

A Consideration (Yet Again) of the Constraints on Political Campaign Intervention Activities of Section 501(c)(3) Organizations

Rochelle Korman

Nonprofit Forum
December 13, 2007

We are once again on the cusp of quadrennial elections in the U.S. (although it feels as if we having been living 2008 for two years now). Every four years the IRS, practitioners, academics and issue-oriented 501(c)(3) organizations re-visit the do's and don'ts of the Section 501(c)(3) prohibition against any intervention on behalf of or in opposition to candidates for public office. As a practitioner in the throes of providing nuanced advice to clients -- national foundations and issue advocacy organizations -- regarding the IRS's lines in the sand (better known as the "facts and circumstances" analysis), I again am struck by the extraordinary difficulty of distinguishing educational/issue advocacy activities from campaign intervention activities other than at the poles.¹ And, I am reminded of what I believe is an important distinction without a difference—treating so-called single- issue organizations (or organizations focused on a limited number of issues) differently from organizations that appear to cover the full waterfront of issues, with the result being an inappropriate chilling and restraint of such organizations' ability (and right under section 501(c)(3)) to discuss, inform and advocate their issues during an election year. It is this latter point that is the focus of this nugget.

¹ NPF members have discussed the campaign intervention prohibition from many angles over the years. Among the papers presented earlier are Antonia Grumbach's "Between Scylla and Charybdis: Navigating the Shoals Between Educational and Political Activity" (1993); Laura Chisolm's "Newt's \$300,000, 501(c)(3) Blues: Themes and Variations" (1997) and "Lining Up the Pieces of the Jurisdictional Puzzle, or What's Subsidy Got to Do with It?" (2001); and Miriam Galston's "Express Advocacy in the Post McCain-Feingold World" (2004(?)). My apologies for other papers I may have overlooked.

The IRS' has historically applied a "facts and circumstances" analysis to its interpretation of the campaign intervention prohibition. Getting the facts and circumstances right is critically important. First, we are dealing with core missions of Section 501(c)(3) organizations that regularly inform, educate, and advocate on issues of importance to society (important to the organizations and their leadership/membership—a subjective not an objective conclusion). At the risk of over-dramatizing, this is what civil society is all about.² Second, *Taxation with Representation* and cases that address the boundaries of unconstitutional conditions probably foreclose any argument that the campaign intervention prohibition is unconstitutional. Nonetheless, we still are talking about speech, a most precious commodity. Third, the Service's attempts at clarification through guidance over the years may be well-intentioned, but has created anomalies that arguably impede the dissemination of information to the public at one of the rare times when the adult American citizenry seems to be somewhat engaged in a public debate about issues. Fourth, from a pure compliance point of view, lack of clarity or "dances on the head of a pin" form of a test can have its own chilling effect. Fifth, the Supreme Court's decision in June in *FEC v. Wisconsin Right to Life* ("WRTL II") (decided about three weeks after Rev. Rul. 2007-41 was issued—no, I am not suggesting that the Supreme Court was influenced by the EO branch) stated that "the proper standard for an as-applied challenge to BCRA Sec. 203³ must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." (WRTL (II) at 16). The Court went on to state that an ad is the functional equivalent of "express advocacy" (the term used in FEC

² I note tangentially that Steve Miller has been making some disturbing public comments about the IRS' role in nonprofit governance and program activities suggestive of the agency becoming the benevolent "decider" of good organizations and bad organizations. A topic for another day.

³ BCRA Sec. 203 makes it a federal crime for any corporation to broadcast any communication that names a federal candidate for elected office and is targeted to the electorate, where the broadcast occurs within a defined time before an election.

parlance for prohibited electioneering) “if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” I do think the EO world should yet again re-visit the question of aligning the tests under the Code and federal campaign law.

