

**TAX FREE WORSHIP WITHOUT FREEDOM OF SPEECH: TOO  
HIGH A PRICE TO PAY? THE HISTORY OF AND  
RAMIFICATIONS FROM THE TAX CODE PROVISION GIVING  
TAX EXEMPTION TO CHARITABLE ORGANIZATIONS**

*“An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.”<sup>1</sup>*

*“We are not afraid to entrust the American people with unpleasant facts, foreign ideas, alien philosophies, and competitive values. For a nation that is afraid to let its people judge the truth and falsehood in an open market is a nation that is afraid of its people.”<sup>2</sup>*

The times, they are a-changin’. Our nation once had a longstanding tradition of church involvement in the political activity of the day. It was once commonplace for pastors to preach about political issues and candidates.

Historically, churches had frequently and fervently spoken for and against candidates for government office. Such sermons date from the founding of America, including sermons against Thomas Jefferson for being a deist; sermons opposing William Howard Taft as a Unitarian; and sermons opposing Al Smith in the 1928 presidential election. Churches have also been at the forefront of most of the significant societal and governmental changes in our history including ending segregation and child labor and advancing civil rights.<sup>3</sup>

This Note will discuss the tax provision found in section 501(c)(3) of the Tax Code which gives tax-exempt status to charitable organizations, specifically churches. The provision states,

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no

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<sup>1</sup> *N.Y. Times v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring).

<sup>2</sup> President John F. Kennedy (1962) (quoted in Rebecca Hagelin, *The (Un)Fairness Doctrine*, The Heritage Foundation, Nov. 28, 2007, <http://www.heritage.org/press/commentary/ed112807b.cfm>).

<sup>3</sup> Alliance Defense Fund, *The Pulpit Initiative Executive Summary*, Sept. 8, 2008 [hereinafter *Executive Summary*].

part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), *and which does 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.*<sup>4</sup>

Part I of this Note will discuss the history of this specific tax provision, including the reasoning behind why it was enacted and any public sentiment at the time concerning its addition to the Code. Part II will explain the structure within the Internal Revenue Service which dictates the education about and enforcement of this provision within the public at large, as well as the investigation of various modern day reported violations of the provision. Part III will discuss the present day impact of this provision, including specific examples of violations. Part IV will evaluate the constitutional ramifications of the provision and its enforcement, and Part V will analyze whether this provision is necessary and what changes, if any, should be made in the future concerning churches' ability to engage in the politics of the day.

## I. HISTORY

Before Lyndon B. Johnson became this nation's 36<sup>th</sup> President, he was a senator from Texas.<sup>5</sup> He was the Minority Leader in the Senate in 1953, and when the power shifted from one party to the other in 1954, he became the Democratic Majority Leader.<sup>6</sup> It was on July 2<sup>nd</sup> of this year that he proposed the addition to the tax provision which is at issue in this Note.<sup>7</sup> The exact portion which was proposed to be added at that time, following the existing tax exemption for charitable organizations, allowed tax exemptions to those organizations which do not “. . . ‘influence legislation, and which do[] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.’”<sup>8</sup> The words, “in opposition to,” were added after the words “on behalf of” in 1987.<sup>9</sup>

When Sen. Johnson introduced the amendment, he categorized its changes to the current wording by saying, “[T]his amendment seeks to

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<sup>4</sup> I.R.C. § 501(c)(3) (2007) (emphasis added).

<sup>5</sup> The White House, [www.whitehouse.gov/history/presidents/lj36.html](http://www.whitehouse.gov/history/presidents/lj36.html), History of Lyndon B. Johnson (last visited November 22, 2008).

<sup>6</sup> *Id.*

<sup>7</sup> 100 Cong. Rec. 9604 (daily ed. July 2, 1954).

<sup>8</sup> *Id.*

<sup>9</sup> *Ass'n of the Bar of the City of N.Y. v. Comm'r*, 858 F.2d 876, 879 (1988).

extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office.”<sup>10</sup> Sen. Johnson stated that he had met with other high-ranking members of the Senate prior to the introduction of this amendment, and that he “under[stood] that the amendment [was] acceptable to them. [He] hope[d] the chairman [would] take it to conference, and that it [would] be included in the final bill which Congress passe[d].”<sup>11</sup> The final note in the Congressional Record concerning this amendment states, “The amendment was agreed to.”<sup>12</sup>

In 1954, the year this amendment was introduced, Johnson was up for re-election to the Senate. There were no congressional hearings, and “[d]uring consideration of the legislation that was to become the Revenue Act of 1954, Senator Lyndon B. Johnson of Texas forced the amendment out of his anger that [two local] Texas non-profit groups had supported his primary opponent.”<sup>13</sup> While it is understood why Sen. Johnson had motivation to approve this amendment, “because there was little debate over the amendment or how it would influence churches, we don’t know precisely why Congress enacted the amendment.”<sup>14</sup>

Specifically, at the time this amendment was introduced, and the bill was up for passage through Congress, Sen. Johnson had faced some political difficulties from certain organizations in his home state.<sup>15</sup> A study done by a Purdue scientologist in the late-1990s found that “[t]he IRS rule that strips tax exemption from churches engaged in electioneering was born of Lyndon Johnson’s Texas politics, not the U.S. Constitution . . . .”<sup>16</sup>

The groups that Sen. Johnson wanted to silence were the Facts Forum and the Committee for Constitutional Government.<sup>17</sup> These groups were considered “the two major ‘anti-communist’ organizations

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<sup>10</sup> 100 Cong. Rec. 9604 (daily ed. July 2, 1954) (statement of Sen. Johnson).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> GARY CASS, GAG ORDER, 58 (2005) (citing BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS, 327 (6th ed. 1992)).

<sup>14</sup> Pew Forum.org, *Pastors to Protest IRS Rules on Political Activity*, Sept. 19, 2008, <http://pewforum.org/events/?EventID=198> (quoting Robert W. Tuttle).

<sup>15</sup> Jay Alan Sekulow, *Should Religious Leaders Be Able to Endorse Political Candidates?*, American Center for Law and Justice In The News (June 2008), <http://www.aclj.org/news/read.aspx?ID=3014>.

