Testimony of Richard W. Painter[1] before the United States House of Representatives Committee on Oversight and Government Reform, Subcommittee on Economic Growth, Job Creation and Regulatory Affairs
Wednesday, February 26, 2014

Mr. Chairman and Members of the Committee:

Thank you for inviting me to testify here today.

For the vast majority of Americans, the burden of federal, state and local taxes is excessive and regulations under which taxes are collected are excessively complex. Taxpayers are entitled to competence and impartiality from the government agencies that collect our taxes.

It is unacceptable for the Internal Revenue Service (IRS) to use politicized search terms to single out individuals and organizations for additional scrutiny. Whether such actions result from gross incompetence or from political motivation of IRS employees, it is serious misconduct. This misconduct took place in one of the most powerful agencies in the Executive Branch. The President must accept responsibility for it and make sure that it never happens again.

From 2010 through 2012, the IRS apparently searched for certain terms in 501(c)(4) tax-exemption applications and placed on hold the processing of applications of organizations with phrases such as "Tea Party," "patriots," or "9/12" in their names. We are entitled to know who ordered this to happen and why. We are also entitled to know about any other IRS misconduct in connection with similar applications from any groups, both liberal and conservative. And we are entitled to know what concrete steps are being taken to prevent future abuses.

And the American people are entitled to a timely response to this matter. The deadline I suggest for the Executive Branch agencies investigating these incidents of IRS misconduct and for Congressional committees doing the same is the same deadline that the rest of us have in the back of our minds: April 15, 2014. If we are expected to comply with our obligations to the government by that date, the government should by then have told us what happened and why and how similar abuses will be avoided in the future.

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501(c)(4) Organizations and Campaign Finance

Organizations organized under Section 501(c)(4) of the Internal Revenue Code have proliferated in recent years. Even before the Supreme Court's decision in *Citizens United*,[2] there were many of them, and there were many abuses.[3] The *Citizens United* decision then opened the floodgates through which private money – from corporations, individuals and unions – flows into the political process.

I share the concerns of many Americans who are disgusted with the current state of affairs in campaign finance. The future of our republican form of government depends upon finding some way for ordinary Americans – the vast majority of citizens who cannot afford to set up or fund a 501(c)(4) – to have a meaningful voice in our government. There are many options including enactment of constitutionally acceptable campaign finance reform legislation, enhanced disclosure obligations, and additional taxpayer funding of political campaigns.[4]

Close IRS scrutiny of 501(c)(4) applications to discern a "political purpose" of an organization, however, is not the way to arrive at a better system of campaign finance. The notion that "social welfare" is somehow distinguishable from "politics" is in my view unworkable, particularly in a society where politics is the process by which we choose our government and social welfare is to a great extent helped or hindered – usually hindered -- by government taxation, expenditure and regulation.

The IRS needs to focus on its mission, which is collecting taxes from people who owe taxes. Tax statutes and regulations should not invite the IRS to inquire into the political opinions or political purpose of persons or organizations in determining an organization's tax status. These ineffective regulations are no excuse for the conduct that occurred at the IRS in 2010-2012, but the regulations should be revised and if necessary the underlying statute should be amended.

The IRS

American taxpayers are entitled to fair, respectful and legal treatment from the federal agency that collects our taxes. We are also entitled to competence from IRS employees and timely review of applications submitted under particular provisions of the Internal Revenue Code. Timely IRS response in all particular taxpayer matters should be a top priority. Delay of an IRS response to a 501(c)(4) application for any reason, whether or not politically motivated, is unacceptable.

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[2] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

[3] See Richard W. Painter, Getting the Government America Deserves: How Ethics Reform Can Make a Difference (Oxford U. Press 2009), Chapter 9 (titled "Off-the-Books Lobbying, Electioneering and the Special Purpose Entities that Do It") (discussing 501(c)(4) and other groups and potential abuses in the years immediately before *Citizens United*).

[4] See Id, Chapter 11 (titled "Campaign Finance").

Congress should either impose on the IRS specific deadlines for taking action with respect to applications and other particular taxpayer matters or require the IRS to promulgate regulations that set specific deadlines for its staff. If taxpayers are required to pay penalties and interest when we delay taking necessary action with respect to our taxes, perhaps the IRS should be required to pay us penalties and interest when they don't do their job on time.

