



Panel Discussion: The Need for Clear Rules for 501(c)(3) Groups at Election Time

August 3, 2007

[Note: Portions of this conference has poor audio recording, e.g. background noise, hence some words are indiscernible.]

Kay Guinane: Thank you all for coming. For phone participants, welcome also. My name is Kay Guinane. I am Director of Nonprofit Speech Rights of OMB Watch. The goal of the panel today is to generate debate and discussion and ideas for improving the situation that charities and religious organizations find themselves in, which is that we do not really know how to comply with the ban on partisan intervention in elections because what is and is not intervention is not clearly defined. Instead, the IRS has discretion to apply its opinion to the facts and circumstances of each case.

We became concerned about this situation when the IRS stepped up and changed this unfortunate process in the last two election cycles. We are also concerned about the increased need for non-partisan voter engagement and voter protection work on the part of nonprofit organizations as to Help America Vote Act is implemented. Our election system needs the support and help of our non-partisan community but the uncertainties surrounding the rules can make that participation difficult.

In July last year, we published a report that laid out our concerns and expressed the need for a bright line test. The copy is back there with the handouts. Now, it is time to explore how fairly the rule could be achieved; what are the pros and cons of having a clear rule? And we want that discussion to kick off today with our panel of experts. We are very fortunate to have a collection of speakers who are not only knowledgeable, but committed to the nonprofit sector. Each panelist will make a short presentation and we will take one question from the audience; then we move on the next panelist and so that we can make lots of time, open it for discussion and follow-up afterwards. For participants on the phone, if you have a question or comment, please email it to aadams@ombwatch.org. We will ask the committee to read questions as time allows.

The scope of this panel is how to make the rule workable, not whether or not it is good policy to have a ban on partisan activity by charities and religious organizations. That is a whole other topic and a whole other panel, which in fact, next week the Hudson Institute is having a debate on this issue on August 9th and you can get more information on their website.

Thank you, also, to the Bauman Foundation for making this event possible. We greatly appreciate it. The restrooms are out that door there and to the right. Coffee and juice is available. Sorry, phone participants, that you cannot help yourselves to that.

Without further delay, I will introduce our panel. Our first speaker is Marcus Owens of the law firm Caplin and Drysdale. Mr. Owens is a former director of the Exempt Organizations

Division of the IRS and an expert on the Exempt Organizations Law, working in areas of advocacy, has represented several clients who have been caught in snares at the IRS enforcement program, and also works on issues regarding philanthropy and its role in society.

Marcus S. Owens: Thank you, Kay. Good morning. My role here this morning is to take a few minutes and set the stage for the debate and, in particular, draw some contrast between the rather precise rules that are applicable to charities and lobbying activity with regard to the rules for charities and political campaign intervention. Both types of activities are considered non-charitable activities for 501(c)(3) organizations, but they are subject to a different set of definitions and standards, although they are both subject to an excise tax.

So what I would like to do is start out by noting that the prohibition on political campaign activity is absolute. The statutory rule set out in 1954 is clear in terms of what the downside is - that if there is political campaign intervention, the result is that the charity involved has jeopardized its tax-exempt status. Now, that statutory change, while it is widely considered to have changed the state of charity law, at least, in the United States, in fact, has antecedents in British Common law. If you look back at court decisions in the 19th and early 20th century in the United Kingdom, you see efforts to create charitable trusts to benefit a particular political party being turned down as charitable by the British courts. So I think the common-law legal tradition would support the statement inherent in the prohibition on political campaign activity, that campaign intervention by itself is not a charitable activity.

Now, what is missing is the definitional piece. What is intervention? We have a similar restriction in the code -- different standard for transgression, but a similar statement that charity should not engage in propaganda and other kinds of lobbying activity. In 1976, Congress created an excise tax for lobbying activity that applies to particular publicly supported charities and they can elect to be covered by the excise tax. The excise tax carries with it a sliding scale of permitted expenditures that will not be transgressing restrictions on the code. When that statutory change was passed, it took the IRS 10 years to develop the first set of regulations. They were released in 1986 and they took a position that is not dissimilar to the position that the IRS is currently taking with regard to political campaign intervention - that the activity is bad, that any rule that permits a level of it should be very narrow and very conservatively written.

The IRS-proposed regulations in 1986 were met with considerable negative comment from the sector. Over the course of the next two years, there was considerable debate back and forth, including the formation of a special advisory panel called and chaired by Donald Alexander, former IRS commissioner, to work through, with the IRS, a set of definitions that would better capture what the sector felt Congress had in mind when it created the rules under section 501(h) for lobbying. As a result of this unprecedented interaction between the sector and the IRS -- and by unprecedented, I mean, it had never happened in the Exempt Organizations context; it also does not happen in normal legislative process either; it was not a formalized Administrative Procedures Act hearing. It was a true advisory committee interaction, unlike the current advisory committee; it was, in essence, an independent committee advising the IRS, not a committee taking direction from the IRS.

Out of that came proposed regulations in 1988 that set out bright line definitions, variety of standards, and instructions and examples that I think the private sector has found very beneficial as it runs its way between its need and its duty to inform the development of

public policy and its need to abide by the limitations on lobbying activity in the code. In contrast to that, in 1987, before the 1988 regulations had been issued, before the lobbying process had come to an end, congress passed the [indiscernible] Reconciliation Act in 1987 and included an excise tax under section 4955 on political campaign intervention by charities. The IRS followed the same playbook if you will, that it followed in 1986 and issued very conservative, relatively uninformative regulations interpreting section 4955.

In contrast to the reaction to the 1986 lobbying regulations, the charitable sector did not rise up and push back and demand better rules from the IRS. No one like Donald Alexander pulled together a group to advice the IRS on what could be a better set of rules or standards. Both the 1988 regulations on lobbying and the 1987, 1988, 1989 vintage regulations under section 4955 were finalized and now are in place.

So we have, in essence, two approaches to setting out definitions and boundaries for charities; one that is very usable and very clear for lobbying activity and one that is the exact opposite for political campaign intervention. We have the IRS basically letting the lobbying rules be self-enforcing. The IRS has not felt compelled to mount significant audit projects looking at the restrictions on lobbying activity by charities.

In contrast, the IRS has been struggling with enormous issues of compliance on the political campaign intervention front. They have issued within the year white papers and general plain-language descriptions of the rules on political campaign intervention and then, most recently, a revenue ruling that sets out 21 situations. None of those will move the state of the law forward, but clearly showed the IRS struggling with its enforcement campaign.

Because of its restricted resources and its philosophy of delegating decision-making as low as possible, the IRS audit program has tended to expand its review, particularly of churches in the last two audit cycles. The delegation order to begin a church examination, particularly their political campaign activity, has been pushed down below the level of the Director General of Examination, none of which is sanctioned under section 7611 of the regulations. But it clearly suggests a widespread IRS desire to deal with political campaign intervention; a finger-in-the-dike mentality, not a systematic approach to the problem seeking a solution.

The IRS audit activities have run into some resistance. They seem to have developed a pattern of issuing no-change advisory letters. Three organizations, I understand, have lost their tax-exempt status. A number have refused to comply with IRS audits. One of those of the NAACP was closed without change; that is the Department of Justice's decline to enforce administrative summons against the organization on behalf of the IRS. A second case involving All Saints Episcopal Church in Pasadena, California remains in limbo waiting for the Department of Justice to take action. Recently, in a church examination, there was initiated at a low level pursuant to IRS delegation orders -- my firm saw the writ of mandamus in federal district court here in Washington ordering the IRS to follow section 7611 and have the inquiry approved at a high level. Before the case could come to trial and indeed could be briefed, the IRS issued a confession of procedural error in the case. I do not know where that matter stands, a case I expect it to be dismissed soon.

But the -- viewing that the political campaign intervention issue has pushed the IRS beyond the limits of its own internal procedures, it started to make significant errors in tax administration and it has not been able to deal with the problem. So I think it is time for some

new solutions to be proposed and perhaps for a more open and constructive dialogue to occur with the charitable sector on this important issue. So with that, I will relinquish the microphone.

Kay Guinane: Anybody have a question for Marc? If none, then I'm going to Greg Colvin, attorney of Silk, Adler & Colvin in San Francisco and he has been active in representing nonprofit organizations and working on advocacy-related issues and exempt organizations committee of the American Bar Association and is a brave soul who has taken a stab at crafting a clear law that we all might all follow. So he will share with us his thoughts about the feasibility of having some clarity in there.

