

Department of the Treasury  
Internal Revenue Service  
General Counsel Memorandum

## General Counsel Memorandum 39811

TR-58-84-88

Date: February 9, 1990

Br6:EAPurcell

MEMORANDUM TO:

Robert I. Brauer

Assistant Commissioner

(Employee Plans and Exempt Organizations)

ATTENTION:

Director, Exempt Organizations

Technical Division

By memorandum dated November 25, 1988, the Director, Exempt Organizations Technical Division (OP:E:EO) forwarded a proposed Technical Advice Memorandum on the above-captioned organization for our formal consideration.

### ISSUES

1. Whether the organization intervened in a political campaign on behalf of or in opposition to candidates for public service in contravention of I.R.C. [section 501\(c\)\(3\)](#) when it urged its members to seek election as Republican or Democratic precinct committeemen.
2. Whether the organization will be subject to tax under [section 527](#) if the organization's exemption is revoked prospectively under the authority of [section 7805\(b\)](#).

### CONCLUSIONS

1. We believe that the organization's activities in connection with the election of precinct committeemen constituted participation or intervention in a political campaign on behalf of candidates for public office. We therefore concur in the inclusion of this argument in your proposed Technical Advice Memorandum although you may wish to revise that Memorandum to incorporate the discussion contained herein.
2. The organization will be subject to tax under [section 527](#) only if the organization is granted prospective relief under [section 7805\(b\)](#) and only for the period covered by that relief.

### FACTS

\*\*\* (the Foundation) was incorporated in the State of \*\*\* on \*\*\*. The Foundation's articles of

incorporation authorize the organization to engage exclusively \*\*\* in \*\*\* described religious and charitable activities. On \*\*\* the Foundation was issued a determination letter recognizing its exemption from Federal income tax as an organization described in [section 501\(c\)\(3\)](#).

The Foundation is dedicated to the protection of religious liberty, the rights of unborn children, the rights of parents to raise their children without governmental interference (except in cases of actual abuse or neglect) and the rights of citizens to enact, through their elected representatives, laws which protect the moral fiber of the nation. The Foundation opposes secular humanism and \*\*\* .

In \*\*\* the Foundation alerted members to the precinct committee elections to be held in \*\*\* . According to a publication of the Foundation, precinct committeemen \*\*\* . The Foundation described all the procedures or \*\*\* register and be elected as precinct committeemen. Members were urged to circulate this information but only among other members in order to avert unnecessary opposition to members' candidacies. The Foundation suggested that successful candidates request from the organization a publication to help them to become effective precinct committeemen.

That publication, entitled \*\*\* contained \*\*\* suggestions, including the following:

\*\*\*

In addition, in \*\*\* and \*\*\* the Foundation's widely distributed voters survey presented the views of the presidential and vice presidential candidates on abortion, homosexuality, voluntary school prayer, secular humanism and ERA. The \*\*\* voters survey also reported the positions of the candidates for governor, attorney general, and the State legislature on various issues such as state income tax, parents' rights, abortion, ERA, homosexual rights, church school freedom, evolution and creationism, nuclear freeze, state lottery and legalized prostitution. The voters survey disclaimed any attempt to judge a candidate's private morality or to 'rate,' 'score,' or 'endorse' any candidate. The stated purpose was to present the candidates' positions on public morality, family issues and religious freedom. The Foundation adjured readers to recognize that, as Christians, they had an obligation, founded in the Scripture, to vote conscientiously for godly rule. The voters survey was published to equip voters \*\*\* .

In \*\*\* the organization distributed a notice entitled \*\*\* . Acknowledging that while the Foundation could not \*\*\* . Members were requested to distribute the notice to their friends and local leaders.

In \*\*\* the Foundation called attention to the primary election to be held in \*\*\* . The Foundation encouraged members to vote in the \*\*\* primary and stated that, \*\*\* . The organization offered members information on candidates running in the primary in order to help members to 'vote well.' This publication also announced that the \*\*\* voters survey would soon be available with information to enable Christians to vote intelligently.<sup>1</sup>

In \*\*\* the Foundation also claimed great success in defeating State legislation abridging 'Christian rights' and announced its legislative agenda for the coming year. The Foundation contacted legislators concerning proposed legislation and urged members to do likewise. The Foundation expended approximately 76 percent of its budget on legislative activities but made no election under [section 501\(h\)](#). In addition, the Foundation expended approximately 27 percent of its budget to retire the debts of two other organizations: \*\*\* , an organization exempt under [section 501\(c\)\(4\)](#), and \*\*\* , an organization that sought, but did not receive, recognition of exemption under [section 501\(c\)\(3\)](#).

