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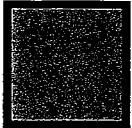
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THE IRS OFFERS GUIDANCE ON 'ELECTION YEAR

The Service's discussion of the campaigning prohibition, though generally quite helpful, risks violating organizations' right of free speech.

ISSUES' FOR EXEMPT ORGANIZATIONS

WENDELL R. BIRD

During this election year, exempt organizations will be tempted to support the candidates of their choice. The Code forbids this. The IRS has provided a full and thorough discussion of the issue in its Continuing Professional Education (CPE) materials. It is very helpful generally, except as it regrettably impinges on and ignores the freedom of speech.

The prohibition on political activities by Section 501(c)(3) organizations.

The Code forbids political activity by Section 501(c)(3) organizations, which may "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."¹ The prohibition is absolute, unlike the lobbying restriction, which forbids only "substantial" lobbying. It does not, however, apply to Section 501(c)(4), Section 501(c)(6), and certain

other organizations, so long as political activity is not their primary activity.²

The tax on political expenditures. Besides the option of revoking exemption under Section 501(c)(3), Section 4955 imposes a tax on political expenditures by Section 501(c)(3) organizations. A "political expenditure" is one made in violation of Section 501(c)(3).³ The initial tax on the organization is 10% of the amount paid, while the initial tax on a manager is 2.5% of the amount paid up to \$5,000. If there is no correction within the taxable period, there is additional tax on the organization of 100%; 50% on a manager, up to \$10,000.⁴

Where political expenditures are a flagrant violation, the IRS can immediately determine the tax for a two-year period and immediately assess it under Section 6852. The IRS also can seek an injunction against further political

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**POLITICAL
ACTIVITIES OF
LEADERS OR
MEMBERS CAN
BE ATTRIBUTED
TO A CHARITY.**

expenditures under Section 7409 if special steps are first taken.

Definition of 'candidate.' A "candidate for public office" is defined as an individual who offers him or herself, or is proposed by others, as a contestant for an elective public office, whether national, state, or local.⁵ TAM 9130008 stated that a person who has not yet announced, but has a campaign committee or exploratory committee, can be a candidate because of the "proposed by others" language. The IRS uses a "facts-and-circumstances" test for this, and for much else under the political activity prohibition, which means that there is no test at all and that the IRS knows it when it sees it.

An incumbent is not necessarily a candidate, even though he or she may theoretically run for another term. According to the legislative history, "the fact that an individual is a prominent political figure does not make him a candidate, even if there is speculation regarding his possible future candidacy for particular offices."⁶

The definitions promulgated by the Federal Election Commission (FEC) and Federal Communications Commission (FCC), of "candidates," "public office," and the like, are not determinative, and may not be *in pari materia*, according to the IRS.⁷ The FEC defines a person as a candidate when he or she has received or expended \$5,000 or more, while the FCC requires a public announcement and other prerequisites.⁸

Definition of 'public office.' For the political activities prohibition to apply, the "public office" the candidate is seeking must be an elective rather than an appointive position.

Thus, someone nominated to a position by the President and subject to confirmation by the Senate, such as a federal judge, is not a candidate. Support of or opposition to such a person's getting such a job, therefore, does not constitute intervention or participation in a political campaign. Supporting or opposing the nominee would constitute "attempting to influence legislation," however.⁹

A candidate for an office in a political party, such as a precinct committee member, is viewed by the IRS as a candidate for public office, according to GCM 39811, 6/30/89. That GCM noted that the party office was created by statute, was continuing rather than occasional, had a fixed term, and required an oath of office.

For private foundation purposes, Section 4946(c) defines a government official broadly, as the holder of either an elective or appointive office. The legislative history referred to "government officials at policy-making levels,"¹⁰ while Reg. 53.4946-1(g)(2)(i) limits "public office" to a position held by a public employee for whom "a significant part of the activities ... is the independent performance of policy-making functions." However, the statute includes various officials compensated as low as \$15,000. The strict private foundation provisions may well reach persons who are not candidates for "public office" under Section 501(c)(3), just as they generally reach other things not prohibited to public charities.¹¹

Definition of 'participating' or 'intervening in.' These definitions take in a broad range of both actors and actions.

Endorsements by individuals. The IRS recognizes that individual officials of Section

¹ Section 501(c)(3); accord, Reg. 1.501(c)(3)-1(3)(iii). There is no legislative history for this provision, though there are several interesting theories. Kindell and Reilly, "Election Year Issues," *Exempt Organizations Continuing Professional Educational Technical Instruction Program for FY 2002* (2001) (hereinafter, Kindell and Reilly (2002)) 335 at 448-51.

² Reilly and Allen, "Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations," *Exempt Organizations Continuing Professional Educational Technical Instruction Program for FY 2003* (2002) L-1. See Rev. Rul. 2004-6, 2004-4 IRB 328; IR 2003-146, 12/23/03; Kindell and Reilly (2002), *supra* note 1 at 367, fn. 18; GCM 34233, 12/3/04. Nevertheless, their political activities are likely subject to the labyrinthine requirements of Section 527 and of the Federal Election Commission (FEC).

³ Section 4955(d)(1). Political expenditures also include certain expenditures of candidate-controlled organizations. Section 4955(d)(2).

⁴ Kindell and Reilly (2002), *supra* note 1 at 354-55.

⁵ Reg. 1.501(c)(3)-1(3)(iii). Accord, Kindell and Reilly, "Election Year Issues," *Exempt Organizations Continuing Pro-*

fessional Educational Technical Instruction Program for FY 1993 (1992) (hereinafter, Kindell and Reilly (1993)) at 400, 404 (1992).

⁶ Staff of the Joint Committee on Taxation, *Lobbying and Political Activities of Tax-Exempt Organizations*, 100th Cong., 1st Sess. at 14 (Jt. Comm. Print 1987). Accord, TAM 9130008; Kindell and Reilly (1993), *supra* note 5 at 408; Hill and Kirschten, *Federal and State Taxation of Exempt Organizations* (Warren Gorham & Lamont, 1994), § 2.03[4][b], at 2-106. This appears to be more a determination by sitting legislators to protect their own reelection bids than a reasoned decision about fair application of a rule.

⁷ Kindell and Reilly (1993), *supra* note 5 at 408-10.

⁸ 11 C.F.R. section 100.3(a); 47 C.F.R. sections 73.1940(a)(1), 76.5(g)(1).