Greg Colvin: Thank you, Kay. Thanks very much for the invitation. I think the first comment I wanted to make about this area of enforcement with political activities of nonprofit, tax-exempt organizations is that we seem to face two kinds of problems. One, which we are not going to talk about today but which runs through the field, is to identify the capacity of various vehicles to conduct political activity under federal law. The most favored vehicle is the federal political committee that can accept only identified, limited contributions but it can do anything it wants to try to influence the outcome of federal elections.

I think many of you are familiar with some of the other vehicles that can do some electioneering activity, including so-called qualified nonprofit corporations under FEC law that come under the Massachusetts right-to-life case, 527 organizations, independent political entities, 501(c)(4)'s -- all under the same standard of, what we think, from the IRS in terms of defining what political activity might cause them to keep or lose their tax exempt status. And of course, corporations and unions are barred by election law from trying to influence federal elections. But individuals, either spending on their own election or trying to influence the election of others, can appear to spend without limit from their own account. So we have this whole question of what kind of vehicle is on the table to decide whether it should or should not participate in election activity; and whether it might face penalties — tax penalties or others — for doing so or going beyond the limits.

The discussion today is about how you draw the line between what is and is not political for these various kinds of vehicles. We have framed it in terms 501(c)(3) organizations which are prohibited from political intervention. But the same line-drawing question comes up with (c)(4)'s that must limit their political intervention to something less than half of what they do and, also, what the definition of 527 is for organizations that have that status by virtue of devoting all or almost all of their activity to politics.

So when we look at the question of speech itself, there is one rule which has come to -- like with the FEC's rule-making process -- and that is to define the speech of soliciting money from others to implement federal elections as causing an organization to follow into FEC political committee status. So there we have one at least bright line, not set by the IRS so far, or adopted or confirmed by the IRS, but at least set by the Federal Election Commission that if... No matter what activity you intend to engage in, if somehow you are telling donors that with their contributions you will try to get someone elected or defeated in the next federal election, that crosses the line.

When we are talking about the rule-making options, whether they are set by the IRS or by Congress, whether the IRS in doing so would use a regulatory process or issue guidance in

the form of revenue rulings or even informal fact sheets, it is interesting to look at the range of possible ways of going about that. In Marc's remarks, he indicated that at the end of one side the scale, we have the facts-and-circumstances approach, which really gives no guidance as to how the activity might be judged, and on the other end of the scale, bright line tests which tell you precisely what falls on the good or the bad side of the line. Actually, we have more than one big facts-and-circumstances test that applies to political activities of charities. Not only do we have the question, did they or did they not intervene in an election; we also have the question, did they engage in any substantial improper private benefit to a partisan entity.

This is how the American Campaign Academy case was decided some years back, not on the basis that the campaign academy, which is a Republican-framed campaign training school, which claimed to be educational, and therefore, 501(c)(3). The judgment of the service in the court was not that it had intervened in any campaign but that it was set up so as to favor private, partisan interests and, therefore, violated this standard which Mark has described as somewhat like the Potter Stewart "I-know-it-when-I-see-it" pornography standard.

So on the other end of this scale, we have bright line tests such as the test under these very fine lobbying regulations for grassroots lobbying, which has a three-part test: if it refers to and reflects a view on a legislative proposal, and there is a call to action to contact your representative or other government official, that crosses the line. It is not necessarily a straight line; it is sort of a curved line because it includes exceptions for mass media communications and other exceptions for advance activities, which have some other substantial purpose or are paid for six months or more before the grassroots lobbying occurs. So these are terrific bright lines; they are very specific. They have certain specific requirements of what you have to say or not say in time periods that apply to when the payment or when the speech occurs.

In between these two polar opposites, there are other approaches that the IRS has used and, for that matter, the FEC as well. One is to apply specific forms of analysis to certain fact patterns, like debates or candidate questionnaires or voter guides or mailing lists or websites. So when you go through the most recent Revenue Ruling 2007-41 --which, frankly, is a great advance in IRS rule making. We have not had any serious revenue rules in this area since the 1980s and here we have about two dozen examples now of different kinds of conduct that are described through little illustrations, little parables of good and bad conduct, that seem to tell us something about how the IRS would look at those specific fact patterns. So that is certainly more useful than nothing, but it is still not a bright line; it is still not a test that tells you which side of the line you might fall on.

About 10 or 11 years ago, Miriam Galston and I, who chaired the ABA sub-committee of the Exempt Organizations Committee and who focuses on political and lobbying activity, suggested a general definition. It is not necessarily a bright line but, at least, a sort of approach. And to paraphrase what that proposal was, we suggested that the intervention standard be interpreted to mean any activity which tends to promote or disparage the prospects for someone to be elected to office and, from a reasonable person's point of view, does not have a nonpartisan charitable purpose. That general definition met with deafening silence. But it is still there as a proposal as to how to look at the intervention standard.

There are other approaches such as the methodology test in a Rev. Proc. 86-43 which is not about politics, specifically, but rather about whether educational speech would consist of inflammatory statements that are made, not to leave the reader or the listener through a learning

process, but to try to inflame passions and cause them to take action in some way that was not truly educational. That kind of methodology test helps. It allows you to look at something you are writing -- a speech that is being prepared and ask yourself a few questions about whether its content is sufficiently factual or open to presenting material that is not just conclusory, but goes through a process of logically leading the listener from one point to the next.

I think that the approach that the IRS seems to be most taken with in the most recent revenue ruling is what I would call a multifactor analysis. The first time that they have done this recently was in the Revenue Ruling 2004-6, which dealt with issue advocacy and issue advertisements, actually, not by 501(c)(3) organizations but by those that are 501(c)(4)'s, (5)'s, and (6)'s that may have 527 tax problems for the political expenditures they might make. Those multifactor analyses looked at an advertisement to determine how close in proximity it was to an actual legislative vote on something, what the content of the advertisement might say about the individual who is being lobbied. Another factor is that, frankly, line up on a good side and a bad side and when you're writing a legal opinion for a client, I guess, you kind of factor this and you try to get as many good ones as you can and have as many few bad ones in the situation you are evaluating.

That multifactor analysis was brought forward and changed slightly in the 2007-41 revenue ruling that recently came out. They applied the multifactor analysis to candidate appearances and some other situations, as well, where in the earlier fact sheet they had said that charity must ensure that during the candidate appearance, there is no solicitation for money, et cetera. And they actually edited that to say that these were factors to be considered, which indicates the IRS -- at least my estimation is, it is moving away from bright lines and more toward, "Well, there are good factors and bad factors and we have to weigh the circumstances in each case. And I do have to say, actually, the facts-and-circumstances test does not always work to the disadvantage of the charitable organization. In many cases, the IRS uses this to look for more mitigating factors that might result in a no-change letter or an acceptance; then, in this case, the organization did not cross the line. So does not always work against you; sometimes it works in your favor.

Nevertheless, I think we would like to have a safe harbor. We would like to have a way to tell our clients while there are many grey areas, there are things that could get you in trouble when you start talking about public officials. When you start talking about public policy issues in church, or in your newsletter, or on your website or in advertisements, there has to be a certain area that is so safe that we feel you can proceed without having to be concerned if the IRS is going to levy a 4955 excise tax or revoke your tax-exempt status.

About a year- and-a-half ago, I took a stab at such a safe harbor - there is a copy of it in the table out there - and I basically -- just from my experience at looking at how many different kinds of questions they got from clients, I found that they tended to fall in two categories. One was the one about whether they can really criticize public officials during an election process when that person is running for election. Somehow, criticism is more popular than praise but sometimes they would like to say positive things about candidates and, still, the same question arises. And what I have been advising is that- and I think that there is some justification for this advice and some of the discussion the IRS gave back in 2002 in its handbook for auditors. It is that you can certainly comment about public official's performance, good or bad, so long as in the commentary, you are not also making a reference to the upcoming election or the

voting process. I believe that this safe harbor area of commentary ought to be safe even if you are not referring to any particular upcoming legislative vote or anything that you are asking that public official to do. It should always be, at least in my view, a free speech entitlement to criticize or praise public officials.

Now there is the question of timing. If the organization has not done so in the past and chooses to do only on a Sunday before the election, you might say that that might or might not be okay. But perhaps it should not be in a safe harbor because if you are going to define a safe harbor, you want to use some precise standards to indicate how that circle is drawn. So for instance, I suggest here that that kind of criticism or praise would fall on a safe harbor as long as it is more than 60 days before an election, which is taking the electioneering communications standard that became final reform and flipping it and using it in different ways. Instead of saying that is a blackout period when you cannot make a commentary, we might say with a safe harbor, that anything before 60 days is safe, assuming it meets the other criteria. But after 60 days, we do not know; it is in a grey area.

