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LEGISLATIVE TESTIMONY

IRS ABUSES: ENSURING THAT TARGETING NEVER HAPPENS AGAIN

Testimony before the House of Representatives, Committee on Oversight and Government Reform

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Introduction

My name is Hans A. von Spakovsky.[1] I am a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

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I am a former in-house counsel with extensive legal experience as a corporate lawyer. I also spent four years at the Justice Department as a career civil service lawyer, including three years as Counsel to the Assistant Attorney General for the Civil Rights Division, where I was responsible for coordinating enforcement of federal laws protecting voting rights.

After leaving the Justice Department, I spent two years as a commissioner at the Federal Election Commission, which is responsible for enforcing the Federal Election Campaign Act that governs the financing of congressional and presidential election campaigns. Being a commissioner is a particularly sensitive post because the federal laws governing campaigns regulate an area protected by the First Amendment: political speech and political activity. While commissioners have a sworn duty to enforce the laws passed by Congress, they also have an obligation to protect the First Amendment rights of candidates, elected officials, and the public when they are carrying out their duties.

Summary of IRS Abuse

On May 10, 2013, former IRS official Lois Lerner revealed that the IRS had been targeting Tea Party and other conservative organizations in a presentation at a conference in Washington, D.C. sponsored by the American Bar Association.[2] This was apparently made public because of the pending release of a May 14 report by the Inspector General for the Department of the Treasury detailing the "inappropriate criteria" used by the IRS to identify for review the applications of conservative organizations for tax-exempt status under Section 501(c)(4) of the Internal Revenue Code.[3] These reviews "resulted in substantial delays in processing" of their applications and the organizations were also subjected to "unnecessary information requests:"[4] voluminous requests for information and documentation irrelevant to the exemption determination.

When Attorney General Eric Holder announced on May 14, 2013, that the Justice Department was opening an investigation, he called the IRS's actions "outrageous and unacceptable."[5] I agree – the actions of the IRS were "outrageous and unacceptable." They represent one of the most dangerous actions that can be taken by a government agency: abusing its great power and authority under federal law to target disfavored individuals and organizations. Here, the disfavored entities were seen by Lois Lerner and her colleagues at the IRS – rightly or wrongly – as opponents of the public policies of President Obama and other members of his political party.

Unfortunately, the individuals at the IRS who planned, implemented, coordinated, and engaged in this behavior were urged to do so in public statements and speeches by the President, who publicly accused conservative §501(c)(4) organizations of "posing as not-for-profit, social welfare and trade groups" and called them "a problem for democracy" and a "threat to our democracy."[6] He severely criticized many organizations for their advocacy after the Supreme

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[2] "IRS apologizes for inappropriately targeting conservative political groups in 2012 election," ASSOCIATED PRESS (May 10, 2013).
[3] "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053 (May 14, 2013).
[4] *Highlights*, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053 (May 14, 2013).
[5] Lucy Madison, "Justice Dept. to investigate IRS targeting," CBS NEWS (May 14, 2013).
[6] Kimberley A. Strassel, *An IRS Political Timeline*, WALL ST. J. (June 6, 2013).

Court's decision in *Citizens United v. FEC*,[7] as did members of Congress who sent letter after letter to the IRS demanding investigations of various conservative nonprofit organizations.[8]

And why? Because President Obama and the members did not like the First Amendment-protected advocacy engaged in by these organizations. The voluminous information requests to applicants by the IRS, the multi-tiered review of their applications, and the long delays in granting exemptions were apparently intended to undermine the *Citizens United* decision and to burden the political speech and political activity of conservative organizations.

That this was a partisan action by the IRS is clear. Both the report by the Inspector General and the extensive investigation by this Committee have shown that only conservative organizations were targeted.

What is worse is that the IRS seems to have learned nothing from its effort to regulate political speech – which is outside its statutory mandate – instead of sticking to its mission, which is collecting tax revenue. In fact, the IRS has proposed new regulations governing §501(c)(4) organizations that would in essence implement the "inappropriate criteria" that the IRS used in its unlawful targeting scheme.[9]

These proposed new rules would undermine and interfere with the system of campaign finance laws and regulations established by Congress and the Federal Election Commission (FEC) and confuse regulated entities. It would embroil the IRS in an area in which it lacks both professional expertise and the structure and safeguards necessary to assure the American people that their government will not discriminate against them on the basis of their political beliefs and activities.

Unfortunately, the IRS has a history of similar abuse, starting with President Franklin Roosevelt, who used the power of the agency "against a host of political rivals and business opponents."[10] Revenue collection in the U.S. relies on voluntary compliance. This type of partisan behavior by the IRS seriously threatens the credibility of the agency as a nonpartisan, politically disinterested agency – a reputation *essential* to its mission.

