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FOREIGN CORRUPTION OF THE POLITICAL PROCESS THROUGH NONPROFIT INSTRUMENTALITIES

Norman I. Silber*

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I. INTRODUCTION

Concern has mounted in recent decades about “dark,” publicly unattributed money contributed to political campaigns by extremely wealthy Americans, corporations, and unions. Much dark money is transferred lawfully-- without public attribution—through nonprofit conduits to candidates for office. A body of literature addresses the wisdom of allowing nonprofits to serve as donation conduits facilitating dark money.¹

There are good reasons to be concerned about this phenomenon. There is empirical support for the proposition that “In general, elected officials are warranted in raising and spending as much money as possible” because “the shorthand for political success — ‘more money, more votes’,” has been validated.² Large campaign donors often get preferential treatment from the elected officials whom they have supported.³

The discussion which follows connects to this dark money discussion, but it is not about eliminating dark and *legal* donations to nonprofit conduits. This article is about nonprofits handling *illegal* donations and contributions—principally by laundering illegal foreign contributions to

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¹ See Lloyd Hitoshi Mayer, Disclosures About Disclosure, 44 Ind. L. Rev. 255 (2010); Michael R. Siebecker, Political Insider Trading, 85 Fordham L. Rev. 2717; Linda Sugin, Nonprofit Oversight Under Siege: Politics, Disclosure, And State Law Solutions For 501(C)(4) Organizations, 91 Chi.-Kent L. Rev. 895; Chicago-Kent Law Review; Comment, Forget Congress: Reforming Campaign Finance Through Mutually Assured Destruction, 63 UCLA L. Rev. 208 (2016); Ellen P. Aprill, The Section 527 Obstacle to Meaningful Section 501(c)(4) Regulation, 13 Pitt. Tax Rev. 43 (2015); See also Jane Mayer, DARK MONEY, THE HIDDEN HISTORY OF BILLIONAIRES BEHIND THE RADICAL RIGHT (2017).

² Philip Bump, Does More Campaign Money Actually Buy More Votes: An Investigation, Nov. 11, 2013.

³ See Tara Siegel Bernard, A Citizen’s Guide to Buying Political Access, N.Y. Times, Nov. 18, 2014.

avored candidates through 501(c)(4) nonprofits. It is true that money spent by American citizens can also unduly affect the outcome of political campaigns, but many of the dangers intrinsic to allowing foreign countries, foreign nationals, and foreign corporations to influence the American electoral process are qualitatively different in kind from the dangers posed by legal “dark money;” and first amendment concerns do not extend to foreigners abroad. Beginning in 1966 foreign contributions consequently have been limited severely, and since 1976, there has been an outright prohibition.⁴

Clandestine channeling of foreign funds directly from political organizations, or indirectly through religious organizations, and into the hands of political candidates, has been prosecuted previously. In 1996, allegations of clandestine donations by the Chinese government and foreign businesses to President Bill Clinton’s campaign led the nonprofit Democratic National Campaign Committee to give back \$2.8 million which it had received from individuals and for-profit entities. A religious organization, the International Buddhist Progress Society, was assessed a relatively large civil penalty.⁵ Incidents have not been reported in which nonprofit political advocacy organizations, organized as (c)(4), have been conduits for foreign contributions.

The present discussion is prompted by the emerging possibility that during the Congressional elections of 2016 and the Presidential election of that year, large-scale, illegal donations from foreign sources reached an undisclosed number of political campaigns by way of a lawful nonprofit conduit, namely the National Rifle Association, operating principally as a 501(c)(4) social welfare organization chartered in New York.⁶

⁴ Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 *Yale L.&P. Rev.* 503 (1996); (Pub. L. 92–225, title III, § 319, formerly § 324, as added Pub. L. 94–283, title I, § 112(2), May 11, 1976, 90 Stat. 493; renumbered § 319, Pub. L. 96–187, title I, § 105(5), Jan. 8, 1980, 93 Stat. 1354; amended Pub. L. 107–155, title III, §§ 303, 317, Mar. 27, 2002, 116 Stat. 96, 109.); see also *Foreign Nationals*, FEC website, <https://www.fec.gov/updates/foreign-nationals/> .

⁵ See Richard A. Opiel, *Democrats Are Fined \$243,000 for Fund-Raising Violations*, *N.Y. Times*, Sept. 21, 2002; Bob Woodward and Brian Duffy, *Chinese Embassy Role in Contributions Probed*, *Washington Post*, Feb. 13, 1997; John Fund, *Not All Foreign-Influence Scandals Are Created Equal*, *National Review*, July 16, 2017. Apart from the alleged Russian contributions during the 2016 presidential campaign, Donald Trump also solicited foreign campaign contributions from members of Parliament in the United Kingdom and elsewhere in the world.

