 16, 2010, at a campaign event, President Obama delivered what became standard language in his campaign speeches at events for Democratic candidates for the U.S. Senate:

Because if you don't think the stakes are large—and I want you to consider this—right now, all across the country, **special interests are planning and running millions of dollars of attack ads against Democratic candidates.** Because last year, there was a Supreme Court decision called *Citizens United*. They're allowed to spend as much as they want without ever revealing who's paying for the ads. That's exactly what they're doing. Millions of dollars. And the groups are benign-sounding: Americans for Prosperity. Who's against that? (Laughter.) Or Committee for Truth in Politics. Or Americans for Apple Pie. Moms for Motherhood. I made those last two up.¹²

On September 22, 2010, at a reception for the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee, President Obama elaborated on these “special interests that are planning and running millions of dollars of attack ads against Democratic candidates,” and claiming that “[e]very single one of them, virtually, is guided by seasoned, Republican political operatives.”¹³

The following day, on September 23, 2010, the DISCLOSE Act was dealt its second, and final, defeat in the Senate that Congress. Three days after the Act's failure, President Obama's senior advisor David Axelrod appeared on ABC's *This Week* and offered the following statement:

I mean, if you—they're spending tens of millions of dollars. In some districts, they're spending more money than the candidate—candidates themselves on negative ads from

¹² The White House, Office of the Press Secretary, *Remarks by the President at a Reception for Connecticut Attorney General Richard Blumenthal* (Sept. 16, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/16/remarks-president-a-reception-connecticut-attorney-general-richard-blume> (emphasis added). See also The White House, Office of the Press Secretary, *Remarks of the President at Finance Reception for Congressman Sestak* (Sept. 20, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/20/remarks-president-finance-reception-congressman-sestak>.

¹³ The White House, Office of the Press Secretary, *Remarks by the President at DCCC/DSCC General Reception* (Sept. 22, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-dcccdsc-general-reception>. See also The White House, Office of the Press Secretary, *Remarks by the President at DCCC General Reception* (Oct. 25, 2010), <http://www.whitehouse.gov/the-press-office/2010/10/25/remarks-president-dccc-general-reception> (“But understand, the other side is fighting back. The same special interests we've been battling on your behalf over the last two years, they are fighting back hard. And they are now using these phony front groups to funnel hundreds of millions of dollars in negative ads all across the country, distorting the records of Democrats.”). President Obama continued to castigate these conservative organizations in campaign speeches through Election Day. See, e.g., The White House, Office of the Press Secretary, *Remarks by the President at an Event for Senator Boxer in Los Angeles, California* (Oct. 22, 2010), <http://www.whitehouse.gov/the-press-office/2010/10/22/remarks-president-event-senator-boxer-los-angeles-california> (“All across America, special interests have poured millions of dollars into phony front groups -- you've seen them. They're called “Americans for Prosperity . . . So they hide behind these front groups. You don't know who these groups are. You don't know who's funding it -- although we have a pretty good idea. Smearing Democratic candidates.”).

benign-sounding Americans for Prosperity, the American Crossroads Fund. No. These are front groups for special interests. These are front groups for foreign-controlled companies, which would have been banned under the bill that we put through Congress, and they don't want the American people to know, and the American people ought to be alert to that.¹⁴

Following the defeat of the DISCLOSE Act, the effort to silence the political speech of certain disfavored organizations became an *exclusively* political campaign effort. President Obama and his top political adviser had made explicitly clear that a dire political problem existed: “[s]pecial interests are planning and running millions of dollars of attack ads against Democratic candidates,” “they pose as non-for-profit, social welfare and trade groups,” and “[e]very single one of them, virtually, is guided by seasoned, Republican political operatives.” They had “tried to fix”¹⁵ this political problem with the DISCLOSE Act, but had failed, and something still needed to be done to address this threat to the Democratic Party’s electoral prospects.

Within days, a member of the United States Senate abused his office to advance his political party’s midterm election campaign efforts by using official resources to pressure the Internal Revenue Service to investigate certain conservative organizations that Democrats had not been able to silence with legislation.¹⁶ While this Senator has since resigned and is not therefore subject to the Committee’s jurisdiction or the subject of this complaint, other, currently sitting senators soon followed with similar behavior, and over the next three and a half years abused the power of their offices for electoral campaign purposes. These actions are outlined below.¹⁷

¹⁴ ABC News, 'This Week' Transcript: Axelrod, McConnell and Queen Rania (Sept. 26, 2010), <http://abcnews.go.com/ThisWeek/week-transcript-axelrod-mcconnell-queen-rania/story?id=11729101&singlePage=true>.

¹⁵ The White House, Office of the Press Secretary, *Remarks by the President at DCCC/DSCC General Reception* (Sept. 22, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-dcccdsc-general-reception>.

¹⁶ On September 28, 2010, Senator Max Baucus wrote a letter to IRS Commissioner Douglas Shulman. (This letter is attached as Exhibit D.) At the time, Senator Baucus was the Chairman of the Senate Committee on Finance, which has oversight jurisdiction over matters relating to taxation and the Internal Revenue Service. Invoking the power of the Senate Finance Committee, Senator Baucus instructed Commissioner Shulman to investigate certain organizations. He specifically identified four groups that the IRS should investigate (Americans for Job Security, Crossroads GPS, American Action Network, and the U.S. Chamber of Commerce), and report back to the Senate Finance Committee with “possible violation[s]” and “recommended actions regarding this matter.” Senator Max Baucus would be included in this complaint, but he resigned from the Senate in February, 2014, to become the U.S. Ambassador to China.

¹⁷ In addition, we now know that by March, 2010, the IRS had begun improperly targeting organizations for extra scrutiny based on the organizations possessing names including words such as “patriot” and “tea party” and mission statements focusing on government spending and debt. J. Russell George, Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Groups for Review* (May 14, 2013) at 30, <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

II. Nine U.S. Senators Interfered with Agency Proceedings and Used Their Offices and Official Resources to Further Their Party's Campaign Objectives

A. Senator Carl Levin

On March 30, 2012, Senator Carl Levin initiated a series of letters with Internal Revenue Service Commissioner Douglas Shulman. (This correspondence is attached as Exhibit A.) As has been reported, “[l]etters from U.S. Sen. Carl Levin, a Michigan Democrat, show his involvement in pressing the IRS to target mostly conservative organizations with cumbersome questionnaires seemingly calculated to slow down their applications for tax-exempt status in the middle of an election year.”¹⁸ These letters ranged from fact-finding and seeking to influence policy, to seeking enforcement actions against specific organizations and requesting confidential taxpayer information that Senator Levin knew, should have known, and was specifically told could not be legally disclosed by the IRS.

