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Mary L. Heen
University of Richmond, mheen@richmond.edu

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The IRS and Your Politically Controversial Speakers

By Mary L. Heen
Don’t be so cautious about who you invite to campus for fear of endangering your nonprofit status. You needn’t shy away from politically controversial speakers.

During the 2008 election cycle, we can expect an upsurge of incidents in which college and university administrators rescind legitimate invitations to politically controversial speakers. As Academic Freedom and Outside Speakers, a statement issued by the AAUP’s Committee A on Academic Freedom and Tenure, affirms, “Because academic freedom requires the liberty to learn as well as to teach, colleges and universities should respect the prerogatives of campus organizations to select outside speakers they wish to hear.” (The statement begins on page 62.)

In the past, administrators have sometimes cited the lack of balance represented by the invitation of a college or university group or the danger that a group’s invitation might violate section 501(c)(3) of the Internal Revenue Code as reasons for canceling or modifying otherwise legitimate invitations. In Academic Freedom and Outside Speakers, Committee A expresses a concern that overly restrictive interpretations of section 501(c)(3) have become an excuse for preventing campus groups from inviting controversial speakers. Developments during the past two years reinforce that concern for the upcoming election season.

Increased enforcement efforts initiated by the federal government combined with the lack of clear rules in this area may lead college and university administrators to apply overly restrictive interpretations of the tax rules. Special danger is posed when administrators face strong objections by powerful constituencies offended by the views of an outside speaker.

Without a firm commitment to the academic freedom principles at stake, administrators may respond to public pressures or government compliance initiatives in ways that undermine the fundamental educational values of an open campus. Academic Freedom and Outside Speakers suggests several broad principles to
guide college and university communities in applying the tax rules to institutions of higher education.

**Academic Freedom at Stake**
Section 501(c)(3) provides that an organization may qualify for tax exemption only if it "does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Under the regulations, activities constituting participation or intervention in a political campaign "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."

Unlike lobbying, in which charities may engage as long as the lobbying activities are not substantial, the prohibition against intervention or participation in a political campaign (the "political prohibition") is absolute. The consequences to an organization for violating the prohibition range from retroactive revocation of tax-exempt status to an excise tax on amounts spent on the prohibited intervention. In 1995, for the first time in its history, the Internal Revenue Service (IRS) revoked the tax-exempt status of a bona fide church because of its involvement in politics. Branch Ministries, which operated a Christian church located in Binghamton, New York, purchased two newspaper ads four days before the 1992 presidential election. The ads contained an open letter signed by the church and its pastor, titled "Christians Beware," which urged Christians not to vote for then-candidate Bill Clinton because of his position on moral issues. Fine print at the bottom of the ad invited "tax-deductible charitable contributions for this advertisement" along with the request that donations be made to the church. Alerted to the ads by newspaper reports and opinion columns, the IRS initiated an investigation and found an egregious violation of the political prohibition. In 2000, the United States Court of Appeals for the D.C. Circuit upheld the revocation by the IRS of Branch Ministries' tax exemption under section 501(c)(3) retroactive to 1992, and rejected the argument of the church and its pastor that the revocation unconstitutionally violated their rights to free speech and to free exercise of their religion guaranteed by the First Amendment. The extreme range in severity of possible sanctions for prohibited activity, from loss of the organization's charitable status to a minimal amount of tax due, poses both compliance and enforcement dilemmas.

In the college and university setting, three key principles of academic freedom should guide administrators in complying with the applicable federal tax rules without undermining fundamental educational values. First, the political prohibition of section 501(c)(3) should be interpreted in light of the educational mission of the college or university. Because the mission of colleges and universities includes creating and transmitting new knowledge, the university community's right to hear ideas and to test them under standards of the academic profession goes to the heart of academic freedom. As part of their educational missions, many colleges and universities also seek to foster the development of mature independence of mind in their students by authorizing them to organize to invite outside speakers as a means of pursuing extracurricular interests. In so doing, institutions recognize and sustain an important element of academic freedom as a necessary condition for achievement of their educational objectives.

The IRS has recognized that activities that might otherwise constitute prohibited political activities can be understood, in the context of a college or university, as furthering the institution's educational mission. For example, a course in political campaign methods that requires students to participate in political campaigns of candidates of their choice does not constitute participation in a political campaign by the university, according to a 1972 revenue ruling. Another ruling issued in 1972 established that providing office space, financial support, and a faculty adviser for a campus newspaper that publishes students' editorial opinions on political matters does not constitute an attempt by the university to participate in political campaigns on behalf of candidates for public...
office. These types of activities instead have been viewed by the IRS as serving the university’s tax-exempt educational purposes.