⁶ The National Rifle Association consists of several affiliated entities, including the National Rifle Association of America, a (c)(4) organization; the NRA Foundation, a (c)(3) organization; and The National Rifle Association Of America Political Victory Fund, which reported to the FEC 21,260,409.45 in campaign contributions between January 1, 2015 and December 31, 2016, see <https://www.fec.gov/data/committee/C00053553/?cycle=2016>

II. RUSSIA AND THE NRA

According to journalists—and to a plea agreement concluded between a Russian national and the United States Attorney for the District of Columbia, senior staff and board members of the NRA communicated with Russians in the United States, and also visited Russia, to promote gun rights in both countries and to foster the creation of a Russian gun rights group. There is further concern that they met with persons in Russia who are under investigation for corrupting the American political process to sow discord and advance the election prospects of Donald Trump and the Republican Party.⁷

Reports describe federal investigations of Russian oligarchs, including Alexander Torshin, Oleg Deripaska, and Konstantin Nikolaev—billionaires closely connected with President Putin. The reported investigations probe whether there were violations of US laws which included, among possible misdeeds, the transfer of money to an American or to Americans who in turn donated millions to the NRA. Mariia Butina, a Russian national living in the United States, pled guilty to being a Russian agent and conspiring with the Russian Ministry of Foreign Affairs to involve the NRA (“Gun Rights Organization”) in furthering a “back-channel of communication” to the NRA and the Republican Party (“Political Party 1.”)⁸ Butina’s business partner and boyfriend Paul Erickson, a Republican conservative political operative, was accused of helping to provide a bridge between the NRA, the Republican Party, and some of these oligarchs, and was identified as a target of federal investigation.⁹

(visited 11/5/2018); see Ciara Torres-Spelliscy, Yes. Violating Certain Campaign Finance Laws Are Criminal Offenses, Moyers.com, July 13, 2017. See, e.g., Tim Dickinson, The Trump-Russia-NRA Connection: Here’s What You Need to Know, Jan. 18, 2018. Regarding the International Buddhist Progress Society, see International Buddhist Progress Society, Inc., d/b/a Hsi Lai Buddhist Temple <https://www.fec.gov/files/legal/murs/4530/00000306.pdf>; Robert Lenhard, FEC Issues Zero Tolerance Decision on Foreign National Contributions, Covington & Burling Inside Political Law, November 21, 2014, <https://www.insidepoliticallaw.com/2014/11/21/fec-issues-zero-tolerance-decision-on-foreign-national-contributions/>.

⁷ Luis Sanchez, Russian elites met with NRA in lead-up to 2016 election: report, The Hill.Com, 06/11/18.

⁸ Statement of Offense, U.S. v. Mariia Butina, Crim. No. 18-218 (TSC), Dec. 6, 2018. Bart Jackson, Reports: Accused Russian agent Maria Butina ready to plead guilty and cooperate with U.S. prosecutors, USA Today, Dec. 11, 2018; Jason Leopold and Anthony Cormier, Here is the Money Trail from the Russian “Agent” and her Republican Partner, BuzzFeed News, July 31, 2018.

⁹ Elizabeth Woodruff, Erin Banco, Feds Target Butina’s GOP Boyfriend as Foreign Agent, Daily Beast, Dec. 5, 2018; Bart Pfankuch, Russian woman and South Dakotan

The NRA, furthermore, reported spending \$35 million during the 2016 campaign cycle--considerably more on political campaign intervention than it had spent in previous cycles. As the McClatchy News Service reported, "The NRA, Trump's biggest financial backer, spent more than \$30 million to boost his upstart candidacy; that's more than double what it laid out for 2012 GOP nominee Mitt Romney, and the NRA money started flowing much earlier in the cycle for Trump."¹⁰

As of this date, no public refutations of the press reports have been distributed by the National Rifle Association.¹¹ Publicly available information from the NRA about its campaign activities is unsatisfactory.¹² There have been no accounts offered to describe the involvement of the NRA board or staff in receiving and distributing foreign money into the campaign funds of Donald Trump or congressional candidates.¹³

The NRA, classified as a (c)(4) social welfare organization, is not required publicly to name campaign fund donors or recipients; or to account for the large increase in its revenue and campaign spending compared to previous years. At the time of the campaign, the names of donors were required to be reported to the IRS confidentially.¹⁴ The records of NRA board meetings are also confidential.

III.

