A BROKEN VESPER: QUESTIONING THE RELEVANCY AND WORKABILITY OF THE CHURCH AUDIT PROCEDURES ACT

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Long before Senator Charles Grassley tweeted support for Brett Kavanaugh or held hearings on the dangers of Facebook, he focused his attention on a more pious part of society—churches. Specifically, Grassley led a charge in the early 1980s to hamstring the Internal Revenue Service ("IRS" or "Service" or "Agency") in its ability to approach houses of worship regarding matters related to their tax-exempt status. These efforts resulted in the passage of the Church Audit Procedures Act ("CAPA") in 1984, which requires approval from a high-level Treasury official before the Service can so much as send a church a letter. Due to the IRS' regional organization at the time, the statute declared that a regional official of a certain rank would be the appropriate high-level official.

Several years later, Congress again trained its sights on the IRS, forcing the Service to reorganize from a regional structure to a centralized one. As a result, CAPA immediately became unworkable as regional officials no longer existed in the agency to approve church tax inquiries. With no direct guidance from Congress on how to address this problem, the IRS applied an administrative patch and designated a new official under

the new organizational chart. Soon thereafter, a religious organization, claiming to be a church, challenged the IRS on their selection in Federal court. The IRS lost the suit. Since that time, an awkward and unnecessary pattern emerged where the IRS attempted to fix this problem, only to be sued for its efforts and then lose in court.

While there is a path forward for the IRS to unilaterally fix its relationship with houses of worship, it is a far better exercise for Congress to intervene. The likely result of this intervention is to amend the text of the statute to reflect the current agency organization. The better approach, however, is to do away with CAPA entirely and bring churches into the regulatory fold.

I. INTRODUCTION

In 1949, George Orwell published his vision of the year 1984. He portrayed a time and place where the level of trust between citizens and their government was marked with fear and unrest.[1] In the actual year 1984, a small contingent of the population found his words prescient. Houses of worship were subject to regulation by the Internal Revenue Service ("IRS"), but the boundaries of that relationship remained unclear. Tension largely existed due to an ambiguous framework set in place by Congress in the 1960s. To fix the confusion previously created, Congress sought a new way forward to govern this relationship. Its effort resulted in the passage of the Church Audit Procedures Act ("CAPA").[2] This legislation left the IRS with higher hurdles to overcome in its enforcement efforts of churches, and it offered more certainty in the agency's authority. CAPA made life for the IRS more difficult in some respects, but it also clarified expectations of the regulators and the regulated. Orwell's words once more seemed appropriate: "Perhaps one did not want to be loved so much as to be understood."[3]

The relationship between the IRS and the religious community was mostly uneventful for the remainder of the 1980s and into the 1990s, but a new century brought about a new problem. Congress ordered a sweeping reorganization of the IRS in 1998 that created a litany of textual issues in statutes enacted under the pre-1998 organization.[4] CAPA, which makes explicit reference to the old organizational chart, became particularly unworkable. Neither Congress nor the IRS acted quick enough to re-establish clarity. Indeed, an under-resourced IRS attempted half measures,[5] which added to the uncertainty, drawing criticism from scholars and practitioners alike.[6] For a time, the IRS seemed to have virtually stopped

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[1] GEORGE ORWELL, 1984 (Penguin Books 1961).

[2] Church Audit Procedures Act, Pub. L. No. 98-369, § 1033(a), 98 Stat. 494, 1034 (1984).

[3] Orwell, *supra* note 1, at 252.

[4] IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a), 112 Stat. 685, 689 (1998).

[5] *See generally* Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations, 74 Fed. Reg. 39003-01 (Aug. 5, 2009) (to be codified at 26 C.F.R. pt. 301).

[6] *See, e.g.*, J. Michael Martin, *Why Congress Adopted the Church Audit Procedures Act and What Must Be Done Now to Restore the Law for Churches and the IRS*, 29 AKRON TAX J. 1, 3-4 (2013); Letter from All. Defense Fund to the IRS, Re: Proposed Amendments to the Regulations Relating to Church Tax Inquiries and Examinations (Nov. 2, 2009); Letter from Caplin & Drysdale to IRS, RE: Proposed Amendments to the Regulations

regulating churches altogether.[7]

Given the current state of affairs, now is the time to rethink the government's approach to regulating houses of worship. At a minimum, the courts or Congress should clarify on how to interpret CAPA. Alternatively, Congress can acknowledge that CAPA was largely a political overreaction from its inception, as well as an unnecessary burden on an over-worked division of the Service, and thus consider eliminating the statute altogether. The untenable path would be a continuation of the inaction and tentative steps taken by the IRS, courts, and Congress in recent years.

Part II of this manuscript offers a brief history of the IRS' role in regulating houses of worship, with an emphasis on how Congress intervened to change the rules in the late twentieth-century and a discussion of why those rules need to be changed once more. Part III explains how the current approach taken by the IRS to regulate churches is both muddled and largely unsustainable given the current agency organization and resources. Finally, Part IV proposes ways to alleviate the regulatory burden on the IRS, primarily suggesting a revision or elimination of CAPA and possibly bringing houses of worship into the regulatory fold along with similarly situated non-profit organizations.

II. TWENTIETH-CENTURY EVOLUTION

A. The Regulatory Role of the IRS

There is some debate of how long the IRS has been overseeing the religious community's compliance with the tax code. While the first tax act codified in the wake of the Sixteenth Amendment authorized IRS oversight,[8] it was not until the 1940s that the IRS took concrete steps to hold exempt organizations accountable.[9] Until about 1970, organizations

Relating to Church Tax Inquiries and Examinations (Oct. 13, 2009).

[7] *See* FREEDOM FROM RELIGION FOUNDATION, *FFRF Sues IRS to Enforce Church Electioneering Ban* (Nov. 14, 2012), https://ffrf.org/news/news-releases/item/16091-ffrf-sues-irs-to-enforce-church-electioneering-ban ("The Freedom From Religion Foundation is taking the [IRS] to court over its failure to enforce electioneering restrictions against churches . . . . A widely circulated Bloomberg news article quoted Russell Renwicks, with the IRS' Tax-Exempt and Government Entities division, saying the IRS has suspended tax audits of churches.").

[8] Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat.114, (1913); *see also* Lloyd Hitoshi Mayer, *The Better Part of Valour Is Discretion: Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations?*, 7 COLUM. J. TAX L. 80 (2016).

[9] Revenue Act of 1948, Pub. L. No. 78-235, 58 Stat. 21, 21; Revenue Bill of 1943, S. Rep. No. 78-627, at 21; *see also* Benjamin W. Akins, *State of Confusion: A Non-Profit's Right to Withhold Donor Information from State Regulators*, 26 S. CAL. INTERDISC. L. J. 427, 429 (2017).

had no legal requirement to even apply for an exemption from income tax.[10] Once the requirements were in place however, non-profit organizations fulfilled their compliance obligations through forms prescribed by the IRS.[11] Not all organizations were required to file returns initially and several are still exempt from the filing requirement today.[12] Notably, houses of worship remain eligible for tax exempt status without filing an application with the Service.[13]

For exempt organizations required to file returns, there are two obligations. First, the organization must file an initial application for exemption, which is typically accomplished through filing Form 1023.[14] This requirement, which began in the mid-twentieth century, was periodically tweaked and significantly reformed in 2014.[15] In this reform, the IRS debuted a far less burdensome process for certain qualifying organizations.[16] This streamlined and less pervasive form was titled Form 1023-EZ, borrowing a suffix from the other forms in the IRS repertoire that are—as one might guess—"easy" for individuals and organizations to complete and file.[17]

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[10] Mayer, *supra* note 8, at 83; *see also* John Montague, *The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption*, 35 CARDOZO L. REV. 203, 210–12 (2013).

[11] The main version of the application for exemption is the Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, and the annual information return is the Form 990, Return of Organization Exempt from Income Tax. *See, e.g.*, JOINT COMM. ON TAXATION, *Overview of Present-Law Rules and Description of Certain Proposals Relating to Disclosure of Information by Tax-Exempt Organizations with Respect to Political Activities,* JCX 59-00 (June 19, 2000).

[12] *See* I.R.C. § 6033(a)(3)(A) (2018) (noting that filing requirements are not applicable to "(i) churches, their integrated auxiliaries, and conventions or associations of churches, (ii) any organization (other than a private foundation . . .) described in subparagraph (C), the gross receipts of which . . . are normally not more than $5,000, or (iii) the exclusively religious activities of any religious order.").

[13] *Id*.

[14] *See generally* U.S. Department of the Treasury, Internal Revenue Service, Form 1023, (Washington, D.C.: 2017), https://www.irs.gov/pub/irs-pdf/f1023.pdf.

[15] *See* Mayer, *supra* note 8, at 82.

[16] *See* U.S. Department of the Treasury, Internal Revenue Service, Form 1023-EZ, (Washington, D.C.: 2014), https://www.irs.gov/pub/irs-pdf/f1023ez.pdf and Instructions for Form 1023-EZ (Washington, D.C.: 2014), https://www.irs.gov/pub/irs-pdf/i1023ez.pdf (available to certain types of entities with $50,000 or less annual gross receipts that have $250,000 or less of total assets); Mayer, *supra* note 8, at 103 ("For the organizations that are eligible to use the new form, however, relatively minimal information is required and, most importantly, certain key requirements are deemed satisfied as long as an appropriate official of the organization attests that they have been met.").

[17] *See*, *e.g.*, U.S. Department of the Treasury, Internal Revenue Service, Form 1040-EZ, (Washington, D.C.: 2017), https://www.irs.gov/pub/irs-prior/f1040ez—2017.pdf; U.S. Department of the Treasury, Internal Revenue Service, Form 5500-EZ, (Washington: D.C., 2018), https://www.irs.gov/pub/irs-prior/f5500ez—2018.pdf; U.S. Department of the Treasury, Internal Revenue Service, Form 990-EZ, (Washington D.C.: 2018),

The second obligation is for tax-exempt entities to file annual information returns.[18] The scope of these filings depends on the size and type of the organizations. This filing requirement provides organizations with a way to report their operational and financial information to the IRS. This is accomplished yearly on some derivation of the Form 990.[19] The form, first revealed as a two page document in the mid-1900s, has blossomed into a dozen pages with nearly 10-times that in instructions.[20] Various mutations of the original Form 990 have also crept into the reporting regime.[21] Most notably, Form 990-N, dubbed the "e-postcard," marked the lowest compliance burden yet for filers in the non-profit sector, allowing small organizations[22] to submit a short online disclosure each year.[23]

For organizations—like churches—that are still outside of the mandatory filing regime, the Service's regulatory role is discernably harder. The U.S. tax system is based on a system of voluntary compliance which the IRS ensures by requiring individuals and organizations to inform the IRS that they are compliant.[24] The entities that remain unobligated to

https://www.irs.gov/pub/irs-pdf/f990ez.pdf.

[18] 26 U.S.C.S. § 6033(a)(1) (2019).

[19] *See* U.S. Department of the Treasury, Internal Revenue Service, Form 990, (Washington, D.C.: 2018), https://www.irs.gov/pub/irs-pdf/f990.pdf.

[20] *See* Akins, *supra* note 9, at 429.

[21] *See* Akins, *supra* note 9, at 429 ("[A] host of related filing regimes have stemmed from Form 990 - e.g., Form 990-N, Form 990-PF, and Form 990-EZ—all serving various types of non-profits based on their size, revenue, and status. The purpose of the Form is to facilitate the collection of information required by IRC section 6033.") (internal citations omitted).

[22] "Small" in this regard is defined as an entity with yearly receipts of $50,000 or less. *See Annual Electronic Filing Requirement for Small Exempt Organizations*, IRS.gov, https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard (last visited Nov. 17, 2019).

[23] The form calls for only eight pieces of mostly innocuous information, such as: Employer identification number, tax year, name and address, principal officer, website address, verification that organization is eligible to file the e-postcard, and (if necessary) a statement indicating organization's plans to dissolve. *See Information Needed to File e-Postcard*, IRS.gov, https://www.irs.gov/charities-non-profits/information-needed-to-file-e-postcard (last visited Nov. 17, 2019).

