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Campaign Activity by Churches: Legal Analysis of Houses of Worship Free Speech Restoration Act

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Summary

In recent years, there has been increased attention paid to the participation by churches and religious organizations in political campaigns. Under current law, churches and other IRC § 501(c)(3) tax-exempt organizations are prohibited from engaging in such activity and risk losing their tax-exempt status if they do. While this outcome is rare, it is possible. For example, in *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000), the U.S. Court of Appeals for the D.C. Circuit upheld the authority of the Internal Revenue Service to revoke the tax exemption of a church that participated in political campaign activity.

Since the *Branch Ministries* decision, several measures have been introduced in Congress that would allow churches to participate in political campaign activity without jeopardizing their exemption. They are the Houses of Worship Free Speech Restoration Act, H.R. 235 (109th Congress) and H.R. 235 (108th Congress); a provision briefly included in the American Jobs Creation Act of 2004, H.R. 4520 (108th Congress); the Houses of Worship Political Speech Protection Act, H.R. 2357 and S. 2886 (107th Congress); and the Bright-Line Act of 2001, H.R. 2931 (107th Congress).

This report provides an overview of the current tax and campaign finance law relevant to this legislation, a discussion of how each bill would amend current law, and a chart that compares the bills. The report will be updated as developments occur.

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Churches can lose their tax-exempt status under Internal Revenue Code (IRC) § 501(c)(3) if they participate in political campaign activity. This prohibition, which applies to all IRC § 501(c)(3) organizations, has been in the law since 1954. It has received increased attention in recent years, in part because of the decision in *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000), which upheld the authority of the IRS to revoke the tax-exempt status of a church that intervened in a campaign.

Since the *Branch Ministries* decision, several measures have been introduced in Congress that would allow churches to participate in political campaign activity. They are the Houses of Worship Free Speech Restoration Act, H.R. 235 (109th Congress) and H.R. 235 (108th Congress); a provision briefly included in the American Jobs Creation Act of 2004, H.R. 4520 (108th Congress); the Houses of Worship Political Speech Protection Act, H.R. 2357 and S. 2886 (107th Congress); and the Bright-Line Act of 2001, H.R. 2931 (107th Congress). This report will, after providing an overview of tax and campaign finance law, discuss and compare these bills.

Before continuing, it should be noted that while the prohibition against engaging in political campaigns applies to all IRC § 501(c)(3) organizations, including charities and educational organizations, the bills discussed in this report would only exempt churches and religious organizations from the prohibition.

Current Law

Tax Law.

Churches and religious organizations are among several types of organizations exempted from federal income taxes by IRC § 501(c)(3). Under that section, one requirement for tax-exempt status is that the organization must 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.

This is viewed as an absolute prohibition and an organization that violates it can lose its tax-exempt status and its eligibility to receive tax-deductible

contributions.[1] While this outcome is rare, the fact that it can happen was shown in *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). In that case, the U.S. Court of Appeals for the D.C. Circuit upheld the authority of the IRS to revoke the tax-exempt status of the Church at Pierce Creek in Binghamton, New York. The church and its pastor had placed a full-page political advertisement in two national newspapers four days before the 1992 presidential elections. The advertisement opposed one of the presidential candidates and included a solicitation for tax-deductible contributions to pay for the advertisement.

While the *Branch Ministries* case underlines the point that a church can lose its exempt status for participating in a campaign, there is a distinction in the tax laws between political *campaign* activities and simple political activities.[2] Political campaign activities include those activities that are specifically linked to election periods and support or oppose particular candidates. Examples of prohibited activities include endorsing or opposing particular candidates; evaluating candidates and supporting a slate of the best-qualified candidates; preparing and distributing voters' guides during an election where the questions asked or the presentation of the information indicate a bias on certain issues; rating of candidates; and making contributions to a political campaign.[3]

Examples of permissible political activities under the tax laws, so long as no candidate is endorsed or opposed, include educational activities, such as conducting public forums at which political questions are considered or conducting candidate forums on a range of issues; compiling a guide consisting of the voting records of Members of Congress on a variety of issues; compiling a guide consisting of the voting records of Members of Congress on selected issues so long as the guide is not widely distributed to the general public during an election campaign; publishing candidate responses to a questionnaire on a variety of subjects; issue advertising or lobbying; nonpartisan public opinion polling; non-partisan voter registration drives; and lobbying for or against the appointment of nonelective officers, such as judges.[4] While these non-campaign political activities are not prohibited, some may cause the organization (and possibly its managers) to be subject to one or more taxes on its political or lobbying expenditures.[5]

A question that frequently arises is whether a church may invite political candidates to appear at its services or other events. The answer is yes, so long as

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[1] IRC § 170(c)(2).

