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The Tax Treatment of International Philanthropy and Public Policy

Robert Paine

THE TAX TREATMENT OF INTERNATIONAL PHILANTHROPY AND PUBLIC POLICY

Robert Paine[*]

I. INTRODUCTION

This paper concerns the tax treatment of charitable[1] contributions made to foreign organizations. Specifically, it discusses the current tax structure that governs contributions made by United States taxpayers to charitable organizations[2] located outside the U.S. and its possessions.

International charitable giving by Americans has continued to increase in the past decade. Americans contributed approximately $203

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1. The term "charitable" is used throughout the text of this article as a generic term and includes any religious, scientific, literary, educational, and similar purpose. *See* United States v. Proprietors of Social Law Library, 102 F.2d 481 (1st Cir. 1939); *see also*, Ould v. Washington Hosp. for Foundlings, 95 U.S. 303, 311 (1877) ("A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."). *Id.*

2. The term "charitable organization" is used throughout the text of this article to refer to any category of organization that is described in § 501(c)(3) of the Internal Revenue Code of 1986 ("Code"). I.R.C. § 501 (2003). Section 501(c)(3) provides that charitable organizations include:

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

I.R.C. § 501(c)(3) (2003).

billion to non-profit organizations in 2000.[3] Of this total, an estimated $2.71 billion was contributed to foreign charities.[4] This figure is up approximately $1 billion from 1992 when international giving totaled $1.71 billion.[5]

However, historical and recent events have made apparent the fact that all of these donations may not have met the goals that Congress intended when it drafted the means to facilitate and restrict international philanthropy. Charities and foundations have a sporadic history of being used to support armed conflict in various parts of the world. In the 1970's, the Irish Northern Aid Committee, or Noraid, used contributions from U.S. individuals to fund the paramilitary activity of the Irish Republican Army, or IRA.[6] Recently, it has become evident that charitable contributions have been used to finance international terrorism. Shortly after the terrorist attacks of September 11, 2001, federal officials raided the offices of the Holy Land Foundation for Relief and Development, a Dallas-based charity.[7] The U.S. government has established that contributions to the organization were used to fund the mission of the Islamic Resistance Movement, or Hamas.[8] Following this revelation, the Bush administration has accused several other charities of being fronts for terrorist organizations: the Global Relief Foundation as a front for al Qaeda, and the Mercy International Relief Organization as a facilitator of the 1998 U.S. embassy bombings, among others.[9]

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3. AM. ASS'N OF FUNDRAISING COUNCIL TRUST FOR PHILANTHROPY, GIVING USA: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2000, at 13 (2001).

4. *Id.* at 19.

5. AM. ASS'N OF FUNDRAISING COUNCIL TRUST FOR PHILANTHROPY, GIVING USA: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 1992, at 11 (1992).

6. Glenn Simpson, *Hesitant Agents: Why the FBI Took Nine Years to Shut Group It Tied to Terror*, WALL ST. J., Feb. 27, 2002, at A1.

7. *Id.*

8. *Role of Charities and NGO's in Terrorist Financing: Congressional Testimony Before the Senate Committee on Banking, Housing and Urban Affairs*, 107th Cong. (2002) (statement of Matthew Levitt, Senior Fellow, Washington Institute for Near East Policy).

9. Shortly after September 11, 2001, President Bush issued Executive Order 13,224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism." Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (2001). The Executive Order mandates a freeze of all U.S. assets of 27 individuals and entities. Included in this number were three charities: the Al Rashid Trust, the Wafa Humanitarian Organization, and Makhtab Al-Khidamat/Al Kifah. Subsequently, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001 Pub. L. No. 107-56, 115 Stat. 272 (2001). Pursuant to the USA Patriot Act, the State Department put 39 entities on the list of organizations suspected of terrorist activities or supporting terrorism. In addition to the three organizations mentioned in Executive Order 13,224, the list includes two other charities, the Afghan Support Committee and the Islamic Heritage Society.

Despite the changes in the landscape of international philanthropy and the revelations regarding its abuse, the U.S. tax system continues to impose an archaic and inconsistent web of policies and restrictions on taxpayers: a system of rules and limitations that differ according to the status of the taxpayer as an individual, a public charity, or a private foundation.[10] The traditional policy that has guided the development of the charitable deduction and tax exemption is that charitable activities ease a burden that would otherwise have to be borne by the United States government. This policy creates inconsistent treatment, however, when it is applied to international charitable giving. Because of this inconsistent treatment and the ever-increasing globalization of the world's communities, Congress should adopt a new policy to guide this field: a policy that grants a charitable deduction and tax exemption (1) if a contribution or grant furthers one of the traditional charitable purposes enumerated in § 501(c)(3) and (2) if the activity does not violate the public policy of the United States.

This paper begins, in Part I, with a discussion of the tax treatment of charitable contributions made by U.S. individuals to foreign organizations. Part II analyzes the current tax structure that governs grants made by private foundations to charitable organizations abroad. Part III includes a discussion of the tax treatment of public charities that make international charitable contributions. Each of these Parts also includes, where relevant, a discussion of the practical application of these rules for the practicing attorney. The paper concludes in Part IV with a summary of the traditional policy rationale that has guided the development of the law in this area and a proposal for reform.

Recently, the Senate has passed the CARE Act of 2003 which would suspend the tax-exempt status of any terrorist organization designated as such by Executive Order or by the Immigration and Nationality Act. *See* S. 476, 108th Cong. § 208 (2003).

10. Charitable organizations described in § 501(c)(3) are divided into two classes: public charities and private foundations. A public charity is a § 501(c)(3) organization that qualifies as one of four types of organizations described in § 509(a)(1)-(4). A private foundation includes any § 501(c)(3) organization that does not qualify as one of the four types of organizations described in § 509(a)(1)-(4). For a description of § 501(c)(3), see *supra* note 2. Generally, the four types of organizations described in § 509(a)(1)-(4) include: (1) organizations conducting certain types of favored activity (e.g. a church, hospital, or educational organization), (2) organizations receiving a substantial amount of support from the general public or governmental entities, (3) organizations that act as a supporting organization for a public charity, and (4) organizations organized and operated exclusively to test for public safety. *See* I.R.C. § 509(a)(1-4) (2003).

