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Critique of IRS Publication 1828: Tax Guide for Churches and Religious Organizations By James Bopp, Jr. October, 2002

In July, 2002, the Internal Revenue Service released its revised and updated “Tax Guide for Churches and Religious Organizations.” The Tax Guide puts its myriad rules, regulations, and interpretations of Section 501(c)(3) into an easy and readable format. Although it may be a welcome clarification of the position of the Internal Revenue Service in some circles, it should not be viewed uncritically. In reality, it is a clarification of the IRS’s attack on the First Amendment of the U.S. Constitution.

The Problem

The problem addressed by these comments is illustrated when, on the one hand, people of faith who speak about moral issues *in public* are accused of attempting to force their religion upon others; and when, on the other hand, they address moral issues *in church*, they are accused of engaging in politics. The Jeffersonian “wall of separation” doctrine, which does not appear in the U.S. Constitution, has inspired a rather bold attempt to silence people of faith not only in the public square, but also in their churches. This attitude is an unofficial but outspoken form of bias or discrimination against people of faith.

A good example is the issue of abortion. When people of faith speak out against abortion in the public arena, they are told not to force their religious views upon others. When people of faith speak out against abortion in their churches, they are told not to bring politics into the church. Opposition to abortion is interpreted as support for pro-life political candidates and opposition to pro-abortion candidates, *even when the candidates’ names are not mentioned.*

Sometimes churches are also threatened with loss of tax exempt status, and sometimes they are investigated by the Internal Revenue Service in order to determine whether revocation of their exempt status is justified. Thus, the possible loss of tax exempt status is used by those hostile to people of faith, to chill their right of free speech, and silence them in their own churches.

This bias against churches has been codified in Section 501(c)(3) of the Internal Revenue Code by the prohibition against activities considered “political intervention” broadly interpreted and enforced by the Internal Revenue Service. The root of the current problem with the prohibition against political intervention by churches and other organizations exempt under IRC § 501(c)(3) is: (1) the vague and overbroad definition of “political intervention;” (2) the draconian penalties for violation of the prohibition; and (3) the resulting chilling effect of the prohibition on churches who want to speak out about the social and moral issues facing our nation.

I. A vague and overbroad definition of “political intervention” by the Internal Revenue Service includes much more than the use of express words in favor of or opposition to a candidate for public office.

Section 501(c)(3) tax exempt status is limited to organizations “which *do 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” (emphasis added). The prohibition on participation or intervention in a political campaign language has been shortened for quick reference in customary usage to the phrase “political intervention.”

A. What is “political intervention” according to the IRS?

“Political intervention” constitutes any activity “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors.”¹

Although the Federal Election Commission has adopted a bright line test of what constitutes “political intervention,” the IRS has not.² Instead of a bright line test, the IRS has adopted a “facts and circumstances” test. Thus, “all the facts and circumstances must be considered.”³

¹26 U.S.C. § 527(e)(2).

²The Federal Election Commission’s “express advocacy” test arose from the United States Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1, 77 (1976), where the Court held that the Federal Election Campaign Act of 1971 (FECA) was limited to the regulation of “communications that expressly advocate the election or defeat of a clearly identified candidate.” The key word is “expressly.” The FECA was subsequently amended to conform to what is known as the “express advocacy” standard in *Buckley*. 2 U.S.C. § 431(17).

³*Election Year Issues* at 344, 346 & 349. “Election Year Issues” is a section of the *Exempt Organizations Technical Instruction Program for FY 2002*, which is a continuing professional education test for IRS agents produced by the IRS. It is available from the Internal Revenue Service, Cat. No. 86865P.

It has even been acknowledged that educational activities may be political intervention when using such a vague and overbroad test: “Educating the public is not inherently inconsistent with the activity of impermissibly intervening in a political campaign.”⁴

B. Specific activities affected by the IRS definition of “political intervention.”

For example, voter registration and GOTV (Get-Out-the-Vote) activities are considered “political intervention” by the IRS unless they are nonpartisan, done without regard to voter’s political preference, do not name any candidate or do not favor one candidate over another, do not name a political party, and the materials *only* urge registering and voting.

