Silenced by the Taxman

By Bradley A. Smith

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It's been over six months since the IRS inspector general's report was released, revealing that the agency had improperly targeted conservative groups for extra scrutiny by withholding approval of what have traditionally been routine applications for organizations to operate as social-welfare organizations under Section 501(c)(4) of the tax code.

Despite assurances that both the FBI and the IRS were conducting investigations of the wrongdoing, many of the conservative groups that were targeted complain that they have yet to hear from anyone in the government. Meanwhile, dozens of conservative groups still are waiting on IRS approval, and the National Organization for Marriage waits for any sign that Eric Holder's Department of Justice plans to prosecute the IRS employee who leaked its confidential tax data to NOM's political enemies. Instead, Justice sits idly by as the IRS protects his identity.

But the IRS has not been completely inactive. Just before heading off for the Thanksgiving holiday, the agency dumped a proposed rule into the *Federal Register* that, if enacted in its current form, would place further restrictions on the political activity of citizen groups, including nonpartisan voter-registration efforts, "meet the candidate" nights and debates, and communications aimed at informing citizens about pending legislation in Congress and the states. It appears, frankly, to be an effort to institutionalize political discrimination in the tax code.

The proposed rule is not entirely without merit. It would do away with the broad, indeterminate "facts and circumstances" test that was a major contributing factor to the IRS scandal. Under that rule, it was left to IRS agents, considering all the "facts and circumstances," to decide whether an organization's activities constituted "social welfare activities" (good) or "electioneering" (bad). Obviously, that gave huge discretion to the IRS agents, and once agency higher-ups approved "Be On the Lookout" (BOLO) lists, targeting groups with words such as "Freedom" and "Tea Party" in their names, it was not surprising how this discretion was used. Replacing the "facts and circumstances" test with more objective criteria is a plus.

The problem is in the proposed criteria. First, the proposed rule would limit the ability of

501(c)(4) non-profits to engage in voter education that even mentions a candidate within 30 days of a primary or 60 days of a general election. Thus, if Congress is debating a budget next October, as it was this past October, non-profits would be limited in attempting to run ads urging citizens to contact members of Congress. Moreover, don't think this applies only to big TV campaigns. It applies to any form of advertising that might reach over 500 people. Inexpensive Internet ads purchased by a local Tea Party outfit, or a mailer announcing a meeting and sent to 2,500 area residents, could endanger a group's tax-exempt status under the proposed rule.

Moreover, "candidate" is defined to include judicial nominees and other presidential appointees. Thus, starting next February 3, 30 days before the March 4 Texas primary, and all the way through Election Day on November 4, 2014, a non-profit 501(c)(4) would face problems if it urged voters to contact a senator to vote against (or for) confirmation of one of President Obama's judicial nominees.

That's not all. The proposed rule would not only limit speech, it would go backward to censor speech. The rule proposes to require groups, starting 60 days before the election, to scrub their websites of any material mentioning a candidate. Thus, an article written last month quoting Democratic members of Congress echoing the president's assurances that "if you like your plan, you can keep your plan" would have to be taken down next Labor Day, just as the campaign was heating up.

The proposed new rules have been widely described in the press as a "crackdown" on political activity by 501(c)(4) non-profit groups, which is strange in and of itself. The law, after all, allows 501(c)(4) organizations to engage in substantial political activity. From the Anti-Saloon League in the 1910s and 1920s to the Sierra Club, Planned Parenthood, the NAACP, and the NRA today, non-profit social-welfare organizations have been deeply involved in political activity. The simple constraint is that electoral activity cannot be their primary purpose, their raison d'être.

Rarely does a government agency decide to "crack down" on legal activity. So what is really going on?

Basically, if 501(c)(4) organizations are prevented from mentioning candidates close to an election, or speaking out about judicial nominees, then that activity will have to be conducted by political-action committees organized under Section 527 of the Internal Revenue Code. From a revenue standpoint, there is little difference — neither 501(c)(4) organizations nor 527 political committees pay tax on the contributions they receive, and in neither case can donors take a tax deduction for their contributions.