The other symmetrical piece of the safe harbor would be to indicate that an organization can make comments about issues and about the upcoming election and about the importance of voting so long as it does not refer specifically to candidates or parties. Now, it is possible to have nonpartisan speech that includes references to candidates or parties if it is even-handed and unbiased, but that is an area in which judgments can be made. My suggestion is that a safe harbor be applied to commentary about issues in elections that does not refer to candidates and parties, but does refer to the importance of the environment, the importance of fair taxation, the importance of a woman's right to privacy, the importance of - and here is where it gets kind of borderline - the composition of the Supreme Court in the next eight years.

There should be an area where the nonprofit sector and the IRS could see eye to eye on what might be safe. I think it is worth putting something out there to see whether it would fly, trying to determine -- and this is how it gets evaluated -- can you do something abusive within the safe harbor? If you can, then the IRS will be very reluctant to accept such a proposal.

In any case, just to make a final comment on this, some people who practice in this area believe that best approach is to let sleeping dogs lie. I have been practicing for more than 28 years in this area without a clear standard. My clients have been able to do pretty well and I may retire before there is a safe harbor. Nevertheless, we are increasingly, with every election period, passing the point beyond which it feels tolerable to have no safe standard, particularly because not only do my clients in many cases want to exercise their free speech rights; they get very upset when their opposition seems to be, as they view it, violating the rules. We have seen an increase in watchdog groups who are turning in their opponents, turning in their adversaries to the IRS in the belief that the standard has been violated.

Well, how are they going to be able to frame such a complaint if we do not have a standard to use? They may come to us; they may come to one of you, saying, "Well, where is this line? We are playing it safe. We are engaging in free speech but we are not trying to intervene in the elections. What can we do about these other people who are active in our issue area and they are causing us to, basically, lose in the big battles of public policy issues because they are going across a line that is not very clear but we wish it were clearer?" So I think maybe the sleeping dogs have to be roused.

Kay Guinane: Thank you very much. Any questions for Greg?

Female Voice: You are suggesting [inaudible] conference. Great. I was going to ask you about the recent Supreme Court case in Wisconsin, the Right to Life case, which was a federal election law case which is now directly [indiscernible]. But there were some interesting findings in that case -- things like in the area of First Amendment; First Amendment rights are impinged. Facts-and- circumstances is not a good thing because we want to try to find another -- where there is specific -- where there is -- to go either way on a decision for free speech. Do you think that might provide an opening to establish a dialogue with the IRS at this point? Something a little different, a wedge to go in and out of this again?

Greg Colvin: Well, that is a very provocative question and I think there is two very interesting parts to that. One is I think I recall that the key statement that Roberts made in his opinion was that a communication might fall within this prohibition only if it is susceptible with no reasonable interpretation other than its appeal to vote for or against a specific candidate. As time goes on, the community of enforcers and the community of people who work in this area may look at such things as widespread TV ads trashing a candidate's military record in the month before the election as having no other reasonable interpretation, except to try to get that candidate defeated. I do not know if that is what Roberts intended but we certainly are in an area where we are trying to reasonably name activity as political when it seems to have no other reasonable interpretation.

The other thing that has to be taken account of in this - and Beth or others may speak about it - is the fact that there is a different constitutional basis for the 501(c)(3) prohibition than there is for the criminal and other civil penalty elements of the FEC law. And in Rehnquist's opinion in the Reagan v. Taxation without Representation case back in the '80s, there was the view taken that the 501(c)(3) charitable status amounts to a tax subsidy, and it is out of legislative grace in which Congress has decided to provide this class of a million 501(c)(3) organizations with tax-exempt status and the ability to receive tax deductible contributions. But, in return for giving that benefit, Congress can impose restrictions on that subsidy. And one restriction is no intervention in political life and may define that more broadly than would be the case with a specific election law that applies to organizations, not because they are subsidized or not subsidized but because they have a different legislative goal, which is to control corruption. So that is going to be an interesting question, whether the tax subsidy theory survives and whether a case might be brought again to test whether the Supreme Court in the future has the same view of tax-exempt status, that it might have a campaign finance reform

Kay Guinane: This is such an interesting question. We will let all our panelists respond to it before we --

Karl Sandstrom: Actually, I was going to address that question, so I'll hold off.

Kay Guinane: Okay.

Marcus Owens: Yeah, I was going to have one observation. I'm not so sure the distinction between civil and criminal is so clear because when a publicly supported charity -- not a church, of course, but a publicly supported charity files its Form 990 and, on the form, indicates it is not engaged in political campaign intervention, it does so under penalties of perjury.

Kay Guinane: Our next speaker is Beth Kingsley. She is another expert in not-for-profit laws, representing many organizations both in 501(c)(3) category but also support for 527's and organizations and affiliations that need to move back and forth between lots of different roles. She is going to talk more about the ideas of safe harbors and bright lines.

Beth Kingsley: I want to talk a little about some of the problems, and I could go on for hours. But I'll handle just a few points on the problems under the facts-and-circumstances test and why in some of the ways in which it is not workable. I will admit upfront that I have some reservations about the idea of a safe harbor -- or rather of the upper bright line, the difficulty of capturing everything that might be abusive in terms of a charity attempting to influence the political process while also allowing all of the really good issue advocacy and voter engagement activity that we think these organizations should be engaged in. That does not mean I do not think it is worth trying and, certainly, if we could get to some safe harbor -- any more guidance, anything that eliminates some of the uncertainty we are faced with, it would certainly be welcome.

But let me turn to you the facts-and-circumstances test. One of the frustrations with it is that we know it is facts-and-circumstances test but we do not know under all the facts and circumstances, have you done what? "Have you intervened in a campaign" is what they tell us and that is not really a very helpful definition; it just repeats something we are attempting to define.

As a result of that uncertainty, a lot of the time when we are advising clients, we are doing a risk analysis. We are talking to them about the fact that there is no precedential guidance that gives them a clear answer and that it is quite possible the IRS would not approve of the course of action they are proposing, although we do not know. On the other hand, sometimes I will say that if you have the resources, the time and the energy to fight them on this and to oppose an audit and fight on it and go to court if need be, you have a really good chance of winning because I actually think your legal arguments are better than those that might be put forward against you. This means the organization is in the position of deciding whether they want to be the test case and - surprise, surprise - most of my clients are not really interested in that. We see them stepping back and not doing things that I think are quite defensible or should be permitted; and I think that is an unfortunate result, to say the least.

Let me highlight a couple of practical things that I have seen coming up, particularly -- this is a very interesting election cycle. We have seen the presidential race start extremely early and we have primary races that are hotly contested on both sides with a huge number of viable candidates and a lot of debate and focus and attention being paid to that race. We are seeing people talk about issues in the context of that as they compete within the primary races. They are often talking about policy issues that are of ongoing and deep concern to charitable organizations.

So what do you do when the leading presidential contender announces from their campaign office a major initiative on some policy fund, and it is your policy? And you might quickly say -- it is not exactly what you would say; you have some criticisms of it and you want to analyze it and the press is all over it and they may even be calling you. Can you weigh in? Can you analyze this position? Can you speak out about it? Can you use that as a platform to put your position forward?

I think the answer is it can be risky. You should, at least, be able to respond to that press call and expound your position, but there is a range of responses that will lead from that, the “Yes, I took the call” and I said, “Well, this is good. This is bad. Here is our position,” all the way through the more obvious things that are clearly -- at least, under the standards articulated in the recent revenue rule and other guidance, that would be considered campaign intervention.

So if I’m buying TV time to criticize a candidate’s position on an issue and they are articulating that as a candidate, I would probably cross the line. But can you put in a website? Can you have an ongoing discussion on your website of important, significant public development that includes candidate’s articulations on your issue? Can you include that in your analysis? There are some risks there, partly because of the existing guidance. The act of comparing your position on an issue to that of a candidate is one of the hallmarks of campaign intervention in many instances. So it raises a risk with a lot of uncertainty there.

Some of the other frustrations I have actually have to do with the ways -- we do have guidance and the -- what I think I see is the undue rigidity of some of it. One example is that in voter education activities, the IRS has focused on the question of whether you address a broad range of issues or a narrow range of issues. Putting aside the frustration that I’m not exactly sure how many issues you need to be broad -- and I get asked that question a lot. Is five enough? I’m really not sure.

Putting that aside, in my examination, I think this can be an unduly broad line if that is an absolute requirement. Certainly, in a voter guide focusing on two or three issues or even just one can be a way of signaling support for a candidate or opposition to a candidate. But what about a debate? We are seeing dozens of primary debates going on this year. Is there not a place for one that focuses on the environment or on national security? That might be considered a narrow range of issues, but it can add meaningfully to the debate and serve a valid voter education function and not serve as a proxy for advancing your organization’s preferences; for those reasons, I think it should be permitted. I find the absolute statement that voter education activities -- they always come back to this broad range of issues when we are talking about educating voters as voters, I do not like.

