



Chairman Michael Batts Comments on Commission's Recommendations with the Exempt Organizations Tax Journal*

October 15, 2014

Paul,

I am compelled to respond to the comments of Mr. Conrad Rosenberg reported in your "Mailbag" from October 13, entitled, "No Good Pulpit Politicking Options."

Mr. Rosenberg states, "That leaves three basic options: repeal the provision [the campaign intervention prohibition in Section 501(c)(3)] (undesirable for all the reasons Marv [referring to a previous post from Marv Friedlander] enumerates); don't enforce the restriction in any case, even the most egregious, which would effectively allow an administrative agency to neutralize a law that was duly enacted by the United States Congress and signed by a President; enforce the law selectively, which would allow IRS a latitude that would be potentially arbitrary and unfair...Those who criticize the IRS for the way it deals with this conundrum do so either for perceived political gain, or because they simply don't understand the problem. These critics of the status quo need to face those alternatives squarely and come up with better options if they can -- or shut up."

As you know, the Commission on Accountability and Policy for Religious Organizations (www.religioustaxpolicycommission.org), which I chaired and which was facilitated by ECFA upon the request of Senator Charles Grassley, did address this issue; assessing the status quo as "untenable" and squarely faced (to use Mr. Rosenberg's term) the alternatives resulting in an elegant if not perfect proposed solution. Keep in mind that the Commission and its panels were composed of 66 individuals that included leaders from every major faith group in America, a panel of highly credentialed exempt and religious organization legal experts, and leaders from a diverse array of secular nonprofit organizations from across the country. The Commission issued its recommended solution in a report delivered to Senator Grassley and published on the Commission's website in August of 2013.

* Michael Batts, Chairman of the Commission on Accountability and Policy for Religious Organizations, provided these comments via email to Paul Streckfus, Editor of the *Exempt Organizations Tax Journal*, in response to an ongoing discussion among readers regarding alternatives to the status quo for government regulation of political speech by churches and other religious organizations.

For some inexplicable reason, intellectual integrity in discussions of this vexing area of the law and its administration is a missing virtue. Rare is the person who addresses with honesty the topic of political communications by religious organizations in the context of a public policy discussion. I have personally engaged in discussions with otherwise brilliant people about this topic only to witness an abject failure on their part to admit or acknowledge some of the realities that exist with respect to this issue. That fact is both shocking and sad, and is part of the reason we find it so difficult to generate a solution.

The Commission did not have that problem. We addressed the issues head-on, with complete candor and a willingness to listen and learn. There was no preconceived outcome of the Commission's process or deliberations, but by listening carefully to the honest input of those involved, we identified a solution with the potential of eliminating virtually all of the current nightmarish aspects of administering the law.

The IRS hates this area of the law. The Commission quoted Dean Zerbe in its report referring to the administration of this area of the law as "extremely hellish" for the IRS. Understandably so. With the law interpreted by the IRS as it is today, does the IRS want to be put in the position of revoking the exempt status of a church as a result of evaluating the content of a minister's sermon? There are arguably at least three fundamental First Amendment freedoms wrapped into the content of a minister's sermon – freedom of speech, free exercise of religion, and the right to peaceably assemble. And there are arguably no rights that are more central to the American experience than those.

What government interest is so compelling that it requires a church and its clergy to relinquish some of their most sacred American rights in exchange for a tax attribute? Casual pundits will argue that not engaging in political speech is the price of tax exemption as if that is some kind of profound, self-evident observation. It is neither profound nor self-evident. It makes no more sense to require a church and its clergy, in exchange for tax exemption, to relinquish their sacred right to say whatever they wish to say in a worship service than it does to require them to relinquish their right to equal protection, their right to protection from unreasonable searches and seizures, or any other fundamental Constitutional right. From another vantage point, if it is so logical to deprive an entity of the freedom to engage in campaign-related speech in exchange for a tax attribute (in the case of churches, their exempt status), then it would seem just as logical to deprive individuals of that right if they deduct mortgage interest on their personal tax returns. In other words, the magic correlation between tax exemption and prohibition of political speech that so many people seem to blindly accept as totally rational is not so much.

