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REVENUE RULING 78-248: THE CONGRESS AND THE CONSTITUTION BE DAMNED

ALFRED L. SCANLAN, ESQUIRE

NATURE AND PURPOSE OF THE ARTICLE

In this paper, I discuss two recent rulings, especially Rev. Rul. 78-248 issued by the Internal Revenue Service on June 2, 1978, a ruling with which, I am sure, many of you are most familiar. I discuss what I consider to be the several severe illegalities, both statutory and constitutional, which infect Rev. Rul. 78-248. Then I will examine the apparent reaction to Rev. Rul. 78-248 in some Catholic circles, especially in some segments of the Catholic press. Finally, and perhaps presumptuously, I offer a prognosis or prediction of the future impact of the revenue ruling and what I believe will be the fate which awaits it if it is ever at issue in court proceedings.

SOME BACKGROUND

By way of background, let me say that although I am not a tax lawyer as such, I have long been interested in the constitutional implications of tax decisions and rulings. In addition, my partner, Louis M. Kauder, who has assisted significantly in the preparation of this article, is an experienced tax lawyer. My familiarity with the precise revenue rulings discussed herein arises primarily from my position as General Counsel to the National Committee For A Human Life Amendment, Inc. (NCHLA). NCHLA is not a section 501(c)(3) organization; rather, it has qualified for tax exemption as a "social welfare" organization under section 501(c)(4) of the Internal Revenue Code. Thus, although it is not taxed on its own income, contributions to NCHLA are not deductible. The organization, as many of you may know, was formed to help educate the American people

concerning the need for a human life amendment to the United States Constitution and to secure their support of any effort, both in the Congress and in the state legislatures, which will effect such a constitutional change. NCHLA receives substantially all of its support from individual dioceses of the Catholic Church in the United States. These contributors are organizations exempt from tax under section 501(c)(3) of the Code. Contributions to such organizations are deductible, but such an organization retains its tax-exempt status only so long as "no substantial part" of its activities involves legislative lobbying. Dioceses that contribute to NCHLA have been advised, and I believe fully advised, that their contributions to NCHLA must be considered as participation in legislative lobbying. Moreover, section 501(c)(3) organizations are absolutely barred, by statutory definition, from participation in or intervention in political campaigns. Such participation is expressly declared by statute to include "the publishing or distributing of statements."¹

At the outset, NCHLA was advised that its activities might be treated as involvement in political campaigns and could be ascribed by the IRS to the dioceses which provide financial support to NCHLA. Further, the churches which might become involved directly in the activities of local congressional district action committees (CDAC's) that have been organized to carry out the lobbying work of NCHLA similarly might be treated as having engaged in proscribed political activity. Thus, it is possible that political campaign activities of NCHLA could threaten the section 501(c)(3) status of any diocese directly implicated in such activities. It was for this reason, among others, that we have continued to counsel NCHLA, in persistent and unambiguous terms, that CADAC's should not endorse, support or rate candidates for Congress in any way, no matter how subtly done.

RECENT IRS RULINGS

In Rev. Rul. 78-160 the Service held that an organization which obtains and then disseminates by newsletter, without editorial comment, the views of candidates for public office on topics of interest to the organization is not entitled to exemption under section 501(c)(3). The reasoning of the ruling was that dissemination of the views of candidates in itself is an act that "can reasonably be expected to influence voters to accept or reject candidates," and therefore that such dissemination constitutes "participation and intervention in a political campaign" proscribed by section 501(c)(3) for exempt organizations. The ruling was declared applicable only on a prospective basis to any organization which had revealed in its application for exemption that it would engage in the

¹ I.R.C. § 501 (c)(3).

activity described in the ruling. Issuance of Rev. Rul. 78-160 was greeted by widespread consternation and severe criticism.²