⁹ Notice 88-76, 1988-2 CB 392; GCM 39694, 1/22/88.

¹⁰ Staff of the Joint Committee on Taxation, *Summary of H.R. 13270 (Tax Reform Act of 1969)*, 91st Cong., 1st Sess. (Comm. Print 1969) at 3.

¹¹ See Kindell and Reilly (1993), *supra* note 5 at 405-06.

501(c)(3) organizations may be personally involved in political campaigns, and may endorse candidates.

[T]he IRS has acknowledged that the prohibition against political activity will not prevent the ministers or other officials of a religious organization from being involved in a political campaign, 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 those of the individuals and not of the organization.¹²

Leaders of charities, like those of other organizations, may list their positions when endorsing candidates, so long as they are acting as individuals and not as organizational heads.

The prohibition against political campaign activity does not prevent an organization's officials from being involved in a political campaign, so long as those officials do not in any way utilize the organization's financial resources, facilities, or personnel, and clearly and unambiguously indicate that the actions taken and statements made are those of the individuals and not of the organization.¹³

The IRS has helpfully offered language that "would serve as a sufficient disclaimer." It suggests: "Organization shown for identification purposes only; no endorsement by the organization is implied."¹⁴

Involvement by the leaders of charities in their individual capacities may not occur, however, at official functions, or in official publications, of the organization. "[W]hen officials of an IRC 501(c)(3) organization engage in political activity at official functions of the organization or through the organization's official publications, the actions of the officials are attributed to the IRC 501(c)(3) organization."¹⁵

¹² Jimmy Swaggart Ministries, Public Statement (12/17/91, filed 12/27/91). Accord, Kindell and Reilly (1993), *supra* note 5 at 435; Pub. 1828, "Tax Guide for Churches and Other Religious Organizations" 10 (2002).

¹³ Kindell and Reilly (2002), *supra* note 1 at 363-64. Accord, Kindell and Reilly (1993), *supra* note 5 at 435.

¹⁴ Kindell and Reilly (2002), *supra* note 1 at 364.

¹⁵ *Id.* Accord, Pub. 1828, *supra* note 13 at 7-8 (Examples 2-3).

¹⁶ GCM 39414, 2/29/84; GCM 34631, 10/4/71; GCM 34523, 6/11/71.

¹⁷ Rev. Rul. 72-512, 1972-2 CB 246; Rev. Rul. 72-513, 1972-2 CB 246.

¹⁸ Section 501(c)(3); Reg. 1.501(c)(3)-1(c)(3)(iii).

¹⁹ GCM 34267, 2/20/70; Anderson, "Falwell Fined for Political Activity by IRS," *Religious News Service*, 4/7/93; Rev. Rul. 67-71, 1967-1 CB 125; Association of the Bar of the City of New York, 868 F.2d 876, 62 AFTR2d 88-5625 (CA-2, 1988), *cert. den.*

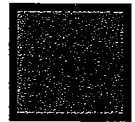
This is a fine line. Political activities of leaders or members can be attributed to a charity where, for example, an official publication says the organization will be sending members out to work on political campaigns. Where agency principles are met, member or employee activities will be attributed to the charity. Where ratification occurs, again attribution occurs.¹⁶ A college political science class that sent students to work for the political campaign of their choice was not political activity, nor was a college newspaper that printed student editorials while indicating that they were not the official position of the college.¹⁷

A radio program by the head of the organization criticizing an announced candidate for President was ruled in TAM 199907021 to be a prohibited political activity. The broadcast was aired in the autumn when elections would occur, noted that the person was "now in the ... Presidential race," and claimed that the candidate's political and economic ideology is a failed ideology.

The IRS, while calling it "a close call," did not find prohibited political activity in the "I'm Fed Up with Congress" communication, a newsletter article quoting from and listing Senators in connection with a vote on which the organization disagreed, a newsletter article about the organization's petitions on judicial nominees, or a radio commentary that suggested that various House members should be voted out of office for a particular vote that was aired a year and a half ahead of the election and when none was an announced candidate.

Endorsements by organizations. Section 501(c)(3) organizations obviously may not endorse candidates for public office.¹⁸ For example, GCM 34267, 2/20/70, found that printing editorials opposing the election of John Kennedy because of his Catholicism was forbidden political activity. The activities of Moral Majority and Jerry Falwell's "I Love America Committee" led to the revocation of tax exemption for at least two years. An organization that, objectively and unbiasedly, selected and supported qualified candidates for a school board was engaged in political activity. Even the noncomparative rating of candidates for elective judicial office is viewed as a sufficient endorsement to disqualify an organization from Section 501(c)(3) status.¹⁹

According to GCM 39811, 2/9/90, encouraging selected individuals to run for public office is forbidden. While such encouragement may



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IS FORBIDDEN.**

be on a tightrope for avoiding preference toward particular individuals running or toward particular parties, it seems that an organization ought to be able to encourage members generally to run for office, if it is able to encourage them generally to vote, in a non-partisan manner.²⁰

One example of the IRS position on organizational endorsements is a public statement, negotiated with and required by the IRS, by Jimmy Swaggart Ministries as a condition for recovering its exemption:

[A]ccording to the IRS, when 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 its official publications are the principal means by which a religious organization communicates its official views to its members and supporters.²¹

The CPE Manual has added that "[u]se of the IRC 501(c)(3) organization's financial resources, facilities, or personnel is also indicative that the actions of the individual should be attributed to the organization."²² For example, in TAM 9609007, the IRS ruled that the Christian Coalition's fundraising letters contravened the political activity provision, and revoked its tax exemption until it was restored by settlement of litigation in 2003. The TAM said that the letterhead contained many of the country's best known "CC" organizations and figures. The letters coincided with elections, showed that the "CC" had worked closely with the "R" political party and had attended its national convention, and implied that contributions to "CC" would help its candidates for public office.

On the other hand, the IRS ruled that a consumer education organization had not violated the political activity prohibition. Its radio program was substantially all on consumer education, and any political discussions were of interest to consumers. However, the IRS focus was not on whether there was any political activity, but on whether the organization was an action organization, where the standard is easier to meet:

It is clear that W engaged in various activities of a political nature. However, many of these matters were of an educational nature and were related to

the overall consumer educational program carried on by W. In other instances specific legislation was not even pending before Congress when the activities were carried on. W has no political agenda and has not backed or supported any candidates for election.... In addition, political activities have never been W's main purpose....