IRS Acting Commissioner Steven Miller acknowledged in an interview that Senator Levin's efforts did, in fact, have an effect on the IRS's internal proceedings. With respect to the question of “further regulating § 501(c)(4) organizations,” when asked what he saw “as the problem that needed to be addressed through either a regulatory change or a legislative change,” IRS Acting Commissioner Steven Miller responded:

So I'm not sure there was a problem, right? I mean, I think we were—we had, you know, Mr. Levin complaining bitterly to us about—Senator Levin complaining bitterly about our regulation that was older than me, where we had read “exclusively” to mean “primarily” in the 501(c)(4) context. And, you know, we were being asked to take a look at that. And so we were thinking about what things could be done.¹⁹

During the same period that Senator Levin was “complaining bitterly, the IRS began discussing the “off-plan” (*i.e.*, secret) development of new regulations for Section 501(c)(4) organizations”²⁰

As shown below, *ex parte* pressure to begin rulemaking proceedings was not the only subject of Senator Levin's extensive correspondence with the IRS.²¹

¹⁸ David Martosko, *Letters: Senior Democrat Pressured IRS To Target Certain Groups*, FOX NEWS (May 15, 2014), <http://nation.foxnews.com/2014/05/15/letters-senior-democrat-pressured-irs-target-certain-groups>.

¹⁹ Letter from Chairman Darrell Issa and Chairman Jim Jordan to Commissioner John Koskinen, Feb. 4, 2014, at 9 (quoting transcribed interview of Steven Miller (Nov. 13, 2013)), <http://oversight.house.gov/wp-content/uploads/2014/02/2014-02-04-DEI-JDJ-to-Koskinen-IRS-c4-Rule.pdf>.

²⁰ *Id.* at 10.

²¹ Senator Levin placed some of his letters to the IRS on his website, but others came to light only recently through a third party's Freedom of Information Act request. Were there additional correspondence or conversations between

**Known Correspondence between Senator Levin and IRS on the Subject of
Section 501(c)(4) Regulation**

<i>Date</i>	<i>Letter From</i>	<i>Letter To</i>
March 30, 2012	Senator Levin	IRS Commissioner Douglas H. Shulman
June 4, 2012	IRS Deputy Commissioner for Services and Enforcement Steven T. Miller	Senator Levin
June 13, 2012	Senator Levin	IRS Commissioner Douglas H. Shulman
July 13, 2012	IRS Director of Exempt Organizations Lois Lerner	Senator Levin
July 27, 2012	Senator Levin	IRS Commissioner Douglas H. Shulman
August 24, 2012	IRS Deputy Commissioner for Services and Enforcement Steven T. Miller	Senator Levin
August 31, 2012	Senator Levin	IRS Commissioner Douglas H. Shulman
September 14, 2012	IRS Deputy Commissioner for Services and Enforcement Steven T. Miller	Senator Levin
September 27, 2012	Senator Levin	IRS Commissioner Douglas H. Shulman
October 17, 2012	IRS Deputy Commissioner for Services and Enforcement Steven T. Miller	Senator Levin
October 23, 2012	Senator Levin	IRS Commissioner Douglas H. Shulman
November 23, 2012	IRS Deputy Commissioner for Services and Enforcement Steven T. Miller	Senator Levin

Senator Levin, his staff, and IRS officials? In order to make an adequate preliminary inquiry, the Committee must obtain information on all contacts made by Senator Levin and his staff with the IRS. The exact nature of Senator Levin's influence on the IRS's actions in this area is unknown and warrants the Committee's full scrutiny.

January 4, 2013	Senator Levin	IRS Acting Commissioner and Deputy Commissioner for Services and Enforcement Steven T. Miller
March 15, 2013	IRS Acting Commissioner and IRS Deputy Commissioner for Services and Enforcement Steven T. Miller	Senator Levin

(This correspondence is attached as Exhibit A.)

1. Senator Levin’s First Letter (March 30, 2012)

The first of Senator Levin’s letters, dated March 30, 2012, was, standing alone, not inappropriate. The Senator requested information regarding the IRS’s Form 1024 application process, the standards applied by the IRS in judging whether the “political” activities of a Section 501(c)(4) organization are consistent with its tax-exempt status, and the consequences of a denial of Section 501(c)(4) tax-exempt status. This first letter did not identify any specific organizations.

IRS Deputy Commissioner for Services and Enforcement Steven T. Miller responded to Senator Levin on June 4, 2012.

2. Senator Levin’s Second Letter (June 13, 2012)

On June 13, 2012, Senator Levin responded to Commissioner Shulman. Senator Levin wrote:

Internal Revenue Code Section 501(c)(4) organizations are increasingly active in partisan political campaigns. These organizations, working in conjunction with independent expenditure committees, or “Super PACs”[,], that can raise unlimited amounts of money from individuals, corporations and unions, are able to avoid revealing their funding sources by hiding behind their tax-exempt status. This trend of using our tax code to limit campaign disclosure is deeply troubling.

Senator Levin also informed the IRS that “a message needs to be sent to Section 501(c)(4) entities on an urgent basis to ensure they understand that any political activities they undertake must constitute a secondary and not the primary activity of their organization. To make that message crystal clear, I urge the IRS to remind all 501(c)(4) organizations about their obligation to observe that restriction on their activities if they want to retain their tax exempt status.” He closed by noting that he “hope[d] you will do that within the next 30 days.”

Lois Lerner responded to Senator Levin on July 13, 2012, and informed him that “the IRS actively educates section 501(c)(4) organizations at multiple stages in their development about their responsibilities under the tax law,” and that the IRS “believe[s] this approach is the appropriate method by which to educate organizations on their responsibilities.”

3. Senator Levin’s Third Letter (July 27, 2012)

Senator Levin responded on July 27, 2012, and complained that the July 13, 2012, response from Lois Lerner “was unsatisfactory.” As requested in his letter of June 13, 2012, Senator Levin wanted the IRS to issue some sort of statement regarding the conduct of political activities by Section 501(c)(4) organizations. He objected to what he characterized as the IRS’s approach of “passively making some information available once a 501(c)(4) entity is already in existence.” (Underline in original).

Senator Levin further objected to the IRS’s long-standing interpretation of 26 U.S.C. § 501(c)(4). He included transcripts of two television advertisements, and assured the IRS that “[t]his is not a partisan issue.” (Anyone in the slightest bit familiar with the political rhetoric of the preceding two years would have known this to be untrue, and it can be safely presumed that officials at the IRS were not fooled.) Senator Levin concluded that these ads “are blatantly and aggressively partisan communications.” Although Senator Levin did not name the sponsor of either advertisement, the first is readily identifiable as a Crossroads GPS advertisement from its closing line, “Support the new majority agenda at newmajorityagenda.org.” The second advertisement was aired by Patriot Majority USA.²²

Senator Levin also continued to pressure the IRS to adopt a new interpretation of Section 501(c)(4) that would bar any “partisan political activity by 501(c)(4) organizations.” For example, he wrote, “[e]ntities that file under Section 501(c)(4) of the Internal Revenue Code and take advantage of its tax exemption benefits should have to make a choice: either lose their exempt status (and pay taxes) or eliminate the partisan political activity.” Directly following this policy recommendation, Senator Levin wrote, “The IRS needs to immediately review the activities of 501(c)(4) entities engaging in running partisan political ads or giving funds to Section 527 organizations that run such ads.”