II. TAX TREATMENT OF INDIVIDUAL DONORS

A. Introduction

Generally, Section 170 of the Internal Revenue Code[11] provides an income tax deduction for a charitable contribution made by an individual.[12] However, as explained below, unless a bilateral tax treaty applies, no deduction is allowed for a contribution that is made directly to a foreign organization. Nevertheless, charitable contributions are deductible if an individual makes the donation to a domestic charity which disburses its funds to a foreign organization as long as the funds are not "earmarked"[13] for a foreign charity and the domestic charity is not acting as a "mere conduit."[14]

B. General Statutory Framework, Historical Analysis & Policy

The income tax consequences of a charitable contribution made by an individual taxpayer are determined by § 170. It provides that "there shall be allowed as a deduction any charitable contribution payment of which is made within the taxable year."[15] A "charitable contribution" is defined as a contribution or gift to or for the use of "a corporation, trust, or community chest, fund, or foundation *created or organized in the U.S. or in any possession thereof*." (emphasis added).[16] Accordingly, the courts have interpreted this requirement to mean that the charitable deduction is limited to contributions to domestic organizations. For example, in *Welti v. Commissioner*, the Tax Court denied the deduction for direct contributions to the First Church of Christ, Scientist, located in

11. I.R.C. §§ 1 *et. seq.* (West, 1986). All section references herein are to the Internal Revenue Code of 1986, as amended ("Code"), and the regulations thereunder ("Regulations"), unless otherwise stated. For ease of reading, references to the masculine gender include the feminine and the neuter genders. The singular tense includes the plural and vice versa, unless the context requires otherwise.

12. I.R.C. § 170(a)(1) (West, 1986).

13. "Earmarking" in its traditional legal sense means to "set aside for a specific purpose or recipient." BLACK'S LAW DICTIONARY 525 (7th ed. 1999).

14. "Conduit" in its traditional sense refers to "a means by which something is transmitted." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 394 (3d ed. 1992).

15. *Id.* On April 9, 2003, the Senate passed the CARE Act of 2003 which places a restriction on the general rule that a deduction is allowed for contributions to charitable organizations. It would deny a charitable deduction for contributions made to any terrorist organization designated as such by Executive Order or by the Immigration and Nationality Act. S. 476, 108th Cong. § 208 (2003).

16. I.R.C. § 170(c) (West, 1986) (emphasis added).

Berne, Switzerland.[17]

Before the enactment of the Revenue Act of 1938, individual U.S. taxpayers could deduct contributions to charitable organizations regardless of the organization's situs. The War Revenue Act of 1917, the first Revenue Act to allow a deduction for contributions made to certain charitable organizations, did not place a geographical restriction on the charitable contribution deduction.[18] However, this provision was modified as it relates to individuals by the Revenue Act of 1938 which provided that the charitable contribution deduction is only allowed if the donee is a domestic organization.[19] Consequently, in order to qualify for the charitable deduction, the Revenue Act of 1938 required that the donee organization must be created or organized in the U.S. or any possession thereof.[20] This provision was reenacted in the Revenue Act of 1954 under the title "Charitable, etc., contributions and gifts,"[21] and it has been carried over to the current Internal Revenue Code of 1986.[22]

The rationale for allowing the deduction of charitable contributions has historically been that charitable contributions relieve a governmental burden, i.e., the government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the government.[23] Consonant with this policy, the 1938 House Ways and Means Committee reasoned that a charitable deduction should not be allowed for a contribution to a foreign charity because the contribution does not relieve a governmental burden.[24] The committee report stated:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. The U.S. derives no such benefit from gifts to foreign institutions, and the proposed limitation is consistent with the above theory.[25]

17. Welti v. Commissioner, 1 T.C. 905 (T.C. 1943).
18. War Revenue Act of 1917, ch. 63, § 214(a), 40 Stat. 300, 330 (1917).
19. Revenue Act of 1938, Pub. L. No. 75-554, § 23(o), 52 Stat. 447, 463 (1938).
20. *Id.*
21. Revenue Act of 1954, Pub. L. No. 83-591, § 170, 68 Stat. 730, 58-61 (1954).
22. Tax Reform Act of 1986, Pub. L. No. 99-514, § 170, 100 Stat. 2085, 167-89 (1986).
23. McGlotten v. Connally, 338 F. Supp. 448, 456 (D.D.C. 1972).
24. H.R. Rep. No. 75-1860, at 19-20 (1938).
25. *Id.*

C. The "Earmarking" and "Mere Conduit" Restrictions

Although § 170 does not permit a charitable deduction for a contribution directly to a foreign organization, an individual is allowed a deduction for a contribution to a U.S. charity despite the fact that it uses funds to support overseas charitable activity.[26] The same House Ways and Means Committee that concluded that a charitable deduction is not allowed if the contribution is made directly to a foreign charity concluded that, "[I]f the recipient, however, is a domestic organization, the fact that some portion of its funds is used in other countries for charitable or other purposes (such as missionary and educational purposes) will not affect the deductibility of the gift."[27]

While there is a general allowance for a deduction for a contribution to a domestic organization that uses its funds overseas, it is not an unrestricted deduction. The deduction is only allowed if the domestic organization is the "real beneficiary"[28] of the contribution and thereby maintains sufficient discretion and control over the funds before they are used for charitable activity abroad. The IRS imposes these restrictions through the use of two interconnected but distinct positions: (1) no deduction is allowed if the contribution to a domestic organization is "earmarked" for a foreign charity, and (2) the domestic organization cannot act as a "mere conduit" through which an individual's contribution is funneled immediately to a foreign organization.[29]

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26. Treas. Reg. § 1.170A-8(a)(1) provides that a charitable deduction is allowed "even though all, or some portion, of the funds of the organization may be used in foreign countries for charitable or educational purposes."

27. H.R. Rep. No. 75-1860, at 19-20 (1938).

28. *See* Gen. Couns. Mem. 34,062 (March 3, 1969) (where deductibility of contributions to the domestic organization was denied only because the "real beneficiary" was considered to be the foreign government).