In this situation W's limited activities in this area are similar to those carried on by the organization described in Rev. Rul. 66-256 [1966-2 CB 210], *supra*; controversial matters are discussed but little or no further action is taken. Therefore, W is not an action organization....

Publication of incumbent voting records. The IRS ruled in Rev. Rul. 78-248, 1978-1 CB 154 (Situation 1), that Section 501(c)(3) organizations may compile and disseminate the voting records of all incumbent members of Congress so long as they are on a wide variety of major subjects, there is no editorial comment, and there is no approval or disapproval of the voting records, express or implied.

The IRS "clarified" one example in this 1978 ruling, because of extensive protest, and issued Rev. Rul. 80-282, 1980-2 CB 178.²³ Charitable organizations under certain circumstances may publish the voting records of congressional incumbents on selected issues, with editorial comment, under certain circumstances. That editorial comment or bias is permitted to take the form of the format and content of the publication not being neutral, each incumbent's votes and the organization's views on selected legislative issues being reported, and the publication indicating whether the incumbent supported or opposed the organization's view. The following factors were found to demonstrate the absence of prohibited political campaign activity:

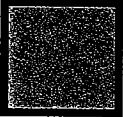
1. The voting records of all incumbents are presented.
2. Candidates for reelection are not identified.
3. No comment is made on an individual's overall qualification for public office.

²⁰ The IRS periodically upholds grants for voter education and a voter registration project aimed at women, particularly minority women, finding them not a taxable expenditure under the private foundation provision in Section 4945. The grantee was partisan regarding issues, but somehow was viewed as nonpartisan regarding candidates. Ltr. Rul. 9540044, Ltr. Rul. 9751029.

²¹ Jimmy Swaggart Ministries, *supra* note 12.

²² Kindell and Reilly (1993), *supra* note 5 at 435.

²³ See Kindell and Reilly (2002), *supra* note 1 at 370-371



**NOTABLY
ABSENT FROM
MOST IRS
DISCUSSION ON
CANDIDATE
COMPARISONS
IS THE
CHARITY'S
FREEDOM OF
SPEECH.**

EXHIBIT I. The IRS Position on Publishing Candidate Voting Records.

<i>Status</i>	<i>Issues</i>	<i>Bias?</i>	<i>Publish?</i>	<i>Authority</i>
Incumbents	Broad subjects	No bias	May	Rev. Rul. 78-248, Ex. 1
Incumbents	Selected issues	Bias	May not	Rev. Rul. 78-248, Ex. 4
Incumbents	Selected issues	Bias	May, under unrealistic circumstances.	Rev. Rul. 80-282

4. No statements expressly or impliedly endorse or reject any incumbent as a candidate for public office.
5. No comparison of incumbents with other candidates is made.
6. The organization points out the inherent limitations of judging the qualifications of an incumbent on the basis of certain selected votes, by stating the need to consider such unrecorded matters as performance on subcommittees and constituent service.
7. The organization does not widely distribute its compilation of incumbents' voting records.
8. The publication is distributed to the organization's normal readership (who number only a few thousand nationwide).
9. No attempt is made to target the publication toward particular areas in which elections are occurring, nor to time the date of publication to coincide with an election campaign.

The difficulty is that all nine factors obviously cannot be met in any real world case, particularly if the eighth factor is found to be necessary.²⁴ The IRS did not indicate which factors must be met. However, the internal IRS training manual says "[t]he critical factors here were that the timing and distribution of the newsletter indicated its publication was not aimed at any elections and the newsletter did not identify which of the incumbents were candidates for reelection." In other words, a newsletter must be published only when it is not news, and crosses the line when it is news.

Given the rules that hedge in unbiased voting guides, it may not be surprising that according to the IRS (in Situation 4 of Rev. Rul. 78-248), organizations may not publish voter

guides reflecting the voting records of incumbent members of Congress on selected issues of interest to the organization. A summary of the Service's position on reporting on incumbent voting records is in Exhibit I, above.

Publication of candidate comparisons. In Situation 2, Rev. Rul. 78-248 also stated that a Section 501(c)(3) organization may publish candidates' responses to its questionnaire on a wide variety of subjects sent to all candidates for an office, so long as no preference is expressed for any viewpoint.²⁵ The IRS listed factors that would be considered in reviewing such a candidate questionnaire:

1. Whether the questionnaire is sent to all candidates.
2. Whether all responses are published.
3. Whether the questions indicate a bias toward the organization's preferred answer.
4. Whether the responses are compared to the organization's positions on the issues.
5. Whether the responses are published as received without editing by the organization.

Other than under these unearthly circumstances, Section 501(c)(3) organizations may not compare candidates, even in an objective and unbiased manner, under the IRS interpretation in this and two other rulings, as well as a case.

Thus, a charity's objective and unbiased selection and support of qualified candidates for a school board was found to be political activity. Another organization was found not to qualify for exemption under Section 501(c)(4) when its "primary activity in furtherance thereof is rating candidates for public office on a nonpartisan basis," the IRS said, because that "is participation or intervention on behalf of those candidates favorably rated and in opposition to those less favorably rated."²⁶

The Second Circuit has held that a Section 501(c)(3) organization may not conduct non-comparative rating of candidates for elective



A SECTION 501(c)(3) ORGANIZATION MAY NOT PUBLISH CANDIDATES' ANSWERS TO ANY QUESTIONS IF DOING SO REFLECTS A BIAS ON THE ISSUES.

²⁴ Kindell and Reilly (1993), *supra* note 5 at 420-421.

²⁵ Kindell and Reilly (1993), *supra* note 5 at 421. See Kindell and Reilly (2002), *supra* note 1 at 371-72.

²⁶ Rev. Rul. 67-71, 1967-1 CB 125; Rev. Rul. 67-368, 1967-2 CB 194.

EXHIBIT II. The IRS Position on Publishing Candidate (Not Incumbent-Only) Comparisons.

Status	Issues	Bias?	Publish?	Authority
Incumbents	Broad issues	No bias	May	Rev. Rul. 78-248, Ex. 2
Incumbents	Broad issues	Bias	May not	Rev. Rul. 78-248, Ex. 3
Incumbents	Selected issues	Bias	May not	TAM 9635003

judicial office, which the IRS viewed as a sufficient endorsement to prevent Section 501(c)(3) status. In *Association of the Bar of the City of New York*, 868 F.2d 876, 62 AFTR2d 88-5625 (CA-2, 1988), cert. den., the bar association rated candidates as either “approved as highly qualified,” “approved,” or “not approved,” based on what were described as objective standards. It was found to be nonpartisan and did not publicize its ratings, but it was found to participate or intervene in political races for judgeships.