[24] *See, e.g.*, Jack Manhire, *There Is No Spoon: Reconsidering the Tax Compliance Puzzle*, 17 FLA. TAX REV. 623, 624 (2015) ("Voluntary compliance is fundamental to a government with a self-reporting tax administration policy enforced by a relatively small number of audits. For example, approximately ninety-eight percent of the tax revenues the U.S. government collects is from taxpayers who voluntarily file their returns and timely pay the tax legally due.") (internal citations omitted); *see also* Jack Manhire, *Essay: What Does Voluntary Tax Compliance Mean?: A Government Perspective*, 164 U. PA. L. REV. 11 (2015) ("If government statistics are correct, almost all of us engage in what the IRS calls 'voluntary tax compliance'. . . . In most congressional reports, the IRS emphasizes voluntary taxpayer compliance as a foundational principle of the U.S. tax system.") (internal citations omitted).

file are, nevertheless, still required to comply with the tax laws and regulations, and the IRS is still tasked with making sure that they are doing so. Here, the IRS must use other means to discover, investigate and correct noncompliance. This, as is reasonable to assume, is burdensome—and it is no small issue. There are at least 300,000 such organizations operating under the banner of tax-exempt churches in the United States.[25] Indeed, this number represents nearly twenty percent of the Internal Revenue Code (IRC) section 501(c) organizations that *are* on file with the IRS.[26] Aside from the danger of an organization's non-compliance going undetected due to the lack of information given to the IRS, the Service is also at a disadvantage in identifying general trends of non-compliance in the religious community—which means the agency must steer blind when it comes to concentrating its education and enforcement efforts.[27] In these situations, the government must largely resort to third-party information like newspaper articles and whistleblowers.[28]

The Service's ability and wherewithal to monitor the many exempt organizations under its authority has ebbed and flowed over the past fifty years.[29] Largely, it has been constrained by budgetary[30] and political

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[25] *See* Montague, *supra* note 10, at 206 (estimating that there are "more than 330,000 churches in the United States.") (citing Nat'l Council of The Churches of Christ In The U.S.A., Yearbook of American & Canadian Churches 2012, 377 (2012)); Mayer, *supra* note 8, at 85 (estimating "that churches currently number approximately 300,000 . . . .").

[26] *See* Mayer, *supra* note 8, at 84 (noting that in 2014, there were 1,568,454 IRC section 501(c) organizations on file with the IRS (citing *IRS Data Book 2014*, at 58)).

[27] *See* Montague, *supra* note 10, at 206–07 ("For the most part, neither the IRS nor the public has any idea what these churches are doing with the donations they receive . . . . As a group, churches have less oversight than any other major institution in America today." (internal citations omitted)).

[28] *See, e.g.*, Montague, *supra* note 10, at 208 (noting that Sen. Charles Grassley selected the six churches for his much publicized 2007 investigation based on "investigative reports by local newspapers and tips from charity watchdog groups." (citing Laurie Goodstein, *Senator Questioning Ministries on Spending*, N.Y. TIMES, Nov. 7, 2007, at A21)).

[29] *See* Marcus S. Owens, *Charity Oversight: An Alternative Approach*, COLUM. UNIV. ACAD. COMMONS 2 (2013), https://academiccommons.columbia.edu/doi/10.7916/D8154F1D (noting that the Service made a push in the mid-twentieth century to more frequently audit foundations, but its production quickly declined again by 1970).

[30] *Id.* at 4 (citing *2006 IRS Data Book*, 56 tbl. 25) (commenting that while the number of tax-exempt entities is ever increasing, "IRS staffing and other resources dedicated to tax-exempt organization oversight have fallen or remained stagnant, and there is no evidence that historic levels of oversight have been adequate to ensure that significant abuses can be identified and addressed in a timely manner."); *see also* Leandra Lederman, *IRS Reform: Politics As Usual?*, 7 COLUM. J. TAX L. 36, 73–74 (2016) (internal citations omitted) ("TIGTA . . . reported that the reduction in the IRS's budget of almost $1.2 billion (in absolute dollars) between 2010 and 2015 resulted in a smaller work force, reduced tax collections, reduced case closures by revenue officers, and reduced service to taxpayers.").

concerns.[31] Further, Congress has helped and hurt the agency's efforts by ordering various reorganizations of the agency throughout the twentieth century.[32] The remainder of this part of the manuscript focuses on two key events—both works of the Legislature—that greatly altered the landscape of how the IRS relates to churches during this timeframe.

B. The 1980s and the Passage of CAPA

The Service's history of regulating houses of worship is a small part of its larger story of regulating all the nation's individuals and entities. Stepping back and looking more broadly at that story reveals a complex history. Put in the position of administering often unpopular laws, the Service has perennially been the face of an unwelcome statutory regime.[33] That is to say, the public has always had an opinion of the agency's actions, and the non-profit sector—including houses of worship—is no exception.[34]

In the mid-twentieth century, the perception of the IRS was especially bad. Many saw the IRS as largely politicized by the Executive branch,[35] and Congress held hearings in order to investigate what their constituents viewed as unfettered agency abuses.[36] Some of its dealings became all too

[31] *See* Lederman, *supra* note 30, at 76 (citing Treasury Inspector General for Tax Administration, *Reduced Budgets and Collection Resources Have Resulted in Declines in Taxpayer Service, Case Closures, and Dollars Collected*, Dept. of the Treasury (May 8, 2015) ("Some in Congress have stated that the IRS budget cuts, which began in 2011, are punishment for bad behavior.")); House Ways and Means Majority Staff Report, *Doing Less With Less: IRS's Spending Decisions Harm Taxpayers* (Apr. 22, 2015) (internal citation omitted); *see also* David A. Herzig, *Justice For All: Reimagining The Internal Revenue Service*, 33 VA. TAX REV. 1, 21-22 (2013) (citing Staff of Joint Comm. on Taxation, 106th cong., rep. of Investigation of Allegations Relating to Internal Revenue Service Handling of Tax-Exempt Organization Matters 6-13 (Comm. Print 2000)). ("As can be seen through the history of the Service, the agency is inherently political in nature. It answers to two masters: Congress and the Executive . . . Essentially, the Service has been accused of using the audit process for political purposes.").

[32] *See, e.g.*, Owens, *supra* note 29, at 3 (discussing how Congress created and eliminated various assistant commissioner and director positions in the exempt organization area of the IRS from the 1970s through current day).

[33] *See* Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, 14 FLA. TAX REV. 223, 224–25 (2013).

[34] *See*, *e.g.*, Tony Perkins, *IRS to Churches: Be Audit You Can Be,* Washington Update (Aug. 8, 2014) https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=14548 (asserting that the IRS plans to censor churches as part of its "intimidation tour.").

[35] *See* David Burnham, *Misuse of the I.R.S.: The Abuse of Power*, N.Y. TIMES, (Sept. 3, 1989), https://www.nytimes.com/1989/09/03/magazine/misuse-of-the-irs-the-abuse-of-power.html (arguing that the Johnson and Nixon administrations weaponized the IRS to combat those protesting for civil rights and against the Vietnam war, and that such executive misuse may date back to Franklin Roosevelt's tenure).

[36] *Id.* (noting that, in the 1960s, Senator Edward Long held publicized hearings on possible improper wiretapping by the IRS; in the 1970s, Senator Joseph Montoya determined to hold hearings on the agency's performance; and, in the 1980s, the House

public, garnering unwanted scrutiny, and its relationship with religious organizations took center stage. While the agency's highly dramatic, decades-long war with the Church of Scientology gained most of the headlines during this time,[37] there was a bigger—less Hollywood-esque—storm brewing regarding how the agency approached entities claiming that are churches. In the 1980s, Congress became acutely motivated to act based on what it viewed as inappropriate actions of the Service toward a handful of churches.[38] The culmination of Congress' interest in this area was the passage of CAPA in 1984,[39] which represented the most restrictive effort yet to ensure the IRS did not overreach in its involvement with these organizations.[40]

The first framework Congress put in place for how the IRS approached, communicated with, and examined churches came fifteen years earlier in 1969.[41] Here, Congress had, for the first time, given express authority to the Service to examine a church when it added a provision for a tax on any unrelated business income of churches.[42] As a corollary, Congress added IRC section 7605(c), which stated that churches

convened for a hearing on potential corruption in the IRS); *see also* David Shribman, *Lament of The Regan I.R.S.*, N.Y. TIMES (Apr. 4, 1982), https://www.nytimes.com/1982/04/04/business/lament-of-the-reagan-irs.html ("Gradually, in Congressional hearings, internal reviews and independent investigations, a startling truth is emerging here: The Internal Revenue Service, once the most feared of Government agencies, is in danger of becoming something of a paper tiger.").

[37] *See* Hugh B. Urban, *Fair Game: Secrecy, Security, and the Church of Scientology in Cold War America*, 74 J. AM. ACAD. REL. 2, 356, 378 (Apr. 26, 2006) (internal citation omitted) ("Since the early 1970s, Scientology has come into a series of conflicts . . . [with the] IRS, regarding its status as a religious organization and its involvement in an array of alleged criminal activities . . . . [T]he Church undertook an elaborate operation that included intensive litigation in courts, a public relations campaign, and, finally, penetration of the IRS intelligence division and chief counsel's office . . . . In the end, however, the spying Scientologists were caught.").

[38] *See* Church Audit Procedures Act: Hearing Before the Subcomm. on Oversight of the I.R.S. of the Comm. On Finance, 98th Cong. 2 (Sept. 30, 1983) [hereinafter CAPA Hearings].

[39] Church Audit Procedures Act of 1984, Pub. L. No. 98-369, § 1033(a), 98 Stat. 494.

[40] *See* Reka P. Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71, 93 (1991) ("The new rules severely restrict the Service's audit inquiry of churches and affiliated organizations.").

[41] *See* 26 U.S.C. § 7605 (1970).

[42] *See* 26 U.S.C. §§ 511-14, 7605(c) (1970); *see* Hoff, *supra* note 40, at 81 (quoting Revenue Act of 1950, ch. 994, 64 Stat. 906, 948) (noting that, in 1950, Congress first "imposed an income tax on the unrelated business income of certain exempt organizations and in this connection narrowed the category of 'religious organizations' exempt from the annual reporting requirement and from the tax on unrelated business income to 'church [or] a convention or association of churches'.") (citing Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 536-37) ("The Tax Reform Act of 1969 amended the 1954 Code to impose a tax on the unrelated business income of churches.").

were free from unreasonable audits.[43] The first sentence of subpart (c) read:

> No examination of the books of account of a church . . . shall be made to determine whether such an organization may be engaged in the carrying on of an unrelated trade or business . . . unless the Secretary . . . believes that such organization may be so engaged and so notifies the organization in advance of the examination.[44]

The second sentence read:

> No examination of the religious activities of such an organization shall be made except to the extent necessary to determine whether such organization is a church . . . and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title.[45]

The interplay of the two sentences in IRC section 7605(c) led to a difference in interpretation between the IRS and practitioners.[46] Specifically, practitioners sought clarification on whether the second sentence—prescribing the circumstances in which the Service could examine a church's "religious activities"—applied to any examination of a church or only one involving unrelated business income.[47] The IRS' stance, made official in regulations in 1971, was that it had the authority to audit the religious activities of a church outside of the restrictions of IRC section 7605(c) as long as the Service was not engaged in an unrelated business income audit.[48] This garnered pushback from several religious groups, and such pushbacks formed the rocky beginnings of Congress' attempt to make good neighbors of the two parties.[49]

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[43] *See* Martin, *supra* note 6, at 5–6.

[44] I.R.C. § 7605(c) (1965). The statute defines "Secretary" as "such officer being no lower than a principal internal revenue officer for an internal revenue region.".

[45] *Id*.

[46] *See* Thomas A. Shaw, *Tax Audits of Churches*, 22 CATH. LAW. 247, 249–51 (1976); *see also* United States v. Coates, 692 F.2d 629, 630–32 (9th Cir. 1982).

[47] *See* Shaw, *supra* note 46, at 249–50.