[2] For further information, see Kindell, Judith E. and Reilly, John Francis, *Election Year Issues,* Exempt Organization Continuing Professional Educational Technical Instruction Program for Fiscal Year 2002; and IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*. Both are available on the IRS website at [http://www.irs.gov].

[3] *See* 26 CFR § 1.501(c)(3)-1(c)(3)(iii); Rev. Rul. 78-248; and Kindell and Reilly, *Election Year Issues*.

[4] *See* Kindell and Reilly, *Election Year Issue*s; Rev. Rul. 78-248, Rev. Rul. 80-282, Rev. Rul. 86-95; and IRS Notice 88-76.

[5] IRC §§ 527(f), 4911, 4912, and 4955.

certain criteria are met.[6] If the individual appears in his or her role as a candidate, then the other candidates must be given equal opportunity to appear, the church or organization must make clear it is not endorsing or opposing any candidate, and no political fundraising may occur. If the individual appears in a role other than as a candidate (e.g., in the position the candidate currently holds), then it should be made clear in what capacity the individual is appearing and there should be no mention of his or her candidacy or the election.

Finally, the tax laws do not prohibit religious leaders from participating in political campaign activity as individuals.[7] Religious leaders may endorse or oppose candidates in speeches, advertisements, etc., in their capacity as private citizens. The leader may be identified as being from a specific church or organization, but it should be clear that he or she is speaking as an individual and not as a representative of the organization. A leader may not make the political statements in the organization's publications, at the organization's events, or in any way that uses the organization's assets (e.g., in a newspaper advertisement paid for by the organization). This is true even if the leader pays for the costs of the publication or event (e.g., the leader pays the publishing costs of the organization's newsletter in which he or she endorses a slate of candidates).

Campaign Finance Law.

The current Federal Election Campaign Act (FECA),[8] which governs the raising and spending of campaign funds, does not perfectly parallel the tax law. FECA generally prohibits corporations from directly making contributions and expenditures in connection with federal elections.[9] Unincorporated organizations, however, are not prohibited by FECA from making such contributions and expenditures. The "Bipartisan Campaign Reform Act of 2002" (BCRA), P.L. 107-155, which amends FECA, further bans corporations, including tax-exempt corporations, from funding "electioneering communications," which it defines as broadcast communications that "refer" to a federal office candidate within 60 days of a general election and 30 days of a primary. The constitutionality of this new provision of law was upheld by the Supreme Court in 2003 in *McConnell v. FEC*.[10] The new Federal Election Commission (FEC) regulations promulgated under BCRA carved out an exception

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[6] *See* Kindell and Reilly, *Election Year Issues*, at 380-82; IRS Publication 1828 at 8-10.

[7] *See* IRS Publication 1828 at 7-8.

[8] 2 U.S.C. § 431 *et seq.*

[9] 2 U.S.C. § 441b(a)(2002). Corporations may make expenditures to communicate with stockholders and executive or administrative personnel and their families, to engage in nonpartisan voter registration or get-out-the-vote campaigns aimed at stockholders and executive or administrative personnel and their families, and to establish, administer, and solicit contributions to a separate segregated fund for political purposes (also known as a political action committee or PAC), 2 U.S.C. § 441b(b)(2).