Notably absent from most IRS discussion in this area is the charity’s First Amendment freedom of speech. Notably absent also is logic—no principled reason is given why incumbents can be compared with an indication of the organization’s position, but candidates may not be compared with an indication of the organization’s position, even though the former is an admission that comparison is not necessarily intervention. In fact, that would appear to involve the IRS doing the political activity, not the charities, by preferring incumbents over challengers. That gives yet more publicity to the incumbents, who already have a publicity edge over challengers, whose greatest obstacle is normally less publicity.

Bias. A Section 501(c)(3) organization may not publish candidates’ answers to any questions if doing so indicates a bias on the issues, according to the Situation 3 of Rev. Rul. 78-248. For example, an organization whose questionnaire gave its views on abortion, secular humanism, and homosexual rights was found in GCM 39811, 6/30/89, to involve implied electioneering when the members receiving results were reminded of a religious duty to vote righteously.

The confused reasoning that produces these results is shown by Rev. Rul. 80-282 effectively overturning much of Rev. Rul. 78-248, coupled with GCM 38137, 10/22/79, in which the Service’s initial thinking for Rev. Rul. 80-282 reached the opposite conclusion. Rev. Rul. 78-248 itself revoked Rev. Rul. 78-160, 1978-1 CB

153, which found political activity in publishing candidate questionnaire responses without any editorial comment.

The IRS prohibits candidate comparisons if the organization’s position is given. In TAM 9635003, the IRS ruled that an organization’s citizen forums violated the political activity prohibition in years 1 and 2, when it published candidate ratings, but not in year 3, when it did not. In years 1 and 2, the candidate ratings consisted of “box score” ratings on three significant issues. In year 3, the organization merely reprinted the candidates’ short replies, without indicating the organization’s position or rating the candidates.

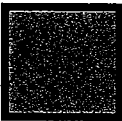
Exhibit II, above, gives a summary of the Service’s position on publishing candidate (not incumbent-only) comparisons.

Establishing a PAC. The Service’s position is that a Section 501(c)(3) organization may not establish a political action committee (PAC).²⁷ That organization may, however, establish a Section 501(c)(4) organization, which in turn may establish a PAC, so long as funds, facilities, personnel, and other organization assets are kept separate. The IRS would find “[u]nfavorable evidence” that such assets were being improperly used if there was “any similarity of name between the IRC 501(c)(3) organization and the PAC, any excessive overlap of directors without a convincing explanation for the situation, and any sharing of facilities.” No one of these factors alone is conclusive evidence of political activity.

The right to speak. Exempt organizations do not, or at least should not, shed their First Amendment rights of free speech and free exercise of religion at the IRS door.

The express advocacy test. The Supreme Court has interpreted the Federal Elections Campaign Act “to reach only funds used for communications that expressly advocate the

²⁷ Kindell and Reilly (2002), *supra* note 1 at 365. Accord, *Branch Ministries*, 211 F.3d 137, 85 AFTR 2d 2000-1767 (D.C. Cir., 2000).



EXEMPT ORGANIZATIONS DO NOT, OR AT LEAST SHOULD NOT, SHED THEIR FIRST AMENDMENT RIGHTS AT THE IRS DOOR.

election or defeat of a clearly identified candidate.”²⁸ That generated the “express advocacy” test, which was subsequently enacted by Congress.²⁹

The Court later endorsed the express advocacy test when it overturned the FEC’s effort to characterize a pro-life organization’s activities as corporate contributions to political campaigns. The Court held that “an expenditure must constitute ‘express advocacy’ to be prohibited,” and that certain corporations “with features more akin to voluntary political associations than business firms” did not fall within the prohibition “solely because of their incorporated status.”³⁰

That raises the question whether the Section 501(c)(3) limitation may similarly only “reach statements that expressly advocate the election or defeat of a clearly identified candidate,” for the same First Amendment reasons.

The IRS position is that Section 501(c)(3) is not so limited, on the ground that Section 501(c)(3) implies that things other than “publishing or distributing of statements” violate the prohibition.³¹ However, the Code’s prohibition is only of “participat[ing] in, or interven[ing] in..., any political campaign;” not of “influencing,” “speaking on issues,” or the like. The Supreme Court has recognized that distinctions between the “discussion of issues and candidates and advocacy of election and defeat of candidates ... dissolve in practical application.”³²

The full and fair exposition test. Reg. 1.501(c)(3)-1(d)(3)(i) further restricts educational organizations, in order to preserve their tax exemption in view of the lobbying restriction, by requiring that they give “a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form

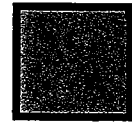
an independent opinion or conclusion.” That regulation initially was struck down as unconstitutionally vague when applied without further standards, but was later upheld by the same circuit when the “full and fair exposition” requirement was combined with a four-point methodology test that “reduce[d] the vagueness.”³³ The second court did not expressly hold that the methodology test eliminated the vagueness in the full and fair exposition test, and vagueness seems apparent. The methodology test was then promulgated administratively, and later upheld by the Tax Court.³⁴

The First Amendment does not require that speech, to be protected as speech, give a “full and fair exposition” of all points of view. In fact, that requirement makes speech no longer free, and subjects it to the arbitrary discretion of an official censor in Washington, whose discretion is only somewhat hedged by the four-point methodology test. It is difficult to imagine any test that is not inherently vague as to what is and what is not a “full and fair exposition of the pertinent facts,” but such a test still would restrict what an organization’s speech could consist of.

As a practical matter, the IRS implicitly acknowledges this by routinely approving the exemption of pro-choice and pro-life organizations that have no intention of giving a full and fair exposition to the opposing viewpoint or opposing facts, and by routinely approving the educational exemption of environmental and industry, feminist and traditional family, and similar issues groups that similarly have no intention of giving equal weight to opposing views.

