

Action Organization Issues: Readings

Key IRS Regulation:

“An organization may be educational even though it advocates a particular position or viewpoint *so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.* On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.”

You can lose your C3 over this (probably not on a single issue among many, but if it is a pattern).

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Treasury Regulations on “Action Organizations”

(3) Action organizations.

(i) An organization is not operated exclusively for one or more exempt purposes if it is an action organization as defined in subdivisions (ii), (iii), or (iv) of this subparagraph.

(ii) An organization is an action organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise. For this purpose, an organization will be regarded as attempting to influence legislation if the organization:

(a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or

(b) Advocates the adoption or rejection of legislation.

The term legislation, as used in this subdivision, includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure. An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation. An organization for which the expenditure test election of section 501(h) is in effect for a taxable year will not be considered an action organization by reason of this paragraph (c)(3)(ii) for that year if it is not denied exemption from taxation under section 501(a) by reason of section 501(h).

(iii) An organization is an action organization if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.

The term candidate for public office means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

(iv) An organization is an action organization if it has the following two characteristics: (a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered.

(v) An action organization, described in subdivisions (ii) or (iv) of this subparagraph, though it cannot qualify under section 501(c)(3), may nevertheless qualify as a social welfare organization under section 501(c)(4) if it meets the requirements set out in paragraph (a) of Sec. 1.501(c)(4)-1.

Rev. Proc. 86-43

(Revenue Procedures are legal authority from IRS,
below Regs in authority, but precedential and binding,
not just an opinion on one letter ruling request.)

November 24, 1986

[**Bold emphases added.**]

[*1]

SECTION 1. PURPOSE

The purpose of this revenue procedure is to publish the criteria used by the Internal Revenue Service to determine the circumstances under which advocacy of a particular viewpoint or position by an organization is considered educational within the meaning of *section 501(c)(3) of the Internal Revenue Code*, and within the meaning of *section 1.501(c)(3)-1(d)(3) of the Income Tax Regulations*.

SEC. 2. BACKGROUND

.01 Section 501(c)(3) of the Code provides for exemption from federal income tax for organizations that are organized and operated exclusively for purposes specified in that section, including educational purposes. Section 1.501(c)(3)-1(d)(3) of the regulations provides that the term “**educational**” relates to **a) the instruction or training of the individual for the purpose of improving or developing his capabilities; or b) the instruction of the public on subjects useful to the individual and beneficial to the community. Under this regulation, an organization may be educational even though it advocates a particular position or viewpoint, so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or [*2] the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.**

.02 In applying section 1.501(c)(3)-1(d)(3) of the regulations, the Service has attempted to eliminate or minimize the potential for any public official to impose his or her preconceptions or beliefs in determining whether the particular viewpoint or position is educational. It has been, and it remains, the policy of the Service to maintain a position of disinterested neutrality with respect to the beliefs advocated by an organization. The focus of section 1.501(c)(3)-1(d)(3), and of the Service’s application of this regulation, is not upon the viewpoint or position, but instead upon the method used by the organization to communicate its viewpoint or positions to others.

.03 **Two recent court decisions** have considered challenges to the constitutionality of section 1.501(c)(3)-1(d)(3) of the regulations. **One decision held that the regulation was unconstitutionally vague. *Big Mama Rag, Inc. v. United States*, 631 F. 2d 1030 (D.C. Cir. 1980). However, in *National Alliance v. United States*, [*3] 710 F. 2d 868 (D.C. Cir. 1983), the court upheld the Service’s position that the organization in question was not educational.** Although the latter decision did not reach the question of the constitutionality of section 1.501(c)(3)-1(d)(3), it did note that the methodology test used by the Service when applying the regulation “tend[s] toward ensuring that the educational exemption be restricted to material which

substantially helps a reader or listener in a learning process.” The court also noted that the application of this test reduced the vagueness found in the earlier *Big Mama Rag* decision.

.04 The methodology test cited by the court in *National Alliance* reflects the **long-standing Service position that the method used by an organization in advocating its position, rather than the position itself, is the standard for determining whether an organization has educational purposes.** This methodology test is set forth in Section 3 of this revenue procedure, and is used in all situations where the educational purposes of an organization that advocates a particular viewpoint or position are in question. Publication of this test represents no change either to existing procedures [*4] or to the substantive position of the Service.

SEC. 3. CRITERIA USED TO DETERMINE WHETHER ADVOCACY BY AN ORGANIZATION IS EDUCATIONAL

.01 The Service recognizes that the **advocacy of particular viewpoints or positions may serve an educational purpose even if the viewpoints or positions being advocated are unpopular or are not generally accepted.**

.02 Although the Service renders no judgment as to the viewpoint or position of the organization, the Service will look to the method used by the organization to develop and present its views. **The method used by the organization will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process.**

.03 The **presence of any of the following factors** in the presentations made by an organization **is indicative that the method** used by the organization to advocate its viewpoints or positions is **not educational.**

1 The presentation of **viewpoints or positions unsupported by facts is a significant portion** of the organization’s communications.

2 The **facts** that [*5] purport to support the viewpoints or positions **are distorted.**

3 The organization’s presentations **make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.**

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

.04 There may be exceptional circumstances, however, where an organization’s advocacy may be educational even if one or more of the factors listed in section 3.03 are present. The Service will look to **all the facts and circumstances** to determine whether an organization may be considered educational despite the presence of one or more of such factors.

SEC. 4. OTHER REQUIREMENTS

Even if the advocacy undertaken by an organization is determined to be educational under the above criteria, the organization must still meet all other requirements for exemption under section 501(c)(3), including the restrictions on influencing legislation and political campaigning contained therein.

Methodology Test to Distinguish Education from Propaganda

[7.8.1] 3.4.7.1 (05-25-1999)

1. Rev. Proc. 86-43, 1986-2 C.B. 729, sets out the methodology test for determining if an organization's materials are educational rather than propaganda. Its focus is on the method used by the organization in advocating its position, rather than the position itself. It requires a review of the organization's materials for factors that show whether

A. it fails to provide a factual foundation for the viewpoint it advocates; or

B. it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process.

2. Review the materials issued by the organization for the following factors, any of which may suggest that the organization is engaged in propaganda rather than education:

A. The presentation of viewpoints unsupported by facts is a significant portion of the organization's communications;

B. The facts that purport to support the viewpoints are distorted;

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

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

3. Two court cases, *The Nationalist Movement v. Commissioner*, 102 T.C. 558 (1994), affirmed per curiam, 37 F.3d 216 (5th Cir. 1994), cert. denied, 513 U.S. 1192 (1995), and *National Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983), upheld denial of exemption to organizations on the grounds that they failed to operate exclusively for charitable or educational purposes. They provide excellent examples how to apply the factors to determine if an organization's methodology furthers educational purposes.

4. An organization may be educational in exceptional circumstances even if one or more of the factors in paragraph (2) is present. Thus, the examiner should review all facts and circumstances that may help clarify the organization's methodology, including internal documents such as:

A. minutes of meetings of the Board of Directors, editorial boards, or other committees that effect the organization's program;

B. contracts with researchers, authors, or other persons the organization engages to develop materials;

C. materials the organization rejected;

D. correspondence files; and

E. fund-raising materials, if not already reviewed as part of the organization's program output.

5. Determine if the organization is an "action" organization as defined in Regs. 1.501(c)(3)-1(c)(3). Even if an organization's materials are educational rather than propaganda, they may still constitute lobbying. Apply both the "ends" test and the "means" test set out in the regulations, which are

A. The organization's main or primary objective or objectives may be attained only by passage or defeat of legislation; and

B. the organization advocates, or campaigns for, attainment of its main or primary objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results available to the public.

6. Determine if the organization otherwise satisfies the requirements for exemption under IRC 501(c)(3). If the organization has royalty income, review the cash disbursement and receipt journals to determine if cash has been advanced to authors and income has been received from publishers in the type of arrangement described in Rev. Rul. 66-104, 1966-1 C.B. 135.

National Alliance, Appellant v. United States of America, et al.;
National Alliance v. United States of America, et al., Appellants

Nos. 81-1899, 81-1900

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

228 U.S. App. D.C. 357; 710 F.2d 868; 1983 U.S. App. LEXIS 26334;
83-2 U.S. Tax Cas. (CCH) P9434; 52 A.F.T.R.2d (RIA) 5609

June 28, 1983, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant government **sought review of the decision of a United States district court, which vacated an Internal Revenue Service (IRS) determination that held appellee taxpayer was not entitled** to tax exemption status. The taxpayer also appealed and contended that the district court should have declared the taxpayer exempt.

OVERVIEW: The taxpayer applied to the IRS for a tax exemption as a charitable and education institution under 26 U.S.C.S. § 501(c)(3). The taxpayer produced publications that repetitively appealed for action, including violence, to put to disadvantage or to injure persons who were members of named racial, religious, or ethnic groups. The IRS issued a final adverse determination letter on the taxpayer's application. The district court entered a judgment vacating the IRS determination based upon precedent that held that the definition of "educational" under Treas. Reg. § 1.501(c)(3)-1 (d)(3)(i) was unconstitutionally vague. The government and the taxpayer appealed. The court reversed the district court's decision and held that the taxpayer's material did not fit within some reasonable interpretation of the statutory term

"educational." The publication failed to present any reasoned development of its conclusions. Moreover, **the taxpayer was not "educational" because its principal function was the mere presentation of unsupported opinion.** The case was remanded to the district court with directions to enter a judgment declaring that the taxpayer was not tax-exempt.

OUTCOME: The court reversed the decision of the district court that vacated an IRS determination that the taxpayer was not entitled to tax exemption status. The case was remanded for further proceedings.

JUDGES:

Tamm, Circuit Judge, and Thomas E. Fairchild, * Senior Circuit Judge for the Seventh Circuit, and Robb, ** Senior Circuit Judge.

* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1976). [**3]

** Senior Circuit Judge Robb participated in the argument of these cases but did not participate in the disposition.

OPINIONBY:

FAIRCHILD

OPINION:

FAIRCHILD, Senior Circuit Judge:

On July 28, 1977, National Alliance applied to the IRS for a tax exemption as a charitable and educational institution under 26 U.S.C. § 501(c)(3). n1 The IRS District Director in Arlington, Virginia denied the corporation's application on March 31, 1978, concluding that National Alliance was neither "charitable" nor "educational" as those terms are applied by Treas. Reg. § 1.501(c)(3)-(1)(d)(2) & (3).

n1 [HN1] Section 501(c)(3) lists the following organizations as among those exempt from taxation under 26 U.S.C. § 501(a):

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

26 U.S.C. § 501(c)(3) (1976).

[HN2] In addition to exempting the organization's profits from federal income tax, classification as tax-exempt under this section has other tax advantages. First, and perhaps most important to organizations like National Alliance, contributions to a § 501(c)(3) organization are tax deductible. 26 U.S.C. § 170(c). Second, expenditures by private foundations in the form of grants to § 501(c)(3) organizations are not

subject to tax. 26 U.S.C. § 4945(d)(5). Third, these organizations are exempt from federal social security taxes, *id.* § 3121(a), and from federal unemployment taxes, *id.* § 3306.

National Alliance, a Virginia Corporation, publishes a monthly newsletter and membership bulletin, organizes lectures and meetings, issues occasional leaflets, and distributes books; all for the stated purpose of arousing in white Americans of European ancestry "an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage." The Treasury Regulation sometimes said to "define" the statutory term "educational" provides that:

"an organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion." n2

The District Director's proposed determination letter quoted extensively from National Alliance publications, and concluded they fell substantially short of satisfying this "full and fair exposition" standard. n3

n2 [HN3] Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) provides:

The term "educational," as used in section 501(c)(3), relates to --

- (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
- (b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or

viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

n3 The letter concluded in part that:

The contents of most of the articles do not appear to be based on anything more than mere opinion and incomplete information. It appears that your publications are being used as an outlet by your organization to spread its racial propaganda which is often inflammatory and unsupported opinion under the guise of being educational. Moreover, the tone and subject matter potentially serves to influence the prejudices and passions of its readers and the opinions of its creators.

*** * * ***

Your organization has not presented a study or discussion of issues on which it has made a policy stand. It has, instead, published its own narrow, unsupported, politically and racially agitative statements of judgment, regarding several highly complex and volatile national issues.

Joint Appendix (“J.A.”) at 22-23.

National Alliance appealed the District Director’s proposed determination letter arguing that the refusal to grant its application for tax-exempt status was based on the content of its publications in violation of the First Amendment. An Assistant Regional Commissioner denied the appeal on January 12, 1979. The IRS issued a final adverse determination letter on April 23, 1979. Having exhausted its available administrative remedies, National Alliance filed suit in federal district

court for declaratory judgment pursuant to 26 U.S.C. § 7428.

