The Rights of Churches and Political Involvement

Since the passage of the Sixteenth Amendment of the United States Constitution, which authorized Congress to impose a federal income tax, Congress has consistently granted churches and religious organizations special exemptions from paying taxes and for receiving tax-deductible contributions.[1] However, if a church or religious organization wishes to qualify for and maintain this tax-exempt status, it must abide by the restrictions on political and legislative activities established in section 501(c)(3) of the Internal Revenue Code of 1986 (as amended).[2] Section 501(c)(3) includes two stipulations: *first*, no substantial part of the organization's activities may consist of carrying on propaganda or otherwise attempting to influence legislation;[3] and *second*, the organization may not participate in political campaigning in opposition to, or on behalf of, any candidate for public office.[4]

In light of how the Internal Revenue Service (IRS) and some courts have interpreted section 501(c)(3) [see discussion below], churches and religious organizations may well consider this law as yet another example of the government's subordination of the rights of religious persons to "matters of national public policy" or to other rights.[5] Understanding section 501(c)(3), however, is necessary for any church that wishes to positively impact the moral and social fabric of our culture. A church must decide whether it can be a viable and influential force in society within the constraints of section 501(c)(3) *or* whether it should forego the benefits of tax-exemption in order to participate unreservedly in the legislative and political process.

Legislative Activities

Defining a "Substantial" Part

Section 501(c)(3) states that a church or religious organization that engages in "substantial" legislative activities jeopardizes its tax-exempt status. The IRS interprets "legislative activities" as attempts to influence legislation by participation in lobbying for the purpose of proposing, supporting, or opposing federal, state, or local legislation; or advocating the adoption or rejection of legislation.[6]

The IRS states that its determination of whether an organization's legislative activities constitute a "substantial" part of its overall activities depends on "all the pertinent facts and circumstances in each case."[7] It gives "[c]onsideration … to a variety of factors including the time devoted by the organization to the activity (by both compensated and volunteer workers), assets devoted to the activity (such as office space, machinery, etc.), as well as expenditures."[8]

To make this determination more precise, one federal court proposed a rule of thumb that an expenditure of less than 5 percent of a tax-exempt organization's time and effort in attempting to influence legislation does not constitute "substantial legislative activities."[9] Many tax-exempt organizations now widely regard the 5-percent rule as a benchmark of permissible legislative activity.[10] Recently, however, the IRS administrative manual noted:

> [The 5-percent rule] provides but limited guidance because the court's view as to what sort of activities were to be measured is no longer supported by the weight of precedent. Moreover, it is not clear how the court arrived at the five percent figure. Most cases … have tended to avoid any

> attempt at percentage measurement of activities. … The central problem is more often one of characterizing the various activities as attempts to influence legislation. Once this determination is made, substantiality is frequently self-evident.[11]

Therefore, the IRS's approach is to conduct a case-by-case review with no precise standards. Consistent with this approach, another federal court rejected the 5-percent rule while ruling in favor of the IRS's revocation of a Christian organization's tax-exempt status.[12] The court reached its decision by broadly interpreting "substantial" legislative activities to include all indirect attempts to influence legislation through "a campaign to mold public opinion."[13] To date, this is the only reported court decision that holds that a religious organization's influence on legislation violates the requirement of section 501(c)(3)

In contrast, several court decisions have specifically held that churches and religious organizations do not violate the restriction on legislative activities when they are motivated by the religious purposes of the organization.[14] These cases, however, interpreted the law as it existed prior to the enactment of the limitation on legislative activities by Congress in 1934.[15]

At one time, the Supreme Court also appeared supportive of legislative involvement by churches and religious organizations when it noted:

> Adherents of particular faiths and individual churches frequently take strong positions on public issues … vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.[16]

But in a more recent case, the Court reasoned that since tax exemptions are "'a matter of grace that Congress can, of course, disallow as it chooses' … Congress is not required by the First Amendment to subsidize lobbying."[17] In so doing, the Court apparently viewed First Amendment rights, such as free speech and religious expression, as less important than the government's tax policy.

In short, only one reported court decision has found a religious organization in violation of section 501(c)(3) by engaging in "substantial" legislative activities. The IRS, however, refuses to abide by any precise standards, such as a percentage rule, to measure when "substantial" legislative activities have occurred. Hence, a church or religious organization seeking to acquire or maintain a tax-exempt status must be aware that there is always *some* risk that its attempt to influence legislation will prompt the IRS to pursue an audit and perhaps even revoke its tax-exempt status.