EXPLORATIONS OF LIABILITY

What if the suspicions reported as "being investigated" are validated? What are the fiduciary duties of officers, directors, and staff with respect to monitoring the funds the nonprofits receive and launder, and the campaign activities they engage in? Can federal and state authorities hold nonprofits culpable as entities, and hold their management and board responsible? Is there exposure to civil or criminal liability for a board member who fails

connected by mysterious Sioux Falls business Arus Leader (USA TODAY), July 24, 2018.

¹⁰ Peter Stone and Greg Gordon, [Web of elite Russians met with NRA execs during 2016 campaign](#), June 11, 2018.

¹¹ There is no information on the NRA website regarding foreign donors, <https://home.nra.org/> (last visited Oct. 3, 2018).

¹²The word "Russia" does not appear on the NRA-PVF website, <https://www.nrapvf.org/about-pvf/> (visited Nov. 8, 2018).

¹³ To the extent that the NRA devoted non-monetary support made possible by illegal funding, such activities would have been unlawful. See *infra*.

¹⁴ The treasury has since eliminated the requirement that (c) (4) donors be disclosed to the government. <https://www.irs.gov/pub/irs-drop/rp-18-38.pdf> ; see also Laura Davison and Bill Allison, Many Political Tax Exempts No Longer Required to Report Donors, Bloomberg LP, July 16, 2018 <https://www.bloomberg.com/news/articles/2018-07-17/many-political-tax-exempts-no-longer-required-to-report-donors> .

diligently to monitor --or is willfully ignorant of-- donations to a nonprofit that are coming directly or indirectly from a foreign terrorist, criminal, or state-supported foreign entity and contributed to political campaigns? These questions are important ones to address to understand whether the existing rules are adequate to promote fair elections and to police nonprofit welfare organizations.

Let us suppose that an investigation by the FBI or by the Federal Election Commission, or by a State Attorney General, reveals that senior staff members and some or all of the board of a nonprofit organization classified as (c)(4) has assisted a foreign terrorist or a foreign criminal organization by recklessly or intentionally permitting itself to be a conduit for unlawful contributions to the campaigns of candidates for state or federal office; or has itself engaged in campaign activities using foreign funds.

A. *Election Law*

Consider first the nature of the civil and criminal violations of the election laws. Contributions *by* foreign nationals to U.S. political campaigns are prohibited by federal election law and are subject to civil and criminal penalties.¹⁵ Contributions *to* political campaigns in the name of another person are treated identically, and are subject to the same penalties.¹⁶ *Knowingly accepting foreign contributions* also is prohibited and subject to criminal and civil penalties.¹⁷ Laundering campaign contributions through

¹⁵ 52 U.S.C. 30121 Sec. 110.20 (b) provides “Contributions and donations by foreign nationals in connection with elections. A foreign national shall not, directly or indirectly, make a contribution or a donation of money or other thing of value, or expressly or impliedly promise to make a contribution or a donation, in connection with any Federal, State, or local election.” (c) prohibits contributions or donations to “a political committee of a political party, including a national party committee, a national congressional campaign committee, or a State, district or local party committee . . .” (e) prohibits disbursements by foreign nationals for electioneering communications; (f) prohibits knowing solicitation, acceptance, or receipt from a foreign national of any prohibited contribution or donation. Paragraph (g) is titled “Solicitation, acceptance, or receipt of contributions and donations from foreign nationals, and provides, “No person shall knowingly solicit, accept or receive from a foreign national any contribution or donation prohibited by paragraphs (b) through (d) of this section. Paragraph (j) prohibits direct or indirect donations to an inaugural committee and knowing acceptance of a donation to an inaugural committee. Section 111.24 establishes relatively modest monetary civil penalties for knowing and willful violations; the Department of Justice has concurrent criminal jurisdiction and has criminally prosecuted individuals for violating the prohibition on foreign political contributions. See Ciara Torres-Spelliscy, *supra*. The section applies to both federal and non-federal elections.

¹⁶ 52 U.S.C. 30122 provides that: “No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.”

¹⁷ *Id.* State law director fiduciary standards would be considerably less stringent. See

conduits and straw donors is “persuasive evidence of the Act’s willful intent element.”¹⁸

The Federal Election Commission has a stringent test for “knowingly accepting” an illegal contribution.¹⁹ The liability of a contribution recipient will be triggered only if there is “actual knowledge that the funds have come from a foreign national; or that awareness of certain facts that would lead a reasonable person to believe that there is a substantial probability that the money is from a foreign national; or awareness of facts that should have prompted a reasonable inquiry into whether the source of funds is a foreign national.”²⁰ If sufficient facts have been established to trigger liability, then the Federal Election Commission or the Justice Department, or both, can find a violation and pursue relatively limited civil fines and potentially more serious criminal charges under the statute.²¹

B. Money Laundering Statutes

If it can be shown that a nonprofit or individuals within it intended to “convert” money obtained from illicit activities so that it appeared to be money gotten from lawful sources, the federal and state money-laundering statutes could be invoked. A federal conviction for money laundering can result in fines of up to \$500,000 or double the amount of money that was laundered, whichever is greater.²² New York establishes money laundering offenses from the fourth degree to the first degree.²³ Under the federal and

infra.