[48] 26 C.F.R. § 301.7605-1; T.D. 7146, 1971-2 C.B. 429; *see* Shaw, *supra* note 46, at 250–51.

[49] *See* Shaw, *supra* note 46, at 250 (noting that the IRS' interpretation of the statute "resulted in instant ecumenism . . . . [T]he United States Catholic Conference, . . . the Union of American Hebrew Congregations, and . . . the National Council, as well as quite a number of other denominations acting separately, all attacked the Proposed Regulations . . . .").

Over the next decade, both the IRS and the various churches it interacted with felt for the boundaries, and the courts stepped in when necessary.[50] Ultimately, though, with such a cold reception to its 1969 statute, Congress took a second bite at the issue. This time, Congress sought to set firmer boundaries on the Service's ability to communicate with churches on all matters, but it needed the requisite justification to do so. As such, it proposed new legislation—CAPA—and held hearings on the state of the IRS' relationship with houses of worship as it stood in the early 1980s.[51] Under the watchful eye of Senator Charles Grassley, among others, the Senate's Subcommittee on Oversight of the IRS welcomed in select witnesses from the government and the religious community to testify to the environment created by the current law.[52]

Senator Grassley opened the proceeding by acknowledging the deficiencies in the current law. Citing one example from several years prior, he generalized the current state of affairs as a situation where churches were being drained of financial resources, while seeing their "integrity, character, and moral foundations" eroded "by innuendo, rumor, and press coverage during extended [IRS] examinations."[53] Congressman Mickey Edwards added that "many churches must deal with the [IRS] on a regular basis," but that while Congress had brought churches into the tax code, it had failed to "spell out clearly enough its intended protection for the churches."[54]

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[50] *See Coates*, 692 F.2d at 633 ("The Church argues that [IRC] section 7605(c) was intended to restrict all examinations of church records, including records of religious activities during an investigation to determine tax exempt status. Such an intent, however, is not evident in either the language or the legislative history of the statute."); *see also* United States v. Dykema, 666 F.2d 1096, 1099 (7th Cir. 1981) ("Indeed [IRC] § 7605(b) itself expressly permits examination even of the religious activities of such an organization to the extent necessary to determine whether the organization is entitled to exempt status by reason of being a church."); *see also* United States v. Holmes, 614 F.2d 985, 988 (5th Cir. 1980) ("The second prong of the *Powell* test was pruned back by Congress in 1969, in regard to examination of churches, when it added subsection (c) to 26 U.S.C. § 7605. That provision limits the inquiry into the religious activities and books of account of churches. . . ." (footnote omitted)).

[51] *See* CAPA Hearings, *supra* note 38.

[52] *See generally* CAPA Hearings, *supra* note 38, at 16. CAPA involved an impressive range of co-sponsors along the political spectrum. In the House of Representatives, alone, there were more than seventy comprised of "liberals, conservatives, boll weevils, gypsy moths, members of the Black Caucus, and the Republican regulars representing a total of 30 States."

[53] *See* CAPA Hearings, *supra* note 38, at 1.

[54] *See* CAPA Hearings, *supra* note 38, at 13.

IRS Commissioner Roscoe Egger defended his agency's right to enforce the IRC with regard to churches,[55] and reiterated that the Service does not audit the "legitimacy or merits of individual religious belief."[56] After noting that IRC section 7605(c) was not added by Congress to lessen the Service's authority but actually to broaden it, Commissioner Egger explained the underlying difficulty the IRS faces: "the Service usually has the burden of obtaining information necessary to determine proper tax status," but because the tax code does not require churches to file exemption applications or annual information returns, "the information is in the custody of the . . . institution."[57] The lack of any previously filed information forces the IRS to make inquiries into churches before and during examinations.

The subcommittee then called what its most discussed witness, Mr. Michael Coleman. Mr. Coleman served as the financial administrator of Gulf Coast Covenant Church, which had recently completed an audit with the IRS.[58] Employing sensational rhetoric, he asserted, "The IRS has proved over and over again that they cannot regulate themselves," explaining that Service personnel on the front lines of church audits possess "an anti-church attitude" where a "church is guilty until proven innocent."[59] That particular audit did not result in an adverse determination to the church, but Mr. Coleman included a ten-page exhibit outlining his church's frustration with the process.[60] Other industry players also opined on the proposed legislation, but seldom from the standpoint of personal experience, as had Mr. Coleman. Representatives from the Presbyterian Church in America,[61] the Rutherford Group,[62] and the National Association

[55] *See* CAPA Hearings, *supra* note 38, at 28 (citing to De La Salle Institute v. United States, 195 F. Supp. 891 (N.D. Cal. 1961); Founding Church of Scientology v. United States, 412 F.2d 1197 (1st Cir. 1969), *cert. denied* 397 U.S. 1009 (1970); Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied* 414 U.S. 864 (1973)).

[56] *See* CAPA Hearings, *supra* note 38, at 28; *see also* CAPA Hearings, *supra* note 40, at 29 ("We have recognized, for example, the exempt church status of organizations as diverse in belief and practices as a fundamentalist Christian commune, a Hindu Ashram, a group of secular humanists, and a sect worshipping pagan deities and practicing witchcraft.") (statement of Roscoe L. Egger, Commissioner of Internal Revenue).

[57] *See* CAPA Hearings, *supra* note 38, at 41; *see also* CAPA Hearings, *supra* note 40, at 33 ("We learn about . . . churches collaterally from information supplied by complainants or informants, a related party (e.g., minister, employee, contributor, affiliated organization), or another service division.") (statement of Roscoe L. Egger, Commissioner of Internal Revenue).

[58] *See* CAPA Hearings, *supra* note 38, at 67. Mr. Michael Coleman was also there in his capacity as president of an organization called the National Integrity Forum.

[59] *See* CAPA Hearings, *supra* note 38, at 68 (testimony of Michael Coleman, President, National Integrity Forum).

[60] *See* CAPA Hearings, *supra* note 38, at 73, 80–89.

[61] *See* CAPA Hearings, *supra* note 38, at 89–97 (testimony of Robert L. Liken).

of Evangelicals[63] all seized an opportunity to stress the need for a more restrictive law to curtail IRS involvement with churches.

The final panel assembled involved the closest thing to an IRS apologist with the inclusion of Mr. William J. Lehrfeld, a former IRS employee and, at the time of the hearings, an attorney representing religious clients.[64] Mr. Lehrfeld stood alone as an opponent to the statute, noting that "the bill is flawed from a tax policy standpoint; it's flawed from a technical standpoint; and it creates . . . substantial constitutional questions . . . [with] no justification . . . that there has been any substantial abuse that cannot be rectified by and within the agency."[65] He acutely noted that the proposed legislation seemed was a reaction to the audit conducted of the Gulf Coast Covenant Church, which he believed was an insufficient impetus to justify new legislation.[66] Less than a year later, CAPA became law as part of the Deficit Reduction Act of 1984.[67]

When the final version appeared—officially housed in IRC section 7611—it attacked the perceived problem of church audits from multiple angles.[68] IRC section 7611(a) sets forth two requirements that must take place before the Service may even contact a house of worship.[69] First, "an appropriate high-level Treasury official" must reasonably believe that the organization's exemption is in question or that it is "carrying on an unrelated trade or business."[70] Second, if such a determination is made, the Service must provide prior notice to the organization of why it believes an inquiry is necessary, the proposed subject matter of the inquiry, and the

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[62] *See* CAPA Hearings, *supra* note 38, at 98–104 (testimony of Tedd N. Williams, Exec. Dir., The Rutherford Inst.) ("[IRC § 7605(c)] has been interpreted to give the IRS broad discretion . . . . Undoubtedly IRS has grown accustomed to this lack of restraint. However, to allow this virtually unfettered discretion to continue will present opportunities of abuse by overzealous IRS officials. . . . . This is not 'doomsday prophesying'.").

[63] *See* CAPA Hearings, *supra* note 38, at 105–10 (testimony of Robert P. Dugan, Jr., Dir., Office of Pub. Affairs, Nat'l Ass'n of Evangelicals) (making reference solely to the church administrator that testified earlier, Mr. Dugan stated, "Our concern is that the IRS in its understandable zeal to curb mail-order ministries, tax protestors and abuses of the tax laws seems determined to resist any attempt whatsoever to curtail its audit powers.").

[64] *See* CAPA Hearings, *supra* note 38, at 118–75. This panel also involved representatives from the American Civil Liberties Union, the Evangelical Council for Financial Accountability, and the National Council of Churches.

[65] *See* CAPA Hearings, *supra* note 38, at 119.

[66] *See* CAPA Hearings, *supra* note 38, at 119 ("[I]f the audit by the [IRS] of the Gulf Coast Covenant Church is to be a paradigm for national legislation affecting all church organizations, the hearing should get both sides of what actually happened.").

[67] Church Audit Procedures Act of 1984, Pub. L. No. 98-369, § 1033(a), 98 Stat. 494 (1984).

[68] I.R.C. § 7611 (2018).

[69] I.R.C. § 7611(a).

[70] I.R.C. § 7611(a)(2).

legal provisions that authorize and apply to the inquiry.[71] Subsection (h) defines such an appropriate official as "the Secretary of the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue Officer for an internal revenue region."[72]

If the Service decides that an examination is necessary after making its inquiry, it is limited as to the records it may examine and the religious activities it may investigate.[73] Further, an audit may only commence after proper notice is given to the organization and to IRS regional counsel.[74] Among other things, notice must contain a copy of the inquiry, a description of the records and activities the Service wishes to audit, and an offer for the Service and the organization to hold a conference together.[75] If the regional counsel receiving the notice objects to the examination, they may express their objection to the appropriate regional commissioner, who has the authority to intervene in the planned audit.[76] Most examinations must be completed within two years, and inquiries without subsequent examinations must be closed within ninety days.[77] The statute permits the IRS to conclude the audit with a notice of revocation or determination of liability, but only after approval by regional counsel and only as it applies to the three tax years preceding the examination notice date.[78] Finally, if the IRS has not complied with the provisions in CAPA, the church's sole remedy is to seek a stay in the proceedings until the noncompliance has

71 I.R.C. § 7611(a)(3).

72 I.R.C. § 7611(h)(7).

73 I.R.C. § 7611(b)(1). The IRS may only examine records and activities "to the extent necessary to determine" whether the organization has any tax liability or whether the organization is actually a church.

74 I.R.C. § 7611(b)(2)(A). The notice must be given to regional counsel at least fifteen days prior to the commencement of the examination.

75 I.R.C. § 7611(b)(3)-(4). If the IRS determines that additional documents or activities need to be examined after the examination commences, it generally has the authority to audit them as well.

76 I.R.C. § 7611(b)(3)(C).

77 I.R.C. § 7611(c)(1)–(2). The statute provides for a tolling of the two-year period upon certain triggers, such as (1) the filing of a related judicial action between the Service and the organization, (2) the failure of the organization to comply with reasonable requests for records, or (3) any period of time agreed upon by both parties.

78 I.R.C. § 7611(d). This section provides for shorter or longer statutes of limitation in some instances. Subsection (f) provides that if no such determination is made, or if the Service does not require "significant change" in the church's operations, then the Service is prohibited from commencing a second inquiry or examination on the same issues for a period of five years (unless a high-ranking official permits it). Originally, this high-ranking official was designated as the "Assistant Commissioner (Employee Plans/Exempt Organizations)", but that position was eliminated in 1998, and the language in subsection (f) was changed to "Secretary." Pub. L. No. 105-206, 112 Stat. 685, 705 § 1102(e)(3)–(f) (1998).

been corrected.[79]

Shortly after the enactment of CAPA, the Treasury Department issued regulations in a "Questions & Answers" format.[80] Here, the IRS defined an "appropriate high-level treasury official" as an "IRS Regional Commissioner (or higher Treasury official)."[81] This determination was necessary to define which official was authorized (1) to approve a church tax inquiry,[82] (2) to determine when a church's repeated failure to respond to routine requests constituted the basis for a church tax inquiry,[83] and (3) to provide the written notice to commence a church tax inquiry.[84] In addition, the regulations clarify the role of "Regional Counsel" as to the examination notice requirement[85] and any final determinations reached by the Service.[86]

While the fifteen years before the passage of CAPA were fraught with uncertainty and ambiguity regarding the legislation that applied to the IRS-church relationship,[87] the fifteen years afterwards were relatively quiet regarding the Service's interaction with houses of worship. On the larger front, though, Congress was slowly planning more sweeping action regarding agency reform. This effort came to a head in the late 1990s and affected every facet of the IRS.

