

**BETWEEN SCYLLA AND CHARYBDIS**

Navigating the Shoals Between Educational  
and Political Activity

by Antonia M. Grumbach

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Introduction

This winter's exchange in the pages of The New York Times between Anthony Lewis and Allen R. Bromberger, Executive Director of Lawyer's Alliance for New York, regarding the boundaries of partisan political activities by charities again raised a troubling subject. Lewis' Op-Ed piece describing an advertisement in USA Today sponsored by the Church at Pierce Creek, urging readers not to vote for Bill Clinton and a voters' guide published by Pat Robertson's Christian Coalition, asked why these organizations were entitled to exemption under Section 501(c)(3) of the Internal Revenue Code (the "Code"). In response to Lewis's editorial, Bromberger, while not addressing the legality of such action by charitable organizations, argued that the prohibition on "partisan political activity" by charities should be loosened.

An election year where candidates from the Republican and Democratic parties are as far apart on many issues as they were in November of 1992 invariably draws some charitable organizations into the fray in one way or another and points out the difficulties of enunciating standards in this area. The Internal Revenue Service has struggled for years to draw the line between permissible educational activity, albeit of an advocacy nature, and impermissible advocacy and action in the political arena, leading to the denial or revocation of tax exemption under Section 501(c)(3) of the Code.<sup>1</sup>

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<sup>1</sup> This paper is concerned not with lobbying and legislative issues but rather with political campaign activity.

\* This paper could not have been written without the assistance and moral support of Laura E. Butzel, Esq., and the opportunity of hot debate with her on the issues.

Increasing numbers of organizations have asked us how far they can go in the political arena without stepping over the educational line into prohibited political activity. Often they have asked if an organization will qualify as educational if its purposes are not itself to engage in prohibited political campaign activity but to teach and train others to engage effectively in such activity. An added gloss on this question arises where the organization's activities are devoted to promoting or advocating a single issue or related group of issues and the organization wants to teach people how to campaign in order to promote this particular issue or viewpoint. For example, will the Service grant an exemption to an organization whose primary purpose is to teach people how to intervene in political campaigns in order to promote "pro-choice" positions? Analysis of relevant current law makes clear that despite the fact that this issue has been discussed and written about at length (and frequently litigated), the distinction between exempt educational and prohibited political activity remains far from clear and is played out against a backdrop of the ever-present question of the constitutionality of the prohibition on campaign activities and the developing law under the Federal Election Campaign Act and regulations.

### **Educational Activity**

The definition of what constitutes an educational purpose has been the subject of debate for some time. The Treasury Regulations provide little guidance. The Regulations state that the term "educational" relates to (1) "[t]he instruction or training of the individual for the purpose of improving or developing his capabilities" or (2) "[t]he instruction of the public on subjects useful to the individual and beneficial to the community." Treas. Reg. § 1.501(c)(3)-1(d)(3). "Education" does not only refer to formal individual instruction or training in a school or university but also refers to the general dissemination of information, including the presentation of public discussion groups, forums, panel lectures or other similar programs.

Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii). More importantly, an "organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion." Treas. Reg. § 1.501 (c) (3) -1 (d) (3) (i). Furthermore, if the Service determines that the organization's principal function "is the mere presentation of unsupported opinion," it will deny educational status. Treas. Reg. § 1.501 (c) (3) -1 (d) (3) (i) .

The Regulations regarding educational organizations that advocate a particular position are the result of a tortured history of the interpretation of the term "educational" as used in the Code. The earliest views of the Service held that advocacy of a particular position did not constitute education under the rules relating to exemption and deductibility. Merely promoting "controversial or partisan propaganda" provided a basis for denying educational status. See Laura B. Chisholm, Exempt Organization Advocacy: Matching the Rules to the Rationale, 63 Ind. L.J. 201, 215 n.76 (1988). In rejecting the idea that such organizations served an educational purpose, the Service relied on its view that Congress did not intend to "encourage the dissemination of ideas in support of one doctrine against another." Tommy F. Thompson, The Availability of the Federal Educational Tax Exemption for Propaganda Organizations, 18 U.C. Davis L. Rev. 487, 498 (1985); see also S.M. 1362, 2 C.B. 152, 154 (1920) ("it was Congress' intention... not to benefit and assist the aims of one class against another... but to foster education in its true and broadest sense..."). In particular, some early Service decisions denied exemption to organizations that disseminated viewpoints that were controversial. Laura B. Chisolm, supra at 215.

For the most part, however, Courts did not support the Service's position; for instance, in Slee v. Commissioner, 42 F.2d 184 (1929), Judge Learned Hand, while not reversing

the denial of exemption to the American Birth Control League because of its legislative and political activities, noted that its activities were a "legitimate scientific enterprise" and further that one could not "discriminate against the organization on the basis that it advocated a [controversial] position." Id. at 185.<sup>2</sup> Eventually the Service changed its position to permit an organization that advocated a particular issue or viewpoint to obtain exemption as an educational organization if it utilized educational "methodology." Tommy F. Thompson, supra at 504-506. The methodology of an organization was the means by which it imparted knowledge rather than the content of the message imparted. See id. at 488 (1983). The Service apparently believed that an organization that deceived or distorted facts or which made appeals to emotions as opposed to reason was not "educational" and should not be granted exemption. Therefore, to be eligible for exemption it should provide a "full and fair exposition of the facts." See id. at 516-17. Nonetheless, the Service was also confronted with the real problem that its method for determining what constituted an educational organization was not content-neutral and that it was making such determinations on the basis of criteria that ran afoul of the First Amendment of the Constitution.