Very quickly thereafter in Rev. Rul. 78-248, the Service hastened to seek to clarify its position on the question considered in Rev. Rul. 78-160. It revoked the earlier ruling and stated generally that some, but not all, "voter education" activities are encompassed by the section 501(c)(3) prohibition against participation in a political campaign. The second, more recent ruling describes and rules on four situations. First, a compilation, without editorial comment, of the voting records of all members of Congress on a wide range of legislative issues is held not to be prohibited political activity. Second, solicitation and dissemination to the public of all candidates for governor in a single state, where the dissemination evidences no bias or preference, is held not to be prohibited political activity. Third, solicitation and dissemination of the views of candidates for public office is held to be prohibited political activity where the framing of the questions to the candidates "evidences a bias on certain issues." And last, publication of a voter's guide by an organization primarily concerned with land conservation is held to be proscribed political activity where the guide is intended as a compilation of incumbents' voting records on selected land conservation issues of importance to the organization. In this situation, the Service reasons that emphasis on a single area of concern indicates a purpose other than nonpartisan voter education and therefore constitutes participation in political campaigns.

INVALIDITY OF THE REVENUE RULING

The Ruling Goes Beyond the Statute and the Regulations of the IRS

The initial, and perhaps the best, argument against the validity of Rev. Rul. 78-248 is that it represents a distortion of congressional intent in that it would deny or withdraw tax-exempt status to organizations whose activities are not partisan under objective standards. Section 501(c)(3) provides:

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 competitions (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 subsec-

² See, e.g., Washington Post, June 2, 1978 at —, col. —; Catholic Standard, June 15, 1978, at 6, col. —.

tion (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.³

The statutory provision quoted above, which was added to the Code in 1934, prohibits a charitable organization from participating in a political campaign on behalf of any candidate and also restricts any attempts by such an organization to influence legislation except where such efforts are an insubstantial part of the organization's activities. The legislative history of the prohibition is skimpy and there have been fewer decided cases and rulings concerning it than one might expect in view of its ambiguity and importance. I am aware of no cases in which partisan political campaign activity by itself has been the cause of a loss of exempt status. Where the IRS has sought to characterize legislative activities as substantial and therefore in violation of the statute, the courts seem to agree only on a finding that proscribed lobbying was a principal activity of the organization.⁴ The courts have stressed that the efforts of the organization to enlighten the public on political issues is not proscribed activity so long as the organization does not endorse or oppose political candidates. In emphasizing that the section 501(c)(3) organizations in those decisions did not endorse or oppose candidates for public office, the courts, in my view, were at least impliedly indicating that they do not regard the publication of candidates' records on particular issues, without endorsement, opposition or ratings, as proscribed political activity.

Thus, the argument that Rev. Rul. 78-248 goes beyond the statutory prohibitions on political involvement seems sound. In Rev. Rul. 78-248, the IRS, without any showing that a single issue organization is involved currently in political activity in behalf of or in opposition to any candidate for public office, nevertheless, presumes that, because of their very nature, one-issue organizations are necessarily involved in proscribed political activity. Such a presumption, I believe, cannot stand up in light of *Seasongood*⁵ and related decisions.

Moreover, the ruling not only goes beyond the statute. It plainly seems to depart from the relevant IRS regulations. For example, Reg. 1.501(c)-1(b)(3)(ii) provides in part that a section 501(c)(3) organization is prohibited "directly or indirectly to 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."

³ I.R.C. § 501 (c)(3).

⁴ Compare *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir.), cert. denied, 414 U.S. 864 (1973) with *Dulles v. Johnson*, 273 F.2d 362 (2d Cir. 1959) and *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955) and *Liberty Nat'l Bank v. United States*, 122 F. Supp. 759 (W.D. Ky. 1959).

⁵ *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955).

(Emphasis added.) And Reg. 1.501(c)(3)-1(d)(3) provides that “[A]n 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.” (Emphasis added.)

In addition, the fact “that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinions 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)”⁶

Revenue Ruling 78-248 to the contrary, the IRS regulations quoted above would indicate that voter education groups which do not endorse or oppose candidates for public office but which engage in nonpartisan research and analysis of issues should be exempt as both educational and charitable. In Rev. Rul. 78-248, however, the IRS apparently has determined that such groups are “action” groups, that is, organizations participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.⁷ The ruling thus contradicts the IRS’ published regulations and indeed also seems to run against previous IRS rulings in which tax exemption was granted organizations which sponsored debates and forums on matters of political concern despite the controversial nature of the speakers.⁸