While there are no fail-safe ways to guarantee that a church or religious organization can be both involved in the legislative process and remain tax-exempt, one risk adverse approach might be for a church to *report* pending legislation to church members, without *proposing, supporting or opposing* any legislation. Of course, nothing prohibits the IRS from scrutinizing even such activity. The Supreme Court has suggested another option: section 501(c)(3) organizations could engage in substantial legislative activities if they establish a separate entity under section 501(c)(4) which could promote "social welfare" but would not qualify for tax-deductible contributions.[18] Beyond that, a church may well assess that it must speak out without inhibition on pending legislation in order to remain culturally relevant, and therefore, willingly forego its tax-exempt status altogether.

Political Activities

Defining "Political" Participation

Unlike the limitation on influencing legislation, section 501(c)(3) provides an absolute and unconditional prohibition on the involvement of tax-exempt churches and religious organizations in political activities, which means that no quantitative or qualitative analysis is necessary to determine whether "substantial" activity has occurred.[19]

According to the IRS, this prohibition means that a church or religious organization may lose its tax-exempt status if it actively *participates or intervenes* in a political campaign by making oral statements or publishing or distributing written statements on behalf of or in opposition to a particular candidate.[20] Furthermore, a church or religious organization does not qualify for an exemption if *its charter empowers it* to "directly or indirectly 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."[21]

Challenges to Exempt Status

To date, only a few religious organizations have lost their tax-exempt status due to political involvement, despite reports that numerous violations have occurred.[22] However, two attorneys who successfully defended the Catholic Church in a lawsuit brought by abortion operators and clergymen asserted that given the high cost of litigation, the mere threat of such a challenge may still have a potential chilling effect on a church's statements and activities.[23]

Recently, several public interest organizations have sought to generate such a chilling effect. For example, in early 1996, Americans United for Separation of Church and State ("Americans United"), announced that it was engaging in a concerted effort with its members and state chapters to monitor and report to the IRS any involvement in political campaigning by churches and religious organizations during the election year, with particular attention being paid to involvement with conservative political candidacies.[24] Although Americans United is not a government entity, its focus on this issue can only heighten the IRS's interest in the types of activities engaged in by churches and religious organizations.

The following sections provide illustrations of political activities that the IRS tends to scrutinize:

Campaign Involvement

According to the IRS, an organization engages in political activity in violation of section 501(c)(3) when it directly participates in the nomination and promotion of candidates for public office. For example, in 1989, the IRS revoked the tax-exempt status of an organization because it had encouraged "through its advocacy in its publications, [its members] to build a cadre of precinct committeemen in order to further its ultimate objective: the nomination and election of candidates who shared [its] beliefs."[25] The IRS observed that "[i]ntervention at this early stage in the elective process is, we believe, sufficient to constitute intervention in a political campaign."[26]

Based on this illustration, it would appear that this prohibition does not mean that churches and religious organizations cannot generally encourage their individual members to be responsible citizens who vote and take an interest in the political process, or that individual members cannot run for public office or support

candidates for public office on their own initiative. The risk of IRS scrutiny increases, however, when these incidents coincide with the church or religious organization's expression of support for a particular political candidate or agenda.[27]

Candidate Endorsements

Likewise, the IRS views an organization's formal endorsement of a political candidate as impermissible. In 1992, the IRS publicized a settlement with Jimmy Swaggart Ministries (JSM), in which JSM acknowledged that it had endorsed Pat Robertson's 1988 presidential candidacy. JSM agreed that it had endorsed Mr. Robertson through statements by Jimmy Swaggart from the pulpit of his church and in the JSM monthly magazine, and agreed to refrain from further political activities. In conjunction with the settlement, the IRS released a statement clarifying its policy on the political involvement of ministers:

> [W]hen a minister of a religious organization endorses a candidate for public office at an official function of the organization, or when an official publication of a religious organization contains an endorsement of a candidate for public office by the organization's minister, the endorsement will be considered an endorsement by the organization since the acts and statements of a religious organization's ministers at official functions of the organization and in its official publications are the principal means by which a religious organization communicates its official views to its members and supporters.[28]

In the same statement, however, the IRS clarified that pastors and other church leaders are free to become personally involved in political campaigns, "so long as those ministers or officials do not in any way utilize the organization's financial resources, facilities, or personnel, and clearly and unambiguously indicate that the actions taken or statements made are from those individuals and not of the organization."[29]

Criticism of Political Candidates

Churches and religious organizations concerned about their tax-exempt status must be careful of the timing and the extent to which they criticize a political candidate during an election year.