The Service squarely faced the constitutional question in Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980). A feminist organization that published a newspaper dealing with issues related to feminism and women in general, Big Mama Rag, Inc., operated a library and also promoted a single issue, women's rights, by holding workshops,

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<sup>2</sup> Also, in Weyl v. Commissioner, 48 F.2d 811 (2d Cir. 1931) rev'g 18 B.T.A. 1092 (1930), the Second Circuit reversed a decision of the United States Board of Tax Appeals and held that the League for Industrial Democracy, which advocated a new social order and conducted research, held lectures and debates, promoted discussion and wrote articles and pamphlets, was an educational organization. The Court stated that the term "education" was to be given its "usual and accepted meaning." Id. at 812. But cf. Leubuscher v. Commissioner, 54 F.2d 998 (2d Cir. 1932), modifying 21 B.T.A. 1022 (1930) (publishing partisan viewpoint not an educational purpose in absence of factual basis. 54 F.2d at 1000).

seminars and lectures. The Service denied Big Mama Rag, Inc. tax-exempt status on the basis that the organization was not pursuing an educational purpose. The organization challenged the denial of exemption and claimed that the full and fair exposition standard was unconstitutional. The denial of exempt status was upheld by the United States District Court for the District of Columbia on the basis that the organization's stance was too "doctrinaire," Id. at 1034, only to be reversed by the United States Court of Appeals for the District of Columbia. The D.C. Court of Appeals found that the full and fair exposition test was unconstitutionally vague and led to inconsistent, arbitrary enforcement by the Service and gave the Service too much discretion, which resulted in censorship. Id. at 1035.

Nonetheless, the Service continued to seek to apply the full and fair exposition test. It was challenged again in National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983); this time, however, the Service argued that in applying this standard it employed its methodology test which looked to four criteria. Id. at 874. These criteria ensured, according to the Service, that application was not arbitrary. The Court in National Alliance upheld the denial of exemption without directly reaching the question of the constitutionality of the full and fair exposition standard. Nonetheless, it did state that "[t]he [methodology] test reduces the vagueness found by the Big Mama decision" and thus appeared implicitly to condone its use. Id. at 875.<sup>3</sup>

The methodology test was formalized by its publication by the Service in Revenue Procedure 86-43, Rev. Proc. 86-43 1986-2 C.B. 729. The purpose of the Revenue Procedure as stated by the Service was twofold: "to determine the circumstances under which

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<sup>3</sup> "The statute commands the Internal Revenue Service, as it were, to steer between Scylla and Charybdis: exemption to all or exemption, in effect, only to degree-granting academic institutions. The methodology test, supervised by the courts, is a carefully charted middle course." Id. at 876.

advocacy of a particular viewpoint or position by an organization is educational within the meaning of Section 501(c)(3) of the Internal Revenue Code," and "to eliminate or minimize the potential for any public official to impose his or her preconceptions or beliefs in determining whether the particular viewpoint... is educational." Id. Under the test, an organization will not be educational if "it fails to provide a factual position for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a reader or listener in a learning process." Id. Further, the Service set forth four factors, the presence of any of which would generally indicate lack of educational methodology.<sup>4</sup> The Service, however, did state that in "exceptional circumstances" an organization could still meet the definition of educational even if one or more of the factors were present. Id. at 730.

Despite ostensible improvement over the "full and fair exposition" test, the methodology test is still a subjective test and continues to provide the Service with a means to censor unpopular views. As Tommy F. Thompson points out, the concept of what is factual "will inevitably be colored by one's own assessment of the correctness of the position advocated, as well as the seemingly objective inquiry whether a significant part of an organization's communications consists of viewpoints unsupported by a relevant factual basis." Tommy F. Thompson, supra at 521. Furthermore, while the Service has apparently abandoned most efforts to deny exemption to advocacy-oriented groups on the basis of this standard, the Service

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<sup>4</sup> The factors are:

"... The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications.

"...The facts that purport to support the viewpoints or positions are distorted.

"... The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusion more on the basis of strong emotional feelings than of objective evaluations."

... The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience... because it does not consider their background or training or the subject matter."

continues to refer to this test as the means for determining whether an issue-oriented group pursues educational purposes. See Internal Revenue Service Manual Handbook HB 7751, May 18, 1988. However, while the Service frequently invoked these or similar criteria to deny exemption prior to 1986, it is increasingly rare for it to do so now.

Furthermore, it is questionable whether an organization which is organized to teach individuals and organizations how to campaign or otherwise educate the public on how to disseminate its views should even be subject to such an inquiry. Its educational aim would not be to advocate a particular viewpoint but to teach others about the methods through which they could advocate this viewpoint. Its materials and instruction would presumably focus not on the issue it was ultimately seeking to promote, but on the method or means of promotion. Teaching people how to compile voter registration lists, to set up organizations (such as political action committees, or social welfare organizations described in Section 501(c)(4) of the Code) which further its purpose, to comply with the restrictions imposed by the Service, to run a media campaign, among other things, would presumably not fail to provide a factual position for its "viewpoint;" literally it has no "viewpoint" that requires a factual position but rather instructs the public on campaign techniques.