29. *See generally* Rev. Rul. 63-252, 1963-2 C.B. 101 and Rev. Rul 66-79, 1966 C.B. 48. Revenue Ruling 63-252 holds that contributions to a domestic charitable organization that transmits funds to a foreign charitable organization are deductible if it can be shown that the contribution is made to or for the use of the domestic organization, and that the domestic organization is not serving as a conduit of a foreign charitable organization. The revenue ruling includes five examples as illustrations. Two of the examples are as follows:

> (1) In order to solicit funds in the U.S., a foreign organization formed a domestic organization. At the time of formation, it was proposed that the domestic organization would conduct a fund-raising campaign, pay the administrative expenses from the collected funds and send any remaining funds to the foreign organization.
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> . . .
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> (4) A domestic organization conducts a variety of charitable activities in a foreign country. If its purposes can be furthered by granting funds to charitable groups organized in the foreign country, the domestic organization makes grants for those purposes from its general fund.

Revenue Ruling 63-525 concludes that contributions to the domestic organization described

Prohibited "earmarking" occurs where an individual donor makes a charitable contribution to a domestic charity and the individual indicates that the funds are to be set aside for a specific foreign grantee.[30] In Revenue Ruling 63-252, the seminal authority on the issue, the IRS concluded that if a contribution to a domestic organization is earmarked for a foreign charity, then it is appropriate to disregard the status of the domestic charity in determining whether a deduction is allowed. In those circumstances, the IRS will look to the status of the ultimate recipient to determine if the contribution is deductible.

The second restriction requires that the domestic organization not be a "mere conduit" through which an individual's contribution is channeled to a foreign organization without the domestic organization exercising any control and discretion over the funds. "Mere conduits" are defined as domestic organizations in which funds come to rest momentarily before being sent to a foreign organization that is selected by the individual donor.[31] The IRS has concluded that an individual cannot use a domestic organization to achieve what the Code otherwise expressly prohibits:

> "A given result at the end of a straight path is not made a different result because reached by following a devious path." . . . [I]t seems clear that the requirements of section 170(c)(2)(A) would be nullified if contributions inevitably committed to a foreign organization were held to be deductible solely because, in the course of transmittal to a

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in the first example set forth above are not deductible. However, contributions received by the domestic organization described in the fourth example are deductible because they are not earmarked in any manner and the use of such contributions is subject to the control of the domestic organization.

Revenue Ruling 66-79, amplifying Rev. Rul. 63-252, provides rules for determining whether a domestic charitable organization exercises sufficient control over the use of contributions. The domestic charity in Rev. Rul. 66-79 was organized by individuals who were interested in furthering the work of a foreign organization which was organized and operated exclusively for charitable, scientific, and educational purposes. The name of the domestic organization suggested a purpose to assist the foreign organization. The bylaws of the domestic charity provided, in part, that: (1) The making of grants and contributions shall be within the exclusive power of the board of directors; (2) the board of directors shall have the power to make grants to any organization organized and operated exclusively for charitable, scientific, or educational purposes within the meaning of § 501(c)(3) of the Code; and (3) the board of directors may, in its absolute discretion, refuse to make any grants or contributions or otherwise render financial assistance to or for any or all purposes for which funds are requested. The domestic charity in Rev. Rul. 66-79 also refused to accept contributions that were earmarked for a foreign organization. Under the facts of Rev. Rul. 66-79, contributions to the domestic charity were regarded as for the use of the domestic charity and not for the foreign organization receiving the grant from the domestic organization. Rev. Rul. 66-79 concludes that contributions to the domestic organization are deductible under § 170.

30. *See* Rev. Rul. 63-252, 1963-2 C.B. 101.

31. *Id.*

foreign organization, they came to rest momentarily in a qualifying domestic organization. In such case the domestic organization is only nominally the donee; the real donee is the ultimate foreign recipient.[32]

In Revenue Ruling 66-79, the IRS announced that a domestic organization is considered a mere conduit if an individual contributor exercises so much control over the domestic organization that he effectively determines the domestic organization's use of the funds. Where, however, the domestic organization receives contributions and places them in a general fund over which it exercises complete control, it will not be considered a conduit.[33]

D. "Friends Of" Organizations

A "friends of" organization is a charitable entity organized in the U.S. for the purpose of supporting a foreign charitable organization.[34] The IRS has allowed charitable deductions for individual contributions to "friends of" organizations although they appear to violate the conduit and earmarking restrictions.[35] That is to say, if an individual makes a contribution to a domestic charity organized for the sole purpose of supporting a foreign organization, it appears that in substance the taxpayer is earmarking his contribution for the foreign organization. Furthermore, it appears that in substance the domestic organization is acting as a mere conduit through which an individual can achieve what § 170 expressly prohibits, i.e., deducting a contribution made to an organization that was not created in the U.S.

However, in Revenue Ruling 66-79, the IRS allowed a charitable deduction for contributions to a "friends of" organization as long as the "friends of" organization exercises sufficient control and discretion over the use of the funds. In that Revenue Ruling, the IRS described a test to determine whether a "friends of" organization exercises sufficient control and discretion over the use of contributions; as long as an individual donor does not determine an organization's use of funds, then a "friends of" organization will be deemed to have sufficient control and discretion over the funds.

32. *Id.*

33. *See* Rev. Rul. 66-79, 1966-1 C.B. 48.

34. *See Id.* The organization in the ruling was a "friends of" organization.

35. *Id.*

E. Bilateral Tax Treaties

Although contributions by individuals directly to a foreign organization are generally not deductible, the U.S. has entered into several bilateral tax treaties which alter the general rules in this area.[36] Three bilateral tax treaties permit an income tax deduction for a direct contribution by a U.S. individual to a foreign charity: the U.S.-Canada Treaty,[37] the U.S.-Mexico Treaty,[38] and the U.S.-Israel Treaty.[39] Each treaty provides for reciprocal deductions of cross-border charitable contributions.[40] However, a deduction is only allowed against foreign source income.[41] For example, if a U.S. taxpayer earns income in Mexico and makes a contribution to a Mexican-based charity that is essentially equivalent to a U.S. charity, then the individual can deduct the contribution against his income earned in Mexico. If the taxpayer earns no income in Mexico, then a deduction against his U.S. income is not allowed.