In one case, a federal court ruled that the Christian Echoes organization had intervened in political campaigns by using its publications and broadcasts to attack candidates and incumbents who were considered too liberal.[30] Specifically, the court stated that in 1961 the organization had criticized President Kennedy and urged its followers to elect conservatives such as Senator Thurmond; several years later, the ministry also urged its followers to defeat Senator Fulbright, criticized President Johnson and Senator Humphrey, and at its annual convention, endorsed Senator Goldwater as a presidential candidate.[31]

Relying on similar reasoning, the IRS recently revoked the tax-exempt status of Branch Ministries (a religious organization doing business as "The Church at Pierce Creek") because the organization had placed a partisan political advertisement in USA Today and The Washington Times opposing the presidential candidacy of Bill Clinton four days prior to the 1992 presidential election.[32]

Distribution of Voting Records and Candidate Surveys

A church or religious organization may publish voting records so long as it remains nonpartisan and does not indicate a preference towards any particular candidate in an election. In 1980, for instance, the IRS upheld

the tax-exempt status of a charitable and educational organization that monitored and reported on judicial and legislative activities and developments in a monthly newsletter distributed to approximately 2,000 persons nationwide.[33] The organization published a summary of the voting records of each member of Congress on selected legislative issues important to it, along with an expression of the organization's position on those issues. The IRS reasoned that since the newsletter was issued on a monthly basis to a small number of readers, the organization was not targeting a particular geographic area or seeking for the date of publication to coincide with an election campaign. Furthermore, the newsletter did not identify which members of Congress were up for reelection, issue any comment on an individual's overall qualifications for office, or expressly endorse or reject any candidate for office.[34]

In contrast, the IRS revoked the tax-exempt status of a religious organization in part because of the organization's "voter survey."[35] Despite containing a disclaimer of any endorsement, the survey clearly identified Christian candidates by their positions, which served the organization's objective of publicizing such candidates. The organization also advocated that Christians dominate the political parties so that more Christian candidates would be nominated and elected to political office.[36]

Providing a Public Forum

A 1974 IRS ruling concerning a broadcasting station held that a tax-exempt organization could provide airtime to qualified candidates for public office, so long as it made such time equally available to all candidates.[37] The station had expressed that the candidates' views were not necessarily those of the station and that the presentation was a public service to educate its viewers. By way of analogy, a church or religious organization should be able to provide a public forum to political candidates as long as it carefully avoids any implication of an endorsement. Even more consistent with this ruling would be to make the forum available to all candidates.

IRS Penalties for Engaging in Political Activities

A church or religious organization that engages in political activities may be subject to excise taxes, an injunction, and the revocation of its exemption.

Two tiers of excise taxes are imposed on a section 501(c)(3) organization involved in political activities. The first tier tax is equal to 10 percent of the amount of each political expenditure, unless the IRS determines that the expenditure was not willful or flagrant.[38] The second tier tax is a 100-percent excise tax on the amount of the political expenditure *if* the expenditure is not corrected within the period beginning on the date the expenditure occurs and ending on *either* the earlier of the date of mailing of a notice of deficiency with respect to the first tier tax *or* the date on which such a tax is assessed.[39]

The IRS may also enjoin a public charity from making further political expenditures whether or not the 501(c)(3) status is revoked.[40] Finally, the IRS may terminate an organization's exemption for the current or immediately preceding taxable year if it makes political expenditures that constitute flagrant violations of the prohibition against political activities.[41]

Conclusion

Tax exemptions for churches and religious organizations are a privilege and not a constitutional right. In fact,

to acquire and maintain this privilege, churches and religious organizations may have to forsake heretofore protected constitutional rights under the First Amendment.

The cases discussed above demonstrate that a church or religious organization that desires to acquire or maintain a tax-exempt status must always remain vigilant. Therefore, it could decide to avoid any involvement in legislative or political activities. Alternately, it could take a risk-adverse approach, such as reporting pending legislation and political candidates in an objective manner *only* and issuing disclaimers that it does not endorse any legislation or candidate. No matter what the approach, however, there is no guarantee that the IRS will not conduct an audit. Tax-exempt churches and religious organizations, therefore, must maintain meticulous records of their activities and expenditures in the event of an audit.

On the other hand, Jesus Christ challenged all Christians, and the Church, to be "the salt of the earth" and "the light of the world."[42] In this age, it requires that the Church address the deteriorating state of the Judeo-Christian moral structure in our society and the continuing rise of the modern secularistic state.[43] It may be difficult, however, to do so without participating in the ongoing political and legislative debate on critical issues affecting the moral climate of our society, such as abortion, education, and parental rights. Hence, a church or religious organization that desires to impact society may question whether the dollars saved as a result of the tax-exempt "privilege" are worth the price of becoming culturally irrelevant.