And finally, the Internet. It has been, I think, 13 years since people really started to use the Internet, since the web became really widely used and accessible. The guidance is trickling out and finally, in 2007-41 we have something presidential about how they are going to treat a link from website to another. It is possible that in another decade, they will talk to us about blogs and hosting our social networking sites and all the things that we are actually dealing with right now. But the rule that they -- let me back off for now; it is not quite a rule. The situations are fairly clear-cut lines. They are helpful that we have some presidential guidance but the actual examples do not embody the undue rigidity that I’m talking about.

But the factors -- there is a discussion about links and the IRS says that you are responsible for what is at the end of what you link to. You may not be able to control it but you control the fact that you maintain a link. You would do well to review the sites you linked to and decide and see if there is intervention at the end of that link. I think that is a bad approach. Now, they do allow you, for instance, to link to all of the websites of candidates in a race as part of an online voter guide that meets the other standards. So they are not just saying that we think you adopt whatever is at the end of any link on your site; it can be part of valid voter

education. But what if I am an environmental group working on a small local issue - cleaning up the local waterway - and I'm working together on that issue with a bunch of national organizations and other (c)(3)s, (c)(4)s, who care about the environment. And I just want to keep links to them as our allies who are also working on this issue, because I think that is useful to people who visit my website.

Well, if some of those are (c)(4)s and if months after I established that link, they have on their homepage mentioned some endorsements of -- have non-(c)(3) or (4) activity, presumably consistent with the applicable campaign finance law. Am I now responsible for the fact that I have linked to that site that contains their political material -- when I did it for a valid reason to begin with, I do not think I should be. I think that if you are maintaining that as useful resource, it would be a mistake to tell me that I have to go back and check all those links because that is just not realistic.

So, I guess, that in some ways highlights some of the reservations I have. If the IRS does respond in putting forward any sort of safe harbor, any sort of bright line guidance, we are going to need to be vigilant. We are going to need to push them not to take positions that are too restrictive and to really think through some of the subtleties and the realities of what people will have to deal with and what is appropriate, what is not appropriate and not just to draw a line that safely keeps charities from intervening in campaigns, but restricts their speech rights and restricts their ability to pursue their charitable mission in appropriate ways.

Kay Guinane: Any questions for Beth?

Female Voice: Hi Beth. I have a question that kind of relates back to your internet issues. And that is a lot of groups, including mine, take advantage of some of the online email management servers that allow you to target messages to decision makers. I guess it makes me a little nervous because there is oftentimes -- your ex-senator from California said, "I'm going to put this new legislation out there to sell off 100,000 acres of public land in the West." So we immediately mobilize our donors and they send emails to their elected officials saying, "Hey, shoot this down. We do not have to agree with it." Are we crossing the line there? Because we are not charging a candidate but we are saying, "This is a ridiculous proposal."

Beth Kingsley: Yeah, what I would say is that the analysis is going to be the same as if you did that log, that advocacy, in any other medium, whether it was direct mail or however you communicate with the people you are mobilizing. My immediate reaction is that one of the key factors that the IRS seems to use to distinguish legitimate issue advocacy from campaign intervention is whether you are responding to something outside of your control, and the timing. So during the legislative proposal put forward they are responding to versus we are just taking advantage of this issue to slam a candidate -- I think the fact that you -- or even having to ask that question illustrates why a nebulous facts-and-circumstances test is probably --

Female Voice: What do you mean by the sense of timing. This is a national -- this happened several years ago and this person was running for office in our state and they lost the election. Nothing happened to us as a result of this...[indiscernible].

Kay Guinane: We will hear from our last panelist and then spend the rest of our time for our questions and comments. So I would like to introduce Karl Sandstrom of law firm Perkins Coie. Karl is a former commissioner on the Federal Election Commission, also specializing in law of tax-exempt organizations. He is going to address how some of the

factors in the Wisconsin Right to Life case and other things that affect this issue. He was one of the principal authors of an amicus brief on behalf of charities that was filed in the Wisconsin Right to Life case not once, but twice.

Karl Sandstrom: When you're last on a panel, it tends to remind you of what Mo Udall once said: "Everything has been said, but not everyone has said it." I will try to avoid that. First, I wanted to commend OMB Watch for having this forum. I did have the distinct pleasure my colleague at Perkins Coie. To file an amicus brief for OMB Watch and a number of other public charities in both WRTL one and two. And what I wanted to talk about this morning was what lesson should the IRS take from that; not that I'm particularly saying when they will learn anything from both cases. But if they sat back and thought about it I would -- this is what I think they should learn.

First, let's determine what is the problem. For me, the problem is the IRS confuses itself with the Center for Disease Control. And the disease they are trying to eradicate is political intervention and in the case of (C)(4)s will limit political intervention. But the problem is the Supreme Court has essentially said, "Those symptoms that you have identified in your alert to commissions, which I call Revenue Ruling 2007-41, actually are a sign of healthy tissue. Things that not a sign of disease, but something that we actually should be promoting - issue discussion. But the IRS are looking at those very symptoms as the ones that we should be advising people are the signs of unhealthy tissues, things and activities that people should not be engaged in. And what do I mean essentially by that?"

The IRS is essentially, as everyone has said -- is applying a facts-and-circumstances test. Now, I have always been confused: Are the circumstances not facts? Are the circumstances merely who occupies the positions of the IRS in enforcing the law? And so what we are saying then of facts-and-circumstances test, are we essentially saying that it depends on the facts? Okay, it depends on the facts. If every area of law that I practice -- whether my client violated a law or not, depends on the facts. So, what facts are we looking to? And what do those facts establish?

So, when we look at political intervention, is it something that we are looking at the actual effects of the communication on the elected? Or are we looking at the intent, whether it is subjective or, as the IRS sometimes suggests, some sort of objective manifestation of intent. Now, in Wisconsin Right to Life, the Roberts opinion essentially says both of those are improper when it comes to looking at political speech. But you look at the intention and concentrate on what each person's intentions are, that means that if there are two different speakers; it could be treated differently based on what this determiner of the facts said they intended to do.

And Robert says, "That will be a bizarre conclusion that your First Amendment rights return on the particular facts that pertain to you and what your objective intention is. We expect the facts -- then the court said, "If you measure by what the effect is; you are then susceptible to what the audience concludes." Not that you would know beforehand what the effect was, but what the audience deems the effect is. They say that it is an inappropriate standard.

So, how does that come to apply with respect to the IRS? Now, the IRS stated - said earlier, "We are actually seeking to achieve a different purpose. We are trying to protect

revenue.” But when you look at the actual actions - going after a preacher - now what revenue is that protecting? You know, if something or someone gets up on and says mass service – what revenue is being protected by paying close attention to what that person is saying?

No, I think what the IRS says is not really -- that despite this action, taxation without representation, we are talking about tax subsidy. The IRS has not demonstrated that it is really concerned about tax subsidies. It is concerned about this disease of political activity and that they have to care for these (C) 3's or else, they will come to suffer from this disease. And that would be bad because they will infect others and it is contagious. People actually will be discussing issues that are important in the election. And so, we have come up with standards to say if the issues are important in an election, do not discuss it. Okay?

But what we want – that is not subject to manipulation? Let me give you in the real world how easy it is to manipulate a standard like that. Let's say, a friend of mine is conservative candidate for Congress. Who would I like maybe in 2004 to be on the battle? What would I like to be discussed on the campaign, let's say, on gay marriage and a constitutional amendment on gay marriage. So, why do I have a friendly colleague who has already been elected introduce a bill on that issue? So, now I am free to discuss that issue -- and that issue, I guess, would be precluded; because now it is an issue. So, I can take issues off the table or put them on the table; it depends on what the political agenda is.

So, the standard actually makes no sense to say whether -- if I'm out there, I want something to be an issue. I can -- let's say stem cells research, and it is not being debated. I can bring it up even though -- regardless of whether it is likely to become an issue or not. To actually, look at something whether it is an issue in the campaign is such an arbitrary and manipulable standard. So then you have to say, again, what is the IRS seeking to achieve and would this court countenance that objective? I'm going to suggest if Wisconsin Right to Life was a (c)(3), was running precisely the same act and with an insubstantial amount of their activity, this court would not permit the IRS either to impose an excise tax or revoke their status because they ran those ads.

And then I will suggest that when it comes to (C) 4's, that running ads such as that can be your principal activity. And I would come to that conclusion in part because of what the court said in taxation without representation. It did preclude (C)(3)'s on the tax subsidy basis from engaging in certain lobbying activities. But they turned around and said -- and this is what Blackman's concurrence said – you cannot impinge then if that -- the (C)(4) avenue -- the use of (C)(4)s - (C)(3) to unlimited lobbying and issue advocacy.