### **Campaign Activity and Educational Organizations**

From early on, and long before the actual Code provisions limiting legislative activity and prohibiting campaign activity, the Courts were upholding the denial of Section 501(c)(3) tax exemption for organizations involved in legislative or political activities. In Slee v. Commissioner, 42 F.2d 184, 185 (1929), Judge Learned Hand said that "[political agitation as such is outside the statute... Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." Although proposed in 1934, see S. Rep. No. 558, 73rd Cong., 2d Sess. 26 (1934), it was not until the Revenue Act of 1954 that the

prohibition on political activity was added to Section 501 (c) (3). Code of 1954, Ch. 1 § 501 (c)(3), 68A Stat. 1, 163.

The Regulations now explicitly deny exemption to "action" organizations.<sup>5</sup> In making a determination as to whether an organization is an action organization under these regulations, "all the surrounding facts and circumstances, including the articles and all activities of the organization are to be considered." Treas. Reg. § 1.501(c)(3)1(c)(3)(iv). In addition, the definition of an action organization gives the Service a broad range of review by allowing it not only to look to the actual activities of the organization but to inquire as to its "objectives" as well. Treas. Reg. § 1.510 (c) (3)-1 (c) (3) (iv). That coupled with its ability to conduct an examination of the "surrounding facts and circumstances" gives the Service a powerful tool for denying exemption, particularly as applied to organizations which skirt the prohibitions on political activity.

In the Service's May 18, 1988 Manual Handbook, the Service acknowledged the interplay between the definition of "educational" and its relationship to the limits on lobbying and the political campaign prohibition:

Public education through the mass media frequently gets into areas that are controversial. While the term educational includes instruction of the public on subjects useful to the individual and beneficial to the community, what an organization claims to be educational may in fact be political or legislative activities.

I.R.S. Manual Handbook, HB 7751, May 18, 1988.

Clearly, the Service and the Courts have felt uncomfortable in extending Section 501(c)(3) status to allegedly educational organizations which become involved in legislative or campaign activity. If one accepts the proposition set forth in Regan v. Taxation with

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<sup>5</sup> Under Treasury Regulation Section 1.501(c)(3)1(c)(3)(iii), an organization is an "action" organization "... if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office..."

Representation, 461 U.S. 540 (1982) (albeit with respect to lobbying activities) that the deductibility of contributions is a government subsidy and that the government may limit the activities of Section 501(c)(3) organizations without running afoul of the First Amendment, one can accept that Section 501(c)(3) organizations may be prohibited from intervening in political campaigns on behalf of candidates.

Having relaxed its position on advocacy organizations so that it is less likely that an organization whose purpose is to advocate a particular issue will be denied exemption on the basis of its lack of educational "methodology," the Service is struggling with organizations which engage in campaign-oriented activities. This change in focus may well be due both to the increased sophistication of campaign techniques and a shift in exempt organization activities toward tangential involvement in political campaigns. There seems to be an increasing interest by Section 501(c)(3) organizations in informing potential voters on issues of interest to the organization and training individuals in campaign techniques that will serve those ends. And as with the tests on the nature of education, the Service's scrutiny is particularly intense where activities that are deemed controversial are advocated, probably because these issues are apt to be the most likely to attract voters and voter activity.

Unlike legislative activities, the prohibition against political campaign activities is absolute.<sup>6</sup> An organization which expressly endorses a candidate for public office will fall outside the parameters of Section 501(c)(3) activity. There seems to be, however, a great variety of political activity in which an organization may engage without violating the electioneering prohibitions. An organization that teaches others to engage in such activities as compiling issue-

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<sup>6</sup> Section 4955 added to the Code in 1987 imposes excise taxes on organizations that participate in prohibited campaign activity. It has been suggested that the tax indicates that there is an intermediate penalty prior to revocation of tax-exempt status for violating the prohibition. The General Counsel's office, at least publicly, has stated otherwise. See Edited Transcript of Winter EO Committee Meeting, 5 The Exempt Organization Tax Review 584 (April 1992).

oriented voter lists, organizing Section 501(c)(4) organizations and political action committees, working on elections, coordinating and communicating with the media and educating others on ways to disseminate its viewpoint is treading very close to the line of prohibited campaign activity. The question is, when does the organization's activity go over the line?

The Service's position on voter education activities and other educational activities related to elections has evolved over the years. Initially, the Service focused on forums or activities of organizations that advocated no particular viewpoint. The Service ruled in a number of cases that organizations whose activities were absolutely neutral but involved candidates or campaigns did not risk loss of exemption. Rev. Rul. 66-256, 1966-2 C.B. 210. For example, the Service held early on that organizations which held public debates, forums or lectures in which speakers discussed controversial views were exempt as educational so long as the organizations sponsoring the debates did not indicate their views on the subjects discussed or evidence bias for or against a political candidate. While such neutral activities would unquestionably be upheld today, the issue, as the Service apparently saw it, was whether the activities in question would "affect voter acceptance or rejection of a candidate."<sup>7</sup> This standard, articulated in the accompanying General Counsel Memorandum, is a very broad standard. There are few activities involving candidates that would not "affect voter acceptance or rejection" of a candidate.