The parties filed cross-motions for summary judgment.

This court had then recently decided *Big Mama Rag, Inc. v. United States*, 203 U.S. App. D.C. 448, 631 F.2d 1030 (D.C.Cir. 1980). **This court there reversed a judgment upholding a denial of tax exemption, and held the IRS regulation defining the term “educational” unconstitutionally vague. The regulation in effect at the time of the IRS National Alliance decision was the same regulation held unconstitutional in *Big Mama*. In argument before the district court, the IRS presented four criteria which it designated the Methodology Test, contended the Methodology Test was an explanatory gloss to the “full and fair exposition” test held vague in *Big Mama*, and argued that National Alliance material was not “educational” under the Methodology Test.** n4

n4 The IRS also shifted from the conclusion reached in its determination letter that National Alliance was not “charitable” under Treas. Reg. § 1.501(c)(3)-1(d)(2) as a discriminatory organization, to the contention that it was not “charitable” in the common law sense because it condoned violence and other illegal activities. The district court dismissed this contention as falling outside its consideration of whether or not National Alliance was subject to an exemption as an educational organization, and the IRS does not continue to press the arguments before this court. *But see Bob Jones University v. United States* 461 U.S. 574, 598, 103 S. Ct. 2017, 2032, 76 L. Ed. 2d 157, 51 U.S.L.W. 4593, 4600 (1983).

The district court concluded that the Methodology Test was itself vague and would not cure the faults of the regulation found in *Big Mama*. n5 The court entered judgment vacating the IRS determination that National Alliance is not entitled to tax exemption, and remanding the matter to IRS for further proceedings in conformity with the district court’s memorandum and *Big Mama*. n6

n5 The district court found authority to review this alternative ground for denial of tax-exempt status in the legislative history of 26 U.S.C. § 7428. The House Report on that section permits the court “to base its determination upon the reasons provided by the Internal Revenue Service in its notice to the party making the request for a determination, or based upon any new argument which the Service may wish to introduce at the time of the trial.” H.Rep.No. 94-658, 94th Cong., 2d Sess. 285, reprinted in 1976 U.S. Code Cong. & Ad. News 2897, 3181-82.

n6 The source of the district court’s authority to review an IRS denial of tax-exempt status is found in 26 U.S.C. § 7428. [HN4] In relevant part § 7428(a) provides:

In a case of actual controversy involving --

(1) a determination by the Secretary --

(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) . . . upon filing of an appropriate pleading, the United States Tax Court, the United States Court of Claims, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification. . . . Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Court of Claims, as the case may be, and shall be reviewable as such.

[HN5] Section 7428 was enacted as part of the Tax Reform Act of 1976 to provide rapid judicial review of § 501(c)(3) exemption controversies. See Comment, *Tax Exemptions For Educational Institutions: Discretion and Discrimination*, 128 U.Pa.L.Rev. 849, 854-55 & n. 41 (1980). Although the section might be construed as providing a civil action for an independent, *de novo* determination of a right to exemption, it has been construed as providing a more customary type of judicial review of the

administrator’s decision upon the administrative record. See *Virginia Professional Standards v. Blumenthal* [79-1 USTC P9167], 466 F. Supp. 1164, 1167-69 (D.D.C. 1979). A remand to the IRS for further consideration would be consistent with construing the section as authorizing a customary type of review proceeding, even though the language mentions only a “declaration” by the court.

Both parties appealed. The government argues that the district court should have declared National Alliance not tax-exempt. National Alliance contends the district court should have declared it exempt.

The district court may well have reasoned that there could be no determination of the entitlement of National Alliance to an exemption in the absence of a valid administrative definition of the statutory term “education.” This view must assume, although the district court did not say so, that the National Alliance material could fit within some reasonable interpretation of the statutory term “educational.” In large measure the parties, particularly the government, have argued the appeals as if the issue were whether reading the Methodology Test into the regulation would cure the vagueness found in *Big Mama*. These arguments are directed more at a review of the validity of a regulation rather than at the merits of a particular claim to tax exemption.

We think, however, that the appropriate first step is to examine the National Alliance materials to determine whether they could in any event qualify as “educational” within the exemption statute.

I.

In response to an IRS request, National Alliance supplemented its application for exemption with back copies of its monthly newsletter, *Attack!*, and its membership bulletin, *Action*. It is these materials the IRS found noneducational. n7

n7 Copies of *Attack!* (dating from April 1974 to July 1977) and copies of *Action* (dating from September 1975 to September 1977) were submitted to the IRS district director and the district court, and are a part of the joint appendix submitted to this court. Neither party asserts that these materials are unrepresentative.

The nature of these publications may be summarized as follows. *Attack!* is the organization's principal publication; it contains stories, pictures, feature articles and editorials in a form resembling a newspaper. The general theme of the newsletter is that "non-whites" -- principally blacks -- are inferior to white Americans of European ancestry ("WAEA"), and are aggressively brutal and dangerous; Jews control the media and through that means -- as well as through political and financial positions and other means -- cause the policy of the United States to be harmful to the interests of WAEA. A subsidiary proposition is that communists have persuaded "neo-liberals" of equality among human beings, the desirability of racial integration, and the evil of discrimination on racial grounds. In support of these themes, each newsletter contains one or two news stories reporting incidents of murder or other violence by black persons, and identifying as Jews persons holding important media or other positions. Reports of black violence are presented as brief factual accounts -- though usually without reference to source -- accompanied by assertions of a media coverup and the inborn savagery of blacks. n8 Identifications as Jews of individuals holding significant positions are accompanied by assertions of resulting Jewish manipulation of American society. n9 Other articles and editorials attribute political and social events deemed detrimental to WAEA to the integration of non-whites into society or to Jewish manipulation of society. n10

n8 Under the headline "Murder of Whites Began in 1969," for example, the May 1974 issue of *Attack!* began:

San Francisco Mayor Joseph L. Alioto's figure of 75 execution-

style murders of White persons by Black killers in California since 1971 has been expanded to approximately 400 by adding figures for similar killings with an apparent racial motive in Illinois, Indiana, Michigan, Missouri, Ohio, and Wisconsin. Police officials who added the unsolved killings in the six Midwestern states to those in California went as far back as 1969. They did not, however, include similar killings elsewhere, such as those which recently occurred in Boston.

The Boston killings, as well as hundreds of others across the country, were apparently random and unplanned acts of savagery against Whites, rather than the cold-blooded, systematic executions which were counted in arriving at the figure of 400 for California and the Midwest. Whether all these 400 killings were, like the "Zebra" slayings in San Francisco, part of a single program of murder directed against Whites or whether they were the work of several different Black groups remains to be seen.

(J.A. 35) The article proceeded to discuss the failure of the Government or mass media to give this violence sufficient attention, concluding:

The mass media policy of suppressing news of Black crimes against Whites has allowed a Black gang (or gangs) to systematically murder approximately 400 White persons during the past five years without arousing public alarm and opposition.

If people all over the country had known about the first of these killings when they occurred, five years ago, there would have been enormous pressure on Federal and local authorities to apprehend the killers. If the killings had continued, and if they had been given full, nationwide news coverage, the White reaction soon would have forced drastic action

against all militant Black organizations. In addition, there would have been generated a strong resistance to the continuation of the numerous racial integration programs which have made Whites such easy victims for Black killers.

It was for this very reason, of course, that the masters of the media suppressed the news. They did not want Americans to see the grisly consequences of turning a civilized country over to a horde of primitive savages, in the name of "equality."

n9 An article published in each issue of *Attack!* over the three year period included in the joint appendix identifies "the few dozen men who control America's media" as Jews. The article concludes:

This Jewish control of the American mass media is the single most important fact of life, not just in America, but in the whole world today. And there is nothing: famine, inflation, fuel crisis, war -- more dangerous to the future of our people.

Until this Jewish control of American public opinion is broken, continued misfortune, confusion, and decadence shall be our lot, and there can be no national liberation or regeneration.

(J.A. 41 *passim*)

n10 For example, past issues of *Attack!* report that integration is responsible for a decline in average real income in the United States (J.A. 138, 150), a drop in SAT scores (J.A. 141), and higher taxes (J.A. 155); and Jewish manipulation of American society, *Attack!* asserts, led the United States into both World Wars. (J.A. 233, 307)

The organization's newsletter describes its themes of black savagery or Jewish manipulation as warnings to WAEA of the "dangers which arise from the presence of so many alien groups in our midst." Joint Appendix at 147. A National Alliance membership bulletin states that these perceived dangers can only be averted by the removal of

non-whites and Jews from society. n11 Issues of *Attack!* advocate that the removal be violent. n12 The terms "non-whites," "blacks," and "Jews" are not defined.

n11 National Alliance's September 1977 *Action* bulletin states:

Despite different local problems and issues, there is a general agreement among all [similar] groups [throughout the world] on two things: (1) Non-White immigration must be halted and all Non-Whites already present must be removed peaceably or otherwise; (2) the Jew must go, totally and unconditionally.

n12 One issue of *Attack!* calls for "an armed confrontation between Whites and Blacks. . . . Far better the loss of a few million lives in a race war than the loss of everything through continued assimilation and miscegenation. After all no lives can be saved in the long run -- only genes, only race." (J.A. 69) Similarly, another issue states that "there will be a worldwide program, which will, once and for all time, solve the problem of Jewish meglomania." (J.A. 59)

Attack! also approvingly reports individual acts of violence against non -whites. For example, under the headline "Fraternity Solves Race Problem," the January 1975 issue of *Attack!* reports the burial alive and death of a black applicant to a white fraternity. (J.A. 75)

In sum, National Alliance repetitively appeals for action, including violence, to put to disadvantage or to injure persons who are members of named racial, religious, or ethnic groups. It both asserts and implies that members of these groups have common characteristics which make them sufficiently dangerous to others to justify violent expulsion and separation.

Even under the most minimal requirement of a rational development of a point of view, National Alliance's materials fall short. The publications before us purport to state demonstrable facts -- such as the occurrence of violent acts, perpetrated by black persons, the presence of Jews in important positions, and

other events consistent with National Alliance themes. The real gap is in reasoning from the purported facts to the views advocated; there is no more than suggestion that the few “facts” presented in each issue of *Attack!* justify its sweeping pronouncements about the common traits of non-whites and Jews or the need for their violent removal from society. It is the fact that there is no reasoned development of the conclusions which removes it from any definition of “educational” conceivably intended by Congress. The material may express the emotions felt by a number of people, but it cannot reasonably be considered intellectual exposition.

Significantly, National Alliance has not suggested before the IRS or the district court or here *any* definition of “educational” which would arguably be met by its material.

The exposition of propositions the correctness of which is readily demonstrable is doubtless educational. As the truth of the view asserted becomes less and less demonstrable, however, “instruction” or “education” must, we think, require more than mere assertion and repetition.

We recognize the inherently general nature of the term “educational” and the wide range of meanings Congress may have intended to convey. In attempting a definition suitable for all comers, IRS, or any legislature, court, or other administrator is beset with difficulties which are obvious. We do not attempt a definition, but we are convinced that the National Alliance material is far outside the range Congress could have intended to subsidize in the public interest by granting tax exemption.

II.

Aside from vagueness, it is clear that in formulating its regulation, IRS was attempting to include as educational some types of advocacy of views not generally accepted. But [HN6] in order to be deemed “educational” and

enjoy tax exemption some degree of intellectually appealing development of or foundation for the views advocated would be required. Hence portion of the Regulation which requires that the organization “present a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, [HN7] an organization is not educational if its principal function is the mere presentation of unsupported opinion.” *Supra* n2. It is clear that the National Alliance material is not educational under that test.

One of the concerns in this area, because of First Amendment considerations, is that the government must shun being the arbiter of “truth.” Material supporting a particular point of view may well be “educational” although a particular public officer may strongly disagree with the proposition advocated. Accordingly IRS has attempted to test the method by which the advocate proceeds from the premises he furnishes to the conclusion he advocates rather than the truth or accuracy or general acceptance of the conclusion.

Thus the Methodology Test presented in this proceeding contains the following four criteria:

1. Whether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization’s communications.
2. To the extent viewpoints purport to be supported by a factual basis, are the facts distorted.
3. Whether or not the organization makes substantial use of particularly inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluations.

4. Whether or not the approach to a subject matter is aimed at developing an understanding on the part of the addressees, by reflecting consideration of the extent to which they have prior background or training.

Joint Appendix at 12.

Nothing in these criteria would suggest that the National Alliance material could be deemed educational.

III.