Second, consistent with the educational mission of colleges and universities, invitations by authorized faculty or student groups should be evaluated in light of the full range of the institution’s curricular and extracurricular programming rather than on an invitation-by-invitation basis. As Committee A’s statement points out, it would be a fundamental error to subject invitations to outside speakers within the context of teaching or research to a test of “balance” that does not reflect professional standards and expertise. However, most invitations do not involve pedagogical or scholarly judgment. Instead, they reflect the interests of campus groups that are authorized by colleges and universities to learn by pursuing their own extracurricular activities. It would be misguided in light of the educational role played by student organizations to require college Republicans or Democrats to “balance” their speaker invitations or programs with invitations to those representing opposing viewpoints. Instead, the spectrum of extracurricular activities sponsored by the college or university should be evaluated on the basis of its educational justifiability rather than on a standard of balance that does not reflect educational objectives.

Nevertheless, some administrators have reflexively imposed on invitations to politically controversial speakers by student or faculty groups the neutrality or balance standards the IRS applies to voter education groups such as the League of Women Voters Education Fund or issue advocacy organizations such as environmental protection or consumer rights groups when they sponsor candidate forums. In that context, the IRS has considered factors such as whether questions for candidates are prepared and presented by an independent nonpartisan panel, whether the candidates are given equal opportunity to present views on a broad range of topics of interest to the general public, whether a moderator implies approval or disapproval of the candidates, and so forth. As discussed above, tax rulings issued in the context of a college or university setting appropriately permit more leeway for student organization activities or curricular programs with valid educational objectives. The legitimate invitations of student or faculty groups should not be vetoed by university administrators because these invitations are said to lack balance.

Third, as the AAUP stated in a resolution in 1966 by its Fifty-second Annual Meeting, “the right to access to speakers on campus does not in its exercise imply in advance either agreement or disagreement with what may be said, or approval or disapproval of the speakers as individuals.” Just as colleges and universities are not responsible for the many different opinions in the books and periodicals in their libraries, so invitations by authorized faculty and student groups to outside speakers do not imply either agreement or disagreement with what may be said, or approval or disapproval of speakers as individuals. Invitations to outside speakers by students or faculty reflect their academic freedom to hear, and not the official approval of a college or university. Universities and colleges may and sometimes should clearly affirm that sponsorship of a speaker or a forum does not constitute endorsement of the views expressed.

Consistent with the political prohibition of section 501(c)(3) and with the values of academic freedom, universities and colleges can specify that no member of the academic community may speak for or act on behalf of the university or college in a political campaign. The idea that a university or college “participates” or “intervenes” in a political campaign by hearing speakers who have something to communicate about issues of relevance to the campus is fundamentally misplaced. It utterly misconceives the role and responsibility of a university, which is not to endorse or oppose candidates, but to discuss issues of relevance to society.

**Election Cycle Enforcement**

Pointing to a sharp increase in prohibited political activity by tax-exempt organizations, including churches and other charitable organizations, the IRS recently launched new enforcement and education programs on this issue. Last February, the IRS issued a report, the “Political Activities Compliance Initiative,” on the results of its enforcement program during the 2004 election cycle. The agency found prohibited political activity in three-quarters of the cases it reviewed from the 2004
A few rulings have identified specific activities that are prohibited, such as candidate endorsements and monetary contributions.

Activities Compliance

very broadly as follows: “This prohibition means 501(c)(3) organizations may not endorse candidates, distribute statements for or against candidates, raise funds for or donate to candidates or become involved in any activity that would be either supportive or opposed to any candidate.” The release did not specifically define what it meant by “any activity” that would be “either supportive or opposed” to any candidate.

During the summer of 2007, the IRS issued a report, 2006 Political Activities Compliance Initiative, which compared the results of its fast-track enforcement efforts dur-
as the IRS acknowledged in its report on the 2004 election cycle, “Activities that give rise to questions of political campaign intervention also raise legitimate concerns regarding freedom of speech and religious expression.”

As the IRS acknowledged in its report on the 2004 election cycle, “activities that give rise to questions of political campaign intervention also raise legitimate concerns regarding freedom of speech and religious expression.” In one such case, reported by the New York Times on September 22, 2006, an Episcopal church in Pasadena, California, regarded "an IRS investigation of an antiwar sermon delivered by the church's former rector on the Sunday before the 2004 election as an attack on freedom of speech and religion." These issues have proved troublesome for the agency as well as for the organizations subjected to investigation. Investigations of churches and other nonprofits in response to news reports and complaints by watchdog groups have raised concerns about issues of free expression and religious freedom as well as undue political influence in the heightened governmental scrutiny of certain charitable organizations.

For example, six months after its February 2006 report, the IRS closed a controversial two-year probe of the tax status of the National Association for the Advancement of Colored People (NAACP). The investigation had been prompted by a July 2004 speech by NAACP chairman Julian Bond that was critical of President Bush. Free organizations involved potentially prohibited political activity. The audit thus provided no review of the substantive conclusions reached by the IRS in its investigations of those charitable organizations. Uncertainty about the line drawn by the government between prohibited political activity and permissible participation in public policy debate has a potentially chilling effect on legitimate, constitutionally protected speech.

Conclusion

A firm commitment to academic freedom provides university and college communities with a princi-