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<sup>7</sup> In Revenue Ruling 74-574, 1974-2 C.B. 160, a nonprofit educational broadcasting station was held not to violate the political campaign activity prohibition when it afforded equal opportunity to all candidates to present their views on the air. General Counsel Memorandum 35902, July 15, 1974 discussed the Revenue Ruling and noted that the broadcasts were made with a "nonpartisan motive" and were "devoid of any objective to aid or assist a particular candidate." It also said that this would not have been sufficient to uphold the exemption and that the Service had to look to "the consequence, reasonably to be anticipated" of the broadcasting station's activities as opposed to its partisan motives or lack thereof.

In 1978, the Service attempted to place strict limits on what constituted permissible voter education activities. In a 1978 ruling, the Service stated that publication of candidates' responses to questions of concern to an organization in a newsletter constituted impermissible intervention in a political campaign despite the fact that the newsletter did not provide any editorial comment. Rev. Rul. 78-160, 1978-1 C.B. 153. Reprising its discussion in GCM 35902, the Service emphasized that it was looking not only to participation or intervention with a particular motive as to the result of a campaign, but to any participation... "which affects voter acceptance or rejection of a candidate." Id. The questionnaire distributed by the organization could "reasonably be expected to influence voters to accept or reject candidates." Id. Following intense criticism, this ruling was withdrawn. In its place, the Service substituted another Revenue Ruling which presented four fact situations involving questionnaires submitted to incumbents and/or candidates. Rev. Rul. 78-248, 1978-1 C.B. 154. Two situations were held not to constitute prohibited intervention in a campaign, while two were held to constitute prohibited activities due to the fact that they were conducted in a "partisan manner." Id. The "partisan" manner was found when the hypothetical organization was a single-issue organization -- it was "primarily concerned with land conservation matters." Id. Its voters' guide on "selected land conservation issues" contained a compilation of incumbents' records on the issues without any express statements in support of or in opposition to any candidate. The guide was widely distributed among the electorate during an election campaign. The Service found that the organization's attention to "one area of concern" indicated that its "purpose" was not "nonpartisan voter education," Id. and that its wide dissemination during an election campaign indicated prohibited intervention in a campaign.<sup>8</sup>

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<sup>8</sup> In the other prohibited intervention situation, an organization submitted a questionnaire to candidates on a wide variety of issues and published a voters' guide based on the candidates'

The extent to which an organization's focus on a particular issue or series of issues, in combination with what would otherwise constitute exempt voter education, continued to pose problems for the Service. In General Counsel Memorandum 38137 (October 22, 1979), the Service argued for denying exemption to an organization that published Congresspersons' votes on selected issues of concern to the organization. The organization was an instrumentality of a church and its stated purposes included "study[ing] the content of the Gospel in its bearing on people...provid[ing] and publish[ing] information on social issues...and formulat[ing] and promot[ing] a program of social education and action.." While the organization claimed that its newsletter was nonpartisan and did not refer to any election nor mention a congressperson's candidacy, the Service found its activities akin to those of the land conservation group. The Service noted that even if the organization's motives were nonpartisan, it could violate the prohibition on intervention in a political campaign. The Service stated that in order for the government to maintain "political neutrality" under Section 501(c)(3), it could grant exemption neither to organizations that "support the ideology of a candidate nor [to] those that support [a] political party."

This GCM was withdrawn only six months later when the Service reconsidered its position and determined that the same organization's activities were exempt. General Counsel Memorandum 38444 (July 15, 1980). The Service noted that the organization published limited copies of the newsletter and that it had a random schedule of publication of the voting survey (although one did fall within an election period). While the Service noted that it could not be said that "the content and format of the publication [were] neutral," the publication did not

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responses. However, [s]ome questions evidence[d] a bias on certain issues." The Service did not articulate what this "bias" was or how it was expressed. Again, the problem was expression of a viewpoint in conjunction with a voter-oriented activity.

identify candidates for reelection or make any comment on an individual's overall qualification, and did not concentrate distribution in states where incumbents rated particularly high or low. Nonetheless, the Service cautioned again that each case depended on its particular facts and circumstances. This GCM focused particularly on the question of timing of the newsletter (not just around election day) and the breadth of dissemination of the newsletter (it was limited). One also wonders if the earlier GCM was withdrawn because the tax-exempt status of a religious entity was involved.

Whatever the reason for this about face, the salient criteria noted in General Counsel Memorandum 38444 were set forth in Revenue Ruling 80-282, 1980-2 C.B. 178, which held that because an organization which published a voters' guide did not: (1) identify candidates for reelection; (2) time distribution to coincide with an election; (3) expressly or impliedly endorse or reject a particular candidate; (4) target distribution to areas in which elections were occurring; and (5) distribute the guide extensively, its activities were exempt educational activities. This ruling thus summarized guidelines for voters' guides which, on some level, are campaign tools. Revenue Ruling 80-282 did not, however, specifically deal with a one-issue or limited issue organization.

Although these rulings seem to retreat somewhat from the denial of exemption for any activity which would "affect voter acceptance or rejection of a candidate," they do not define what the Service means by "bias," "partisanship" or "implied approval" or what constitutes a "wide variety of issues" or "extensive distribution." The rulings underscore the fact that the Service, as in the educational/advocacy arena, continued to grapple with the issue of how to treat organizations that disseminated information on specific issues. The Service also appeared to be wavering between the concept that prohibited political activity would be confined to intervening

in a campaign on behalf of or in opposition to a particular candidate and the concept that prohibited intervention could occur where an organization was merely "influencing" voter opinion and, by extension, the outcome of an election. See Wilfred R. Caron & Deirdre Dessingue, I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions, 2 J.L. & Pol. 169, 193-97 (1985). Code Section 4945(d)(2) (which governs the conduct of private foundations and penalizes them for making grants to organizations whose activities may "influence the outcome" of an election).