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79 I.R.C. § 7611(e).

80 26 C.F.R. § 301.7611-1 (2019).

81 *Id*.

82 26 C.F.R. § 301.7611-1(A-1) ("[T]he IRS may begin a church tax inquiry only when the appropriate Regional Commissioner (or higher Treasury official) reasonably believes, on the basis of facts and circumstances recorded in writing, that the organization (1) may not qualify for tax exemption as a church; (2) may be carrying on an unrelated trade or business . . . ; or (3) may be otherwise engaged in activities subject to tax.").

83 26 C.F.R. § 301.7611-1(A-7) ("Repeated (two or more) failures by a church or its agents to reply to routine requests . . . will be considered by the appropriate [IRS] Regional Commissioner to be a reasonable basis for commencement of a church tax inquiry under the church tax inquiry and examination procedures . . . .").

84 26 C.F.R. § 301.7611-1(A-9) ("Upon commencing a church tax inquiry, the appropriate Regional Commissioner is required to provide written notice to the church of the beginning of the inquiry.").

85 26 C.F.R. § 301.7611-1(A-10) ("Where an examination is conducted . . . church records or religious activities of a church may be examined only if, at least 15 days prior to the examination, written notice of the proposed examination is provided to the church and to the appropriate Regional Counsel . . . . At the time the notice of examination . . . is provided to the church, a copy of the same notice will be provided to the appropriate Regional Counsel. The Regional Counsel is then allowed 15 days from issuance of the second notice in which to file an advisory objection to the examination.").

86 26 C.F.R. § 301.7611-1(A-11) (2018) ("[T]he Regional Counsel is required to approve, in writing, certain final determinations that are within the scope of [IRC §] 7611 and adversely affect tax-exempt status or increase any tax liability.").

87 *See supra* text accompanying notes 46–51.

C. The 1990s and the Passage of the IRS Restructuring and Reform Act of 1998

At the end of the twentieth century, Congress passed the IRS Restructuring and Reform Act of 1998 ("RRA 1998").[88] While CAPA seeks only to address how the Service relates to churches, RRA 1998 seeks to address how the Service relates to everyone. The effect was a reorganized IRS acutely structured to accommodate specific types of taxpayers.[89] The agency effectively transformed into a constituent-focused model that addressed taxpayer needs.[90]

The lead up to this reform, in part, traces back to the late-1980s when the IRS finally secured funding from Congress for a major upgrade to the agency's information technology.[91] The IRS made clear that the program was expensive, but it struggled to keep pace with current tax administration demands using decades-old technology.[92] As soon as Congress awarded the funds, though, the partnership began to sour. A series of government Accountability Office reports released in the succeeding years scoured the agency for shortcomings and malfeasance, and elected officials heard increased murmurs from their constituents about customer service shortcomings.[93] By the mid-1990s, Congress took two steps to hem in the Service. First, Congress began its withdrawal of funding for the Service's much needed technology upgrades.[94] Second, and more importantly, it formed a commission to explore the idea of reorganizing the agency.[95] The

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88 Pub. L. No. 105-206, 112 Stat. 685 (1998).

89 *See* Lederman, *supra* note 30, at 62.

90 Herzig, *supra* note 31, at 30 ("The core concept was to view the taxpayer, not the government, as client. As Commissioner Charles Rossotti stated, '[i]t is particularly important that performance measures do not directly or indirectly cause inappropriate behavior towards taxpayers, and that they provide incentives for service-oriented behavior.'" (footnotes omitted)); *see* Leandra Lederman, *Should Congress Reform The 1998 Reform Act: Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 992 (2003) ("One of the changes brought about by the process of IRS reform was the now-standard reference to taxpayers as 'customers' of the IRS." (footnote omitted)).

91 Lederman, *supra* note 30, at 56 (noting that "Congress approved the IRS's [Tax Systems Modernization] plan" after its then-current technology resulted in "a very public failure" when "a janitor at the IRS's Philadelphia Service Center reported finding mangled unopened returns in wastebaskets and in the bathroom, including checks . . . ." (footnotes omitted)).

92 The technology upgrade plan "was created because the IRS had been struggling for years to maintain systems that dated from the 1950s and 1960s." *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/IMTEC-90-13, TAX SYSTEM MODERNIZATION: IRS' CHALLENGE FOR THE 21ST CENTURY (Feb. 1990), http://www.gao.gov/assets/220/212210.pdf).

93 Lederman, *supra* note 90, at 978 (citing Cong. Res. Serv., CRS Reports on Status of IRS Restructuring and Reform (Mar. 22, 2001).

94 *See* Lederman, *supra* note 30, at 57.

95 *Id.*; *see also* Herzig, *supra* note 31, at 29.

commission explored ways to remold the Service into a more efficient and friendly governmental body.[96]

The committee's work lived in obscurity for only so long. After it released its findings in 1997, the committee's recommendations were discussed and debated in a very public way as the "political context ultimately hijacked the process."[97] While the committee's report faulted the IRS for several of its shortcomings, it also showed that the issues were partly Congress' fault for its lack of oversight and failure to update the tax code.[98] A bill to act on these recommendations made its way through the House, but the proposed legislation was put on hold as the Senate Finance Committee decided public hearings would be necessary for America to understand the full extent of the perceived abuses.[99]

The hearings, by design, showcased disillusioned IRS employees, disgruntled taxpayers, cowed agency executives, and great amounts of showmanship.[100] Among the other spectacles, the hearing saw agency employees testifying behind screens and the Bible used as a prop.[101] Further, the Commissioner was directed to answer questions alone and without the aid of his Assistant Commissioner or the Taxpayer Advocate, who arguably was in better positions to answer Congress's detailed and case-specific questions.[102] A current employee emphasized how the IRS tactics were "literally ruining families, lives, and businesses—all

[96] *See* Herzig, *supra* note 31, at 29 ("The purpose of Congressional intervention was to further insulate the Service from pressures of both Congress and the Executive. The commission made several recommendations focusing on oversight, technology, and recovering damages." (citing Cong. Res. Serv., CRS Reports on Status of IRS Restructuring and Reform CR-2 (Mar. 22, 2001)); *see also* Lederman, *supra* note 30, at 57 (stating that Congress formed the commission, in part, to explore whether the IRS should be reorganized due partially to taxpayer complaints about burdensome audit processes and poor customer service).

[97] Lederman, *supra* note 30, at 58.

[98] Lederman, *supra* note 90, at 978 (noting that the recommendations of the committee included "restructuring Congressional oversight of the IRS, providing the IRS with a Board of Directors, updating the IRS's technology, requiring the IRS to develop a strategic plan for increasing electronic filing of tax returns, increasing taxpayers' ability to recover damages in appropriate cases, and simplification of the tax law") (citing Cong. Res. Serv., CRS Reports on Status of IRS Restructuring and Reform (Mar. 22, 2001)).

[99] *See* Lederman, *supra* note 30, at 58; *see also* Ryan J. Donmoyer, *Three Days of Hearings Paint Picture of Troubled IRS*, 76 TAX NOTES 1655, 1655 (1997).

[100] Donmoyer, *supra* note 99, at 1655 ("IRS employees and aggrieved taxpayers painted a picture last week of an out-of-control tax administration agency so bent on fulfilling its law enforcement mission that it will destroy innocent taxpayers rather than admit to a mistake.").

[101] Donmoyer, *supra* note 99, at 1658 ("At times, the hearings featured theater that bordered on absurd.").

[102] *See* Donmoyer, *supra* note 99, at 1657.

unnecessarily and sometimes illegally."[103] A stream of taxpayers also took the stand with stories ranging from gross incompetence to malicious abuse.[104]

The IRS Commissioner apologized profusely at the hearing and promised internal reform, but the din had grown too loud.[105] Representative Michael Forbes conjured familiar language from the CAPA hearings: "We saw a government agency totally out of control, lacking accountability, an agency where one is guilty until proven innocent . . . ."[106] By the time RRA 1998 was passed a year later, it made sweeping changes to the agency.[107] Among other reforms, the law restructured the Service away from its geographical model toward a taxpayer-type based model.[108]

For the past half-century, the Service had been arranged by region.[109] From top to bottom, it had one national office, multiple regional offices, more than thirty district offices, and an organizational structure that included employee titles such as "regional commissioner" and "regional counsel."[110] Each region independently handled all examination and

[103] Donmoyer, *supra* note 99, at 1655. (This same agent also spoke of how they believed the agency preyed on the vulnerable segments of society that cannot defend themselves, focusing audit efforts solely on the poor, and placing illegal wiretaps in employee breakrooms.)

[104] *See* Donmoyer, *supra* note 99, at 1656. (These witnesses involved a man who claimed the agency coerced him into paying $250,000 to end an examination; a woman who stated that the IRS had mixed up her records for the past 10 years, sending her into "a vicious cycle" of legal issues; a Catholic priest who was harassed with tax notices regarding his dead mother; and a couple who said the IRS' mix-up of an employer identification number led to an erroneous audit and cost them $11,000.).

[105] Donmoyer, *supra* note 99, at 1657 ("The horror stories sent the IRS scrambling to apologize. . . . IRS Acting Commissioner Michael P. Dolan conceded that there were serious problems within the IRS and said that the agency 'was wrong' in the way it treated the taxpayers who had testified . . . .").

[106] Lederman, *supra* note 30, at 59 (quoting Joint Review of the Strategic Plans and Budget of the Internal Revenue Service, 1999, JCS-4-99, at 9 (May 25, 1999)).

[107] Pub. L. No. 105-206, 112 Stat. 685 (July 22, 1998).

[108] Lederman, *supra* note 90, at 980 (citing Pub. L. No. 105-206, 112 Stat. 685 § 1001(a)). The legislation also established new oversight to improve accountability (creating TIGTA and the IRS Oversight Board); *See* Lederman, *supra* note 30, at 62. The legislation also revised and expanded the "Taxpayer Bill of Rights," which included select provisions that, if violated by a Service employee, would serve as grounds for termination; *See* Lederman, *supra* note 90, at 981.

[109] See Lederman, supra note 30, at 62 (citing Joseph J. Thorndike, Annual Regulation of Business Focus: Reorganization of the Internal Revenue Service: Reforming the Internal Revenue Service: A Comparative History, 53 ADMIN. L. REV. 717, 762 (2001)).

[110] *See* David Holmgren, THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998 WAS SUBSTANTIALLY IMPLEMENTED BUT CHALLENGES REMAIN (2010) [hereinafter Holmgren Memorandum], https://www.treasury.gov/tigta/iereports/2010reports/2010IER002fr.html#governanceorganizationalstructure.

collection functions.[111] Statutes such as CAPA and IRS regulations were written based on this structure.[112] The new agency structure created four new operating divisions, centrally located in Washington, D.C. The new "customer-based" organization included divisions entitled, "Wage and Investment," "Small Business and Self Employed," "Large & Mid-Size Business," and "Tax Exempt and Government Entities."[113] Each division had national—not regional—authority over its specified types of taxpayers.[114]

With the passage of RRA 1998, statutes like CAPA immediately became problematic. Any attempt to draw parallels between the pre- and post-reorganization organizational charts of the agency is akin to fitting square pegs into round holes. Congress did not immediately amend statutes affected by this phenomenon, nor did the IRS engage in a total overhaul of the affected regulations. Instead, the agency clung to a "savings provision" in RRA 1998[115] intended to allow the Service to operate without disruption, and it issued a delegation order offering general rules on how it would handle the change in organization.[116] In regard to CAPA, this administrative patch quickly unraveled.