Thus, Senator Levin demonstrated his desire for the IRS to issue a public statement announcing that Section 501(c)(4) organizations were barred from engaging in any “political” speech.

What Senator Levin sought from the IRS was certainly unusual, and perhaps unprecedented. The purpose of this public statement is obvious – Senator Levin sought to use the IRS to chill the speech that he wished to suppress, in order to enhance the electoral prospects of his party.

²² See Patriot Majority USA Press Release (May 29, 2012), http://webiva-downton.s3.amazonaws.com/76/315/PMUSA_News_Release_--_TV_Ad_in_NV_--5-29-2012.pdf.

Finally, Senator Levin asked whether “the following 501(c)(4) organizations a) applied for; and if so, b) received the described exemption for political activity from the IRS?” Senator Levin listed the following organizations: Crossroads Grassroots Policy Strategies (GPS); Priorities USA; Americans Elect; American Action Network; Americans for Prosperity; American Future Fund; Americans for Tax Reform; 60 Plus Association; Patriot Majority USA; Club for Growth; Citizens for a Working America Inc.; and Susan B. Anthony List. While Senator Levin’s question as written makes little sense, he was presumably asking whether the named organizations had submitted Form 1024 applications, and whether the IRS had approved those applications. Ten of these twelve named organizations represented points of view hostile to Senator Levin’s party.

IRS Deputy Commissioner for Services and Enforcement Steven T. Miller responded to Senator Levin on August 24, 2012.

4. Senator Levin’s Fourth Letter (August 31, 2012)

On August 31, 2012, Senator Levin wrote to IRS Commissioner Shulman again. He wrote, “I find it unacceptable that the IRS appears to be passively standing by while organizations that hold themselves out to be ‘social welfare’ organizations clearly ignore the tax code with no apparent consequences.” Senator Levin asked “[h]ow many 501(c)(4) organizations which appear to be primarily engaged in political activity have been notified by the IRA [sic] within the last 6 months that they may be in violation of the law?” With Labor Day—the traditional start of political campaigns—looming, Senator Levin added, “[i]t is urgent that I receive your answers promptly, and no later than September 10 please.”

IRS Deputy Commissioner for Services and Enforcement Steven T. Miller responded to Senator Levin’s “urgent” letter on September 14, 2012.

5. Senator Levin’s Fifth Letter (September 27, 2012)

On September 27, 2012, Senator Levin requested legally protected, confidential taxpayer information from the IRS. In a letter to Commissioner Shulman, he requested the responses of four organizations to Question #15 from the Form 1024 application. He sought information regarding Crossroads Grassroots Policy Strategies (GPS), Priorities USA, Americans for Prosperity, and Patriot Majority USA. Senator Levin also asked if these four organizations had been recognized as tax-exempt by the IRS.

On October 17, 2012, Deputy Commissioner for Services and Enforcement Steven T. Miller responded to Senator Levin. With respect to Senator Levin’s request for confidential taxpayer information, Deputy Commissioner Miller wrote: “As discussed in our previous responses dated June 4, 2012, and August 24, 2012, the IRS cannot legally disclose whether the organizations on your list have applied for tax exemption unless and until such application is approved. Section 6104(a) of the Internal Revenue Code permits public disclosure of an application for recognition of tax exempt status only after the organization has been recognized as exempt.”

As the IRS itself makes clear, “Members of Congress in their individual capacity are entitled to no greater access to returns or return information than any other person inquiring about the tax affairs of a third party.”²³ It was improper for Senator Levin to *repeatedly* seek access to such information on specific organizations he perceived as hostile to his party’s political campaign and electoral interests.

6. Senator Levin’s Sixth Letter (October 23, 2012)

On October 23, 2012, Senator Levin once again pressured the IRS about whether or not it was examining, or had already examined, four named organizations: Crossroads Grassroots Policy Strategies (GPS); Priorities USA; Americans for Prosperity; and Patriot Majority USA. Specifically, Senator Levin asked, “[h]as the IRS examined whether or not the following 501(c)(4) organizations are engaged primarily in the promotion of social welfare? Please indicate yes or no, and, if yes, whether the examination is still pending.”

On November 23, 2012, Deputy Commissioner for Services and Enforcement Steven T. Miller responded to Senator Levin, and informed him: “[a]s previously stated in our response dated June 4, 2012, section 6103 of the [Internal Revenue] Code prohibits the disclosure of information about specific taxpayers, including whether they are under investigation or examination, unless the disclosure is authorized by some provision of the Code. Thus, we are legally prohibited from disclosing information related to examination activity.”

7. Senator Levin’s Seventh Letter (January 4, 2013)

On January 4, 2013, Senator Levin requested information regarding the IRS’s illegal leak of the Form 1024 tax-exemption application of Crossroads GPS to *ProPublica*,²⁴ as well as “an update as to the status of the application for tax exempt status filed by Crossroads Grassroots Policy Strategies.”

On March 15, 2013, IRS Deputy Commissioner for Services and Enforcement (and Acting Commissioner) Steven T. Miller responded to Senator Levin. With respect to the illegal leak of a confidential Form 1024 application to *ProPublica*, Acting Commissioner Miller informed Senator Levin that “[w]e are unable to comment further.” With respect to the current status of Crossroads GPS’s Form 1024 application, Acting Commissioner Miller once again informed Senator Levin that “Section 6104(a) of the Code does not permit public disclosure of an application for recognition of tax-exempt status and supporting materials only after the application has been approved for the organization to be recognized as exempt. The IRS has no record of an approved application for Crossroads GPS.”

²³ Internal Revenue Service, Chief Counsel, Procedure and Administration, *Disclose & Privacy Law Reference Guide* (Pub. 4639), <http://www.irs.gov/pub/irs-pdf/p4639.pdf>, at 1-11.

²⁴ See Kim Barker, *Karl Rove’s Dark Money Group Promised IRS It Would Spend ‘Limited’ Money on Elections*, PROPUBLICA (Dec. 14, 2012), <http://www.propublica.org/article/what-karl-roves-dark-money-nonprofit-told-the-irs>.