F. Summary

In summary, under the traditional policy rationale, a deduction is allowed for a charitable contribution because it eases a burden on

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36. I.R.C. § 894 (2003) provides that the Code "shall be applied to any taxpayer with due regard to any treaty obligation of the U.S. which applies to such an organization."

37. *See* Convention between the United States of America and Canada, September 26, 1980, U.S.-Can., art. 19 (as amended by the protocols signed on June 14, 1983 and March 28, 1994), [hereinafter U.S.-Canada Treaty].

38. *See* Convention Between the Government of the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 18, 1992, U.S.-Mex., art. 22, [hereinafter U.S.-Mexico Treaty].

39. *See* Convention Between the Government of the United States of America and the Government of Israel with Respect to Taxes on Income, November 20, 1975, art. 12, U.S.-Isr., (as Amended by the Protocol Signed on May 30, 1980) [hereinafter U.S.-Israel Treaty].

40. *See, e.g.*, Article 15-A(1) of the U.S.-Israel Treaty, which provides:

> In the computation of taxable income of a citizen or a resident of the United States for any taxable year under the revenue laws of the United States, there shall be treated as a charitable contribution under such revenue laws contributions to any organization created or organized under the laws of Israel (and constituting a charitable organization for the purpose of the income tax laws of Israel) if and to the extent such contributions would have been treated as charitable contributions had such organization been created or organized under the laws of the United States. . . .

41. *See, e.g.*, Article 15-A(1) of the U.S.-Israel Treaty, as amended by the protocol approved in 1982, which provides that a U.S. taxpayer may only claim a deduction for contributions to Israeli charities up to 25 percent of his or her Israeli-source adjusted gross income. Similarly, Article 22, paragraph 2 of the U.S.-Mexico Treaty, in conjunction with § 170(b)(1)(A), limits the amount of an individual U.S. taxpayer's deduction for contributions to Mexican charities to 50 percent of his or her Mexican source adjusted gross income.

government. However, unless a bilateral tax treaty applies, an individual is not allowed a charitable deduction for a direct contribution to a foreign charity because a charitable contribution made outside the United States presumably does not ease a governmental burden. Nevertheless, a charitable deduction is allowed if an individual makes a contribution to a domestic charity which then disburses the funds to a foreign charity, as long as the funds are not earmarked for a foreign charity and the domestic charity does not act as a mere conduit. In order to meet these requirements, the domestic charity must maintain sufficient control and discretion over the funds contributed to the organization.

III. TAX TREATMENT OF PRIVATE FOUNDATIONS

A. Introduction

Private foundations, like public charities, are not concerned with the deductibility of their grants because they are exempt from taxation. However, private foundations are concerned with maintaining their exempt status and avoiding any excise taxes that may be imposed by Chapter 42 of the Code. Section 4945 of Chapter 42 imposes an excise tax on any "taxable expenditure" of a private foundation.[42] A "taxable expenditure" is defined, *inter alia*, as any amount paid or incurred by a private foundation as a "grant to an organization other than a public charity or an exempt operating foundation,[43] unless the granting foundation exercises 'expenditure responsibility.'"[44] Generally, a grant by a private foundation to a foreign charity is not subject to the excise tax on taxable expenditures if (1) the foreign organization has a

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42. I.R.C. § 4945(a)(1) (2003).

43. I.R.C. § 4940(d)(2) (2003) defines an "exempt operating foundation" as any private foundation if:

> (1) the foundation is an operating foundation, i.e., it makes direct distributions for the active conduct of the activities constituting the purpose or function for which the foundation is organized and operated, or
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> (2) the foundation has been publicly supported for at least 10 taxable years, i.e., it is an organization that normally receives a substantial part of its support from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public.

44. I.R.C. § 4945(d) (2003). As defined in the Code, "expenditure responsibility" requires a private foundation to exert all reasonable efforts and to establish adequate procedures (1) to see that a grant is spent solely for the purpose for which it is made, (2) to obtain full and complete reports from a grantee on how the funds are spent, and (3) to make full and detailed reports with respect to such expenditures to the Secretary of the Treasury. I.R.C. § 4945(h) (2003).

determination letter from the IRS that recognizes it as a public charity, (2) the foundation exercises expenditure responsibility with respect to the grant, or (3) the foundation makes a "good faith determination" that the prospective grantee is the equivalent of a public charity.

B. General Statutory Framework, Historical Analysis & Policy

The general exemption provision is § 501. It provides that "an organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503."[45] Since private foundations and public charities are organizations that are described in § 501(c), they are both exempt from tax.[46] Civilizations throughout documented history have provided some form of tax exemption. The Bible chronicles the story of tax exemption in the ancient world, "We also notify you that it shall not be lawful to impose tribute, custom, or toll upon any one of the priests, the Levites, the singers, the doorkeepers, the temple servants, or other servants of this house of God."[47] After the Reformation, tax benefits spread to secular charities with the British Statute of Charitable Uses of 1601.[48] The 1601 Statute eased the technical conveyancing rules of the common law in order to facilitate charitable transfers to certain religious and secular charities.

The enactment of the first corporate income tax in 1894 gave rise to the codification of federal income tax exemption in the United States. The Revenue Act of 1894 included an explicit exemption for "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes . . . [and] stocks, shares, funds or securities held by any fiduciary or trustee for charitable, religious, or educational purposes"[49] A similar exemption provision has been included in every subsequent federal income tax act.

Although several theories have been proposed to explain the existence of tax exemption,[50] the courts and commentators recognize that the traditional explanation for exemption is similar to the policy justification that underlies the charitable deduction, i.e., that exempt

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45. I.R.C. § 501(a) (2003).

46. *See supra* note 10 for a discussion of organizations that qualify as a § 501(c) organization.

47. *Ezra* 7:24 (New Revised Standard Version).

48. An Act to Redress the Mis-employment of Lands, Goods, and Stocks of Money Heretofore Given to Certain Charitable Uses, 1601, 43 Eliz. 1, ch. 4 (Eng.).