The preparation and distribution of voter guides is “political intervention” unless they address a “wide variety” of issues, the position of the organization on the issues is not indicated, and the voter guides are distributed broadly to the general public, not a target audience.⁵

Candidate forums are only permissible voter education if “all legally qualified persons” are included, a broad range of issues are covered, questions are posed by “a nonpartisan, independent panel of knowledgeable persons,” candidates are given an equal opportunity to present their views, and the moderator states that the views expressed are the views of the candidates, not the organization.⁶

Even educational activities may be deemed “political intervention” if there is a use of “code words” like “conservative,” “liberal,” “pro-life,” “pro-choice,” “anti-choice,” “Republican,” or “Democrat.”⁷ Further, any “coordination” of an *otherwise permitted activity* with a political committee or candidate constitutes “political intervention.”⁸

It is obvious that the expression of an opinion on any matter of public concern may be deemed “political intervention” when such a vague and overbroad definition is used. When political issues are inherently moral issues as well, churches are effectively excluded from the debate by such a vague and overbroad rule. When the Internal Revenue Service uses an “all the facts and circumstances” test, the likelihood that any communication addressing social and moral issues will be found to be “political intervention” is substantial.

⁴Treasury Advice Memorandum (TAM) 8936002.

⁵Revenue Ruling 78-248, 1978-1 C.B. 154; *Election Year Issues* at 370-72.

⁶Rev. Rul. 86-95, 1986-2 C.B. 73; *Election Year Issues* at 372-75.

⁷*Election Year Issues* at 345.

⁸TAM 9117001.

II. The result of the prohibition is a chilling effect on churches who want to speak out about the social and moral issues facing our nation.

The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The First Amendment protects the four “indispensable democratic freedom[s].”⁹

Political expression is “at the core of our electoral process and of the First Amendment freedoms.”¹⁰ Further, “[I]t can hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.”¹¹ “[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates.”¹²

Section 501(c)(3), as currently interpreted, effectively silences churches by prohibiting them from addressing those social and moral issues that are at the center of public policy debate. In other words, Section 501(c)(3) only permits churches to discuss moral issues that don’t have any impact on current public policy issues. Such a rule marginalizes people of faith and makes churches irrelevant to public discourse and debate. It is inherently discriminatory.

Even if very carefully orchestrated, any communication that might have an impact on an issue of public policy may be deemed “political intervention” by the IRS under current law. All that is necessary is that a communication be found by the IRS to “contain some relatively clear directive that enables the recipient to know the organization’s position on a specific candidate or slate of candidates.”¹³ No wonder so many clergy and churches avoid addressing any social or moral issues during an election year. No matter what the church’s communication is, it can be construed under the “all the facts and circumstances” test to be supporting all candidates who share the same or similar view, and opposing all candidates who hold a different view.

In short, the problem is that the IRS doesn’t think the First Amendment applies to Section 501(c)(3).

⁹Thomas v. Collins, 323 U.S. 516, 529-30 (1945).

¹⁰Williams v. Rhodes, 393 U.S. 23, 32 (1968).

¹¹Buckley v. Valeo, 424 U.S. 1, 14-15 (1976).

¹²Mills v. Alabama, 384 U.S. 214, 218 (1966).

¹³*Election Year Issues* at 345-46.

The Solution

The solution is to reject the position of the IRS in regard to Section 501(c)(3) and to affirm the First Amendment. As stated above, the purpose of the First Amendment was to protect the free discussion of governmental affairs including the discussion of candidates for political office. In legal parlance, discussion of governmental affairs is called “issue advocacy.” The United States Supreme Court has held that protection of issue advocacy reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁴ However,

the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. . . . In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers. . . .¹⁵

The Supreme Court in *Buckley*, in affirming absolute constitutional protection for issue advocacy, recognized that issue advocacy could influence elections.

Public discussion of public issues, which also are campaign issues, readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert influence on voting at elections.¹⁶

Based on this recognition, the Court in *Buckley* affirmatively endorsed influencing elections through issue advocacy:

As long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.¹⁷

¹⁴New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

¹⁵*Buckley*, 424 U.S. at 42-43.

¹⁶*Id.* at 43 n.50.

¹⁷*Id.* at 45.

The express advocacy test protects issue advocacy communications from regulation. Overbreadth and vagueness “can be avoided only” by limiting statutes “to communications that include[] explicit words of advocacy of election or defeat of a candidate.”¹⁸ The Court gave examples of “express words of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”¹⁹ Thus, the Court adopted an “explicit words of advocacy” test, not a “magic words” test.

Thus, as long as a church avoids using express advocacy for a candidate, and its major purpose and activities continue to promote religion, it may discuss the moral and social issues that it considers important. The First Amendment protects its right to do so.

Using the above bright line tests, Section 501(c)(3) is not nearly as restrictive as the IRS would have us believe. As the 2002 elections approach, the need for clear guidelines on the permissible political activities of churches and pastors becomes great. This paper provides these guidelines based upon the requirements of the Federal Election Campaign Act, the Internal Revenue Code, the First Amendment, and the United States Supreme Court precedents cited above.