8. Correspondence Appears to End; IRS Officials Meet with Senator Levin's Staff; Planned Subcommittee Action

Acting Commissioner Miller's letter of March 15, 2013 appears to be the final letter exchanged between Senator Levin and the IRS on these subjects – at least it is the last publicly available letter. Recently released documents obtained by Judicial Watch indicate that IRS officials met with Senator Levin's staff in May 2013, to discuss the preceding year's correspondence. This meeting was apparently in preparation for a planned hearing or other action by the Permanent Subcommittee on Investigations regarding IRS regulation and treatment of certain Section 501(c)(4) organizations. According to one report, Senator Levin said that “[t]ax-exempt 501(c)(4)s are not supposed to be engaged in politics,” and “[w]e’re going to go after them.”²⁵

In other words, it was Senator Levin's intention to continue pursuing the agency for its supposed failure to suppress the activities of certain nonprofit organizations – presumably the ones he had previously named in his letters.

B. Senator Richard Durbin

On October 11, 2010, with the fall electoral campaigns shifting into high gear, Senator Durbin wrote to IRS Commissioner Shulman, and informed the IRS that “[o]ne organization whose activities appear to be inconsistent with its tax status is Crossroads GPS.” Senator Durbin requested that the IRS “quickly examine the tax status of Crossroads GPS and other (c)(4) organizations that are directing millions of dollars into political advertising, and respond with your findings as soon as possible.”²⁶

In a press release issued by his Senate office, Senator Durbin trumpeted that he had called for the “IRS to investigate spending by Crossroads GPS.”²⁷ (Senator Durbin's letter and press release are attached as Exhibit B.) As *Politico* noted at the time, “[t]he request from the Senate's No. 2 Democrat comes in the midst of a push from the White House to cast doubt on the funding sources of groups like Crossroads GPS.”²⁸

²⁵ Joe Nocera, *The Senate's Muckraker*, NEW YORK TIMES (March 18, 2013), http://www.nytimes.com/2013/03/19/opinion/nocera-the-senates-muckraker.html?ref=opinion&_r=0.

²⁶ Letter from U.S. Senator Richard Durbin to IRS Commissioner Douglas H. Shulman (Oct. 11, 2010), <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=833d8f1e-bbdb-4a5b-93ec-706f0cb9cb99>.

²⁷ U.S. Senator Richard Durbin, *Press Release: Durbin Urges IRS To Investigate Spending By Crossroads GPS* (Oct. 12, 2010), <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=833d8f1e-bbdb-4a5b-93ec-706f0cb9cb99>.

²⁸ Meredith Shiner, *Dick Durbin: IRS should investigate Crossroads* (Oct. 12, 2010), <http://www.politico.com/news/stories/1010/43496.html>.

We now know that Senator Durbin's press release was circulated within the IRS shortly after it was issued. A House Committee has found that "senior IRS official Joseph Urban circulated a press release from Senator Dick Durbin, entitled 'Durbin urges IRS to investigate spending by Crossroads.'"²⁹ The IRS's response to Senator Durbin, if any, is not part of the public record. It is also not known if Senator Durbin, or members of his staff, met with or otherwise contacted IRS officials regarding the demands in his letter.

In May 2013, Senator Durbin appeared on *Fox News Sunday*. Host Chris Wallace asked Senator Durbin why he singled out Crossroads GPS in his October 11, 2010, letter. Senator Durbin replied:

I can just tell you flat out why I did it, because that Crossroads organization was boasting about how much money they were raising as a 501(c)(4). . . . Crossroads was Exhibit A. They were boastful about how much money they were going to raise and beat Democrats.³⁰

Senator Durbin made no effort to hide the fact that his letter from 2010, which he sent in his official capacity using official resources, and invoking the power of his position as a United States Senator, was motivated purely by his party's campaign and electoral considerations and animus towards his political opponents.³¹

C. Senators Charles Schumer, Michael Bennet, Al Franken, Jeff Merkley, Jeanne Shaheen, Tom Udall, and Sheldon Whitehouse

On February 16, 2012, as the Presidential election season was getting underway, Senators Charles Schumer, Michael Bennet, Al Franken, Jeff Merkley, Jeanne Shaheen, Tom Udall, and Sheldon Whitehouse wrote to IRS Commissioner Douglas H. Shulman "to inquire if the Internal Revenue Service ('IRS') is investigating or intends to investigate whether groups designated as 'social welfare' organizations . . . are improperly engaged in a substantial or even a predominant amount of campaign activity" and "to urge you to investigate these

²⁹ Memorandum from Majority Staff, Committee on Oversight and Government Reform regarding Interim update on the Committee's investigation of the Internal Revenue Service's inappropriate treatment of certain tax-exempt applicants (Sept. 17, 2013) at 7, <http://oversight.house.gov/wp-content/uploads/2013/09/2013-09-17-Interim-update-on-IRS-Investigation-of-tax-exempt-applicants1.pdf>.

³⁰ *Durbin: No Regrets On Calling Out Crossroads To IRS*, FOX NEWS (May 26, 2013), <http://nation.foxnews.com/dick-durbin/2013/05/26/durbin-no-regrets-calling-out-crossroads-irs>.

³¹ *See also Editorial: Durbin's enemies list*, CHICAGO TRIBUNE (Aug. 8, 2013), http://articles.chicagotribune.com/2013-08-08/opinion/ct-edit-durbin-20130809_1_alec-crossroads-gps-enemies-list ("We've seen no evidence that Durbin's accusation of crimes was accurate, but he surely achieved one goal: He made potential donors think twice about contributing to a group a U.S. senator had publicly named as an illegal operation.").

allegations.”³² In a press release announcing the letter, Senator Bennet explained its true purpose and target:

For instance, long-time partisan operative Karl Rove is a senior official behind a 501(c)(4) “social welfare” charity, yet it’s common knowledge that his organization exists to elect and defeat specific political candidates. Elections operations such as Mr. Rove’s should not be allowed to masquerade as charities to take advantage of their tax exempt status and hide their donors from the public. It’s the IRS’s job to enforce the tax code and make sure that “social welfare” organizations are what they say they are.³³

Mr. Rove’s organization, of course, was Crossroads GPS. The Senators’ letter, in other words, was simply another call for the IRS to investigate Crossroads GPS, and raises questions as to whether there were other staff contacts, written communications, or meetings between the Senators’ offices and the IRS. Senator Bennet and Senator Schumer are members of the U.S. Senate Committee on Finance, which has oversight jurisdiction over matters relating to taxation and the Internal Revenue Service.

On March 12, 2012, the same group of Senators again wrote to IRS Commissioner Shulman, this time “to ask the Internal Revenue Service (‘IRS’) to immediately change the administrative framework for enforcement of the tax code as it applies to groups designated as ‘social welfare’ organizations.” (Both letters and Senator Bennet’s press release are attached as Exhibit C.) The Senators’ letter references a March 7, 2012, article in the *New York Times* that mistakenly refers to “American Crossroads” as a Section 501(c)(4) organization.³⁴ (The article’s author confuses American Crossroads, a Section 527, FEC-registered independent expenditure only committee, with Crossroads GPS, a Section 501(c)(4) social welfare organization.)