49. Revenue Act, ch. 349, § 32, 28 Stat. 509, 556 (1894).

50. *See generally*, JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS, at 330-50 (2d ed. 2000).

entities ease a burden on government.[51] Congress provides an exemption from taxation for certain entities because they relieve the government from the burden of performing certain services or providing certain goods to the public. In this view, exemption is a *quid pro quo* for an exempt organization's cost of providing these goods and services.

C. The Excise Tax on Taxable Expenditures

Although § 501(a) provides that private foundations are generally exempt from taxation, they are subject to excise taxes in specific circumstances. One of the circumstances in which an excise tax is imposed is if a private foundation makes a taxable expenditure.[52] Under § 4945, any amount paid or incurred by a private foundation as a grant to an organization is a taxable expenditure unless the grant is made to a public charity or to an exempt operating foundation or the private foundation exercises expenditure responsibility with respect to the grant.[53] The term "public charity" includes three categories of charitable organizations described in §§ 509(a)(1), (a)(2), and (a)(3). These categories include:

> (1) churches, educational organizations, hospitals and medical research facilities, certain organizations related to colleges and universities, governmental units, and publicly supported organizations as described in Section 170(b)(1)(A)(i)-(vi);[54]
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> (2) Section 501(c)(3) organizations which receive a substantial part of their total revenue or support from activities substantially related to the organization's exempt purpose;[55] and
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> (3) organizations operated to be a "supporting organization" for an organization described in (1) or (2) above.[56]

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51. *See e.g.*, Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 581 (1924); St. Louis Union Trust Co. v. United States, 374 F.2d 427, 432 (8th Cir. 1967); McGlotten v. Connally, 338 F. Supp. 448, 456 (D.D.C. 1972); BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 8-16 (7th ed. 1998); Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in CRITERIA FOR EXEMPTION UNDER § 501(C)(3), in IV RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2025, 2033-34 (John P. Persons et al. eds., 1977).

52. I.R.C. § 4945(a) (2003).

53. I.R.C. § 4945(d)(4) (2003).

54. I.R.C. § 509(a)(1) (2003).

55. I.R.C. § 509(a)(2) (2003).

56. I.R.C. § 509(a)(3) (2003). A "supporting organization" is defined as an organization that is "organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the

Furthermore, the Regulations provide that for purposes of the expenditure responsibility rules, a grantee organization is treated as a public charity if:

> (1) the organization qualifies as a public charity under Section 509(a)(1), except that its funds are not used within the U.S., or it was organized under the laws of a foreign country;[57]
>
> (2) it is an organization described in Section 170(c)(1) (i.e., it is a state, possession of the U.S., or any political subdivision of a state or possession of the U.S.);[58] or
>
> (3) it is a foreign government, or any agency or instrumentality thereof, or an international organization designated as such by Executive Order under 22 U.S.C. § 288 (which includes, among others, organizations such as the United Nations, World Health Organization, International Monetary Fund, and the International Bank for Reconstruction and Development).[59]

Any amount paid by a private foundation to a foreign organization which is recognized by the IRS as a public charity is not a taxable expenditure within the meaning of § 4945.[60] However, very few foreign charities have obtained a § 501(c)(3) determination letter confirming its status as a public charity.[61] Therefore, in order to avoid the excise tax on taxable expenditures, a private foundation that makes a grant to a foreign charity normally must comply with one of two requirements: (1) it must exercise expenditure responsibility with respect to the grant, or (2) it must make a "good faith determination" that the foreign organization is the equivalent of a public charity.

D. Expenditure Responsibility

Expenditure responsibility requires that a private foundation use all reasonable efforts and establish adequate procedures to (1) see that a grant is spent solely for the purpose for which it was made, (2) obtain

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functions of or to carry out the purposes of one or more specified organizations described in paragraph (1) or (2) [of § 509]."

57. Treas. Reg. § 53.4945-5(a)(4) (2003).

58. Treas. Reg. § 1.511-2(a)(2) (2003). A grant by a private foundation to an instrumentality of a state for exclusively charitable purposes is not a taxable expenditure.

59. Treas. Reg. § 53.4945-5(a)(4) (2003).

60. I.R.C. § 4945(d)(4) (2003).

61. *See generally* JOHN EDIE & JANE NOBER, BEYOND OUR BORDERS, COUNCIL ON FOUNDATIONS (revised ed. 1999).

full and complete reports from the grantee on how the funds are spent, and (3) make full and detailed reports with respect to such expenditures to the IRS.[62] In order to meet these requirements, a foundation must: (1) conduct a pre-grant inquiry,[63] (2) execute a written agreement with the foreign organization that specifically addresses certain requirements specified in the Regulations,[64] (3) obtain annual reports and a final written report from the grantee organization regarding the use of the grant funds,[65] and (4) provide the IRS with the required information concerning grants made in a taxable year.[66]

1. Pre-Grant Inquiry

Before making a grant to a foreign organization, a private foundation must conduct a limited inquiry that is complete enough to give a reasonable person assurance that the grantee will use the funds for charitable purposes.[67] The pre-grant inquiry should focus on (1) the identity, prior history, and experience of the grantee organization and its managers and (2) any knowledge that the private foundation has concerning the management, activities, and practices of the grantee organization.[68]

2. Written Grant Agreement

The expenditure responsibility rules require that the private foundation must execute a written agreement with the foreign organization that addresses certain requirements specified in the Regulations.[69] Specifically, the written agreement must include an agreement by the grantee:

(1) to repay any portion of the grant not used for grant purposes;[70]

(2) to submit full and complete annual reports on the manner in which the funds are spent and the progress made in accomplishing the

62. Treas. Reg. § 53.4945-5(b)(1) (2003).
63. Treas. Reg. § 53.4945-5(b)(2) (2003).
64. Treas. Reg. § 53.4945-5(b)(3) (2003).
65. Treas. Reg. § 53.4945-5(c) (2003).
66. Treas. Reg. § 53.4945-5(d)(1) (2003).
67. Treas. Reg. § 53.4945-5(b)(2) (2003).
68. *Id.*
69. Treas. Reg. § 53.4945-5(b)(3) (2003).
70. Treas. Reg. § 53.4945-5(c)(1) (2003).