Some of the issues were clarified in Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988). The Court upheld the Service's denial of Section 501(c)(3) status to the Association of the Bar of the City of New York. In addition to other educational activities, the Bar Association rated judicial candidates for appointive and elective judgeships. The Court held that this rating system constituted prohibited intervention in political campaigns. In so doing, the Court said that the term "nonpartisan, . . . need not refer to organized political parties." Id. at 880 (citing Haswell v. United States, 500 F.2d 1133, 1144 (1974)). In addition, the Court stated that the ratings system was not based on "objective data," but was the "subjective expression of opinion" that would "reflect the philosophy of the organization," and, importantly, that this opinion was expressed "with an eye toward imminent elections . . ." The Court thus underscored that both the expression of an opinion on issues (here the suitability of a candidate for the judiciary), and the intention to affect the outcome of an election were factors to be considered in determining whether political activity existed. On some level, the result of the Bar Association case seems obvious. If one assumes a nonobjective rating system, then the ratings clearly were intended to influence voters in their selection of judges.

In more recent rulings, the Service has nonetheless failed to clarify the parameters of prohibited campaign intervention; in fact, it appears that the Service is moving toward defining prohibited intervention more broadly. In Private Ruling 8936002 (May 24, 1989), the Service clearly headed toward finding prohibited intervention in a political campaign, only to retreat in the final outcome. The organization's charitable and educational purposes included improving the conditions of the poor, the underprivileged and the alienated. It focused its activity on peace and arms control issues which were, according to the Service, a primary concern of the 1984 Presidential campaign. Timed to coincide with the 1984 presidential election, the organization sponsored media advertising which denounced "star wars," urged the pursuit of peace and invited the public to "vote" (later changed to "join the debate") and made statements such as "something has to change."

The Service reasoned that because former Vice President Mondale was "perceived as the 'dovish' candidate on defense positions" and President Reagan supportive of promoting defense and "star wars," the advertisements could be seen as demonstrating a preference for Mondale. The Service stated that the expression of ideology in and of itself is not intervention, but when timed to target specific voters on a national level, at a time most likely to influence their decisions, such expression becomes problematic. Ultimately, however, the Service held "reluctantly" that the organization should not be denied its Section 501(c)(3) exemption, because the advertisements "could be viewed as nonpartisan" and thus did not constitute prohibited intervention. The effect of its meanderings was to leave the law in this area just as muddy as before.

This ruling also articulates the Service's position that the Federal Campaign Election Act ("FECA") does not control matters under Section 501(c)(3). In particular, the

Service rejected the application of the Supreme Court's holding in Federal Election Committee v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), which concerned the constitutionality of portions of FECA. Among other things, the Supreme Court held that in order to be subject to FECA's rule prohibiting corporations from using treasury funds to make expenditures "in connection with" any federal election an expenditure must constitute "express advocacy," that is, there must be an express statement in support of a clearly identified candidate to be considered political intervention. The Court rejected as unconstitutional the idea that advocacy of issues was enough to trigger the FECA prohibitions. The Service's position was that FECA and the laws applicable to Section 501(c)(3) organizations were motivated by different concerns.<sup>9</sup> The Service argued further that it was not necessary for an organization to identify a candidate by name in order "to influence voters" and that the advertising campaign in the Service's view was not merely the expression of a viewpoint.

In General Counsel Memorandum 39811 (February 9, 1990), the Service went further than it had previously. The organization which was dedicated to the protection of religious liberty, the illegalization of abortion, the rights of citizens "to enact...laws which protect the moral fiber of the nation" and other issues identified with the religious right, had urged its membership to register for election as "precinct committeemen." Id. It described the procedures for registration and urged members to vote for each other. Whereas the Service had suggested that an organization need not mention the name of an existing candidate to be engaged

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<sup>9</sup> In fact, this is still the position of the Service. See Edited Transcript of Winter EO Committee Meeting, 5 The Exempt Organization Tax Review, 584, 585 (1992), statement of Marcus Owens, Director of IRS Exempt Organizations Technical Division: "From time to time...someone suggests that the rules governing campaigns that the Federal Election Commission has adopted should be carried over, transposed, utilized by the [Service] with regard to the 501(c)(3) prohibition...Our view is that Congress had in mind two distinctly different purposes when it created the Federal Election Commission's...rules and when it created the prohibition...[on] intervening in political campaigns."

in prohibited campaign activity, the Service held that the Regulation's prohibition on participation on behalf of a candidate did not require participation on behalf of a specific, identifiable candidate. The Service appeared to be influenced by the organization's publication of a voter survey which, according to the Service, encouraged members to "vote intelligently' for righteous or Christian candidates," presented records on issues of concern to the organization, but disclaimed an attempt to endorse candidates. While acknowledging that this participation was not "as 'direct' as some," the Service revoked the organization's exemption. Id.