The Senators’ letter also references language in the *New York Times* article to suggest another topic the IRS might wish to investigate: “whether certain nonprofits may be soliciting corporate contributions that are then treated by the company as a business expense eligible for a tax deduction.” The *New York Times* article refers to the practices of two specific

³² Letter from U.S. Senators Charles Schumer, Michael Bennet, Al Franken, Jeff Merkley, Jeanne Shaheen, Tom Udall, and Sheldon Whitehouse to IRS Commissioner Douglas H. Shulman (Feb. 16, 2012), <http://bennet.senate.gov/download/?id=deaf8fcd-8e98-4c0d-a34a-8f1a9ffbba9a>.

³³ Senator Michael F. Bennet, *Press Release: Senators Call for IRS Investigations into Potential Abuse of Tax-Exempt Status by Groups Engaged in Campaign Activity* (Feb. 16, 2012), <http://www.bennet.senate.gov/newsroom/press/release/senators-call-for-irs-investigations-into-potential-abuse-of-tax-exempt-status-by-groups-engaged-in-campaign-activity>. Only Senator Bennet issued a press release about the February 16, 2012, letter. Senator Bennet’s actions may also have been a simple act of political retribution – Crossroads GPS had criticized Senator Bennet’s voting record in advertising distributed in 2010. See, e.g., Crossroads GPS, *Bennet Calendar* (Aug. 15, 2010), <https://www.youtube.com/watch?v=f85DHhYcqU4>.

³⁴ Jonathan Weisman, *Scrutiny of Political Nonprofits Sets Off Claim of Harassment*, NEW YORK TIMES (March 6, 2012), http://www.nytimes.com/2012/03/07/us/politics/irs-scrutiny-of-political-groups-stirs-harassment-claim.html?_r=0&adxnnl=1&pagewanted=all&adxnnlx=1400259731-f/uKcQkmk546dXpIhBPMng.

organizations: American Crossroads and Priorities USA. (Priorities USA is a Section 501(c)(4) organization; as noted above, the article's author did not understand the difference between American Crossroads and Crossroads GPS, but presumably meant Crossroads GPS.)

The purpose of the Senators' letter is plain: it is a request that the IRS immediately, and unilaterally, change the law to shut down certain Section 501(c)(4) organizations in the midst of an election year. The *Times* article itself described the status of 501(c)(4) organizations as an ongoing "election year struggle" by "Democratic lawmakers pressing for a crackdown on nonprofit political groups and conservative organizations."

In January 2014, Senator Schumer acknowledged this in very frank terms. In a campaign speech sponsored by the Center for American Progress Action Fund (a Section 501(c)(4) organization), titled "The Rise of the Tea Party and how Progressives can Fight Back," Senator Schumer offered an outline for how Democrats can defeat the Tea Party. One part of his proposal was to use the IRS to stamp out Tea Party organizations. Senator Schumer said:

We have to do something to address the damage done by the Supreme Court's *Citizens United* decision. One of the great advantages the Tea Party has is the huge holes in our campaign finance system created by this ill-advised decision. Obviously the Tea Party elites gained extraordinary influence by being able to funnel millions in undisclosed dollars into campaigns with ads that distort the truth and attack government...It's clear we're not going to pass anything legislatively, as long as the House of Representatives is in Republican control. But there are many things that can be done by the IRS and other government agencies, and we have to redouble our efforts. We have not worked hard enough on this.³⁵

This is a clear admission that Senator Schumer's earlier efforts – undertaken in his capacity as a United States Senator and using official resources – were in pursuit of this political campaign and electoral agenda, and were part a broader campaign to defeat the Tea Party movement. Senators may, of course, attempt to defeat their political rivals. They may not, however, attempt to use the IRS to achieve these goals. Senator Schumer and the Senators who joined him abused their positions as Members of the United States Senate when they sought to use the IRS for partisan political purposes.

Moreover, Senator Schumer's comment that "we have not worked hard enough on this," raises a question as to whether the Senator or his staff made other improper contacts with the IRS to advance these campaign purposes.

Senator Whitehouse similarly revealed his motivations at an April 2013 hearing of the Senate Judiciary Committee's Subcommittee on Crime and Terrorism. The Senator called senior IRS and Department of Justice officials before his committee. He then used the hearing

³⁵ Remarks of Senator Charles Schumer: *The Rise of the Tea Party and how Progressives can Fight Back* (Jan. 23, 2014), <http://www.americanprogressaction.org/events/2014/01/16/82507/remarks-by-senator-charles-schumer-d-ny/>.

to lambaste the IRS and the Department of Justice for not criminally prosecuting certain Section 501(c)(4) organizations, lamenting that “not one person has been put before an investigative grand jury.”³⁶

D. Pressure on the IRS May Have Triggered Audits

The Senators’ pressure on the IRS may have yielded visible results in 2011. On May 12, 2011, *The New York Times* reported that the IRS had sent letters to five donors to Section 501(c)(4) organizations “informing [the donors] that their contributions may be subject to gift taxes depending on whether the donations exceeded limits under the tax laws.”³⁷ This was a shocking development within the world of tax attorneys and nonprofit organizations. As the *New York Times* explained, “[t]he timing of the agency’s moves, as the 2012 election cycle gets under way, is prompting some tax law and campaign finance experts to question whether the I.R.S. could be sending a signal in an effort to curtail big donations.”³⁸ The motivation behind the IRS’s action was obvious to all – to chill donors to the conservative nonprofit organizations that had become useful political enemies for the Democratic Party. As a former Director of the IRS’s Exempt Organizations Division stated, “The lack of clarity and the potential for not-insignificant taxation on these gifts will cause many of the biggest donors to think twice.”³⁹

III. Violations of Senate Rules and Code of Conduct

The actions detailed above constitute: (i) interference with executive branch agency proceedings; (ii) misuse of official resources for campaign purposes; (iii) the appearance of impropriety; and (iv) improper conduct which may reflect upon the Senate. All of these actions appear to have been undertaken for electoral, rather than official purposes – Senators Durbin and Schumer, in particular, have openly stated as much. Additionally, Senator Levin’s repeated requests for information, after being explicitly informed that the information could not lawfully be disclosed, violate Paragraph 2 of the Code of Ethics for U.S. Government Service. We request that the Committee, in accordance with its mandate, investigate each violation accordingly and impose appropriate sanctions.

The actions described above also raise reasonable questions of whether the Senators engaged in improper *ex parte* communications beyond the communications reported above. The Committee’s investigation should, we believe, explore as well whether such other communications were made.

³⁶ U.S. Senate Committee on the Judiciary, Subcommittee on Crime and Enforcement, Current Issues in Campaign Finance Enforcement (April 9, 2013), <http://www.judiciary.senate.gov/meetings/current-issues-in-campaign-finance-law-enforcement>.

³⁷ Stephanie Strom, I.R.S. Moves to Tax Gifts to Groups Active in Politics, *NEW YORK TIMES* (May 12, 2011), http://www.nytimes.com/2011/05/13/business/13gift.html?_r=0.

