WWJD about the IRS?

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On the question of whether to submit to secular taxation, Jesus famously advised the Jews to "render to Caesar the things that are Caesar's, and unto God the things that are God's." In response to the ongoing Internal Revenue Service scandal, Congress should take a page out of Mark 12:17 and render to the IRS only the issues that are within the agency's expertise. Concomitantly, regulation of politics should be vested solely in the agency that is best structured for the role: the Federal Election Commission.

In its report of the IRS's targeting of conservative groups seeking tax-exempt status, the Treasury Inspector General for Tax Administration notes that IRS examiners "lacked knowledge of what [political] activities are allowed by … 501(c)(3) and … 501(c)(4) tax-exempt organizations." They are not alone. Political and tax law experts grapple with this problem every day.

The IRS uses a free-ranging "facts and circumstances" test for determining impermissible "political intervention" by nonprofits. The standard is so vague that the IRS has all but given up on providing clarification. In its current "Election Year Issues" publication, the agency lists four factors it considers, and then cites to a 1991 conference presentation by a private-sector attorney for other unspecified factors that may be relevant.

Political "reform" advocates have proposed to fix the problem by simply prohibiting nonprofits, and 501(c)(4)s in particular, from engaging in any political activities, or to permit only a miniscule amount. These suggestions still beg the question of what constitutes political intervention, and they still leave the IRS as the adjudicator.

In a forthcoming Harvard Business Law Review article (written before the IRS scandal), my colleagues Brad Smith and Allen Dickerson at the Center for Competitive Politics note: "When agencies are used to regulate activity outside their core area of responsibility and expertise, they are not usually equipped to address the issues involved, they risk their credibility, and they potentially do damage to the original regulatory scheme." This is precisely the problem we have seen unfolding at the IRS. The agency was created to collect taxes; it has no greater expertise at regulating politics than the Federal Communications Commission would at regulating corporate securities, or the Securities and Exchange Commission at regulating telecommunications. Experts on this issue who

agree on little else all agree the IRS has never even wanted this role.

So where should we go from here? To answer that question, we must first review where we are now. Under the IRS's current regulations, tax-exempt 501(c)(4)s must be "primarily engaged in promoting … the common good and general welfare of the people of the community." This is commonly understood to allow 501(c)(4)s to engage in political intervention (which makes sense, as such work promotes good government), so long as it is not the majority of their activity.

A different tax code provision gives tax-exempt status to 527 organizations existing "primarily for the purpose" of accepting and making political contributions and expenditures. While 527s must publicly report their donors, 501(c)(4)s do not. Under a separate set of campaign finance laws, however, the FEC also determines whether certain organizations must publicly report their donors. Unsurprisingly, the two agencies' rules are not the same.

Congress can alleviate the IRS's miseries by treating all tax-exempt organizations the same under the tax code. Then, the IRS would not have to determine whether entities may participate in politics. Instead of the open-ended "facts and circumstances" test, the law should specify a few discrete activities – such as making contributions to candidates or parties, or sponsoring "independent expenditures" (as defined by campaign finance law) or a PAC's fundraising costs – that would require an entity to pay taxes on its business and investment income or political expenditures (as is the rule today). Whether such organizations are required to report donors for their political activities should be left to the FEC, which has its own flaws but at least has clearer rules.

501(c)(3) charities would have to be treated differently because their donors receive a tax deduction, unlike donors to 501(c)(4)s, (5)s, (6)s, and 527s. Charities are ineligible to engage in any politics, and they should be given a defined, objective set of prohibited activities.

While the FEC's commissioners do not possess divine wisdom, they are evenly divided by party, which prevents the agency from being used for partisan purposes. They also have significantly more political experience and appreciation for First Amendment rights than do the IRS bureaucrats. As an added layer of protection, the FEC's determinations also are more susceptible to judicial review under the law than are the IRS's. If we must have any regulation of politics at all, the jurisdiction should be vested exclusively with the FEC.

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