<sup>16</sup> Larry Witham, *Texas politics blamed for ’54 IRS rule LBJ wanted to keep Senate seat*, WASH. TIMES, Aug. 27, 1998 (discussing a study done by James Davidson, a Purdue University sociologist).

<sup>17</sup> *Id.*

behind the attempt to thwart LBJ's bid for reelection."<sup>18</sup> What is important is that "[t]he ban on church electioneering ha[d] nothing to do with the First Amendment or Jeffersonian principles of separation of church and state . . . 'It was prompted by Johnson's desire to challenge McCarthyism, protect the liberal wing of the Democratic Party in Texas, and win re-election.'"<sup>19</sup> According to the writer of the study, "Johnson wasn't focused on churches or religions at all."<sup>20</sup> Whatever his motive,

Four months prior to elections, without a hearing or debate, LBJ forced an amendment on the Senate floor to prohibit all non-profit groups from engaging in political campaigning or electioneering. LBJ received sparse opposition in 1954, as many of his peers were eager to extinguish 'McCarthyism' and the 'Red hunt' once and for all.<sup>21</sup>

Doubtless whether his intention was to restrict churches or simply to silence those non-profits who opposed him in that election year, the consequences of this restriction have been far-reaching in both the religious and political arenas.

Before this law was passed, churches had quite a different role in politics. It was under the Revenue Act of 1913 that churches first received their tax-exempt status.<sup>22</sup> Then, in 1934, the exemption was restricted to exclude those "churches and all non-profit organizations that participated in lobbying activities." It was only in 1954 that Sen. Johnson included the provision that related to elections.<sup>23</sup> But before these measures took place, churches took a very active role in politics.

[F]or the first century and a half of our nation's history, 'election sermons' were commonplace in which pastors appealed to their congregations to support or oppose particular candidates based on their positions on issues. Religious leaders did not merely speak about moral principles alone – they encouraged church members to take specific action in the voting booth to support those principles.<sup>24</sup>

History now includes the last 54 years which, of course, tell a very different story.

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<sup>18</sup> Aaron Tyler, *Preserving the Moral Compass: House of Worship Speech Protection Act Is Defeated*, 45 J. OF CHURCH AND STATE 1, Oct. 1, 2003.

<sup>19</sup> *Witham*, *supra* note 16 (discussing a study done by James Davidson, a Purdue University sociologist).

<sup>20</sup> *Id.*

<sup>21</sup> *Tyler*, *supra* note 18.

<sup>22</sup> *Id.*

<sup>23</sup> J.R. Labbe, *The First Church of Electioneering?*, FORT WORTH STAR-TELEGRAM, Feb. 27, 2008.

<sup>24</sup> *Sekulow*, *supra* note 15.

## II. HOW THE IRS EDUCATES THE PUBLIC ABOUT AND ENFORCES THE RESTRICTIONS OF THE PROVISION

The Internal Revenue Service first began closely regulating the political activity of 501(c)(3) organizations in 2004.<sup>25</sup> The manner of regulation is through a program that has been named the Political Activities Compliance Initiative.<sup>26</sup> This Initiative consisted of:

- Letters to the national political party committees explaining the law's ban on political campaign activity by charities and churches.
- A letter in the Federal Election Commission's monthly newsletter asking candidates to ensure that their contacts with charitable organizations do not inadvertently jeopardize the tax-exempt status of any organization.
- A news release reminding charities and churches of the ban.
- Reorganizing the IRS' Web site materials concerning the ban to make them more accessible to organizations, political candidates and parties, and the general public.
- Examinations of organizations the IRS believes may be violating the ban.<sup>27</sup>

For the 2008 election cycle, the Internal Revenue Service reiterated their goals for ensuring that there were no violations of the restrictions of section 501(c)(3) of the Tax Code. A letter from Lois G. Lerner, Director of the Exempt Organizations section of the IRS, stated the goals:

- Educate the public and the relevant community, and provide guidance, on the prohibition on political campaign intervention by section 501(c)(3) organizations.
- Maintain a meaningful enforcement presence in this area.<sup>28</sup>

Education and enforcement are the two arms of the IRS's Exempt Organizations (EO) section.<sup>29</sup> Within this EO section, the Political Activities Compliance Initiative Referral Committee and a project

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<sup>25</sup> Letter from Lois G. Lerner, Director, Exempt Organizations, Department of the Treasury, Internal Revenue Service, to Marsha Ramirez, Rob Choi and Bobby Zarin, Internal Revenue Service (Apr. 17, 2008) *available at* [http://www.irs.gov/pub/irs-tege/2008\\_paci\\_program\\_letter.pdf](http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> IRS.gov, *Political Activities Compliance Initiative, (2008 Election)*, <http://www.irs.gov/charities/charitable/article/0,,id=181565,00.html> (July 28, 2008).

<sup>28</sup> Letter from Lois G. Lerner, *supra* note 25.

<sup>29</sup> *Id.*

coordinator are found.<sup>30</sup> The internal IRS letter states, “As in the past, this committee of career civil servants with extensive EO tax law experience will continue to determine which cases to pursue, and the project coordinator will help ensure consistency.”<sup>31</sup>

#### A. Education

The website of the IRS pertaining to 501(c)(3)s and the restrictions placed upon them concerning political involvement lists the requirements for being a tax exempt organization.<sup>32</sup> The site states that 501(c)(3) organizations cannot be an “action organization”, meaning that “it may not attempt to influence legislation as a substantial part of its activities and it may not participate in any campaign activity for or against political candidates.”<sup>33</sup>

Under a section entitled, “The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations,” there are more specific activities listed which are in direct violation of the regulation.<sup>34</sup> For instance, “[c]ontributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity.”<sup>35</sup> In addition, any activity which has “evidence of bias” constituting “favor of one candidate over another” or opposition to any candidate would be “prohibited participation or intervention.”<sup>36</sup> But the site goes on to say that even if the bias is not overt, but only “ha[s] the *effect* of favoring a candidate or group of candidates”, it will still be found to be in violation of the provision.<sup>37</sup>