III. TWENTY-FIRST CENTURY PROBLEMS

A. CAPA Under Strain

In Delegation Order 193, issued shortly after RRA 1998, the IRS averred it had the power to take "actions previously delegated to . . . Regional Commissioners . . . by Treasury Regulations . . . for matters under their jurisdiction . . . and to delegate" those actions to Division Commissioners and Directors, among other current agency officials.[117] Using this order, the IRS placed the authority to make the "reasonable belief" determination required to begin a church tax inquiry, formerly assigned to a Regional Commissioner, to the Director of Exempt Organizations, Examinations ("DEOE").[118] The DEOE, as the name suggests, is an executive in the agency who has command over all examinations of exempt organizations occurring in the United States.

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111 *Id*.

112 *See* text accompanying notes 68 and 86.

113 *See* Holmgren Memorandum, *supra* note 110.

114 *See* Holmgren Memorandum, *supra* note 110.

115 Pub. L. No. 105-206, § 1001(b), 112 Stat. 685, 689 (July 22, 1998); *see also* H.R. 2676, 105th Cong., Cong. Rep. 105-599, at 194 (1998).

116 Deleg. Order 193 (Rev. 6) (Renamed to Deleg. Order 1-23) (Internal Revenue Manual § 1.2.2.2.20 (Nov. 8, 2000)).

117 *Id*. at ¶¶ 7–8.

118 *See* Internal Revenue Manual § 4.75.39. (Jun. 1, 2004).

Among his or her duties, the DEOE oversees hundreds of employees, develops procedures for how organizations are selected for audit, acts as a technical expert in the areas of the IRC relevant to non-profit organizations, and protects the integrity of the Service's examination function.[119] As such, the IRS viewed the DEOE as the best fit to pass judgement on whether a tax inquiry into a church was necessary.[120]

The Service's efforts were short lived, however, as challenges surfaced only a few years later. Most notably, a Minnesota organization took exception to the agency's interpretation of CAPA in a post-RRA 1998 environment.[121] The organization, Living Word Christian Center ("LWCC"), received its first correspondence from the IRS in 2007.[122] The Service, upon receiving reports that the organization may be giving its pastor inappropriate benefits, sent LWCC a letter notifying it that the Service was launching a tax inquiry into its affairs, signed by the DEOE.[123] The church refused to comply, and the Service initiated an investigation. After issuing a summons to the organization, LWCC raised the defense that the investigation was invalid because the DEOE is not an "appropriate high-level treasury official" for purposes of CAPA.[124]

At the core of LWCC's argument was the idea that the old position of Regional Commissioner was higher on the organizational chart than is the current DEOE. The focus was on the word "rank" in IRC section 7611(h)(7), asserting that since the Regional Commissioner was only one rank below the Commissioner's office, only a similarly situated official under the current structure would satisfy the statute.[125] Since the DEOE is four levels removed from the Commissioner, LWCC argued that it is not equivalent to the Regional Commissioner in terms of rank.[126] The government stressed the futility of determining "rank" by simply counting

[119] *See* United States' Objections to Magistrate's Report and Recommendation at n.3, United States v. Living Word Christian Center, No. 0:08-mc-00037-ADM-JJK (D. Minn. Dec. 3, 2008).

[120] *Id*. at 4–6.

[121] *See* United States v. Living Word Christian Center, 2009 U.S. Dist. LEXIS 6902 (D. Minn. Jan. 30, 2009).

[122] *Id*. at *1–2.

[123] *Id.* at *2.

[124] *Id.* at *2–3.

[125] *Id.* at *4–7. (stating that CAPA defines an "appropriate high-level Treasury official" as "the Secretary of the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region." I.R.C. § 7611(h)(7)).

[126] United States v. Living Word Christian Center, 2009 U.S. Dist. LEXIS 6902, at *8 (D. Minn. Jan. 30, 2009) ("The Court agrees . . . that the DEOE does not constitute an appropriate high-ranking Treasury official.").

rungs on the ladder of the organizational chart.[127] After all, there could be no equivalent to the head of a geographic region when there were no longer geographic regions.

Specifically, the government put forth the three arguments: first, the IRS reassigned the authority for the "reasonable belief" determination under CAPA to an executive who has broader and deeper authority than the old Regional Commissioner.[128] Such broader authority granted the DEOE nation-wide jurisdiction, whereas Regional Commissioners had authority over just one-seventh of the country at the time CAPA was passed. The DEOE—which focused on examinations of exempt organizations—had deeper authority than the Regional Commissioners who supervised a broader range of exams.[129] The second argument asserted by the government was that the statutory construction of IRC section 7611 proved Congress was not interested in simply counting steps in the organizational structure.[130] If so, they would not have placed the review for beginning a second audit of a church in a position *lower* on the organizational chart than the official tasked with authorizing a first audit.[131] The government lastly argued that its delegation of authority to the DEOE via informal agency guidance was entitled to deference.[132]

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[127] *Id.* at *7–11.

[128] *Id.* at *7.

[129] *See* United States' Objection to Magistrate's Report and Recommendation at 5-6, U.S. v. Living Word Christian Ctr., No. 0:08-mc-00037-ADM-JJK (D. Minn. Dec. 3, 2008). (determining that "[T]he DEOE outranks the former regional commissioners in that the DEOE oversees examinations of all tax-exempt organizations nationally, meaning she has much greater authority over the examination of exempt organizations—including churches—than the regional commissioners had over any type of taxpayer. Regional commissioners oversaw examinations of exempt organizations only within their region—approximately one seventh of the country at the time Congress enacted [IRC] § 7611 . . . This greater authority over and familiarity with exempt-organization audits, including church examinations, means the DEOE is—as Congress intended in mandating the 1998 reorganization—more focused on and attuned to the needs of exempt organizations").

[130] *Living Word Christian Center*, 2009 U.S. Dist. LEXIS 6902, at *8.

[131] *Id.* (noting that before RRA 98, a second inquiry into a church could only be authorized by the Assistant Commissioner for Employer Plans and Exempt Organizations per I.R.C. § 7611(f). This was an official three-levels removed from the Commissioner. The Government had argued "that because the requirements for a second inquiry are more stringent, and Congress allowed a lower ranking member to conduct this more sensitive review even after the 1998 reorganization, Congress valued expertise over rank.").

[132] *Id.* at *10. The Government argued that under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), it was entitled to judicial deference for its choice of delegation of the "reasonable belief" determination of I.R.C. § 7611 because it was an exercise in the "IRS' expertise and experience in tax administration." United States' Objection to Magistrate's Report and Recommendation at 10 U.S. v. Living Word Christian Ctr., No. 0:08-mc-00037-ADM-JJK (D. Minn. Dec. 3, 2008).

The court, persuaded by the simple exercise of counting organizational chart positions, declined to adopt any of the government's arguments. The court held that the DEOE was not a permissible official under IRC section 7611(h)(7). The court instead believed that the Tax Exempt and Government Entities ("TE/GE") Commissioner was the appropriate official, being two places higher up on the organizational ladder than the DEOE.[133] According to the statute, the court authorized the government to resume its examination after it had corrected the issue.[134] However, this resumed examination never happened. The government did not appeal the case, nor did it file an "action on decision" acquiescing or not acquiescing in the court's ruling.[135] Instead, the Treasury Department proposed amended regulations that altered who it believed was an "appropriately high-level Treasury official" for purposes of CAPA.[136]

These proposed regulations were published in 2009 and remain in the "proposed" state today—never having been finalized nor withdrawn.[137] They assert that the official who is most capable of making the reasonable belief determination of IRC section 7611 is now the Director, Exempt Organizations ("DEO").[138] As explained in the regulations, the DEO "is a senior executive who reports to the Commissioner/Deputy Commissioner, [TE/GE] Division, and who is responsible for planning, managing, directing and executing nationwide activities for Exempt Organizations."[139] This designation sought to achieve a middle-ground between the agency's original interpretation that the DEOE was the best official and the *LWCC* court's view that the TE/GE Commissioner was the best choice.[140] From

133 *Id*. at *10–11 ("This Court also ultimately finds the IRS's interpretation unpersuasive and . . . that the IRS's summons be denied because it was not authorized by 'an appropriate high-level Treasury official.'").

134 I.R.C. § 7611(e)(1)(A) (stating, in part, that if the IRS has not substantially complied with the "notice requirements . . . with respect to any church tax inquiry or examination, any proceeding to compel compliance with any summons with respect to such inquiry or examination shall be stayed until the court finds" that the IRS has made "all practicable steps to correct" the matter); I.R.C. § 7611(e)(2) (stating that this remedy is exclusive).

135 An action on decision signals whether or not the Service will follow an unfavorable court ruling. The decision takes one of three postures: (1) Acquiescence, (2) Acquiescence in result only, or (3) Non-acquiescence. Internal Revenue Manual § 36.3.1 (Mar. 14, 2013).

136 Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations, 74 Fed. Reg. 39003, 39004 (Aug. 5, 2009).

137 *Id*.

138 *Id.* at 39005 ("These proposed regulations eliminate references to the Regional Commissioner and instead provide that the Director, Exempt Organizations is the 'appropriate high-level Treasury official' for purposes of the reasonable belief and inquiry notice requirements of Treas. Reg. § 301.7611–1 Q1–A1, Q7–A7, and Q9–A9.").

139 *Id*.

140 United States v. Living Word Christian Center, No. 08-mc-37, 2009 U.S. Dist. LEXIS 6902, at *6-7 (D. Minn. Jan. 30, 2009) ("The nearest equivalent to the Regional Commissioner under the current IRS organization is the [TE/GE Commissioner].").

the standpoint of the organizational chart, the DEO is three places removed from the IRS Commissioner—one above the DEOE and one below the TE/GE Commissioner.[141] The proposed guidance also sought to clarify the other positions referenced in IRC section 7611. The defunct Regional Counsel's duty to review and possibly file an advisory objection to an IRS audit of a church was given to the current position of TE/GE Division Counsel/Associate Chief Counsel.[142] This same official was also tasked with the duty to review certain final agency determinations.[143] Further, they placed the responsibility to review for a potential second audit of a church in the TE/GE Commissioner.[144]

The issuance of the proposed amendments did not bring the issue to resolution. Indeed, the agency's problems in the CAPA arena only escalated. Immediately after publication, the agency began receiving comments from industry practitioners and advocacy groups, many possessing varying degrees of the same reaction: they disliked the *LWCC* court's choice of the TE/GE Commissioner, and the IRS's choice of the DEO.[145] Multiple comments suggested that the only official who can truly achieve the intent of Congress in carrying out the "reasonable belief" determination was the IRS's Deputy Commissioner for Services and Enforcement ("DCSE")—an official immediately below the IRS Commissioner.[146] One commenter felt that only the IRS Commissioner or the Treasury Secretary would do.[147] At the other end of the spectrum, one

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[141] *See* I.R.M. 1.1.23.5.1 (Mar. 7, 2017) (showing that DEOE reports to the DEO); I.R.M. 1.1.23.2(4) (Mar. 7, 2017) (showing that the DEO reports to the TE/GE Commissioner).

[142] Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations, 74 Fed. Reg. 39003, 39004 (proposed Aug. 5, 2009) (noting that the TE/GE Division Counsel/Associate Chief Counsel is the highest-level legal advisor for the TE/GE Division). *See* I.R.M. 1.1.6.17(2) (June 18, 2015).

[143] Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations, 74 Fed. Reg. at 39005 ("These proposed regulations amend Treas. Reg. § 301.7611–1 Q11–A11 by providing that the Division Counsel/Associate Chief Counsel, Tax Exempt and Government Entities, is the official responsible for complying with the written determination and approval requirements of section 7611(d)(1).").

[144] *Id.* at 39006 (noting that the regulations also provide that the Deputy TE/GE AC/DC with authority over exempt organizations may make this decision).

[145] *See, e.g.*, Letter from Alliance Defense Fund, *supra* note 6; Letter from Caplin & Drysdale to IRS, RE: Proposed Amendments to the Regulations Relating to Church Tax Inquiries and Examinations (Oct. 13, 2009).

[146] See Fred Stokeld, EO Director Shouldn't Approve Church Audits, Witnesses Say, 65 TAX PRAC. 90 (Feb. 1, 2010).