[10] 124 S. Ct. 619, 688-89 (2003). For further discussion regarding this decision, see CRS Report RL32245, *Campaign Finance Law: A Legal Analysis of the Supreme Court's Ruling in McConnell v. FEC*, by L. Paige Whitaker.

to this prohibition for IRC § 501(c)(3) nonprofit corporations[11] on the theory that the tax code already prohibits such organizations from funding such advertisements.[12]

In addition, in the 1986 decision, *FEC v. Massachusetts Citizens for Life, Inc. (MCFL),*[13] the Supreme Court held that the prohibition on corporations using their corporate treasury funds to make contributions and expenditures in connection with federal elections could not constitutionally be applied to certain non-profit corporations. Under *MCFL*, certain nonprofit, nonstock corporations are permitted to spend treasury funds to make contributions and expenditures in connection with federal elections if: (1) the corporation is formed for the purpose of promoting political ideas and does not engage in business activities; (2) the corporation has no shareholders or other affiliates with an economic incentive to remain associated with the corporation when they disagree with its political activities; and (3) the corporation is not established by a business corporation and does not accept contributions from business corporations.[14]

How Legislation Would Change Current Law

H.R. 235 (109th Congress). Under section 2 of H.R. 235, churches, their integrated auxiliaries, and conventions or associations of churches would

> not fail to be treated as organized and operated exclusively for a religious purpose . . . [or] deemed to have participated in, or intervened in any political campaign on behalf of (or in opposition to) any candidate for public office . . . because of the content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings.[15]

The bill specifies that this rule applies not only for the organization's treatment under IRC § 501(c)(3), but also for purposes of eligibility to collect tax deductible contributions [IRC § 170(c)(2)], various estate and gift tax provisions [IRC §§ 2055, 2106 and 2522], and the excise tax on political expenditures [IRC § 4955].

Section 3 of the bill provides that no church member or leader would be prohibited from expressing personal views on political matters or election for public office during regular religious services, so long as these views are not disseminated beyond the attendees at the service. Dissemination would include a mailing with

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[11] 11 C.F.R. § 114.10 (2003).

[12] However, it is not clear that the Internal Revenue Code or current IRS regulations would necessarily treat all broadcasts that meet the definition of "electioneering communications" as campaign intervention. It may be that the future IRS regulations will be informed by the FECA regarding what activities constitute campaign intervention, but there is no requirement that they do so.

[13] 479 U.S. 238 (1986).

[14] *Id.* at 264.

[15] While the focus of this report is on political campaign activity, this language is not limited to such activity.

more than an incremental cost to the organization and any electioneering communication. Section 3 also provides that nothing in section 2 of the bill would permit any disbursements for electioneering communications, or political expenditures, prohibited in the Federal Election Campaign Act.

The bill would preclude a church from making campaign contributions or paying for full-page endorsement advertisements such as that sponsored by the Church at Pierce Creek. However, this language would permit any activity that could be deemed part of a sermon or other presentation during a religious service. As such the bill would appear to permit activities such as express endorsement or opposition to a candidate for public office during a sermon; requests that contributions be made directly to the candidate's committee or other political organizations; directions for individual contributions of services to political campaigns; and exhortations to vote for particular candidates.

H.R. 235 (108th Congress). The version of the Houses of Worship Free Speech Restoration Act that was introduced in the 108th Congress was also numbered H.R. 235. It was identical to the version introduced in the 109th Congress, although it did not include IRC §§ 2055, 2106, 2522 and 4955 in the list of affected sections and it did not include the language concerning church leaders expressing and disseminating personal views.

Since this version of H.R. 235 did not include the provision dealing with dissemination, it is possible that the bill would allow an incorporated church to reprint the sermon or minutes of the gathering and mail them to church members as corporations are permitted to communicate with stockholders under 2 U.S.C. § 441b(b)(2).[16] Broadcasting sermons by incorporated churches containing endorsements would appear to be prohibited under the language of BCRA as an "electioneering communication," but the FEC regulations have interpreted broadcasts by § 501(c)(3) nonprofit corporations as exempt from the definition of "electioneering communication." It is unclear how this could impact the interpretation of the bill.