The Constitutional Infirmities of the Ruling

I find it extraordinary that the IRS would conclude, as it apparently has done in Rev. Rul. 78-248, that disseminating the views of candidates for public office without in addition calling for the election or defeat of a candidate could, in any objective context, constitute “partisan” political activity proscribed by Congress for section 501(c)(3) organizations. The activity which Rev. Rul. 78-248 held to be prohibited for section 501(c)(3) organizations certainly does not fall within the common understanding of “political campaigning,” as expressed in the statute and in the IRS’ own regulations. If, however, I am incorrect in that opinion and IRS could successfully claim a proper statutory basis for Rev. Rul. 78-248, then grave constitutional implications immediately arise. I deal with these now.

It is, of course, a cardinal principle of construction that statutes should be construed to avoid constitutional invalidity if such a reading is

⁶ Treas. Reg. § 1.501(c)(3)-1(d)(2) (1980).

⁷ Treas. Reg. § 1.501(c)(3)-1(c)(iii) (1980).

⁸ See, e.g., Rev. Rul. 74-574, 1974-2C.B. 160; Rev. Rul. 72-512, 1972-2C.B. 246.

permissible in light of the language used.⁹ If section 501(c)(3) may correctly be construed to authorize the IRS to determine when speech that does not expressly call for the election or defeat of a candidate is in fact disqualifying political campaigning, the constitutionality of the statute is surely in doubt.

The principle that courts will, if they reasonably can, avoid the decision of constitutional questions was demonstrated very recently in a close factual context. I refer to the decision of the Supreme Court in *NLRB v. Catholic Bishop of Chicago*.¹⁰ In that case, the Court held that neither the language of the National Labor Relations Act nor its legislative history disclosed "any affirmative intention by Congress" that church-operated schools are within the jurisdiction of the NLRB. A majority of five justices, speaking through Mr. Chief Justice Burger, noted that in "keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions." In the event that such questions would be presented, said the Court, "we must first identify 'the affirmative intention of the Congress clearly expressed' before concluding that jurisdiction existed." The Court, as stated, held that jurisdiction did not exist, declining to construe the National Labor Relations Act "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." I show below that very similar, and equally grave, difficulties exist with Rev. Rul. 78-248.

There are at least three sound bases for holding that section 501(c)(3) as construed and implemented by Rev. Rul. 78-248 is constitutionally infirm. Together they persuasively demonstrate, to my mind, the incorrectness of the construction of section 501(c)(3) adopted by the Service. In the first place, there is probably insufficient correlation between the legitimate government interests allegedly served by section 501(c)(3) and the restrictions on expressive activity imposed by the ruling. Section 501(c)(3) reflects a congressional judgment that political *partisanship* should not be subsidized through a tax exemption.¹¹ That judgment can be effectuated by prohibiting section 501(c)(3) organizations from supporting, opposing or rating candidates. By going further and proscribing the dissemination of information when not accompanied by endorsements, proposals or ratings, Rev. Rul. 78-248 does not advance substan-

⁹ See, e.g., *Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1965); *United States v. Harriss*, 347 U.S. 612 (1953); *United States v. Rumely*, 345 U.S. 41 (1952); *United States v. Congress of Indus. Organizations*, 335 U.S. 106 (1948).

¹⁰ 440 U.S. 490 (1979).

¹¹ Cf. *Cammarano v. United States*, 358 U.S. 498 (1959) (lobbying expenses nondeductible).

tially the state's interest in preventing charitable organizations which enjoy tax-exempt status from becoming involved in partisan politics. It does, however, threaten a significant curtailment of voter education programs which help inform the electorate. In other words, the ruling may well run afoul of the first amendment principle that restrictions on speech, especially speech lying at the very core of the free speech protection of the Constitution, must be "closely drawn to avoid unnecessary abridgement."¹²