If this court has concluded that these ads are issue advocacy and are not political, it is hard for me to identify the basis by which the IRS can conclude they cannot be your principal activity. And that this effort and the costs associated with trying to put things into various buckets and then to put those buckets on a scale to see does it tilt too much or they are in balance or make sure our other activity outweighs, which is a constant effort.

I personally question whether it is required, but the problem is precisely as it has been identified. Most clients are timid. So the law may be different from the bold and for the timid. If you actually believe strongly like some of the clients of [indiscernible] who brought the WRTL case -- do they have a right to do this? You will see them engage next year, very actively, in political activity.

For those who are fearful that they will lose their status -- remember what this is, going back to my medical analogy here. It is what they force you to infer -- they see these symptoms, the IRS, and they are going to come in, what the person may do. They are going to impose an examination on you. Examinations are costly enough, covered by insurance. If you ever first confront, "How much is this going to cost me?" And then your doctor is going to tell you, "Yeah --" and if they find a sufficient number of these symptoms to be present, they require surgery. And a lot of people die when the IRS imposes surgery for political activity because in cutting out this tumor, they tend to cut out vital organs. And so, what your choice now, patient: how do you avoid the activity? Because I have avoided all the costs imposed through examination and I avoid potential death that would result from the surgery the IRS would then - - do you say, you can go to court and then what if my client asks how much will that cost. And you point out that such litigation runs into usually six figures; they are thinking, "Now, does that mean I have to pay cut? Does that mean I have to be cut out of the program? Does that mean what we wanted to do this year, we cannot do?"

So what the IRS depends on is cowering people into submission. Now why do we not take this advice? Why do they not take this? I think I'm not optimistic [indiscernible] change. If many do not have kind of a prayer invested -- I worked with the IRS agency. People who have for years consider it their mission to preserve the charity, the sanctity of (C)(3)'s -- I'm not going to abandon that easily. When they can easily accomplish their objective by continuing to run base standards and relying on people like myself, advising people that there is substantial risk to doing this; that they will accomplish what they believe is the legitimate objective and it has nothing to do with the objective identifying tax cessation without representation -- into assuring that these activities are not subsidized. It is totally removed from that purpose.

Now, I'll say -- going back to the (C)(3) [indiscernible] substantial debt. I would contend that more for the IRS, that the IRS today will still say [indiscernible] precisely like that done by the WRTL, if done by a (C)(3), [indiscernible] intervention and would be a basis for revoking their status even if it is insubstantial.

Kay Guinane: Questions for Karl?

Female Voice: [Indiscernible] Do you think there should be bright standards between (c)(4)s and (c)(3) and other types of organizations?

Marcus s. Owens: I'm sorry. I think it needs the constitutional distinction between the standards that apply (c)(4)s and (c)(3)s. After WRTL, I do not see that you can limit this sort of issue advocacy by IRS re-characterizing its political intervention by (c)(4), that the court has said this is issue advocacy and not political intervention. I do not see how the IRS could be successful in the long run by maintaining, despite the court precluding this issue advocacy, we may re-characterize it as political intervention.

Beth Kingsley: I think that there is a particular constitutional pressure to draw the bright line between -- for (c)(4)s and 527s because they were not talking about a significant tax subsidy in the form of deductible contributions. We are just talking about engaging in policy advocacy and needing to know which box do I fit into for tax purposes. What are my tax compliance obligations? And the failure to draw that distinction clearly is a real problem, and I think that is what you -- I'm more optimistic that you will get favorable court rulings pushing on the vagueness there, than necessarily with (c)(3)s. But the IRS has told us it is the same

standard. They use the same test to make that distinction. So, I think that the constitutional purpose for (c)(4)'s and 527's I think is another reason they should really consider more carefully articulating what pot different activities fall into.

Greg Colvin: I think there are going to be some changes in practice and in focus that relate to these different tax vehicles. The 527s were fairly discredited in the 2004 elections and the analysis that has been done afterwards. It is not to say that they are going to disappear; in fact, I think certainly in situations where they can be funded without asking people for money to influence elections would just fund them with money where there is no questions asked. I think we are going to see 527s still survive.

But we tend to really view that there should be more activity that we see occurring in (c)(4)'s, and I think to some extent, the decision in the Wisconsin Right to Life case, since it was a (c)(4), will promote that. I interpret the tax rules a little differently than Karl; I think that the IRS would not have a problem with genuine grassroots lobbying that was directed toward a current issue, which the filibuster-related lobbying of Feingold was seriously a pending issue at that time and by the standards the IRS has put out for what issue advocacy is not intervention, I think they would probably be okay with that.

But I think one of the reasons we are going to see more activity in (c)(4)s is that they can, either through the qualified non-profit, the MCFO exception or even without it, engage in a great deal of speech activity, which would not be subject to FEC enforcement, which then leads to the question how much of it can you do in the (c)(4). Beth and I, two years ago, worked on another white paper fallen on somewhat deaf ears so far. But we did it for the purpose of preparing for that day when (c)(4)s would become hot property. And what it suggested is that there ought to be a bright line rule that says, "So long as your expenditures for this partisan activity - again, assuming we know how to define that - are less than 40 percent of your total annual expenditures, then the IRS should leave you alone."

The area of activity for (c)(3)'s, I think, is going to be increasingly in the field as the Gates and Rhodes foundations are both doing with educational reform of saying, "We want candidates to pay attention to our issues, and we are going to spend a great deal of money to inject their issues into the election rules." We will stop short of asking them to endorse our agenda because we know from a certain IRS revenue ruling, 76-456 -- Deirdre's is smiling; she might have had a hand in that -- that you cannot ask; it is a "do not ask, do not tell" rule. But nevertheless, you can promote your agenda and you can publicize it and you can say, "We hope the candidates will take account of it in their programs."

Marcus Owens: I guess the thing that I wonder about is the usefulness of the tax subsidy distinction because Section 527's do receive a significant tax subsidy in the form -- an exemption from the gift tax. Now, it really only applies to wealthy individuals, but they are often the ones who are most attracted to Section 527's. Arguably, that exemption does not apply to (c)(4)'s. So, I'm just not sure how the subsidy argument really works when you sit down and then think about it. Certainly, there is no contribution deduction, but that gift tax exemption is perhaps more significant to large donors.

Kay Guinane: Question over here.

Gary Bass: I'm Gary Bass with OMB Watch. I guess, I fall in the camp that believes (c)(3)s should play a critical role in strengthening our democracy, whether it be through

nonpartisan vote or activity or direct lobbying or indirect lobbying. And in fact, I think, we have a challenge, which is the chill you referred to that is quite significant where maybe it is because of the facts and circumstances, or maybe it is because of the ambiguities that you [indiscernible]. Whatever it is, you clearly do not have the charitable community very engaged.

And so, I guess my question is a two-part question. You guys are the legal scholars; you are the shining beacon to all of us. So what do we do? What is the strategy to get more involved, given what you all described today as one part of it? And the second is, if we go down the bright line - that is one of the solutions -- Marc, what you did not mention in the opening was that the ruling was pretty significant rules -- it took a lot of work. It did not just happen; it took a lot of work to get to the point where there is a satisfactory set of rules didn't just happen. How do we go through that today? Do you go through that today?

Greg, I do not necessarily agree to your 60-day idea. Congress could be in the session and he was on [indiscernible] lobby or referendum. I mean, how do we get through this if you are arguing for a bright line test for both parts? What do we do and then how do you get through that bright line test?

Greg Colvin: One thing I think we could do is invest some scholarship in the whole question of tax subsidy because, actually, the more I think about it and try to live with the sense that my clients are getting a tax subsidy, it kind of does not meet a reality test. Most churches - - oh, I will not say most churches but -- yeah, churches do not file 990's typically so you do not really know whether they have an end-of-the-year profit that would otherwise be taxed. Certainly, they have the benefit of tax-deductible deductions, but I do not think anyone is suggesting now we are crossing the line between church and state that we are giving some great subsidy to those that are engaged in religious activity through the tax code.

There is another theory, the definition of income theory. Boris Bitker and others have advanced it some time ago and what it really says is the reason we have these tax exemptions is basically we do not want to count as taxable income, money that an individual has decided not to keep for themselves and use to pursue their own self-interest. And that when someone makes a contribution and it could be to a (c)(3) or a (c)(4) -- but to the public interest in some way we disregard it for purposes of taxing them. That is another way of getting to the same place of believing that when you make such a contribution you can take it off your taxable income, without saying the government is subsidizing those organizations.