¹⁸ Richard c. Pilger, Director, Federal Prosecution of Election Offenses (Eighth Ed., 2017), 141.

¹⁹ Federal Election Commission, Who Can and Cannot Contribute, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cant-contribute/> (visited 11/4/2018).

²⁰ The regulation provides guidance and a safe harbor. A recipient should decline a gift in circumstances such as where the contributor uses a foreign passport for identification purposes or provides a foreign address; or if the contribution is made from a foreign bank; or the contributor or donor resides abroad. A safe harbor provides that a person has conducted a reasonable inquiry if he or she seeks and obtains copies of current and valid U.S. passport unless he or she has “actual knowledge that the source of the funds solicited, accepted, or received is a foreign national.” 11 C.F.R 110.20 (a)(5).

²¹ Pilger, Federal Prosecution of Election Offenses 138.

²² 18 U.S.C. 1986.

²³ A person is guilty of money laundering when, “knowing that the property involved in one or more financial transactions represents the proceeds of criminal conduct, he or she conducts one or more such financial transactions which in fact involve the proceeds of specified criminal conduct with intent to: Promote the carrying on of criminal conduct or engage in conduct constituting a felony (under tax law); or Knowing that the transaction or transactions in whole or in part are designed to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of criminal conduct; or avoid any

state statutes, the elements of the offense require that the laundering recipient must know that the funds laundered are the proceeds of specified sorts of criminal conduct. There are no reports which would provide support for an allegation that the contributed sums themselves came from illegally obtained sources. Unless it could be established that the donated funds were the result of specified criminal activity and that the nonprofit organization or its officers or directors could be charged with the requisite knowledge, the nonprofit and its officers and directors would not be subject to money-laundering penalties.

C. Internal Revenue Service Authority

The penalties imposed by the Federal Election Commission and the Justice Department would be the beginning of the story of federal enforcement. What about the Internal Revenue Service? If a penalty is assessed against the (c)(4) by the FEC, or an audit by the IRS revealed unlawful expenditures, how might the IRS hold accountable such a nonprofit and discourage future misconduct?

The story would be different if the NRA were a (c)(3) charitable organization. IRC 4955 imposes taxes on a nonprofit organization, and on its management, on “political expenditures” if made by a *Sec. 501 (c)(3)* organization.²⁴ But the NRA is a (c)(4) organization entitled by regulatory interpretation to engage in political activity, and Internal Revenue Code Section 527 imposes a different regime. Section 527, in general, shields funds raised and spent for general political purposes by (c)(4), (c)(5), and (c)(6) groups from taxation.²⁵

According to Section 527, an exempt organization that expends funds on the narrower category of *political campaign intervention* must pay tax on the

transaction reporting requirement imposed by law. . .” New York Penal Law Sec. 470 et. seq. Failing to report income derived from criminal activity in a material manner can be a felony under tax law, see I.R.C. Sec. 7206.

²⁴ The tax in Sec. 4955 is on “any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” 26 USC 4955. The amount of the tax is initially a percentage of the amount spent, and it is supplemented dramatically by additional taxes if there is no recovery of the amount spent and safeguards against future misbehavior established. *Id.*

²⁵ Social Welfare organizations classified as (c)(4) must operate “primarily” to serve social welfare. The maximum amount of political activity social welfare organizations may engage in before it is its “primary” activity is uncertain. See Ellen Aprill, *supra* n.2. Under the misguided standard the “social welfare” classification of the NRA whose expenditures in 2016 exceeded \$412,000,000, would not be jeopardized by a \$30,000,000 contribution.

lesser of its net investment income or the amount it spends on political campaign intervention.²⁶ Sections (c)(4), (c)(5) and (c)(6) organizations similarly face a tax on expenditures to “influence or attempt 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.” But section 527 (f) undermines its own disciplinary impact by authorizing (c)(4) organizations to establish “segregated funds,” closely resembling FEC “Political Action Committees”, to collect and spend funds on political campaign intervention free of the tax on exempt expenditures.²⁷ The wisdom of permitting this escape hatch has been contested.²⁸

It is remarkable not to find an analogous “intermediate sanction” in Section 527 of the Internal Revenue Code that would tax or otherwise penalize Social Welfare (c)(4) organizations with “segregated fund” accounts who have supported candidates with money that has been derived illegally, including from foreign sources. That is, under the assumption that the foreign illegal activity is engaged in by a segregated fund of a (c)(4)— a plausible possibility—then there is no directly applicable intermediate sanction: No section of the Internal Revenue Code Subtitle or in Section 527 provides for excise taxes that would impose intermediate sanctions on social welfare organizations which engage in impermissible political activity.

