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Censorship Through The Tax Code: The Obama Administration Unveils New Rules That Discourage Political Activity

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The Obama administration has launched the first attack in a carefully planned war on conservative and libertarian political speech. In November, the IRS proposed "clarifying" the rules that govern the political activity of 501(c)(4) "social welfare" groups, many of which have been branded by the left as nefarious "dark money" cabals. By clarifying the rules, the IRS hopes to provide guidance on how much, and what kind, of political activity (c)(4)s can engage in. In reality, the IRS is using the tax code to discourage conservative political speech.

There are of course both liberal and conservative (c)(4)s, but, since 2010, conservative (c)(4)s and other "outside money" groups have greatly outspent liberal ones. Coming from a president who has publicly chided conservative (c)(4)s for not revealing their donors, it is not surprising that he would turn to the ultimate bully in the bully pulpit: the IRS.

Let's take a step back. In order to have (c)(4) status, an organization must be organized "primarily" around social welfare and community activity. For decades, this language has been interpreted by lawyers to mean that a (c)(4) can't spend more than 50 percent of its funds on political activity, and the IRS largely went along with that rule of thumb. Of course, the next question is: "what is 'political activity'?" And it is here these clarifying rules become a thinly disguised political power game.

Under the proposed rules, "candidate-related political activity" now includes nearly everything that most (c)(4)s do, including voter registration, voter guides, grassroots lobbying, events where candidates appear, candidate debates, and issue advocacy. This means that many (c)(4)s would have to count nearly all their activities as political spending, even though the rules remain unclear on what percentage of spending can be on "candidate-related political activity." Not coincidentally, the new rules don't apply to labor unions, which are not (c)(4)s and therefore can still do all those things without running afoul of the IRS.

Want to create a (c)(4) to organize a grassroots campaign to encourage voters to email their member of Congress to oppose the Farm Bill? That is now a "candidate-related political activity"

and must be included as part of your organization's political spending. Want to hold a voter registration drive that doesn't mention any candidates? That is also considered "candidate-related political activity" under the proposed rules. Even commenting on nominees, such as a Supreme Court justice, can be "candidate-related political activity" even though there is no candidate mentioned.

Some may ask why politically active social welfare groups are getting special tax status from the IRS in the first place. They're not. In fact, contributions to (c)(4)s aren't tax deductible, and most (c)(4)s are organized around social welfare issues that are inexorably intertwined with politics, such as Planned Parenthood, the Sierra Club, and the Brady Campaign to Prevent Gun Violence.

A better question to ask is: what evil is the IRS trying to eliminate? When did pushing for ideas and critiquing public figures' stances become something bad? When did we start caring more about who is saying something rather than what is being said?

Anonymous political speech was essential to American history. Would Thomas Paine's *Common Sense*, originally published anonymously, now be called "candidate-related political activity" funded by "dark money?" Would the anonymous *Federalist Papers* get administrative review from the IRS and an exposé in *Mother Jones* on the "secret money behind the Constitution?" The country that pioneered the strongest protections for free speech in history is becoming obsessed with the idea that there are people out there trying to illegitimately "influence" politics.

King George III would have of course been happy to shut up Thomas Paine with an obscure section of the tax code. Similarly, the Anti-Federalists might have jumped at the chance to expose the authors behind the Federalist Papers and to report their publishing costs as "candidate-related political activity." As we've recently seen, the IRS is often used as a cudgel against political opponents, and this time it is no different. The proposed rule has all the indications of being a planned effort by the administration to squelch opposition speech.

After all, nothing in Washington, D.C. this important to an election happens by accident.

The rule just "happened" to be proposed on November 29th, the Friday after Thanksgiving. Not only did this obscure the rule from the news cycle, it put one-third of the required 90-day notice-and-comment period in December, a month where much of D.C. is on vacation or otherwise not involved. Furthermore, unlike nearly every other rule that goes into effect 30 days after the final rule is published, the (c)(4) rules go into effect the day they are published.

If the rule is published in the proposed form, then there are many (c)(4)s from both the left and the right that will simply have to go dark because nearly all of their activities will be considered "political." They can reorganize as a 527 group, but then they will have to disclose donors, which was the administration's goal from the outset. The left then can employ their favorite fallacious argument: ad hominem attacks on donors rather than ideas.

In all likelihood, this rule will be published without heeding the suggestions of any comments from interested groups. After that, the court cases will begin to pile up, and some claims will

likely be successful. Legal victories, however, will not come soon enough to forestall the effects on the 2014 and 2016 elections. How convenient…