You can still say the government has to decide which organizations qualify to be public-interested and which can receive these amounts of income that otherwise would be taxable to you. So they still got a border patrol function, but maybe it is a different function; it is not a function that is protecting the federal fisc; it is a protection of the integrity of those public-interested organizations and then it becomes kind of like disease control. And which it is fair to ask what is a healthy non-profit tax exempt, public institution to which when you give money, we can feel like it is being given without self-interest? And there is where the ambiguity lies.

We are so ambivalent about whether political activity is in the public interest or whether it is self-interested, and it runs all the way through the 527 and other ways in which we have treated amounts of money that people give for politics. There used to be a tax credit that you

got for up to a hundred dollars that you give it to a candidate. In the same tax system that penalizes (c)(3)'s for giving anything to candidates.

Karl Sandstrom: Well, first, let me make a little footnote that the reason it was removed – too many people cheated. They did not make a contribution.

Now, to me it strikes me rather strange, this tax subsidy argument, the way it is imposed. I have been audited by the IRS. I went in; no one threatened that I could no longer work if I didn't pass the audit. What they threatened me with was, I was going to owe more taxes. So they were going to take, you know -- in fact, I was fortunate they owed me a larger refund. But the question is why is this debts penalty sitting out there if all you are trying to do is protect, you know, revenue?

Most organizations would probably be more interested in the issue out of the (c)(3)'s, might be willing to take the risk with a vaguer standard, if the only penalty was that you may have to pay taxes for those tax deductible contributions you receive for that. And what if the contributions you received were not even tax deductible? What if we only use money that was not deducted? Then what is the interest then in regulating the (c)(3) speech activities?

If I have a (c)(3) pot of money that no one has received any tax benefit by giving to me, what is the tax subsidy? What is the interest of the IRS other than this "I want to preserve the nature of (c)(3)s?" I find that to be true in some of the academic literature. But they seem to be more interested in that somehow these groups actually are different, that we need to look after them; foster them as if they are small children. (c)(4) is to be treated like adolescents -- no, (c)(3) to be treated like small children, that they would do dangerous things if they are not prevented from doing so.

So we give them very broad rules to caution them, to keep them at home so they do not cross the street into more dangerous territory. So, I think actually the solution to this is, with respect to (c)(3)s, essentially, give them the opportunity to run the risk. Allow them to take funds that are not tax- preferred and use [indiscernible] funds without limit. So someone reaches their gift limit and therefore they did not get any tax benefit from contributing to your (c)(3). You can isolate those and use them however you see fit

And I think that is the approach, you know, which -- (c)(4)'s, I think after WRTL, that this court will not try to make a distinction between political intervention and lobbying activities if those activities are considered not political expenditures under FICA, they will be considered issue advocacy for (c)(4)s.

Marcus Owens: I think in terms of a practical approach to struggling with this, I think the time actually is ripe for that because of the Wisconsin Right to Life decision. I think what has to happen is a small group has to develop a rule along the lines of the Section 49-11 regulations. I would see it as a regulation coming out of Section 4955 and Section 162 where there is also a prohibition on political campaign intervention. So we could throw in (c)(4), as well. But what it would do -- I would suggest as a starting point would be that you would have a presumption that you do not have intervention unless you have a call to action coupled with a candidate's name or a clear analogy to a candidate, a liberal conservative kind of description. And then we would build off that and create a presumption that it is not intervention, followed by some analysis of how you would -- that presumption would be rebutted by the government.

This group would draft that proposal. I would suggest as a draft regulation and then it would be presented to the IRS accompanied by support from across support from across the political spectrum and accompanied by congressional pressure. Because the IRS did not, as you accurately pointed out -- and I [indiscernible] it did not self generate the Section 49-11 regulations; it was a cram-down as they say. And it would have to be the same thing.

I do not think this is an area that is really susceptible to legislation. I think we have the legislation to give the IRS the excuse to write a usable rule. What they need is the inspiration; they need the document that they could then adopt as their own. They will not be able to self-generate. The agency, for any variety of reasons, will not go there. So, I think the proposal would be over the next four to five months. Produce a rule, seek broad-spectrum support, seek congressional support, and then pressure Treasury and IRS to adopt it before the 2008 elections.

Male Voice: I'm wondering what the reality is that will allow this to happen. Congress is [indiscernible] some lobbying [inaudible] lobbying reform, which seems to be based on the Democrats' perceived inability to pass reform. I think that a lot of the (c)(3) groups are -- that will be affected by this might be perceived as being potential enemies of the Democratic majority. Republicans might be hostile as well. What is the congressional strategy on this?

Karl Sandstrom: I think part of the congressional strategy would be that someone who represents, let's say, the NAACP -- someone who represents other churches; someone who represents the more conservative churches and say that they should not have to run the risk of losing their tax-exempt status. But the risk of these audits and the costs associated with it -- that regardless how you conclude it should be defined that the risks are too great and you -- well, the NAACP -- when you look at who is to Chairman of the Ways and Means Committee, you might be able to have some influence.

Given the chairman's record on these issues and on issues related to NAACP. And some of the others, I would say, are on that committee -- other senior members from different communities. So and then I think many of the churches who have more conservative philosophies have a deep and abiding interest. And then if that is joined by issue groups, (c)(3)s throughout the political spectrum, saying, going to Congress with a common proposal -- I think that will be the strategy.

Male Voice: Yes. But what is your sense then of what the final state would look like? Because it seems like you look at the guidance that is available to us now, I think there is a very conservative approach that even if you get more clear [sounds like] even if you get [indiscernible] out of the IRS and pass the bright line test, how are we going to have tests that are going to actually help us do business in a different way, which I think is a separate question?

Beth Kingsley: I think that is right. It is really critical that if -- I mean if -- for one thing, I think Marc's right; it is not going to be something that's going to come from the IRS. And then if we put together a proposal that is carefully thought out, you can avoid this sort of thing they might come up within their own. And I think it is really important to organize around it. I think there is a broad coalition across the political spectrum that has come together in the past in support of nonprofit speech rights and that probably could be mobilized again.

Marcus Owens: I think the starting point is to remember that the prohibition is a statutory rule, albeit, one based on common law, and opposing it is a constitutional way of free speech. So it seems to me the safe harbor or the standard has to start from the presumption that it should err on the side of permitting the speech. And I think the government, the IRS and Treasury Department – whatever the administration -- and this is a nonpartisan approach to interpretation by the executive branch has been to err on the side of prohibition, not on the side of free speech. There has been a failure to really come to grips with that fact and dodge the idea of taxation with representation and I think “dodge” is the right word. But I think, fundamentally, you have to come to grips with that and once they do, once they can accept this of that, then it is easier to write a rule like that.

Karl Sandstrom: I would like to say I'm big in reducing the instances that you get capital punishment. I think capital punishment should be reserved for terrorists and if you make a good faith judgment that this was permitted activity, the penalty should be that you only would pay, in fact, to the government [indiscernible] the tax subsidies. You should not have to run the risk in going out of business. I mean, you should not shut down this wonderful church on Pasadena because of what the preacher, in his passionate [guest preacher] said in his a passionate sermon.

Male Voice: But does that speak more to [inaudible] immediate sections?

Karl Sandstrom: I think that the sanction should be similar to what would be done in the tax code in the profit area, I think. If I mistake a business deduction, the result is I do not have to give up my occupation. I have to pay more tax. I mean, I have to pay a penalty associated with that additional tax, but I do not have to give up my occupation.

Greg Colvin: Karl makes a really did point because when you look at 501(c)(6)'s and 162(e), which is the portion of the code dealing with business expenditures for lobbying and political activity, there is that kind of scalability where to the extent that you are making expenditures for lobbying and political activity, that does not qualify for the business deduction. So if the amount of your subsidy disappears when you make those kinds of expenditures. That does not exist in the charitable area; it is a pass-fail kind of test.

But what is intriguing about looking at things the way it is done for business is that it will eliminate the necessity to be continually setting up these different tax-status organizations. If you could have a single organization that could engage in these activities with money that was not coming from deductible sources, you would not have to set up a separate (c)(4) or even a separate 527; you would report on a single 990 to the IRS what you did and how you paid for it, and it would not have to have a separate corporation in this house of tandem affiliates. You know, I would love to participate in a short crash project before 2008 to get a better standard. And I have done those kinds of things, not necessarily directed toward the next six months, but through the ABA -- some projects in trying to get better guidance. And I think we are facing a couple of difficulties in doing that before the 2008 election.