Some will argue in response to the logic described in the preceding paragraph that the government imposes a variety of restrictions on organizations as a condition of granting recognition of exempt status. Examples are prohibitions against private inurement and substantial private benefit, to name a couple. While that is true, the types of restrictions imposed (other than the campaign intervention prohibition) do not abridge the

fundamental First Amendment rights of the organizations. There is no First Amendment right for an organization to compensate its leaders excessively.

Then there is the “subsidy” argument. That is the argument that the government should not “subsidize” political speech – and that 501(c)(3) tax exemption and the charitable contribution deduction represent a subsidy of an organization’s activities by the government. Such a position starts with the arrogant premise that all income is the government’s and that whatever portion of a person’s income the government allows the person to keep (via tax deductions, a tax rate of less than 100%, or otherwise) is a “subsidy.” The subsidy argument has other flaws but I will avoid the temptation to enumerate them here. The government isn’t subsidizing religious organizations...the government is (and is supposed to be) leaving them alone. Not molesting them. Not “excessively entangling” with them. It is hard to imagine an act that would be more of an example of “excessive entanglement” than the government monitoring the content of ministers’ sermons across America, waiting to pounce and revoke the exemption of a church whose minister crosses an arbitrary line drawn by a peeved senator from Texas in 1954.

One reality often blindly overlooked is that the vagueness of the current law as applied by the IRS, coupled with the threat of loss of exemption for violating it, chills speech that is permissible under current law. The IRS has stated in its published guidance that “all of the facts and circumstances” of an organization’s actions must be taken into consideration in determining whether an organization has violated the prohibition against political campaign intervention. For example, according to the IRS, making a communication about a social or moral issue could violate the law, depending on when it is done and how it is done. When the line of demarcation is unclear, and the consequence of crossing it can be nuclear, it should be no surprise to anyone that many religious and nonprofit leaders steer so far from the line that they avoid saying things that they believe need to be said for the public good.

Another reality often overlooked is the fact that hundreds of churches participating in the Pulpit Freedom Sunday initiative led by Alliance Defending Freedom have been intentionally delivering sermons at least annually since 2008 in which they address political candidates and campaigns. Some churches even have their sermons transcribed and sent to the IRS with a request to be audited. The IRS has not, as of this writing, taken adverse action against any of these churches. These churches are doing this to exercise what they consider to be their constitutional freedoms in the hope of initiating litigation with the IRS. The atheist group, Freedom from Religion Foundation, sued the IRS (the case was recently “settled”) for failure to enforce the law. The IRS has purportedly (according to FFRF) claimed that it has identified churches for possible enforcement action but the IRS has not shared any information publicly about the matter.

Yet another reality often completely ignored is that a large number of African-American and other ethnic minority churches regularly engage in political communications in the context of their worship services – and for valid and understandable reasons. Following

is an excerpt from the Commission's report on this topic (footnotes omitted, but please see the report for the numerous supporting references):

It is commonly known and well-documented that many African-American churches have historically engaged heavily in the American political process. Doing so is an integral part of the culture of many African-American churches and communities. According to a study conducted by the Pew Research Center in late 2012, black Protestant churchgoers are eight times as likely to hear about political candidates at church as their white mainline counterparts. The Pew study further reveals that 45% of black Protestant churchgoers indicated that the messages they hear at church favor a particular candidate.

The Commission's leadership convened a meeting on April 3, 2013 to which a number of African-American church leaders were invited for the purpose of sharing information about political activities within African-American churches and communities. We are deeply grateful for the participation of the leaders who attended and for the candid information and insights they shared. In that meeting, African-American church leaders shared relevant literature with us, engaged in robust discussions, and confirmed our understanding that:

- Communications about political campaigns occur with frequency in African-American churches,
- Such communications are an integral part of the culture and community of African-American churches,
- Such communications have a long history in the African-American church, and
- Engagement by African-American churches in the political arena is not likely to cease.