³⁸ *Id.*

³⁹ *Id.*

A. Interference with Executive Branch Agency Proceedings

In the present matter, there is no question that each of the named Senators intervened in executive branch agency matters. They instructed IRS officials to (1) investigate certain specific organizations, (2) take certain actions with respect to tax-exempt applications, and (3) undertake certain rulemaking and interpretative proceedings. The Committee has previously recognized that “[t]here are ethical limits to a Member’s intervention in agency matters.”⁴⁰ The Committee has explained:

The extent of the statutory and judicial limitations imposed on congressional intervention depends on the kind of administrative proceeding involved, with the most stringent limitations placed on congressional contacts involving pending agency adjudications. Adjudication is the resolution of factual and legal disputes in particular situations involving existing statutes or regulations. In contrast, rulemaking (which may be formal or informal) is the formulation, amending, or repealing of prospective and generally applicable rules and standards.⁴¹

Each of the Senators named above improperly interfered with adjudications of the IRS in order to further their party’s electoral prospects. They sought to pressure the IRS to investigate specific organizations, find that specific organizations were in violation of the law, reach specific results pertaining to pending applications by individual organizations, and adopt specific regulatory interpretations and policies. These actions were inconsistent with the appropriate role of a U.S. Senator.

The available evidence indicates that the named Senators exerted the power and influence of their respective offices and committees to “strongly encourage” the IRS to investigate certain named private actors, that the reason for this effort was to advance partisan campaign and electoral objectives, and in the course of doing so, sought to deprive the IRS of the ability to independently determine whether such investigations were warranted. For example, Senator Durbin asked the IRS to “quickly examine the tax status of Crossroads GPS.” Senator Bennet, a member of the Senate Committee on Finance, stated publicly, in a press release issued by his Senate office that accompanied his first letter to the IRS, that “it’s common knowledge that [Crossroads GPS] exists to elect and defeat specific political candidates” and “[e]lections operations such as Mr. Rove’s [*i.e.*, Crossroads GPS] should not be allowed to masquerade as charities to take advantage of their tax exempt status.”⁴²

⁴⁰ Report of the United States Senate Select Committee on Ethics, *Investigation of Senator Alan Cranston*, S. Rep. No. 102-223, at 7 (1991).

⁴¹ *Id.* at 7-8.

⁴² Senator Michael F. Bennet, *Press Release: Senators Call for IRS Investigations into Potential Abuse of Tax-Exempt Status by Groups Engaged in Campaign Activity* (Feb. 16, 2012), <http://www.bennet.senate.gov/newsroom/press/release/senators-call-for-irs-investigations-into-potential-abuse-of-tax-exempt-status-by-groups-engaged-in-campaign-activity>.

Senator Levin provided the IRS with the script of a Crossroads GPS advertisement and told the IRS that the advertisement “clearly fit the factors the IRS has laid out in its guide for what constitutes a political campaign activity.” He concluded that this ad, along with another, were “blatantly and aggressively partisan communications.” Senator Levin also told the IRS: “[t]he IRS *needs to immediately review* the activities of 501(c)(4) entities engaged in running partisan political ads or giving funds to Section 527 organizations that run such ads. The IRS *needs to advise* 501(c)(4) entities of the law in this area and the factors it will look at in reviewing 501(c)(4) status and tax exemption issues” (emphasis added). When the IRS’s response did not satisfy Senator Levin, he responded to Commissioner Shulman that the IRS’s response was “unacceptable.” He later repeatedly requested confidential taxpayer information about specific organizations, and continued to pressure the IRS on whether it had “examined” specific organizations. Senator Levin’s course of correspondence with the IRS went far beyond normal inquiry and oversight, and constituted the sort of intrusion and interference that the Committee should sanction.

Insofar as the Senators directed the IRS to reach certain conclusions, their conduct ran afoul of limits the Committee has previously recognized. As the Committee explains, “[t]he manner and degree of intervention also may become improper...when a legislator’s conduct implies that a particular decision is not the administrator’s to make, but has been mandated by the Member.”⁴³

B. Misuse of Official Resources for Campaign Purposes

31 U.S.C. § 1301(a) provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” The Senate Ethics Manual explains:

This principle of federal appropriations law has been interpreted in Congress to mean that congressional employees receive publicly funded salaries for performance of official duties and, therefore, campaign or other non-official activities should not take place on Senate time, using Senate equipment or facilities.⁴⁴

Or, in the words of the United States District Court for the District of Columbia, “[i]t is clear from the record that Congress has recognized the basic principle that government funds

⁴³ Senate Ethics Manual (2003 ed.) at 183; *see also* Investigation of Senator Alan Cranston, Additional Views of Senator Jesse Helms at 12 (“Former Attorney General Griffin Bell has written that the propriety of contacts by Members of Congress with the bureaucracy ‘comes into question if it is something more than a neutral request for information.’ During the Committee’s hearings, in response to questions from Senator Rudman, Judge Bell elaborated that a legislator is limited in the nature of his intervention when an agency is acting in a quasi-judicial role, such as in an investigation or issuing a license. Judge Bell stated that it would be appropriate for a Member of Congress to make an inquiry in such a case, ‘but probably not go much beyond that.’”).

⁴⁴ Senate Ethics Manual at 139 (2003 ed.).

should not be spent to help incumbents gain reelection.”⁴⁵ While the line between “official” and “campaign” activities may not always be clear, “[t]he difference between official representational and legislative duties on the one hand and political activities on the other has long been recognized in Congress.”⁴⁶ The Senate Ethics Manual allows that some “legitimate representative duties ... might yield some political benefits,” but there remains a category of “activities designed to win elections by legislators in their other role as politicians.”⁴⁷

As outlined above, in 2010, the Democratic Party, led by President Obama, adopted a political *campaign* strategy that focused on the new breed of independent, conservative nonprofit organizations. Or, as Sam Stein of the *Huffington Post* wrote at the time, “Democratic higher-ups have been charting out an election-focused effort to use the money spent by independent conservative groups against the candidates who are their primary recipients.”⁴⁸ On September 26, 2010, the President’s political advisor, David Axelrod, publicly, falsely, and without supporting evidence, accused Americans for Prosperity and “the American Crossroads Fund” of being “front groups for foreign-controlled interests.”⁴⁹ Two days later, on September 28, 2010, then-Senator Max Baucus used official resources and the imprimatur of the Senate Finance Committee to urge the IRS to investigate certain organizations (the same ones that Democrats routinely complained about on the campaign trail), identify “possible violations” and report back to the Finance Committee. The Senators who are the subject of this complaint soon followed his lead.