Nothing in this court's decision in *Big Mama Rag, Inc. v. United States*, 203 U.S. App. D.C. 448, 631 F.2d 1030 (D.C.Cir. 1980), compels our reaching a different conclusion. The plaintiff in that case, Big Mama Rag, Inc. ("BMR, Inc."), was a non-profit organization formed for the purpose of creating "a channel of communication for women that would educate and inform them on general issues of concern to them." *Id.* at 1032. Its primary activity is the production of a monthly newspaper, *Big Mama Rag*, which prints articles, editorials, calendars of events, and other information of interest to women. It also devotes a considerable minority of its time to promoting women's rights through workshops, seminars, lectures, a weekly radio program, and a free library. *Id.* The IRS denied BMR, Inc. tax-exempt status concluding among other things that the content of *Big Mama Rag* was not "educational" as that term is defined under the "full and fair exposition" standard. Treas. Reg. § 1.501(c)(3)-(1)(d)(3). The district court, reviewing the denial of an exemption under § 7428, granted the IRS's motion for summary judgment on similar grounds.

On appeal BMR, Inc. argued that issues discussed in its publication received full and fair treatment; alternatively, the organization argued that the "full and fair exposition" standard was itself unconstitutional. After

reviewing the definition of "educational" contained in § 1.501(c)(3)-(1)(d)(3), the *Big Mama* court held that the "full and fair exposition" test was unconstitutionally vague. The court found the test lacked "the requisite clarity, both in explaining which applicant organizations are subject to the standard and in articulating its substantive requirements." 631 F.2d at 1036. The court concluded this vagueness left the regulation inherently susceptible to discriminatory enforcement by individual IRS officials. *Id.* at 1040.

The IRS had relied on the "full and fair exposition" test in deciding that BMR, Inc. was not tax-exempt. Having decided that the test was unconstitutional, this court vacated the judgment appealed from and remanded for further proceedings. The court did not direct the district court to enter judgment declaring BMR, Inc. tax-exempt, nor did it direct remand to IRS. The court may have assumed that the district court would take the latter course and that IRS would decide the matter under some other standard or analysis, perhaps reworking its regulation. In fact, however, the parties reached some sort of accommodation, and the district court dismissed the action with prejudice upon stipulation by the parties.

We assume that the court in *Big Mama* viewed the activity of BMR, Inc. as falling within the range of reasonable interpretation of "educational" as used in the statute, or at least not clearly outside such range. Thus the vague test posed a real risk that BMR, Inc. might have been denied exemption under the test while others not distinguishable on any principled objective basis might be granted exemption.

In the present case we see no possibility that the National Alliance publication can be found educational within any reasonable interpretation of the term.

Relying on the Supreme Court's decision in *Speiser v. Randall*, 357 U.S. 513, 518, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958), the *Big Mama*

court noted that [HN8] while First Amendment activities need not be subsidized, the discriminatory denial of tax exemptions for engaging in particular speech can impermissibly infringe constitutionally protected rights. *631 F.2d at 1034*. As a consequence the court held invalid a standard so vague that it might permit an IRS official to discriminate between applications on the basis of approval or rejection of the ideas expressed by the applying organizations. Neither *Speiser* nor *Big Mama*, however, stand for the proposition that an exemption may not be denied on criteria neutral with regard to viewpoint. *See Regan v. Taxation With Representation*, 51 U.S.L.W. 4584 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (May 23 1983); *Grayned v. City of Rockford*, 408 U.S. 104, 113, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *Cammarano v. United States*, 358 U.S. 498, 513, 3 L. Ed. 2d 462, 79 S. Ct. 524 (1959).

We have no doubt that publication of the National Alliance material is protected by the First Amendment from abridgement by law. *Healy v. James*, 408 U.S. 169, 33 L. Ed. 2d 266, 92 S. Ct. 2338 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978). But it does not follow that the First Amendment requires a construction of the term “educational” which embraces every continuing dissemination of views. *See Taxation With Representation*, 51 U.S.L.W. at 4585 461 U.S. 540, 546, 103 S. Ct. 1997 (quoting *Cammarano*, 358 U.S. at 515, (Douglas, J., concurring)) (“We again reject the ‘notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. ‘“); *Big Mama*, 631 F.2d at 1040 (“And we by no means intend to suggest that tax-exempt status must be accorded to every organization claiming an educational mantle.”). n13

n13 In *Taxation With Representation* the Supreme Court expressly rejected the suggestion that a statute is subject to strict scrutiny whenever

Congress subsidizes some speech, but not all speech. *461 U.S. at 546*, *51 U.S.L.W. at 4585*.

Based on a careful review of National Alliance’s publications in the record before us, we are convinced that the IRS denial of exemption was not arbitrary or discriminatory, and was consistent with any reasonable interpretation of the statutory term “educational.”

IV.

We observe that, starting from the breadth of terms in the regulation, application by IRS of the Methodology Test would move in the direction of more specifically requiring, in advocacy material, an intellectually appealing development of the views advocated. The four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process. The test reduces the vagueness found by the *Big Mama* decision.

The government does argue that the Methodology Test goes about as far as humanly possible in verbalizing a line separating education from non-educational expression. It says, in part:

The methodology test leads to the minimum of official inquiry into, and hence potential censorship of, the content of expression, because it focuses on the method of presentation rather than the ideas presented. * The methodology test is thus the least intrusive standard available to evaluate an organization’s qualification for tax exemption. Although the test requires the exercise of judgment, abuses of such judgment are checked both by extensive administrative review and by prompt post-determination access to the courts. The statute commands the Internal Revenue

Service, as it were, to steer between Scylla and Charybdis: exemption to all or exemption, in effect, only to degree-granting academic institutions. The methodology test, supervised by the courts, is a carefully-charted middle course.

* We recognize that the First Amendment protects style as well as content from Government suppression (*Cohen v. California*, 403 U.S. 15, 26, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971)) but we are here dealing not with Government suppression but Government subvention. And Congress is free to select certain forms of expression for official support, without offending the Constitution. See *Harris v. McRae*, 448 U.S. 297, 314-318, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980).

We need not, however, and do not reach the question whether the application of the Methodology Test, either as a matter of practice or under an amendment to the regulation would cure the vagueness found in the regulation by this court in *Big Mama*.

The judgment appealed from is reversed and the cause remanded with directions to enter judgment declaring National Alliance not tax-exempt. n14

n14 Denial of National Alliance's application for tax-exempt status might arguably flow from a source separate from the question of the organization's educational nature: National Alliance restricts membership on the basis of

race. While the organization's articles of incorporation prohibit members, this prohibition practically extends only to members *as shareholders* in the corporation. National Alliance actively solicits individuals to become participating members in sponsored activities through its publications. (J.A. 40, 326-408). National Alliance expressly restricts such membership to "persons of European race." Application for Recognition of Exemption at 4. In *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972), a three-judge court held that the Secretary of the Treasury could not grant tax-exempt status to a fraternal organization that denied membership to non-whites. The granting of these tax benefits was viewed as federal "subsidies" of discriminatory practices in violation of the equal protection component of the Due Process Clause of the Fifth Amendment as well as restrictions on "Federal financial assistance" under Title 42 U.S.C. § 2000 (d). Since that decision this circuit has held that [HN9] "racially discriminatory [educational] institutions are ineligible for tax-exempt status under section 501(c)(3)." *Wright v. Regan*, 211 U.S. App. D.C. 231, 656 F.2d 820, 833 (D.C.Cir. 1981), petition for cert. granted 462 U.S. 1130, 103 S. Ct. 3109, 77 L. Ed. 2d 1365 (Nov. 23, 1981) (No. 81-970). See also *Bob Jones University v. United States*, 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157, 51 U.S.L.W. 4593 (1983); *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997, 30 L. Ed. 2d 550, 92 S. Ct. 564 (1971). These decisions certainly call into question whether an organization enjoying an educational tax exemption under federal law may deny membership on the basis of race. Having concluded that the instant organization is not entitled to an educational exemption, however, we do not address this issue.

BIG MAMA RAG, INC., a Colorado nonprofit Corporation, APPELLANT v. UNITED STATES OF AMERICA, et al.

No. 79-1826

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

203 U.S. App. D.C. 448; 631 F.2d 1030; 1980 U.S. App. LEXIS 14132; 80-2 U.S. Tax Cas. (CCH) P9674; 46 A.F.T.R.2d (RIA) 5723

June 9, 1980, Argued

September 15, 1980, Decided

PRIOR HISTORY:

Appeal from the United States District Court for the District of Columbia (Civil Action No. 77-1649).

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff nonprofit organization sought review of a decision of the United States District Court for the District of Columbia, which granted summary judgment to defendant government and upheld the Internal Revenue Service's (IRS) rejection of the organization's application for tax-exempt status.

OVERVIEW: The nonprofit organization, **whose purpose was to create a channel of communication for women that educated and informed them on general issues of concern to them, had a heavy reliance on charitable contributions and applied for tax exempt status as a charitable and educational institution.** The IRS denied the application. The district court upheld that denial and granted summary judgment to the government. On appeal, the court reversed and remanded. The definition contained in Treas.

Reg. § 1.501(c)(3)-1(d)(3) lacked sufficient specificity to pass constitutional muster. **Its "full and fair exposition" standard, on which the denial of the tax-exempt status was upheld by the district court, was vague both in describing who was subject to that test and in articulating its substantive requirements. The district court's decision was based on the value-laden conclusion that the organization was too doctrinaire. IRS officials earlier advised the organization that an exemption could be approved only if it agreed to abstain from advocating homosexuality as a mere preference. Clearly, there was an inherent susceptibility to discriminatory enforcement of vague statutory language.**

OUTCOME: The court reversed and remanded the decision of the district court, which granted summary judgment to the government and upheld the IRS's rejection of the organization's application for tax-exempt status.

COUNSEL:

Robert Jenkins, III, Washington, D. C., for appellant. Jeffrey L. Yablon, Washington, D. C., was on the brief for appellant. Harris Weinstein, Washington, D. C., also entered an appearance for appellant.

Robert A. Bernstein, Atty., Dept. of Justice, Washington, D. C., with whom M. Carr Ferguson, Asst. Atty. Gen., Carl S. Rauh, U. S. Atty., Washington, D. C., at the time the brief was filed, were on the brief, for appellee.

JUDGES:

Before TAMM, ROBINSON, and MIKVA, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

OPINIONBY:

MIKVA

OPINION:

Plaintiff, Big Mama Rag, Inc. (BMR, Inc.), appeals from the order of the court below granting summary judgment to defendants n1 and upholding the IRS's rejection of plaintiff's application for tax-exempt status. Specifically, BMR, Inc. questions the finding that it is not entitled to tax exemption as an educational or charitable organization under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (1976), and Treas.Reg. § 1.501(c)(3)-1(d) (2) & (3) (1959). Appellant also challenges the constitutionality of the regulatory scheme, arguing that it violates the First Amendment and the equal protection component of the Fifth Amendment and that it unconstitutionally conditions tax-exempt status on the waiver of constitutional rights.

n1. Defendants in this case are the United States, W. Michael Blumenthal, as Secretary of

the Treasury, and Jerome Kurtz, as Commissioner of IRS.

Because **we find that the definition of “educational” contained in Treas. Reg. § 1.501(c)(3)-1(d)(3) is unconstitutionally vague** in violation of the First Amendment, we reverse the order of the court below.

I. BACKGROUND

BMR, Inc. is a nonprofit organization with a feminist orientation. Its purpose is “to create a channel of communication for women that would educate and inform them on general issues of concern to them.” App. 76. To this end, it publishes a monthly newspaper, Big Mama Rag (BMR), which prints articles, editorials, calendars of events, and other information of interest to women. BMR, Inc.’s primary activity is the production of that newspaper, but it also devotes a considerable minority of its time to promoting women’s rights through workshops, seminars, lectures, a weekly radio program, and a free library.

BMR, Inc. has a predominantly volunteer staff and distributes free approximately 2100 of 2700 copies of Big Mama Rag’s monthly issues. Moreover, the organization has severely limited the quantity and type of paid advertising. As the district court found, BMR, Inc. neither makes nor intends to make a profit and is dependent on contributions, grants, and funds raised by benefits for over fifty percent of its income. 494 F. Supp. 473, 476 (D.D.C.1979).

