

Politics and the Pulpit

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Another election season is upon us and with it a flurry of information — and misinformation — about what churches and other religious organizations can and cannot do. Fortunately for religious leaders, the law is relatively clear.

THE LAW

Like all organizations that are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code and eligible to receive tax deductible contributions under section 170(c)(2) of the Internal Revenue Code, churches are prohibited from supporting or opposing any candidate for elected public office. This prohibition applies to candidates for federal, state or local offices. The IRS enforces this prohibition through audits, fines, and loss of tax-exempt status.

Q: Doesn't the First Amendment allow churches to support and oppose candidates?

A: No. Churches, like all organizations tax-exempt under section 501(c)(3) of the Internal Revenue Code, are absolutely prohibited from supporting or opposing candidates for elected public office. As recently as 2000, a federal appellate court squarely rejected a church's claim that the First Amendment's free exercise of religion clause allowed the church to urge the public to vote against a candidate. *Branch Ministries and Dan Little, Pastor v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000); see also *Bob Jones University v. United States*, 461 U.S. 574, 603 (1983) (Supreme Court held that "not all burdens on religion are unconstitutional The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (citation omitted)). The fact that a church may be motivated by its religious principles will therefore not prevent a church from losing its tax-exempt status and facing other penalties if it supports or opposes any candidate.

WHAT IS SUPPORTING OR OPPOSING A CANDIDATE?

The courts and the IRS consider all of the relevant facts and circumstances in determining whether a church has supported or opposed a candidate. While making donations to candidates, raising funds for candidates and endorsing candidates are prohibited, so are more subtle efforts to support or oppose candidates. In its recently updated *Tax Guide for Churches and Religious Organizations* (Publication 1828), the IRS provides the following examples of prohibited activities by churches:

- **Sermon.** Minister D is the minister of Church M. During regular services of Church M shortly before the election, Minister D preached on a number of issues, including the

importance of voting in the upcoming election, and concludes by stating, “It is important that you all do your duty in the election and vote for Candidate W.” Since Minister D’s remarks indicating support for Candidate W were made during an official church service, they constitute political campaign intervention attributable to Church M.

- **Church Newsletter.** Minister B is the minister of Church K. Church K publishes a monthly church newsletter that is distributed to all church members. In each issue, Minister B has a column titled “My Views.” The month before the election, Minister B states in the “My Views” column, “It is my personal opinion that Candidate U should be reelected.” For that one issue, Minister B pays from his personal funds the portion of the cost of the newsletter attributable to the “My Views” column. Even though he paid part of the cost of the newsletter, the newsletter is an official publication of the church. Since the endorsement appeared in an official publication of Church K, it constitutes campaign intervention attributed to Church K.
- **Candidate Invitation.** Minister F is the minister of Church O. The Sunday before the November election, Minister F invited Senate Candidate X to preach to her congregation during worship services. During his remarks, Candidate X stated, “I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday.” Minister F invited no other candidate to address her congregation during the Senatorial campaign. Because these activities took place during official church services, they are attributed to Church O. By selectively providing church facilities to allow Candidate X to speak in support of his campaign, Church O’s actions constitute political campaign intervention.
- **Voter Guides.** Church S distributes a voter guide during an election campaign. The voter guide is prepared using the responses of candidates to a questionnaire sent to candidates for major public offices. Although the questionnaire covers a wide range of topics, the wording of the questions evidences a bias on certain issues. By using a questionnaire structured in this way, Church S is participating or intervening in a political campaign.

Court decisions, IRS rulings and IRS publications provide the following additional examples of prohibited activity:

- **Statements.** Publishing or distributing written or printed statements or making oral statements on behalf of or in opposition to a candidate. Treasury Regulation § 1.501(c)(3)-1(c)(3)(iii); *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973).
- **Evaluating Candidates.** Considering the qualifications of all candidates, selecting those determined to be best qualified or evaluating the candidates based on objective and nonpartisan criteria, and publicizing the results of that selection or evaluation.

Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988), cert. denied, 490 U.S. 1030 (1989); Revenue Ruling 67-71.