The Exempt Organizations Technical Division proposes to revoke the Foundation's tax exemption, effective \*\*\* for the following reasons:

1. The publication and distribution of the voters surveys, widely distributed during election campaigns, evidenced a definite bias on the issues presented in contravention of Treas. Reg. [sections 1.501\(c\)\(3\)-1\(c\)\(3\)\(i\)](#) and (iii) and Rev. Ruls. [80-282](#), 1980-2 C.B. 178 and [78-248](#), 1978-1 C.B. 154. Moreover, the Foundation's activities in connection with the election of precinct committeemen constituted intervention on behalf of or in opposition to candidates for public office in contravention of Treas. Reg. [sections 1.501\(c\)\(3\)-1\(c\)\(3\)\(i\)](#) and (iii) and Rev. Rul. [67-71](#), 1967-1 C.B. 125;
2. The Foundation engaged in substantial legislative activities in violation of Treas. Reg. [sections 1.501\(c\)\(3\)-1\(c\)\(3\)\(i\)](#) and (ii); and
3. The Foundation made substantial expenditures for the benefit of private interests in violation of Treas. Reg. [section 1.501\(c\)\(3\)-1\(d\)\(1\)\(ii\)](#).

You have requested that this Office consider the viability of the Service's position with respect to the Foundation's activities in connection with the election of precinct committeemen.

## ANALYSIS

To be recognized and remain exempt under [section 501\(c\)\(3\)](#), an organization must be organized and operated exclusively for exempt purposes. This requires that the organization must not 'participate in, or intervene in ...any political campaign on behalf of (or in opposition to) any candidate for public office.' Treas. Reg. [section 1.501\(c\)\(3\)-1\(c\)\(3\)\(i\)](#) provides that an 'action' organization does not operate exclusively for exempt purposes. Treas. Reg. [section 1.501\(c\)\(3\)-1\(c\)\(3\)\(iii\)](#) provides that:

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.<sup>2</sup>

Accordingly, if the position of precinct committeeman is a 'public office' and if the Foundation intervened on behalf of candidates for that office, the Foundation could be classified as an 'action' organization on that basis.

The election laws of the State of \*\*\* define the authority and duties of precinct<sup>3</sup> committeemen of a major political party.<sup>4</sup> Any member of a major political party who is a registered voter is eligible to file a declaration of candidacy for precinct committeemen. \*\*\* A candidate for the office of precinct committeeman must declare under penalty of perjury, the following:

1. He declares himself to be a candidate for nomination to the office or precinct committeeman;
2. Precinct committeeman is a partisan office, and he requests that his name be printed upon the ballots as a candidate of his (designated) political party;
3. He is legally qualified to assume office if elected; and
4. He will support the Constitution and laws of the United States and the Constitution and laws of the State of \*\*\* . Precinct committeemen are elected in the general election for a two- year term. The general election is held in even-numbered years \*\*\* . Precinct committeemen serve without

compensation.

The precinct committeeman serves two functions. First, he certifies to the county chair of his party's county central committee those members of his political party whom he deems qualified to serve as precinct election officers in the next election. The county chair may strike the name of any person so certified if the county chair determines such person unqualified to serve as a precinct election officer.

\*\*\*

From the list of persons submitted by the chair of each party's county central committee, the county auditor selects as precinct election officers, one inspector and two judges of election for each precinct. These offices must be allocated between the two political parties that received the most votes in the preceding presidential election. \*\*\* The precinct election officers are responsible for receiving, depositing and counting the ballot and for making returns to the proper canvassing board. \*\*\* Precinct election officers are subject to criminal penalties for violation of the election laws \*\*\* . Precinct election officers are compensated.

Second, the precinct committeemen in each county constitute the county central committee. The county central committee is required by statute to hold its organizational meeting no later than the \*\*\* following the general election. The officers of the retiring committee must give timely written notice of the meeting to all newly elected precinct committeemen. At the organizational meeting, the precinct committeemen elect from their ranks, a chair and vice-chair of the county central committee a state committeeman and a state committeewoman. \*\*\*

The state committeemen and state committeewomen elected by each county central committee constitute the state committee of their political party. The state committee has the authority generally to adopt bylaws, call conventions and provide for the nomination of presidential electors. In the event of a conflict between the rules of the state committee and those of a county central committee, the state committee's rules control. The state convention's rules, in turn, supersede those of the state committee. \*\*\*

