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Protecting the First Amendment from the IRS

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Abstract
The targeting of conservative citizen organizations by the Internal Revenue Service should concern every American. As one of the most powerful federal agencies, the IRS can devastate associations of like-minded individuals, such as nonprofit Tea Party groups, that form a fundamental part of America's political culture. Citizens use these groups not only to assert their views and opinions under the protection of the First Amendment, but also to advance the social welfare of the country. Government employees who willfully violate the tax code to retaliate against First Amendment–protected expression and activity should lose their jobs—at the very least—and federal law governing tax applications and returns should be strengthened by making IRS auditors personally liable for First Amendment–type violations and clarifying and simplifying the rules governing exemptions.

"Congress shall make no law...abridging the freedom of speech."

—U.S. CONST., Amend. I

"Political speech must prevail against laws that would suppress it, whether by design or inadvertence.... Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subject or viewpoints."

—*Citizens United v. Federal Election Commission*[1]

KEY POINTS

- The targeting by the IRS of conservative organizations is a violation of their First Amendment right to assert their views and opinions on important issues and risks chilling important speech.
- The broad and ill-defined rule on prohibited campaign activity by tax-exempt organizations gives the IRS too much leeway to misinterpret the law.
- Congress should amend federal law to allow personal liability for IRS employees who intentionally target taxpayers for political purposes.
- Congress should also impose a time limit for review of applications for tax-exempt status by the IRS and clarify that prohibited political campaign activity is only express advocacy on behalf of or in opposition to a candidate.
- Through its oversight function, Congress must determine how this happened, who initiated and approved it, and what changes are required to make sure that it does not happen again.

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The indefensible Internal Revenue Service targeting of Tea Party and other conservative citizen organizations is a scandal that should concern the entire nation. The IRS is one of the most powerful federal agencies in Washington. When operating well, it applies the tax code evenhandedly and helps to fund critical federal operations. When operating poorly, however, the agency can ruin the lives, businesses, expressive freedom, and prosperity of every American. It can also devastate associations of like-minded individuals, such as the nonprofit Tea Party groups, that form a fundamental part of America's political culture.

As Alexis de Tocqueville said, when Americans "want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association."[2] Such associations are critical to the First Amendment ecosystem: Citizens use these groups not only to assert their views and opinions under the protection of the First Amendment, but also to try to advance the social welfare of the country.

Government employees who willfully violate the tax code to retaliate against First Amendment–protected expression and activity should lose their jobs—at the very least. Further, federal law governing tax applications and returns should be strengthened to prevent IRS employees from infringing on the First Amendment rights of organizations to engage in political speech—for example, by making IRS auditors personally liable for First Amendment–type violations and clarifying and simplifying the rules governing exemptions.

IRS Rules and Regulations

The majority of Tea Party and other conservative organizations targeted by the IRS were filing for tax-exempt status under 26 U.S.C. § 501(c)(4), while a smaller number were filing under § 501(c)(3). Section 501(c)(3) is the federal provision governing organizations with religious, charitable, scientific, literary, or educational purposes, donations to which are generally deductible from individual contributors' federal income taxes. Such charitable organizations may not spend a "substantial part of their activities" trying to influence legislation and may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[3]

It is precisely because the contributions to these charities are deductible that they cannot engage in political activities. Indeed, organizations seeking such a tax exemption must submit IRS Form 1023, which explains the mission and exempt purpose of the organization and lists the programs and activities in which it intends to engage.

Section 501(c)(4) governs "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare."[4] Under IRS regulations, an organization fits within the definition of the "promotion of social welfare" if "it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."[5]

Donations to such organizations are *not* deductible as charitable contributions for federal income tax purposes.[6] The IRS has interpreted federal law to mean that § 501(c)(4) organizations can "engage in germane lobbying activities" on issues and can also engage in substantial political activities barred to § 501(c)(3) charitable organizations as long as those activities are not "the organization's primary activities."[7] It is because contributions are not tax

1. 130 S.Ct. 876 (2010).
2. Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence, vol. 2, part 2, chapter 5, pp. 513–14 (1969).
3. 26 U.S.C. § 501(c)(3).
4. 26 U.S.C. § 501(c)(4).
5. 26 CFR § 1.501(c)(4)-1(a)(2).
6. *Donations to Section 501(c)(4) Organizations*, Internal Revenue Service, http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Donations-to-Section-501%28c%29%284%29-Organizations (last updated Mar. 8, 2013).
7. John Francis Reilly, Carter C. Hull, and Barbara A. Braig Allen, *IRC 501(c)(4) Organizations, Exempt Organizations-Technical Instruction Program for FY 2003*, Internal Revenue Service, page I-25; *available at* http://www.irs.gov/pub/irs-tege/eotopici03.pdf. Carter Hull, one of the authors of this IRS guide, testified about the IRS targeting in July, telling Congress that he was told to forward Tea Party applications to the Office of the Chief Counsel of the IRS. *IRS Official Testifies That Political Appointee's Office Involved in Tea Party Screening*, Fox News (July 18, 2013), http://www.foxnews.com/politics/2013/07/18/irs-lawyer-testifies-that-political-appointee-office-involved-in-tea-party/.

deductible that "organizations exempt under IRC 501(c)(4) are generally allowed greater latitude than that allowed to organizations exempt under IRC 501(c)(3)."[8] Organizations seeking this tax exemption must submit IRS Form 1024, which similarly requires explaining the mission and purpose of the organization and listing its programs and activities.

