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The Ballot, the Bimah, and the Tax Code

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Ellen P. Aprill

There are those involved in synagogue life who insist that synagogues risk loss of exemption and the ability to receive tax-deductible contributions if their leaders engage in political discourse of any kind. Others believe that so long as clergy do not explicitly endorse or oppose any candidate for public office, they are free to engage in political commentary of any kind. Neither is true.

Charities, including churches and synagogues, fail to satisfy the requirements for exemption from income tax under section 501(c)(3) of the Internal Revenue Code if they “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.” For purposes of this essay, I will describe this prohibition as the “political campaign intervention.” In contrast, the tax code permits synagogues, like other charities, to lobby – take positions on particular legislative matters – so long as such lobbying activities do not amount to a “substantial part” of their activities. Furthermore, charities, including synagogues, may take positions on public policies issues without limit. In brief: no political campaign intervention, some lobbying, and unlimited policy discussion.

While these distinctions are relatively clear in broad outline, the Internal Revenue Service (“IRS”) enforces the political campaign intervention prohibition against both explicit and

indirect endorsement or opposition. The prohibition of indirect political campaign intervention blurs the edges of all three of these categories. The lack of guidance as to what is “substantial” for purposes of the lobbying limitation further complicates the landscape.

Charities, moreover, can speak on these matters in various ways – through resolutions, newsletters, programs, and, in the case of synagogues, from the bimah. For the purposes of the tax laws, rabbis often act in an official capacity and in that role, their actions can have consequences for the tax status of their congregations. At other times and in other ways, the tax laws recognize that rabbis speak as individuals, with the full protection of First Amendment rights. Distinguishing when rabbinic speech is deemed that of the individual and when it is attributed to the synagogue is crucial. That is, rabbis need to know when their voice and actions have consequences for their congregations as institutions subject to the federal tax laws rather than for themselves as individuals.

This essay will explain briefly how the IRS distinguishes these categories. To do so, it will include examples, background, and current developments. A full discussion of all the issues and questions that arise in this area of the law will not be possible, however, and thus a list of helpful references will be included at the end. The goal of the piece is to help rabbis understand this area of the law so that they may navigate within its strictures, such as they are.

Background and Purpose of the Political Campaign Intervention Prohibition

Lyndon B. Johnson introduced the political campaign intervention ban as an amendment to section 501(c)(3) during a Senate floor debate on the 1954 Internal Revenue Code. No legislative history contemporary with the legislative change explains the purpose of this prohibition. Legislative history from 1987 explains that the ban “reflects a Congressional policy

that the U.S. Treasury should be neutral in political affairs.”¹ The fact that a number of other categories of tax-exempt organization are permitted to engage in political campaign intervention undercuts this rationale. These other categories of tax-exempt organizations, however, are not eligible to receive tax-deductible contributions. Thus, a more persuasive justification for the prohibition is that Congress did not wish to allow tax-deductible contributions to be used for political campaign intervention.

Constitutionality of the Political Campaign Intervention Prohibition

The First Amendment states that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” Thus, many have argued, an absolute prohibition on political campaign intervention for religious groups is unconstitutional. It is incumbent for many, if not most, religions to speak out on political issues, the argument continues, and the need to speak truth to power may require intervening in political campaigns to address the key social issues of the day to carry out that religious obligation.

The courts, to date, have not been sympathetic to this point of view. The most recent is a 2000 case, Branch Ministries v. Rossotti.² Four days before the presidential election in 1992, the Church at Pierce Creek ran full-page advertisements in *USA Today* and the *Washington Times* urging Christians not to vote for then-Governor Clinton because his position on such issues as abortion and homosexuality violated Biblical precepts. The ads also solicited tax-deductible contributions. The Court of Appeals found that the Church failed to demonstrate that revocation of tax exemption for political campaign intervention substantially burdened its free exercise rights. According to the court, “the Church does not maintain that a withdrawal from electoral

¹ H.R. Rep. No. 100-391 (II), at 1625, 1627 (1987).

² 211 F.3d 137 (D.C. Cir 2000).

politics would violate its beliefs. The sole effect of the loss of tax exemption will be to decrease the amount of money available to the Church for its religious practices. The Supreme Court has declared, however, that such a burden ‘is not constitutionally significant.’” The court affirmed the revocation of church’s exemption.