The result differs depending on whether the IRS applies a strong version or a weak version of the “full and fair exposition” requirement. For example, in TAM 199907021, when the IRS used a nonrigorous version, it ruled that newsletter articles on various public policy issues were educational, not political:

While nearly all of X’s articles discuss various public policy issues from a particular ideological perspective, the articles to some extent set forth the opposition’s positions. Despite the perception that X’s articles present facts that shed an unfavorable light on opposing ideological perspectives, we cannot say that newsletter articles or X’s other informational communications are based upon unsupported opinion. X, on a regular basis, has cited independent sources that support the facts contained in the articles. The communications of an organization such as X are



THE FIRST AMENDMENT DOES NOT REQUIRE THAT SPEECH, TO BE PROTECTED AS SPEECH, GIVE A ‘FULL AND FAIR EXPOSITION.’

²⁸ *Buckley v. Valeo*, 424 U.S. 1, 77 (1976).

²⁹ 2 USC section 431(e)-(f); see 11 C.F.R. section 109.1(b)(2).

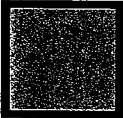
³⁰ *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264-65 (1986) (involving a 501(c)(4) organization). See also *Faucher v. FEC*, 928 F.2d 468 (CA-1, 1991) (following test); GCM 39811, 6/30/89 (pro-life group lost exemption for encouraging members to attend political caucuses and vote for pro-life candidates).

³¹ *Kindell and Reilly* (2002), *supra* note 1 at 346; *Kindell and Reilly* (1993), *supra* note 5 at 413.

³² *Buckley v. Valeo*, *supra* note 28 at 42.

³³ *Big Mama Rag*, 631 F.2d 1030, 46 AFTR 2d 80-5723 (D.C. Cir., 1980); *National Alliance*, 710 F.2d 868, 52 AFTR 2d 83-5609 (D.C. Cir., 1983).

³⁴ Rev. Proc. 86-43, 1986-2 CB 729; *Nationalist Movement*, 102 TC 558 (1994).



**'MANDATING
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educational, even though they maintain clear and definite positions on public policy issues that are discussed and addressed in the legislative and political realms, because they use an educational methodology. Therefore, we conclude that X's communications are educational, within the meaning of section 1.501(c)(3)-1(d)(3)(i) of the regulations.

The normal strict scrutiny requirements for regulations of speech. The District of Columbia Circuit did not appear to connect its lenient view of the "full and fair exposition" requirement, coupled with the four-point methodology test, with general First Amendment law about compelled speech (exposition of the other side) or arbitrary discretion. As the Supreme Court said about a requirement that charitable solicitors give specified statements or disclosures:

Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.³⁵

Content-based regulations, like prohibitions against speech and compulsions of speech, are evaluated under strict scrutiny analysis. Under strict scrutiny, the IRS may "not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored."³⁶

Even if an educational organization meets the "full and fair exposition" test, it is not insulated from an IRS charge of political activity. The IRS internally takes the position that "[a]ctivities that meet the methodology test of Rev. Proc. 86-43 may nevertheless constitute participation or intervention in a political campaign."³⁷ If there were truly a full and fair exposition, however, there logically would not be preference to one viewpoint or candidate. If voter guides biased toward at least incumbents are permissible, and if issues advocacy groups are allowed to exist, there are ad hoc exceptions to the requirement of full and fair exposition.

Non-educational organizations. The full and fair exposition test has not been applied to Section 501(c)(3) organizations that are not educational, and probably does not apply to the religious-educational, humanitarian-educational, or literary-educational activities of organizations with purposes under Section 501(c)(3) that are "religious, charitable, scientific, ... literary, or" that fall into some category other than strictly "educational." For instance, Sunday school or Torah class may be

religious-educational, but need not give a full and fair exposition to other religions' views. Very serious First Amendment problems would be raised by an attempt to apply the "full and fair exposition" test to religious organizations.

The 'Election Year Issues' article

The Fiscal Year 2002 edition of the Service's Technical Instruction Program ("CPE Manual") included a very helpful revision of the generally excellent "Election Year Issues" chapter that appeared nine years before. The first half covers the political activity prohibition, while the second half treats Section 527. The revision incorporated a number of suggestions made by the ABA's Committee on Exempt Organizations, along with adding new cases and rulings.

All of the content is balanced, and most of it is respectful of First Amendment freedoms enjoyed by Section 501(c)(3) organizations. Nevertheless, several areas appear to the author to give inadequate protection to freedom of speech.

Voter guides and candidate comparisons. The CPE Manual follows Rev. Ruls. 78-248 and 80-282, as it must do. Unfortunately, it thereby uses a defective translation of the Code as it applies to voter guides and candidate comparisons, in the author's view, and does not adequately recognize the broad freedom of speech that the First Amendment confers or the need to justify limitations on speech by strict scrutiny.

Surprisingly, the CPE Manual's only discussion of the Internet is to note that the IRS

³⁵ *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Riley Court found no constitutional difference between compelled speech and compelled silence, saying: "There is certainly some difference between *compelled speech* and *compelled silence*, but in the context of protected speech, *the difference is without constitutional significance*, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say." *Riley, supra* at 796-97 (1988) (emphasis added). Accord, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

³⁶ *Riley, supra* note 35 at 800. See also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); *Sable Communications v. FCC*, 495 U.S. 115, 126 (1989) ("Content-based restrictions on speech must be narrowly tailored to achieve a compelling government interest").

³⁷ *Kindell and Reilly* (2002), *supra* note 1 at 349; *Kindell and Reilly* (1993), *supra* note 5 at 415.

issued an announcement in 2000 asking for comments on the need for guidance about Internet activities. It thus misses an opportunity to point agents in the right direction, a direction that might be respectful toward First Amendment rights that cloak the Internet and other forms of protected speech.

'Code words.' The CPE Manual for 1993 essentially created a theory that Section 501(c)(3) organizations must be intimidated from using otherwise permissible words because they could amount to "surreptitious" political activity. The IRS describes its vigilant search for "code words" as follows:

[A]n IRC 501(c)(3) organization may avail itself of the opportunity to intervene in a political campaign in a rather surreptitious manner. The concern is that an IRC 501(c)(3) organization may support or oppose a particular candidate in a political campaign without specifically naming the candidate by using code words to substitute for the candidate's name in its messages, such as "conservative," "liberal," "pro-life," "pro-choice," "anti-choice," "Republican," "Democrat," etc., coupled with a discussion of the candidacy or the election. When this occurs, it is quite evident what is happening—an intervention is taking place. See [TAM 9117001] for an example of coded language constituting political campaign intervention.³⁸

'Code words coupled with a discussion of the candidate.' While political campaigning might theoretically be disguised as issue advocacy, that is not the essence of most issue advocacy,

as shown by the wide range of issue advocacy that is entirely unrelated to political campaigning. At a minimum, it is troublesome that the IRS seems to presume that some common words are used dishonestly by charities, and are satanic verses with dire consequences from use. At a maximum, it would be an abridgment of First Amendment rights to treat some speech as prohibited, or as disfavored, without compliance with strict scrutiny.