purposes of the grant;[71]

(3) to maintain records of receipts and expenditures and to make its books and records available to the grantor at reasonable times;[72] and

(4) not to use any of the funds (i) to carry on propaganda, or otherwise attempt to influence legislation; (ii) to influence the outcome of any public election, or to carry on, directly or indirectly, any voter registration drive; (iii) to make any grant which does not comply with the individual grant requirements of Section 4945(d)(3) or the organizational grant requirements of Section 4945(d)(4); or (iv) to undertake any activity for any noncharitable purpose.[73]

3. Reports from the Grantee Organization

The grantor private foundation must obtain annual reports from the foreign organization on the use of grant funds.[74] The reports must show how the funds are being used in compliance with the terms of the grant and the progress made by the grantee in fulfilling the purposes of the grant.[75] After all of the grant funds are used, the foreign organization must submit a final report to the foundation.[76] The final report must cover all expenditures made from the grant funds and indicate the progress made toward the purposes of the grant.[77]

4. Private Foundation Report to the IRS

To satisfy the reporting requirements, a private foundation must submit annual reports to the IRS concerning grants over which the foundation must exercise expenditure responsibility.[78] The foundation must submit required information on its annual information return, Form 990-PF, with respect to each grant awarded during the year and for each grant for which any amount or report is outstanding at any time during the year.[79]

71. Treas. Reg. § 53.4945-5(c)(2) (2003).
72. Treas. Reg. § 53.4945-5(c)(3) (2003).
73. Treas. Reg. § 53.4945-5(b)(3) (2003).
74. Treas. Reg. § 53.4945-5(c)(1) (2003).
75. *Id.*
76. *Id.*
77. *Id.*
78. Treas. Reg. § 53.4945-5(d)(1) (2003).
79. *Id.*

E. Equivalency Determinations & Grantee Affidavits

The second alternative that the Regulations permit in making a grant to a foreign charity is that the private foundation can make a "good faith determination" that the foreign organization is the equivalent of a U.S. public charity, i.e., that the foreign organization would qualify under §§ 501(c)(3) and 509(a)(1), (a)(2), or (a)(3) if it applied for recognition of its status as a public charity.[80] According to the Regulations, the "good faith determination" can be based on either an opinion of counsel that the foreign organization is the equivalent of a public charity or an affidavit of the grantee organization.[81]

1. Equivalency Determination

An equivalency determination is an opinion of counsel (retained by either the grantor or the grantee) that the foreign grantee organization, except for its place of organization, is the equivalent of a U.S. public charity.[82] While the IRS has not provided explicit guidelines regarding the information upon which such an opinion should be based, the requirements for grantee affidavits described in the next section indicate that the opinion should be based on at least the following information and documents:

(i) Organizational documents of the foreign grantee, i.e., articles, bylaws, governing rules, etc.

(ii) A detailed description of the grantee's purposes.

(iii) A copy of the relevant statutory law, or provisions in the governing instrument, stating how the assets of the grantee will be distributed if it should cease operations.

(iv) A demonstration that the grantee does not provide any individual private benefits and does not engage in any non-charitable activity.

(v) A demonstration that the grantee does not engage in legislative or political activity.

80. Treas. Reg. § 53.4945-5(a)(5) (2003). *See supra* notes 54-56 and accompanying text for a discussion of organizations that qualify as a § 501(c)(3) organization that are charitable organizations described in §§ 509(a)(1), (a)(2), or (a)(3).

81. *See* Treas. Reg. §§ 53.4942-3(a)(6), 53.4945-5(a)(5), 53.4945-6(c)(2).

82. Treas. Reg. § 53.4945-5(a)(5) (2003).

(vi) Financial support data.[83]

2. Grantee Affidavit

A private foundation may also make a grant to a foreign charity by obtaining a written affidavit from the grantee organization that contains enough information for a foundation manager to make a reasonable determination that the foreign charity is the equivalent of a U.S. public charity.[84] The affidavit must be in English, must be attested to by a principal officer of the grantee organization and contain or be accompanied by the following:

(i) A statement that the grantee is operating exclusively for charitable purposes.

(ii) A description of the grantee's past and present activities.

(iii) Copies of the grantee's charter, bylaws, and other governing instruments.

(iv) A statement that the country's laws and customs do not allow the grantee's assets to benefit private parties.

(v) Dissolution provisions guaranteeing that remaining assets will be distributed for charitable and public purposes.

(vi) A statement that the country's laws or customs do not allow the grantee to engage in substantial lobbying or any political activity.

(vii) A grantee other than a church, hospital, or educational institution must show that it meets the public support test under Section 170(b)(1)(A)(vi) or Section 509(a)(2) by furnishing current financial information.[85]

(viii) A statement identifying what other organizations, if any, control or operate with the grantee.[86]

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83. BENJAMIN T. WHITE, THE FOUNDATION DESK REFERENCE: A COMPENDIUM OF PRIVATE FOUNDATION RULES 19 (2002).

84. Treas. Reg. § 53.4945-5(a)(5) (2003).

85. Generally, an organization meets the public support test if it normally receives a substantial part of its support from a governmental unit or from direct or indirect contributions from the general public. *See* Treas. Reg. § 1.170A-8.

86. White, *supra* note 83, at 20.

F. Revenue Procedure 92-94[87]

Revenue Procedure 92-94 provides a simplified procedure for private foundations that intend to make a good faith determination that a foreign organization is the equivalent of a U.S. charity. The Revenue Procedure applies to a grant that is made by a private foundation to a foreign organization that does not have a determination letter from the IRS that recognizes the foreign organization's classification as a public charity. A private foundation that follows the requirements of Revenue Procedure 92-94 will be protected against the imposition of excise taxes under § 4945, i.e., excise taxes imposed on taxable expenditures.

Revenue Procedure 92-94 allows a domestic foundation to base its reasonable judgment and good faith determination that the foreign organization is the equivalent of a U.S. charity on a "currently qualified" affidavit prepared by the grantee, provided that it fulfills the affidavit requirements outlined in Revenue Procedure 92-94.[88] These requirements are similar to the requirements outlined above for grantee affidavits. The affidavit does not have to be prepared for a particular U.S. donor. Once the affidavit has been executed, it will protect all private foundations that make grants to the foreign organization as long as the affidavit is "currently qualified." An affidavit will be "currently qualified" as long as the underlying facts on which the affidavit is based have not changed.