Not all believe that this decision has resolved the constitutional issue. The Alliance Defense Fund (“ADF”) has sponsored two annual Pulpit Freedom Sundays in late September.³ Ministers participating in Pulpit Freedom Sunday preach about how Scripture applies to every area of life, including, if they choose, candidates for election. As the ADF explains on its website, it has organized Pulpit Freedom Sunday in hopes that the IRS will revoke the exemption of at least some participating churches so that the ADF can challenge the constitutionality of the political campaign intervention prohibition. The ADF reports that 83 churches from 30 states participated in Pulpit Freedom Sunday in 2009, as compared to 32 in 2008, although it is not clear how many ministers engaged in political campaign intervention by endorsing or opposing candidates for public office. The ability of the IRS to investigate the churches that have participated in Pulpit Freedom Sunday has been hampered, however, by a recent court decision that the procedures the IRS has been using to authorize examinations of churches does not satisfy the applicable statute, which has special and particular requirements for any church audit. The IRS has recently proposed new regulations to cure these procedural infirmities and is expected to resume investigations once the regulations become final.

Even if political campaign intervention is not required as a constitutional matter, a number of legislators and scholars have called, and continue to call, for some loosening of the prohibition as a matter of policy and prudence. Some proposals, for example, would permit

³ See ADF website at <http://www.adfmedia.org/News/PRDetail/9835?search=1>

churches to engage in political campaign intervention in communications to members or during regularly scheduled services. One such provision, the Houses of Worship Political Speech Protection Act, proposed and defeated in 2002, would have paralleled the current provision for lobbying activities by providing that churches would qualify for exemption so long as no substantial part of their activities consist of participating or intervening in a political campaign. The RAC strongly welcomed its defeat. Rabbi David Saperstein, in a press release from the RAC, described it as a bill that would have “jeopardized the integrity of religion and the political process, “embroiling “houses of worship in divisive battles as to which candidates to support or oppose, undercut campaign finance laws, and led to extensive government monitoring of church political activities.”

Legislative proposals to modify the political campaign intervention prohibition surface regularly and the ADF remains committed to mounting a constitutional challenge to it. Thus, this is an area that calls for continued vigilance and monitoring for those involved in synagogue life.

Political Campaign Intervention – Express Endorsement or Opposition

When questions about political campaign intervention relate to express candidate endorsement or opposition, the parameters of the prohibition are for the most part easily understood. As a result of the statutory prohibition, congregations cannot make contributions to any candidate’s campaign, display a banner endorsing or opposing a candidate for public office on their building or on their website, or send a letter to their members urging them to vote for or against a candidate for public office. All of these would constitute direct intervention in a political campaign.

The political campaign intervention prohibition applies only to the campaigns of individuals for public office. The IRS has interpreted these requirements in various authorities.⁴ The public office can be at any level – federal, state or local. It includes elected judges, school boards or dog catchers, if they are elected by the public. (Action in support of a judicial nominee who must be confirmed by a legislative body, such as a Supreme Court Justice, is considered lobbying, not intervention in a campaign for public office, and subject to the lobbying limit, discussed below.) The election need not be contested or involve the participation of political parties. “Candidates” for public office are generally those who have offered themselves or been proposed by others for elective office. Speculation about a prominent person’s future run for office does not make the person a candidate. An individual who has formally announced an intention to seek election will be considered a candidate. If actions are taken by an individual or by others to further the goal of candidacy, an individual could be considered a candidate even before a formal announcement.

As the challenge mounted by the ADF indicates, however, the political campaign intervention prohibition extends to clergy acting in their official capacity. Thus, a rabbi cannot endorse a candidate from the pulpit, in the congregational newsletter, or at a congregational event, however precious the principle of freedom of the pulpit. Both in a document that has a degree of precedential authority⁵ and in a publication designed specifically to guide churches, the IRS takes the position that even disclaimers by the clergy that their remarks represent their personal views do not cleanse such remarks made in official organization publications or at official functions.

⁴ Authorities include Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(iii); Rev. Rul. 67-71, 1967-1 C.B. 125; Tech. Adv. Mem. 9130008, and Notice 89-76, 1988-2 C.B. 392.

⁵ Rev. Rul. 2007-41, 2007-1 C.B. 1421. The examples in the Church Guide are closely based on those in Rev. Rul. 2007-41. This essay does not discuss all of the many examples in the Church Guide.