However, not every possible manner of political involvement is so clearly forbidden. The IRS itself states that the prohibition of “[c]ertain activities or expenditures” would have to be taken in context of the surrounding “facts and circumstances”.<sup>38</sup> If actions are taken in a non-partisan manner, they will likely be acceptable. Examples given of

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> IRS.gov, *Exemption Requirements*, <http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html> (Dec. 22, 2006).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

approved activities are “certain voter education activities (including presenting public forums and publishing voter education guides)”.<sup>39</sup>

In June of 2007, the IRS put out a Revenue Ruling 2007-41 examining “21 examples illustrating the application of the facts and circumstances to be considered to determine whether an organization exempt from income tax” because of its 501(c)(3) status has, through its actions, violated the restrictions on political intervention.<sup>40</sup> The purpose of this Ruling was to give exempt organizations a clear idea of what constitutes a violation of the law.<sup>41</sup>

The 21 situations described in the Ruling are divided into seven categories, such as “Voter Education, Voter Registration and Get Out the Vote Drives” and “Issue Advocacy vs. Political Campaign Intervention.”<sup>42</sup> Two examples from the Ruling are Situations 5 and 9:

*Situation 5.* Minister *C* is the minister of Church *L*, a section 501(c)(3) organization and Minister *C* is well known in the community. Three weeks before the election, he attends a press conference at Candidate *V*’s campaign headquarters and states that Candidate *V* should be reelected. Minister *C* does not say he is speaking on behalf of Church *L*. His endorsement is reported on the front page of the local newspaper and he is identified in the article as the minister of Church *L*. Because Minister *C* did not make the endorsement at an official church function, in an official church publication or otherwise use the church’s assets, and did not state that he was speaking as a representative of Church *L*, his actions do not constitute campaign intervention by Church *L*.

*Situation 9.* Minister *F* is the minister of Church *O*, a section 501(c)(3) organization. The Sunday before the November election, Minister *F* invites Senate Candidate *X* to preach to her congregation during worship services. During his remarks, Candidate *X* states, “I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday.” Minister *F* invites no other candidate to address her congregation during the Senatorial campaign. Because these activities take place during official church services, they are attributed to Church *O*. By selectively providing church facilities to

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<sup>39</sup> *Id.*

<sup>40</sup> Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

<sup>41</sup> IRS.gov, *Political Campaign Intervention by 501(c)(3) Tax-Exempt Organizations – Educating Exempt Organizations*, available at <http://www.irs.gov/charities/charitable/article/0,,id=179750,00.html> (October 24, 2008).

<sup>42</sup> Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

allow Candidate *X* to speak in support of his campaign, Church *O*'s actions constitute political campaign intervention.<sup>43</sup>

According to the Holdings section of the document, a little over half of the situations addressed were found not to constitute a violation.<sup>44</sup>

The situations addressed in this Ruling will be reviewed in Part III of this Note, looking at the parallels between the hypothetical situations and holdings in the Ruling and the actual investigations and decisions made by the IRS in the face of reports of actual political intervention.

Additionally, the IRS has published the “tax guide for Churches and Religious Organizations: benefits and responsibilities under the federal tax law.”<sup>45</sup> Much of this document reiterates what is on the IRS website; however, it also goes into more detail as to what types of organizations constitute a church, and discusses the enforcement arm of the IRS EO section as well.<sup>46</sup>

## B. Enforcement

While the IRS has published many documents for the purpose of educating 501(c)(3) organizations about the restrictions on political involvement, there are instances when the provisions are not followed as they were written and must be enforced.

In *Branch Ministries v. Rossotti*, the Court of Appeals for the District of Columbia Circuit outlines the procedure which the IRS follows in order to determine if a church has violated the requirements for tax-exemption and whether revocation of their status is necessary.<sup>47</sup> The court states that there are

special restrictions on the IRS's ability to investigate the tax status of a church. The Church Audit Procedures Act (“CAPA”) sets out the circumstances under which the IRS may initiate an investigation of a church and the procedures it is required to follow in such an investigation. Upon a ‘reasonable belief’ by a high-level Treasury official that a church may not be exempt from taxation under section 501, the IRS may begin a ‘church tax inquiry.’<sup>48</sup>

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<sup>43</sup> *Id.* at 1422-23.

<sup>44</sup> *Id.* at 1422-26.

<sup>45</sup> IRS.gov, *Tax Guide for Churches and Religious Organizations: Benefits and responsibilities under the federal tax law*, available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf> [hereinafter *Tax Guide*].

<sup>46</sup> *Id.*

<sup>47</sup> *Branch Ministries v. Rossotti*, 211 F.3d 137, 139-40 (D.C. Cir. 2000).

<sup>48</sup> *Id.* (internal citations omitted).



If the inquiry does not produce satisfactory results, the IRS may continue with the “second level of investigation: a ‘church tax examination.’”<sup>49</sup> In this part of the investigation, records and activities are examined to determine whether the organization actually is a church for taxation purposes.<sup>50</sup>

The Tax Guide for Churches and Religious Organizations offers a more specific analysis of the IRS’s mode of inquiry.<sup>51</sup> This Guide contains a section entitled “Special Rules Limiting IRS Authority to Audit a Church” which discusses when the IRS may do further investigations into a 501(c)(3) organization, or an organization which is applying for such status.<sup>52</sup> As previously stated, this section states that investigations into a church’s tax status can only occur after the Director of Exempt Organizations Examinations “reasonably believes, based on a written statement of the facts and circumstances, that the organization: (a) may not qualify for the exemption; or (b) may not be paying tax on an unrelated business or other taxable activity.”<sup>53</sup>

The audit process is described in this section, informing churches that if the “reasonable belief” factor is met and the IRS notifies the church of its inquest, the church has time (typically 90 days) to respond in order to explain the issues that have caused the inquiry.<sup>54</sup> If this response does not complete the investigation, or if no response is given, there will be a second letter sent from the IRS.<sup>55</sup> At this point, the organization is able to meet with a representative from the IRS to discuss the issue.<sup>56</sup> Once the examination begins, it must end within two years after the IRS sends the second letter.<sup>57</sup> This process does not always reach the examination stage, and in many instances the IRS is persuaded there has been no grievous violation which would constitute revocation of the organization’s tax-exempt status.<sup>58</sup>