The following excerpts are from the seminal work on the topic, *The Black Church in the African American Experience*, by C. Eric Lincoln and Lawrence H. Mamiya:

Politics in black churches involves more than the exercise of power on behalf of a constituency; it also includes the community building and empowering activities in which many black churches, clergy, and lay members participate daily.

As the primary social and cultural institution, the Black Church tradition is deeply embedded in black culture in general so that the sphere of politics in the African American community cannot be easily separated from it.

In an article written for the Marquette Law Review entitled *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression* by

Churches, author Anne Berrill Carroll observed, “[A]n assault on the political role of black churches may be seen as nothing less than an assault on black enfranchisement itself, which was nurtured within the churches during a time when no other forum for the black political voice existed.”

The African-American church has been a source of significant social change in the United States. Some of the most well-known leaders of the Civil Rights Movement in America (e.g., Dr. Martin Luther King, Jr.) were clergy from African-American churches. Given the nature, origin, and history of political activity in the African-American church, the Commission believes that it is not in the best interests of American public policy for the federal government to attempt to change that attribute of the African-American church, nor does the Commission believe that any attempts to do so would or should be successful.

All of these realities combined make for an untenable situation.

The Commission recommended a solution that, in its simplest terms, would require Congress to clarify that certain political communications, engaged in by 501(c)(3) public charities, would not constitute prohibited political campaign intervention. The core criterion would be that the communication must occur within the ordinary course of a 501(c)(3) organization’s regular and customary exempt-purpose activities and must not involve an incremental expenditure of funds (other than de minimis amounts).

The Commission did not recommend repeal of the prohibition in its entirety – primarily out of concern that doing so could permit the flow of funds from donors to political campaigns through churches and charities.

The Commission’s report describes the solution in much more detail and with numerous examples of how it would apply.

So, as things sit, following are the real options for addressing the mess that exists today in this area of the law:

1. The IRS can ignore the law with respect to all churches and the content of their worship services. (Such an approach seems problematic in light of obstacles that include litigation by atheist groups and the direct confrontations by hundreds of churches in the Pulpit Freedom Sunday initiative.)
2. The IRS can enforce the law uniformly and attempt to revoke the exemptions of churches accused of violating the prohibition. (Such an approach seems problematic in that it would require revoking the exemptions of and/or altering the cultural reality of a large swath of African-American and other churches for whom political expression is an understandably steeped aspect of their culture.)
3. The IRS can selectively enforce the law. (Such an approach is highly problematic and unlikely to succeed – especially in the aftermath of the recent

accusations of selective and biased treatment of certain organizations in the 501(c)(4) arena. Not to mention that such an approach would not be a valid policy position...it would be a disgrace.)

4. Congress and Treasury can adopt a statutory and regulatory solution that acknowledges, addresses, and reasonably accommodates the realities outlined above without “creating a monster.” Permitting political communications by 501(c)(3) organizations within the context of their usual and customary exempt-purpose activities and strictly limiting the ability of those organizations to make incremental expenditures in so doing would solve virtually all of the problems associated with administering the existing law as currently interpreted and (somewhat) applied.

Finally, I would acknowledge that there are those who object generally to the idea of permitting churches and charities to take positions with respect to candidates and campaigns, regardless of whether doing so involves spending money incrementally. A prominent argument in this camp goes something like this – “That is a terrible idea. The result would be Republican churches and Democratic churches. Republican charities and Democratic charities.” In response to such an argument, I would note that to the extent we don’t already have Republican and Democratic churches and charities, there is no reason to believe that allowing limited freedom of communication in the political arena would result in the “free for all” that some predict. We only need to look to the reality of the existing federal tax rules related to lobbying for proof. Churches and charities have been permitted for decades to engage in lobbying for specific legislation, so long as such activity is not a substantial part of their activities. Yet, very few churches and charities engage in true lobbying activities – in most cases, because they do not consider such activity to be appropriate for them. With decades of history bearing out that observation, there is no reason to believe that churches and charities will decide to pervasively engage in campaign-related communications, even if they have more freedom to do so.

Is the Commission’s proposed solution perfect? No. Is it better than what we have today? I submit that the answer is “Yes.” By light years.

Sincerely,

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