Recommended Solutions

The misbehavior of the IRS raises the question of what regulatory or legislative changes can be made to prevent this type of abusive action by the agency from reoccurring. There are a number

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[7] 558 U.S. 310 (2010).

[8] For a listing and timeline outlining these criticisms and demand for IRS action, see the Appendix of the Letter of Eight Former Federal Election Commissioners to the IRS (Feb. 27, 2014), available at http://www.campaignfreedom.org/wp-content/uploads/2013/12/Comment-on-IRS-NPRM-by-former-FEC-Commissioners.pdf.

[9] "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," 78 FED. REG. 71535 (Nov. 29, 2013).

[10] *See* Gail Russell Chaddock, "Playing the IRS card: Six presidents who used the IRS to bash political foes," THE CHRISTIAN SCIENCE MONITOR (May 17, 2013); Elizabeth MacDonald, "The Kennedys and the IRS," WALL ST.J. (Jan. 29, 1997).

of changes that could be made in both the organizational structure of the IRS as well as the revenue laws governing tax-exempt organizations.

- **Make the IRS an independent agency run by a multi-member commission.**

When compared to other federal agencies like the FEC, the IRS lacks the type of safeguards that Congress put in place to assure citizens that tax regulation and enforcement would not be used to stifle political opposition to the party in power. Specifically, the FEC is an independent agency and, unlike the Treasury Department and the IRS, is not directly accountable to the party controlling the White House. Additionally, the FEC has a bipartisan makeup of six commissioners, three from each of the two major political parties, nominated by the President and confirmed by the Senate. Since it takes four votes for the FEC to carry out any action, this reassures the public that the agency's policies, regulations, and enforcement decisions are based on the legal and factual merits rather than on partisan or ideological considerations. The IRS lacks both of these important institutional safeguards.

The dangers that this creates for IRS involvement in the political process should be obvious in light of the Inspector General's report of May 2013 and the ensuing congressional investigations. Whether or not IRS personnel acted contrary to laws or ethical norms or targeted particular ideologies, it should be apparent that the IRS's status within the Treasury Department, as part of the Obama Administration and as an agency controlled by a single political party, will leave any political involvement subject to claims that the agency is being misused for partisan purposes.

- **Place a time limit on the IRS's review of applications or eliminate the IRS review requirement entirely.**

The IRS's use of "inappropriate criteria" to target the tax-exempt applications of conservative §501(c)(4) organizations led to unjustified and inexcusable years-long delays that hindered or entirely stopped the operations of these organizations, particularly their ability to raise money from donors. Thus, it is obvious that a time limit should be placed on IRS review of tax-exempt applications; exemptions should be granted *automatically* unless the IRS completes its review within a specified period of time. This time period could be extended *once* if the IRS requested further *relevant* information, but there should be an absolute deadline so that determinations cannot 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.[11] Failure of the Attorney General to respond within the 60-day period constituted automatic preclearance of the submitted changes.[12]

Alternatively, §501(c)(4) organizations could be automatically granted tax-exempt status as soon as they submit a basic application to the IRS. This would free up IRS employees from having to conduct a review of the organization and prevent the type of partisan manipulation that occurred

[11] 28 CFR § 51.9.

[12] *Id.* § 51.42.

under Lois Lerner. If a problem develops in the future or the IRS later obtains evidence that an organization is abusing its tax-exempt status, it could at that time conduct a detailed audit just as it does for other individual taxpayers and businesses when problems arise. There is no logical or legal reason why the IRS should conduct a review of these applications for newly formed organizations that are just starting their activities.

- **The IRS should only be allowed to take into account political speech or activity that consists of express advocacy.**

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."[13]

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 the election of 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.

- **The IRS should be forced to define "the promotion of social welfare" to include and allow political speech and political activity.**

To qualify for tax-exempt status under 26 U.S.C. §501(c)(4), a nonprofit organization must be "operated exclusively for the promotion of social welfare." The IRS's regulations have long stated that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[14] The regulations provide, however, that §501(c)(4) organizations may participate in political campaigns as long as such participation does not constitute the "primary purpose" of the organization.[15]

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[13]Greg Korte, *IRS List Reveals Concerns over Tea Party "Propaganda,"* USA TODAY, Sept. 18, 2013.

[14]26 CFR §1.501(c)(4)-1(a)(2)(ii).