According to the letter from Ms. Lerner, the Director of EO, to three other Directors in the Tax Exempt and Government Entities Division of the IRS, the goals for enforcement were four-fold.<sup>59</sup> The letter contends that the focus of the PACI will be on “allegations of more egregious

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Tax Guide, supra* note 45, at 26.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Letter from Lois G. Lerner, supra* note 25.

violations and the cases that result from them.”<sup>60</sup> The three types of cases which are said to need to be more closely monitored which are applicable to the discussion of this Note were:

- Cases Involving Issue Advocacy and Potential Campaign Intervention
- Internet Cases – Web Sites of Section 501(c)(3) Organizations with Links to Web Sites of Other Organizations
- Potential Contributions by Section 501(c)(3) Organizations<sup>61</sup>

The letter cites the situations covered in Revenue Ruling 2007-41 which have been previously discussed, and states that the IRS has faced situations which are not immediately answerable by the holdings of those hypothetical violations.<sup>62</sup> In addition, the letter states that the EO should be ready to be presented by specific “taxpayer challenges, which may lead to court . . . .”<sup>63</sup>

Throughout the Director’s letter, the mantra is oft-repeated that reports of violations will have to be examined within the context of the “facts and circumstances” of the instance. This leads one to assume that the law may not be as clear as the IRS would hope, nor that the volumes of educational resources that are produced are fully covering the full spectrum of this regulation. In fact, when investigating Internet Cases, the director even goes so far as to deem “the number of ‘clicks’ that separate the objectionable material from the 501(c)(3)’s Web site” to be a “significant consideration” in whether there has been a violation.<sup>64</sup>

The IRS states that “[v]iolating [certain] prohibition[s] may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes.”<sup>65</sup> An excise tax has been defined as “[a] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee).”<sup>66</sup>

### III. MODERN DAY EXAMPLES OF REPORTED VIOLATIONS AND RESULTING INVESTIGATIONS

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* See Rev. Rul. 2007-41, 2007-25 I.R.B.

<sup>63</sup> *Letter from Lois G. Lerner, supra* note 25.

<sup>64</sup> *Id.*

<sup>65</sup> IRS.gov, *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, <http://www.irs.gov/charities/charitable/article/0,,id=163395,00.html> (Apr. 17, 2008).

<sup>66</sup> Black’s Law Dictionary (8th ed. 2004).

a. Resulting in Revocation of Tax-Exempt Status of Church

The United States Court of Appeals for the District of Columbia Circuit case, *Branch Ministries v. Rossotti*, discussed the first instance in which the Internal Revenue Service ever revoked an organization's tax-exempt status. The revocation was affirmed by the court in this case in 2000, 46 years after the Johnson Amendment was passed.<sup>67</sup> The court recounts the facts of the case as, "Four days before the 1992 presidential election, Branch Ministries, a tax-exempt church, placed full-page advertisements in two newspapers in which it urged Christians not to vote for then-presidential candidate Bill Clinton because of his positions on certain moral issues."<sup>68</sup> The case was brought by the church and its pastor on grounds that the IRS had "acted beyond its statutory authority, . . . the revocation violated [the church's] right to free exercise of religion guaranteed by the First Amendment and the Religious Freedom Restoration Act, and [the church] was a victim of selective prosecution in violation of the Fifth Amendment."<sup>69</sup>

Branch Ministries was the organization which operated the Pierce Creek Church in New York.<sup>70</sup> The Church had run the two advertisements in *USA Today* and *The Washington Times*.<sup>71</sup> Donations were accepted from people across the nation in support of the advertisements as well.<sup>72</sup>

The actions taken by the Church to influence the presidential campaign prompted an inquiry by the IRS in 1992, which led to an examination from 1993-95, ending in the revocation of the Church's tax-exempt status in January of 1995.<sup>73</sup> Following this determination the Church and its pastor sued the IRS.<sup>74</sup>

The court focuses mainly on the Church's allegation that the revocation of its tax exempt status was an infringement upon the Church's rights under the First Amendment and RFRA.<sup>75</sup> The Church contended that revocation of its tax-exempt status would threaten its existence and would "not only make its members reluctant to contribute

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<sup>67</sup> *Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 140.

<sup>71</sup> *Branch Ministries v. Rossotti*, 211 F.3d at 140.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 142.

the funds essential to its survival, but may obligate the Church itself to pay taxes.”<sup>76</sup>

In response to these concerns, the court states that “because of the unique treatment churches receive under the Internal Revenue Code, the **impact of the revocation is likely to be more symbolic than substantial**.”<sup>77</sup> The Church can still consider itself a church and even be a 501(c)(3) organization with all benefits that come with that classification.<sup>78</sup> The only difference is that when donors are audited after the revocation, they have the burden to show that the donee is in fact a church, instead of having the presumption of that fact which is given with a tax-exempt status classification.<sup>79</sup>

The court found the church’s claims to be baseless and affirmed the lower court’s summary judgment decision in favor of the IRS.<sup>80</sup>

#### b. Situations Which Did Not Result in Revocation of Church’s Tax-Exempt Status

According to the Alliance Defense Fund, “despite the strict IRS interpretation of it, *to date, there is no reported situation where a church has lost its tax exempt status or been directly punished for **sermons delivered from the pulpit** evaluating candidates for office in light of Scripture*.”<sup>81</sup>

In the Summary of the 2006 Political Activities Compliance Initiative, the Internal Revenue Service gives it statistical results from the 2004 and 2006 election cycle investigations that it conducted due to reported violations of the tax code.<sup>82</sup> The report compares the results of 2006 to those of 2004, showing that although there were 237 reported violations in 2006, compared to 166 reported in 2004, the IRS only examined 100 and 110 in those years, respectively.<sup>83</sup>

The Summary lists the allegations that the violations were based on:

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<sup>76</sup> *Branch Ministries v. Rossotti*, 211 F.3d at 142.

<sup>77</sup> *Id.* (emphasis added).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 143.