The principal reason for the passage of the intermediate sanctions rules that affect private foundations and public charities was to empower the Service to impose an effective disincentive to misbehavior rather than having to “drop the atomic bomb” by revoking an organization’s exemption. A provision in the tax code that imposes an analogous tax on social welfare organizations that violate federal election laws, as well as on their managers and board members who do so—including violations of 52 USC 30121 et. seq. (“Contributions and donations by foreign nationals”)—would serve several important public policy goals. Such a rule would do more to deter minor violations than can be done under present tax law and provide organizations and their boards with positive guidance and incentives. Jurisdiction to sanction the board and its individual members would necessarily rest with state authorities.

To hold the NRA to account the IRS would have other avenues to

²⁶ See Aprill, *supra* n. 2, at 47.

²⁷ IRC Sec. 527(f)(3). See Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities Through Federal Tax Law*, 75 U. Cin. L. Rev. 1071 (2007) 1078.

²⁸ See, e.g., Jennifer Herwig and Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 Geo. L.J. 1443 (2014); Nicole A. Gordon, *Options For Continued Reform Of Money In Politics: Citizens United Is Not The End*, 80 Alb. L. Rev. 83(2016/2017).

consider. Illegal foreign contributions—whether classified as unrelated business income or gifts--would constitute a form of income which a nonprofit would need to report accurately.²⁹ Failure to report such income and to pay any tax due on it --if it is were unrelated business income, for example-- or intentional mischaracterization of the income, would jeopardize exempt status. Whether an organization such as the NRA could on such facts successfully claim that Russian contributions were purely general activity gifts is, on these hypothetical facts, doubtful. Indeed, if the NRA retained the contributed funds for its own general activity and operating purposes, and then spent money previously allocated for general purposes on campaign donations, these might be analyzed as part of a conspiracy to violate election laws, or as Russian bribes.³⁰

In the absence of intermediate penalties, or in lieu of applications by analogy to other misconduct as just described, the only appropriate tool in the toolbox of the IRS may be to sanction a social welfare organization that has compromised the integrity of the electoral process with the revocation of tax-exempt status. When an organization fails its “operational” mandate-- to operate entirely in ways that serve its mission-- its status should and will be revoked.³¹ Failing the operational test can occur in mundane situations, as by failing to complete an informational return; or more unusually by deviation from a stated tax-exempt purpose-- as by organizing as an association of war veterans but failing to have sufficient war veterans as members.³² It is notable that in June, 2018, the IRS revoked the tax-exempt status of Americans for Job Security, a tax-exempt (c)(6) business league which spent millions of dollars influencing elections but failed to file its tax returns for three years; however its failure to file, rather than the political activity itself, formed the

²⁹ Treas. Reg. 1.61-14; *James v. U.S.*, 366 U.S. 213 (1961). Money acquired through illegal means must be reported and taxed. Income from illegal activities must be included as income on Form 1040, line 21. Form 990 attaches great importance to reporting unrelated business income. In its guidance about gaming operations, for example, the Service states that “IRC Section 501(c)(4) organizations promote social welfare. Gaming is considered both a business and a recreational activity; it does not ordinarily promote social welfare. If it is the primary activity of a social welfare organization, it may jeopardize the organization’s exempt status. If not a primary activity, the gaming income will be UBTI unless an exclusion or exception applies.” Exempt Organization Gaming and Unrelated Business Taxable Income, <https://www.irs.gov/charities-non-profits/exempt-organization-gaming-and-unrelated-business-taxable-income> (visited Nov. 6, 2018).

³⁰ Chisun Lee, *How Politicians Use Nonprofits to Hide Dark Money*, Brennan Center for Justice, Mar. 29, 2018.

³¹ Failing the “organizational” test, which focuses on governing documents, will also lead to the loss of exempt status.