[147] *See* Martin, *supra* note 6, at 18 ("[T]he American Center for Law and Justice . . . took an even more conservative approach by suggesting that this responsibility should rest at least with the IRS Commissioner, if not the Treasury Secretary." (internal citations omitted)).

comment applauded the IRS for the proposed regulations in the hopes of bringing clarity to the issue and allowing the government to continue its duty to hold these exempt organizations accountable.[148]

As litigation continued, the government became entangled in the ambiguity of CAPA with everything from defending against a writ of mandamus[149] to a case involving the IRS's authority to initiate a civil assessment action against private individuals.[150] In 2014, the IRS found itself in a legal battle with an organization who demanded the agency to release all of its documents related to "existing, proposed, new, or adopted procedures for church tax inquiries or examinations from January 2009 to the present."[151] The organization also requested all agency documents related to the proposed changes to the regulations under IRC section 7611.[152] This dispute over whether the agency had legally complied with the Freedom of Information Act stretched over several years before the United States District Court for the District of Columbia granted the IRS's motion for summary judgment, dismissing the case in its tracks.[153] Indeed, this prolonged litigation, which was launched to prevent the IRS from hiding "details of its illicit targeting of churches,"[154] only came about

[148] Letter from Americans United for Separation of Church and State to the IRS, RE: Proposed Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations (Nov. 2, 2009) (letter on file with author) ("We appreciate the IRS' efforts . . . to clarify the enforcement responsibilities . . . Given the . . . efforts by some organizations in recent years to encourage houses of worship to blatantly violate federal law, having a clear and valid enforcement regime is absolutely essential").

[149] Southern Faith Ministries v. Geithner, 660 F. Supp. 2d 54, 55–56 (D.D.C. 2009) ("Southern Faith Ministries seeks a writ of mandamus requiring a reasonable belief determination from an 'appropriate high-level Treasury official' before the IRS can continue its church tax inquiry."). This case began before the proposed regulations were published; *Id.* at 55 (noting that the letter in this case that initiated the church tax inquiry was signed by the DEOE); *Id*. (ruling on the case after publication, though, deciding that the only remedy available under IRC section 7611 was a stay in the proceedings—not a writ of mandamus); *Id*. at 56.

[150] United States v. Booth, No. CIV-F-09-1689, 2010 U.S. Dist. LEXIS 105986, *6–7 (E.D. Cal. Sept. 21, 2010) ("Defendants cite to [*LWCC*] but that opinion is inapposite . . . . In the case at hand, there is no evidence that the change in officials is substantive as opposed to an adjustment of forms.").

[151] All. Defending Freedom v. I.R.S., No. 15-525, 2017 U.S. Dist. LEXIS 158473, at *1 (D.D.C. Sept. 27, 2017). This organization had filed a comment to the agency proposed regulations in 2009 under a different name. *See*, Letter from Alliance Defense Fund, *supra* note 6.

[152] All. Defending Freedom v. I.R.S., U.S. Dist. LEXIS 158473, at *1.

[153] *Id.* at *15 ("In short, the Court is satisfied, based on the . . . detailed declarations submitted by the IRS, that the agency conducted an adequate search for responsive documents.").

[154] See Judicial Watch Files FOIA Lawsuit on Behalf of Alliance Defending Freedom on IRS Investigations into Churches and Religious Groups, JUDICIAL WATCH (May 4, 2015), https://www.judicialwatch.org/press-room/press-releases/judicial-watch-files-foia-lawsuit-on-behalf-of-alliance-defending-freedom-on-irs-investigations-into-churches-and-religious-

because the agency was earlier sued by another organization claiming that the IRS was not doing enough to examine churches.[155]

In the past few years, the IRS has taken lesser measures to end the controversy. In 2016, the agency rewrote its procedures to state that a church tax inquiry may begin when the DEO, "who acts in concurrence with the TE/GE Commissioner," makes the "reasonable belief" determination.[156] This evidences the closest the Service has come to officially acquiescing to the *LWCC* court's decision that the TE/GE Commissioner is the correct official under the current agency organization.[157] Still, the drama continued.

In 2018, a United States District Court for the District of South Carolina ruled that the agency's half measure of tweaking its internal guidance was not sufficient when it failed to strictly follow IRC section 7611's requirements.[158] In that case, an organization called Bible Study Times ("BST") claimed it was a church after an inquiry had been made.[159] The IRS stopped the audit in order to go through its IRC section 7611 procedures, which included sending the organization a letter from the DEO.[160] However, under the revised agency procedures, the TE/GE Commissioner reviewed this case before the audit began and signed an internal document making the "reasonable belief" determination before the commencement of the inquiry and examination.[161] The *BST* court agreed with the *LWCC* court that the TE/GE Commissioner was "comparable" to the Regional Commissioner,[162] and the court agreed that the TE/GE Commissioner made the required determination before the examination began.[163] The IRS, however, lost the case because only the DEO's signature—not the TE/GE Commissioner's signature—was on the inquiry

groups/.

155 *See FFRF Sues IRS to Enforce Church Electioneering Ban*, *supra* note 7.

156 *See* IRM § 25.5.8 (Jan. 27, 2016); § 4.75.39.1.1(6) (Oct. 30, 2017).

157 *See Living Word Christian Center*, No. 08-mc-37, 2009 U.S. Dist. LEXIS 6902, at *2–3.

158 United States v. Bible Study Times, 295 F. Supp. 3d 606, 608 (D.S.C. 2018).

159 Bible Study Times v. United States, 240 F. Supp. 3d 409, 415 (D.S.C. 2017).

160 *Bible Study Times*, 295 F. Supp. 3d at 610.

161 *Id.* at 610 n.3 ("[The Approvals Cover Sheet] reflects signatures (or substitutes for signatures) of the DEO, the TE/GE Commissioner, and five other IRS officials under two separate sections titled 'Church Tax Inquiry Notice' and 'Church Notice of Examination.'").

162 *Id*. at 627 ("Based on the language of the statute, the court finds the TE/GE Commissioner's 'level' or 'rank' the most significant consideration. Whether viewed from the perspective of closeness to the IRS Commissioner or removal from the examination function, the TE/GE Commissioner's rank is comparable to that of a former Regional Commissioner.").

163 *Id.* at 630 ("Because the Government has made a prima facie showing the TE/GE Commissioner made the Determination, it has made the necessary showing this statutory requirement was satisfied.").

notice sent to the organization.[164] The court reasoned that such an omission was significant "because BST declined (or lost) the opportunity to address the IRS' concerns by less formal means while it (correctly) maintained the DEO lacked authority to institute an Inquiry or Examination."[165]

B. The IRS Under Strain

The IRS's problem in regulating houses of worship in the face of an unworkable statute is compounded because the agency is understaffed and underfunded for the task.[166] This, among other reasons, is a plausible explanation as to why the Service has not taken more administrable action in an area such as CAPA. As chronicled in recent years, the Service is trending downwards in terms of its efficiency and effectiveness in regulating the exempt sector and the taxpayer community.[167]

There are multiple factors contributing to this. First, the number of exempt organizations has exponentially increased in the past forty years.[168] In 1980, there were less than one million IRC section 501(c) organizations on file with the IRS.[169] In 2017, there were roughly 1.8 million.[170] These numbers are based on the number of organizations that have filed returns with the IRS, since we only know about those who filed. As mentioned, 300,000 or more of these organizations are churches, which are not required to file a return.[171] Further, the IRS has also dealt with an unbudgeted spike in exemption applications in the past decade. This was partly due to a law mandating that any organization who had failed to file a return for three consecutive years would automatically lose their tax-exempt status.[172]

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164 *Id.* at 631 ("In this case, the TE/GE Commissioner did not sign the Inquiry Notice and the IRS did not otherwise disclose her Determination to BST at any point between when the Inquiry Notice was signed . . . and when the Government filed its Reply in support of the Petition . . . .").

165 *Id.* (footnote omitted).

166 *See* Mayer, *supra* note 8, at 96 (commenting on the difficulty the Service faces in trying to serve law abiding exempt organizations, and to correct the non-compliant behavior of others, without the much needed resources "to keep pace with the size and complexity of both the exempt organizations community and the applicable law.").

167 *See generally* Owens, *supra* note 29, at 2–4; *see also* Lederman, *supra* note 30.

168 *See* Mayer, *supra* note 8, at 84 (citing I.R.S. 1980 Ann. Rep. 76).

169 *Id.*

170 I.R.S. Data Book 2017, at 51 (suggesting that the bulk of these organizations—over 1.7M—claim exemption under subsection (c)).

171 *Id.* at 55 n.4 ("Not all organizations described in section 501(c)(3) must apply for recognition of tax-exempt status, including churches, interchurch organizations of local units of a church, integrated auxiliaries of a church, conventions or associations of churches. . ."); *see also, id*. at 85.

172 The IRS notified nearly 300,000 organizations of this action in advance, but not all took the required steps to keep their exemption. The result was that many organizations lost

Second, the Service's resources have not kept pace with the increased workload. Funding has decreased or remained stagnant in recent years.[173] Even with the introduction of the revised tax code in 2018, the agency failed to secure much needed funding from Congress.[174] This decrease in resources has affected staffing levels across the agency.[175] While the exempt organization employee group appeared to have avoid this general decline in numbers, it has also failed to keep up with increase in demand.[176] The decreased funding has also affected the breadth and quality of the Service's functionality.[177] For example, funding for top agency executives is below par compared to similar private sector positions.[178] Further, those within the agency are using older technology.[179]

their exempt status and had to reapply with the Service. *See* NAT'L TAXPAYER ADVOCATE SPECIAL REPORT TO CONGRESS: POLITICAL ACTIVITY AND THE RIGHTS OF APPLICANTS FOR TAX-EXEMPT STATUS 27 (2013); *see also* Lederman, *supra* note 30, at 47 (citing U.S. Gov't Accountability Office, GAO-15-164, TAX-EXEMPT ORGANIZATIONS, BETTER COMPLIANCE INDICATORS AND DATA, AND MORE COLLABORATION WITH STATE REGULATORS WOULD STRENGTHEN OVERSIGHT OF CHARITABLE ORGANIZATIONS 30 (2014) http://www.gao/gov/assets/670/667595.pdf; *see also* Memorandum from Michael R. Phillips, Deputy Inspector General for Audit, TIGTA to the Acting TE/GE Commissioner, Final Audit Report – Appropriate Actions Were Taken to Identify Thousands of Organizations Whose Tax-Exempt Status had been Automatically Revoked, but Improvements are Needed (Mar. 30, 2012) (Audit # 201110014).

173 *See* Lederman, *supra* note 30, at 70–71 (noting that in 2015, Congress gave the IRS a budget that "was approximately eighteen percent lower than it was in 2010," and in 2016, Congress awarded the IRS a budget that "did not bring the IRS's funding even up to its 2014 level.").

174 Emily Horton, *2018 Funding Bill Falls Short for the IRS*, CENTER ON BUDGET AND POLICY PRIORITIES (Mar. 23, 2018), https://www.cbpp.org/blog/2018-funding-bill-falls-short-for-the-irs (noting that the IRS will incur significant expense in implanting the Tax Cut and Jobs Act, but that Congress' funding "provides just $320 million from 2018 through 2019 for the IRS to implement the law. . . . [while] it cuts all other IRS funding by $124 million, leaving overall IRS funding a full $2.5 billion—18 percent—below the 2010 level, adjusted for inflation.").

175 *See* I.R.S. Budget & Workforce, Table 29, https://www.irs.gov/statistics/irs-budget-and-workforce (last visited Jan. 9, 2019). In 1988, the IRS had nearly 115,000 full-time employees dedicated to running its various operations. That number has consistently decreased over the past 30 years, and it stands at around 75,000 today.

176 *See* Mayer, *supra* note 8, at 87 (noting that for 2013 the IRS's "Exempt Organization Division . . . had about 20 percent more employees total than 38 years earlier. . . [but] during approximately the same time period the number of [exempt] organizations has almost doubled . . ." (internal citations omitted)).

177 *See* Lederman, *supra* note 30, at 73–74.

178 *See* Owens, *supra* note 29, at 5 ("The maximum base compensation of the Senior Executive Service, the highest level of career employee in the federal government, is currently fixed at approximately $179,700 or approximately the salary of a mid-level associate in a large law firm.").