In the second place, the distinction drawn by the ruling between dissemination of candidates' views on a variety of issues and dissemination limited to a narrow range of issues renders the ruling constitutionally suspect on another, independent, ground. Equal protection principles applicable to the Federal Government by operation of the due process clause of the fifth amendment require that distinctions among speech be carefully scrutinized and "tailored to serve a substantial governmental interest."¹³ The ruling attempts to justify the distinction between single and multi-issue voter guides by opining that a particular guide's "emphasis on one area of concern indicates that its purpose is not nonpartisan voter education." But the ruling's test for determining when voter education activity is motivated by partisan purposes is both overinclusive and underinclusive. Some organizations may seek to influence partisan elections by disseminating information on a variety of issues. Other groups which are primarily concerned with informing the electorate about a particular set of issues may recognize that exercise of the franchise should be premised on assessment of the character and entire records of the candidates. The practical result of the Service's ruling is that organizations with the financial resources to include a wide range of issues in its material may distribute voter guides without loss of tax-exempt status, but organizations with the resources to address only a single issue may not. Yet the "First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."¹⁴

The third constitutional infirmity of Rev. Rul. 78-248 is its intimidating vagueness. The IRS now holds that when a 501(c)(3) organization disseminates the views of all the candidates for an office it will lose its tax-exempt status if its purpose was partisan, and that a brochure's emphasis on a single area of interest may evidence such a purpose. This is an extremely unpredictable standard. An organization simply could not know

¹² *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); see *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1976); *Elrod v. Burns*, 427 U.S. 347 (1976).

¹³ *Police Dep't v. Mosley*, 408 U.S. 92, 99 (1972); see *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

¹⁴ *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).

how the IRS would interpret its decision to disseminate the views of candidates.

It is practically impossible to know whether, in particular circumstances, the mere publication of views of candidates or their voting records on a particular issue constitutes a plea for the election of one candidate and the defeat of another. As is the case whenever free speech is exercised, it is the hope of the actor that his speech will have some effect on someone. But a stand on an issue does not constitute the call for the election or defeat of a candidate. Such a call can be made only in unmistakable language to that effect. I believe that unspoken and inferential support of a candidate to some immeasurable degree is a standard of legally insufficient specificity on which to ground administration of a prohibition against political activity. Because it is not possible to know how others might read one's choice to disseminate views of candidates, an organization could never know beforehand whether it was engaging in proscribed political activity.

The vagueness of Rev. Rul. 78-248 is objectionable for several reasons grounded in the Constitution. It is, of course, an essential of due process that fair warning be provided before penalties are imposed or privileges revoked.¹⁵ Uncertain whether their voter education activities would lead to revocation of tax-exempt status, many charitable organizations will steer a safe course and forego exercise of their first amendment liberties. As I discuss below, some Catholic publications have elected precisely such a course of inaction. A final vice of the vagueness of Rev. Rul. 78-248 is the unbridled discretion it affords IRS officials. Permitted to infer a partisan purpose from the totality of the circumstances, officials charged with administering Rev. Rul. 78-248 will be able to exercise their discretion selectively to penalize unpopular organizations, including religious groups, and ideas.¹⁶ The selective discretion which the ruling would permit could result in a situation, for example, where a future administration that was anti-abortion and tolerant of the efforts by the Church to educate the electorate on issues related to abortion but, at the same time, hostile to the efforts of other Church agencies to educate the electorate on civil rights or economic issues. In this connection, I point out that the United States Catholic Conference, a section 501(c)(3) organization, participated in the circulation of the civil rights voting records of a number of members of the Congress. Other section 501(c)(3) organizations also participated in that effort. Under Rev. Rul. 78-248, the circulation of these voting records could be regarded as a violation of the ruling and a

¹⁵ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Smith v. California*, 361 U.S. 507, 517-18 (1959).

¹⁶ See *Shuttlesworth v. Birmingham*, 394 U.S. 149 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Staub v. City of Baxley*, 355 U.S. 313 (1958).

cause for revocation of tax exemption. I note this particular incident not to frighten anyone but only to illustrate the broad and dangerous dimensions of the ruling.