On October 11, 2010, Senator Durbin engaged in the exact same misappropriation of official resources for campaign and electoral purposes. He wrote to the IRS demanding an investigation of one particular nonprofit organization that had been repeatedly targeted by the Democratic Party on the campaign trail: Crossroads GPS. He even issued a press release, from his Senate office, announcing, “Durbin urges IRS to investigate spending by Crossroads.” Senator Durbin later acknowledged that he acted for pure electoral reasons – because he believed that Crossroads GPS was “boastful about how much money they were going to raise and beat Democrats.”

Subsequently, Senators Bennet, Franken, Schumer, Whitehouse, Merkley, Shaheen, and Udall wrote “to inquire if the Internal Revenue Service is investigating or intends to investigate whether groups designated as ‘social welfare’ organizations...are improperly engaged in a

⁴⁵ *Id.* quoting *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982), *aff’d*, 461 U.S. 911 (1983).

⁴⁶ *Id.* at 141 quoting *Buckley v. Valeo*, 424 U.S. 1, 84 n. 112 (1976).

⁴⁷ *Id.*

⁴⁸ Sam Stein, *Obama, Dems Try To Make Shadowy Conservative Groups A Problem For Conservatives*, HUFFINGTON POST (Sept. 21, 2010), http://www.huffingtonpost.com/2010/09/21/obama-dems-try-to-make-sh_n_733133.html.

⁴⁹ ABC News, *'This Week' Transcript: Axelrod, McConnell and Queen Rania* (Sept. 26, 2010), <http://abcnews.go.com/ThisWeek/week-transcript-axelrod-mcconnell-queen-rania/story?id=11729101&singlePage=true>.

substantial or even a predominant amount of campaign activity.” The Senators wrote: “[w]e urge you to investigate these allegations and to seriously consider launching a rulemaking to prevent this type of abuse of the tax code.” Two Senators who signed the letter, Senators Bennet and Schumer, are (and were at the time) members of the Senate Committee on Finance. Senator Bennet issued a press release, from his Senate office, stating that “it’s common knowledge that [Crossroads GPS] exists to elect and defeat specific political candidates” and that “operations such as Mr. Rove’s should not be allowed to masquerade as charities to take advantage of their tax exempt status.”

Finally, Senator Levin engaged in the same type of conduct for campaign and electoral purposes over a lengthier period of time. His correspondence with the IRS during 2012 included calls for sending “a message...to Section 501(c)(4) entities on an urgent basis,” chastising the IRS for its passivity, identifying specific advertisements that he found objectionable, demanding that the IRS “immediately review the activities of 501(c)(4) entities engaged in running partisan political ads,” and repeatedly seeking confidential information on specific organizations.

Under Section 6103(f)(3) of the Internal Revenue Code, Senators Levin, Durbin, and Schumer had no authority to obtain the information in their requests. Other Committees may obtain confidential taxpayer information “by a resolution of the Senate,” in which case the IRS “shall furnish such committee, or a duly authorized and designated subcommittee thereof, sitting in closed executive session, with any return or return information which such resolution authorizes the committee or subcommittee to inspect. Any resolution described in this paragraph shall specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.”

All of these actions were part of a coordinated, electoral campaign strategy designed to target, chill, and silence certain organizations – but were conducted by the Senators acting in their official capacities, and using official resources.

C. The Appearance of Impropriety

In recent years, the Committee has admonished Members for actions that created “at least the appearance of impropriety.”⁵⁰ The actions of the Senators detailed above create, at a bare minimum, the *appearance* that these Senators misused their official positions and resources to pursue partisan political campaign objectives, and the *appearance* that they improperly sought to interfere with IRS proceedings for the impermissible purpose of targeting

⁵⁰ See, e.g., U.S. Senate Select Committee on Ethics, Public Letter of Qualified Admonition to Senator Pete V. Domenici (Apr. 24, 2008), at 1 http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=a72e7b0d-e6f9-49e4-a41f-7d052a9c0ad9 (“created as appearance of impropriety that reflected unfavorably on the Senate”); U.S. Senate Select Committee on Ethics, Letter of Admonition to Senator Robert G. Torricelli (July 30, 2002), at 3 http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=f8304fee-ee4-4cc4-8564-1c0807f47cad (“Therefore, the Senate Select Committee on Ethics, on behalf of and pursuant to authority granted by the United States Senate, expresses its determination that your actions and failure to act led to violations of Senate Rules (and related statutes) and created at least the appearance of impropriety, and you are hereby severely admonished.”).

and ultimately silencing certain nonprofit organizations viewed as hostile to their party's electoral prospects.

D. Improper Conduct Which May Reflect Upon the Senate

The actions of the Senators detailed above reflect discredibly upon the U.S. Senate. The Committee has the authority to sanction these Senators for such conduct.

The Senate Code of Official Conduct is “not intended to be a comprehensive code of conduct for Senators,” but instead is “targeted at a limited area of activity” and is “not intended to displace the generally accepted norms of conduct.”⁵¹ As the Senate Ethics Manual explains, “Senate Resolution 338, as amended, gives the Committee the authority to investigate Members who engage in ‘improper conduct which may reflect upon the Senate,’ regardless of whether such conduct violates a specific statute, Senate Rule, or regulation.”⁵²

As Senator Heflin explained in November 1991:

Senate precedent is clear. A Senator may be disciplined for improper conduct which violates unwritten but well established norms of Senate behavior, even though the Senator's actions violate no specific law or Senate rule. This has always been and must continue to be the case, if we are to protect the public's trust in the integrity of the Senate.

[***]

In determining that a well understood but unwritten standard of Senate behavior applies to a specific case, the committee looks to and is guided by relevant statutes, rules, rulings, and resolutions, the common and individual experiences of Senators, and the history of Senate disciplinary cases.⁵³

The current version of the Senate Ethics Manual reflects these sentiments: “[c]omplementing these written standards (i.e. rules and statutes) is a body of unwritten but well-established norms of Senate behavior, violation of which may be deemed ‘improper conduct reflecting upon the Senate.’”⁵⁴ Or, as the Committee explained, “[t]he Senate has disciplined its Members for conduct that was unethical or improper, regardless of whether it violated any law or Senate rule or regulation.”⁵⁵

⁵¹ Senate Ethics Manual (2003 ed.) at 433.

⁵² *Id.* at 432 (internal citation and quotation marks omitted).

⁵³ 137 Cong. Rec. S 17175 (Statement of Sen. Heflin, Nov. 20, 1991).

⁵⁴ Senate Ethics Manual at 18 (2003 ed.).

⁵⁵ S. Rep. No. 102-223, at 5 (1991).