<sup>80</sup> *Id.* See also Anne Constable, *Politics in the Pulpit: How Far is Too Far?*, SANTA FE NEW MEXICAN (Oct. 19, 2008).

<sup>81</sup> *Executive Summary*, *supra* note 3 at 1.

<sup>82</sup> IRS.gov, *2006 Political Activities Compliance Initiative*, [http://www.irs.gov/pub/irs-tege/2006paci\\_report\\_5-30-07.pdf](http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf) (last visited December 28, 2008) [hereinafter *2006 Initiative*].

<sup>83</sup> *Id.*

1. Exempt organization distributed printed documents supporting candidates.
2. Church official made a statement during normal services endorsing candidates.
3. Candidate spoke at an official EO function.
4. Organization distributed improper voter guides or candidate ratings.
5. Organization posted a sign on its property endorsing a candidate.
6. Organization endorsed candidates on its website or through links on its website.
7. Organization official verbally endorsed a candidate.
8. Organization made a political contribution to a candidate.
9. Organization allowed a [*sic*] noncandidate to endorse a candidate during a speech at the organization's function.
10. Organization's facilities used for political campaign intervention.<sup>84</sup>

Despite these allegations and examinations, the IRS investigations that eventually became closed cases found that despite those confirmed violations that concerned church involvement in political activity, not one time did the IRS revoke the church's tax-exempt status.<sup>85</sup> In 2006 there were 42 instances in which the IRS found that "[p]olitical intervention [was] substantiated," and in 2004 there were four instances of the same.<sup>86</sup> However, despite the IRS stating unequivocally that such political involvement is "absolutely prohibited,"<sup>87</sup> only a "written advisory [was] issued" in each of those cases.<sup>88</sup>

An example of a situation where the IRS carried out an inquiry and investigation in a church politicking situation was in the case of the All Saints Episcopal Church in Pasadena, California.<sup>89</sup> While the pastor, Reverend George F. Regas, did not specifically endorse a candidate for president, "two days before the 2004 election, Regas [gave a sermon that] was critical of the Iraq war and Bush's tax cuts."<sup>90</sup>

The IRS told the Church it needed to produce all documents and materials that had to do with anything political that were created in

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<sup>84</sup> *Id.* at 4.

<sup>85</sup> *Id.* at 5.

<sup>86</sup> *Id.*

<sup>87</sup> IRS.gov, *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, <http://www.irs.gov/charities/charitable/article/0,,id=163395,00.html> (last visited December 28, 2008).

<sup>88</sup> *2006 Initiative*, *supra* note 82.

<sup>89</sup> Associated Press, *IRS Investigating Liberal Calif. Church*, available at [http://www.breitbart.com/article.php?id=D8K629Q01&show\\_article=1](http://www.breitbart.com/article.php?id=D8K629Q01&show_article=1) (Sept. 16, 2006).

<sup>90</sup> *Id.*

2004.<sup>91</sup> The Church responded to the IRS stating that it would not comply with the orders and would not send the documents.<sup>92</sup> The IRS offered to not pursue the case if “the church would admit wrongdoing and agree not to hold similar sermons in the future,” but All Saints refused.<sup>93</sup>

The Rev. Barry Lynn of Americans United for Separation of Church and State was quoted in an article concerning the All Saints investigation where he suggested that the IRS’s treatment of churches was not equal.<sup>94</sup> He offered the example of a Baptist preacher in Arkansas who gave a sermon critical of then-candidate John Kerry and supportive of President George W. Bush, but the IRS never investigated.<sup>95</sup>

Eventually the IRS determined that revocation of the church’s tax-exempt status was not necessary.<sup>96</sup> On September 10, 2007, almost three years after the sermon in question, the IRS notified the church that although it did violate the tax code when Rev. Regas gave his anti-war sermon, that it would be able to retain its tax-exemption.<sup>97</sup> However, the IRS failed to explain the reasoning behind its decision.<sup>98</sup>

### c. ADF Pulpit Initiative

The Alliance Defense Fund (ADF) describes itself as a legal organization whose purpose is to defend the freedom of speech by way of bringing specific cases to court defending speech, as well as by training new lawyers and building up other groups to defend the same cause.<sup>99</sup>

On September 28, 2008, the ADF conducted what was called Pulpit Freedom Sunday.<sup>100</sup> That day, pastors who were involved in the event gave “Scripture-based sermons from the pulpits of their churches

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<sup>91</sup> Louis Sahagun, *Church Votes to Fight Federal Probe*, L.A. TIMES, Sept. 22, 2006, at B-1, available at <http://articles.latimes.com/2006/sep/22/local/me-all saints22>.

<sup>92</sup> *Id.*

<sup>93</sup> OMBWatch.com, *IRS Audits Church for Anti-War Sermon*, <http://www.ombwatch.org/article/articleview/3167> (Nov. 15, 2005).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Rebecca Trounson, *Pasadena church wants apology from IRS*, L.A. Times, Sept. 24, 2007, available at <http://articles.latimes.com/2007/sep/24/local/me-all saints24>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Alliance Defense Fund, *Purpose*, [www.alliancedefensefund.org/about/purpose/default.aspx](http://www.alliancedefensefund.org/about/purpose/default.aspx) (last visited November 23, 2008).

<sup>100</sup> *Executive Summary*, *supra* note 3.

comparing and contrasting the differing positions of the presidential candidates in light of Scripture.”<sup>101</sup> The pastors will discuss important issues influential in the 2008 election year and will talk about candidates’ stances on those issues.<sup>102</sup> This was a planned violation of the 1954 Johnson amendment restricting churches involvement in politics.<sup>103</sup> The purpose of the Initiative was to create litigation stemming from the violations, in order to allow the court system to deem the provision of the tax code unconstitutional under the First Amendment Free Speech Clause.<sup>104</sup>