In considering the validity of Rev. Rul. 78-248, I have not suggested the invalidity of the statutory proscription against substantial legislative lobbying and any political campaigning by section 501(c)(3) organizations. One commentator has argued the unconstitutionality of the lobbying restriction without addressing the partisan political activity proscription.¹⁷ Others have suggested constitutional arguments that do not differentiate the lobbying restriction from the partisan campaign restriction.¹⁸

The arguments against both restrictions seem to me to be the same insofar as they are grounded on first amendment and equal protection considerations. The argument is essentially that enjoyment of a benefit conferred by government, in this case tax exempt status, may not be conditioned upon the abandonment of a constitutional right.¹⁹ Although I consider the arguments against the validity of the present statutory prohibition to be cogent, I do not believe them entirely persuasive even in the more modern constitutional climate in which the guarantees of the Bill of Rights, as made applicable to the states through the fourteenth amendment, have been afforded very extensive reach.²⁰ Still, insofar as Rev. Rul. 78-248 is concerned, one may concede the facial validity of the statutory prohibitions but still readily demonstrate the invalidity of the proscription against political activity as construed by the Revenue Ruling.

FACTORS TO WEIGH IN ADVISING AFFECTED ORGANIZATIONS

Revenue Ruling 78-248 is an especially troublesome administrative holding from the point of view of rendering advice to organizations possibly affected by it. On the one hand, for the reasons previously stated, I believe its validity to be very much in doubt. On the other hand, one may not casually or cavalierly advise a client to ignore an interpretation of the Code announced by the IRS. Yet, in the context of advice rendered by my law firm, prior to publication of the ruling, that conservatively outlined the duties and obligations of section 501(c)(3) and related (c)(4) entities

¹⁷ Troyer, *Charities, Law-Making and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. TAX INST. 1415 (1973).

¹⁸ See Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439 (1960); Note, *Regulating the Political Activity of Foundations*, 83 HARV. L. REV. 1843 (1970).

¹⁹ Cf. *Speiser v. Randall*, 357 U.S. 513 (1958) (veteran's property tax exemption cannot be conditioned on the taking of a loyalty oath).

²⁰ See *Cammarano v. United States*, 358 U.S. 498 (1959).

in sensitive political areas, we have in effect advised that that organization continue as before without regard to the disturbing implications of the revenue ruling.

That, however, is not how some others apparently have advised section 501(c)(3) organizations and I think it important and useful to note these differing approaches. Because the IRS has a well established, reasonably efficient private rulings program, it is common for lawyers, faced with an ambiguous tax regulation or ruling, to seek clarifying and definitive guidance from the IRS, rather than counsel their clients to act, or not act, on the basis of counsel's opinion of the matter. Yet, I strongly believe that pursuit of clarification of Rev. Rul. 78-248 through the rulings process is an extremely unwise course to follow in this early period in the life of this controversial ruling.

I understand, I hope incorrectly, that legal representatives of the Catholic press may seek specific rulings from the IRS on the full implications of Rev. Rul. 78-248. I know for a fact that the ACLU has sought a clarifying ruling on behalf of a Protestant press organization. Yet, so far as I can tell, the factual circumstances on which the IRS is likely to be asked to rule in these situations seem clearly to fall on the negative side of the ruling. Thus, requests for such rulings should be calculated to invite IRS declarations that the proposed activities would cause revocation of exemption. I am certain that a proliferation of private rulings to that effect would greatly magnify the chilling influence the IRS already has had on the reasonable and responsible voter education activities of the religious press, especially since private rulings are now automatically made public and circulated among tax professionals by the tax publishers.

I believe that this cumulative chilling effect can and should be avoided. There is reason to believe that Rev. Rul. 78-248 is not the end result of actual examinations by the IRS of exempt organization activity, but rather is the expression of IRS views on hypothesized facts, an expression motivated by an IRS need to respond to an election year clamor that some organizations enjoying exempt status were exerting influence on election results. While I have no desire to throw down gauntlets for the IRS, I have doubted that the IRS would actually bring itself to revoke exemptions of organizations that published material described in the negative examples in Rev. Rul. 78-248 on the grounds recited in the ruling and for no other reason. I remain convinced that the IRS sought by issuance of the ruling to accomplish its desired objective of neutralizing the indirect political impact of exempt organization activities through the chilling effect of an *in terrorem* announcement, but that it did not intend to embark upon, and has not launched, an audit program actually designed to implement the ruling on a uniform basis.