In one example in the IRS publication, Tax Guide for Churches and Religious Organizations, (“Church Guide”), not only did a minister’s column state that it was his personal opinion that a particular candidate should be reelected, but the minister also took care to pay from his personal funds for the portion of the cost of the newsletter attributable to his column. Such efforts were to no avail. Because the endorsement appeared in the official publication of the church, the example concluded that it constituted political campaign intervention attributed to the church. Similarly, because a rabbi speaks in her official capacity from the bimah or at a synagogue function, an endorsement or criticism of a candidate for public office from the bimah or at any synagogue event would be attributable to the synagogue. Emphasizing that the remarks were the rabbi’s own personal opinion and members of the congregation should decide themselves how to vote would not change the result.

At the same time, rabbis do not lose their First Amendment rights and remain free to endorse candidates when acting in their individual capacities. The Church Guide offers two examples. In one, a minister endorses a candidate at a press conference three weeks before an election, an endorsement reported in an article on the front page of the local newspaper in which the minister’s position and church are identified. In the other example, a candidate publishes a full-page ad in the local newspaper listing five prominent ministers who have personally endorsed the candidate. The ad indicates the position and affiliation of each minister. The ad states, “Titles and affiliations of each individual are provided for identification purposes only.” The candidate’s campaign committee pays for the advertisement. In both examples, the IRS concludes that because the minister did not make an endorsement at an official church function, in an official church publication, or use church funds or other assets, the actions did not constitute prohibited political campaign intervention. The Church Guide also urges religious

leaders who speak or write in their individual capacity to indicate that their comments are personal and not intended to represent the views of the organization.

For the most part, congregations easily avoid express endorsements. A report on an IRS Political Activity Compliance Initiative (“PACI”) observed in 2006 that pastors of churches that the IRS had investigated based on referrals during the 2006 election cycle generally made conscious efforts to avoid express endorsements of candidates. Far more difficult are the issues to communications that convey a message on behalf of in opposition to a candidate indirectly.

Political Campaign Intervention – Indirect Endorsement or Opposition

The PACI Report pointed out that many churches and ministers believe that the political campaign intervention prohibition is limited to expressly endorsing or opposing candidates. Such is not the case. It applies as well to an indirect endorsement if it clearly conveys a message on behalf of, or in opposition to a candidate. Whether or not such activity violates the ban depends on the facts and circumstances. The possibility of indirect endorsement complicates compliance for synagogues and rabbis. By its very nature, it grants a degree of discretion to IRS agents in a particularly sensitive area of the law, one closely allied to precious First Amendment freedoms.

Facts and circumstances tests are commonplace throughout the law in general and tax law in particular. It is also standard practice to apply tax laws to both direct and indirect violations. To do otherwise would permit too easy an avoidance of the rules. Moreover, recent guidance from the IRS has gone a long way in clarifying what is and is not indirect endorsement or opposition.

Again, the Church Guide offers helpful examples of frequently encountered situations. The key question in each case is whether the activity at issue is conducted in a non-partisan manner. Thus, a congregation may invite a candidate to speak as a candidate if the congregation gives the other candidates an equal opportunity to speak. In one example, each of three Congressional candidates for the district in which a church is located were invited to speak on successive Sundays as part of regular worship services. Each answers questions on a wide variety of topics from the congregation. Such actions did not violate the political campaign intervention prohibition. In another example, only one candidate is invited. The candidate asks for the congregation's votes during the candidate's remarks. According to the IRS, such actions constitute violation of the political campaign intervention ban by the church.

In some cases, revenue-generating activities could constitute political campaign intervention. The Church Guide also offers examples of partisan and non-partisan business activity. In the "good" example, a church rents its hall for a fee to a candidate for a fundraising dinner on the same first come, first served basis it has done for members of the public for several years. In the "bad" example, the church rents its mailing list, which it has never done before, to the campaign committee of a candidate who supports funding for faith-based programs and declines to rent its mailing list to the campaign committees of other candidates.

By far the most difficult line-drawing involves when public policy discussion or issue advocacy could be viewed as indirect political campaign intervention. The Church Guide states, "Like other section 501(c)(3) organizations, some churches and religious organizations take positions on public policy issues, including issues that divide candidates in an election for public office. However, section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention." The Church Guide lists key factors for determining whether

a communication results in political campaign intervention. They are important enough to list in full.

- whether the statement identifies one or more candidates for a given public office,
- whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions,
- whether the statement is delivered close in time to the election,
- whether the statement makes reference to voting or an election,
- whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office,
- whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election, and
- whether the timing of the communication and the identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

The Church Guide cautions that although a communication must be considered in context, it is “particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election.”