Specifically, the Pulpit Initiative was only intended to involve what pastors preached, not any Get Out the Vote campaigns, or other non-partisan activity.<sup>105</sup> The ADF stated that their reasoning behind the Initiative was not to promote any candidates, or to encourage churches to preach about one political party over another. Instead, the Initiative was created in order to allow churches to make the decisions for themselves about whether they want their pastor preaching about politics. According to publications released by the ADF, it is not their position that churches must or need to delve into the foray of politics, but that “this decision [of whether to discuss political matters] should be made by the pastor and the church . . . not the IRS.”<sup>106</sup> The stance of the ADF is that this area is no place for the IRS, and the current restrictions on what pastors can preach about without losing their tax-exempt status is a violation of the right of freedom of speech, which is at “the very heart of the First Amendment.”<sup>107</sup>

One pastor of the 33 who participated in the Initiative was Rev. Ronald Johnson, Jr., from Living Stones Fellowship Church in Crown Point, Indiana.<sup>108</sup> He gave his reasoning for participating in the event saying, “If we cannot discuss any and all topics, including those the IRS

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<sup>101</sup> *Id.*

<sup>102</sup> Alliance Defense Fund, *Pulpit Freedom Sunday*, <http://www.alliancedefensefund.org/issues/religiousfreedom/default.aspx?cid=4684>.

<sup>103</sup> *Executive Summary*, *supra* note 3.

<sup>104</sup> *Id.* at 2. *See* U.S. CONST. amend I.

<sup>105</sup> Alliance Defense Fund, *The Alliance Defense Fund Pulpit Initiative: What It Is – What It’s Not*, <http://www.telladf.org/UserDocs/WhatIsPI.pdf> (last visited December 31, 2008).

<sup>106</sup> Alliance Defense Fund, *Pulpit Freedom Sunday*, <http://www.alliancedefensefund.org/issues/religiousfreedom/default.aspx?cid=4684> (last visited December 31, 2008).

<sup>107</sup> *Id.*

<sup>108</sup> Peter Slevin, *33 Pastors Flout Tax Law With Political Sermons*, at A02, WASH. POST, Sept. 29, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/28/AR2008092802365.html>.

may deem ‘political,’ even within our communities of faith, we will become what Martin Luther King Jr. called an ‘irrelevant social club without moral or spiritual authority.’”<sup>109</sup> Rev. Johnson focused on the abortion and same-sex marriage issues, and explained where now President-elect Barack Obama and Senator John McCain stood on those issues.<sup>110</sup> His sermon included a presentation of slides comparing the candidates’ views on issues and how each lined up with Biblical principles.<sup>111</sup> While Johnson did not endorse McCain, he made a point to conclude that Obama’s views were contrary to those Biblical principles he had highlighted.<sup>112</sup> He summed up his stance on the Pulpit Initiative by saying, “[it] is not about promoting political parties or agendas or establishing a ‘theocracy.’ It’s about our right to bring kingdom principles and solutions to bear on contemporary social problems if we so choose. A pastor may choose not to, but it’s the pastor’s choice, not the choice of the IRS.”<sup>113</sup>

However, not all members of the clergy were in support of the ADF’s actions. A group made of Christian and Jewish clergy along with former IRS employees, including a former director of the IRS EO office, tried to stop the Pulpit Freedom Sunday before it was set to occur.<sup>114</sup> The group’s purpose was to call the IRS’s attention to the “‘flagrant disregard of the ethical rules’” and to have the IRS investigate whether the ADF itself was putting its tax-exempt status in jeopardy.<sup>115</sup>

In addition, the group Americans United for Separation of Church and State called the ADF’s plan “a ‘stunt’ that is part of an effort by the religious right to build a church network that will ‘put their candidates into office. It’s part of the overall game plan.’”<sup>116</sup>

It remains to be seen whether these churches who participated in the Pulpit Initiative will have their tax-exempt statuses revoked or whether a court will take up the question as to the constitutionality of this tax provision.

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<sup>109</sup> Ron Johnson, Jr., *Pulpit Politics is Free Speech*, US NEWS AND WORLD REPORT, Nov. 17, 2008.

<sup>110</sup> *Slevin*, *supra* note 107.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Johnson*, *supra* note 108 (emphasis added).

<sup>114</sup> Peter Slevin, *Ban on Political endorsements by Pastors Targeted*, at A03, WASH. POST, Sept. 8, 2008, available at [http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090702460\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090702460_pf.html) (quoting Marcus S. Owens, former Director of the IRS EO Office).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (quoting Joe Conn, spokesman for Americans United for Separation of Church and State).



#### IV. FREEDOM OF SPEECH AND CHURCH-STATE SEPARATION IMPLICATIONS

As the tax provision in question concerns churches and what actions they are able to take and what types of speech are allowed within those churches, naturally freedom of speech and church-state separation questions are raised in its examination.

The Pew Forum on Religion and Public Life had a Question and Answer session with Robert W. Tuttle on September 19, 2008 to discuss the Alliance Defense Fund's Pulpit Freedom Sunday.<sup>117</sup> In the session the constitutional arguments that the ADF might use should their actions lead them to court were discussed.<sup>118</sup> Specific to free speech arguments, Mr. Tuttle suggested that the ADF would contend that the restriction was content-based and therefore unconstitutional.<sup>119</sup> Other constitutional arguments that could be made would be on the basis of the Free Exercise Clause and the Religious Freedom Restoration Act, arguing that it places a substantial burden on churches, and the Establishment Clause, as the restriction leads to church-state entanglement.<sup>120</sup>

Dr. Jay Alan Sekulow of the American Center for Law and Justice has discussed on the organization's website the implications of the 1954 Johnson Amendment calling it a "54-year-old federal tax law that prevents religious leaders from truly exercising their constitutionally-protected free speech rights when they act in their official capacity as a pastor or head of a religious, tax-exempt organization."<sup>121</sup>

Dr. Sekulow states that the purpose of the IRS was "to collect revenue for the general treasury," but this amendment has turned the organization into the "speech police."<sup>122</sup> He recounts the history in our nation of sermons given with the distinct purpose of influencing and educating people on elections of the day.<sup>123</sup>

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<sup>117</sup> Interview by the Pew Forum with Robert W. Tuttle, David R. and Sherry Kirschner Berz Research Professor of Law and Religion, The George Washington University Law School on Sept. 19, 2008, *available at* <http://pewforum.org/events/?EventID=198>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Jay Alan Sekulow, *Should Religious Leaders Be Able to Endorse Political Candidates?*, American Center for Law and Justice (June 2008) <http://www.aclj.org/news/read.aspx?ID=3014>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