Finally, in Technical Advice Memorandum 9117001, (September 5, 1990), an organization which engaged in a voter registration project, sent mass fund-raising mailings and operated campaign schools was found to be intervening in a political campaign. The voter registration project called on "conservatives" to act to ensure that "the progress that we have made in the past 3½ years" is not "lost" and to register voters who "agree with Conservative values." In its materials, the organization expressed opposition to Ted Kennedy, Walter Mondale and the NEA. The Service found that these materials were designed to urge the public to vote for President Reagan and that the term "conservative" was a mere proxy for "republican." The combination of ideology (here not even the promotion of a single issue but many issues) identified with a candidate, the use of what was considered a code word in support of a particular party and timing which coincided with an election were determining factors.

This TAM is interesting for its discussion of campaign schools.<sup>10</sup> The Service devoted much of its analysis to the organization's operation of campaign schools which were designed to teach individuals how to "wage a professional...campaign." The organization

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<sup>10</sup> From earlier examinations of the educational exemption, degree-granting schools were clearly within the ambit of the exemption, even if they ran courses which involved learning about campaigns. Rev. Rul. 72-512, 1972-2 C.B. 246 (university was not participating in prohibited campaign activity by providing a political science course that required students' participation in political campaigns of candidates of their own choice).

argued that the operation of these schools was an exempt educational activity. This activity included educating individuals about operating campaigns that had an "ideological outlook." The organization argued that its educational materials thus "necessarily focus[ed] on skills required in working for conservative candidates" (emphasis added) and implied that "liberal" ideological campaign schools would of necessity focus on different skills.

The Service did not pursue the argument about ideology and focused more on whether the organization was open to individuals associated with the Democratic party. It noted that the schools used some Democratic party "materials" and while mostly staffed with and attended by Republicans it may have included some students who were Democrats as well. The Service also stated that "[i]f the school activity was viewed in isolation there would be some justification for concluding that [the schools] operated in a sufficiently nonpartisan manner" to be considered educational. Nevertheless, it concluded that in view of the other activities of the organization, the fact that most attendees and staff were Republicans, materials were largely devoted to how to elect Republicans and there was no statement that student selection would be "nonpartisan," the schools were engaged in prohibited political activity. Thus, by looking at all the "facts and circumstances" of the organization as a whole the Service did not find the campaign schools to be sufficiently removed from the political scene to be entitled to Section 501(c)(3) exemption. This TAM is also interesting because it did not rely on American Campaign Academy v. Commissioner, 92 T.C. 1053 (1989), to support its denial of exemption.

In American Campaign Academy the Court found that an organization designed to operate a school to train individuals to fill managerial and other roles in political campaigns was not exempt. Rather than relying on the political prohibition of Section 501(c)(3), however, the Court found that the school was not operated exclusively for an exempt purpose due to the

fact that it served a private rather than public interest. The case is notable for its novel approach to defining what constitutes a private purpose in contravention of Section 501(c)(3).

American Campaign Academy ("ACA") was incorporated for exclusively educational purposes, including the operation of a school to train persons for careers as political campaign professionals, research and publication of educational materials covering the operation of a political campaign, and research regarding the public's views on politics and political issues. The Service had concluded that ACA was organized exclusively for educational purposes, no substantial part of its activities consisted of lobbying activities and most significantly that it was "not involved in any proscribed campaign activities." Rather, the Service argued that ACA was operated for a substantial non-exempt private purpose, *i.e.*, by benefiting Republican candidates and entities more than incidentally and by serving the private interests of Republican party entities, in contravention of Treasury Regulation Section 1.501 (c) (3)-1 (d) (1) (ii) .

The Court agreed that ACA did not pass the "operational test" of Section 501(c)(3) and in fact served a private interest. But rather than finding that the private interests served were those of the organization's "insiders" (*e.g.*, the founders or students), the Court concluded that the private interest served was that of Republican candidates and entities. The Court stated that ACA conducted its educational activities with the "partisan objective" and "partisan purpose" of benefiting those entities.<sup>11</sup> This "secondary" benefit to Republican entities was more than incidental<sup>12</sup> and thus more than an insubstantial part of ACA's activities furthered

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<sup>11</sup> The Court's conclusion was based in part on the fact that ACA's organizational structure was dominated by Republican interests. It was funded by Republican sources, two of its initial directors had ties to Republican party organizations (the NRCC and the Republic National Committee), it was an outgrowth of the Republican National Committee, and a majority of its board of directors had ties to the Republican party. In addition, its curriculum was composed of topics centered on the Republican party and ACA could not name a single student who had worked for a Democratic campaign.

<sup>12</sup> ACA's students received the primary benefit of ACA's instruction and education.

a nonexempt purpose. Once the Court found this, it stated that in order to prevail, ACA would have to show that the Republican beneficiaries comprised a charitable class and that they did not comprise a select group of members earmarked to receive benefits.<sup>13</sup>

This case presents a number of problems (not the least of which is that there was little if no precedent for the Court's analysis). But while the Court's treatment of the "secondary beneficiaries" and its determination that their interests were of significance (as opposed to the interests of the primary beneficiaries) are disheartening, they are also full of possibilities. If taken to its logical conclusion, educational organizations whose ultimate beneficiaries are members of a particular identifiable non-charitable group would be vulnerable. On the other hand, if the ultimate beneficiaries were members of a recognized charitable class, an organization might be able safely to tread closer to the line of involvement in political activity. The encouragement of greater participation in campaigns by groups which fall within a charitable classification could provide a new approach to dealing with the campaign prohibition.