One is that, the decision was just made basically taking away what had been a test that indicated what was and was not acceptable election activity – the electioneering communications prohibition, indicating I think more of a limitation on the FEC's power to matters of expressed advocacy. In that environment, it is going to be tough to define a standard that sweeps in more activity than the expressed advocacy standard and it has been tried in

numerous occasions and it is difficult to pass those other tests under McCain, Feingold Law, to promote --

Female Voice: Support, attack, oppose.

Male Voice: Promote, support, attack, oppose; another way of looking at what it is you are saying about a candidate and whether -- if it is not an expressed advocacy, it still would cross a line. I think Marc's idea of a presumption or whether there is a safe harbor -- and it has some way in which you are connecting action and candidates is the right approach. But to try to advance in this environment a sense that there is a separate tax standard that is more punitive than the standard that the Supreme Court just looked at, is going to be tough. And it may take, as it often has, going through an election cycle with the existing removal of restraints to see whether people feel there is such a level of abuse that now we know what we have to do to fix it.

The other thing that I think makes it difficult right now is that the IRS, at long last, after 25 years did put out a pretty long revenue ruling which is precedential and addresses a the number of the issues about what is or is not political intervention. Granted it was not a bright line; it is a multifactor test. But it is something more than what we had before and there might be some desire to let that work through an election cycle to see whether it is truly inadequate.

So, I think those are some difficult things to consider as you decide when you might put forward a safe harbor or a presumption rule, although that has never stopped me before. And when you put these things out, they are there and they are there for the time in which it may be right to pick it up and make use of it.

Kay Guinane: We have a question and it has come in through the folks on the phone and because several of the questions have addressed the issue advocacy problem and defining what that is. What about endorsing issues when you are not urging vote for a specific candidate? But could it be interpreted -- that is, a de facto endorsement of the candidate because they have the same position as your organization on the issue? Is there any relief from the fact that the candidates may endorse your issue first and -- or what if both major candidates have taken position in support of your issue. Does that make a difference?

Beth Kingsley: That highlights a problem o the facts-and-circumstances test. We do not know. It depends on the issue; it depends on the ways. I think, you know, Karl talked about the problem of is it a fair campaign issue. What if I -- if this is my issue, this is what I have been doing for 20 years, and it is hard to know when your commentary on that issue becomes a problem because of the way it is being talked about in the race. But IRS does say that if you have a history on the issue and a history of similar communications, those are good factors. But we are in this multifactor test.

Greg Colvin: If you have to deal sometimes with 501(c)(3)'s being attacked by candidates for being an ACLU card- carrying member I think that would justify the ACLU in taking some public stand on the credibility of being a member of the ACLU. It has happened to Planned Parenthood; it has happened to a number of groups. I think if that is how you have been drawn in to the public sphere, you should have greater latitude than if you are the one taking the initiative to try to have the candidates define themselves on your issue. But that is just trying to interpret the facts and circumstances.

Karl Sandstrom: I represent a couple of organizations who are very involved in environmental issues; new organizations who think the time is right to push the issue and push it into the campaign. It is somewhat ironic; they were successful at that because they knew they cannot speak on it. So, they are actually able to make global warming the major issue next year because they have no track record. They are essentially barred from talking about it. They are being created specifically for the purpose of assuring that this is debated in election year. They think it is a critical issue. Why would we any way mute them? In particular, we talked about -- when the Supreme Court talks about this is a sign of a healthy political system; not an unhealthy one.

Kay Guinane: Any more questions from the audience? I have a hypothetical situation just to throw out there that I think illustrates some of the problems we have and see if you have any ideas that might probably work our way out of in trying to craft a bright line rule.

This whole question of how positions on issues are valid and basic values that a charitable religious organization may have can enter into its discussion of public policy issues and the way that it urges other people to view public policy issues. Vision America has announced this year, which is not an election year, a big voter registration drive. They are recruiting patriot pastors to help get people engaged in the election process and paying attention to it. They want the values that they see are important as something that is reflected in the debate on the election and similar to the groups that are trying to get global warming into the debate.

Because their particular values may seem to be more identified with one political party or candidates than another, do they have to hold back in articulating those values? Are there ways that we can tell them they can promote those values without intervening in an election or supporting or voting a particular candidate?

Marcus Owens: I think there is a -- I would like to step away from the specifics of your example because I think there really is an interesting factual question as to whether you do not have an example of churches using their deductible monies in political campaigns there, and talk about just the idea of issue advocacy and discussion when that same issue is also present legitimately in the charitable, religious, and educational sector, and has been historically and is also deeply embedded in the political campaign and how you can even talk about that issue.

And I think that highlights the absurdity of the current IRS approach, which is, frankly, that discussion of issues is itself indicative of political campaign intervention. And that has been the statement leading -- in the letters of two of my clients announcing their IRS audit, in the accusory statement the criticism of the government's policies was campaign intervention; criticism of the incumbent's ideas was political campaign intervention.

Now, the salient issue was the war in Iraq. And I have clients for whom one of their deeply held religious beliefs is "Thou shall not kill." I have other clients who are generally not in favor of war. One, -- there is a political candidate, John McCain, who has come out in support of the war in Iraq. There are other candidates who had come out against the war in Iraq. How does one talk about one's religious beliefs that include the concept of not killing other people? How does one talk about the war in Iraq from the standpoint of public policy and what is going to happen next week and next month without regard to the political election when that same issue is itself now a divisive issue? There are candidates strongly in favor and

candidates strongly against; you cannot discuss it without endorsing or opposing a candidate. It is impossible.

The only answer is the Constitution promotes freedom of speech, so you ought to be able to talk about it. Any other answer runs counter to the fundamental precepts, the ones on which this country is founded. And so we have to craft a standard, we the public at large because the IRS is not going to step up to the plate that acknowledges that, and creates the open debate, allows it to occur.

Karl Sandstrom: I think one of the learned lessons from WRTL is the FEC did not step up to the plate. They had an opportunity between the WRTL 1 and WRTL 2 in crafting regulation; they chose not to. A lot of pressure from the reforming community, the editorial pages of small or major newspapers. It has essentially set the FEC on the course to lose WRTL, too. And the IRS could find themselves in a very simple position if they continue to have this aggressive program where the standards that they are enforcing remain vague. If someone -- eventually, is going to get this to court and one of the things I just -- with respect to my other proposal, if you would just pay the tax and then going to seek a refund we will have more court decisions resolving what the line is. Rather, you just change that much, you could go in and change the IRS stance and all these facts and circumstances start to fade away.

Marc Owens: I think there is a real problem with that approach, and that is, unlike the FEC, which has to go to court to have its actions reviewed, the IRS always has the ability to back out. The NAACP did that. They paid the tax; they filed for refund, set the clock running, and the IRS stepped back before they found themselves in court. So you cannot rely on litigation to develop the rule here, because the government always has the ability to back away from a tough case.

Karl Sandstrom: I just want to give the IRS the opportunity to regulate that away.

Marcus Owens: We do not develop long [cross-talking]

Karl Sandstrom: I am all in favor of going to the Congress and trying to get the law changed.

Marcus Owens: You will not end up with a useful standard there, either.

Karl Sandstrom: But I will tell you how it can change.

Marcus Owens: We have the law. We have the guidance from Congress.

Karl Sandstrom: Yes, but if I can change essentially -- if I can do away with capital punishment, that I change how we advise clients.

Beth Kingsley: Yes. I would love to see the test case that pushes this, that really puts the IRS over the line; that the FEC -- that they were just pushed over. But they do that so regularly back down. I was so hopeful that the Christian Coalition was going to give us guidance. I was hopeful the NAACP was going to give us guidance because they were not backing down and the government repeatedly does and it is very disappointing. And that really highlights the sort of -- if you have the resources to fight, you may just be able to walk away in the end.

Greg Colvin: Well, maybe the next call we should make us to Jim Baugh [phonetic], because I think he has done a tremendous public service in First Amendment Law by bringing

these cases, not necessarily on behalf of my clients and my own political views, but it is really good to fairly test these rules and every manifestation that they present themselves, including with the IRS. And we are, I think, somewhat at a disadvantage that for the most part there is no organized force within the non-profit communities that says, "You know, this is an important way to spend money over decades and that is to bring the necessary test cases to get the latitude that we think we should have in the First Amendment to engage in the kind of speech that we are all frustrated about here." I do think -- thinking more about how you solve a problem of people being in non-profit organizations able to speak out on issues.

There are a couple of things that the IRS could just come right out and clarify. One is, as Marc was suggesting, that if you are discussing an issue like the war in Iraq, as long as -- and I am not talking about a safe harbor now -- that you should have no risk to your tax exempt status, no penalty if you discuss an issue. And during the discussion of that issue you make, no mention of voting, candidates, elections that might connect that issue to an upcoming election. And you should be able to discuss those issues broadly and widely at any time and in any place. I would love to hear the IRS say that. I mean, obviously there are -- sometimes when you cannot talk about the war in Iraq without talking about the incumbent President who is running for reelection, and there you have some difficulty. But usually you can discuss the issues without bringing up the name or the administration of somebody who is running for office.