[15]*See* IRS Revenue Ruling 81-95, 1981 WL 166125 (1981) ("Since the organization's primary activities promote social welfare, its lawful participation or intervention in political campaigns on behalf of or in opposition to candidates for public office will not adversely affect its exempt status under section 501(c)(4) of the Code. Further

In contrast, §501(c)(3) of the Internal Revenue Code completely prohibits charitable organizations from participating or intervening in political campaigns on behalf of or in opposition to candidates for public office. *No such prohibition exists in §501(c)(4) of the Code.*

Instead, the IRS has imposed such a limitation by its misguided interpretation of "social welfare," which Congress did not define when it enacted §501(c)(4). However, contrary to the IRS's misinterpretation, in a democracy, political involvement and participation are certainly within the definitions of "social welfare." This is particularly so when Congress, in the statutory section immediately preceding, expressly prohibited other types of organizations from engaging in political activity.[16]

Existing IRS regulations defining "social welfare" for the purposes of §501(c)(4) begin and end with these provisions: "An organization is operated exclusively for 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" and "[a]n organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements."[17]

Promoting the common good and general welfare of the people for the purpose of bringing about civic betterment and social improvement must include advocacy in the election process. This is particularly true given the broad and extensive scope of modern government. In today's America, promoting "civic betterments and social improvements" is almost impossible without interacting with and attempting to influence government officials and legislators, as well as promoting the election of candidates with the principles and positions on issues that particular organizations believe are important to achieving their goals for promoting "social welfare."

By manipulating the definition of "social welfare" to exclude political speech and political activity such as voter registration efforts, voter education, meet-the-candidates forums and debates, get-out-the-vote drives and other such activities, the IRS is trying to impose political restrictions as a condition of receiving tax-exempt status as a §501(c)(4) organization *in direct conflict with* the decision by Congress in enacting §501(c)(4) *not* to impose political restrictions as such a condition.

Section §501(c)(4) organizations should be allowed to fully participate in political speech and political activity that is necessary to promote their particular issues and mission. At a bare minimum, the IRS should only include express advocacy and not "indirect participation" in election activities in its tallying of the amount of candidate-related political activity an advocacy organization engages in.

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this organization will be subject to the tax imposed by section 527 on any of its expenditures for political activities that come within the meaning of section 527(e)(2).").

[16]Indeed, if §501(c)(4) prohibited all political activities, as some have argued, *see, e.g.*, Citizens for Responsibility and Ethics in Washington, *Gill v. Department of Treasury Fact Sheet,* May 17, 2013, available at http://www.citizensforethics.org/page/-/PDFs/Legal/CREW%20vs.%20IRS/5-17-13_CREW_IRS_Lawsuit_Fact_Sheet.pdf, many organizations would become "orphans" under the tax code. They would no longer qualify under §501(c)(4), nor would they qualify as "political organizations" under 26 U.S.C. §527, because they would not be "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures" as required by §527. The only other option would be to treat such organizations as the Sierra Club, the Planned Parenthood Action Fund, and the League of Women Voters as for-profit businesses, a result clearly not contemplated by Congress.

[17]26 CFR §1.501(c)(4)-1(a)(2)(i).

It is important to keep in mind that this definition of the allowed activities of a §501(c)(4) is *not* a tax-revenue issue since they are not charitable organizations – donations are not tax-deductible. Even organizations that expressly spend 100 percent of their time on political campaign activity – Section 527 organizations – are still exempt from taxation except under certain limited circumstances. The IRS should get itself out of the business of judging what is and what is not acceptable political speech and political activity.

- **IRS employees should be held personally liable for breaching the confidentiality of taxpayers.**

Under 26 U.S.C. §6103, the IRS as an agency is liable for the disclosure of confidential tax return information filed by taxpayers. But there is no personal liability imposed on the IRS employee for such an egregious violation of the public trust, which limits the deterrent value of this statute given the merit system civil service rules that make it almost impossible to fire a career employee. Neither is personal liability imposed for an IRS employee opening up an audit or investigating groups for illegitimate, nontax-related reasons. The IRS has also cynically misused the confidential requirements of this statute as an excuse to avoid identifying IRS employees who have unlawfully disclosed such information to complaining taxpayers. This happened most prominently with the National Organization for Marriage, which complained to the IRS about its confidential Schedule B donor form being improperly disclosed by someone at the IRS. After identifying the responsible employee, the IRS refused to reveal that individual's name to NOM, citing the prohibitions in Sec. 6103.

It should be made clear that Section 6103 does not prevent the IRS from providing the name of an IRS employee who has violated the nondisclosure requirements to both the complaining taxpayer and congressional investigators. This would facilitate implementation of a new statutory provision holding IRS employees personally liable for unlawfully disclosing taxpayer information or opening an audit or investigating a taxpayer for illegitimate, nontax-related reasons – particularly actions based on viewpoint discrimination, i.e., taxpayers being targeted because of their political philosophy, ideology or the exercise of their First Amendment rights.