179 *See* Owens, *supra* note 29, at 5 ("Historically, IRS internal management information systems have been designed to track tax returns and related matters for for-profit organizations and individuals, and then adapted to address some of the management information requirements of the tax-exempt organizations function, which, of course, is a

Third, the Service has an image problem. As seen in the CAPA hearings, complete with horror stories from practitioners and parishioners,[180] or the RRA 1998 hearings, complete with horror stories from a wider audience,[181] the IRS has a difficult time winning the favor of the people—and thus Congress.[182] This problem has ebbed more than flowed over the years, and it recently surfaced with the so-called tea-party scandal.[183] Once again the IRS found itself in the political crosshairs as it was accused of inappropriately scrutinizing right-wing organizations that applied for exempt status.[184] After another round of contentious hearings,[185] Congress again decided agency reform was necessary.[186] Currently, the agency—especially the exempt organizations division—finds itself in the familiar position of seeing little hope of increased funding to fulfill its ever growing list of obligations.[187]

rational, economic approach to the task."); *see also,* Lederman, *supra* note 30, at 75 ("Budget insufficiencies may also exacerbate the IRS's longstanding deficiencies in technology infrastructure. Much of the IRS's current technology expenditures are still used for upgrades to systems built in the 1950s and 1960s. A lot of its newer technology is outdated, too.").

180 *See supra* text accompanying notes 53–67.

181 *See supra* text accompanying notes 99–104.

182 *See* Lederman, *supra* note 30, at 70 ("IRS reform following a perceived scandal is also likely to be focused on reining in the IRS, not on looking at the whole picture, including whether the IRS has sufficient funding to effectively carry out all of the duties Congress has given it.").

183 *See* Memmott, Mark, *IRS Apologizes For Singling Out Conservative Groups*, NPR (May 10, 2013, 12:41 PM), https://www.npr.org/sections/thetwo-way/2013/05/10/182867374/irs-apologizes-for-singling-out-tea-party-and-patriot-groups ("Saying that it was wrong, insensitive and inappropriate, a top official from the Internal Revenue Service apologized Friday to conservative groups that were singled out for additional IRS scrutiny during the 2012 campaign.").

184 *See* Mullis, Steve, *GOP Call For Inquiry Of IRS Targeting Of Tea Party Groups*, NPR (May 12, 2013, 6:28 PM), https://www.npr.org/sections/thetwo-way/2013/05/12/183438593/gop-call-for-inquiry-of-irs-targeting-of-tea-party-groups ("Republican lawmakers on Sunday called for a full investigation. . . . 'This is truly outrageous,' Republican Sen. Susan Collins of Maine said on CNN's *State of the Union*. 'It is absolutely chilling that the IRS was singling out conservative groups for extra review.'").

185 *See generally* Peters, Jeremy W., *I.R.S. Official Invokes 5th Amendment at Hearing*, N.Y. TIMES (May 22, 2013). The agency official at the center of the hearings was Lois Lerner, who held the position of DEO at the time of the events in question. Her testimony before the committee largely consisted of invoking her Fifth Amendment right against self-incrimination. This resulted in strong rhetoric from Republican members of the committee. Former Commissioner Douglas Shulman also took his turn before Congress and was pressed by both sides.

186 *See* Lederman, *supra* note 30, at 67 ("Congress followed up the inflammatory hearings that began in 2013 with legislation at the end of 2015. The Consolidated Appropriations Act, 2016, contained various restrictions on the IRS, including a subtitle termed 'Internal Revenue Service Reforms,' part of the included PATH Act of 2015." (internal citations omitted)).

187 *See* Mayer, *supra* note 8, at 99 ("Realistically, not much more can be done with

IV. A SUGGESTION FROM HERE

What is clear so far is that the IRS faces an increasingly difficult battle in keeping up with the expansion of the charitable sector, especially in its regulation of churches. This is partly because these organizations are not required to file initial or annual returns, which would disclose information about their finances and assure compliance with applicable laws. The agency's job becomes harder because it remains underfunded and understaffed for the task coupled with poor prospects for change. The issue is complicated by CAPA—a statute that provides specific statutory protections shielding organizations claiming to be churches from advances of the Service to gather or examine possible noncompliance issues. The crowning jewel, of course, is that CAPA is irreversibly broken considering the current agency structure. Without a doubt, fixing the issues created with CAPA through RRA 1998 is possible, but that is not necessarily the best path. When a law must be tortured to keep it viable, it is time for new law or at the least, repeal of that law. The following section discusses these options.

A. Repair CAPA

Aside from scholarly efforts, there has been no serious discussion of repealing CAPA.[188] Indeed, all efforts to fix the issues created by RRA 1998 center on re-interpreting the statute by administrative action.[189] While this is an impossible exercise given the complete tear-down and rebuild of the IRS's structure at the start of the twenty-first century, there is a way forward if Congress refuses to act. It starts with the reality that it is impossible to honor the statute's text. Once acknowledged, it becomes a simple exercise of trying to honor the spirit of the statute.

The purpose of CAPA is to provide clarity to the IRS and churches about how they interact with each other. It also offers churches special protections that are not available to similarly situated organizations. Congress saw fit to accomplish these purposes, in part, by placing decision making authority of whether or not to initiate contact with a house of worship with an official possessing a politically sensitive perspective.[190] CAPA generally defines such a person as "an appropriate high-level

respect to increasing the prominence of the exempt organizations function . . . Nor is a significant increase in resources . . . likely in the foreseeable future, given both the financial state of the federal government and the political unpopularity of the IRS." (internal citations omitted)).

188 *See, e.g.*, Montague, *supra* note 10; Hoff, *supra* note 40.

189 *See supra* notes 136–144, 156 and accompanying text.

190 *See* I.R.C. § 7611 (2018). This same purpose was accomplished in the preceding statute, I.R.C. § 7605(c), which also required an officer "no lower than a principal internal revenue officer for an internal revenue region" to believe an examination was necessary.

Treasury official."[191] When Congress more specifically defined this person as "the Secretary of the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region," it was dealing with an agency organization not just conceptually realigned from what it is today, but also one that had more rungs on the ladder.[192] The new organization not only specializes each operating division by taxpayer type, but it also flattens the structure, centralizing control in a national office.[193]

It is too narrow of an exercise to simply point to a box on the current organizational chart and see if it is at the same level as one on the pre-1998 organizational chart. Instead, the appropriate analysis should be to find an executive that possesses familiarity with the IRS's role in interacting with houses of worship, familiarity with the IRS's examination process, and familiarity with making policy decisions at least at a regional level. All these requirements may be found in the DEOE.[194] As was argued by the Government in the *LWCC* case, this official is more knowledgeable than the Regional Commissioner in the specialized area of exempt organization examinations, and this official has a wider scope of authority in that they possess a national purview.[195]

Even after conceding the argument that the DEOE is inappropriate because they are too close to the audit process, this is remedied by moving the responsibility to make the reasonable belief determination to their direct manager—the DEO. The DEO is the highest official in the IRS that deals exclusively with exempt organization matters, including: (i) customer education and outreach; (ii) rulings and agreements; and (iii) examinations.[196] The DEO, based in Washington, D.C., reports directly to the TE/GE Commissioner and is "responsible for planning, managing, directing and executing nationwide EO activities."[197]

The IRS kowtowing to the reasoning of the *LWCC* court by naming the TE/GE Commissioner as the appropriate Treasury official for purposes of the IRC section 7611 "reasonable belief" requirement would arguably

191 I.R.C. § 7611.

192 *See* Modernizing America's Tax Agency: IRS Organization Blueprint (Apr. 2000), 1–10 and 1–17, https://www.irs.gov/pub/irs-utl/27877d00.pdf (noting that the post RRA 1998 organizational chart has roughly half as many steps between the Commissioner's Office and front-line employees).

193 *Id*. at 1–17; *see generally* Frank Wolpe, Getting Back to the "Grassroots" of Tax Administration: Because "We the People" Long For a Gathering of American Eagles to Restore Trust in the Internal Revenue Service with A Rebuild IRS Initiative, 49 AKRON L. REV. 863 (2016).

194 *See supra* note 118 and accompanying text.

195 *See supra* notes 128–129 and accompanying text.

196 Internal Revenue Manual § 1.1.23.5(5) (Mar. 7, 2017).

197 *Id*. at (1)–(2).

surpass the statutory requirement but would not be detrimental to tax administration. Certainly, this should appease the judiciary. Whether it was the *LWCC* court first making this determination,[198] or more recently the *BST* court announcing that "the positions of former Regional Commissioner and current TE/GE Commissioner are each broader in some respects than the other, though both clearly have broad responsibilities[],"[199] courts are clearly trending toward this solution to the statutory problem.

The main caveat to having the TE/GE Commissioner be the substitute for the former Regional Commissioner is that this solution creates an issue regarding who would serve as the official designated to authorize a second inquiry to a church. This responsibility was previously vested in the Assistant Commissioner (Employee Plans and Exempt Organizations) ("AC EP/EO").[200] Although the Assistant Commissioner is lower on the organizational chart than the Regional Commissioner, the Assistant Commissioner is the most knowledgeable person in the Service in regard to exempt organizations.[201] With nationwide authority over exempt organizations and employee plans,[202] the Assistant Commissioner's role is similar to the TE/GE Commissioner.[203] Such authority makes the Assistant Commissioner's role a novelty among the issues created by RRA 1998. The IRS indeed had a national official designated to serve a constituent of taxpayers before the reorganization. It was this official that Congress gave the authority to make the more sensitive determinations of re-auditing a church after a first audit closed.[204] In its proposed regulations, the IRS suggested giving second-inquiry determination authority to the TE/GE Commissioner.[205] Obviously, giving the TE/GE Commissioner authority to

198 *See* United States v. Living Word Christian Ctr., 08-37 ADM/JJK, 2009 U.S. Dist. LEXIS 6902, *10-11 (D. Minn. Jan. 30, 2009).

199 United States v. Bible Study Time, Inc., 295 F. Supp. 3d 606, 627 (D.S.C. 2018).

200 26 U.S.C. § 7611(f)(1) (2018).

201 *See* Robert A. Boisture, Julie W. Davis, & Lloyd H. Mayer, *How the IRS Plans to Restructure Its Exempt Organization Operations*, 10 J. TAX'N EXEMPT ORG. 5, 195–96 (1999); *see also* Owens, *supra* note 29, at 3.

202 *See* Boisture, *supra* note 201, 195–96; *see also* United States v. Living Word Christian Ctr., 08-37 ADM/JJK 2009 U.S. Dist. LEXIS 6902 (D. Minn. Dec. 3, 2008). ("[T]he [AC EP/EO] was the chief official in a component of the IRS that had specialized experience in dealing with exempt organizations. Thus, Congress positioned authority for initial church tax inquiries in a more generalized, regional official, but elevated the second, more delicate inquiry decision to an official with a national perspective and specialized knowledge . . . .").

203 *See* Internal Revenue Manual § 1.1.23.2 (Mar. 7, 2017).

204 *See* I.R.C. § 7611(f) (2018).

205 *See generally* Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations, 74 Fed. Reg. 39003, 39006 (proposed Aug. 5, 2009).

make this second-inquiry determination would make it impossible for the TE/GE Commissioner to also make the initial "reasonable belief" determination. Thus, the IRS selected the DEO for the first "reasonable belief" determination in its proposed regulations.[206]

The only untenable suggestion is to replace the role of the former Regional Commissioner with the current position of DCSE. Doing so would place individual audit decisions in the IRS Commissioner's Office, which would expressly go beyond what is necessary under CAPA. Though several commenters suggested this approach in response to the IRS' proposed regulations,[207] there is no justification for this under the statute. Even the primitive framework of counting rungs on the organizational ladder shows the DCSE is higher than the former Regional Commissioner. As the *BST* court explained, both the 1984 organizational chart (in place when CAPA was enacted) and the current organizational chart possess a Commissioner's box at the top of the chart, containing the IRS Commissioner and at least one Deputy Commissioner.[208] The court concluded, "Had Congress intended to make the Deputy Commissioner the lowest official to whom authority to make the [IRC section] 7611 Determination could be delegated, it could easily have done so as such a position existed in 1984. That Congress did not do so weighs against any argument that would produce such a result."[209]

Further, naming the DCSE as the appropriate official for the first reasonable belief determination creates a problem as to who is the proper official to conduct the second level determination under IRC section 7611(f). If the choice is to go further up the organizational ladder, this would force the IRS Commissioner into making an individual audit determination. Going lower on the chart for the second-inquiry determination also causes problems: whether one chooses the TE/GE Commissioner or any other of the Division Commissioners, one would require subordinates to make determinations on matters more sensitive than and related to decisions previously made by their superiors.[210]

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206 *See supra* note 134.