The problem with the regulation governing § 501(c)(4) is that it creates no bright-line rule that is easy to interpret and understand. In fact, this statute is so broad and ill-defined that the IRS applies a "facts and circumstances" test that can vary greatly depending on the subjective views of the particular bureaucrats who are applying the test. Specifically, if "more than 50% of an organization's activities might support or oppose candidates under the vague 'facts and circumstances' test, then the group" does not qualify under § 501(c)(4).[9]

There is no IRS requirement that either type of organization must publicly reveal the identity of its donors—an important limitation intended to protect associational rights as explained in the seminal case on compelled disclosure, *NAACP v. Alabama*.[10] As the Supreme Court of the United States held in that case, the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[11] Furthermore, the Court affirmed that there is a "vital relationship between freedom to associate and privacy in one's associations"; compelled disclosure is "a restraint on freedom of association."[12]

According to Cleta Mitchell, an experienced and highly respected lawyer who represents organizations seeking tax-exempt status, prior to 2010 when the improper IRS targeting began, it "would typically [take the IRS] three months to one year [to process an application from] a 501(c)(3) organization and 3 to 6 months for a 501(c)(4)" organization."[13] In 2012, the IRS goal for processing such applications "was 121 days."[14]

"Inappropriate" Behavior by the IRS

As an Inspector General's report concluded, early in 2010, "the IRS began using inappropriate criteria to identify organizations applying for tax-exempt status to review for indications of significant political campaign intervention."[15] The criteria were based on the names and policy positions of the organizations "instead of indications of potential political" activity. A "Be On the Look Out" or BOLO listing was created that directed IRS employees to give special attention to any applications or organizations that:

- Had "Tea Party," "Patriots," or "9/12 Project" in their names;
- Listed as their issues government spending, government debt, or taxes;
- Were interested in educating the public to "make America a better place to live"; and
- Made statements criticizing how the country was being run.

According to the Inspector General (IG), this directive resulted in "substantive delays in processing certain applications" and "allowed unnecessary information requests to be issued" to such organizations.

In March 2010, just one month before the targeting began, the IRS approved in 90 days and with no questions asked the exemption application of Champaign Tea Party, an Illinois-based organization. But for the next 27 months, no Tea Party application was approved while "dozens of applications from similar liberal and progressive groups" were

8. Reilly, Hull, and Braig, page I-25.
9. Bradley A. Smith, *The IRS Attack on Political Speech*, Wall St. J., Aug. 8, 2013.
10. 357 U.S. 449 (1958).
11. *Id.*. at 460.
12. *Id.* at 462.
13. Cleta Mitchell, IRS Targeting of Conservative Groups: A History, Overview and Status Report 2 (2013).
14. Treasury Inspector General for Tax Administration, Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review 1 (2013).
15. *Id.* at. highlights.

approved.[16] Many of these organizations listed the same types of purpose as the Tea Party organizations: "citizen participation" or "voter education and registration."

The Treasury Department IG says that 296 conservative organizations were targeted. As of December 17, 2012, only 108 conservative organizations had been approved; 28 others withdrew their applications out of frustration. At least 160 cases were open for "more than three years and crossing two election cycles." It is also important to note that despite the IRS acknowledging its "mistakes" and promising to fix the problem, there are still organizations "awaiting approval after three years."[17]

The "unnecessary information requests" made to targeted organizations were voluminous, asking for huge amounts of information and documentation irrelevant to the exemption determination.[18] Such requests included demands for the names (and resumes) of donors, board members, and volunteers—information that has nothing to do with a determination of whether the organization improperly engages in political activity. In fact, since all of the information provided to the IRS during an application is made public, once an exemption is granted, providing that information would violate the basic privacy and associational rights of the organizations and their members, donors, and volunteers. The IRS even demanded copies of social media postings, as well as information and correspondence with conservative college interns, including "specific information about their internship work and where the interns were employed" after their internship, and the content of a religious group's prayers and the names of books read by another group.[19]