Through precinct caucuses, county, district and state conventions, the major political parties select delegates to their national presidential nominating conventions. Precinct committeemen participate in the precinct caucuses. Cf. \*\*\*

The Foundation encouraged its members to seek election to precinct committees and for members to support those candidacies. The administrative file however, identifies no Foundation members who actually ran for precinct committee office. This raises the issue of whether participation in a political campaign on behalf of any candidate for public office requires participation on behalf of a specific, identifiable candidate. It is our view that a specific, identifiable candidate is not required. Treas. Reg. [section 1.501\(c\)\(3\)-1\(c\)\(3\)\(iii\)](#) contains an absolute prohibition on all political campaign activities by charitable organizations. The Foundation participated in precinct committee elections in the hope that member-precinct committeemen would someday control the political parties. To achieve this goal, the Foundation needed only to learn which of its members had actually been elected to precinct committees. There was no need or incentive to identify the particular candidates.<sup>5</sup> In its discussion of the Tax Court opinion, the Court in *The Ass'n of the Bar of the City of New York v. Commissioner*, [858 F.2d 876](#), 879 (2d Cir. 1988), observed that the ratings of candidates were "published with the hope that they will have an impact on the voter." The effort, and not the effect, constituted intervention in a political campaign. Therefore, whether anyone heeded the call to run for precinct committeeman, whether that individual was elected, and if so, what he or she subsequently did are all immaterial. To

require the identification of particular candidates would undermine the clear prohibition against “any” participation contained in the regulations.

*Marchioro v. Chaney*, [442 U.S. 191](#) (1979), considered a challenge to a state statute establishing state committees of political parties. The Court, in discussing the purpose of state regulation of political parties, stated,

These laws are part of broader election regulations that recognize the critical role played by political parties in the process of selecting and electing candidates for state and national office. The State's interest in ensuring that this process is conducted in a fair and orderly fashion is unquestionably legitimate; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.’ *Storer v. Brown*, [415 U.S. 724](#), 730. That interest is served by a state statute requiring that a representative central committee be established, and entrusting that committee with authority to perform limited functions, such as filling vacancies on the party ticket, for the nomination of Presidential electors and delegates to national conventions. Such functions are directly related to the orderly participation of the political party in the electoral process.

442 U.S. at 195-197.

Precinct committeemen hold a position created by statute and swear an oath to uphold the State of \*\*\* and the United States Constitutions in the performance of their duties. They carry out their statutory obligations to assist in the selection of election officers, an essential function in the State's regulation of elections. Statutes mandate their participation in their party's county central committee and state committee which are essential to the electoral process. Precinct committee positions thus possess the characteristics of public office under state law: they are created by statute; are continuing; are not occasional or contractual; have a fixed term of office; and require an oath of office. See generally, 63A Am. Jur.2d Public Officers and Employees section 9 (1984).

Moreover, in *The Ass'n of the Bar of the City of New York*, the Court stated, “a campaign for public office in a public election merely and simply means running for office, or candidate for office, as the word is used in common parlance and as it is understood by the man in the street.” [858 F.2d at 880](#). This statement, concerning campaigns for judicial office, further strengthens the argument that precinct committee positions are public offices. To the average person, the appearance of precinct committee candidates on the general election ballot indicates that the position is a public office.

The remaining issue is whether the Foundation intervened “directly or indirectly” in a political campaign for public office. The Foundation's officers, directors, employees and members are united in the belief that “[G]od wants Christians to assume civil authority.” The organization pursued two complementary strategies to achieve this objective: voters surveys and election of precinct committeemen.

In the short term, the Foundation encouraged its members to “vote intelligently” for righteous or Christian candidates in the primary and general elections. The voters surveys clearly identified Christian candidates by their positions on the issues. The Foundation also strove to identify righteous candidates in order to publicize such candidates, presumably through future voters surveys or other means.

The organization also advocated that Christians dominate the political parties so that more Christian candidates would be nominated and elected to public office. The first step in the Foundation's long-

term strategy was to encourage members to be elected as precinct committeemen. These individuals could then exert influence within the party apparatus, beginning with the county central committee. Precinct committeemen could sway the precinct caucus, a step in the selection of delegates to the party's presidential nominating convention.