Such a church or religious organization could establish a *separate* entity under section 501(c)(4) of the Code, which could promote "social welfare" but would not qualify for tax-deductible contributions. The most direct approach, of course, would be to simply forego efforts to maintain a tax-exempt status and invest unreservedly in engaging every facet of our society, including the political realm.

Endnotes

1. Walz v. Tax Commission, 397 U.S. 664, 676 n.4 (1970).

2. All "section" references herein are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §" references are to the regulations under the Code ("Regulations"), unless otherwise noted.

3. Except as set forth in I.R.C. § 501(h) (1996).

4. I.R.C. § 501(c)(3) (1996).

5. See e.g., Bob Jones University v. United States, 461 U.S. 574 (1983) (religion rights inferior to issues concerning public policy); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 26-27 (1989) (Blackmun, J., concurring) (accusing other Justices of preferring one First Amendment value over another).

6. Treas. Reg. § 1.501(c)(3)-1(c)(3). Additionally, the Regulations regard an organization as *not* being operated for an exempt purpose if it is an "action" organization; that is, if its main or primary objective is the enactment or defeat of proposed legislation and it advocates or campaigns for such an objective.

7. Internal Revenue Service, Tax Guide for Churches and Other Religious Organizations (1994).

8. Id.

9. Seasongood v. Commissioner, 227 F.2d 907, 912 (6th Cir. 1955).

10. Hammar, Pastor, Church & Law 744 (2d ed. 1991).

11. Internal Revenue Manual §§ 392-94 (1989).

12. Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973). The Tenth Circuit Court of Appeals rejected the 5-percent rule, reasoning that a "percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances." Id. at 855. It should be noted that this decision is only binding within the Tenth Circuit; i.e., federal courts in Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.

13. Id. The court rejected the notion that to violate section 501(c)(3) it was necessary for a religious organization to attempt to influence *specific* legislation before Congress. Id.

14. See e.g., International Reform Federation v. District Unemployment Compensation Board, 131 F.2d 337 (D.C. Cir. 1942) (church organization was exempt despite proposing thirty-six legislative bills because its activity was consistent with its religious purposes); Girard Trust Co. v. Commissioner, 122 F.2d 108 (3d Cir. 1941) (Methodist Episcopal Church was exempt because lobbying activities carried on by its Board of Temperance, Prohibition and Public Morals were motivated by religious beliefs); Lord's Day Alliance v. United States, 65 F.Supp. 62 (E.D. Pa. 1946) (religious organization established to promote observance of the Sabbath was exempt since its legislative efforts were incidental to its religious purposes).

15. Hammar, supra, note 10, at 744.

16. Walz v. Tax Commision, 397 U.S. at 670.

17. Regan v. Taxation with Representation, 461 U.S. 540, 546, 549 (quoting Commissioner v. Sullivan, 356 U.S. 27, 28 (1958)). In Regan, the Court also suggested that section 501(c)(3) organizations could engage in substantial legislative activities by establishing a 501(c)(4) organization (a "civic league" promoting "social welfare") which can engage in such activities but not receive tax-deductible contributions. Id. at 544. In addition, section 501(h) of the Internal Revenue Code permits an organization to make an election to participate in lobbying activities. As set forth in section 4911(c), a sliding scale of permissible lobbying nontaxable amounts is established based on the organization expenditures for exempt purposes. Churches and their integrated auxiliaries, however, are not eligible for this election. I.R.C. § 501(h)(3) (1996).

18. Regan, 461 U.S. at 544. In addition, section 501(h) of the Internal Revenue Code permits an organization to make an election to participate in lobbying activities. As set forth in section 4911(c), a sliding scale of permissible lobbying nontaxable amounts is established based on the organization expenditures for exempt purposes. Churches and their integrated auxiliaries, however, are not eligible for this election. I.R.C.

§ 501(h)(3) (1996).

19. Furthermore, section 504(a)(2)(B) of the Code states that if an organization loses its 501(c)(3) exemption for engaging in political campaign activities, it may not seek to reclassify itself as a "civic league" promoting "social welfare" under section 504(c)(4). I.R.C. § 504(c)(4) (1996).

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

21. Id. A "candidate for public office" refers to an "individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local." Id.

22. Hammar, supra, note 10, at 750; Political Activities by Churches, 6 Church Law & Tax Rep. 3 (Sept./Oct. 1992). For instance, revocation was averted in Abortion Rights Mobilization v. Regan, 544 F.Supp. 471 (S.D.N.Y. 1982), a case in which several operators of abortion facilities and certain clergymen challenged the tax-exempt status of the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB"). The plaintiffs alleged that the Catholic Church had intervened in political campaigns as part of its efforts to oppose abortion. The court dismissed USCC and NCCB as parties on the grounds that the plaintiff had insufficient standing to file suit. Id.