Because of its heavy reliance on charitable contributions, BMR, Inc. applied in 1974 for tax-exempt status as a charitable and educational institution. n2 That request was first denied by the IRS District Director in Austin, Texas, on the ground that the organization’s newspaper was indistinguishable from an “ordinary commercial publishing practice.” n3 After BMR, Inc. filed a protest and a hearing was held in the IRS National

Office, the denial of tax-exempt status was affirmed on three separate grounds:

n2. Tax-exempt status is desirable for two reasons: the profits of exempt corporations are not subject to federal income tax, 26 U.S.C. § 501(a) (1976); and contributions to the organization are tax deductible, 26 U.S.C. § 170(c) (1976). Appellant, which does not expect to make a profit and is heavily subsidized by contributions, seeks tax-exempt status for the second reason.

n3. The District Director's letter to BMR, Inc. stated:

Based on the information submitted, it appears that your corporate activities, which presumably are within the charter powers, are business activities. They are devoted to publishing a newspaper and selling it to the general public in accordance with ordinary commercial publishing practices. Although the newspaper published articles expressing the Feminist point of view, there is no showing that the operations fulfill a corporate role which in and of itself is exclusively charitable, scientific, literary or educational.

App. 77-78.

1. the commercial nature of the newspaper;
2. the political and legislative commentary found throughout; and
3. the articles, lectures, editorials, etc., promoting lesbianism.

App. 1030.

To enable BMR, Inc. to obtain judicial review of the IRS decision, the IRS District Director issued a final determination letter, which denied tax-exempt status on the grounds that, inter alia, the content of BMR was not educational and the manner of distribution was that of ordinary commercial publishing organizations. n4

n4. The District Director's reasoning stated in full:

The organization in publishing the newspaper is not operated exclusively for educational purposes as required by Code

section 501(c)(3) as the content of the publication is not educational, the preparation of the material does not follow methods educational in nature, the distribution of the material is not valuable in achieving an educational purpose and/or the manner in which the distribution is accomplished is not distinguishable from ordinary commercial publishing practices.

App. 14.

Appellant then brought a declaratory judgment action in the District Court for the District of Columbia. n5 On cross-motions for summary judgment, the judge granted appellees' motion. Although the court rejected appellees' argument that BMR, Inc. was not entitled to tax-exempt status because it was a commercial organization, it agreed that appellant did not satisfy the definitions of "educational" and "charitable" in Treas.Reg. § 1.501(c)(3)-1(d)(2) & (3). The court found no constitutional basis for disturbing the IRS's decision.

n5. See 26 U.S.C. § 7428 (1976) (providing for declaratory judgment action in federal district court for determination of tax-exempt status).

II. THE REGULATORY SCHEME

[HN1] Tax exemptions are granted under section 501(c) of the Internal Revenue Code to a variety of socially useful organizations, including the charitable and the educational. n6 The Code forbids exemption of an organization if any part of its net earnings inures to the benefit of private persons or if it is an "action organization"-one that attempts to influence legislation or participates in any political campaign. Treasury regulations impose additional requirements: exempt status is accorded only to applicants whose articles of organization limit their activities to furtherance of exempt purposes (the "organizational test") or whose activities are in fact aimed at accomplishment of exempt purposes (the

“operational test”). Treas.Reg. § 1.501(c)(3)-1(b) & (c) (1959).

n6. Section 501(c) provides in relevant part:

[HN2] The following organizations are referred to in subsection (a) (which grants exemption):

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

26 U.S.C. § 501(c) (1976).

The Treasury regulations also define some of the exempt purposes listed in section 501(c)(3) of the Code, including “charitable” and “educational.” The definition of “educational” is the one at issue here:

The term “educational,” as used in section 501(c)(3), relates to-

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

Treas.Reg. § 1.501(c)(3)-1(d)(3)(i) (1959).

The district court found that BMR, Inc. was not entitled to tax-exempt status because it had “adopted a stance so doctrinaire” that it could not meet the “full and fair exposition” standard articulated in the definition quoted above. Appellant’s response is threefold. First, it argues, the “full and fair exposition” hurdle is not applicable at all here because BMR, Inc. is not an organization whose primary activity or principal function is advocacy of change. Second, BMR, Inc. contends that its publication does satisfy the requirements of the “full and fair exposition” standard. Finally, appellant maintains that denial of its application for tax-exempt status on the basis of the “full and fair exposition” standard is unconstitutional for a number of reasons.

Even though tax exemptions are a matter of legislative grace, the denial of which is not usually considered to implicate constitutional values, tax law and constitutional law are not completely distinct entities. In fact, the First Amendment was partly aimed at the so-called “taxes on knowledge,” which were intended to limit the circulation of newspapers and

therefore the public's opportunity to acquire information about governmental affairs. See *Grosjean v. American Press Co.*, 297 U.S. 233, 246-49, 56 S. Ct. 444, 447-48, 80 L. Ed. 660 (1936). In light of their experience with such taxes, the framers realized, in the words of Mr. Justice Douglas, that "(t)he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 63 S. Ct. 870, 874, 87 L. Ed. 1292 (1943). Thus, although First Amendment activities need not be subsidized by the state, the discriminatory denial of tax exemptions can impermissibly infringe free speech. *Speiser v. Randall*, 357 U.S. 513, 518, 78 S. Ct. 1332, 1338, 2 L. Ed. 2d 1460 (1958). Similarly, [HN4] regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials. n7 We find that the definition of "educational," and in particular its "full and fair exposition" requirement, is so vague as to violate the First Amendment and to defy our attempts to review its application in this case. n8

n7. *Cammarano v. United States*, 358 U.S. 498, 79 S. Ct. 524, 3 L. Ed. 2d 462 (1959), is not to the contrary. There the Court upheld Treasury regulations prohibiting business deductions of lobbying expenses. These "nondiscriminatory" provisions, intended to put "everyone in the community . . . on the same footing," *id.* at 513, 79 S. Ct. at 533, are very different from the regulations at issue here, which leave room for discriminatory denial of tax-exempt status.

n8. Given this disposition of the case, we do not, and need not, address the other issues raised by appellant: that the organization satisfies the requirements of Treas.Reg. § 1.501(c)(3)-1(d)(2) & (3) and is therefore entitled to tax-exempt status; that the regulation is violative of equal protection; and that exemption is unconstitutionally conditioned on the waiver of constitutional rights.

III. VAGUENESS ANALYSIS

[HN5] Vague laws are not tolerated for a number of reasons, and the Supreme Court has

fashioned the constitutional standards of specificity with these policies in mind. First, the vagueness doctrine incorporates the idea of notice-informing those subject to the law of its meaning. *Smith v. Goguen*, 415 U.S. 566, 572, 94 S. Ct. 1242, 1246, 39 L. Ed. 2d 605 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972). A law must therefore be struck down if " "men of common intelligence must necessarily guess at its meaning." " *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760, 48 L. Ed. 2d 243 (1976) (quoting *Connally v. Genera Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926)). See also *Baggett v. Bullitt*, 377 U.S. 360, 367, 84 S. Ct. 1316, 1320, 12 L. Ed. 2d 377 (1964).

Second, the doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement. *Hynes*, 425 U.S. at 622, 96 S. Ct. at 1761; *Goguen*, 415 U.S. at 572-73, 94 S. Ct. at 1246-47; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S. Ct. 839, 847, 31 L. Ed. 2d 110 (1972). To that end, laws are invalidated if they are "wholly lacking in "terms susceptible of objective measurement." " *Keyishian v. Board of Regents*, 385 U.S. 589, 604, 87 S. Ct. 675, 684, 17 L. Ed. 2d 629 (1967) (quoting *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286, 82 S. Ct. 275, 280, 7 L. Ed. 2d 285 (1961)). See also *NAACP v. Button*, 371 U.S. 415, 466, 83 S. Ct. 328, 355, 9 L. Ed. 2d 405 (1963) (Harlan, J., dissenting) ("Laws that have failed to meet this (vagueness) standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment, unaided by objective norms.").

These standards are especially stringent, and an even greater degree of specificity is required, where, as here, the exercise of First Amendment rights may be chilled by a law of uncertain meaning. *Hynes*, 425 U.S. at 620, 96 S. Ct. at 1760; *Goguen*, 415 U.S. at 573, 94 S.

Ct. at 1247; NAACP v. Button, 371 U.S. at 432-33, 83 S. Ct. at 337-38. [HN6] Vague laws touching on First Amendment rights, noted the Supreme Court in *Baggett*,

require (those subject to them) to “steer far wider of the unlawful zone,” than if the boundaries of the forbidden areas were clearly marked, . . . by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.

377 U.S. at 372, 84 S. Ct. at 1323 (quoting *Speiser v. Randall, 357 U.S. 513, 526, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460 (1958)*) (citation omitted). Measured by any standard, and especially by the strict standard that must be applied when First Amendment rights are involved, the definition of “educational” contained in *Treas.Reg. § 1.501(c)(3)-1(d)(3)* must fall because of its excessive vagueness.

We do not minimize the difficulty and delicacy of the task delegated to the Treasury by Congress under section 501(c)(3) of the Code. Words such as “religious,” “charitable,” “literary,” and “educational” easily lend themselves to subjective definitions at odds with the constitutional limitations we describe above. Treasury bravely made a pass at defining “educational,” but the more parameters it tried to set, the more problems it encountered.

The first portion of the regulation relied upon to deny BMR, Inc.’s request for tax-exempt status measures an applicant organization by whether it provides “instruction of the public on subjects useful to the individual and beneficial to the community.” *Treas.Reg. § 1.501(c)(3)-1(d)(3)(i)(b) (1959)*. The district court rejected that test with barely a murmur of disagreement from appellees. That standard, held the court below, “would be far too subjective in its application to pass constitutional muster.” *494 F. Supp. at 479 n.6*.

We find similar problems inherent in the “full and fair exposition” test, on which the district court based affirmance of the IRS’s denial of tax-exempt status to BMR, Inc. That test lacks the requisite clarity, both in explaining which applicant organizations are subject to the standard and in articulating its substantive requirements.

A. Who is Covered by the “Full and Fair Exposition” Test?

According to the terms of the Treasury regulation, only an organization that “advocates a particular position or viewpoint” must clear the “full and fair exposition” hurdle. Appellant maintains that the definition of an advocacy organization is to be found in the preceding subsection of the regulation, which defines the term “charitable”:

[HN7] The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an “action” organization of any one of the types described in paragraph (c)(3) of this section.

Treas.Reg. § 1.501(c)(3)-1(d)(2) (1959).

The district court held that this part of the regulation was designed to cover charitable institutions and that BMR, Inc., an educational rather than a charitable organization, must meet the “full and fair exposition” standard rather than the more lenient “action organization” standard of section 1.501(c)(3)-1(d)(2). n9 Obviously, if BMR, Inc. is an advocacy group and is not a charitable organization, it may not take cover under the “action organization”

standard but must instead meet the “full and fair exposition” test.

n9. [HN8] An action organization is one that tries to influence legislation or participates in any political campaign. See 26 U.S.C. § 501(c)(3) (1976), quoted in full in note 6 supra.

The initial question, however, is whether or not BMR, Inc. is an advocacy group at all. What appellant turns to Treas.Reg. § 1.501(c)(3)-1(d)(2) for is the definition of “advocacy,” not for the appropriate standard to be applied to advocacy organizations seeking tax-exempt status. The district court did not deal with that question, and, indeed, it is difficult to ascertain from the language of the regulation defining “educational” exactly what organizations are intended to be covered by the “full and fair exposition” standard and whether or not the definitions of advocacy groups are the same for both educational and charitable organizations. n10

n10. For a comprehensive discussion of the ambiguous relationship between the definitions of “educational” and “charitable” in the Treasury regulations, see Comment, Tax Exemptions for Educational Institutions: Discretion and Discrimination, 128 U.Pa.L.Rev. 849, 862-66 (1980) (hereinafter cited as U.Pa.Comment).

The uncertainty of the coverage of the “full and fair exposition” standard is evidenced by its application over the years by the IRS. The Treasury Department’s Exempt Organizations Handbook has defined “advocates a particular position” as synonymous with “controversial.” n11 Such a gloss clearly cannot withstand First Amendment scrutiny. It gives IRS officials no objective standard by which to judge which applicant organizations are advocacy groups—the evaluation is made solely on the basis of one’s subjective notion of what is “controversial.” And, in fact, only a very few organizations, whose views are not in the mainstream of political thought, have been deemed advocates and held to the “full and fair exposition” standard. n12 The one tax-exempt homosexual organization cited by the

Government as evidence that the IRS does not discriminate on the basis of sexual preference was required to meet the “full and fair exposition” standard even though it admittedly did not “advocate or seek to convince individuals that they should or should not be homosexuals.” Rev.Rul. 78-305, 1978-2 C.B. 172, 173.

n11. “Organizations doing research or educating the public on controversial public issues must stick to the reasoned approach and avoid unsupported opinion.” 3 Int.Rev.Manual-Admin. (CCH) pt. 7751, § 345.(12), at 20,572 (Apr. 28, 1977).

n12. For a discussion of these applications of the “full and fair exposition” standard, see U.Pa.Comment, supra note 10, at 858-59.