³² See Tax Exempt Organization Search (formerly Select Check), <https://www.irs.gov/charities-non-profits/tax-exempt-organization-search> ; PLR 9315002; 1992 PLR LEXIS 2757 (Nov. 5, 1992).

basis for the revocation.³³

While the general proposition that revocation is a viable option in appropriate circumstances is sound the specific possibility that the Internal Revenue Service would revoke the tax-exempt status of the NRA during the Trump administration seems fantastically remote. In an administration well-disposed to the positions of the NRA and broadly supportive of gun rights, within a culture steeped in reverence for the Second Amendment, is frankly unimaginable, even if members of the board confessed to their illegal conduct.³⁴ The possibility that the IRS would revoke the exemption of an affiliate segregated campaign entity such as The NRA Victory Fund, however, seems greater, especially if the FEC penalized the Fund.³⁵

IV. ACTIONS BY STATE AUTHORITIES

Under the assumption that an investigation reveals a nonprofit's illegal conduit activity, or that foreign individuals have been convicted of interfering with an election with the willing or careless assistance of the nonprofit, what might a state attorney general do? In New York, as in other states, the Attorney General is responsible for supervising charitable organizations and has broad authority to investigate nonprofit activities.³⁶ She is the state's chief legal officer (not its chief of law enforcement), and as such she is "the

³³ See William Gray, IRS revokes dark money group Americans for Job Security's tax IRS exempt status, Issueone.org, June 12, 2018; Auto Revocation List, Revocation Date Mar. 15, 2018, posted June 11, 2018.

³⁴ See *Partners in Charity, Inc. v. Commissioner*, 141 T.C. 151 (2013) (revocation of (c)(3)); see also *Construction and Application of Federal Regulations Governing Retroactive Revocation of Tax-Exempt Status*, 22 A.L.R. Fed. 3d 5.

³⁵ According to the Form 990 informational return filed by the NRA, it is "a 501c4 membership association with four 501c3 public charities and a Section 527 political action committee PAC which is a separate segregated fund. . . . The NRA Political Victory Fund is a separate unincorporated PAC of the NRA." The NRA return states that "in the event that any funds are received by the NRA and earmarked to the PAC, the NRA has systems in place to ensure any such receipts are promptly and immediately deposited into the separate segregated funds accounts. Therefore, there were no reportable transactions between the NRA and the PAC for the purpose of any Schedule R." Schedule R (related organizations and unrelated partnerships), Part VII, Return Reference Part II. In our hypothetical case, Russia under existing law could state that it donated to the NRA for general political purposes but not campaign intervention purposes—but whether it in fact did so would be a question of fact; any claim that it was for general purposes and that receipt of funds was not intended to offset larger campaign contributions would not need to be taken at face value by the IRS or an attorney general.

³⁶ See, e.g., Attorney General Underwood Announces Lawsuit Against Donald J. Trump Foundation and Its Board Of Directors For Extensive And Persistent Violations Of State And Federal Law, June 24, 2018, <https://ag.ny.gov/press-release/attorney-general-underwood-announces-lawsuit-against-donald-j-trump-foundation-and-its> (visited Nov. 6, 2018).

guardian of the legal rights of the citizens of New York, its organizations and its natural resources,” with subpoena powers to investigate.³⁷ The Attorney general also enforces the election law statutes of the state.³⁸ Potentially there could be a multiplicity of causes of action.

Section 112(a) of the New York Not-for-Profit Law authorizes the Attorney General to take actions and bring special proceedings, including derivative actions, against nonprofit organizations that violate their mission.³⁹ The focus of the attorney general, of course, is on enforcing the mission-oriented duties of directors and officers of nonprofits, and not, primarily, on supervising the system of federal elections.

In the fact pattern hypothesized, we make some large assumptions: we assume that the facts establish that the organization itself has violated its mission by serving as a conduit; that some of its fiduciaries intentionally made false statements on federal and state returns; and that some senior managers and some or all of the board members knew of the foreign donations and illegal political contributions.

FEC rules are directed at the integrity of the election process; the Not-for-Profit Law is directed at the integrity and effectiveness of nonprofit governance. Thus, whether the FEC test for “knowing receipt” of funds can be met to trigger election law penalties, the Attorney General may determine that officers and board members of the NRA violated their duties of obedience—a duty recognized by common law as a separate cause of action in New York—and their duty of care.

The duty of obedience requires that the board work to ensure that the organization complies with applicable laws and regulations, acts in accordance with its own policies, carries out its mission appropriately, and does not engage in unauthorized activities.⁴⁰ A board which condones an

³⁷ Overview Of The Functions Of The Office Of The Attorney General, <https://ag.ny.gov/legal-recruitment/overview-functions-office-attorney-general> (last visited November 6, 2018).