G. Bilateral Tax Treaties

The application of the equivalency test discussed above may be affected by a tax treaty entered into by the United States.[89] For example, the U.S.-Mexico treaty provides that the Contracting States may agree that Mexican law provides standards that are essentially equivalent to those under U.S. law for public charities.[90] If the States so agree, the

87. Rev. Proc. 92-94, 1992-2 C.B. 507.

88. *Id.* See Appendix A for a sample form affidavit and instructions; see Appendix B for a sample completed affidavit.

89. For a discussion of the equivalency test, see *supra* note 82 and accompanying text.

90. U.S.-Mexico Treaty, art. 22(1) states:

> An organization resident in a Contracting State which is operated exclusively for religious, scientific, literary, education or other charitable purposes shall be exempt from tax in the other Contracting State in respect of terms of income, if and to the extent that: a) such organization is exempt from tax in the first-mentioned Contracting State; and b) the items of income of such organization would be exempt from tax in the other Contracting State as exempt from tax as an organization with religious, scientific, literary, educational, or other charitable purposes.

U.S.-Mex Treaty *supra* note 38, art. 22.

treaty provides that a U.S. private foundation may treat a Mexican grantee as a U.S. public charity if the grantee has been determined by Mexican authorities to meet such standards.[91] If this is the case, the U.S. private foundation does not need to use the equivalency test. To date, the U.S. has entered into treaties with Canada,[92] Germany,[93] and the Netherlands[94] that contain a similar provision.

H. Summary

In summary, under the traditional policy rationale, both private foundations and public charities enjoy tax favored status because they perform activities that ease a burden on government. However, private foundations are subject to an excise tax if they make any taxable expenditure. A grant by a private foundation to a foreign charity is not subject to the excise tax imposed on taxable expenditures if (1) the foreign charity has a determination letter from the IRS that recognizes it as a public charity, (2) the foundation exercises expenditure responsibility with respect to the grant, or (3) the foundation makes a good faith determination that the prospective grantee organization is the equivalent of a public charity. Revenue Procedure 92-94 provides a simplified procedure by which a private foundation can make a determination that a foreign organization is the equivalent of a U.S. charity.

IV. TAX TREATMENT OF PUBLIC CHARITIES

The tax treatment of public charities that make grants to foreign organizations is less complicated than private foundations due to the fact that public charities are not subject to the strict requirements of Chapter 42 of the Code. A U.S. public charity may transfer funds to a foreign organization without subjecting itself to excise tax or jeopardizing its exempt status if (1) the transfer is consistent with the charity's exempt purpose and (2) the charity controls and monitors the use of the funds by

91. *Id.*

92. *See supra* note 37, U.S.-Canada Treaty.

93. Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and Certain Other Taxes, August 29, 1989, U.S.-F.R.G., art. 27, [hereinafter U.S.-Germany Treaty].

94. Convention Between the United States of America and the Kingdom of the Netherlands of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, December 18, 1992, U.S.-Neth., art 36, [hereinafter U.S.-Netherlands Treaty].

the foreign organization.[95] If the grant is made to a foreign charity which is recognized by the IRS as a public charity, the requirement that the transfer be consistent with the domestic charity's exempt purpose is presumed to be met.[96] If the grantee organization does not have a determination letter from the IRS, then there is no presumption that the funds are being used for an exempt purpose.[97] In that instance, the domestic charity will have the burden of establishing that the grant was made for an exempt activity and that the grant was in fact used for the purpose for which it was made.[98] As an IRS CPE text states, the failure to meet these requirements may jeopardize the public charity's exempt status and the deductibility of contributions to the organization:

> If a domestic organization, otherwise qualified under 501(c)(3), transmits funds to a private organization not described in 501(c)(3) and fails to exercise, or has too little discretion and control over the use of such funds to assure their use exclusively for charitable purposes, the domestic organization forfeits its qualification for exempt status because it cannot demonstrate that it is operated exclusively for charitable purposes, and contributions to it are not deductible.[99]

V. POLICY & PROPOSAL

As mentioned throughout the text of this paper, the traditional policy underlying the revenue laws that govern charitable giving is that these activities enjoy tax favored status because they relieve a burden that the government would otherwise have to bear.[100] Congress provides a charitable deduction and exemption from taxation because charitable activity relieves the government from the burden of performing certain services or providing certain goods to the public. This policy, when applied to charitable giving beyond the borders of the United States, leads to inconsistent treatment.

As discussed in detail above, a deduction is not allowed if an individual makes a charitable contribution directly to a foreign organization because it presumably does not ease a burden that the government would otherwise have to bear. For example, suppose an

95. Rev. Rul. 74-229, 1974-1 C.B. 142.

96. *Id.*

97. Rev. Rul. 68-489, 1968-2 C.B. 210.

98. *Id.*

99. JAMES F. BLOOM ET AL., FOREIGN ACTIVITIES OF DOMESTIC CHARITIES AND FOREIGN CHARITIES, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1992, at 233 (1991).

100. *See supra* notes 23-25 and 50-51 and accompanying text.

individual makes a contribution to a hypothetical charity named Habitat for the Homeless and suppose that it is a charity organized in West Virginia and operated to help the homeless in a rural part of that state. Under the traditional policy rationale, the contribution is deductible because it relieves the government of a burden to provide affordable housing that it may otherwise have. Conversely, suppose that the same individual makes a charitable contribution directly to a hypothetical organization known as The Fund for the Homeless of Uganda, a charity that provides housing to citizens of Uganda and organized and operated solely within the borders of that country. A deduction is not allowed in this instance because the contribution does not relieve a burden that the government may otherwise have to bear. That is, since the government of the United States does not have the burden of providing housing to citizens of Uganda, it should not grant tax favored status to contributions that provide affordable housing in that country. At this point, the traditional policy when applied to charitable giving outside the United States is consistent.