The Treasury regulation defining “educational” is, therefore, unconstitutionally vague in that it does not clearly indicate which organizations are advocacy groups and thereby subject to the “full and fair exposition” standard. And the latitude for subjectivity afforded by the regulation has seemingly resulted in selective application of the “full and fair exposition” standard—one of the very evils that the vagueness doctrine is designed to prevent.

B. What Does the “Full and Fair Exposition” Test Require?

The Treasury definition of “educational” may also be challenged on the ground that it fails to articulate with sufficient specificity the requirements of the “full and fair exposition” standard. The language of the regulation gives no aid in interpreting the meaning of the test:

[HN9] An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an

organization is not educational if its principal function is the mere presentation of unsupported opinion.

Treas.Reg. § 1.501(c)(3)-1(d)(3) (1959).

What makes an exposition “full and fair”? Can it be “fair” without being “full”? Which facts are “pertinent”? How does one tell whether an exposition of the pertinent facts is “sufficient ... to permit an individual or the public to form an independent opinion or conclusion”? And who is to make all of these determinations?

The regulation’s vagueness is especially apparent in the last clause quoted above. That portion of the test is expressly based on an individualistic-and therefore necessarily varying and unascertainable-standard: the reactions of members of the public. The Supreme Court has recognized that [HN10] statutes phrased in terms of individual sensitivities are suspect and susceptible to attack on vagueness grounds. See *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688, 29 L. Ed. 2d 214 (1971) (“Conduct that annoys some people does not annoy others. Thus, the ordinance is vague ... in the sense that no standard of conduct is specified at all.”). See also *Kingsley Int’l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684, 701-02, 79 S. Ct. 1362, 1372, 3 L. Ed. 2d 1512 (1959) (Clark, J., concurring in the result); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-05, 72 S. Ct. 777, 781-82, 96 L. Ed. 1098 (1952).

An additional source of unclarity lies in the relationship between the two sentences comprising the “full and fair exposition” test. Appellant argues that the two should be read as counter-examples-an organization fails to satisfy the test only if “its principal function is the mere presentation of unsupported opinion.” The Government, on the other hand, contends that tax-exempt status must be denied BMR, Inc. if a substantial portion of its newspaper

consists of unsupported opinion. Again, the language of the regulation does not resolve this issue. n13

n13. The IRS has adopted a list of specific guidelines to implement the Treasury definition of “educational.” But those guidelines use the same conclusory terms as the regulation and are not helpful in clarifying its meaning:

[HN11] An organization ... may qualify ... if (1) the content of the publication is educational, (2) the preparation of material follows methods generally accepted as “educational” in character, (3) the distribution of the materials is necessary or valuable in achieving the organization’s educational and scientific purposes, and (4) the manner in which the distribution is accomplished is distinguishable from ordinary commercial publishing practices.

Rev.Rul. 67-4, 1967-1 C.B. 121, 122; see Rev.Rul. 77-4, 1977-1 C.B. 141.

The district court’s interpretation of the “full and fair exposition” test, and the one advocated by the Government, is no more precise. The district court found the Treasury regulation “capable of objective application” because “it asks only whether the facts underlying the conclusions are stated.” 494 F. Supp. at 480. But distinguishing facts, on the one hand, and opinion or conclusion, on the other, does not provide an objective yardstick by which to define “educational.” The distinction is not so clear-cut that an organization seeking tax-exempt status-or an IRS official reviewing an application for exemption-will be able to judge when any given statement must be bolstered by another supporting statement. n14

n14. Moreover, we fail to understand the preoccupation of the district court and the IRS with facts, statistics, surveys, and such, which can be easily distorted and therefore of questionable educational value.

One of the five examples cited by the Government as evidence of BMR “s failure to meet the “full and fair exposition” test may be used to illustrate our point. Most of the article, discussing Susan Saxe’s 1975 plea of guilty to

charges stemming from a bank robbery in Philadelphia, is simple journalistic reporting. It discusses the terms of the plea bargain, the reaction of local feminists, the differential treatment accorded Saxe supporters and white men who went to observe the pretrial hearing, and police questioning of women in Philadelphia. In return for Saxe's plea, the Government apparently agreed, among other things, to "call off its investigation of the women's and lesbian communities" in the area and not to ask Saxe to testify against "anyone she has known or know (sic) about in the last five years." By forcing Saxe to choose between her own interests and those of other women, the article continues, "the Government has clarified for us, once again, that we, as women, are inextricably bound up with each other in the struggle." *Big Mama Rag*, July, 1975, at 1, cols. 1-3, reprinted in App. 447.

Certainly, the author's viewpoint is not disguised in the last sentence. But is the statement one of fact or opinion? If the latter, is the author's description of the terms of the guilty plea sufficient to inform readers of the basis underlying her opinion? Or is further proof of the existence of "the struggle" necessary? If so, would the article satisfy the "full and fair exposition" test without that final statement? Neither the Treasury regulation nor the proposed fact/opinion distinction is responsive to these questions. And one's answers will likely be colored by one's attitude towards the author's point of view. n15

n15. Ironically, an article appearing in the same issue of BMR as the Saxe piece criticizes another feminist group, which had accused Gloria Steinem of collaborating with the CIA, for "slant(ing) the information it presents in such a way as to make certain conclusions inevitable, rather than presenting the facts and leaving the reader to reach her own conclusions." *Big Mama Rag*, July, 1975, at 5, cols. 1, 4, reprinted in App. 451.

The futility of attempting to draw lines between fact and unsupported opinion is further

illustrated by the district court's application of that test. The court did not analyze the contents of BMR under its proposed test but merely stated, without further explication, that the publication was not entitled to tax-exempt status because it had "adopted a stance so doctrinaire that it cannot satisfy this standard." *494 F. Supp. at 479*. Instead of applying the purportedly objective test the court had formulated, it was forced to resolve the case by resorting to the subjective notion of whether the publication was "doctrinaire." We can conceive of no value-free measurement of the extent to which material is doctrinaire, and the district court's reliance on that evaluative concept corroborates for us the impossibility of principled and objective application of the fact/opinion distinction.

Appellees suggest that the Treasury regulation at issue here embodies a related distinction-between appeals to the emotions and appeals to the mind. n16 Material is educational, they argue, if it appeals to the mind, that is, if it reasons to a conclusion from stated facts. Again, the required linedrawing is difficult, a problem which is compounded if the difference between the two relies on the aforementioned fact/opinion distinction.

n16. The court below also seemed to endorse this distinction: it read the Treasury regulation as requiring that a publication be "sufficiently dispassionate as to provide its readers with the factual basis from which they may draw independent conclusions." *494 F. Supp. at 479* (emphasis supplied). One can only speculate how a poetry publication would be classified under such a dichotomy.

Moreover, the Treasury regulation does not support such a narrow concept of "educational" and we cannot approve it. Nowhere does the regulation hint that the definition of "educational" is to turn on the fervor of the organization or the strength of its language. As the Supreme Court has recognized in another context, the emotional content of a word is an important component of its message. See

Cohen v. California, 403 U.S. 15, 26, 91 S. Ct. 1780, 1788, 29 L. Ed. 2d 284 (1971). n17

n17. Our broad reading of “educational” comports with similarly flexible interpretations of the Treasury regulation. See, e. g., *Lions Associated Drag Strip v. United States*, 64-1 U.S. Tax Cas. P 9283 (S.D.Cal.1964) (automobile drag strip); *Mobile Arts & Sports Ass’n v. United States*, 148 F. Supp. 311 (S.D.Ala.1957) (football halftime shows); Rev.Rul. 67-216, 1967-2 C.B. 180 (county fair); Rev.Rul. 65-271, 1965-2 C.B. 161 (jazz festivals); Rev.Rul. 64-275, 1964-2 C.B. 142 (sailboat racing instructions).

An example raised by appellees in their brief and discussed at oral argument is illustrative. The American Cancer Society’s cause may be better served by a bumper sticker picturing a skull and crossbones and saying “Smoking rots your lungs” than by one that merely states “Smoking is hazardous to your health.” Both are intended to impart the same message, and they are identical in degree of specificity of the underlying facts. Although the first may be said to appeal more to the emotions, and the second to the mind, that distinction should not obscure the similarities between the two. They should be considered equal in educational content.

Even if one could in fact differentiate fact from unsupported opinion, or emotional appeals from appeals to the mind, these proposed distinctions would be inadequate definitions of “educational” because material often combines elements of each. In such cases, appellees suggested at oral argument, a quantitative test would be appropriate. But the Treasury regulation makes no mention of such a test. Even if a quantitative approach were authorized, it is unclear how much of a publication’s content would have to be factual, or appeal to the mind, in order to satisfy the “full and fair exposition” standard. Also unanswered is who would apply the test and determine the requisite amount of factual material. Certainly, the Treasury regulation itself gives no clue. n18

n18. In addition to advancing the two distinctions discussed above to elucidate the Treasury’s definition of “educational,” appellees also rely on the notion of onesidedness. They point to BMR’s editorial policy of “not print(ing) any material which, by our judgment, does not affirm our struggle.” Big Mama Rag, Sept., 1976, at 4, col. 2, reprinted in App. 667. We agree with the court below that the Treasury regulation may not be read to compel an educational organization to “present views inimical to its philosophy.” 494 F. Supp. at 479.

Thus, neither of the distinctions proposed here remedies the imprecise language of the “full and fair exposition” standard or clarifies the requirements imposed by that test.

IV. CONCLUSION

The definition of “educational” contained in Treas.Reg. §1.501(c)(3)-1(d) (3) lacks sufficient specificity to pass constitutional muster. Its “full and fair exposition” standard, on the basis of which the denial of BMR, Inc.’s application for tax exemption was upheld by the court below, is vague both in describing who is subject to that test and in articulating its substantive requirements.

The history of appellant’s application for tax-exempt status attests to the vagueness of the “full and fair exposition” test and evidences the evils that the vagueness doctrine is designed to avoid. The district court’s decision was based on the value-laden conclusion that BMR was too doctrinaire. Similarly, IRS officials earlier advised appellant’s counsel that an exemption could be approved only if the organization “agree(d) to abstain from advocating that homosexuality is a mere preference, orientation, or propensity on par with heterosexuality and which should otherwise be regarded as normal.” App. 1030. Whether or not this view represented official IRS policy is irrelevant. It simply highlights the inherent susceptibility to discriminatory enforcement of vague statutory language.

We are sympathetic with the IRS’s attempt to safeguard the public fisc by closing revenue

loopholes. And we by no means intend to suggest that tax-exempt status must be accorded to every organization claiming an educational mantle. Applications for tax exemption must be evaluated, however, on the basis of criteria capable of neutral application. The standards may not be so imprecise that they afford latitude to individual IRS officials to pass judgment on the content and quality of an applicant's views and goals and therefore to discriminate against those engaged in protected First Amendment activities. n19

n19. Moreover, the infrequent use of the "full and fair exposition" standard to deny tax-exempt status, see text accompanying note 12 supra -as well as the IRS's approval of educational tax exemptions for a broad range of institutions, see note 17 supra -points up not only the standard's discriminatory potential but also its apparent unimportance to revenue concerns. For a critical evaluation of the fiscal considerations allegedly justifying the "full and fair exposition" test, see U.Pa. Comment, supra note 10, at 881-82.

We are not unmindful of the burden involved in reformulating the definition of "educational" to conform to First Amendment requirements. But the difficulty of the task neither lessens its importance nor warrants its avoidance. Objective standards are especially essential in cases such as this involving those espousing nonmajoritarian philosophies. In this area the First Amendment cannot countenance a subjective "I know it when I see it" standard. n20 And neither can we.

n20. See *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring).

This case is accordingly reversed and remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Terry Note: this is EXCERPTS from a Court Case where an entity lost its C3 because it's primary issue could only be resolved through legislation and its materials were too much advocacy, too little "nonpartisan analysis study and research."

Bold Emphases are mine.

FUND STUDY ECON v IRS
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Argued November 10, 1998
Decided December 8, 1998
No. 98-5105
The Fund for the Study of Economic Growth
and Tax Reform,
Appellant
v.
Internal Revenue Service,
Appellee
Appeal from the United States District Court
for the District of Columbia
(No. 97cv00747)

Wald, Circuit Judge : The Fund for the Study of Economic Growth and Tax Reform ("Fund") appeals the decision of the district court upholding the determination of the Internal Revenue Service ("IRS") that the Fund did not qualify for tax exempt status under 26 U.S.C. § 501(c)(3) ("501(c)(3)"). In order to qualify for tax exempt status under 501(c)(3), an organization must be both organized and operated exclusively for exempt purposes, charitable, educational, scientific, and so forth. An organization is not operated exclusively for exempt purposes if it is an "action" organization, defined in the regulations as an organization which "advocates, or campaigns for, the attainment" of legislation. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv)(b). The IRS determined that the Fund was an "action" organization because it advocated on behalf of the repeal of the current tax code and the implementation of legislation

embodying its proposals for a flat tax. 1
The district court agreed with the IRS that the Fund was an "action" organization and, hence, was not qualified under 501(c)(3). After careful review of the record, we find that the district court did not err in so doing and we accordingly affirm its decision upholding the IRS's denial of tax exempt status under 501(c)(3).