³⁸ A.G. Underwood Announces Election Day Hotline To Protect Voter Access During Tuesday's General Election, Nov. 5, 2018, <https://ag.ny.gov/press-release/ag-underwood-announces-election-day-hotline-protect-voter-access-during-tuesdays>; N.Y. Election Law, § 3–104, State board of elections; enforcement powers. The hypothetical does not suppose that the NRA corrupted state elections.

³⁹ N.Y.NPC Sec. 112. The specified actions include: “(1) To annul the corporate existence or dissolve a corporation that has acted beyond its capacity or power or to restrain it from carrying on unauthorized activities; (2) To annul the corporate existence or dissolve any corporation that has not been duly formed; . . . (4) to procure a judgment removing a director of a corporation for cause under section 706 (Removal of directors); (5) To dissolve a corporation under article 11 (Judicial dissolution); (7) To enforce any right given under this chapter to members, a director or an officer of a charitable corporation. The attorney-general shall have the same status as such members, director or officer.”

⁴⁰ See *Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 186 Misc. 2d 126 (1999).

unlawful strategy to place a gun-friendly candidate into presidential office through accounting misrepresentations jeopardizes the mission of the organization.

The duty of care requires directors to act “in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.”⁴¹ Assuming that the foreign funds were donated to the NRA for general activity purposes, and if the Victory Fund increased by some corresponding amount, reasonably prudent directors reviewing financial documents arguably should have been aware of the likelihood that the donated funds were meant to offset increased campaign expenditures by the organization.⁴² A board failing to exercise due diligence to identify the true purpose of a massive foreign gift, or worse, deciding to increase its campaign contributions because of a windfall foreign gift, has violated its duty of care. The executive director of the Victory Fund in this hypothetical also would have negligently violated fiduciary duties in failing to operate the Fund in good faith and as would a reasonably prudent person.

What remedies for such violations? The standard per Sec. 112 for annulling the corporate existence of a nonprofit is not specified by the Nonprofit Corporation Law or established by case-law. If proven, concealing foreign contributions; engaging in fraudulent accounting; significantly corrupting elections and public faith in the election process; diminishing the chances for success of candidates whose views conflict with the interests of the nonprofit -- would be sufficient to justify annulment.

Proceedings could be initiated by the Attorney General obtain damages, to remove complicit board members and hold them personally liable for acting in bad faith. Mandating a new election is of course beyond the authority of the Attorney General, but she could, on tort principles, pursue monetary judgments against responsible officers and directors and against the entity itself, which might be calculated, in theory, according to the provable actual damages to the citizens of the state enhanced by a punitive amount with a deterrent additur.⁴³

⁴¹ New York NPCL Sec. 717.

⁴² Id. Thus, if the contribution to nonpolitical activities enables the NRA to make larger contributions than previously this would not be a necessary barrier to prosecution. Nonprofit organizations receiving major gifts have obligations to exercise due diligence in understanding the true purposes of large gifts and to properly account for them. See, e.g., Carnegie Mellon University, Gift Acceptance, Counting and Reporting. <https://www.cmu.edu/policies/forms-and-documents/Gift%20Acceptance%20Counting%20and%20Reporting%20Policy.pdf> Tracing principles can be applied to follow funds. If board members understand or are willfully ignorant of the fact that a large contribution from a foreign contributor is intended to result in larger contributions being made to political campaigns, that would establish culpability.

⁴³ See Note, Read My Lips: Examining the Legal Implications of Knowingly False

The problem of recommending an appropriate damages assessment would challenge any judge or jury, considering that the impact of illegal campaign expenditures included increasing the probability for success in a national presidential campaign and other campaigns. The Attorney General would also consider that these torts impair constitutional rights, and that the nonprofit not only violated specific statutes, i.e., campaign funding laws, but also impaired individual constitutional rights. The area of determining damages against nonprofit entities for their constitutional torts deserves much further study.

Establishing the personal liability of managers and board members would be a matter of showing that they personally breached their duty of care or a duty of obedience, or “aided and abetted a breach of a fiduciary duty.”⁴⁴ Individual corporate directors and officer do not incur personal liability for the torts of their corporation unless they participate in the wrong or authorize or direct that it be done.⁴⁵ In the context of a commercial dispute, in *Wantickets RDM, LLC v. Eventbrite, Inc.*,⁴⁶ the New York Commercial Division recently denied a motion to dismiss plaintiff Wantickets’ claims for aiding and abetting stating that there were sufficient allegations that a manager “provide[d] ‘substantial assistance’ to the primary violator” in order to plead knowing participation in a breach of fiduciary duty.⁴⁷

Campaign Promises., 90 Mich. L. Rev. 428 (1991) (exploring tort damages for false campaign promises).