This improper activity at the IRS and the decision to target conservative organizations occurred after senior Administration officials, including President Barack Obama, criticized the Supreme Court's decision in *Citizens United*, claiming it would "open the floodgates" for "special interests" to "spend without limit in our elections."[20] As detailed in the interim report of the House Committee on Oversight and Government Reform, numerous Democratic Members of Congress sent letters to the IRS demanding that it investigate the tax status of exempt organizations, claiming (with no evidence) that such groups were abusing their tax status.[21]

As the Oversight Committee report summarizes, there was an "orchestrated" and "sustained public relations campaign seeking to delegitimize the lawful political activity of conservative tax-exempt organizations and to suppress these groups' right to assemble and speak."[22] This was "part of a long-term assault on First Amendment rights" the result of which is that "citizen groups must navigate a maze of government paperwork and apply to the IRS for a tax license to speak on politics."[23]

The House report concludes that "it is evident that all levels within the IRS were highly attentive to the political climate surrounding the tax-exempt applications in the wake of *Citizens United*" and were well aware of the political pressure "on the IRS to 'fix the problem' of 501(c)(4) groups engaged in political activity."[24] This conclusion comes despite the fact that such organizations are entitled to engage in unlimited issue advocacy, and even political activity, as long as campaign activity is not an organization's primary purpose.

16. Gregory Korte, *IRS Approved Liberal Groups While Tea Party in Limbo*, USA Today, May 15, 2013.
17. Stephen Diana and Seth McLaughlin, *IRS Spied on Tea Party After Granting Tax-Exempt Status*, Wash. Times, Sept. 18, 2013.
18. David Martosko, *Revealed: The 55 Questions the IRS Asked One Tea Party Group After More than Two Years of Waiting*, The Daily Mail, May 13, 2013.
19. Patrick Howley, *IRS Scandal Figure Lois Lerner Retires*, The Daily Caller, Sept. 23, 2013; Patrick Howley, *IRS Targeted Conservative College Interns*, The Daily Caller, May 20, 2013.
20. President Barack Obama, State of the Union Address (Jan. 27, 2010); *see also* Robert Gibbs, White House Press Secretary, Daily Briefing (Jan. 21, 2010).
21. H. Comm. on Oversight and Government Reform, Interim Update on the Committee's Investigation of the Internal Revenue Service's Inappropriate Treatment of Certain Tax-Exempt Applicants (2013), *available at* http://oversight.house.gov/wp-content/uploads/2013/09/2013-09-17-Interim-update-on-IRS-Investigation-of-tax-exempt-applicants1.pdf.
22. *Id. at* 3.
23. Smith, *supra* note 9.
24. H. Comm. on Oversight and Government Reform, *supra* note 21, at 6.

Some observers have claimed that Tea Party organizations applying for tax-exempt status as social welfare organizations were using a "tax advantage" to engage in political activity. This argument is erroneous, however, as the donations that these organizations receive are not tax-deductible; the groups were simply seeking an exemption from paying taxes, as does any nonprofit organization with regard to the contributions of its members and donors—contributions derived from incomes already taxed by the federal, state, and local governments. To claim that such organizations—groups that are not in business and not making a profit—should pay additional taxes is unreasonable and illogical.

Likewise, any assertion that political speech and education about issues in Washington does not constitute "promotion of social welfare" also rings hollow—particularly in light of the government's deep involvement in social welfare through countless government programs and regulations. As former FEC Chairman Brad Smith says, "What kind of democracy claims that political participation is not in the interest of 'social welfare?'"[25]

First Amendment Violations

There is no question that the actions of the IRS interfered with the First Amendment rights of groups of citizens who had associated together in the time-honored tradition of America's body politic. These conservative organizations were composed of concerned citizens trying, as the IRS noted in its targeting criteria, to "make America a better place to live" by educating citizens about the importance of constitutional principles and the dangers posed by "government spending, government debt or taxes." More than two-dozen organizations withdrew their tax-exempt applications out of frustration—applications often essential to raising the funds necessary for such organizations to exist—thereby stilling their voices and their political speech about the important issues facing this nation.

It is exactly this type of behavior that the Supreme Court disapproved in the *Citizens United* decision. Similar to the IRS's recent conduct, in *Citizens United*, the Federal Election Commission had "created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests." [26] Just as in that case, the IRS process for seeking tax-exempt status and its invasive review created "an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable."[27]

For example, one Tea Party organization, True the Vote, was forced to sue the IRS after its application for tax-exempt status under § 501(c)(3) remained pending for more than three years and the organization was subjected to intrusive questioning that was irrelevant to the consideration of its tax-exempt status. True the Vote is dedicated entirely to improving the security and integrity of the election process and has never engaged in any partisan campaign activity of any kind. Yet, on September 20, 2013, the Justice Department filed a motion to dismiss True the Vote's lawsuit, claiming the case was mooted because the IRS had decided to grant the exemption, although there was no explanation of the reason for the interminable delay.[28]

What relief do these groups have when the IRS targets them politically? On the one hand, taxpayers do not have a private right of action (a *Bivens* action) against the IRS for violations of First Amendment rights.[29] On the other hand, First Amendment principles are enshrined to a limited extent in the tax code itself. For example, 26 U.S.C. § 7605(b) prohibits "unnecessary examination or investigations," and 26 U.S.C. § 7433(2) is the vehicle for private lawsuits alleging such misconduct. The plaintiff can obtain only "actual, direct economic damages...as a proximate result of the reckless or intentional or negligent actions...and...the costs of the action." Consequently, while First Amendment punitive damages and equitable relief are not available, attorneys' fees and

25. Smith, *supra* note 9.

26. 130 S.Ct. at 896.