The DOJ Investigation

The Department of Justice (DOJ) has opened an investigation of the misconduct at the IRS during the 2010- 2012 time frame. The scope and purpose of this investigation is unclear. The staffing of the investigation, however, has apparently introduced yet more controversy into an already controversial situation.

No particular ethics rule explicitly prohibits a career prosecutor who has made campaign contributions from participating in, or even directing, an investigation such as this one. Not knowing even the present scope of the DOJ investigation, and where it might lead, however, I cannot be certain that such a conflict would not arise.

The impartiality rule -- 5 CFR 2635.502 -- has catch-all language[5] that government employees, including career prosecutors, should consider in these situations. The rule's standards, however, are subjective unless a government employee falls into one of the specific categories of relationships set forth in the rule, and campaign contributions do not alone create a relationship falling into one of these categories.[6] The purpose of the rule is not necessarily to disqualify an employee from a particular assignment but to encourage and in some instances require that the employee consult with agency ethics officials and his or her superiors before making a decision about whether going forward with a particular assignment is in the best interest of the agency.

[5] 5 CRF 2635.502(a) reads: "(a) Consideration of appearances by the employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.(1) In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.(2) *An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter*." (emphasis added)

[6] The language in section (a)(2) of the rule above thus determines whether the covered relationship rule applies at all to the situation of a federal employee who was a campaign contributor or otherwise supported a political campaign or party.

Given the enormous controversy about alleged politicization of the IRS, I hope such a conversation about staffing this investigation occurred at the DOJ. If I were a senior official at the DOJ, I would not put the leadership of an investigation such as this into the hands of any employee who appeared to have a strong allegiance to one political party or the other. Others might disagree. I feel strongly, however, that such a conversation about appearances of impartiality should have taken place in the DOJ and I hope it did.

Finally, I am frustrated at not knowing the purpose and scope of the DOJ investigation. Which specific criminal statutes are potentially involved in the investigation, and what evidence is there to date of violations of such provisions and by whom? If there is evidence of criminal activity the DOJ should investigate thoroughly and swiftly, but if not the DOJ should stand down and allow other government officials, including the Inspector General and Congressional oversight committees, to do their job of investigating alleged misconduct that falls short of criminal violations. We learned from the Clinton White House's unfortunate experience with a DOJ investigation after the suicide of Deputy White House Counsel Vincent Foster, that DOJ investigations should not be organized to provide "negative assurances" or "political cover." A DOJ investigation should be a real investigation when it occurs, and should be aggressive and impartial, but it should only occur at all if it is appropriate under the circumstances.

The Hatch Act

My initial reaction to this scandal was that it raised serious concerns under the Hatch Act, which prohibits any use of official position to affect the result of an election.[7] During the two years leading up to the Presidential election of 2012, IRS delay of Section 501(c)(4) applications from groups identified with "Tea Party," "patriots," or "9/12" at least raises a prima facie case of a Hatch Act violation. Given the prominent role that the many 501(c)(4) organizations already approved by the IRS have in influencing public opinion prior to elections,[8] politically motivated IRS denial or delay of 501(c)(4) applications from other groups could affect the result of an election.

The Office of Special Counsel (OSC) is charged with investigating alleged violations of the Hatch Act. In view of the enormous power of the IRS and the potential for abuse, the OSC should aggressively investigate this and any other evidence of Hatch Act violations at the IRS. The OSC may determine that it is appropriate to rely on an Inspector General investigation rather than conduct its own investigation, provided the Inspector General investigation addresses the Hatch Act issues. The OSC, however, should not remain silent. I am not claiming that there necessarily were Hatch Act violations at the IRS – I don't know. However, the American people are entitled to a definitive answer to this question, and the OSC has a responsibility to play a central role in finding it.

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[7] See 5 U.S.C. Section 7323 (providing that "an employee may not— **(1)** use his official authority or influence for the purpose of interfering with or affecting the result of an election")

[8] See Painter, Getting the Government America Deserves supra Chapter 9 (discussing the influence of these and similar groups on elections).