I am not going to analyze the above five points in this very brief paper; rather I will go out on a limb and assume the validity of the first four, at least to the degree necessary to challenge the Service’s fairly consistent position that a single issue organization must be extra careful in pursuing its agenda because there is a tacit presumption that if that organization’s position on its primary issue is consistent with a candidate’s position, the organization must be endorsing that candidate.

Current State of IRS Guidance

The Service issued Revenue Ruling 2007-41 in June (copy attached) which uses 21 hypothetical situations to lay out the Service’s current thinking on applying its facts and circumstances test regarding campaign intervention. At the poles, much of the guidance hangs together and the Service has been fairly consistent. For example, voter education materials and questionnaires may not demonstrate a bias or preference in “content or structure with respect to the views of a particular candidate”; forums are acceptable so long as all candidates are invited and the actual event “provides fair and impartial treatment of candidates”; and Section 501(c)(3) organizations may take positions on public policy issues, “including issues that divide candidates in an election for public office”, so long as the organization avoids “any issue advocacy that functions as political campaign intervention.” (all quotes are from Rev. Rul. 2007-41).

Application to So-Called Single Issue Organizations

Single issue organizations—or those perceived as single issue—are generally treated differently by the IRS in its pronouncements from supposedly multi-issue

organizations for campaign intervention purposes—certainly implicitly if not explicitly.. This is true for organizations across the political spectrum: environmental, conservation, abortion rights, gun control, gun freedom, charter schools; estate tax repeal, etc. The question then is not whether the Service is itself biased on specific issues (I don't believe that is so), but whether questioning candidates on their positions regarding a "specific" issue or a cluster of related issues constitutes intervention anymore than questioning candidates on the magical "broad range of issues". From the perspective of say Planned Parenthood, a woman's right to choose connects with women's and girls' health, economic and educational issues, surely a broad range of issues, but just as surely not considered such by the Service. Other categories considered or likely to be considered single issue, would be organizations focused on climate change, conservation, the US involvement in the Middle East, ending the war (Iraq not Vietnam) and so forth.

Rev. Rul. 78-248⁴, Rev. Rul. 80-282⁵, and Rev. Rul. 86-95⁶, are three key rulings that lay out the Service's position on the "broad range of issues" requirement. Interestingly, the 2002 CPE Text⁷ actually is not nearly so emphatic. Rev. Rul. 2007-41 restates the positions taken by the Service in these rulings, but by its silence, appears to backtrack from some of the conclusions in the 2002 CPE text regarding activities of single or limited issue organizations during an election period. Thus,

- Situation 4 of Rev. Rul 78-248 describes an organization concerned with land conservation issues that compiles the voting records of incumbent legislators on these issues and distributes the report widely. The organization presents the information in a factual manner. The Service, in ruling that this organization is engaged in improper campaign intervention states that although the organization is providing useful

⁴ 1978-1 C.B. 154

⁵ 1980-2 C.B. 178

⁶ 1986-2 C.B. 73

⁷ Judith E. Kindell & John Francis Reilly, "Election Year Issues," IRS Exempt Organizations Continuing Professional Education Technical Instruction Program (August 29, 2002). The 2002 CPE Text was an update of the 1993 CPE Text by the same authors.

information, the “emphasis on one area of concern indicates that the organization’s interest is not nonpartisan voter education.”

- Rev. Rul. 80-82 “amplifies” Situation 4 of Rev. Rul. 78-248. The ruling approves an organization that is similar to the Situation 4 organization in that it gathers records on a limited set of issues. Because the dissemination is not widespread, but rather limited to the newsletter’s readership, which is only a few thousand nationwide, the gathering and reporting is acceptable.
- Rev. Rul. 86-95 addresses an acceptable candidate forum sponsored by a 501(c)(3) organization because, *inter alia*, the candidates are asked questions across a broad range of issues, even though there may be particular issues that are of primary interest to the organization’s members or others in the audience.
- The 2002 CPE Text is more helpful to the activities of single issue organizations and notes that the mere similarity of an organization’s position on the issues with that of a candidate will not of itself constitute campaign intervention. Regarding published issue advocacy, the 2002 CPE Text states that “...the fundamental test that the Service uses to decide whether an IRC 501(c)(3) organization has engaged in political campaign intervention while advocating an issue is whether support or opposition to a candidate is mentioned or indicated by a particular label used as a stand-in for a candidate. Accordingly, the appropriate focus is on whether the organization, in fact, is commenting on a candidate rather than speaking about an issue.”⁸ [emphasis in original text.]