Freedom of speech, and particularly freedom of speech for issue advocacy, includes the freedom of speech of a charity to describe its position as "conservative" or "liberal," "pro-life" or "pro-choice," etc., whether or not elections are occurring and whether or not politicians use those terms. The freedom of speech to report relevant news should include the freedom to identify the political party sponsoring initiatives or whose legislators are taking particular positions.

The IRS, however, appears to qualify a restriction on speech by saying that could happen only if the issue advocacy is "coupled with a discussion of the candidacy or the election." That is a good start in the First Amendment direction, and has strong parallels in the Section 501(h) test for legislative advocacy, which

³⁸ Kindell and Reilly (2002), *supra* note 1 at 345. Accord, Kindell and Reilly (1993), *supra* note 5 at 412

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treats discussion of legislation as lobbying activity only if there is a call to action.

'Code words coupled with discussions of elections.' In a footnote to the above quotation, however, the IRS immediately backs away from that apparent deference to First Amendment rights:

A finding of political campaign intervention from the use of coded words is consistent with the concept of "candidate"—the words are not tantamount to advocating support for or opposition to an entire political party, such as "Republican," or a vague and unidentifiably large group of candidates, such as "conservative[.]" because the sender of the message does not intend the recipient to interpret them that way. Code words, in this context, are used with the intent of conjuring favorable or unfavorable images—they have pejorative or commendatory connotations. When combined with discussions of elections, the code words also make specific candidates identifiable—the organization would not use up air time or newspaper space with a code word if the word was not intended to communicate to the viewer, listener, or reader a specific elective choice....³⁹

The first quoted sentence begins well, but ends with a subjective test of intent. How does the IRS know that "the sender of the message does not intend the recipient to interpret them that way?" The consequence is that a charity's right to endorse a "liberal," "conservative," "environmentalist," "pro-free enterprise," or other position ends if the organization "intends" to help people on its side of the national issue including undefined candidates, and is threatened and chilled to the extent the IRS wants to allege that the organization "intends" something different from its words. (Later, the CPE Manual says that "the motivation of an organization is irrelevant when determining whether the political campaign prohibition has been violated."⁴⁰)

The second quoted sentence assumes its conclusion, by branding these as "code words."

The third quoted sentence abandons the requirement that "code words" be "coupled with a discussion of the candidacy or the election," and instead finds a transgression if "code words" are "combined with discussions of elections" such as the "2004 elections," even though there is only a reference to a "vague and unidentifiably large group of candidates." Moreover, the third sentence also goes on to assume its conclusion—that the use of "code words" is *ipso facto* the support of candidates, because "the organization would not use up air time or newspaper space with a code word if the word was not intended to communicate to the viewer, listener, or reader a specific elective choice." However, the organization may well

use a "code word" such as "liberal" or "conservative" simply as shorthand for the position of the person described, or as shorthand for the organization's own First Amendment position, or for the position represented by a cluster of First Amendment beliefs. The organization does not necessarily "use up air time or newspaper space with a code word [only] if the word was not intended to communicate to the viewer, listener, or reader a specific elective choice."

The best evidence of the legitimate use of "code words" is their use outside of campaign periods, and the correct view is that if the organization uses terms frequently outside of the election cycle, it has the freedom of speech to continue to use them during the election cycle, even if the usage increases because more issues or more public interest occurs during the election cycle.

On the other hand, the Service's initial test seems reasonable, that such words only when "coupled with a discussion of the candidacy or the election" (a specific candidate or election) can rise to the level of prohibited political activity. The hope is that the IRS will reasonably interpret its concluding sentences:


Therefore, the fundamental test that the Service uses to decide whether an IRC 501(c)(3) organization has engaged in political campaign intervention while advocating an issue is whether support for or opposition to a candidate is mentioned or indicated by a particular label used as a stand-in for a candidate. Accordingly, the appropriate focus is on whether the organization, in fact, is commenting on a candidate rather than speaking about an issue.⁴¹

Free speech dangers of a 'code words' test. This brings us back to the initial quotation in this section. The IRS confidently says "[w]hen this occurs, it is quite evident what is happening—an intervention is taking place." It is not at all evident to the author that references to "conservative" or "liberal," "pro-choice" or "pro-life," "pro-environmental" or "free enterprise," or similar terms are used significantly as code words, at least if one believes the First Amendment rights of an organization include

³⁹ Kindell and Reilly (2002), *supra* note 1 at 345, fn. 10; Kindell and Reilly (1993), *supra* note 5 at 412 fn. 6. It is regrettable that this language, trenching as it does upon First Amendment rights, is carried over unchanged from the 1993 to the 2002 Manual.

⁴⁰ Kindell and Reilly (1993), *supra* note 5 at 415. Accord, Kindell and Reilly (2002), *supra* note 1 at 352.

⁴¹ Kindell and Reilly (2002), *supra* note 1 at 346. Accord, Kindell and Reilly (1993), *supra* note 5 at 412.



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the right to say that it holds to a particular belief or to describe newsmakers as holding to particular beliefs.

Besides the question whether the IRS can prohibit speech based on what is "quite evident" to it, several First Amendment questions are raised by the whole code words theory.

First, the "code words" concept is overbroad, because it either prohibits or restricts use of words that perhaps are occasionally used to represent a candidate, but are often and in fact generally used to represent ideas. The Supreme Court has been more than clear that overbroad, or prophylactic, regulation of speech is impermissible:

Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made.⁴²

Second, the "code word" concept involves unfettered or standardless administrative discretion that the Supreme Court has often found to violate the First Amendment by imposing virtually unreviewable prior restraints.

[S]uch conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights.⁴³

The identification of any term as a code word is notoriously manipulable and subjective. Moreover, the designation of labels as "code words" and "pejorative" of course partakes of the same sin—it is a code word for evil and a pejorative designation unrelated to the merit of the concept. An example is the issue advocacy campaign of an organization that timed its advertisements to coincide with presidential debates, but that did not mention either candidate or party by name. The IRS "reluctantly" concluded in TAM 8936002 that:

⁴² Riley, *supra* note 35 at 796. Accord, *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

⁴³ *Broadrick*, *supra* note 42 at 613 (1973). The Court said that this was a rule "in the area of the First Amendment," *id.* at 611, which applies to "spoken words," "rights of association," and "standardless discretionary power." *Id.* at 612-13.