The second thing that the IRS could do is to say -- and I heard Cathy Livingston who is one of the leading lawyers for the IRS, working on these regulations that the IRS will not take evidence of intent into account. Because as Karl said, evidence of intent can cause two different speakers to be treated differently because somehow you have some e-mail or phone message or whatever that indicates what they are really trying to do with respect to an upcoming election versus someone who is never uttered such a phrase. If intent is really not going to be counted against an organization, then let us just say so because it really is a better administrative system to look at where do you cross the line based on what you do, not on what you thought you might do, or what you hoped the result might be. It is just those two things - issues and intent would really, I think, bolster the sector in being able to have some confidence about what they can say and how they can discuss it with their fellows.

Marc Owens: I would only point out litigation is not a sure thing. You can be surprised whether it is a court opposing Bob Jones University or supporting it. And so, I would just point everyone to the example of the Section 4911 Regulations. We are really talking here about an administrative rule; we are not talking about a statutory principle. We have a statutory principle. We can create a usable appropriate administrative rule under that. The problem is it will not be self-generated by the agency. It is going to have to be done outside the agency and delivered to the agency in a very vocal and demonstrative way. That has worked.

Gary Bass: I am not even sure and know how to phrase all this, but there are things that, the fear I have is that this approach of trying to make a good challenge. For most of us that are executive directors or the management of (c)(3)'s, it does not help us, except maybe years down the road. As a board member of organizations, there is a notion of saying, "Do not get involved; it is safer." Because of the ambiguities.

So Marc, your approach may help them by coming up with something that is clearer; it is in a regulation. But at the same token, after this huge battle on the 4911 a couple of years. I did not see this rush of sea breeze coming in to either elect or to demonstrate more expenditures

for lobbying. So, despite any of the rules; we did not see this huge shift. So, I am really nervous about all of this discussion of whether it is really going to help in the longer run. I also say that if we go to the regulatory approach -- Greg, I'm going to probably do battle with you because I'm not happy about the notion about mentioning the member suddenly [background noise] cross the line [indiscernible] and the reason for that is I should be able to talk about the war and I should be able to say that McCain supports the war. I do not have to say I'm for McCain or against McCain. I'm not going to use those magical words, but I should have every right as an organization that cares about issue to speak about it and bring your contacts to where members of Congress or candidates this hour. I do not understand why they would cross the line. So, I would do battle and I do not know how you resolve those things in a regulatory context.

Greg Colvin: Just to react to that, I think what is difficult is to talk about safe harbors, like a safe harbor for a speech that does not mention anyone as running for office just so people know they can talk on issues that are very involved even in campaign debates. But fitting into a safe harbor does not mean that when you are outside of that safe harbor, you are in trouble. It just means that you are in an area of relative risk and that is where we are now.

Beth Kingsley: And I think it is really important that if what gets advanced is a safe harbor that it not -- we be careful not to let it become a floor. I mean, I still think there is a benefit to a safe harbor but I think that is a risk of -- once you are outside of this, oh, that is bad. No, that is just back to we cannot craft the bright line yet or have not yet.

Karl Sandstrom: I'd like to reduce the fear. I'm trying to take people who are more timid, including all board members, and make them a little less timid, that they can be a little bolder and not leave that to how other organizations should try to dictate. What you had for instance in the course of the last cycle of course, the last cycle is incredible -- 527 -- millions of dollars were pumped in to discuss issues where those issues -- some of these organizations could well have used some of that money to discuss the issue in a more informal way, because they had experienced with that issue; they had membership on that issue, rather than coming up with these organizations on the fly; for instance organization dealing with the war of 2004. They were created late in the cycle. They went up -- some of them ended up flush with cash after the election because the money kept coming in because what they were doing was considered effective in highlighting that issue. It would be better to have a system where those organizations that put in time and effort and intellectual capital on these issues can use it.

Marcus Owens: I think we have to remember the structure; simply looking at the prohibition, if it was removed from the Internal Revenue Code, I think, actually, the fear of board members once they realized what the actual statutory framework is would be greater because Section 4955 applies a tax to the organization and to the individual who approved the action. The cost of an IRS audit now, if it is an aggressive one, is well past \$100,000. Now, if you are on the board of an organization that took an aggressive action, you approved it as a board member, the IRS comes in. They do not threaten tax exempt test; they just say, "We want to conduct an inquiry to determine if the excise tax should apply." You as a board member at that point should go seek and engage your own counsel and that will not be inexpensive. The organization has to engage separate counsels and then you have to deal with the battle of information, document request, third party record keeper summonses, depositions. It is not fun; it is a great distraction and it is a tremendous use of resource. At the end of the

day you get a no-change letter. And so, any board member who realized that is what they are facing, why this particular statutory scheme that includes Section 1255 -- further repercussions are not there. The IRS revokes very few organizations, but it does put a lot through that audit wringer and that is incredibly expensive.

Kay Guinane: Does the language and the Wisconsin Right to Life case that talks about the burdens on a group being investigated in the FEC context thing? There should not be too much discovery in that kind of thing. That language, in Wisconsin Right to Life; that had an impact on how far the IRS goes in making these examinations costly and burdensome.

Marcus Owens: I do not think so. The IRS is given very broad authority to make up inquiries to determine whether the tax laws have been -- and that has to be the case. And there are far too many creative people out there playing games with their taxes that have nothing to do with criminal activities. The IRS needs to be able to conduct in-depth inquiries, or else the system of support in our government collapses.

Karl Sandstrom: Sure. I think our way of saying it is some soul-searching at the IRS. If they can exact the penalty without vindicating the law that they are relying upon, there is something wrong. If I can essentially accomplish my own personal, political agenda not expressed in the documents or regulations or anything like that, by bringing in action, and threatening directors with large fines and causing the organization to incur large expenses, something is amiss. We need to find a way to address that. Maybe the only way to address it is for some soul-searching at the IRS about what are they seeking to achieve. And I think that is what has been missing at the IRS. Any idea; what purpose are they actually advancing? Because they are largely not advancing a little -- checking a tax subsidy.

Greg Colvin: There is another possible approach not from the enforcement standpoint, but from the standpoint of organizations that are facing these kinds of dilemmas. And that is to treat the excise tax as a little bit of an override, an extra 10 percent for engaging in activity. And it reminds me - I think I heard about this from the authors of the book *Freakonomics*, where, apparently, there have been studies of child care centers that have rules; you have to pick up your kid by six o'clock and they found that most parents complied with that, but some did not. And in order to try to get better compliance, they charged you a dollar a minute for coming in late. And they found that fewer parents actually complied because they lost this social approbation that comes from this and ended up with just a cost of being late.

So, when you look at the various tax penalties for political activity, it is amazing that the 4950 excise tax rate on the organization, not on the directors, is so low; it is only 10 percent. If you go over your lobby limits under 501H, it is 25 percent and I have had add clients willingly, proudly pay that because in a particular year they needed to go over the limit. Likewise under 162, if you are a trade association that has understated your non-lobbying expenditures, you pay a proxy tax of 35 percent. So that is another way of -- not from the IRS enforcement standpoint but from the standpoint of what would it mean if we did not have revocation hanging over. But this was treated as a cost doing political business. Some -- not all -- but some organizations might react in just this way.

Karl Sandstrom: Which may be good.

Greg Colvin: Yes. [Cross-talking]

Karl Sandstrom: But I do not see that that is necessarily bad if they end up having to pay a tax similar to proxy tax and we increase public discussion of the issues during an important presidential year. That seems to me, all for the better.

Beth Kingsley: I think if that where the case (c)(3)'s would become the campaign vehicle of choice because what is the marginal rate most people are paying on that charitable contribution? Twenty-eight percent? And the charity only needs to pay 10 percent for the political activity? I mean you could play [cross-talking].

Male Voice: [Cross-talking] there are agencies in every state of this country. I used to be on an agency here in Washington, the FEC, that regulates political activity. And the court has identified what can be regulated under the Constitution --what is not. And so, we leave it to the agencies that regulates politics to regulate those agencies, (c)(3)'s too.

Kay Guinane: We clicked noon time and so I think we are going to have to draw to a close for today. But I appreciate your time and attention. Everyone, we will be putting out a report in the fall that summarizes this discussion and I hope that that will lead to the kinds of next steps we have heard described here today. The sector needs to take because we collectively need to take to better protect our rights, speak out. So, thank you for your attention and also thank you very much for our panelists here today.

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