These are guidelines for action recommended to insure that churches and pastors conform with the law, but not necessarily with Internal Revenue Service interpretations of the law. One caution - state laws may be more restrictive than these guidelines and, therefore, in applying them to specific situations, particularly state elections, you should consult your own local counsel.

Conclusion

It is time to stop the IRS and others from using Section 501(c)(3) to silence churches. Clergy and churches should be able to make public statements about social and moral issues, and candidates’ positions on social and moral issues, without threat of investigation, loss of tax exempt status, or assessment of taxes and penalties.

¹⁸*Id.* at 43.

¹⁹*Id.* at 44 n.52.

Guidelines for Political Activities of Churches and Pastors

Tax Exemption of Churches

Almost all churches are exempt under Section 501(c)(3) of the Internal Revenue Code on the basis that they are “operated exclusively for religious, charitable . . . or educational purposes.” As a 501(c)(3) exempt organization, a church:

a. is exempt from paying corporate income taxes and donations to it are tax deductible on federal tax returns, and

b. may expend funds for religious, charitable and educational purposes and an insubstantial amount on lobbying and to promote legislation.

A 501(c)(3) exempt organization, however, may not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.” Thus, a church may not participate in a political campaign by expenditure of its funds. Not all *political activity* which would influence a political campaign, however, falls under this prohibition.

Political Activities

Political activities referred to here are activities which influence the election of candidates for political office – most of which are referred to as electioneering. Activities which can influence the election of a political candidate are quite broad and range from contributions to a political candidate to activities such as publishing the voting record of incumbents running for reelection. Only some of these activities are considered active electioneering which cannot be done by a church, *some of this activity can even be done by a 501 (c)(3) organizations*; it depends on the type of activity.

Active electioneering cannot be done by a church. Active electioneering involves actions such as endorsement of candidates and expenditures of funds to expressly advocate the election or defeat of a candidate for political office. Active electioneering is of three types: (1) a direct contribution which is a monetary contribution *given* to a candidate, (2) in-kind contributions which include giving things of value to a candidate (such as a church mailing list) and paying for a communication which expressly advocates the election or defeat of a clearly identified candidate made in consultation with or with the knowledge of the candidate, and (3) independent expenditures which are expenditures expressly advocating the election or defeat of a political candidate made *without* the knowledge of or consultation with any candidate.

Individuals, however, such as individual pastors, may participate in political campaigns, as long as they do so as individuals, not in the name of the church. Any individual, including a pastor, may wear different hats at different times and, therefore, be involved in political activity, as long as he *is wearing the right hat*.

The following is a list of activities that may be considered political activities in the broad sense and that a church or pastor, in his individual capacity and using his own funds, may wish to do. A “yes” response means the activity is permissible, a “no” means it is not.

	<u>Church</u>	<u>Pastor</u>
2. Discuss the positions of candidates on public issues	Yes	Yes
3. Endorsement of Political Candidates	No	Yes
4. Contributions to Political Candidates	No	Yes
5. In-Kind Expenditures In Favor of or Against Political Candidates	No	Yes
6. Independent Expenditures In Favor of or Against Political Candidates	No	Yes
7. Contributions to PACs	No	Yes
8. Payment of Expenses for Attendance at Caucus of State/National Convention	No	Yes
9. Appearance of Political Candidate at Church Meeting or Service	Yes	N/A
10. Distribute:		
a. Candidate Surveys	Yes	Yes
b. Voting Records	Yes	Yes
c. Candidate Political Statement	No	Yes
10. Distribution by others of Candidate Political Statements in Church Parking Lot	Yes	N/A
11. Rent Church List (at Market Value)	Yes	N/A
12. Non-partisan Voter Education and		

Registration	Yes	Yes
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13.Church Bulletin or Newsletter:

a.Political Ads at regular rate	Yes	N/A
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b.Political Ads at less than regular rate	No	N/A
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c.News Stories	Yes	N/A
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d.Editorials	No	N/A
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Explanation of Individual Items

Item 1. **Discuss the positions of candidates on public issues.**

Pastors and churches are free to discuss the positions of candidates on issues – including criticizing or praising them for their positions. This is called issue advocacy.

Item 2. **Endorsement of Political Candidates.**

The endorsement of a candidate includes any statement which uses explicit words to expressly advocate the election or defeat of a clearly identified candidate, such as “elect,” “support,” “defeat,” or “oppose.” This is called express advocacy. A church may not engage in express advocacy, but a pastor, in his individual capacity, may.