The Church Guide includes a telling example, one that may be troubling to some, but worthy of careful consideration. In the example, Candidate A and B are running for state senate

in a particular district. The issue of state funding for faith-based indigent hospital care in the district is a prominent issue in the campaign, and both candidates have spoken out on it. Candidate A supports such funding; Candidate B does not, supporting instead increased state funding for public hospitals. At the church's annual fundraising dinner, which takes place a month before the election P, the head of a board of elders at a church in the district, gives a long speech about health care issues in which he discusses the issue of funding for faith-based programs. He does not name any candidate or political party. He makes the following statement at the end of the speech: "For those of you who care about quality of life in District W and the desire of our community for health care responsive to their faith, there is a very important choice coming up next month. We need more funding for health care. Increased public hospital funding will not make a difference. You have the power to respond to the needs of this community. Use that power to when you go to the polls and cast your vote in the election for your state senator." The IRS concludes that the church has violated the political campaign intervention prohibition because the remarks of the church elder occurred at an official function, shortly before the election, and referred to an upcoming election after stating a position on an issue that is prominent in a campaign that distinguishes the candidates.

That the political campaign intervention prohibition applies to indirect endorsement requires heightened sensitivity on the part of rabbis. It does not mean that, close to elections rabbis need to cease discussion of public policy issues, even those issues that distinguish candidates, close to an election. But the IRS guidelines strongly suggest that rabbis and congregations avoid any discussion of candidates by name, unless done in scrupulously nonpartisan manner. That is, any discussion of candidates by name should be such that a disinterested observer would not consider the communication as endorsing one of the candidates

over another. An example of such a neutral presentation would be a forum in which a representative of each candidate presents that candidate's views. The political campaign intervention prohibition may also call for care in inviting guest speakers close to an election. Caution may counsel that close to an election clergy and lay leaders remind some guest speakers about these rules before guests address the congregation on issues prominent in the election.

At the same time, this set of rules does not mean that clergy need hesitate to remind congregants to get involved in the election and vote. It does, however, mean that policy discussions and "get out the vote" exhortations need to be separated rather than combined. With such cautions, rabbis and congregations will find themselves in little danger of violating the ban on intervention in campaigns for public office.

Results of the IRS Political Action Compliance Initiatives

As noted earlier, in recent election cycles, the IRS has conducted Political Activity Compliance Initiatives. Based on referrals, it examined possible political activity among some 100 exempt organizations in each of the 2004, 2006, and 2008 election cycles. Results are available for 2004 and 2006. For both election cycles, the most common violations identified as being those of the 40+ churches among those organizations selected for examination were distribution of printed documents supporting candidates, statements endorsing candidates during normal services, well-known individuals endorsing a candidate at an official church function, candidates speaking at official functions, and distributions of partisan voter guides.

Although the statutory prohibition by its terms is absolute such that even a de minimis amount of political campaign intervention could result in loss of exemption, the IRS did not revoke exemption in any of these cases. Neither did it impose the available excise tax of 10% on

political campaign intervention expenditures. It instead issued written advisories because either the act of intervention was shown to be an anomaly or because the organization corrected the intervention and took steps to prevent future intervention.

Lobbying

Under the tax rules, communications that congregants understand to be policy discussions could be considered indirect endorsements that are impermissible political campaign interventions. In the case of lobbying, the misunderstanding often goes in the other direction – statements that congregants perceive to be impermissible political activity are likely to be perfectly permissible lobbying activity. Synagogues are permitted to lobby both legislators and the public to a certain extent. (Again, when clergy engage in lobbying communications at official functions or in official publications, such communications will be attributed to the congregation. Such communications are not forbidden but will count toward the amorphous limit.) As a practical matter, moreover, the limit on lobbying is seldom a concern in synagogue life.

In the language of the Internal Revenue Code, an organization is exempt under section 501(c)(3) so long as “no substantial part” of its activities consist of “carrying on propaganda, or otherwise attempting, to influence legislation.” (The Internal Revenue Code permits most charities, but not churches to elect to be subject to certain dollar limits up to \$1,000,000, on a sliding scale depending on an organization’s size, for lobbying expenditures.⁶) In *Regan v. Taxation with Representation of Washington*,⁷ the Supreme Court upheld the limit on the ability of section 501(c)(3) organizations to lobby on the grounds that, since they received tax-

⁶ Major religious organizations asked, apparently on what they saw as constitutional grounds, not to be subject to any such limitation at the time this election was enacted.

⁷ 461 U.S. 540 (1983).

deductible contributions, Congress can refuse to pay for lobbying activities “out of public moneys.”