Organizations intervene in political campaigns in diverse ways. The traditional, direct approach is to criticize or praise candidates running in the general election. *Christian Echoes Nat'l Minister, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973). At earlier stages in the elective process, an organization may intervene in a primary election or dispatch members to influence the selection of candidates at party caucuses or conventions. *Norris v. United States*, 86 F.2d 379 (8th Cir. 1936), rev'd on other grounds, 300 U.S. 564 (1937), cited in *The Ass'n of the Bar of the City of New York*, 858 F.2d at 880; \*\*\* GCM 39,414 (Feb. 29, 1984). The Foundation sought, through its advocacy in its publications, to build a cadre of precinct committeemen in order to further its ultimate objective: the nomination and election of candidates who shared the Foundation's beliefs. Intervention at this early stage in the elective process in order to influence political parties to nominate such candidates, is, we believe, sufficient to constitute intervention in a political campaign.

There is some authority, however, that supports the Foundation's position that it did not participate in a political campaign on behalf of any candidate for public office.

Section 4946 defines "public office" for purposes of section 4941. Treas. Reg. section 53.4946-1(g)(2)(i) states,

In defining the term "public office" ...such term must be distinguished from mere public employment. Although holding a public office is one form of public employment, not every position in the employ of a State or other governmental subdivision ...constitutes "public office." Although a determination whether a public employee holds a public office depends on the facts and circumstances of the case, the essential element is whether a significant part of the activities of a public employee is the independent performance of policymaking functions....[S]everal factors may be considered as indications that a position in the executive, legislative, or judicial branch of the government of a State, ...or political subdivision or other area of ...the foregoing ...constitutes a "public office." Among such factors to be considered in addition to that set forth above, are that the office is created by the Congress, a State constitution, or the State legislature, or by a municipality or other governmental body pursuant to authority conferred by the Congress, State constitution or State legislature, and the powers conferred on the office and the duties to be discharged by such office are defined either directly or indirectly by the Congress, State constitution, or State legislative, or through legislative authority.

Under the regulation, precinct committeemen would not be considered as holding public office because their duties entail no independent policymaking functions.<sup>6</sup> However, the additional factors to be considered as indicative of a public office and which are listed in the latter part of that regulation would support the Service's position.

In addition, the Foundation can argue that it merely educated its members on civics and government in furtherance of its exempt function. Compare Rev. Rul. 76-456, 1976-2 C.B. 151 (considered by this Office in \*\*\* GCM 36,557, A-614103 (June 11, 1976)) with Rev. Rul. 67-71 and the Bar Ass'n of the City of New York. However, based on our analysis of the facts presented, we agree that the Service should assert that the Foundation participated or intervened in a political campaign on behalf of candidates for public office by urging its members to seek election as precinct committeemen in contravention of section 501(c)(3).

You have also asked us to consider the effect, for purposes of [section 527](#), if the Foundation's exemption is revoked prospectively under [section 7805\(b\)](#).

[Section 527](#) imposes a tax on the “political organization taxable income” of “political organizations.” [Section 527\(e\)\(1\)](#) defines “political organization” as an organization organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an “exempt function.” [Section 527\(e\)\(2\)](#) provides that the term “exempt function” means “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization....” To meet the organizational test, the organization’s articles of incorporation must provide that, “the primary purpose of the organization is to carry on one or more exempt functions.” Treas. Reg. [section 1.527-2\(a\)\(2\)](#). The Foundation is not a political organization because its articles of incorporation fail the organizational test of Treas. Reg. [section 1.527-2\(a\)\(2\)](#).

[Section 527](#) also imposes an income tax on exempt organizations other than political organizations. [Section 527\(f\)\(1\)](#) states that:

If an organization described in [section 501\(c\)](#) which is exempt from tax under [section 501\(a\)](#) expends any amount ...for an exempt function ...then, notwithstanding any other provision of law, there shall be included in the gross income of such organization for the taxable year, and shall be subject to tax under subsection (b) as if it constituted political organization taxable income....

[Section 527\(f\)\(2\)](#) further provides that income and deductions taken into account for purposes of [section 511](#) are excluded from the [section 527](#) tax computation.<sup>7</sup>

The Foundation's voters surveys and activities in relation to precinct committeemen appear to be “activities that are directly related to and support the process of influencing or attempting to influence the ...election of any individual to public office or office in a political party.” Treas. Reg. [sections 1.527-2\(c\)\(1\)](#) and [1.527-6\(b\)](#). The expenditures for such activities subject a [section 501\(c\)](#) organization to tax under [section 527\(f\)](#).<sup>8</sup>

[Section 7805\(b\)](#) provides that the Secretary may prescribe the extent, if any, to which any ruling or regulation relating to the internal revenue laws shall be applied without retroactive effect.