Item 8. **Candidate Appearance at Church Meeting.**

A political candidate may appear at a church service. The appearance of a candidate before a church service, however, is limited as follows:

a.any other candidate for the office or any other political party who is a candidate for the office who requests to appear must be given the same opportunity, and

b.no solicitation for funds for the candidate or endorsement of the candidate may be made by any representative of the church.

In addition, a church may allow political candidates to have a meeting or use the facilities of the church on the same basis that civic groups and other organizations are allowed to. If civic groups and other organizations are required to pay some rent for using the church property, the political candidate should be charged the same amount.

Item 9 (a). **Candidate Survey.**

A Church may publish or distribute the results of surveys of candidates on public issues. Such surveys, however, must be non-partisan. As a result, 501(c)(3) church groups should observe the following conditions in publishing or distributing the survey:

a.publish the response of all the candidates for the particular office by use of “yes” and “no”. It may use “+” and “-“ or “pro-life” and “anti-life” to indicate whether the candidate’s position on the issue conforms with the church’s position on the issue. The survey may specify the desired or “morally correct” response;

b. do not include any words indicating either endorsement of or support for any of the candidates or indicate that the reader should “vote pro-life”. Advocacy of one issue voting should be reserved for other issues of the church bulletin or newsletter when the survey is not published; and

c. do not publish the response to the survey under the control, direct or indirect, of any candidate.

It is preferable that candidate surveys involve a variety of issues, but this is not required.

Item 9 (b). Voting Records.

501(c)(3) church groups may also publish the voting records of incumbent public officeholders. In the case of publication of voting records, the church has more leeway than in publishing candidate surveys as follows:

d.the church, in publishing the incumbent’s votes on particular issues, may indicate the church’s view and the fact that the incumbent supported or opposed the church’s view. Thus, “+” or “-“ or “pro-life” and “anti-life” may be used, and

e.in other respects, the publications should be non-partisan. As a result, the voting records of all incumbents in the area should be presented, candidates for reelection should not be identified, no comment should be made on an individual’s overall qualifications for public office, and no statements expressly advocating the election or defeat of any incumbent as a candidate for public office should be offered.

Item 11. Rental of Church List to Political Candidates.

Lists of members of the church congregation may be rented to candidates for their use in seeking support or raising funds. The candidate must pay the fair market value for the list if it is rented from the church.

Item 12. Voter Education.

A church may participate in non-partisan voter education. Here, voter education involves discussion of the electoral process, such as how to run for public office or delegate, how to register, where to vote, helping or assisting people to register and get out the vote drives. All such activity is permissible as long as it is not directed at one party or candidate over another.

Item 13. Church Bulletin or Newsletter.

(a) & (b) Political Ads.

A church bulletin or newsletter may publish an ad for a political candidate, as long as the ad is purchased at the regular rate for such ads published in that bulletin. If discounts are given regular advertisers under certain

circumstances, the same discounts may be extended to the political advertiser. In addition, the bulletin may be selective in printing ads - for instance, only ads from pro-life candidates can be accepted. A political ad may not be sold to a candidate at less than the regular rate since this would constitute a political contribution to the candidate.

a. News Stories.

A bulletin published by a church may publish without limitation news stories on political candidates, political campaigns and endorsements of political candidates by political organizations.

The publication of voting records and candidate surveys in bulletins are subject to the limitations delineated in Items 9 (a) and 9 (b).

b. Editorials.

A bulletin published by a 501(c)(3) church, however may not publish an editorial supporting or endorsing a candidate for political office. This would be considered a church endorsement which it may not do.

V. Pastors

Pastors, as individuals, have the same rights as all other American citizens to involve themselves in political activity. Pastors thus have much greater latitude to involve themselves in political activities that does a church. The following should guide a pastor regarding personal political activities which may relate to his church position:

a. A pastor may individually and personally endorse candidates for political office, but a pastor may not endorse candidates *on behalf of* his church.

b. A pastor's personal endorsement may be made from the pulpit if it is clear that it is his personal view and not that of the church itself.

c. A pastor may allow his name to be used as a supporter of a candidate in the candidate's political advertisements. In this connection, the pastor may be identified as pastor of a particular church.

d. While a church may not establish a political action committee, pastors and other like-minded individuals may establish a political action committee, but care should be taken that the committee is separate from the church and no use is made of church assets or facilities except to the extent that church facilities are allowed to be used by other outside groups.