⁴⁴ Note that NPCL § 720-a, which provides broad immunity to directors against third parties in circumstances other than gross negligence or intentional misconduct, does not immunize directors from the reach of federal statutes to the extent the claims are based upon federal law. This section also does not apply to actions taken by the Attorney General or actions commenced under Not-For-Profit Corp. Law § 719 (director liability in certain defined transactions) or Not-For-Profit Corp. Law § 720 (actions brought on behalf of the organization). [N.Y. Not-for-Profit Corp. Law § 720-a.](#)

⁴⁵ See *Meecker v. McLaughlin*, 2018 U.S. Dist. LEXIS 117211 (citing among other cases *Aeroglide Corporation v. Zeh*, 301 F.2d 420, 422 (2d Cir. 1962). See also *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1177 (2d Cir. 1993) (director not personally liable for his corporation's contractual breaches unless he assumed personal liability, acted in bad faith or committed a tort in connection with the performance of the contract); *DeWald v. Amsterdam Housing Authority*, 823 F. Supp. 94, 103 (N.D.N.Y. 1993) (“Case authority overwhelmingly supports the conclusion that voting members of a board cannot be held liable for the corporate entity’s resulting acts.”); *Marine Midland Bank v. John E. Russo Produce Co., Inc.*, 50 N.Y.2d 31, 44, 405 N.E.2d 205, 427 N.Y.S.2d 961 (1993). (“corporate officers and directors not liable for fraud unless they personally participate in the misrepresentation or have actual knowledge of it”).

⁴⁶ *Wantickets RDM, LLC v. Eventbrite, Inc.*, 2017 N.Y. Misc. LEXIS 2780 (Sup. Ct. Jul. 21, 2017).

⁴⁷ See *Fitzgerald v. Nat’l Rifle Asso.*, 383 F. Supp. 162 (D.N.J. 1974) (“No one is entitled to use the First Amendment protections as a shield behind which illegal activities are conducted, or legal obligations are shirked.”) 167.

A state attorney general does not ordinarily bring criminal charges against board members or organizations, but there have been exceptions. Professor Evelyn Brody has written that “In rare cases, conduct by the organization or individuals rises to the level of criminal activity — for example, the deliberate and flagrant use of an exempt school to convert personal expenditures into deductible charitable contributions.” Brody also highlights the possibility of criminal prosecutions for supporting where fraudulent misreporting to State of Federal agencies plays a role. *United States v Mubayyid* upheld an individual’s convictions for filing false Forms 990 which concealed a jihadist website, newsletter and an orphan sponsorship program for families of martyred mujahideen.”⁴⁸

In the NRA hypothetical, if an individual or individuals worked within a nonprofit in bad faith to corrupt the 2016 election, the Attorney General, responsible for protecting the integrity of nonprofit organizations and the integrity of the election system, would be within the bounds of her role to refer the matter for prosecution to the State’s Attorney.

INTERJURISDICTIONALITY

The final problem addressed here concerns the overlap between federal and state authority. It could be argued that it is traditional for Attorneys General to defer to the Internal Revenue Service or the Federal Election Commission in matters trenching on federal jurisdiction. In other work I have argued for the value of delineating jurisdictional boundaries to encourage enforcement.⁴⁹

There are working relationships which have operated to establish priorities for enforcement. State and federal authorities devote their resources in a consistent manner to some enforcement activities rather than others, depending on current events and political philosophies. Such consistency reduces concerns about double jeopardy, over-prosecution, and the like. Regardless of the pressure state authorities may feel to go after a nonprofit for its failure to pay state tax on unrelated business income, such cases will virtually always be an IRS priority. Conversely, no matter how forcefully the Service is urged to take up a conflict over the interpretation of a bylaw (unless, perhaps, the bylaw involved discrimination subject to federal civil rights laws or depended for its interpretation on the language of a federal tax provision), state action would probably occur first.⁵⁰

⁴⁸ Evelyn Brody in Matthew Harding, ed., *RESEARCH HANDBOOK FOR NOT-FOR-PROFIT LAW* (Elgar, forthcoming).

⁴⁹ See Silber, *Nonprofit Interjurisdictionality*, 80 Chi.-Kent. L. Rev. 613 (2005).

⁵⁰ *Id.*

CONCLUSION

In the situation described here, as hypothesized above, it appears—however paradoxical or ironic—that the federal tax and election rules, as currently constituted, are likely to be less effective than the powers afforded to state attorneys general under their broad authority, which includes monitoring and, where appropriate, holding accountable nonprofits and their officers and directors who become vehicles for foreign interference in local, state, or national elections.

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