On another front, the Courts have been dealing with the Federal Election Campaign Act, 2 U.S.C. § 431 et. seq. (Supp. 1992), ("FECA"). Unlike Section 501 (c) (3), FECA requires that expenditures for communications must amount to "express advocacy" in order to be covered by certain of its provisions. While the Supreme Court has often repeated that the standards applicable to and the concerns informing the interpretation of FECA are different

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<sup>13</sup> The Service's and Court's attention to the "partisan" affiliation of the students, teachers and incorporators of the ACA is problematic. The concept of "partisanship" would not appear to have any place outside of the political campaign prohibition or lobbying activity limitations. Its use suggests that the Court and Service were concerned about the "political activity" at issue. Nonetheless, the prohibition in Section 501(c)(3) concerns political campaign activity on behalf of a particular candidate, not merely political activity. It would be difficult to identify a particular candidate or campaign in the context of a perpetually ongoing school, located in one area. This may be the reason the decision was based on the theory regarding the secondary beneficiary of a private benefit.

than those related to prohibited political campaign intervention under Section 501(c)(3),<sup>14</sup> the cases interpreting FECA and regulations promulgated thereunder may be instructive. In Buckley v. Valeo, 424 U.S. 1 (1976) the Court held unconstitutional disclosure provisions for independent expenditures made "for the purpose of ... influencing" the election of candidates. Id. at 76-77; Federal Election Commission v. Furgatch, 807 F.2d 857, 860 (9th Cir. 1987), cert. den. 484 U.S. 850 (1987). The Buckley court stated that such language "raise[d] serious problems of vagueness." As noted in Furgatch, 807 F.2d at 860, "[t]he Court [in Buckley] was particularly insistent that a clear distinction be made between 'issue discussion' which strongly implicates the First Amendment, and the candidate-oriented speech that is the focus of the Campaign Act."

In response to such cases as MCFL, Furgatch and Faucher v. Federal Election Commission,<sup>15</sup> the Federal Election Commission recently issued proposed regulations, 57 Fed. Reg. 33548 (July 29, 1992), which would replace the current language regarding "partisan" or "nonpartisan" activity with language prohibiting corporations and labor organizations from "making expenditures for communications to the general public expressly advocating the election or defeat of federal candidates," and would provide "further guidance as to what types of communications constitute express advocacy." Id. For example, under one proposed alternative "expressly advocating" would be defined as a communication which, when looked at as a whole, "includes an expression of support for or opposition to a clearly identified candidate, a clearly

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<sup>14</sup> In Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 255 n.9 ("MCFL"), the Court distinguished the situation it was addressing with that at issue in Regan v. Taxation with Representation. Unlike the activity involved in MCFL, in Regan the limitations on lobbying "infringe[d] no protected activity, for there is no right to have speech subsidized by the Government." This was contrasted with the independent expenditures of MCFL which was seen as "core political speech under the First Amendment."

<sup>15</sup> Faucher v. Federal Election Commission, 928 F.2d 468 (1st Cir. 1991), cert. denied \_\_\_\_\_ U.S. \_\_\_\_\_, 112 S. Ct. 79 (1991), held unconstitutional an FECA regulation on the basis that it restricted not only "express advocacy" but "issue advocacy," Faucher, 928 F.2d at 470-71.

identified group of candidates, or to the candidates of a clearly identified political party ..."

57 Fed. Reg. 33560. "Support for or opposition to" would be defined to include certain specific phrases enunciated in Buckley as well as "suggestions to take action to affect the result of an election such as to make contributions or to participate in campaign activity." Id. Alternatively, the proposed regulations would define "expressly advocating" as communications which are "an exhortation to support or oppose a clearly identified candidate." In addition to the Buckley phrases,<sup>16</sup> this would include messages "which taken as a whole with limited reference to external events is susceptible to no other reasonable interpretation than as encouraging the candidate's election or defeat rather than some other course of action." Id.

While these regulations are developed in a context more restricted by the First Amendment, they are not irrelevant. The use of the term "partisan" in countless Tax Court decisions and revenue rulings is confusing, without precise definition and not terribly instructive.<sup>17</sup> It would be a good place for the Service to start in clarifying its terms were it to define what "partisan" means as this term has too often become a code word for prohibited political campaign activity.

### **Where does it all lead?**

As the 501(c)(3) rulings and cases indicate, the definition of what constitutes prohibited political campaign activity is far from clear. The standards as applied by the Service and courts are inconsistent. See Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* 349

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<sup>16</sup> In Buckley the Court described some phrases that constituted express advocacy such as "vote for, elect, support, ... Smith for Congress" and others. Buckley, 424 U.S. at 80 n.108.

<sup>17</sup> In Faucher, the Court invalidated the FEC regulation in question because its "definition of 'nonpartisan' inextricably binds its prohibition of issue advocacy with its prohibition of express advocacy." Faucher, 928 F.2d 468, 472.