⁴⁴ Kindell and Reilly (2002), *supra* note 1 at 375-76. While this passage is in the discussion of voter guides, it would appear to be equally applicable to other organization newsletters and publications.

[W]hile the ads could be viewed as focusing attention on issues of war and peace during the 1984 election campaign, individuals listening to the ads would generally understand them to support or oppose a candidate in an election campaign. The timing of the release of the ads so close to the November votes, even though the reference was changed to "join the debate," is also troublesome.... [W]e reluctantly conclude A, through its C project, probably did not intervene in a political campaign....

Exempt organizations do not welcome "reluctant" positive findings, and close cases do not provide clear rules.

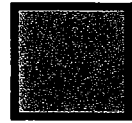
The continued IRS chilling of exempt organizations' publications. The IRS also has a theory that an organization reporting on what its members care about implicitly asks readers to compare candidates' positions:

As noted above, voting records reports covering a fairly diverse set of specific issues can be biased if the issues are presented in a way to highlight similarities—or dissimilarities—between a candidate's record and the organization's known agenda....

Therefore, the real difficulty presented by advocacy communications on a specific topic during an election campaign is not the narrow issue focus, *per se*, but the risk that the communication invites its audience to compare a candidate's positions with the organization's own views. For example, a voter guide by an environmental organization that reports votes by incumbent candidates on environmental legislation implicitly asks readers to measure candidates' records against the organization's pro-environmental position. In other words, the communication, in effect, is commenting on the candidates rather than merely addressing an issue....⁴⁴

First, the IRS offers no meaningful standard to distinguish between permissible speech and "implicitly ask[ing] readers to measure candidates' records against the organization's pro-environmental position." Once the IRS steps away from merely prohibiting express advocacy to prohibiting "highlight[ing] similarities—or dissimilarities—between a candidate's record and the organization's known position," there is no principled standard. Everyone knows that a pro-environmental organization would prefer that pro-environmental candidates be elected and re-elected, and that anti-green candidates be defeated and unseated. The same is true of any other exempt organization and its positions. To turn the obvious into a precipice invisible through the 1111 Constitution Avenue mist is to chill constitutional rights.

Second, the effect of this statement is that an organization is censored, or at least chilled,



FREEDOM OF SPEECH, PARTICULARLY FREEDOM FOR ISSUE ADVOCACY, INCLUDES THE A CHARITY'S FREEDOM TO DESCRIBE ITS POSITION.

from reporting the very news that its members and readers care most about, to the extent it involves the names or identities of legislators who happen to be candidates for office. Members of the House of Representatives are typically candidates more than 50% of the time they are in office, and members of the Senate are typically candidates about 33% of the time. The concept that an environmental organization may not report on environmental legislation and the names of its sponsors—or at least that it will be “closely scrutinized to determine whether the organization is intervening in a campaign,” is simply censorship in the form of a prior restraint or at least a chilling effect. The concept applied to other organizations similarly involves a violation of their First Amendment right.

If an organization reports on news in its areas of interest, however narrow, including the names of sponsors and other legislators, outside of the election cycles of those legislators, the First Amendment should protect its freedom of speech to do the same thing even if those legislators choose to become candidates.

‘News coverage’ versus ‘editorializing.’ The IRS elsewhere acknowledges that charities’ publications may refer to an undefined extent to candidates during election periods without necessarily violating the political activity prohibition:

During an election campaign, news stories, by definition, may involve reporting on a particular candidate’s activities.

The fundamental distinction here is between what is news coverage and what is an attempt through editorial policy to promote or oppose a particular candidate. Questions, of necessity, are highly factual, but the overall focus is on the policy of the organization. What does the organization normally do when it covers news stories? Does it have a policy of only covering particular candidates? Does it, in fact, only cover particular candidates? Is the coverage slanted to show any particular candidate in a favorable or unfavorable light?⁴⁵

The latter part of the IRS position is a reasonable one: a charity’s newsletter may do during an election cycle what it does outside an election cycle in reporting on candidates, so long as it does not cover only particular candidates.

The middle of the IRS quotation illustrates the First Amendment concern about the manipulability of such IRS interpretations about political activity. There the IRS differ-

entiates between “news coverage” and an “attempt through editorial policy to promote or oppose a particular candidate.” Many would contend, with the author, that the four major networks could not meet that test, because they often speak more favorably of Democrats than Republicans, both in commentary and editorial programming. Few universities could meet the test either, because faculty polls generally show a predominance of support of Democrats over Republicans. The fact that networks and universities do not meet that test implies either that the test cannot humanly be met, or that the test is not a meaningful test. The IRS should simply smell the coffee, impartially, that environmental organizations are entitled to speak of more Democrats as favorable to their positions and more Republicans as unfavorable; that free enterprise organizations are entitled to speak of more Republicans as favorable to their stances and more Democrats as unfavorable; that pro-choice organizations are entitled to speak of more Democrats as favorable and more Republicans as unfavorable; that pro-life organizations are entitled to do the reverse; and so on through all the issue advocacy organizations.

Christian Echoes National Ministry, Inc., 470 F.2d 849, 31 AFTR 2d 73-460 (CA-10, 1972), *cert. den.*, held that articles that were highly complimentary of some candidates, and highly complimentary of others, violated the political activities proscription. The IRS found in GCM 34267, 2/20/70, that editorials opposing the election of John Kennedy because of his Catholicism amounted to forbidden political activity.

Recent developments on political activities

Several developments during the last few years will affect the paths that exempt organizations can follow during the coming months.

The McCain-Feingold Bipartisan Campaign Reform Act of 2002. This law became effective on 11/6/02. It most affects Section 501(c)(3) organizations that broadcast, cablecast, or

⁴⁵ Kindell and Reilly (2002), *supra* note 1 at 369; Kindell and Reilly (1993), *supra* note 5 at 419. It is disappointing that the IRS did not make this passage less menacing to First Amendment rights, but retained it intact.

satellite-cast programs, or that publish newspapers or magazines.