However, suppose that the same individual makes a charitable contribution to a domestic organization, The Charity for the Homeless, which then disburses its funds to The Fund for the Homeless of Uganda. Although traditional policy dictates that tax favored status is only granted if an activity relieves a governmental burden, the contribution is deductible despite the fact that the funds are ultimately being used to further a purpose that does not relieve a burden on the United States government; i.e., to help the homeless of Uganda. Suppose further that the Ford Foundation makes a grant to The Fund for the Homeless of Uganda. Even though the traditional policy analysis informs that exemption is a matter of legislative grace for organizations that relieve a governmental burden, the Ford Foundation maintains its exempt status despite the fact that the grant furthers a charitable purpose in Uganda. Nevertheless, in these two instances the contribution by an individual that ultimately funds the activity of The Charity for the Homeless is deductible and the domestic charity and the private foundation maintain their tax-exempt status despite the fact that the contribution does not ease a burden on the United States government.

Furthermore, the policy of granting a charitable deduction and tax exemption if an activity eases a governmental burden is an archaic method of analysis. This policy was articulated and adopted by the House Ways and Means Committee in 1938. This era was a time of great isolationism in the United States and political instability abroad.[101] Due to the globalization of the world marketplace and the interdependence of economic and political structures through international organizations such as the International Monetary Fund, the United Nations, and the International Bank for Reconstruction and Development, the traditional policy rationale is not an effective method of determining whether a charitable deduction and tax exemption should be granted.[102]

Due to the archaic nature of the traditional policy rationale and its inconsistent results when applied to international philanthropy, Congress should adopt a new policy to facilitate and restrict international charitable giving. This policy should grant a charitable deduction and tax exemption (1) if a contribution or grant furthers one of the traditional charitable purposes enumerated in § 501(c)(3) and (2) if the activity does not violate the public policy of the United States. This policy analysis is broad enough to recognize a more fundamental goal of government, that is to encourage charitable activity as representing one of the highest and noblest achievements of mankind.[103] At the same time, the policy is restrictive enough to facilitate only those activities which do not violate the fundamental goals of United States policy.[104]

Suppose, for example, an individual makes a contribution to a hospital organized in Iraq and operated to treat Iraqi cancer patients. Under the policy proposed in this paper, the contribution is deductible because it is made for one of the traditional charitable purposes

101. *See generally*, ISOLATIONISM: OPPOSING VIEWPOINTS (Bruno Leone et al. eds., 1994).

102. For a thorough treatment of globalization, see generally THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (First Anchor Books, 2000).

103. It has long been recognized that government grants a charitable deduction and tax exemption in order to encourage charitable activity as an expression of a noble achievement. *See e.g.*, Matter of Huntington, 168 N.Y. 399, 407 (N.Y. 1901).

> The organized charities and benevolent agencies which actually relieve human misery, and labor in unselfish devotion to improve the moral and physical conditions of mankind, are alike the fruits and aids of good government, and to exempt their property – usually the gifts of the benevolent – from the burdens of taxation is scarcely less the duty than the privilege of the enlightened legislator.

Id. See also People *ex rel.* Seminary of Our Lady of Angels v. Barber, 42 Hun. 27, (N.Y. App. Div. 1887), *aff'd*, 106 N.Y. 669 (N.Y. 1887); ELI K. PRICE, TAXATION OF LEARNING, CHARITY AND RELIGION (1851).

104. The Supreme Court has acknowledged that a public policy constraint has long been recognized in the law of charitable trusts. In *Bob Jones University v. United States*, the Court ruled that "to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest." 461 U.S. 574, 592 (1983). *See also* Perin v. Carey, 65 U.S. 465, 476 (1861) ("[I]t has now become an established principle of American law, that courts of chancery will sustain and protect . . . a gift . . . to public charitable uses, provided the same is consistent with local laws and public policy . . . .").

enumerated in § 501(c)(3) as interpreted by the IRS and the courts[105] and the activity does not violate the public policy of the United States. In contrast, suppose that the same individual makes a contribution to an Iraqi hospital but the hospital is organized to treat Iraqi Republican Guard soldiers wounded in combat with the United States. In this instance, the contribution is not deductible. Although it furthers one of the traditional charitable purposes, it violates the interests and public policy of the United States. The policy proposed in this paper recognizes the inherent value of charitable activity whether it occurs at home or abroad, but it also seeks to limit charitable giving to those activities which do not violate the public policy of the United States.

VI. CONCLUSION

As discussed above, the purpose of this paper has primarily been to examine the current tax treatment of international charitable giving and secondarily to provide a summary analysis of the policy that has given rise to this tax treatment and set forth a proposal that Congress should adopt a new policy to facilitate and restrict international philanthropy.

The Code provisions that govern charitable giving and the Regulations thereunder give rise to inconsistent treatment when they are applied to cross border charitable giving. Individuals are not allowed a charitable deduction for grants made directly to a foreign organization, but they are allowed a deduction for the same contribution if it is made to a domestic organization despite the fact that it is eventually used to further charitable activity abroad. Likewise, private foundations and public charities which make grants to foreign organizations do not jeopardize their exempt status unless they do not comply with the oversight and control and discretion requirements. Despite the fact that a grant by a private foundation or a public charity relieves no more of a governmental burden than a charitable contribution directly from an individual, a charitable deduction is not allowed in the latter circumstance whereas tax exemption is not revoked in the former.

Due to the archaic nature of the policy rationale and the inconsistent treatment that results when it is applied to international charity, Congress should adopt a new policy. This new policy should grant a charitable deduction and tax exemption (1) if the contribution

105. Although § 501(c)(3) and the Regulations thereunder do not contain a reference that promotion of health is a charitable purpose, this activity has been recognized by the IRS and the courts as charitable on several occasions. *See e.g.* E. Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1287 (D.C. Cir. 1974); Rev. Rul. 69-545, 1969-2 C.B. 117.

furthers one of the traditional charitable purposes enumerated in § 501(c)(3) and (2) the activity does not violate the public policy of the United States. This policy will better meet the changing role of international charity in an ever-increasingly globalized and interconnected world, and it will ensure that any charitable contribution will not support an activity that violates the public policy of the United States.