It's important to remember that this nation has a rich and welcomed history of turning to religious leaders and churches during the debate of the great moral issues of the day. The 'election sermon' was once very common – pastors acknowledging our religious heritage and addressing key issues of their day. During the revolutionary era, pastors in the pulpit encouraged dissent and called for freedom – the prelude to the birth of our country – a country that cherishes free speech. That freedom is as important today as it was then. Unfortunately, pastors now risk losing their tax-exempt status if they speak out.<sup>124</sup>

Pastors need to be able to exercise their freedom of speech just as any other American is able to.<sup>125</sup>

On the other hand, James Wood, a Southern Baptist minister, discussing the political movement of the Christian Right together with the Conservative Right which began in the 1980s, highlights the “dangers and defects of the [New Religious Right] movement” as he writes,

To identify any nation with God is to distort the prophetic role of religion and to deny the fundamental basis of a free and democratic society by making an idol of the state. . . . The temptation of religious leaders to use political means for the accomplishment of religious ends is no less dangerous than the temptation of public officials to use religion for political ends.<sup>126</sup>

However, while this may be a danger of allowing clergymen to give their endorsements of political candidates and issues from the pulpit, it is not reason enough to silence the freedom of speech which is so foundational in our public arenas.

One cannot govern morality. Laws cannot force people to have innocent motives. If a pastor uses his authority and stature in the church to further his own personal agenda, or even an agenda that a church has which is contrary to what the rest of America wants or believes, it is not the duty of the law or the judicial system to silence those opinions or agendas. A pastor who speaks and acts contrarily to what his congregation desires will be let go or he will change his ways. A church which espouses to opinions with which a majority of its congregation disagrees will soon have a much smaller church body.

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> James E. Wood, Jr., *Religious Fundamentalism and the New Right*, in CHURCH AND STATE IN AMERICAN HISTORY 246, 250 (John F. Wilson & Donald L. Drakeman eds., 1987).

The silencing of speech is not the answer. Unfavorable speeches and action have their place in society as much as those that are popular. As John Stuart Mill said, “If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.”<sup>127</sup>

## V. THE NEXT STEP

### a. Further Clarification by the IRS in Subsequent Election Years

The Internal Revenue Service has produced election guidelines in the years 2004, 2006, and 2008.<sup>128</sup> In 2008 there were more specific goals made and more direction for the program was considered to be needed.<sup>129</sup> However, the regulations are unclear for churches and other organizations as to what is allowable under the tax code and what types of activity are in violation of the provision.<sup>130</sup> “[V]ague rules and unclear enforcement by the IRS” have made the regulations very hard to understand and avoid violating for churches.<sup>131</sup>

One concern with further regulation from the IRS is that in each election cycle, the determining factors as to what activity could cause the revocation of a church’s tax exempt status to become less clear. “The IRS has issued a news release on the subject in every presidential election year since 1992.”<sup>132</sup> However, the number of reported violations has increased in the two most recent election cycles.<sup>133</sup> Contrarily, the number of investigations launched because of those reports has virtually stayed the same.<sup>134</sup> The clarification made between those reported years has not prevented churches from acting in such a way that launches investigations from the IRS.<sup>135</sup>

Instead of further regulation by the IRS, other options for clarification in this area would be repealing the Johnson Amendment or

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<sup>127</sup> JOHN STUART MILL, *ON LIBERTY* (1859).

<sup>128</sup> *Letter from Lois G. Lerner, supra* note 25.

<sup>129</sup> *Id.*

<sup>130</sup> OMBWatch.com, *Group Plans to Challenge IRS Election Standard*, <http://www.ombwatch.org/article/articleview/4252/1/537> (May 13, 2008).

<sup>131</sup> *Id.*

<sup>132</sup> IRS.gov, *IRS Continues Program on Political Campaign Activity by Charities; Stresses Education and Enforcement*, <http://www.irs.gov/newsroom/article/0,,id=181570,00.html> (Apr. 17, 2008).

<sup>133</sup> *See supra* notes 82-83.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

passing another piece of legislation giving the right to endorse and oppose political candidates back to clergy and churches.

b. Repeal the 1954 Johnson Amendment

There are numerous reasons that are often cited encouraging the appeal of the Johnson amendment.<sup>136</sup> As stated previously in this note, *supra* section IV, it is arguable that the amendment is a violation the Free Speech Clause of the First Amendment.<sup>137</sup> Organizations advocating for change in the law would likely argue that this provision of the Tax Code is a religious restriction which can only be determined to be constitutional after it is found that the government must has a compelling interest for the restriction.<sup>138</sup> The argument is that the compelling state interest has not been met, and therefore the burden on churches is unconstitutional as it violates the 1993 Religious Freedom Restoration Act.<sup>139</sup> The Johnson amendment is also said to be a violation of the Establishment Clause in that the amendment allows the government to determine what pastors can preach about within the walls of the church which “excessively entangles government and religion.”<sup>140</sup> Should a court agree with these arguments, it could strike the law down as unconstitutional.

Courts themselves have stated that the revocation of the tax-exempt status of a church is “more symbolic than substantive” and that not much changes when a church loses this classification.<sup>141</sup> If this is true, what is the purpose of the threat of revocation in the first place? If, as in the *Branch Ministries* case, there would not be much difference for the church between having the tax-exempt status and not, it is a waste of time and money for the IRS to go through the inquiry and examinations of these churches when their determination will not amount to any significant consequence.

i. HR 2357 (2002) and HR 235 (2005)

There have been attempts made to pass bills that would allow churches to become involved in the political process, including endorsements by pastors from the pulpit, while maintaining the tax-exempt status of the church.

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<sup>136</sup> *Executive Summary*, *supra* note 3.

<sup>137</sup> *Id.*

<sup>138</sup> Interview by the Pew Forum with Robert W. Tuttle, *supra* note 116.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* See also *Executive Summary*, *supra* note 3.

<sup>141</sup> *Branch Ministries v. Rossotti*, 211 F.3d 157, 142-43 (D.C. Cir. 2000).