- **Distributing Others' Evaluations of Candidates.** Distributing the evaluations of candidates by others, such as the views of the audience for a candidate forum. Technical Advice Memorandum 9635003 (Apr. 19, 1996).
- **Legislative Voter Records.** Publishing a compilation of the voting records of incumbents on a narrow range of issues, such as land conservation, and distributing the compilation widely among the electorate, even if the guide does not include express statements in support of or in opposition to any candidate. Revenue Ruling 78-248, Situation 4.
- **Campaign Material.** Distributing voter education material prepared by a candidate, political party or PAC. Kindell & Reilly, "Election Year Issues," IRS Exempt Organizations Continuing Professional Education Technical Instruction Program for FY2002, at 372.
- **Allowing Use of Space, Services or Mailing List.** Selling or renting space, services or mailing lists to a candidate unless available to all candidates on an equal basis, also available to the public on the same basis, and provided on a regular basis (not provided for the first time to a candidate). Kindell & Reilly, "Election Year Issues," IRS Exempt Organizations Continuing Professional Education Technical Instruction Program for FY2002, at 383-84.
- **Loan Funds.** Making a loan to, or guaranteeing a loan to, a candidate, political party or PAC. Technical Advice Memorandum 9812001 (Aug. 21, 1996).

Q: Does this mean churches and pastors can't do anything related to an election?

A: No. Churches are allowed to engage in strictly non-partisan election-related activities. For example, churches can encourage their members to register to vote and to vote as long as they do not encourage them to support or oppose particular candidates or parties. Encouraging support of a candidate includes oblique references, such as, for example, referring to a candidate for re-election as President by talking about all of the progress made during the "past 3-1/2 years" immediately before the election and discussing the importance of protecting the "conservative" (or "liberal") agenda, even if the candidate is not mentioned by name. Pastors are also allowed to personally support and even endorse candidates, but they must not use any church resources, such as letterhead, newsletters or facilities, to do so and must make it clear that they are speaking on their own behalf and not on behalf of the church.

Q: Does this mean churches can't speak out on public policy issues?

A: No. Churches can speak out on public policy issues as long as such messages are not attempts to urge support for or opposition to any candidate. Churches can also engage in lobbying (supporting or opposing legislation, including ballot initiatives) as long as doing so remains an insubstantial part of the church's total activities. Neither the IRS nor the courts have set a bright line for what is "insubstantial," but generally spending less than five percent of the church's expenditures, time, etc. on such activities should be insubstantial.

WHAT CAN HAPPEN IF A CHURCH SUPPORTS OR OPPOSES A CANDIDATE?

A church that supports or opposes a candidate can find itself facing an IRS audit, fines and loss of tax-exempt status. Public information about IRS audits is relatively scarce because the IRS is not permitted to release such information, but here are a few examples of what has happened to some churches and other religious organizations:

- **Branch Ministries (The Church at Pierce Creek).** Four days before the 1992 presidential election, this church placed full-page advertisements in two newspapers in which it urged Christians not to vote for then-presidential candidate Bill Clinton because of his positions on certain moral issues. The IRS began an inquiry of the church within a matter of weeks. Eight years later, after extensive litigation, the U.S. Court of Appeals for the District of Columbia upheld the IRS's revocation of the church's tax-exempt status.
- **Christian Broadcasting Network.** In the mid-1980s, this ministry supported the presidential campaign of its founder, Rev. Pat Robertson, according to the IRS. Ten years later CBN settled with the IRS by agreeing to the revocation of its tax-exempt status for 1986 and 1987, the revocation of the tax-exempt statuses of three former affiliates, making a "significant payment" to the IRS, avoiding partisan campaign activities in the future, placing more outside directors on its board, and implementing other organizational and operational changes to ensure tax law compliance.
- **Old Time Gospel Hour.** In 1986 and 1987, this ministry affiliated with Rev. Jerry Falwell raised money for a PAC, according to the IRS. After a four-year audit by the IRS, the IRS revoked the tax-exempt status of the ministry retroactively for 1986 and 1987 and the ministry agreed to pay the IRS \$50,000 in taxes for those years and to change its organizational structure so that no future political campaign intervention activities would occur.

These examples illustrate the following burdens churches that support or oppose candidates may face:

- **IRS Audit:** The IRS can only open a church tax inquiry, which can then lead to an audit, if it has sufficient evidence to create a reasonable belief that the church has in

fact violated federal tax law. Evidence of a single incident of a pastor endorsing a candidate from the pulpit or of a church hosting a candidate or PAC fundraiser is enough to meet this standard, however. As shown by the above examples, such audits can take years to resolve, costing tens of thousands of dollars in legal fees and distracting church staff from their other responsibilities and duties.

