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The IRS Attack on Political Speech

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The Internal Revenue Service's scandalous targeting of tea party and conservative groups refuses to die, as one by one the administration's explanations prove untrue.

We were told that the White House, like the rest of the country, learned about the program on May 10 through a planted question asked of then IRS official Lois Lerner at an American Bar Association conference. Turns out the White House knew earlier. We were told the targeting was the work of a few rogue IRS employees in Cincinnati. Then those employees insisted that they were being managed from Washington.

We were told that no political appointees were involved, but now we know the scandal goes at least to the office of Obama appointee and IRS Chief Counsel William Wilkins. We were told that liberal groups were targeted, too. But then the IRS's inspector general, whose report exposed the harassment, clarified that only conservative groups were targeted.

Now the administration line is that the scandal is nonetheless "phony." That assertion is part of a Democratic counteroffensive contending that the tea party and conservative groups applying for "charitable" tax status never should have sought such IRS approval.

Rep. Xavier Becerra (D., Calif.), chairman of the House Democratic Caucus, argued on "Meet the Press" on May 19 that conservative groups were, "under the guise of a charity, [using] undisclosed millions of dollars to do political campaigns." At a May hearing, Sen. Bill Nelson (D., Fla.) claimed that the groups were supposed to spend their money on "charitable activities," and demanded of the IRS, "How could you all in the IRS allow the tax breaks funded basically by the taxpayer [to be spent] on these political campaign expenditures?"

Liberal columnist Jeffrey Toobin has also taken up the theme that the groups were seeking improper tax advantages. Writing in the May 14 issue of the New Yorker, Mr. Toobin argued that if approved by the IRS, the tea party groups would not pay taxes on contributions received. "In return for the tax advantage," he wrote, these groups

"must refrain from traditional partisan political activity, like endorsing candidates."

This attack is wrong on the law, and cynical as politics. As these IRS apologists well know, liberal groups, such as Moveon.org, have long had the same tax status as that requested by the tea party and conservative groups—and that status is not of a "charity."

Charities fall under Section 501(c)(3) of the tax code, and they include the Red Cross, Boy Scouts, churches, private colleges and even overtly agenda-oriented organizations such as the NAACP and the Sierra Club Foundation. Contributions are tax deductible to the donor, and for that reason the organizations are prohibited from engaging in political activities.

Yet conservative groups targeted by the IRS did not seek tax status as charities. They were applying for designation as nonprofits operating under Section 501(c)(4) of the tax code, for "the promotion of social welfare." Contributions to 501(c)(4) organizations are not tax deductible, so there is no "tax break" for their donors. Nor do the groups themselves get a "tax advantage." Mr. Toobin argues that these groups should be reclassified under Section 527 of the tax code. More on that below, but 527 organizations also pay nothing in taxes. So there is no "tax advantage" to operating as a 501(c)(4).

So why was the IRS involved at all, and why does it matter? The answer is that the IRS scandal is part of a long-term assault on First Amendment rights. Thanks to "campaign finance reform," citizen groups must navigate a maze of government paperwork and apply to the IRS for a tax license to speak on politics. People literally need a lawyer to figure it out, and not just any lawyer, but one from the highly compensated and mostly Washington, D.C.-based bar practicing "political law."

The standard used by the IRS to decide who qualifies for 501(c)(4) tax status is an arbitrary "facts and circumstances" test that few people understand. If more than 50% of an organization's activities might support or oppose candidates under the vague "facts and circumstances" test, then the group is placed in the same tax status—Section 527—as candidate committees, political parties and political-action committees.

Social-welfare groups under Section 501(c)(4) must disclose the campaign activity they undertake, but they do not have to publicly disclose information about their donors and members to either the IRS or the Federal Election Commission. This is the result of 70 years of Supreme Court decisions protecting the privacy right of Americans to associate in groups without disclosing their affiliations to the government.

Democrats want the IRS to require the conservative groups to register as political

committees under Section 527. This would increase their regulatory burden by requiring them to file quarterly or monthly reports detailing their receipts and expenditures. It would also force them to reveal personal information about their supporters and members, enabling government retaliation and laying the groundwork for unofficial harassment of those supporters. Such harassment has become a routine tactic of the political left, especially since it was successfully used to target financial supporters of California's Proposition 8—which banned same-sex marriage in the state—to get them fired from jobs, for instance.

IRS apologists argue that Section 501(c)(4) requires organizations to operate "exclusively for the promotion of social welfare," but Section 501(c)(4) has never been interpreted to prohibit all political activity.

This explains why left-wing groups such as MoveOn.org, People for the American Way, Naral Pro-Choice America, and the Brady Campaign to Prevent Gun Violence have operated for years under 501(c)(4) status. They spend millions to support liberal candidates and agendas, with nary a protest from Democrats now raging against the tea parties and other conservatives. By delaying approval for conservative groups, the IRS left them in legal limbo, with uncertain liabilities, obligations and ability to act—exactly what the Obama administration wanted.

But this raises another question: Why aren't political education and discussion a form of promoting "social welfare"? What kind of democracy claims that political participation is not in the interest of "social welfare?"

Rep. Becerra argues that 501(c)(4) status should be reserved for "something good, not groups that are in business to do politics." That's a remarkable statement from a man who has spent the past 22 years in elective office. Yet this is also the logic of the campaign finance "reform" movement that has wielded so much political influence over the last 40 years. Its drumbeat is that participating in public affairs is bad.

Regardless of how high the scandal goes, we should question a culture and philosophy that made so many career IRS officials feel comfortable scrutinizing groups merely because they had "tea party" or "patriot" in their names.

Americans should participate in the political life of the nation. That is what the First Amendment was intended to protect. Shame on those who discourage self-government.

Mr. Smith, a former chairman of the Federal Election Commission, is now chairman of the Center for Competitive Politics.