Title I deals with “soft money” donated to political parties. It prohibits parties, or organizations controlled by parties, from soliciting or making donations to Section 501(c) organizations that conduct certain activities, or to Section 527 organizations except political committees. McCain-Feingold allows federal candidates and incumbents to solicit contributions for Section 501(c) organizations with a principal purpose that does not include voter registration, voter identification, get out the vote, or certain other federal election activity, so long as the solicitation does not earmark how the contributions will be spent. An FEC regulation allows federal candidates to solicit for a Section 501(c) organization if it conducts such activities, so long as they are not its primary activities and so long as the contributions are not earmarked for them.

“Federal election activity” is defined as voter registration within 120 days before a federal election, get out the vote efforts in connection with a federal election, and generic campaign activity in connection with such an election. FEC regulations exclude encouraging voter registration, and encouraging voting, which of course must be nonpartisan if done by a Section 501(c)(3) organization.

Title II deals with non-candidate expenditures, and Subtitle A deals specifically with electioneering communications. McCain-Feingold defines “electioneering communications” as those that are publicly distributed (generally broadcast, cablecast, or satellite-cast), and give the name or a picture of a clearly identifiable federal candidate, within 60 days of a general election or 30 days of a primary election (or caucus or convention). For House and Senate candidates, such communications must also be received by at least 50,000 people, but that threshold does not exist for presidential candidates. The statute excludes news broadcasts and express advocacy (independent expenditures). FEC regulations exempt unpaid programming, news stories and editorials, candidate debates, newspapers and magazines, signs, e-mail, telephone calls, and Internet communications that are not simulcast. These regulations also exempt communications by Section 501(c)(3) organizations, because they are subject to the prohibition on political activity under tax law. Another provision in

effect bans issue advocacy that is coordinated with a candidate or a party.

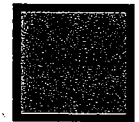
Subtitle B deals with independent or coordinated expenditures. It repealed the FEC’s prior regulations on coordinated communications, and the FEC issued new regulations defining when an expenditure is coordinated with a party or a candidate. FEC regulations now find coordination when a communication is paid for by someone other than a candidate or campaign and meets all of the following tests:

1. It is public (broadcast, cablecast, satellite-cast, published in newspaper or magazine, by telephone, or by billboard).
2. It is an electioneering communication, or one that expressly advocates the election or defeat of a clearly identified federal candidate, or refers to a federal candidate, and is made within 120 days of the election and is targeted to the area of the race.
3. It has a prohibited relation to the candidate or party, such as being made at their request, or with their material involvement in content or use, or being distributed after substantial discussion with them. The co-ordination can be indirect, by using a vendor to the candidate or party, or using information from a person formerly associated with the candidate or party.

There are exceptions for news stories and editorials.

Civic, labor, and business organizations. Rev. Rul. 2004-6, 2004-4 IRB 328, provides guidelines for Section 501(c)(4), (c)(5), and (c)(6) organizations engaged in advocacy activities. The ruling implicitly recognizes that civic, labor, and business organizations (not Section 501(c)(3) organizations) may support or oppose candidates, so long as that is not their primary purpose or activity. This support or opposition may take the form of a communication that “explicitly advocates” the election or defeat of a candidate. Alternatively, there might be no express advocacy, but the policy discussion might wear the emperor’s new clothes of facts and circumstances by which it is deemed to support or oppose a candidate.

Such an organization may either (1) establish a separate segregated fund, which gives notice under Section 527(i) and reports under Section 527(j), or (2) use its own funds, which does not bring it under those notice and



THE ‘CODE WORDS’ TEST IS OVERBROAD, AND INVOLVES UNFETTERED OR STANDARDLESS ADMINISTRATIVE DISCRETION.

reporting provisions, but does bring it under the tax in Section 527(f)(1) on the lesser of investment income or exempt function expenditures.⁴⁶

Branch Ministries. The IRS revoked the tax exemption for a church because it published newspaper advertisements the week before the 1992 election urging voters not to vote for Bill Clinton because of moral issues. The church argued that the political activities prohibition in Section 501(c)(3) applied only to non-church charities, not to churches. In *Branch Ministries*, 211 F.3d 137, 85 AFTR 2d 2000-1767 (D.C. Cir., 2000), the District of Columbia Circuit upheld a district court's holding that the political activity prohibition applies to churches too, and upheld the revocation of exemption. The church argued that the prohibition is unconstitutional, but the appellate court upheld its constitutionality.

Christian Coalition. The FEC charged that speech by a person serving as executive director of the Christian Coalition constituted express advocacy by Christian Coalition in opposing a candidate. In the speech, then-executive director Ralph Reed said:

[V]ictory will be ours. It will be ours here in Montana. And it will be ours all across America.... We're going to see Pat Williams sent bags packing back to Montana in November of this year. And I'm going to be here to help you.⁴⁷

A district court held in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (DC D.C., 1999), that though it was "just shy," this statement was not express advocacy of voting against the congressman:

Although the implicit message is unmistakable, in explicit terms this is prophecy rather than advocacy. Reed predicts that victory "will be" ours and that "we're going to see" Pat Williams defeated in the November election. Neither of these verbs

expressly directs the audience to do anything; the speaker has announced that this will come to be without any further action. Making the issue closer is Reed's final statement that he would return "to help you." For Reed to "help" there must be some action taking place for him to assist. However, that action—"sending" the candidate's "bags packing"—comes just shy of referring to the campaigning and voting against Pat Williams necessary to bring that about. Though the message is clear, it requires one inferential step too many to be unequivocally considered an explicit directive.

... As others have acknowledged, results such as this appear unsatisfyingly formalistic, allowing precisely the sort of communications Congress sought to prohibit to remain immune from liability.... But the Supreme Court felt that the First Amendment required a choice between a toothless provision and one with an overbite; results such as this flow directly from that choice.⁴⁸

Conclusion

If the IRS restrictions on speech by exempt organizations were draped with anything but tax law, they would immediately be perceived as impermissible limitations on or chilling of First Amendment rights. The tax curtain should be lifted for speech that is not express advocacy of the election or defeat of a candidate for office, so the light of the First Amendment shines undarkened. The discrimination in favor of incumbents as opposed to challengers, and in favor of carefully calculated words as opposed to more clumsy equivalents, should end. ■

⁴⁶ See also Reilly and Allen, *supra* note 2.

⁴⁷ *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 56-57 (DC D.C., 1999).

⁴⁸ *Id.* at 63. This strikes the author as mistaken, because "we're going to see" appears to mean "see to it," meaning that the executive director is saying that Christian Coalition is going to take action "to help you" against the congressman in the November election.