(1992).<sup>18</sup> There is a continuum between neutral voter activities which are seen as educational and activities which run afoul of the campaign intervention prohibition. Clearly, the closer a Section 501(c)(3) organization gets to endorsing a particular candidate (or supporting a particular party) the further it has moved from neutral (and permissible) voter participation activities. It is also clear that Congress and the Service have determined that campaign- or voter-related activities are a benefit to a democratic society. Certain of these activities further charitable purposes. Organizations which engage in political campaign activity which is not neutral are also accorded tax exemption. Both social welfare organizations, Section 501(c)(4) of the Code, and political committees, Section 527 of the Code, are granted partial, if not full exemption, though they do not receive the benefit of tax deductible donations. Voter registration activities which do not focus on a particular candidate or party are seen as valuable educational activities and come within Section 501(c)(3) status.<sup>19</sup>

The difficulty comes in trying to determine which voter- or campaign-related activities will or should be recognized as permissible under Section 501(c)(3). Assuming the constitutionality of Section 501(c)(3)'s prohibition against political activity, what constitutes prohibited intervention in a political campaign still requires definition and amplification. Where is the boundary for an organization which does not go so far as to "expressly advocate" the election of a particular candidate and should it be able to pursue activities under the educational rubric? The Service has identified factors which will affect the determination of whether an activity is prohibited. These include: timing of activity in relation to an election; extent of

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<sup>18</sup> Ironically, while the Services' rulings and the regulations on political activity appear to be growing less clear, the Federal Election Committee appears to be attempting to clarify its terms. See, *The Nonprofit Counsel*, at 3 Bruce R. Hopkins, ed. 1993.

<sup>19</sup> Sections 4945 (d) (2) and (f) of the code provide that private foundations may support certain voter registration activities, albeit subject to special limitations.

dissemination of materials (more limited dissemination is an indication of lack of intervention); identification of candidates, whether by name or influence; and advocacy of issues which coalesce around the espoused platform of one candidate or party. The discussion of these factors still hinges on such undefined terms such as "nonpartisan," "bias" and the like -- which lend themselves to a perilously subjective approach. Some attempt to follow the lead of the Federal Election Commission to try to define some of these terms would be welcome.

Instructing the public as to how to wage a campaign in order to promote a particular issue seems to make the determination more difficult. While the Service appears to have departed somewhat from Revenue Ruling 78-160 (which held that a voter survey devoted to land conservation issues constituted participation in a political campaign due to its single issue focus), the Service's concern may be that advocacy of an issue is more likely to intersect with a particular campaign or a particular candidate.

On the one hand, it could be argued that the activities of the hypothetical organization are educational despite their ultimate commitment to a political ideology. If its "students" and "professors" were not affiliated with any particular political party and its materials identified no particular candidate, its activities would be less suspect in the view of the Service. Nonetheless, if it took its educational activities to areas of the country in which an election campaign was underway, it would most likely be moving closer toward engaging in prohibited activity. If that campaign involved two candidates, one of whom was strongly identified with abortion rights and one who was against abortion rights, it is probable that the organization would be seen as allying itself with a particular candidate. Because the Service has suggested at least once that an organization need not identify a candidate by name in order for there to be

intervention on behalf of or in opposition to a candidate, it is probable that this would constitute prohibited political activity.

It is troubling, however, that the application of these rules may result in denying an organization the ability to engage in activity that has political consequences but does not seem to constitute intervention in a political campaign on behalf of a candidate for public office. The hypothetical organization should be able to air its views on a subject (without commenting on a particular candidate's suitability for office on the basis of his or her position) without jeopardizing its tax-exempt status. The fact that its position is also supported, or opposed, by a candidate should not threaten that exemption, unless its educational activities seem to be targeted on that candidate.

Further, as the Service moves away from focusing on the explicit components of prohibited political campaign activity contained in the Treasury Regulations, it becomes easier for it to use its position to deny status to organizations with which it disagrees. It should be noted that there are four factors to the prohibition. These are that (1) there be participation or intervention, (2) in a political campaign; (3) on behalf of an individual who is a candidate, (4) for public office.

That portion of Technical Advice Memorandum 9117001 devoted to campaign schools and the decision in American Campaign Academy are particularly troublesome because the organizations' activities seem more closely aligned with educational activities with which we are familiar, and therefore eligible for Section 501(c)(3) status. The Service, in fact, thought that ACA qualified as an educational organization. It did not rely on ACA's political activity to deny exemption, but rather on the "private" secondary benefit. Look again at our hypothetical

organization which wishes to educate the public to operate pro-choice campaigns. Is this "pure" education, or political intervention or private benefit?

The American Campaign Academy case raises this additional level of uncertainty for our hypothetical organization. In our hypothetical case, the secondary beneficiaries could be viewed as candidates who support abortion rights. On the other hand, a persuasive argument could be made that it was not the candidates who were the secondary beneficiaries but rather women. The ultimate objective pursued would be to augment women's freedoms and help them to pursue their constitutional and civil rights under law. Such a class would be considered charitable. Treas. Reg. § 1.501 (c) (3) -1 (d) (2).

Ultimately, whether single-issue or ideologically based, a school which operates series of workshops or classes, albeit one which teaches campaign techniques should fall within the educational rubric so long as it does not aim its educational activities on promoting particular candidates or intervening in elections. The fact that it trains individuals or entities how to undertake these activities should not be sufficient to deny it exemption. It provides for the dissemination of ideas and should not have to fall back on the concept of a charitable class. The various factors articulated by the Service: timing, relationship to an election, identification, whether specific or not, may all be relevant factors as to whether its activities constitute prohibited intervention. Various undefined terms such as "partisanship" do not seem useful. Only when such a school itself targets the election of specific candidates should it be subject to the possibility of loss of 501 (c) (3) status.