Unfortunately, the 2002 CPE Text does not appear to carry the day. Rev. Rul. 2007-41 does not explicitly address the predicament of single issue organizations. None of the 21 hypothetical examples address any but the most obvious situations. The closest the Rev. Rul. comes to addressing the issue is a general statement that “Section 501(c)(3) organizations may take positions on public policy issues “including issues that divide candidates in an election for public office.” But, they must avoid any issue advocacy that “functions” as political campaign intervention. In other words, issue advocacy and campaign intervention are not mutually exclusive and one must parse through all the facts and circumstances to determine if there is an intervention alongside or on top of the issue advocacy.

⁸ Note that the 2002 CPE Text updated some of the positions of the 1993 CPE Text following excellent and detailed comments by the ABA Subcommittee on Political and Lobbying Activities in 1995 (which I believe was led by Miriam Galston and Greg Colvin).

This parsing however is tricky and time-consuming and becomes more difficult for the single issue organization because of the presumption that intervention is taking place. Rev. Rul. 2007-41 lists five factors used to evaluate whether or not a candidate forum constitutes campaign intervention; one factor is ‘whether the topics discussed by the candidates cover a broad range of issues....’ The satisfactory hypothetical example, Situation 7, restates as a favorable factor that candidates at the hypothetical forum have the opportunity to address and field questions on a “wide variety of topics.”

The problem with the “broad range of issues” requirement is that it effectively disables those organizations that have developed some of the most complete analyses of particular issues over a sustained period of time from freely presenting and advocating their positions. Or, to put it another way, it disables those organizations that are not inclined to play audit roulette and that want to do their work in a legally compliant way. Encouraging all candidates—regardless of party affiliation-- to offer more complete, thoughtful and responsive answers to questions on specific issues should be viewed as consistent with the role of a 501(c)(3) organization acting in a nonpartisan manner.

In fact, it could easily be argued that were a group of single issue organizations to combine forces to hold a public forum on a broad range of issues, the outcome would likely be a sharpening of differences between/among candidates rather the dumbed down, “on the one hand, on the other hand”, answers that the Service seems to believe is the hallmark of non-intervention and nonpartisanship. Yet, a group effort at a forum should easily pass the “broad range of issues” requirement and level the playing field for the facts and circumstances analysis. For example, imagine a candidate forum where all the major Republican and Democratic presidential candidates have been invited. Rudy, Mitt, and Huckabee are the

Republicans present and Clinton, Obama and Edwards are the Democrats who appear. The forum is sponsored by Catholics for a Free Choice, Environmental Defense, and the Brennan Center. Chris Matthews and Lou Dobbs have agreed to be the questioners and have framed all the questions themselves—and the questions include but are not limited to the issues of primary concern to the sponsors. I suggest that the answers to the questions posed will more sharply define the differences between the candidates than a forum sponsored say by Environmental Defense with questions largely on environmental concerns. Would this then constitute campaign intervention by these organizations? Or would it fly because the forum covered a broad range of issues (and met the other criteria of neutral questions, neutral questioners, etc.)?

My preference would be for the Service to undertake a complete and thorough review of how it has interpreted and applied the prohibition over the years. There is too much at stake for this country to have an uninformed, asleep at the switch citizenry. Short of a complete review, however, I think the most valuable modification would be to adjust the seeming presumption against single-issue organizations and organizations that focus on a limited cluster of related issues. I look forward to a lively discussion.