I. Background

On April 3, 1995, the Republican leadership in Congress, then-Senate Majority Leader, Robert Dole, and then-Speaker of the House of Representatives, Newt Gingrich, announced the formation of the National Commission on Economic Growth and Tax Reform ("Commission") which was charged with the task of designing a "flatter, fairer, and simpler" system of taxation. Joint Appendix ("J.A.") at 91. Dole and Gingrich appointed Jack Kemp as chair

of the Commission, who in turn established the Fund, a charitable trust which was intended to be the legal entity providing the financial support (through solicited donations) for the activities of the Commission.

On June 12, 1995, the Fund submitted to the IRS an application for recognition of exemption under 501(c)(3).² In its application to the IRS, the Fund stated that it had been established to “fund the study, research and analysis of ideas and proposals to reform the Nation’s tax system” and that it would “provide grants to nonpartisan individuals and entities (including educational and scientific institutes) to research and analyze data on whether and to what extent the present tax system burdens economic growth.” *Id.* at 42.

From June to September of 1996, the Commission held a series of public hearings around the country on the issue of reforming the present tax system. The Commission also requested responses of the American public through a survey in “Sound Off” in *Money Magazine* which asked people how they would reform the federal income tax system. Finally, on January 17, 1996, the Commission published a report, “Un-leashing America’s Potential: A Pro-Growth, Pro-Family Tax System for the 21st Century.” The Commission issued a press release to correspond with the release of its report, stating that the Commission “today recommended to the U.S. Congress and the President that the current Internal Revenue Code be repealed in its entirety and replaced with a new, simplified, single rate tax system with a generous personal exemption.” *Id.* at 202. The report itself also began by stating that the Commission “recommend[ed] to the Congress and to

the President of the United States that the current Internal Revenue Code be repealed in its entirety.” *Id.* at 354. The report stated that the principles and recommendations contained therein comprised a “Tax Test” and asked “that Congress not pass nor the President sign any tax legislation that fails to pass this test.” *Id.* The issuance of the report was widely covered by the press. See *id.* at 420- 42.

By letter dated August 8, 1996, the IRS communicated its initial adverse determination that the Fund did not qualify for tax-exempt status. First, the IRS determined that because the Fund’s primary activity was to provide funding for the Commission, the IRS would treat the Commission’s activities as those of the Fund.³ Next, the IRS found that the evidence indicated that the Commission was an “action” organization. The regulations applicable to 501(c)(3) provide that an organization seeking 501(c)(3) status must be organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals. *Treas. Reg. § 1.501(c)(3)-1(d)(1)(i)*. The regulations provide that an organization is not operated exclusively for exempt purposes if it is an “action” organization. *Treas. Reg. § 1.501(c)(3)-1(c)(3)(i)*. An organization is an “action” organization if it has the following two characteristics: “(a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in

nonpartisan analysis, study, or research, and making the results thereof available to the public.” Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv).

The IRS determined that the Commission met both prongs of this “action” organization test because (a) it sought to encourage the implementation of a flat tax, a goal that could only be accomplished by legislation, and (b) it advocated for this goal. J.A. at 540-43. In finding that the Commission advocated, the IRS looked primarily to the final report issued by the Commission, noting that “[b]ecause the final report is virtually the only product of the Commission, the facts and circumstances that lead us to conclude that its predominate purpose is advocacy are centered in that document.” Id. at 543. With respect to the report, the **IRS concluded that it “read[] like a brief or manifesto in support of a particular list of tax law changes”; that it was drafted “to present the most forceful arguments in favor of one point of view”; and that, “as a whole,” it was “a document rooted in advocacy....”** Id. at 542-43. The IRS’s initial determination was therefore that the Fund did not qualify for 501(c)(3) tax exemption because it constituted an “action” organization.

and analyze data on whether and to what extent the present tax system burdens economic growth.” Id. at 42.

<snip>

The Fund conceded that it met the first prong of the “action” organization test, that is, that its policies could only be achieved by way of legislation, and the court found that the Fund met the second prong as well, that is, that it advocated

for the attainment of the legislation. The court made a number of findings indicating that the Fund advocated. For example, the court found that while the Fund organized public hearings throughout the country, “the record show[ed] that these **were conducted to advance a particular political message and to [provide] support for a cornerstone of the Republican agenda in the 1996 elections.**” Id. at 622-A. The court also noted that the speakers at these hearings “clearly enunciated” the message of “mobilizing the majority in Congress (a Republican Congress) to achieve a tax reform....” Id. The court also took account of the press releases and newspaper accounts covering the activities of the Commission, noting that the “record [wa]s replete with examples that the Commission advocated a legislative agenda that favored the repeal of the current tax code, and the installation of a ‘flat tax,’ “ and that the “Commission admittedly relied on the press for marketing and advertising of its objectives and disseminating its proposed recommendation.” Id. The court also emphasized the timing of the entire endeavor, noting that the Commission lasted no more than one year, a year in which the “political environment [was] laden with tax reform issues.” Id. at 622-A-622-B. **Finally, the court noted several statements made by members of the Commission, and related parties, including a statement by Senator Dole and Speaker Gingrich, that the work of the final report “ ‘will surely serve as a catalyst for congressional hearings and debate,’ “** id. at 623, and a statement by the Vice Chairman of the Commission that the final report “ ‘will guide the debate over tax reform

throughout this campaign year.’ “ Id . at 624.

<snip>

Based on these findings, the district court concluded that the IRS did not err in finding that the Fund was “actively engaged in advocacy,” holding that “the evidence on the record supports a finding that the plaintiff is an ‘action organization’ and is therefore barred from the privilege of [501(c)(3)] tax exemption.” Id .

<snip>

A footnote: **We emphasize that our holding in this case is quite narrow. We are not holding that any organization which studies an issue touching on legislation, reaches a conclusion with respect to that issue, and then argues the merits of that conclusion must necessarily be characterized as an “action” organization. We are simply holding that an organization which assumes a conclusion with respect to a highly public and controversial legislative issue and then goes into the business of selling that conclusion may properly be designated an “action” organization.**

Terry Note: this is an example of a complaint filed against an ally for sloppy 990 reporting, being more engaged in lobbying and possibly political intervention than was reported or possibly appropriate. The most particular complaint is reported zero lobbying – an all too frequent error on our side.

Note that the complaint makes many factual / representational errors about law; do NOT take what it says as accurate. However, it is a good example of perils of incomplete 990's, claiming that the blank lobbying section was an effort to cover-up when it was most certainly more of an error or fear of reporting that I see on most policy advocacy 990's I see. A lot of the complaint is crap, but it gives a sense of what can happen.

Center for the Defense of Free Enterprise

February 8, 2002

Hand Delivery
Commissioner Charles O. Rossotti
Commissioner of Internal Revenue Service (N:C)
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Environmental Working Group, Inc.

Dear Commissioner Rossotti:

We write to alert the Internal Revenue Service to serious violations of the tax laws governing nonprofit organizations. Public information shows that The Environmental Working Group (EWG), a 501(c)(3) organization, has violated its tax status by unlawfully engaging in excessive lobbying and politicking. The evidence leads us to believe the violations are flagrant and we submit specific documentation for your scrutiny. We believe that EWG's tax exemption should be revoked immediately because the organization:

- Functioned as an illegal political action organization, including pressuring Vice President Gore during his run for President;
- Operates as a lobbying organization, including receiving a \$1.6 million grant to lobby the 2002 Farm Bill;
- Lobbied the California legislature for a year without registering as lobbyists
- Submitted false or misleading reports to the IRS about its lobbying expenditures;
- Hid its lobbying political expenditures while operating as a project of the Tides Foundation.

Such actions by a "public charity" are clearly illegal and should (at a minimum) result in revocation of the organization's tax-exempt status.

EWG Description

The earliest EWG grant records in the Foundation Center database show donations from six foundations to the Environmental Working Group in 1989, when EWG was located in the offices of The Island Press in Washington, D.C. Two of these 1989 grants show that EWG was one of the roughly 250 “projects” which are operated under the tax-exempt status of The Tides Foundation, which is based in San Francisco. Subsequently, EWG was shifted to the newly-created Tides Center, Inc. (the “Tides Center”), which was established as “the management side” of The Tides Foundation. EWG first appears in the Tides Foundation Form 990 for the fiscal year ending April 30, 1995, with the listing of Kenneth A. Cook, the EWG president, as one of Tides Foundation’s five highest paid employees and the listing of \$46,909 in Tides grants to EWG. The non-private foundation status of Tides Foundation was challenged *[Terry: this is crap, they are confusing the advance ruling period – hard to believe they’d write this without a lawyer reviewing the draft!]* by the IRS between 1977, the filing year, and 1982, when the IRS ruled that Tides Foundation was not a private foundation. Neither the details of EWG’s relationship to Tides Foundation nor EWG’s lobbying and political activities are reported in Tides Foundation’s IRS filings for any year. In effect, EWG was a secret organization hiding under the Tides umbrella.

The organization emerged from the Tides umbrella and formally incorporated as a District of Columbia corporation in February of 1999. Despite the fact that the organization has been operating in San Francisco since at least 1993, the EWG did not register with the State of California as a foreign corporation until March of 2001.

Overview of EWG IRS Returns

EWG describes itself as “a not-for-profit environmental research organization dedicated to improving public health and protecting the environment by reducing pollution in air, water and food.” There are currently two IRS Form 990 returns publicly available for the EWG: one for the two month short period ending December 31, 1999 (a copy of which is appended hereto as Attachment One) and one for the 2000 tax year (a copy of which is appended hereto as Attachment Two).

The 1999 return states that the total revenue for that two month short period equaled \$806,941 (line 12). Almost ninety-eight percent of that money is accounted for by \$788,667 in “direct public support” (line 1a). EWG’s return also states that the organization spent about twenty-eight percent of all the money raised (\$222,590 / line 17) with absolutely none of the funds being used for the purpose of attempting to influence legislation and public opinion. *[Terry: Shows that opponents will attack under-reported lobbying.]*

EWG’s 2000 return states that the total revenue for the calendar year equaled \$1,476,213 (line 12). Almost 96.7% of that money is accounted for by \$1,427,028 in “direct public support” (line 1a). EWG’s return also states that it spent about 103.5% of all the money raised (\$1,476,521 / line 17) with none of the funds being used for the purpose of attempting to influence legislation and public opinion.

Other documents described below show these reports to be false or misleading.

EWG Pattern of Lobbying and Political Activities

For the general public to accept the EWG's assertion that no funds were expended on lobbying activities during the short period in 1999 and the entire 2000 calendar year would be for the public to completely disregard EWG's very open lobbying efforts before, during and after 1999 and 2000. When combined with evidence of an overt pattern of intervention in political campaigns, the EWG's publicly documented lobbying activities in excess of the Part VI-A Section (h) allowance appear clearly in violation of 501(c)(3) standards.

Lobbying Activities Chronicled in the News through 1999.

EWG has served a lobbying function throughout most, if not all, of its existence. The Tides Center's annual federal returns for the 1997 and 1998 tax years listed payments to "Environmental Group" (which we believe to have been the EWG) as "lobbying grants." As recently as June of 1998, EWG and the Tides Center were listed by the State of California as being one of the state's top 100 largest lobbyist employers.

The EWG has repeatedly and continuously exploited the internet in order to advance its causes. In fact, their websites serve as their primary method for distributing materials and information regarding their legislative advocacy, member targeting, and vote reporting. For instance, the Environmental Working Group's 'Chicken Little' site (www.chickenlittle.org) corresponds to the organization's report released in November of 1997 railing against the U.S. automakers for lobbying against environmental regulations, and more specifically against a global warming treaty. On this website, "surfers can read the eye-popping comments of polluters who fought against the most basic environmental regulations." The report recommends that Congress and the Clinton Administration rewrite the nation's transportation law, speed the introduction of alternative fuel sources, and make cars more efficient by raising fuel economy standards.