23. Caron & Dessingue, I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions, 2 U. Va. J. Law & Pol. 169, 180 (1984).

24. Americans United for Separation of Church and State, "Americans United for Separation of Church and State Announces National Project to Expose Illegal Politicking By Churches," News Release (March 19, 1996).

25. I.R.S. Gen. Couns. Mem. 39811 (June 30, 1989). The IRS also revoked the organization's tax-exempt status because of the voters' surveys it published (see infra in Distribution of Voting Records and Candidate Surveys).

26. Id.

27. Tax-exempt churches and religious organizations must be on guard against the unsolicited distribution or display of political campaign literature by its individual members or others at their services or meetings. For example, Americans United recently accused a church of endorsing a particular candidate when the candidate, without prior approval, placed campaign literature on a book table in the church building.

28. As reported in Political Activities by Churches, 6 Church Law & Tax Rep. 8 (Sept./Oct. 1992).

29. Id.

30. Christian Echoes, 470 F.2d at 856.

31. Id. The Church Law & Tax Report criticizes this decision by pointing out that Christian Echoes' attacks on President Kennedy actually preceded the next presidential election by three years. Consequently, the

Report noted, this decision implies that all office holders are candidates under 501(c)(3) and effectively stifles churches and other exempt organizations from ever criticizing an office holder. Political Activities by Churches, 6 Church & Tax Rep. 3-4 (Sept./Oct. 1992). The Report also argues that a subsequent ruling of the United States Supreme Court, in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), undercuts the Tenth Circuit's rationale. In Bellotti, the Court held that business corporations have a constitutional right to address public issues, and it was impermissible for a state to penalize them for doing so. Id. at 785. In the process, the Court also asserted that it was improper under the First Amendment for a government to wield its power in a way that would channel the expression of views of business, as well as religious, charitable and civic, corporations. Although one could also take this statement to mean that the entire prohibition against political activities is unconstitutional, the Court has never issued such a conclusion. In fact, in Regan v. Taxation with Representation (discussed supra), it held that the companion limitation on legislative activities *is* constitutional and that "Congress is not required by the First Amendment to subsidize lobbying." 416 U.S. at 546.

32. This case is currently pending as Branch Ministries, Inc. v. Richardson, Civ. No. 95-CV-724 in the United States District Court of the District of Columbia. The plaintiff has filed a civil suit against IRS Commissioner Richardson, and she has defended the IRS's revocation on the basis of the reasoning in Christian Echoes. See Brief for the Defendant in support of Her Motion for Summary Judgment, p. 23-24.

33. I.R.S. Ruling 80-282 (1980).

34. Id.

35. I.R.S. Gen. Couns. Mem. 39811 (June 30, 1989). In addition to the Code, some states may have election laws that require groups that distribute voter guides to register as political committees and to make disclosures concerning their financial supporters. The constitutionality of such requirements under the Virginia election law is now the subject of pending litigation in Jordahl v. Democratic Party of Virginia, Civ. No. 95-1043-R (W.D. Va.). Please contact your state legislature to inquire if any such laws exist in your state.

36. Id. See also Association of the Bar of New York of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988), cert. denied, 490 U.S. 1030 (1989) (a non-religious organization that rated and published the ratings of candidates for elective judicial office as a very small portion of its total activities failed to qualify for tax-exempt status under section 501(c)(3)).

37. I.R.S. Ruling 74-574 (1974).

38. I.R.C. § 4955(a) (1996). Section 4955(d)(1) defines a "political expenditure" as any amount paid or incurred by a section 501(c)(3) organization for participation in or intervention in, including the publication or distribution of statements, a political campaign on behalf of or in opposition to any candidate for public office. I.R.C. § 4955(d)(1) (1996).

39. I.R.C. § 4955(f)(4) (1996). Section 4955(f)(3) defines "corrected" as the recovery of the expenditure, where possible, and the establishment of safeguards to prevent all future occurrences. I.R.C. § 4955(f)(3)

(1996).

40. I.R.C. § 7409 (1996) To enjoin, the IRS must notify the organization of its intention to seek injunctive relief if the expenditure does not cease. Prior to such notification, the IRS Commissioner must personally determine that the organization has committed flagrant political expenditures and that injunctive relief is the appropriate method to prevent any future expenditures.

41. I.R.C. § 6852 (1996).

42. Matthew 5:13-14.

43. For further reading on this issue, please request a copy of the Rutherford Institute pamphlet entitled "Engaging the Culture," by John W. Whitehead.