As various guidance from the IRS has explained,⁸ legislation includes action by Congress, any state legislature, local governing bodies, and by the public in a referendum, ballot initiative, constitutional amendment or similar procedure. It does not include actions by executive branch or independent administrative agencies or judicial bodies. Attempting to influence legislation includes direct contacts with legislators and their staffs to propose, support or oppose legislation as well as efforts to urge the general public to contact legislators or their staffs to propose, support or oppose legislation. Neither policy discussion nor education is lobbying. Conveying nonpartisan analysis, study or research on legislative matters to legislators is not lobbying, so long as such analysis is not intended to support a particular position. Communicating with members of the congregation on issues of common interest is not lobbying. If, however, members are urged to contact legislators or their staffs or members of the general public in support of or opposition to specific legislation, then lobbying is taking place.

Lobbying activities can lead to revocation of exemption only if they are a substantial part of the organization’s activities, relative to its other activities. There is no clear guidance from the IRS or the courts as to what is substantial. A case in 1955 held that devoting less than five percent of an organization’s time and effort to lobbying was insubstantial; a case in 1974 found activities in the 16-20% range to be substantial.⁹ Other cases have used a subjective balancing test involving all the facts and circumstances in which relevant factors include the percentage of

⁸ Authorities include Treas. Reg. sec. 1.501(c)(3)-1(c)(3)(ii); Rev. Rul. 70-79, 1970-1 C.B. 127, and Rev. Rul. 70-449 1970-2 C.B. 111.

⁹ See *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955) and *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), cert. denied 419 U.S. 1107 (1975). For application of a balancing test, see *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972).

an organization's budget (or employee time) spent on lobbying; the continuous or intermittent nature of the organization's legislative involvement; the nature of the organization and its aims. According to the Church Guide, the IRS "considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity."

It is not unusual for clergy, congregational boards, or social action committees to urge their members, or pass resolutions urging their members or the public, to contact legislators regarding specific acts of legislation or to write such letters on behalf of the congregation. All such activity would constitute lobbying. But whatever test for substantiality is applied, it is unlikely that violations of the lobbying limitation would occur, given all the other activities of our congregations. Very occasionally, some additional caution may be prudent. The "substantial part" test does include volunteer efforts, and it can be difficult at times to know when an individual's activities should be attributed to the organization. Thus, in a situation similar to California's Proposition 8, which required marriage to be between a man and a woman, and which so many of our congregations so strongly and actively opposed, it may be useful for some congregations to keep records of when their members are acting in their capacity as synagogue members as well as what other synagogue resources being devoted to the lobbying effort. With such records, they would be prepared in the unlikely event of any challenge, whether from the IRS, the press, or the blogosphere.

Conclusion

When it comes to synagogue involvement in the political process and eligibility for tax exemption, the Internal Revenue Code has different rules for different kinds of activities. It

forbids all intervention on behalf of or in opposition to the political campaign of any candidate for public office. As a rule of thumb, rabbis and others in congregational life will avoid violating this prohibition in the vast majority of cases if they avoid discussing candidates by name. They are always free to engage in discussions of public policy, although they need to exercise care and sensitivity in discussing particular policy issues that distinguish candidates for a particular office close to an election. Lobbying, in contrast, is not forbidden. Synagogues may engage support or oppose legislation so long as such lobbying does not constitute a “substantial part” of a congregation’s activities. This limit is unlikely to pose a problem in any but the very most unusual cases. Thus, while rabbis face many challenges in deciding what role politics should play in their rabbinate, complying with the strictures of the Internal Revenue Code should not pose a significant burden.

References

IRS Tax Guide for Churches and Religious Organizations (major resource discussed herein)

<http://www.irs.gov/pub/irs-pdf/p1828.pdf>

Political Activity Guidelines for Catholic Organizations (detailed multi entry guidelines and discussion)

<http://www.usccb.org/ogc/guidelines.shtml>

Politics and Pulpit 2008: A Guide to the Internal Revenue Code Restrictions on the Political Activity of Religious Organizations (Pew Forum on Religion and Public Life)

http://pewforum.org/newassets/misc/politics_and_the_pulpit_2008.pdf

Revenue Ruling 2007-41 (precedential guidance on which Church Guide is based)

http://www.irs.gov/irb/2007-25_IRB/ar09.html

Speak Truth to Power: A Guide for Congregations Taking Public Policy Positions (URJ)

http://urj.org/kd/_temp/EF486F9B-B80B-D378-80EF2B24D127DB1/Truth%20to%20Power%202005.pdf