- **Fines:** The Internal Revenue Code imposes a 10% excise tax on amounts expended for supporting or opposing a candidate by a section 501(c)(3) organization, including a church, and a 2.5% excise tax (up to a maximum of \$5,000) payable by any manager who approved the expenditure knowing it was against the law. The Code imposes additional taxes if a church or other section 501(c)(3) organization refuses to correct the violation. Correction involves recovering the political expenditures to the degree possible and taking steps to prevent future violations.
- **Injunction and Immediate Taxation:** Congress has also given the IRS the authority to seek an immediate injunction in the case of flagrant violations of the prohibition on supporting or opposing candidates, and authority to immediately assess tax for willful and flagrant violations of the prohibition.
- **Revocation of Tax-exempt Status:** The IRS can revoke the tax-exempt status of a church that supports or opposes a candidate. For churches that only receive income in the form of contributions, revocation itself does not have any financial consequences because gifts are generally not taxable. For churches with investment or other income, however, becoming taxable for one or more years results in that income becoming taxable.
- **Changes in Operations and Organization:** The IRS may agree not to revoke the tax-exempt status of a church or to impose the maximum financial penalties, but only if a church agrees to take certain steps to prevent future violations of the law. These steps may range from requiring a church's leaders to agree to a written policy against supporting or opposing candidates to seeking changes in a church's governance structure to the degree that structure is not based on specific religious convictions.
- **Election Law:** Supporting or opposing a candidate may also violate federal or state election law. For example, a church that is incorporated and which makes a contribution to a candidate's campaign has violated federal election law. Violations of election law can lead to an investigation by the Federal Election Commission or its state equivalent, the imposition of fines, and even criminal penalties.
- **Other Consequences:** A church that improperly supports or opposes a candidate may face negative publicity. It may also face loss of state or local tax-exempt status, including property tax exemption, if that exemption is based on federal exemption or applies the same criteria as federal exemption. The IRS is required to inform state authorities of any revocation of tax-exempt status.

Q: Isn't loss of tax-exempt status only "symbolic" and so there is no real penalty for a church that supports or opposes a candidate?

A: Mathew D. Staver, President and General Counsel of Liberty Counsel, has stated that because churches can easily reclaim tax-exempt status and donations to churches are not taxable as income, "churches do not need to fear the loss of their tax-exempt status" as a result of supporting or opposing candidates. He bases this view on the result of the Branch Ministries case, described above. This position is wrong for several reasons.

Even if a church does not suffer any financial penalty from the loss of tax-exempt status for one or more years because its only income is contributions, a church will still bear the burden of responding to an IRS inquiry and possible audit. More importantly, an IRS investigation will almost certainly distract church leaders from their other responsibilities and duties, often for several years.

A church may also face financial penalties. The IRS may assess excise taxes on both the church and its leaders. If the church received investment or other non-contribution income during the year for which it is no longer tax-exempt, it may be required to file IRS Form 1120 (corporate income tax return) and pay tax on that income. State or local authorities may also demand taxes for that period as well, including property taxes.

Rev. Jerry Falwell, in the July 21, 2004 edition of his e-newsletter Falwell Confidential, cites Mr. Staver's views and states that Branch Ministries only lost its "IRS letter" for one day. This is simply incorrect. The IRS revoked the tax-exempt status of Branch Ministries on January 19, 1995 retroactively to January 1, 1992 and the courts upheld that revocation. The only reason this may not have resulted in tax was if Branch Ministries' sole source of income was contributions.

Rev. Falwell also states that no church has ever really lost its tax-exempt status. This is clearly false. A simple search of IRS announcements for the word "church" reveals that on average about one church a year loses its tax-exempt status.

The greatest penalty, however, may be reputational. If the church becomes, fairly or not, primarily known in the community as the church that violated the law by supporting or opposing particular candidates, its ability to witness to the community may be irrevocably damaged.

ADDITIONAL RESOURCES

Additional information about the rules for churches and election-related activity include:

- IRS Publication 1828, Tax Guide for Churches and Religious Organizations, available at www.irs.gov/pub/irs-pdf/p1828.pdf

- Churches and Politics: A Guide for Religious Leaders, produced by Americans United for Separation of Church and State and available at www.au.org/site/PageServer?pagename=resources_pastorsguide
- Politics and the Pulpit: A Guide to the Internal Revenue Code Restrictions on the Political Activity of Religious Organizations, written by Deirdre Dessingue, Associate General Counsel of the United States Conference of Catholic Bishops, published by The Pew Forum on Religion and Public Life, and available at www.pewtrusts.com/pdf/religion_pew_forum_irs.pdf
- Analysis: Churches & Politics: A Primer for Following the Law, written by George R. “Chip” Grange, Stephen H. King and Stephen S. Kao, published by the Baptist Press (the Southern Baptist news service), and available at www.bpnews.net/bpnews.asp?ID=18752

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