According to the Manual:

Certain conduct has been deemed by the Senate in prior cases to be unethical and improper even though such conduct may not necessarily have violated any written law, or Senate rule or regulation. Such conduct has been characterized as “improper conduct which may reflect upon the Senate,” and has provided the basis for the Senate’s most serious disciplinary cases in modern times.⁵⁶

The Committee’s authorization to investigate such conduct was intended to “take into account all improper conduct of any kind whatsoever.”⁵⁷ In some cases, “the Committee has stopped short of finding that alleged conduct was ‘improper conduct reflecting upon the Senate,’ but has found that the conduct should not be condoned or should otherwise be criticized in a public statement by the Committee.”⁵⁸ Specifically, Senator Dennis DeConcini was rebuked for “aggressive conduct with regulators” that the Committee deemed “inappropriate.” The Committee found that his “intervention with regulators gave [the] appearance of being improper and was attended with insensitivity and poor judgment.”⁵⁹ Similar findings were made against Senator Donald Riegle.⁶⁰ Senator John McCain was also found to have “exercised poor judgment in intervening with regulators.”⁶¹

As noted earlier, one of the Articles of Impeachment in the Watergate scandal was that the President had “endeavoured to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purpose[s] not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.”⁶²

After the Watergate scandal, Congress passed a bill, codified at 26 U.S.C. 7217, to help ensure a future President would not make such requests. That law states that it “shall be unlawful for any applicable person to request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer.” Clearly the Congress has never found such behavior to be proper, and the Committee should find that it reflects “unfavorably upon the Senate.”

⁵⁶ Senate Ethics Manual at 432 (2003 ed.).

⁵⁷ *Id.* at 433 quoting 110 Cong. Rec. 16933 (1964) (statement of Sen. Case).

⁵⁸ *Id.* at 435.

⁵⁹ *Id.* at 435 n.19.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Articles of Impeachment of Richard M. Nixon, Art. II at 4.

More recently, Senator Roland Burris was admonished “for actions and statements reflecting unfavorably upon the Senate.” According to the Committee:

While the Committee did not find that the evidence before it supported any actionable violations of law, Senators must meet a much higher standard of conduct. Senate Resolution 338 gives this Committee the authority and responsibility to investigate Members who may engage in “improper conduct which may reflect upon the Senate.”⁶³

Finally, in 2012, the Committee found that Senator Tom Coburn engaged in “improper conduct which reflects on the Senate,” and accordingly issued to him a qualified admonition. Again, the Committee noted that while it “did not find that [Senator Coburn’s] conduct constituted actionable violations of criminal law, the Committee believes that Senators are obligated to meet a higher standard, and it has the authority and responsibility to investigate Members who may engage in improper conduct which reflects on the Senate.”⁶⁴

The evidence detailed in this letter more than justifies this Committee taking action against the Senators named herein. They disregarded the fact that “public office is a public trust,”⁶⁵ and sought to use the IRS to target certain nonprofit organizations for partisan political campaign and electoral purposes. This is improper conduct that reflects discreditably upon the Senate.

In the alternative, and in the event the Committee chooses not to issue any formal admonition, the Committee should take this opportunity to issue new guidance “which makes it clear that going forward such actions will be viewed by the Committee as improper conduct reflecting discreditably on the Senate.”⁶⁶

E. Violation of the Code of Ethics for U.S. Government Service

In correspondence dated June 4, 2012 and August 24, 2012, responding to letters from Senator Levin, IRS officials noted that the Service is prohibited by law from disclosing information on the status of applications for tax-exempt strategies. Yet, on September 27, 2012, Senator Levin demanded information on the status of applications by Crossroads Grassroots Policy Strategies (GPS), Priorities USA, Americans for Prosperity, and Patriot Majority USA. After again being informed by the IRS on October 17, 2012 that it could not

⁶³ U.S. Senate Select Committee on Ethics, Public Letter of Qualified Admonition to Senator Roland W. Burris (Nov. 20, 2009), http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=75733369-12f4-4a65-b71c-c71276547255.

⁶⁴ U.S. Senate Select Committee on Ethics, Public Letter of Qualified Admonition to Senator Tom Coburn (May 25, 2012), http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=0a9cd6e2-4bdd-4ab6-bf8d-aec192e90f2a.

⁶⁵ S. Res. 266, 90th Cong. 2d Sess. (1968).

⁶⁶ U.S. Senate Select Committee on Ethics, Letter to Senator David Vitter (March 29, 2012), at 2 http://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=ba27f460-6cf2-4330-9455-84cf04c8b8e7.

legally divulge such information, Levin made yet another request for such information on October 23, 2012.

On November 23, 2012, the IRS reminded Senator Levin in no uncertain terms, “[a]s previously stated in our response dated June 4, 2012, section 6103 of the [Internal Revenue] Code prohibits the disclosure of information about specific taxpayers, including whether they are under investigation or examination, unless the disclosure is authorized by some provision of the Code. Thus, we are legally prohibited from disclosing information related to examination activity.” Yet, on January 4, 2013, Senator Levin once again demanded information on the status of various tax-exempt applications.

The Code of Ethics for U.S. Government Service, adopted in 1958, applies to officeholders as well as career officials. Paragraph 2 states that “[a]ny person in government service should...[u]phold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.”

Senator Levin’s repeated requests for information on adjudications, after being repeatedly and explicitly warned that his requests could not be legally fulfilled, constitute a breach of the Code of Ethics for U.S. Government Service’s requirement that he “never be a party to [the] evasion” of the “laws and legal regulations of the United States.” Under the circumstances, Senator Levin’s conduct can only be seen as an effort, by a U.S. Senator writing in his official capacity, to pressure IRS officials to violate the Internal Revenue Code provisions on confidentiality.

F. Possible Improper *Ex Parte* Communications

Pursuant to 5 U.S.C. § 557(d), “[i]n any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding.”

This Complaint has outlined in detail improper actions by these Senators, undertaken to enhance their party’s electoral prospects. These violations are apparent from the information already in the public realm. They suggest, however, that there may have been additional private communications by these Senators or their staff with IRS officials regarding agency proceedings, possibly prejudicing these proceedings in the process.

While the members named in this complaint periodically bragged of their effort and trumpeted it to the press and party donors, other requests were apparently kept off-the-record, and revealed only in response to investigations and FOIA requests. It is reasonable to infer that other communications, not yet revealed, may also have occurred. The Committee should examine whether any of the correspondence detailed above, or other communications not yet

public, are in violation of this, and related, statutory provisions regarding the conduct of agency proceedings.

IV. Conclusion

As detailed above, the actions of Senators Carl Levin, Richard Durbin, Charles Schumer, Jeanne Shaheen, Tom Udall, Sheldon Whitehouse, Al Franken, Michael Bennet, and Jeff Merkley violated specific rules and standards, as well as the unwritten, established norms of Senate behavior. We respectfully request that this Committee, as mandated by Committee Rule of Procedure 3(b), conduct an investigation, determine and assess the full extent of these Senators' interference with IRS proceedings, and impose appropriate sanctions.

Sincerely,

A handwritten signature in blue ink that reads "Bradley A. Smith". The signature is written in a cursive style with a large initial "B".

Bradley A. Smith, Chairman

A handwritten signature in blue ink that reads "David Keating". The signature is written in a cursive style with a large initial "D".

David Keating, President