The EWG has actively lobbied the California legislature with the well-timed release of several reports. In April of 1998, for example, a bill (AB 2617) was introduced in conjunction with an EWG report entitled "Methyl Bromide Use Near California Schools 1995." The proposed bill would have created a 1,000-foot buffer zone for agricultural methyl bromide applications near schools, day care facilities and home and require notification of people living and working within a mile of the field.

The EWG lobbying activities clearly carried over into the 1999 tax year with the many reports and news releases issued by EWG. For example, in January of 1999 the EWG and Californians for Pesticide Reform released a report entitled "What You Don't Know Could Hurt You: Pesticides in California's Air" which stated that toxic pesticides were found in a significant majority of air samples. The report summarized two years of tests--tests which they received assistance in conducting after calling on local communities to participate. In the report's executive summary, the EWG stated: "DPR's [the California Department of Pesticide Regulation] head-in-the-sand attitude, symptomatic of the agency's longstanding accommodation of agricultural interests at the expense of public health, has allowed pesticide air pollution to effectively escape monitoring and needed controls. . ." The report goes on to offer a list of action items for the State of California, including the transfer of authority for the regulation of pesticides in air from DPR to the California Air Resources Board and increased reporting requirements. At the time the

report was released, two bills regarding the regulation and possible ban of methyl bromide were expected to be presented to the state legislature.

In May of 1999, the EWG report entitled “Reading, Writing and Risk: Air Pollution Inside California’s Portable Classrooms,” coincided with the announcement of a bill by California Assemblyman Kevin Shelley that would have required the state to set standards for air quality in portable classrooms.

In July of 1999, Senators introduced a bill requiring the EPA to slow its review of thousands of farm pesticides for their impact on children’s health. In a clear attempt to mold public opinion regarding the proposed legislation, the EWG’s president responded by stating, “This is nothing other than a pesticide industry lobbyists’ bill from pesticide companies who are more interested in profits than protecting children’s health.” The EWG had hammered at the pesticide industry’s influence earlier in the month with the release of the EWG’s report entitled “Bureaucrats to FatCats.” This report accused the pesticide program for the Environmental Protection Agency of serving as a “farm team” for the pesticide lobby.

Illegal Political Activities Chronicled in the News through 1999.

The EWG also made attempts to influence the 2000 presidential election. For example, in September of 1999, the EWG responded to the introduction of George W. Bush’s environmental advisors by releasing “George W. Bush’s Anti-Environmental Advisors: Beyond the Official Bios.” The report stated:

“What most voters do not know is that the assembled group of policy advisors typically work for corporate front groups working for goals far outside the mainstream environmental perspective. . . These corporate front groups support everything from ‘takings’ legislation that would pay companies not to break environmental and public health laws and dismantling the Endangered Species Act, to denying the existence of global warming and the seriousness of air pollution. . . A few individuals even have ties to the so-called ‘wise use’ movement, an extreme movement whose 25 states goals include ‘immediate wise development of the petroleum resources of the Arctic National Wildlife Refuge’ and ‘creation of National Mining System’ under which ‘all public lands including wilderness and national parks shall be open to mineral and energy production under wise use technologies.’”

This clearly partisan report made no attempt whatsoever to analyze the backgrounds of the other presidential candidates’ environmental advisors.

EWG Legislative Lobbying During 2000.

The pesticide debate also spilled over into the 2000 tax year. The EWG asked Rep. Richard Pombo (R-Calif.) to reveal all the details surrounding the drafting of HR 1592, the Regulatory Fairness and Openness Act of 1999, a bill that it argued would “severely undercut” the 1996 Food Quality Protection Act. The act proposed new procedures for the EPA to use when assessing risks and evaluating data in reassessing existing pesticide tolerances.

With regard to a bill that would make it more difficult for the EPA to ban or restrict the use of pesticides on which the House Agriculture Committee indefinitely delayed action, EWG spokesperson Richard Wiles stated that it is “an election-year nightmare for

moderate Republicans and Democrats alike. . .an ethically challenged bill [emphasis added] that poses real threats to children's health, which is a political third rail for any member of Congress."

In April of 2000, the EWG released a study which stated that 10 percent of farmers received 61 percent of the \$22.9 billion in government payments. The EWG used this study to make a case for distributing farm subsidies based on financial need, rather than on the amount of production. Arguing that the 1996 law was heavily biased in favor of large, corporate farms and agribusiness partnerships, the study recommended that Congress force farmers to document financial need and to limit payments.

In September of 2000, as state environmental regulators lobbied for greater control over regulation, EWG analyst John Coequyt said, "Our fear is that states are taking a much more active and political role in running programs. . .With that comes a higher degree of political accountability. The result can be that states become much less interested in fining corporations."

EWG's Illegal Political Activities Chronicled During 2000.

Throughout the 2000 tax year the EWG continued to pursue its political agenda through any means available.

In the spring of 2000, the EWG was among a handful of environmental groups which spent \$60,000 on ads, including print ads in The New York Times and in USA Today's European edition, criticizing Vice President Al Gore over negotiations on a global treaty to ban harmful chemicals linked to cancer, birth defects and other genetic abnormalities. The goal of these ads was to get the administration's attention and spark action by the vice president. EWG president Ken Cook stated, "Everyone's expecting some action from the vice president."

Also in the spring of 2000, the EWG planned a boycott of Sam Wyly's company Greenmountain.com in response to Wyly's public criticism of Vice President Gore and his advertising blitz that benefited Gov. Bush just before the March primaries. Wyly and his brother formed an organization and paid about \$2.5 million to create and air the spots. The EWG called off the boycott after Wyly announced that he would stay off the air in the general election contest.

The EWG also weighed in on state elections during the 2000 campaign season. Commenting on Rep. David McIntosh (R-IN), who at the time was running as a gubernatorial candidate in Indiana, EWG spokesperson Mike Casey characterized him as "a one-man environmental wrecking ball" and stated that "[h]e is widely viewed here as the polluting industry lobbyist's best friend, the man to go to if you are a polluting industry lobbyist who wants a favor done. . .[and] has worked hard to establish that role for himself. The man is consistent."

In April of 2000, Michigan's top environmental official announced plans to organize a summit between several state environmental officials and top industry executives to discuss environmental issues under a possible Bush presidency. The EWG president criticized the planned meeting calling it "a secret meeting to plot dirtier air" that displayed an "openly partisan approach to environmental policy." A spokesperson for the EWG stated that Russ Harding's summit "is a dirty and suspicious little web of

backroom dealing” and that it was clearly a move to drum up support for Gov. Bush’s presidential bid.

Finally, an analysis of the inaccuracy of the EWG’s tax return for the 2000 calendar year can almost be summarized by a single report dated October 17, 2000. On that date, the EWG released a report entitled “Lone Smog State: Data from Texas, Other States Show Bush with Worst Anti-Smog Record.” The report stated that of 556 polluters in areas of Texas that do not meet basic clear air standards, 93 were violating laws established by the federal Clean Air Act.

While the EWG spokesperson denied that politics was the main reason for the release, he admitted to the St. Louis Post-Dispatch that politics was a motive. The spokesperson stated, “People need to know what a Bush EPA would look like. Texas is the smoggiest state in the country and Houston is the smoggiest city because, under Bush, Texas doesn’t enforce clean air laws against big industrial polluters.”

The report itself stated the EWG’s political agenda when it stated:

“If applied at the national scale, the Texas approach would cripple ongoing efforts to control one of the nation’s most serious pollution problems. If campaign contributions are any indication, industry interests clearly support Texas-style regulation. Our review of political contributions shows that the chemical plants, refineries and factories violating VOC standards in Texas have given heavily to Gov. Bush’s campaigns for governor and the White House.”

The report continued with a discussion of the Texas environmental laws under Governor Bush and more details on the sources of campaign contributions.

What purpose does a discussion of campaign contributions to Governor Bush serve in a supposedly non-partisan analysis of statistical data regarding smog? Even if the EWG were to assert that the report was released to educate voters under Treas. Reg. 1.501(c)(3)-1(d)(3), there was no “full and fair exposition of the pertinent facts” to permit the members of the public to form their own independent opinions. There was no discussion of Al Gore’s or Ralph Nader’s environmental records or analysis of their campaign contributions. The only non-partisan aspect of this report was the chart on the first page listing the top 17 “law breaking smog polluters in smog non-attainment zones.”

Despite the spokesperson’s disclaimer that the EWG did not endorse presidential candidates, clearly this report, released less than a month before the 2000 presidential election and on the eve of the final presidential debate, was intended to influence voters’ decisions in the election. In *Christian Echoes Nat. Ministry, Inc.*, 470 F.2d 849 (10th Cir. 1972), the court held that an organization intervened in political campaigns even though it did not formally endorse specific candidates. The organization in that instance used its publications and broadcasts to attack candidates and incumbents who it considered too liberal.

The EWG was even among the group of environmentalists, organized labor and other special interest groups that urged Ralph Nader to withdraw from the 2000 presidential elections because he was hurting Vice President Gore’s chances. In a letter to Nader, the EWG president argued that a Bush administration would bring “excruciating consequences” for the public interest community. His appeal to Nader went on to state,

“Virtually everything the environmental community has achieved over the past thirty years could be at stake.”

After the 2000 presidential election, the EWG representatives were more than ready to publicly state their disappointment with the outcome and assign blame. Regarding Ralph Nader, EWG president Ken Cook declared, “The public-interest community is going to spend tens of millions of dollars a year for the next four years playing defense. . .I don’t think [Nader’s] going to build a Green Party any more than O.J.’s out there looking for a murderer.” In a separate statement, Mike Casey, spokesman for the EWG, stated “I think he’s [Nader] building an ego, not a movement. . .we will absolutely blame Ralph Nader directly --and his politically stupid choice of continuing his campaign.” Casey also stated, “Because he put his ego before his commitment, he wakes up today with 3 percent, no federal money, he stands virtually alone in the environmental community and he’s put Bush and his goon squad [emphasis added] in the White House.” In another statement, Casey remarked, “Let the voters who said there’s no difference between Bush and Gore wait until Big Oil’s candidate gets in the White House. . .Bush is going to take those Greens to school and we’re all going to pay the tuition.”

EWG’s 2001 Political and Lobbying Actions.

The EWG continued its aggressive lobbying tactics in the 2001 tax year and for the first time in regulatory filings admitted that its activities were lobbying activities. In August of 2001, EWG finally acknowledged the nature of its activities when it submitted a Lobbying Registration and Lobbying Report Form to the Clerk of the House of Representatives. The transmittal letter states that the organization did not register sooner because “it did not expect to meet the Lobbying Disclosure Act’s \$22,500 lobbying expenditure threshold.” (See Attachment Three). The document also discloses that EWG has or will make an election for the first time under I.R.C. Section 501(h) regarding the treatment of its lobbying expenditures. It is ironic that the EWG did not anticipate meeting the legislative threshold despite the fact that during 2000 The Joyce Foundation awarded the EWG a \$1,620,000 grant (over 3 years) to “support a concentrated program of agriculture policy reform” according to its website. However, the Joyce Foundation’s Form 990 listed the purpose of this grant more specifically as: “For work on 2002 Farm Bill.”

Of the various links featured on EWG’s website, one of special importance is titled “Farm Subsidy Database.” Selecting this link connects the viewer to a map of the U.S. entitled, “Who Wins and Who Loses in Federal Farm Policy.” If the viewer clicks on a state, the page will display information on how, under current laws, the U.S. government has misspent federal funds on agricultural subsidies. This website also features commentary as to why “current federal programs probably didn’t serve you or your local economy well.” The EWG explains its reasons for posting this information as follows:

Farm assistance is vital for agriculture and rural America. We need robust programs to support farmers’ incomes while helping them protect natural resources and the environment. EWG staff have worked for many years on policies that have brought billions of dollars in support to the farm sector through the Conservation Reserve Program, Wetlands Reserve and other important conservation programs.

We think even more support is warranted.

But we also think current policy has badly failed almost everyone in agriculture but the very largest producers of a few favored crops. Most farmers and ranchers -- indeed, entire regions of the country -- receive little or no assistance. Tens of thousands of farmers who have applied for USDA conservation programs, for instance, have been turned away because those programs are chronically under-funded. In almost every state, there are multi-million dollar backlogs of applications of farmers and ranchers waiting to get into the program.

Before Congress enacts another Farm Bill that will set agriculture policy for the next 5-10 years, at a cost of \$170 billion, the entire country should have better information about how taxpayers have already invested \$90 billion since 'Freedom to Farm' became law. . ." [emphasis added].