207 *See supra* note 146.

208 United States v. Bible Study Times, 295 F. Supp. 3d 606, 625 (D.S.C. 2018).

209 *Id.*

210 This scenario of having the DCSE make the first-inquiry determination and having the TE/GE Commissioner make the second-inquiry determination was proposed by one of the commenters to the IRS proposed regulations. The commenter believed that a second-inquiry determination under IRC § 7611(f) would also require a re-evaluation by the official tasked with the original reasonable belief determination. The comment acknowledged that requiring a subordinate to approve or overrule a request made by their superior was problematic, suggesting that possibly a lower-official outside the chain of command of the DCSE make the determination to avoid conflict. *See* Letter from Caplin & Drysdale to IRS, *supra* note 145. What the comment fails to acknowledge, however, is that forcing the

In short, either the DEOE or the DEO is adequate to fulfill Congress's intentions under CAPA. While the TE/GE Commissioner is an acceptable choice as well to make the "reasonable belief" determination, this renders filling the role of a second-inquiry determination problematic. Finally, the choice of the DCSE to make the determination is both outside the intentions of Congress and poised to create more problems than are already present in this area. Of course, Congress could easily fix this issue by amending CAPA and defining who is an appropriate official to approve a church tax inquiry, but there is possibly a better path of legislative action—repealing the statute altogether.

B. Eliminate CAPA

1. CAPA & RRA 1998 Were Political Overreactions

The aim of CAPA and RRA 1998 was to reform perceived abuses by the IRS. The concerns brought to the public's attention by Congress were done to gain support for the desired reforms. In the case of CAPA, Senator Grassley traced the origin of his interest to a testimony he had heard several years earlier from a church representative who was unhappy with an audit of his congregation.[211] Through a nearly 200-page hearing record, the CAPA proceedings mainly relied on the testimony of one aggrieved church.[212] The remainder of the testimony was filled with practitioners, industry players, and policymakers debating the issue from a tax administration viewpoint.[213] Indeed, much of that debate was in relation to CAPA's predecessor, which appeared fifteen years earlier.[214] Little to no time was spent exploring alternative avenues to bring guidance to the relationship between houses of worship and the IRS, or whether it was needed.

With RRA 1998, the pattern was similar. Congress curated an invite list of sensational witnesses to sell the public on how bad the agency's behavior had become. The collection of anecdotes at the hearing did not cover a broad swath of abuses, but they painted a picture through graphic anecdotes.[215] While the fallout from the hearings took the form of a

Government into the choice between expertise and independence is not one contemplated by the statute.

[211] *See* CAPA Hearings, *supra* note 38, at 11 (stating that he first found this issue worthy of considerable attention when he chaired a hearing where "testimony was presented by a witness representing an audited church whose congregation spent thousands of dollars and expended hundreds of man-hours during an examination").

[212] *See supra* notes 58–60.

[213] *See supra* notes 61–66.

[214] *See supra* notes 43–50.

[215] *See supra* notes 100–104.

sweeping agency reorganization, the testimonies that stirred this action later proved to be unreliable. Witnesses either recanted their tales or exaggerated the facts.[216] Neither measure appears to have been motivated by a desire for better tax policy. Instead, both acts had the appearance of political maneuvers which turned out in several respects to harm tax administration—CAPA by adding procedural hurdles to the process by which the IRS approaches and examines houses of worship, and RRA 1998 by creating a vast transaction cost that has diverted agency resources away from its tax administration and collection missions.[217]

Moreover, the purposes of both acts were misguided. CAPA's goal was to better protect churches by placing authority for initiating an IRS inquiry into the hands of an "appropriate high-level treasury official."[218] Regardless of whether that high ranking official should be a director, commissioner, or even a secretary, it does not acknowledge or address the fact that offices as high as the President have historically weaponized the Service's audit process.[219] Even if such actions by the executive are seen as vestiges of the past, one does not have to look beyond the past few years to find an agency head brought down because of knowledge, involvement, or responsibility for taxpayer specific dealings.[220]

RRA 1998 intended to streamline agency accountability by restructuring its organization. In creating a national office operating as an agency brain over its four operating divisions, the reorganization changed much to accomplish this accountability in service of its constituents.[221] As seen as recently as 2013, RRA 1998 did not stop accusations of gross abuse of low-level employees giving inappropriate scrutiny to tax-exempt

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[216] Lederman, *supra* note 30, at 60 ("[T]he bona fides of many of the shocking stories . . . are questionable. John Colaprete famously 'has "recanted all this—he happened to be out of the country" when this was said to have occurred. . . . The GAO ultimately found many of the witnesses' horror stories unfounded or exaggerated.'") (citing Spellman, Joe, *Conference Panel Ponders Finance Hearing Horror Stories*, 83 TAX NOTES 1854, (quoting former IRS Commissioner Mortimer Caplin) and U.S. Gov't Accountability Office, GAO REPORT ON ALLEGATIONS OF IRS TAXPAYER ABUSE (May 24, 1999)).

[217] *See id.* at 64 ("One result of the IRS Reform Act was a sharp downturn in collection activity for several years. Audit rates, tax lien filings, levy notices served on third parties, and seizures all dropped dramatically starting around the 1998 fiscal year . . . ." (internal citations omitted)); *see also* Wolpe, *supra* note 193, at 890–92.

[218] I.R.C. § 7611(a)(2), (h)(7) (2018).

[219] *See* Herzig, *supra* note 31, at 22–26 (detailing executive misuses of the agency beginning in the 1950s).

[220] In May 2013, Acting IRS Commissioner Steven T. Miller resigned as the agency's head shortly after news broke of that the IRS may have been inappropriately targeting conservative groups applying for tax-exempt status. *See* Josh Hicks, *Steven Miller's Resignation Memo to IRS Employees*, WASH. POST (May 16, 2003), https://www.washingtonpost.com/news/federal-eye/wp/2013/05/16/steven-millers-resignation-memo-to-irs-employees/?utm_term=.8ba8f49a8c1f.

[221] *See* Wolpe, *supra* note 193, at 870.

applications.[222] The issue was addressed by national office officials who spoke without a complete understanding of, or control over, the facts. In sum, an argument that the old decentralized, regional authority structure might be the better avenue for holding employees of all levels accountable gained traction.[223]

As for the question of how the IRS-church relationship can exist in an appropriate and administrable fashion in the present environment, the organization of the agency matters less than the church specific rules. As such, the focus of reform should be on changing or eliminating CAPA, not on rethinking RRA 1998. For while the agency restructuring has its drawbacks, it does add expertise to the field of exempt organizations—like houses of worship—by designating groups of agency personnel to specifically serve this type of taxpayer.[224] In other words, CAPA was an overreaction in 1984 when the IRS was regionally organized, and it is unnecessary today, where the agency is designed, in part, to specifically serve exempt organizations.

2. Bring Houses of Worship into The Fold

Under the premise that CAPA was a political overreaction at its inception and is currently unworkable, there are two paths forward that would make this area more administrable for the IRS and less intrusive for churches. First, Congress could simply repeal CAPA and allow the IRS to use its existing exempt organization audit procedures (along with the accompanying safeguards) to govern its audits of churches.[225] Under this solution, courts would still be there to referee the relationship. It would, however, allow the IRS to treat houses of worship and their affiliates the same as it treats other organizations that claim tax-exemption. Given that this exam function no longer remains under agency generalists, but rather under national executives focused on serving exempt organizations, the process would entail the appropriate accountability to assuage any reasonable concerns of the church community.

Second, Congress could bring churches into the filing regime that currently applies to most other exempt organizations—religious and non-religious alike. At present, the treatment of churches by the tax code arguably creates more constitutional concerns than it solves. Churches do

222 *See* Mullis, *supra* note 184.

223 *See* Wolpe, *supra* note 193, at 893–97 (Professor Wolpe mounts an energetic and unapologetic argument that RRA 1998 was a "mammoth misstep" that should be abandoned, which "would mean a joyous homecoming for a greatly updated successor structure to the 1952–1998 style Classic District Office, which was the best architecture the IRS ever enjoyed").

224 *See* Lederman, *supra* note 90, at 980.

225 *See* Internal Revenue Manual §§ 4.75.4–.39 (Sept. 9, 2016).

not need to apply for exemption or provide an annual filing, and many do not.[226] Even with CAPA, though, the IRS is not off the hook from making inquiries into and investigating houses of worship, so the agency has an obligation to involve itself with these organizations as necessary. With organizations that file applications and annual returns, the IRS has basic information about the organizations. Whether this occurs on a version of the Form 1023 or a version of the Form 990, the agency does not have to feel around blindly. With churches that do not file, however, the agency's need to make an inquiry is exponentially more necessary as it must inquire about even the most basic of information—information that might be provided on one of the forms.[227] Many church tax inquiries may never have to begin if the IRS could reference a simple filing to obtain information. This is not to say that churches should be subject to a more extensive filing process than applies to similarly situated organizations, but only that Congress might find it appropriate to require some minimal amount of annual information from churches.[228]

Of course, the options of repealing CAPA and instituting a basic filing requirement do not have to be mutually exclusive. Such reforms, though, might be best served in baby steps. Under a plan where the regulatory landscape changes to eventually include repealing both CAPA and the filing exemption for churches, the logical order is to impose the filing requirement first. This would allow houses of worship to funnel into a relatively unobtrusive filing regime while still protecting them with extra safeguards in the event the IRS makes an inquiry. Once both the IRS and houses of worship gain a comfort level with this new status quo, CAPA should be able to fall away with little fanfare.

V. CONCLUSION

When Congress passed the Tax Cut and Jobs Act in late 2017, it had an opportunity to fix many of the quirks that had found their way into the IRC since its last major revision. While the Act succeeded in some respects, it failed in others. Most notably, it failed to change portions of the code that are, by design, only workable under the pre-RRA 1998 structure of the IRS. This was the case with CAPA and all its various references to now obsolete regional positions within the agency. The Service attempted

226 *See* I.R.C. § 6033(a)(3)(A) (2019).

227 *See supra* text accompanying notes 14–23.

228 The Form 99-N (e-Postcard) may be a logical place to start. It only requires eight pieces of information, which are readily available to the filing church and helpful in answering basic questions about the organization's structure and operations. *See* I.R.S., Information Needed to File e-Postcard, https://www.irs.gov/charities-non-profits/information-needed-to-file-e-postcard (last updated May 13, 2019).

to solve this issue and failed. Courts have waded into the waters as well, and the issue still persists. The IRS, which is increasingly under-resourced to carry out its duty of monitoring exempt organizations such as churches, is left with three options on how to proceed under the current statutory framework: First, it can maintain its stance that the DEO is the appropriate official to authorize a church tax inquiry. Second, it can agree with the courts that the higher ranked TE/GE Commissioner is adequate. Finally, it can kowtow to the practitioners who insist that no official ranked lower than a Deputy Commissioner will do. However, all these avenues have their drawbacks.

The simple solution would be for Congress to acknowledge the difficulty the Service faces and either amend CAPA or repeal it entirely. Placing houses of worship on par with similarly situated organizations would not unreasonably lessen the protections available to these organizations. Further, requiring these organizations to comply with some minimal filing obligation might save the Service from ever needing to make inquiries in the first place. Regardless of the path chosen, the only constant we can glean from history is that for any change to be successful, Congress must bypass the circus of theatrical hearings in favor of reasoned devotion to workable tax policy.