27. *Id*. at 876.

28. True the Vote, Inc. v U.S., Civil Action No. 1:13-cv-00734-RBW (D.C. D.C.).

29. *See, e.g.*, Hudson Valley Black Press v. I.R.S., 408 F.3d 106 (2nd Cir. 2005) (holding that a taxpayer has no direct First Amendment *Bivens* relief against an alleged retaliatory audit following an op-ed critical of the IRS, but that the taxpayer could sue the IRS for violations of the tax code).

damages from the U.S. government are available to aggrieved parties for certain types of misbehavior.

What Needs to Be Done

In the True the Vote lawsuit, the Justice Department, in essence, argues that True the Vote has no claim for the long delay in reviewing its tax-exempt application or for the unwarranted requests and inspection of superfluous and intrusive information and documentation. DOJ claims that while 26 U.S.C. § 6103 prohibits the disclosure of confidential tax return information by the IRS, it does not cover the IRS's asking for information or documentation for its review.

To the extent that it opened unnecessary, intrusive investigations into groups based on the content of their political speech, the IRS has harmed First Amendment values and possibly violated the tax code itself.

Whatever kind of legally cognizable claim is available, it is clear that there are a number of problems that could be resolved by Congress with new legislation.

First, section 6103 should be amended to prohibit IRS officials from demanding information and documentation that is not directly relevant to their review of applications.

Second, a time limit could be placed on IRS review of tax-exempt applications; exemptions would be granted automatically unless the IRS completed its review within a specified period of time. This time period could be extended if the IRS requested further relevant information, but there should be an absolute deadline so that determinations could not be delayed for years either intentionally or through errors made by IRS employees.

Such a time limit is not unprecedented; the U.S. Department of Justice operated under a 60-day time limit when it reviewed voting changes submitted by jurisdictions for preclearance under Section 5 of the Voting Rights Act.[30] Failure of the Attorney General to respond within the 60-day period constituted preclearance of the submitted changes.[31]

Third, Congress can allow for personal liability of IRS workers who open audits, leak information, or investigate groups for illegitimate reasons.

Finally, the vague and extremely broad nature of the definition of campaign activity for exempt organizations contained within 26 U.S.C. § 501—"participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"—gives the IRS far too much leeway to create mischief and interfere with protected First Amendment activity by applying an ambiguous "facts and circumstances" test. The e-mails and other documents disclosed to date in the investigation of the IRS by the House Oversight and Government Reform Committee demonstrate that IRS employees often mistakenly believed that criticism of elected officials like President Obama or their policies and positions on important issues constituted prohibited campaign activity instead of what it was—protected speech—even though the IRS considered it "anti-Obama rhetoric" and "emotional" and inflammatory "propaganda."[32]

Therefore, the statutory language should be amended so that "political" or "campaign" activity consists only of "express" advocacy on behalf of or in opposition to particular candidates—that is, advocacy that directly and explicitly asks individuals to vote for or against candidates. Such a reform would draw a bright line between real campaign activity and speech about issues, politics, government, and elected officials. Furthermore, such a definition would also be easier to administer since there is a long history of cases and regulatory actions by the Federal Election Commission on express advocacy.

Conclusion

The foregoing reforms would protect the free speech and associational rights of organizations and their members, whether conservative or liberal, while at the same time deterring improper conduct by the IRS. The rights in the First Amendment are fundamental to the preservation of this nation's republican form of government, and Congress should act to ensure that they are preserved.

Specifically, Congress, through its oversight responsibility, should continue investigating

30. 28 CFR § 51.9.

31. *Id.* § 51.42.

32. Greg Korte, *IRS List Reveals Concerns over Tea Party "Propaganda,"* USA Today, Sept. 18, 2013.

whether the IRS simply made bureaucratic errors in targeting conservative organizations—as some of its employees and the Administration have claimed—or whether these events were part of a deliberate program initiated in 2010 to target conservative organizations that might have interfered with President Obama's reelection effort or the achievement of his legislative goals in Congress. It is up to Congress to determine how this happened, who initiated and approved it, and what legislative or regulatory changes are required to make sure that it does not happen again.

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