The EWG also continues to use its website to influence legislation by attacking specific members of Congress. "Dirty Money," a feature of EWG's website, provides the public information on how "money from anti-environmental corporations and coalitions affects environmental decision makers." To substantiate its claim that "polluters have far more access to political decision makers--and far more influence over environmental decisions--than ordinary citizens do. . ." the EWG provides a spreadsheet presentation featuring "dirty money" given to a representative. The EWG's insinuations about these representatives are unmistakable: if an elected official is included on their list of "dirty money" recipients, then his or her voting integrity has been compromised and they will vote in favor of their polluting donors to the public's detriment. The intent is clearly to influence the official's vote on specific legislation.

During 2001, the EWG has shown a particular affinity for personally attacking House Agriculture Committee Chairman Larry Combest in an effort to get his cooperation. In a May 14, 2001, letter to Chairman Combest, EWG explained their "Farm Subsidy Scorecard" series in which the EWG tracked subsidy payments from 1985 through 2000. In what can only be described as an attempt to influence legislation by embarrassing Chairman Combest, the EWG stated:

"Given your critical role in writing the next farm bill, the first scorecard will be about your district, which EWG will publish and post on our web site this week at www.ewg.org. EWG's analysis raises important questions about the extent to which farm payments are adequately aiding the family farmers in your district. One issue is the severe concentration of payments among relatively few, large farm operations."

In an October 3, 2001, press release entitled "Combest Stoops to New Low" the EWG attacked Chairman Combest for allegedly threatening the funding for food stamps and other nutrition programs if House members voted to cut farm subsidies to provide conservation payments to family farms. The press release quotes stating, "Chairman Combest is clearly saying that paying off the big agribusiness in his district is more important than nutrition for poor kids. . . Farm Bill politics used to just be tough, but now Mr. Combest has made them ugly."

During 2001, the EWG continued pursuit of members of Congress by assembling "subsidy records into a searchable database as part of its campaign to shift the emphasis in farm programs from crop payments to conservation." What better way to encourage

voters not to vote for a particular politician or to embarrass the politician into changing a stance than by assembling such a database.

With regard to agricultural debates in the Congress, Ken Cook explained that the farm bill is a top priority for national environmental groups and that “[t]he goal is to get as many people aware of the opportunity to do something in this farm bill, who don’t normally think of the farm bill as anything but a remote Byzantine unimportant process.” He also stated, “The goal is to get enough people to get the attention of the House Agriculture Committee that there might be a move if there isn’t a solid conservation plank in the bill that’s reported out of committee.”

Conclusion

The EWG flagrantly intervened in several state and national level political campaigns despite clear federal statutes and regulations specifically prohibiting such activities. Moreover, the EWG, an organization that has admitted the lobbying nature of its activities both before and after the relevant tax periods, claims not to have expended any funds for lobbying during 1999 and 2000 even though the organization continued to operate and continued to produce reports, letters and statements on pending legislative issues and against specific politicians, most of which are posted on the EWG’s own website. Had they claimed to have spent any money at all on legislative lobbying activities, their actions would not be so reprehensible. Instead, they chose to claim no lobbying expenditures at all.

The actions of the Environmental Working Group documented here clearly violate the laws governing tax-exempt organizations and require revocation of the organization’s tax-exempt status.

Thank you for your prompt attention to this matter.

Sincerely,
Ron Arnold
Executive Vice President
Center for the Defense of Free Enterprise

Footnotes

See, The Foundation Center, Foundation Grants database, 1989 grant records to EWG from: The William and Flora Hewlett Foundation (\$150,000); The Educational Foundation of America (\$40,000); The Ford Foundation (\$200,000, 2-year grant); The Andrew W. Mellon Foundation (\$250,000); The Charles Engelhard Foundation (\$15,000); The Florence and John Schumann Foundation (Bill Moyers, President) (\$225,000, 3-year grant).

The 1989 grant records for The Andrew W. Mellon Foundation and The Charles Engelhard Foundation show the recipient as “Tides Foundation. Environmental Working Group, DC.”

The Tides Foundation, a public charity, allows people and institutions that, for one reason or another, do not want to be publicly identified with a certain cause to give money to Tides as donor-advised funds. The legally separate Tides Center manages most Tides Foundation “projects.”

1994 Form 990, attached schedule for Part III(A) and Schedule A, Part I.

IRS letter to Tides Foundation dated 16 June 1982.

See, EWG website at <http://www.ewg.org/about.html>.

1999 Form 990, Schedule A, Part VI-A.

2000 Form 990, Schedule A, Part VI-A.

Form 990, Schedule A, Part VII for 1997 and 1998.

See, http://www.ss.ca.gov/prd/lobbyingreport09_6qtr/emp-misc-g-z.html,

The IRS is currently reviewing the issue of internet use by tax-exempt organizations in connection with political and lobbying activities to determine whether specific guidelines should be issued. See, IRS Announcement 2000-84: Request for Comments Regarding the Need for Guidance Clarifying Application of the Internal Revenue Code to Use of the Internet by Exempt Organizations.

See, "Blind Spot" at <http://www.ewg.org/pub/home/reports/blindspot/blindhomes.html>.

"Evolving Activism," E Magazine, Jan. 1, 2000, p. 8.

See, http://www.ewg.org/reports/camb95/mb_press.html.

"California bill would require 1,000-foot buffer zone for methyl bromide," Pesticide & Toxic Chemical News, May 7, 1998, No. 28, Vol. 26.

See EWG report, "What You Don't Know Could Hurt You: Pesticides in California's Air," January 1999, p. 3 at <http://www.ewg.org/reports/cadrift/pr.html>.

Supra, p.5.

Sharon Bernstein, "Use of Powerful Insecticide Fills Air with Controversy," March 23, 1997, Los Angeles Times, Part A, Page 1.

See, <http://www.ewg.org/reports/readingwritingrisk/pressrelease.html>.

Glen Martin, "Study Finds Toxic Air In Portable Classrooms," The San Francisco Chronicle, May 27, 1999, Pg. A19.

Bruce Alpert, "New Criteria Sought On Pesticide Safety; EPA Restrictions Prompt Legislation," The Times-Picayune, July 31, 1999, National Section.

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See EWG report, "George W. Bush's Anti-Environmental Advisors: Beyond the Official Bios" released in September 1999 (citing The Wise Use Agenda, edited by Alan Gottlieb, 1989.)

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Philip Brasher, "Weekly Farm: \$15 billion not enough for farmers," The Associated Press, State & Local Wire, Sept. 8, 2000.

See EWG report "Green Acres: How Taxpayers are Subsidizing the Demise of the Family Farm" released in April 2000. Found at <http://www.ewg.org/archives/reports-by-year.php?year=2000>.

Rob Hotakainen, "Áid Helped Big Farms the Most. . ." Star Tribune, New Section, p. 1A, Apr. 26, 2000.

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Laura Meckler, "Environmental Groups Airing Anti-Gore Ad," The Associated Press, Political News, Mar. 21, 2000.

Jeff Leeds, "Bush Backer Says He's Through With Ads," Los Angeles Times, National Desk, Apr. 5, 2000.

"McIntosh Denies Newspaper Reports Calling Him No Friend of Environment," The Associated Press, Political News Section, State & Local Wire Apr. 18, 2000.

John Mintz, "Bush Backers To Talk About Clean Air Rules; State Officials, Companies See Hope For Relaxation," The Washington Post, Campaign 2000, Apr. 20, 2000.

Bill Lambrecht, "Texas Leads Nation in Polluting Plants, Report Says; Illinois Is Second; Bush Campaign Questions Group's Findings," St. Louis Post-Dispatch, News Section, Oct. 17, 2000.

See, EWG report "Fuzzy Air: Why Texas is the Smoggiest State," released Oct. 17, 2000, p.2.

Eun-Kyung Kim, "Former Nader Allies Urge Him To Yield Field To Gore," The Associated Press State & Local Wire, Political News, Nov. 2, 2000.

"Nader: Is There Life After Crucifixion?" The Nation, Dec. 4, 2000, p. 17.

"Labor and Democrats Vilify Nader, The Bulletin's Frontrunner, Nov. 9, 2000.

Eun-Kyung Kim, "Nader, Buchanan See Growing Role For Third-Party Politics," The Associated Press, Political News, Nov. 8, 2000.

Richard Willing, "Democrats Blast Nader's Campaign; Green Party Candidate Shrugs Off Criticism," USA Today, Nov. 9, 2000.

See, The Joyce Foundation Annual Report 2000 at <http://www.joycefdn.org/home.htm>.

See, The Joyce Foundation 2000 Form 990, Grant Activity Report, p. 24, grant to EWG.

See e.g., Link for the State of Florida at <http://www.ewg.org/farm/state.php?fips=12>.

See, <http://www.ewg.org/farm/data/why.html>.

See, EWG website at <http://www.ewg.org/dirtymoney>.

Letter of Kenneth A. Cook and Anne C. Keys, Environmental Working Group, to House Agricultural Committee Chairman, Larry Combest, May 14, 2001, found in the news archive on EWG website <http://www.ewg.org>.

See, EWG website, press release of October 3, 2001.

"Farm Aid Benefits Lawmakers. . .," The Washington Post, Sept. 1, 2001, A01.

"Outside Enviro Groups Lobby for Conservation," The Hill, Sept. 12, 2001, p. 27.



Eye On Non-Profits

Are you pro-nuclear disarmament, anti-immigration, anti-globalization, and pro-term limits?

Your conscience may not be, but your money is. Ideological groups on the left and right collect billions of dollars in tax-deductible contributions every year to wage their crusades—which means you and every other taxpayer is subsidizing their efforts.

How could this be? Doesn't the same First Amendment that allows these groups to exist also protect you from being forced to support them? It does. By funding their causes with tax-deductible money these crusaders are breaking the law. The problem for taxpayers is that despite the rampant abuse taking place, nothing is being done to stop it.

The Nonprofit Corporate Crime Scandal:

How ideological groups break the law by helping themselves to your tax dollars.

Perhaps one of the most frequently violated provisions of the federal tax code is IRC 501(c)3. This is the law that grants special tax-exempt status to nonprofit organizations that are operated for charitable and certain other public benefit purposes, such as education. In addition to exempting an organization from income tax, 501(c)3 status entitles a group to solicit tax-deductible contributions (and thereby tap into a form of taxpayer funding).

How is the law being abused? It's being routinely violated by ideological and social action groups that improperly obtain 501(c)3 exempt status by describing their purposes to the IRS as "educational." While the IRS has so far done virtually nothing to stop this form of abuse, federal tax laws and the IRS' own regulations make it very clear that propaganda campaigns or efforts to force social action do not qualify as education. Those who wish to undertake such crusades have every constitutional right to do so, but when they use tax-deductible contributions to fund such activity they break the law and violate the free speech rights of taxpayers who don't support their causes.

Under the tax laws, social action groups may be established as tax-exempt nonprofit organizations, but not as 501(c)3 organizations. Instead, such groups are exempt under IRC 501(c)4, which provides exemption from income taxation but does not confer eligibility to collect tax-deductible contributions.

The law on tax-exempt "educational" organizations:

- Under federal tax law [IRC 501\(c\)3](#), organizations that are "organized and operated exclusively for religious, charitable...or educational purposes" are exempt from taxation. Exemption under this section gives these groups the right to solicit tax-deductible contributions.
- "Educational purposes" are defined in the regulations implementing the statute. [Reg. 1.501\(c\)\(3\)-1\(d\)\(3\)](#) defines education as follows: "The instruction or training of the individual for the purpose of improving or developing his capabilities; or the instruction of the public on subjects useful to the individual and beneficial to the community."

With regard to education as it relates to social issues, the regulations further provide that "An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion."

- In determining whether an organization that advocates a particular point of view is educational or not, IRS examiners are supposed to follow Revenue Procedure 86-43, 1986-2 C.B. 729. These

guidelines further clarify the [distinction between education and propaganda](#). They provide that the presence of any of the following factors in presentations made by an organization is indicative that the organization is not educational:

1. The presentation of viewpoints unsupported by facts is a significant portion of the organization's communications.
 2. The facts that purport to support the viewpoints are distorted.
 3. The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.
 4. The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.
- For a detailed discussion of the law on what constitutes impermissible propaganda by a 501(c)3 organization, see the IRS's discussion brief [Education, Propaganda, and the Methodology Test](#).
 - An organization whose methods are educational does not qualify as an educational organization if its principal objectives are legislative and it advocates in any way for them. Even if the group does not engage in direct or grassroots lobbying of legislators, it still violates the law if it publicly advocates its position and that position can only be attained through legislation.

[Reg.1.501\(c\)\(3\)-1\(c\)\(3\)\(iv\)](#) provides that an organization is not an educational organization, but rather an "action" organization (which cannot qualify for exemption as a 501(c)3 organization) " if it has the following two characteristics: (a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public."

[How to Contribute](#)