



## DC Circuit Reinstates Conservative Groups' Lawsuits against IRS Targeting

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Remember the claims from Obama administration fans that the scandal of the Internal Revenue Service targeting Tea Party and conservative groups wasn't really much of a scandal after all; that it was the result of inadvertence or incompetence and, in any event, has been fully addressed so that it won't happen again?

A unanimous panel of the DC Circuit Court of Appeals isn't buying it. Today the circuit's three-judge panel unanimously reinstated lawsuits against the IRS over the targeting program ([PDF](#)). With scathing language, it ruled that a lower court had improperly credited the IRS's promises that it had ended its abusive targeting and sought to rectify the harms being sued over. In fact, the court said, evidence indicates that the IRS has not only failed to provide adequate guarantees of future good behavior, but continues even now to hassle some of the groups it harassed. Today's ruling finds "little factual dispute" about the targeting and resulting "unequal treatment." In fact, it is "plain ... that the IRS cannot defend its discriminatory conduct on the merits." Significantly, the service "has, obviously, taken no action to disavow or discredit" the Inspector General report from the Treasury, its own parent department, with its damning evidence of wrongdoing. So – contrary to what one set of IRS defenders has said – there is no real question whether there was wrongdoing, only what the remedies should be.

The court today did give the IRS a win on two issues that had been part of the litigation. First, it said, there is clear precedent that individual IRS employees cannot be made subject to liability. Second, while it is a legally closer question whether the agency violated rules on the disclosure of taxpayer information, under the circumstances, including the principle of sovereign immunity that insulates the government from many damage suits, a lower court did not act improperly in disallowing that claim too. So it upheld the lower court's dismissal of those two claims.

At the same time, it gave the conservative groups what may be their most significant demand: a day in court on the consequences of the Service's illegality. It ruled that they were entitled to

seek injunctive (forward-looking) relief, namely a court order forbidding the IRS from doing the same thing in the future. And its logic in analyzing this point was devastating to the Service's defenders.

The Service had sought to get the injunctive claims dismissed as moot on the grounds that it had stopped the targeting and put the episode behind it. It was the lawyerly equivalent of what the scandal-minimizing pundits have said: Let's put this behind us and move on. But the court wasn't buying it.

As the court notes, getting a claim dismissed as moot on grounds of "voluntary cessation" of wrongful practices is a tough standard to meet where a defendant claiming reformed character, as here, is in practical fact "free to return to [its] old ways." The defendant must meet a "heavy burden" of proof on two points, it said, citing a 1998 DC Circuit case: "(1) there is no reasonable expectation that the conduct will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." The IRS had met neither of these marks, it said.

With that, the court turns to a discussion of the Service's current posture and policies – and it isn't pretty. The IRS has "suspended" the targeting program for now, which is very different from ending it or adopting permanent reforms. The wrongdoing itself was no passing aberration: the Inspector General report, the court notes, is "replete with details of discriminatory processing and delay" not briefly but over multiple years and election cycles. Nor was it merely a matter of pulling the files of disliked groups for otherwise-normal review: the targeted groups were put through the wringer with extraordinarily intense and intrusive information demands of a sort well calculated to chill association with dissident views perceived as anti-Administration. Not only has the IRS not truly forsworn targeting, the court said: it's even continuing to hassle some of the same conservative plaintiffs! It took particular cheek for IRS lawyers to stand up and argue that the case was moot when they were still carrying on the challenged policies.

A final note on the court and on the composition of today's panel. The DC Circuit is often seen as second in influence only to the US Supreme Court, and because of its jurisdiction sees far more than its share of cases seeking to hold the federal government accountable for unlawful behavior. Lately, with a majority of Democratic appointees, it has become more deferential to the federal government on many regulatory issues. But note that the particular panel in today's case consists of three Republican appointees who were part of the previous conservative majority from the Circuit's Reagan-Bush era: Senior Judge David Sentelle, who wrote the opinion, Senior Judge Douglas Ginsburg, and Judge Karen LeCraft Henderson. So caution is in order in guessing whether the full circuit would have reached the same conclusions and, if so, whether it would have done so in the same outspoken way.