- **The IRS should be prohibited from using campaign finance reports or public disclosure of a taxpayer's political donations as a basis for commencing an IRS audit or investigation of the taxpayer**

There is evidence that the IRS and particularly Lois Lerner exchanged information with the FEC on a particular organization that had applied for tax exempt status.[18] The disclosure rules that govern federal campaigns should not be abused by the IRS to target taxpayers based on their political donations. This represents a partisan misuse of such disclosure information. The IRS should be barred from using donor and other information filed with the FEC as a basis for targeting a taxpayer for investigation or an audit.

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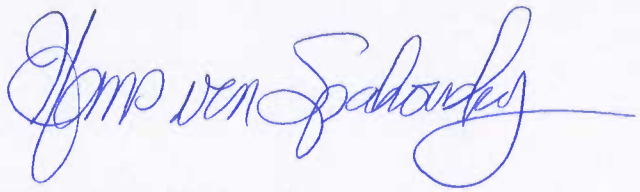
[18] Eliana Johnson, "E-mails Suggest Collusion Between FEC, IRS to Target Conservative Groups," NATIONAL REVIEW ONLINE (July 31, 2013), at http://www.nationalreview.com/corner/354801/e-mails-suggest-collusion-between-fec-irs-target-conservative-groups-eliana-johnson

This Committee's investigation into the IRS scandal is extremely important and it should continue to attempt to get more information about what happened. It is also vital that Congress, based on the Committee's findings, makes the legislative and other changes necessary to make sure this does not happen again. Otherwise, the IRS and federal bureaucrats will believe that they can use the enormous power of our federal tax laws to target the political opposition of an administration without any fear of any consequences.

Respectfully submitted,



Hans A. von Spakovsky

Committee on Oversight and Government Reform
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Name: Hans A. von Spakovsky

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2011. Include the source and amount of each grant or contract.

NONE

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

Although I am a Senior Legal Fellow at the Heritage Foundation, I am testifying independently about my own research. My opinions do not necessarily reflect the opinions of the Heritage Foundation.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2010, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

NONE

I certify that the above information is true and correct.

Signature: Hans A. von Spakovsky Date: July 28, 2014

Heritage Expert

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Hans von Spakovsky is an authority on a wide range of issues – including civil rights, civil justice, the First Amendment, immigration, the rule of law and government reform -- as a senior legal fellow in The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies.

As manager of the think tank's Election Law Reform Initiative, von Spakovsky also studies and writes about campaign finance restrictions, voter fraud and voter ID, enforcement of federal voting rights laws, administration of elections and voting equipment standards.

Heritage's election reform project examines not only how to protect the integrity of campaigns and elections but to achieve greater fairness and security. "In an era of razor-thin election margins, these issues are vital to the preservation of our republican form of government and the rule of law," von Spakovsky says.

Previously, as manager of the think tank's Civil Justice Reform Initiative, von Spakovsky studied how plaintiffs' attorneys and activists attempt to manipulate the courts for their own ends -- at the expense of the public.

He is the co-author with John Fund of the book "Who's Counting?: How Fraudsters and Bureaucrats Put Your Vote at Risk" (Encounter Books, 2012) and "Obama's Enforcer: Eric Holder's Justice Department" (HarperCollins/Broadside June 2014).

Before joining Heritage in 2008, von Spakovsky served two years as a member of the Federal Election Commission, the authority charged with enforcing campaign finance laws for congressional and presidential elections, including public funding.

Previously, von Spakovsky worked at the Justice Department as counsel to the assistant attorney general for civil rights, providing expertise in enforcing the Voting Rights Act and the Help America Vote Act of 2002.

A former litigator, in-house counsel and senior corporate officer in the insurance industry, von Spakovsky worked on tort reform and civil justice issues there for more than a decade.

He has served on the Board of Advisors of the U.S. Election Assistance Commission and on the Fulton County (Ga.) Board of Registrations and Elections. He is a former vice chairman of the Fairfax County (Va.) Electoral Board and a former member of the Virginia Advisory Board to the U.S. Commission on Civil Rights. He currently serves on the Policy Board of the American Civil Rights Union.

His analysis and commentary have appeared in The Wall Street Journal, The Washington Times, Politico and Human Events, as well as such outlets as National Review Online and Townhall. His series for PJ Media, “Every Single One,” was nominated for a Pulitzer Prize. He appears regularly on Fox News Channel and on other national and regional TV and radio news outlets.

He has testified before state and congressional committees and made presentations to, among other organizations, the National Association of Secretaries of State, the Federalist Society, the National Conference of State Legislatures and the American Legislative Exchange Council. He also has taught as an adjunct professor at the George Mason University School of Law.

A 1984 graduate of Vanderbilt University School of Law, von Spakovsky received a bachelor's degree in 1981 from the Massachusetts Institute of Technology. He currently resides in Vienna, Va.