Representative Walter Jones of North Carolina introduced H.R. 2357 on June 28, 2001.<sup>142</sup> It was named the Houses of Worship Political Speech Protection Act, and had the purpose of “[a]mend[ing] the Internal Revenue Code to permit a church to participate or intervene in a political campaign and maintain its tax-exempt status as long as such participation is not a substantial part of its activities.”<sup>143</sup> The bill failed to pass with a vote of 178-239 on October 2, 2002.<sup>144</sup>

In 2005, the Houses of Worship Free Speech Restoration Act of 2005 failed to be passed as well.<sup>145</sup> It was also introduced by Rep. Walter Jones and its purpose too was “[t]o amend the Internal Revenue Code of 1986 to protect the religious free exercise and free speech rights of churches and other houses of worship.”<sup>146</sup> This bill was referred to the House Committee on Ways and Means, but was never passed, and two years after it was introduced, officially failed.<sup>147</sup>

ii. HR 2275 (2008)

The most recent piece of legislation to be introduced concerning this issue is H.R. 2275.<sup>148</sup> It was introduced on May 10, 2007, and was referred to the House Committee on Ways and Means.<sup>149</sup> Similar to the previous failed bills, the purpose of 2275 is “[t]o restore the Free Speech and First Amendment rights of churches and exempt organizations by repealing the 1954 Johnson Amendment.”<sup>150</sup> This bill was introduced by Rep. Jones, and has eight co-sponsors, including Rep. Jesse Jackson, Rep. Ron Paul, and Rep. Duncan Hunter.<sup>151</sup>

Dr. Sekulow of the American Center for Law and Justice has expressed his support for the passage of this bill by saying,

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<sup>142</sup> The Library of Congress, H.R. 2357, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.02357>: (last visited December 28, 2008).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> The Library of Congress, H.R. 235, *available at* <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.+235>: (last visited December 28, 2008).

<sup>146</sup> *Id.*

<sup>147</sup> GovTrack.us, H.R. 235, *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h109-235> (last visited December 28, 2008).

<sup>148</sup> GovTrack.us, H.R. 2275, *available at*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2275> (last visited December 28, 2008).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

The time has come to give religious leaders unbridled free speech. Congress is considering legislation to repeal the 54-year-old law targeting churches and tax-exempt organizations.

Such a move won't result in churches or religious organizations being turned into political machines. It will make it easier, though, for religious leaders to speak out clearly about the issues and candidates that shape the lives and affect the future of millions of people of faith.<sup>152</sup>

Whether it is through legislation changing the Johnson Amendment, or the IRS changing their rules for violating the tax code, "Whatever the outcome of this conflict — whether we end by erasing the lines or drawing new ones — this is a debate worth having. Religious freedom doesn't mean much if houses of worship are intimidated by the IRS when they speak out on matters of conscience."<sup>153</sup>

## VI. CONCLUSION

The 1954 Johnson Amendment should be repealed because of its infringement upon the Freedom of Speech and because the Internal Revenue Service neither has the authority to determine what is able to be said within churches, nor does it enforce the law with any sort of logic or continuity.

The Internal Revenue Service should not be policing speech within churches or other charitable organizations. Speech is a constitutional issue, not one dealing with the nation's revenue. As Ron Johnson, one of the pastors participating in the Pulpit Initiative, wrote,

[t]he Internal Revenue Service has placed itself in the role of evaluating the content of a pastor's sermon to determine if the message is "political." We need to ask: Where did this authority come from? And why should Americans be willing to submit to this unconstitutional power grab without even a whimper? Why are pastors the only people who have allowed the IRS to censor their First Amendment rights for a tax exemption they have enjoyed since the founding of our nation--a tax exemption that existed long before the IRS did?<sup>154</sup>

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<sup>152</sup> Jay Alan Sekulow, *Should Religious Leaders Be Able to Endorse Political Candidates?*, American Center for Law and Justice, (June 2008) <http://www.aclj.org/news/read.aspx?ID=3014>.

<sup>153</sup> Charles C. Haynes, *The Case Against All Saints: Has the IRS Gone Too Far?*, First Amendment Center, (Nov. 27, 2005) <http://www.firstamendmentcenter.org/commentary.aspx?id=16100>.

<sup>154</sup> Ron Johnson, Jr., *Pulpit Politics is Free Speech*, U.S. NEWS AND WORLD REPORT, Nov. 17, 2008.

It is time for the government to let churches govern themselves to a greater extent. Congregations should be responsible for their pastor's unpopular opinions by either accepting what is said, changing pastors for one who will speak on behalf of what the church stands for, or by leaving that church for a better-suited place.

Church-state separation *should* be found in this area by allowing churches to fulfill one of the purposes for which they were created—to be involved in moral issues of the day and be a community for like-minded individuals. Discussing the church in the Bible, the apostle Paul writes,

It was he who gave some to be apostles, some to be prophets, some to be evangelists, and some to be pastors and teachers, to prepare God's people for works of service, so that the body of Christ may be built up until we all reach unity in the faith and in the knowledge of the Son of God and become mature, attaining to the whole measure of the fullness of Christ. . . . [S]peaking the truth in love, we will in all things grow up into him who is the Head, that is, Christ. From him the whole body, joined and held together by every supporting ligament, grows and builds itself up in love, as each part does its work.<sup>155</sup>

The state should allow differing opinions to come from churches, and instead of silencing unpopular opinions, should let the free market of ideas decide who wins.

Finally, the IRS has not enforced this provision evenly between churches or in accordance to the language of the restriction. The tax code states that an organization can be classified as a church if it does not intervene in political activities including endorsement of candidates. However, it has been shown that even when the provision is definitively violated, the IRS has continued to classify those organizations as churches. If the IRS is not going to enforce the provision as written, it should not enforce it at all. And if the provision is enforced as written, it is most likely a violation of those freedoms which the Constitution gives to individuals. The 501(c)(3) tax provision preventing pastors and churches from participating in political activities and expressing political preferences and endorsements should be revoked.

*Michelle C. Kogler*

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<sup>155</sup> Ephesians 4:11-13, 15-16 (NIV).