Rev. Rul. [78-289](#), 1978-2 C.B. 180 holds that when an organization's exemption under [section 501\(a\)](#) is revoked prospectively, by application of [section 7805\(b\)](#), the organization is treated as though it were exempt from Federal income taxes until the effective date of the revocation. Consequently, in the interim, that organization is subject to the unrelated business income tax imposed by [section 511](#). There is nothing in the legislative history of [section 511](#) that suggests that an organization can be a fully taxable organization and nevertheless be subject to the unrelated business income tax under [section 511](#).

The tax imposed by [section 527](#) is an income tax under Subtitle A of the Code. Treas. Reg. [section 1.527-8\(a\)](#). [Section 527\(f\)\(2\)](#) contemplates that an organization exempt under [section 501\(c\)\(3\)](#) may be subject to tax under both [section 527](#) and [section 511](#) during the same taxable year. Therefore, by analogy, Rev. Rul. [78-289](#) should also govern the result under [section 527](#). The Foundation is either a fully taxable organization or is subject to tax under [sections 527](#) and [511](#).

Therefore, we conclude that if the Foundation is granted relief under [section 7805\(b\)](#) and its exemption is revoked prospectively, the Foundation is subject to [section 527](#) for the period covered by the [section](#)

[7805\(b\)](#) relief. However, if [section 7805\(b\)](#) relief is denied and the Foundation's exemption is revoked retroactively, the Foundation would be a fully taxable entity and not subject to tax under [section 527](#).

James J. McGovern

Assistant Chief Counsel

By: Harry Beker

Chief, Branch No. 6

Office of the Assistant Chief Counsel

(Employee Benefits and Exempt Organizations)

Attachment:

Adm. File

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<sup>1</sup> The questionnaire sent to candidates running in the \*\*\* election note the Foundation's members were greatly interested in \*\*\* . The questions to candidates concerned homosexual rights, abortion, child pornography, sex education, property tax exemption for churches, governmental intervention in internal church affairs and parents' freedom from governmental interference in raising their children. The preferred answer to all of the questions was evident.

<sup>2</sup> Treas. Reg. [section 1.501\(c\)\(3\)-1](#) was adopted in T.D. 6391 1959-2 C.B. 139. The Omnibus Budget Reconciliation Act of 1987, [Pub. L. No. 100-203 section 10711\(a\)](#), 101 Stat. 1330-464 (1987) amended the last clause of [section 501\(c\)\(3\)](#) to reflect the regulations' position that political campaign activities embrace activities on behalf of and in opposition to any candidate for public office. The statutory clarification applies to activities occurring after December 22, 1987. The identical provision in the regulations applies to activities occurring on or before that date. H.R. Rep. No. 391, 100th Cong., 1st Sess., 1621; H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 1018 (1987). [Publ L. No. 100-203 section 10711\(c\)](#), [101 Stat. 1330-465](#) (1987). [Section 4955](#), subjecting [section 501\(c\)\(3\)](#) organizations and their managers to excise tax on 'political expenditures,' is effective for taxable years beginning after December 22, 1987. [Pub. L. No. 100-203, 10711\(a\)](#), [101 Stat. 1330-464- 465](#) (1987).

<sup>3</sup> 'Precinct' means a geographical subdivision for voting purposes within or without the limits of a city or town, whether established by a board of county commissioners, by a city council, or by the board of supervisors of a township. \*\*\* This memorandum will refer to this office as precinct committeeman.'

<sup>4</sup> A "major political party" is any political party of which at least one nominee for president, vice president, United States senator, or a state-wide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. \*\*\* Major political parties have the power to designate candidates to appear on the state primary election ballot. \*\*\*

<sup>5</sup> The administrative file does not reflect whether the Foundation tracked members' candidacies.

<sup>6</sup> Rev. Rul. [67-71](#), cited in the proposed Technical Advice Memorandum at 13, concerns elections to a school board. A board of education makes policy decisions; public school teachers do not. The functions of precinct committeemen could be analogized the latter category.

<sup>7</sup> The purpose of [section 527\(f\)\(2\)](#) is to avoid double taxation and double deductions. S. Rep. No. 1357, 93d Cong. 2d Sess.,

30 (1974), 1975-1 C.B. 534.

<sup>8</sup> Because the definition of political organization exempt function clearly embraces the Foundation's activities in connection with precinct committeemen, the Foundation would be subject to tax under [section 527\(f\)](#) irrespective of the classification of these activities under [section 501\(c\)\(3\)](#).

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