H.R. 4520 (108th Congress). The provision in H.R. 4520, former section 692 (Safe Harbor for Churches), was only briefly in the bill. It was struck by the Committee on Ways and Means by unanimous consent on June 14, 2004. The provision would have done several things. First, it would have codified existing law so that churches and religious organizations would not have been treated as participating in a political campaign solely because of private statements made by their religious leaders. Second, churches and religious organizations that unintentionally intervened in a political campaign would not have lost their tax-exempt status or eligibility to receive deductible contributions unless the organization or its religious leaders had done so on more than three separate occasions during the calendar year. Third, the provision created a new excise tax on the unintentional violation of the prohibition on political campaign activity. If the church had at least three violations during the calendar year, then the sanction would have equaled the highest corporate tax rate multiplied by the church's gross income. If the church had

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[16] Unincorporated churches are not subject to the FECA restrictions on corporations.

two violations, then the sanction would have equaled that amount divided by two. If the church had one violation, then the sanction would have equaled the full amount divided by 52. The amount of tax owed would have been reduced by any amount imposed for the existing excise tax.

H.R. 2357 (107th Congress). The Houses of Worship Political Speech Protection Act, H.R. 2357 and S. 2886 (107th Congress) would have excepted churches and church auxiliaries from the absolute prohibition on participation or intervention in a political campaign and added language which would have measured churches' political campaign activities by the same "no substantial part" test that is used for lobbying activities of all IRC § 501(c)(3) organizations. That is, "no substantial part" of churches' activities could be "participating in, or intervening in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

Since the bill did not include a numerical test, each church or religious organization would have been judged on a case-by-case basis as to whether or not its campaign activities were a substantial part of its activities as a whole. Although "no substantial part" is a flexible standard, that test would prevent a church from being organized to conduct political campaign activities.

H.R. 2357 received a floor vote on October 2, 2002, and failed to pass by a vote of 178 to 239 (Roll no. 429).

H.R. 2931 (107th Congress). Under the Bright-Line Act of 2001, H.R. 2931, a church would only have participated in political campaign activity if it normally made expenditures for such purposes in excess of 5% of its gross revenues. The bill also created a numerical test for the lobbying limitation. Under current law, churches and other IRC § 501(c)(3)organizations may only conduct an insubstantial amount of lobbying. The bill would have allowed churches to lobby without risking its exemption so long as its lobbying expenditures did not normally exceed 20% of the church's gross revenues. The church could not have spent more than 20% of its gross revenues on political campaign and lobbying activities. The bill did not define the term "normally."

Table 1. Comparison Among the Bills

	H.R. 235 (109th Cong.)	**H.R. 235 (108th Cong.)**	**Former section 602 of H.R. 4520 (108th Cong.)**	**H.R. 2357 (107th Cong.)**	**H.R. 2931 (107th Cong.)**
Allows unlimited types of activities	No, permissible activities are limited to those in "the content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings."	No, permissible activities are limited to those in "the content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings."	Yes, although activities must be unintentional violations of the prohibition against political campaign activity.	Yes	Yes
Allows unlimited amount of permissible activities	Yes, but types of activities are limited.	Yes, but types of activities are limited.	No, churches may only unintentionally violate the prohibition three times before risk losing exempt status and being subject to penalty taxes.	No, the political activity can not be more than a "substantial part" of the church's activities.	No, the political activities could not exceed 5% of the organization's gross revenues.
Addresses personal speech by religious leader	Yes	No	Yes	No	No

	H.R. 235 (109th Cong.)	**H.R. 235 (108th Cong.)**	**Former section 602 of H.R. 4520 (108th Cong.)**	**H.R. 2357 (107th Cong.)**	**H.R. 2931 (107th Cong.)**
Explicitly affects IRC sections dealing with estate and gift taxes	Yes	No	No	No	No
Adds a new penalty	No	No	Yes, on unintentional violations of prohibition.	No	No
Addresses lobbying	No	No	No	No	Yes, church could only lose exemption if it normally spent more than 20% of its revenue on lobbying (political and lobbying expenditures could not exceed 20% of the church's revenue).
Outcome	Referred to the Ways and Means Committee.	Referred to the Ways and Means Committee; no further action.	Struck by the Ways and Means Committee by unanimous consent on June 14, 2004.	Received floor vote in the House of Representatives on October 2, 2003 and failed to pass by a vote of 178-239.	Referred to the Ways and Means Committee; no further action.