Those who invited IRS letter rulings in this difficult area, and in the

meantime advised their clients to steer a wide berth around the troubles portended by the ruling, would be acting as agent for the perpetuation of the chilling effect on lawful activity, and at the same time would be pushing the IRS to more active examination and revocation activity than it has exhibited a penchant for so far. Moreover, a negative letter ruling is not itself a route to litigation in which Rev. Rul. 78-248 could be challenged. Even the new declaratory judgment procedures now authorized under section 7828 of the Code are available only upon denial or revocation of exempt status; they are not likely to be available only upon issuance of a prospective ruling that addresses proposed activity. The lawyer who obtains a negative ruling has the same counseling problem which we all have now, only he has exposed his client to a far greater likelihood of revocation of exemption for past or continuing activity.

I am persuaded that the risks of possible confrontation with the IRS are not so great that I must advise my clients to abandon activity arguably within the reach of the ruling until, by an act of supplication, we might achieve IRS blessing of the activity. If my clients are satisfied that the activity is protected by the Constitution and the statute, they should need no endorsement from the IRS. Fully cognizant of a difference of opinion between the IRS and other lawyers, including myself, on the substantive issues, I adhere to the view that my clients are not realistically exposed to a wrongful loss of exemption until the IRS exhibits an inclination to proceed to implement the ruling through audit examination, revocation of exemption and resulting litigation.

I do not want to see the IRS pushed to a point where its political obligations will require it to implement the ruling. A succession of ruling letters on the subject, however, could have that effect and could cause the IRS to solidify views that at this point may not be solidified. We must bear in mind that we address noble and essential activity of free people, and we should not be afraid that a mistaken bureaucratic view will prevail over the free exercise of religion and speech protected by the Constitution which so "plainly rank high in scale of our national values."²¹ Indeed, the *Bishop of Chicago* case, in my judgment, itself confirms the opinion that the IRS, like the NLRB, ultimately will not be permitted to step on the fundamental rights of free press and freedom of religion. If continued activity of the sort arguably within the ambit of Rev. Rul. 78-248 ultimately leads to litigation over exempt status, the litigation will serve important social and political ends. I am unable to counsel my clients to avoid that litigation at all costs by abandoning protected activity pending acceptance of my views by the IRS. I would hope that you and your clients, the Catholic bishops of the United States, and the Catholic

²¹ NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

press, as well, would be willing to take as their gospel the Constitution of the United States and not the Code as construed by the IRS in Rev. Rul. 78-248.

CONCLUSION

At the beginning of this paper I said I would give my judgment about the future impact of Rev. Rul. 78-248, and also that I would predict what the outcome might be if the ruling were ever to become an issue in litigation. Turning first to the less rash of these promises, I am convinced that the ruling will not be implemented and actively enforced by the IRS against churches and church-related organizations which mount the courage to publicize the records of political candidates, whether on single issues or on multiple issues, *provided that* such organizations do not participate in political campaigns by *endorsing, opposing or rating* candidates. On the other hand, if tax lawyers in any significant numbers insist on rushing to the IRS to seek rulings on various fact situations, a body of revenue rulings could build up quickly to the point that the IRS bureaucracy might feel compelled to attempt to deny or revoke exemptions of section 501(c)(3) organizations who proceed in a manner that IRS believes to be in violation of the ruling.

Ultimately, should litigation ensue under section 7428 of the IRC which challenged a denial or revocation of section 501(c)(3) exemption on the basis of Rev. Rul. 78-248, I am reasonably confident that the ruling would either be struck down by the courts or else its more jagged bureaucratic teeth would be pulled by judicial construction. Since, as I indicated earlier, the argument that the ruling goes beyond the statute would make unnecessary consideration of the several compelling constitutional arguments against the ruling, it is on precisely that ground that I believe the ruling would meet its judicial demise, or at least its substantial emasculation. It could even be the case that a court might vitiate Rev. Rul. 78-248 on an even narrower, but still sound, ground, that is, the failure of the ruling to comply with the IRS's own published regulations.²² Whatever the ground of its overturning might ultimately prove to be, however, I, for one, look forward to the day when the ruling receives the judicial fate it so greatly deserves!

²² For an application of the traditional administrative law rule that an agency must comply with its own rules see *Service v. Dulles*, 354 U.S. 363 (1975).